

## **How rape myths are used and challenged in rape and sexual assault trials**

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### **Abstract**

Court responses to rape and sexual assault have been repeatedly criticised in England and Wales (Brown, Horvath, Kelly & Westmarland, 2010). In particular, research has identified prevalent stereotypes about rape in both the Criminal Justice System and wider society, with these rape myths often being used as the predominant explanation for inadequate victim/survivor treatment (see Temkin & Krahé, 2008). The existing literature, though, tends to rely on interviews or is outdated by policy, so the present research uses court observations to explore what is actually happening in adult rape and sexual assault trials. The findings show that rape myths are still routinely used at trial, but that they are sometimes resisted using judicial directions or prosecution comments. In addition, the research highlights how rape myths are kept 'relevant' to trial through a focus on inconsistencies, a dichotomy of wholly truthful/untruthful witnesses, and conceptualisations of 'rational' behaviour as being the 'normal' way to act. These findings provide a new understanding of rape myths and have implications for policy; in particular, that while training legal professionals is helpful, it cannot be expected to fully address the use of rape myths.

### **Keywords**

Rape, sexual assault, trials, criminal justice system, rape myths, rationality, courts

For decades, the Criminal Justice System (CJS) in England and Wales has been accused of poor responses to rape and sexual assault (Brown et al., 2010). Such criticisms have led to reform and CJS practices have improved, but the Stern (2010) review found that inadequacies remain. This article examines court responses to rape and sexual assault, exploring why attempts at improvement have not been fully

effective. In particular, it scrutinises the use of rape myths because they are frequently blamed for the problems identified (Temkin & Krahé, 2008), and despite extensive research there remain areas of comparative neglect. For example, Hudson (2002) suggested that the use of rape myths is reinforced by the legal context of trials, but there is relatively little understanding of how this may occur. Similarly, Smart (1989) and Lees (1996) critiqued the way some knowledge is undermined at trial, often through gendered methods of establishing 'truth'. The present research therefore seeks to understand the use of rape myths at trial by observing how they are made relevant despite increasing awareness of the realities of rape. It will be argued that some legal professionals resist rape myths, but that their use is reinforced by discourses about 'rationality' and a focus on inconsistencies. First, though, it is useful to briefly introduce the existing literature on rape myths and feminist critiques of the CJS.

In addition, it is useful to consider terminology from the outset, as different authors have used a range of terms to describe the accuser and accused. The current authors will use 'victim/survivor' to refer to the accuser, because the terms 'victim' and 'survivor' can be overly simplistic in isolation (Horvath & Brown, 2009). While others have chosen to use terms that represent the victim/survivors' legal status, for example 'complainant' or 'alleged victim', we felt that this created a narrow view of legitimacy and that 'victim/survivor' better reflected the risk of secondary victimisation in the CJS (see Ellison, 2007). In relation to the defendant, however, we felt it was important to highlight that there had not been a conviction at the stage examined, so 'the accused' was the most appropriate term to reflect their status. While this may initially appear to treat the accuser and accused differently, it is notable that adversarial trials are concerned with establishing the defendant's guilt beyond reasonable doubt and so are not a comment on the victim/survivor's status.

### **Rape myths: Existing research**

The term 'rape myth' gained prominence in the 1970s after Brownmiller's (1975) discussion of misled beliefs about sexual violence and Estrich's (1976) analysis of how some rapes were considered more 'real' than others. Burt (1980) then developed a research base about the factors influencing acceptance of such beliefs;

Burt argued that these factors were strongly related to wider beliefs about sex and gender. Lonsway and Fitzgerald (1994) later refined the theoretical basis of the term 'rape myth' by highlighting their difference from stereotypes. For Lonsway and Fitzgerald (1994), rape myths were not only stereotypical attitudes in the sense of ascribing generalised assumptions to individual sexual offences, but they also had a cultural function. This function was to explain an important societal phenomenon in a way that maintained the status quo (Thornton, 2002), and suggested that rape myths have mythical characteristics regardless of whether or not the beliefs were sometimes true (see Conaghan & Russell, 2014). Indeed, Lonsway and Fitzgerald (1994: 135) noted 'the truth value of these statements in a particular situation is not as significant as the fact they tend to be universally applied'. It is arguable, then, that rape myths are a combination of stereotypical attitudes about rape with the cultural functioning of a myth, leading to the most common definition: 'prescriptive or descriptive beliefs about rape that serve to deny, downplay or justify sexual violence' (Bohner et al., 1998: 14).

It was perhaps therefore unsurprising that Temkin and Krahé (2008) asserted that rape myths determine which assaults were taken seriously. Indeed, Burrowes (2013) suggested that myths were used to criticise a victim/survivor's actions; ignoring the role of fear, guilt and shock in decision-making.<sup>1</sup> The following table (adapted from Burrowes, 2013) outlines the most frequently discussed myths, organised in the four categories proposed by Bohner et al. (2009):

<b>Types of rape myths</b>	<b>Commonly discussed myths</b>
Beliefs that blame the victim/survivor	People who get voluntarily intoxicated are at least partly responsible for their rape
	People provoke rape by the way they behave and dress
	If the victim/survivor does not scream, fight or get injured then it is not rape
Beliefs that cast doubt on allegations	False allegations are common, mostly because of revenge or regret

	All victim/survivors will be visibly distressed in the aftermath of the rape and when giving evidence
	Any delay in reporting the rape is suspicious
Beliefs that excuse the accused	Rape is a crime of passion
	Male sexuality is uncontrollable once 'ignited'
Beliefs that assume rape only occurs in certain social groups	Rape only occurs between strangers in public places
	Male rape only occurs between gay men
	People working in prostitution cannot be raped

In the 1990s a series of seminal studies highlighted the presence of these myths in the criminal justice system. For example, Lees (1996) observed rape trials in the Old Bailey and argued that both judges and defence barristers invoked stereotypes about women's sexuality, as well as myths about the nature of rape. These, she argued, undermined women's experiences and created a sense of violation that revictimised victim/survivors (Lees, 1996). Other studies highlighted police cynicism, with Gregory and Lees (1996) finding that officers were openly sceptical if a victim/survivor had not reported immediately or did not have visible injuries. More recent research suggested that such views remained, with O'Keeffe, Brown and Lyons (2009) finding similar themes 20 years later. There have been positive developments since these seminal works, most notably the removal of corroboration warnings at trial; however, in research undertaken in 2010 prosecution barristers still appeared ineffective at challenging rape myths (Smith & Skinner, 2012).

Research published in the last 10 years continued to criticise barristers, judges and police officers for relying on rape myths (Temkin & Krahé, 2008). For example, Lovett et al. (2007) found that barristers routinely invoked myths to portray victim/survivors as blameworthy for being in high-risk situations. Indeed, Ellison and Munro (2009a) suggested that rape myths were often used by defence barristers to portray victim/survivors' behaviour as suspicious, lowering their credibility with the jury. For example, in a later project, Ellison and Munro (2013)

found that victim/survivors without visible injury were frequently perceived as not trying hard enough to prevent attack. In addition, the Crown Prosecution Service (CPS, 2013) highlighted an ongoing belief that false accusations were common, despite a review suggesting this was unfounded. Juries have also been found to interpret delayed reporting or inconsistencies in a victim/survivor's evidence as a sign of false allegations<sup>ii</sup> (Rose, Nadler & Clark, 2006). Similarly, victim/survivors who were not visibly distressed, or were 'too' upset, have been perceived as less credible (Taylor & Joudo, 2005). These beliefs are problematic because they assume victim/survivors will respond to rape homogenously in set ways (Payne, 2009).

In addition, rape myths are problematic because of their gendered nature. This is not to say that male survivors are immune to misunderstandings or myths, but that rape myths have tended to focus on traditional gender norms. In particular, Moore (2014) noted that media reporting on rape has used myths about rape to create cautionary tales aimed at women, outlining appropriate or inappropriate behaviour. This, she argued, was in reaction to increased female freedom and was the reason why so many myths focus on the cautionary tales of intoxicated women, flirtatious women, or women having informal relationships (Moore, 2014). Rape myths can therefore be understood through Lonsway and Fitzgerald's (1994) description of their cultural function: To explain and justify sexual violence, which is disproportionately experienced by women, in such a way as to maintain the status quo in relation to gender norms.

Perhaps the most widely discussed element of the rape myth literature has been that of 'real rape', which was first highlighted by Estrich (1976). The term has often been used to highlight the narrow definition of rape held by the public, who assumed 'real rape' occurs violently between strangers in public places despite this being relatively uncommon (McEwan, 2005). Recent debate has challenged this as overly simplistic, though, with Ellison and Munro (2010, 2013) finding that mock jurors do recognise that most rape occurs between acquaintances and partners. Despite this recognition, however, false accusations and the need for strong physical resistance featured heavily in deliberations where women were perceived as giving mixed signals (Ellison & Munro, 2013). Indeed, while Brown et al. (2010) argued that public attitudes to rape victim/survivors have softened in recent decades, there has

been ongoing debate about whether 'mixed signals' mean a victim/survivor is partly responsible in rape.

