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IS THE JURY OUT ON SEXUAL HISTORY EVIDENCE? THE IMPACT OF SEXUAL HISTORY EVIDENCE ON MOCK JURY DELIBERATIONS IN RAPE TRIALS

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Abstract

Evidence about a rape complainant's previous sexual history is restricted in English and Welsh trials, due to the risk it could be used incorrectly by barristers to assert that: i) women who have previously consented to sex are more likely to consent in future, and ii) women considered 'promiscuous' are not credible witnesses (*R v Seaboyer, 1991*). However, research such as Smith (2018a) demonstrates that restrictions are routinely ignored, meaning such evidence remains prevalent, causing complainant's distress.

Despite high profile calls for reform, there is limited evidence as to whether sexual history evidence adversely impacts on the jury. We currently rely on two significantly outdated studies internationally which were limited in scope. This PhD is the first in England and Wales to examine the impact of sexual history evidence on juries.

As research with 'real' juries is prohibited, this thesis utilises mock jury simulations to explore the impact of previous sexual behaviour with the defendant on mock juror deliberations. 18 mock juries (comprising 119 participants overall), were conducted, using volunteer community participants who observed one of nine mini rape trial recreations, in which the nature of sexual history evidence was adapted, as was the level of consistency in the complainant's account.

Quantitative findings demonstrate lower perceptions of complainant believability and higher defendant believability when sexual history evidence was introduced; with this impact being most pronounced where the complainant was least consistent. Qualitative analysis of jury discussions showed that whilst some jurors acknowledged the potentially prejudicial nature of sexual history evidence, endorsement of rape myths about sexual history remained routine. These prejudicial narratives were typically subtle in nature but tied closely to heteronormative ideals and speculation of complainant credibility. The thesis concludes that sexual history evidence continues to prejudice jurors in England and Wales, thus highlighting the need for further research and adding to the growing body of evidence calling for policy reform.

Key Words: Rape, Sexual History Evidence, Rape Myths, Jury System, Mock Juries

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Introduction

The Research Problem

Evidence of a complainant's previous sexual history arguably remains one of the most contentious and emotive types of evidence that can be introduced in modern rape trials (Thomason, 2018). Substantial controversy exists about the admissibility of this evidence at trial, with arguments typically centring on the defendant's right to fair trial versus the complainant's right to privacy, and the overarching question of relevance versus prejudice (McGlynn, 2017). Whilst there is general agreement across the literature that there are some instances in which sexual history evidence may be considered relevant, the question of where such relevance lies remains strongly contested. Some assert that some flexibility in restrictions is necessary to balance the interests of relevance in each individual case, whilst equally protecting the defendant's right to fair trial (Mirfield, 2002; Dent and Paul, 2017; Hoyano, 2019). Nevertheless, critics have called for tighter restrictions on the assertion that this evidence is usually irrelevant to the central question of consent and instead is often invoked at trial to give credence to outdated and prejudicial notions of respectability, appropriate femininity and assumed consent (McGlynn, 2017; Smith, 2018a; Sous, 2020). The inclusion of this evidence in the high-profile trial of footballer Ched Evans (R v Evans, 2016) has ultimately reignited debates and renewed questioning about the continued inclusion of sexual history evidence at trial in England and Wales, reflecting similar discussions taking place globally.

Historically, evidence of a complainant's previous sexual history with either the accused or a third party was considered as central evidence in sexual offences trials, as a measure of the complainant's credibility, character, and an indication of whether she consented (Temkin, 1984). However, having recognised the highly prejudicial nature of these notions, sexual history evidence has since been restricted in sexual offences trials in England and Wales

through a raft of legislation (see Section 3.3) and currently under s.41 Youth Justice and Criminal Evidence Act [YJCEA] (1999). S.41 restrictions dictate that the admission of sexual history should be exceptional (MOJ, 2017) and may only be adduced whereby it falls within one or more of four statutory exceptions listed in s.41, as discussed in Section 3.3.3.

Restrictions aimed to curtail reliance upon the so-called 'twin-myths' – namely that (a) 'promiscuous' women are more likely to consent to sexual activity and (b) that they are less credible in their accounts at trial *(R v Seaboyer, 1991)*. These myths in turn, it is argued, interplay with multiple further rape myth narratives regarding notions of femininity, respectability and moral standards of 'appropriate' socio-sexual behaviour (Temkin and Krahe, 2008; Phipps, 2009). The inclusion of sexual history as evidence at trial can thereby be criticised as exacerbating the already troubling culture of sexism and rape myths in the criminal justice system's [CJS] response to sexual offending (Hey, 2012), and previous, albeit older, research has indicated that this can influence juror perceptions of evidence and final verdicts (Schuller and Hastings, 2002; Kelly *et al.* 2006).

Notwithstanding initial support for the enactment of the supposedly rigorous s.41 provisions, practical implementation and application of s.41 has attracted strong critique (Durham *et al.* 2016a; McGlynn, 2017; Smith, 2018a). Whilst restrictions attempt to assert the boundaries for proper inquiry of complainants at trial (Hansard HL Deb, 23 March 1999), research suggests that the inappropriate admission of such evidence at trial, either directly or indirectly, happens "all too often" under s.41 (Gillen, 2019: 270).

This debate surrounding sexual history evidence reached the forefront of public discussion following the high-profile acquittal of professional footballer Ched Evans in 2016 and has since polarised academic and political debate (Section 3.4.2). Whilst supporters of the judgement argued that the evidence was relevant in order to prevent a miscarriage of justice (Dent and Paul, 2017; Thomasson, 2018), critics contended that the Evans judgement represented an

unjust widening of s.41, and set a dangerous precedent about how a complainant of rape, usually a woman, has previously behaved (Philips, 2016; McGlynn, 2017).

In the wake of the Evans judgement, there have been high profile calls to reform s.41. Liz Saville Roberts MP proposed modifying current provisions *(Sexual Offences (Ammendment) Bill 2016-17),* in order to mirror Canadian restrictions that effectively bar all sexual history evidence with third parties, except where manifestly unjust to do so. Meanwhile, Harriet Harman MP proposed more radical revisions *(Prisons and Courts Bill 2016-17)* to ban all sexual history evidence for all purposes, in all situations. Both such bills were abandoned following the calling of a general election in May 2017. However, Harman, alongside a cross-party group of MPs, since reignited more modest proposals for reform within the *Police, Crime, Sentencing and Courts Bill (2021)*. This proposal advocated excluding all third-party sexual history and implementing an additional requirement for sexual history with the defendant, to weigh up probative versus prejudicial value of such evidence, before allowing it at trial. Nevertheless, such amendments were not pursued in this bill, with HM Government (2020) instead committing to a Law Commission review of the inclusion of sexual history evidence in rape trials to direct reform efforts. Outcomes of this review, however, have not yet been given.

Yet, whilst significant debate continues regarding the inclusion of sexual history as evidence at trial, very little is known about how jurors interpret such evidence and how this ultimately affects final verdicts. We currently rely upon two older studies by Catton (1975), in Canada, and Schuller and Hastings (2002) in the United States. These were both limited in scope, using relatively simple trial vignettes and all-student samples (Section 3.8), and have become fundamentally outdated. Whilst both studies found lower ratings of guilt whereby sexual history evidence had been introduced, the lack of any deliberative element means that we do not know *how* jurors interpreted such evidence and *why* they came to these verdicts.

The current thesis fills this gap in knowledge, providing an up-to-date study of mock juror discussions of sexual history evidence in the English and Welsh context. It focuses solely on

sexual history evidence with the accused, as there generally remains greater agreement surrounding the need to limit sexual history evidence with third parties (See Chapter 3 for further discussion). Ultimately, this thesis illustrates the ongoing prejudicial influence of sexual history evidence, which intersects with wider mythical ideals of heteronormativity, credibility, and appropriate socio-sexual behaviour. In doing so, it answers the following research aims:

1. Determine whether/how the inclusion of sexual history evidence at trial quantifiably impacts upon mock jurors' perceptions of witnesses and final verdicts
    a. To analyse whether these perceptions are influenced by different forms of sexual history evidence
    b. To establish the interplay, if any, between sexual history evidence and other rape myths, for example demeanour or the level of consistency in the complainants account
2. Examine whether/how mock jurors discuss the potential relevance of sexual history evidence in their deliberations.
3. Establish whether/how the inclusion of sexual history evidence at trial impacts upon mock juror perceptions of witness credibility within deliberations

It is important to note from the outset, that due to problems presented by the Covid-19 pandemic, the mock jury simulations were carried out entirely online. This is a novel approach to mock jury simulation research and Chapter Four comprehensively outlines the re-design process.

Structure of the Thesis

Chapter One provides a general outline of the criminal justice context and response to sexual offending in England and Wales. This gives essential background information regarding current shortcomings and critiques of the justice process and contextualises the research questions of this thesis. Chapter Two scrutinises the literature on so-called rape myths, which have been repeatedly theorised as a key reason behind persistent difficulties of the justice response to sexual offending and are intertwined with discussions of sexual history evidence. Chapter Three examines the nature and impact of sexual history evidence and outlines

legislative and procedural reform efforts that have been undertaken in England and Wales to date. Following this, Chapter Four describes the mock jury methodology, including the study design, participant recruitment and data analytic plan. Chapters Five to Seven present quantitative and qualitative findings of the current research, each corresponding to one of the research aims. Finally, Chapter Eight summarises key findings and highlights areas for further research, as well as implications of the current study. Overarchingly, this thesis presents sexual history evidence as a continued barrier to achieving justice in rape trials, holding the potential to distort jurors' interpretations of the evidence and perpetuate reliance on rape myths and stereotypes.

Chapter One: Criminal Justice Response to Rape in England and Wales

1.1 Introduction

Since the advent of second wave feminism, numerous critiques have continued to highlight the inadequacy of justice response to sexual violence in England and Wales, from low convictions and high attrition, to frequent trauma suffered by complainants in pursuing the justice process (Hohl and Stanko, 2015; HM Government, 2020; Walker, Hester, McPhee, Williams, Bates and Rumney, 2021; Hanna, 2021). A steep decline in prosecution and conviction rates has now reached an all-time low and has been branded as the "effective decriminalisation of rape," with just one in 70 reports even reaching trial (Centre for Women's Justice [CWJ], End Violence Against Women Coaliition [EVAW], Imkaan, Rape Crisis, 2020). Despite numerous reform attempts that have been implemented with some success (Section 1.4), it is widely acknowledged that rape complainants continue to be let down by the justice process (HM Government, 2020), with critiques widespread throughout academic and public discourse.

Whilst the current project focuses on the impact of sexual history evidence on jury decision-making, it is vital to situate these discussions, by first scrutinising wider critiques about the CJS response to rape in England and Wales. Analysis of earlier stages of the justice process, outlines the way in which evidence is presented at trial and therefore frames latter discussions about jury decision-making. The current chapter thus outlines recent high-profile controversies about the justice response to sexual violence in England and Wales, before scrutinising the underlying adversarial legal context. This provides a holistic contextual background of current contentions in the CJS response to rape, and these will be drawn upon throughout the remainder of the thesis to inform discussions about sexual history evidence and juror decision-making.

1.1.1 Terminology and definitions

Before exploring the relevant literature, it is necessary to define key terms like “rape” and rationalise the chosen terminology. As a study rooted in criminal justice responses to rape, the legal definition of rape is adhered to, as set out in s.1 Sexual Offences Act [SOA] (2003):

> *(1) A person [A] commits an offence if—*
>
> *a. he intentionally penetrates the vagina, anus or mouth of another person [B] with his penis,*
>
> *b. B does not consent to the penetration, and*
>
> *c. A does not reasonably believe that B consents.*

This most recent definition expanded the requirements of rape to include oral penetration and introduced some level of gender neutrality into the definition by acknowledging all sexes as potential victims (SOA, 2003). Yet perhaps of most note, the SOA (2003) also introduced the first statutory definition of consent under s.74, which states that:

> *“Consent:” For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice.*

This acknowledges the freedom and capacity of choice for individuals, whilst s.75 and s.76 outline further clarifications of how consent may be established, noting for example that consent to one activity does not amount to consent to another (SOA, 2003). Yet whilst the starting presumption must be that consent was *not* given, it remains the task of the prosecution to demonstrate that the defendant did not have a “reasonable belief” in consent. This matter remains open to the judgement of juries, however the SOA (2003) states that being reckless in gaining consent or knowing the complainant not to consent, does not amount to a reasonable belief. It was therefore hoped that these evidential presumptions would direct juror focus onto the steps taken by the defendant to gain consent, as opposed to focus being on the complainants actions and reactions (CPS, 2012). In practice, however, it is not clear whether this goal has been achieved (Smith, 2018a).

Additionally, there is debate around the optimal terminology when referring to people who (allege they) have experienced or (are alleged to) have perpetrated rape (Kelly, Burton and Regan, 1996; Young and Maguire, 2003; Hockett and Saucier, 2015; College of Policing, 2018). Terms such as 'victim,' 'survivor,' 'victim-survivor,' 'complainant,' 'accuser,' 'perpetrator,' 'offender,' 'defendant' and 'rapist' are among some of the typical, contested terms across the sexual violence literature. It is important to recognise that each of these terms is laden with connotations regarding vulnerability, emotional mentality, inherent power (im)balances and ultimately guilt, innocence, truth, or deception. It is thereby crucial to consider language choices with care in this distinctly emotive field. Kelly *et al.* (1996) provide an excellent analysis of these debates, which are beyond the remit of this thesis.

Yet, whilst not overlooking such debates, this thesis – as a study based firmly within criminal justice discourse - will adopt the distinctly legalistic terms of 'complainant' and 'defendant,' being the terminology used in court and thereby the terms heard by real jurors at trial. Many legal professionals suggest that these terms reflect an impartiality and neutrality before the judgement of law (Beckley, 2018), however this paper recognises the contested nature of these terms as highlighted above.

Complainant for example, for some, triggers notions of complaining or whining and can thereby trivialise the harm felt by those alleging rape or another form of sexual victimisation (Conklin, 2020). Moreover, the term defendant may be seen as at odds with the presumption of innocence and burden of proof, by implying that the accused is under an obligation to defend and actively prove their innocence. Without disregarding these issues, being a study rooted in criminal justice procedure, such terms are still deemed to be most appropriate for this thesis so as to remain consistent with established procedure and enhance the realism of the research for the mock jurors.

1.2 Situating the Debate: Attrition and Conviction Patterns for Rape in England and Wales.

Both critiques and attempts to reform the CJS response to rape in England and Wales have been wide-ranging in recent decades, however, Stern (2010) has argued that focus on convictions and attrition has taken over the debate. Accordingly, this section situates wider debates about CJS responses to rape, by first outlining up-to-date figures and discussions about attrition and conviction patterns in England and Wales. This provides important contextual background to the current research, and is intrinsic to debates about sexual history evidence, which is theorised as both increasing attrition and hampering conviction rates (Kelly *et al.* 2006).

Lack of report remains the most prominent stage of attrition in sexual offences cases, with estimates suggesting that only 16% of female victims and 19% of male victims will ever report sexual victimisation to the police (Crime Survey England and Wales [CSEW], 2021). Reasons for under-reporting are diverse, but responses from the CSEW (2021) list inter alia feelings of embarrassment and humiliation, and perhaps more concerningly, a perception that the police would not do anything, a fear of not being believed and a fear of going to court. Similarly, a recent survey by the Victim's Commissioner cited the main reason for lack of report as fear of not being believed, followed by apprehension that procedural justice or success in court would not be achieved (Molina and Poppleton, 2020). Thus, whilst positively, reporting rates have increased year on year [albeit a slight drop of 0.7% in 2020] (CSEW, 2021), with higher confidence in the justice system and better recording practices cited as potential reasons for this (CSEW, 2021); the scale of under-reporting remains alarming and is seemingly indicative of the ongoing problematic nature of CJS responses to sexual violence (McKee, 2021).

Indeed, despite increasing reporting rates, prosecution and convictions for rape have plummeted in recent years. The End Violence Against Women Coalition [EVAW] have coined this as the "effective decriminalisation of rape" (EVAW, 2019), with Home Office (2020)

statistics revealing record low prosecutions of just 1.4% in the year ending March 2020. Unique evidential requirements, such as frequent lack of corroboration, eyewitness testimony or physical evidence, inevitably make sexual violence difficult to prosecute and convict. However, recent controversy has emerged about an alleged change in CPS charging policy from a merits-based approach to bookmakers' approach[1], which the Centre for Women's Justice [CWJ] and EVAW argued was the core reason behind this significant drop in prosecutions (Section 1.2.1). The government's end-to-end rape review (2020) submitted that this decrease in charging, in practice, could not be attributed to one sole cause, but noted that heavy workloads and an increase in digital evidence may have impacted this. Nonetheless, this substantial drop in prosecutions, irrespective of cause, represents unsatisfactory outcomes for the vast majority of rape complainants and must be acknowledged as a cause of concern.

Meanwhile, research has shown that complainants continue to feel unsupported in the justice system, leading to growing levels of attrition. The end-to-end rape review (HM Government, 2020) identified that 57% of complainants in adult rape cases felt unable to pursue the case. More recently, research by London's independent victims' commissioner revealed that 64% of rape complainants in London, withdrew their support for an investigation within 30 days of reporting (Waxham, 2021). Complainants cited key concerns as disclosure and the low chance of conviction, again illustrating concerning issues within the current CJS response to rape.

Alongside this drop in prosecutions and increase in attrition, rape convictions measured from initial report to final conviction have ultimately reached their lowest level since records began, and were described by the Victim's Commissioner as "utterly shameful" (EVAW, 2019; Baird, 2020). Whilst the courts have traditionally been perceived as less problematic than other stages of the justice system, due to higher conviction rates once cases have reached this

[1] A merits-based approach focuses on the strength of evidence put forward, whilst a bookmaker's approach considers likely outcome as central.

stage (Smith, 2018a), they remain problematic. Figures on convictions at court vary significantly between sources, with the CWJ *et al.* (2020) denoting a conviction rate of 42%, whilst CPS figures for 2019-20 suggest a 69% conviction rate (CPS, 2020). However, it is important to note that this CPS figure includes 27% guilty pleas and also includes charges initially flagged as rape that resulted in a lesser conviction. Overarchingly, it is agreed that the number of rape convictions from initial report, is decreasing (HM Government, 2020), and again therefore represents inadequate outcomes for complainants.

Taken together therefore, up-to-date attrition and conviction patterns represent ongoing, unsatisfactory outcomes for rape complaints (CWJ *et al.* 2020) and highlight substantial inadequacies in the CJS response to rape. Yet arguably, these attrition and conviction figures alone only reflect a fraction of wider, persistent issues (Stern, 2010) and are ultimately a direct consequence of the numerous obstacles which exist to inhibit the successful prosecution rape in England and Wales. As suggested above, recent largescale controversy has centred around an alleged change in CPS charging policy and contentious new disclosure practices, which have both been asserted to have exacerbated ongoing shortcomings in the CJS response to rape. These provide vital background and context to arguments discussed within the current research.

1.2.1 A Change of CPS Charging Policy?

The alleged change of CPS charging policy attracted national media headlines and provoked public, as well as academic, outcry in September 2018 (Topping, 2018). It was alleged by the CWJ and EVAW that the CPS had covertly and unlawfully changed the policy for prosecuting rape cases, from a merits-based to bookmaker's approach, and in doing so, was contributing to dramatic drops in prosecution rates (Bowcott, 2019). Whilst the traditional merits-based approach focused on the strength of case evidence rather than likely outcome, it was asserted that the alleged bookmaker's approach, could be influenced by rape myths and stereotypes in attempts to pre-empt juror decisions (CWJ *et al.* 2020). This alleged policy change thereby,

seemingly compelled prosecutors to pre-empt juror attitudes, by considering myths and stereotypes in charging decisions. Such discussion is thus pivotal to the current research, as it illustrates the need to clearly understand juror decision-making, in order to direct effective and appropriate policy reform.

The CPS merits-based approach to prosecuting sexual violence was implemented from 2009 onwards, to award focus to the strength of case evidence and thereby dismiss reliance on myths and stereotypes in charging decisions. Indeed, the CPS recognised that reliance on rape myths at trial was a problem, and pledged in their *Policy for Prosecuting Cases of Rape* (CPS, 2012: 15) to "robustly challenge such attitudes in the courtroom. " The *Joint CPS and Police Action Plan on Rape* (2014) equally emphasized that investigators and prosecutors must focus upon the behaviour of the defendant, rather than complainant and judicial directions were also implemented to warn jurors against relying on rape myths (Judicial College, 2010).

Nevertheless, controversy emerged in 2018 following the removal of all reference to the merits-based approach from all CPS literature and guidance (Green, 2019; Topping, 2018). Meanwhile, The Guardian exposed evidence that the CPS's director of legal services and the director of public prosecutions [DPP] had urged prosecutors to ditch a proportion of "weak cases out of the system" during specialist sexual offences training seminars, so as to improve conviction rates (Topping and Barr, 2018). The CWJ and EVAW brought judicial review proceedings against the CPS, however the CPS continued to deny a change of policy and in March 2021, three senior Justices ruled that there had been no change "of legal substance" in CPS charging policy. Despite this ruling the CWJ and EVAW have maintained that "rape victims continue to be let down by a broken criminal justice system" (CWJ, 2021).

Following this controversy, the CPS announced a new 5-year blueprint for the prosecution of rape and serious sexual offences in July 2020, citing the need to understand and reduce the gap between reported cases of sexual violence and those which are charged (CPS, 2020).

This was later endorsed by HMCPSi's (2021) report, yet this did denote that investigation into the practical implementation of this plan is necessary. The end-to-end rape review (2020: 38) similarly revealed launch of 'Operation Soteria' to drive "systematic and sustainable transformation" in the police and CPS response to rape, to achieve "active and effective" investigations. Whilst these reflect positive sentiments and policy rhetoric, in practice, recent Guardian analysis has revealed that according to current rates of improvement, it would take 18 years to reach pre-2016 prosecution levels (Topping *et al*. 2021). It is therefore important that further research is carried out to continue to scrutinise these commitments and hold the CPS to account. Importantly, scrutiny must be given to the nature of cases being charged, to understand whether potentially prejudicial evidence such as rape myths and sexual history evidence, is behind decreased prosecutions.

1.2.2 Changes in Disclosure Practices

As well as controversy surrounding CPS charging policies, contention also arose in reference to a change of CPS disclosure policy for rape and serious sexual offences cases in 2018. This has become highly important to debates about sexual history evidence, as sexually explicit messages and images discovered within disclosure may be used to introduce a complainant's sexual history evidence into trial (Daly, 2021b).

