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A study of the detrimental impact of rape mythologies and victim stereotypes in the application of character evidence in jury trials in England and Wales

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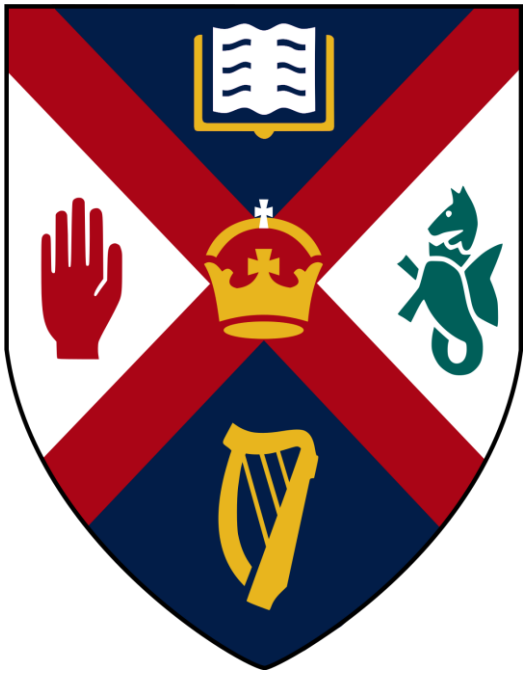
A Study of the Detrimental Impact of Rape Mythologies and Victim Stereotypes in the Application of Character Evidence in Jury Trials in England and Wales



This dissertation is submitted to the Queen's University of Belfast, School of Law in partial fulfilment of the Juris Doctor (JD) Degree
By

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A Study of the Detrimental Impact of Rape Mythologies and Victim Stereotypes in the Application of Character Evidence in Jury Trials in England and Wales

Introduction

Rape is at the highest levels recorded since the induction of the National Crime Recording Standard in 2002. These figures, however, do not necessarily mean that there are more rapes occurring than ever before but rather, it could suggest that more victims are feeling secure enough to report the crime to the police and that police recording of these types of offences has improved. Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services (HMICFRS) have conducted a number of inspections into police crime recording[1]. In 2014, it was concluded that 26 per cent of sexual offences were not recorded when reported to the police[2]. In a report assessing the efficacy of policing between May 2019 and March 2020, it has been found that this number has dropped to only 6 per cent of sexual offences reported to the police going unrecorded[3]. While it is promising to see improved rates of police recording of sexual offences, there is now evidence to suggest that the impact of increased recording is not having the same effect on the growing numbers of reported sexual assaults. This means that the growing numbers of sexual offences may now be, at least partly, attributed to a genuinely growing crime rate[4]. However, it is when attrition rates in rape cases are examined the stark reality of a justice gap for victims of rape comes to light. Recent reports show that the percentage of reported rape cases that go to trial has fallen to only 1.4% in England and Wales[5]. Unique challenges are often raised by rape trials, ranging from victim perception, lack of evidence, police referral to CPS and CPS pushing forward with prosecution. It is important to further examine what is causing such high rates of attrition in rape cases and where the law and procedures can be altered to improve the current treatment of rape cases and its victims.

A commonly suspected obstacle for rape prosecution is the knowledge of the existence of many preconceived notions the general public might hold regarding the crime of

[1] 'Crime in England and Wales: Year Ending March 2020' (*Ons.gov.uk*, 2020) <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/yearendingmarch2020#other-types-of-violence>.
[2] HMIC, 'Crime-Recording: Making the Victim Count' (Inspectorate of Constabulary 2014).
[3] HMICFRS, 'State of Policing: The Annual Assessment of Policing in England and Wales 2019' (Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services 2020) <https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/state-of-policing-2019.pdf>.
[4] ONS above at n 1.
[5] Lizzie Dearden, 'Rape "Decriminalised" As Only 1.4% of Reported Attacks Prosecuted in England and Wales' *The Independent* (17 October 2019) <https://www.independent.co.uk/news/uk/crime/rape-prosecutions-uk-disclosure-mobile-phones-cps-a9160556.htm>.

rape, rapists and rape victims. The fear of not being believed has been cited as a primary reason many victims do not report their attacks to the police[6]. One of the most common stereotypes is that of the *real rape victim.* The idea of a virtuous woman who behaved cautiously remaining in good neighbourhoods and moving about within reasonable hours is the only true victim of rape[7]. The moment a woman deviates from this persona her rape complaint may be viewed with scepticism, activating negative (victim blaming) rape myths. A portion of the myths stem from the commonly held belief in what 'real rape' is and how a 'real victim' should react to such a crime, a further list and discussion of common rape myths can be found in chapter 1[8]. Many today believe that most rapes are committed by strangers when in reality approximately 90% of rapes are committed by known men, partners, or former partners of the victim[9]. Additionally, 'real victims' employ some kind of avoidance or resistance and usually sustain injuries or torn clothing stemming from the attack. Finally, 'inappropriate' behaviour following the rape, such as, showering, cleaning the scene, appearing unemotional or delayed reporting suggests a false allegation.

In a trial observation study conducted at the end of 2010, it was found that defence counsel often employ various versions of rape myth for a multitude of reasons[10]. Key ways in which these myths were used involved distancing the defendant and the present case from the idea of 'real rape', highlighting the ways in which the facts did not fit into the mould of a virtuous victim and a violent stranger. Secondly, the defence counsel used myth to discredit the complainant emphasising aspects of her history, psychology or character that would distance her from the image of the 'real rape' victim. Lastly, the facts of the case were presented as a platform for inviting false conclusions about such facts based on popular rape myths, that is to say, the myth itself is not explicitly referenced but defence counsel will outline the facts of the case in such a way that jury members arrive at the desired conclusion after even the most simplistic reasoning. It is tactics such as these that are the focus of this thesis. It will focus on the psychology behind the function of stereotype activation and the role it plays in rape trials, specifically in discrediting alleged victims in the eyes of the jury.

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[6] Karen G. Weiss, 'Too Ashamed to Report: Deconstructing the Shame of Sexual Victimization' (2010) 5 Feminist Criminology.; Laura C. Wilson and Katherine E. Miller, 'Meta-Analysis of the Prevalence of Unacknowledged Rape' (2015) 17 Trauma, Violence, & Abuse.

[7] Susan Estrich, *Real Rape: How the Legal System Victimises Women Who Say No* (Harvard University Press 1976).

[8] 'Myths About Rape' (Rape Crisis England and Wales, 2018) <https://rapecrisis.org.uk/mythsvsrealities.>.

[9] Ibid.

[10] Jennifer Temkin, Jacqueline M. Gray and Jastine Barrett, 'Different Functions of Rape Myth Use in Court: Findings from A Trial Observation Study' (2016) 13 Feminist Criminology.

Understanding the psychology behind successful stereotype activation and the role plays in the decision-making process will be key in examining the legislation enacted to protect alleged victims in rape trials. The definition of stereotype to be used here comes from the work of Francis Dane where, for simplicity in discussion, the word stereotype is used to denote any structured set of beliefs about any identifiable group[11]. Stereotypes can be activated on a conscious or unconscious level and many people are unaware that they hold any at all. Rape myth acceptance can construct a stereotype in a person's mind when perceiving either rape victims or the crime of rape itself. Accepting various rape myths as perceived truth creates an image of a certain 'type' of woman who gets raped. For example, this 'type' of woman probably dresses provocatively, is capable of resisting her attacker but does not, is young and flirtatious, partakes in the recreational use of alcohol or drugs, and stays out late into the night[12]. Women who fit into this constructed group can be perceived by those who accept various rape myths related to these characteristics as, at least partially, blameworthy when recounting their attack[13]. If a juror were to process evidence through this construct, their perception of the victim and her credibility may suffer a degree of bias upsetting the balance of justice necessary for a fair trial.

This research will be most relevant to improving the treatment of alleged victims in rape trials that are dependent on direct evidence of the complainant with little corroborating evidence. A lack of directional evidence providing a clear or indisputable version of the events makes jurors more likely to draw on their pre-existing knowledge (or scripts/stereotypes) to interpret the facts in determining who is more blame-worthy[14]. Research has shown than when an assault is more stereotypical, jurors are more likely to believe the victim, blame her less and convict the defendant[15]. Similarly, studies have shown that the more an offence strays from the commonly constructed 'real-rape' script, the more the victim's credibility suffers and the more blame she receives[16]. There has been some

[11] Francis Dane, 'Applying Social Psychology in the Courtroom: Understanding Stereotypes in Jury Decision Making' (1992) 16 Contemporary Social Psychology. See above at n. 10.
[12] This idea of 'type' of woman will be more thoroughly examined in Chapter 1 through ideas such as attribution theory, hypothetical scripts and cultural scaffolding.
[13] P Mazelan, 'Stereotypes and Perceptions of the Victims of Rape' (1980) 5 Victimology.
[14] Mark Kebbell and Nina Westera, 'Promoting Pre-Recorded Complainant Evidence in Rape Trials: Psychology and Practice Perspectives' (2011) 35 Criminal Law Journal, and Louise Ellison and Vanessa E. Munro, 'A Stranger in the Bushes, or an Elephant in the Room? Critical Reflections upon Received Rape Myth Wisdom in the Context of a Mock Jury Study' (2010) 13 New Criminal Law Review.
[15] Blake McKimmie, 'Stereotypes in the Courtroom', *New Directions for Law in Australia* (ANU 2017).
[16] Blake M. McKimmie, Barbara M. Masser and Renata Bongiorno, 'What Counts as Rape? the Effect of Offense Prototypes, Victim Stereotypes, and Participant Gender on How the Complainant and Defendant Are Perceived' (2014) 29 Journal of Interpersonal Violence.

recognition by legislators for the need to protect alleged victims from such misconceptions being formed about them during rape trials. As it will be shown in later chapters, current legislation restricting the introduction of certain kinds of evidence are not enough to protect victims however, further restrictions would infringe too much on the defendant's right to a fair trial. Therefore, the most logical way forward in this case may be to adduce more educational evidence in an attempt to create a greater balance for justice for both complainants and defendants.

Currently, provisions known as rape shield legislation recognise and attempt to prevent the formation of a certain level of bias against the complainants of rape. Rape shield legislation includes provisions preventing the introduction of evidence pertaining to a complainant's sexual history[17]. Rape shield legislation in England and Wales would be found in sections 41- 43 of the Youth Justice and Criminal Evidence Act 1999 (as the main focus is found in section 41 these provisions will be referred to as Section 41 from here). The predominant rule found in Section 41 prevents any evidence or cross-examination pertaining to the sexual history of the complainant. However, this type of evidence may come into trial with the court's approval of a pretrial application made by the defence. The court may grant these applications under specific circumstances set out in the legislation. A comprehensive study performed evaluating the use of Section 41 in court found that in many cases the section 41 restrictions were 'evaded, circumvented and resisted'[18]. Further, it was found that applications were made in just under one-third of trials sampled however, sexual history evidence appeared in two-thirds of trials[19]. In a report published by the Attorney General's Office in December 2017 it was reported that after tracking 309 rape trials in 2016, Section 41 applications were made in only 13% of cases and denied in 92% of these trials. These figures may suggest that the use of Section 41 improved drastically over the 11 years between the two studies with better training and education surrounding the unique issues raised by rape trials however, it may also be attributed to different figures gathered in different sampling methods.

It is not the intent of Section 41 that needs to be heavily scrutinised, but rather the effect that its function can have on the perception of complainant. It has been suggested that

[17] Clare McGlynn, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' (2017) 81 The Journal of Criminal Law.
[18] Liz Kelly, Jennifer Temkin and Sue Griffiths, 'Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials' (Home Office 2006) <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.628.3925&rep=rep1&type=pdf>.
[19] Ibid.

the acquittal rate when an application was successful was 90% compared to 52% when it was not[20]. It then must be considered what is happening with the introduction of this kind of evidence and how it impacts the jury's perception of the complainant and in what ways to seemingly have such a large impact given the figure above. The more the defence can normalise the alleged activities into 'typical' sexual behaviour for the complainant the easier it is for them to shift focus from their client to the complainant[21]. Exploring deeper psychological effects of rape myth acceptance and their function in discrediting victims during trial can aid in understanding how best to improve procedures in rape trials. That is not to say that the legislation as it stands must be done away with, the application and review process for introduction of evidence may be useful in preserving a fair trial for the defendant.

Following this discussion, it is important to ask if there is a way for evidence law to address the issue of rape myths and stereotypes in influencing jury perception of the complainant. Should we use what we know about the function of stereotypes and other aspects of social psychology to format a new approach to presentation of evidence beyond the protections set out under section 41 in order to create better complainant protection in rape trials? This dissertation will be a study of the detrimental impact of these stereotypes and myths in the application of character evidence in jury trials. The aim is to determine whether the current laws dictating this type of evidence need to be rebalanced in order to provide stronger protection for victims or whether doing so jeopardises a fair trial for defendants. To best determine what kinds of limitations should be placed upon the character evidence used against victims in rape trials, the present work will be divided into four chapters each examining the different ways and areas in which this type of evidence can be problematic.

The first chapter will begin by setting out the common myths found in current literature surrounding rape trials. Research on rape mythology in England and Wales, wider society's belief in them and their appearance in real trials will play a key role in aiding discussion about the threat posed by certain beliefs. Psychological studies explaining stereotype activation and its role in human cognition will further evidence the need for rebalancing of character evidence in rape trials explaining the elements of stereotyping that are simply reflexive human nature. The prejudicial effect that this type of character evidence can have on complainants in rape cases will be assessed as well as any prejudicial effect excluding this type of character evidence will have on defendants.

[20] McGlynn above at n 17.
[21] Aileen McColgan, 'Common Law and the Relevance of Sexual History Evidence' (1996) 16 Oxford Journal of Legal Studies.

The second chapter will dissect the current rape shield legislation in England and Wales. The laws defining the elements of rape and consent through past decades will be explored to better grasp the evolving nature of society's perception of rape and its victims. The ideology behind the creation of what has become known as England and Wales' rape shield legislation, the Youth Justice and Criminal Evidence Act 1999, will be assessed to determine what was intended by Parliament with this law. `Additionally, the views of the opposition and alterations made to the Bill following its initial readings in Parliament will be outlined in order to provide a fuller understanding of the issues regarding a defendant's right to a fair trial and alleged victim protection. Brief case examples highlighting the interpretation of the legislation through the years will also be provided to shed light on how the intent behind the words may not be standing up to case by case tests. Finally, more contemporary research examining the function of the YJCEA 1999 twenty years later will be evaluated for potential reform recommendations for the future of rape shield legislation.

The third chapter will expound the importance of character evidence and the influence it can have in jury trials. This chapter will explain what is meant by character evidence, the philosophy behind its role in trial and why it is important. In the context of rape trials, taking from the discussions of previous chapters, the significance of protecting the victim from the introduction of negative character evidence will be reviewed. There are strong protections for defendants preventing the introduction of evidence of their bad character however, oftentimes the prejudicial effect produced by 'bad character' evidence against the complainant is not very robust. Considering the psychological evidence to be laid out in chapter one, the cognitive processes taking place in jurors' minds will be identical whether forming biases against the defendant or the victim. Given the backdrop of rape mythology and victim stereotypes, as well as the ease with which defence counsel may trigger these perceptions with seemingly innocuous facts, the rebalancing of victim/defendant protection is in need of legislative review.

The fourth chapter will consist of an examination of the efficacy of the use of jury trials for trying sexual offences. This will include a discussion of the history behind the creation and preference for juries in England and Wales, and jury alternatives suggested in various research reports. In addition to the jury alternatives, further reform recommendations will be studied, particularly the introduction of general expert evidence to serve as juror education. In 2006, the Government released a report recommending the introduction of educational expert evidence in trials for sexual offences in order to contest juror misconceptions about victims of sexual violence. Additional psychological experiments

researching the practicality of such recommendations with mock jurors will cited in order to bolster the opinion of the current work for the need to revisit these recommendations. Criticisms of the implementation of general expert evidence will be explained in order to better tailor recommended reforms to address potential problems before they occur.

Finally, this work will conclude with a reiteration of the recommendation for the introduction of general expert testimony as a form of juror education. It is of the current author's opinion that there is no way to further restrict the introduction of evidence that may be interpreted as prejudicial to alleged victims in rape trials and that the most balanced solution to the issues set out in earlier chapters is the introduction of scientifically validated education for the juror to help them better check their biases before undertaking the decision-making process. These recommendations will be reinforced by the explanation of the important role psychology can play in the legal process, and how the social sciences can be utilised in many facets of the legal system.

Methodology

The primary goal of this dissertation will be to analyse and comment on the risk of prejudice faced by complainants in rape trials stemming from the presentation of evidence, attributed to her character that is consistent with commonly held rape myths and victim stereotypes. It will achieve this analysis by undertaking a multi-disciplinary approach using the lens of law and psychology fusion of psycho-social and legal desk-based research, examining both primary and secondary sources. It will attempt to provide a thorough understanding of the law as it is written and how it functions in the courtroom. As the discussion above will suggest, the law in its written form is not always an accurate representation of its practicality in the courtroom. Understanding a law's function in practice can highlight the areas in which its intention and function are not in line. Having this foundation is vital in order to rule out the written law itself as the source of any alleged malfunction in its use (Hutchinson, 2018). In the context of the above discussion, it was stated in *R v Riley*[22] that it cannot be imagined, a scenario in which third party sexual history evidence is relevant to establishing consent, yet, an avenue for its introduction into trial still exists over a century later. It might be said that preserving this avenue for introduction preserves the balance between victim and defendant rights. It is here in which doctrinal research must be pursued to inform the interplay between Section 41, Section 75 of the

[22] *R v Riley* (1887) 18 QBD 481.

Sexual Offences Act 2003, and its mention of reasonable belief in consent, and the right to a fair trial found in Article 6 of the Human Rights Act 1998. The legal principles underlying how these provisions measure against one another is important to obtain through doctrinal research as well as academic commentary on how this interplay functions in the courtroom and society.

In order to further the analysis of the chosen provisions and selected literature, a psycho-legal research framework will be used. If law is meant to govern people, it is logical to study the law as it might be psychologically interpreted by the individuals it is meant to control. Cases can be re-examined with the view that certain evidence, rather than adding to a defendant's innocence claim, might be useful only in detracting from the complainant's rape claim. Understanding human perception and how evidence will be perceived by a jury (and even legal practitioners) may help fill some of the gaps in the literature focusing on law rape mythology. Psycho-legal research will inform how these views are used cognitively to influence legal practitioner and juror perceptions of the individuals to whom they are applied. Investigating the psychology of stereotypes or schemas and the influence they can have on a person's cognitive processing compiled with the laws surrounding evidence in rape cases and the function of these laws at trial may demonstrate the need for some alteration to the rape trial procedures.

The field combing psychology and law has been defined as such, 'legal psychology is the scientific study of the effects of law on people; and the effect people have on the law[23]. Legal psychology also includes the application of the study and practice of psychology to legal institutions and people who come into contact with the law.' To properly understand the words and institutions meant to control the behaviour of people it is important to understand the people themselves. Psychology, society, and law do not exist in a vacuum and drawing from each discipline might create the most functional working model for the legal system to operate within. Combining these fields and explaining the dangers of victim stereotypes and rape mythology being adduced as character evidence from the psychological perspective can fill a void that exists in the current research. As it stands, there is little overlap of the true scientific explanation for what is happening in the minds of the jury when the myths and stereotypes studied by the legal research are presented in the courtroom.

There exists much evidence of rape myths and their perpetuation in trial (often by defence counsel) as well as many studies testing public rape myth acceptance. The empirical

[23] James Ogloff, *Taking Psychology and Law into the Twenty-First Century* (Springer 2006).

psychological studies help us to understand the prevalence with which the general population might truly accept such stereotypes, while the courtroom observation studies highlight how often these stereotypes are presented to members of the general population on the jury. The original contribution of the current research aims to analyse both categories of research and highlight what is happening in the brains of jury members, scientifically, when these stereotypes are presented. By melding the scientific psychological studies of cognition and perception with the legal research demonstrating the existence of rape myths and victim stereotypes, the negative outcomes for complainants of sexual assault become much more glaring. Explaining these two areas in conjunction with one another will add to the discussion surrounding reform of the current legislation. Explaining what is happening in the minds of jurors with the presentation of this type of character evidence, and the science proving that these types of mental exercises are, essentially, involuntary, makes a much stronger case for legal scholars putting forth arguments that victims of sexual offences face a substantial amount of prejudicial effect of their own when taking the stand in rape trials. Utilising both of these fields, the current work further aims to explain what legal solution might best overcome the psychological challenges evidenced in the studies of cognition and perception to be explored in the forthcoming chapters.

Before proceeding, brief discussion of the language to be used in the remainder of the work must be emphasised. In proceeding, I will often refer to victims of rape as, victims, complainants or alleged victims. In the more general societal context, I will refer to the term victim to retain the connotation that the women mentioned here have had a crime committed against them and that there is not action she could have taken to 'deserve' this offence. In discussions pertaining to a trial setting, I will refer to these women as 'alleged victims' so as to preserve the defendant's presumption of innocence. It is not meant to imply that woman is being untruthful and is not a victim however, it is a delicate situation in which it is imperative to ensure the defendant retains his presumption of innocence until a judgement has been made. The delicacy of the language only further demonstrates the difficulty faced in rape trials in balancing the rights of each party involved and the ease with which outsiders can be swayed to believe one side over the other.

Chapter 1: Rape Mythology, Persistence and Activation Mechanisms in Society

The purpose of this chapter is to examine what is meant by *rape myths* as a general concept, outline some of the most commonly repeated rape myths and to examine their prevalence in society and more specifically, the courtrooms of England and Wales. The overarching societal causes for the belief in such myths, as well the psychology behind the belief in such myths will be examined. The goal is to clearly define the concept of rape mythology and to provide concrete examples of commonly referenced myths in the existing literature. There myths will be explained in a general societal context followed by their appearance in the trial setting. All of this will be explored through a psychological lens in order to understand why the existence of these myths create problems for complainants in rape trials. A more detailed discussion of specific psychological processes that can take place in the process of perception will be included to provide context for issues raised in future chapters.

It is important at the outset to clarify what is meant by the term *rape myths* in the context of the present work. Simplistically, rape myths can be described as beliefs about the victims and perpetrators of rape, as well as, where and how it happens[24]. It is beliefs of this kind that are thought to be held, in some form, by members of the public as both a product of cultural norms regarding gender and sexuality, and the natural psychological workings of human cognition[25]. The Crown Prosecution Service (CPS) in their legal guidance on sexual offences acknowledges rape myths as being commonly held beliefs that are not true[26]. They go further to offer an explanation as to why these beliefs become 'commonly held', recognising that they stem from people's need to make sense of a situation that appears otherwise 'senseless'. This type of description goes to the core of the issues raised in this dissertation. The CPS has recognised that it is in people's nature to grasp onto any explanations that fit within what they already know about the world. Specific ideas about what they 'know' about the world will be expanded upon below[27]. A deeper understanding

[24] Vivien Stern, 'The Stern Review: A Report by Baroness Stern CBE of an Independent Review into How Rape Complaints Are Handled by Public Authorities in England and Wales' (Home Office 2010).
[25] Anthony Murphy and Benjamin Hine, 'Investigating the Demographic and Attitudinal Predictors of Rape Myth Acceptance in U.K. Police Officers: Developing an Evidence-Base for Training and Professional Development' (2018) 25 Psychology, Crime & Law.
[26] 'Rape and Sexual Offences - Chapter 21: Societal Myths | The Crown Prosecution Service' (*Cps.gov.uk*, 2017) <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-21-societal-myths>.
[27] A discussion of the psychology behind the formation of beliefs will follow below, citing: Nicola Gavey, *Just Sex? The Cultural Scaffolding of Rape* (Routledge 2005), Fritz Heider, *The Psychology of Interpersonal Relations* (Wiley 1958).

about why this type of reasoning occurs, and what might be done about it, is what this work will attempt to discover.

Early usage of the term rape myth can be found in discussion about 'real rape' versus 'simple rape'[28]. What this work describes as 'real rape' is the stereotypical image of rape. The rape that we see in media portrayals. The rape which occurs in the dark of night, perpetrated forcefully by a stranger, where the woman vigorously fights back and runs to the police the moment, she is able. This rape is taken very seriously, it is the type to elicit outrage in criminal justice professionals and the public alike. The idea of 'real rape' and the sympathy it garners from the general population will be further examined when placing it within the concept of the hypothetical script. The term 'simple rape' references those rapes that do not necessarily stir a large amount of concern in the criminal justice system[29]. 'Simple rape' often portrays a rape in which the victim may have had some kind of relationship with the offender, there may be no weapon or violence or there may have been no physical resistance by the victim. Much research[30] would agree that these elements play into typical rape myths and often lead to complaints of this kind to be trivialised. However, 'simple rape' may be a confusing label to apply to these offences. The elements comprising 'simple rape' often make applying the law to such crimes much more ambiguous. Given the timing of Estrich's creation of the terminology, it was logical to construe these descriptions as 'simple rape' as it may have been more simply discounted by the criminal justice system as false or not as deserving of justice because there was some level of victim blame to be considered. In present day, given women's rights progression[31], complaints that would have been considered 'simple rape' back in the 1970's would not be quickly discounted as false today however, time has not made prosecuting these types of reports any less ambiguous for legal teams, judges and juries making them the opposite of simple.

[28] Susan Estrich, *Real Rape: How the Legal System Victimises Women Who Say No* (Harvard University Press 1976).
[29] Ibid.
[30] In addition to Estrich's work referenced above at n. 30, literature regarding the way in which rape complaints are trivialised continues to appear today, decades after the beginning of the women's movement. See: LeeAnn Kahlor and Dan Morrison, 'Television Viewing and Rape Myth Acceptance Among College Women' (2007) 56 Sex Roles., Rebecca Chennells, 'Sentencing: The Real Rape Myth' (2011) 23 Agenda.
[31] A general overview of women's rights movement can be found here: Carrie N Baker, *The Women's Movement Against Sexual Harassment* (Cambridge University Press 2008). A more contemporary look at what is being done in the present to advance women's rights in the digital age can be found here: Kaitlynn Mendes, Jessica Ringrose and Jessalynn Keller, '#Metoo and the Promise and Pitfalls of Challenging Rape Culture Through Digital Feminist Activism' (2018) 25 European Journal of Women's Studies.

In the table below are two lists containing the most common rape myths. One column represents myths primarily focused on victim traits and behaviours, the other contains myths focused on elements of the crime of rape itself. It is fairly representative of most stereotypes about rape and its victims; however, it is by no means exhaustive of all stigmas surrounding the topic. The list was sourced from the Crown Prosecution Guidance because the wider focus of this current work is the function of these myths in the courtroom setting, as will be discussed in later chapters. Additionally, this list, and this dissertation as a whole, is solely focused on female victims of rape and male perpetrators. This is not meant to imply that rapists are always male or that victims are always female. Male victims face additional unique stereotypes as do victims belonging to the LGBT community. Both of these populations would benefit from specific research into their own experiences in reporting rape and facing trial as a complainant, but this does not mean that these groups would not also benefit from the potential improvements set out here[32].

Victim-Focused Myths	**Crime-Focused Myths**
Scantily clad, flirtatious women provoke attack	Rape is a crime of overwhelming sexual desire and once a man starts, he cannot be stopped
Overly intoxicated women are asking for it	Rape happens between strangers
It is not rape if she did not cry out or fight back	Rape happens at night, down dark alleys
She doesn't act like a 'victim'	Rape is a violent act that leaves physical evidence
The sex was consensual but now she regrets it	Rapists are the 'other', identifiably different than the man next door
If she didn't immediately report, it probably wasn't rape	Rape allegations are often false

[32] Further reading on the experience of male rape victims can be found in: Mark A Whatley and Ronald E Riggio, 'Gender Differences in Attributions of Blame for Male Rape Victims' (1993) 8 Journal of Interpersonal Violence.; Kathy Doherty and Irina Anderson, 'Making Sense of Male Rape: Constructions of Gender, Sexuality and Experience of Rape Victims' (2004) 14 Journal of Community & Applied Social Psychology. Literature on the experience of victims identifying as part of the LGBT community can be found in: Sharyn J. Potter, Kim Fountain and Jane G. Stapleton, 'Addressing Sexual And Relationship Violence In The LGBT Community Using A Bystander Framework' (2012) 20 Harvard Review of Psychiatry.; Jaclyn E Miller, 'Mental Health Professionals' Perceptions, Attitudes, And Beliefs About Lesbian, Gay, Bisexual, And Transgender Rape Victims' (PhD, Massachusetts School of Professional Psychology 2013).

Women who invite men back to their homes are implying their intentions	
Women known to be very sexually active likely consented	
Prostitutes cannot be raped	

'Rape and Sexual Offences - Chapter 21: Societal Myths | The Crown Prosecution Service' (*Cps.gov.uk*, 2017)

Rape Mythology in Wider Society

The research dating back decades also considers the role of wider societal beliefs about sex and gender when examining the treatment of rape and rape victims in the criminal justice system[33]. Looking at the list of common rape myths above, it is clear to see that those who ascribe to such beliefs are likely to assign some level of blame to the victim. Many times, the crime-focused myths do not occur independently and at least one factor found in a victim-focused myth will be present. In context, these myths will often not be referred to outright in a trial but rather, they will be hidden within an ambiguous rape narrative. The jury decision becomes ambiguous when they must decide whether to believe the defendant or the alleged victim with little other evidence to aid them. Because of this, the jury in making their determination of truth in an uncertain situation it can become instinctual for a person to rely on previously held beliefs[34]. Modern society claims to detest rape and those who commit it, yet it does not appear that anyone can really decide what is meant by the 'crime of rape'. When set in, for example, a real-world acquaintance rape scenario it appears to be more difficult for the general public to decipher what is the crime of rape and what is an unfortunate case of 'mixed signals'[35]. What is meant here by acquaintance rape is an assault perpetrated by someone known to the victim such as a friend, classmate or date, it is important to the context of the current work as the majority of rapes are perpetrated by individuals known to the victim and it is easiest for outsiders to wonder about 'mixed signals' when the parties have some form of relationship[36].

[33] Martha R. Burt, 'Cultural Myths and Supports for Rape.' (1980) 38 Journal of Personality and Social Psychology.
[34] This reference to previously held beliefs in ambiguous situations is the human psychological tendency to rely on heuristics as a cognitive shortcut. This will be discussed in more depth later in chapter 1 however, more literature on heuristics and cognitive shortcuts can be found here: Philip M. Fernbach and Bob Rehder, 'Cognitive Shortcuts in Causal Inference' (2013) 4 Argument & Computation.; Lori Colwell, 'Cognitive Heuristics in the Context of Legal Decision Making.' (2005) 23 Forensic Psychology.
[35] Kate Harding, *Asking for It: The Alarming Rise of Rape Culture--and What We Can Do About It* (Da Capo Lifelong Books 2015).
[36] Claire R. Gravelin, Monica Biernat and Caroline E. Bucher, 'Blaming the Victim of Acquaintance Rape: Individual, Situational, and Sociocultural Factors' (2019) 9 Frontiers in Psychology.

The current research has focused on rape victim perception, as the issues faced by these victims appears to be, at least somewhat, unique when compared to victims of other crimes. Research has posited that sexual assault is more closely tied to broader social attitudes about the victim's conduct than any other criminal offence[37]. Additionally, it is argued that the attention on sexual assault has shifted away from the legal framework and toward the interaction between cultural norms and legal processes[38]. Should the public attitude toward rape uphold these preconceived notions that have come to be characterized as rape myths, it would prove very difficult to keep them out of trial proceedings. As many studies in social psychology will tell us, evidence exists to show that rape myths are widely held and effect media reporting about rape, victim reporting to authorities, decisions about the investigation and prosecution processes and jury deliberations[39]. Further empirical research has repeatedly demonstrated a relationship between the presence of attitudes underpinning rape myths and the tendency to 'downplay sexual violence against women by men'[40].

