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The Shackled Sexual Assault Victim: Trauma, Resistance, and Criminal Justice Violations of an Indigenous Woman

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The Shackled Sexual Assault Victim: Trauma, Resistance, and Criminal Justice Violations of an Indigenous Woman†

Melanie Randall††

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Introduction

THE ORDINARY RESPONSE TO ATROCITIES is to banish them from consciousness. Certain violations of the social compact are too terrible to utter aloud: this is the meaning of the word unspeakable.

Atrocities, however, refuse to be buried. Equally as powerful as the desire to deny atrocities is the conviction that denial does not work. . . . Remembering and telling the truth about terrible events are prerequisites both for the restoration of the social order and for the healing of individual victims.¹

In a Canadian courtroom in 2015, during a preliminary inquiry for a sexual assault trial, the resources of the criminal justice system were used to forcibly confine and systematically violate the rights of a woman who was not the accused perpetrator

1. JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE - FROM DOMESTIC ABUSE TO POLITICAL TERROR*, at 1 (1992).

of the crime but—astonishingly—the victim.² Instead of being supported throughout the grueling process of cooperating with the legal system about the violent sexual assault she had endured, she was shackled.³ Instead of getting the help she needed in order to cope with testifying about the trauma of the vicious attack she had suffered, she was literally imprisoned throughout the proceedings.⁴ How could this have happened in a country holding itself up as a champion of human rights and equality? Even posing this question reveals a perspective outside of Indigenous experience.⁵ From the viewpoint of Indigenous women, the callous disregard and degradations shown to them by the criminal justice system are not “astonishing” but, unfortunately, routine.

It is no coincidence that the woman who suffered this degradation was an Indigenous woman.⁶ It is no coincidence that she was homeless. It is no coincidence that her relatively short life had been marked by the multiple challenges of drug addictions and poverty. These are the very conditions of socially produced marginalization and disempowerment in which colonialism and the genocidal disregard for Indigenous peoples have been writ large in shaping Canada’s history and present.⁷ An appreciation of these very same conditions should have made those in positions of power in that courtroom—particularly the Judge and the Crown prosecuting the case—acutely sensitive to her circumstances and needs. They should have been able to utilize their considerable power, skills, and abilities to marshal the many resources at their disposal to assist her. This is not what happened. Instead, they chose to exercise their legal authority to confine her and strip her of her basic human rights and liberties, all while she was performing

2. See Dean Bennett, *Alberta Launches Investigation After Sexual Assault Victim Jailed During Hearing*, GLOBAL NEWS (June 5, 2017), <https://globalnews.ca/news/3503303/alberta-launches-investigation-after-sexual-assault-victim-held-in-remand-during-hearing/> [perma.cc/YGG6-T72A].

3. *Id.*

4. *Id.*

5. As Sheila Wahsquaikhezik (patiently) pointed out to me, the degradation and dehumanization of Angela Cardinal in a Canadian courtroom is not “astonishing.” As she wrote to me, “it is not ‘astonishing’ that resources are used to systemically violate the rights of a woman, especially if she is an indigenous woman.”

6. In fact, although the intersectionality of the multiple aspects of her identity and the difficult circumstances of her life were all no doubt relevant to the way she was mistreated, it is her status as an Indigenous woman that seems to have been determinative and defining.

7. I refer to Angela Cardinal in the past tense because she was tragically killed in an unrelated incident less than a year after the preliminary inquiry at which she was subjected to the appalling rights violations which are the subject of this analysis. *R. v. Blanchard*, 2016 ABQB 706, para. 2 (Can.).

her civic duty by giving evidence in a legal proceeding about traumatic harms she had suffered.⁸ She was the victim of the crime, not the offender.⁹

Canada prides itself as a nation defined by its commitment to human rights protections and equality rights guarantees.¹⁰ Canada has a robust legal rights regime of constitutional, Charter,¹¹ and human rights law¹² that guarantees any sexual assault complainant, in theory at least, equal protection under the law. There is even a Canadian Victims' Bill of Rights¹³ adding, in theory at least, an additional layer of legal protections for victims of crime. And there is a great deal of rhetoric from the Canadian government and the Supreme Court of Canada about "reconciliation" with Indigenous peoples, the original occupants of the country.¹⁴ As well, the government has made numerous pledges to address the causes of violence against Indigenous women and the multiple inequalities they face.¹⁵ These promises remain largely abstract, more honored in their breach than in their observance.

8. Bennett, *supra* note 2.

9. *Id.*

10. See, e.g., Dep't of Just., *Rights and Freedoms in Canada*, GOV'T OF CAN. (Mar. 10, 2017), <https://www.justice.gc.ca/eng/rp-pr/cp-pm/just/06.html> [perma.cc/4PBV-3ADU].

11. INST. FOR THE ADVANCEMENT OF ABORIGINAL WOMEN (IAAW) & THE WOMEN'S LEGAL EDUC. & ACTION FUND (LEAF), SUBMISSION, INDEPENDENT REVIEW OF CIRCUMSTANCES SURROUNDING THE TREATMENT OF "ANGELA CARDINAL" IN R. V. BLANCHARD 2 (Oct. 15, 2017), www.leaf.ca/wp-content/uploads/2017/11/Cardinal-Inquiry-IAAW-and-LEAF-Final-Submission-Oct-15.pdf [perma.cc/FP8A-Q49J] [hereinafter IAAW/LEAF Submission].

12. Canadian Human Rights Act, R.S.C. 1985, c H-6 s. 2.

13. Canadian Victims Bill of Rights, S.C. 2015, c 13 s. 2.

14. See, e.g., *Calder v. British Columbia*, [1973] S.C.R. 313 (recognizing Aboriginal title); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (outlining the test for "proof" of Aboriginal title); *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257 (clarifying the Court's view on the "requirements" for Aboriginal title); *Mikisew Cree First Nation v. Canada*, [2018] 2 S.C.R. 765 (addressing the Duty to Consult); *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (recognizing and affirming that the rights of Indigenous peoples predate the beginning of Canada as a nation); *Ktunaxa Nation v. British Columbia*, [2017] 2 S.C.R. 386 (affirming the duty to consult). Of course, the Supreme Court of Canada's right to rule on these issues, and its appropriateness as a forum for establishing or recognizing Indigenous rights in the first place, is contested, though this is not questioned or interrogated by the Court itself.

15. See, e.g., WOMEN & GENDER EQUALITY CANADA, BACKGROUNDER - NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS (June 24, 2019), www.canada.ca/en/status-women/news/2019/06/backgrounder--national-inquiry-into-missing-and-murdered-indigenous-women-and-girls.html [perma.cc/3US9-DLEV] ("Eliminating violence against Indigenous women and girls is an urgent issue in Canada. The Government of Canada is committed to addressing the systemic causes of violence and increasing the safety of Indigenous women, girls and LGBTQ and Two Spirit people.").

Was it callous indifference, or was it willful blindness over many days, on the part of the legal players in that courtroom? Regardless, the record is clear on what happened to the woman who chose to be a “cooperative”¹⁶ victim-witness in this case. This record is a devastating indictment of the legal system as a whole. It is this legal story, and especially its broader context and significance, that I recount and analyze here.

I organize the analysis of what happened to this woman at the preliminary inquiry around themes which I describe as layers of violation, layers which are intersecting and compounding. These themes highlight distinct dimensions of the wrongful conduct, stereotypes, and ignorance underpinning the inhumane treatment of Angela Cardinal. The themes, or layers of violation, revolve around the violation of Angela Cardinal’s most fundamental rights and liberties, her retraumatization at the hands of the criminal justice system, and the failure to hold any of those responsible for this to account.

I also examine the story, and its many dimensions, through three lenses. First, the story of the shackling of Angela Cardinal at the preliminary inquiry and her subsequent incarceration has to be situated in wider context. As the Institute for the Advancement of Aboriginal Women (IAAW) and the Women’s Legal Education and Action Fund (LEAF) so effectively emphasized:

[T]he social context of racism, colonialism, and sexism produce conditions of systemic and targeted forms of violence and abuse against Indigenous women. This context also increases Indigenous people’s overrepresentation and unequal treatment in the criminal justice system, with particular implications for Indigenous women.¹⁷

It is only in the larger social, political, and economic contexts of both pervasive gender inequality and colonial forms of inequality shaping the lives of Indigenous women that the significance of the

16. I use this term critically as it denotes assumptions about “ideal victims,” and expectations that women who have endured sexual violence, or domestic violence, should report to the police and then follow through with all the demands and requirements of the criminal justice system, even when these demands are onerous, unreasonable, trauma-inducing and can even, in some cases, imperil a woman’s safety. For analyses of these dynamics, see Melanie Randall, *Sexual Assault Law, Credibility, and “Ideal Victims”: Consent, Resistance, and Victim Blaming*, 22 C.J.W.L. 397 (2010); Melanie Randall, *Domestic Violence and the Construction of “Ideal Victims”: Assaulted Women’s “Image Problems” in Law*, 23 ST. LOUIS. U. PUB. L. REV. 107 (2004).

17. IAAW/LEAF Submission, *supra* note 11, at 1–2.

story of Angela Cardinal's abuse at the hands of the Canadian legal system can be fully grasped. The documentation of her story and its wider significance can hopefully contribute to the ongoing conversations, actions, and institutional changes needed to address and remedy the structural harms and inequalities Indigenous women in Canada systematically continue to suffer.

Second, I elucidate the narrative in terms of what it tells us about how the criminal justice system's response to sexual assault victims—and in particular to women not seen as “ideal victims”¹⁸—can go very badly wrong; the themes are expressed here in the worst possible way. The epidemic levels of sexual violence marking the lives of Indigenous women in Canada have been well documented, as have the state failures in delivering equal protection of the law.¹⁹ Too often, Indigenous women are viewed with such a degree of disdain and contempt that they end up being treated, as Sherene Razack has powerfully expressed it, as if disposable.²⁰

The third lens through which I explore this story is through that of Angela Cardinal's amazing resistance in the face of the degrading and dehumanizing treatment to which she was subjected by the Canadian criminal justice system. As one scholar of resistance explains:

stories of women's successful resistance have both individual and social impact; they challenge beliefs about women's vulnerability and men's physical superiority, about women's inherent “rapeability,” and about male protection or firearms as women's best and only options for safety. In doing so, they not only remind individual women of their own capacity for resistance, they deconstruct social and cultural assumptions about sex, gender and violence.²¹

This theme of women's resistance to sexual violence is an important corrective to dominant and totalizing narratives of

18. See discussion *supra* note 16.

19. See Shana Conroy, *Police-Reported Violence Against Girls and Young Women in Canada, 2017*, STAT. CAN. (Dec. 17, 2018), www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54981-eng.htm [perma.cc/CQW5-WS39]; see also Shana Conroy & Adam Cotter, *Self-Reported Sexual Assault in Canada, 2014*, STAT. CAN. (July 11, 2017), www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14842-eng.htm [perma.cc/42GV-SVC3].

20. The idea of “disposability” is discussed at length by Sherene H. Razack in her article, *Gendering Disposability* 28 C.J.W.L. 285 (2016) [hereinafter Razack, *Gendering Disposability*], in which she analyses the story of the searing dehumanization of Cindy Gladue in the trial of first instance.

21. Jill Cermele, *Telling Our Stories: The Importance of Women's Narratives of Resistance*, 16 VIOLENCE AGAINST WOMEN 1162, 1166 (2010).

victimization which obliterate their agency—an agency²² which often survives even in the face of the most extreme forms of violence and abuse. Indigenous women, often individually and as a collectivity (diverse as this collectivity is), have displayed fierce agency and resistance in response to the historical harms and contemporary wrongs they have endured and continue to endure.²³

Angela Cardinal's resistance was, in the words of Sheila Wahsquaonaikezhik, "a willful, determined resistance, spirited and dynamic, directive and powerful."²⁴ Drawing attention to Angela Cardinal's resistance highlights her demand for respect, her consistent centering of her own dignity, and her refusal to accept the dehumanizing treatment meted out to her. Moreover, it is a lens that allows her personality to shine through, providing us with a fuller sense of who she was as a person, her psychological astuteness, intelligence, and her humanity.

I. Widening the Lens: State Failures and Violence Against Indigenous Peoples and Women in Canada, the US, Australia, and New Zealand

In almost every category of social harm or inequality, Indigenous women in Canada are the most affected and over-

22. For a range of discussions of the ideas of "agency," "burdened agency," "partial agency," and "constrained autonomy," see generally, for example, MARTHA A. FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004); *RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF* (Catriona Mackenzie & Natalie Stoljar eds., 2000); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 351 (1995); Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 832 (1999); Caroline Joan Picart, *Rhetorically Reconfiguring Victimhood and Agency: The Violence Against Women Act's Civil Rights Clause*, 6 RHETORIC & PUB. AFF. 97 (2003); Shelley Cavalieri, *Between Victim and Agent: A Third-Way Feminist Account of Trafficking for Sex Work*, 86 IND. L.J. 1409 (2011); Diana T. Meyers, *Two Victim Paradigms and the Problem of 'Impure' Victims*, 2 HUMAN.: AN INT'L J. OF HUM. RTS., HUMANITARIANISM, & DEV. 255 (2011).

23. See, e.g., litigation undertaken by Sharon D. McIvor, *McIvor v. Canada*, 2009 B.C.C.A. 153 (Can.). For just one organizational example among many, see the work and many projects of the Native Women's Association of Canada, <https://www.nwac.ca/> [perma.cc/P2KW-XKZK]. See also Rep. of the Hum. Rts. Comm. at 166, *Views Adopted by the Human Rights Committee Under Article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, Concerning Communication No. R.6/24*, U.N. Doc. A/36/40, annex XVII (1977); Hum. Rts. Comm., *Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2020/2010*, U.N. Doc. CCPR/C/124/D/2020/2010 (2019); Samantha Nock, *Anchored by Love, Fuelled by Anger: Indigenous Women's Resistance*, RABBLE (Aug. 20, 2014), <https://rabble.ca/blogs/bloggers/samantha-nock/2014/08/anchored-love-fuelled-anger-indigenous-womens-resistance> [perma.cc/P2C4-RH9M].

24. Personal correspondence, on file with author.

represented. This is true for the incidence and rates of poverty,²⁵ homelessness,²⁶ incarceration,²⁷ HIV infection,²⁸ sex trafficking,²⁹ and violent victimization, including domestic violence and sexual assault.³⁰

The crisis of Missing and Murdered Indigenous and Aboriginal women is a North-America-wide-phenomenon that has been extensively documented.³¹ After much public pressure, as well as in response to Call to Action #41 of the Truth and Reconciliation Commission, a national inquiry into the crisis was struck by the

25. See Jordan Press, *Nearly 50 per Cent of Indigenous Children in Canada Live in Poverty, Study Says*, THE GLOBE & MAIL (July 9, 2019), www.theglobeandmail.com/canada/article-half-of-indigenous-children-live-in-poverty-highest-rate-of-child/ [perma.cc/9SV7-3428].

26. Nicholas Keung, *Report Says Indigenous People in Toronto Are Far More Likely to Be Homeless, Unemployed and Hungry*, TORONTO STAR (Feb. 28, 2018), www.thestar.com/news/gta/2018/02/28/report-says-indigenous-people-in-toronto-are-far-more-likely-to-be-homeless-unemployed-and-hungry.html [perma.cc/5WU9-GQQL].

27. See Dep't of Just., *Just Facts: Indigenous Overrepresentation in the Criminal Justice System*, GOV'T OF CAN. (May 2019), www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2019/may01.html [perma.cc/J7AC-C4XX].

28. Pub. Health Agency of Can., *Chapter 8: HIV/AIDS Epi Updates, July 2010 – HIV/AIDS Among Aboriginal People in Canada*, GOV'T OF CAN. (July 2010), www.canada.ca/en/public-health/services/hiv-aids/publications/epi-updates/chapter-8-hiv-aids-among-aboriginal-people-canada.html [perma.cc/ZVG5-7FPY].

29. *Local Safety Audit Guide: To Prevent Trafficking in Persons and Related Exploitation* at 6, PUB. SAFETY CAN. (2013), <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/lcl-sfty-dtgd/index-en.aspx> [perma.cc/4XC8-244H].

30. Dep't of Just., *supra* note 27.

31. NAT'L INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS, RECLAIMING POWER AND PLACE: THE FINAL REPORT OF THE NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS (2019), www.mmiwg-ffada.ca/final-report/ [perma.cc/P9LN-NAWW] [hereinafter MMIW Final Report]; The Inter-Am. Comm'n H.R., *Missing and Murdered Indigenous Women in British Columbia, Canada*, Doc. No. 30/14, OEA/Ser.L/V/II. (Dec. 21, 2014), www.oas.org/en/iachr/reports/pdfs/indigenous-women-bc-canada-en.pdf [perma.cc/V6FT-NK58] [hereinafter IACHR Report]; Rep. of the Special Comm. on Violence Against Indigenous Women, *Invisible Women: A Call to Action, A Report on Missing and Murdered Indigenous Women in Canada*, HOUSE OF COMMONS CHAMBRE DES COMMUNES CAN. (2014), www.ourcommons.ca/Content/Committee/412/IWFA/Reports/RP6469851/IWFArp01/IWFArp01-e.pdf [perma.cc/5D8Y-9RW4]; HUM. RTS. WATCH, *THOSE WHO TAKE US AWAY: ABUSIVE POLICING AND FAILURES IN PROTECTION OF INDIGENOUS WOMEN AND GIRLS IN NORTHERN BRITISH COLUMBIA CANADA* (2013), www.hrw.org/sites/default/files/reports/canada0213webwcover_0.pdf [perma.cc/X79N-TXXD]; AMNESTY INT'L, *CANADA: STOLEN SISTERS: A HUMAN RIGHTS RESPONSE TO DISCRIMINATION AND VIOLENCE AGAINST INDIGENOUS WOMEN IN CANADA* (2004), www.amnesty.ca/sites/amnesty/files/amr200032004enstolensisters.pdf [perma.cc/F7WC-QUJA]; Elaine Craig, *Person(s) of Interest and Missing Women: Legal Abandonment in the Downtown Eastside*, 60 MCGILL L.J. 1 (2014) [hereinafter Craig, *Person(s) of Interest and Missing Women*].

federal government of Canada in 2016.³² After extensive and lengthy hearings, a substantial final report was tendered, documenting and analyzing the many dimensions of the problem and issuing a comprehensive and wide-ranging set of recommendations.³³

The findings and analysis of the MMIW Inquiry indicate that:

violence against Indigenous women and girls is a crisis centuries in the making. The process of colonization has, in fact, created the conditions for the ongoing crisis of missing and murdered Indigenous women, girls, and 2SLGBTQIA³⁴ people that we are confronting today.³⁵

According to Statistics Canada, indigenous women experience violent victimization at a rate 2.7 times that of non-Indigenous women.³⁶ Indigenous women are severely over-represented amongst murder victims.³⁷ Indigenous women are sexually assaulted at three times the rate of non-Indigenous women and suffer domestic violence at triple the rate.³⁸

Indigenous women in Canada, as in other nations, are disproportionately killed, often in the context of sexual violence, as occurred in the harrowing case of Cindy Gladue, an Indigenous woman who was left to bleed to death in a bathtub after suffering lacerations to her vaginal wall after Bradley Barton violently penetrated her with his hand or an object (this aspect of the case was unproven at trial).³⁹ As Sherene Razack has observed of the

32. WOMEN AND GENDER EQUALITY CANADA, *supra* note 15.

33. MMIW Final Report, *supra* note 31.

34. MMIW Final Report, *supra* note 31. “The National Inquiry has chosen to use the term ‘2SLGBTQ’ (representing Two-Spirit, lesbian, gay, bisexual, transgender, queer and questioning people)[.] By putting ‘2S’ at the front, we are remembering that Two-Spirit people have existed in many Indigenous Nations and communities long before other understandings of gender and orientation came to us through colonization. This also puts Two-Spirit people right at the front of our conversations, rather than at the end.” National Inquiry into Missing and Murdered Indigenous Women and Girls, *Lexicon of Terminology*, MMIWG-GGADA (Nov. 1, 2018), https://www.mmiwg-ffada.ca/wp-content/uploads/2018/02/NIMMIWG_Lexicon_ENFR-1.pdf [perma.cc/2VGW-XRZU].

35. MMIW Final Report, *supra* note 31, at 88.

36. TINA HOTTON MAHONEY, JOANNA JACOB & HEATHER HOBSON, STAT. CAN., CATALOGUE NO. 89-503-X, WOMEN IN CANADA: A GENDER-BASED STATISTICAL REPORT: WOMEN AND THE CRIMINAL JUSTICE SYSTEM 8 (2017), www.statcan.gc.ca/pub/89-503-x/2015001/article/14785-eng.pdf [perma.cc/HAE9-MU56].