The duty of disclosure is recognised as an acclaimed safeguard of adversarial procedure (Ashworth, 1998; Raitt, 2011), to secure 'equality of arms' (Raitt, 2011: 33) and ensure the defendant's right to fair trial (Murphy and Whitty, 2000). This enables defence counsel to thoroughly prepare their case and deters "over-zealous, careless or dishonest construction of the prosecution case" (Greer, 1994; Murphy and Whitty, 2000: 148). However, in January 2018, the CPS announced a new *National Disclosure Improvement Plan* for rape and serious sexual offences cases, which provoked significant critique. This allowed police and prosecutors to request that complainants or witnesses submit their mobile phones, laptops, tablets and/or smart watches to the prosecution as evidence for case preparation, or risk the

case being dropped. It came in a bid to improve conviction rates following a number of high-profile trials which collapsed whereby ‘crucial’ digital evidence emerged during trials and halted prosecutions late in the process (BBC, 2018).

The CPS suggested that disclosure issues were responsible for the collapse of many sexual offences trials, so new practices were essential to ensure fair trials and improve conviction rates (CPS, 2018a). The EVAW Coalition however, contended that the CPS were concentrating on a technical issue which only affects around 1% of cases and in doing so, demonstrating ongoing attitudes of victim blame and inferring that rape cases are especially prone to false allegations (EVAW, 2019a). It was argued that, whilst in some instances, it may be necessary to examine complainants’ electronic devices, disproportionate focus on this gave credence to myths surrounding ‘appropriate’ actions and reactions, pivoted cases around complainant credibility and in doing, so, perhaps further deterred reporting (BBC, 2019).

Nevertheless, following a CPS review of disclosure practices in all rape and serious sexual offences cases, the National Police Chief’s Council and CPS introduced ‘digital data extraction forms’ in February 2019, as a further measure to enable digital evidence gathering from complainants’ devices (Fouzder, 2020). Whilst the CPS justified this on the basis of sanctioning a common, nationwide approach to disclosure so that complainants would know what to expect (CPS, 2019), this approach was coined as the equivalent of a ‘digital strip search’ and was criticised for asking complainants to essentially sign away their right to privacy (EVAW, 2019a). Moreover, as this disclosure form was specific to sexual offences, the inference was given that these cases are particularly prone to false allegations (EVAW, 2019a) despite research evidence demonstrating this perception to be false (Kelly, Lovett and Regan, 2005).

Much like debates about sexual history evidence, discussions centred upon the perceived relevance of this evidence, and how relevance could be defined. Director of Public Prosecutions Max Hill asserted that digital disclosure would only occur where there was a

'reasonable line of enquiry' and therefore only 'relevant' material would be put before the court (Fouzder, 2020). Yet, critics contended that the notion of 'relevance' is ambiguous and inherently discretionary (Rape Crisis, 2018; HC Deb, 2019 24 April), so fails to provide clarity to complainants (RASAC, 2019). Importantly, these debates seemingly mirror those relating to where the perceived 'relevance' of sexual history evidence lies.

In practice, the CPS own inspectorate found that 40% of prosecutor requests for further data, were disproportionate and intrusive (Baird, 2020), whilst frontline case workers suggested as many as 8 in 10 rape complainants were being asked to submit phone data (Rape Crisis, 2019). EVAW (2019a) emphasised this focus on disclosure as particularly concerning for sexual history evidence, as it is evident that vast amounts of digital communication material may emerge regarding current or previous sexual partners or sexual practices. Disclosure thus not only risks violation of a complainant's privacy (Big Brother Watch, 2019) but equally presents further challenge regarding rape myths and the inclusion of sexual history evidence at trial (EVAW, 2019a).

The CWJ thus initiated a legal challenge against these consent forms, but this was put on hold pending publication of the Information Commissioners report [ICO], later published in June 2020 (Denham, 2020). The damning ICO report found variation across forces in data extraction practices and evidenced inappropriate use of disclosure forms (Rape Crisis, 2020). It asserted there was 'no evidence' of police investigators seeking less intrusive alternatives to mobile phone data extraction and expressed concerns of proportionality, necessity and collateral intrusion in respect to disclosure practices (CWJ, 2020). A prompt Court of Appeal Judgement, shortly after publication of the ICO report, set out guiding legal principles for the lawful and proportionate approach to disclosure, highlighting the necessity for reasonable lines of enquiry, reassurance to complainants and a proportionate approach to extracting data *(Bater-James and Mohammed v The Queen, [2020])*.

Controversial consent forms were accordingly withdrawn in July 2020 and replaced by an interim form (Thompson, 2020), before new forms were implemented in September 2020 in line with the Bater-James principles. The Attorney General's Office (2020) has since published clear guidance regarding the appropriate approach to disclosure, highlighting the need for disclosed evidence to be relevant. In accordance, the CPS (2021) have also updated their guidance on disclosure in light of rapid increases of digital evidence. These updated measures thereby reflect a step in the right direction, however further research is necessary to assess whether these are effective in practice.

1.2.3 Section Summary

This section has highlighted prominent debates about shortcomings in the underlying policy and practice context for responding to sexual offences in England and Wales. These debates have attracted vast public, academic and governmental scrutiny, representing widespread failures in the criminal justice response. In examining these issues, this section has illuminated numerous areas of contention to inform the research aims of the current study. Indeed, issues relating to disclosure inherently reverberate into the trial evidence that jurors hear and are expected to discuss, whilst a charging policy that pre-empts juror decision-making ultimately relies upon an understanding of juror decision-making processes. Meanwhile, existing research has shown that the inclusion of sexual history evidence at trial, can both reduce the likelihood of conviction and dissuade victims from coming forward (Kelly *et al.* 2006), thereby feeding centrally into debates about attrition and conviction patterns. This contextual background is therefore necessary to understand latter debates about sexual history evidence, juror decision-making and overall context and implications to reform current CJS responses to rape in England and Wales.

1.3 Adversarial Gameplay

As well as emerging critiques about the policy and practical justice response to rape in England and Wales, the adversarial legal system is also said to present numerous challenges

and obstacles to justice for cases of rape and serious sexual offences (McCarthy-Jones, 2018; Smith, 2021). Of particular concern for the current research, is scrutiny of trial proceedings and theorisation of supposed 'adversarial gameplay' that has been said to contribute to the use of rape myths during trial and skew the determination of trial evidence (Burton *et al.* 2007; Smith, 2018a). This evidence presented at trial, forms the totality of jurors' knowledge of the case, and therefore these narratives hold strong potential to influence juror interpretations of evidence and final verdicts. The way in which arguments are built during trial, thus provides important context to the current research as it frames debates about how sexual history evidence is invoked and how the presentation of this, impacts on juror decision-making.

The oppositional structure of the adversarial trial has engendered critique in this respect. This oppositional structure is built upon the premise that partisan advocacy by two opposing sides will best lead to the determination of truth (Sward, 1989; Rock, 1993; Tulkens, 1995) and ensures that both sides of the contest are heard, so as to test the prosecution's case (Johnston, 2016). However, critics have asserted that this 'battlefield' structure, which pits one side (the prosecution) against the other (the defence), simply creates a game in which the ultimate goal of advocates is purely to 'win' (Taslitz, 1999; Carson and Pakes, 2005). Proponents of this dualistic structure assert that lawyers *should* 'play to win' using all available means to serve their client (Smith, 2012) and that rigorous vetting of witnesses to expose inconsistencies is imperative to achieving best evidence (Rosenberg *et al.* 1976). However, opponents assert that this oppositional structure gives rise to a "combative and competitive" courtroom (Ellison, 2000) which inhibits the search for truth and instead skews the investigation towards a determination of which party has better representation (Ellison, 1997; Burton, Evans and Sanders, 2007).

Indeed, within this oppositional structure, all access to witnesses is filtered by partisan advocates who examine and cross-examine each witness, to establish truth and highlight inconsistencies. Witness testimony is therefore considered an opportunity for the jury to not

only assess the content of evidence, but also mannerisms, posture, gestures and appearance of witnesses to assess truthfulness and credibility (Wang, 2017).

In practice however, it may be argued that these ideals pivot the presentation of evidence around a storytelling structure (Ellison, 1997) which is open to exploitation by advocates. In sexual violence trials specifically, for example, Smith (2018a) submitted that this structure seemingly incentivises advocates to manipulate the evidence and invoke stereotypes and myths, simply to increase their chance of 'winning.' Indeed research has continued to highlight distressing and humiliating questioning styles in rape trials (Gray and Horvath, 2018) whereby counsel routinely exploit inconsistencies (Smith, 2018a) and belittle complainants' accounts (Durham *et al.* 2016a), particularly when questioning complainant's about their previous sexual history (Kelly *et al.* 2006). Such narratives, it is argued, are simply introduced as a defence tactic to discredit the complainant or bolster the defendant, rather than being relevant to case facts (McGlynn, 2017; Smith, 2018a; Cowan, 2021).

Indeed, within this oppositional structure, research has shown that legal representatives largely fail to present facts known to them, that disfavor their client (Sevier, 2014). This raises moral questions regarding the implications of adversarial gameplay and highlights potential inequity between opposing parties. In turn, this can again be said to encourage reliance on myths and stereotypes such as sexual history evidence, thereby skewing the presentation of evidence (Smith, 2018a; Daly, 2021a).

1.3.1 Secondary Victimisation

Whilst proponents of the oppositional adversarial structure often adopt human rights justifications, that the defendant must be awarded the right to a fair trial and the right to face his accuser (Wallach, 1997); critics submit that a frequent biproduct of adversarial gameplay, is the secondary victimisation of complainants. Widely denoted as 'judicial rape,' (Lees, 1993) research has shown that many sexual offences complainants continue to endure extensive manipulative questioning during trial, typically scrutinising *their* behaviour and credibility

(Payne, 2009; Temkin, Gray and Barrett, 2018; BBC, 2020). Complainants are regularly accused of lying during trial and their evidence customarily called into question (Temkin *et al.* 2018; Smith, 2018a).

In acknowledging these difficulties, special measures have been gradually implemented since YJCEA 1999, in attempts to ameliorate difficulties for witnesses at trial. These allow vulnerable and intimidated witnesses to inter alia give evidence behind screens, via live link, in private, to give pre-recorded evidence or cross-examination (CPS, 2010), with all complainants of sexual offences automatically eligible to receive these provisions.

Positively, research has suggested that these provisions reduce stress and anxiety for witnesses, enhance witness satisfaction, improve witness confidence and ultimately improve the standard of evidence given (Hamlyn *et al.* 2004; McNamee, Molyneaux and Geraghty, 2012; Campbell and Cowan, 2017; Brooks-Hay, Burman and Bradley, 2019). They were thus used by the majority of sexual offences complainants surveyed by Majeed-Ariss *et al.* (2021), and purportedly eased the CJS process.

Nonetheless, literature has continued to highlight practical difficulties of special measures, including technical difficulties which can lead to significant delays (HMCPSI, 2007; McMillan and Thomas, 2013; Smith, 2018a). Some commentators have also critiqued the premise of special measures, asserting that this undermines adversarial ideals and hinders the defence case (Marsh and Dein, 2021). Nevertheless, Ellison and Munro (2014) found limited effect of special measures on mock juror perceptions of the defendant or defence, and concluded that these are a positive step forward to protect complainants.

Yet, whilst special measures are seemingly positive, Hanna (2021: 63) cautioned that “it would be a stretch to hail them [special measures] as a panacea for the ongoing problems faced by victims.” She highlighted that even where screens or live link are used, complainants are often caught unaware that they will still be seen by the courtroom or on a screen, and are often discouraged by this (Hanna, 2021). Meanwhile, substantial research had equally shown that

even where special measures are used, these do not prevent inappropriate or intrusive questioning (Durham *et al.* 2016a; Smith, 2018a; Killean, 2021). Burton *et al*. (2007) therefore argued that the adversarial focus on winning continues to be seemingly prioritised and undermines the safeguards offered by special measures.

Meanwhile, despite the introduction of special measures, complainants continue to enjoy no formal standing in adversarial proceedings, but attend trial simply as witnesses for the prosecution (Smith and Daly, 2020). As such, complainants routinely report feeling over-shadowed or side-lined during adversarial proceedings (Hanna, 2021) as, whilst prosecution counsel may intervene to protect the complainant, they are under no obligation to do so and act solely on behalf of the public interest (Gillen, 2019; Killean, 2021). Ultimately therefore, Burton *et al.* (2007) submitted that features of the traditional adversarial process inevitably undermine provisions for vulnerable witnesses at trial, and thus a conflict exists between basic assumptions of the adversarial fact-finding process and the needs and interests of vulnerable witnesses such as rape complainants (Ellison, 1997). Again, these debates are intrinsic to provisions about sexual history evidence, as research has shown that this is often introduced in a way that discredits the complainant and puts *her* behaviour and credibility on trial (Smith, 2018a; Daly, 2021a).

1.3.2 The Jury

Trial by jury is a fundamental, core and often cherished aspect of the adversarial legal system in England and Wales (Ellison and Munro, 2009a). Perhaps the most substantial and recognisable construct of the adversarial structure, the jury performs the ultimate function of justice as the deciders of verdict, hearing almost all rape trials at Crown Court[2] in England and Wales (Herring and Wall, 2015; CPS, 2017a). Yet, whilst steeped in historical significance and

[2] Exceptions arise where there is realistic prospect of jury tampering

tradition (Willmott *et al.* 2021), a growing body of literature and public discourse has called into question the suitability of juries to deliver justice, particularly in rape trials (Willmott *et al.* 2021; Booth, Willmott and Boduszek, 2017; Dorrian, 2021). Thus, as the current project seeks to examine how juries interpret and rely upon sexual history evidence in rape trials, it is crucial to examine the role and function of this central feature of the justice process.

The jury, selected at random from twelve lay members of the population, is often upheld as fundamental symbol of fairness, honesty and impartiality within the adversarial legal system (Lloyd-Bostock and Thomas, 2010). It is said to embody diversity, through lay representation in justice discourse, and strengthens the legitimacy of the criminal justice system by representing the impartiality of justice from the potential influence of a totalitarian state. (Creaton and Pakes, 2011; Slapper and Kelly, 2017). As an institution, it thereby continues to attract strong public support (Thomas, 2007), with 80% of British citizens in Roberts and Hough's (2011) survey advocating its continued use.

Nevertheless, despite seemingly embodying the concept of democracy for some (Hawkins, 2017), critics have suggested that juries often fail to comprehend complex issues of trial, lack interest in the cases they hear and/or form pre-judgements or stereotypical assumptions regarding the facts of cases before them (Taylor, 2007). Indeed research has continued to evidence jurors' frequent reliance upon extra-legal factors and information from media, family and friends, that may impact their decision-making at trial (Daftary-Kapur, Dumas and Penrod, 2010). This has ultimately engendered a degree of scepticism towards trial by jury, with the suggestion that "jurors may not be rational or fair agents" (Curley *et al.* 2021: 1).

In reference to cases of sexual violence in particular, which are well known to invoke engrained societal attitudes, judgements and stereotypes (EVAW, 2018a; Johnson and Johnson, 2021; Barn and Powers, 2018), these concerns surrounding the potential lack of impartiality within juries, arguably become emphasised. Numerous mock jury studies have thereby sought to scrutinise the process of jury decision-making in sexual violence trials, with the majority of

focus placed on the influence and impact of rape mythology. In a recent comprehensive review of studies examining rape myths and juror decision-making, Leverick (2020) found that in 28 of 29 studies, greater endorsement of rape myths by individual jurors led to increased attributions of blame towards the complainant. Willmott (2017) identified similar findings in his mock jury research and even found higher rape myth acceptance scores to be predictive of not guilty verdicts, thus suggesting a direct association between extra-legal factors and trial outcomes. Meanwhile in qualitative analyses of juror deliberations, Ellison and Munro (2009b, a; c, 2010a, 2013) have repeatedly identified problematic myth endorsing attitudes as influencing jurors within their deliberations and ultimately therefore impacting verdicts.

In response to these numerous research findings, various critiques have sought to examine alternatives to trial by jury or perhaps reforms to the jury process. Indeed Krahé and Temkin (2013) examined potential reforms such as expert evidence or female only judges, whilst Willmott *et al.* (2021) similarly proposed inter alia juror education programmes, juror screening based on RMA scores and restricting the use of rape myths at trial to limit prejudicial narratives heard by jurors. A recent petition to the House of Lords called for compulsory juror education in all rape trials (Petition 209573, 2018), however this only received 16,445 signatures perhaps indicating a lack of public support for this proposal. More radical critiques, however, have called for total abolition of juries in rape trials (Ann Coffey HL Deb, 2018 Nov 21). Whilst this concept has attracted media interest, it has equally been met with strong opposition, with the suggestion that jury-bias may simply be replaced by judicial bias and prejudice (Munro, 2019; Willmott *et al.* 2021). Whilst such arguments are largely outside the scope of the current research, the recent Dorrian Review (2021) examining the Scottish context, provides an excellent overview about potential alternatives to trial by jury and associated practical considerations.

The influence of rape myths on juries therefore remains a particularly contentious subject and is discussed further in Section 2.4. However, despite widespread critique, trial by jury continues to lie at the heart of the justice system in England and Wales and therefore analysis

of its operation is crucial in order to understand shortcomings. Whilst research inside the jury room remains prohibited under the *Contempt of Court Act (1981)*, scrutiny of potential juror actions and reactions within legal process is fundamental to inform policy and reform debates. Willmott *et al. (*2021: 23) thereby argue that "existing blind faith in the jury's ability to get it right is no longer sufficient," and research into the operation of juries is vital to instil public faith in the system. The current research is the first in the English and Welsh context to scrutinise jurors' interpretations of sexual history evidence and will thereby vitally add to the knowledge base on the operation and effectiveness of the jury system.

1.3.3 Section Summary

The current section has outlined key controversies associated with the adversarial trial for sexual offences in England and Wales. Whilst adversarial procedure is steeped in tradition, and adversarial ideals attempt to engender fairness and justness within legal process (Creaton and Pakes, 2011), this section has highlighted numerous critiques and shortcomings associated with adversarial trial procedure in practice. Exploitation of adversarial ideals and gameplay tactics were highlighted as distorting the search for truth, whilst concurrently routinely traumatising complainants (Smith, 2021). These shortcomings are particularly onerous in reference to rape trials, which inherently involve both vulnerable witnesses and which are steeped in widespread endorsement of myths and stereotypes. Not only does exploitation of adversarial ideals thereby further victimise many complainants, but also routinely sways the presentation of evidence towards endorsement of myths and stereotypes which in turn, can sway jurors interpretations and understandings of trial evidence (Willmott, 2017). In response, growing controversy surrounds the suitability of juries to deliver justice in rape trials has emerged (Coffey, 2018; Willmott *et al.* 2021; Booth *et al.* 2017), and remains a central question to the current research.

1.4 Reform Efforts

Having established recent controversies and critiques of the CJS response to sexual offending in England and Wales, it is equally important to acknowledge positive policy reform. In conformity with the government rhetoric of a victim-centred approach to criminal justice (MOJ, 2002), recent decades have been marked by significant reform efforts. Whilst many of these reforms are beyond the remit of the current study, the following section outlines the introduction of specialist sexual offences training and judicial directions. These two reforms were implemented at trial, in attempts to diminish reliance on rape myths and stereotypes and improve conviction patterns. Restrictions to the use of sexual history evidence are explored in depth in Chapter 3.

1.4.1 Training for Legal Professionals

Compulsory specialist sexual offences training was introduced for all rape prosecutors in 2007 (CPS, 2012), following recommendation of the *Sexual Violence and Abuse Action Plan* (HM Government, 2007). An independent bar equivalent (HMCPSI, 2007) and 'Serious Sexual Offences Seminar' for judges (Judicial College, 2019-20) have equally both since been implemented, as has an in-depth guide endorsed by the DPP which provides guidance on responding to rape myths at trial (Burrowes, 2013).

Whilst such interventions have been relatively well received by academic researchers (Smith and Skinner, 2017; Gray and Horvath, 2018), including an excellent analysis by Rumney and Fenton (2011); the extent to which training guidance is adopted by legal counsel remains largely unknown. Positively, Stern (2010) found a strong commitment amongst CPS prosecutors to bring about the necessary change and Rumney and Fenton (2011) endorsed the use of experts to deliver practical training advice. Yet, the HMCPSi (2016) report revealed that whilst training has been positive, there remained a lack of training courses available for new prosecutors and the need for refresher training was often identified. The HMCPSi (2021)

report equally found that prosecutors often struggled to find time to undertake training, due to complex caseloads.

Thus, criticism has arisen regarding the practical implementation of this training. 'Rape leads' frequently report a lack of necessary extra resources and time needed to support the execution of the expert status awarded (Stern, 2010). Meanwhile Rumney and Fenton (2011) highlighted that the impact of training will always be limited to where trainees are willing to challenge their own assumptions. This arguably presents a significant obstacle for sexual offence trials, whereby engrained stereotypes are widespread (Chapter 2) and may hinder individuals' willingness to challenge their views. Some critiques even suggest that training can perpetuate stereotypes, whereby information of course materials is left unchecked, and trainees thus misinterpret material given to them (Smith, 2018a).

Moreover, in practice Smith (2018a) noted that some barristers would reject rape myths when defending a case, but then endorse these when prosecuting. This seemingly indicates that barristers may understand the realities behind rape myths but introduce myths regardless whereby it is tactical to do so. This may be drawn back to the underlying adversarial focus on winning, which arguably undermines the impact of training in favour of adversarial manipulation tactics.

At this juncture therefore, Smith and Skinner (2015) recommended that training and good practice guidelines should be further developed, including hypothetical scenarios to warn barristers of the dangers of rape myth usage. They suggested this should lead to the development of centres of good practice and specialist sexual violence courts. This notion of specialist courts is further explored by Hanna (2021) and Burman and Brindley (2021) as a potential remodelling of the legal response to sexual offences, using entirely specially trained individuals to run these courts and hopefully improve outcomes accordingly.

1.4.2 Judicial Directions

Alongside specialist sexual offences training, judicial directions were introduced into the Crown Court Bench Book (Judicial College, 2010). These allow judges to confer guidance to jurors regarding the appropriate evidence to consider in deliberations and highlights the risk of applying stereotypes or generalisations when considering trial evidence (Ellison, 2019). Whilst no formal legislation exists to mandate the use of judicial directions, research has positively shown that these are routinely utilised by judges (Durham *et al.* 2016a) as another attempt to alleviate the influence of rape myths at trial (Judicial College, 2010), and in doing so, improve conviction rates.