When exploring social attitudes relating to rape myths on a macro-scale, feminist scholars attribute such views to 'deep-rooted social traditions of male dominance and female exploitation'[41]. Many are taught masculinity and femininity from a very early age. When sexuality comes into the picture, it is the man who is expected to become the seducer and the woman is to be seduced. He must initiate the sexual encounters and dictate the direction in which they develop, the woman's job is simply to consent or refuse[42]. These types of beliefs appear normal to many, and by no means are incorrect. It is the inclusion of the belief that male sexual aggression is uncontrollable, and women must set limits on sexual activity so not to unleash such 'powerful forces' that causes this ideology to become problematic[43]. These ideologies track closely with the concept of sexual scripts, which will be further explored later in this chapter and throughout the work. The sexual script can include the idea that a woman will engage in *token resistance to sex,* when in reality she intends to engage in it, in

[37] Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap* (Hart 2008).
[38] Ibid.
[39] G Bohner and others, 'Rape Myth Acceptance: Cognitive, Affective and Behavioural Effects of Beliefs that Blame the Victim and Exonerate the Perpetrator', *Rape: Challenging contemporary thinking* (Willan 2009).
[40] Ibid., Heike Gerger and others, 'The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English' (2007) 33 Aggressive Behavior.
[41] Colleen A Ward, *Attitudes Toward Rape* (Sage 1995).
[42] Stevi Jackson, 'The Social Context of Rape: Sexual Scripts and Motivation', *Rape and Society* (Westview 1995).
[43] Ibid.

order to maintain the more subdued female sexuality[44]. The culmination of these kinds of ideals create the lens through which many might view a rape narrative in a trial setting, bringing what have come to be called rape myths into the courtroom.

Bearing the preceding discussion in mind, the definition of rape myths to be used here can be described as 'prescriptive or descriptive beliefs about rape that help deny, downplay or justify sexual violence'[45]. This definition then, outlines the ways in which rape myths can become problematic in the context of jury members. Should these attitudes leak into the jurors reasoning throughout the process, it may lead to exactly what the above definition warns of: downplaying or justifying the sexual violence they have just been told about. It may not be the legal system's job to educate the public however, it is the job of the legal system to ensure justice for victims and offenders alike. This job may consist of educating those members of the public it employs to decide rape cases in order to preserve justice alleged victims and protect them from unfair stereotypes being brought into the courtroom. It has been observed in recent years, prosecution attempts at countering elements of rape myths presented as evidence in front of the jury as well as judicial instructions to the jury before deliberation on the importance of avoiding stereotypes[46]. One such example of these attempts can be found in the judge's summing up in *R v D*[47], in which the jury is invited to consider why a rape victim might not immediately report to the police; a fact the defence relied heavily upon in their case, implying that the victim delayed reporting to give herself time to construct her story. The defendant was convicted and appealed based on the extent of the judge's comment in his summing up. The judge's summing up about rape and why a victim may delay reporting was quite extensive and contained the following passage:

> [Women who are raped] are often too traumatised or embarrassed to tell anyone what's going on, and a very serious aspect of the offence in those circumstances is that a woman feels trapped. She is, after all, in her own home, very often simply too ashamed and embarrassed to tell anyone that the person that she has brought into her home to share her life, be with her children, is now raping her. She won't

[44] Charlene L. Muehlenhard and Carie S. Rodgers, 'Token Resistance to Sex' (1998) 22 Psychology of Women Quarterly.
[45] Gerd Bohner and others, 'Rape Myths as Neutralizing Cognitions: Evidence for a Causal Impact of Anti-Victim Attitudes on Men's Self-Reported Likelihood of Raping' (1998) 28 European Journal of Social Psychology.
[46] Olivia Smith and Tina Skinner, 'Observing Court Responses to Victims of Rape and Sexual Assault' (2012) 7 Feminist Criminology.
[47] *R v D* [2008] EWCA Crim 2557, [2009] Crim LR 59.

> tell her neighbours, friends… even very close friends…children, still less the police, because of those factors which bring to bear[48].

In the context of the present discussion, this case appears as a step in a positive direction, especially as the Court of Appeal upheld the conviction and that decision has been taken as precedent. However, in reading the Court of Appeal decision it is noted that, while the judge had a right to make such statements, they were not measured enough to preserve even-handedness toward the defendant, citing that the passage reads 'like a prosecution closing speech'. The conviction was upheld due to other discrepancies in the defence counsel's story as being the most-likely source of the defendant's conviction. The precedent allowing judges to make these kinds of warnings in their summing up is truly a positive move. Most recently, guidance as to the types of warnings that might be given by judges in these types of trials have been outlined in the Crown Court Compendium; highlighting the various dangers that can lie in assumptions about sexual offences and the victims[49]. Examples of ways in which to address these assumptions are provided, many of which will be addressed later in this work. The difficulty lies in that the Crown Court Compendium still leaves it up to the judge to make a decision to issue warnings about these assumptions. If these kinds of statements could lead to grounds for an appeal will judges opt to make such statements, or will they be so measured in their speech that it may not provide effective protection against such myth? Such inconsistencies in these types of warnings can be examined through real trial observation, identifying patterns and frequency of warnings issued to juries by judges. More research and information about the practical applications of myths and existing protections against them in the trial setting will aid in our understanding of how this area of law can improve.

Trial Observation Studies

Trial observation studies and mock jury trials, seeking to better grasp the appearance of rape myths and stereotypes at trial and in deliberations have been performed a number of times. In one such study, researchers observed eight rape trials in England in 2010[50]. Looking through many of the previously conducted studies and government reports and training policies, their goal was to observe the current trial

[48] Ibid at para 6.
[49] David Maddison and others, 'The Crown Court Compendium: 20-1 Sexual Offences – The Dangers of Assumptions' (Judicial College 2020).
[50] Jennifer Temkin, Jacqueline M. Gray and Jastine Barrett, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2016) 13 Feminist Criminology.

atmosphere with regards to rape trials. A conservative approach to myth identification was taken only identifying rape myth use when counsel explicitly made generalisations about rape, victims, or perpetrators that were false or when such false generalisations were clearly implicit in the argument. Despite this conservative approach the researchers found that rape myths appeared frequently across all eight trials. The ways in which these myths were employed have been subdivided into three overarching themes: use of the 'real rape' stereotype to highlight where the prosecution case might differ, second they are used to discredit the complainant degrading her character and/or background and third, myths relating to specific facts of the case are used to invoke common stereotypes[51].

Rape myths did not go unchallenged in the trials, sometimes rebutted by the complainants during cross-examinations and sometimes challenged by the prosecution however it is noticed that this did not occur in every case. The fact that myths are repeatedly utilised by defence counsel, yet not caught and disputed each time by the prosecution is problematic[52]. This study draws into question the true level of protection afforded to complainants under the current laws. Even more troubling, judicial challenges reported in this study highlighted a definitive need for review. There was great inconsistency in judicial warnings regarding these stereotypes between trials[53]. Despite the Judicial Studies Bench Book available to judges at the time of this study, giving judges suggestions as to ways in which to instruct juries in order to combat certain myths that may have appeared during trial, the application of such was lacking[54]. There was little uniformity in how these illustrations, as they are referred to in the Bench Book, were applied. Some judges very successfully gave instructions to the jury as per these illustrations, some gave very vague suggestions surrounding them, some chose to say nothing at all and one judge opted to repeat Sir Matthew Hale's assertion that rape allegations are easy to make and difficult to refute[55].

The efficacy of these practices, while extremely positive in regard to progression, remains questionable when placed within the context of social attitudes and social psychology. As mentioned above, challenges to the appearance of these myths do occur in

[51] Ibid.
[52] Ibid.
[53] Ibid.
[54] Judical College, 'The Trial of Sexual Offences' (2011) <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/eLetters/CCBB_first_supplement_071211.pdf>.
[55] Temkin and others above at n 50.

trial, however they are less frequent than the instances in which the stereotypes are invoked. It is difficult to know why this is, however in the context of the following discussion exploring the psychology behind the employment of these beliefs, it may be that individuals expected to make such challenges might be missing myths that are hidden within the context of a complete narrative. Prosecutors, complainants and judges might, even subconsciously, ascribe to these myths themselves and therefore, not flag them as problematic when hidden in a logical case specific narrative. Cognitive shortcuts, to be explained further below, can cause the usage of these myths to be missed, as deeper reasoning will be skipped when your brain hears what it is expecting to hear[56]. In addition to possibly missing the opportunity to negate the presentation of misleading evidence, there is no recourse for keeping these ideas out of the jury room, should a juror carry them in. Unfortunately for researchers in England and Wales, real trials can be observed but real jury deliberations cannot. Mock jury studies are often conducted as an alternative in order to provide insight into how these ideas might be utilised in reasoning during jury deliberation. Below, studies of this type will be explored in an attempt to better understand how a jury might deliberate in rape trials.

Mock Jury Studies

It is extremely important to employ studies such as these when attempting to review the efficacy of the law, as it is only in the trial setting that such worth can be assessed. While trial observation studies provide us with valuable knowledge about how rape myths are presented and challenged by trial actors, they provide no insight into how these stereotypes might materialise in jury deliberation. Due to this fact, mock jury trials are the next best form of insight into how these beliefs might carry over into the jury room. Research into rape jury deliberation has shown that the more categorical, gut reactions to public surveys and polls are not necessarily replicated in a formal, though experimental, jury deliberation setting[57]. That being said, there are particular drawbacks of experimental mock jury settings as compared to a genuine jury deliberation that must also be considered before presenting each of the following studies. Social science researchers would measure how closely a simulated situation best matches its "rea'-world" counterpart through what they call its *ecological*

[56] Philip M. Fernbach and Bob Rehder, 'Cognitive Shortcuts in Causal Inference' (2013) 4 Argument & Computation.
[57] Emily Finch and Vanessa E. Munro, 'Lifting the Veil: The Use of Focus Groups and Trial Simulations in Legal Research' (2008) 35 Journal of Law and Society.

validity[58]. Factors in a mock jury simulation such as, the way in which evidence is presented (e.g. through a video of a full trial acted out by actors, through an audio recording of testimonies, or a written summary of the evidence), the diversity of the 'jurors' as a sample, and the underlying knowledge that no one will actually face sentencing depending on their verdict can affect the ecological validity of mock jury studies. There are also positive aspects to mock jury studies however, these simulations make it possible to alter singular variables in each trial, a way of creating a repetition that could not be done in the real-world equivalent. While it is important to note that members of the general public may partake in different cognition in a formal setting, such as that of a trial deliberation[59], the later discussion regarding the psychology of this type of reasoning will show the almost reflexive nature of previously instilled biases and how it is fairly consistent across many types of decision-making therefore, allowing us to draw still valuable conclusion from the following studies.

A further, particularly relevant, mock jury study used nine mock trial scenarios acting out a rape trial in front of a lay jury[60]. The goal of the study was to determine whether the assumptions "(1) that certain behavioural cues on the part of the complainant (including her failure to physically resist, delayed reporting, and calm appearance) adversely impact upon jurors 'perceptions of credibility; and (2) that expert testimony is a useful vehicle for addressing these inferential shortcomings in jurors' understandings[61]. Presenting differing variables while acting out a trial scene, the researchers aimed to decipher which, if any, factors when immersed in broader societal norms translate into elements of blame attributable to the complainant and how that translates into verdict. They hoped through identifying these more specific factors, the legal system would be able to deal with biases in deliberations more aptly in the future. The three primary elements tested in this study were the presence of evidence of resistance or injury to the complainant, the amount of delay in reporting, and the complainant's demeanour at trial and how, if at all, these factors impacted the perception of complainant credibility during jury deliberation[62]. The discussions surrounding these pieces of evidence in the mock deliberations were highly informative and extremely important to the

[58] David Breau and Brian Brook, '"Mock" Mock Juries: A Field Experiment on the Ecological Validity of Jury Simulations' (2007) 31 Law and Psychology Review.
[59] More research about the validity and value of mock juries can be found here: Richard L. Wiener, Daniel A. Krauss and Joel D. Lieberman, 'Mock Jury Research: Where Do We Go from Here?' (2011) 29 Behavioral Sciences & the Law.
[60] Louise Ellison and Vanessa E Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49 British Journal of Criminology.
[61] Ibid at p. 203.
[62] Ibid.

current work as these factors are, firstly, all pieces of common rape myths identified above (in order: it's not rape if she didn't fight back, it couldn't have been that serious if she didn't immediately go to the police, and she's not acting like a 'real victim' so she must be lying)[63]. Secondly, the recorded discussions in this experiment are as close as researchers are going to get to real insight into how eligible jury members discuss each piece of evidence they heard at trial, considering researchers are not allowed in real jury rooms under the Contempt of Court Act 1981.

Mock Jurors in this study, when discussing the presence of resistance or injury to the complainant (or lack thereof) often supported previous research findings that most people believe a visibly injured complainant's account over that of a seemingly uninjured woman[64]. The use of force has not been an element in the rape law of England and Wales since the nineteenth century however in this study many jurors cited the lack of physical bruising on the complainant they heard as being significant to their not guilty verdicts[65]. These assertions were made despite evidence of the victim using verbal resistance and subsequently becoming paralysed from fear and not offering any indication of positive consent, both elements considered clear enough resistance within the legal definition of the crime. It was said in this study "Their [the mock jury participants] commitment to the belief that a 'normal' response to sexual attack would be to struggle physically was, in many cases, unshakeable."[66]

It cannot be said that after a single study this type of reaction poses great danger to rape victims at trial however, studies examining real case outcomes in which the victim was physically injured or not display a similar trend. It has been shown that sexual assault claims in the absence of evidence of physical force and complainant resistance are significantly less likely to secure a conviction[67]. More concerning were the findings that even in the presence of evidence of bruising and scratches to the victim, some jurors were willing to offer alternative explanations for such injuries or proffered that a severe attack such as rape would have led to more serious injuries than bruises and scratches. As mentioned previously, there is no force requirement to establish rape in its legal definition and the evidence of discussions such as these in a jury room (especially a mock jury in which the freedom of a real defendant

[63] Estrich above at n 28.
[64] Ellison and Munro above at n 60.
[65] Ibid.
[66] Ibid at p. 206.
[67] Liz Kelly, Jo Lovett and Linda Regan, 'A Gap or a Chasm? Attrition in Reported Rape Cases' (Home Office 2005); Jennifer M. Brown, Carys Hamilton and Darragh O'Neill, 'Characteristics Associated with Rape Attrition and the Role Played by Scepticism or Legal Rationality by Investigators and Prosecutors' (2007) 13 Psychology, Crime & Law.

does not hang on the verdict) are somewhat alarming. The weight in which jurors assign certain pieces of evidence may not be occurring in the way in which the law intends, and it is for this reason that it might be time for revision.

It is not only physical resistance that has been shown to affect the jury deliberations. The delay in reporting created mixed results. Various suggestions about complainant motives behind their reporting times were made about both immediate and delayed reporting. In delayed reporting scenarios some responses included the complainant taking her time in creating her false story before going to the police, as well as criticisms of the victim for not immediately going to the police in order to preserve forensic evidence as most people are 'more savvy' about police procedures in today's time and the victim should have done more to help[68]. Additionally, some jurors took issue with immediate reporting, particularly in the 'paralysed by fear' scenario. Some took issue with the idea that a woman might freeze up during the assault but then immediately snap back to reality in order to immediately phone the police. Others suggested that many women would at least phone a friend or family member before the police and therefore, were also sceptical.

Unlike the physical injury evidentiary issues however, there were jurors that raised positive points about both timelines, showing a greater ability to see multiple perspectives surrounding issues in reporting time. Many jurors took the stance that immediate reporting was corroborating evidence of the victim's story as she would have had no time to make up any facts before the police took her statement. Additionally, few jurors argued that in cases of delayed reporting it is important to understand that we cannot predict how anyone (even ourselves) will react to trauma. Others drew attention to the fact that a delayed report may reflect the time a victim took in deciding what she will do next after such an event, she may need time to figure out if she will even report at all. While deliberations surrounding immediate/delayed reporting were slightly less negative towards the victims, such responses still suggest strong preconceived ideas about rape, and even, what happens after[69].

The final variable tested in this study was complainant demeanour. The complainant in each 'trial' appeared either calm, or emotional when giving her testimony. Overall, these results suggested that complainant's demeanour does affect assessments of her credibility however, not in any one consistent way. Many jurors contributed a calm demeanour as being cold and calculating, drawing suspicion regarding the victim's ability to remain calm while

[68] Ellison and Munro above at n 60.
[69] Ibid.

sitting in the same room as a man who allegedly raped her. Others suggested it could be a result of legal or police advice and still others suggested the woman could be using detachment as a coping mechanism. Similar mixed reactions were elicited from emotional complainants. Some jurors citing that, surely someone that emotional could not be lying. Others proposing that of course she could just a very good actress looking for sympathy.

The researchers make a very important point in saying: "the mock jurors appeared to have little understanding of the psychological effects and external pressures that could influence a rape complainant's demeanour in court"[70]. This statement demonstrates the impact psychology has in the courtroom. It is unreasonable to expect jurors to have any understanding of someone's psychology when going through a trial, however as this study shows, it clearly does impact the narrative jurors will draw from the individuals. The aim of this work is to understand what, psychologically, is going on in the jurors' minds when they are drawing these narratives. In understanding this, the law may take steps to better preserve a more neutral perception of rape victims when going in front of a jury. Chapter 4 of this dissertation will explore the potential use of expert psychological evidence as a means of educating jury members before the trial with scientifically validated psychological explanations debunking myths. Understanding how, psychologically, jury members are drawing conclusions is the first step in informing what information can be best used to debunk the previously discussed myths, aiming to neutralise biases in the jury room. Below, is a discussion of the psychology behind these beliefs, why they may be so pervasive and how they can influence the decision-making process.

The Psychology

There are two important ways in which psychology affects the current work, one, the social psychology behind the perception of rape, rape survivors, and rapists, and two, the cognition taking place in the minds of jurors hearing evidence in rape trials and how the brain translates it into reasoning. The social psychology of rape perception accounts for where the public's view of rape, and its actors, might come from, why these views have taken hold and how they may be changed or be affected through time. These psychological studies would aid in our understanding why or how rape myths may have come to take a place in society and why they persist in the minds of so many. Additionally, understanding the concepts explained below, will help inform the issues raised in the rest of the current

[70] Ibid at p. 212.

work. It is through this psychological lens that I will examine relevant legislation, presentation of evidence, and potential solutions to the issues identified in earlier chapters.

Cultural Scaffolding

All of the varying factors that may weigh on a person's mind when considering guilt or innocence in a rape trial might cause a person to rely on cognitive tools to make sense of everything. Before getting deeper into the ideas endorsed by cognitive psychology, a concept from education research must be highlighted. A term known as cultural scaffolding is often discussed in more recent rape myth literature[71]. Cultural scaffolding is the use of a person's own cultural language and experiences to aid in learning[72]. People are more receptive to new concepts when the presenter relates it to prior experiences or existing knowledge[73]. In the context of rape myth literature, research explains, rape and sex are so intertwined that the everyday normative forms of heterosexuality work as a cultural scaffolding for rape[74]. This can be likened to a traditional sexual script in that, specifically in rape trials, information presented that matches within such a script will be more willingly received by those who identify with such thinking.

In a trial observation study, it was repeatedly observed barristers talking about what is *normal* or what is *rational* however, the authors of this study argue that it is often overlooked that these two words are typically connected to more masculine ideals[75]. The use of the word *rational* is traditionally presented as fact in court despite being socially constructed[76]. These methods again bring back the problem with dichotomizing behaviour. A person is either rational or irrational, normal or abnormal however, a person's 'rational' behaviour often varies based on the context and the individual[77]. These types of practices make the presentation of rape myths that much more convincing as the barristers will be using them to build upon the common juror's prior cultural understandings: heteronormative relationships.

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[71] Nicola Gavey, *Just Sex? The Cultural Scaffolding of Rape* (Routledge 2005).; Olivia Smith and Tina Skinner, 'Observing Court Responses to Victims of Rape and Sexual Assault' (2012) 7 Feminist Criminology; Olivia Smith, *Rape Trials in England and Wales* (Palgrave Macmillan 2018).
[72] Geneva Gay, 'Preparing for Culturally Responsive Teaching' (2002) 53 Journal of Teacher Education.
[73] Faridah Pawan, 'Content-Area Teachers and Scaffolded Instruction for English Language Learners' (2008) 24 Teaching and Teacher Education.
[74] Nicola Gavey, *Just Sex? The Cultural Scaffolding of Rape* (Routledge 2005).
[75] Olivia Smith and Tina Skinner, 'Observing Court Responses to Victims of Rape and Sexual Assault' (2012) 7 Feminist Criminology.; Carol Smart, 'The Woman of Legal Discourse' (1992) 1 Social & Legal Studies.
[76] Carol Smart, *Feminism and the Power of Law* (Taylor and Francis 2002).
[77] Donald Nicolson, 'Taking Epistemology Seriously: 'Truth, Reason and Justice' Revisited' (2013) 17 The International Journal of Evidence & Proof.

As mentioned above, the early lessons about femininity and masculinity coupled with retaining more traditional sexual scripts, in which men initiate and drive sexual desires/encounters and women are in charge of consenting or preventing the arousal in the first place, creates a multitude of issues for the perception of rape victims. Should this be the construction of a person's cultural scaffolding, their understanding of the experience of a victim of rape will be flawed. Not only is this person misunderstanding victims of rape, they are misunderstanding the crime of rape itself. 40% of participants in a previous study felt that rape was primarily committed as a result of overwhelming sexual desire[78]. This is a large proportion of potential jurors who inherently misunderstand the crime at the outset.

Rapists are commonly seen as the 'other', sex-fiends or lusty men giving in to their pent-up sexual frustration. This is a powerful misconception and best corrected by Groth and Birnbaum in their summation:

> [R]ape is in fact serving primarily nonsexual needs. It is the sexual expression of power and anger. Forcible sexual assault is motivated more by retaliatory and compensatory motives than by sexual ones. Rape is pseudosexual act, complex and multidetermined, but addressing issues of hostility (anger) and control (power) more than passion (sexuality)[79].

While the psychology of the offender is not the focus of this work, it is often lacking in discussions about the crime of rape and is vital in forming a more complete picture of the problem. Many of the trial observation studies do not comment on whether the psychology of rape is addressed in the courtroom. Should this continue to be overlooked, the common perception that rape is about sex will continue to colour the minds of jurors and observers. "This erroneous but popular belief that rape is the result of sexual arousal and frustration creates the foundation for a whole superstructure of related misconceptions pertaining to the offender, the offense and the victim"[80]. This 'superstructure of misconceptions' is arguably the extensive list of rape myths still evident in many people's perception of rape and its victims today.

The fundamental building block in most victim-focused rape myths involves the victim being inappropriately sexual in one way or another. Given the above discussion about what rape is truly about, it would seem illogical that these types of

[78] Hannah McGee and others, 'Rape and Child Sexual Abuse: What Beliefs Persist about Motives, Perpetrators, and Survivors' (2011) 26 Journal of Interpersonal Violence.
[79] A. Nicholas Groth and H. Jean Birnbaum, *Men Who Rape: The Psychology of the Offender* (Plenum Press 1981) at p.2.
[80] Ibid.

myths continue to carry weight for so many individuals. However, the societally accepted, and often undisputed due to lack of rape offender research, beliefs continue to allow this type of cultural scaffolding to be built and passed on over time. It could even be argued that men are apt to agree with rape myths to confirm that feeling that male rapists are 'other' and that the two are categorically different from one another. Alternatively, women may be eager to believe in these types of myths to garner a sense of security. If the victim was dressed too provocatively or drank too much or invited a stranger back to her flat, then simple paths for other women to avoid the same fate were carved out. Offender psychology provides important background to identify the major fallacies in rape myth acceptance, it is not the focus. Further studying the psychology of individuals who do partake in some level of rape myth acceptance is the objective to better explain why the continued illustration of such myths at trial are so dangerous for certain jurors.

Attribution Theory

Assuming that the individuals being referred to in this section display some level of rape myth acceptance, it is what psychologically occurs in their minds when presented evidence alluding to one or more myths. One of the primary psychological theories used for rape perception research is attribution theory. "The primary purpose of attribution theory is to examine how individuals 'cognise' their social environment by examining factors influencing the social perceiver's judgement of the behaviour of self and others, and the cognitive mechanisms whereby the cause of behaviour is located within people themselves or in environmental/situational conditions"[81]. According to this, theory there are three main principles of attribution theory taking place when an individual is interacting with their social environment[82].

1) We gain an understanding of the social world by a process of rational causal analysis.
2) The function of the causal analysis is to narrow the range of causes to internal or external loci.
3) Humans are rational and logical problem solvers. People will make attributional judgements by assessing cause and effect between two variables.

Applying these factors to the current study, it would paint a picture of jurors building their understanding of their world/community through simply living in it as such and functioning

[81] Fritz Heider, *The Psychology of Interpersonal Relations* (Wiley 1958).
[82] Ibid.

as a member of society. They then would undertake a causal analysis of the events being presented to them in a rape trial and attributing responsibility to either the actors or the environment. Finally, jurors would use rationale and logic to aid in their analysis of the variables and attribute responsibility. As it has been proffered that, generally, there exists little understanding about underlying motives of perpetrators of rape, it would follow that the cause and effect analysis might fall upon the victim. Framing this type of reasoning within a common rape myth it may resemble something like this: a juror is brought up in society with traditional values, ascribing to heteronormative ideals (e.g. a woman should not be 'overtly' sexually active), as jury member the juror reduces the factors heard in court down to being attributable to the environment or to the human, that juror then uses their logic to make this cause and effect attribution, leading the juror to attribute responsibility to the complainant as she should not have been overtly sexual based on their previous social understanding. It is worth mentioning that this is a very basic explanation and many factors will play into a person's reasoning process such as unique personality disposition and cognitive and motivational biases with everything happening in a very short span of time[83]. Furthermore, this information should not be viewed as an indication of widespread willingness to attribute more blame to victims over offenders, it simply is meant to study what aspects might increase victim blame more than others[84].

The Defensive Attribution Hypothesis emphasises further relevant activity, allowing people to increase victim blaming in order to decrease their similarities with the victim as well as decrease their perceived likelihood of suffering a similar fate[85]. In the context of this theory, rape myth acceptance serves an ego-defensive and self-protective purpose, resulting in biases in the attribution process leading to more blame getting directed at the victim away from the perpetrator[86]. Combining this theory with the data collected in the mock jury study, it seems highly likely that some participants were undertaking this type of processing. Instances in which, seemingly female, participants spoke about what they would have done differently had they been in the complainant's place suggests, on some level, an attempt to distance themselves from the situation the complainant had been subjected to[87]. This type of

[83] Edward Ellsworth Jones and Richard E Nisbett, 'The Actor and the Observer: Divergent Perceptions of the Causes of Behavior' [1971] Motivation.
[84] Paul Pollard, 'Judgements About Victims and Attackers in Depicted Rapes: A Review' (1992) 31 British Journal of Social Psychology.
[85] Kelly G. Shaver, 'Defensive Attribution: Effects of Severity and Relevance on the Responsibility Assigned for An Accident.' (1970) 14 Journal of Personality and Social Psychology.
[86] Irina Anderson, Geoffrey Beattie and Christopher Spencer, 'Can Blaming Victims of Rape be Logical? Attribution Theory and Discourse Analytic Perspectives' (2001) 54 Human Relations.
[87] Ellison and Munro above at n 60.

processing is understandably useful for jurors, in an exercise to determine what believable as well as what was reasonable, a person may wish to examine how they think they might have acted in that situation. The problem arises when, even subconsciously, they begin to try to distance themselves from the actors as a defence mechanism, leading to attributing some level of blame to the victim, especially when this act of distancing might push the victim closer to fitting into a common rape myth schema.

Hypothetical Scripts

One reason many rape myths remain prevalent in society, is their ability to match up to preconceived ideas about what happens before, during, and after rapes and how each person would act throughout. While much research exists to explain the wide breadth of reactions to be had after a trauma such as rape, it would not make up common reading material or topics of conversation within the general public. Many people would never have to confront any flaws in their beliefs about what rape is and who perpetrates/falls victim to it. These ideas, a preconstructed story about an event, would be known as a 'script'. A script is a mental representation of an event, imagined in a way so that it contains a logical series of events[88]. Our individual or societal expectations build the event in our minds through a serious of if-then events[89]. Many times, scripts are made up of ideas about what should take place mixed with ideas about what would be socially expected[90].

A further mock jury study identified many statements that would otherwise indicate a certain level of rape myth acceptance, were instead set in the context of scripts[91]. Faced with a trial scenario in which presence of consent was the primary question, jurors were then asked to deliberate. Similar to ideas found in the defensive attribution hypothesis above, many jurors (including women) asserted that the woman should have known what her actions were implying[92]. The researchers here found that many jurors were eager to cite that it is common knowledge that a man's sexual expectations are inevitable and that in itself provides a certain level of justification for the events. Conversely, a woman who wishes to convey her

[88] Robert Abelson, 'Script Processing in Attitude Formation and Decision Making', *Cognition and social behavior* (Lawrence Erlbaum 1976).
[89] Alison P Lenton and Angela Bryan, 'An Affair to Remember: The Role of Sexual Scripts in Perceptions of Sexual Intent' (2005) 12 Personal Relationships.
[90] Barbara Krahé, Steffen Bieneck and Renate Scheinberger-Olwig, 'The Role of Sexual Scripts in Sexual Aggression and Victimization' (2007) 36 Archives of Sexual Behavior.
[91] Louise Ellison and Vanessa E. Munro, 'Of 'Normal Sex' and 'Real Rape': Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' (2009) 18 Social & Legal Studies.
[92] Anderson and others above at n 86.

lack of consent must do so forcefully and repeatedly in order to have performed her expected duty in the context of scripts[93].

Many of the findings in the sexual script mock jury study, found a prominent result in jurors' belief in male sexuality as uncontrollable[94]. Research into the offenders of rape, as previously noted, warn of the dangers of operating under these kinds of misconceptions: "To regard rape as an expression of sexual desire is not only an inaccurate notion but also an insidious assumption"[95]. A grave warning for a serious threat posed by the ease with which a shift in blame can occur. Male sexuality was one of the only (mostly) uniform ideas found within what can be interpreted as participants' scripts. Evidence regarding location of the sexual activity, even in the confines of a flat, the time spent together before the alleged rape, the level of intoxication and the post-offence behaviour all materialised in different ways in different individual scripts. These results are not entirely surprising considering the construction of scripts is composed of personal experience as well as normative values[96]. The results of the study suggest that scripts are neither as factually grounded nor clearly definitive of what 'should' and 'shouldn't' occur when mapped onto real life crime events[97].

Difficulty further arises in the use of scripts in the context of the legal tests for presence and belief in consent. Relying upon the concepts of freedom, capacity and reasonable belief in consent found in the legal definitions in the Sexual Offences Act 2003, scripts would colour jurors' judgements based on personal experience and knowledge of modern behaviour and human nature[98]. Recall the previous discussion regarding 'real rape' and 'simple rape', one can be called *real* as it is the script most often associated with rape[99]. As evidenced by the preceding research, there is little proof that this concept of 'real rape' has lost much hold over society's ideas about what rape is, who commits such acts, and who falls victim to it.

Questioning *Myth*

The prevalence of rape myths and even their very existence is not unchallenged. Despite a breadth of literature regarding rape myths and their function in society and the

[93] Krahe and other above at n 90.
[94] Ibid.
[95] A. Nicholas Groth and H. Jean Birnbaum, *Men Who Rape: The Psychology of the Offender* (Plenum Press 1981) at p.2.
[96] Abelson above at n 88.
[97] Krahe and others above at n 90.
[98] *R v Olugboja* [1982] QB 320.
[99] Estrich above at n 28.

criminal justice system, critiques claiming that the prevalence and effect of rape myths is overstated. It is argued that feminist researchers, by propagating these 'myths', are simply creating 'myths about myths'[100]. This theory goes further, in explaining that the creation of rape myth research was initiated by feminist scholars in a covert bid to progress a singular feminist vision 'under the guise of tackling clear-cut well-defined rape myths'[101].

It is extremely important to be critical of research and question any underlying motives for its performance and findings, however in the case of the previously mentioned criticisms, many of conclusions are drawn based on a the writings of Donald Dripps, whose work is not necessarily part of the group consensus with the body of rape myth literature[102]. Dripps asserts that problems arise in rape law because there is a divide between 'elite' opinion and 'popular' opinion about sexual and gender roles. 'Elite' opinion is defined as the celebration of autonomy (including female autonomy). Those holding this opinion would be less likely to propagate rape myths or victim blame due to 'non-traditional' female sexual behaviour. 'Popular' opinion regards male sexual aggression as natural and female sexual activity as inappropriate and vulgar[103]. This assertion serves as a cornerstone of an argument against the validity of rape myth research, making it out to be problematic. Not only does this statement attempt to a stark divided between those who celebrate female autonomy and those who support male dominance, it also devalues the general public's opinions and beliefs[104]. The complexity of sexual violence and human reaction to it cannot be dichotomized into one or other. Attempts to fit reactions and attitudes towards rape into one of two categories, and the issues that come along with such at trial, will be discussed further.