This debate is why Reece (2013) critiqued rape myth research, arguing that it fails to differentiate between myths about rape and sexual scripts rooted in gender inequality. While Reece (2013) also criticised the methodology of rape myth research, this was rebutted by Conaghan and Russell (2014) and Reece (2014) has since focused on the more complex issue of sexual scripts. The existing literature highlights sexual scripts which portray women as needing to police men's single-minded pursuit of sex, with offenders perceived as less culpable if the victim/survivor indicated an interest and so initiated men's 'uncontrollable urges' (Basow & Minieri, 2011; Wheatcroft & Wagstaff, 2009). Reece (2013, 2014) challenged this, however, arguing that some women *do* put themselves into positions where they can passively initiate sex. This raises questions about beliefs such as the commonly named 'coffee myth', which is the idea that women who invite men in for coffee are indicating interest in sex and so any subsequent sexual contact is automatically consensual. From Reece's perspective, these may not be myths at all, since those who adopt traditional sexual scripts may indeed signify consent in passive ways (Gurnham, 2015). Such arguments are useful for understanding why mock juries may continue to consider the 'coffee myth' in their deliberations (Ellison & Munro, 2013); however they ignore that consent can be removed at any time before and during sex, so a genuine signal earlier in an evening cannot justify a disregard for later signals. Indeed, it is arguable that in a situation where someone is passive about signalling consent, a reasonable person would take steps to check their interpretation of the situation. This is discussed in Coy et al.'s (2013) work on consent and the role of body language cues where one party is the primary instigator. Reece's (2013, 2014) and Gurnham's (2015) analyses might also highlight the usefulness of Kelly's (1988) continuum of sexual violence, since they are effectively critiquing the idea that rape is wholly separate from consensual sex that adheres to traditional sexual scripts. It is clear, then, that some rape myths require a nuanced understanding and that the way they are adopted or rejected by the public is perhaps more complex than has previously been recognised.

### ***Tackling rape myths***

There have been several policy changes to address the problem of rape myths (CPS, 2013). For example, the *Sexual Offences Act (SOA) 2003* attempted to clarify the meaning of consent and enable discussion of the accused's actions as well as the victim/survivor's. This has been largely welcomed, but a 2006 Home Office evaluation found that the *SOA 2003* had not significantly improved conviction rates or accused men's accountability (McGlynn, 2010). In fact, McGlynn (2010) argued that discussion of reasonable belief *increases* reliance on extra-legal factors because, for example, victim/survivor behaviour is likely to influence whether or not an accused's belief in consent is considered reasonable.

Training for judges and prosecution barristers has also aimed to alleviate the use of rape myths by highlighting the realities of rape. Rumney (2011) praised such training; for example judicial sex offence courses are delivered by experts and give practical advice about legal decisions. Burrowes (2013) has also provided excellent guidance for prosecutors, explaining the key narratives adopted by mock jurors when including rape myths in their deliberations. Significantly, though, Rumney (2011) acknowledged that some legal professionals would attend training without challenging their preconceptions. In addition, Stern (2010) argued that training could perpetuate stereotypes if interpretations of the course material are not checked. For example, Smith (2009) found that one barrister perceived his training as teaching him to doubt any victim/survivor who *was* emotionally distressed. While training is likely to play a key part in tackling rape myths, then, it is not a simple or comprehensive answer.

Finally, attempts to counter stereotypes in rape trials have involved the introduction of judicial directions at the end of the trial, sometimes called 'myth-busters', on the effects of sexual victimisation (Judicial Studies Board, 2010). Carline and Gunby (2011) found that barristers were sceptical of increasing the number of judicial directions, arguing that they unduly complicate trial and 'push' jurors down a path to conviction. Ellison and Munro (2009b) highlighted potential benefits, though, concluding that judicial directions were effective in lowering rape myth acceptance among juries. Despite this, Leippe et al. (2004) claimed that guidance is more effective when given at the start of trial and Keogh (2007) called for expert

witnesses to outline the realities behind sexual violence; but there is debate about whether this would be more convincing than judicial directions (Ellison & Munro, 2009b).

Despite the potential benefits of using judicial directions to counter rape myths, their impact is likely to be constrained by underlying legal contexts. This, Hudson (2002) argued, is because the use of rape myths fits with how evidence is measured against a hypothetical ideal. Although Hudson (2002) was referring to sentencing outcomes rather than trial practices, this suggests that training and judicial directions alone cannot address the use of rape myths. The present article therefore seeks not only to examine whether rape myths continue to be used in court, but also how the underlying context of trials may reinforce their use.

### **Feminist critiques: 'Rationality' and dyads in law**

In order to better understand how trial contexts may reinforce the use of rape myths, it is helpful to examine feminist critiques of the law and its response to rape.<sup>iii</sup> Smart's (1989) *Feminism and the Power of Law* is perhaps the seminal work to do this, arguing that legal discourses narrow the scope of discussion and are presented as authoritative to the detriment of other forms of knowledge. Smart (1989) therefore criticised legal responses to rape, especially for the need to translate everyday experiences into another format to make them relevant. In other words, the law may dismiss the issues most important to victim/survivors and is arguably ill equipped to deal with how violence against women often features cumulative events rather than discrete incidents (Hunter, 1996).

Smart (1989, 1992) also rejected the reliance on law because of the tendency to prioritise Enlightenment ideals such as 'rationality' (see also Oliver, 1991). The Rationalist Tradition, conceptualised by Twining (2006), is central in legal education and focuses on the search for objective truth through reason. Nicolson (2000) suggested that this leads to a widespread belief that behaviour is rooted in dispassionate, logical thought processes, so evidence can be tested against how a 'reasonable' person would act. Such beliefs are misled, however, because they ignore the power relations involved in designating what is 'reasonable' or 'normal' (Hunter,

1996; Smart, 1989). Indeed, Smart (1992) argued that while notions of masculinity and femininity are fluid, discourses about 'normality' tend to focus on a narrow perspective that is typically considered male-dominated (and white, heterosexual, able-bodied, middle class ...). By contrast, Nicolson (2013; see also Oliver, 1991; Scales, 1986) observed that 'rational' behaviour varies depending on the context and individual involved.<sup>iv</sup> While the law is presented as neutral and objective, then terms such as 'rational' are rooted in the largely masculinised Enlightenment Tradition and exclude more feminised ways of knowing (Naffine, 1990).

Smart (1989) therefore noted that the designation of behaviour as 'rational' or 'irrational' is socially constructed yet presented as fact.<sup>v</sup> She also observed that the construction of 'rationality' hinges on binary understandings: Language is used to create dyads such as true/false, reason/emotion, man/woman, and so on (Smart, 1989). Nicolson (2013) asserted that these binaries are politically loaded because one part is constructed as subordinate to the other, for example 'reason' is prioritised over 'emotion'. This subordination is not arbitrary and the perspectives of those from marginalised groups are often less valued (Oliver, 1991). Hunter (1996), for example, argued that the dyad of 'rational'/'irrational' is mapped onto 'masculine'/'feminine' in ways that value men's perspectives more highly because they are considered 'rational'.

The masculinisation of 'rationality' can be traced back to the emergence of Greek philosophy, which sought to use reason to overcome the mysterious forces of the natural world (Oliver, 1991). Women were closely associated with nature, especially in the faith beliefs of the time, and Plato even described women as imitating the earth. To overcome the 'dark forces' of nature therefore meant transcending the experiences and knowledge of women (Lloyd, 1993). Indeed, when Pythagoras created his table of 10 contrasts, he linked the male/female binary with the limited/unlimited one. As women menstruate and were linked with greater fluidity (see Cixious, 1986), women were therefore associated with the unbounded and indeterminate, which was presented as something to fear and control (Lloyd, 1993). Religion and science have perpetuated this binary since, for example there is an ever-growing body of psychological research on gender differences in problem-solving and emotionality. In her review of this literature, however, Fischer (1993)

concluded that there is no consistent evidence of gender differences in these matters and that any perceived variation is the result of gendered stereotyping. For Oliver (1991), this stereotyping of women as non-‘rational’ serves to maintain the gender order by providing justification for excluding women from positions of power. While Smart (1989) critiqued the idea of a homogenous ‘women’s experience’, she therefore acknowledged that binary language could disadvantage the ‘feminine’ in a variety of intersectional ways. In particular, Smart (1989: 33) argued that binaries are ‘completely inappropriate to the “ambiguity” of rape’, meaning that they ignore the complexity of the circumstances in which rape often occurs. In rape trials, then, if the behaviour of a victim/survivor is designated as ‘irrational’ according to male understandings of the world, their evidence can be undermined.