Whilst judges largely welcomed the introduction of these directions to help overcome the influence of rape myths amongst jurors (Stern, 2010), barristers interviewed by Carline and Gunby (2011) were sceptical of such directions, contending that these could push jurors down the road to conviction or unduly complicate the trial process. Nevertheless, substantial research has seemingly proven these concerns as unfounded, and highlighted the positive impact that such directions may have. Ellison and Munro (2009c) found judicial directions were effective in lowering rape myth acceptance amongst mock jurors, and Callander (2016) equally asserted that these can reduce the extent to which rape myths adversely impact on juror decision-making. The Court of Appeal has since endorsed the use of judicial directions for sexual offences trials, to caution juries against applying myths and stereotypes (*R v M, [2010] EWCA Crim 1578*; Thomas, 2020).

However much like specialist training, the practical implementation of judicial directions has been critiqued. In their observational research, both Temkin *et al.* (2018) and Durham *et al.* (2016) observed that judges tended to simply parrot the list given in the Crown Court Bench Book, rather than tailoring directions to the case in hand, thus minimising the impact of these directions. Similarly, Ellison's (2019) analysis of mock juror deliberations showed that participants often failed to connect the guidance given, and the case that they were presented

with. Complex language, legal jargon and adult literacy have all been identified as obstacles to juror comprehension of judicial directions, thereby limiting their impact (Ogloff and Rose, 2005; Heffer, 2008; Steele and Thornburg, 1988). McEwan (2005) therefore submitted that the impact of directions is limited as judges rarely make proper use of these. Meanwhile Smith and Skinner (2017) observed that whilst directions are largely positive, these are easily undermined by defence counsel, thus negating any challenge to stereotypes.

Therefore, whilst perhaps a step in the right direction, proposals to strengthen judicial directions have been welcomed. Ellison and Munro's (2009c) findings suggested that pre-trial directions may be more effective than post-trial and even suggested that in a lengthy trial jurors may benefit from pre and post-trial directions. Similarly, Gillen (2019) recommended that enhanced written judicial directions, juror training, and perhaps a 30-minute pre-trial video, could all be effective in cautioning jurors about rape myths. Hanna (2021), however contented that due to the engrained nature of rape myths, it is hard to be convinced that such provisions would sufficiently prevent rape myth endorsement amongst jurors. Chalmers and Leverick (2018) provide an excellent analysis of the impact of different methods of conveying such information to jurors and suggested that the effectiveness of judicial directions could be enhanced simply by providing these in written format. Their findings equally suggested that jurors are more likely to follow instructions which used plain language and explained *why* these directions were being given. Similarly, Leverick's (2014) meta-analysis equally emphasised the simplification of language, relevance of directions and additional written copies of directions, as advisable to improve their effectiveness. Ultimately therefore, whilst the debate remains, it is generally accepted that judicial directions are somewhat positive in reducing reliance on rape myths, although could be easily adapted to increase their impact.

1.4.3 Section Summary

This section has reviewed the literature regarding some attempts to reform the CJS response to sexual offences and improve the experience of complainants pursuing the justice process.

Whilst it has shown that attempts at reform are generally welcomed and reflect a desire amongst legal professionals and policy makers to improve justice discourse; in practice, implementation of each of these reform attempts has seemingly been somewhat discordant from original intention. Thereby, it must be recognised that policy reform alone is insufficient to improve justice discourse, and ultimately, this must be met with resources and commitment to effectuate largescale change. Whilst not dismissing the success of these attempts at reform, each has shown to be somewhat limited in practice, and thereby represents ongoing and persistent difficulties in the CJS response to sexual offending.

1.5 Chapter Summary

This chapter has illuminated up-to-date evidence and discussions regarding the persistent shortcomings and difficulties within the criminal justice response to sexual offences in England and Wales. At the centre of these debates, attrition and conviction statistics reflect extremely troubling figures for complainants who wish to pursue a claim through the CJS, with the vast majority never even reaching the trial stage. Against this backdrop, the recent, highly controversial alleged change of CPS charging policy and approach to disclosure, have exemplified many of the ongoing difficulties in responding to sexual offences and attracted widespread critique. Alongside these modern debates, the current chapter has also interrogated the underlying adversarial justice context, which has been said to enable and perpetuate numerous obstacles to justice. Whilst attempts at reform have been outlined, with some showing notable successes; variation in practical implementation and application has equally been criticised as perpetuating problems. These discussions provide vital context for the current research by outlining central debates about justice discourse which inform and underpin more specific debates about the inclusion of sexual history evidence at trial and ultimately its' impact on jurors.

Chapter Two: Rape Myths

2.1 Introduction

Chapter One outlined core critiques of the CJS response to rape in England and Wales, including poor attrition, prosecution, and conviction figures. Whilst explanations behind such inadequacies vary; perhaps the most widely accepted and theorised explanation relates to the influence and impact of so-called “rape myths” (Burt, 1980). It is argued that these widespread, stereotypical beliefs about sexual violence, create a cognitive framework or schema about *what* rape is, *how* it occurs and *who* it affects, which is then used by individuals to judge specific allegations of rape against (Gray and Horvath, 2018).

The current chapter outlines the literature to define the concept of rape myths and their cultural and gendered function, before then examining the extent to which rape myths accepted and endorsed within society in England and Wales. The chapter then scrutinises the impact and influence of rape myths at trial, providing an overview of the literature, examination of their construction and function at trial, and finally an assessment of what is known about rape myths and juror decision-making practices.

This discussion is central to the current research, as such beliefs tend to be widespread across society (Stern, 2010), meaning that prospective jurors are likely to endorse and potentially rely on these myths in deliberations (Willmott, 2017; Leverick, 2020). Meanwhile, research has repeatedly shown that myths are routinely presented alongside evidence at trial (Smith, 2018a; Daly, 2021a; Temkin *et al.* 2018), and are therefore are often pivotal to the evidence that jurors hear. Finally, sexual history evidence specifically, is said to prompt endorsement of the so-called twin myths (R v Seaboyer, 1991) and is also said to intertwined with wider myths regarding respectability, femininity and appropriate socio-sexual behaviour (McGlynn, 2017; Gillen, 2019; Phipps, 2009). Taken together, this makes scrutiny of the rape myth literature vital to provide background discussion for the current research findings and recommendations.

2.2 Defining Rape Myths

Since early classifications by Brownmiller (1975), Burt (1980), Estrich (1987) and Lees, (1996), rape myths have become perhaps the *most* researched aspect of social and justice responses to sexual violence (Smith, 2018a). Yet despite extensive research, much debate continues to exist about how to correctly define rape myths, with various definitions offered over recent decades. These debates are beyond the scope of the current literature review, however for the purposes of this thesis, I adopt Gray and Horvath's (2018: 16) definition being that rape myths are:

> *"Attitudes about rape, rape perpetrators and rape victims that serve to shift the blame for rape onto the victim, whilst minimizing the perpetrator's responsibility and denying the seriousness of rape."*

Notably this definition does not refer to "falsity" of these beliefs, as whilst they are misguided, they may be applicable to *some* rape cases even if this is the distinct minority (Gerger *et al.* 2007). The definition does, however, highlight the customary impact of rape myths in transferring the onus of responsibility onto the complainant, whilst excusing and dismissing the wrongdoing of the defendant and trivialising the impact of sexual violence. This serves to account for the immeasurable and assorted content of rape myths, whereby an exhaustive list is arguably impossible to produce.

Further classification by Bohner *et al.* (2013) however, is useful in framing the typical themes of rape mythology, whilst again accounting for the varied content of these myths across societies, culture and time period (Table 1.1).

Table 2.1 Bohner *et al.* (2013) Classifications of Frequent Rape Myths and Examples

Category of Rape Myths	Common Examples
Beliefs that blame the victim	'Women regularly provoke rape through their behaviour and/or appearance' 'Women play hard to get so sometimes no means yes'
Beliefs that express disbelief at claims of rape	'Women cry rape when they regret sex' 'Most changes of rape are unfounded' 'Real rape will involve violence and/or weapons' 'Real rape will result in physical injury to the victim'
Beliefs that exonerate the perpetrator	'Men have uncontrollable sexual urges' 'Men are biologically pre-dispositioned to want sex' 'If she has consented before, then how can it be rape'
Beliefs that only certain 'types' of women can be raped	'A woman who dresses in skimpy clothes or sexy underwear should not be surprised if a man tries to sleep with her' 'Only women who sleep around and hang out in bars, get raped'

In some instances, adherence to the above rape myths may occur, however myths serve to create a generalisation about all rapes meaning that, to those who endorse them, very few rape allegations will qualify as 'real rape' and therein lies the issue (Temkin *et al.* 2018).

2.2.1 Cultural Function of Rape Myths

Lonsway and Fitzgerald (1994) argued that the universal application of rape myths, awards these assumptions the cultural functioning of a myth as opposed to a stereotype. Indeed, research has shown that rape myths are underpinned by social norms regarding sex, gender, femininity, respectability, social class and acceptance of interpersonal violence (Burt, 1980; Phipps, 2009; Barn and Powers, 2018; CPS, 2017b). The collective and cultural phenomenon that underpins rape myth endorsement, has therefore been labelled through sociological theory as 'rape culture' (Burt, 1980; Johnson and Johnson, 2021). Such culture is said to normalise and trivialise sexual violence, through power imbalances that ultimately maintain the status quo regarding sex and relationships in society and dismiss the seriousness of rape

(Thornton, 2002; Johnson and Johnson, 2021). Accordingly, rape myths have been described as strong socio-cultural indicators of attitudes that minimize social problems such as rape (Suarez and Gadalla, 2010), and are intertwined with “complex social issues of sexism, racism, homophobia, socially endorsed sexual activities, and so on” (Suarez and Gadalla, 2010: 2024). Cowan (2021) suggests that these attitudes are not only *embedded within* but also *sustained by* popular culture, media outlets, neoliberal ideology and entrenched psychological drives (Cowan, 2021).

This engrained nature of rape myths is therefore of particular concern in common law jurisdictions such as England and Wales, whereby jurors, as the ultimate deciders of guilt, are drawn from a society in which these prejudicial attitudes are seemingly intrinsic. Whilst a body of literature exists to deny the existence of a so-called rape culture and will be discussed in depth in Section 2.2.3, the widespread endorsement of rape myths and stereotypes within society (Section 2.4) is said to illustrate the problematic and socially embedded nature of these attitudes, which in turn can permeate justice discourse.

2.2.1.1 Intersectionality and Rape Myths

Within the wider premise of a rape culture, which asserts that myths and socially embedded through cultural norms, literature has also emerged to attest to the intersectional nature of these beliefs, which sustain and perpetuate numerous compounded social oppressions such as gender, race, class, ethnicity and religion (Crenshaw, 1991). Whilst the gendered nature of rape myths has been well established (Section 2.2.1.2), the concept of intersectionality recognises these wider structural inequality and power imbalances within rape myth discourse, that affect experiences of sexual violence (Ackerley and Latchford, 2017).

The intersectional matrix recognises that women’s experiences of sexual violence may vary significantly dependent on inter alia ethnicity, disability, socio-economic status, access to employment and housing (Crenshaw, 1991; Smith, 2018a). This heightens some women’s vulnerability to sexual harms and creates marginalities in the harm that they experience

(McNaull, 2021). In turn, the construction of harm varies according to these intersectional oppressions (Phipps, 2009), with complainants from minoritised and marginalised groups, those with learning disabilities and with mental health conditions, particularly unlikely to achieve convictions (Lovett *et al.* 2007; Hester and Lilley, 2017; Daly, 2021a). These compounded oppressions therefore not only influence the individual experience of sexual victimisation, but also the societal and CJS response.

Indeed, intersectional research has contended that rape myths not only endorse and sustain traditional heterosexual, gendered norms; but crucially reflect "prevailing white, middle-class, patriarchal, heteronormative values" (Cowan, 2021: 86). For example, presumptions of a 'real' rapist reflect an 'other' and certainly not white, middle-class, educated, handsome men (Patil and Purkayastha, 2015). Similarly, violence against women of colour, the lower classes or those, for example, working in the sex industry, is largely stigmatised and routinely fails to capture public outcry or attention (Gill, 2013; Patil and Purkayastha, 2015). Rape myths, therefore, arguably present violence against minority groups in a way that problematises and further marginalises those groups, failing to recognise the wider of structural social inequality (Beckett and Pearce, 2017).

Meanwhile at trial, Daly (2021a) illustrated continued reliance upon these intersectional mythical ideals, with unemployment and social class frequently drawn upon as a means to stigmatise and discredit complainants. These intersectional framings, in turn contribute towards wider stereotypical assumptions of credibility and 'ideal' victimhood, to impact on justice outcomes. Phipps (2009) provides an excellent analysis of this, suggesting sexual violence continues to be portrayed predominantly as a working-class men's issue, and as such these men are more frequently prosecuted, convicted and routinely receive harsher sentences. On the contrary, the experience of working-class women as complainants is often de-valued, with these women seen as less credible and sexual victimisation simply a 'natural' part of their social experience (Phipps, 2009). This adheres to stereotypical constructions of 'out of control' working-class sexuality which situates poorer and less educated women as

sexual provocateurs. This question is therefore central to the current research, with such notions of credibility and respectability at the core of narratives about women's sexual history (McGlynn, 2017; Smith, 2018a).

Ultimately therefore, whilst it is increasingly recognised that sexual violence fits within a wider remit of multiple structural oppressions (Gossett, 2016), rape mythology continues to shape dominant notions of rape, victimhood and perpetrators according to white, middle-class, heterosexual values. Rape myths therefore subjugate all genders, sexualities, races and classes according to an overarching misguided patriarchal model (Nicola, 2013). Whilst the current research is limited in its intersectional nature, it does examine perceptions of credibility and gender within jurors' responses to sexual history evidence. Nevertheless, further research into the way in which rape myths, and particularly those surrounding sexual history, sustain and perpetuate these wider compounded oppressions, is crucial to holistically understanding rape myths as an obstacle to justice and in doing so, to direct reform efforts.

2.2.1.1.1 The Gendered Nature of Rape Myths

Within the intersectional matrix, whilst several oppressions (explored above) have traditionally been overlooked in research, the gendered nature of rape mythology has been well established. Whilst intersectional commentaries of third-wave feminists may critique this overwhelming focus on gender, suggesting it ignores wider intersectional identities (Crenshaw, 1991); gendered oppression in rape mythology must not be understated. Indeed, rape remains a crime predominantly committed by men, against women (CSEW, 2021) and rape myths have been shown to create 'sexual scripts,' which dictate the expected form of sexual interactions between men and women (Frith, 2013), according to traditional gender role stereotypes (Grubb and Turner, 2012). This is particularly relevant to myths surrounding sexual history evidence, which is routinely introduced at trial within wider ideals of heteronormativity and appropriate gender roles within sexual relationships (Kelly *et al.* 2006). The gendered nature of sexual history will be explored in more detail Chapter Three.

Yet, in response to rape mythology more widely, Hockett and Saucier (2015) asserted that rape myths are a societal tool, used to create misguided narratives about rape as a means to maintain the status quo regarding women's subordination in society. Indeed, rape myths typically serve to impose a narrow binary model in which males are portrayed as sexual aggressors, for example being unable to control their sexual urges, whilst females are sexually passive, for example by 'playing hard to get' (Cowan, 2021). These assumptions align with traditional gendered ideals in which men are exemplified as powerful, dominant, and aggressive, whilst women are seen as weak, feeble, and fragile (Grubb and Turner, 2012). This translates to traditional socio-sexual assumptions in which men are usually socialised as initiators of sex and sexual relations and women, the gatekeepers (Bridges, 1991). In turn, rape is often assessed as an extension of consensual sexual behaviour (Grubb and Turner, 2012), and therefore attitudes towards supposed 'acceptable' socio-sexual behaviour are used to dictate where blame and responsibility are perceived to lie for non-consensual sexual acts (Stern, 2010). Again, these framings are intrinsic to those of sexual history, and highlight the distinctly gendered nature of myths that surround this evidence.

Rape mythology has thus been shown to sustain perpetuates these underlying patriarchal ideals and gendered dyads, to create framings against which, allegations of rape are judged. Men are presented as being ruled by their sexual desires, and the onus of responsibility is transferred onto women as gatekeepers to police, resist and avoid seemingly inevitable male sexual advances (Smith, 2021). These framings are reflected at trial, through narratives such as questioning whether the complainant physically resisted, had been flirting or 'leading the defendant on,' what she was wearing or whether she was intoxicated (Temkin *et al.* 2018; Smith, 2018a). In doing so, attribution of blame is put on the female gatekeeper, for deviating from this gendered role and inference given that her own behaviour somehow contributed towards her victimisation (O'Byrne, Hansen and Rapley, 2008; Wheatcroft, Wagstaff and Moran, 2009). Conversely, the defendant is alleviated of blame as he seemingly could not

control himself when faced with a ‘disrespectfully’ dressed, flirtatious female (Edwards *et al.* 2011; McKeever, 2019).

In turn, numerous studies have shown that where a complainant has deviated from traditional feminine norms, by for example, inviting the defendant home, kissing, accepting a lift or drinking alcohol, jurors are overwhelmingly less likely to convict (Ellison and Munro, 2009a; Krahé and Temkin, 2013). Similarly, multiple studies have uncovered a strong link between rape myth acceptance and adherence to traditional gender role attitudes (Grubb and Turner, 2012; Reynolds, 2016), with endorsement of gender roles leading to significantly higher levels of victim blame (Ben-David and Schneider, 2005). Adherence to traditional gender norms and ‘appropriate’ socio-sexual behaviour thus create a hostile environment for complainants of sexual violence at trial (Burt, 1980), and even influences whether victims themselves identify their experience as rape (Peterson and Muehlenhard, 2004).

Furthermore, Moore (2014) noted that media reporting of sexual violence similarly tended to draw upon the gendered element of rape myths, in order to caution women about the risk of ‘inappropriate’ sexual behaviour upon their safety. Again, this attaches responsibility to the female role as a gatekeeper and demonstrates reversed blame attribution onto the complainant. These cautionary tales of intoxicated and flirtatious women in the mainstream reporting of sexual violence, Moore (2014) however submitted, is a reaction to increased female freedom and uses rape mythology to try to sustain traditional gender roles.

The rise of social media has arguably demonstrated a backlash to these traditional gendered rape supportive values, with movements such as #MeToo #IBelieveHer and #ThisIsNotConsent gaining prominence to reject rape mythology. Whilst such complainant solidarity arguably reflects movement towards dismissal of rape myths from mainstream narratives, polarised movements and dissenting voices have equally emerged. Whilst less prominent, backlash movements such as #IBelieveThem and #MenToo have decried female complainants as sluts’ who ‘cry rape’ whereby they regret sexual intercourse, and therefore

demonstrate ongoing adherence to patriarchal gendered myths. Even through a simple twitter search (31st May 2019) of these hashtags, ongoing rape myth endorsement is acutely evident:

> *"Sorry hun but regret is not rape. We as a society need to think carefully before we ruin young men's lives. Maybe if false accusers were named so publically it would give them pause for thought. #IBelieveThem"*
>
> *"#MenToo Tons of fake rape allegations have trampled our world. Fake accusers are everywhere. They are heinous criminals. Half of molestations are fake and made for extortion or publicity or personal vendetta."*
>
> *"Hope these 4 young men can now rebuild their lives and today's verdict goes someway to discourage the scourge men face with false allegations #IBelieveThem"*

These narratives exemplify the gendered and persistently engrained nature of rape mythology, as heavily impacting upon the way individuals [and inevitably therefore jurors], perceive and respond to allegations of sexual violence.

Yet, returning to intersectional critiques above, these framings can equally be discussed beyond gender. For example, movements such as #MeToo have been centred around economically and racially privileged women in mainstream media coverage, who are therefore portrayed as 'good' complainants (Boyle, 2019). Perhaps, if these women did not have the same privilege or did not adhere to norms of 'appropriate femininity' in the way that they did therefore, these movements may not have gained the same traction. Phipps (2009) provides an excellent analysis of these intersectional analyses, and these framings must be explored further to comprehensively understanding societal framings of sexual violence. Nonetheless, patriarchal gendered nature of rape myths that structurally oppress women's equality and refer back to outdated gender role stereotypes, is seemingly well proven and will be discussed in this study's findings in Chapters 6 and 7.

2.2.2 "Myths about Myths"

Whilst broad academic consensus has denoted the potential prejudicial impact of rape myths, it is important to recognise dissenting voices. This body of discussion has ultimately sought to

dismiss the existence of a rape culture, contest the seriousness of rape myths and argue that mainstream focus on these attitudes is both misguided and unhelpful (Saunders, 2018).

Critics have thereby denoted the concept of rape culture as “ridiculous” (Paglia, 2015), “hysteria” (McElroy, 2016) and ultimately a “troubling source of moral panic” (Hoff-Sommers, 2014). Gittos (2015: 2), a defence solicitor, argued in his self-published book that this concept of rape culture in itself is a dangerous myth, fed by “panicked news stories” and sustained by increasingly intrusive surveillance of sexual violence which perpetuates anxieties. He suggested that rape statistics have been grossly inflated by feminist activists, whom, he asserts, label “perfectly ordinary relationship behaviour” whereby things may “get a bit frisky” (p.23) as rape, so as to sustain this “wildly successful fiction created by PC feminists” (McElroy, 2016: 2). Gittos (2015: 64) concluded, that the state have entered into a “legislative assault” upon people’s private lives as a result of this moral panic, whereby “many more situations can be classed as rape today than could be thirty years ago” (p.63), so as to sustain this myth. Young (2017) affirmed this standpoint, suggesting that the “rape culture myth is highly damaging to the principles of fairness”, such as the presumption of the defendant’s innocence and right to a fair trial, and argued that the rhetoric itself relies upon misinformation and distortion.

It is of note however, that none of these critiques derive from academic sources or have been subject to peer-review. McElroy, Young, Hoff-Sommers and Pagalia are all prominent American journalists, professing themselves as ‘individualist feminists,’ blaming individual men for sexual violence and thus dismissing the notion that sexual violence has any cause from culture as a whole. Meanwhile, Gittos is an English defence solicitor and blog writer on a plethora of different and unrelated aspects of criminal law and popular culture. Accordingly, the reliability and quality of this rape culture denial literature is problematic.