A further question about the legitimacy of rape mythology accompanies what is often called the *coffee myth*. The coffee myth commonly states that should a woman invite a man into her home for coffee after a date that are interested in sex and therefore any following sexual activity is likely consensual[105]. It is argued that an invitation to coffee at

[100] Helen Reece, 'Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?' (2013) 33 Oxford Journal of Legal Studies.
[101] Ibid.
[102] The criticisms addressed here come from Helen Reece as cited in the note above. Her work is drawing from the work of Donald Dripps found in Donald Dripps, 'After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?' (2008) 57 Akron Law Review. Further, the questioning of Reece's arguments is found in Joanne Conaghan and Yvette Russell, 'Rape Myths, Law, and Feminist Research: 'Myths About Myths'?' (2014) 22 Feminist Legal Studies.
[103] Donald Dripps, 'After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?' (2008) 57 Akron Law Review.
[104] Reece above at n 100.
[105] Ibid.

home, after a date, does in some way socially signal consent to sex, as so many regard it as such[106]. The argument here is, if so many interpret this coffee invitation as code for sex then, the coffee myth is not really a myth. The best way to learn how women consent to sex is to find how people say women show consent to sex[107]. Should they respond that the coffee invitation shows consent, then that must indicate how women consent to sex. Such evidence of consent then must mean that if the later sexual advance was not consensual there must have been a lack of clarification by the woman also known as "sexual miscues"[108].

There are a multitude of factors that create confusion around this kind of reasoning. For those who adopt traditional sexual scripts, women may put themselves into positions that allow them to passively initiate sexual activity, like inviting a man in for coffee[109]. Adopting a traditional sexual script would mean that woman would be less forthcoming with her sexual desires, believing men to be the sexual aggressors and therefore signalling her interest, but allowing the man to actively pursue it[110]. Alternatively, this type of reasoning ignores the fact that consent can be revoked at any time, an invitation in for coffee is not a pass to ignore negative signals later[111].

A further issue arises when considering all of this placed within the legal context requiring a *reasonable belief* in consent in section 75 of the Sexual Offences Act 2003. What is reasonable and how are jury members determining this? In the coffee myth scenario, one might assume that a reasonable person would take steps to ensure their interpretation of the signals is correct before proceeding with any type of sexual act[112]. On the contrary, should someone following a traditional sexual script hear a story like this and the woman maybe never says yes (but has signalled what would be considered a yes in traditional myths) and she also is not clear in saying no (and men are meant to be more sexually forward) would it be considered reasonable if the man did not stop and check his interpretation? These types of contextual cues may alter what is deemed reasonable to different individuals depending on their internalised sexual script. These differences and expectations become a serious issue during rape trials. When jurors must be sure beyond a

[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] David Gurnham, 'A Critique of Carceral Feminist Arguments on Rape Myths and Sexual Scripts' (2016) 19 New Criminal Law Review.
[110] Michael W. Wiederman, 'The Gendered Nature of Sexual Scripts' (2005) 13 The Family Journal.
[111] Smith and Skinner above at n 75.
[112] Maddy Coy and others, ''Sex Without Consent, I Suppose That Is Rape': How Young People in England Understand Sexual Consent' (Office of the Children's Commissioner 2013).

reasonable doubt that the complainant did not consent and the defendant's argument was that he believed there was consent, should the scenario even remotely resemble anything described by a traditional sexual script, a defendant's claim to have believed there was consent suddenly becomes a lot more reasonable, preventing a guilty verdict.

Some research has suggested that public attitudes toward rape victims have relaxed in recent years, however the debate regarding whether sending mixed signals affords some responsibility to the victim of rape, is ongoing[113]. All of this reveals the subtle distinctions to be made in understanding rape myths and the way they are processed by the public are much more complex than many would believe[114]. In practical terms, this cognitive processing, minor belief differences and the retention of more traditional gender roles in sexual situations becomes very important in the trial setting and the creation/interpretation of sexual offence legislation. The following chapter will fist examine the treatment of rape as a crime, historically and into the present. The evolution of the sexual assault legislation and its interpretation in court cases will then be explored, utilising the psychological research discussed here to best inform where improvements in reform might be made to future legislation.

[113] Miranda Horvath and others, 'Connections and Disconnections: Assessing Evidence, Knowledge and Practice in Responses to Rape' (Government Equalities Office 2010).
[114] Coy and others above at n 112.

Chapter 2: Rape Shield Legislation: The Legal History, Today and International Comparators

Following the previous discussion examining rape myths and public perception of rape, its victims and its perpetrators, the laws and its language defining rape and its consequences must be added to the analysis. The common law and multiple pieces of legislation have defined what rape is and how it should be prosecuted through history. The wording and considerations made in such legislation can provide insight into society's treatment of sexual autonomy and freedom, rape and its survivors through time. In this chapter, the definition of rape and the definition of consent found in various pieces of legislation will be highlighted. These definitions will be taken from the common law as well as, the Sexual Offences Act 1956, the Sexual Offences (Amendment) Act 1976, and the Sexual Offences Act 2003.

Additionally, legislation dictating appropriate treatment of complainants of rape in cross-examination, often referred to as rape shield legislation, will be explored. The Youth Justice and Criminal Evidence Act 1999 (YJCEA) will serve as the primary source of discussion of rape shield legislation; however, the stalled Sexual Offences (Amendment) Bill 2016-17 and the Domestic Violence and Abuse Bill 2019 will also be considered for their potential efficacy to tackle pressing issues should either re-emerge in future Parliaments. First this chapter will undertake an examination of the legislation through recent history. This will attempt to provide an understanding of the law's treatment of the crime of rape, its victims and its perpetrators. Next an inspection into the interpretation of these words in the trial context will attempt to highlight the ways in which the information provided in the previous chapter is linked to the interpretation of the written law and why that can create difficulty in practice.

Rape Shield Legislation in England and Wales

At present, the primary provision identifiable as rape shield legislation for England and Wales can be found in the Youth Justice and Criminal Evidence Act 1999 (the YJCEA). Specifically, parts of this legislation act to 'shield' victims from cross-examination about previous sexual history, as per the typical definition of rape shield legislation mentioned above. For as long as rape has been recognised as a crime through most of history, the sexual history evidence of its victims has played its own evolving role. For much of early history,

rape was seen as a property crime between men, with women treated as the stolen or defaced property[115]. A crucial element to the severity of punishments for rape at this time was often the woman's virginity. If a woman was yet to be married, and therefore still a virgin, it was seen as a grave crime against her father to defile her in such a way, essentially devaluing the worth of the woman, depriving the father of his rightful bride price[116]. The punishment for this crime, at certain points in history, was death or dismemberment, at other times it included castration and conversely, in other definitions the punishment was two years imprisonment, fines or compensation to be paid to the husband or father of the victim[117].

While less focused on reducing a woman's credibility, her sexual history (depending on the time period and wording of the current law) would determine if the crime of rape was even possible against a specific woman or how severe the punishment should be as weighed against the purity of the victim. This idea of a woman's sexual history determining her 'rape-ability' continued to feature later into history[118]. In the 18th century, a man who had beaten and raped a woman launched the defence that because the woman in question was a 'streetwalker' she was his to take[119]. This defence was successful and marked a standard of men's entitlement to 'insatiable' women[120].

Historical views regarding the use of sexual history evidence have not been uniformly treated in the way outlined above. In *R v Riley*[121], Lord Coleridge stated that as the issue in the case was to prove whether or not there had been an attempt to rape made by A, evidence of a complainant's previous connection with B and/or C is not relevant. He further explained his reasoning outlining that not only does the evidence *not go directly* to the point in issue in the trial, but it would cause hardship and be unfair to the woman. It was too recognised, that not only was it unfair to the individual complainant to admit this type of evidence, it could have broader implications leading to deprive 'unchaste' women of any protection from the courts against crimes of this type[122]. This, unfortunately, did not create a common law blanket ban on third party sexual history evidence in rape trials moving forward. The

[115] Susan Brownmiller, *Against Our Will* (Penguin 1975).
[116] Ibid.
[117] Ibid; Keith Burgess-Jackson, *Rape: A Philosophical Investigation* (Dartmouth Publishing Company 1996).
[118] Olivia Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Palgrave Macmillan 2018).
[119] Jack Farrell, 'Vixens, Sirens and Whores: The Persistence of Stereotypes in Sexual Offence Law' (2017) 20 Trinity College Law Review.
[120] Ibid.
[121] R v Riley (1887) 18 QBD 48.
[122] Ibid.

discussion below will explore how this type of evidence continues to appear in trials historically and into the modern day. This has been through legislation that allowed judicial discretion in admitting it, or case law providing a different interpretation on the more restrictive laws later enacted.

The Sexual Offences Act 1956

The Sexual Offences Act 1956 simply states 'it is a felony for a man to rape a woman'[123]. There are provisions explaining the illegality of 'procuring' women by threats, false pretences, or administration of drugs however, there is no statutory definition of the word rape specifically[124]. The law of rape, at this time, lacked both a definition of what rape was, but also what role the concept of consent was to play. The lack of consent was meant to be demonstrated by the presence of evidence proving intimidation, incapacitation by drugs or alcohol, or deception by the defendant as to their identity during intercourse[125]. Further, these provisions provided no protection to complainants during cross-examination. Under these laws, defence counsel was free to cross-examine complainants about any sexual history evidence with the defendant and anyone else[126]. Evidence meant to demonstrate a complainant's promiscuity, sexual 'immorality' or past prostitution was admissible as relevant to the issue of consent[127]. As this evidence was to an issue of the case it would not be considered an undue imputation on the complainant's character and therefore the defendant was safe from any questions pertaining to his previous convictions or sexual history[128].

Due to rising criticism, the Report of the Advisory Group on the Law of Rape (Heilbron Committee), was formed to investigate the shortcomings of the operation of rape law and the treatment of consent in rape trials[129]. This analysis was primarily done through a thorough examination of the ruling by the House of Lords in *DPP v Morgan*[130]. In this case, Mr Morgan invited three friends to his home to have sexual intercourse with his wife. He informed them that she would struggle against them as it excited her, but she would submit to the intercourse. Arriving at his home, Mr Morgan pulled his sleeping wife from their bed and

[123] Sexual Offences Act 1956 s1(1).
[124] Sexual Offences Act 1956 s2(1), 3(1) & 4(1).
[125] 'Rape and Sexual Offences - Chapter 3: Consent | The Crown Prosecution Service' (*Cps.gov.uk*, 2017) <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-3-consent>.
[126] Zsuzsanna Adler, 'Rape- The Intention of Parliament and Practice of the Courts' (1982) 45 The Modern Law Review.
[127] Ibid.
[128] Criminal Evidence Act 1898 s.1(f)(ii).
[129] 'Report of the Advisory Group on the Law of Rape Cmnd.6352' (Home Office 1975) <https://www.ncjrs.gov/pdffiles1/Digitization/37318NCJRS.pdf>.
[130] DPP v Morgan (1975) 61 Cr App R 136.

he and the three other men dragged her to another room all while she was fighting and screaming to her sons to call the police. All three men proceeded to rape Mrs Morgan and then her husband followed after. Immediately following the event, Mrs Morgan drove straight to the hospital and made a complaint of rape. All of the men were subsequently convicted of rape and sentenced to four years imprisonment, with Mr Morgan receiving a ten-year sentence[131].

Upon appeal, it was argued that the men could not be convicted of rape, as they held a genuine belief that Mrs Morgan was consenting and the 'reasonableness' of such a belief did not matter[132]. While the existence of a genuine belief in consent would demonstrate that the prosecution was not successful in proving the *mens rea* for the crime and therefore must result in an exoneration, the House of Lords emphasised that the reasonableness of such belief was not to be considered wholly irrelevant. This assertion preserved the convictions of the men in *Morgan* but was tempered by the further explanation that the reasonableness of belief is but only one factor, which the jury should take into account when deciding whether the belief is genuine[133]. They should draw all relevant inferences from all of the evidence presented but reasonableness is not a legal requirement[134].

Just months after the decision in *Morgan*, critics of the former decision were proven justified in their fears, in the decision in *R v Cogan*[135]. Here, Mr Cogan was tried alongside his co-defendant Mr Leak for the rape of Mrs Leak. Similar to *Morgan*[136], the day following an altercation with his wife, Mr Leak brought Cogan home the bar and told his wife that Cogan wanted to sleep with her. Under threat, Mr Leak forced his wife upstairs where both men proceeded to rape her. In court Mr Leak admitted that he intended Cogan to rape his wife as punishment for their previous argument. Cogan asserted that he believed Mrs Leak was consenting, despite admissions by both men that Mrs Leak was sobbing during the ordeal and Cogan acknowledging that he never directly addressed Mrs Leak as to whether or not she was consenting. Mr Leak was convicted of aiding and abetting the rape[137], and Mr Cogan was convicted of rape. The trial judge asked the jury to find whether any belief in consent Cogan

[131] Ibid.
[132] Ibid.
[133] Ibid.
[134] Heilbron Committee above at n 129.
[135] R v Cogan (1975) 2 All E.R. 1059.
[136] Morgan above at n 127.
[137] Mr Leak could not be charged with rape because of the marital rape exemption (*R v Clarence* (1889) 22 QB 23).

had was based on reasonable grounds. The jury decided that they did believe that Cogan held a genuine belief however this belief was not based on reasonable grounds. Mr Cogan's conviction was reversed on appeal as the Court Appeal citing *Morgan* found that the simple fact that the jury believed Cogan's belief in consent was genuine, he must go free[138].

Around this time, the Advisory Group of the Law on Rape (Heilbron Committee) released their report outlining their recommendations. These recommendations included the creation of a statutory definition of rape, emphasising lack of consent as the 'crux of the matter' rather than violence, among others[139]. The Committee also sought to make clear that while belief in consent need not have a legal 'reasonableness' test, the lack or presence of reasonable grounds for belief should be considered alongside all of the evidence in jury deliberations. Additionally, the Committee recommended that sexual history evidence of the complainant with men other than the defendant should be inadmissible except with leave granted by the trial judge guided by principles laid out in legislation. The recommended guidelines to be included in any subsequent legislation, outlined that the judge must be satisfied that the introduction of or cross-examination about evidence pertaining to the complainant's past sexual history with individuals other than the accused

a) that this evidence relates to behaviour on the part of the complainant which was strikingly similar to her alleged behaviour on the occasion of, or in relation to, events immediately preceding or following, the alleged offence; and
b) that the degree of relevance of that evidence would to issues arising in the trial is such that it would be unfair to the accused to exclude it[140].

The Sexual Offences (Amendment) Act 1976

Following the release of the aforementioned report, a private members bill, that is a bill introduced by a legislator who is not acting on behalf of the executive was introduced, and most of these recommendations were very closely adhered to. However, this was soon met with criticism primarily arguing that the proposed legislation tips the balance too far in favour of complainants[141]. Members of Parliament were of the view that a woman's sexual history was frequently relevant to consent. Additionally, it was agreed by many that a woman's sexual reputation was relevant to the credibility of her complaint. The proposed

[138] Cogan above at n 135.
[139] Heilbron Committee above n 129.
[140] Ibid at p. 23-24.
[141] Adler above at n 126 at p. 667.

clause regarding these topics was redrafted to reflect such concerns and eventually the final version was passed, leading to the Sexual Offences (Amendment) Act 1976[142].

Under this new legislation, a man is defined as having committed rape if he has unlawful sexual intercourse with a woman who at the time does not consent to it; and at the time he knows she does not consent to it or is reckless as to whether she consents to it[143]. It is outlined that whether or not the man had reasonable grounds to believe in consent is a matter to be considered in conjunction with all other evidence in the trial and not as a piece of evidence on its own[144].

These provisions emphasised the importance of lack of consent to the *actus reus* for the crime of rape and a knowledge of, or disregard for this lack of consent as the core of the *mens rea* needed to be proven to find an accused guilty. The difficulty for the prosecution under this law would be proving whether a man intended to have sexual intercourse without consent (or was reckless to whether consent was present) and the lack of reliance on an objective test for whether a defendant's claimed belief in consent was reasonable or not. It is not only the lack of a legal requirement for the jury to consider the reasonableness of a defendant's belief in consent, the new legislation is lacking in protection for alleged victims from ways in which the defence may try to prove a belief was genuine in cross-examination. Section 2 of the Sexual Offences (Amendment) Act 1976 provides that no evidence of or cross-examination about a complainant's sexual history with anyone other than the defendant may be adduced without leave being granted by the trial judge. The trial judge must be satisfied that it would be *unfair* to the defendant to exclude such evidence or questions when granting leave[145].

The operation of Section 2 was examined in multiple studies after its enactment, revealing some continuing problems for complainants and their protections from inappropriate cross-examination. One such study observed 50 rape trials in the Central Criminal Court in 1978-79[146]. It was found through these observations that applications under Section 2 to include evidence of the complainant's sexual history were made in 40 percent of trials. The grounds for these applications commonly fell into one of three categories: the evidence was relevant to the complainant's credibility, to some issues at trial (not consent), or relevant to the issue of consent[147]. Applications claiming relevance to the issue of consent

[142] Ibid. at p.667.
[143] Sexual Offences (Amendment) Act 1976 s.1(1).
[144] Ibid s.1(2).
[145] Ibid s.2(2).
[146] Adler above at n 126 at p.665
[147] Ibid. at p. 668.

made up the majority accounting for 80 percent of applications before the trial judge. Ultimately, three quarters of the applications made were either granted or partially granted, allowing the defence to question complainants about their sexual history or part of such[148].

The extreme flexibility afforded to judges through the discretion granted by Section 2 was the source of a great deal of inconsistency regarding its application. In *R v Lawrence*[149], the judge explained that in determining whether it was fair to allow or exclude sexual history evidence it must be considered whether such evidence, if allowed, would change the jury's view of the complainant's evidence if the question(s) were not allowed. This is in contravention with intent of Parliament in creating such a protection as outlined by the Heilbron Committee, any sexual experience (even if unrelated to the case) deemed inappropriate may elicit a critical response from the jury, changing their view of the complainant (and her evidence)[150]. The Court of Appeal recognised the problem with inconsistent application of section 2 in its ruling in *R v Viola*[151], and for the first time ruled the trial judge erred in excluding evidence of a complainant's sexual past. Despite asserting that rulings under Section 2 are a matter of judgement rather than discretion and that the trial judge in this case had made the wrong judgement, the Court resisted setting out any clear guidelines for judges in applying this discretion[152].

Without this clarity rape conviction rates experienced a dip into the 1990s. In 1977 32% of reported rape cases ended in a conviction or caution. This number fell to 24% in 1985 and further to only 9% in 1997[153]. In 1999, the conviction rate for reported rape cases was only 7.5%[154] . The Home Office recognised the need for reform of these laws in 1999 and formed the Home Office Review Team to examine sex offences law in England and Wales[155]. Around the same, the use of sexual history evidence at trial was being reviewed in the Parliamentary debates surrounding the later enacted Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999).

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[148] Ibid. at p. 671.
[149] R. v. Lawrence [1977] Crim.L.R.
[150] Heilbron Committee above at n 129.
[151] R. v Viola [1982] 1 W.L.R. 1138.
[152] Above at n 125.Adler at p.672
[153] Jessica Harris and Sharon Grace, 'A Question of Evidence? Investigating and Prosecuting Rape in the 1990S' (Home Office 1999).; Liz Kelly, 'A Research Review on the Reporting, Investigation and Prosecution of Rape Cases' (Criminal Justice Joint Inspection 2002) https://www.justiceinspectorates.gov.uk/cjji/inspections/joint-inspection-into-the-investigation-and-prosecution-of-cases-involving-allegations-of-rape/ at p. 13.
[154] Liz Kelly, 'A Research Review on the Reporting, Investigation and Prosecution of Rape Cases' (Criminal Justice Joint Inspection 2002) https://www.justiceinspectorates.gov.uk/cjji/inspections/joint-inspection-into-the-investigation-and-prosecution-of-cases-involving-allegations-of-rape/ at p.13.
[155] H. Power, 'Towards a Redefinition of the Mens Rea of Rape' (2003) 23 Oxford Journal of Legal Studies at p. 380.

The sexual history provisions found in the (future) YJCEA 1999 raised considerable debate in Parliament during its readings. Proposals included guidelines dictating in legislation under what circumstances a complainant's sexual history will be allowed in cross-examination, specifying criteria that must be met for evidence of this type to fit into one of the gateways for admission into trial. The Bill kept the pretrial application process found in Section 2 of the Sexual Offences (Amendment) Act 1976. The opinions expressed by the Members of Parliament demonstrate the stark diversion in beliefs about sexual history evidence and its relevance in trial.

MPs made arguments for the use of sexual history evidence citing Article 6 of the European Convention on Human Rights (ECHR), as well as going as far as to suggest that it is important propensity evidence. Mr Elfyn Llwyd protested that the bill, in some respects, "flies in the face of Article 6 of the ECHR"[156]. A concern that would be revisited by the Court of Appeal in 2002 and discussed below in *R v A*[157]. Mr Llwyd explained his concerns about the Bill possibly violating Article 6 by limiting the scope in which defence counsel can cross-examine complainants and 'test the veracity' of their evidence[158]. Mr Hogg (a practising barrister by trade) added to these concerns asserting that 'the most important person in a criminal case is the defendant'[159]. He further explained that the purpose of a criminal court is to ensure a fair trial and ensure the case is proved beyond a reasonable doubt, which is not quite the same as trying to determine the truth[160].

The arguments against safeguarding complaints from cross-examination about their sexual history in legislation also included statements echoing sentiments about propensity from decades before, mentioned above. Following a discussion by Mr Straw explaining the difficulty facing prosecutors, specifically in cases involving acquaintance-rape where consent is the primary question rather than offender identity, Mr Hogg, again, spoke about sexual history being relevant *especially* in cases involving consent. He here stated 'if a complainant has a propensity to promiscuous behaviour, that fact may be relevant to the issue of consent and therefore should be a matter to go before the jury. Additionally, the same idea applies to a propensity to specific sexual practices, these too can aid in the decision as to whether the prosecution has proved lack of consent[161]. These ideas harken back to the reasoning

[156] HC Deb 15 April 1999 vol 329 col385-458.
[157] R v A [2002] 1 AC 45.
[158] HC Deb above at n 156.
[159] Ibid.
[160] Ibid.
[161] Ibid.

employed by judges (and defence counsel in applications) that created the calls for reform in this area in the first place[162].

Following the same logic, Mr Roger Gale expressed further issues with the sexual history evidence and endangering the fairness of the trial for defendants. He cites that that convictions are too hard to overturn to justify creating such risks that excluding this type of evidence would create[163]. He expounds further that men in the dock for rape are immediately guilty and the accuser a victim. Revisiting, studies outlined in Chapter 1 of the present work, it can be said this is not always the case. Specifically, in cases where consent is the primary issue, the presentation of certain evidence is liable to create negative views of the accusers therefore discrediting them[164].

The other side of the debate also mimics previous attitudes expressed by, arguably fewer, legal practitioners of the past. MPs including, Angela Smith, Harry Cohen, and Teresa Gorman asserting that they can think of no scenario in which a woman's sexual history with anyone other than the defendant is relevant at trial[165]. The proponents of excluding such evidence went as far as describing the legal pathways reserved for introduction of such evidence under certain circumstances as 'loopholes' creating great concern for the efficacy of the Bill in protecting complainants. Ms Smith opined that the leave allowed for such evidence should be omitted entirely and if this should not be the case, guidelines and strict instructions should be made to the courts[166]. Mrs Gorman agreed, predicting that providing such 'loopholes' allows for 'clever defence barristers' to find ways around the legislation allowing for continued humiliation and discrediting of victims of sexual crimes. She identified the need for special treatment of victims of sexual crimes as we, as a legal system, have made the crimes themselves special. Simplistically put, the crimes of rape and domestic violence are by definition Grievous Bodily Harm, but by separating them because of the sexual/domestic elements we are creating a different attitude toward them[167]. Again, as illustrated by research in Chapter 1 of the present work, it can be hypothesised that this statement is true. Evidence demonstrating a woman's inclination to promiscuity, or her lack of precautions taken to

[162] Zsuzsanna Adler, 'Rape- The Intention of Parliament and Practice of the Courts' (1982) 45 The Modern Law Review.; Home Office, 'Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System' (Home Office 1998).
[163] HC Deb above at n 156.
[164] Louise Ellison and Vanessa E. Munro, 'of 'Normal Sex' and 'Real Rape': Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' (2009) 18 Social & Legal Studies.; Olivia Smith and Tina Skinner, 'Observing Court Responses to Victims of Rape and Sexual Assault' (2012) 7 Feminist Criminology.
[165] HC Deb above at n 156.
[166] Ibid.
[167] Ibid.

safeguard herself from these types of offences has a much larger psychological impact on jury members when perceiving her 'victim status' than evidence serving a similar purpose for victims of other crimes[168]. Specifically, in response to Mr Hogg's claims that there are a number of cases in which it might be relevant for the jury to know that the complainant is a person inclined to promiscuity in order to inform the question of consent, Mr Cohen vehemently disagreed citing that the promiscuity of a woman is never relevant: if she has not given her consent, it is *rape*. He explains that the issue on trial is what the accused did or did not do[169]. He too expressed his concerns about the 'loopholes' and the introduction of third-party sexual history evidence only serving to demean, humiliate and attack the character of the complainant and divert attention away from the facts of the rape.

It is this argument that is also incorporated in the argument of the current work. Similar to sexual history evidence, evidence alluding to a truth in rape myths serve only to divert the attention away from any bad acts of the accused to lead jurors to more heavily scrutinise the character of the complainant.

The Youth Justice and Criminal Evidence Act 1999

Ultimately, the concerns about the gateways for introduction of sexual history evidence to act as loopholes for 'clever defence barristers', were not acted upon and the final version of the Bill enacted into law contained the following provisions restricting the introduction of sexual history evidence. Section 41 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999) restricts the use of evidence of a complainant's sexual history absent an application made by or on behalf of the accused. Section 41(2) states that the court must not give leave to such applications unless it is satisfied that (a) subsection (3) or (5) applies and (b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.

It is the use of the 'gateways' (found in subsections (3) and (5) as previously mentioned) allowing for such evidence that is the primary reason for continued scrutiny of the use of sexual history evidence in trial. Section 41(3)(a-c) contains three of the four gateways and creates the following channels for defence counsel to admit complainant sexual

[168] Claire R. Gravelin, Monica Biernat and Caroline E. Bucher, 'Blaming the Victim of Acquaintance Rape: Individual, Situational, and Sociocultural Factors' (2019) 9 Frontiers in Psychology.; Jody Raphael, *Rape Is Rape: How Denial, Distortion, and Victim Blaming Are Fuelling A Hidden Acquaintance Rape Crisis* (Chicago Review Press 2013).
[169] HC Deb above at n 156.

history evidence. Section 41(3) applies if the evidence of question relates to a relevant issue on the case and either:

> Section 41(3)(a), that issue is not an issue of consent; or
>
> Section 41(3)(b), it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or
>
> Section 41(c), it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—

(i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or

(ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event,

> that the similarity cannot reasonably be explained as a coincidence.

The fourth gateway is found in Section 41(5) and applies if the evidence or question;

> (a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and
>
> (b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

The interpretation of these gateways in subsequent trials has been varied and has faced relative praise or criticism from each side of the divide on beliefs about the relevance of sexual history evidence in rape trials. An empirical study evaluating the use of this new legislation in rape trials was released by the Home Office in 2006[170]. This report was initially

[170] Liz Kelly, Jennifer Temkin and Sue Griffiths, 'Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials' (Home Office 2006) https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.628.3925&rep=rep1&type=pdf.

critical of the use of Section 41 in practice, citing that defence counsel often made application verbally either right before or during cross-examination, leaving little time for prosecutors to properly prepare. The authors also found sexual history evidence being brought in without any reference to the legislation hypothesizing that judges either did not notice or failed to sanction the defence for violations of this type[171]. Since the release of that report there has been a vast increase in training for judges and barristers for trying sexual offence cases[172].

A later study showed that the primary concern was that complainants were often unaware of the allowance of sexual history evidence or cross-examination[173]. The previously mentioned study showed that in 565 cases, applications were made in only about 25% of cases, however, 70% of those cases were acquaintance rapes[174]. As per discussions in Chapter 1 of the current work, many times in acquaintance rapes the issue of consent becomes more ambiguous, sometimes creating a greater reliance on heuristics in jury members[175]. The presentation of previous sexual history evidence may have a greater prejudicial impact on the complainant than legal scholars would anticipate due to how this type of evidence is processed psychologically in jury members.

Sexual Assault Advocates argue that the YJCEA 1999 is still not robust enough in its protection against third party sexual history evidence, while many legal practitioners worry that it is too restrictive, creating too many rules regarding admission of evidence that may affect an accused's right to a fair trial[176]. There have been provisions passed in more recent years adding more meaning to the rigorous terminology found in Section 41 however, appellate case law has provided the most guidance and clarification on terminology and the application of the four gateways[177]. Many of the cases highlighted below involve a wider interpretation of the YJCEA 1999 in order to preserve a defendant's right to a fair trial often to the detriment of the complainant. The discussion below will attempt to further the argument that the current treatment of the YJCEA 1999 is not providing adequate protection

[171] Ibid.
[172] Laura Hoyano, 'The Operation of YJCEA 1999 Section 41 in the Courts of England & Wales: Views from the Barristers' Row' (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3295246> .
[173] Ministry of Justice and Attorney General's Office, 'Limiting the Use of Complainants' Sexual History in Sex Cases: Section 41 of the Youth Justice and Criminal Evidence Act 1999: The Law on the Admissibility of Sexual History Evidence in Practice' (2017).
[174] Hoyano above at n 172.
[175] Kate Harding, *Asking for It: The Alarming Rise of Rape Culture--and What We Can Do About It* (Da Capo Lifelong Books 2015).
[176] Hoyano above at n 172.
[177] Ibid.; Sexual Offences Act 2003.; Criminal Justice Act 2003.

to alleged victims at trial and that a better balance might be struck by utilising the previously mentioned social sciences research.

R v A (no 2) [2002] 1 AC 45

The case of *R v A*[178] is perhaps the most significant case involving the interpretation of Section 41. The facts and judgement will be outlined below, followed by examples of other notable cases decided in the wake of the *R v A* human rights decision[179]. The original facts in the case involved the complainant meeting two men (flatmates) around May 2000. She (the complainant) began a relationship with one of the men. On 13 June 2000 the complainant, her boyfriend and his flatmate (the defendant, A) went for a picnic on the bank of the Thames and all consumed alcohol. Upon returning to the men's flat, the boyfriend collapsed and was taken to hospital in an ambulance. The complainant and A decided to walk along the river to the hospital. It is on this walk that the complainant contends that A fell to the ground and when she reached out to help him up, he pulled her down and raped her. The accused states that it was here that the complainant initiated consensual sexual activity. The following day the complainant went to the police and filed a report.

Before the trial began, the defendant applied to adduce evidence of a consensual sexual relationship between himself and the complainant that had been taking place for the previous 3 weeks leading up to alleged rape, with their most recent encounter occurring only one week prior to the reported event[180]. The trial judge rejected the application for this line of questioning as Section 41 of the YJCEA 1999 did not allow for it. On appeal the Court of Appeal asked this question: "May a sexual relationship between a defendant and complainant be relevant to the issue of consent so as to render its exclusion under section 41 of the Youth Justice and Criminal Evidence Act 1999 a contravention of the defendant's right to a fair trial?"[181]

On his appeal to the House of Lords, the defendant would ask for Section 41 of the YJCEA 1999 to be read in accordance with Section 3 of the Human Rights Act 1998 so that Section 41 could be interpreted in a way that was compatible with Article 6 of the European Convention on Human Rights guaranteeing the right to a fair trial. If Section 41 could not be read in this way, then it was asserted that the House must make a declaration of incompatibility. The House of Lords refused to make a declaration of incompatibility;

[178] R v A (no 2*)* [2002] 1 AC 45.
[179] Ibid.
[180] Ibid.
[181] Ibid at para 6.

however, they did agree that the interpretation of Section 41 must be subject to the guarantee of the right to a fair trial under Article 6 of the ECHR through the Human Rights Act 1998. It was decided that a balance must be found between the probative value of the evidence of sexual history and the potential prejudice it might be liable to create in distracting the jury from the real issue[182]. A fair trial, according the Court in this case, requires consideration of the interests of the accused, the victim and society, and therefore, proportionality must be weighed. With this in mind, the Court held that Section 41(3)(c) must be interpreted sufficiently broadly to ensure that evidence, where it is so relevant to consent that to exclude it would endanger the fairness of the trial, must be admitted[183].