Rock (1993) also critiqued these binaries in trial, arguing that juries have been given a stark choice between two opposing arguments. This tended, he suggested, to mean witnesses adapted their evidence to fit into the binary mould rather than reflecting the complexity of social life (Rock, 1993). This is important because it is assumed a witness will only misrepresent events because of memory failure or malice, rather than having different interpretations of an event or feeling pressure to conform to societal norms (Hunter, 1996). A witness who changes their evidence about an incident between first report and trial has therefore been perceived as lying, despite the fact that several other factors may be involved (Hunter, 1996). In sum, the use of binary language oversimplifies evidential discussions at trial. This is combined with a tendency to focus on positivist beliefs about truth and the decision-making processes of ‘normal’ people; all of which arguably place an undue focus on a gendered notion of ‘rationality’. The present research therefore sought to examine the use of rape myths in relation to this underlying context by observing how they were made relevant at trial.

## **Methodology**

Court observations were undertaken for 10 months in 2012, with a three-month pilot in 2010. The methodology was chosen because observations can explore what actually happens in court, rather than relying on interviewees to be honest (Foster, 2006). Burman et al.’s (2007) work on sexual history evidence in Scotland is an

excellent example of how useful court observations are, but they have tended to be an underused method so this study addresses a perceived gap in the literature. Speedwriting was used to make handwritten trial transcripts,<sup>vi</sup> before the data was transcribed and analysed using NVivo. The data analysis drew upon Fairclough's (2010) approach to critical discourse analysis, which focuses on interdiscursivity, power relations and assumptions in speech.

The time intensive nature of observations, as well as the detailed data produced, meant that a relatively small sample was most appropriate to ensure that the trials were analysed in sufficient depth (Curtis et al., 2000). The sample therefore consisted of 18 adult rape and sexual assault trials, with an additional 10 in the pilot study. The sample was chosen using a combination of purposeful and opportunity sampling, for example the court was selected because it had recently won awards for witness treatment which suggested it was a centre of good practice. The trials themselves were sampled opportunistically, with the researcher attending court and asking the court administrators for the time and location of the next adult rape or sexual assault trial scheduled to start that day. The sampled trials were varied, but there was a bias towards domestic violence contexts, as this made up the majority of cases.<sup>vii</sup> Trials were directly observed rather than relying on court transcripts in order to ensure that intonation could be considered in the analysis, as well as observing the informal aspects of court such as the public gallery (see Smith, forthcoming). The sample did not feature a male victim/survivor because the researcher was not aware of any such cases at the court during the observation period; however a male victim/survivor featured in the pilot study (Smith & Skinner, 2012).

The ethical considerations of the research were complex. As courts are considered part of the public domain, methods literature has tended to assume that gaining consent is not required for trial observations (see Baldwin, 2008). Indeed, it was not possible to gain access to all interested parties in order to inform them of the research and get their consent. To partially address this, permission was received from Her Majesty's Courts and Tribunal Service, as well as by gaining the trial judge's consent to observe and take notes. This allowed the barristers, and in turn the accused, to be informed about the research and object if desired. Since it could not

be considered full consent, though, the many significant but informal comments made by legal personnel and members of the public gallery were excluded from the research data, leaving only the comments made during the public aspect of court. Notably, the victim/survivor and other witnesses were not informed or given the opportunity to consent because they were kept separate and could not be accessed. Future researchers may wish to address this by contacting Independent Sexual Violence Advisors or the Witness Service to provide an information sheet and indirectly gain consent, however this was not done because of concern that it could make witnesses self-conscious.

This highlights another ethical consideration of the research: Risk of harm. The ethics literature is clear that participants must be protected from undue intrusion, distress, embarrassment or other harm because of their involvement (Bachman & Schutt, 2011). There was potential for people to feel uncomfortable or embarrassed by the researcher's presence and note-taking, so a low profile in court was maintained. This involved being discreet about note-taking and being prepared to leave if there was any sign of discomfort. No such sign occurred, however, and in reality there were always journalists or students taking notes so the researcher's presence was not unusual. Most significantly, Bachman and Schutt (2011) also argue that *not* researching topics such as court responses to sexual violence can perpetuate harm and so the research was ethically justified. For a more detailed consideration of the ethical considerations and practical difficulties in undertaking court observation research, please see Smith (2014).

## **Findings**

In the trials observed, rape myths were used extensively in every trial and were a routine way for the defence to undermine prosecution witnesses' credibility. These were resisted by some judges and prosecution barristers, but remained 'relevant' for juries through a focus on identifying inconsistencies and discourses about 'rationality'.

### ***Rape myths, 'normal' behaviour and the oversimplification of rape contexts***

Rape myths were used to portray victim/survivor behaviour as either 'normal' or 'abnormal'. For example, juries were told to evaluate whether the demeanour of victim/survivors was 'consistent' with expectations; namely that they were visibly distressed immediately after the offence, when initially reporting, and at trial:

Her demeanour when giving her account [is upset] ... consistent with what she's complaining about. (Judge, T17)<sup>viii</sup>

Similarly, 12 trials featured discussion about whether or not the victim/survivor resisted sexual violence using adequate physical struggle, with any failure to do this being portrayed as 'abnormal' and therefore suspicious:

Squirming is the word [Victim/Survivor] uses throughout. She doesn't do anything else ... What would you do? Is just squirming what you would do? [Continues this for several minutes]. (Defence, T12)

Despite research suggesting that victim/survivors regularly wait before disclosing rape (Burrowes, 2013), it was also presented as unusual to delay reporting to the police. Delayed reports were therefore challenged and defence barristers suggested there must be cynical motives for subsequently coming forward:

[Victim/Survivor] didn't choose to tell anybody, despite all this intervention, but then last year [Accused had a modelling contest] that perhaps she knew about ... Her infatuation was so strong [and she couldn't contact him another way] ... Of course, delayed complaint is normal in some cases ... but look at the circumstances, they're very important, aren't they? (Defence, T12)

Here, the barrister recognised that delayed reporting is common, but then argued that the eventual report was suspiciously timed by invoking gendered stereotypes about obsessive and vengeful women.

Victim/survivors were also presented as 'abnormal' and untrustworthy if they maintained contact with the accused after the initial offence. For example:

She carried on life as if nothing had happened because nothing had, except in [her head]. She slept in the bed [for the rest of the night] ... Life carried on. She didn't make any excuses to avoid him [and they still had nice days out together] ... And again, life carried on [and they were still having nice days out and consensual sex in the run up to Accused's arrest]. (Defence, T18)

These discussions ignored the complexity of rape contexts, presenting victim/survivors as suspicious if they held any positive emotions towards the accused:

The text messages show, don't they, an attempt to patch up a relationship ... to a man who raped her just hours before. It simply doesn't make sense does it? Playful, affectionate; but not texts from a man who has been raping his wife ... (Defence, T4)

Such comments dichotomised relationships as either wholly good or wholly bad. By highlighting texts in which the victim/survivor and accused appeared to feel positively towards each other, this barrister therefore argued that the victim/survivor could not have been raped. Creating inconsistencies in this way ignored the complexity of abusive relationships, which can feature hope and love alongside manipulation and victimisation.

In fact, barristers frequently oversimplified the context of rape, mostly by tightly controlling the evidence heard and creating an assumption that people always act consistently. For example, the defence barrister in T17 prevented the victim/survivor from explaining her reasons for delayed reporting:

Defence: ' ... But you don't call the police for something as terrifying as [accused walking into your house and trying to get in your shower]?'

Victim/Survivor: '[I said I'd call someone if he didn't get out]'

Defence: '[How long was it between that and telling the police]?'

Victim/Survivor: 'Because I didn't have much confidence'

Defence: 'Now that's a "why" answer, I'm asking a "how long" question'  
Victim/Survivor: '[I don't, it was before Christmas].' (T17)

This suggests that the barrister was not concerned with understanding what happened, instead seeking to invoke the rape myth about delayed reporting and stop any explanations of the victim/survivor's behaviour. Such treatment occurred in most trials, with several defence barristers trying to remove fear as a justification for the victim/survivor not calling police immediately so that they could criticise the delay. For example:

Defence: 'You had no reason to not tell the police'  
Victim/Survivor: 'I was scared'  
Defence: 'But you didn't see him again'  
Victim/Survivor: '[But he's done stuff before ...]'  
Defence: 'You, in fact, could not let go of your obsession with him.' (T12)

Similarly, barristers presented a narrow definition of reporting which focused only on the police. This was especially apparent in T14, when it was agreed that the victim/survivor's disclosure to a Sexual Assault Referral Centre should not be mentioned in the judicial directions about delay:

Prosecution: 'Can we look at [the direction about delayed report] saying "she made no complaint to police", because in the Agreed Facts we note she did go the SARC'  
Judge: '[But she said "no police"]'  
Prosecution: '[The implication is she spoke to nobody about it]'  
Defence: '[You'll do an evidential summary and can say then, but this is] about failure to complain to the police'  
Judge: 'Yes, exactly, I'm going to leave it as it is.' (T14)

While it is positive that the prosecution barrister attempted to include this evidence in judicial directions, his arguments were quickly dismissed.