Stiebert (2018) provided an excellent rebuttal to Gittos (2015), which highlighted his reliance on a flawed interpretation of rape culture that did not accord with philosophical and sociological

theory. Indeed, much of the denial literature interprets rape culture as suggesting that the entirety of society are actively encouraging or failing to punish those who rape. These arguments misunderstand the premise of rape culture, which does not necessarily equate to blatant encouragement, promotion or acceptance of sexual offending (Chaplene-Smith, 2018), but rather is about more nuanced victim blaming within naturalistic cultural settings (Stubbs-Richardson *et al.* 2018). For example, notions such as asking a complainant what she was wearing, whether she fought back or whether she was intoxicated, as seen frequently in rape trials(Temkin *et al.* 2018), all conform to victim blaming attitudes at the core of a rape culture.

Stiebert (2018) therefore dismissed Gittos' critique as failing to acknowledge the realities of rape or rape culture or situate these within the wider cultural context. By suggesting that certain non-consensual sexual behaviours are merely matters of "sexual etiquette" rather than rape, Gittos trivialised sexual violence by normalising rape as a matter of sexual norms. By arguing that these behaviours were not labelled as rape 30 years ago and thereby demonstrate "legislative assault," Gittos failed to recognise that such behaviours may have always been harmful, however victims simply lacked any re-course to challenge such behaviours. Stiebert (2018) thus suggested that Gittos' critique ultimately, unwittingly demonstrates his own complicity with the rape culture that he was seeking to dismiss. Whilst Gittos asserted that law reforms simply amount to state interference on people's personal lives, Stiebert (2018) concluded that reform ensures that rape is treated seriously as a crime, which is rooted in a culture which frequently denies victims a voice.

Meanwhile, alongside this rape culture denial literature, perhaps the most unreserved critique regarding the impact of rape myths was advanced by Helen Reece (2013). Reece (2013) asserted that feminist researchers are engaged "in a process of creating myths about myths" by overstating the prevalence and effect of rape stereotypes and designating certain beliefs as myths when they are not. Whilst she acknowledged that historical attitudes towards rape were distinctly discriminatory, she was careful to situate these as historic aberrations. In doing

so, Conaghan and Russell (2014) argued that Reece failed to acknowledge the legacy of this subordination, which continues to influence social, political and economic aspects of modern life. Conaghan and Russell (2014: 25) provide an excellent rebuttal to Reece's analysis, stating that it is "methodologically flawed, crudely reductionist and rhetorically unyielding." Indeed, Reece's critique was gender neutral meaning it failed to recognise structural gendered oppressions, and also focused on just three rape myths, citing others such as delayed reporting or physical resistance as relatively unproblematic and perhaps beyond contestation.

Reece (2013) devoted the bulk of her analysis to challenging the so-called 'coffee myth' which assumes that a woman inviting a man back for coffee after a date is a signal to suggest her willingness to consent to sex. Reece (2013) held that this is a quintessential norm embedded in social contract theory, and argued that this provides jurors essential context in which to judge whether consent was given, within a complex social interaction. Smith (2018a) contended that whilst Reece may be justified in stating that narratives around social contract are not always wholly irrelevant; such evidence cannot be held synonymous with consent. Indeed, this notion of miscommunication, enables male perpetrators to accord the status of 'naive mishearers' which then attributes he onus of ensuring proper and sound communication to the female complainant (Conaghan and Russell, 2014). This in turn, encourages traditional sexual double standards of victim blame as discussed above and therefore to credit miscommunication as legitimate is dangerous, as it allows men to cynically *pretend* to misunderstand indirect or implicit refusals (Gurnham, 2016). Again, such critique thereby failing to appreciate the wider patriarchal cultural context that underpins rape myths (Conaghan and Russell, 2014).

Finally, in respect to the influence of rape myths on justice discourse, Wolchover (2008) proposed that there is a lack of evidence to substantiate widespread claims that rape myths are responsible for low convictions and high attrition. More recently, in her much anticipated analysis of 'real jurors,' Thomas (2020) asserted that claims of widespread adherence to rape myths by jurors are simply incorrect. Her findings, which achieved widespread media attention,

argued a clear lack of rape myth endorsement amongst jurors. However, this thesis contends that her findings did in fact show continued rape myth acceptance. For example, 78% agreed or were unsure, that they would expect rape complainants to be very emotional when giving evidence, whilst 61% agreed or were unsure that if both people are drunk it is hard to know if it was really rape. This research will be discussed in depth in Section 2.4.3. which examines rape myth acceptance amongst jurors. However it is important to note from the outset that despite significant attention awarded to these findings, Thomas's (2020) methodology may be criticised in encouraging socially desirable answers and her conclusions may therefore be scrutinised (see Section 2.4.3).

Ultimately, whilst dissenting voices have continued to assert that rape myths are not problematic in social or justice responses to rape, these voices may be readily critiqued and are considerably outweighed by significant and extensive academic research which suggests precisely the opposite (Willmott, 2017; Temkin *et al.* 2018; Smith, 2018a; Leverick, 2020; Ormston *et al.* 2019; Chalmers, Leverick and Munro, 2021). It may be asserted that rape mythology has become more subtle and covert over time (McMahon and Farmer, 2011), however there remains a degree of acceptance within *academic* discourse that rape mythology continues to perpetuate heteronormative, patriarchal cultural narratives which act as a cultural scaffolding of rape (Nicola, 2013; Daly, 2021a).

2.2.3 Section Summary

This section has highlighted the conceptualisation of rape mythology and its function within society. The embedded cultural function of rape myths, adhering to social norms, and enhancing both gendered and further oppressions, makes such beliefs particularly problematic and difficult to tackle. Whilst the bulk of such literature has focused on rape myths generally, myths relating to sexual history evidence remain equally embedded within societal norms, as discussed in Chapter Three, and thereby seemingly hold strong potential to span society and influence individual perceptions of rape. This is especially onerous in common law

jurisdictions such as England and Wales, whereby jurors are drawn from the general population and thereby likely to bring with them, these pre-existing misguided attitudes within their interpretations of case evidence. It is therefore crucial for the current research, to scrutinise the influence and nature of rape mythology in the population, as this inevitably impacts juror attitudes in the deliberation room.

2.3 Rape Myths at Trial

Having established the nature and societal function of rape myths that inform discourse about *what* rape is, *how* it occurs and *who* is involved (Bohner *et al.* 1998), it has become acknowledged that rape myths can be especially dangerous in the legal context (Temkin *et al.* 2018; Smith, 2018a). They hold the potential to influence each stage of the justice process (Angolini, 2015; Hohl and Stanko, 2015; Waterhouse, Reynolds and Egan, 2016), from reporting behaviour of victims, decision-making behaviour of CJS investigators and prosecutors, narratives at trial and ultimately jurors' final assessment of verdict (Wilson and Scholes, 2008; Bohner *et al.* 2013; Willmott, 2017). Endorsement of rape myths has therefore been identified as an instrumental barrier to justice within the criminal prosecution of rape cases (Temkin, 2010; Dinos *et al.* 2015), creating a perception of rape which encourages victim blame, whilst exonerating offenders (Bohner *et al.* 2013).

Most research to date, has tended to focus upon pre-trial police and investigative stages in which attrition is at its highest (Lovett and Kelly, 2009). However, this thesis focuses specifically on trial, whereby myths persist perhaps most strongly (Smith, 2018a), and from where jurors' hear all case evidence. Academic research has consistently demonstrated extensive reliance on a plethora of different rape myths across observational datasets in trials in England and Wales (Adler, 1987; Lees, 1993; Durham *et al*. 2016a; Smith, 2018a; Temkin *et al.* 2018; Daly, 2021a), and therefore, the following sections will scrutinise the literature on their impact at this stage. Such discussions are central to the current research, as narratives

heard at trial ultimately inform and shape the evidence that jurors hear and their narrative interpretation of case facts.

2.3.1 Initial Research and The Real Rape Hypothesis

Reliance on rape myths at trial in England and Wales was first identified in two key observational studies of Adler (1987) and Lees (1996). Adler's (1987) research used court observations, whilst Lees (1996) analysed complainants accounts, police records and monitored Crown Court trials. Focusing principally upon sexual history restrictions, Adler (1987) found that 75% of applications under s.2 SOA (1976) were granted, often on spurious grounds to discredit the complainant and achieve an acquittal. She also noted that female complainants were regularly seemingly put on trial and required to reach exceptionally high, traditional, and virtuous standards of femininity to achieve a conviction. Meanwhile, Lees (1996) highlighted how myths were invoked in order to undermine the complainant and suggest that *her* behaviour had precipitated events. These findings prompted legislative reform, through introduction of the *Sexual Offences Act (2003)*, however more recent observational research has continued to evidence much the same problems as this initial work (Durham *et al.* 2016; Smith, 2018a; Temkin *et al.* 2018; Daly, 2021a).

In the US context, Susan Estrich's (1987) formulation of the “real rape” hypothesis shone further light on the impact of rape myths throughout the justice system. Estrich (1987) proposed that only real rapes, being those which heavily adhere to stereotypical ideals, are treated seriously by the CJS, whilst far more common ‘simple’ rapes are often disregarded. Estrich (1987) described her own rape victimisation as a real rape – committed by a stranger, who was black, stole her car and used violence – and noted that she was ‘lucky’ that no one doubted her claim of rape. However, she highlighted that had these stereotypical real rape markers not been present, police, prosecutors and judges would be unlikely to treat the offence seriously and ultimately diminish the chance of conviction. This hypothesis thereby

highlighted the CJS' undue reliance on myths and stereotypes and emphasised the need for structural reform.

In practice, this stereotypical 'real rape'[3] is actually relatively rare (Temkin and Krahe, 2008; Horvath and Brown, 2013), and does not reflect requirements of the legal definition of rape (Venema, 2016). Nevertheless, it has become, and arguably continues to be, a dominant generalisation of rape, with evidence showing that complainants themselves, police investigators, prosecutors and juries continue (to some extent), to judge rape allegations against these notional standards (Krahé *et al.* 2008; Venema, 2016). Jackson (2021) even found that complainants at SARCs would routinely assert that they did not fight back, protect themselves or had known the assailant, and therefore suggested that it could not *really* have been rape. Thus, demonstrating how pervasive such attitudes continue to be in informing perspectives of sexual violence (Waterhouse, Reynolds and Egan, 2016; Jackson, 2021).

Meanwhile, real rape ideals are widely perpetuated and sustained by media reporting, which tends to predominantly focus on reporting these 'real' rapes, thus failing to illustrate the far more probable and commonplace 'simple' rape as an issue (Bows and Westmarland, 2017; Cowan, 2021). As such, complainants of 'simple' rape are often tasked with convincing investigators and other CJS officials of the legitimacy of their allegation (McMillan and Thomas, 2013; Bows and Westmarland, 2017). Horvath and Brown (2013) therefore submitted that the continuing pervasiveness of the real rape stereotype in mainstream and justice discourse, is likely a significant contributor to the so-called justice gap.

Positively, Ellison and Munro (2013) found increasing recognition in their sample of mock jurors, that rape can be committed by non-strangers and is no less serious for it, thereby indicating that the real rape stereotype is becoming less persuasive. Nonetheless, this sample did continue to endorse wider stereotypes regarding inter alia, sexual miscommunication, a

[3] A rape committed by a stranger, at night, involving violence and/or weapons.

defendant's reasonable belief in consent, and a lack of physical resistance by the complainant, thus demonstrating ongoing adherence to some aspects of the real rape hypothesis. Moreover, onus was routinely placed upon the complainant to better communicate her non-consent and fight back against the perpetrator (Ellison and Munro, 2013). Similarly, recent findings of Chalmers *et al.* (2021) in the UK's largest mock jury study to date, found ongoing adherence to the real rape stereotype including the belief that the complainant would have injuries, would resist an attack and would report the offence immediately.

Recent observational studies have also identified concentration on real rape ideals at trial, particularly by defence counsel (Temkin *et al.* 2018; Smith, 2018a). The premise of real rape thus continues to be influential in societal and justice discourse, and research has ratified its applicability across jurisdictions and time periods (Temkin *et al.* 2018). This is problematic, not only for attributing blame to the complainant, but it also alters the way in which evidence is presented to jurors, and thereby likely influences juror decision-making.

2.3.2 Rape Myth Function at Trial

As discussed above, the gendered and cultural function of rape myths makes these beliefs particularly difficult to tackle, sustaining traditional gender roles and social norms, and being perpetuated by mainstream media and public discourse (Suarez and Gadalla, 2010; Cowan, 2021). In the trial context, where the majority of sexual violence trials come down to a contest of credibility between the complainant and defendant (Gillen, 2019), rape myths are similarly deployed to perpetuate and sustain these socio-sexual double standards and portray the *complainant's* behaviour as irrational and suspicious (Smith, 2018a; Cowan, 2021).

Substantial research has shown that rape myths are regularly used by defence counsel to refocus trial onto an assessment of the complainants actions and character (Wistrich, 2007; Burrowes, 2013) so as to make her appear blameworthy (Lovett *et al.* 2007), suspicious (Taylor, 2007) and to lower her credibility (Ellison and Munro, 2009b). This myth usage regularly frames the complainant's actions as abnormal or irrational (Smith, 2018a) and

therefore inconsistent with those of a genuine complainant (Jordan, 2004; Ellison, 2005). Similarly, they continue to be employed as a means to distance the allegation in hand from that of a *real* rape, to increase the chance of acquittal (Temkin *et al.* 2018). In doing so, these myths create a trial context whereby "the veracity of the victim's allegations is often on trial at the same time as the defendant's culpability" (Boeschen, Sales and Koss, 1998: 414). These manipulation tactics not only portray the complainant as a liar, put her on trial (Payne, 2009) and contribute to frequent secondary victimisation; but also bypass examination of the defendant's alleged wrongdoing (Temkin *et al.* 2018).

Indeed, recent researchers have detected subtle variation in the emphasis of rape myths to perpetuate a socio-sexual double standard and attribute blame to the complainant, whilst excusing the defendant (Cowan, 2021). For example, whilst a complainant may be depicted as blameworthy as a result of intoxication, this may be used to lessen the defendant's culpability, asserting he was not in control of his actions or aware of his wrongdoing (Cowan, 2021). These notions of the defendant as naïve and unable to control his aggression or sexual urges, serve to trivialise the nature of sexual violence and the perpetrator's actions (Bohner *et al.* 2013; Barn and Powers, 2018).

In turn, Smith (2018a) argued that this habitual myth usage at trial, situates notions of 'normality' and 'rationality' as central, and therefore seemingly encourages jurors to rely on these myths in deliberations. In turn, numerous studies of jurors, have highlighted that greater level of myth endorsement by jurors, increases the likelihood of acquittal (Leverick, 2020; Willmott *et al.* 2018). This centrality of myths at trial, has thus been shown to influence jurors' evaluations of evidence and further contribute to low conviction rates (Ellison and Munro, 2013; Willmott, 2017; Leverick, 2020).

Meanwhile, as well as being evidential obstacles at trial, rape myths have also been held to exacerbate the trauma of complainants and add to feelings of victimisation (Maier, 2008). These manipulative questioning strategies relying upon rape myth narratives are "oppressive

and invidious" (Temkin, 2002: 9) and contribute to the frequent secondary victimisation of complainants at trial (Ellison, 2007; Smith and Skinner, 2012). Therefore, modern myth usage functions to not only further victimise and distress complainants, but also increases the likelihood of their disengagement with the criminal justice process, thereby contributing towards attrition (Kelly *et al.* 2005).

2.3.2.1 Real-Life Examples of Rape Myth Function at Trial

Whilst academic research has highlighted the function and impact of rape myths at trial, numerous recent high-profile cases have equally exemplified reliance on myths at trial as highly problematic. Particularly notable have been R v Evans (2016), the so-called Irish rugby rape trial (2018) and the Cork 'thong' case (2018), which have all attracted intense media scrutiny and provoked large-scale debate across UK public discourse. This section examines these cases to provide context for the current research by highlighting the type of evidence that jurors continue to hear at trial, but also illuminating potentially changing public, and thereby juror, attitudes towards rape myths and sexual violence.

The Evans case reignited debates regarding sexual history evidence and will be discussed at length in Chapter 3. The so-called Irish rugby rape trial equally provoked large scale media interest as the defendants were, like Evans, sporting celebrities. The details of the alleged rape were shocking and became even more so following the publication of highly explicit, misogynistic WhatsApp messages between the defendants (Gallagher, 2018). Outcry then became greater surrounding the fact that the complainant was subjected to days of manipulative and intrusive questioning by four defence counsel, which heavily drew on dominant myths and stereotypes (Killean, Dowds and McAlinden, 2021). Thus, precipitating Ireland's #MeToo movement and #IBelieveHer, this case provoked outcry across the UK regarding the treatment of complainants at trial and ultimately prompted the Gillen review (2019) to consider law and procedure for serious sexual offences in Northern Ireland.

Similarly, the so-called Cork 'thong' trial prompted further public and media outcry across the UK, with a complainant's bloodied thong being passed around the courtroom and between jury members during trial. Defence counsel reportedly suggested to the 17-year-old complainant that she was "open to meeting someone" by wearing this thong and advised the jury that "You have to look at the way she was dressed. She was wearing a thong with a lace front" (Sherwood, 2018). These, highly myth endorsing statements again prompted vast media and public outcry, leading to protests across the UK and social media hashtag #ThisIsNotConsent.

Whilst two of these three trials occurred outside of the English and Welsh jurisdiction, ramifications and outcry were felt across the UK and fundamentally demonstrated the ongoing problematic use of rape myths and onerous procedures at trial. The substantial public outcry in response to these cases, however, seemingly demonstrates a shift in rhetoric regarding attitudes towards rape and rape myths. Social media, and in particular Twitter, became the site of momentous public debate and remarkable dialogue regarding public understanding of sexual violence and rape myths. Both #IBelieveHer and #ThisIsNotConsent gained the attention of millions and prompted women's rights marches across the UK and Ireland, demonstrating a growing rejection of rape myths and victim blaming attitudes.

Nevertheless, these movements have equally been met with calls for the women who 'destroyed' these various defendants' lives to be named, shamed, and even sued. This polarisation of attitudes has been reflected across social media and through newspaper headlines such as:

> *Rugby rape trial verdict: Accused deserve to be anonymous, says man whose life was ruined by rape claim (Belfast Telegraph, 29.03.2018)*
>
> *Stuart Olding 'suffered huge financial detriment' after rugby rape trial (The Journal.ie, 12.10.2018)*
>
> *Tony Bellew calls for Ched Evans rape accuser to be 'punished' - sparking Twitter row (Liverpool Echo, 22.03.2018)*

Therefore, despite national and international feminist movements marking a positive evolution of social attitudes towards sexual violence, it is evident that rape myths and victim blaming narratives continue to persist within other branches of society and thus permeate the jury eligible population. Thus, whilst public, and therefore juror, attitudes are seemingly improving in some aspects of the population, the polarisation of debates here reflects ongoing myth endorsement and thus provides further justification for the current research, to assess how such attitudes pervade into juror decision-making processes.

2.3.3 Rape Myth Construction at Trial

Having established persistent use of rape myths at trial, often to discredit the complainant and her testimony (Penwill, 2008); Smith (2018a) submitted that it is essential to understand how the underlying trial context enables this.

Evidence has shown that rape myth narratives tend to be constructed by defence counsel using leading and/or closed questioning techniques (Kebbell, O'Kelly and Gilchrist, 2007). This limits a witness's ability to elaborate on and explain their evidence (Burman, 2009) and so is arguably used as a method to help support the narrative of the defence barrister. It may be argued that adversarial ideals facilitate myth usage, as evidence heard by jurors at trial is confined that that which each legal team presents to them during trial in the form of competing courtroom stories (Ellison, 1997). Therefore, not presenting facts that disfavour their client (Sevier, 2014), barristers (especially the defence), produce narratives that are frequently rooted in rape mythology and based upon stereotypical assumptions of what constitutes a 'real' rape (Smith, 2018a; Temkin *et al*. 2018).

It is argued that the adversarial goal of 'winning,' incentivises counsel to rely upon mythology and manipulation tactics (Smith, 2018a). Thus, exploiting the adversarial storytelling structure, defence counsel are able to raise ideas of rationality, inconsistency and 'appropriate demeanour' of complainants (Smith, 2018a), reinforced by a culture largely accepting of such stereotypical ideals (Stiebert, 2018; Cowan, 2021). In drawing on these myth-based

narratives, closed questions are utilised to redirect focus onto marginal details and rape myths, whilst limiting witness's (typically the complainant's) ability to make detailed explanation of their behaviour (Kebbell *et al.* 2007; Smith, 2018a). Jurors are thereby invited to fall back on stereotyped ideas of *how* rape occurs, and mythical ideas therefore become central in the execution of justice (Smith and Skinner, 2017).

As such, substantial research has concluded that rape myth usage in engrained in court culture and reinforced by the legal context of trials (Hudson, 2002; Burton, Evans and Sanders, 2006; Smith, 2021). The legal fixation upon rationality and inconsistencies arguably keeps myths relevant to the trial setting (Smith and Skinner, 2017), whereby any deviation from the hypothetical 'ideal' is used to cast doubt on the truthfulness of the complaint and complainant (Gray and Horvath, 2018). Reliance on myths arguably therefore persists and is reinforced by the legal cultural scaffolding of trial and creates complex power relations whereby judges arguably feel unable to challenge questions or arguments where both barristers agree (Smith, 2018a, 2021). Such assertion is vital to considerations of sexual history applications, which must be approved by the trial judge, before such evidence may be submitted to trial. Nevertheless, these applications are routinely neglected in practice, as outlined throughout Chapter 3.

Cowan (2021) therefore, asserted that rape mythology is sustained and perpetuated by the underlying patriarchal rationalist tradition of the adversarial trial, which ultimately serves to prejudice trial against complainants. Thus, Smith and Skinner (2017) argued that to overcome reliance on myth usage, the adversarial system's focus on winning and battle-like structure of trial, must first be tackled.

2.3.4 Challenge to Rape Myths at Trial

Whilst several reform efforts have been implemented (Section 1.4) in a bid to expel reliance on rape myths from sexual offences trials in England and Wales, recent observational

research has suggested that challenge to these myths during trial actually remains relatively rare (Smith, 2018a; Temkin *et al.* 2018).