"Consequently, the 1999 prohibition on questioning on previous sexual behaviour to previous sexual contact with the defendant had to be read flexibly, so as not to mislead the jury by "disembodying" the narrative through withholding evidence of a previous consensual sexual relationship"[184]. The holding that evidence of this type is relevant to the issue of consent raised concerns with many scholars, appearing to act as a form of evidence implying a certain propensity to consent[185]. Reading these gateways in such a broad manner, not only brings the law back to a time similar to those under Section 2 of the 1976 Act, but also seems to confirm one of the 'twin myths' found in *R v Seaboyer*[186] under Canadian law. The 'twin myth' in reference creates the belief that complainants with a prior sexual history are more likely to consent. The ideas of character, proportionality, relevance and reasonableness, and their relationships to consent will be explored in more depth in the following chapter.

It was in the same judgement in which Lord Hope gave four primary examples of issues that may fall outside 'issues of consent' and therefore might be admissible through the gateway outlined in Section 41(3)(a). He explained that this evidence might be adduced for reasons pointing to guilt or innocence rather than generally toward consent. The first of Lord Hope's four examples was evidence adduced to support the defence of reasonable belief in consent. This is unlikely to be applicable as issues of belief in consent are strongly linked to issues of consent, but Section 41 should successfully prevent evidence or questioning

[182] R v A above at n 178.
[183] Ibid.
[184] Hoyano above at n 172.
[185] Louise Ellison, 'Commentary on R V A (No 2)', *Feminist Judgments: from theory to practice* (1st edn, 2010).
[186] R v Seaboyer [1991] 2 SCR 577.

implying that sexual activity between the complainant and one individual led to a reasonable belief in consent to any activity between the complainant and the accused[187].

The second example provided under this gateway was evidence of a complainant motive to fabricate evidence. This again, will be limited in scope as any motive aiming to be proved by such evidence must be relevant to an issue in the case. Whatever the motive, it is unlikely to be relevant to the issue at trial[188]. Additionally, Section 41(4) protects complainants from attempts to introduce evidence through any of gateways found in Section 41(3) solely for the purpose of impugning the credibility of the complainant as a witness. The third example provided by Lord Hope is the introduction of evidence that provides alternative explanation for physical conditions relied on by the prosecution to establish that intercourse took place. In *R v L*[189] the defence was permitted to reference a previous rape of the same complainant to provide alternative explanation for physical evidence of a damaged hymen adduced by the prosecution. The final example of evidence that may apply as an issue not relating to consent might be evidence explaining where a complainant's sexual knowledge might have come from, if not from the offence experienced at the hands of the accused. It had arisen in previous cases (e.g. *R v MF*[190]) that the prosecution was introducing evidence citing the only source of the complainant's knowledge of sexual activity of this kind on trial could have come from having experienced the crime[191].

The found in Section 41(3)(b) refers to events occurring at or around the same time as the alleged offence. This gateway specifically, was considered in *R v A*[192] and the judges agreed that there is little risk in imposing a narrow interpretation of the window that may count as around the same time. While the gateway described in subsection (b) has proved to be somewhat unproblematic, the gateway defined in subsection (c) has received a good amount of attention thanks to its examination in a high-profile case in recent years. Section 41(3)(c) provides for consideration of similar fact evidence.

[187] 'Rape and Sexual Offences - Chapter 4: Section 41 Youth Justice and Criminal Evidence Act 1999 | The Crown Prosecution Service' (*Cps.gov.uk*, 2018) <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-4-section-41-youth-justice-and-criminal-evidence>.
[188] Ibid.
[189] R v L [2015] EWCA Crim 741.
[190] R v MF [2005] EWCA Crim 3376.
[191] CPS above at n 187.
[192] R v A above at n 178.

R v Evans[193] involved professional football player, Ched Evans, convicted of rape in 2010. After serving half of his sentence, he was released on license and appealed his case. The Court of Appeal overturned his conviction and at his retrial in 2016, he was acquitted. The controversy arose when the court allowed two men to testify as to adduce evidence of similar sexual experiences with the complainant. The men (third parties) had had sexual intercourse with the complainant, one shortly before and one shortly after the rape on trial. They explained the complainant had, as in the *Evans* case, consumed alcohol, initiated the sexual contact, directed them into similar positions and used similar phrases[194]. This evidence was controversially allowed in through the similar fact provisions in Section 41(3)(c). Following this case many critics accused the court of opening the floodgates for sexual history evidence. Allowing this similarity exception, especially similarities involving sexual behaviour with third parties, is amounting to an assumption that previous consent is indicative of future consent[195]. Ideas such as these demonstrate that, however logical the reasoning might be, many people are naturally inclined to believe in propensity evidence of consent. As mentioned previously, Chapter 3 will address the broader concepts of character, propensity, proportionality and credibility, and how perception of these might be altered by minor pieces of information and how the law may want to address this.

The fourth and final gateway is found in Section 41(5). This gateway allows for evidence to be adduced in rebuttal to prosecution evidence of a complainant's sexual behaviour. It is restricted in that, the prosecution may open the door to this type of evidence however, the defence cannot adduce evidence that goes further than is necessary to rebut the prosecution's claims. A case in which this type of gateway was used to adduce evidence, is *R v F*[196]. The complainant, in this instance, accused the defendant of abusing her for years as a child. However, it was agreed that there was a sexual relationship between the two parties as adults for approximately six years. The complainant claimed that this relationship was one of submission and a result of years of grooming. The defendant argued that the complainant was happy in this relationship and has accused him of this present abuse as revenge for breaking off their relationship and wanted to adduce some photos and videos of a sexual nature to

[193] R v Evans [2016] EWCA Crim 452.
[194] Ibid.
[195] Clare McGlynn, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' (2017) 81 The Journal of Criminal Law.
[196] R v F [2005] 2 Cr App R 13.

prove as such. The trial judge allowed evidence of the existence of the adult relationship. However, the photos and videos were not permitted.

Upon appeal, the photos and videos were permitted, as they went to the cornerstone of the appellant's defence. Not only was it accepted that these videos stood to prove that the adult relationship was that of a happy one, but it was also meant to strengthen the defence's assertion that the accusations at issue (of childhood abuse) were false. The Court of Appeal additionally clarified that if the evidence under application is deemed to be relevant under the statute, and does not prove to humiliate the complainant, there is no judicial discretion to exclude parts of the evidence[197]. Similarly, the issues raised by the interpretation of the law in *R v A*[198] and *R v Evans*[199], the admittance of the evidence present in *R v F*[200] specifically, had the ability to greatly influence the jury. The use of graphic, visual representations of the accused's argument would obviously be a more powerful tool in convincing jurors of its validity. If the complainant's evidence was simply her word, there are a lot of additional factors that would need to be considered when examining proportionality. It appears, from all of the examples proffered above, that when considering proportionality and probative value the only considerations made are to the ECHR, but when examining the science, it may need to become a more nuanced exercise.

YCJEA 1999 Process Improvements and Reform Recommendations

Despite some court decisions that might be said to alter the intention behind the enactment of the YJCEA 1999, there have also been significant steps taken to build on the improvements the Act was intending to make. Section 100 of the Criminal Justice Act 2003 was enacted to further restrict cross-examination of witnesses (other than the defendant) on their bad character, requiring an evidential foundation before allegedly false previous allegations can be asked of a complainant. Further, Criminal Practice Rules and Criminal Practice Directions began to highly encourage an ethos of active case management, ensuring that all applications, even those made mid-trial, must be submitted in writing, listing all proposed questions[201]. Legal practitioner training for sexual offence specific cases became a mandatory measure, requiring all prosecuting advocates to be accredited through a CPS Rape

[197] Ibid.
[198] R v A above at n 178.
[199] Evans above at n 193.
[200] R v F above at n 196.
[201] Hoyano above at n 172.

and Serious Sexual Offence panel. They must also undergo initial and regular training, with rape prosecutions being handled by experienced lawyers as members of a Rape and Serious Sexual Offence team[202].

As professional training for legal and criminal justice practitioners has been steadily increasing, there have also been recommendations in Parliament for changes to the laws. Heading for its second reading when Parliament was dissolved before a snap election in 2017, the Sexual Offences (Amendment) Bill 2016-17 had been proposed to broaden the scope of evidence prohibited by Section 41. Specifically, the new provision would read as follows:

> In section 41 of the Youth Justice and Criminal Evidence Act 1999 after subsection (1) there shall be inserted the following subsection—
>
> > "(2) A Court in making a determination in respect of subsection (1) may require that the cross examination of a complainant shall not involve any matter appertaining to their appearance, behaviour or their sexual history with any unrelated third parties regardless of the nature of the complainant's alleged behaviour either before or subsequent to the current proceedings nor should such matters be admissible as evidence if the purpose is to undermine the credibility of the complainant unless it would be manifestly unjust to treat them as inadmissible."

This provision attempts to create broader categories of protection outside of sexual history evidence including things such as appearance and nature of behaviour, while still acknowledging that there are cases in which a complainant's sexual history with the defendant is more relevant than the elements listed above.

Following the death of the Sexual Offences (Amendment) Bill 2016-17 with the dissolution of Parliament, a new cross-party group, led by two former Solicitor Generals, brought about a new list of proposed reforms for sexual history evidence

[202] Ibid.

and Section 41[203]. Harriet Harman QC MP explained the reasons for their new proposals emphasising that it is not a 'fair trial' if irrelevant and prejudicial evidence against the complainant is being allowed in. The list of new proposals includes a complete prohibition on evidence of a complainant's sexual history with anyone other than the defendant as evidence of consent. The group also calls for complainants' rights to participate and be represented in the hearings for any Section 41 applications. Finally, it is called for judges to have attended the sexual violence training course before being permitted to hear a rape case[204].

While it is of paramount importance to protect the rights of defendants as their liberty is at stake, there is very little evidence suggesting that appropriate technical arrangements are made to adequately protect the rights of victims, despite the commonly portrayed 'victim-centric' image of the criminal justice system. Drawing from previous discussion about rape myths and psychological perception of information, the laws and commonly, their interpretation at trial, do not have consideration for one another. It is imperative that safeguards and procedural guarantees and rights of the accused, including those with an evidentiary nature, are examined in the context of the social and psychological research to ensure that they do not operate as unreasonably (and, at times, unjust) technical obstacles to conviction of the guilty. A thorough examination of these concepts in conjunction with principles of perception and legal language must be done to create a clearer idea of what a 'fair trial' might look like.

[203] Lizzie Dearden, 'MPs Launch Campaign to Stop Sexual History Being Used Unfairly Against Rape Complainants in Court' *The Independent* (29 January 2018)<https://www.independent.co.uk/news/uk/crime/rape-victims-sexual-history-court-used-section-41-campaign-stop-harriet-harman-vera-baird-a8181701.html>.
[204] Ibid.

Chapter 3: Character Evidence: Usage, Interpretation and Risks

Having already examined rape mythologies, the function of the laws surrounding sexual crimes, and protections afforded to complainants through increased training and evidentiary rules, this chapter aims to expand upon the unique challenges that victims of rape face in the application of evidence law at trial. Sexual offences are frequently challenging to prove beyond a reasonable doubt. There are seldom witnesses outside of the complainant and the accused. Therefore, factual issues will often boil down to a 'He said, she said[205]. "He said, she said' cases are traditionally and notoriously hard to prove beyond a reasonable doubt for prosecuting authorities. Many times, physical evidence, if available, is explained away when the defendant claims the complainant consented. The frequency of this type of argument and its regular success rate, makes rape a uniquely challenging offence from an evidentiary standpoint when compared to trying other crimes[206].

The typical lack of physical evidence in most rape trials, and the narrative-led evidence presentation that becomes the foundation for the jury's decision-making process makes character a key element in determining who to believe. However, understanding the psychological processing of information, and the function of rape myths creates a more daunting outlook for victims than one might expect.

This chapter will attempt to explain the risk of prejudice faced by complainants in rape cases, whose extent tends to equal that usually faced by defendants. This will be done by first examining the concept of character in general. The function of character as a form of evidence will follow. Finally, three types of risk in this use of character as evidence will be explored: 1) the creation of prejudice, 2) the human tendency to commit the fundamental attribution error, and finally 3) character as an indicator of propensity towards certain behaviours. The goal is to expose the ease with which a person's perception of another can be altered simply by how evidence about character is presented.

[205] Deborah L Rhode, *What Women Want: An Agenda for the Women's Movement* (Oxford University Press 2015).
[206] Ibid. Further discussion about consent, or belief in consent as a defence in rape trials can be found here: Dana Berliner, 'Rethinking the Reasonable Belief Defense to Rape' (1991) 100 The Yale Law Journal.; Christina M. Tchen, 'Rape Reform and a Statutory Consent Defense' (1983) 74 The Journal of Criminal Law and Criminology.

What Is Character?

The concept of a person's character is familiar to many people but may be difficult to define. Theoretically, character means different things to different fields of study[207]. In psychology, thoughts, emotions, and behaviour can interact to form a pattern that is often construed as a person's character[208]. It is common for personality and character to be considered interchangeable however, many studies will distinguish character from personality by examining the moral undertones associated with character traits that are not commonly found when describing personality traits[209]. For example, commonly thought of character traits might include honesty and integrity, while personality would describe people using traits such as analytical or introverted[210]. It is clear that character and personality both, refer to traits however, character seems to be the chosen label when describing the behaviours indicating the make-up of an individual's ethical or moral compass.

While sometimes distinguished from personality for carrying more moral and ethical connotations, as well as being potentially more stable through time, character, and the reliance on traits in general to predict behaviour is widely questioned for efficacy. It is thought that ethics should provide guidance to a person about what to do in certain situations. Most have ideas about which 'master virtues' should inform our decision making[211]. However, neither the general public nor moral philosophers can agree on which virtues should take precedence over the others and it may depend on the context[212]. Additionally, many moral dilemmas create conflict between values that may be treated as equally admirable character traits[213]. Situational context cannot only influence which values or virtues may take most priority over others; situations can make seemingly positive qualities quite sinister[214]. Terrorists may possess virtues such courage, loyalty, persistence and self-control. However, the context, it can be argued, would make them less desirable to the general public[215]. How much of a person's character then, are stable internally driven virtues and values, and how much is actually driven by the context of a situation?

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[207] Rhode above at n 205.
[208] Taya Cohen and others, 'Moral Character in the Workplace' (2014) 107 Journal of Personality and Social Psychology.
[209] William Fleeson, 'Toward a Structure and Process-Integrated View of Personality: Traits as Density Distributions of States' (2001) 80 Journal of Personality and Social Psychology.
[210] Joel Kupperman, *Character* (Oxford University Press 1991).
[211] Rhode above at n 205.
[212] Christopher Peterson and Martin E. P Seligman, *Character Strengths and Virtues* (American Psychological Association 2004).
[213] James Rachels and Stuart Rachels, *The Elements of Moral Philosophy* (McGraw Hill 2011).
[214] Rhode above at n 205.
[215] Rachels and Rachels above at n 213.

The Person- Situation Debate

Until approximately the 1960's the common belief in the field of psychology was that humans possessed stable character traits that could predict their behaviour across various situations[216]. This view, that personality (traits) are the most important determinant of behaviour is the *Person* side of the debate, or *personism*[217]. This idea that traits remained consistent across contexts and were good predictors of behaviour was popular as it was intuitive and drew upon common sense yet, it was simply not supported by empirical studies[218]. It was found that personality variables are only weakly correlated with behaviour. A correlation value of 0.3 is often called the personality ceiling as studies rarely find an effect greater than this[219].

The other side of this debate was the *situation* side, or *situtationism*[220]. Within this faction, it is believed that situational factors are better predictors of human behaviour than personal traits[221]. In a study on honesty in school children, researchers found that there was consistency between situations, but not across children[222]. The study found that the same child was likely to cheat on a similar type of test, but this did not make him more likely to lie or steal, or even cheat on a different kind of test[223]. Drawing from the results of this study, it can be said that something about the situation drove the child to cheat on the test and that he is probably not inherently a 'cheater'. Hartshorne and May concluded that honesty is not a unified character trait but a function of situation[224]. Situationists, often consider proponents of personism as making a fundamental attribution error[225]. As discussed in chapter 1, the fundamental attribution error is made when behaviour is falsely attributed to personality traits rather than situational factors[226]. The fundamental attribution error acts as a cognitive bias,

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[216] Robert R. McCrae and Paul T. Costa, 'The Stability of Personality: Observations and Evaluations' (1994) 3 Current Directions in Psychological Science.
[217] Mike Redmayne, *Character in the Criminal Trial* (1st edn, Oxford University Press 2015).
[218] Walter Mischel, *Personality and Assessment* (Lawrence Erlbaum Associates 1968).
[219] Lee Ross and Richard Nisbett, *The Person and the Situation: Perspectives of Social Psychology* (Pinter & Martin Ltd 2011).
[220] Rhode above at n 205.
[221] Redmayne above at n 217.
[222] Hugh Hartshorne and Mark May, *Studies in the Nature of Character: Studies in Deceit* (Macmillan 1928).
[223] Ibid.
[224] Ibid.
[225] Rhode above at n 205.
[226] Gilbert Harman, 'Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error' (1999) 99 Proceedings of the Aristotelian Society.

which leads people to interpret another's behaviour to the kind of person they are rather than as a product of social or environmental influences acting upon them[227].

Upon further research, it was discovered that correlation figures for situationism were equally as low as personality traits' r = 0.3 findings[228]. These results suggest that a combination of personality traits and situational factors are best used in explaining human behaviour. Situationists would like to argue that inconsistencies in behaviour imply that a stable personality does not exist, however researchers in favour of a synthesis of the two sides of the debate is the most logical way to end the person-situation debate[229]. The proposed combination of the two sides would explain how humans can be flexible in their behaviour and will interpret situations in personally unique ways thus, acting in accordance to their own interpretations[230]. The synthesis argument asserts that there exist many types of consistency, certain behaviours may show more consistency due to personality trait influence, while others may be more consistent in a situational context[231]. Ultimately, humans are composed of a unique mixture of traits that can be sensitive to different features of situations. A seemingly small change to a situation could have a large impact on behaviour, while a large change to a situation may have no impact at all[232].

Despite the above-mentioned sensitivity to various nuances in situations, people predict the behaviour of others in their everyday lives on a continuous basis. People will predict whether or not a friend is running late based on previous punctuality or how an employer may react to their own tardiness based on previous reactions[233]. People will extrapolate from past actions on more important matters as well, such as which candidate to vote for or whom to hire as an employee[234]. Clearly, character can influence decision making in high stakes situations, the legal process is no different, the role of character in trial is sometimes disputed in ways that resemble the person-situation debate.

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[227] Ibid.
[228] David Funder and Daniel Ozer, 'Behaviour as a Function of the Situation' (1983) 44 Journal of Personality and Social Psychology.
[229] William Fleeson and Erik Noftle, 'The End of the Person–Situation Debate: An Emerging Synthesis in the Answer to the Consistency Question' (2008) 2 Social and Personality Psychology Compass.
[230] Walter Mischel, 'Toward a Cognitive Social Learning Reconceptualization of Personality.' (1973) 80 Psychological Review.
[231] Fleeson and Noftle above at n 229.
[232] Christian B Miller, *Character and Moral Psychology* (Oxford University Press 2013).
[233] Redmayne above at n 217
[234] Ibid.

Character as Evidence

There are multiple arguments for and against the use of character evidence in both the fact-finding and the sentencing stage of criminal trials[235]. For the purpose of this chapter, the focus will remain on the use of character in the fact-finding portion of the trial as the analysis pertains to witness character and therefore, sentencing is not relevant. The idea of character evidence and much of the analysis of its use, purpose and effects during a trial pertain the potential harms it could bring to a defendant's right to a fair trial. There is constant debate as to whether excluding character is withholding vital information from the jury or protecting the defendant from undue prejudice[236]. The following are commonly cited problems with the use of character evidence.

The Activation of Prejudice

The appearance of prejudice in a criminal trial is not always intentional or noticeable. Many people consider the process of perception as a simplistic one. Commonly, people think the task of perceiving information and situations occurs only on the surface and that everyone perceives information in the same way, as we all have the same physical structures to do so[237]. It can be described as the belief that the eyes are like video cameras and that information taken in by the eyes is simply projected straight into the brain. Many psychologists and philosophers that the process of perception is a more intricate procedure influenced by personal beliefs, attitudes and expectations[238].

It is this influence of beliefs, attitudes and expectations that can create prejudice whether the observer is aware of it or not. In the criminal trial, the risk of unfair prejudice arising is especially great in weak cases[239]. One study found that in cases in which evidence of a defendant's previous criminal record was introduced, the likelihood of conviction rose from less than 20 per cent to 50 per cent[240].

Section 98 of the Criminal Justice Act 2003 contains the definition of bad character for the purposes of evidence law. Under this provision, evidence of a person's "*bad character*" are defined as "evidence of, or of a disposition towards, misconduct on his part, other than evidence which:

(a) has to do with the alleged facts of the offence with which the defendant is charged, or

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[235] Ibid.
[236] Deborah Rhode, *Character: What it Means and Why it Matters* (1st edn, Oxford University Press 2019).; Mike Redmayne, *Character in the Criminal Trial* (1st edn, Oxford University Press 2015).
[237] Jerry A Fodor, *The Modularity of Mind* (The MIT Press 1983).
[238] Daniel T Gilbert and Patrick S Malone, 'The Correspondence Bias' (1995) 117 Psychological Bulletin.
[239] Rhode above at n 205.
[240] Redmayne above at n 217.

(b) is evidence of misconduct in connection with the investigation or prosecution of that offence"[241].

Evidence of bad character against a defendant can be introduced under one of seven gateways found in section 101 of the Criminal Justice Act 2003.

The law dictates *what* and *when* evidence is introduced at trial, but it cannot regulate how it is psychologically interpreted. Studies of decision-making in experimental settings and trial settings found that jurors use evidence of a criminal history to infer guilt not just dishonesty[242]. The weight given to a piece of evidence by any juror cannot truly be predicted or known and there are multiples ways in which even subtle differences in interpretation can changes the effect this presentation can have on the decisions making process.

In order to determine criminal responsibility, juries are often asked to assess an accused's intent and credibility which, in many cases, involves utilising character evidence to aid in making such personal assertions[243]. Using character traits to make determinations about what may or may not be going on in a defendant's mind, however, can create a margin of error leaving room for the insertion of personal biases in a juror's reasoning process. As will be discussed below, it is natural in cognitive processing for humans to attribute behaviours to traits, we will extrapolate what another may or may not do based on what type of person we perceive them to be[244]. In an account of his time serving as a member of a jury, D. Graham Burnett aptly sums up the difficulty created by character evidence in a criminal trial in saying:

> Somehow, in the history of jurisprudence, these issues- who people were, what they had done in the past—had come to be thought of as different in kind from the 'facts' of a case, different from blood on the wall and reams of phone company records. How had this idea gotten going, when it was so counterintuitive? I was being asked to decide if a crime had occurred—in other words, if someone did something to someone else. How could the nature of either someone stand off limits?[245]

Generally, it is a lawyer's job to create a narrative from the facts in a criminal trial, and as with any narrative the audience would come to expect some level of character development. However, there exists an obvious danger in character development in criminal trials, the

[241] Criminal Justice Act 2003 s.98.
[242] Theodore Eisenberg and Valerie P. Hans, 'Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes' (2009) 94 Cornell Law Review.
[243] Rhode above at n 205.
[244] Redmayne above at n 217.
[245] D. Graham Burnett, *A Trial by Jury* (Bloomsbury 2002) p.71.

creation of prejudice or misuse of the selected information. Many psychological studies have shown that people are particularly likely to attribute criminal responsibility to individuals who are seemingly bad or who have acted with bad motives in the past[246]. The results of these experiments stand to demonstrate the existence of a differentiation between the concept of legal blame and the psychology of moral blameworthiness[247].

With regards to victims of rape, this idea of moral blame is vital to our understanding of the detrimental impact rape myths can have on their trial experience. It can be argued that the more *morally* blameworthy a jury perceives an alleged victim to be for her own victimisation, the less *legal* blame they will assign to the accused. In the literature addressing defendant character evidence, nullification prejudice is described as the nullification of the correct verdict in order to penalise personal qualities or punish prior bad acts[248]. Nullification prejudice might run in the opposite direction when examining the function of rape mythology in rape trials. Should a juror employ a certain amount of rape myth acceptance, they may perceive the alleged victim as blameworthy and therefore nullify a guilty verdict for the accused.

Reasoning prejudice

Reasoning prejudice occurs when the factfinder gives *too much weight* to bad character evidence[249]. Frequently, evidence of more negative qualities will be given greater weight than evidence of good character[250]. This tendency is a form of confirmation bias, in which individuals will believe information that is consistent with their expectations and they will overlook information that does not match[251]. This is particularly relevant when considering the alleged victim's treatment in front of the jury. Any degree of rape myth acceptance within jury members could mean that their confirmation bias is activated in such a way that evidence confirming these beliefs is weighted *more heavily* than warranted, and evidence that might contradict these myths is discounted.

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[246] Janice Nadler and Mary-Hunter McDonnell, 'The Psychology of Blame: Criminal Liability and the Role of Moral Character' [2010] SSRN Electronic Journal.
[247] Janice Nadler, 'Blaming a Social Process: The Influence of Character and Moral Emotion on Blame' (2012) 75 Law and Contemporary Problems.
[248] Rhode above at n 202.
[249] Redmayne above at n 217.
[250] Miguel Angel Mendez, 'California's New Law on Character Evidence: Evidence Code Section 352 and Impact of Recent Psychological Studies' (1984) 31 UCLA Law Review.
[251] Charles G. Lord, Lee Ross and Mark R. Lepper, 'Biased Assimilation and Attitude Polarization: The Effects of Prior theories on Subsequently Considered Evidence.' (1979) 37 Journal of Personality and Social Psychology.

A poll examining the prevalence of sexual assault victim blame found that 26 per cent of respondents believed that a woman was partially or wholly responsible for being raped if she was wearing revealing clothing. The same poll revealed that 22 per cent of responders believed in partial responsibility if the woman had had many previous sexual partners with a further 8 percent believing in the woman's total responsibility for the same[252]. Further, it was found that 30 per cent of people polled believed the woman bore partial or total responsibility for being raped if she was drunk at the time, and 37 per cent assigned partial or total responsibility if the woman failed to clearly say no to the offender[253]. These types of responses help demonstrate the risk created with the presentation of what would be negative character evidence in the eyes of individuals that display any rape myth acceptance.

Alternatively, with this type of prejudice, there are ways in which this would produce a more sympathetic response to alleged victims and that is the context of the 'real rape' myth. Chapter 1 discusses at length the concept of 'real rape' and the 'ideal' victim. Decision-makers who ascribe to this myth, would expect the complainant to have behaved in a certain way such as falling victim to a stranger and physically resisting her attacker. Alleged victims who fit this description may benefit from reasoning prejudice as their evidence will more closely confirm a jury's expectation than would an alleged victim of acquaintance rape, or an attack in which the alleged victim and attacker are known to one another. This is not to say that such ideals should be conserved, as tipping the scales in either direction is inappropriate and should be avoided to preserve the spirit of the justice system.

Moral prejudice

In contrast to reasoning prejudice, moral prejudice in when the correct weight is given to the evidence, but the factfinder dislikes the defendant based on previous bad conduct and will be more inclined to convict, even when they are not convinced beyond a reasonable doubt[254]. This, on a surface level, is concerning. It is not believed that many people would employ this kind of prejudice intentionally. The concern is that this type of 'bad person'

[252]'UK: New Poll Finds a Third of People Believe Women who Flirt Partially Responsible for Being Raped' (*Amnesty.org.uk*, 2020) <https://www.amnesty.org.uk/press-releases/uk-new-poll-finds-third-people-believe-women-who-flirt-partially-responsible-being> .

[253] Ibid. It is important to note however, that this poll was conducted in late 2005 and quantifications of such attitudes are likely to have changed in present times. Despite less contemporary numbers, research and media in recent years suggest that similar attitudes persist in recent years, see the following: Kirsten J. Russell and Christopher J. Hand, 'Rape Myth Acceptance, Victim Blame Attribution and Just World Beliefs: A Rapid Evidence Assessment' (2017) 37 Aggression and Violent Behavior; Joan Smith, 'Rape Victims Can't Get Justice Because the System is Collapsing - and Here's the 'Damning' Proof' *The Telegraph* (2019) https://www.telegraph.co.uk/women/life/rape-victims-cant-get-justice-system-collapsing-damning-proof/.

[254] Redmayne above at n 217.

evidence will affect the jury on a subconscious level. Juries members may subconsciously lower the standard of proof or justify this type of reasoning by putting more weight towards other pieces of prosecutorial evidence in order to justify the guilty decision[255]. This description is aimed at observers choosing to negatively judge an individual for prior misconduct or criminal behaviour, however it is also applicable to judgements about someone's sexual character.

The idea of sexual character also involves assigning a person a label of 'good' or bad' but rather than basing it on general misconduct it is based on what society would commonly deem sexual misconduct[256]. Sexual misconduct, in this case, simply means the common belief that it is socially unacceptable for a female to be promiscuous. A woman's sexual character is closely tied to rape mythology as it is often implied by innuendo through reference to common elements found in rape myths[257]. Referencing a woman's clothing, dating habits, or even something as blunt as her sexual history is useful in establishing the image of a woman of questionable sexual character[258].

Adding to the implications about sexual character made by defence counsel questions, the way in which women are asked to describe their experience can create more sexualised image of complainants. In order to establish the elements of the crime, women are often asked to describe the events in detail. As the crime is sexual in nature, this can require the description of body parts and sexual acts[259]. Not only can this be degrading for alleged victims to do in open court, it can immediately link graphic sexual content to the complainant, something the defendant may get the opportunity to avoid. This link may create a more negative perception of the alleged victim's sexual character, something that can decrease her credibility, or cause jury members to weigh other evidence differently than they would have if the complainant was deemed a woman of 'good' sexual character.

Further, the length of time women must spend in the witness box during a rape trial increases her risk of harsh character judgments from the jury. A Scottish study found that in most trials women were in the witness box for 1-2 hours, in a quarter of trials they were questioned 2-3 hours and in a minority of cases, women were in the witness box for over 5

[255] Ibid.
[256] Beverley Brown, Michèle Burman and Lynn Jamieson, *Sex Crimes on Trial: Sexual Evidence in the Scottish Courts* (Edinburgh University Press 1993).
[257] Ibid.
[258] Ibid.
[259] Michele Burman, 'Evidencing Sexual Assault: Women in the Witness Box' (2009) 56 Probation Journal.

hours[260]. The more time spent in the witness box, the more time jury members have to interpret a complainant's answers and behaviour in order to make character judgements.

This extra time, however, has not always proved necessary. Humans, in day to day life as well as acting as jury members make intuitive judgements of blame, almost automatically after hearing a story of misconduct[261]. This automatic reaction identifying, someone as good or bad, can then influence our decision while processing further information about them[262]. This can create a sort of snowball effect in judgement, as our automatic attribution of blame for something potentially minor can continue to grow with this blame carrying across future judgements about the individual growing into a potentially severe blame judgement[263].