37. *Id.* at 7–8.

38. *Id.*

39. *R. v. Barton*, 2019 SCC 33.

patterned nature of violence against Indigenous women and their treatment as disposable objects:

When Indigenous women's bodies are destroyed in the extreme way that we see in murdered Indigenous women, the value of their bodies in the social order is made clear . . . [T]he scopoc regime of sexualized violence is key to disposability. The violence that is written on the flesh tells the colonial story of whose bodies have value.⁴⁰

Writing specifically about the experiences of Indigenous women in Canada the MMIW Inquiry found that their "right to justice is compromised."⁴¹ This profoundly compromised right to justice for Indigenous women in relation to the legal system leads to dual arrests (where the police arrest both the batterer and the victim), over-incarceration, institutional reprisals, and a reluctance to report interpersonal violence due to mistrust of police, stereotyping, and the presumption of criminality.⁴²

The criminal justice system in Canada remains a site of intense discrimination and injustice for Indigenous peoples in Canada generally. After an in-depth investigation of Policing and Indigenous women, Human Rights Watch observed the broader context as follows:

The legacy of settler colonialism and racist assimilation policies—particularly the residential school system—still overshadow the present-day dynamics between police and Indigenous communities. Residential schools, which the Canadian government operated up until 1994, along with the Catholic Church, forcibly removed Indigenous children and youth from their communities, severing connections to their kinship networks and family, language, and culture. Many Indigenous children and youth in residential schools were also subjected to severe psychological and sexual abuse while in these facilities. The [Royal Canadian Mounted Police] was actively involved and complicit in ensuring that Indigenous children attended these schools. This historical context fuels the strong mistrust, suspicion, and resentment many Indigenous people continue to feel towards law enforcement.⁴³

40. Razack, *Gendering Disposability*, *supra* note 20, at 291.

41. MMIW Final Report, *supra* note 31, at 625.

42. MMIW Final Report, *supra* note 31, at 621–717. These themes are documented and discussed at greater length in Chapter 8 of the Final Report, *Confronting Oppression – Right to Justice*.

43. See HUM. RTS. WATCH, SUBMISSION TO THE GOVERNMENT OF CANADA ON

The members of the Canadian government's "National Inquiry into Missing and Murdered Indigenous Women and Girls" find that:

In Canada, the history of the justice system within Indigenous communities and its effectiveness and fairness in pursuing justice have been under discussion and debate. From Saskatchewan's "starlight tours," involving the Saskatoon Police Department in the 1990s and 2000s, to the more recent acquittal of the Saskatchewan farmer charged with the death of Colten Boushie, Indigenous Peoples have had little reason to be confident that the justice system is working for them.⁴⁴

Despite some progressive legal decisions from Canada's Supreme Court attempting to recognize and remedy this systemic inequality,⁴⁵ the problem is entrenched, pervasive, and persistent. As well-known legal scholar Patricia Monture-Angus wrote:

Enough has been said and written about the devastating effects of the Canadian criminal justice system on both Aboriginal citizens and our nations. Despite this fact, little has been accomplished to do more than accommodate Aboriginal persons in the mainstream system. There has been no systematic change of Canadian justice institutions.⁴⁶

A widely publicized and harrowing example in Canada of the kind of vicious racism and blatant contempt and disregard Indigenous women can experience in a variety of institutional contexts came to light in the fall of 2020, when Joyce Echaquan live-streamed her experiences in a hospital in Quebec while she called out in pain to a hospital staff indifferent to her pleas for help as she lay dying.⁴⁷

POLICE ABUSE OF INDIGENOUS WOMEN IN SASKATCHEWAN AND FAILURES TO PROTECT INDIGENOUS WOMEN FROM VIOLENCE 3 (June 19, 2017), https://www.hrw.org/sites/default/files/supporting_resources/canada_saskatchewan_submission_june_2017.pdf [perma.cc/Y94F-MJ5U].

44. MMIW Final Report, *supra* note 31, at 625.

45. *See, e.g.*, *R. v. Ipeelee*, [2012] S.C.R. 13; *R. v. Gladue*, [1999] 1 S.C.R. 688, *R. v. Desautel*, 2021 SCC, 17.

46. Patricia Monture-Angus, *Women and Risk: Aboriginal Women, Colonialism and Correctional Practice*, 19 CAN. WOM. STUDIES 24, 27 (1999). This powerful passage is also cited in IAAW/LEAF Submission, *supra* note 11, at 3.

47. Kristy Kirkup & Tu Thanh Ha, *Indigenous Woman Records Slurs, Taunts of Quebec Hospital Staff Before Her Death*, THE GLOBE & MAIL (Sept. 29, 2020), <https://www.theglobeandmail.com/canada/article-indigenous-woman-records-slurs-taunts-of-quebec-hospital-staff-before/> [perma.cc/LQ4F-AQC6].

Joyce Echaquan was a thirty-seven-year-old Atikamekw woman who arrived at the hospital reporting stomach pain. The mother of seven had previously experienced similar health problems and reported to hospital staff that she had a heart condition. As she grimaced and moaned in pain, members of the hospital staff verbally abused her, one calling her “stupid as hell.”⁴⁸ The video shows a nurse addressing her in French, saying:

“Are you done acting stupid? Are you done?”⁴⁹

The recording then shows another nurse saying: “You made some bad choices, my dear,” and, “What are your children going to think, seeing you like this . . . ?”

“She’s good at screwing, more than anything else,” the first nurse says.⁵⁰

Shortly after this exchange, Echaquan died in the same hospital.⁵¹

At a news conference a few days after her death, Carol Dubé, Echaquan’s partner, stated “I’m convinced that my partner is dead because systemic racism contaminated the Joliette hospital.”⁵² He announced that his family would be filing a lawsuit against the hospital, saying “[s]he spent her final days in agony, surrounded by people who held her in contempt, people who were supposed to protect her.”⁵³ While condemning the comments made to her as “totally unacceptable,” the Premier of Quebec, François Legault denied that the mistreatment of Joyce Echaquan was indicative of systemic racism.⁵⁴

48. *Id.*

49. *Id.*

50. *Id.* See also Leyland Cecco, *Canada: Outcry After Video Shows Hospital Staff Taunting Dying Indigenous Woman*, THE GUARDIAN (Sept. 30, 2020), <https://www.theguardian.com/world/2020/sep/30/joyce-echaquan-canada-indigenous-woman-hospital> [perma.cc/P6PN-NL7X].

51. Cecco, *supra* note 50. On the day she died, she was administered morphine, despite warning doctors that she could not handle the drug due to a heart condition and pacemaker. *Id.*

52. Jillian Kestler-D’Amours, *Systemic Racism in Canada Killed Joyce Echaquan, Family Says*, ALJAZEERA (Oct. 2, 2020), <https://www.aljazeera.com/news/2020/10/2/systemic-racism-killed-my-partner-joyce-echaquans-family-says> [perma.cc/53P9-TGLZ].

53. Mélissa Goden, *She Was Racially Abused by Hospital Staff as She Lay Dying. Now a Canadian Indigenous Woman’s Death Is Forcing a Reckoning on Racism*, TIME (Oct. 9, 2020), <https://time.com/5898422/joyce-echaquan-indigenous-protests-canada/> [perma.cc/Z5V4-A7VQ].

54. Kristy Kirkup & Tu Thanh Ha, *supra* note 47. The nurse and orderly heard abusing Echaquan in the video, were fired shortly after it went viral; a few months after the incident, the head of the regional health agency overseeing the hospital

Mistreatment of and discrimination against Indigenous women is hardly unique to Canada. In the United States, the levels of violence and failures of state action and protection have also been described as a “crisis,”⁵⁵ and certainly experienced as such by Indigenous women.

Research from the National Institute of Justice indicates that 84 percent of Indigenous women have experienced physical, sexual, or psychological violence in their lifetimes.⁵⁶ According to the Justice Department, one in three Native American women experience rape or attempted rape, a rate more than twice the national average.⁵⁷ While rates of processing crimes of sexual violence through the criminal justice system are low for all women in general, they are unsurprisingly lower still for Indigenous women. Specifically, only 13 percent of sexual assaults reported by Native American women result in the arrest of perpetrators, compared with 35 percent for Black women and 32 percent for White women.⁵⁸

Inadequate criminal justice system responses to Indigenous women in the U.S. are also a systemic problem.⁵⁹ For example, Alaska has four times the national rates of sexual assault and a documented history of failing to investigate and prosecute this gendered crime.⁶⁰ Detailed journalistic investigations have

was quietly removed from his post. *Top Stories of 2020: Joyce Echaquan’s Hospital Video Shocked Quebec*, MONTREAL GAZETTE (Dec. 23, 2020), <https://montrealgazette.com/news/local-news/top-stories-of-2020-joyce-echaquans-hospital-video-shocked-quebec> [perma.cc/W4E7-PP75].

55. Maya Salam, *Native American Women Are Facing a Crisis*, N.Y. TIMES (April 12, 2019), www.nytimes.com/2019/04/12/us/native-american-women-violence.html [perma.cc/96PF-WHRD].

56. ANDRÉ B. ROSAY, NAT’L INST. OF JUST., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN (June 1, 2016), nij.ojp.gov/topics/articles/violence-against-american-indian-and-alaska-native-women-and-men [perma.cc/NY4F-TGF6].

57. Timothy Williams, *For Native American Women, Scourge of Rape, Rare Justice*, N.Y. TIMES (May 22, 2012), www.nytimes.com/2012/05/23/us/native-americans-struggle-with-high-rate-of-rape.html [perma.cc/GQ62-ZHGZ].

58. Salam, *supra* note 55.

59. Marie Quasius, *Native American Rape Victims: Desperately Seeking an Elephant-Fix*, 93 MINN. L. REV. 1902 (2012).

60. See Complaint, *Hardy v. City of Nome*, 2020 WL 5048363 (D. Alaska Aug. 26, 2020) (No. 2:20-CV-0001-HRH), https://www.acluak.org/sites/default/files/field_documents/clarice_hardy_complaint.pdf [perma.cc/B2MD-73JW]. See also John D. Sutter, *The Rapist Next Door*, CNN (2014), <https://www.cnn.com/interactive/2014/02/opinion/sutter-change-alaska-rape/> [perma.cc/LY7E-ETUY] (exploring why Alaska’s rape rate is the highest in the U.S.); Sara Bernard, *Rape Culture in the Alaskan Wilderness*, THE ATLANTIC (Sept. 11, 2014), <https://www.theatlantic.com/health/archive/2014/09/rape-culture-in-the-alaskan->

uncovered a pattern of inaction and institutional resistance on the part of the police towards Alaskan Native women's reports of rape and sexual violence, demonstrating "systemic, decades long indifference."⁶¹ In an effort to seek justice, the American Civil Liberties Union of Alaska, the ACLU's Racial Justice Program, and Sonosky, Chambers, Sachse, Miller & Monkman, LLP filed suit against the City of Nome, Alaska, along with the former law enforcement officials "who, in a display of systemic bias against Alaska Native women, failed to investigate hundreds of sexual assaults reported to the Nome Police Department, including Clarice 'Bun' Hardy's."⁶²

The tragedy of and state failures regarding the disproportionate number of Missing and Murdered Women in the United States also echoes the situation in Canada. For example, "in 2016, 5,712 [I]ndigenous women and girls were reported missing, but only 116 were logged by the US Department of Justice's federal missing persons database."⁶³

The situation facing Indigenous and Māori women in New Zealand and Indigenous women in Australia, while distinct, also bears striking parallels to the inequalities shaping the lives of Indigenous peoples generally, and Indigenous women specifically, in North America. In New Zealand, Māori peoples are over-represented in rates of economic deprivation and poverty,⁶⁴ unemployment,⁶⁵ and homelessness.⁶⁶ For Māori women these

wilderness/379976/ [perma.cc/5S38-48A5]; Victoria McKenzie & Wong Maye-E, *In Nome, Alaska, Review of Rape 'Cold Cases' Hits a Wall*, ASSOCIATED PRESS (Dec. 20, 2019), <https://apnews.com/article/b6d9f5f6fd71d2b75e3b77ad9a5c0e76> [perma.cc/8MEE-KCN3]; Adriana Gallardo, Nadia Sussman & Agnes Chang, ProPublica, and Kyle Hopkins & Michelle Theriault Boots, Anchorage Daily News, *Unheard*, ANCHORAGE DAILY NEWS (June 1, 2020), <https://features.propublica.org/alaska-sexual-assault/unheard-survivor-stories/> [perma.cc/R32C-6P77].

61. See McKenzie & Maye-E, *supra* note 60.

62. *Justice for Clarice Hardy*, ACLU ALASKA, <https://www.acluak.org/en/cases/justice-clarice-hardy> [perma.cc/AQD8-AFU3].

63. Salam, *supra* note 55.

64. See, e.g., Statistics New Zealand, *Latest Child Poverty Statistics Released*, STATS NZ (Feb. 24, 2020), www.stats.govt.nz/news/latest-child-poverty-statistics-released [perma.cc/UL7C-53JP] (discussing how after housing costs have been deducted, the number of Māori children living in New Zealand in relative poverty is 25% while the rate for children in European households is 17%).

65. *Māori in the Labour Market*, N.Z. MINISTRY OF BUS. INNOVATION & EMP. (2017), www.mbie.govt.nz/assets/c71b557b32/2017-monitoring-report-Maori-in-the-labour-market.pdf [perma.cc/V5VR-4W33].

66. HOUSING FIRST AUKLAND, IRA MATA, IRA TANGATA: AUCKLAND'S HOMELESS COUNT REPORT (2018), <https://www.aucklandhomelesscount.org.nz/wp-content/uploads/2019/10/PiT-FinalReport-Final.pdf> [perma.cc/X8AB-H3NF] (finding

inequalities are sharper still. For example, according to a 2017 report, the Māori unemployment rate, at 10.8 percent, was more than double the national unemployment rate of 4.9 percent. For Māori women, this was even higher, at 12 percent.⁶⁷

Health and wellbeing are also adversely affected for Māori peoples in New Zealand relative to the general population. Life expectancy is, on average, seven years less for Māori than for non-Māori people.⁶⁸ Another indicator of poorer health outcomes situated in a social context of colonialism and inequality is that:

Māori are demonstrably less likely than non-Māori to survive nearly every cancer, and nearly twice as likely to die from their cancer overall. Ethnic differences in cancer survival such as these can be seen as an indirect marker of the quality of a country's cancer services and the equity of service delivery.⁶⁹

Māori people are similarly over-represented as victims of crime and subjects of incarceration. According to the New Zealand Department of Corrections, as of March 2020, Māori account for 52.8 percent of the prison population⁷⁰ while making up only about 16.5 percent of the total population.⁷¹

The 2014 New Zealand Crime and Safety Survey indicated that 33 percent of Māori were victims of one or more crimes in 2013.⁷² Māori women experienced higher than average victimization rates at 36 percent.⁷³ 2013 statistics suggest that Māori women are “more than 6.5 times more likely to be hospitalized for serious assault and attempted homicide, and almost three times more likely to die by homicide than non-Maori

that Māori, at 11% of the general Auckland population, were over-represented among those surveyed at 42.7% (53 people)).

67. *Māori in the Labor Market*, *supra* note 65.

68. Health Quality & Safety N.Z., A WINDOW ON THE QUALITY OF AOTEAROA NEW ZEALAND'S HEALTH CARE 2019 14 (2019), https://www.hqsc.govt.nz/assets/Health-Quality-Evaluation/PR/Window_2019_web_final.pdf [perma.cc/LLW2-JGJP].

69. *Id.* at 31.

70. *Prison Facts and Statistics – March 2020*, N.Z. DEP'T OF CORR. (2020), www.corrections.govt.nz/resources/research_and_statistics/quarterly_prison_statistics/prison_stats_march_2020#ethnicity [perma.cc/7PWV-37EG].

71. *New Zealand's Population Reflects Growing Diversity*, STATS NZ (Sept. 22, 2019), www.stats.govt.nz/news/new-zealands-population-reflects-growing-diversity [perma.cc/7VBK-MT5V].

72. MINISTRY OF JUST., 2014 NEW ZEALAND CRIME AND SAFETY SURVEY: MAIN FINDINGS 73 (2015), www.justice.govt.nz/assets/Documents/Publications/NZCASS-201602-Main-Findings-Report-Updated.pdf [perma.cc/NU56-RRRE].

73. *Id.*

women resident in New Zealand.”⁷⁴ Māori women are also, in comparison to non-Māori women, “almost six times more likely to be hospitalised because of assault and attempted homicide, and 1.6 times more likely to die of assault and homicide.”⁷⁵

In Australia, the same themes of colonialism and its harms are evident in data on indicia of inequalities such as homelessness,⁷⁶ unemployment rates, poorer health outcomes, and over-incarceration. In 2018, the Indigenous employment rate was around 49 percent, compared to around 75 percent for non-Indigenous Australians.⁷⁷ Data from the same year revealed that 45 percent of Indigenous Australians aged fifteen and over were receiving some form of income support payment, compared to 23 percent of non-Indigenous Australians.⁷⁸

Inequality and negative health outcomes are also correlated for Indigenous peoples in Australia. The Australian Government reported in 2020 that for the period of 2015–2017, life expectancy at birth was 71.6 years for Indigenous males (8.6 years less than non-Indigenous males) and 75.6 years for Indigenous females (7.8 years less than non-Indigenous females).⁷⁹ Furthermore, in 2018, the Indigenous child mortality rate was 141 per 100,000—twice that for non-Indigenous children (67 per 100,000).⁸⁰ This is significant because:

74. Denise Wilson, Debra Jackson & Ruth Herd, *Confidence and Connectedness: Indigenous Māori Women’s Views on Personal Safety in the Context of Intimate Partner Violence*, 37 HEALTH CARE FOR WOMEN INT’L 707, 708–09 (2016) (citing FAMILY VIOLENCE DEATH REVIEW COMM., FOURTH ANNUAL REPORT: JANUARY 2013 TO DECEMBER 2013, (Health Quality & Safety Comm’n N.Z., 2013), <https://www.hqsc.govt.nz/assets/FVDRC/Publications/FVDRC-4th-report-June-2014.pdf> [perma.cc/V8AG-2HEN]; MINISTRY OF HEALTH, TATAU KAHUKURA: MĀORI HEALTH CHART BOOK 2010 (2nd ed.)).

75. FAMILY VIOLENCE DEATH REV. COMM., FIFTH ANNUAL REPORT: JANUARY 2014 TO DECEMBER 2015, (Health Quality & Safety Comm’n N.Z., 2016), 42–43, <https://www.hqsc.govt.nz/assets/FVDRC/Publications/FVDRC-5th-report-Feb-2016-2.pdf> [perma.cc/QH5J-DB2E].

76. In 2017–2018, Specialist Homelessness Services provided support for 1% of Australia’s total population. Of these individuals, 25% were Indigenous and 60% were women. AUSTL. INST. OF HEALTH & WELFARE, AUSTL. GOV., AUSTRALIA’S WELFARE 2019: IN BRIEF 19 (2019), www.aihw.gov.au/getmedia/795385cc-6493-45c9-b341-7ddf6006d518/aihw-aus-227.pdf.aspx?inline=true [perma.cc/ZKG8-UG7G].

77. AUSTL. GOV., CLOSING THE GAP REPORT 65 (2020), ctgreport.niaa.gov.au/sites/default/files/pdf/closing-the-gap-report-2020.pdf [perma.cc/8HUU-SNAQ] [hereinafter CLOSING THE GAP REPORT].

78. Austl. Inst. of Health & Welfare, *Indigenous Income and Finance*, AUSTL. GOV. (Sept. 11, 2019), www.aihw.gov.au/reports/australias-welfare/indigenous-income-and-finance [perma.cc/LY2G-22VE].

79. CLOSING THE GAP REPORT, *supra* note 77, at 78.

80. *Id.* at 15.

child mortality is associated with a variety of health and social determinants. Although a complex set of factors are involved, maternal health (such as hypertension, obesity, and diabetes) and risk factors during pregnancy (such as smoking and alcohol use) are key drivers of birth outcomes and deaths among Indigenous children. However, access to quality medical care, public health initiatives and safe living conditions serve as protective factors and can improve the chances of having a healthy baby.⁸¹

Indigenous women in Australia, like their counterparts in other countries, also suffer disproportionately higher rates of interpersonal violence. The Australian Bureau of Statistics, for example, reports that during 2004–2005, “[a]fter adjusting for age differences between the two populations, Indigenous women were more than two-and-a-half times as likely as non-Indigenous women to have been a victim of physical or threatened violence.”⁸² A 2016 governmental report revealed that Aboriginal and Torres Strait Islander women experienced physical assault at 4.9 (NSW), 9.1 (SA) and 11.4 (NT) times the rates for non-Indigenous women for the year 2015, according to police records.⁸³ The same report found that 2014–2015 hospitalization rates for Aboriginal and Torres Strait Islander family violence-related assaults were 32 times the rate for non-Indigenous females.⁸⁴ Finally, the 2017 report from the U.N. Special Rapporteur on the Rights of Indigenous Peoples indicated that Indigenous women in Australia “are 10 times more likely to die of violent assault and 32 times more likely to be hospitalized as a result of violence-related assault compared with non-Indigenous women.”⁸⁵

Being Indigenous in contemporary society, then, is typically a marker for various kinds of systemic inequality. As one researcher notes:

81. *Id.* at 20.