Delayed reporting was not the only stereotype that barristers invoked by presenting an oversimplified understanding of the alleged offence. During discussions of physical resistance, barristers kept control of the information heard by the jury through the use of closed questions:

Defence: 'What did you do to prevent [the penetration]?'

Victim/Survivor: '[Nothing, I just said "no"]'

Defence: '[You didn't scream]?'

Victim/Survivor: '[No]'

Defence: 'Did you put your knees up?'

Victim/Survivor: '[No I couldn't, because he was practically on top of me]'

Defence: 'You didn't injure him in any way?'

Victim/Survivor: '[No].' (T14)

This focused on what the victim/survivor had not done, rather than her recollection of repeatedly saying 'no'; and prioritised an examination of how victim/survivors *removed* consent instead of how accused men *gained* it. Similarly oversimplified arguments were made about the physical build of accused men and victim/survivors, with several defence barristers presenting the victim/survivor as 'irrational' for not struggling because they were bigger than the accused:

Defence: 'He's quite a bit shorter than you, isn't he?'

Victim/Survivor: 'Yes'

Defence: 'And you're quite a bit stronger than him'

Victim/Survivor: '[I'm taller but he's well-built, he's two or three times stronger than me]'

Defence: 'He had to push you away ...' (T4)

This quote shows the downplaying of other contextual factors, for example how emotional coercion might prevent physical resistance. These discussions also highlighted stark facts, like height, without discussing the additional factors in physical strength, for example muscle mass. The victim/survivor in the quotes above tried to resist this argument, noting the accused's muscular build; however this was ignored in subsequent questions.

### ***Inconsistencies and rape myths***

In the quotes above, several barristers created a sense of inconsistency between 'normal' reactions and victim/survivor behaviour. Such inconsistencies were presented as important because of an assumption that people will act 'rationally' and consistently in all situations (discussed later). For example, if victim/survivors *had* physically resisted but had not done so throughout the rape, this was used to challenge their honesty:

Defence1: 'Can I just ask you, because what you said before, is that you were trying to kick ... and if you're telling the truth, we can understand ... what you told the police is that ... every time he let go, you kicked out ... did you kick him when he was taking your clothes off?'

Victim/Survivor1: 'No'

Defence1: 'Why?'

Victim/Survivor1: '[I was too scared]'

Defence1: 'But you weren't too scared all of the time, were you, because you kicked out?'

Victim/Survivor1: 'Yeah.' (T1)

Here, the defence barrister presented the decision about whether or not to struggle as the result of 'rational' thought, meaning it should have started as soon as unwanted sexual contact began to occur. By ignoring the potential non-'rational' influences on the victim/survivor's actions, the defence presented a false allegation as the only explanation for such inconsistency. If, however, behaviour is not purely based on 'rational' decision-making, then such inconsistencies are to be expected.

In relation to the victim/survivor's demeanour, defence barristers also critiqued any apparent inconsistencies between their occasional assertiveness and the narrative of victimisation. For example, despite the victim/survivors' clear distress and vulnerability during their evidence, the defence barristers in T1 and T4 argued:

Let me make a point against myself: not every rape case results in injury, some victims submit to the attack ... you may think of [Victim/Survivor3] and you may think it's hard to imagine submitting. (Defence2, T1)

[Some women] are so fearful ... that they don't complain [but they also wouldn't complain about their partner buying the wrong chocolates]. She was very difficult to control as a witness, wasn't she? ... Was that the downtrodden woman imprisoned in her own home? (Defence, T4)

In the first quote, the Defence noted a 'myth-buster' about physical resistance and injury, but dismissed it as irrelevant because the victim/survivor had been assertive in other situations. By presenting a person's demeanour as remaining constant in every situation, the barristers excluded the possibility that people may respond differently to different contexts. This served to deny the ways in which people can act differently even in similar situations, and failed to acknowledge the potential impact of trauma on decision-making (Lodrick, 2007).

### ***Resisting rape myths***

On a positive note, there was some resistance to rape myths. For example, defence barristers occasionally noted the realities behind myths, while comments made by prosecution barristers and judges aimed to challenge these beliefs. In fact, prosecution barristers resisted stereotypes at some point in every full trial, often by outlining the possible reasons for the victim/survivor's 'suspicious' behaviour. This challenged the reliance on 'rational' ideals by providing alternative interpretations of the victim/survivor's actions, but also cautioned juries about the dangers of assumptions:

[The victim/survivors] seem to act in ways in which we would all think, no doubt, are stupid ... and these are all points, no doubt, that will be raised by My Learned Friends ... Please remember, experience in these courts shows time and time again that people react differently. Rape complainants are very different ... When you're thinking 'well, that was a

bit odd', just remember everyone's different ... Please don't stereotype. (Prosecution, T1)

It's going to be brought up ... but don't give in to myths and stereotypes about people in that domestic context [because you may think you'd act differently]. You do not know how victims of rape and domestic abuse behave unless, sadly, you have some knowledge of it. (Prosecution, T9)

Many of these comments used the judicial 'myth-buster' directions as a framework, and were not particularly complementary about victim/survivors. For example, the T1 prosecution barrister called the three victim/survivors 'stupid' and 'odd' instead of asserting that their actions are common after sexual victimisation. Such resistance suggests that barristers recognise some of the realities of rape; but one barrister, who was observed in both prosecution and defence roles, used 'myth-busters' when prosecuting, yet invoked myths when defending. For example, the above quote from the T9 prosecution was by the same barrister whose defence in T4 was heavily centred on rape myths.

Judicial resistance to rape myths was less prevalent than that of prosecution barristers, but 'myth-buster' directions were given at the end of 10 trials.<sup>ix</sup> These comments tended to highlight the diversity of victim/survivor reactions to rape and sexual assault; cautioning the jury on assumptions about 'normal' behaviour:

Now it is important that you leave behind assumptions ... It is the experience of the court that there are no stereotypes in rape ... Again, there are no classic rapes. (Judge, T9)

Judges also sometimes addressed specific rape myths, mostly in relation to the need for victim/survivors to be visibly distressed and report to police immediately. Some judges therefore made comments like:

It may be thought that the fact that there was a delay in reporting may mean that it is less likely to be true ... It would be wrong to assume that ... There is no set rule. Some [report immediately], others react with

shame or guilt or confusion and do not tell anyone ... A late complaint doesn't necessarily mean a false one any more than an immediate complaint means a true one. (Judge, T17)

And the fact that [Victim/Survivor] was distressed at times ... may have had nothing to do with the case. She may have regretted what she'd done ... The demeanour in court is not necessarily evidence of them telling the truth, it depends on personality. (Judge, T14)

Resistance to rape myths is positive because it increases the likelihood that jurors will base their deliberations on relevant issues rather than misleading assumptions about rape. Despite this, the latter quote shows how judicial directions about demeanour were only used to challenge the *prosecution's* use of rape myths in the observed cases, warning juries to be cautious about believing the victim/survivor because of their distress.

Overall, resistance to rape myths tended to involve judges or prosecution barristers challenging the idea of 'normal' behaviour. Where these comments came from the judge, in a position of authority, the jury may well have taken them seriously; however much of the resistance to rape myths was undermined and myths continued to be portrayed as 'relevant' to jury decision-making (see below).

### ***Why do rape myths remain 'relevant' for juries?***

While the resistance outlined above is positive because of the acknowledgement of alternative narratives about rape and the attempt to ensure juries only consider relevant issues, the limited data from this study did not appear to show any link between the use of 'myth-busters' and conviction rates. This is not surprising since any challenge to the relevance of myths was strongly undermined by defence barristers and several factors meant they were kept 'relevant' for juries. One of the key ways that this occurred was for defence barristers to challenge 'myth-buster' directions in their closing speeches. This was not about asserting that the stereotypes were true in general, but rather about asking whether they were true in the specific case. For example, the defence barrister in T9 stated:

Of course I agree there are myths and stereotypes ... But [...], we should add, shouldn't we, if we're talking about what experience shows, is that not all allegations of rape by young girls are true (sic) ... Uncomfortable fact, but one we have to deal with. (Defence, T9)

Another defence barrister simply presented 'myth-busters' as patronising to the jury:

[Prosecution said] to put aside the myths and stereotypes. I'm not going to insult your intelligence by talking about them; they belong in the last century. (Defence2, T1)

This comment implied that 'myth-busters' were redundant and so unnecessary for the jury to consider in depth. When he subsequently focused on myths for the rest of his closing speech, the jury may therefore have failed to consider whether or not he was drawing on stereotypes because they had been told such arguments would not be used.