In a psychological study, participants were asked to read essays either in support of Fidel Castro or in opposition to Fidel Castro. Participants were told before reading the essays, that the authors were assigned their stance, and therefore their essays did not reflect their true opinions about Fidel Castro. Despite this knowledge, participants still believed that the essay told them something about the author's political views[264]. This can be quite telling, in that our initial judgements are extremely hard to relinquish despite being told otherwise. In a separate study, participants were given a description of skiing accident. In one scenario the skier that crashed into bystanders was described as a well-liked, employed man who volunteers during his time off. In the second scenario the skier is described as irresponsible and lazy. The irresponsible and lazy skier was consistently judged as more responsible and more deserving of punishment[265]. It could be argued, following these conclusions, that the presentation of evidence implying a negative view of an alleged victim's sexual character can be quite dangerous. It is significant to note, however, that when the two skiers are judged in conjunction with one another, they are deemed *equally blameworthy*, suggesting that this type of prejudice in determining responsibility, can be overcome with deliberate effort[266].

Fundamental Attribution Error

Furthering the discussion from Chapter 1, it is difficult to discuss jury deliberation without considering attribution error. As previously mentioned, the fundamental attribution

[260] Michele Burman and others, 'The Law of Evidence in Sexual Offence Trials: Baseline Study' (Scottish Executive 2005).
[261] Nadler and McDonnell above at n 246.
[262] Ibid.
[263] Nadler above at n 247.
[264] Edward E Jones and Victor A Harris, 'The Attribution of Attitudes' (1967) 3 Journal of Experimental Psychology.
[265] Nadler and McDonnell above at n 246.
[266] Redmayne above at n 217.

error, also known as correspondence bias, is the tendency to attribute behaviour to personality rather than situation[267]. This idea ties closely to the situationism side of the debate explained above. The fact that this tendency is labelled as an error would suggest that it is incorrect to attribute behaviours solely to internal, personal traits rather than being guided by the context of the situation. Those on the side of situationism would assert that common people often do not appreciate the sensitivity to situations and magnitude of the effect that they can have in dictating behaviour.

A very commonly known, and widely believed example of the correspondence bias is the American Dream[268]. Traditionally, the American Dream encompasses a belief that no matter who a person is or where they come from, any goal or lifestyle is achievable. Should a person maintain this belief, it would follow then that any individual who fails to build the traditional idea of a *successful* life, is not motivated, smart or resourceful enough to achieve this goal. The premise of the American Dream perpetuated the common rags to riches anecdotes; however, it refuses to recognise the effects someone's environment can have on their upward social mobility, seeing character traits in place of societal restraints.

It is not unusual for context to be overlooked when assessing another's behaviour. Common people operate under a kind of *dispositionism*, identifying traits when they are not truly the cause of an action[269]. The danger in assigning traits from action is that traits are not visible and therefore, outsiders must extrapolate characteristics through inference.

As Gilbert Malone put it,

> Character, motive, belief, desire, and intention play leading roles in people's construal of others, and yet none of these constructs can actually be observed. As such, people are forced into the difficult business of inferring these intangibles from that which is, in fact, observable: other people's words and deeds. When one infers the invisible from the visible, one risks making a mistake[270].

Character, motive, belief, desire and intention as listed above not only are crucial in forming people's construal of others but also, are the prefect summation of what juries are trying to construe about actors in rape trials. As the most difficult rape cases involve acquaintance rape, in which the sexual activity is not denied by either party but rather, the defendant

[267] Redmayne above at n 217.
[268] Daniel T Gilbert and Patrick S Malone, 'The Correspondence Bias' (1995) 117 Psychological Bulletin.
[269] Ross and Nisbett above at n 219.
[270] Gilbert and Malone above at n 268 at p.21.

asserts that there was consent and the complainant asserts that there was not. It is most often in these cases that the jury members must attempt to discern who to believe with very little physical evidence and therefore, must construe each of the above listed qualities about each of the parties, risking mistake. This can be especially arduous when considering the length of time in which the complainant spends in the witness box. Recounting the events in graphic detail, and often facing repeated disputes from defence barristers allows more time and more material for observers to discern her 'sexual character'[271].

Generally, people will make stronger dispositional judgements about others behaving in a way that is more extreme than they would expect in a certain situation[272]. A collection of rape myths are good illustrators of this point. Take, for example, the 26 per cent of respondents in the poll above[273], who believe that a woman is partially or wholly responsible for being raped if she was wearing revealing clothing. If you were to interpret revealing clothing, as acting in a way that is more extreme than necessary in a certain situation, meaning the majority of people would not have worn such revealing clothing to such an event or venue, onlookers would be more inclined to make stronger dispositional judgements about this woman. This would create the risk that evidence of a woman's dress becomes linked to evidence of her character.

In an alternative scenario, the same idea, that observers will attribute stronger dispositional judgement to behaviour that is seemingly more extreme than warranted by the situation. In many acquaintance rape trials, each party would need to explain the event in question, from their perspective, allowing for the aforementioned judgements of each person's actions to come into play. The defendant's version of events would most likely sound like a fairly normal consensual sexual interaction. The complainant however would probably describe a scenario less familiar to members of the jury. The feelings/behaviours of the complainant in a situation in which she did not consent to what was happening whether she verbally or physically resisted and that was ignored, she did not have the capacity to consent or she remained silent, she will have to describe a scenario in which many people will not have experienced. If the defendant is arguing that the complainant consented in what was a fairly normal situation, the complainant's actions in reporting what perceivers deem to be 'normal' to the police as rape, can be categorised as extreme. This again, will leave the

[271] Michele Burman and others, 'Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study' (Scottish Executive 2007).
[272] Gilbert and Malone above at n 268.
[273] Amnesty above at n 252.

complainant vulnerable to powerful character judgements that may create a different weighing of evidence, as mentioned above.

While the above scenarios vary greatly and these types of observations and judgements will not be made by every person selected to serve on a jury however, similar difficulties will be faced by each member of a jury. In order to make their judgements, the law asks jury members to consider the evidence presented and determine the defendant's culpability based on the facts presented to them. Psychology would suggest however, that this task is much more difficult than expected. To gain a true understanding of a situation from another person's perspective, the observer must be able to imagine themselves in the situation with exactly the knowledge the actor had at that time[274]. A simplistic example is the inability of most people to appreciate the difficulty of a problem they already know the solution to, for others who do not share this same knowledge[275]. If this concept was to be applied to jury members in rape trials there are many more examples in which this idea may present itself.

Many of the rape myths discussed at the beginning of this work, relate to the application of a certain level of victim blame for putting themselves in a dangerous situation in the first place. It is easy for those with hindsight to pick out all of the ways in which a rape victim could have avoided the attack in an era in which most of the rape prevention work still remains focused on women safeguarding themselves[276]. The police often advise women to avoid walking alone, at night, on poorly lit streets, using headphones or other distractions[277]. These types of warnings do not only go out when there has been a string of attacks, as was the case referenced above. As a young woman starting university, in our orientation, we were given *tips* by campus security such as: avoid walking anywhere alone after dark, walk to bus stops as close to the arrival times as possible to avoid waiting alone for long periods, it went as far as women should avoid wearing ponytails, for this will make you an easier target as an attacker can grab your hair all at once preventing escape. The repeated dissemination of warnings like these, coming from sources considered extremely knowledgeable about these crimes (i.e. police forces, judges, prosecutors) can create this kind of hindsight effect in bystanders. If members of the general public have heard these warnings and acquired this

[274] Gilbert and Malone above at n 268.
[275] Baruch Fischhoff, 'Hindsight is Not Equal to Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty.' (1975) 1 Journal of Experimental Psychology: Human Perception and Performance.
[276] Carrie Rentschler, '#Safetytipsforladies: Feminist Twitter Takedowns of Victim Blaming' (2015) 15 Feminist Media Studies.
[277] 'Victim Blaming: Is It a Woman's Responsibility to Stay Safe?' (*BBC News*, 2018) <https://www.bbc.co.uk/news/uk-england-45809169>.

alleged knowledge about how not to be raped, it will be difficult for them to understand why an alleged victim was not able to avoid it herself. With the presentation of evidence that relates to rape myths and contradicts these *tips*, such as walking alone at night or drinking too much at the bar, the jury's focus is shifted onto the 'shortcomings' of the alleged victim and what she did 'wrong', rather than what the defendant may have done wrong.

There is risk in asking others to determine what an individual was thinking, free from bias, when there is no possible way to know exactly what that person knew when they engaged in their own decision-making process. This creates risk for prejudice against defendants and witness/alleged victims alike, however the purpose of the present work is to examine this evidence in conjunction with rape mythology in order to demonstrate the need to re-evaluate the treatment of rape alleged victims with this in mind.

Propensity

Often times character evidence will be introduced in order to strengthen the prosecution's assertion that the defendant is the most likely culprit of the crime he is on trial for because his character is that of someone who is more likely to have acted in the described way[278]. A fault in this particular method is that character traits may help in predicting behaviours, but they can also indicate dispositions to be motivated in certain ways to make unique considerations[279]. Referring back the person/situation debate, a view of character as determining propensity would not account for the sensitivity to nuances in situations. A certain trait may help in predicting whether a person is more likely to act in a certain way however without looking at the specificity of the situation, it cannot be known how their motivations will be affected. As described in the Hartshorne and May experiment, children may be likely to cheat on a test but that was not a predictor of further dishonesty, it did not even make them more likely to cheat on a different type of test[280]. If the idea of propensity is not as straightforward as commonly believed how can it play a role in criminal trials?

In the context of criminal behaviour and defendant behaviour predictions, it is argued that propensity may be more useful that social psychology would suggest due to the presence of additional research to draw on. Criminology and crime statistics can add additional information to propensity predictions aiding in its accuracy[281] . Repetition of criminal behaviour is more frequently studied and understood than general human behaviour and

[278] Ibid.
[279] R. A. Duff, 'Choice, Character, and Criminal Liability' (1993) 12 Law and Philosophy.
[280] Hugh Hartshorne and Mark May, *Studies in the Nature of Character: Studies in Deceit* (Macmillan 1928).
[281] Redmayne above at n 217.

becomes only one piece of the puzzle in presentation of evidence at trial, and its use is carefully governed by laws in order to preserve a defendant's right to a fair trial[282]. It would not be in the spirit of the law to base verdicts on the frequency of misconduct, as this would go against the idea that individuals are autonomous and free to determine and alter their behaviour at any moment[283].

This type of autonomy argument against propensity closely relates to the idea that consent can be revoked at any time. Section 74 of the Sexual Offences Act 2003 defines consent as the agreement to the act by choice, while utilising the freedom and capacity to make that choice. The option of choice remains at all times allowing for either party to withdraw consent, any sexual activity that persists becomes a crime. The problem arises in the use of character evidence of an alleged rape victim to show a sort of *propensity to consent*. Many of the rape mythologies discussed in chapter one of the current work, create the perception of the alleged victim as being the type of woman more likely to consent. The undertone of many of the myths suggest that the alleged victim is hypersexual and therefore more likely to be lying about withholding consent. References to her manner of dress, flirtatious behaviour, or willingness to get close to strangers might cause others to predict, after the presentation of evidence of this type, that the alleged victim has behaved in this way in the past and therefore behaved in this way in the present case.

Predicting behaviour in this way, it is argued, does not truly affect autonomy as one person's predictions do not dictate the actions of another[284], however in some ways jury decision-making is predictions determining behaviour as it has already occurred, and the subject cannot alter it. Again, this speaks to the problem with overlooking a person's sensitivity to situations. There are many variables that can trigger a person to alter their behaviour, and sexual behaviour is no different[285]. A seemingly small change could create a deviation from the usual pattern of behaviour that many outsiders would not consider significant enough to stray from behaviours often attributed to internal traits[286]. For example, the alleged victim may regularly invite dates back to her home at the end of the night, however after arriving there, maybe the date says something that upsets her, or does something to make her want to end the night without any kind of sexual encounter. Each act

[282] Ibid. Additionally, the law governing the use of bad character at trial is found in the Criminal Justice Act 2003 s. 98-113.
[283] DT Wasserman, 'The Morality of Statistical Proof and the Risk of Mistaken Liability' (1991) 13 Cardozo Law Review.
[284] Redmayne above at n 217.
[285] Mischel above at n 230.
[286] Christian B Miller, *Character and Moral Psychology* (Oxford University Press 2013).

in the series of events should be taken as individual situations with only minor changes wielding the power to alter the pattern, it could be argued that this is even more likely when another individual is involved as there are many ways in which their own behaviour could alter the situation. This idea will be further explored below in the context of undue prejudice.

A further issue with treating character evidence as evidence of a propensity is exactly that, propensities are not really evidence of anything. The idea of propensity evidence treats propensities as real despite the fact they are behaviours that may have never manifested[287]. How can a glass be described as fragile before it broken? Or a rubber band as elastic before it is stretched?[288] The same can be said about character traits. How can we describe a person as brave if they have never acted bravely?[289] Oftentimes, propensity evidence involves the presentation of evidence of certain risk factors that may lead to a certain behaviour.

A popular example would be the Macdonald Triad —a set of three factors that, if any combination of two or more are present together, it is said to be predictive of, or associated with, a later violent tendencies, particularly with relation to serial offenses. In particular, the Macdonald Triad explains that bedwetting, fire setting, and animal cruelty in childhood are indicators of later aggressive and violent behaviour in adulthood, with many linking these behaviours to serial and sexual murderers[290]. This triad has been popularised in criminology and by the FBI, however there is no clear empirical evidence substantiating the claims[291]. More contemporary research has highlighted that the components of the triad are more often, better indicators of a dysfunctional homelife, child abuse or poor coping skills in children[292]. To use these factors as predictors of future violent criminal behaviour is problematic and further, to use them as evidence that someone has committed a crime is even more so[293].

The problem faced by alleged rape victims in this sense is the introduction of evidence implying a likelihood to have consented to the encounter in question. As per previous discussion, many times sexual history, manner of dress and flirtatious behaviour are presented in court to demonstrate the sexual character of the complainant. In the readings of the Youth Justice Criminal Evidence 1999, members of Parliament argued *against* the exclusion of sexual history evidence as it provides important propensity evidence and without

[287] Stephen Mumford, *Dispositions* (Oxford University Press 2003).
[288] Ibid.
[289] Duff above at n 279.
[290] Charlotte Hannah Parfitt and Emma Alleyne, 'Not the Sum of its Parts: A Critical Review of the Macdonald Triad' (2018) 21 Trauma, Violence, & Abuse.
[291] Ibid.
[292] Ibid.
[293] Redmayne above at n 217.

it would undermine the defendant's right to a fair trial[294]. Attempts to show propensity to consent may imply that the act the defendant is charged with did not happen however it also suggests that the complainant has lied to police, barristers and is continuing to do so in court under oath. The question then becomes, if it is valid to show propensity to engage in certain sexual activity, must it also be relevant to demonstrate the complainant's propensity to lie to police and commit the crime of perjury? Under this argument, should jury members believe that rape myths show a certain level of propensity to consent to sexual intercourse, it must be taken that the complainant is then lying about the events in her testimony, which is a crime in itself.

How Can Character Help?

Studies have demonstrated the link between belief in rape myths and attribution of responsibility[295]. These studies have uncovered that victim blaming behaviour was more likely in people who believe in rape myths, and that these same people attribute less responsibility to the defendant[296]. Understanding this link, as well as the above discussion, demonstrating that evidence which may not appear to be directly related to rape myths can still be particularly effective in activating them in the minds of observers, is important in determining possible remedies. The successful use of innuendo by defence barristers to alter perceptions of alleged rape victims at trial is one of the key problems for the effective use of rape shield legislation and the prevention of the use of prohibited evidence under these laws[297]. Understanding the nuance of human perception of character (of others) can add to the creation of sound reform. Allowing for some discussion of how potential reforms might be interpreted in the decision-making process at trial, before the law is enacted, could create the most effective protection of alleged victims against rape myths while also ensuring the retention of fair trials for defendants.

Many jurisdictions, who have enacted similar provisions, have encountered similar problems in preventing the use of prohibited evidence at trial. Subsequently, many rape

[294] HC Debate 15 April 1999 vol 329 cc385-458.
[295] Beverly A. Kopper, 'Gender, Gender Identity, Rape Myth Acceptance, and Time of Initial Resistance on the Perception of Acquaintance Rape Blame and Avoidability' (1996) 34 Sex Roles.; Barbara Krahe, 'Victim and Observer Characteristics as Determinants of Responsibility Attributions to Victims of Rape1' (1988) 18 Journal of Applied Social Psychology.
[296] Ellen S. Cohn, Erin C. Dupuis and Tiffany M. Brown, 'In the Eye of the Beholder: Do Behavior and Character Affect Victim and Perpetrator Responsibility for Acquaintance Rape?' (2009) 39 Journal of Applied Social Psychology.
[297] Burman above at n 259.

shield laws have been deemed only marginally effective[298]. Not only are these laws lacking in efficacy, debates continue surrounding the appropriateness of such legislation in the first place[299]. The inherent tension between protecting an accused's right to a fair trial and avoiding the re-victimisation of complainant's by protecting their dignity and privacy is also a frequent element in the ongoing debate[300]. Drawing from multiple sources, examining several reform recommendations, and exploring the methods employed in other jurisdictions will be vital in attempting to increase the efficacy of rape shield legislation in England and Wales, while maintaining balance between the alleged victim and the accused's rights.

[298] Beverley Brown, Michèle Burman and Lynn Jamieson, *Sex Crimes on Trial: Sexual Evidence in the Scottish Courts* (Edinburgh University Press 1993).
[299] Neil Kibble, 'Judicial Discretion, and the Admissibility of Prior Sexual History Under Section 41 of the Youth Justice and Criminal Evidence Act 1999: Sometimes Sticking to Your Guns Means Shooting Yourself in the Foot' [2005] Criminal Law Review.
[300] Fiona Raitt, 'Balancing Rights of Complainer and Accused' [2009] The Law Society of Scotland Journal Online.

Chapter 4: The Future for Juries in Rape Trials

Evidence, and the psychology behind the interpretation of such evidence cannot be examined without also examining the body doing the interpreting. In this case, that is the jury. The jury is often seen as the gold standard in fairly deciding verdicts in criminal trials for serious offences[301]. Linked to the Magna Carta of 1215, many refer to the right of 'no free man being taken or imprisoned, except by lawful judgement of his peers', as a fundamental right dating back many centuries. For ordinary citizens however, this did not truthfully provide the right to a trial by jury until closer to the 18th century, as at the time of the Magna Carta 'free man' only truly meant members of the upper social classes[302]. Although the widely believed timeline of the creation of the lay jury may not be entirely accurate (as it does not include all men as alluded to by the Magna Carta), the move towards the use of a lay jury as a means of ending 'trial by ordeal' and increasing fairness and impartiality is an accurate account[303].

Prior to the conception of what resembles our modern-day juries, individuals in medieval England were judged innocent or guilty by God through a trial by ordeal. The ordeal typically involved fire or water. A trial by fire usually entailed the accused being tasked to hold a red-hot iron rod and walk three metres[304]. If the wound healed clean within three days, the accused was deemed innocent, if it got infected, they were guilty. Alternatively, in a trial by water an accused was bound and thrown into water, if they sunk, they were innocent, if they floated, they were guilty[305]. In both of these events, it was up to God to determine the fate of the accused - guilt or innocence - by allowing or not the burns to heal or by having or not the water 'accept' the accused hence, preventing them from sinking. This certainly appears illogical and irrational in contemporary times when it comes to adjudication in criminal trials and fact-finding. Interestingly, it has been found that ordeals more often pronounced innocence than they did guilt[306]. Frequently, it was believed that only

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[301] Dominic Willmott, 'An Examination of the Relationship Between Juror Attitudes, Psychological Constructs, and Verdict Decisions Within Rape Trials' (PhD, University of Huddersfield 2017).
[302] Ibid.; Thomas McSweeney, 'Magna Carta and the Right to Trial by Jury' [2014] College of William & Mary Law School Faculty Publications https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2761&context=facpubs; Sadakat Kadri, *The Trial a History from Socrates to OJ Simpson* (Harper Collins 2005).
[303] Sadakat Kadri, *The Trial a History from Socrates to OJ Simpson* (Harper Collins 2005).
[304] Duncan Leatherdale, 'Trial by Ordeal: When Fire and Water Determined Guilt' (*BBC News*, 2019) <https://www.bbc.co.uk/news/uk-45799443>.
[305] Ibid.
[306] Ibid; Robert Bartlett, *Trial by Fire and Water: Mediaeval Judicial Ordeal* (Clarendon Press 1988).

an innocent person would allow themselves to go through an ordeal, as a guilty person would have believed God would judge them so[307]. Additionally, the outcome of an ordeal was open to interpretation by the community, which often had a sense of whether the accused was guilty or innocent already. It was up to the people to determine how the wound seemed to be healing, or whether the accused sank a sufficient amount[308].

A papal decree in 1215 declared that priests should no longer take part in trials by ordeal. However, this indirectly rendered this type of trial inoperative, as priests were needed to bless the iron or the water and oversee the ordeal[309]. Increasing scientific discovery and a growing preference for human reason diminished the appeal and desire for judgements by God. In 1219 King Henry III declared that a jury of twelve people would now decide guilt or innocence at trial[310]. Now, 800 years later, it is still the most desirable method of determining guilt or innocence in criminal matters in England and Wales and in most common law jurisdictions[311]. Despite the continued preference for jury trials in many jurisdictions, advances in social sciences and human behaviour might be an opportunity to improve the utility of a jury trial.

Modern understanding of human psychology, decision-making, rationale, victimology and offending has advanced exponentially in the last 800 years. Additionally, over multiple decades research about common rape myths and their prevalence in society has been conducted by academics in a variety of fields. Thus far, the current work has examined the commonly found rape myths, the psychology behind their activation, the laws surrounding the introduction of evidence in rape trials, and the interpretation of evidence as proving the character of rape victims when at trial. Together with the study of the existence of rape mythology has come proposed solutions to the problems it creates for complainants of rape in the criminal justice system. This chapter aims to first, examine the role of a jury in a rape trial, analyse one of the most commonly proposed solutions to the misuse of rape myths by

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[307] Robert Bartlett, *Trial by Fire and Water: Mediaeval Judicial Ordeal* (Clarendon Press 1988).
[308] Duncan Leatherdale, 'Trial by Ordeal: When Fire and Water Determined Guilt' (*BBC News*, 2019) <https://www.bbc.co.uk/news/uk-45799443>.
[309] Ibid.
[310] Robert Bartlett, *The Medieval World Complete* (Thames and Hudson 2010).
[311] Wilmott above at n. 301 at p. 18. For more information on the preference for jury trials in other jurisdictions see: Neil Vidmar and Valerie P Hans, *American Juries: The Verdict* (Prometheus Books 2007) and Jane E. Dudzinski, 'Justification for Juries: A Comparative Perspective on Models of Jury Composition' (2013) 2013 University of Illinois Law Review. But see: Honorable William G. Young, 'Vanishing Trials, Vanishing Juries, Vanishing Constitution' (2006) 40 Suffolk University Law Review for an exploration into the growing use of plea bargaining ultimate diminishing the preference for jury trials. Additionally, an examination of a similar trend beginning in the UK can be found here: Oliver Wright, 'Court Rule Changes 'May Drive Innocent Defendants into Making Guilty Pleas' *The Independent* (2016) https://www.independent.co.uk/news/uk/home-news/court-rule-changes-may-drive-innocent-defendants-making-guilty-pleas-a7080566.html.

jurors in the courtroom, and explore the impact this solution could have on the rights of the defendant. Finally, I will attempt to analyse the proposed solution in the context of the research outlined in previous chapters and in relation to the defendant's rights, in an attempt to provide additional insight into a possible way forward for operationalising social science evidence in countering rape myths in the courtroom.

Juries in Rape Trials

Often times, the issue to be resolved in a rape trial is not really a legal issue at all. Of course, the jury must use the legal definitions found in sexual offence legislation in order to determine whether the crime has been committed (i.e., all the elements of the offence are present and proved) and what is meant by consent or lack thereof, but before all of this, they must decide whose version of the events to judge this by. The most difficult task for juries will many times be found in the context of a trial for so-called 'acquaintance rape', that is a rape committed by a person who is known to the victim. To determine what happened in private, without any other witnesses other than the accuser and the accused requires a deep assessment of the two individuals presenting the primary evidence, their stories[312]. Determining the truth in this scenario would be difficult for anyone faced with the task, whether it be twelve members of the public or a specially trained judge[313]. It is argued that these judgements are strengthened through numbers and a diversity of opinion being forced to merge together[314]. This is the ideal way of reaching what would be a fair decision, however with the proof of the existence of rape myths held throughout wider society, compiling a group of factfinders who may carry these kinds of myths should not be considered fair. Suggestions for alternatives to a jury in rape trials include an expert tribunal, or a rape specialised judge, or a combination of the two.

The Gillen Review extensively examined serious sexual offences in Northern Ireland[315], and while this is not the jurisdictional focus of the current work, the report presents issues similar in kind to what is being outlined here for potential solutions to warrant consideration. In addition to UK jurisdictions, this Review explores methods employed by

[312] Joanna Hardy, 'Judging the Jury: Why Rape Trials Can Still Be in Safe Hands' *The Law Society Gazette* (11 December 2018) <https://www.lawgazette.co.uk/commentary-and-opinion/judging-the-jury-why-rape-trials-can-still-be-in-safe-hands/5068627.article>.
[313] Ibid.
[314] 'Magna Carta and the Right to Trial by Jury', in Randy J. Holland (ed.), *Magna Carta: Muse and Mentor* 139-157 (Thomson Rueters, 2014).

[315]Sir John Gillen, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (2 May 2019) available at https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf.

other systems in the common law as well as civil law tradition[316]. Countries included in the examination are Denmark, France, Germany, South Africa, Iceland, Ireland, The Netherlands, New Zealand, Australia, United States and Canada. In the civil law systems, judges hear cases alongside lay assessors while the adversarial system defaults to jury trials with the option to elect a judge-alone trial for differing reasons depending on the jurisdiction[317]. An issue within common law systems repeatedly cited by academics studying rape myths, is the presentation of evidence to the decision-makers at trial. In common law systems, the evidence is presented to, in most cases a jury, by parties with interests in the outcome of the case, therefore making them more likely to tailor the facts to present a certain narrative[318]. This practice is a primary source of the problems presented by rape trials. The success of the cases often influenced by the credibility of the narrative of either side makes the danger of rape myths clearer. Whether conscious of this or not, defence cases will often be framed within rape myths in order to diminish the credibility of the complainant[319]. The defence must vigorously defend their client, this often means presenting less favourable information about the complainant and avoiding introducing facts that might paint their client in a more negative light.

Removing the jury could decrease the twisting of stories by each party in attempts to make more convincing narratives. Professionally trained judges and lay assessors (or specialists) could create a very fact-focused trial system, removing some of the 'I don't believe that *type* of woman (or man, or defendant)' sentiment that often results from a more narrative or story-telling style trial. Based on previous chapters however, this may not be the case. Singular judges or a panel of experts as factfinders, both alternative solutions recommended by other experts, carry their own risks[320]. The first risk, as mentioned previously, is that stereotypes can operate on an unconscious level therefore, if the judges or specialists themselves are not careful to consciously check their own reasoning, rape myths could still seep into trials, especially if the adversarial style of evidence presentation remains

[316] Ibid.
[317] Ibid.
[318] Luke M Froeb and Bruce H Kobayashi, 'Evidence Production in Adversarial Vs. Inquisitorial Regimes' (2001) 70 Economics Letters.
[319] Olivia Smith and Tina Skinner, 'Observing Court Responses to Victims of Rape and Sexual Assault' (2012) 7 Feminist Criminology.; Jennifer Temkin, Jacqueline M. Gray and Jastine Barrett, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2016) 13 Feminist Criminology.
[320] What is meant here by 'panel of experts' or 'specialist panel' is a group of experts with specialist knowledge in the area of sexual violence to act as fact-finders. The following article provides a comprehensive overview of the benefits and risks of single-judge and expert panels as fact-finders in rape trials. Amelia Erin Retter, 'Thinking Outside The (Witness) Box: Integrating Experts into Juries to Minimise the Effect of Rape Myths in Sexual Violence Cases' (2018) 49 Victoria University of Wellington Law Review.

and only the decision-makers are altered. Similarly, singular judges only provide perspective from one age group, one gender, one race and ultimately one background that the diversity of the jury would provide checks and balances for[321]. This type of change could further exacerbate the ongoing debate surrounding judicial diversity, allowing predominantly white males to act as the sole decision-maker in what comes down to a largely male vs. female issue[322]. Similarly, a small panel of experts run the risk of becoming trial hardened, forming their own myths based on attitudes and behaviours they may see repetitively in rape trial after rape trial[323]. If any kind of specialist panel does not become trial hardened, there may be a risk of the opposite occurring and these panels may experience a high turnover rate due to burn out.

Despite these potential flaws in a system change, New Zealand has released its own report recommending the consideration of alternative fact-finding methods in sexual offence trials. The report cites the cost saving benefits of sole judges presiding over sexual offence cases[324]. Additionally, judges could be provided much more extensive training on the decision-making process and interpretation of evidence specific to sexual offences, as they could be trained and assessed regularly rather than repeatedly training new juries for each case[325]. While obvious benefits arise from more extensive training for judges in difficult cases, potential pitfalls must be acknowledged. With the removal of the jury the Commission notes that there is a loss of the expression of democratic involvement in the criminal justice system[326]. The protection against oppressive or arbitrary government and public confidence in the system could also be diminished[327]. These risks are relevant to most common law jurisdictions, yet still recommendations are put forth for United Kingdom to explore similar options[328].

Weakening the democratic involvement in the criminal justice system by removing the jury from sexual offence trials completely is a drastic move with potentially broad

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[321] Hardy above at n 312.
[322] For a more in-depth look into judiciary diversity and the theories as to its efficacy see: Rosemary Hunter, 'More Than Just a Different Face? Judicial Diversity and Decision-Making' (2015) 68 Current Legal Problems; and Erika Rackley, 'What a Difference Difference Makes: Gendered Harms and Judicial Diversity' (2008) 15 International Journal of the Legal Profession.
[323] Hardy above at n 312.
[324] New Zealand Law Commission, 'The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes' (Law Commission 2015).
[325] Ibid.
[326] Ibid.
[327] Ibid.
[328] Wilmott above at n 301; Nigel Booth, Dominic Willmott and Daniel Boduszek, 'Rape Myths and Misconceptions' *The Law Society Gazette* (21 December 2018).

consequences for public confidence in the legal system. This does not necessarily mean however, that we must simply stick to the status quo and continue conducting rape trials as we are at present. There are a copious number of research studies examining the prevalence of rape myths in society and in the courtroom[329]. The enactment of the Youth Justice and Criminal Evidence Act 1999 acknowledged the problems and prejudicial effect rape myths can have on complainants in rape trials. This attempt to protect rape victims from re-victimisation and the formation of biases against them during trial, was very limited in scope, in terms of the rape myths it protects against, and has become a rule that is oftentimes evaded in actual trials[330]. Psychologically, there is a much broader collection of information, besides sexual history evidence, that can activate rape myth stereotypes in a juror's mind and plenty of evidence to show that more needs to be done to combat these biases in the courtroom.

A study performed in 2017 examined the verdict implications that juror attitudes regarding rape myths can have in a trial scenario[331] . In this study, researchers assessed jurors against widely recognised psychological traits such as affective responsiveness, cognitive responsiveness, egocentricity, and interpersonal manipulation[332]. Affective responsiveness refers to a person's ability to respond to others' feelings and emotions, similar to empathy. Similarly, cognitive responsiveness describes an individual's response to the feelings and emotions of others however, this is about cognitively understanding those feelings rather than sharing them personally. Egocentricity regards a person's failure to recognise the interests, beliefs or attitudes of others while primarily focusing on their own self-interests or beliefs[333]. Additionally, researchers placed jurors on the Acceptance of Modern Myths About Sexual Aggression Scale (AMMSA Scale)[334]. The AMMSA Scale is a 30 item self-report metric that uses insights from racism and sexism research to measure acceptance of modern myths about sexual aggression[335]. Previous rape myth acceptance scales required the myths under

[329] A simple glance at the current work's bibliography will provide a wealth of literature on rape myths generally and in the legal system.
[330] Liz Kelly, Jennifer Temkin and Sue Griffiths, 'Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials' (Home Office 2006) http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.628.3925&rep=rep1&type=pdf>.
[331] Wilmott above at n. 301 at p. 29.
[332] Ibid; Nigel Booth, Dominic Willmott and Daniel Boduszek, 'Rape Myths and Misconceptions' The Law Society Gazette (21 December 2018) at p. 3.
[333] Ibid.
[334] This was part of the study Dominic Willmott, 'An Examination of the Relationship Between Juror Attitudes, Psychological Constructs, and Verdict Decisions Within Rape Trials' (PhD, University of Huddersfield 2017) at p. 29. The research validating the creation of the AMMSA Scale can be found here: Heike Gerger and others, 'The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English' (2007) 33 Aggressive Behavior.
[335] Heike Gerger and others, 'The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English' (2007) 33 Aggressive Behavior at p.425.

examination to be demonstrably false however, the AMMSA Scale defines myths as ethically wrong rather than false[336].