82. *The Health and Wellbeing of Aboriginal and Torres Strait Islander Women: A Snapshot, 2004–05*, AUSTL. BUREAU OF STAT. (July 8, 2009), <https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4722.0.55.001Main+Features12004-05> [perma.cc/2MH9-YCHR].

83. STEERING COMM. FOR THE REV. OF GOV'T SERV. PROVISION, OVERCOMING INDIGENOUS DISADVANTAGE: KEY INDICATORS 2016 4.98 (2016), www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2016/report-documents/oid-2016-overcoming-indigenous-disadvantage-key-indicators-2016-report.pdf [perma.cc/VY72-EZB9].

84. *Id.*

85. Victoria Tauli Corpuz, *Rep. of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia*, U.N. Doc. A/HRC/36/46/ at 16 (2017).

It is no coincidence that the 370 million Indigenous people worldwide rank consistently toward the bottom of their national income levels. Whether in colonial Asia, Africa, Australia or the Americas, Indigenous peoples have been treated with enormous inhumanity.⁸⁶

The World Bank reports that:

Although they make up over 6 percent of the global population, [Indigenous People] account for about 15 percent of the extreme poor. Indigenous Peoples' life expectancy is up to 20 years lower than the life expectancy of non-indigenous people worldwide.⁸⁷

More specifically still, Indigenous women bear the burden of discrimination and dehumanization faced by Indigenous peoples generally, but compounded by sexism and misogyny.

The travesty of what happened to Angela Cardinal in a Canadian courtroom, therefore, is one more piece in an elaborate, multi-layered, and still unfolding story (or sets of stories) of the many types of discrimination perpetrated against Indigenous women in Canada and beyond. What happened to her is one example of “a history of the sexual brutalization and attempted annihilation of Indigenous women”⁸⁸ of state neglect, and of state perpetrated harms.

A. *The Sexual and Physical Assault Perpetrated Against Angela Cardinal*

Twenty-seven years old when she suffered the sexual attack on June 16th of 2014, Angela Cardinal was a petite Cree woman who grew up in Maskwacis.⁸⁹ She moved to Edmonton when she was fourteen years old and was a high school graduate.⁹⁰ At the time of the sexual assault, she had been homeless and living on and off the street for some time.⁹¹

86. Daniel Wilson, *Income Inequality and Indigenous Peoples in Canada*, BROADBENT INST., https://www.broadbentinstitute.ca/daniel_wilson_income_inequality_and_indigenous_peoples_in_canada [perma.cc/T9LH-NLQF].

87. *Indigenous Peoples*, WORLD BANK (Sept. 24, 2019), <https://www.worldbank.org/en/topic/indigenouspeoples> [perma.cc/VRF8-45JG].

88. Razack, *Gendering Disposability*, *supra* note 20, at 290.

89. *R. v. Blanchard*, 2016 ABQB 706, para. 7.

90. *Id.*

91. *Id.*

The horrendous sexual attack Angela Cardinal suffered took place in the Edmonton, Alberta apartment of the assailant, Lance Blanchard, a known sexual offender released from prison the previous year.⁹² He had spent thirty-seven of the previous forty years in custody for a string of violent offences.⁹³ In 1975, he was found guilty of raping a girl with intellectual disabilities⁹⁴ and “[t]hree years later, he forced a 13-year old girl into a car at knifepoint, threatening to sexually assault her.”⁹⁵ That same year, he abducted an eleven-year-old boy, again at knifepoint, and tried to sexually assault him.⁹⁶ While in prison in 1978, Blanchard killed a fellow inmate.⁹⁷ Blanchard was clearly not unfamiliar with perpetrating violence, and often extreme violence.

The day of the assault, Angela Cardinal attempted to enter an apartment building near 106 Avenue and 111th Street, where Blanchard “happened to be a resident.”⁹⁸ Discovering the back door of the building locked, “[s]he laid down and fell asleep on some nearby grass.”⁹⁹

At some point later that day, while walking his dog, Blanchard spied Angela Cardinal on the grass.¹⁰⁰ He approached her to ask if she wanted anything or needed medical assistance and agreed to heat up some soup she had in her bag.¹⁰¹ At a later point, Blanchard returned. In a brief conversation, he asked if she wanted to come inside and warm up.¹⁰² “In no uncertain terms,” she rejected his offer.¹⁰³

Later that same day, Angela Cardinal noticed another tenant entering the apartment building.¹⁰⁴ To gain access, she lied that she was going to visit a friend.¹⁰⁵ Once inside, she remained near the

92. *Id.* at paras. 20, 32.

93. *Id.* at para. 254.

94. Janice Johnston, *Doubts About Sex Assault Victim Angela Cardinal Raised in Sworn Affidavit*, CBC NEWS (June 19, 2017), www.cbc.ca/news/canada/edmonton/edmonton-angela-cardinal-sexual-assault-lance-blanchard-affidavit-1.4168302 [perma.cc/Q2YP-E4EP] [hereinafter Johnston, *Doubts About Sex Assault Victim*].

95. *Id.*

96. *Id.*

97. *Id.*

98. *R. v. Blanchard*, 2016 ABQB 706, para. 14.

99. *Id.*

100. *Id.* at para. 15.

101. *Id.*

102. *Id.* at para. 16.

103. *Id.*

104. *Id.* at para. 17.

105. *Id.*

bottom of the stairs.¹⁰⁶ She began singing to herself (“This Little Light of Mine”) and then fell asleep.¹⁰⁷

Blanchard, coming down the stairs intending to go outside to force Angela Cardinal into his apartment, discovered her in the stairwell.¹⁰⁸ Waking her up, he threatened her with a knife and dragged her to his apartment.¹⁰⁹ There he sexually assaulted her, but a significant physical struggle ensued when she fought back.¹¹⁰ Angela Cardinal was able to call the police who then arrested Blanchard and took her to the hospital to receive medical attention for her injuries.¹¹¹

In an unrelated shooting which took place in the interval between the preliminary inquiry and the trial itself, Angela Cardinal was killed.¹¹² She did not, therefore, live to witness the conviction of Blanchard, or to speak publicly about her experiences once they received national media attention.¹¹³

B. *The Preliminary Inquiry*

A preliminary inquiry is a pre-trial hearing for a legal determination of the sufficiency of the evidence requiring an accused to stand trial for the offence(s) charged.¹¹⁴ At the preliminary inquiry for *R. v. Blanchard*, Angela Cardinal was both a cooperative witness and the key witness in the Crown’s case.¹¹⁵ Her testimony ultimately led to Blanchard’s conviction in December of 2016 for aggravated sexual assault, kidnapping, unlawful confinement, possession of a weapon, and uttering threats to cause death or bodily harm.¹¹⁶ In later legal proceedings he was subsequently designated a dangerous offender.¹¹⁷

It was during her testimony at the preliminary inquiry that Angela Cardinal’s situation seriously unraveled, with the power of the state brought down against her in the most oppressive way imaginable. Despite behaving as a cooperative witness, she was

106. *Id.*

107. *Id.*

108. *Id.* at para. 246.

109. *Id.* at paras. 18–20, 246.

110. *Id.* at paras. 21–27.

111. *Id.* at paras. 26–28.

112. *Id.* at paras. 2, 5.

113. Johnston, *Doubts About Sex Assault Victim*, *supra* note 94.

114. William Poulos, *The Preliminary Inquiry: Staying Within the Zone of Protection*, 62 CRIM. L.Q. 365, 366 (2015).

115. *R. v. Blanchard*, 2016 ABQB 706, paras. 183, 241.

116. *Id.* at para. 343.

117. *R. v. Blanchard*, 2018 ABQB 205, para. 167.

incarcerated for five nights during the course of her testimony.¹¹⁸ During the proceedings, to add insult to injury, she was often handcuffed and shackled.¹¹⁹ Angela Cardinal was stigmatized, mislabeled, and depersonalized, ultimately transformed from the cooperative victim-witness she actually was, to being treated as if she were an out-of-control offender needing containment and imprisoning.

i. The First Layer of Violation: Stigmatizing Ms. Cardinal as a “Flight Risk”

At the time of the preliminary inquiry, Angela Cardinal was still living on the street.¹²⁰ Apparently labouring under the mistaken belief she was a “flight risk”, the authorities had a subpoena for her appearance issued.¹²¹ However, no effort had ever been made to track her whereabouts.¹²² Nor had any effort apparently been made to assist her with finding secure or permanent housing after she had been subjected to the traumatic criminal attack.¹²³ As someone living a precarious life on the streets, she could not receive mail as she did not have the benefit of a permanent address.¹²⁴ The uncontested fact is that Angela Cardinal had no knowledge she was required to testify on the dates set for the preliminary inquiry.¹²⁵

As it turned out, on June 3, 2015, two days before she was required to testify at the preliminary inquiry, Angela Cardinal happened to see two police officers she knew.¹²⁶ She approached them on the street, they advised her of the proceedings, and she voluntarily accompanied them to police headquarters.¹²⁷ The police found her a hotel room so she could testify the next day.¹²⁸ She was there the next morning when they came to pick her up.¹²⁹

118. *R. v. Blanchard*, 2016 ABQB 706, paras. 228–35.

119. *Id.* at paras. 221, 231–35.

120. *Id.* at para. 228.

121. *Id.* at paras. 228–30.

122. *Id.* at para. 228 (“While a subpoena was issued for her to attend the Preliminary Inquiry, there was no attempt to serve it on her though there appears to have been a general lookout for her.”).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at paras. 228–29.

128. *Id.* at para. 229.

129. *Id.*

The issuing of the subpoena appears to have been based on the belief she was unreliable and would need to be compelled to attend court. Nothing about her actual conduct supported this mistaken assumption. Indeed, as Justice Macklin observed in the decision of the trial itself, “[t]o that point, there had not been any incident of her failing to attend when required to do so, as it is clear that she was never served with a [s]ubpoena to attend in the first place.”¹³⁰ The gratuitousness of the subpoena was therefore made evident by the fact that it never had to be served.

At the time of the preliminary inquiry, Angela Cardinal was exactly where she said she would be. Quite reliably. This truth, the factual record, and the demonstration of her reliability did not prohibit the legal professionals in this proceeding from relying on faulty and racist assumptions about her. Who she was and the precarious circumstances of her life at the time seem to have unleashed victim blaming, rape myths, and stereotypical and racist ideas—that she was unreliable, untrustworthy, and not credible. Sadly, these legal professionals then proceeded with even more harmful and rights-infringing conduct against Angela Cardinal.

ii. The Second Layer of Violation: Judicial Confusing of Victim and Accused

Feminists have long pointed out that women who are victims of sexual assault experience themselves as being put on trial in the criminal justice system by virtue of the many ritualized hostilities of the court processes.¹³¹ The behaviour of some judges suggests that they actually labour under the mistaken belief that sexual assault victim-witnesses are, in some fundamental sense, *the ones actually on trial*. This has extended to judicial episodes in which *the victims of sexual assault have been confused with the accused*. This is precisely the indignity to which Angela Cardinal was subjected in the preliminary inquiry.¹³² Specifically, at one point during the

130. *Id.* at para. 229.

131. See generally CAROL SMART, *Rape, Law and the Disqualification of Women's Sexuality*, in FEMINISM AND THE POWER OF LAW (1989) (providing an early analysis); Elaine Craig, *The Inhospitable Court*, 66 U. TORONTO L.J. 197 (2016) [hereinafter Craig, *The Inhospitable Court*]; ELAINE CRAIG, PUTTING TRIALS ON TRIAL: SEXUAL ASSAULT AND THE FAILURE OF THE LEGAL PROFESSION (2018) [hereinafter CRAIG, PUTTING TRIALS ON TRIAL]; Craig, *Person(s) of Interest and Missing Women*, *supra* note 31.

132. Letter from Alice Woolley, Professor of Law, Univ. of Calgary, to Alberta Justice Minister Kathleen Ganley, Chief Judge Terence Matchett of the Alberta Provincial Court, and to the Law Society of Alberta, at 4 (June 14, 2017) (available

proceeding Judge Bodnarek mistakenly referred to her as “Ms. Blanchard,” the last name of her assailant.¹³³ Understandably offended and insulted, she responded with an angry outburst.¹³⁴

It is interesting to note that this is the identical so-called ‘slip of the tongue’ former judge Robin Camp exhibited in the infamous *R. v. Wagar* trial.¹³⁵ The judge was ultimately removed from the bench after a highly publicized hearing widely noted in the Canadian press, in part because of his bluntly victim-blaming question: “couldn’t you just keep your knees together?”¹³⁶ At the trial, the sexual assault victim—also a very young Indigenous woman—was notoriously referred to by the judge as “the accused.”¹³⁷

This judicial confusion was noted in the excellent report submitted by the Institute for the Advancement of Aboriginal Women (IAAW) and the Women’s Legal Education and Action Fund (LEAF) to the independent review of the treatment of Angela Cardinal, a review prompted when journalists broke the story about her court room shackling.¹³⁸ The authors draw parallels between Judges Bodnarek’s and Camp’s confusion of the accused with the woman who was the victim-witness. As they astutely observed, “[t]he treatment of Ms. Cardinal during the Preliminary Inquiry appeared to be informed by discriminatory assumptions about Indigenous women’s inherent dangerousness, their criminality, immorality, and drunkenness.”¹³⁹ To this extent, then, these sexual assault victims were themselves perceived to be on trial.

These examples of judicial errors cannot simply be accidental slips of the tongue—nor does it seem plausible that they expose random, or unconscious bias. Rather, they more likely reflect the barely repressed suspicions of women victim-witnesses in sexual

at *The Incarcerated Complainant: Submissions to the Minister of Justice*, ABLAWG (June 15, 2017), https://ablawg.ca/wp-content/uploads/2017/06/Blog_AW_Blanchard.pdf [perma.cc/A3MW-WU5F] [hereinafter Woolley Letter].

133. *R. v. Blanchard*, 2016 ABQB 706, para. 231.

134. Woolley Letter, *supra* note 132 (citing Preliminary Inquiry Transcript at 369 line 19, *R. v. Blanchard*, 2016 ABQB (E-File No. ECP17BLANCHARDL) [hereinafter Preliminary Inquiry Transcript]); IAAW/LEAF Submission, *supra* note 11, at 10 (citing Preliminary Inquiry Transcript at 473 line 19).

135. *R. v. Wagar*, 2014 CarswellAlta 2756, para. 92 (Can. Alta. Prov. Ct.) (WL).

136. Transcript of Trial Proceedings at 119 line 15, *R. v. Wagar*, 2014 Can. Alta. Prov. Ct. (E-File No. CCP14WAGARALEX3).

137. *Id.* at 348 line 28, 432 lines 5 and 16, 433 line 20, 437 line 9, 442 line 41, 443 line 6, 446 line 41, 450 line 34.

138. IAAW/LEAF Submission, *supra* note 11.

139. *Id.* at 11.

assault proceedings held in the minds of some members of the judiciary.

Such judicial errors support the frequent assertion that the objects of the legal inquiry in a sexual assault trial are often the women who have been violated, not the accused. Mixing up the names of the sexual assault victims with the accused reflects the judicial preoccupation with—quite literally—*putting the victim on trial*.¹⁴⁰ On this view, the question shifts onto the credibility of the victims' accounts of sexual violence: Are they liars? Are they to be believed? This, of course, ties in with that most pernicious of all rape myths—that women routinely lie about being raped. These judicial confusions actually reveal the skeptical judicial imagination explicitly expressed.

Judge Bodnarek's misnaming of Angela Cardinal by calling her by the name of her sexual attacker was one of the early insults heaped upon the multiple legal injuries she endured. And yet, so dignified and polite was she, that after this affront to her dignity, she even apologized to the court for having expressed anger about it.¹⁴¹

iii. The Third Layer of Violation: The Failure to Understand the Context of Ms. Cardinal's Life Circumstances and her Trauma Responses

At the point in the preliminary inquiry when she was required to recount some of the more harrowing aspects of the attack committed against her, Angela Cardinal had some difficulty in testifying.¹⁴² At this point, in fact, her difficulties testifying became particularly acute.

This is extremely common. Indeed, it is more typical than it is exceptional in a criminal sexual assault proceeding, especially one involving a physically violent attack such as Angela Cardinal had suffered.¹⁴³ As Justice Macklin described in the subsequent trial, in the process of testifying, "[s]he was clearly distraught and, using

140. See CAROL SMART, *FEMINISM AND THE POWER OF LAW* (1989); CAROL SMART, *Law's Power, the Sexed Body, and Feminist Discourse*, in *LAW, CRIME AND SEXUALITY: ESSAYS IN FEMINISM*, 70–86 (1995) (providing an early analysis); Craig, *The Inhospitable Court*, *supra* note 131 (providing a more recent analysis).

141. IAAW/LEAF Submission, *supra* note 11, at 12–13.

142. Woolley Letter, *supra* note 132, at 4.

143. See generally JUDITH DAYLEN, WENDY VAN TONGEREN HARVEY & DENNIS O'TOOLE, *TRAUMA, TRIALS, AND TRANSFORMATION: GUIDING SEXUAL ASSAULT VICTIMS THROUGH THE LEGAL SYSTEM AND BEYOND* (2006); CRAIG, *PUTTING TRIALS ON TRIAL*, *supra* note 131 (describing the difficult experiences of women testifying in sexual assault cases in Canada).

her word, ‘panicking’. She was somewhat belligerent.”¹⁴⁴ The use of the latter term, in these circumstances, is particularly problematic.¹⁴⁵ Describing Angela Cardinal as “belligerent” is pathologizing and fails to understand the various ways in which women process trauma responses.¹⁴⁶ It also stigmatizes what are very often healthy expressions of anger.

Women’s anger is barely tolerated in our society. Too often it is contained, ignored, or punished.¹⁴⁷ The rightful anger and outrage that Angela Cardinal experienced throughout the extraordinarily emotionally taxing task of testifying about her violent sexual assault, within the confines of the adversarial criminal trial process, should not be mischaracterized or dismissed as “belligerence.”

Instead of being offered whatever resources might have assisted and *supported her* through the adversarial legal process—as should take place in any trauma-informed approach—Angela Cardinal was punished and treated as if she were a criminal living in a dystopian era. It strains belief that such events could take place in 2015, in a Canadian court room. Instead of being provided with care, respect, and appropriate resources, she was pathologized, stigmatized, and abandoned for her reactions to traumatic events.

The trial judge described Angela Cardinal as coming “across as an intelligent woman during her testimony. While there were times when she was clearly distraught, much of her testimony was given in a clear, cogent, coherent and articulate manner.”¹⁴⁸ But in her distress she became listless. At one point during a break, she took to lying down on a bench outside the courtroom, behaviour the

144. R. v. Blanchard, 2016 ABQB 706, para. 229.

145. It is also sharply at odds with the rest of the tone of Justice Macklin’s decision in which he displayed significant sensitivity to the degrading situation Angela Cardinal was put in, as is elaborated more fully in the text below.

146. See Lori Haskell & Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims: What the Criminal Justice System Needs to Know*, JUST. CAN. (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3417763 [perma.cc/L247-7249] [hereinafter Haskell & Randall, *Impact of Trauma*] (detailing the psychological and physiological effects of trauma and advocating for a trauma-informed justice system).

147. See, e.g., Rachel Flowers, *Refusal to Forgive: Indigenous Women’s Love and Rage*, 4 DECOLONIZATION, INDIGENEITY, EDUC. & SOC’Y 32, 42–43 (2015) (analyzing recent social responses to women’s anger); SORAYA CHEMALY, RAGE BECOMES HER: THE POWER OF WOMEN’S ANGER (2018); REBECCA TRAISTER, GOOD AND MAD: THE REVOLUTIONARY POWER OF WOMEN’S ANGER (2018); JAMELIAH YOUNG-MITCHELL, THE DEATH OF THE ANGRY BLACK WOMAN (2018); Casey Cep, *The Perils and Possibilities of Anger*, NEW YORKER (Oct. 8, 2018), www.newyorker.com/magazine/2018/10/15/the-perils-and-possibilities-of-anger [perma.cc/AQH2-VBWB].