Significantly, defence barristers in almost half of the trials also argued that their discussion of rape myths was legitimate because the prosecution used them as supporting evidence where possible:

You see, if she'd left in a hurry the Prosecution would be saying 'well, there you are, that's consistent', but are you meant to ignore it when it is not? ... [Prosecution] has told you about stereotypes ... whenever there's something out of kilter, it is a clear refuge to say ... 'well this is not a normal person' ... It has an air of 'heads I win, tails you lose', doesn't it? ... If you don't consider what would be done by a normal person, well then how are you meant to evaluate the evidence? (Defence1, T1)

[Victim/Survivor] didn't bite, kick or scream ... You don't have to ... but it is good evidence in cases where that does happen and so you may think it's useful to know that she didn't bite, kick or scream. (Defence, T9)

Both of these quotes suggest that it is not only the defence use of rape myths that is problematic, since prosecution use of stereotypes to *support* the victim/survivor's evidence also perpetuates a reliance on misunderstandings about sexual violence. This use of stereotypes by the prosecution occurred whenever a victim/survivor had behaved in a way that conformed to rape myths, most notably in relation to visible distress. In fact, the discussion of 'appropriate' victim/survivor demeanour was almost exclusively put forward by the prosecution, and not the defence:

Prosecution: 'You saw her tears on the video ... was that an act?'

Accused: 'Yes'

Prosecution: 'When she broke down crying because she said you always went for her hair, was that an act?'

Accused: 'Yes, she attacked me.' (T4)

This does not automatically mean that defence barristers no longer critique victim/survivors for their demeanour, however, as all victim/survivors in this study did display visible distress.

While some use of rape myths may relate to ignorance about the realities of rape, then it also appears that something more foundational is supporting their use at trial. One such factor may be the framing of certain behaviour as 'irrational' and 'abnormal'. Barristers evaluated a witness's actions by comparing them to how a hypothetical 'normal' and 'rational' person would act in the same situation. Any apparent deviation from this hypothetical ideal, or failure to justify a victim/survivor's behaviour with 'rational' thought processes, was then portrayed as meaning that the witness could not be trusted; for example, when one victim/survivor could not say why she misled nurses about her reason for having a termination. The Defence then noted:

Of course, it doesn't tell you about [the rape], but it does tell you, doesn't it, that [Victim/Survivor] is capable of behaving in really rather odd ways ... This is not a girl whose word you would really accept ... and really you

have to be sure about this girl's evidence ... because if you can't, then you can't be sure that [Accused] is guilty. (Defence, T9)

This termination occurred two weeks *before* the rape, so suspicion about non-'rational' actions related not only to the events immediately surrounding an attack, but also to peripheral issues and the witness's character in general. This type of discussion was pervasive throughout the full trials, with over 350 occurrences over all of the trials, and was central to how barristers established their case. Notions of 'rationality' were therefore also used to support the defence case by arguing that accused men would not have committed rape because it would be illogical to do so:

If he raped her [...] maybe he thought she would say nothing about that to her dad, but if he raped her and took her phone, well her dad's going to notice that ... The very fact that he stole her phone demonstrates that he feared no worse accusation would come back at him. (Defence1, T1)

This assumed that the decision to rape is one based on 'rational' thought processes, without exploring whether or not this assumption was well founded, and went uncontested by the Prosecution.

Like rape myths, general notions of 'rationality' were also used to support the prosecution case whenever the victim/survivor's behaviour was consistent with 'rational' ideals:

Why did she, at the very first opportunity, run out of the front door? ... If nothing much had happened, why not get some clothes on? Why not stay and look after [Son]? (Prosecution, T9)

In addition, prosecution barristers often used 'rational' thought processes to argue that victim/survivors' accounts would have fewer imperfections if they were making a false allegation:

When you're making up an allegation of rape, do you make it for a situation when people have just been in the house? ... Do you make it for

a situation, not when he was violent to you, but when he was apologising to you? ... Why would you be conceding that you had sex? ... This woman is so evil that she's going to use the death of her father as a way to remember the date? ... the conception of her children? ... The violence, of course, is separate ... Why does she not suggest that there was violence within [the rapes] as well? (Prosecution, T4)

Here, the prosecution barrister highlighted unusual aspects of the case and contrasted them with what someone 'would' do if they were making a false allegation. The idea that witnesses would act using 'rational' decision-making was therefore central to the arguments of both parties, and was used to assess the accused's actions as well as the victim/survivor's. These discussions were then repeatedly presented as 'relevant' for the jury because of a focus on inconsistencies and a perceived dichotomy of wholly truthful/wholly dishonest witnesses. For example, jurors were told they should focus on inconsistencies in the evidence:

You must look for inconsistencies. It's your duty. (Defence, T6)

Why would it be important that you have to consider these inconsistencies? Well imagine [you were accused]. Well what can you say to that except 'I didn't do it' ... He doesn't have to say anything ... that's how strong the burden of proof is: that he doesn't have to say anything ... that's why we have to point to the inconsistencies. (Defence, T4)

In portraying evidence as deviating from 'rational' ideals, creating an inconsistency between the witness's actions and 'normal' behaviour, barristers therefore cast doubt on a witness's testimony. The high standard of proof required for a conviction was then used to argue that any doubt about prosecution witnesses should result in acquittal:

You have to be sure, nothing less than that will do ... A not guilty verdict covers a multitude of other situations [and not just if you think the Accused is innocent] ... It comes where you think it's likely or very likely that he's guilty. A not guilty verdict covers where you have grave worries

that he's guilty, so if all I've achieved is that you think he just might, just might, be telling the truth, then the correct verdict is not guilty. (Defence, T17)

'Rational' ideals were also presented as relevant to deliberations because witnesses were portrayed as being wholly accurate *or* inaccurate, rather than a mixture of both:

Either [Victim/Survivor] was the subject of an attack on this night by this man, or she has completely made it up. (Prosecution, T12)

Who is telling the truth, who is not, because it's part of this case, isn't it, that both cannot be telling the truth. (Judge, T9)

Victim/survivors' evidence was therefore presented as either wholly true or completely false, ignoring how mistakes, memory lapses, and pressure to be the 'perfect victim' might lead to a mixture of truth and error. This dichotomy was arguably done to simplify jury decision-making in cases where it was agreed the victim/survivor's account amounted to rape if true. It became especially problematic, though, when barristers and judges presented a minor inaccuracy about one aspect of the evidence as evidence that witnesses were wholly untrustworthy. This can be seen most clearly in the T9 quote already discussed above:

Of course, it doesn't tell you about [the rape], but it does tell you, doesn't it, that [Victim/Survivor] is capable of behaving in really rather odd ways ... This is not a girl whose word you would really accept ... and really you have to be sure about this girl's evidence ... because if you can't, then you can't be sure that [Accused] is guilty. (Defence, T9)

Much of the barristers' portrayal of trustworthiness therefore centred on 'rational' ideals; and it is noteworthy that the four trials where juries returned guilty verdicts (T1, T9, T15, and T17) involved victim/survivors being very candid about their imperfections:

Police Officer: 'So you ended up on the bed, how were you on the bed?'

Victim/Survivor: '[I had my back on the bed, I don't remember how but I'm not sure if I'm making up a story to get to what I know]'

...

Police Officer: 'So how long was he gone into this other place, room, for?'

Victim/Survivor: '[I don't know, I just froze, I don't know why I didn't try and escape], it's not something that happens to you, it's just something that happens to someone else. It's just [...] shit.' (T9)

Resisting the dichotomy of wholly accurate/wholly inaccurate, as the victim/survivor has done perhaps unconsciously in the above quote, therefore appears important in avoiding the undermining of victim/survivors based on 'rational' ideals.

### **What are the implications of these observations?**

The observations outlined above support existing literature and create new understandings of how rape myths are used at trial. For example, they provide further evidence that the myths discussed in existing research are still routinely used in trials to undermine the victim/survivor's credibility. The most commonly discussed myths related to 'appropriate' demeanour, delayed reporting, failure to cut contact with the accused, and physical resistance. These are also the stereotypes most commonly cited in research on police and public attitudes (Temkin & Krahé, 2008), suggesting that the myths used at trial reflect those discussed elsewhere.

Rape myths were used by creating a sense of 'appropriate' behaviour and involved framing victim/survivor's actions as 'abnormal' if they did not comply with this norm. Hudson (2002) has already highlighted this 'logic of law' in relation to sentencing policy, but not the evaluation of evidence. Others, like Wheatcroft and Wagstaff (2009), have noted that myths are used to create an ideal template of 'real rape', but they overlook the ways in which victim/survivors are measured against

this. The observations above therefore develop the theorisation of rape myths, highlighting that they are used as a form of 'rational' ideal.