Upon completion of the above assessment, high levels of rape myth bias were found among participants[337]. These results suggest that preconceived biases, stemming from rape myths, could have a much greater impact on trial outcomes than many would like to acknowledge[338]. Following a statistical analysis between variables including juror age, gender and AMMSA scores against the verdict preference variable, it was established that higher AMMSA scores were consistent predictors of Not Guilty verdicts[339]. The opposite, however, was also true. Participants who scored very low on the AMMSA Scale were more likely to return a guilty verdict[340]. This is a striking result as jurors heard the same evidence in the same case, yet different AMMSA scores yielded different verdicts. On a broad scale these results could stand to validate the allegations that rape myths are a legitimate problem affecting juror decision-making in rape trials. Out of all of the characteristics included in the study, rape myth attitudes were the only trait directly related to the verdict preference[341]. Following this research, it has been further hypothesised that low conviction rates in acquaintance rape trials, in which the jury must effectively choose whom to believe, might be attributed to rape myth acceptance rather than the jury simply being not sure beyond a reasonable doubt[342].

This study, and the AMMSA score verdict results creates a question in the effectiveness for an American-style *voir dire* as a potential solution for removing jurors with explicit biases that may affect their ability to contribute to an objective verdict. Examining these types of biases, or rape myth acceptance, through a *voir dire* process would arguably aid in the goal of creating a more balanced perception of the accuser and the accused in sexual offence trials but also poses certain drawbacks. For example, looking at the results of the study discussed above, testing a potential jurors' attitude toward rape myths yielded more likely not guilty verdicts from individuals scoring high on the AMMSA scale, but also yielded more likely guilty verdicts from those scoring low on the AMMSA scale. Does this mean the legal system would only be able to select jurors scoring in the middle to keep from

[336] Ibid.
[337] Wilmott above at n 301.
[338] Nigel Booth, Dominic Willmott and Daniel Boduszek, 'Rape Myths and Misconceptions' The Law Society Gazette (21 December 2018).
[339] Wilmott above at n 301.
[340] Ibid.
[341] Wilmott above at n 298; Booth and others above at n 338.
[342] Booth and others above at n. 338.

selecting jurors predisposed to biases against the defendant as well as the alleged victim? Additionally, how far would the examination of potential jurors go? Would it include questions about a potential juror's own experience with victimisation or accusations made against them? And would this create new grounds for appeal if it is later discovered that a juror was not truthful during this questioning?[343]

All of the potential solutions as discussed thus far, come with the potential to provide a level of relief to complainants in sexual offence trials. Singular judges can receive expert training before presiding over sexual offence cases, allowing them to undertake a more clinical review of the evidence. However, singular judges carry with them the criticism of a narrower diversity of opinion on such cases as well as the risk of burnout dealing with a difficult subject matter repetitively[344]. The above discussed solution involving an expert panel of judges carries similar positive and negative aspects. A panel would still allow for expert training and lessen the criticism of a singular viewpoint and voice deciding these more difficult cases, however the risk of burnout, or alternatively the formation of their own myths and preconceived notions about certain facts due to repetition is still present. The American-style *voir dire* also stands to remove jurors with potential prejudice due to rape myth acceptance or victim stereotypes but it too, creates its own complications.

None of the proposed solutions are perfect, they appropriately target the problem discussed through the previous chapters but they also have their downsides. The recommended solution chosen by the current work, the introduction of expert evidence to be discussed at length below, also appropriately targets the issues as they have been discussed and also has its own drawbacks, one being that it is very costly. While cost must be considered when making real-world decisions, for the purpose of the current work and the continuity of the psychological evidence presented in the preceding chapters, the introduction of expert evidence fits present argument best. The goal has been to determine a solution to the negative perception of alleged victims in rape trials through the presentation of evidence seeming to confirm rape myths or stereotypes. This is best achieved through an expert presentation of why these negative perceptions are false and will be further explained below. The introduction of these explanations by an outside expert, rather than by the prosecution or through judicial instruction, again coincides with the psychological evidence presented in

[343] Jennifer Becker, 'Jury Selection in Adult Victim Sexual Assault Cases' (Manchester, New Hampshire, 2019) see also the New Hampshire case referenced in the presentation above *State V Afshar* [2018] 171 N.H. 381 as an example of appeals based on juror dishonesty about victimisation.
[344] See the articles examining judicial diversity by Hunter and Rackley both above at n 322.

earlier chapters that would posit that the jury would perceive this information differently coming from an expert than from parties seemingly involved in the trial. Justifications for these assertions are to follow.

Expert Evidence

The primary solution to the perceived problem of rape myth acceptance in jurors, in the opinion of the current work, is the introduction of expert psychological evidence explaining the common misconceptions created by rape myths[345]. Traditionally, expert evidence is admissible if it has both relevance and probative value[346]. Legal relevance requires a logical relationship between the piece of information and an issue at trial that needs proven or disproven. In addition to relevance the expert evidence must have a high level of probative value. However, probative value is a relative concept that is a question of degree oftentimes determined within the context of a larger evidentiary picture [347]. In the current context there is not a question as to the relevance of psychological expert testimony in rape trials in debunking rape myths. To give an example, an expert may testify as to the reasons why a rape victim might not resist during the assault (i.e. freezing due to fear or knowing that fighting will have worse consequences than what is happening at present). There exists a logical relationship in relaying this information to a jury, should they choose to accept it, they can add it to the list of factors to consider when determining complainant/defendant credibility. The probative value of this type of evidence is where much of the contention surrounding the topic begins. In general, relevant and valid expert evidence is admissible and considered to have probative value when there is as issue in the case that requires specialist knowledge to be resolved[348]. The expert in question must have specialist knowledge or experience related to the issues in question and must fit into one of five categories. The expert evidence consists of opinion on facts presented to the court, explanation of technical subjects or words, fact which requires expertise to observe comprehend and describe, fact which does not require expertise but is required as preliminary to evidence in one of the previously mentioned categories and finally the expert evidence may be admissible hearsay of a specialist nature[349].

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[345]The following studies examine the efficacy of this suggestion empirically: Nancy Brekke and Eugene Borgida, 'Expert Psychological Testimony in Rape Trials: A Social-Cognitive Analysis.' (1988) 55 Journal of Personality and Social Psychology.; L. Ellison and V. E. Munro, 'Turning Mirrors into Windows? : Assessing the Impact of (Mock) Juror Education in Rape Trials' (2009) 49 British Journal of Criminology.
[346] Tristram Hodgkinson, *Expert Evidence* (Sweet & Maxwell 1990).
[347] Ibid.
[348] Ibid.
[349] Ibid.

Considering the difficulties presented to juries in the face of rape myths and potential for prejudices against complainants in rape trials, the question becomes can experts act as myth 'debunkers' for the prosecution? Is this fair to the defendant? Is this type of expert evidence legally admissible? And does it diminish the role of the jury as fact finders? Below I will attempt to address each of these questions in the hope that the answers will form a possible, and fair, way forward for evidence law in relation to juror bias in rape trials.

2006 Government Recommendations

In 2006 the Government released a consultation paper entitled Convicting Rapists and Protecting Victims – Justice for Victims of Rape[350]. In this consultation, the Government addressed questions relating to a wide range of frequently cited issues faced by victims of rape when going to trial including the lack of a definition for the term capacity, the availability of special measures when testifying for all victims of sexual crimes, and the introduction of expert psychological witness testimony, to better safeguard against the utilisation of rape myths by jurors.

The focus here will be on the introduction of expert psychological witness testimony. The 2006 Consultation proposed amending the law in order to allow the prosecution to introduce expert evidence explaining common characteristics, behaviours and reactions displayed by rape victims. It is explained that the goal of such a change would be to 'dispel myths and stereotypes concerning how a victim should behave' in order to help the judge and jury understand that there is a range or normal and varied reactions to such trauma[351]. These changes are meant to take into account defendant rights and ensure that the introduction of this type of expert testimony will be open to cross-examination by the defence. The introduction of this evidence is described as 'levelling the playing field between the prosecution and defence' by allowing the prosecution to put forward a credible alternative narrative to that proposed by the defence.[352]

It is the view of the current work, that the Government was correct in recommending some kind of equalising provision for complainants in sexual assault cases. As per the previous chapters, there exists an ever-growing body research confirming the utilisation of rape myths in defence narratives and juror decision making in rape trials[353]. While it is of the

[350] Office for Criminal Justice Reform, 'Convicting Rapists and Protecting Victims - Justice for Victims of Rape' (Home Office 2006).
[351] Ibid at p.16.
[352] Ibid.
[353] Louise Ellison and Vanessa E Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49 British Journal of Criminology.; Jennifer Temkin, Jacqueline M. Gray and

utmost importance to preserve a defendant's right to a fair trial and avoid biasing the jury against him, the existing research suggests that in many trials, jurors may begin the trial with previously held biases against the complainant and the law should take these types of prejudices into account. In the consultation paper referenced above, it is acknowledged that currently (as referring to the year of the paper's publication, 2006), omissions, discrepancies, errors, delays in reporting or displays of any other behaviours that do not appear 'normal' for victims of rape, form the basis of the defence's arguments pointing to the unreliability of the complainant as a witness[354]. Clearly, questioning discrepancies in a witness' statement is vital in the adversarial system and should not be disallowed however, with the well-established scientific study of psychological reactions to traumas, such as rape and domestic violence, the prosecution should be given the opportunity to counter rape mythology with real psychology. This type of evidence should not be viewed as a way of bolstering a victim's credibility, or starting her off in a more favourable position than the defendant in the eyes of the jury, but rather putting the complainant and the defendant on equal footing when having their credibility assessed by the jury. According the government in the aforementioned consultation paper, currently decisions regarding the credibility of the victim or witness are being made without all the relevant knowledge (that could be filled in by expert psychological testimony)[355].

This expert psychological testimony would be able to inform the court of the variety of scientifically confirmed psychological reactions to abuse or trauma that from an outsider's perspective may appear unnatural or not how a 'real' victim would react. The expert is capable of challenging erroneous assumptions made by the jurors about complainants in these rape trials. There has been a good deal of research into the efficacy of expert psychological testimony to aid a variety of witnesses such as children, individuals with developmental delays and rape victims. There still exists much debate within the academic community as to whether this type of evidence is effective enough to warrant adding to the trial process and whether it impacts a defendant's right to a fair trial. For the purpose of the current work two primary studies examining the impact and efficacy of expert psychological testimony in rape trials will be assessed below in an attempt to determine whether this is a viable way forward for sexual offence trials in England and Wales at present.

Jastine Barrett, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2016) 13 Feminist Criminology.

[354] Hodgkinson above at n 346.

[355] Ibid.

Expert Evidence Including Hypothetical/Concrete Examples

Previous chapters have addressed research into the existence of rape myths within the criminal justice system, primarily their existence in the courtroom setting and how sexual offence legislation might contribute to the continued efficacy of defence arguments utilising rape myths. With the empirical evidence of the existence of and use of these rape myths at trial, we must now examine the experimental research into the possible solutions. Chapter 1 of the current work discusses common rape myths and the psychological process of perception and stereotypes activation. It is explained that the process of perception can have a wide margin for error. Most of these errors and misconceptions can be attributed to a dependency on heuristic thinking and theory-driven processing[356]. In a mock jury study, researchers tested whether these mental short-cuts, created by widely held rape myths, could be overcome through the presentation of group probability data[357]. This question stems from previous research suggesting that 1) group data may be difficult to understand in relation to a specific complainant unless a relatively explicit link between the two are established and 2) the concept of belief perseverance identifies the difficulties that exist in overcoming the influence of previously formed beliefs and causal theories on future judgements[358].

Due to these two premises, researchers in this study hypothesised that the most effective use of expert testimony explaining group data will be when it is presented in the beginning of the trial and when it is explicitly linked to the case at hand[359]. The timing of the expert presentation at trial is important, as it is believed that once the jurors have heard the complainant's evidence, belief perseverance will prevent the expert evidence from having any effect on their already formed beliefs. A similar premise applies to the reason for including an explicit link to the present case, it is believed that jurors will struggle to properly

[356] Susan T Fiske and Shelley Taylor, *Social Cognition: From Brains to Culture* (3rd edn, SAGE 2016).; Richard Nisbett and Lee Ross, *Human Inference: Strategies and Shortcomings of Social Judgement* (Prentice-Hall 1980).
[357] Nancy Brekke and Eugene Borgida, 'Expert Psychological Testimony in Rape Trials: A Social-Cognitive Analysis.' (1988) 55 Journal of Personality and Social Psychology.
[358] The first half of the question stems from research into the base rate fallacy and Bayesian theories found in research such as: Norman Fenton, Martin Neil and David A. Lagnado, 'A General Structure for Legal Arguments About Evidence Using Bayesian Networks' (2012) 37 Cognitive Science.; Melvin Manis and others, 'Base Rates Can Affect Individual Predictions.' (1980) 38 Journal of Personality and Social Psychology. The second half relays information from research into belief perseverance found: Charles G. Lord, Lee Ross and Mark R. Lepper, 'Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence.' (1979) 37 Journal of Personality and Social Psychology.; Amos Tversky and Daniel Kahneman, 'Judgment Under Uncertainty: Heuristics and Biases' (1974) 185 Science.
[359] Brekke and Borgida above at n 357 at p. 373.

integrate the information provided by the expert in their decision-making process, as vague probability information has been shown to have less of an effect on an individual's reasoning. The expert in this scenario was described to the jury as a psychiatrist who had done research in the area of rape, counselled rapists and rape victims and who has taught courses in human sexuality and sexual dysfunction[360]. The evidence was presented to the jury by allowing the prosecution to ask the expert a series of leading questions allowing the expert to highlight the following commonly help misconceptions about rape and rape victims: a) few women falsely accuse men of rape, b) rape is a highly underreported crime, c) many rapes involve at least casual acquaintances of the victim rather than strangers, d) rape is a crime of violence, not passion and e) It is often better for a woman to submit rather than risk additional violence from attempts to fight back[361].

In addition to the prosecution's leading questions, the expert was cross-examined by the defence and testified that he was paid by the county to testify and that he had discussed the facts of the case with the prosecution prior to his testimony[362]. The case specific hypothetical example was created from formulating a story from the facts of a previous real rape trial that closely matched the facts in the simulated rape trial in the study. It was found that expert psychological evidence was most effective in the condition in which the expert used a hypothetical example to link the evidence and the case. In this condition, the jury returned higher conviction rates, harsher recommended sentences, and reported more favourable perceptions of the victim[363]. The expert in this condition did not comment directly on the victim's credibility nor convey sympathy for the victim, however the jury may have inferred that the expert believed the current victim through his explanation of the hypothetical victim and therefore may have influenced their judgement in a way other than increasing their reliance on scientific evidence[364].

A further study was performed in order to ascertain whether or not the hypothetical example was the sole reason for the result obtained in the first study. In the second study the researchers included conditions in which the expert included a specific hypothetical example, concrete examples interspersed within the general data, or just the data itself[365]. It was discovered that when the expert testimony was not specific (whether through case-specific or

[360] Ibid.
[361] Ibid. at p. 374.
[362] Ibid.
[363] Ibid.
[364] Ibid.
[365] Ibid.

concrete examples), it appeared relatively ineffective. Given the research discussing hypothetical scripts discussed in previous chapters, the results of this study are not overly shocking[366]. In a sort of a common-sense logic, it is easiest to replace the belief in one scenario with another. For example, if you were to believe that most rapes are perpetrated by a man not known to the victim, and have the idea of a dark shadowy figure attacking a woman in the streets at night, it would be much easier to illicit a re-evaluation of this belief by telling the story of a woman who went on a few dates with a man and was then attacked by this man in her home, than by simply stating the statistics regarding the number or percentage of rape victims who knew their attacker. In the context of a story it is much easier to imagine how someone might be attacked by an acquaintance if provided an example than to only hear the data, especially in a trial when everything else is heavily narrative based.

The study unfortunately found little insight into how exactly jurors utilised this expert testimony. It was unclear whether jurors used the expert's testimony to support arguments about case facts or whether it subtly influenced the way they interpreted and discussed other evidence presented in the case[367]. While it was not overtly clear how the jurors used the expert testimony in their decision-making, it was found that in all conditions with expert evidence (hypothetical example, concrete examples and standard facts) victims experienced a higher credibility rating. There was greater discussion of victim credibility however, the tone of the discussion appeared relatively split[368]. In the context of this work, this is an important consideration, as this may point to expert evidence being a viable solution to the problem of rape myths destroying victim credibility at trial, without leaning too far away from the defendant's right to a fair trial.

To further support this suggestion, the discussion surrounding victim resistance was greatly decreased with the presentation of expert evidence. In the condition lacking any expert evidence, 15 per cent of the jury deliberation was related to the amount of victim resistance to the attack, most of it being defence-oriented noting that she did not resist enough[369]. In the hypothetical example condition this subject of deliberation was decreased to just 2 per cent and became more prosecution focused. Finally, the change in results depending on the timing of the presentation of the expert evidence raises questions for larger

[366] Irina Anderson, Geoffrey Beattie and Christopher Spencer, 'Can Blaming Victims of Rape Be Logical? Attribution Theory and Discourse Analytic Perspectives' (2001) 54 Human Relations.; Robert Abelson, 'Script Processing in Attitude Formation and Decision Making', *Cognition and social behavior* (Lawrence Erlbaum 1976).
[367] Brekke and Borgida above at n 357.
[368] Ibid.
[369] Ibid.

assumptions made by the legal system regarding the decision-making process. The law assumes that jurors will hear all of the evidence, collect it in their memories and only interpret it when all the facts have been heard, something that is called a recall set in social psychology[370]. However, the finding that expert evidence becomes ineffectual when presented later in the trial would suggest that juries do not gather and interpret evidence in a recall set. It is more likely that jurors will hear information and attempt to categorise and organise it as it is presented, forming the information into a meaningful plot, this is known as an impression set[371]. This will mean that jurors will filter the evidence being presented before them through the beliefs and information they already have deciding then where to categorise based on this. Given that is it believed that there is a proportion of jurors that will enter the courtroom holding some level of rape myth acceptance (unconscious or not), and the concept of belief perseverance mentioned previously, the presentation of expert evidence later in the trial would have to force jurors to reinterpret all of the evidence they've already heard and filtered through these previously held beliefs, a process which is unlikely to occur[372]. While this method of information collection and organisation is likely to happen with the reception of any information, it is important to recall, as discussed in Chapter One of the current work, how much these 'jurors' truly believed they were jurors. As previously discussed, some of the shortcomings of mock jury experiments could have been experienced here and in the study to be discussed below, further impacting the results and the reality we might attribute to them.

General Expert Evidence

In a more contemporary study, researchers examined whether a more general approach to expert evidence in rape trials[373]. In contrast to the expert testimony studied in the previous research, the goal of this study was to examine general expert testimony. General expert testimony refers to testimony serving a more modest educational function, informing jurors about certain facts they might not already by aware of[374]. It is important in this instance

[370] David L. Hamilton, Lawrence B. Katz and Von O. Leirer, 'Cognitive Representation of Personality Impressions: Organizational Processes in First Impression Formation.' (1980) 39 Journal of Personality and Social Psychology.
[371] Nancy Pennington and Reid Hastie, 'Evidence Evaluation in Complex Decision Making.' (1986) 51 Journal of Personality and Social Psychology.
[372] Ibid; Charles G. Lord, Lee Ross and Mark R. Lepper, 'Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence.' (1979) 37 Journal of Personality and Social Psychology.; Amos Tversky and Daniel Kahneman, 'Judgment Under Uncertainty: Heuristics and Biases' (1974) 185 Science.
[373] L. Ellison and V. E. Munro, 'Turning Mirrors Into Windows?: Assessing the Impact of (Mock) Juror Education in Rape Trials' (2009) 49 British Journal of Criminology.
[374] Louise Ellison, 'Closing the Credibility Gap: The Prosecutorial Use of Expert Witness Testimony in Sexual Assault Cases' (2005) 9 The International Journal of Evidence & Proof.

that the expert's explanations of the complainant's behaviour are not profile-based or linked to any kind of psychological or medical syndrome[375]. The problems presented by this kind of linkage will be discussed further below in the context of potential problems posed by the introduction of expert testimony. General expert testimony will draw from generalised social science evidence aiming to provide jurors with accurate social and psychological context to evaluate behaviour that might otherwise be interpreted as abnormal or counterintuitive[376]. This expert must also limit their testimony to 'minimal, fully supported claims for which there is a consensus in the social science literature' so that the validity of the expert evidence does not incite a dispute with the defence[377].

In this general expert testimony study, the evidence was presented after the complainant had given her evidence and the medical testimony had been distributed to jurors as a written statement read out by the prosecutor[378]. The expert was described as a qualified psychologist with clinical experience with rape victims but no prior knowledge of the complainant or the facts of the case[379]. The other conditions in the study consisted of the jury hearing the same exact information in the form of educational guidance delivered through extended judicial instruction at the close of the trial, and no education provided. The jury deliberations were monitored, and it was found that juror education had a positive influence on the jury's interpretation of the complainant's calm demeanour while giving evidence and on her delayed reporting. The educated jurors were more willing to accept that a variety of reasons for these behaviours exist when assessing the complainant's credibility[380]. The jurors rarely directly referenced the guidance when deliberating, however their comments in some way reflected the content of the education. This may suggest that the guidance, like rape myths themselves are influencing the interpretation of evidence on a more subconscious level. Post deliberation questionnaires did indicate that jurors found value in the education and thought that it was useful during deliberation[381].

In contrast to the study discussed above, education regarding a complainant's physical resistance to her attacker appeared to have little or no effect. Despite the expert explaining

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[375] Ellison and Munro above at n 373.
[376] Jennifer Long, 'Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions' (American Prosecutors Research Institute 2007).
[377] Jennifer Temkin and Barbara Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart 2008).; Liberty, 'Liberty's Response to the Consultation Convicting Rapists and Protecting Victims' (Liberty 2006).
[378] Ellison and Munro above at n 373.
[379] Ibid.
[380] Ibid.
[381] Ibid.

that ‘freezing’ during an attack is not a reaction reserved solely to stranger rape and providing supportive explanations for this, jurors in both the educated and uneducated conditions echoed each other’s statements[382]. This finding does not bode well for general expert evidence as a catchall solution for countering rape myths at trial. If this type of evidence cannot counter one of the commonly identified myths[383], it may not be effective enough to warrant its introduction in trial. In the context of heuristics, it is hypothesised that information may only be employed to the extent that it is either consistent with the jurors’ existing beliefs or it is able to offer an alternative causal narrative[384]. This tracks with the previous findings in which hypothetical examples appeared to have a stronger impact than general data[385], the hypothetical example could be providing a stronger alternative narrative than what the jurors might form on their own, drawing from the presentation of simple data. While accurate, this idea creates concern in some legal scholars for the preservation of a fair trial for the defendant. It is agreed that venturing too far into specifics (even with hypothetical examples) could have a negative impact on the defendant, however there was no evidence found that the introduction of general expert testimony led to jurors disregarding elements of the defence evidence or to interpret the general information as indirectly vouching for the complainant’s credibility[386]. While there was no specific evidence discovered in this study, the potential for negative ‘spill over’ effects that may cause other issues at trial should be discussed[387].

Potential Problems with Expert Evidence

There are a few primary criticisms surrounding recommendations for the addition of expert evidence in rape trials. There exists a fear that the addition of such evidence will have the effect of ‘usurping’ the role of the jury[388]. Others argue that the inclusion expert testimony of this kind, over complicates the trial and muddles the jury’s task[389]. In addition to

[382] Ibid.
[383] 'Rape and Sexual Offences - Chapter 21: Societal Myths | The Crown Prosecution Service' (*Cps.gov.uk*, 2017) <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-21-societal-myths>.
[384] Anne Maass, John C. Brigham and Stephen G. West, 'Testifying on Eyewitness Reliability: Expert Advice Is Not Always Persuasive' (1985) 15 Journal of Applied Social Psychology.
[385] Brekke and Borgida above at n 357.
[386] Ellison and Munro above at n 373.
[387] Neil J. Vidmar and Regina A. Schuller, 'Juries and Expert Evidence: Social Framework Testimony' (1989) 52 Law and Contemporary Problems.
[388] Tony Ward, 'Usurping the Role of the Jury? Expert Evidence and Witness Credibility in English Criminal Trials' (2009) 13 The International Journal of Evidence & Proof.; R v D.D., 2000 SCC 43; R v Doody [2008] EWCA Crim 2394; Hock Lai Ho, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford University Press 2008).
[389] R v Turner [1974] QB 834.

having a potential detrimental impact on the role of a jury in the trial setting, a defendant's right to a fair trial must be kept in the forefront of these discussions. The criminal law and rules governing criminal proceedings are the criminal's Magna Carta.[390] They guarantee the accused adequate protections from the more powerful government, requiring that he be punished within statutory limits using statutory regulations[391]. There must be very careful consideration of the impact on defendants if we are going to alter these regulations and limits in any way. Usurpation of the jury, over complication of the trial and the larger human rights impact on the defendant will be explored below.

Usurping the Jury

The fear that the introduction of expert evidence usurping the role of the jury is one shared by judges and scholars alike. It is the fear that the expert's testimony will be afforded an undue amount weight by the jury, wholly accepting his/her evidence as fact without fully considering on what his/her conclusions are based[392]. While this is not a risk unique to the introduction of expert evidence in rape trials, it is important explore this argument, as it pertains to recommendations for reform to be made by the current work. The jury's duty is to judge the credibility of each witness, to defer that judgement to another would be a failing in that duty[393]. Conversely, the jury would also fail in its duty to not consider expert evidence that may go towards credibility. If a jury chooses not to believe a witness on the basis of previously held misconceptions or stereotypes, that too, creates injustice[394]. In the same vein, introducing evidence that is meant to go towards the credibility of a witness, it is argued, can be considered usurpation in the form of 'oath-helping'. Witnesses are presumed to be credible therefore, any evidence aiming to bolster this presumption is needless unless the opposing party seeks to declare otherwise [395]. These fears, while moderately valid, assume that the presentation of evidence on an issue is the same as deciding the issue[396]. The usurpation argument places very little faith in the capabilities of the jury. In the same way that commentators argue that the ability of the jury to shelve previously formed stereotypes

[390] Franz von Liszt, 'The Rationale for the Nullum Crimen Principle' (2007) 5 Journal of International Criminal Justice at p. 1010. The text in the cited article is reproduced is from the essay, 'Die deterministischen Gegner der Zweckstrafe' [Deterministic Opponents of Purposive Punishment], 13 Die gesamte Strafrechtswissenschaft (1983) 325-370.
[391] Ibid.
[392] Tony Ward, 'Usurping the Role of the Jury? Expert Evidence and Witness Credibility in English Criminal Trials' (2009) 13 The International Journal of Evidence & Proof.
[393] Hock Lai Ho, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford University Press 2008).
[394] Temkin and Krahe above at n 377.
[395] Ian Howard Dennis, *The Law of Evidence* (Sweet & Maxwell 2010).
[396] Mike Redmayne, *Expert Evidence and Criminal Justice* (Oxford University Press 2001).

and misconceptions when instructed to do so[397], it now becomes the opposite, citing that hearing expert testimony will make the decision for them. This does not provide a lot of clarity on the issue of entrusting responsibility to the jury.

The Courts have spoken on the issue of expert opinion evidence in a less than favourable way. In a Canadian Supreme Court decision, the dangers of such evidence were discussed[398]. It was determined that expert opinion evidence should past a test for necessity rather than helpfulness. It was decided that this evidence was unnecessary, as it risked leading the jurors to abdicate their role as factfinders to the expert and the same information could be explained through judicial direction[399]. A similar approach was taken in England, in which the judge provided the information that might have been provided by an expert however, in directing the jury, it was expressed that the judge should not adopt views of experts who have not given evidence[400]. These cases reflect some of the responses to the Government's 2006 recommendations for expert evidence, suggesting the use of extended judicial directions providing additional guidance in rape trials rather than expert evidence[401]

In a similar spirit to the argument above, is has been decided in court that if on the proved facts a jury can draw their own conclusions without help, expert opinion is unnecessary[402]. While this is true of the face of it, it does not take into account the fact that these conclusions may draw from more than the proven facts, namely stereotypes and rape myths. It is understandable that adducing more information for the jury to wade through (especially information judges have, in the past, deemed unnecessary) can over complicate and draw out trials, a fact that is undesirable for all parties. However, recommendations to be made below are not out to provide conflicting information, or unjustly sway the jury in favour of the complainant, but rather prevent misconceptions about victims while protecting an accused's rights to a fair trial.

[397] Hardy above at n 312.
[398] R v D.D., 2000 SCC 43.
[399] Ibid.
[400] R v Doody [2008] EWCA Crim 2394.
[401] Criminal Bar Association, 'Response to Consultation Paper 'Convicting Rapists and Protecting Victims' (Criminal Bar Association 2006).; David Wolchover and Anthony Heaton-Armstrong, 'Debunking Rape Myths' (2008) 158 New Law Journal.
[402] R v Turner [1974] QB 834.

Defendant's Right to a Fair Trial

As mentioned above, substantive criminal law and the rules governing criminal proceedings are to be seen and preserved as the criminal's Magna Carta[403]. Much avoidance of advancing victim rights at trials, stems from the fear of impacting a defendant's right to a fair trial[404]. Article 6 of the European Convention on Human Rights, transcribed into UK law in Article 6 of the Human Rights Act 1998, ensures an accused the right to a fair trial. This should provide the utmost protection to the accused, as an injustice, such as wrongful conviction, carries grave consequences for the individual. However, the European Convention on Human Rights categorises rights as either absolute, qualified, or limited[405]. A defendant's right to a fair trial is an absolute right and cannot be qualified, however this does not mean that nothing can be done to protect the rights of victims and witnesses should significant harm to them appear likely[406]. This would suggest that the right to a fair trial can be balanced against the protection of witnesses and victims. This does not mean that the rights of the defendant should be dimmed in the name of protecting witnesses and victims. However, it could provide justification for added protections for victims and witnesses that tip the scales (within reason) to provide more balance. It is argued that this balance is not a zero-sum game but rather when tensions do arise, they are approached with even-handed consideration[407].

The problems outlined above, while also problematic for the defendant, are mostly issues threatening the ideas underpinning the jury trial system. The real danger for defendants presented by the introduction of expert evidence is in the introduction of case/complainant specific testimony. A good example of more specific expert testimony comes from the United States. In the US, expert testimony often attests to the symptoms and behaviours of Rape Trauma Syndrome or Post Traumatic Stress Disorder (PTSD)[408]. This evidence is often presented as *education* for the jury, in an attempt to raise awareness of behaviours related to

[403] Von Liszt above at n 390 at p. 1010.
[404] Jonathan Doak, *Victims' Rights, Human Rights and Criminal Justice* (Hart 2008).
[405] Brian Gibson, *Introduction to the Criminal Justice Process* (2nd edn, Waterside Press 2002).
[406] Steven Powles, 'Evidence', *Human Rights in the Investigation and Prosecution of Crime* (Oxford University Press 2009).
[407] Alison Gerry, 'Victims of Crime and the Criminal Justice System', *Human Rights in the Investigation and Prosecution of Crime* (Oxford University Press 2009).; Matthew Hall, *Victims of Crime: Policy and Practice in Criminal Justice* (2nd edn, Routledge 2012).
[408] Patricia A. Frazier and Eugene Borgida, 'Rape Trauma Syndrome: A Review of Case Law and Psychological Research.' (1992) 16 Law and Human Behavior.; Arthur Garrison, 'Rape Trauma Syndrome: A Review of Behavioural Science Theory and Its Admissibility in Criminal Trials' (2000) 23 American Journal of Trial Advocacy.

trauma, it risks the jurors interpreting matching complainant behaviours as confirmation of her rape[409]. Presenting behaviours as part of a syndrome diagnosis of those who have experienced rape or trauma could create a different kind of schema for jurors to organise evidence into creates real risk of inducing a large prejudicial effect against the defendant. If the trial is for the offence of rape and an expert is presenting evidence of a class of people with a medical connotation, that then matches the described behaviour of the complainant, the jury may be more apt to put the complainant in that Rape Trauma Syndrome/PTSD class. Yet oftentimes, the exact question for the jury to answer at trial is whether or not the rape occurred, if the expert is providing evidence fitting the complainant into a class of people that have been raped or experienced severe trauma, the expert is essentially providing the answer to this question. In this case, the expert might actually be usurping the jury.