Indeed, Temkin *et al.* (2018: 218) observed "few instances of well-constructed challenges to rape myths" during their study, with prosecution counsel regularly missing opportunities to rebut myths. More positively, Smith (2018a) noted that there was some resistance to rape myths by prosecution counsel and trial judges in every observed trial, however such challenges tended to be easily undermined by defence barristers. Moreover, following these 'myth-busting' attempts of the prosecution, Smith (2018a) observed numerous tactics by defence counsel to keep these myths 'relevant.' For example, by acknowledging a belief as a myth but then distancing this from the case in hand or by stating that the myth-buster directions of the prosecution were patronising to jurors. Moreover, whilst Smith (2018a) noted that resistance to myths did occur, this was generally not immediate but much later during the prosecution's closing speech or judge's summing up, potentially minimising the impact of these challenges. Therefore, whilst prosecutors are encouraged to challenge rape-myths (Burrowes, 2013), observational research indicates that in practice, this is rarely effective (Durham *et al.* 2016a; Temkin *et al.* 2018; Smith, 2018a). Additionally, while judicial directions are now utilised in the majority of trials (Section 1.4.2), as a means to challenge reliance on rape myths, research suggests that judges rarely make proper use of directions (McEwan, 2005) and often fail to stray beyond the pre-prepared list of stereotypes listed in the Bench Book (Temkin *et al.* 2018).

Ultimately therefore, whilst some (albeit minimal) challenges to rape myths have been noted in the observational research (Smith, 2018a; Temkin *et al.* 2018), the practical implementation of these challenges is critiqued. Moreover, without access to jury deliberations or mock jury research examining these myth-busting attempts, it cannot be ascertained with any certainty whether these challenges hold influence for jurors (Temkin *et al.* 2018). Whilst some research has noted some positive impact of judicial directions (Section 1.4.2), further research exploring myth-busting more broadly is needed.

2.3.5 Section Summary

The current section has scrutinised existing literature in regard to how rape myths function, are constructed and are resisted in rape trials in England and Wales. Observational studies have repeatedly illustrated rape myths as being used as manipulation tactics, which serve to discredit the complainant and exonerate the defendant, with very little practical resistance. This subtle manipulation of evidence is pivotal to the current research, illustrating how myths are framed as fact during trial and how these tactics are thereby used to influence jurors' perceptions of trial evidence.

2.4 Rape Myth Acceptance [RMA]

As substantial research has illustrated the cultural function of rape myths and ongoing reliance on these at trial (Smith, 2018b; Temkin *et al.* 2018; Durham *et al.* 2016b; Daly, 2021a), it is essential to examine the extent to which different individuals may endorse rape myths. Levels of RMA affect individual, societal and institutional judgements of sexual violence and responses. Therefore, scrutiny of RMA amongst the general population, and in particular jurors, helps to inform the current research aims by indicating the likely impact of rape myths on jurors and justice outcomes.

2.4.1 Measuring Rape Myth Acceptance

Multiple explicit and implicit RMA scales have been developed over time, using a variety of psychometric tools (Grubb and Turner, 2012). These measure an assortment of attitudinal and demographic characteristics (Gray and Horvath, 2018), to quantify an individual's or population's level of rape myth endorsement. Strong acceptance has been shown to be a strong predictive factor of sexual violence perpetration as well as of victim blame (Gurnham, 2016; Yapp and Quayle, 2018), and therefore findings of RMA scales may be used to inform prevention and intervention programmes (Johnson and Johnson, 2021).

Whilst a variety of RMA tools have been developed in recent decades, the Acceptance of Modern Myths about Sexual Aggression [AMMSA] has arguably become accepted as the most valid and most widely used measure of RMA. Having recognised that myth endorsement has become more subtle over time, AMMSA utilises subtle wording and a likert scale for answers, in attempts measure both less obvious myths about rape and myths about less severe forms of sexual aggression (Gerger *et al.* 2007). Whilst ongoing critique does exist regarding the subtlety of RMA scales including AMMSA (McMahon and Farmer, 2011), Willmott (2017) argues that the refinement of these measures, including AMMSA, has undoubtedly contributed to broader understanding of the extent to which individuals accept modern myths and how these may impact on decision-making. The AMMSA scale was therefore used in the current research design, as discussed in Chapter 4.

Notably, RMA literature has revealed that RMA may be predicted by endorsement of a variety of prejudices such as sexism, racism, classism and ageism (Suarez and Gadalla, 2010), again highlighting the engrained cultural function of rape myths. Whilst much of this literature is beyond the scope of the current research, it is important to recognise that demographic and attitudinal characteristics of jurors may influence their RMA and thereby their decision-making processes.

Gender is generally accepted as potentially the strongest demographic predictor of RMA, with males typically exhibiting greater RMA than females (Suarez and Gadalla, 2010; Hockett *et al.* 2016). Termed the “ubiquitous gender effect,” research has shown that men are more likely to attribute higher levels of blame and responsibility towards the female complainant, than female counterparts (Schneider *et al.* 2009; Angelone *et al*. 2021) and have less supportive attitudes and empathy for complainants (Ward, 1995; Brady *et al.* 1991). In reference to juror decision-making processes therefore, female jurors are more conviction prone in rape cases, according greater empathy to complainants (Kovera, McAuliff and Hebert, 1999). This is seemingly a result of patriarchal social structures which frame rape mythology (Angelone *et*

al. 2021), and perhaps equally owing to the fact that females are disproportionately likely to become complainants (Willmott, 2017).

Further demographic characteristics such as age, educational attainment, ethnicity and religion have all too, in some studies been shown to impact upon levels of myth acceptance however the impact of these is more contested in the literature (Hockett *et al.* 2016). For example, whilst Suarez and Gadalla's (2010) meta-analysis found no statistically significant relationship between age and RMA, nor did Sleath and Bull (2015); however Süssenbach and Bohner, (2011) did find a significant effect. Generally it has come to be accepted that older, less-educated individuals tend to more accepting of rape myths (Anderson and Doherty, 2007; Boakye, 2009; Johnson and Beech, 2017), as do those from ethnic minorities and those who hold religious beliefs (Oney, 2014; Barnett, Sligar and Wang, 2018). Yet as stated above, there remains contention as to whether such characteristics are consistently strong predictors of myth acceptance (Hockett *et al.* 2016).

Meanwhile significant research has also examined whether attitudinal factors may impact an individual's level of RMA (Hayes, Lorenz and Bell, 2013). Such research has ranged from exploring psychopathy, level of empathy, cognitive responsiveness, hostility, sexism and so on, upon levels of RMA (Willmott, 2017; Murphy and Hine, 2019). Ultimately, there remains less agreement within the literature regarding attitudinal predictors of RMA, however just world belief theory and self-esteem levels were collected from jurors in the current research.

Just world belief [JWB] theory (Lerner, 1980) asserts that individuals view their world as a just and safe place, whereby 'good things happen to good people' and 'bad things happen to bad people'. Within this outlook, the misfortune of others is typically justified by attributing onus or responsibility to the individual themselves, as to accept otherwise is to admit that you yourself may be vulnerable to injustice (Hammond, Berry and Rodriguez, 2011). This is therefore linked to higher RMA (Vonderhaar and Carmody, 2015), as to perceive an "innocent" and not blameworthy rape complainant, threatens the JWB. Whilst research on this remains mixed,

multiple studies have found a significant relationship between strong belief in a just world, and increased RMA (Lonsway and Fitzgerald, 1994; Hayes, Lorenz and Bell, 2013; Vonderhaar and Carmody, 2015).

Self-esteem is also widely hypothesised as a key predictor of RMA, however, again the literature remains mixed. Whilst Burt (1980), Forbes and Adams-Curtis (2001) and Willmott (2017) all found high self-esteem to be predictive of low RMA; Megías *et al.* (2011) and Karsli and Anli (2011) found precisely the opposite. Both latter studies, however, were conducted in non-English speaking jurisdictions, whereby cultural or language differences may decrease the applicability to the current research. Nevertheless, discussion persists about whether attitudinal factors such as self-esteem may be predictive of RMA, and perhaps in turn can be screened against to discourage rape myth endorsement amongst jurors (Willmott, 2017).

Alongside individual predictors of RMA, RMA trends amongst certain groups has also been explored. Sleath and Bull (2015) for example found that police officers in the UK tend to subscribe to myths that the complainant was lying, whilst Krahé *et al.* (2008) found that law students with high levels of RMA were likely to blame the complainant.

2.4.2 Rape Myth Acceptance in England and Wales

Despite growing research and more thorough RMA scales such as AMMSA having been developed in recent years, the extent to which rape myths are accepted and endorsed by the wider population in England and Wales remains subject to much debate. Multiple attitudinal questionnaires and surveys have been conducted with the British population to measure RMA. However, notably there remains limited academic literature exploring RMA in the English and Welsh context, with the majority of such research being conducted in the USA (Barn and Powers, 2018). The current section outlines research exploring RMA amongst the population in England and Wales, whilst a focus on juror RMA is explored below.

Amnesty International conducted a poll of British citizens in 2005, which revealed widespread adherence to rape myths. 34% of respondents agreed that if a woman had been flirtatious, she was at least partly responsible for the rape, whilst 30% felt this would be true where the woman was drunk and 26% where the woman wore sexy or revealing clothing. Similarly 13 years on from the Amnesty findings, the 'Sexual Consent Survey' conducted by EVAW (2018a) revealed ongoing "worrying" attitudes towards sexual consent and rape, amongst respondents from the British public. Of the almost 4,000 respondents, 33% admitted not classing it as rape whereby there is no physical violence, 40% believing it is not rape to remove a condom without the partner's consent, 24% believing rape does not occur in long term relationships and so on. Whilst neither survey employed a validated RMA scale and may be critiqued on this basis, the findings demonstrate strong levels of myth endorsement in response to these measures. Arguably even, if either survey had used a more subtly framed RMA scale, findings would have shown yet higher levels of myth endorsement.

Furthermore, a recent academic survey of UK students by Barn and Powers (2018) which used the validated 'Illinois Rape Myth Acceptance Scale,' revealed that sexual promiscuity of the complainant was the most accepted and influential rape myth relied upon by participants. This finding suggests that sexual history evidence is likely to invoke bias against a complainant and crucially likely to alter juror judgements of the evidence at trial.

Nevertheless, this same study by Barn and Powers (2018) found relatively low levels of overall RMA amongst student participants from the United Kingdom. This finding significantly contrasts with the established mock jury research (Ellison and Munro, 2009c; a; b; Willmott, 2017) and the Amnesty International and EVAW Coalition survey results. It indicates that rape myth acceptance is actually limited across society and thus unlikely to play a significant role in jury decision-making. This low acceptance rate may however be easily explained through the methodological choices of the study. Indeed, the sample consisted solely of university students in London, being young and highly educated, thereby inherently less likely to be accepting of rape mythology than a sample of the typical UK population. Moreover, data

collection through face-to-face surveys is likely to have created an inherent social desirability bias, whereby some participants would have tended to answer in a way they would have deemed to be more socially acceptable, due to their response being communicated directly to the researcher (Lavrakas, 2013). It may therefore be argued that due to such methodological drawbacks, rape myth acceptance amongst typical individuals and jurors in England and Wales is likely to be significantly higher than this study indicated. Indeed the CPS (2021) recognises that "rape myths and stereotypes…need to be identified and addressed where they arise" and consistent academic research continues to recognise the significant influence of rape mythology upon the general population.

Thus, whilst greater understanding and social awareness of rape myths may now exist; research shows that myth endorsement continues to persist (EVAW, 2018a; Amnesty International, 2005), albeit potentially having become more subtle and covert over time (Gerger *et al.* 2007; McMahon and Farmer, 2011).

2.4.3 Rape Myth Acceptance amongst Jurors

Whilst jurors are given the opportunity to engage in careful, systematic processing of the evidence presented at trial (Temkin *et al.* 2018), it is widely accepted that jurors routinely arrive in court with existing schemata or prototypes for various crimes and particularly for sexual offences (Ellison and Munro, 2010b; Willmott *et al.* 2021). This schema serves to misrepresent rape, rapists and victims (Bohner *et al.* 2013) and reliance on it therefore increases the likelihood of inaccurate and/or biased verdicts (Krahé and Temkin, 2013)

Leverick (2020) provides an excellent overview of existing mock jury research which has explored rape myth acceptance and juror decision-making, and ultimately presents overwhelming evidence that juror myth endorsement affects their evaluation of evidence and decision-making in rape trials. Similarly, Willmott *et al.* (2021) concluded that there is extensive empirical evidence to show that jurors' preconceived attitudes towards rape and rape myths, prejudice jury judgements, decisions and deliberative discussions.

In terms of quantitative research, Wolchover (2008) submitted that there is no statistical evidence to demonstrate that juries habitually apply rape myths to favour defendants in rape trials. However, Leverick (2020) reported near unanimous findings across 29 peer reviewed mock jury studies, showing significant relationships between complainant/defendant blame and RMA scores. Whilst the majority of these studies were conducted in the US, Willmott (2017) equally reported high levels of rape bias amongst English and Welsh jurors, as did Chalmers *et al.* (2021) amongst Scottish jurors. Similarly, Dinos *et al*.'s (2015) meta-analysis of mock jury studies across Western jurisdictions also found that 8 of the 9 studies explored showed a significant relationship between juror decisions of guilt and scores of RMA. Ultimately these findings suggest clear impact of RMA on juror decision-making which can both prejudice trials and undermine ideals of fairness (Booth *et al.* 2017).

Furthermore, substantial qualitative research has also illustrated connection between RMA and juror bias. Studies have illustrated jurors' reliance on myths relating to inter alia, intoxication (Finch and Munro, 2005), lack of physical resistance or injury (Temkin and Krahe, 2008; Chalmers *et al.* 2021), adherence to the real rape stereotype (Ellison and Munro, 2009a) and impact of previous relationship with the defendant (Ellison and Munro, 2013) on juror decision-making. Ellison and Munro (2010a) positively found that the stranger rape stereotype has become less persuasive with most jurors acknowledging the legitimacy of acquaintance rape, however they found continued reliance on multiple other myths including physical resistance, delayed reporting, false allegations, mixed signals and so on. Moreover Ellison and Munro (2009b) reported that jurors continue to rely upon socio-sexual norms and heterosexual scripts to inform perceived 'normal' reactions to sexual assault. Therefore, where a complainant seemingly deviated from these 'appropriate' behavioural norms and thus 'put herself at risk,' it typically results in increased attributions of blame of the complainant (Ellison and Munro, 2009b; Gray, 2015; Gray and Horvath, 2018). Similarly, most recently, Chalmers *et al.* (2021) found that whilst challenge to rape myths is common in jury deliberations, endorsement of mythical ideals regarding lack of resistance and injury, the need for

corroboration and the spectre of false allegations continued to be highly influential across deliberative datasets. Crucially therefore, the majority of mock jury research to date has highlighted the continue impact of rape myths on jurors attributions of guilt and perceptions of witnesses in sexual offences trials (Stewart and Jacquin, 2010; Hammond, Berry and Rodriguez, 2011; Gray and Horvath, 2018).

Nevertheless, dissenting voices do exist. In particular, Thomas (2010), in a Home Office commissioned review of the jury system, suggested that jury decision-making is fair in terms of verdict consistency, racial discrimination and adherence to legal instructions. Moreover, in her latter research with 'real' jurors, whom she asked to complete a RMA questionnaire after trial, Thomas (2020) concluded that claims of juror bias are not valid and asserted that jurors no longer rely on rape myths in decision-making. Her claim that "hardly any jurors believe what are often referred to as widespread rape myths," has been presented in mainstream discourse as ground-breaking findings, however this negates decades of academic literature which has highlighted the ongoing influence and impact of rape mythology of juror decision-making. Importantly, whilst Thomas's (2020) findings inevitably add to the knowledge base on juror reliance on rape myths, such findings must be addressed and interpreted with regard for the methodology used to obtain such data, which may be substantially critiqued. Firstly for instance, Thomas (2020) relied on participant questionnaire data and did not use a validated rape myth acceptance scale to interrogate myth endorsement. Consequently, the findings are likely to illustrate some social desirability bias and potentially failed to uncover the subtle and nuanced nature of modern myth endorsement. Secondly, Thomas's (2020) claim of using 'real' jurors, and in doing so, dismissing the validity of mock jury research, again may be critiqued as there is no evidence to suggest such model is any more ecologically valid than previous mock jury research. Whilst many of these critiques are beyond the remit of the current study, Daly *et al.* (2021) provide excellent scrutiny of Thomas's (2020) research and highlight that it is "important to avoid hyperbolic claims about what the study reveals."

Ultimately, whilst Thomas (2020) critiques the use of mock jury research in this area due to artificiality of task Wiener, Krauss and Lieberman (2011), such research arguably remains instrumental to understanding narratives, justifications and explanations associated with RMA amongst jurors and the impact of this upon legal process (Anderson and Doherty, 2007). As discussed above, substantial mock juror research has highlighted the ongoing impact of rape myths on jurors interpretations of the evidence and therefore Ellison and Munro (2009b) submitted that it is erroneous to suggest that myths will not play a part in juror decision-making. Equally 10 of 24 barristers and judges interviewed within Kelly *et al.'s* (2006) research, felt that as a result of myth endorsement, juries present a major barrier to convictions in rape trials. Whilst Leverick (2020) cautions against total removal of juries in rape trials, she suggests that reforms and further research are necessary in order to expel rape mythology from juror decision-making processes.

2.4.4 Section Summary

This section has outlined the current literature regarding RMA amongst both the general population and juries in England and Wales. Whilst some debate exists within the literature, and methodological approaches used may be critiqued; ultimately it has shown that there remains broad consensus in the academic research that rape myths continue to be widely accepted in England and Wales. Whilst these may have become more subtle and covert over time, ongoing endorsement of rape myths must be recognised in directing reform efforts. Ultimately this provides crucial contextual evidence to the current research, which seeks to examine how jurors interpret and rely on evidence in rape trials.

2.5 Chapter Summary

This chapter has outlined the existing literature on rape myths at trial, including their function, construction, and evidence of good practice where rape myths are challenged during trial. It then situated the impact of these myths, by examining rape myth acceptance amongst jurors and the wider population. In doing so, this chapter has situated the context in which rape

myths, such as those relating to sexual history, are raised, and relied upon during trial, and outlined difficulties of combatting these ideas in CJS discourse.

Crucially, the embedded function of rape mythology, both in societal contexts and trial discourse, presents a significant obstacle to ideals of fair and impartial justice, particularly within jury deliberations. Thus, whilst debate remains as to the extent that jurors endorse or reject rape mythology within deliberations, it is widely recognised that rape myths continue to hold the potential to act as an important barrier to justice in rape trials. This underlying context of rape mythology is thereby pivotal to the current research, providing a backdrop against which juror attitudes and interpretations of evidence are framed.

Chapter Three: Sexual History Evidence

3.1 Introduction

Chapter Two has explored the concept and impact of rape myths in society and on CJS discourse in England and Wales. The current chapter will explore the literature and discourse surrounding the use of sexual history evidence in rape trials. Sexual history evidence includes any evidence adduced at trial relating to the complainant's previous sexual behaviour, either with the defendant and/or a third party/parties. The current research however focuses solely on sexual history evidence with the defendant, as there tends to be greater agreement amongst commentators towards the invariable irrelevance of third-party sexual history evidence, meaning there is less contention about this in the literature and reform proposals (Section 3.7).

Nonetheless, sexual history evidence remains one of the most contentious and emotive pieces of evidence to persist in modern rape trials (Thomason, 2018), as it is asserted that it is often used incorrectly at trial, to endorse a plethora of different rape myths and gendered stereotypes about consent and normative sexual behaviour (Kelly *et al.* 2006). In particular, it is said to give implicit credence to the so-called 'twin myths' (R v Seaboyer, 1991) that:

> *a. If a woman has consented to previous sexual contact, she is more likely to consent again on future occasions and,*
>
> *b. Women with extensive sexual histories are less credible in their accounts to the court*

Despite legislative restrictions to limit the inclusion of sexual history evidence at trial, multiple recent observational studies have highlighted the routine continued inclusion of this evidence at trial, often introduced simply to discredit the complainant (Durham *et al.* 2016a; Smith, 2018a).

This chapter explores current debates surrounding the inclusion of sexual history evidence in rape trials in England and Wales, considering the overarching research aim to establish the

impact of this evidence on jurors. It first addresses justifications behind restricting sexual history evidence at trial, before then examining how restrictions have been implemented through current and past legislation in England and Wales. Following this, it explores the impact, strengths and weaknesses of the current legislation and addresses high-profile critiques of the existing restrictions. Finally, it reviews the current field of knowledge regarding juror interpretations of sexual history evidence and outlines the knowledge gap which the current thesis seeks to fill.

3.2 Why Restrict Sexual History Evidence?

Sexual history evidence "has long been perceived as the canary in the criminal justice mine" (Smith, 2018a: 119). It has been shown to correlate with decreased conviction rates (Kelly *et al.* 2006), increased trauma for complainants (Hanna, 2021), and to deter reporting (Durham et al. 2016a). Meanwhile, research in other jurisdictions, albeit potentially outdated, has shown that the inclusion of this evidence at trial, tends to result in harsher judgements and increased levels of victim blame by jurors (Catton, 1975; Schuller and Hastings, 2002). Whilst there tends to be some agreement in academic discourse that complete abolition of sexual history evidence at trial is unjustifiable (McGlynn, 2017; Stark, 2017; Hoyano, 2019; Brewis and Jackson, 2020), the necessity to restrict such evidence, so as to limit these unintended collateral outcomes remains equally important (McGlynn, 2017; Smith, 2018a; Daly, 2021a). As such, the inappropriate reliance on sexual history evidence at trial, has been widely condemned by feminist critics in the criminal evidence field (Thomason, 2018) and identified as a deeply embedded obstacle to the right to survivor justice (Smith, 2018a). Despite a somewhat limited academic evidence base exploring the *impact* of sexual history evidence, especially in England and Wales; calls to restrict this evidence at trial have been far-reaching and pervasive. These typically centre around notions of relevance, myth endorsement and the treatment of complainants, as discussed below.