Such a focus on 'rationality' reflects Nicolson's (2000, 2013) assertion that the Rationalist Tradition, discussed earlier, is central to legal culture and that evidence is evaluated by measuring it against 'logical' thinking, despite decades of evidence that human behaviour (and memory) is inconsistent. The way in which 'rationality' was constructed at trial held particular significance because it often ignored that the actions being portrayed as 'irrational', for example not struggling, could also be framed as a logical response to trauma, fear and the drive for survival (Lodrick, 2007). Korobkin and Ulen (2000) similarly argued that legal discourse should recognise the role of emotions, intuition and context when designating behaviour as 'rational' or 'irrational'. Indeed, Koelsch, Fuehrer and Knudson (2008) argued that women experience tension after sexual assault because they are aware of the 'rational' precautions advised by society, but the situation was also very complex and it was not always clear what the 'rational' action should be. The interviewed women in Koelsch et al.'s research (2008) then sought to make sense of their experiences by discussing whether their responses were 'right' and 'wrong', in order to learn a more 'rational' response for any future experiences. This shows that behaviour of sexual offence survivors cannot be dichotomised into 'rational' or non-'rational', even when the logic of the actions is not immediately apparent to an outside observer.

The observations also reflect Smart's (1989) analysis that binaries are imposed on law through language dyads, such as reason/emotion, in both written and spoken legal discourse. These dualisms contain a subordinate element in the way that rationality was presented as preferable to emotion; as Smart (1992) notes, this is often gendered. Taslitz (1999) noted similar arguments, pointing to the way in which barristers present juries with *either* the prosecution *or* defence case, rather than acknowledging that elements of both can be true (see also Rock, 1993). The present findings support this, with a witness's evidence usually being portrayed as wholly accurate or wholly inaccurate; in turn legitimating any discussion of peripheral issues because a single untruth could be extrapolated to mean no truth.

This may at least partially explain why there is a demand for victim/survivors to be considered 'perfect' in order to be believed<sup>x</sup> (Rose et al., 2006).

Similarly, the focus on inconsistencies reflects the central role assigned to discrepancies in rape asylum applications (Baillot, Cowan & Munro, 2013). As was found in the trials above, Baillot et al. (2013) noted that some decision-makers seemed to question applicants with the intention of highlighting and then exploiting inconsistencies. It is well established that memory recall is often inaccurate and that trauma greatly exacerbates this difficulty (Herlihy, Robson & Turner, 2012), making this overreliance on inconsistencies problematic when evaluating witness credibility. Such an embedded focus on discrepancies between witness evidence and the hypothetical 'rational' ideals involved in rape myths once more suggests that training alone cannot eradicate the use of rape myths in court.

It is positive that the relevance of rape myths was sometimes resisted, and this may suggest that training legal professionals about them has been helpful. Rape myths remained prevalent, however, and judicial directions were easily undermined by the defence. In addition, while many judges and barristers displayed a nuanced understanding of sexual violence contexts, others continued to demonstrate ignorance. The judge in T14 was the clearest example of this, regularly interrupting the victim/survivor's evidence in order to make stereotyping comments. When the findings were shown to some of the barristers involved, one reflected such concerns, saying that some judges continue to hold out-dated beliefs. Interestingly, the judge who made the most stereotypical comments was also the one who most extensively used 'myth-buster' comments in his summary, showing that using 'myth-busters' did not automatically mean legal personnel had a good understanding of sexual violence. It is an achievement that the guidelines were used even when they did not appear to reflect the judge's beliefs, but it remains important to address stereotypes held by judges where present. Rumney (2011) noted that judicial training is well designed and constantly being improved, however some judges will attend the course and be allowed to try rape cases without really engaging. Alongside training, then, it may be helpful to implement a court observation scheme to identify problematic practices by judges. The Police and Crime Commissioner for

Northumbria, Vera Baird, has piloted such an observation scheme and will be reporting on the results shortly.

The findings also provide new insights into how rape myths are used, highlighting the ways in which they were raised by prosecution barristers *as well as* the defence. This happened especially in relation to distress, which was discussed almost exclusively by the prosecution. The Crown therefore used stereotypes as supporting evidence wherever possible, legitimating the defence usage. This must be tackled if 'myth-busters' are not to be undermined, and will need to be raised with prosecutors and police for consideration during trial preparation.

Another notable finding was that a barrister who resisted stereotypes while prosecuting also heavily used them when in a defence role. Smith (2014) has highlighted the adversarial focus on winning at any cost, showing that barristers will manipulate evidence and invoke rape myths if it will increase the persuasiveness of their argument. For stereotypes to be truly addressed, this focus on winning *at any cost* must therefore be tackled (Smith & Skinner, 2012). It is unclear how this would best be achieved, but clarification of the Bar Code of Conduct's guidance on misleading the jury and intimidating witnesses may help, alongside an increased profile for the breach of human rights claims that are upheld internationally for ill-treatment at trial (see Westmarland, 2005). This recognition that it is not only those accused of a crime who are entitled to human rights protections would mean that barristers cannot simply dismiss poor victim/survivor treatment as collateral damage in the pursuit of justice (Smith, 2014). Similarly, guidance should be given as to whether doubt based on misinformation or myth can be considered '*reasonable doubt*', given that it is arguably unreasoned (Boyle, 2009). In addition, continued public awareness-raising is likely to reduce the mention of rape myths because juries would be less convinced by them, removing barristers' incentive to raise such issues. It may therefore be useful for juries to watch a video before trial, for example the police 'only yes means yes' DVD. Educating the jury about stereotypes from the beginning may make them more willing to accept 'myth-buster' comments made by legal professionals during trial (Leippe et al., 2004), but would not bias the jury because they already receive the information at other times.

Ellison and Munro (2009b) have also examined the potential benefits of using expert witnesses to counter the common rape myths held by juries. Expert witnesses are expensive, though (Council of Circuit Judges, 2006), and so they should only be introduced if they are significantly more effective than the existing 'myth-buster' directions used by judges. There is evidence that expert witnesses are effective at appeasing jury stereotypes about delayed reporting and victim/survivor demeanour, although not the need for physical resistance, potentially making the expense worthwhile (Ellison & Munro, 2009a, 2009b). Having said this, Goodman-Delahunty et al. (2011) found that Australian mock juries were equally convinced by judicial comments and clinical psychologists. Goodman-Delahunty et al.'s (2011) research also suggested that juries are more convinced by judicial comments made during closing speeches, casting doubt on the idea that juries are more influenced by guidance given at the beginning of trial (see also Ellison & Munro, 2009b; Leippe et al., 2004). It may therefore be best to continue developing the use of judicial guidance to the jury, rather than getting distracted by ongoing debates about expert evidence (Ewing, 2009; Ward, 2009).

Notable in these findings is a sense of the Sisyphean struggle for reform highlighted by McGlynn (2010): Rape myths were resisted and yet remained prevalent. There is a sense of continuity despite attempts at change, and this is mirrored in Antipodean research by Zydervelt et al. (2016), which found that lawyers' strategies for cross-examination had barely changed since the 1950s, despite social and legal reform (see also Stern, 2010). As McGlynn (2010: 150) eloquently stated, 'the story of rape law reform in England and Wales over the past 10 or more years is one which includes tales of progressive changes being met with resistance; often unacknowledged and perhaps unconscious and unrecognised, but resistance nonetheless'. Jordan (2015: 110) sought to understand this cycle of reform and resistance, noting that it is partly because of a reliance on policy in place of cultural change. In order for rape trials to truly improve, then, there must be some recognition of the need for gender equality – something not to be taken for granted in light of increasing post-feminist discourse (Jordan, 2015). Despite this apparent nihilism, though, McGlynn (2010) has rightly observed that there is sure and steady progress. Since Lees' (1996) work on courts, there have been restrictions on sexual history evidence, the development of 'myth-buster' directions, public awareness

campaigns and the *Sexual Offences Act 2003*. To paint a wholly bleak picture would be misleading, and the observations discussed here should be seen as a cause for hope *as well as* of concern.

## **Conclusion**

Overall, these court observations show how ideas about ‘rationality’ and ‘normality’ are central to the evaluation of evidence. This has meant that rape myths have remained relevant to jury deliberations despite attempts at highlighting the realities behind rape. This is mostly because inconsistencies were prioritised and witness evidence was dichotomised as wholly accurate/wholly inaccurate. For example, any perceived ‘irrational’ action or inaccurate statement could be used to argue that a witness was not wholly honest, and so not credible at all. Rape myths were therefore routinely discussed and used to oversimplify the incidents being discussed. Notably, prosecution barristers also used rape myths to support their case whenever possible. This legitimated the defence’s usage of such points and helped undermine any ‘myth-buster’ comments to the jury. This research therefore highlights the factors that serve to reinforce the discussion of rape myths at trial, moving beyond an assumption that their usage is simply about ignorance.