148. R. v. Blanchard, 2016 ABQB 706, para. 348.

Crown then used against her to argue for her imprisonment.¹⁴⁹ According to Crown Prosecutor Patricia Innes, she was “curled up on the benches outside, literally *unwilling* to interact.”¹⁵⁰ It was at this point that the Crown sought to take more drastic action against Angela Cardinal, and the Judge appeared not to hesitate in facilitating her incarceration.¹⁵¹

Psychological shut down or collapse is a common trauma response,¹⁵² especially likely during or after the traumatic recalling of the experience of a life-threatening sexual and physical attack.¹⁵³ During a break in the proceedings, it was no surprise Angela Cardinal had to lie down after being questioned and testifying about the violent assault she suffered. Reliving the horrifying details of the violent physical attack and the sexual violation of her body would have been retraumatizing and exhausting. Her need for a rest—both psychological and physical—taken on the bench is something the legal professionals in the court room should have understood. In addition, it is highly probable her discomfort and distress may not have only been emotionally based. She was apparently also hungry as she had not eaten well or sufficiently during this entire ordeal.¹⁵⁴

The Crown did seek some limited support for Angela Cardinal but clearly for instrumental purposes only in order to allow the hearing to proceed. Ms. Innes’ words to Judge Bodnarek make this abundantly evident. As she explained, “. . . witnesses [are] required to present themselves in a manner that they are fit to testify[.] [S]he has not done that.”¹⁵⁵ For this Crown, support for the victim-witness was exclusively for the purpose of getting her in shape to testify, not

149. Steven Penney, *Unlawful Remand: The Wrongful Jailing of a Sexual Assault Victim*, FAC. OF L., UNIV. OF ALBERTA: FACULTY BLOG (June 16, 2017), ualbertalaw.typepad.com/faculty/2017/06/unlawful-remand-the-wrongful-jailing-of-a-sexual-assault-victim-.html [perma.cc/S7MX-SUXC].

150. IAAW/LEAF Submission, *supra* note 11, at 11 (emphasis added).

151. *Id.* (“Despite the fact that Ms. Cardinal was compliant and never refused to testify, she was ordered remanded under s. 545(1)(b) of the *Criminal Code*, a provision that allows for a Preliminary Inquiry judge to order the detention of a witness who, ‘having been sworn, refuses to answer the questions that are put to him, without offering a reasonable excuse for his failure or refusal.’”).

152. This has been noted in the psychological and trauma literature for many years. It is more recently explained and applied to victim responses in the criminal justice system in Haskell and Randall, *Impact of Trauma*, *supra* note 146.

153. I owe this point to Dr. Lori Haskell.

154. *R. v. Blanchard*, 2016 ABQB 706, para. 176 (“[S]he lived a lifestyle where she would often stay awake all night long for safety reasons and look for shelter during the daytime to sleep and keep warm. She was also cold, hungry and looking for food.”).

155. Woolley Letter, *supra* note 132, at 6.

to provide her with the needed psychological support. Ms. Innes therefore advised the Judge that, “. . . it occurred to me that perhaps somebody from the Native community **like a medicine person** [sic] **or something** could assist.”¹⁵⁶

The problematic language used by the Crown here reflects ignorance of the kinds of culturally appropriate resources she could have drawn upon—from the Cree community specifically, and from other Indigenous communities more broadly. Calling for a “medicine person” [sic] in particular demonstrates limited knowledge of Indigenous cultures and their diversity. Angela Cardinal was already abandoned before the proceedings had even begun when no one thought to connect her with victim supports, members of her own community, and a range of other appropriate services. Adequate supports from the outset would have helped her be more physically and emotionally grounded. This, in turn, would have helped her better manage the inherently stressful legal proceedings before and during the preliminary inquiry.

Instead, it appears the Court laboured under the mistaken belief that she lacked the capacity or the “will” to participate in Court proceedings, as if it were simply a matter of strength of character rather than being a procedure requiring resources and supports for traumatized victims. In relying upon highly derogatory, patronizing, racist and colonial assumptions about Angela Cardinal, the Crown seriously misjudged her. It appeared she departed too much from what the Crown and Judge expected as the demeanour of an “ideal victim,”¹⁵⁷ one who could recount her experience in a calm, collected and linear manner, perhaps exhibiting outward feminine distress at appropriate moments, but ultimately rational and in control of the narrative required by the court. Instead, she was stigmatized as a homeless Indigenous woman, believed to be “out of control,” and perceived as someone needing to be contained in the most degrading way possible.

As the authors of the IAAW/LEAF submission to the independent review powerfully observe:

In sum, rather than being treated as a rights-bearing legal subject entitled to dignity and respect, Ms. Cardinal was subjected to harshly punitive treatment. In fact, it appears as though she was objectified and reduced to a mere instrument of the prosecution. The Crown aggressively pursued the

156. *Id.* (emphasis added).

157. See Randall, *Sexual Assault Law, Credibility, and ‘Ideal Victims’*, *supra* note 16.

prosecution of an accused with a long history of violence and Ms. Cardinal became a casualty of this process.¹⁵⁸

At the point the media spotlight was turned on this case¹⁵⁹ and attention focused on how so-called vulnerable witnesses are treated in the criminal justice system,¹⁶⁰ many well-meaning recommendations were offered for improved treatment of victims.¹⁶¹ Excellent as many of these recommendations are, and imperative as it is that they be implemented, none are expressly trauma-informed as they necessarily should be to reflect the fullest extent of knowledge and best practices in the area.¹⁶²

But more fundamentally, the whole concept of “vulnerable witness” is itself in many cases, especially like this one, deeply problematic and in need of some analysis. Why? Because this construct slips too often into locating the idea of “vulnerability” within the woman herself, as if vulnerability were some sort of personal characteristic, stigma or deficiency carried within her. Even when meant well, the term is too often a backward or upside-down formulation of the problem. It looks inwards instead of outwards, to the social conditions producing and structuring “vulnerability.”¹⁶³

More fundamentally, this traditional formulation of vulnerability as a personal and individual problem is one which relieves us, *particularly those working within the criminal justice system and those working within law*, from looking systemically and structurally at the social conditions producing the so-called vulnerability in the first place.

Is it ultimately really about “personal vulnerability” in a situation such as Angela Cardinal’s? Instead, it is more fundamentally about structural inequalities, trauma histories, and

158. IAAW/LEAF Submission, *supra* note 11, at 15.

159. See generally Janice Johnston, *Sex Assault Victim Jailed After Crown, Police Refused to Pick Up Hotel Bill*, CBC NEWS (June 15, 2017), www.cbc.ca/news/canada/edmonton/angela-cardinal-sexual-assault-victim-jailed-hotel-remand-1.4161035 [perma.cc/XX7J-XMTP] [hereinafter Johnston, *Sex Assault Victim Jailed*].

160. ROBERTA CAMPBELL, INDEPENDENT REPORT ON THE INCARCERATION OF ANGELA CARDINAL, ALBERTA GOV. 15 (2018), open.alberta.ca/dataset/8cd7c0a6-b8ea-4c33-ae01-f42177558fa1/resource/4867cd3d-9b2d-4ce1-9412-38d017d42b29/download/independentreportincarceration-angelacardinal.pdf [perma.cc/FQN9-HDWY] [hereinafter Campbell, *Independent Report*].

161. See Haskell & Randall, *Impact of Trauma*, *supra* note 146.

162. *Id.*

163. Surely the problem has mutually reinforcing elements. I do not deny the personal and psychological elements of vulnerability. Here, I am making a different and larger political point.

how these layers get interconnected and lived in individual histories. It's about addictions and their ravages in people's lives. It's about poverty and/or homelessness. It's about misogyny and sexism. It's about oppression, marginalization, and disempowerment. It's about colonialism, and the multiple ways in which colonialism gets expressed, lived, and structured in Indigenous people's lives.¹⁶⁴ Most importantly, this notion of "vulnerable victims" too easily lets the institution of the criminal justice system itself off the hook from examining its own role in exacerbating the very harms of sexual violence.

Here, the issue was not so much that Angela Cardinal was a "vulnerable witness," as if this were her unique personal affliction. To the contrary, she was, as Justice Macklin noted, clearly a highly intelligent woman struggling with difficult life circumstances, circumstances that were socially constructed and hardly unique, but shared by many other women with similar life histories.¹⁶⁵ She struggled with a total lack of stability and support in these difficult circumstances. Not only was she radically disempowered in the legal proceeding in which she acted as a dutiful citizen by testifying as a victim of a crime against the state, but she was dehumanized by powerful people within a powerful legal system.

Angela Cardinal was, therefore, rendered even more vulnerable than she already was, every aspect of her "vulnerability" exacerbated by the indignities foisted upon her by the Crown and the judge. During her entire testimony, which—let's remember—actually led to the perpetrator's conviction, this woman was in shackles; at night she was sent to sleep in a prison. This is the astounding part of the story I analyze next.

iv. The Fourth Layer of Violation: The Shackling and Imprisonment of Ms. Cardinal as If She Were a Criminal (and Not a Sexual Assault Victim)

*"[P]unishment is confused with care."*¹⁶⁶

Misinterpreting Angela Cardinal's listlessness as evidence of uncooperativeness, the Crown asked Judge Bodnarek to issue an

164. See MMIW Final Report, *supra* note 31; see also Lori Haskell & Melanie Randall, *Disrupted Attachments: A Social Context Complex Trauma Framework and the Lives of Aboriginal Peoples in Canada*, 5 J. ABORIGINAL HEALTH 48 (2009) [hereinafter Haskell & Randall, *Disrupted Attachments*].

165. R. v. Blanchard, 2016 ABQB 1323, para. 348.

166. IAAW/LEAF Submission, *supra* note 11, at 13.

order to allow for her detention.¹⁶⁷ This request was made pursuant to Section 545(1)(b) of the *Criminal Code*. This provision provides:

545 (1) Where a person, being present at a preliminary inquiry and being required by the justice to give evidence . . .

(b) having been sworn, refuses to answer the questions that are put to him . . . without offering a reasonable excuse for his failure or refusal, the justice may adjourn the inquiry and may, by warrant in Form 20, commit the person to prison for a period not exceeding eight clear days or for the period during which the inquiry is adjourned, whichever is the lesser period.¹⁶⁸

The Crown claimed, then, that Angela Cardinal's detention would be justified on the basis that she was refusing to answer questions put to her, a situation which was, to put it mildly, factually inaccurate.¹⁶⁹

Because this was such an astonishing and degrading move to make against a victim-witness in a sexual assault proceeding, the justification provided by the Crown bears repeating at some length. In addition, because the judge allowed this highly unusual order, examining the record in some detail allows the inherently problematic assertions and assumptions to be exposed.

The Crown, Patricia Innes, narrated the following into the court record:

Sir, since we adjourned and of course the Court was privy to the complainant making the attempt to testify that she did make. It was not helpful I don't think being in the state that she's in for her to attempt to testify. She was — just to give you a little bit of background. A subpoena was issued for her, I'm not exactly sure of the date, but it was in April. It took until approximately a week ago when she wasn't served to have the Downtown police resources looking out for her. Luckily somebody located her in the downtown area on Wednesday morning and brought her into the police station in an attempt to have her sit down and watch her, in this case the videotape CD of her interview as is normal in preparation for witnesses. She was not willing to do that. She was very agitated and upset about the idea of doing that to the point where the attempt to have her do that did not continue.¹⁷⁰

167. Woolley Letter, *supra* note 132, at 5.

168. Criminal Code, R.S.C. 1985, c C-46, s. 545(1)(b).

169. Woolley Letter, *supra* note 132, at 5.

170. *Id.* at 6 (citing Preliminary Inquiry Transcript at paras. 387–90).

Innes explained that arrangements had been made for Angela Cardinal to have a hotel room.¹⁷¹ She proceeded to narrate a story making it appear as if Ms. Cardinal had not been available, when in fact she had been fully cooperative with the police and had appeared when required.¹⁷² While the Crown continued to paint a picture of an uncooperative victim-witness, a more accurate and compassionate depiction would have highlighted a woman in distress. Innes told the judge:

[The police] [b]rought her here and she essentially (INDISCERNIBLE) that's been around outside can attest to the fact that she curled up in a corner of the witness room out there or the ante room and just laid on the floor and closed her eyes and is non-communicative.¹⁷³

The Crown continued:

Efforts were made to get her to understand the importance of standing up and becoming vocal and giving her evidence. And the best shot that we took at that was when she came in here this morning and was essentially unable to participate in the process in a way that we need for a witness to participate. In speaking with the person from the Bissell Rayann (phonetic), I don't know her last name I'm sorry, she's outside and certainly can be asked questions about this, but she indicated that in her experience the presentation of [Ms. Cardinal] is consistent with somebody who's coming down off of methamphetamine which is why potentially why she's so incredibly unable to be alert and wake up. It's a possibility and obviously she's not diagnosed and it could be other things. Additionally, she made reference here when she was on the witness stand about wanting to commit suicide. She also, according to the one detective who was one of the two detectives that was looking after her hotel and transportation to court this morning told them that some days back and I do not have a specific date that she hung herself in an alley and one of her friends saved her.¹⁷⁴

In this statement we see the Crown's acknowledgment of the psychological distress suffered by Angela Cardinal as evidenced by the statement she had wanted, at some point, to commit suicide.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

How, then, would locking her up in a prison, ever be the appropriate response?¹⁷⁵

The Crown continued to explain to the Judge that:

... the complainant simply wishes to go to sleep. I don't like having to ask this, but I feel I have no option and that is I ask, Sir, that as this witness has presented in a fashion that is not consistent with being able to give her evidence and given the difficulty in getting her here in the first place and maintaining enough idea of where she's located to ensure she attends for court I'm asking *that she be detained in custody and brought back to court the next day that we sit in an attempt to have her give her evidence.*¹⁷⁶

The Crown went on to say:

Now, my friend brought up the idea that she might want to speak with duty counsel. I have no problem with that of course. I'm not sure that anyone is going to be in a position to speak with her as she is not communicated with really anyone outside other than I think she took a couple of Tylenol a little bit ago. I can certainly have the worker come in Rayann. The lady from the Ambrose House the Elder who's here Ms. Goulay to speak to whether or not they think someone could communicate with her, but I haven't [sic] really run out of options, Sir, other than to suggest that.¹⁷⁷

This entire narrative advanced by the Crown pathologizes Angela Cardinal, miscasting her as unreliable and uncooperative when she had, in fact, been at the hotel as promised and had voluntarily attended court. Moreover, she had answered questions to the best of her ability until she became so emotionally distressed that she needed to lie down.¹⁷⁸ This occurred at about the same point in the proceedings that the judge mistakenly called her by the name of the man who had assaulted her.¹⁷⁹ However, the Crown persisted in the pathologizing narrative to the Judge:

I know witnesses [are] required to present themselves in a manner that they are fit to testify **she has not done that.** I don't know whether this is her own doing or some other thing

175. I owe this point to Sheila Wahsquaonaikezhik.

176. Woolley Letter, *supra* note 132, at 6 (emphasis added) (citing Preliminary Inquiry Transcript at paras. 387–90).

177. *Id.*

178. Penney, *supra* note 149.

179. Woolley Letter, *supra* note 132, at 4.

is at play or it's a combination of factors, but if we turn her back after today to her own devices I can probably guarantee, short of having an officer essentially handcuff himself to her she won't be here unless the officers are lucky enough to find her again.¹⁸⁰

This claim is not only unfounded, but racist, based on stereotypes about Indigenous people as unreliable and untrustworthy.¹⁸¹ This latter claim was also a particularly egregious misrepresentation to the Court since Angela Cardinal had fully cooperated with the prosecution, attended court voluntarily, and answered questions up until the point she became distressed and apparently collapsed in exhaustion on the bench outside the court room. Undaunted, the Crown pressed on, further pathologizing her distress and omitting the crucial fact that the subpoena was never served, having been entirely unnecessary given her voluntary attendance.¹⁸² In Ms. Innes' words:

It's in the public interest that she be here to testify. So these are the things that I'm putting before you, Sir . . . And we also have the overriding concern that she be here in a state to testify at some reasonable date in the future if that is ever going to occur I think with the additional factor that we are in a court of law, she's under subpoena. We had this history trying to locate her although I don't have the details of what efforts were made to locate her in the first place. I do know that as of Friday of last week two sergeants from Downtown Division had spread out a bulletin to all members to keep their eye out for this young lady and to try to bring her in to to—for the—to serve her with the subpoena which was in their—in their custody.¹⁸³

On the basis of the Crown's assertions, and without requesting any supporting evidence, let alone any further submissions from counsel, Judge Bodnarek ordered that Angela Cardinal be imprisoned for the weekend at the Edmonton Remand Centre.¹⁸⁴ As Professor Alice Woolley, a leading academic legal ethicist before her appointment to the bench, points out, Judge Bodnarek "did not flag

180. *Id.* at 6 (emphasis added) (citing Preliminary Inquiry Transcript at paras. 387–90).

181. Sheila Wahsqonaikhezihik pointed out this aspect of the Crown's submission to the Court.

182. Woolley Letter, *supra* note 132, at 6 ("A subpoena was issued for her, I'm not exactly sure of the date, but it was in April.").

183. *Id.* at 7 (citing Preliminary Inquiry Transcript at paras. 387–90).

184. IAAW/LEAF Submission, *supra* note 11, at 12.

the issue with the factual basis for the order . . . and did not ask the Crown to provide additional information . . .”¹⁸⁵

Crown Prosecutor Innes had made the request without any evidentiary basis, and worse still, on the basis of serious misrepresentations to the court about Angela Cardinal. As one legal commentator observed:

These statements [from the Crown] were pure assertions. No evidence was adduced to support them, and the court did not direct Ms. Cardinal back to the stand to continue her testimony. Nor did the prosecutor provide any legal argument or case law supporting her claim that section 545(1)(b) authorized the detention.¹⁸⁶

Both the Crown Attorney and the Judge were ostensibly “concerned” about Angela Cardinal’s physical and mental state.¹⁸⁷ The Crown suggested she had “presented in a condition unsuitable for testifying and we don’t know what the reason is.”¹⁸⁸

Yet their concern did not extend to providing the necessary care and supports needed by Angela Cardinal, a woman performing a public duty by cooperating with a sexual assault trial in which she was the centerpiece by virtue of her crucial evidence. Instead, the so-called “concern” of the Crown and the Judge was manifested by entrapping and incarcerating this woman in the same place where offenders are held, including the very offender who had physically and sexually assaulted her.

Even the duty counsel, the court appointed defence lawyer appointed for the sole purpose of protecting the security and liberty interests of a person in the position of Angela Cardinal, failed to rise to the occasion to argue vigorously against her detention. Thus, the indignity of the situation was further compounded by the duty counsel’s failure to challenge and resist the judicial order to imprison her. This is the bare minimum one should expect from legal representation when such fundamental rights as personal liberty are at stake, as Woolley so ably points out.¹⁸⁹ Since incarceration is among the most extreme examples of the state’s power to infringe a person’s fundamental rights and liberties, this breach of a defence lawyer’s duty to an incarcerated witness like

185. Woolley Letter, *supra* note 132, at 13.

186. Penney, *supra* note 149.

187. Woolley Letter, *supra* note 132, at 9.

188. *Id.* at 7.

189. *Id.* at 12.

Angela Cardinal is, to say the least, extremely surprising, if not a dereliction of professional duty.

Professor Woolley has done a superb job of explicating the many potential ethical issues and breaches on the part of the lawyers and judges involved in incarcerating Angela Cardinal. Based on her thorough review of the transcript of the preliminary inquiry, the trial judgment, and various other proceedings, Woolley wrote and publicly posted a letter to then Alberta Minister of Justice, Kathleen Ganley, carefully substantiating her claim that both the lawyers and the judge bear responsibility for an order which “subjugated Ms. Cardinal” and violated her rights.¹⁹⁰

The incarceration of Ms. Cardinal was such an egregious breach of human rights and other legal norms, involving so many rights violations, that it is difficult to know where to begin disentangling them. Moreover, the flimsy basis for her incarceration was based on a series of misrepresentations to the Court by the Crown and legal errors by the Judge, for which there has still been no professional accountability.¹⁹¹

At the end of Angela Cardinal’s testimony on June 8, 2015, the Court again remanded her.¹⁹² Contrary to the information presented to the Court by the Crown, Angela Cardinal had returned to the hotel the evening of June 4 before she was to testify.¹⁹³ She was then taken by the police to her mother’s home where she was found the next morning.¹⁹⁴ She was never missing and had never failed to appear.

At this level of state failure, then, we see a total system breakdown by three different legal levels in the court system—the Crown, the Judge, and the duty counsel. The detention of this sexual assault victim also represents the use and abuse of state resources—in all, Angela Cardinal was incarcerated for five nights, from June 5 to June 10.