3.2.1 (Ir)Relevance of Sexual History Evidence

At the heart of discussions about the inclusion of sexual history evidence at trial, lie core debates about relevance and admissibility (Kibble, 2001). It is argued that where sexual history evidence is relevant to central issues of trial and consequential determinations of verdict, it must be included so as not to violate the defendant's right to fair trial (Thomason, 2018; Hoyano, 2019; Marsh and Dein, 2021). Yet, discordance exists about how to define and assess relevance of sexual history evidence, whilst also acknowledging the potentially prejudicial nature of this (Stark, 2017). Indeed, critiques have arisen on the basis that in practice, claims of relevance are often based upon adherence to outdated and misguided rape myths and stereotypes regarding appropriate socio-sexual behaviour (McGlynn, 2017; Smith, 2018a; Gillen, 2019). It is therefore this inappropriate determination of relevance, that underpins critiques about the ongoing, frequent reliance on sexual history evidence at trial, and calls to implement further, more rigorous restrictions (McGlynn, 2018).

Easton (2000) for example, submitted that it is hard to see that sexual history can ever be deemed as relevant, unless we are to rely upon myths and stereotypes of appropriate behaviour or to compound female sexual experience with perceptions of credibility. Similarly, McColgan (1996) argued that the admission of sexual history evidence at trial is inconsistent with ordinary, common law notions of relevance as it bears no logical relationship to the legal definition of rape, but simply endorses misguided notions of ideal victimhood. These arguments suggest that sexual history evidence remains largely *irrelevant* to questions of consent in most cases (Levanon, 2012), and therefore to include it at trial routinely risks distorting the focus of the jury, rather than promoting their fact-finding role (Schuller and Hastings, 2002; Sous, 2020).

More recently however, McGlynn (2017; 2018) developed more nuanced up-to-date analyses of these arguments. Whilst she did acknowledge that there may be limited instances in which previous sexual history evidence may be relevant to trial facts and thereby advocated narrow

interpretation of restrictions, rather than total abolition; she equally highlighted the risks and potentially distorting impact of introducing irrelevant and prejudicial sexual history evidence at trial. She reiterated that legal consent remains person, time, and situation specific, meaning that such evidence should not be admissible to prove consent, and argued that the propensity to consent assertion represents overly simplistic and misguided interpretations of relevance. Whilst supporting this assertion, Smith (2018a) noted frequent and routine ongoing reliance on the propensity narrative at trial, and thereby similarly advocated for more robust interpretations of relevance.

Notably, Judge L'Heureux-Dubé in the landmark Canadian case of *Seaboyer (1991: 197)* stated that “the concept of relevance [in relation to sexual history evidence] has been imbued with stereotypical notions of female complainants and sexual assault.” Indeed, Smith (2018a), whilst acknowledging that increased awareness now exists about the inaccuracy of outdated notions of female sexual purity and chasteness as a social marker of morality (Farrell, 2017); continued to observe reliance on these outdated ideals at trial. McGlynn (2017) therefore suggested that even where sexual history is deemed as relevant at trial, this relevance must be weighed up against its prejudicial impact. Therefore, in cases where relevance is only marginal or where the prejudicial impact could be extensive, she argued that such material should not necessarily be admitted to trial.

Nevertheless, Birch (2002) contested that there are a myriad of factual contexts in which sexual history could be relevant, and argued that current s.41 provisions are “draconian” and amount to “legislative overkill” in their restrictive nature. Indeed, in the landmark case of R v A [No.2] UKHL 25, [2001], the Law Lords arguably eased the s.41 gateways approach, by upholding the assertion that the exclusion of sexual history evidence had violated the defendant’s right to fair trial. This judgement however engendered substantial debate and is discussed in further detail in section 3.4.1.

This notion of relevance of sexual history evidence thus remains highly contentious and since there remains no common law test for relevancy, it remains open to substantial debate (Thomason, 2018). Stark (2017) developed a detailed analysis of this framing of relevance for sexual history evidence, highlighting both contextual and definitional issues as key. He emphasised that logical relevance does not exist in a vacuum and therefore relevance must be explored with reference to specific case facts and wider contextual factors, as well as socially constructed definitional factors. He ultimately concluded sexual history evidence may be deemed relevant in some instances and should not be prohibited altogether, however calls for further research to explore the *reasoning* behind sexual history evidence applications. Hoyano (2019) has since conducted such research into the basis of real-life s.41 applications and concluded that current s.41 provisions are not in need of reform. This finding fundamentally contradicts the bulk of the observational assessment of s.41, which assert frequent and often inappropriate reliance on this evidence at trial (Smith, 2018a; Temkin *et al.* 2018; Daly, 2021a). However, Hoyano's (2019) research was commissioned by the Attorney General's Office and MOJ and therefore may have portrayed current provisions in a positive light due to such vested interest.

Nevertheless, judges in Kibble's (2004) study and barristers in Hoyano's (2019) study equally revealed consensus amongst legal professionals that sexual history evidence remains relevant in some instances and to exclude this evidence altogether, would be to impede justice for the accused. Dent and Paul (2017) similarly argued that to prohibit sexual history evidence altogether, endangers the defendant's right to fair trial and impedes the task of jurors to determine verdict in the absence of some potentially crucial evidence.

Ultimately, whilst arguments for reform remain divided, in general the consensus remains across the literature that reform is necessary. On both sides of the debate, broad agreement exists that some legislative restrictions are needed in order to limit the inclusion of sexual history evidence at trial to only strictly *relevant* instances. However, the extent to which these restrictions limit or prohibit sexual history remains fiercely debated. These debates recognise

that a balance must be struck between complainant wellbeing and right to privacy, versus circumstances in which the jury *need* to hear such evidence to reach a just verdict and to uphold the defendant's right to fair trial (Smyth, 2021; Marsh and Dein, 2021). Nevertheless, where such balance lies remains unknown, and arguably cannot be reached whereby a fundamental lack of research exists to determine how jurors interpret and rely upon this evidence.

3.2.2 The Twin Myths

Within discussions of relevance, the conceptualisation of the twin myths typically underpins arguments which assert that sexual history evidence is largely *irrelevant* to trial. As stated above, sexual history evidence is theorised to give implicit credence to these so-called twin myths that: a) previous consent may be indicative of future consent and b) women with extensive sexual histories are less credible. Both of these assumptions are misguided and inaccurate, but ongoing adherence to these myths is routinely cited as the reason behind needing to restrict the inclusion of sexual history evidence at trial (McGlynn, 2017). It must be noted here that arguments about the influence of the twin-myths, do not underpin calls for abolition of sexual history, but merely the need for robust restrictions to ensure such evidence is only admitted where relevant, and in an appropriate manner.

3.2.2.1 Propensity to Consent

The premise of propensity to consent asserts that previous consent may be indicative of future consent or make future consent more likely. Adherence to this narrative therefore posits sexual history evidence as relevant to trial as a marker of consent. This rationale however profoundly challenges the notion of consent being a person, time and situation specific enterprise, given afresh on each occasion (McGlynn, 2017) and has engendered significant debate as to the legitimacy of this assumption.

McGlynn (2017) strongly condemned the notion of propensity, asserting that it contradicts legal framings of consent. Similarly Easton (2000) denoted propensity to consent arguments

as an inductive leap, which would be unacceptable in other areas of criminal law such as medical consent. She emphasised that surgeons for example, must seek consent for each procedure and can never assume ongoing consent. Moreover, McGlynn (2017) likened the propensity argument to that of assumed consent in marriage and suggested it shows little improvement from this once-held legal assumption.

Thomason (2018) however, endorsed assumptions of propensity arguing that psychological 'trait theory' demonstrates that previous behaviours readily influence future decision-making and therefore prior consent may influence future consent. However it may be argued that this is an oversimplification of sexual consent, which wholly fails to acknowledge the variety of contexts and relationships in which sexual victimisation can occur, such as coercive or abusive relationships (McGlynn, 2017). Indeed, in reality, a past sexual partner – perhaps an abuser - may in fact be the least likely person that one would consent to sexual relations with in the future. Moreover, Redmayne (2003) examined sexual offences reporting trends in America and noted that women with more extensive sexual histories are *more* likely to be raped, but actually *less* likely to report a rape and no more likely to advocate a false allegation. Therefore, to use sexual history evidence to infer a greater likelihood of consent appears wholly misguided.

Thomason (2018) however, contended that propensity critiques (see McColgan, 1996; Easton, 2000) appear to be unaware of, or predate, bad character legislation contained in the *Criminal Justice Act (2003).* Such legislation reversed (particularly in regards to defendants), the traditional common law inference of propensity using bad character, for example sex workers. Thomason (2018) thereby argued that these propensity critiques no longer apply to the current law. Yet, as discussed throughout Chapters One and Two, observational research has shown that female complainants at court continue to be judged against traditional feminine norms as the supposed gatekeepers of sexual relations (Smith, 2021). Consequently, the impact of bad character legislation may be contested in practice.

3.2.2.2 Credibility

Alongside discussion about the legitimacy of the propensity assertion, emerges further discussion regarding moral judgements of the complainant as a result of her sexual history. McGlynn (2017) suggested that sexual history evidence invites juries to make moral judgements of the complainant's lifestyle, personal habits and dress and therefore tempts scrutiny of her credibility at trial. Indeed, both Smith (2018a) and Daly (2021a) observed that sexual history evidence was routinely introduced by barristers at trial, in attempts to discredit and malign the complainant and her moral character. Thus whilst in modern day culture, social discussion of sexual activity is more acceptable and it would rarely be suggested that sexually active women are less truthful, McColgan's (1996) premise of 'moral credibility' arguably continues to be applicable. Moral credibility refers to evidence used to "show the complainant to be so morally inferior as either not to deserve the court's sympathy or not to provide suitable foundation for punishing the accused" (McColgan, 1996:281). Narratives observed surrounding sexual history therefore, which are routinely invoked according to myths and stereotypes of 'appropriate' female behaviour and sexuality (Temkin *et al.* 2018; Smith, 2018a; Daly, 2021a), seemingly exemplify this adherence to moral credibility.

This presentation of sexual history evidence as crucially linked to the complainant's credibility and notions of 'appropriate' sexual behaviour, reinforces persistent stereotypes of 'good' or 'bad' women and ideal victimhood (Farrell, 2017). In doing so, it draws on implicit assumptions about how women would reasonably respond to sexual aggression using traditional notions of gendered sexual agency such as the slut vs stud binary (Kelly *et al.* 2006; Hackman *et al.* 2017).

Commenting on its persuasiveness, barristers in Temkin's (2000) study openly stated that "if the complainant could be portrayed as a 'slut,' this was highly likely to secure an acquittal." Indeed, Farrell (2017) submitted that this stereotypical imagery remains the bedrock of the rhetoric surrounding women's sexual behaviour, and is thus routinely deployed as a mechanism to discredit and demean the complainant's evidence. Likewise, academic scrutiny

has evidenced that knowledge of a woman's previous sexual activities can shift the focus of trial onto moral blame of the complainant, rather than legal analysis of the defendant's actions, and ultimately decrease the likelihood of conviction (Schuller and Hastings, 2002; McGlynn, 2017).

Sexual history evidence is therefore routinely viewed as a tactic employed by defence counsel to discredit the complainant and infer, inter alia her motivation to lie, to portray her as a 'scorned woman' seeking revenge or to infer her willingness to consent (Smith, 2018a; Ubell, 2018). This supposed link between women's chastity and their credibility is outdated, sexist and fundamentally incorrect (Simon-Kerr, 2008), reflecting ongoing adherence to rape myths and highlighting the potential prejudicial impact on juries.

Reflecting the opposing view however, Birch (2002) submitted that previous sexual history holds little prejudicial impact and mused that evidence of a defendant's bad character is far more open to prejudice. Whilst minimal research has tested this assumption, both Schuller and Hastings (2002) and Catton (1975) reported lower perceptions of the complainant's credibility amongst jurors whereby sexual history had been included at trial, thus seemingly disproving Birch's (2002) argument. Moreover, it may be argued that Birch's (2002) assertion also ignores extensive research findings showing the continued potency of rape myths throughout society (Section 2.4), which again emphasise the potential to prejudice a jury. Like many of the myths discussed in Chapter Two, sexual history is embedded in an underlying gendered context of traditional, socio-sexual norms in which rape myths arise and by which they are reinforced (Temkin, 2003). Thus, whilst not disputing the possibility that evidence of a defendant's bad character may prompt prejudice amongst jurors; sexual history evidence must equally be acknowledged as evidence routinely rooted within moral judgements and contests of credibility (Smith, 2018a), thereby risking significant juror prejudice.

Indeed, Simon-Kerr (2008) drew on the powerful cultural history whereby for women, honour and credibility depended on chastity and a reputation of sexual virtue. She suggested that

such problematic notions of gender and honour have inevitably reverberated through legal rules and thereby the roots remain deep within courtroom culture. Hey (2021), therefore asserted that the inclusion of sexual history as evidence at trial can exacerbate the already troubling culture of sexism and rape myths in the CJS response to sexual offending. Therefore, restrictions may be justified in the interests of achieving justice, as this evidence is theorised as being likely to influence lay jurors' perception of the veracity of the allegation and credibility of the complainant.

3.2.2.2.1 Sexual History Evidence, Credibility, and Intersectionality

Whilst substantial literature has theorised the connection between sexual history evidence and perceptions of complainant credibility, intersectional critiques highlight these perceptions as inherently portrayed according to white, heteronormative standards of 'appropriate' femininity. In doing therefore, these framings seemingly overlook compounded intersectional oppressions.

Indeed, substantial literature has recognised the gendered nature of sexual history evidence, in which the socio-sexual double standard portrays males as sexually permissive and dominant, whilst females sexuality is constrained and restricted by social norms (Lefkowitz *et al.* 2014). Yet on top of this gendered dyad, intersectional critiques posit further interactions between sexual history evidence and notions of 'appropriate' femininity, heterosexuality, social class and ideas of respectability (Phipps, 2009). However very little research exists to situate these intersections.

Nevertheless at its core, sexual history evidence was originally introduced so that evidence of prostitution, being considered "notorious bad character," could be adduced to the court (McGlynn, 2017). This illustrates a clear historic association, which served to construct women working in the sex industry as lesser or undeserving victims and therefore clearly interlinked social class and reputation with sexual history. Whilst provisions and attitudes have inevitably developed since this invocation, sexual history evidence at trial routinely remains rooted in

conceptualisations of character, reputation (McGlynn, 2017) and ultimately therefore the 'othering' of complainants.

Indeed, observational research has shown that sexual history is typically introduced at trial amongst wider ideals of credibility and respectability (Smith, 2018a; Daly, 2021a), which tends to hinge upon narrow notions of 'appropriate' sexual experience (Phipps, 2009; Cowan, 2021). For example, Daly (2021a) observed that complainants' sexual history (and that of their mothers), was clearly linked to historic conceptions of patriarchal society as a means to police female sexual behaviour and reinforce wider mythical portrayals of complainants as irrational, unstable and untrustworthy. Such narratives she observed, were additionally bolstered by classist, ageist and ableist narratives (Daly, 2021a). The intersection between female sexual experience and notions of credibility, reputation, and social standing, is therefore seemingly evident.

Beyond this however, very minimal research has explored the intersection between sexual history and further oppressions such as race. Phipps (2009) submitted that lower class or coloured women tend to be positioned outside of the constructions of appropriate femininity, as deviant bodies, and are perceived as more likely to make false allegations. However, ultimately further research is needed to situate sexual history with these wider intersectional analyses. The current thesis thereby examines notions of credibility, alongside sexual history, however a larger scale, intersectional study of sexual history is seemingly justified beyond this.

3.2.3 Impact on the Complainant

Alongside discussions which argue that sexual history evidence should be restricted due to its' frequent irrelevance at trial and potential endorsement of myths, restrictions are also justified to protect complainants. Indeed, substantial literature has highlighted the potential of sexual history evidence to secondarily victimise, traumatise and distress complainants at trial and to deter reporting (Kelly *et al.* 2006).

Sexual history evidence is routinely introduced at trial within a context of numerous rape myths which attack the character and credibility of the complainant, according to outdated notions of chastity, female sexuality and other claims regarding inter alia mental health and substance abuse (Temkin *et al.* 2018; Smith, 2018a; Hanna, 2021). Questioning on sexual history is therefore routinely characterised as irrelevant, intrusive and repetitive (Kelly *et al.* 2006; Hanna, 2021), with court observers in the Northern Irish context describing this "badgering" of complainants as constituting "harassment" (Hanna, 2021: 65). Moreover, in many cases where sexual history evidence is introduced, this is done so without application (Durham *et al.* 2016a; Smith, 2018a), meaning complainants are uninformed before trial, thus serving to add the distress and trauma of the trial process (LimeCulture, 2017).

Furthermore, the risk of having one's sexual history evidence brought up at trial has been cited as a key deterrent for many victims of sexual violence (Kelly *et al.* 2006; Durham *et al.* 2016a). Victims are reported to "weigh up" the issues of having their sexual history raised in court, in both deciding whether to report and whether to withdraw from the CJS process (Kelly *et al.* 2006).

Brewis and Jackson (2020: 54) however, whilst not disputing that "complainants have endured appalling treatment in the form of irrelevant and excessive cross-examination about their sexual histories," suggested that this may be "unavoidable if the questioning can be attributed to relevant evidence which, if excluded, would affect the defendant's rights under Article 6 ECHR." This perspective highlights the contentious nature of balancing notions of relevance for defendants, with provisions to safeguard complainants, and ultimately highlights the necessity for clear and rigorous rape shield provisions that appropriately restrict the inclusion of this evidence at trial. It is perhaps worth reiterating McGlynn's (2017) proposal that probative value of sexual history should be weighed up against its potential prejudicial impact on jurors, and perhaps adding to this, also weighed up against its risk of traumatising and distressing the complainant.

Positively, rape shield restrictions such as s.41 have attempted to serve this purpose in limiting reliance on previous sexual history, in order to protect complainants from humiliating and distressing cross-examination on their sexual past, and to ensure complainants confidence in the justice system itself (MOJ, 2017; Gillen, 2019). In line with the victim-centred rhetoric of criminal justice in England and Wales (MOJ, 2002), the justice process claims to ensure all complainants are treated with dignity and respect whilst also being given a voice through meaningful participation (Wemmers, 2009). Restrictions on sexual history evidence thus attempt to ensure greater confidence and support for complainants, however in practice, the extent to which s.41 has achieved this is open to debate.

Indeed, academic research has continually demonstrated the persistence of sexual history evidence at trial and routine circumvention of s.41 restrictions (Section 3.4), ultimately contributing significantly to the trauma and distress experienced by many complainants at trial, despite the implementation of these rape shield provisions (Smith, 2018a; Temkin *et al.* 2018; Cowan, 2020). Questioning on sexual history continues to be "humiliating" (Eleftheriou-Smith, 2017) and an attack on complainants' privacy, dignity and emotions (Levanon, 2012) which can result in "irreparable harm" (Waxham, 2017) and stop other victims from coming forward. Questions of complainants' wellbeing and protection are therefore fundamental to debate surrounding the use of sexual history evidence at trial and must be considered as central to reform recommendations.

3.3 Development of the Law on Sexual History Evidence

The law on sexual history evidence has developed in a somewhat piecemeal fashion over the past four decades (Hey, 2012). Therefore, before examining the current legislative procedure of s.41, it is important to examine the evolution of this legislation, to comprehensively understand both the successes and shortcomings.

Historically, evidence of a complainants previous sexual history was considered to be of key evidential importance to a rape trial (Temkin, 1984). Focus originally concentrated upon

evidence of prostitution, being an example of 'notorious bad character,' in order to infer consent and challenge the credibility of the complainant (McGlynn, 2017). Progressively, an increasingly tolerant judicial approach to the admission of such evidence widened the common law, and evidence of more general promiscuity or previous sexual activity with the accused was also commonly deemed to be relevant (McGlynn, 2017). By the nineteenth century, this relaxed approach to the admissibility of such evidence became crystallized in the common law (Temkin, 1984; Thomason, 2018) and led to "degrading, diminishing and functionally deficient cross-examination" in many trials (Hunter, 2014: 262).

By the 1970s, alongside the rise of second wave feminism, these relaxed common law rules governing the admissibility of sexual history evidence began to be regarded with dissatisfaction and unease (Temkin, 1984). It was becoming increasingly acknowledged that this focus upon women's sexual activity as a marker of their credit, was likely to be crucial to the outcome of the case and equally dissuaded women from reporting (Easton, 2000). In England and Wales, an Advisory Group on the Law of Rape was assembled in response to public concern (Easton, 2000). This group was commissioned to "give urgent consideration to the law of rape in light of recent public concern" and thus the Heilbron Report was composed (Heilbron Committee, 1975: 201).

3.3.1 The Heilbron Report (1975)

The Heilbron Report specifically aimed to assess areas of rape law in need of 'urgent' amendments, as a means to reduce the ordeal of complainants, whilst equally ensuring a fair and impartial trial for defendants. It was hoped that such amendments would make it easier for juries to arrive at a true verdict, encourage victims to come forward and result in a greater proportion of convictions (Hey, 2012).

The curtailment of cross-examination about sexual history was deemed "probably one of the most important and urgent reforms" (p219). Heilbron positively acknowledged that sexual activity is a matter of choice for women and is not indicative of the truthfulness of her testimony

or the likelihood of whether she consented. The existing procedures and practices of the courts under the common law regime they suggested, regularly amounted to an unnecessary and hurtful attack on the complainant's character and credibility, and ultimately a distraction to the jury.

The Heilbron Report therefore recommended significant restrictions to sexual history evidence, guided by and based on direct legislation. It aimed to prevent the inclusion of sexual history evidence where the aim of doing so was simply to encourage a jury to have a negative opinion of the complainant. Sexual history evidence with a third party was therefore deemed generally inadmissible, except for exceptional circumstances determined by the trial judge. Sexual history with the defendant however, they concluded could be relevant to the issues of trial and therefore *may* be included subject to specific legislative restrictions enforced by the trial judge.

These recommendations were widely welcomed by commentators as appropriately strict (Hailsham HL Deb 1976, October 22), whilst continuing to award some space for judicial discretion where necessary, through subjective statutory measures (Hey, 2012). Nevertheless, the allowance for subjectivity may now equally be critiqued as enabling differing outcomes from case to case depending on the trial judge. Moreover Hey (2012) has since critiqued this approach, suggesting that to say sexual history with the defendant may sometimes be relevant, is to admit the rape myth that previous consent is indicative of future consent, into law.

Nevertheless following the Heilbron Committee (1975) recommendations, statutory rape shield provisions were imposed within the *Sexual Offences Act (1976),* albeit arguably not in the way intended or recommended.

3.3.2 Section 2, Sexual Offences (Amendment) Act (1976)

S.2 was the first statutory intervention in England and Wales to formally restrict the inclusion of sexual history evidence in rape trials. Resiling from the more rigorous recommendations of Heilbron however, this statute placed significant faith in judicial discretion, in order to limit the admissibility of such evidence at court (McGlynn, 2017).