In addition, the notions of ‘rationality’ observed can be linked to the criminal justice system’s Rationalist Tradition, which emphasises a masculinised view of reason as the ultimate way of knowing (Nicolson, 2013). This in turn reflects a gendered perspective on ‘rationality’ dating back to Ancient Greece, with women being portrayed as ‘irrational’ and therefore untrustworthy by philosophers such as Plato (Lloyd, 1993). Without recognition that this gendered bias is present throughout legal discourse but holds no basis in empirical research, gender inequality within evidence evaluation is likely to continue (Naffine, 1990). While policy reform can continue to reduce the use of rape myths, then, it is not until the CJS addresses its focus on binaries and out-dated assumptions about ‘rationality’ that these reforms can become more effective.

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<sup>i</sup> Reece (2013) has challenged this, arguing that robbery victims are also criticised and so rape is not unique. Research by Bieneck and Krahe (2011) appears to contradict this, however, with victim/survivors

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of robbery being blamed less than those of rape when both are intoxicated or have had previous relationships with the accused.

<sup>ii</sup> Although some mock juries penalise victim/survivors for being too coherent, so there is a narrow margin of ‘appropriate’ consistency (Munro & Kelly, 2009).

<sup>iii</sup> However, Naffine (1990) observes that the law is neither simplistically good nor bad for gender equality, being complex and contradictory like all social life. In addition, Rumney (2008) found that while rape trials involve gendered ideas about behaviour, male victim/survivors were also treated poorly and so gender is not the only consideration.

<sup>iv</sup> For example, while one person may consider it ‘rational’ to struggle against rape, another may perceive submission and avoidance of injury to be the most ‘rational’ option. The decision will depend on contextual issues such as fear, past intimidation, and the fight/flight/freeze/flop instinct (Lodrick, 2007).

<sup>v</sup> Elsewhere, ‘rationality’ has been critiqued by literature on ‘bounded rationality’, which is the idea that behaviour is purposeful, but sometimes fails to be fully rational because of limited intelligence or a lack of knowledge (Kaufman, 1999). In addition, it is argued that behaviour cannot be separated from context and will often be determined by emotions (Korobkin & Ulen, 2000).

<sup>vi</sup> It is illegal for the public to record Crown Court trials (Her Majesty’s Courts & Tribunals Service, 2014).

<sup>vii</sup> There are no up-to-date statistics about the proportion of trials featuring partner violence, but Lovett et al. (2007) note that attrition is lower among domestic violence rapes once reported and so this may actually be representative.

<sup>viii</sup> In quotations, ‘...’ signifies a quote that has been shortened. Any pauses will be signified by ‘[...]’. Words in box brackets have been paraphrased or cannot be guaranteed as a direct quote.

<sup>ix</sup> See Judicial Studies Board (2010) for example directions; although judges did not give the full directions listed, but rather summarised their essence and ignored the concrete examples provided.

<sup>x</sup> Although it is notable that the present findings suggest a victim/survivor, who is candid about not having the ‘perfect’ evidence, may have been more convincing for juries.

## References

Bachman, R. and Schutt, R.K. (2011). *The Practice of Research in Criminology and Criminal Justice* (Fourth Edition). London: Sage Publications.

Baillet, H., Cowan, S. & Munro, V. (2013). Second-hand Emotion? Exploring the Contagion and Impact of Trauma and Distress in the Asylum Law Context. *Journal of Law and Society*, 40(4), pp.509–540.

Baldwin, J. (2008). Research on the Criminal Courts. In King, R.D. and Wincup, E. (eds.), *Doing Research on Crime and Justice* (pp.375–398). Oxford: Oxford University Press.

Basow, S. & Minieri, A. (2011). ‘You Owe Me’: Effects of Date Cost, Who Pays, Participant Gender and Rape Myth Beliefs on Perceptions of Rape. *Journal of Interpersonal Violence*, 26(3), pp.479–497.

Bieneck, S. & Krahe, B. (2011). Blaming the Victim and Exonerating the Perpetrator in Cases of Rape and Robbery: Is There a Double Standard? *Journal of Interpersonal Violence*, 26(9), pp.1785–1797.

Bohner, G., Reinhard, M.A., Rutz, S., Sturm, S., Kerschbaum, B. & Effler, D. (1998). Rape Myths as Neutralising Cognitions: Evidence for a Causal Impact of Anti-Victim Attitudes on Men’s Self-Reported Likelihood of Raping. *European Journal of Social Psychology*, 28(2), pp.257–268.

Bohner, G., Eyssel, F., Pina, A., Siebler, F. & Viki, G.T. (2009). Rape Myth Acceptance: Cognitive, Affective and Behavioural Effects of Beliefs that Blame the Victim and Exonerate the Perpetrator. In Horvath, M.A.H. and Brown, J. (eds.), *Rape: Challenging Contemporary Thinking* (pp.17–45). Cullompton: Willan Publishing.

Boyle, C. (2009). Reasonable Doubt in Credibility Contests: Sexual Assault and Sexual Equality. *The International Journal of Evidence and Proof*, 13(4), pp.269–292.

Brown, J., Horvath, M., Kelly, L. & Westmarland, N. (2010). *Connections and Disconnections: Assessing Evidence, Knowledge and Practice in Responses to Rape*. London: Government Equalities Office.

Brownmiller, S. (1975). *Against Our Will: Men, Women and Rape*. New York: Bantam Books.

Burrowes, N. (2013). *Responding to the Challenge of Rape Myths in Court: A Guide for Prosecutors*. London: NB Research.

Burt, M. (1980). Cultural Myths and Supports for Rape. *Journal of Personality and Social Psychology*, 38(2), pp.217–230.

Burman, M., Jamieson, L., Nicholson, J. and Brooks, O. (2007). *Impacts of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study*. Edinburgh: Scottish Government.

Carline, A. & Gunby, C. (2011). How an Ordinary Jury Makes Sense of it is a Mystery: Barristers' Perspectives on Rape, Consent and the Sexual Offences Act 2003. *Liverpool Law Review*, 32(3) pp.237–250.

Cixious, H. (1986). *The Newly Born Woman*. Minnesota: University of Minnesota Press.

Conaghan, J. & Russell, Y. (2014). Rape Myths, Law, and Feminist Research: Myths about Myths? *Feminist Legal Studies*, 22(1) pp.25–48.

Council of Circuit Judges. (2006). *Convicting Rapists and Protecting Victims: A Consultation Response of the Council of Her Majesty's Circuit Judges*. London: Council of Circuit Judges.

Coy, M., Kelly, L., Elvines, F., Garner, M. & Kanyeredzi, A. (2013) *'Sex without consent, I suppose that is rape': How Young People in England Understand Sexual Consent*. London: Office of the Children's Commissioner.

Crown Prosecution Service. (2013). *Charging Perverting the Course of Justice and Wasting Police Time in Cases Involving Allegedly False Rape and Domestic Violence Allegations*. London: Crown Prosecution Service Equality and Diversity Unit.

Curtis, S., Gesler, W., Smith, G. & Washburn, S. (2000). Approaches to Sampling and Case Selection in Qualitative Research: Examples in the Geography of Health. *Social Science and Medicine*, 50(7-8), pp.1001-1014.

Ellison, L. (2007). Witness Preparation and the Prosecution of Rape. *Legal Studies*, 27(2), pp.171-187.

Ellison, L. & Munro, V.E. (2009a). Reacting to Rape: Exploring Mock Juror's Assessments of Complainant Credibility. *British Journal of Criminology*, 49(2), pp.202-219.

Ellison, L. & Munro, V.E. (2009b). Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials. *British Journal of Criminology*, 49(3), pp.363-383.

Ellison, L. & Munro, V. (2010). Getting to (Not) Guilty: Examining Jurors' Deliberative Processes In and Beyond the Context of a Mock Rape Trial. *Legal Studies*, 30(1), pp.74-97.

Ellison, L. & Munro, V. (2013). Better the Devil you Know? 'Real Rape' Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations. *International Journal of Evidence & Proof*, 17(4) pp.299-322.

Estrich, S. (1976). *Real Rape: How the Legal System Victimises Women Who Say No*. London: Harvard University Press.

Ewing, K. (2009). Attitudes and Responses to Rape in Light of the Low Conviction Rate. *Plymouth Law Review*, pp.48-70.

Fairclough, N. (2010). *Critical Discourse Analysis: The Critical Study of Language* (Second Edition). Harlow, UK: Pearson Education Limited.

Fischer, A. (1993). Sex Differences in Emotionality: Fact or Stereotype? *Feminism & Psychology* 3(3) pp.303–318.

Foster, P. (2006). Observational Research. In Sapsford, R. And Jupp, V. (eds), *Data Collection and Analysis* (pp.57–92). London: Sage Publications.

Goodman-Delahunty, J., Cossins, A. & O'Brien, K. (2011). A Comparison of Expert Evidence and Judicial Directions to Counter Misconceptions in Child Sexual Abuse Trials. *Australian & New Zealand Journal of Criminology*, 44(2), pp.196–217.

Gregory, J. & Lees, S. (1996). Attrition in Rape and Sexual Assault Cases. *British Journal of Criminology*, 36(1), pp.1–17.