Here it is also incumbent on us to note the terrible irony that this period of incarceration is *a longer period of imprisonment* than most sexual offenders in Canada ever receive, given that most cases of sexual assault are never touched by the criminal justice system and, of those that are processed, the conviction rate is extremely

190. Woolley Letter, *supra* note 132, at 13.

191. *Id.*

192. *Id.* at 9.

193. *Id.* at 8.

194. *Id.*

low.¹⁹⁵ That the overwhelming majority of sexual assault cases are never even reported to the police has been well and thoroughly documented by decades of research.¹⁹⁶ This means the vast majority of those who sexually assault and violate others do so with impunity. This low rate of reporting has not, unfortunately, significantly changed in recent years.¹⁹⁷

As the authors of the IAAW/LEAF Submission observe, “[a]ssumptions were made by the Crown, defence and court about [Angela Cardinal’s] state of sobriety, whether she was using drugs, her willingness to appear in court without being incarcerated, and her ability to testify, resulting in a deprivation of her liberty and equality rights.”¹⁹⁸ In the detention of Angela Cardinal, we see the paradox of a sexual assault victim “punished” for the “crime” of cooperating with the very system that is supposed to be there to deliver justice to her.

v. The Fifth Layer of Violation: Multiple Rights Violations, Legal Obfuscation, and the Absence of a Legal Foundation for Imprisoning Ms. Cardinal

Judge Bodnarek appears to have accepted that he had authority to imprison the victim-witness Angela Cardinal under Section 545(1)(b) of the Canadian *Criminal Code*. But this provision

195. Data from the Canadian Government indicates that around 5% of sexual assaults are reported to police. SAMUEL PERREAULT, STAT. CAN., CATALOGUE 85-002-X, JURISTAT: CRIMINAL VICTIMIZATION IN CANADA IN 2014, at 26 chart 15 (2015); ADAM COTTER & LAURA SAVAGE, STAT. CAN., CATALOGUE 85-002-X, GENDER-BASED VIOLENCE AND UNWANTED SEXUAL BEHAVIOUR IN CANADA, 2018: INITIAL FINDINGS FROM THE SURVEY OF SAFETY IN PUBLIC AND PRIVATE SPACES 20 (2019), <https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00017-eng.pdf> [perma.cc/DYM9-6HBB]. As of the 2016–2017 fiscal year, only 42% of all sexual assault cases resulted in a finding of guilt, and only 22% of those resulted in an incarceral sentence. STAT. CAN., TABLE 35-10-0031-01, ADULT CRIMINAL COURTS, GUILTY CASES BY MOST SERIOUS SENTENCE, ANNUAL, <https://www150.statcan.gc.ca/t1/tb11/en/tv.action?pid=3510003101&pickMembers%5B0%5D=1.1&pickMembers%5B1%5D=2.8&pickMembers%5B2%5D=3.1&pickMembers%5B3%5D=4.1&pickMembers%5B4%5D=5.1&cubeTimeFrame.startYear=2016+%2F+2017&cubeTimeFrame.endYear=2016+%2F+2017&referencePeriods=20160101%2C20160101> [perma.cc/DLT9-8Y5T]; STAT. CAN., TABLE 35-10-0027-01, ADULT CRIMINAL COURTS, NUMBER OF CASES AND CHARGES BY TYPE OF DECISION, <https://www150.statcan.gc.ca/t1/tb11/en/tv.action?pid=3510002701&pickMembers%5B0%5D=1.1&pickMembers%5B1%5D=2.8&pickMembers%5B2%5D=3.1&pickMembers%5B3%5D=4.1&pickMembers%5B4%5D=5.2&cubeTimeFrame.startYear=2016+%2F+2017&cubeTimeFrame.endYear=2016+%2F+2017&referencePeriods=20160101%2C20160101> [perma.cc/32AS-TYRY].

196. PERRAULT, *supra* note 195; COTTER & SAVAGE, *supra* note 195.

197. Compare PERRAULT, *supra* note 195, at 3, and COTTER & SAVAGE, *supra* note 195, at 21.

198. IAAW/LEAF Submission, *supra* note 11, at 9.

of the *Code* pertains to witnesses who refuse to answer questions.¹⁹⁹ Angela Cardinal did not refuse to answer questions put to her.

An independent legal report on the issue of her detention completed by Steven Penney elaborates:

But even if she did constitute a genuine flight risk, it wouldn't matter. The provision does not authorize detention to prevent absconding. Of course, witnesses may be jailed for contempt if they refuse to comply with a properly-served subpoena or other court order, but they cannot be detained prospectively because of a concern that they may not come to court.²⁰⁰

Roberta Campbell, a criminal lawyer who was commissioned to conduct an independent review of the mistreatment of Angela Cardinal, made this same finding in her external report. Campbell concluded that the Crown should not have sought an order to incarcerate Ms. Cardinal and concluded her incarceration was not justified by any section of the *Criminal Code*.²⁰¹

Similarly, the authors of the IAAW/LEAF Submission express strong concern about “the serious violations of Ms. Cardinal’s Section 7 and Section 11(d) *Charter* rights throughout the Preliminary Inquiry.”²⁰² In their view, “[t]he remanding of the complainant was not done according to law and violated basic norms of due process.”²⁰³

It seems incontrovertible, then, that Angela Cardinal’s detention should never have been sought and was legally unjustified under the *Criminal Code* or at common law. It was both legally impermissible as well as morally noxious to incarcerate the victim of the crime of sexual assault. Yet this is exactly what happened. Clearly there should have been some accountability for these egregious legal errors.

vi. The Sixth Layer of Violation: Retraumatizing a Sexual
Assault Survivor - Violating Ms. Cardinal’s
Psychological Safety by Confining Her in Close
Proximity with Her Violent Sexual Attacker

As if this story could get no worse, during her days and nights of imprisonment, Angela Cardinal was for periods of time actually

199. IAAW/LEAF Submission, *supra* note 11, at 11.

200. Penney, *supra* note 149 (emphasis added).

201. CAMPBELL, *supra* note 160, at 8–9.

202. IAAW/LEAF Submission, *supra* note 11, at 13.

203. *Id.*

physically trapped in close proximity with the very man who had violently attacked her. During normal court adjournments, she was often housed in a cell next to or near that of the Accused.²⁰⁴

Even more appallingly, she was episodically put into confined spaces with Blanchard. “[I]t is clear that on many occasions, she was required to walk right past the Accused in order to exit the courtroom.”²⁰⁵ Furthermore, “[o]n at least two occasions, she was transported between the Remand Centre and the Courthouse *in the same transport van . . .*”²⁰⁶ This was a form of forcible confinement of Angela Cardinal which traumatically exposed her on multiple occasions to the very source of her injuries—her violent attacker. This kind of entrapment could only have retraumatized an already traumatized sexual assault victim.

In its report after the fact, the judicial council noted that “[Judge] Bodnarek took steps to keep Cardinal and Blanchard apart *when he heard* they were being transported in the same van.”²⁰⁷ The judicial council noted that the Judge also took other measures to “keep the two as far away from each other as possible in court.”²⁰⁸ But this hardly attenuates the wrongfulness or the inconceivable insensitivity of confining Ms. Cardinal in spaces close to the man who would be proven to have violently assaulted her. This is the extreme antithesis of a trauma-informed institutional response, let alone one guided by principles of common sense and decency.

vii. The Seventh Layer of Violation: The Court’s Denial of
Its Rights Contraventions and Self
Congratulation in the Face of Its Degradation of
Angela Cardinal

Judge Bodnarek revealed himself to be strikingly disconnected from the suffering he inflicted upon Angela Cardinal when he ordered her to be shackled and imprisoned. Comments Judge Bodnarek made about the proceedings appear to betray how blithely inured he was to the travesty of justice he perpetrated.

204. *Id.* at 14.

205. *R. v. Blanchard*, 2016 ABQB 706, para. 235.

206. *Id.* (emphasis added).

207. Dean Bennett, *Alberta Judge Cleared in Case Where Sexual Assault Victim Was Shackled, Jailed in Court*, THE TORONTO STAR (Feb. 23, 2018), www.thestar.com/news/canada/2018/02/23/alberta-judge-cleared-in-case-where-sexual-assault-victim-was-shackled-jailed-in-court.html [perma.cc/VNB9-P39K] (emphasis added). However, why this action was only taken after the fact remains unanswered.

208. *Id.*

There appears to be a self-congratulatory tone to some of the remarks he directed at Angela Cardinal during her ordeal.

For example, at multiple points during the proceedings, Angela Cardinal complained that she did not want to be sent back to the prison where the food was bad and “someone pooped in all . . . [the] showers.”²⁰⁹ Judge Bodnarek’s disregard of her concerns are evident by how he kept her incarcerated, but also made patronizing comments directing her to be patient because, in his view, the Court was “*making really good progress.*”²¹⁰

This is among the most astonishing and revealing of the small moments to be gleaned from the transcript of this horrifying episode. That the Judge was apparently sufficiently detached from the indignities and discomfort he imposed on the victim-witness must underlie his sense of entitlement in commenting favourably on the pace of the legal proceedings. Perhaps from his vantage point from the bench, the progress of the legal proceeding was “good.” For Angela Cardinal, however, it was anything but.

It is as if Judge Bodnarek laboured under the misapprehension that this judicial observation—which reflects the self-referential vantage point of the legal system and his position of power and comfort issuing orders from the bench—would be appeasing or was relevant to the frightening circumstances into which Angela Cardinal had been remanded. This judicial remark that the Court was “*making really good progress*” was made while the judge elected to ignore Ms. Cardinal’s repeated pleas to be freed, choosing instead to keep her shackled, in handcuffs, and incarcerated, night after night.

viii. The Eighth Layer of Violation: Institutional Betrayal -
The Failure to Take Responsibility for and Fully
Acknowledge the Levels of Harm and
Wrongdoing

The story of what happened to Angela Cardinal in the criminal justice system is a story of institutional failure and betrayal. Indeed, the horrendous treatment meted out against her is, in microcosm, an expression and example of the multiple and ongoing ways the criminal justice system, including the police, so often and spectacularly fails at the macro level, to adequately or appropriately respond to the specific needs of Indigenous women harmed by

209. *R. v. Blanchard*, 2016 ABQB 706, para. 231.

210. *Id.* at para. 233 (emphasis added).

violence.²¹¹ In fact the criminal justice system itself can be a site of violence and often perpetrates serious harms against Indigenous women.²¹² This is a stark example of institutional betrayal.

The term “institutional betrayal” refers to wrongdoings perpetrated by an institution upon individuals who depend on that very institution.²¹³ Developed by Jennifer Freyd, and since elaborated upon and applied in a range of contexts, this concept captures the additional and compounding harms experienced by those betrayed by institutions mandated to protect, serve, assist, respect and acknowledge them in some fundamental capacity.²¹⁴ It can apply to failing to prevent or respond supportively to wrongdoings by individuals (e.g. sexual assault) committed outside of or within the context of the institution.²¹⁵

There has been an explosion of important research, largely from the disciplines of psychology and psychiatry, on the nature and impact of traumatic events and traumatic responses, as experienced at an individual level.²¹⁶ As Jennifer Freyd explains, however:

[N]ew research has begun to focus on events that are clearly traumatic and yet historically have not fit neatly within the individually focused model that has dominated the field of traumatic stress. . . . What does it mean to find danger in a place where one instead expected to find safety? These questions mark a notable departure from descriptions of traumatic experiences as flashpoints of danger in an otherwise safe world.²¹⁷

211. See, e.g., Sherene H. Razack, *Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George*, 15 CAN. J.L. & SOC. 91 (2000) [hereinafter Razack, *Gendered Racial Violence*]; Sherene Razack, *Sexualized Violence and Colonialism: Thoughts Related to the Investigation of Missing and Murdered Aboriginal Women*, 28 C.J.W.L. 285 (2016); Razack, *Gendering Disposability*, *supra* note 20; MMIW Final Report, *supra* note 31.

212. See generally HUM. RTS. WATCH, POLICE ABUSE OF INDIGENOUS WOMEN IN SASKATCHEWAN, *supra* note 43.

213. See Jennifer J. Freyd & Carly Parnitzke Smith, *Institutional Betrayal*, 69 AM. PSYCH. 575 (2014) [hereinafter Freyd & Smith, *Institutional Betrayal*].

214. *Id.*

215. Melissa Platt, Jocelyn Barton & Jennifer J. Freyd, *A Betrayal Trauma Perspective on Domestic Violence*, in VIOLENCE AGAINST WOMEN IN FAMILY RELATIONSHIPS 185 (Evan Stark & Eve Buzawa eds., 2009); see also Jennifer J. Freyd, *When Sexual Assault Victims Speak Out, Their Institutions Often Betray Them*, THE CONVERSATION (Jan. 11, 2018), theconversation.com/when-sexual-assault-victims-speak-out-their-institutions-often-betray-them-87050 [perma.cc/79PZ-3DXU].

216. For some of the seminal works in the field, see, for example, BESSEL VAN DER KOLK, *THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* (2014); HERMAN, *supra* note 1.

217. Freyd & Smith, *Institutional Betrayal*, *supra* note 213, at 577.

Freyd developed the concept of “institutional betrayal”²¹⁸ to analyse systemic level harms. With colleagues, she has further explored and developed the concept in a variety of contexts in order to “examine institutional action and inaction that exacerbate the impact of traumatic experiences.”²¹⁹ This concept effectively illustrates the fundamental ways in which the criminal justice system, which is organized around principles of due process and fairness, not only failed to treat a citizen victim-witness such as Angela Cardinal with the dignity and respect she deserved, but then actively and profoundly harmed her by transgressing her most basic of human rights. Not only was there institutional betrayal through a violation of her fundamental rights, but this was then significantly compounded by the failure of any oversight bodies to hold any of the legal players accountable for their wrongdoing.

After media reports brought to public attention Angela Cardinal’s terrible situation and mistreatment in this preliminary proceeding of a sexual assault trial, significant media scrutiny was focused on the case.²²⁰ One important outcome was the search for accountability from those within the legal system responsible for her shackling and detention as if she were the criminal, not the victim.²²¹ Unfortunately, despite a number of commentators and organizations recognizing and speaking out against this wrongdoing, not a single one of the responsible parties was ever held to account. Worse still, the institution responsible for overseeing judicial conduct and ethics absolved all key figures, including the Judge, of any responsibility for violating Angela Cardinal.²²²

218. *Id.* (“Institutional betrayal is a description of individual experiences of violations of trust and dependency perpetrated against any member of an institution in a way that does not necessarily arise from an individual’s less-privileged identity.”).

219. *Id.*; see also Jennifer J. Freyd & Carly Parnitzke Smith, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 *J. OF TRAUMATIC STRESS* 119 (2013).

220. See, e.g., ‘Extreme Failings’: Justice Minister Outlines Scope of ‘Angela Cardinal’ Case Review, CBC NEWS (June 15, 2017), www.cbc.ca/news/canada/edmonton/extreme-failings-justice-minister-outlines-scope-of-angela-cardinal-case-review-1.4163029 [perma.cc/CU9K-FLZC].

221. See, e.g., Johnston, *Sex Assault Victim Jailed*, *supra* note 159; Janice Johnston, *I’m the Victim and I’m in Shackles’: Edmonton Woman Jailed While Testifying Against Her Attacker*, CBC NEWS (June 5, 2017), <https://www.cbc.ca/news/canada/edmonton/sex-assault-victim-jailed-judge-edmonton-1.4140533> [perma.cc/B3E2-RY9Y] [hereinafter Johnston, *I’m the Victim*].

222. The Alberta Judicial Council cleared Judge Bodnarek as is elaborated below. For public reports of this, see Bennett, *supra* note 207.

It should be pointed out, however, that not all members of the legal profession failed to see the obvious and glaring problems. Justice Macklin, in the trial decision itself, recognizing the appalling treatment meted out to Angela Cardinal at the preliminary inquiry, said so explicitly and clearly in his reasons for judgment.

Then Alberta Provincial Justice Minister Kathleen Ganley also strongly condemned the court's conduct, condemning it as "unacceptable."²²³ As she explained, "[t]he way this woman was treated in our justice system is absolutely unacceptable, and we cannot lose sight of the extreme failings in this case."²²⁴ Minister Ganley went on to state, "[i]t is not easy on any of us to admit that the system did not meet the public's legitimate expectations."²²⁵ She then asserted, "if we do not admit that this was a bad outcome, we lose the opportunity to improve the system."²²⁶

Minister Ganley also made the connection between the appalling treatment endured by Angela Cardinal and her status as an Indigenous woman struggling with homelessness and addictions in a racist society. Ganley explained, "one of the questions that keeps me up at night is whether this would have been the case if this woman was Caucasian and housed and not addicted, whether this would have happened to her."²²⁷ It seems patently obvious that it would not have. Finally, Ganley acknowledged that Ms. Cardinal was owed an apology she can now never receive.²²⁸

Minister Ganley then took action to mandate a committee to recommend policy changes on the treatment of victims in Alberta and sought a public report on what happened.²²⁹ Rebecca Campbell, the external reviewer appointed by Ganley, concluded that she had difficulty summarizing "all that went wrong in a case such as this,"

223. 'Extreme Failings', CBC NEWS, *supra* note 220.

224. *Id.*

225. Janice Johnston, 'Incredibly Damning Allegation': Angela Cardinal Case Ignites Feud Between Prosecutors, Justice Minister, CBC NEWS (June 21, 2017), <http://www.cbc.ca/news/canada/edmonton/angela-cardinal-kathleen-ganley-crown-prosecutors-1.4169582> [perma.cc/YZS5-HXAV] [hereinafter Johnston, *Incredibly Damning Allegation*].

226. *Id.*

227. Michelle Bellafontaine, 'Question of Race in Sex Assault Victim's Jailing Keeps Me Up at Night,' Alberta Justice Minister Says, CBC NEWS (June 5, 2017), www.cbc.ca/news/canada/edmonton/sex-assault-victim-jailed-ganley-1.4146682 [perma.cc/J35K-UVC4].

228. *Id.*

229. *Changes to Further Support Victims of Crime*, GOV'T OF ALBERTA (Feb. 23, 2018), www.alberta.ca/release.cfm?xID=52457A2F9131F-DC13-5220-03AF07EC8913968D [perma.cc/GFZ6-XUJW].

which she described as revealing “systemic problems” in “a complete breakdown of legal protections.”²³⁰

A powerful and thoroughly researched joint submission to the independent review was made by the Institute for the Advancement of Aboriginal Women (IAAW) and the Women’s Legal Education and Action Fund (LEAF).²³¹ The authors condemned the many mistakes made, recognizing that Angela Cardinal’s voice and rights were systematically ignored.²³²

Moreover, these organizations crucially took note of the broader context by observing that “the treatment of Ms. Cardinal occurred in a context in which relations between Indigenous women and the criminal justice system are in crisis.”²³³ The report authors explain that:

Overall, the contextual factors outlined here show the deeply flawed relationship between the criminal justice system in Alberta and Indigenous women. Indigenous women are under-protected and over-criminalized. Indigenous women are disproportionately victimized by violent crime, yet rather than protecting them, the criminal justice system disproportionately targets them as “criminals.” It is incumbent on actors in the criminal justice system to consider this context in their engagement with Indigenous women and to take proactive decisions to break this cycle.²³⁴

Even in the face of the media outcry,²³⁵ the strong and resounding condemnation from national organizations such as the IAAW and the LEAF, the condemnation expressed in the independent review of the case, as well as that of the Alberta Minister of Justice, none of the legal oversight bodies saw fit to raise a concern, let alone impose accountability on the Judge, Crown, or duty counsel defence lawyer who together facilitated Angela Cardinal’s shackling and imprisonment.

230. *Jailing of Edmonton Sex Assault Victim ‘A Call to Action’*, CBC NEWS (Feb. 23, 2018), <https://www.cbc.ca/news/canada/edmonton/angela-cardinal-justice-alberta-jailed-victim-1.4547990> [perma.cc/WR8R-H3RB].

231. IAAW/LEAF Submission, *supra* note 11.

232. *Id.*

233. *Id.* at 20.

234. *Id.*

235. See Don Braid, *Sexual Assault Victim Who Was Shackled and Jailed Yet Another Example of Failure of Justice*, NAT’L POST (June 6, 2017), <https://nationalpost.com/news/don-braid-sex-assault-victim-who-was-shackled-and-jailed-yet-another-example-of-failure-of-justice> [perma.cc/F5DJ-5D5E] (“[T]he case of Angela Cardinal, who was jailed during her testimony—is so offensive to natural justice that it can literally make you gasp, or gag.”).