A US case provides a real-life example how the presentation of this evidence might look. The defendant was convicted of raping a woman, despite his claims that they engaged in consensual intercourse. A psychologist was called by the prosecution who had personally examined the complainant and concluded in court that the complainant's condition was consistent with all of the symptoms of Rape Trauma Syndrome[410]. The court concluded that rape trauma syndrome was an appropriate topic of expert testimony in a case in which only consent was at issue[411]. In a more contemporary case, a defendant was convicted of kidnapping and rape[412]. During the trial, an expert testified about the common behaviours associated with rape trauma syndrome and rape victims. It was determined that this evidence was appropriate to assist the jury in evaluating evidence, often as a response to a defence claim that the post-assault behaviour of the complainant did not reflect that of a 'true' victim. In this case, the expert had not interviewed the victim and provided no opinion on the victim specifically at all[413]. It is the opinion of the current work, that the risk to the defendant posed by this case is much lower than that of the case described above. However, framing these behaviours in a medical/clinical context still presents the risk of over-affecting the jury in favour of the complainant, that is undesirable to the goal of achieving a closer balance between the evaluation of the credibility of complainants and defendants at trial. This

[409] Robert P. Mosteller, 'Syndromes and Politics in Criminal Trials and Evidence Law' (1996) 46 Duke Law Journal.
[410] State v. Brodniak, 221 Mont. 212, 718 P.2d 322 (1986).
[411] Ibid.
[412] State v. Kinney, No. 99-122 (Vt. Oct. 13, 2000).
[413] Ibid.

method, of describing clinically diagnosed behaviours risks further alienating groups of victims who do not fit into this category[414].

Balancing the perception of complainants and defendants in rape trials is the ultimate goal. There exists enough evidence in social psychology and legal research to know that more can be done to protect rape victims through the trial process. The Government attempted this through rape shield legislation[415], but this has proven relatively ineffectual for victims, as well as unfair to defendants[416]. Given the empirical support, it may be time to revisit the Government's 2006 expert evidence recommendations, and implement a well-controlled, empirically supported, expert line of questioning early-on in rape trials, open to cross-examination and challenges by the defence. Potential methods for this move forward and justifications for such a move will be discussed further in the coming chapter.

[414] Ellison and Munro above at n 373.
[415] Youth Justice and Criminal Evidence Act 1999 s.41.
[416] R v A (No 2) [2001] UKHL 25.; J.R. Spencer, '"Rape Shields" and the Right to A Fair Trial' (2001) 60 The Cambridge Law Journal.

Conclusion

What Can the Current Research Tell Us?

It is clear from the totality of the research that complainants in rape trials, and victims in society, would benefit from further protections from rape mythologies and stereotypes. Social psychology and other social sciences research can inform the design of these protections, in order to create the best fit for purpose. Evidence does not need to be openly presented as character evidence to be attributed to a person's character[417]. For this reason, the solution to the problem may not be attempting to keep rape myth-related evidence out of the courtroom but rather, bring rape myth-countering evidence into the courtroom. In the context of the research discussed in this work, it is clear that when filtered through the preconceived notions created by rape myths, the defence can use almost any piece of evidence to diminish complainant credibility. If we were to attempt to remove or limit every piece of evidence that could be interpreted in a way that negatively impacted the perception of the complainant, we would most definitely negatively impact the defendant's right to a fair trial. This conclusion has been drawn from the psychological evidence demonstrating ways in which human interpret the character of others, and the common mistakes that can be made in the process[418]. Combining this evidence with common narratives in rape trials (especially acquaintance rape trials in which other evidence is lacking) it can be seen how minute, agreed upon, details in the retelling of events (for example if the woman invited the man back to her apartment after a date) can have a prejudicial effect on the complainant[419].

Revisiting the Use of Expert Evidence in Rape Trials

Considering the body of research discussed previously, it may be time for the Government to revisit their 2006 recommendations. The introduction of educational general expert testimony "represents a pragmatic, defensible and efficient means of redressing at least some of the unfounded assumptions and attitudinal biases that prevent too many victims of sexual assault from accessing justice.[420]" The Government itself, recognised back in 2006

[417] Deborah Rhode, *Character: What It Means and Why It Matters* (1st edn, Oxford University Press 2019).; Gilbert Harman, 'Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error' (1999) 99 Proceedings of the Aristotelian Society.
[418] Lee Ross and Richard Nisbett, *The Person and the Situation: Perspectives of Social Psychology* (Pinter & Martin Ltd 2011).; Daniel T Gilbert and Patrick S Malone, 'The Correspondence Bias' (1995) 117 Psychological Bulletin.
[419] Kim Scheppele, 'Just the Facts, Ma'Am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth' (1992) 37 New York Law School Law Review.
[420]Ellison and Munro above at n 368 at p.379.

that certain societal attitudes do contribute a substantial amount to the low conviction rates in rape cases[421]. They conceded that at the time, in 2006, the only evidence as to what occurred is being considered against a backdrop of misperceptions and myths as to how 'real' victims act, and it was occurring unchallenged[422]. Examining more recent research reflecting a similar sentiment, it can be concluded that alternative methods to resolve this issue have not been effective[423]. Utilising the psychological evidence surrounding perception, attribution theory, heuristics and stereotype activation, expert evidence could be, as mentioned above, the most pragmatic and efficient way of rectifying the issues faced by rape victims.

Moving forward, the presentation of expert evidence may resemble something of the following. Experts may be appointed by the court in the preliminary stages of the trial, as the goal is to diminish any previously held biases or stereotypes, the research suggests that the expert's information will be best absorbed before the rest of the trial of the evidence has had a chance to be filtered through said biases[424]. The expert would only provide evidence alerting the court, and jurors alike, to information they might not have been previously aware. This evidence would be based on empirically analysed and scientifically validated behaviours of victims or witnesses[425].

Some critics argue that this type of expert evidence competes with the rule in *Turner*[426], that expert evidence is unnecessary when it is only serving to inform them of principles that should already be *common knowledge*. Other scholars cite that psychological and psychiatric evidence of all kinds, competes with folk psychology and challenges what jurors think they already know, creating more complications than benefits[427]. However, a substantial portion of the current work is spent explaining why the common psychological

[421] Office for Criminal Justice Reform, 'Convicting Rapists and Protecting Victims - Justice for Victims of Rape' (Home Office 2006).
[422] Ibid.
[423] Olivia Smith and Tina Skinner, 'Observing Court Responses to Victims of Rape and Sexual Assault' (2012) 7 Feminist Criminology; Olivia Smith, *Rape Trials in England and Wales* (Palgrave Macmillan 2018).; Jennifer Temkin, Jacqueline M. Gray and Jastine Barrett, 'Different Functions of Rape Myth Use in Court: Findings From A Trial Observation Study' (2016) 13 Feminist Criminology.
[424] Nancy Brekke and Eugene Borgida, 'Expert Psychological Testimony in Rape Trials: A Social-Cognitive Analysis.' (1988) 55 Journal of Personality and Social Psychology. Charles G. Lord, Lee Ross and Mark R. Lepper, 'Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence.' (1979) 37 Journal of Personality and Social Psychology.; Amos Tversky and Daniel Kahneman, 'Judgment Under Uncertainty: Heuristics and Biases' (1974) 185 Science.
[425] Home Office above at n 421.
[426] R v Turner [1975] 1 All ER 70.
[427] Tony Ward, 'Usurping the Role of the Jury? Expert Evidence and Witness Credibility in English Criminal Trials' (2009) 13 The International Journal of Evidence & Proof.

processing, coupled with the proof of existing rape myths should be enough reason to present evidence countering what is 'mistaken' common knowledge. In the 2006 recommendations the Government also recognises this fact citing that the common reactions of victims of trauma such as rape is not part of the everyday knowledge of the ordinary juror, a fact that is supported by academic research[428]. It is not simply that rape complainants are judged against biased preconceptions, it is that this judgement directly benefits the defendant.

The 2006 Government recommendations included the following list of imagined issues that experts may provide general education about:

- The common misconception that rape within a domestic abusive relationship the victim would immediately leave
- The misconception that victims always willingly come to court to give evidence against their attacker
- Reasons why victims may delay reporting
- Reasons why victims may blame themselves for their attack
- Reasons why victims may downplay or minimise their trauma
- Explanations for incomplete or changing memories of the events
- Reasons why victim do not always physically resist or flee[429]

These are only a sampling of potential issues the expert may speak to at trial from the 2006 recommendations, however they do still closely resemble the list of recognised myths published in guidance by the CPS in 2017[430]. Observing the research produced in more recent years, it is clear that these myths remain prevalent enough in society to warrant new and continuing research, suggesting that a change is needed.

'General' preliminary expert testimony introduced in order to cover these topics would essentially function as other expert evidence would. The prosecution and defence counsel would both obtain a statement outlining the court appointed expert's opinions to be given in the preliminary stages of the trial in order to identify whether there are any additional questions either party would like to ask in cross-examination[431]. Normally, if the defence does not object to any points in the statement, the expert evidence could be read out

[428] Home Office above at n 421.
[429] Ibid at p.20.
[430] 'Rape and Sexual Offences - Chapter 21: Societal Myths | The Crown Prosecution Service' (*Cps.gov.uk*, 2017) <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-21-societal-myths>.
[431] Home Office above at n 421.

in court by the prosecution. However, I would argue that, while there should be little objection to the expert evidence as it would only include facts backed up by widely accepted empirical evidence, allowing the expert to appear and present evidence in person prevents the jury from perceiving the evidence as the prosecution making their case rather than attempting to provide education[432].

Additionally, the defence might benefit from using the cross-examination to remind the jury that while the expert's evidence is meant to ensure they do not invalidate the complainant's credibility for the wrong reasons, it is not meant to ensure they do not judge the complainant's credibility at all. This reminder may come in the form of their own leading questions allowing the expert to disclose that they may be getting paid by the state for their testimony and that they are there as a court appointed witness. Research has suggested that testifying to these facts have little effect on the benefits gained from the education provided by the expert[433], but it would stand to increase the transparency of this process and safeguard an element of impartiality for the defendant. In either line of questioning the expert would be forbidden from addressing any facts of the case, the complainant or defendant, the information would consist mostly of items from the list above, accompanied by any psychological clarification that may be needed. This could include explanation of how the brain may process information, and any studies performed that reinforce these facts can be used as concrete examples.

Those against the use of expert evidence as a way of dispelling rape myths in the trial setting, argue that the prosecution can just as effectively argue all of the points that an expert can make in their opening statement[434]. However, the goal of this work has been to demonstrate that despite an increased awareness of rape mythology in legal actors, there has been little improvement for victims in the trial setting[435]. Additionally, experts in this subject area can provide a much more nuanced and technical explanation of the psychology of rape

[432] Ibid.
[433] Nancy Brekke and Eugene Borgida, 'Expert Psychological Testimony in Rape Trials: A Social-Cognitive Analysis.' (1988) 55 Journal of Personality and Social Psychology.; L. Ellison and V. E. Munro, 'Turning Mirrors Into Windows?: Assessing the Impact of (Mock) Juror Education in Rape Trials' (2009) 49 British Journal of Criminology.
[434] Home Office above at n 416.
[435] For an exploration of the continuing improvements and why the results are less impactful than expected see: Jan Jordan, 'Here We Go Round The Review-Go-Round: Rape Investigation and Prosecution—Are Things Getting Worse Not Better?' (2011) 17 Journal of Sexual Aggression.

victims relieving some of the burden on prosecutors to become experts in human behaviour[436].

Convictions rates seem to suggest that there is more that must be done to bring justice for rape victims at trial[437]. The number of cases referred to CPS for a charging decision has decreased by 40 per cent in the last three years[438]. Allegedly, this fall is due to a practice by CPS in only taking cases with solid evidence in an attempt to increase the conviction rates[439]. If this is the case, it is time to explore amending the practices surrounding how rape trials are handled from report to verdict. Considering the body of rape myth literature and the support from psychological principles as to their danger, the law must begin to examine what more can be done protect victims of rape in the criminal justice system. It is the recommendation of the current work that a court appointed expert witness be brought in in rape trials to provide juror education. The prosecution and the defence would have access to the evidence the expert planned to present prior to trial and would be allowed to cross-examine the witness should they wish to attempt to clarify any points made by the expert. However, there should be little dispute over what facts the expert presents as the court shall ensure the studies used as the basis of fact are accepted by the majority of the scientific community in order to avoid any discrediting of such science in the future[440].

Using Psychology to Inform Legal Reform

"Empirical psychology studies can offer insights into law and legal decision-making, while testing legal assumptions to improve the accuracy and fairness of the legal system."[441] The goal of the current work was to examine how empirical psychology might help inform legal solution to a well-established issue within rape trials. There exists many 'social and

[436] Patricia A. Tetreault, 'Rape Myth Acceptance: A Case for Providing Educational Expert Testimony in Rape Jury Trials' (1989) 7 Behavioral Sciences & the Law.; Nicholas P. Spanos, Susan C. Dubreuil and Maxwell I. Gwynn, 'The Effects of Expert Testimony Concerning Rape on the Verdicts and Beliefs of Mock Jurors' (1991) 11 Imagination, Cognition and Personality.
[437] Danny Shaw, 'Rape Convictions at Record Low in England and Wales' (*BBC News*, 2020) <https://www.bbc.co.uk/news/uk-53588705>.
[438] Ibid.
[439] Ibid.
[440] For more information on the revision of sciences used in the courtroom see: Kelly Servick, 'Reversing The Legacy Of Junk Science In The Courtroom' (7 March 2016) *Science Magazine* <https://www.sciencemag.org/news/2016/03/reversing-legacy-junk-science-courtroom> . While the psychological evidence proposed for use here is slightly different to forensic evidence, it is important that all scientific experts make clear that there is room for individual differences and margins of error in findings to further add to the jury's ability to accurately determine how much weight they would like to assign to certain pieces of evidence.
[441] Avani Mehta Sood, 'Applying Empirical Psychology to Inform Courtroom Adjudication - Potential Contributions and Challenges' (2017) 301 Harvard Law Review at p.301.

cognitive phenomena' that surreptitiously impact the operations of the legal system[442]. An identified psychological phenomenon, not only applicable in the context of rape mythologies in rape trials, has the ability to affect every trial that takes place. The process known as motivated cognition describes the tendency to perceive and interpret information towards to a predetermined preferred outcome[443]. This can be a completely unconscious process, even if the goal is to follow the law precisely, legal decision-makers (not just jury members) are susceptible to motivated cognition[444]. Knowledge this possibility can make judges more aware of whether they are making decisions to justify a preferred outcome or if they are faithfully following the law, unbiased. The value of psychology can not only show legal actors where they might make unconscious psychological mistakes, it can also demonstrate where they need to ensure lay decision makers are not making these mistakes.

Understanding the areas in cognitive processing in which mistakes might occur can help improve the decision-making functions at trial. Additionally, it can improve judicial directions. The task of explaining technical laws to the lay members of a jury can be improved when a judge understands how a jury will interpret his instructions, cognitively[445]. The current work explored multiple mock jury studies attempting to apply psychological concepts to the findings of these studies. A better understanding of how a jury processes evidence, as well as judicial instruction, can significantly add to discussions on legal reform. An obvious methodological flaw in empirical studies assessing juror psychology in the trial setting is the lack of the true weight of the verdict decision weighing upon the jury. While mock jury studies are exceedingly helpful, the real value for psychological studies would come from examining actual jury deliberations in which someone's freedom is at stake. The value of psycho-legal research, especially where juries are concerned, if at a minimum, researchers were to be allowed into the jury room. Many of the justifications for maintaining juror secrecy can be retained with only a few simple precautions[446]. Despite the numerous possible benefits of understanding the happenings in a real jury room, "the legal system is

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[442] Ibid.
[443] Ziva Kunda, 'The Case for Motivated Reasoning.' (1990) 108 Psychological Bulletin.
[444] Ibid.
[445] Mehta Sood above at n 441.
[446] Connor Griffith, 'Jury Confidentiality Rules: Protector of Honesty or Enabler of Injustice? | Keep Calm Talk Law' (*Keep Calm Talk Law*, 2019) <http://www.keepcalmtalklaw.co.uk/jury-confidentiality-rules-protector-of-honesty-or-enabler-of-injustice/#:~:text=Keeping%20jury%20deliberations%20and%20the,to%20jurors%20from%20outside%20forces.&text=As%20noted%20by%20Lord%20Justice,they%20played%20in%20a%20trial.>. the justifications for maintaining juror secrecy include, public confidence, frank discussion, protection of the jurors and finality of verdicts.

largely in the dark about how jurors absorb, interpret, and apply the factual and legal information they are given to determine criminal liability."[447]

On a societal scale, using psychology to tailor education programs dispelling myths at the social level may eventually render the recommended general preliminary expert evidence in rape trials obsolete, but until then we must use the evidence we have, to make well informed changes and precautions to increase justice for all[448]. This could be in the form of the same psychological experts who participate in juror education in the opening phase of the trial, working with communities to further spread accessible psychological education.

[447] Mehta Sood above at n 441 at p.305.
[448] Toni Massaro, 'Experts, Psychology, Credibility and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony' (1985) 69 Minnesota Law Review.

Complainant's Sexual History

Case Note on R v A No.2 [2001] UKHL 25

The current note will examine the decision and impact of *R v A (no. 2)* [2001] UKHL 25 on rape shield legislation in England and Wales. Here, the House of Lords was tasked with determining whether Section 41 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999) contravened a defendant's right to a fair trial as guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) as enacted in the UK as Article 6 of the Human Rights Act 1998 (HRA 1998). The present case is somewhat unique in that the issues to be decided were put to the court prior to the trial taking place[449]. The sensitive nature of the facts, the public interest in protecting vulnerable witnesses the guarantee to a fair trial for defendants meant the Court was required to perform a very delicate balancing exercise to ensure the legislation continued to function as parliament intended while also ensuring the human rights of the defendant were preserved.

The question of *fairness* arose, in this case, from the exclusion of evidence in a rape trial under, what was at the time, new rape shield legislation in England and Wales. Rape shield laws are designed to 'shield' victims of sexual offences from degradation or humiliation by preventing cross-examination about their sexual history[450]. It has greater implications for sexual autonomy, allowing individuals to say no to intercourse regardless of their sexual history with the other party[451]. This idea that a complainant's sexual history is not *always* relevant in a rape trial has been recognized in English law for many years. Section 2 of the Sexual Offences (Amendment) Act 1976 prevented any evidence or cross-examination about the sexual experience of the complainant with anyone other than the defendant on behalf of the defendant without the leave of the judge[452]. This judicial discretion in admitting sexual history evidence, however, was criticized by many scholars as often improperly admitting this sexual history evidence[453].

Section 41 of the YJCEA 1999 restricted this judicial discretion in admitting sexual history evidence. Under Section 41 judges were tasked to ensure that any sexual history

[449] R v A No.2 [2001] UKHL 25 at para. 26.
[450] Olivia Barton, 'R V A (No 2) and the Protection of Complainants' Dignity, Privacy and Sexual Freedom' (2015) 3 North East Law Review.
[451] Ibid at p. 1.
[452] Sexual Offences (Amendment) Act 1976 s. 2(1).
[453] Aileen McColgan, 'Common Law and the Relevance of Sexual History Evidence' (1996) 16 Oxford Journal of Legal Studies.; Liz Kelly, Jennifer Temkin and Sue Griffiths, 'Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials' (Home Office 2006) <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.628.3925&rep=rep1&type=pdf>.

evidence admitted must fit within one of the legislated fact gateways, is relevant to an issue in the case and is necessary to preserve a fair trial[454]. These stronger restrictions were justified by Parliament as an attempt to avoid inaccurate assumptions that are often made about complainants in rape trials; i.e. that a woman who have had sex with one man is more likely to consent to sex with other men[455]. Section 41 also removes any reference to third parties in restricting sexual history evidence. There is no distinction made between preventing the introduction of sexual history evidence between the complainant and third parties or the complainant and the defendant. This *prima facie* ban without the leave of the judge was justified by citing dangers associated with the introduction of evidence of a sexual history with accused. It was asserted that introduction of this evidence could lead the jury to accept that consensual intercourse once means that future intercourse was also with the woman's consent[456]. Any acceptance of this belief goes against the question under the law which must always be whether there was consent to sex with the accused on the specific occasion outlined at trial[457].

These provisions specifically aim to balance injustices faced by complainants in rape trials. However, the accused is entitled to a fair trial, a right that is classified as absolute. Any conviction obtained in breach of this right cannot stand[458]. This right is subject to balancing in the context of weighing the interests of the accused, the victim and society against one another and considering proportionality[459]. The question is then, whether one of these interests should prevail over another and if the current legislation allows that. In the context of *R v A* the question will be whether Section 41 adequately and proportionately protects complainants in rape trials or does it infringe upon a defendant's right to a fair trial more than absolutely necessary[460]?

The Facts

The occurrence that brought the parties to court are as follows. In May 2000 the complainant met the defendant and the defendant's friend. The complainant and the defendant's friend formed a sexual relationship. On 13 June 2000 the complainant visited the flat the defendant and his friend shared. The complainant and the friend engaged in sexual

[454] Youth Justice and Criminal Evidence Act 1999 s. 41 (3), (4).
[455] R v A (no. 2) [2001] UKHL 25 at para 3.
[456] Ibid at para 4.
[457] Ibid at para 4.
[458] R v Forbes [2001] 2 WLR 1 at para 24.
[459] R v A (no. 2) [2001] UKHL 25 at para 38.
[460] Ibid at para 5.

intercourse while the defendant was not home. Later that day, when the defendant returned home, all three went for a picnic on the bank of the Thames. During the picnic, the defendant and the friend drank a significant amount of alcohol. Upon all three returning to the flat, the friend collapsed and was taken to the hospital by ambulance. The defendant and the complainant later left the flat intending to walk to the hospital. The two walked along the river, where the defendant fell down. According to the complainant, she attempted to help the defendant up from the ground however, he pulled her to the ground and had sexual intercourse with her. Later the same day, the complainant reported the rape to the police. The police interviewed the defendant however, under the advice of his solicitor he refused to answer any questions. The defendant later prepared a statement asserting that the complainant was never against the sexual relationship they had been having[461].

The defendant's case consisted of the defence that the sexual intercourse took place with the complainant's consent[462]. The defence asserts that the complainant initiated consensual sexual intercourse that was also part of a continuing sexual relationship. This continuing relationship had been occurring for a period of about three weeks prior to the events in question. The defendant claims that he and the complainant had had consensual sexual intercourse at the flat on multiple occasions, the last occurring about one week before the events in dispute[463]. In the first trial, counsel for the defendant applied for leave to cross-examine the complainant about the alleged previous sexual relationship between the two parties, and to lead evidence about it. An alternative to relying on the defence of the complainant's consent, the defendant sought to rely on the defence that he believed in the complainant's consent[464].

The judge ruled that: (i) the act of consensual sexual intercourse with the friend could be put to the complainant in cross-examination; (ii) that the complainant could not be cross-examined, nor could evidence be led, about her alleged sexual relationship with the defendant; (iii) that the prepared statement could not be put in evidence[465]. Following this ruling the judge gave leave to the defendant to appeal to the Court of Appeal as the above ruling would breach the defendant's right to a fair trial under Article 6 of the Convention[466]. The defendant exercised this right and appealed against the judge's rulings.

[461] R v A (no. 2) [2001] UKHL 25 para 18.
[462] Ibid at para 17.
[463] Ibid at para 19.
[464] Ibid at para 17.
[465] Ibid at para 20.
[466] Ibid at para 21.

The Court of Appeal found that the first part of the judge's ruling was made in error as no leave to cross-examine the complainant about her sexual intercourse with the friend was sought to be admitted[467]. Additionally, Rose LJ recorded a concession, he determined, rightly made by the Crown, that questioning and evidence relating to the complainant's alleged prior sexual activity with the defendant was admissible under section 41(3)(a) of the Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999) in relation to the defendant's belief in consent. Ultimately, the Court of Appeal found that the judge's ruling in entirely excluding such evidence was incorrect. Conversely, is was found that the effect of the YJCEA 1999 is that the alleged previous sexual relationship is inadmissible on the issue of consent[468]. Further, it was determined that the trial judge would eventually be required to direct the jury that the evidence of the complainant's consensual activity with the defendant in the time leading up to the alleged rape is only relevant to the issue of the defendant's belief in consent and not to whether or not the complainant truly consented[469]. It was this point in which Rose LJ expressed the view that this direction may lead to an unfair trial as a previous sexual relationship may be relevant to the issue of consent as well as belief in consent[470]. In January of 2001, the Court of Appeal certified the following question:

> "May a sexual relationship between a defendant and complainant be relevant to the issue of consent so as to render its exclusion under section 41 of the Youth Justice and Criminal Evidence Act 1999 a contravention of the defendant's right to a fair trial?"[471]

Counsel for the defendant added to this appeal to the House that he would invite the House to read down Section 41 of the YJCEA 1999 in accordance with Section 3 of the Human Rights Act 1998 (HRA 1998) in order to allow Section 41 to be given effect in a way that is compatible with the defendant's right to a fair trial guarantee under Article 6 of the Convention. Additionally, if that is not possible, he would invite the House to make a declaration of incompatibility[472].

Considering these invitations by defence counsel, the Secretary of State for the Home Department applied for leave to intervene in this stage. An Appeal Committee recommended that this leave be granted. Lord Hope of Craighead on this committee observed that while it is

[467] Ibid at para 22.
[468] Ibid at para 23.
[469] Ibid at Ibid.
[470] Ibid at para 23.
[471] Ibid at para 6.
[472] Ibid at para. 25.

best to consider compatibility and the right to a fair trial after the conclusion of the trial in order to best evaluate the trial as a whole[473]. However, in this case the trial has yet to take place but as the YJCEA 1999 was enacted to protect vulnerable witnesses, such as complainants in rape trials, it is not desirable to expose them to the trauma of giving evidence for a second time should a new trial be ordered. Additionally, as this issue was deemed one of public importance, it thought that it is likely to affect other trials[474]. The Director of Public Prosecutions confirmed this belief, informing the House that the same issue has arisen in thirteen other criminal cases[475].

The Decision

Aiming to answer the question as to whether a sexual relationship between a defendant and complainant can be relevant to the issue of consent so as to render its exclusion a contravention of the defendant's right to a fair trial, the House of Lords examined the intentions behind Section 41 and its effect on the right to a fair trial. In addition to this, the various options as to what recourse to take under the HRA 1998 should the legislation prove incompatible with the defendant's right to a fair trial.

It is first imperative to examine the exact wording of the legislation that is being challenged. Section 41 of the YJCEA 1999 prevents evidence and cross-examination about *any* sexual behaviour of the complainant except with leave of the court. This leave may be granted when

a) consent is an issue and where the sexual behaviour of the complainant is alleged to have taken place "at or about the same time as the event which is the subject matter of the charge against the accused"[476] and
b) where the sexual behaviour of the complainant to which the question or evidence relates is alleged to have been "in any respect, so similar" to the sexual behaviour which is shown by evidence to have taken place as part of the event which is the subject matter of the charge or to any other sexual behaviour of the complainant which took place at or about the same time as that event "that the similarity cannot reasonably be explained as a coincidence"[477].

[473] R v A (Joinder of Appropriate Minister) [2001] 1 WLR 789 at para. 11,12.
[474] Ibid.
[475] R v A (no. 2) [2001] UKHL 25 at para 26.
[476] Youth Justice Criminal Evidence Act 1999 section 41(3)(b).
[477] Ibid section 41(3)(c).

Leave may also be granted if the evidence of the complainant's sexual history goes no further than to rebut prosecution evidence[478]. Upon this examination it was determined that that prima facie, the restrictions placed on the court's power by these provisions seriously limits the opportunities for cross-examination or the adducing of evidence on behalf of the accused[479]. The words 'at or about the same time' would seem to prohibit questions about continuous periods of cohabitation or sexual relationships, or independent events more than a very recent period before the event in question[480]. Additionally, the inclusion of the requirement for the sexual behaviour relied be 'so similar' to the sexual activity in questions was determined to be 'very restrictive'[481].

Introduction of such evidence was described as a matter of common sense. A prior sexual relationship between the complainant and the accused may, depending on the circumstances be relevant to the issue of consent. "It is a species of prospectant evidence which may throw light on the complainant's state of mind."[482] Therefore, restrictions found in section 41 are capable of preventing the accused person from adducing relevant evidence which may be critical to his defence whether it is to belief in consent or consent itself. If this is the case section 41 must be declared incompatible with the Convention[483]. Excluding this evidence further risks disembodying the case before the jury, increasing the danger of miscarriages of justice furthering the possible need for a declaration of incompatibility under section 4 of the HRA 1998[484].

The next question the Court sought to answer was whether the means used to restrict or modify an accused's right to a fair trial pursues a legitimate aim and if there was reasonable proportionality between the means and aim sought to be achieved[485]. There was little difficulty in determining that the restrictions found in Section 41 served a legitimate aim. Not only is it in the general public interest to protect vulnerable witnesses, encouraging the reporting of crime helps to uphold the rule of law, allowing those who have committed a crime to be brought to justice[486]. The difficulty in the decision came in determining whether the means of achieving this goal were proportionate. The House of Lords believed that the binding nature of the restrictions leaves no discretion to judges. Diminishing this discretion

[478] R v A (no. 2) [2001] UKHL 25 at para 8.
[479] Ibid at para. 9.
[480] Ibid.
[481] Ibid.
[482] Ibid at para 31.
[483] Ibid at para 10.
[484] Ibid at para 32.
[485] Ashingdane v United Kingdom (1985) 7 EHRR 528, 547, para 57.
[486] R v A (no. 2) [2001] UKHL 25 at para 91 & 92.

would deny the judge the opportunity, when there are no other options, of preventing unfairness to the defendant, even in circumstances that would not prejudice the administration of justice[487]. It was ruled that Section 41 was a blanket exclusion of potentially relevant evidence. It for this reason that the Court determined it must exercise its right under Section 3 of the HRA 1998 to read Section 41 in a way that is compatible with the Convention, specifically by reading down the similar fact gateway found in Section 41(3)(c). It was stated:

> "[D]ue regard always being paid to the importance of seeking to protect the complainant from indignity and humiliating questions, the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6 of the Convention."[488]

The issue was then remitted to the trial judge for determination of whether the evidence was admissible on the facts[489].

Reasoning and Analysis

Having determined that Section 41 went beyond what is necessary to achieve its aims, the Law Lords went on to explain why sexual history was so relevant in sexual assault trials, its restriction endangers a defendant's right to a fair trial. It was recognised in their reasoning that Section 2 of the Sexual Offences Act 1976 allowed too much inclusionary discretion for sexual history evidence with third parties and left completely unregulated sexual history evidence between the complainant and defendant even if in remote in time and context. A serious issue to be corrected by future legislation[490]. The test for proportionality of the corrections made by Section 41, examined whether these restrictions went no further than what is necessary to achieve their objective. This examination included a look into the public interest in the rule of law. Section 41 would fail in its purpose if those who commit sexual offences are not brought to trial because its intended protections are inadequate, allowing distress or humiliation of witnesses or deflection of the jury from the true issue in the case by

[487] Ibid at para 99.
[488] Ibid at para 46.
[489] Clare McGlynn, 'Feminist Judgement R v A (No. 2) [2001] UKHL 25', *Feminist Judgements: From Theory to Practice* (Hart Publishing 2010).
[490] Ibid at para 28.

allowing irrelevant evidence[491]. From this perspective, it was determined that the scope of Section 41 in relation to sexual history with others was justified however, the creation of a blanket exclusion of sexual history between the complainant and the defendant subject to narrow exceptions 'poses an acute problem of proportionality'[492].