Gurnham, D. (2016). A Critique of Carceral Feminist Arguments on Rape Myths and Sexual Scripts. *New Criminal Law Review*, 19(2), pp.141–170.

Her Majesty's Courts & Tribunal Service (HMCTS). (2014). *Information for Researchers*. Accessed online at: <http://www.justice.gov.uk/publications/research-and-analysis/courts>.

Herlihy, J., Robson, L. & Turner, S. (2012). Just Tell Us What Happened To You: Autobiographical Memory and Seeking Asylum. *Applied Cognitive Psychology*, 26(5), pp.661–676.

Horvath, M.A.H. & Brown, J. (2009). Setting the Scene: Introduction to Understanding Rape. In Horvath, M.A.H. and Brown, J. (eds.), *Rape: Challenging Contemporary Thinking* (pp.1–14). Cullompton: Willan Publishing.

Hudson, B. (2002). Restorative Justice and Gendered Violence: Diversion or Effective Justice? *British Journal of Criminology*, 42(3), pp.616–634.

Hunter, R. (1996). Gender in Evidence: Masculine Norms vs Feminist Reforms. *Harvard Women's Law Journal*, 19, pp.127–167.

Jordan, J. (2015). The Long and Winding Road: Improving Police Responses to Women's Rape Allegations. In Johnson, H., Fisher, B. & Jaguier, V. (eds), *Critical Issues on Violence Against Women: International Perspectives and Promising Strategies* (pp.104–116). London: Routledge.

Judicial Studies Board. (2010). *Crown Court Bench Book: Directing the Jury*. London: Ministry of Justice.

Kaufman, B.E. (1999). Emotional Arousal as a Source of Bounded Rationality. *Journal of Economic Behaviour & Organization*, 38(2), pp.135–144.

Kelly, L. (1988). *Surviving Sexual Violence*. Oxford: Basil Blackwell Ltd.

Keogh, A. (2007). Rape Trauma Syndrome: Time to Open the Floodgates? *Journal of Forensic and Legal Medicine*, 14(4), pp.221–224.

Koelsch, L., Fuehrer, A. & Knudson, R. (2008). Rational or Not? Subverting Understanding Through the Rational/Non-rational Dichotomy. *Feminism & Psychology*, 18(2) pp.253–259.

Korobkin, R.B. & Ulen, T.S. (2000). Law and Behavioural Sciences: Removing the Rationality Assumption from Law and Economics. *California Law Review*, 88(4), pp.1051–1144.

Lees, S. (1996). *Carnal Knowledge: Rape on Trial*. London: Women's Press.

Leippe, M., Eisenstadt, D., Rauch, S. & Seib, H. (2004). Timing of Eyewitness Expert Testimony, Jurors' Need for Cognition, and Case Strength as Determinants of Trial Verdicts. *Journal of Applied Psychology*, 89(3), pp.524–541.

Lloyd, G. (1993). *The Man of Reason: 'Male and 'Female' in Western Philosophy* (Second Edition). London: Routledge.

Lodrick, Z. (2007). Psychological Trauma: What Every Trauma Worker Should Know. *British Journal of Psychotherapy Integration*, 4(2) pp.18–29.

Lonsway, K. & Fitzgerald, L. (1994). Rape Myths in Review. *Psychology of Women Quarterly*, 18, pp.133–164.

Lovett, J., Uzelac, G., Horvath, M. & Kelly, L. (2007). *Rape in the 21st Century: Old Behaviours, New Contexts and Emerging Patterns*. ESRC End of Award Report (RES-000-22-1679). Swindon: Economic and Social Research Council.

McEwan, J. (2005). Proving Consent in Sexual Cases: Legislative Change and Cultural Evolution. *International Journal of Evidence and Proof*, 9(1), pp.1–25.

McGlynn, C. (2010). Feminist Activism and Rape Law Reform in England and Wales: A Sisyphean Struggle? In McGlynn, C. and Munro, V.E. (eds.), *Rethinking Rape Law: International and Comparative Perspectives* (pp.139–153). Abingdon: Routledge.

Moore, S. (2014). *Crime and the Media*. Basingstoke: Palgrave Macmillan.

Munro, V. & Kelly, L. (2009). A Vicious Cycle? Attrition and Conviction Patterns in Contemporary Rape Cases in England and Wales. In Horvath, M.A.H. and Brown, J. (eds.), *Rape: Challenging Contemporary Thinking* (pp.281–300). Cullompton: Willan Publishing.

Naffine, N. (1990). *Law and the Sexes*. London: Unwin Hyman Ltd.

Nicolson, D. (2000). Gender, Epistemology and Ethics: Feminist Perspectives on Evidence Theory. In Childs, M. and Ellison, L. (eds.), *Feminist Perspectives on Evidence* (pp.13–37). London: Cavendish.

Nicolson, D. (2013). Taking Epistemology Seriously: 'Truth, Reason and Justice' Revisited. *International Journal of Evidence & Proof*, 17(1), pp.1–46.

O'Keeffe, S., Brown, J.M. & Lyons, E. (2009) Seeking Proof or Truth: Naturalistic Decision-Making by Police Officers When Considering Rape Allegations. In Hovarth, M.A.H. and Brown, J. (eds.), *Rape: Challenging Contemporary Thinking* (pp.229–254). Cullompton: Willan Publishing.

Oliver, P. (1991). What Do Girls Know Anyway? Rationality, Gender and Social Control. *Feminism & Psychology*, 1(3) pp.339–360.

Payne, S. (2009). *Rape: The Victim Experience Review*. London: Home Office.

Reece, H. (2013). Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong? *Oxford Journal of Legal Studies*, 33(3), pp.445–473.

Reece, H. (2014). Debating Rape Myths. *LSE Law, Society and Economy Working Papers*, 21, pp.1–23.

Rock, P. (1993). *The Social World of an English Crown Court*. Oxford: Clarendon Press.

Rose, M.P., Nadler, J. & Clark, J. (2006). Appropriately Upset? Emotion Norms and Perceptions of Crime Victims. *Law and Human Behaviour*, 30 (2), pp.203–219.

Rumney, P.N.S. (2008). Gender Neutrality, Rape and Trial Talk. *International Journal of Semiotic Law*, 21(2), pp.139–155.

Rumney, P. (2011). Judicial Training and Rape. *Journal of Criminal Law*, 75(6), pp.473–481.

Scales, A.C. (1986). The Emergence of Feminist Jurisprudence: An Essay. *The Yale Law Journal*, 95(7), pp.1373–1403.

*Sexual Offences Act 2003*. London: The Stationery Office.

Smart, C. (1989). *Feminism and the Power of Law*. London: Routledge.

Smart, C. (1992). The Woman of Legal Discourse. *Social & Legal Studies*, 1(1) pp.29–44.

Smith, O. (2009). An Investigation into the Effects of Court Culture on Barristers' Opinions of Responses to Rape. *Dissertation (BSc)*. Bath, UK: University of Bath.

Smith, O. (2014). Observing Justice: Court Responses to Rape and Sexual Assault. *PhD Thesis*. Bath, UK: University of Bath.

Smith, O. (forthcoming). *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths*. London: Palgrave Macmillan.

Smith, O. & Skinner, T. (2012). Observing Court Responses to Victims of Rape and Sexual Assault. *Feminist Criminology*, 7(4), pp.298–326.

Stern, V. (2010). *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*. London: Home Office.

Taslitz, A. (1999). *Rape and the Culture of the Courtroom*. New York: New York University Press.

Taylor, N. & Joudo, J. (2005). *The Impact of Pre-Recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-Making: An Experimental Study*. Australian Institute of Criminology Research and Public Policy Series (No. 68). Canberra, Australia: AIC.

Temkin, J. & Krahé, B. (2008). *Sexual Assault and the Justice Gap: A Question of Attitude*. Oxford: Hart Publications.

Thornton, J. (2002). Myths of Aging or Ageist Stereotypes. *Educational Gerontology*, 28, pp.301–312.

Twining, W. (2006). *Rethinking Evidence: Exploratory Essays*. Cambridge: Cambridge University Press.

Ward, T. (2009). Usurping the Role of the Jury? Expert Evidence and Witness Credibility in English Criminal Trials. *International Journal of Evidence and Proof*, 13(2), pp.83–98.

Westmarland, N. (2005). Rape and Human Rights: A Feminist Perspective. *Thesis (PhD)*. Department of Social Policy and Social Work: University of York, York.

Wheatcroft, J.M. & Wagstaff, G.F. (2009). Revictimizing the Victim? How Rape Victims Experience the UK Legal System. *Victims and Offenders*, 4(3), pp.265–284.

Zydervelt, S., Zajac, R., Kaladelfos, A. & Westera, N. (2016). Lawyers' Strategies for Cross-examining Rape Complainants: Have We Moved Beyond the 1950s? *British Journal of Criminology*. Advance Online Copy.