Instead, in 2017, the President of the Crown Association vigorously defended the Crown's request for Angela Cardinal's remand.²³⁶ When a CBC news reporter asked Crown prosecutor Innes if she would have done anything differently in the case, knowing what she knows now, she categorically replied: "No."²³⁷ Innes apparently remained unperturbed by her shameful treatment of this victim-witness in this sexual assault prosecution.

Furthermore, James Pickard, President of the Alberta Crown Attorneys' Association, defended the actions of the Crown prosecutor in a blistering four-page letter to then-Justice Minister Ganley.²³⁸ Just as disconcertingly, "50 fellow prosecutors" in Alberta chose to make a visible display of their enthusiastic support.²³⁹

In the same defensive vein, contrary to the finding of other legal experts such as Professor Alice Woolley, the Alberta Judicial Council (AJC) declined to make any finding of judicial misconduct against Judge Bodnarek. Adding insult to injury, the Judicial council claimed—*without citing any substantiation*—that there was a legal basis for Angela Cardinal's imprisonment.²⁴⁰ This kind of assertion, without detailed reasoning and substantiation to support it, would barely muster a passing grade on a first-year law exam. Reason and justification are central and defining aspects of legal analysis, yet the AJC seemed content to relieve itself of this obligation.

This closing of legal ranks occurred in the same criminal justice system ostensibly dedicated to the rule of law and victims' rights.²⁴¹ The idea of the significance of victims' rights—which long

236. Johnston, *Sex Assault Victim Jailed*, *supra* note 159.

237. Janice Johnston, *Alberta's Chief Judge Will Examine Case of Jailed Sexual Assault Victim*, CBC NEWS (June 5, 2017), <https://www.cbc.ca/news/canada/edmonton/lance-blanchard-angela-cardinal-diana-goldie-patricia-innes-1.4147276> [perma.cc/DSEG-L2M4].

238. Johnston, *Incredibly Damning Allegation*, *supra* note 225.

239. *Id.*

240. *No Judicial Misconduct in Case of Jailed Sex Assault Victim, Council Finds*, CBC NEWS (Feb. 23, 2018), www.cbc.ca/news/canada/edmonton/no-judicial-misconduct-in-case-of-jailed-sex-assault-victim-council-finds-1.4549004 [perma.cc/2NYL-CUYF].

241. *See, e.g.*, Canadian Victims Bill of Rights, S.C. 2015, c 13 (Can.) ("Whereas it is important that victims' rights be considered throughout the criminal justice system; Whereas victims of crime have rights that are guaranteed by the *Canadian Charter of Rights and Freedoms* . . . [e]very victim has the right to have their security considered by the appropriate authorities in the criminal justice system Every victim has the right to have reasonable and necessary measures taken by the appropriate authorities in the criminal justice system to protect the victim from intimidation and retaliation.").

predate legislation enacted to recognize them—is articulated in the express language of the preamble to the Canadian Victims Bill of Rights:

Whereas it is important that victims' rights be considered throughout the criminal justice system;
Whereas victims of crime have rights that are guaranteed by the *Canadian Charter of Rights and Freedoms*; . . .²⁴²

Not only do we see institutional betrayal in the degrading treatment of Angela Cardinal during the preliminary inquiry, but we also see another and compounding layer in the unconscionable responses of the professional oversight bodies of the legal profession, which defended the actions of the Judge and Crown and refused to impose any censures for violating Angela Cardinal's rights many times over.

Even worse, the AJC took pains to deny the presence or relevance of any social factors in the Judge's response to this victim-witness, such as the fact that Angela Cardinal was an Indigenous woman. Nor did the Council acknowledge the presence of sexism, racism, and colonialism in society at large as well as in the criminal justice system, or the antipathy towards vulnerable and marginalized people struggling with addictions and homelessness, and how these factors necessarily shaped Angela Cardinal's treatment. Instead, in a complete and totalizing erasure of the context and impact of multiple layers of discrimination at play in this case, the AJC wrote, "*There is no evidence that the gender or aboriginal status of the complainant influenced any of Judge Bodnarek's rulings in this case.*"²⁴³

The finding that Angela Cardinal's gender or aboriginal status had no impact on the judgment, in addition to being untenable, is at odds with judges' ethical duties issued by the Canadian Judicial Council, as Emma Cunliffe points out in an incisive blog post.²⁴⁴ The Canadian Judicial Council directs judges, in the *CJC Ethical Principles for Judges*, and in relation to the principle of equality, to "strive to be aware of and understand differences arising from, for

242. *Id.* (emphasis in original).

243. *No Judicial Misconduct in Case of Jailed Sex Assault Victim*, *supra* note 240.

244. Emma Cunliffe, *Incarcerating the Victim: Indigeneity, Gender and the Canadian Legal System's Treatment of 'Angela Cardinal'*, RECONCILIATIONSYLLABUS (March 1, 2018), [https://reconciliationsyllabus.wordpress.com/2018/03/\[perma.cc/LA57-WG7U\]](https://reconciliationsyllabus.wordpress.com/2018/03/[perma.cc/LA57-WG7U]).

example, gender, race, religious conviction, culture, ethnic background, sexual orientation or disability.”²⁴⁵

Even in the otherwise sensitive and progressive external report commissioned by the Alberta Justice Minister, Roberta Campbell wrote that the authors of the report “do not believe that the anyone [sic] *deliberately engaged in racist or discriminatory action* towards Ms. Cardinal, as that is not borne out by the court record, but instead believe that systemic bias played a role in the unfolding of the narrative.”²⁴⁶ Roberta Campbell’s opinion represents a retreat from holding key legal professionals responsible, and instead avers to free-floating “systemic bias” not rooted in any individual person’s beliefs or actions.

While we have seen a few public examples of institutions taking responsibility for errors and wrong-doing and moving forward to make positive changes, this case is emphatically not an example. Instead, we have an erasure of responsibility and whitewashing—pun intended—by some of the most powerful players and oversight bodies in the legal system, denying the obvious significance of Ms. Cardinal’s Indigeneity and the contexts, legitimating beliefs and practices of racism, sexism and colonialism which situated her life and the responses to her within the criminal justice system.

A final example of institutional betrayal can be found in the erasure of Angela Cardinal’s true identity. The woman who is the subject of this story is publicly identified by the pseudonym Angela Cardinal because her real name remains covered by a publication ban.²⁴⁷ However, her family has protested this, wanting her true identity revealed.²⁴⁸ During an interview with CBC Radio, when asked about the publication ban and the reasons for its persistence after Cardinal’s death, her sister-in-law replied:

245. CANADIAN JUDICIAL COUNCIL, ETHICAL PRINCIPLES FOR JUDGES 23 (2004), https://cjc-ccm.ca/sites/default/files/documents/2019/news_pub_judicialconduct_Principles_en.pdf [perma.cc/V4CC-VUJ4]. These principles are being redrafted and updated, with a new Draft posted November 20, 2019, while the final and updated version is being completed. CANADIAN JUDICIAL COUNCIL, Draft, ETHICAL PRINCIPLES FOR JUDGES (Nov. 20, 2019), <https://cjc-ccm.ca/sites/default/files/documents/2019/EPJ%20-%20PDJ%202019-11-20.pdf> [perma.cc/M3QN-YEUG].

246. CAMPBELL, *supra* note 160, at 16 (emphasis added).

247. *Id.* at 3.

248. ‘People Need to Know Who She Is,’ Says Family of Sex Assault Victim Shackled During Her Attacker’s Trial, CBC RADIO (June 7, 2017), <http://www.cbc.ca/radio/asithappens/as-it-happens-wednesday-edition-1.4149694/people-need-to-know-who-she-is-says-family-of-sex-assault-victim-shackled-during-her-attacker-s-trial-1.4149697> [perma.cc/VW4K-GJTE].

We don't know, the whole family wants it gone. Because she's a human being. There are so many Angela Cardinals. People could mistake one for the other. Giving her a fake name doesn't make her who she is. Her name makes her who she is. I think that people need to know who she is.²⁴⁹

Angela Cardinal's sister-in-law continued to describe the woman she wanted people to know. In her sister-in-law's words, Angela Cardinal was "[a] loving, caring mother. She was my best friend. She was homeless, and she had nothing, but if me and her brother needed something, she would take the shirt off her back to help us. She loved everybody, she loved society. She never hated anybody."²⁵⁰

Obscuring Angela Cardinal's real identity and name under a publication ban has the effect of depersonalizing her and erasing her. The fact that Angela Cardinal's real name has not been revealed is yet another violation occurring even after her death, and one still experienced by her surviving family.

None of the institutions which should have assisted Angela Cardinal while she was alive—indeed which were obligated to assist her—did so. Instead, those institutions betrayed her.

C. Widening the Lens on Institutional Betrayal: The Shameful Practices of Shackling and Imprisoning Indigenous Women

The shackling and imprisoning of Angela Cardinal was not an isolated incident. There are numerous examples, within Canada and elsewhere, of the institutional betrayal of Indigenous women—themselves the victims of sexual violence and/or physical assault—in jailing them at various stages in the criminal justice process.²⁵¹ Despite having lived through harrowing experiences of violence, these women were treated as criminals, not as victims.

In a case eerily similar to some of the aspects of Angela Cardinal's, another Indigenous woman, Kitty Nowdlok-Reynolds, who was Inuk, was violently raped by another Inuk man and then

249. *Id.*

250. *Id.*

251. See R v. A(M), 2020 NUCJ 4, 6; SHERENE RAZACK, LOOKING WHITE PEOPLE IN THE EYE: GENDER, RACE AND CULTURE IN COURTROOMS AND CLASSROOMS 80–81 (1998); Shannon Sampert, *Justice System Re-victimizes Indigenous Women*, WINNIPEG FREE PRESS (June 8, 2017), <https://www.winnipegfreepress.com/opinion/analysis/justice-system-re-victimizes-indigenous-women-427155601.html> [perma.cc/ZS5B-JL2P].

later brutalized by the criminal justice system.²⁵² In 1990, she was violently sexually assaulted while living in Iqaluit.²⁵³ Nowdlok-Reynolds then moved from her home in the North to Vancouver after her attacker was arrested.²⁵⁴ Police had neglected to obtain a statement from Nowdlok-Reynolds prior to her move, and so, after a “series of inept police bureaucratic manoeuvres,” Crown counsel sought and obtained a warrant for her arrest to compel her attendance in court in the Northwest Territories.²⁵⁵

Nowdlok-Reynolds was “arrested and put in handcuffs, dragged through the airports in Edmonton and Vancouver, Ottawa and Toronto, in part because the security guard responsible for her travel had slept in and missed one of her flights north.”²⁵⁶ Nowdlok-Reynolds was also jailed for five days while she was escorted by police back to Iqaluit.²⁵⁷ Similar to Angela Cardinal’s ordeal, Nowdlok-Reynolds was transported to the courtroom while confined in the same vehicle as her attacker.²⁵⁸ The RCMP Public Complaints Commission appointed to oversee her complaint pointedly noted: “[We] may be pardoned for wondering which victimizing incident had the greater effect, the sexual attack on June 7, 1990 or the treatment accorded to her by the criminal justice system.”²⁵⁹ Nowdlok-Reynolds said it was as if “she had been raped twice.”²⁶⁰ About twenty-five years later Angela Cardinal suffered virtually identical treatment.

In 2018, an Inuk woman, identified by the initial K, was being assaulted by her boyfriend.²⁶¹ Called by K’s sister for help, the RCMP arrived and determined that K was intoxicated.²⁶² At the time of the attack, K was on bail conditions forbidding her to drink alcohol.²⁶³ Although it was evident that K had been violently assaulted, the kind of “assistance” the RCMP elected to offer at the

252. RAZACK, LOOKING WHITE PEOPLE IN THE EYE, *supra* note 251, at 80–81 (citing ALLAN WILLIAMS, S. JANE EVANS & LAZARUS ARREAR, ROYAL CANADIAN MOUNTED POLICE PUB. COMPLAINTS COMM’N, PUBLIC HEARING INTO THE COMPLAINT OF KITTY NOWDLOK-REYNOLDS: COMMISSION REPORT (1992) [hereinafter RCMP Commission Report]).

253. *Id.*

254. *Id.*

255. *Id.*

256. Sampert, *supra* note 251.

257. *Id.*

258. RAZACK, LOOKING WHITE PEOPLE IN THE EYE, *supra* note 251, at 81.

259. *Id.* (citing RCMP Commission Report, *supra* note 252, at 47).

260. Sampert, *supra* note 251.

261. R v. A(M), 2020 NUCJ 4, 6.

262. *Id.* at 12.

263. *Id.*

scene of the crime where K was being beaten, was to charge K with breaching her bail conditions.²⁶⁴

When she appeared before him, Justice of the Peace Joseph Paul Murdoch-Flowers, addressed her as follows:

You're sitting here with your face black and blue, beaten. And I'm sorry that I have to say that, but I see that. And I have to say that, because this is being recorded and I want whoever hears this in the future to be able to see in their minds what I see from this seat.²⁶⁵

K was given an absolute discharge.²⁶⁶

In 2020, the same Justice of the Peace faced a disturbingly similar case. In 2018, A(M), also an Inuk woman, called the police for assistance because she was being assaulted by her stepfather.²⁶⁷ A(M), too, was on bail conditions prohibiting her from drinking alcohol.²⁶⁸ Again, exercising the same wisdom, the RCMP elected at the scene of her violent assault to arrest A(M) and charge her for breaching her bail condition.²⁶⁹ The Justice of the Peace stated:

Such decision making by the police and Crown is a failure to properly exercise the discretion which the law grants them to charge or not to charge. More importantly, it is a disservice to some of the most vulnerable people in our society—namely Inuit women who suffer from domestic violence.²⁷⁰

He continued on, emphasizing that “the police and Crown must cease this practice.”²⁷¹ A(M) was also granted an absolute discharge.²⁷²

These situations are not unique to Canada. In Western Australia there have been several similar cases where women, particularly Indigenous women, call police to report abuse, and are themselves arrested, for “crimes” such as unpaid fines.²⁷³ The case

264. *Id.*

265. *Id.* at 14.

266. *Id.* at 15.

267. *Id.* at 11.

268. *Id.*

269. *Id.*

270. *Id.* at 27.

271. *Id.* at 28.

272. *Id.* at 29.

273. See Livia Albeck-Ripka, *The Police Were Called for Help. They Arrested Her Instead*, N.Y. TIMES (Feb. 24, 2019), <https://www.nytimes.com/2019/02/24/world/australia/police-arrest-aboriginal-woman-fines.html> [perma.cc/FMX5-XT8U].

of Ms. Dhu is one especially tragic example.²⁷⁴ After receiving an anonymous tip that Ms. Dhu had been the victim of domestic violence, police arrived at her home and arrested not only her violent spouse but Ms. Dhu as well.²⁷⁵ What was Ms. Dhu's crime? She owed more than 3,600 Australian dollars from an initial smaller fine for not having provided police with personal details after they stopped her on the street.²⁷⁶

While in custody Ms. Dhu complained of feeling unwell, but "the majority of the persons responsible for [her] care formed the view that she was exaggerating or feigning symptoms of being unwell."²⁷⁷ Ms. Dhu died in custody as a result of complications from injuries sustained in an earlier domestic assault incident.²⁷⁸ Not only is it grossly inappropriate for a victim of domestic violence to be arrested at the scene of the crime, but the shocking negligence and blatant disregard for Ms. Dhu's wellbeing shown by the criminal justice system's authorities clearly make them complicit in her death.

In another incident in Australia, Kearah Ronan, a twenty-six-year-old Indigenous woman, six months pregnant at the time, was arrested and jailed when she did not attend court to give evidence against her former partner in a domestic violence case.²⁷⁹ Although Ronan informed the court registry in advance that she was sick and unable to attend court, the Magistrate ordered an arrest warrant at the request of the police prosecutor.²⁸⁰ As a result of this seriously inappropriate arrest, the pregnant and terrified Ms. Ronan was

274. Although her full name is available, the media referred to her as Ms. Dhu. See, e.g., *id.*; *Ms Dhu Death in Custody: CCTV Footage Shows 'Inhumane' Police Treatment – Video*, THE GUARDIAN (Dec. 16, 2016), <https://www.theguardian.com/australia-news/video/2016/dec/16/ms-dhu-death-in-custody-cctv-footage-shows-inhumane-police-treatment-video> [perma.cc/X6HZ-RXPC]; Sebastian Neuweiler, *Ms Dhu's Family to Sue State Over Death in Custody*, ABC NEWS (July 20, 2017), <https://www.abc.net.au/news/2017-07-20/ms-dhu-family-to-sue-wa-over-death-in-custody/8728620> [perma.cc/DY76-JDY5]; Belinda Jepsen, *Ms Dhu Died in Prison After Failing to Pay Fines. A Six-Year Fight Means No One Else Will*, MAMAMIA (June 17, 2020), <https://www.mamamia.com.au/ms-dhu/> [perma.cc/G7EY-3BKK].

275. Albeck-Ripka, *supra* note 273.

276. *Id.*

277. Rosalinda Vincenza Fogliani, State Coroner, *Inquest into the Death of Julieka Ivanna Dhu*, at 4, 11020-14, Ref. No. 47/15, W. AUSTRAL. CORONER'S COURT, (Dec. 16, 2016), www.coronerscourt.wa.gov.au/_files/dhu%20finding.pdf [perma.cc/YA9T-P7GM].

278. *Id.* at 27.

279. Annabel Hennessy, *How Did It Come to This? Kearah Ronan Was Locked Up For Being Sick*, W. AUSTRALIAN (May 31, 2019), <https://thewest.com.au/news/wa/how-did-it-come-to-this-kearah-ronan-was-locked-up-for-being-sick-ng-b881217063z> [perma.cc/8RN5-TMC7].

280. *Id.*

forced to spend the night in a police lock-up.²⁸¹ Worse still, when this egregious conduct came to light, a police spokesperson defended the arrest. By tragic coincidence, Ms. Ronan was the cousin of Ms. Dhu.²⁸²

The following examples involve the arrest of victims of sexual assault. In these cases, although not specifically identified as such, there is a high probability that the victims were Indigenous, given that the attacks took place in Canada's Northwest Territories, home to many Indigenous peoples.²⁸³

In 2018, police arrived at an alleyway in response to a service call that a woman was being raped.²⁸⁴ Instead of taking the woman to the hospital for a medical examination and using the rape kit to collect evidence, the police arrested her for public intoxication and held her locked up overnight.²⁸⁵ The trial judge in that case stated, "I am unable to imagine circumstances which would justify this type of treatment of a victim of sexual assault."²⁸⁶

In 2016, J.S., a thirteen-year-old girl, was sexually assaulted while on probation.²⁸⁷ The police had been looking for her because she had breached her curfew.²⁸⁸ Located at the house of the accused, "extremely intoxicated,"²⁸⁹ J.S. was put in a jail cell overnight for intoxication and for breaching curfew, instead of being taken to the hospital to be examined.²⁹⁰ At trial, J.S. left the courtroom partway through her cross-examination and failed to return, undoubtedly a reaction to the traumatizing experience of the trial and her desire

281. *Id.*

282. *Id.*

283. STATISTICS CANADA, FOCUS ON GEOGRAPHY SERIES, 2016 CENSUS (2017), [https://www12.statcan.gc.ca/census-recensement/2016/as-sa/fogs-spg/Facts-PR-Eng.cfm?TOPIC=9&LANG=Eng&GK=PR&GC=61& \[perma.cc/QN4M-HGZR\]](https://www12.statcan.gc.ca/census-recensement/2016/as-sa/fogs-spg/Facts-PR-Eng.cfm?TOPIC=9&LANG=Eng&GK=PR&GC=61&[perma.cc/QN4M-HGZR]) (detailing census data that 50.7% of the Northwest Territories population is Aboriginal).

284. *R. v. Kapakatoak*, 2018 NWTTC 10, para. 6.

285. *Id.* at para. 36.

286. *Id.* at para. 44; see also Richard Gleeson, *Yellowknife RCMP Jail Woman After She Was Sexually Assaulted*, CBC NEWS (Aug. 27, 2018), www.cbc.ca/news/canada/north/rcmp-jail-sexual-assault-victim-1.4798644 [perma.cc/HDH8-QFJS] (describing the judge's disapproval of the victim's treatment by police).

287. *R. v. Durocher*, 2016 NWTSC 17, para. 1.

288. *Id.* at para. 19.

289. *Id.* at para. 22; see also Richard Gleeson, *N.W.T. Judge Questions RCMP's Treatment of 13-Year-Old Sexual Assault Victim*, CBC NEWS (Mar. 29, 2016), www.cbc.ca/news/canada/north/hay-river-sexual-assault-victim-13-years-old-1.3510347 [perma.cc/P8JZ-A9RU] (describing how the case raises questions about police treatment of sexual assault victims).