This discretionary approach, in practice however, was found to be severely lacking (Thomasson, 2018) and did little to stem to the flow of sexual history being admitted at trial (McGlynn, 2017). Indeed, counsel continued to ask questions regarding the complainant's previous sexual history, often without application and with little regard for the statutory s.2 provisions (Easton, 2000). Moreover, where application to the trial judge was sought, admission of such evidence was usually granted. Adler's (1987) observational analysis of rape trials at the Old Bailey, reported a 75% success rate for these s.2 applications. Meanwhile, Easton (2000) noted that even when a trial judge refused to admit sexual history evidence, the Court of Appeal seemed extremely willing to grant appeals.

Consequently, critics condemned the lack of guidance as to what was to be [or not] regarded as unfair inclusion of sexual history under the s.2 restrictions (Temkin, 1984). For example, S.2 permitted judges to admit third party sexual history evidence where it would be "unfair not to do so," based upon whether the judge felt that such evidence would lead a jury to view the evidence differently. The salient issue that emerged however, was that in practice juries' assumptions regarding sexual behaviour often relied upon myths and stereotypes. As such it was argued that this evidence was likely to influence jurors perceptions of the case by jurors, whether right or wrong to do so (Easton, 2000).

Moreover, whilst Heilbron asserted that sexual history must not be used to call into question the credit of the complainant, the Court of Appeal arguably appeared to rule otherwise under s.2 provisions in the case of R v Viola (1982 EWCA Crim J0510-4). In this case, the court noted that questions of sexual history pertaining only to the credit of the complainant would

"seldom be allowed" but noted that there is a "grey area" between credit and relevance to consent. Ultimately, this verdict therefore indicated that attacks on complainant credibility may, on occasion, continue to be deemed relevant despite the new statutory governance. This crucially therefore, undermined the supposed safeguarding intention of this rape shield provision.

Whilst the Criminal Law Revision Committee (1984) contended that there was no evidence to suggest that s.2 provisions were not working, multiple observational studies evidenced continued routine reliance upon such evidence at trial (Adler, 1987; Lees, 1996), prompting calls for further reform.

3.3.3 Section 41, Youth Justice and Criminal Evidence Act (1999)

Sections 41-43 of the Youth Justice and Criminal Evidence Act [YJCEA] (s.41 for shorthand) are the most recent statutory attempts to restrict the inclusion of sexual history evidence at trial in England and Wales. The implementation of these restrictions was widely welcomed by feminist academics, however provoked critique amongst some commentators as "having surpassed its legislative aim of protecting complainants from harassment in the courtroom by excessively curtailing the defendant's right to adduce potentially vital cogent evidence" (Brewis and Jackson, 2020: 53). Nevertheless, some aspects such as the broadening of protection for all sexual offences, rather than just rape and cognate offences covered under s.2 (Birch, 2002), were largely welcomed and uncontroversial.

In contrast to s.2, s.41 was implemented to be intentionally rigid in its structure (Hoyano, 2019) ultimately removing judicial discretion. It made clear that the admission of sexual history should be exceptional (MOJ, 2017) and specified that no evidence of a complainant's sexual history may be adduced at trial except whereby it falls within one or more, of four statutory exceptions:

- S.41(3) (a) – Where the issue is <u>not an issue of consent</u>

- S.41(3) (b) – Where it is an issue of consent, and the evidence 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
- S.41(3) (c) - Where it is an issue of consent and the sexual behaviour of the complainant is alleged to have been, in any respect, 'so similar' that the similarity cannot reasonably be explained as a coincidence
- S. 41(5) - To enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused

Additionally, sexual history evidence may never be admitted where the purpose for doing so would be to impeach the complainant's credibility [s.41(4)] and may only be admitted where not doing so could render an unsafe conclusion of the jury [s.41(2)(b)].

These rules apply to defence counsel (not prosecution), who must make a written application pre-trial, specifying under which exceptions the application is made and the questions that counsel intend to ask at trial (Crown Court (Amendment) (No.2) Rules, 2000). It was hoped that this would award the judge and prosecution an opportunity to assess and challenge such evidence, whilst also ensuring greater certainty for complainants and a more transparent procedure (Kelly *et al.* 2006).

S.41 therefore sought to reset the boundaries of proper inquiry for complainants of sexual offences at court, acknowledging that "a woman exercises— and is entitled to exercise— her consent independently on each occasion" (Hansard, HL Deb 23 March 1999: 1218). Thereby replacing the widely criticized flexibility of s.2, the specific and objective provisions of s.41 sought to act in the best interests of both complainant and defendant (CPS, 2018b). In implementing such restrictions, it was held that the clauses "allow enough scope for all relevant evidence [and]… provide a statutory framework for determining relevance" whilst also restricting such evidence to "a very limited extent" (Hansard, HL Deb 23 March 1999: 1216).

3.4 Section 41 in Practice

Whilst the much stricter and more rigid approach to rape shield provisions was widely welcomed within feminist academic discourse, the practical implementation of s.41 provisions

has been widely critiqued. Crucially, despite supposedly removing the heavily criticised discretionary element from rape shield legislation, in practice, considerable discretion has been exercised resulting in the continued, frequent inclusion of sexual history at trial and highly contested case outcomes. Most notably, the cases of R v A [No.2] (1999 UKHL 25) and R v Evans (2016 EWCA Crim 452) have reignited debates regarding the implementation, interpretation and suitability of the s.41 restrictions, and prompted high-profile calls for further reform.

3.4.1 R v A (2001) [Sexual History with the Defendant]

Shortly after the enactment of s.41, the Law Lords returned judgement in the case of R v A [No.2] (2001, UKHL 25). It was the first major case to be decided under the new YJCEA (1999) provisions and challenged the supposedly rigid nature of these restrictions. Ultimately the House of Lords interpreted these restrictions to an almost unrecognisable state (Hey, 2012), prompting significant outcry and making this case pivotal in debates assessing the successes and failures of s.41.

R v A was the culmination of a legal challenge to s.41 on the basis that this contravened a defendant's right to fair trial as enshrined under Article 6 *European Convention on Human Rights [ECHR] (1953)* and *Human Rights Act [HRA] (1988)*. The central question was one of consent, whereby the defence sought to present evidence of the complainant's prior sexual activity with the accused. The suggestion being, that the complainant and defendant were engaged in a secret affair [although the prosecution did not accept this], and therefore this evidence was fundamental to the central issue of consent.

At first instance, it was ruled that this evidence was inadmissible, not falling within one of the four statutory exceptions of s.41. However, on appeal the House of Lords debated how narrowly relevant sexual history must be in order to be adduced under s.41. Lord Steyn articulated that:

> *'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'* (*R v A* [2001] UKHL 25, 32).

Ultimately therefore, it was ruled that a blanket exclusion of sexual history evidence could interfere with a defendant's right to fair trial. Accordingly, the Law Lords exercised their interpretive duty under s.3(1) of the HRA (1998) to widen s.41 restrictions to achieve compatibility with Article 6 (Kelly *et al.* 2006). Interpreting the similarity exception [s.41(3)(c)], the Lords ruled that such evidence should be admitted whereby it was "so relevant to the issue of consent that to exclude it would endanger the fairness of trial under article 6" (*R v A* [2001] UKHL 25: 46). Within this test of admissibility, it was deemed that the term "so similar" under s.41(3)(c) did not require the sexual behaviour to be "bizarre or unusual" in order to be relevant, as to require too narrow relevance may impact upon the defendant's right to a fair trial (*R v A* [2001] UKHL 25: 135). Leave was thus granted to include sexual history evidence under the similarity exception - which need "not so unremarkable" or differ from regular sexual conduct – in order to adhere to article 6.

This judgement however, prompted significant debate regarding Parliamentary intention with critics accusing the Law Lords "judicial activism" (Bhola-Dare and Fletcher, 2020). Gurnham (2018) submitted that whilst this approach may be correct as a matter of the narrowly construed law, it fails to take due account of the risks surrounding exposing the jury to such prejudicial material. Whilst the Lords were clear that they did not intend this decision to widen the remit of s.41 (*R v A* [2001] UKHL 25), the judgement ultimately reintroduced judicial discretion back into the test of admissibility and seriously undermined the gateways approach in the 1999 Act (Hey, 2012). Numerous critics have therefore been highly critical of the interpretive approach taken, suggesting that it amounted to 'judicial overkill' whereby judges effectively took it upon themselves to re-write s.41 (Nicol, 2004). Hey (2012) argued that R v A effectively rendered s.41 as somewhat obsolete, as even where evidence does not fit under one of the four gateways, the judge can decide to allow it anyway.

Whilst some supporters praise the Lords in R v A, arguing that without this judgement, s.41 would have otherwise been an unworkable legal straitjacket which could render unsafe decisions (Kibble, 2001), the lack of clear explanation of judgement remains widely criticised. Ellison (2010) submitted that the proper step forward would have been to declare the legislation incompatible and give Parliament the opportunity to clearly restate the scope of restrictions. Instead, critics have argued that the lack of clear, well-founded reasoning within the judgement of R v A has engendered legal uncertainty and undermined the purpose of the 1999 legislation (Ellison, 2010).

Moreover, in accepting the defence's assertion that previous sexual history may increase the prospect of subsequent consent, the Lords ultimately endorsed the propensity assertion (Ellison, 2010). Many judges appear in agreement with the Lords here, stating this a matter of common sense (Kibble, 2001), however such rationale wholly challenges the notion that consent is person and situation specific, given afresh on each occasion (Ellison, 2010; McGlynn, 2017). Feminist critics therefore maintain that this implies a generalised propensity to consent (Ellison, 2010), which inherently diminishes the notion of women's sexual autonomy and reinforces discriminatory stereotypes depicting women as sexually accessible (Boyle. and MacCrimmon, 1998).

Birch (2002) however submitted that sexual history evidence in R v A *was relevant*; not to infer that the complainant's non-consent was highly unlikely, but rather to "set the scene" and provide further information for the jury, to aid them in choosing between conflicting accounts. Yet, even if previous sexual history could be deemed as relevant to background, this perhaps marginal relevance must be weighed up against the potential prejudicial effects of admitting such evidence (McGlynn, 2017). Indeed, even in discussions during R v A, Lord Hutton acknowledged the potential of sexual history evidence to divert the jury's attention from key issues and distort the course of trial. Durham *et al. (*2016) therefore proposed that where sexual history evidence is included, trial judges should specifically direct the jury that this is background evidence and should not be used to support an assumption of consent. The final

judgement in R v A however, Smith (2018a) contended, ignored the prejudicial attitudes associated with sexual history and instead upheld the very myth of propensity to consent that s.41 was intended to address. McGlynn (2017) provides an excellent analysis of these arguments in more depth.

Whilst Parliament's aim for s.41 had been to encourage greater reporting and victim participation in justice without fear of humiliation or unwarranted questioning, many argue R v A undermined this ethos (Hey, 2012). Ellison (2010) therefore submitted that R v A simply served to muddy the waters in respect to this central issue, acting to the detriment of complainants and the fair administration of justice.

3.4.2 R v Evans (2016) [Sexual History with Third Parties]

The debate surrounding sexual history evidence returned to the forefront of public discussion following the hugely controversial, high-profile acquittal of professional footballer Ched Evans. The 2016 appeal ruling provoked large-scale public and academic critique of the implementation of s.41, with the final judgement seemingly widening s.41 restrictions even further than R v A (Smith, 2018a).

In May 2011, Evans and fellow footballer Clayton McDonald had sex with a heavily intoxicated young woman in a hotel room. Evans had joined McDonald and the complainant who were already in the room, after lying to the hotel receptionist in order to gain a key to the room. After having sex with the complainant, Evans left via the fire escape.

Evans was convicted at first instance, whilst McDonald was acquitted. However, campaigns led by Evans' family for new information, kept the case in the public eye. Although his first appeal was refused, Evans' defence team and private investigators later found two new witnesses who said that they had had consensual sex with the complainant around May 2011 in similar circumstances to those alleged by Evans.

On appeal Evans' lawyers argued that the new evidence was relevant under s.41(3)(c), as it involved behaviour 'so similar' to the events described by Evans, that it could not reasonably be explained as a coincidence. Specifically, they identified the similar elements as:

(a) the complainant 'had been drinking'

(b) she 'instigated certain sexual activity'

(c) she 'directed her sexual partner into certain positions' and

(d) she 'used specific words of encouragement' (EWCA Crim 2259).

The Court of Appeal ruled that this evidence could therefore be admissible under s.41(3)(c) and quashed Evans' original conviction, ordering a retrial. At retrial, the sexual history evidence was admitted, and Evans was acquitted.

The case has therefore attracted strong academic critique, on the basis that it expanded the law yet further to include 'similar' sexual history evidence with third parties, not just the accused. Evans' defence team had relied upon Lord Clyde's obiter statements in R v A (2001), that the sexual history in question need not be unusual or bizarre. This, despite clear intention of the Lords in R v A that such test of admissibility, related only to sexual history with the accused and not third parties (2001, UKHL 25:131)[4].

Unsurprisingly, the prosecution counsel argued that the behaviour in question was commonplace and far from remarkable, thus could naturally be explained as a coincidence and certainly not evidence from which consent could be inferred. Indeed, multiple public surveys have identified the 'doggy style' position adopted, as the public's favourite sexual position (Richards, 2015; Gallagher, 2017; Bass, 2020), whilst the phrase "f**k me harder" returns several thousand results on the world's most popular commercial porn website, Pornhub (McGlynn, 2017). Moreover, one of the men from which the third-party evidence was being brought, suggested that the phrase and position in question was adopted just once

[4] Intention that was further enforced in subsequent appeals of *R v Andre Barrington White (2004*) and *R v Hamadi (2007)*

across five or six occasions of sexual activity with the complainant, and thus the pattern in question was far from established. Strong academic critique thus proclaimed that the everyday nature of this sexual history pointed towards coincidence and thus should not have been admissible under s.41(3)(c). In these arguments, it was asserted that to hold this evidence as admissible represented another serious widening of s.41 (Baird, 2016; McGlynn, 2017).

Following this judgment therefore, critics have suggested that it is difficult to pretend that the bar for including sexual history evidence at trial remains high (McGlynn, 2017). The Court of Appeal have maintained that *R v Evans* presented a "rare case" (EWCA Crim 2559:74) and did not foresee that this would set a precedent for future cases. Dent and Paul (2017) submitted that the jury's verdict did not set a legal precedent and was confined solely to the facts of the case in question. However, McGlynn (2017) argued that to allow normal, everyday sexual activity to be admissible under s.41, means that the likelihood of such evidence being admitted again in future is far from rare. She went on to suggest that this ruling, in essence, provides defence barristers an open invitation to trawl through a complainant's sexual history seeking similarities. MP Jess Philips reiterated this view, asking "what is to stop a defendant in future, simply going onto Facebook and crowd-sourcing information from a victim's previous sexual partners and using it against her in court" (Philips, 2016b). Dent and Paul (2017) argued that this view implicitly suggests that defendants fabricate these accounts whereas in practice this is unlikely to occur. Yet arguably, the Evans case has demonstrated how the witnesses in question came forward following public campaigns by the Evans family, and thereby seemingly illustrates that critiques of McGlynn and Phillips appear warranted.

Harman and Baird (2017) alongside numerous other academics, therefore suggested that the Evans case submits a dangerous precedent about how a complainant of rape (usually a woman) has previously behaved and fears that rape trials could simply become inquisitions into the complainant's sex life. Whilst Hallett LJ was careful to note at appeal that "we have made no criticism of X," (Paragraph 6) or her credibility, Gurnham (2018: 17) attested that the

"judge's words here feel like a rather disingenuous denial of the invitation to pass moral judgment that is implicit in defence counsel's submission."

Ultimately however, whilst it is unknown how this evidence influenced the jury and their final verdict, widespread reporting of this case in popular discourse illustrates distinct moral judgments and high levels of victim blame. A simple twitter search of '#ChedEvans' returns several victim blaming statements within just the top ten results (21.03.2019):

> *"I hope the girl who ruined Ched Evan's life is put in jail like he was! That lad had his whole life turned upside down for something he didn't do! She HAS to be punished."*
>
> *"So happy for Ched Evans and his potential big move. He is a shining example of the depths you can come back from at the hands of toxic feminism. Come at me. Stupid little bitch twats."*

McGlynn (2017) warned that Evans does not simply open the floodgates but risks a tsunami for the use of sexual history evidence in modern rape trials, as to hold this everyday commonplace behaviour as remarkable appears to revert to antiquated, prejudicial notions of women being the passive gatekeepers of sexual relations. The complainant's behaviour in the Evan's case was far from the actions of a gatekeeper and violates traditional feminine socio-sexual norms. It is this, that Gurnham (2018) asserts carries significant prejudicial risk to the outcome of the case. McGlynn (2017) submitted that the logical conclusion post-Evans, is to formulate a meaningful test in which to measure a meaningful plan, pattern, or connection of sexual history, so as to develop objective certainty within the similarity exception. Yet, whilst calls for reform have been far reaching, none have yet been enacted to replace current s.41 provisions.

3.5 The Current Use of Sexual History Evidence at Trial in England and Wales

Following these high-profile cases and debates, substantial literature has sought to scrutinise the use of sexual history evidence in rape trials in England and Wales. The Criminal Bar

Association submitted that s.41 has been an overwhelming success, with sexual history evidence rarely introduced at trial and only done so where strictly relevant (Morris, 2016). Likewise, a CPS commissioned audit conducted by the Ministry of Justice [MOJ], claimed that sexual history evidence was included in just 8% of finalized rape trials in 2016. The sample consisted of a random dip of two flagged CPS rape case files per CPS area each month, yielding a sample of 309 cases. It concluded s.41 to be an effective safeguard ([MOJ], 2017).

However, the methodological approach of this MOJ research has been widely discredited (Harman and Baird, 2017). The sample included all rape trials in E&W, meaning it included guilty pleas where no trial took place (Harman and Baird, 2017) and trials of child complainants where sexual history evidence is inherently less likely to be included (Kelly *et al.* 2006). The final figure also only represented instances where a pre-trial application had been made, meaning it did not include late/no applications (Green, 2019). Arguably therefore, this report failed to suitably address the issue of sexual history evidence, instead attempting to create a favourable assessment of s.41 without truly reflecting the current difficulties (Bowcott, 2018; Harman and Baird, 2017).

Substantial academic research on sexual history evidence has since demonstrated that such evidence is not rare (Smith, 2018a) and the inappropriate admission of such evidence at trial, either directly or indirectly, happens all too often under s.41 (Gillen, 2019), as shown in Table.3.1.

Table 3.1: Court Observation Studies – Comparative Use of s.41 (And s.28 NI)

Study	Was sexual history evidence included at trial?	Pre-Trial Application for Sexual History?	Sampling Technique
MOJ (2017)	284 of 309 finalised cases (8%)	Did not include late applications or instances whereby no written application was made	All rape cases including child sex offences and guilty pleas
Kelly *et al.* (2006)	18 of 23 trials (78%)	In 9 of these trials, no application was made to include sexual history at trial	Rape trials
Durham *et al.* (2016)	11 of 30 trials (37%)	3 applications made during trial. In 4 cases, no applications were made.	Adult rape trials
Smith (2018a)	9 of 11 trials (82%)	8 out of 9 applications to include sexual history evidence were made during trial	Adult sex offence trials
Temkin *et al.* (2018)	4 of 8 trials (50%)	No applications made	Adult rape trials (and one attempted rape)
Daly (2021a)	5 of 6 trials (83%)	No applications made during trial: Unable to verify whether all of these were made before trial, however s.41 was referenced in 2 instances.	Serious sexual offences trials
Victim Support NI (2021) *This explored the Northern Irish context, not England and Wales.	7 of 27 trials (26%)	4 applications were observed at trial, two of which were refused. *Observers noted that some advanced applications may have been made that were not observed within the observational research	Sexual assault, rape and indecent assault trials

The academic observations outlined in Table 3.1 conflict with the MOJ report, by demonstrating continued frequent reliance on sexual history, often without necessary application. Indeed, in an earlier Home Office commissioned study by Kelly *et al.* (2006). It was reported that sexual history evidence was raised in two thirds of observed rape trials, with written applications only occurring in one third of these instances. They observed that oral

applications to include sexual history were widespread and disadvantaged the prosecution who were unable to consult with the CPS or complainant about possible objections. Hoyano (2019) critiqued this finding, suggesting it was not substantiated by empirical data. Yet, further observational research illustrated in Table 3.1 indicates similar findings to Kelly *et al.* (2006), suggesting continued, widespread failure to follow the procedural safeguard of a pre-trial, written application.

In light of this widespread lack of pre-trial applications, measures were taken to tighten s.41 procedural requirements. Part 36 of the *Criminal Procedure Rules (2013)* was drafted to ensure the formal requirement of a written pre-trial application to include sexual history. However, observational research after this date continued to illustrate a substantial lack of pre-trial applications to include sexual history (Table 3.1), thereby potentially amplifying distress of complainants (Brewis, 2018).

Smith (2018a) noted that where late applications were made in her observational dataset, typically no reason was given for lateness, and these were rarely challenged by the judge or prosecution. Since this research however, Part 22 of the Criminal Procedure (Amendment) Rules (2018) has further set out the application process for adducing sexual history evidence, including a requirement for the defence to give notice of an intention to adduce such evidence at trial (Crim PR 22.4). The Criminal Practice Directions (2015) (Amendment No.6) also came into force in 2018, attempting to ensure compliance with procedural restrictions of sexual history and to ensure rules are applied consistently and not circumvented (Brewis, 2018). Positively Daly's (2021a: 237) dataset reflects current practice and whilst she noted that procedural requirements appear to be more widely adhered to, she equally noted that complainants continued to be "questioned about irrelevant aspects of their sexual history, seemingly with the purpose of impugning their character." Each of the above observational researchers thereby urged that renewed examination for reforming s.41 is necessary (Kelly *et al*. 2006; Durham *et al.* 2016a; Temkin *et al.* 2018; Smith, 2018a; Daly, 2021a).

Alongside these observational studies, a national survey of ISVAs in 2017, reported that sexual history evidence was being included in "a significant number of trials," with 11% of those surveyed suggesting that this evidence was used in over 50% of cases in their caseloads (LimeCulture, 2017). The same study suggested that in 28% of cases where sexual history evidence was raised, no application was made to do so (LimeCulture, 2017). Whilst Hoyano (2019) heavily critiqued the methodological choices of this survey, by asserting that ISVAs were unclear on legislative restrictions of s.41 and that findings were based on mere estimates; the findings crucially illustrate dissatisfaction of s.41 restrictions amongst frontline support workers.