The exclusion of evidence of a previous sexual history between the complainant and defendant on the issue of consent is where the issues with proportionality are highlighted. In this case, it was deemed "a matter of common sense, a prior sexual relationship between the complainant and the accused may, depending on the circumstances, be relevant to the issue of consent"[493]. The House described it as 'strange' that evidence that two people who might have lived together or regularly participated in consensual sexual acts as part of a happy relationship, should be excluded on the issue of consent, unless it is immediately contemporaneous[494]. These events were considered useful as a type of 'prosepectant' evidence helping to shed light on the complainant's state of mind[495]. It was made clear that the Law Lords were not suggesting that previous consensual sexual activity can be used to prove consent at the time in questions as relevance and sufficiency of proof are two different things. This is likened to evidence of an accused person a week before an alleged murder threatening to kill the deceased, this is not proof that the accused's intent to do so a week later, but it is still logically relevant to the issue[496].

Despite acknowledging the high rates of acquittals in rape cases before the enactment of the YJCEA 1999 and research explaining the ineffective protections provided to alleged victims when allowing judicial discretion in controlling the introduction of sexual of history[497] the House chose to reintroduce a judicial discretion in favour of the defendant's right to a fair trial contrary to the intentions Parliament.

Commentary

The decision in *R v A (No 2)* elicited many different reactions. Critics of the YJCEA 1999 welcomed the *R v A* decision allowing an 'unworkable' 'theoretically flawed' provision

[491] Ibid at para 94.
[492] Ibid at para 30.
[493] Ibid at para 31.
[494] Ibid at para 10.
[495] Ibid at para 31.
[496] Ibid at para 31.
[497] Jennifer Temkin, 'Evidence in Sexual Assault Cases: The Scottish Proposal and Alternatives' (1984) 47 The Modern Law Review at p. 635.; Colgan above at n 453 at p.307.

to become compliant with the Convention[498]. Others were critical of the decision, citing the overstepping of the judiciary in their power under Section 3 of the HRA 1998 essentially opting to 'rewrite' Section 41[499]. Still further, feminist scholars criticised the reasoning within the judgement, linking the relevance of sexual history evidence with consent[500]. It is this argument that much of the current commentary will focus. Within the judgement, it is recognised that Parliament was better equipped to strike the correct balance between defendant's rights and protection of witnesses on such a sensitive topic[501]. It was Parliament's intent in enacting the YJCEA 1999 to restore and maintain public confidence in the law through its protection of witnesses and victims at trial for sexual offences[502]. It is of my opinion that the Law Lords, in this case, did not give this issue its proper weight.

Section 41 was enacted with the intention to increase victims' confidence in the legal system and lower the unsatisfactorily high attrition rate for rape cases[503]. Reducing the set circumstances in which a complainant will be subjected to questions about her previous sexual history, Section 41 aimed to reduce the risk of prejudicial and inaccurate conclusions being drawn by the jury regarding the victim's state of mind or credibility[504]. These are highly legitimate aims as sexual history evidence makes acquittals more likely, it was found (even after the enactment of the YJCEA 1999) that 90 per cent of trials in which sexual history applications were made ended in acquittal, as compared to 52 per cent of cases where no application was made[505]. There exists a correlation between acquittals and cases where the sexual reputation of complainants had been discredited[506].

A jury's tendency to draw inappropriate inferences from a complainant's sexual history (inferences Section 41 aimed to prevent) was even acknowledged in *R v A*[507]. Despite this acknowledgement, the decision citing the linkage between previous sexual activity between the complainant and defendant and consent as 'common sense' inappropriately

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[498] Neil Kibble, 'Section 41 Youth Justice and Criminal Evidence Act 1999: Fundamentally Flawed or Fair and Balanced?' (2004) 8 Archbold News at p. 6.
[499] Francesca Klug, 'Judicial Deference Under the Human Rights Act 1998' (2003) 2 European Human Rights Law Review.
[500] Louise Ellison, 'Commentary on R v A (No. 2) [2001] UKHL 25', *Feminist Judgements: From Theory to Practice* (Hart Publishing 2010) at p. 208.
[501] R V A (No. 2) [2001] UKHL 25 at para 99.
[502] Ibid.
[503] Kelly et al. above at n 453 at p. 2.
[504] Diane Birch, 'Rethinking Sexual History Evidence: Proposals for Fairer Trials' (2002) 531 Criminal Law Review.
[505] Beverley Brown, Lynn Jamieson and Michele Burman, 'Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials' (Scottish Office Central Research Unit 1992).; Kelly et al. above at n 453.
[506] Zsuzsanna Adler, *Rape on Trial* (Routledge & Kegan Paul 1987).
[507] R V A (No. 2) [2001] UKHL 25 at para. 94.

ignores the prejudice that sexual history can have on the jury's perception of the complainant. Essentially, the decision in *R v A* upholds the myth of a 'propensity to consent' that Section 41 was attempting to remove from rape trials[508]. The Law Lords' decision chooses to ignore the situation specific nature of consent. Every sexual act requires fully fresh consent regardless of any sexual history between the two parties, there should be no 'prospectant' evidence of consent[509]. Broadly, this type of reasoning removes the sexual autonomy of the complainant as an individual capable of making different decisions, at different times depending on the circumstances[510]. As the House of Lords was not referring directly to a 'propensity to consent' they do refer to sexual history as evidence of a certain mindset or affection towards the defendant as providing insight into the likelihood of the complainant's consent[511].

In the context of the current dissertation, introduction of such evidence is even more prejudicial from the psychological perspective. As has been discussed in the larger body of the work, even minor suggestions (such as previous sexual history between the parties) can activate certain myths in the minds of the jurors negatively (and unfairly) affecting their perception of the complainant. Additionally, their Lordships' reference to 'common sense' in determining the probative value of such evidence as 'common sense' can be informed by past experience and pre-existing beliefs which in turn can be influenced by common myths and stereotypes in society. It is best explained by Justice L'Heureaux-Dube's dissenting judgment in *Seaboyer*[512] warning against the attribution of too much probative value to prior sexual history as 'there are certain areas of inquiry where experience, common sense and logic are informed by stereotype and myth.' The 'myth' in question is that, having consented to intercourse with the defendant in the past, the complainant was more likely to have consented at the time in question. This perpetuates the view that a woman is unlikely to have been raped by a person with whom she has previously consented to intercourse[513]. With this consideration in mind, we must question then the accuracy of their Lordships' evaluation of

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[508] Clare McGlynn, 'Feminist Activism and Rape Law Reform in England and Wales: A Sisyphean Struggle?', *Rethinking rape law: International and comparative perspectives* (Routledge 2010).; Clare McGlynn, 'Reforming the Law on Sexual History Evidence: Reforming the Law on Third Party Evidence' (2017) 81 The Journal of Criminal Law.; Olivia Smith, *Rape Trials in England and Wales* (Palgrave Macmillan 2018) at p. 102.

[509] McGlynn above at n 503; Smith above at n 503; R V A (No. 2) [2001] UKHL 25 at para 31.

[510] Ellison above at n 500.

[511] Christine Boyle and Marilyn MacCrimmon, 'The Constitutionality of Bill C-49; Analyzing Sexual Assault as if Equality Really Mattered' (1998) 41 Criminal Law Quarterly.

[512] *R v Seaboyer* [1991] 2 RCS **577** (Supreme Court of Canada) at para 356.

[513] Barton above at n 450.

the ‘fairness’ of the trial. It is of my opinion that they failed to apply the appropriately weight the probative value and prejudicial effect of sexual history evidence with third parties and the accused alike. This is not to say that this information cannot be put to the jury, but to allow its use towards the issue of consent is more prejudicial than it is probative.

It is in my opinion that the third-party intervenors in the case struck the appropriate balance. Vera Baird QC, writing for the Rape Crisis Federation of England and Wales, argued against the submission of evidence of a prior sexual history between the complainant and the defendant on the issue of consent[514]. It was submitted, and I would agree, that it may be necessary for the jury to hear this information, but it shall be admitted only as background evidence to contextualise the facts of the case. The test for admissibility of background evidence would be whether the jury would be seriously misled of unable to make a fair assessment of the defence case if denied knowledge of prior sexual activity between the parties[515]. It was further added that the trial judge should direct the jury that such background evidence should not be used to support the assumption of consent. Allowing these facts to be heard by the jury prevents the risk of ‘disembodying the case before the jury’[516] and retains a stronger protection for complainants in rape trials as was the intention behind section 41.

R v A, allowing the consideration of previous sexual activity between the two parties to aid in the determination of consent at the time in question sends a dangerous message to victims of sexual violence at the hands of their partners or ex-partners. First, it implies that their case may not be taken as seriously as those who may have been attacked by a stranger and it may create the feeling that these victims are not worthy of the protection of the law[517]. There were many other avenues their Lordships could have explored in order to find a better balance in protecting both defendant’s and complainant’s rights in rape trials, the path chosen, in my opinion, was erroneous both in the undermining of the intentions of Parliament and in their weighing of probative value of sexual history evidence.

[514] Harriet Samuels, 'Feminist Activism, Third Party Interventions and the Courts' (2005) 13 Feminist Legal Studies.
[515] Ibid.
[516] R V A (No. 2) [2001] UKHL 25 at para. 32.
[517] Barton above at n 450.

Youth Justice and Criminal Evidence Act 1999: Chapter III Protection of Complainants in Proceedings for Sexual Offences
Section 41 Restriction on Evidence or Questions about Complainant's Sexual History

The use of a woman's sexual history as evidence of her credibility as a complainant of rape is not a new phenomenon. Historically, a woman's sexual history could determine the severity of the punishment for the perpetrator. This was mostly due to the treatment of rape as a property crime rather than an offence against the person[518]. Under Roman law, if the woman was unmarried, the act of a man stealing her away from her parents or guardians and having his way with her was treated as the same crime whether the acts were with the woman's consent or not[519]. A young virginal woman was considered the property of her parents and therefore the crime of rape was considered more akin to theft from the parents, consent played no part in it[520]. In many other historical cases, a woman's status or profession formed the basis of her credibility. Studies of rape trials in the late 19th century found that a conviction for rape was most likely when the rape was a brutal act of violence usually in a public place against a respectable woman that was a complete stranger and had done nothing to acknowledge her attacker[521]. Some of these elements arose out of pure practicality of proving the act, for example, the attack taking place in public allowed for more convictions as there were other witnesses to attest to which version of events took place. Brutal violence also strengthened the complainant's credibility through the introduction of medical evidence. It was the necessity of a perception of respectability and complete lack of connection to the alleged assailant that left many women without justice.

The rules of evidence in these times, allowed a victim's credibility to be determined by circumstances. The woman could bolster the credibility of her evidence if it was shown the accused fled the scene after the attack and if she immediately sought to report the crime, often leaving women of certain statuses or in certain circumstances unprotected by the law[522]. For example, if the woman happened to be of a lower status than then assailant, he would have no reason to flee as he held the position of power and therefore, higher favour in society[523]. Additional problems with status discrepancies arose for women who were assaulted behind closed doors, more specifically, their place of employment. For many

[518] Susan Brownmiller, *Against Our Will* (Penguin 1975).
[519] Carolyn Conley, Rape and Justice in Victorian England, Victorian Studies (1986) 29(4) p. 520.
[520] Ibid.
[521] Ibid.
[522] John Jervis, *Archbold's Pleading and Evidence in Criminal Cases*, 19th ed. (London: H. Sweet, 1878), p. 764 in Carolyn Conley, Rape and Justice in Victorian England, Victorian Studies (1986) 29(4) p. 526.
[523] Conley, above at n 519 at p. 526.

women, society was apt to believe complainants of public attacks with corroborating witnesses however, for woman assaulted in private, there was less support. Not only were there no corroborating witnesses, many times the attacker was the woman's employer and her, a servant. The problems for complainants in a position of servitude to their attacker were twofold. One, there was a clear power imbalance between the victim and attacker, potentially preventing the woman from reporting, especially in a timely manner due to fears of negatively impacting her employment and two, a man with household staff would normally be a man of *respectability* in society preventing him from being viewed as the *type* to rape[524]. These ideals are echoed in many of the rape myths believed in modern society. Research has shown that, even today, the general public carries preconceived notions about the who is a *rapist* and the *type of woman* that gets raped. A list of common rape myths as highlighted by the CPS can be found in chapter 1 of the current dissertation[525]. Many of these myths reflect these preconceived notions and, as explained in chapter 1, the more the facts of the assault or the characteristics of the complainant/defendant deviate from these preformed beliefs the more difficulty jury members have accepting them as fact. It is for these reasons that many jurisdictions have enacted what is known as rape shield legislation, in order to protect rape complainants from further trauma and prejudice[526].

Section 41 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999) might be considered England and Wales' rape shield legislation as it was enacted with the intention of protecting alleged victims of sexual assault from humiliating or degrading cross-examination. The following report will attempt to illuminate what types of protections existed for complainants of sexual offences before the enactment of the YJCEA 1999, the intentions behind the creation of the YJCEA 1999, specific provisions included in the YCJEA 1999 that constitute what would be considered a rape shield, reactions to the enactment of the law and its treatment in court and finally the present treatment of the YJCEA 1999 and proposed amendments to it over time.

Rape Shield before the Youth Justice and Criminal Evidence Act 1999

As discussed above, historically complainants of sexual offences faced a certain level of scepticism when there existed no other witnesses to the alleged attack or when the alleged

[524] Ibid. at p. 526-8.
[525] 'Rape and Sexual Offences - Chapter 21: Societal Myths | The Crown Prosecution Service' (*Cps.gov.uk*, 2017) found on p. 17 of the current work.
[526] Olivia Smith, *Rape Trials in England and Wales* (Palgrave Macmillan 2018).

assailant was of a certain 'respectable' status in the community. There were certainly improvements over time, however whispers of the olden days could be found in sexual offence legislation into more modern history and debates regarding reform. The below section will outline protections afforded to complainants of sexual offences before the enactment of the YJCEA 1999 and the criticisms of such protections that led to the creation of current legislation.

In order to provide a more comprehensive view of treatment of rape as outlined as a crime in legislation and the provisions created in order to protect complainants, it is important to start with the Sexual Offences Act 1956. The Sexual Offences Act 1956 states only that 'it is a felony for a man to rape a woman'[527]. The was no more detailed definition of what 'rape' actually entailed and there was no mention of what role consent played in determining whether or not a rape occurred. Consent was not completely ignored in practice, while there was no definition provided by the legislation, it was determined that the lack of consent was to be demonstrated by the presence of evidence proving intimidation, incapacitation by drugs or alcohol, or deception by the defendant as to their identity during intercourse[528].

Additionally, the Sexual Offences Act 1956 provided no protection to complainants during cross-examination. Under this law, defence counsel was free to cross-examine complainants about any sexual history evidence with the defendant and anyone else[529]. Under these rules evidence of a complainant's promiscuity, sexual 'immorality' or past prostitution was admissible as it was considered relevant to the issue of consent[530]. Because this evidence was relevant to the issue of consent, its presentation was not considered an undue imputation on the complainant's character, preventing any similar lines of questioning to be put to the defendant pertaining to his previous convictions or sexual history[531].

Rising criticism of these practices led to the commission of the Report of the Advisory Group on the Law of Rape (Heilbron Committee) in order to investigate the shortcomings of the operation of rape law and the treatment of consent in rape trials[532]. Upon completion of their investigation, the Heilbron Committee released their report with their

[527] Sexual Offences Act 1956 s1(1).
[528] 'Rape and Sexual Offences - Chapter 3: Consent | The Crown Prosecution Service' (*Cps.gov.uk*, 2017) <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-3-consent>.
[529] Zsuzsanna Adler, 'Rape- The Intention of Parliament and Practice of the Courts' (1982) 45 The Modern Law Review.
[530] Ibid.
[531] Criminal Evidence Act 1898 s.1(f)(ii).
[532] 'Report of the Advisory Group on the Law of Rape Cmnd.6352' (Home Office 1975) <https://www.ncjrs.gov/pdffiles1/Digitization/37318NCJRS.pdf>.

reform recommendations. Amongst the most pertinent recommendations was the creation of a statutory definition of rape, emphasising lack of consent as the 'crux of the matter' rather than violence, among others[533]. It also emphasised that it must be made clear that while belief in consent need not have a legal 'reasonableness' test, the lack or presence of reasonable grounds for belief should be considered alongside all of the evidence in jury deliberations. Additionally, the Committee recommended that sexual history evidence of the complainant with men other than the defendant should be inadmissible except with leave granted by the trial judge guided by principles laid out in legislation.

Following the release of the Heilbron Committee's report, a private members bill was introduced utilising most of the Committee's recommendations. However, this bill was too met with criticism, arguing that the proposed reforms tipped the balance too far in favour of complainants[534]. These criticisms stemmed from Members of Parliament retaining the belief that a woman's sexual history was frequently relevant to consent. Additionally, it was agreed by many that a woman's sexual reputation was relevant to the credibility of her complaint. These beliefs led to the redrafting of the proposed clauses concerned with such ideals, creating the final version that was passed into law as the Sexual Offences (Amendment) Act 1976[535].

With the enactment of the Sexual Offences (Amendment) Act 1976, a man is defined as having committed rape if he has unlawful sexual intercourse with a woman who at the time does not consent to it; and at the time he knows she does not consent to it or is reckless as to whether she consents to it[536]. It is outlined that whether or not the man had reasonable grounds to believe in consent is a matter to be considered in conjunction with all other evidence in the trial and not as a piece of evidence on its own[537]. The mention of consent and the idea that a man is responsible for ascertaining said consent is a shift in a positive direction. However, the lack of a legal requirement for the jury to consider the reasonableness of a defendant's belief in consent allowed for a very broad use of consent as a defence. This new legislation was further lacking in protection for alleged victims from the ways in which the defence may try to prove a belief was genuine in cross-examination. Section 2 of the Sexual Offences (Amendment) Act 1976 provides that no evidence of or cross-examination

[533] Ibid.
[534] Adler above at n 529 at p. 667.
[535] Ibid.
[536] Sexual Offences (Amendment) Act 1976 s.1(1).
[537] Ibid s.1(2).

about a complainant's sexual history with anyone other than the defendant may be adduced without leave being granted by the trial judge. The trial judge must be satisfied that it would be *unfair* to the defendant to exclude such evidence or questions when granting leave[538]. It is Section 2 that would be the standing rape shield legislation prior to the enactment of the YJCEA 1999.

Many argued that this provision provided little improvement for complainant protection, allowing far too much judicial discretion to judges who gave leave too readily[539]. There was little guidance provided to judges in using the discretion provided by section 2 and without this clarity rape conviction rates declined into the 1990s. In 1977 32% of reported rape cases ended in a conviction or caution. This number declined to 24% in 1985 and further to only 9% in 1997[540]. In 1999, the conviction rate for reported rape cases was only 7.5%[541] . The continued drop prompted the Home Office to recognise the need for reform of these laws that same year and thus, the Home Office Review Team was formed to examine sex offences legislation in England and Wales[542].

Around this time, the use of sexual history evidence at trial was being reviewed in the Parliamentary debates surrounding the proposed new legislation to later become the Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999). There was considerable debate surrounding the sexual history provisions proposed and where the correct balance of restriction of such evidence should lie. The controversy, for many, was the proposal for imposing legislative guidelines removing judicial discretion in determining what circumstances a complainant's sexual history will be allowed in cross-examination and introducing specific criteria that must be met for this type of evidence to be admitted at trial. The Bill kept the pre-trial application process found in Section 2 of the Sexual Offences (Amendment) Act 1976 but introduced more specific 'gateways' that the judge must be satisfied the evidence fits into before allowing it in.

Opinions were very divided on the idea of these gateways, some arguing that the gateways are too restrictive and the balance is now tipped too far in favour of the victims

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[538] Ibid s.2(2).
[539] J.R. Spencer, '"Rape Shields" and the Right to A Fair Trial' (2001) 60 The Cambridge Law Journal.
[540] Jessica Harris and Sharon Grace, 'A Question of Evidence? Investigating and Prosecuting Rape in the 1990s' (Home Office 1999).; Liz Kelly, 'A Research Review on the Reporting, Investigation and Prosecution of Rape Cases' (Criminal Justice Joint Inspection 2002) https://www.justiceinspectorates.gov.uk/cjji/inspections/joint-inspection-into-the-investigation-and-prosecution-of-cases-involving-allegations-of-rape/ at p. 13.
[541] Ibid, Kelly.
[542] Helen Power, 'Towards a Redefinition of the Mens Rea of Rape' (2003) 23 Oxford Journal of Legal Studies at p. 380.

while others argue that allowing evidence of this kind in any capacity is irrelevant and does not provide enough protection to the victims. During the YJCEA 1999's readings and debates in Parliament, MPs that made arguments for the use of sexual history evidence cited Article 6 of the European Convention on Human Rights (ECHR), and suggested that it is important propensity evidence. Mr Elfyn Llwyd protested that the bill, in some respects, "flies in the face of Article 6 of the ECHR"[543]. Mr Llwyd explained his concerns about the Bill possibly violating Article 6 by limiting the scope in which defence counsel can cross-examine complainants and 'test the veracity' of their evidence[544]. Further, Mr Hogg (a practising barrister by trade) added to these concerns asserting that 'the most important person in a criminal case is the defendant'[545]. He explained that the purpose of a criminal court is to ensure a fair trial and ensure the case is proved beyond a reasonable doubt, which is not quite the same as trying to determine the truth[546]. Others argued that convictions are too hard to overturn to justify the risks that excluding this type of evidence would create[547].

Proponents of this side of the debate expressed the belief that sexual history was relevant *especially* in cases involving consent. Mr Hogg again asserted that 'if a complainant has a propensity to promiscuous behaviour, that fact may be relevant to the issue of consent and therefore should be a matter to go before the jury. The same reasoning was applied to the use of sexual history to show a propensity for specific sexual practices, believing that these too can aid in the decision as to whether the prosecution has proved lack of consent[548].

MPs on the opposite side of the debate argued that they can think of no scenario in which a woman's sexual history with anyone other than the defendant is relevant at trial[549]. Those wishing to provide more protection for victims, described the gateways reserved for introduction of sexual history evidence under certain circumstances as 'loopholes' creating great concern for the efficacy of the Bill in its intention to provide greater protections. One MP opined that the leave allowed for such evidence should be omitted entirely and if this should not be the case, guidelines and strict instructions should be made to the courts[550]. This was supported by another who predicted that providing such 'loopholes' would allow for 'clever defence barristers' to find ways around the legislation leading to continued

[543] HC Deb 15 April 1999 vol 329 col385-458.
[544] Ibid.
[545] Ibid.
[546] Ibid.
[547] Ibid.
[548] Ibid.
[549] Ibid.
[550] Ibid.

humiliation and discrediting of victims of sexual crimes. The need for special treatment of victims of sexual crimes was argued because we, as a legal system, have made the crimes themselves special. Simplistically put, the crimes of rape and domestic violence are by definition Grievous Bodily Harm, but by separating them because of the sexual/domestic elements we are creating a different attitude toward them[551]. Others specifically disagreed with the implication of a *propensity* described by the opposition. These MPs asserted that the promiscuity of a woman is never relevant: if she has not given her consent, it is *rape*. This side of the argument believes that the issue on trial is what the *accused* did or did not do[552].

The Provision

Ultimately, the Youth Justice and Criminal Evidence Act 1999 was passed and the gateways remained. Below, Section 41 of the YJCEA 1999 is the primary concern of the current work, as it would be considered the rape shield provision and the specific wording of the final legislation will be examined below. Section 41 of the YJCEA 1999 restricts the use of evidence of a complainant's sexual history absent an application made by or on behalf of the accused. Section 41(2) states that the court must not give leave to such applications unless it is satisfied that (a) subsection (3) or (5) applies and (b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.

It is the use of the 'gateways' (found in subsections (3) and (5) as previously mentioned) allowing for such evidence that is the primary reason for continued scrutiny of the use of sexual history evidence in trial. Section 41(3)(a-c) contains three of the four gateways and creates the following channels for defence counsel to admit complainant sexual history evidence. Section 41(3) applies if the evidence in question relates to a relevant issue on the case and either:

> Section 41(3)(a), that issue is not an issue of consent; or
>
> Section 41(3)(b), it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or

[551] Ibid.
[552] Ibid.

Section 41(c), it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—

(iii) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or

(iv) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event, that the similarity cannot reasonably be explained as a coincidence.

The fourth gateway is found in Section 41(5) and applies if the evidence or question;

(a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and

(b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

The interpretation of these gateways in subsequent trials has been varied and has faced relative praise or criticism from either side of the divide depending on beliefs about the relevance of sexual history evidence in rape trials. An empirical study evaluating the use of this new legislation in rape trials was released by the Home Office in 2006[553]. This report was initially critical of the use of Section 41 in practice, citing that defence counsel often made application verbally either right before or during cross-examination, leaving little time for prosecutors to properly prepare. The authors also found sexual history evidence being brought in without any reference to the legislation, hypothesizing that judges either did not notice or failed to sanction the defence for violations of this type[554]. Since the release of that report there has been a vast increase in training for judges and barristers for trying sexual offence cases[555]. Still, sexual assault advocates argue that the YJCEA 1999 is still not robust

[553] Liz Kelly, Jennifer Temkin and Sue Griffiths, 'Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials' (Home Office 2006) https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.628.3925&rep=rep1&type=pdf.
[554] Ibid.
[555] Laura Hoyano, 'The Operation of YJCEA 1999 Section 41 in the Courts of England & Wales: Views from the Barristers' Row' (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3295246> .

enough in its protection against third party sexual history evidence, while many legal practitioners worry that it is too restrictive, creating too many rules regarding admission of evidence that may affect an accused's right to a fair trial[556]. Judicial decisions regarding the function of Section 41 and fair trials more closely align to the latter opinion above and two primary examples of this will be outlined below.

Judicial Reactions to the YJCEA 1999

The case of *R v A*[557] is perhaps the most significant case involving the interpretation of Section 41. Before the trial began, the defendant applied to adduce evidence of a consensual sexual relationship between himself and the complainant that had been taking place for the previous 3 weeks leading up to alleged rape, with their most recent encounter occurring only one week prior to the reported event[558]. The trial judge rejected the application for this line of questioning as Section 41 of the YJCEA 1999 did not allow for it. On appeal, the Court of Appeal asked this question and referred the case to the House of Lords: "May a sexual relationship between a defendant and complainant be relevant to the issue of consent so as to render its exclusion under section 41 of the Youth Justice and Criminal Evidence Act 1999 a contravention of the defendant's right to a fair trial?"[559] Ultimately, the case of *R v A* became less about disputing whether or not the alleged rape occur and more about determining the viability of the rules set out in Section 41.

It was decided that a balance must be found between the probative value of the evidence of sexual history and the potential prejudice it might be liable to create in distracting the jury from the real issue[560]. A fair trial, according the Court in this case, requires consideration of the interests of the accused, the victim and society, and therefore, proportionality must be weighed. With this in mind, the Court held that Section 41(3)(c) must be interpreted sufficiently broadly to ensure that evidence, where it is so relevant to consent that to exclude it would endanger the fairness of the trial, must be admitted[561].

"Consequently, the 1999 prohibition on questioning on previous sexual behaviour to previous sexual contact with the defendant had to be read flexibly, so as not to mislead the jury by "disembodying" the narrative through withholding evidence of a previous consensual

[556] Ibid.
[557] R v A (no 2*)* [2002] 1 AC 45.
[558] Ibid.
[559] Ibid at para 6.
[560] Ibid.
[561] Ibid.

sexual relationship"[562]. The holding that evidence of this type is relevant to the issue of consent raised concerns with many scholars, appearing to act as a form of evidence implying a certain propensity to consent[563]. Interpreting the gateways in such a broad manner, not only undermines Parliament's intention to provide more protection to victims than under Section 2 of the 1976 Act, but also seems to confirm one of the 'twin myths' found in *R v Seaboyer*[564] under Canadian law. The 'twin myth' in reference creates the belief that complainants with a prior sexual history are more likely to consent.

For years following the decision in *R v A,* it was disputed as to whether the broad interpretation of the similar fact gateway found in Section 41(3)(c) would apply only to sexual history between the complainant the accused or if it would extend to third parties as well. This question was answered in 2016 in *R v Evans*[565] with the decision of the Court of Appeal and subsequent acquittal of Mr Evans following a retrial. In April 2012, Ched Evans was tried and convicted for the rape of a woman in a hotel room. The complainant had claimed that she had no memory of the events that had taken place the night before as she was too intoxicated. The prosecution argued that due to her level of toxication, the complainant would not have been capable of providing consent to sexual activity, nor could Mr Evans had formed a reasonable belief in her consent[566].

In 2016, the Criminal Cases Review Commission referred the Evans back to the Court of Appeal following a more in-depth investigation which uncovered new evidence that might have impacted the outcome of the trial if it had been heard[567]. This new evidence came from two additional men who were said to have had engaged in sexual activity with the complainant in the weeks surrounding the alleged rape. Counsel for Mr Evans argued at the 2016 appeal that the description of complainant's sexual behaviour provided by the two additional witnesses was so similar to the events described by Mr Evans that it could not reasonably be seen as coincidence[568]. These similarities included the complainant's consumption of alcohol, instigation of the activity, direction of her partners into certain

[562] Hoyano above at n 555.
[563] Louise Ellison, 'Commentary on R V A (No 2)', *Feminist Judgments: from theory to practice* (1st edn, 2010).
[564] R v Seaboyer [1991] 2 SCR 577.
[565] R v Evans (Chedwyn) [2016] EWCA Crim 452.
[566] Ibid.
[567] Brian Brewis and Adam Jackson, 'Sexual Behaviour Evidence and Evidence of Bad Character in Sexual Offence Proceedings: Proposing a Combined Admissibility Framework' (2020) 84 The Journal of Criminal Law at p.51.
[568] R v Evans above at n 565.

sexual positions and the use of certain phrases during the activity[569]. This argument was accepted using the precedent stet in R v A[570] that the sexual behaviour did not have to be 'unusual or bizarre' in order for the judge to admit it through the similar fact gateway found in Section 41(3)(c)[571]. Following this appeal, Mr Evans was acquitted.

Due to the public image of Mr Evans and the large amount of publicity surrounding both the original trial and the 2016 appeal, the judgement (and allowance of third-party sexual history evidence) attracted significant criticism and called for legislative reform[572]. This reform was attempted with the introduction of a Private Members Bill (Sexual Offences (Amendment) HC Bill (2016–17)) and an amendment to the Government's Prison and Courts Bill also introduced in 2017[573], both falling with the dissolution of Parliament in May of 2017. A Review by the Attorney-General's Office and Ministry of Justice and empirical research on behalf of the Criminal Bar Association have investigated the function of Section 41 in the last few years, both concluding that Section 41 is working as intended and that there is no reason to conclude that it should be made more restrictive[574].

Despite these reports, it is the goal of the body of this dissertation to demonstrate why the negative impact on complainant perception in rape trials in conjunction with this type of evidence is often improperly weighed when trying to balance the defendant's right to a fair trial and prejudicial effect on the complainant. It is not the primary goal of rape shield legislation to prevent complainant embarrassment on the stand but rather, to exclude evidence that is of little relevance that only serves to distract the jury from the issues at trial[575]. It is for this reason that the current dissertation agrees that it might be dangerous to the rights of the defendant to create further evidentiary restrictions in rape trials, however there is still work to be done in protecting complainants of sexual offences from myths and misconceptions distracting the jury from the larger issues at hand. As discussed in this earlier work, the solution may not lie in continued alteration of provisions in Section 41, but additional protections added to evidence rather than restriction. It cannot be up to one piece of

[569] Ibid.
[570] R v A above at n 557.
[571] Smith, above at n 526 at p. 103.
[572] Brewis and Jackson above at n 567 at p.50.
[573] Ibid.
[574] Ministry of Justice, 'Limiting the Use of Complainants' Sexual History in Sex Cases' Cm 9547 (2017); Laura Hoyano, 'Cross-Examination of Sexual Assault Complainants on Previous Sexual Behaviour: Views from the Barristers' Row' (2019) 2 Criminal Law Review.
[575] Jennifer Temkin, 'Sexual History Evidence: Beware the Backlash' (2003) 4 Criminal Law Review at p. 239.

legislation to undo centuries of linkage between a woman's morality and credibility and her sexual behaviour[576].

[576] Smith, above at n 526 at p. 103.

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