290. *R. v. Durocher*, 2016 NWTSC 17, para. 23.

for self-preservation.²⁹¹ The trial judge stated that he “would not have been inclined to issue a warrant for the arrest of J.S. even if an application for a warrant had been made.”²⁹² The trial judge specifically referenced J.S.’s treatment by the police upon arrest as a circumstance that must be taken into consideration when addressing her decision to leave the courtroom.²⁹³ While laudable that the trial judge recognized, however tentatively (“not have been inclined”), the police’s wrongful conduct in jailing a sexual assault victim only thirteen years of age, his mild condemnation is insufficient.

These examples highlight one of the particularly appalling ways in which the criminal justice system continues to fail Indigenous women in Canada, Australia, and beyond. After being sexually and physically assaulted, these women should have been offered support and compassion. Instead, they were treated like criminals—arrested, incarcerated, and shackled.²⁹⁴

The brutal and degrading treatment of Indigenous women at the hands of professionals within the criminal justice system cannot be understood without reference to the defining context and reverberations of colonialism, racism and misogyny. It can only be because of entrenched racism and sexism—such that Indigenous women are viewed as unworthy of basic respect and rights and therefore disposable—that these practices have taken place.

291. *Id.* at para. 17.

292. *Id.* at para. 39.

293. *Id.*

294. When I delivered a much shorter version of this analysis as a keynote address at a conference in British Columbia (Melanie Randall, Keynote Address at Beyond #MeToo: Supporting Survivors | Changing Culture (Nov. 14, 2018)), I was taken aback by how many Indigenous women approached me afterwards to tell me that this story was far from unique, that there are many more like Angela Cardinal across Canada whose stories of mistreatment have not been revealed, let alone remedied. While already aware of the horrifying scale of violence against Indigenous women in Canada, I had naively hoped that the egregiousness of Angela Cardinal’s story at the hands of the criminal justice system was at least somewhat extreme and anomalous. However, this is far from the truth as Indigenous women working on the front lines already know. In fact, once the story of Angela Cardinal’s incarceration was exposed by the media, a CBC journalist investigated and uncovered two additional cases in which sexual assault victims, each of whom was extremely vulnerable and impoverished, were imprisoned, one only sixteen years old, the other, eight months pregnant. See Janice Johnston, ‘Great Unfairness’: 2 More Sex Assault Cases Where Victims Were Jailed to Ensure Their Court Testimony, CBC NEWS (July 28, 2017), www.cbc.ca/news/canada/edmonton/edmonton-victims-sexual-assault-custody-alberta-1.4226601 [perma.cc/8VC8-R92F].

Police and state failures in relation to women who are victims of gendered violence are well documented.²⁹⁵ It is difficult to imagine, however, that affluent, Caucasian women who are victims of gendered violence would be arrested for extraneous matters when they call police during a domestic violence incident, or would be imprisoned while they testify about their own sexual assaults in criminal proceedings. These examples of dehumanizing conduct in shackling and imprisoning Indigenous women who are victims of gendered violence themselves, also demonstrate the profound failure to recognize or understand the harms of such violence. This dehumanizing conduct highlights a systematic prioritizing of the imperatives of the criminal justice system over the needs of the women whose experiences of violence should have led them to expect assistance, respect, and rights protections from that very system.

II. Resistance and Resilience in the Face of Indignities, Degradation, and Violence

One powerful and striking theme, both in the story of Angela Cardinal's sexual assault and the mistreatment she suffered while cooperating with the prosecution, is the strength of her spirit, her resilience, and the resistance she demonstrated throughout. Too often in accounts of what is done to women, and in documenting victimization and the forms of violence perpetrated against women, we fail to pay sufficient attention to, or even recognize, women's multiple ways of coping with, and, more importantly, vigorously and creatively resisting, this violence. In fact, the many ways in which women respond to, cope with, struggle against, and try to end the violence in their lives has not always, or even often, been framed in terms of *resistance*.

Resistance is a refusal, a way of engaging in, contesting, and opposing a relationship, often of unequal power. Highlighting resistance points to how women try to stop or contain violence perpetrated against them, or diminish circumstances of domination and oppression. More fundamentally, resistance is also a challenge to the power expressed through the infliction of this violence and/or domination in the first place. Seen this way, resistance is an important corrective to totalizing narratives of victimization which

²⁹⁵ See, e.g., HUM. RTS. WATCH, *THOSE WHO TAKE US AWAY*, *supra* note 31; HUM. RTS. WATCH, *POLICE ABUSE OF INDIGENOUS WOMEN IN SASKATCHEWAN*, *supra* note 43.

fail to grasp agency and resistance in the face of often crushing circumstances of domination and victimization.

Angela Cardinal's fierce resistance is a remarkable, defining, and crucial part of her story that must be foregrounded if there is to be a more complete and adequate narrative of her experience. Angela Cardinal resisted both at the time she was being sexually and physically assaulted by a massively larger and stronger man, and she resisted throughout the time she was cooperating with the preliminary inquiry. Despite her resistance, Angela Cardinal was shackled and imprisoned by an overwhelmingly powerful arm of the state—the criminal justice system. This is the very system that was supposed to protect her.

A. Angela Cardinal's Incredible and Courageous Resistance Throughout Two Assaults

At the time of her violent assault by Blanchard, Angela Cardinal's fierce resistance undoubtedly minimized the extent of the physical injuries she suffered, and stopped the attack, thereby saving her life.

At just over five feet tall and weighing only 109 pounds, Angela Cardinal was a very petite woman.²⁹⁶ In contrast, Blanchard, her attacker, was an extraordinarily large man; he was 6-foot-7¾ inches tall and weighed 260 pounds.²⁹⁷ Although Blanchard's body was huge in comparison to hers, Angela Cardinal amazingly fought off the massively physically larger Blanchard.²⁹⁸

Even more details reveal the nature of what she faced during the sexual assault.²⁹⁹ At trial, the judge found as fact that the accused:

grabbed her, forced her onto the couch face down and took off her shoes and socks. He attempted to take off her pants but she resisted. Still holding the knife to her, he touched her breasts underneath her clothing and touched her vagina and buttocks over her clothing. He then threw her on the floor.³⁰⁰

296. R v. Blanchard, 2016 ABQB 706, para. 7.

297. *Id.* at para. 32.

298. *Id.*

299. Ms. Cardinal's account of what happened was found to be credible by the trial judge and was bolstered by corroborating evidence of her injuries and of the crime scene. *Id.* at para. 241.

300. *Id.* at para. 248.

Angela Cardinal was also stabbed and slashed during the horrific sexual attack, and had her head slammed against the floor. She required more than twenty-seven stitches to repair the lacerations Blanchard inflicted.³⁰¹ Her attempts to escape her assailant's apartment were thwarted because the blood from her own wounds made the doorknob too slippery to turn.³⁰²

The judge further found as facts these details about the accused's attack on Angela Cardinal:

While on top and behind the Complainant with a knife in his hand, the Accused touched her breasts underneath her tank top. He also rubbed her vagina and her buttocks over top of her clothes. After throwing her to the floor, he exposed his penis and placed it close to the Complainant's face. He did all of this forcefully and violently. The Accused committed these acts intentionally and clearly against the Complainant's will. He was holding a knife to her for most of the time.³⁰³

Outlining the gravity of the offence, the trial judge continued:

The force intentionally applied by the Accused wounded the Complainant and endangered her life. At one point, the Accused stabbed the Complainant in the hand as she tried to protect herself. She was cut numerous times, including once on her face. He hit her head against the floor. I have no doubt that the use of the knife by the Accused and the injuries inflicted upon the Complainant caused wounding and severe bleeding and endangered her life. She could have died.³⁰⁴

At some point during the attack, Angela Cardinal was able to grab a phone and dial 911 by throwing it across the room before her assailant could get it.³⁰⁵ She shouted to the operator for help, all the while terrified that she would be killed, as Blanchard continued to attack her.³⁰⁶ Throughout the terrifying assault, she displayed an

301. *Id.* at para. 28.

302. *Id.* at para. 272 ("The blood on the door and doorknob was seen by police officers who attended the scene a few minutes after the 911 call was made and photos were taken. The only person bleeding was the Complainant. There was blood on the doorknob and blood spattered on the door downwards from the area of the doorknob. There is nothing credible to suggest that it got on the door in any way other than from the Complainant attempting to turn the doorknob and open the door.").

303. *Id.* at para. 317.

304. *Id.* at para. 318.

305. *Id.* at para. 26.

306. *Id.* at para. 249.

amazing fighting spirit—what the trial judge Justice Eric Macklin later described as a “feisty resistance.”³⁰⁷

Allowing ourselves to acknowledge some of the horrible aspects of the violence perpetrated against Angela Cardinal, it is not difficult to imagine, then, that requiring her to recount this traumatic attack in the courtroom would itself be deeply traumatizing. It is also not difficult to predict that any close contact with the assailant would be severely distressing and traumatizing. Yet our criminal justice system required both of these from Angela Cardinal, in the most offensive and degrading of ways.

To reiterate:

- She was forced to testify in shackles.
- She was forced at times to wear handcuffs.
- She was forced to be trapped in a van in close proximity to her violent attacker on the way to court.
- She was forced to sleep in a prison for five nights, all while fully cooperating (the “cooperative victim-witness”) in a criminal proceeding in which she was the main source of evidence, and in which she testified as a public service to the state.³⁰⁸

And all this took place in 2015, in Canada, a country whose rhetoric prides itself on its rights protections, commitment to equality, and care of the vulnerable.

*B. “This Is a Great System:”³⁰⁹ Cardinal’s Resistance
Strategies During the Legal Proceedings*

Throughout the preliminary trial, once again asserting her agency and her resistance, Angela Cardinal insistently protested her imprisonment as well as the shackles she was forced to wear. She gave evidence to the court on her own behalf that she had been a reliable witness, even though the Crown failed to attend to this fact.³¹⁰ She objected to being sent to sleep in jail and insisted that she not be placed back in remand with its deplorable conditions, the bad food, and the soiled and contaminated showers.³¹¹ She was ignored. The judge continued to patronize her.³¹²

307. *Id.* at para. 249.

308. See discussion *supra* Section I.B.iv. (“The Fourth Layer of Violation”).

309. Woolley Letter, *supra* note 132, at 12 (quoting Angela Cardinal’s sarcastic preliminary inquiry testimony).

310. Woolley Letter, *supra* note 132, at 8–9; see also discussion *supra* Section I.B.iv.

311. *Blanchard*, 2016 ABQB 706, para. 231.

312. *Id.* at para. 232; Woolley Letter, *supra* note 132, at 9.

Almost always, she protested in a straightforward way by calling out and naming what was happening to her, describing the frankly upside-down nature of the experience. “I’m the victim and look at me. I’m in shackles,” she said to Judge Bodnarek.³¹³ Unmoved by her plea, he ordered her back to a jail cell. “Aren’t you supposed to commit a crime to go to jail?” she retorted.³¹⁴

At one point during her imprisonment, the proceeding was delayed until mid-afternoon in order to accommodate a dental appointment for the accused.³¹⁵ This lengthy delay meant that Angela Cardinal’s time in prison was protracted and also that she was kept waiting around for the entire morning and part of the afternoon. All this so the man who had sexually and physically attacked her could receive some dental work. She, of course, received none, though she pointed out, with a flourish, that she could have benefited from some, as seen in the exchange below:

COURT: Okay. All right. So, we’re back tomorrow at 2 PM[.]
INNES: Thank you, Sir.
COURT: Thank you.
CARDINAL: At two?
COURT: Two, yes.
CARDINAL: So, I am in the gaol cells incarcerated while you sit missy pritzzy on your fricking stairs—on your chair, and I get to sit in the gaol cell cool?
INNES: Ms. [Cardinal]
COURT: We’re—we’re doing 2:00 because Mr. Blanchard needs some emergency dental work done and—
CARDINAL: Emergency?
COURT: —and they can only do it on Tuesdays and he’s—he’s waited some time for this. So, he’s going to be.
CARDINAL: Emergency?
COURT: —he’s going to be seen by a dentist tomorrow. So, that—that’s why he—
CARDINAL: I need to be seen by a dentist. You don’t see me crying, My Lord.³¹⁶

At another point in the proceedings, in a Kafka-esque reframing, the Crown made the astonishing claim to Angela Cardinal that the abhorrent treatment she was receiving was akin

313. *Blanchard*, 2016 ABQB 706, para. 232.

314. Johnston, *I’m the Victim*, *supra* note 221.

315. Woolley Letter, *supra* note 132, at 12.

316. *Id.*

to assistance. This is evident in the exchange below when Crown Attorney Patricia Innes refers to the court as “accommodating” her. The victim-witness’ frustration is palpable as she asks to be released from being essentially held in bondage:

CARDINAL: Can we make this testimony faster? Like somehow get me out of these shackles and get me free?

COURT: We’re[. . .]

INNES: We’re going to do everything we can *to accommodate you*.³¹⁷

The Crown’s response is a gross perversion of any concept of accommodation, in either the generic or the legal sense.

When the Judge claimed that, from his perspective, the proceedings were moving well, Angela Cardinal corrected him, demanding a judicial focus on *her* experience, not his:

CARDINAL: I’m the victim and look at me. I’m in shackles. This is fantastic. This is great fricking—this is a great system.

COURT: We’re—we’re making really good progress.

CARDINAL: Not great progress. Look at me, I’m in shackles[.]

COURT: No, I understand.

CARDINAL: Judge, *you wear these*. I’d like to see that[.]³¹⁸

Angela Cardinal’s boldness, her challenge to his power and authority, her demand for equality, and her insistence the judge understand her experience in that moment are plainly evident in her provocative suggestion that Judge Bodnarek subject himself to the shackles into which he had forced her. This was, again, an expression of her creative and insistent resistance.

As fundamentally important, however, was the psychological astuteness and sophistication Angela Cardinal revealed when she issued this challenge to the Judge. In suggesting to the judge that she should be mentalized,³¹⁹ she was issuing a profound rebuttal to his claim to “understand” her or what she was saying. Instead, she

317. *Id.* (emphasis added).

318. *Id.* (emphasis added).

319. Mentalization is a psychological term which describes the process of recognition of the other, involving the imaginative mental activity required to perceive and interpret human behaviour and feelings of others. See Peter Fonagy & Elizabeth Allison, *What Is Mentalization? The Concept and Its Foundations in Developmental Research*, in *MINDING THE CHILD: MENTALIZATION-BASED INTERVENTIONS WITH CHILDREN, YOUNG PEOPLE AND THEIR FAMILIES* 11 (Nick Midgley & Ionna Vrouva eds., 2012).

was insisting that he failed to understand, as if saying to him, “you absolutely do not get this.” She insisted the only way he might begin to have a real understanding of her experience would be if he were forced down from his position on the bench and almost literally placed into her shoes. Only then could he understand the indignity he was imposing upon her by shackling her: by personally experiencing it.

Cardinal’s resistance strategies and responses are truly inspiring. In the face of the indignities heaped upon her, she persistently retained her dignity. Under such circumstances of duress and radical disempowerment, how did she ever possess the bravery and presence of mind to challenge the judge so calmly and name the reality of the situation like she did? How did she not rage and swear and curse (all totally understandable and warranted responses)? Her resistance strategies are a testament to her lively fighting spirit, no doubt a product of her indomitable personality and perhaps of the many survival strategies she may have had to construct to survive the multiple challenges of her life.

Within the inescapable confines of her situation, Angela Cardinal refused to accept the indignities heaped upon her. She resisted in the ways she could, both at the time of the attack, in order to save her life, and throughout her terrible ordeal at the preliminary inquiry where she gave evidence and fully cooperated with the state. Throughout all of her spirited and creative strategies of resistance, she refused to accept as justified the many expressions of degrading and wrongful conduct against her.

*C. A Police Investigation and Criminal Prosecution Not
Trauma-Informed, but Trauma-Inducing*

What Angela Cardinal endured at the preliminary proceeding counts as one of the most appalling examples of gendered and racialized harms that the Canadian criminal justice system has imposed on a sexual assault complainant in recent memory. This part of the story must also be understood through the lens of this complainant’s strategy, in the face of the egregious institutional revictimization, of incredibly powerful, persistent, determined and dignified resistance.

Angela Cardinal’s legal story throws into stark relief the pressing need for social context and trauma-informed criminal justice system responses, especially to victims of crimes like sexual

assault (though also needed more broadly).³²⁰ Social context-aware and trauma-informed responses—within the legal system and beyond—require recognition of the racialized and gendered harms Indigenous people have suffered in colonial societies.³²¹ Social context-aware, trauma-informed approaches recognize systemic discrimination in its many forms and how its structures shape people's lives, including their psycho-social development, influence their psychological capacities and coping mechanisms and circumscribe their life choices and opportunities.³²²

Paralleling developments in other professions, particularly the health fields, there has been a significant shift towards trauma-informed approaches to the prosecution of sexual assault.³²³ This means, in part, attention to the nature of trauma and its role in human responses and adaptations, an understanding of the neurobiology of traumatic impacts on victims, and a shifting of institutional procedures and practices to take this knowledge meaningfully into account.³²⁴ It would be an understatement to describe this proceeding in the prosecution of Blanchard as the antithesis of a trauma-informed sexual assault prosecution.

Even before the decision to prosecute the case was reached, the little we know of the structure of the police interview of Angela Cardinal reveals that it was highly problematic. Not only did it fail to conform to trauma-informed standards for interviewing sexual assault complainants, but it also represents a prioritizing of

320. See Haskell & Randall, *Impact of Trauma*, *supra* note 146, at 24–35 (discussing trauma and the importance of understanding it in its relation to social contexts such as colonialism and gender); see also Haskell & Randall, *Disrupted Attachments*, *supra* note 164 (discussing trauma and the wellbeing of the Aboriginal peoples in Canada).

321. See generally Haskell & Randall, *Disrupted Attachments*, *supra* note 164; Joseph P. Gone, *Redressing First Nations Historical Trauma: Theorizing Mechanisms for Indigenous Culture as Mental Health Treatment*, 50 *TRANSCULTURAL PSYCHIATRY* 683 (2013); Maria Yellow Horse Brave Heart, *The Return to the Sacred Path: Healing the Historical Trauma and Historical Unresolved Grief Response Among the Lakota Through a Psychoeducational Group Intervention*, 68 *SMITH COLL. STUD. SOC. WORK* 287 (1998). Maria Yellow Horse Brave Heart coined the term “historical trauma.” See *Dr. Maria Yellow Horse Brave Heart Speaks on Historical Trauma*, SMITH COLL. SCH. FOR SOC. WORK, <https://ssw.smith.edu/about/news-events/dr-maria-yellow-horse-brave-heart-returns-smith-give-rapoport-lecture> [perma.cc/SER6-D8SG].

322. Haskell & Randall, *Disrupted Attachments*, *supra* note 164; Lori Haskell & Melanie Randall, *Social Context, Trauma-Informed Approaches to Law*, (unpublished manuscript) (on file with author).

323. See Haskell & Randall, *Impact of Trauma*, *supra* note 146, at 5; see, e.g., CANADIAN CTR. ON SUBSTANCE ABUSE, *THE ESSENTIALS OF . . . SERIES, TRAUMA-INFORMED CARE* (2014), www.ccsa.ca/sites/default/files/2019-04/CCSA-Trauma-informed-Care-Toolkit-2014-en.pdf [perma.cc/E2FD-HPXK].

324. See Haskell & Randall, *Impact of Trauma*, *supra* note 146.

outdated standardized police requirements over the needs of traumatized crime victims. It is impossible to ignore the racist and sexist disregard with which it appears the police treated her.

When the police arrived at the scene of the crime, Angela Cardinal “was found bloodied and on the floor in the hallway entrance to the apartment.”³²⁵ She was taken to the hospital about an hour and a half later, at about 8 p.m., where her injuries were treated.³²⁶ As the trial judge also noted, “[t]here were marks around her throat where she testified she had been strangled by the Accused when he tried to quieten her after the 911 call.”³²⁷

The emergency physician who attended to Angela Cardinal reported that:

[Cardinal] did not appear to have a normal mental status and was fluctuating between falling asleep and crying. He thought she was carrying on strangely and was not answering his questions in a normal manner. He testified that she appeared sleep deprived, which would have affected her ability to respond.³²⁸

This characterization reveals the emergency physician’s failure to recognize or understand typical trauma responses. As Judith Herman explains, “[t]he psychological distress symptoms of traumatized people simultaneously call attention to the existence of an unspeakable secret and deflect attention from it. This is most apparent in the way traumatized people alternate between feeling numb and reliving the event.”³²⁹

It is not, therefore, a “strange” response to a traumatic event, such as the near death experience and sexual assault through which Ms. Cardinal had just lived, to fluctuate between “falling asleep and crying.”³³⁰ Instead, “[t]he dialectic of trauma gives rise to complicated, sometimes uncanny alterations of consciousness”³³¹ Nor is it abnormal to deviate from what one might consider a “normal mental status” which is to be expected in

325. R v. Blanchard, 2016 ABQB 706, para. 144.

326. *Id.* at para. 28.

327. *Id.*

328. *Id.* at para. 146.

329. HERMAN, *supra* note 1, at 11.

330. *Compare id.* (describing the common signs of psychological distress in traumatized people), and R v. Blanchard, 2016 ABQB 706, para. 146 (recounting the doctor’s testimony that he believed Ms. Cardinal was sleep deprived due to her fluctuations between falling sleep and crying).

331. HERMAN, *supra* note 2, at 11.

“normal” and regular life circumstances.³³² It would be strange, in fact, *not* to consider the traumatic event and its understandable psychological impacts in assessing a patient’s mental and physical status (as is required for a trauma-informed medical response).

This kind of destabilized mental status is consistent with a number of the stresses Angela Cardinal experienced—a traumatic and life-threatening attack, significant physical injuries, sleep deprivation, and not having eaten in many hours—causing her to feel physically unstable and unwell.³³³ In addition, along with many other medications, she was given five doses of Fentanyl, a powerful opioid prescribed for her severe pain.³³⁴

She was discharged from the hospital at 3:50 a.m.³³⁵ In the middle of the night, then, having suffered severe injuries in a life-threatening attack, psychologically traumatized, heavily medicated, and sleep deprived, she was not allowed to get a full restorative night’s sleep or rest. Instead, she was taken immediately to police headquarters so police could conduct an interview.³³⁶ Why? This has been routine with sexual assault victims, based on the inaccurate belief memory is more reliable and accounts of crimes more thorough closest to the time of the attack.³³⁷

At 5:35 a.m., only about ninety minutes after her hospital discharge, when she had fallen asleep at the police station, she was woken up by the police to sign a consent form to obtain her medical records.³³⁸ Was this necessary? The authorization paperwork could have waited. This urgency demonstrated an overriding concern for police procedures and needs, not a sensitivity to the profound and threatening experience Angela Cardinal had endured only hours before, or to her need for rest.

To further compound this disregard for the traumatized Angela Cardinal, she was awakened again by police, and “provided a caution”!³³⁹ About what could she possibly have needed to be

332. See Haskell & Randall, *Impact of Trauma*, *supra* note 146, at 10. Cf. HERMAN, *supra* note 1, at 11 (describing highly emotional and contradictory storytelling, hysteria, and other abnormal emotional behaviors that might manifest in individuals who are traumatized).

333. R v. Blanchard, 2016 ABQB 706, paras. 8–15, 18–28.

334. *Id.* at para. 147.

335. *Id.*

336. *Id.* at para. 150.

337. Cf. Haskell & Randall, *Impact of Trauma*, *supra* note 146, at 14, 19, 23, 29 (discussing best practices for obtaining follow-up statements from victims, which requires diverging from the norm to allow memories to consolidate).

338. R v. Blanchard, 2016 ABQB 706, para. 150.

339. *Id.*

“cautioned”? The record does not reveal the specifics of this caution, but police interviews “under caution” are typically done with crime *suspects*, not crime *victims* such as Angela Cardinal.³⁴⁰ The caution suggests that the police approached her with suspicion, as if she were a wrongdoer, as opposed to someone who had just been brutalized and was in need of support. Further, it suggests that systemic racism and sexism, so deeply a part of the lives of Indigenous women, shaped how the police responded to Angela Cardinal who had just been sexually assaulted and violently attacked.

Still insufficiently rested, Angela Cardinal was then immediately required by the police to provide a statement about the violent attack.³⁴¹ When she appeared too fatigued to continue, she was allowed to sleep briefly, only until 2:54 p.m., when she was reawakened to continue the interview.³⁴² The police interview of this injured, exhausted sexual assault victim continued for over three hours, until 6:09 p.m.³⁴³

Trauma-informed practices for police undertaking sexual assault investigations have been developed over a number of years, but adopted in some jurisdictions in Canada only since about 2018.³⁴⁴ Trauma-informed practices were well established in many other fields well before then.³⁴⁵ But even in the absence of official adoption of trauma-informed approaches in the policing context—which would require that police conduct only an initial bare bones interview and then continue a few days later once the victim has fully slept and rested—common sense and decency should have alerted attuned police officers to the heavy and unreasonable burden being placed on a traumatized crime victim who had just been viciously attacked, injured, treated at the hospital, and who was profoundly exhausted, not least because she had been kept awake all night. In other contexts, Angela Cardinal appreciated the police who were kind to her, even those who had arrested her in the

340. See *A Review of Brydges Duty Counsel Services in Canada*, CAN. DEPT OF JUST. (Jan. 7, 2015), https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr03_la4-rr03_aj4/p5.html [perma.cc/49Z7-L7XJ] (describing the rights of the accused after a caution).

341. *R v. Blanchard*, 2016 ABQB 706, para. 150.

342. *Id.*

343. *Id.*

344. See Haskell & Randall, *Impact of Trauma*, *supra* note 146, at 19.

345. See, e.g., BC PROVINCIAL MENTAL HEALTH & SUBSTANCE USE PLAN. COUNCIL, CTR. FOR EXCELLENCE ON WOMEN'S HEALTH, TRAUMA-INFORMED PRACTICE GUIDE (May 2013), http://bcewh.bc.ca/wp-content/uploads/2012/05/2013_TIP-Guide.pdf [perma.cc/BS87-TYBH].

past, describing them as “awesome.”³⁴⁶ At this time, however, the police were hardly awesome in their treatment of Angela Cardinal, instead they failed her.

Conclusion: The Poetry of Angela Cardinal’s Spirit—What We Must See

As Alice Woolley observed of the criminal justice system’s response to Angela Cardinal, “it is impossible not to think that part of the problem . . . was a failure to see Ms. Cardinal in her full humanity.”³⁴⁷ Her full humanity, however, was much more fully grasped and appreciated by Judge Eric Macklin who presided over the trial itself. Judge Macklin was so troubled by what he learned about her treatment in the legal proceeding overseen by Judge Bodnarek, that he was moved to add a postscript to his decision convicting the accused explicating his views on Angela Cardinal’s fate at the preliminary inquiry.³⁴⁸

Because she was killed before the case reached trial, Judge Macklin listened to recordings of Angela Cardinal’s testimony at the preliminary inquiry.³⁴⁹ Despite not ever having met her, he was able to get a sense of who she was as a person in a fuller way. In describing her as a person worthy of respect, and pointing out her strengths and achievements, he resisted and rejected the stereotyping, stigmatizing, and pathologizing that Angela Cardinal had experienced at the preliminary inquiry. As is evident in this passage, Judge Macklin took pains to flesh out some of the achievements of her life as well as to highlight her positive attributes. In Judge Macklin’s words:

In her testimony, she confirmed that she had graduated from Grade 12 and was a good student. It is not difficult to accept this would be true, as she clearly came across as an intelligent woman She spoke of having some artistic talent and displayed a sense of humor when suggesting that drawings she had taken depicting the Accused’s apartment and the Accused were not of Picasso quality. When shown a particular photograph of the scene, she identified a piece of paper on the floor as a poem that she had written. She recited the poem in Court and indicated that she kept it in her sock so that in the

346. Alice Woolley, *Law and Morality: Reflections on the Angela Cardinal Case*, ABLAWG (June 24, 2017), <https://ablawg.ca/2017/06/24/law-and-morality-reflections-on-the-angela-cardinal-case/> [perma.cc/ANE7-3K54] [hereinafter Woolley, *Law and Morality*] (citing Preliminary Inquiry Transcript at 745, 835).

347. *Id.*

348. R v. Blanchard, 2016 ABQB 706, paras. 346–47.

349. *Id.* at paras. 183, 347, 349.

event it fell out, she could “make someone smile from a distance without knowing it . . . cute little things like that might make life beautiful[.]”³⁵⁰

Shown a photograph in court of where she had been attacked, Angela Cardinal’s focus on and identification of her poem on the floor of the crime scene—the space in which she was sexually violated, physically assaulted, and had her body cut and injured—confirms her powerful survival and coping skills. Her poem and her attachment to it—“you look best in a smile so wear that one with pride because it’s always darkest before dawn”³⁵¹—also reveals something profoundly beautiful about her spirit and her creativity.

Angela Cardinal shared her poem with the court in the preliminary inquiry, despite this being another space where she had been violated³⁵²—shackled and imprisoned by legal professionals—all of whom represented institutions of the Canadian government. She shared it in the hopes that she could contribute to making “life beautiful,” despite her own life having been deeply marked by pain and profound struggles.³⁵³

In his postscript, Judge Macklin did not shy away from noting the difficult circumstances of Angela Cardinal’s life and their direct relationship to what befell her at the preliminary inquiry. In unusual and strong terms for a judge, he wrote that:

The Complainant was a 27-year-old Indigenous woman who was homeless and living on the street. I have related the circumstances surrounding her remand to ensure attendance at the Preliminary Inquiry (paras 228 to 238 above). Her treatment by the Justice system in this respect was appalling. She is owed an apology. Unfortunately, no apology can be extended to her as she was tragically shot and killed in an unrelated incident.³⁵⁴

Judge Macklin powerfully concluded the trial decision, then, with a postscript highlighting Angela Cardinal’s strengths and situating her life in its social context.³⁵⁵ This is a conceptual shift—not often seen in law—which moves away from blaming

350. *Id.* at para. 348.

351. Woolley, *Law and Morality*, *supra* note 346 (citing Preliminary Inquiry Transcript, 645–46).

352. *R v. Blanchard*, 2016 ABQB 706, para. 348.

353. *Id.*

354. *Id.* at para. 347.

355. *Id.* at para. 348.

marginalized people for the oppressive difficulties with which they struggle. It implicitly integrates a recognition of the broader and systemic forces at play in shaping marginalization. As Judge Macklin said of Angela Cardinal, “[u]nfortunately, her life circumstances did not allow society to see or experience her intelligence and artistic qualities.”³⁵⁶

Judge Macklin, unlike Judge Bodnarek and Patricia Innes for the Crown, saw Angela Cardinal in her fuller humanity. This echoes the powerful and insistent plea—the *demand*—she made throughout the preliminary proceedings when she was imprisoned and shackled. In her repeated requests for removal of her shackles, she more than once implored of Judge Bodnarek:

“Look at me.”³⁵⁷

We must listen to this plea.

Angela Cardinal’s insistence—“Look at me”—is a demand to be heard, seen, and acknowledged. It is a call for recognition. It is a demand for us to reroot ourselves in the teaching of respect³⁵⁸ so central and foundational to Indigenous cultures. It is a demand for equality. And it is a demand for justice.

These demands must be met by a re-imagined and reconfigured criminal justice system if there is to be anything like actual fairness, equality, and justice.

When Angela Cardinal addressed the judge by saying “look at me,” she was insisting on her rights, and asking that her experience be recognized and understood. At a very minimum she called on the judge to show her fairness, dignity, and respect, to recognize her as a full human being, and to see her as someone forced to suffer when she should have been supported. He did not oblige.

We must see the treatment of Angela Cardinal in that Canadian court room, and at the hands of the police beforehand, as revealing larger, profound, and systemic state failures against Indigenous women in Canada and beyond. These failures have been well documented for many years. They are not new. They should evoke a sense of shame and of outrage in all of us.

Outrage is insufficient, however. Mobilizing is required. Change is required. The extensive recommendations of the Missing

356. *Id.* at para. 349.

357. *Id.* at paras. 232–33.

358. This wording was suggested to me by by Sheila Wahsqonaikezhik who also described Angela Cardinal’s plea, “look at me,” as a “song to be heard.”

and Murdered Indigenous Women and Girls Inquiry provide a roadmap for this change.

It is not an overstatement that we remain legally and politically in a state of emergency when talking about the lives of Indigenous women in Canada. This emergency includes the staggering extent of sexual and physical violence they endure. It also fundamentally and centrally includes criminal justice system failures and wider state responsibilities to Indigenous women, responsibilities dramatically more often evaded than fulfilled.

Angela Cardinal's story is an example not only of the scale of the system failures, legal failures, and indignities so many Indigenous women continue to endure. It is also an example of multiple institutional betrayals, and of the complicity of all of us who are not Indigenous in these betrayals.

Not only Canadian constitutional and human rights law should have secured and protected Angela Cardinal's rights in that courtroom. Article 22(2) of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),³⁵⁹ of which Canada is a full supporter, specifies that:

States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.³⁶⁰

Clearly, adequate measures were not taken to ensure that Angela Cardinal enjoyed the full protection of her rights. Instead, she was endangered on many levels by being shackled, incarcerated, and forced to ride in the same vehicle as her violent attacker.³⁶¹

Article 9 of The International Covenant on Civil and Political Rights,³⁶² to which Canada is a State party, stipulates that:

359. See G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples art. 22(2) (Sept. 13, 2007), https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.18_declaration%20rights%20indigenous%20peoples.pdf [perma.cc/5MQY-FAD4].

360. *Id.*

361. R v. Blanchard, 2016 ABQB 706, para. 221; see also discussion *supra* Section I.B.vi. ("The Sixth Layer of Violation") (describing the various ways in which Cardinal was forced into proximity with her attacker during and surrounding the preliminary inquiry).

362. International Covenant on Civil and Political Rights art. 9, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.³⁶³

The judicial deprivation of one's liberty is one of the most drastic powers in Canadian law and it is subject to vigorous constitutional rights protections. The forced detention of Ms. Cardinal during the preliminary hearing and her shackling and handcuffing while she testified violated these rights. Angela Cardinal was a victim-witness in the case; she was not charged with a crime, nor was she a criminal, yet even criminals are recognized as persons with rights which were denied to her in this case. The terrible irony is that, had she been charged with a crime, she would have had the benefit not only of robust general constitutional protections, but also of Section 718.2(e) of the Canadian Criminal Code,³⁶⁴ which mandates courts to consider the circumstances of Indigenous offenders, and the Supreme Court's elaborations of the issues in *Gladue*, *Ipeelee*, and *Ewert*.³⁶⁵

What happened to Angela Cardinal, while unique in its specificity, is general in its applicability to the lives of other Indigenous girls and women in Canada, the United States, and beyond, and the violence, abuse, neglect, and institutional betrayals they have endured. Some of their names in Canada are well known, others are not: Pamela George,³⁶⁶ Tina Fontaine,³⁶⁷ Cindy Gladue.³⁶⁸ The young Indigenous woman sexual assault

363. *Id.*

364. R.S.C. 1985, c C-46, s 718.2.

365. *R v. Gladue*, [1999] S.C.R. 688 (holding the trial court erred by failing to consider an offender's traumatic background in sentencing, and directing the court to seek "all available sanctions, other than imprisonment"); *R. v. Ipeelee*, [2012] S.C.R. 433 (reaffirming *R. v. Gladue*); *see also Ewert v. Canada*, [2018] S.C.R. 165 (finding that Correctional Service Canada's assessment of risk in evaluating parole applications does not appropriately evaluate the risk posed by and against Indigenous offenders).

366. *See generally* Razack, *Gendered Racial Violence*, *supra* note 211 (describing the sexual attack on and murder of Pamela George, its cover up, and the deeply racist and sexist trial).

367. *See* Pamela Palmater, *Shining Light on the Dark Places: Addressing Police Racism and Sexualized Violence Against Indigenous Women and Girls in the National Inquiry*, 28 CAN. J. WOMEN & L. 253, 254–55 (2016); Bill Graveland, *Raymond Cormier Found Not Guilty in Death of Winnipeg Teen Tina Fontaine*, NAT'L POST (Feb. 23, 2018), nationalpost.com/news/canada/cp-newsalert-accused-in-death-of-winnipeg-teenage-girl-not-guilty-of-murder [perma.cc/RXZ8-YSDL].

368. *See* Jonny Wakefield, *Bradley Barton Trial: Wound that Killed Cindy Gladue Would Require 'Considerable' Force, Pathologist Testifies*, EDMONTON J. (Jan. 13,

complainant in *R. v. Wagar*.³⁶⁹ The petite, twelve-year-old Indigenous girl serially sexually assaulted by three non-Indigenous adult men in their twenties in rural Saskatchewan.³⁷⁰ The still many Missing and Murdered Indigenous women. The Highway of Tears.³⁷¹ The list goes on, and on.

Angela Cardinal's powerful and self-respecting resistance throughout her ordeals is an inspiration in an otherwise bleak and harrowing story.

During the sexual assault, she fought off her attacker and kept herself alive. During the assault on her basic rights and fundamental dignity during the preliminary inquiry, she dared to spar with the judge and vigorously and repeatedly contested being confined and jailed. She called out and named what was happening to her in a system massively more powerful and resourced than she was: the same system that degraded her.

Angela Cardinal's individual resistance serves to remind us of the need for greater and organized resistance to end systematic violence against Indigenous women, the social conditions which facilitate it, and the state failures which further construct and compound it.

2021), <https://edmontonjournal.com/news/local-news/bradley-barton-trial-wound-that-killed-cindy-gladue-would-require-considerable-force-pathologist-testifies> [perma.cc/6L6V-8WPG]; Kathleen Harris, *Top Court Hears Grim Details of Cindy Gladue's Last Hours as It Considers New Murder Trial*, CBC NEWS (Oct. 11, 2018), <https://www.cbc.ca/news/politics/supreme-court-gladue-barton-1.4762680> [perma.cc/T3RY-8EM6].

369. *R. v. Wagar*, 2014 CarswellAlta 2756 (Alta. Prov. Ct.).

370. Krista Foss, *The Cree Girl and the White Men*, THE GLOBE & MAIL (Nov. 12, 2001), www.theglobeandmail.com/news/national/the-cree-girl-and-the-white-men/article1034556/ [perma.cc/7YG5-U23P]. This case is extensively and powerfully analysed by Lucinda Vandervort, *Legal Subversion of the Criminal Justice Process? Judicial, Prosecutorial and Police Discretion in Edmondson, Kindrat, and Brown*, in *SEXUAL ASSAULT IN CANADA: LAW, LEGAL PRACTICE AND WOMEN'S ACTIVISM* 111–50 (Elizabeth Sheehy ed., 2012). For the trial history see *R. v. Edmondson*, 2005 SKCA 51, *leave to appeal to Supreme Court of Canada denied*, 2005 SCC 273 (No. 30986). Dean Edmondson was tried for the crime by a jury in 2003 and convicted. Jeffery Lorne Brown and Jeffery Kindrat were tried together in 2003 and acquitted by the jury; a retrial was ordered in 2005. For the judgment on the appeal of Kindrat and Brown's acquittal, see *R. v. Brown*, 2005 SKCA 7. These original Brown and Kindrat retrial cases were severed in 2007. The Kindrat retrial by jury proceeded in 2007, leading to an acquittal that was not appealed. Brown's retrial was adjourned until May 2008. The jury failed to reach a verdict and the matter was stayed by the Crown in early July 2008. See Editorial, *Balancing Justice in a Difficult Case*, LEADER-POST, July 9, 2008, at B8.

371. "The Highway of Tears" describes the highway corridor of about 725 kilometers between Prince George and Prince Rupert in British Columbia, Canada, where many of the Missing and Murdered Indigenous women have "disappeared." Carrier Sekani Fam. Servs., *Highway of Tears*, HIGHWAY OF TEARS, <https://www.highwayoftears.org/about-us/highway-of-tears> [perma.cc/X5DW-7U5V].

It is essential to hear Angela Cardinal's plea to be seen, and to situate it more broadly within the ongoing abject institutional failures experienced by Indigenous women. We must come to grips with, and end our collective complicity in, these failures, which in turn requires sustained political will and action on multiple fronts.

The detailing of Angela Cardinal's story is a call to action. It calls us to be more courageous. It is especially important for all of us working to end violence against women, and more generally, striving for a more just society. This requires that we see and honour Angela Cardinal's ferocious and powerful resistance, as we systematically work to foreground the lives of Indigenous and First Nations women in the struggle for women's equality and a world free from sexual assault and sexual violence.

Angela Cardinal kept a poem in her sock, she tells us through her testimony at the preliminary inquiry, so that if it fell out, someone might find it and enjoy it, and she might, from a distance, make that person smile. In this way she said that she hoped to contribute to making life beautiful. It expressed a way for her to be seen and to be remembered. Throughout the many atrocities she endured in her short life, she retained her beautiful spirit and she shared it with us. We must honour her spirit. We must do whatever is necessary to make sure no Angela Cardinals are ever again subjected to what she endured in the name of so-called "justice."