Moreover, recent research has not only highlighted the unacceptable frequency in which sexual history evidence continues to be introduced, but also the often erroneous context and purpose for doing so (McGlynn, 2017). For example, barristers are within their rights to discuss the context of the case [e.g. that C and D had been kissing prior to the incident], however Temkin *et al.* (2018) noted that questioning on sexual history would often go beyond this, invoking rape myths about the complainant and her supposed propensity to consent. Smith (2018a) similarly observed that sexual history evidence regularly served to undermine the complainant's credibility in suggesting that her prior consent somehow indicated falsity of the allegation. She noted that these narratives were often invoked alongside the suggestion that rape and consensual sex are fundamentally different, inferring that similarities between the alleged rape and prior consensual sexual activity, demonstrated latter consent. This narrative is clearly based in mythology and disregards extensive feminist research regarding the continuum of sexual violence, which posits sexual violence on a continuum alongside consensual sexual activity and culturally accepted sexual practices (Kelly, 1988).

Ultimately therefore, research findings continue to indicate frequent and erroneous reliance upon sexual history evidence at trial, with s.41 restrictions routinely "evaded, circumvented and resisted" (Kelly *et al.* 2006: 77). In turn, "as legal restrictions are ignored, myths about sexual history are permitted to enter the courtroom" (Temkin *et al.* 2018: 214).

3.6 Critiques of S.41

Notwithstanding initial support for the enactment of the more rigorous s.41 rape shield legislation, the discretionary practical implementation and enduring reliance on sexual history at trial has resulted in substantial critique (McGlynn, 2017; Marsh and Dein, 2021).

Whilst some assert that s.41 provisions are too rigorous in nature, others suggest they are too lax. Dennis (2006) suggested that the tightly drawn categories of admissibility protect complainants from unwarranted intrusions into their privacy and concluded that s.41 provisions are suitable. Gillen (2019) equally highlighted this right to privacy as an overriding objective of rape shield legislation, as a measure to protect complainants, although not specifically referencing s.41 provisions. Meanwhile Dent and Paul (2017: 1) supported the s.41 provisions by suggesting that it is the "emotive rhetoric and misconceived hyperbole surrounding s.41 itself [that] is unhelpful and misleading," not the legislation.

However in general, analyses of s.41 provisions on both sides of the debate have reflected dissatisfaction and emphasised calls for reform. Birch (2002: 551) has labelled the s.41 approach as "draconian" in eliminating judicial discretion and thus leaving judges "no room to manoeuvre." She therefore advocated for the elimination of s.41 altogether, with an entirely discretionary approach instead implemented in its wake. Temkin (2003: 11) however fundamentally rejected this submission, suggesting that it would "take us back even further to a pre-Heilbron approach." Yet ,later analysis by Kibble (2004: 10) supported Birch's (2002) standpoint, submitting that the rigidity of s.41 would have been "unworkable," had it not been for the decision of *R v A (2002)* whereby judicial discretion was reinstated.

More recently, in Hoyano's (2019) study, whilst 60% respondent barristers considered that s.41 was working in the interests of justice, and only 27% suggested that it was not working; 36% agreed that an amendment to clarify s.41 provisions would be beneficial. In building upon these findings, Marsh and Dein (2021: 53) highlighted the complexity of current provisions as a major hurdle to justice, suggesting that "s.41 created a complex and confusing web of

criminal evidence and procedure" which has hampered practitioners and the execution of justice. Similarly, Hoyano (2019: 29) described current provisions as "so labyrinthine" that counsel have to continually revisit and decipher this legislation when trying sexual offences cases. Notably in Hoyano's (2019) study however, 0% of respondent barristers were in favour of reforming s.41 to make it more restrictive and similarly Marsh and Dein (2021) called for greater flexibility of restrictions. Marsh and Dein (2021: 53) highlighted *R v Evans* as the supposed "poster trial" for the need for judicial discretion, by highlighting how sexual history evidence can impact crucially on the outcome of trial, thus suggesting that restrictions may impact on the execution of justice and the right to fair trial.

On the opposite side of the debate, campaigners and feminist researchers have maintained that s.41 provisions remain too lax, meaning that the admission of sexual history evidence at trial continues to occur all too often, with s.41 restrictions routinely flouted (McGlynn, 2017; Smith, 2018a; Gillen, 2019). Whilst Dent and Paul (2017) submitted that s.41 provides a high threshold for the inclusion of sexual history evidence at trial, which is rarely met; McGlynn (2018) rebutted this claim using *R v Evans (2016)* to highlight the laxity and flexibility that has been interpreted from current provisions to substantially widen the initial gateways approach. Similarly, Smith (2018a) asserted that most lines of questioning on sexual history could be framed as either explaining or rebutting the prosecution's evidence and therefore it became almost impossible in her observed trial dataset, to deny an application under s.41(5). Resultantly, multiple recent observational studies have highlighted the continued persistent inclusion of sexual history evidence at trial, often overlooking necessary safeguards (Durham *et al.* 2016a; Temkin *et al.* 2018; Smith, 2018a), and this has informed arguments for tightening restrictions.

Underpinning these calls for further tightening, lie debates regarding Parliamentary intention. As considered in section 3.4, both *R v A (2002)* and *R v Evans (2016)* arguably contradicted Parliamentary intention, resulting in an unlawful and unintended widening of restrictions. Lord Hope (2004) submitted that *R v A (2002)* should not be construed as authority for any wider

reading of s.41, yet in effect both *R v A (2002)* and *R v Evans (2016)* did re-write the originally tightly drawn s.41 categories, irrespective of Parliamentary intention (Hey, 2012). Consequently, s.41 has had a seemingly limited effect upon restricting sexual history at trial.

Following *R v A (2002),* Temkin (2003) suggested that the gateways are sufficiently wide for a range of sexual behaviour to be included, and are in fact significantly broader than exceptions seen in other jurisdictions. Similarly, Gillen (2019) submitted that s.41 demonstrates a relatively low threshold for highly prejudicial sexual history evidence to be included, compared to other jurisdictions and thereby is a somewhat weak safeguard.

3.6.1 Sexual History Applications in Practice

Alongside discussion of the continued prevalence of sexual history, lie further debates regarding the appropriateness of applications. In Smith's (2018) observational research, she noted that both judges and prosecution counsel routinely failed to challenge applications, treating this as a mere formality, as opposed to a stringent procedural guideline. Defence counsel on the other hand, both Kelly *et al.* (2006) and Hey (2012) suggested, are routinely maliciously motivated in their timing of verbal applications, doing this just before cross-examination so as to put most pressure on the complainant.

Moreover in regards to processing applications, research suggests that judges are often unaware of the s.41 restrictions or choose not to follow them, meaning the legislation itself may be correct but the implementation is unsatisfactory (Hey, 2012). Birch's (2002: 553) damning critique submitted that s.41 presents the “most elaborate formulae possible” for sexual history applications, however Dennis (2006) contended that whilst the legislation is undoubtedly complex , this is no excuse for judges and barristers to only have a vague grasp of it. In practice however, it seems that judges knowledge of s.41 is routinely vague (Temkin and Krahe, 2008) with half of the judges interviewed in Kelly *et al.'s* (2006) study entirely unaware of .41 rules or their content. Kelly *et al.* (2006) also reported that judges surveyed, typically interpreted *R v A* (2001) to mean that they now enjoyed very broad residual discretion

to admit sexual history evidence in order to ensure a fair trial under article 6. Further when judges presume s.41 to be too narrow, it is argued that the simply revert back to discretionary ideals and disregard s.41 (Kibble, 2004; Hey, 2012).

Hoyano (2019) however, dismissed these findings, by asserting that significant training on s.41 has been implemented since Kelly *et al.'s* (2006) research, and maintained that practitioner understandings have thereby improved considerably. Nevertheless, Smith (2018a), Temkin *et al.* (2018) and Daly (2021a) have continued to highlight inappropriate reliance on sexual history evidence at trial by legal practitioners, thereby calling Hoyano's (2019) attestation of widespread understanding amongst these individuals, into question.

It is however, important to recognise that much of this research was undertaken both before the introduction of compulsory sexual offences training of judges (Judicial College, 2010) and before changes to the Criminal Practice Directions in April 2018. Compulsory sexual offences training has been somewhat successful as discussed in section 1.4.1. Meanwhile the Criminal Practice Directions further tightened the procedural requirements for s.41 applications and provided more detailed guidance to judges and counsel for adducing this behaviour. It is hoped that these amendments should assist in preventing attacks on the character of the complainant (Brewis and Jackson, 2020), and recent research of Daly (2021a) suggests improvements have been made. However, further research is necessary to explore whether this aim has been achieved extensively in practice.

3.6.2 Complainant Protection Under S.41

Whilst a major justification for the rigid s.41 restrictions was to protect complainants from unnecessary harm at trial, s.41 has been heavily criticised in this respect. Research has shown that sexual history evidence continues to be routinely relied upon at trial as a means to impugn the complainant's character and continues to traumatise complainants as a bi-product of the justice process (McGlynn, 2017; Temkin *et al.* 2018; Smith, 2018a).

Following *R v A,* complainant protection is routinely presented as at odds with the defendant's right to fair trial. Whilst not disputing that complainants may endure appalling treatment and questioning on their sexual history at trial, Brewis and Jackson (2020) asserted that this may be unavoidable as fair trial arguments deem it necessary and relevant. Similarly, the House of Lords in *R v Hamadi (2007 EWCA Crim 3048: Para 18)* recognised that the aim of protecting complainants from "indignity and humiliating questions…must ultimately give way to the right to a fair trial." Thus Temkin and Krahe (2008) found that judges routinely neutralised the stringency of s.41 by emphasising the importance of the right to a fair trial to legitimise the inclusion of sexual history. Smith (2018a) equally observed the defendant's right to fair trial to be seemingly prioritised over the complainant's wellbeing and right to privacy in her observational dataset.

Notably however, whilst significant literature has highlighted the potential traumatic impact of this evidence on complainants (McGlynn, 2017; Smith, 2018a), there is a paucity of in-depth qualitative research with complainants that has provided detailed, comprehensive insight into complainant experiences and perspectives. Such insight is essential in knowing where to direct reform debates and provide vital support services.

Whilst Birch (2002) suggested that any kind of rape shield legislation is built upon tenuous foundations, as this always has the potential to interfere with the defendant's right to fair trial; feminist critics fundamentally condemn this asymmetric interpretation of the right to fair trial (Smith, 2018a) whereby the defendant's interests appear to take precedence over the complainant's wellbeing (McGlynn, 2017). In recognising this contention, some jurisdictions have implemented independent legal representation for complainants where a sexual history application is raised, as will be discussed in Section 3.7. Yet ultimately, the balance between the relevance of sexual history as a matter of fair trial, versus the prejudicial and harmful impact of this upon complainants, remains at the centre of ongoing debates, with a fundamental lack of consensus amongst commentators (Stark, 2017; Thomason, 2018).

3.6.3 Sexual Behaviour

S.41 was initially praised for covering “all sexual behaviour” [s.42(1)(c)] and therefore providing broad protection for complainants from unwarranted examination on *any* form of their previous sexual conduct. However, a lack of explicit and comprehensive definition of “sexual behaviour” has engendered significant critique and uncertainty.

The Court of Appeal asserted that it would be “foolish” to define sexual behaviour in detail, due to borderline cases that are often “really a matter of impression and common sense” (*R v Mukadi (2003 EWCA Crim 3765: Para 14)*. However this enforcement of judicial discretion appears to be at odds with the rigidity of the s.41 gateways and seemingly instead reverts back to the discretionary approach of s.2 SOA (1976), so has been heavily critiqued (Kelly *et al.* 2006; McGlynn, 2017).

McGlynn (2017) contended that the opaque nature of the definition and lack of clear rationale behind this legislative regime has given rise to ambiguity within the law on sexual history evidence, creating uncertainty for complainants, practitioners, and justice outcomes more broadly. Similarly, Kibble (2004) suggested that ill-defined terms like “sexual behaviour” have rendered the s.41 provisions hard to understand. Therefore, the decision of whether a certain behaviour falls within the remit of s.42(1)(c) has been the crux of many judgements, causing development of individualised common law precedents in the place of clear legislative guidance. For example Kelly *et al.* (2006) outlined a case where it was ruled that a 12 year-old complainant’s engagement in supposed ‘risqué’ text conversations, was outside the scope of s.41 as this text messaging did not amount to sexual behaviour. Yet in *R v D (2011 EWCA Crim 2305)* it was ruled that engaging in sexually charged messaging did amount to sexual behaviour and therefore did fall within the scope of s.41. This lack of clear legislative regulation inevitably engenders uncertainty and also demonstrates clear inequity for complainants, as a result of these inadequate discretionary approaches.

3.6.3.1 Sexting

Whilst theoretically all forms of sexual behaviour should fall within the scope of the s.41 provisions, as outlined above, the notion of sending or receiving sexually charged messages has become a supposed 'borderline' matter. The concept of 'sexting' is a rapidly emerging phenomenon, becoming more and more relevant to sexual offences trials in England and Wales, especially in light of the recent disclosure crisis (Section 1.2.2). However, whilst the CPS maintain that digital evidence does fall within the scope of s.41 restrictions (CPS, 2019), the lack of clear guidelines and practical training on the matter has engendered a degree of ambiguity in the law that must be scrutinised.

Whilst the Bater-James approach to the admissibility of digital evidence seemingly represents a step in the right direction (Section 1.2.2); Smith and Daly (2020) cautioned that previous similar rulings which found that digital evidence was not automatically relevant to sexual offences trials, did not effectuate changes in practice. Daly (2021a) therefore asserted that clear guidance and training which addresses how s.41 governs digital evidence in practice, would be beneficial.

Sexting can be defined as "sending, receiving, or forwarding sexually explicit messages, images, or photos through electronic means, particularly between cell phones" (Klettke, Hallford and Mellor, 2014: 45). It is a rapidly growing phenomenon (Hales, 2018), with figures suggesting that it is becoming a norm, particularly amongst young people. Stasko and Geller (2015) found 88% of surveyed adults aged 18-82 reported to have ever sexted, and 82% having done so in the last year. Reuters Health also reported that at least one in four teens are receiving sexts, and one in seven sending them (Rapaport, 2018).

Therefore, particularly in light of new disclosure practices, evidence of previous sexting is likely to become ever more relevant to rape trials. Indeed, Daly (2021a) observed in her dataset that digital sexual conversations were drawn upon during trial so as to advance sexual history evidence with the apparent intention of discrediting the complainant. Sweeny and Slack (2017)

provide an excellent analysis of this issue, suggesting that the courts and rape shield legislations across jurisdictions, are only just beginning respond to these challenges. The current uncertainty and lack of practical advice regarding the scope of s.42(1)(c) is therefore a matter of urgent concern.

Alongside this uncertainty of scope, there is also a paucity of research regarding how jurors are likely to interpret and assess this evidence if introduced at trial. Whilst Schuller and Hastings (2002) found that 'sexual behaviour' in the form of kissing/petting was met with less prejudice by jurors, than evidence of previous sexual intercourse; more generalised literature on sexting suggests that this form of sexual behaviour can in fact be met with high levels of prejudice (Dearden, 2020). Nevertheless, the majority of the current sexting literature relates to children and young people, with strong judgemental views emerging within peer groups (Ringrose *et al.* 2012; Blyth and Roberts, 2014; Crofts *et al.* 2016). Little evidence exists however, as to how adult sexting may be viewed by the population as a whole and importantly by jurors.

Nevertheless, research on peer sexting has demonstrated that girls tend to be judged much more negatively by peers than boys (Ringrose *et al.* 2012), perhaps demonstrating a further extension of the slut vs stud binary and socio-sexual double standard (Farvid, Braun and Rowney, 2017). Equally, it may be theorised that attitudes towards sexting practices, much like broader sexual history, encompass and perpetuate the same socio-sexual double standards and norms of supposed appropriate femininity (Phipps, 2009; Ringrose *et al.* 2012). Investigation of juror attitudes toward such practice is therefore fundamental and will be explored within the current study.

3.7 Proposals to Reform S.41 Provisions

In the wake of these widespread critiques about the inclusion of sexual history evidence at trial, there have been multiple major proposals for reform. Liz Saville Roberts MP proposed modifying current provisions using the *Sexual Offences (Ammendment) Bill 2016-17*, in order

to effectively bar all sexual history evidence with third parties, except whereby it would be manifestly unjust to do so. Harriet Harman MP proposed a far more radical revision under the *Prisons and Courts Bill 2016-17* that "no evidence can be adduced and no questions may be asked in cross-examination by or on behalf of the accused about *any* sexual behaviour of a complainant." Whilst both Bills were discussed in the House of Commons, the dissolution of Parliament in May 2017 as the result of the general election, ultimately ceased implementation of either proposal.

Markedly however, both such calls for reform were met with substantial scepticism and critique from legal professionals. Popular legal blogger 'The Secret Barrister' lambasted Harman's proposal as "horrendously, stupidly dangerous" (Secret Barrister, 2017), suggesting that it would contravene the defendant's right to fair trial and fundamentally outlaw evidence which can be distinctly relevant to trial. Simon Myerson (2017) was equally critical of Harman's proposal, arguing that in practice very few applications are granted under s.41 and that juries typically understand judicial directions, thereby limiting the prejudicial nature of sexual history.

In response to these critiques however, it is worth highlighting findings of observational research which has repeatedly shown s.41 restrictions to be circumvented and ignored (Durham *et al.* 2016a; Smith, 2018a; Temkin *et al.* 2018; Gillen, 2019; Daly, 2021a). Meanwhile mock jury research – though outdated - has equally highlighted the prejudicial impact of this evidence on jurors (Catton, 1975; Schuller and Hastings, 2002). Consequently, whilst concerns regarding total abolition of sexual history evidence at trial may be warranted; these unremitting critiques by legal professionals are equally unhelpful in failing to recognise the complexity of this issue and various factors for consideration.

Nevertheless, since these 2017 reform proposals, there has been considerable theorisation about alternative amendments to the s.41 provisions. Whilst the MOJ (2017) report concluded that s.41 was operating effectively, feminist critics have continued to argue that urgent legislative reform is vital to tighten current restrictions and encourage reporting (McGlynn,

2017; Smith, 2018a; Daly, 2021a). McGlynn (2017) argued that the similarity exception under s.41(3)(c) be removed, or failing this, the requirement for unusual or distinctive behaviour to be reinstated. Even in the absence of wholesale reform, she concluded that amendments could be made to current restrictions to enhance vigilance and improve clarity and practical implementation. Bhola-Dare and Fletcher (2020) similarly concluded that stricter provisions to effectively balance the scales between complainant protection and right to fair trial was favourable, but failing this stricter implementation, clarity of the legislation was essential.

Green (2018) however, proposed that removal of the similarity exception is unnecessary, instead favouring procedural, rather than legislative changes. She asserted that s.41 provisions have succeeded in striking an appropriate balance between competing interests, and argued that procedural focus on the implementation of s.41 and focus upon addressing myths and stereotypes, would be more effective than legislative reform to improve the treatment of complainants (Green, 2018). Corker Binning Chambers (2017) similarly mooted that is procedural rather than legislative change, which is needed, asserting that s.41 provisions have provided a strict gateway of admissibility, so “it is the gatekeeper and not the gate that requires further scrutiny.”

Nevertheless, whilst in agreeance that the procedural implementation, as opposed to content of legislative gateways that has given rise to confusion and uncertainty; Hargreaves (2020) of Carmelite Chambers asserted that reforms are needed to reintroduce clarity into the law. Hoyano (2019) also highlighted a good case for redrafting the current legislation within its current scope defined by case law, to improve clarity and remove the current complexity that makes the law so difficult to implement.

In acknowledging this complexity in s.41’s wording, Stark (2017) proposed that s.41(2)(b) be brought to the forefront of s.41 legislation, in place of the current gateways approach. The central aspect of the legislative question would become whether “refusal of leave [to include sexual history] 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." This would refocus the current legislation towards "flexible indicators of relevance and probative value," (p.7) leaving the gateways as considerations rather than core assessors. Stark (2017) argued that this flexibility, rather than the Harman approach, is the most sensible way forwards. However, whilst Thomason (2018) commended this approach as removing some of the complexity from s.41, he highlighted that it limits the inclusion of sexual history evidence to only contextual evidence, rather than where it is *directly* relevant to an issue.

Brewis and Jackson (2020) thereby built upon Stark's proposal, drawing upon rape shield provisions from other jurisdictions, to propose a combined admissibility framework of bad character and sexual history evidence. This model, they argued, retains the high threshold for admissibility developed under s.41, but moves away from the tightly drawn gateways approach towards a more straightforward model of admissibility.

Alternatively, Marsh and Dein (2021) proposed a new approach to s.41 based on an 'interests of justice' model used for hearsay provisions under s.114 Criminal Justice Act (2003). This contrasts to Stark's (2017) proposal, favouring a positive interests of justice requirement, rather than the negative unsafe conviction approach of s.41(2)(b). However, this approach may be criticised as re-introducing judicial discretion into the law, and thereby seemingly stepping back towards the highly critiqued s.2 approach.

Finally, Harriett Harman leading a cross-party coalition of MPs, reignited parliamentary calls for reform in 2018, suggesting a more modest package of reform proposals, than those in the Prisons and Courts Bill (2016-17). The proposals were presented within the Police, Crime, Sentencing and Courts Bill (2020) to:

- Prohibit evidence of a complainant's sexual activity with anyone other than the defendant as evidence to show consent
- Ensure that the probative value of sexual history evidence is not outweighed by the danger of prejudice
- Re-define "issue of consent" and remove this as a reason for the inclusion of sexual history evidence

- Ban applications being made immediately before trial
- Give complainants the right of representation, with legal aid, to oppose any application to admit s.41 material about them

These proposals seemingly represent a more victim-centric approach to legislative reform of sexual history provisions, than those discussed within the literature to date. These reform proposals acknowledge findings of academic research, which has continually shown s.41 to be ineffective, unclear and ultimately failing to effectively stem the flow of sexual history evidence from the courts (Durham *et al.* 2016a; McGlynn, 2017; Smith, 2018a).

In particular, proposals for independent legal representation for sexual history applications is welcomed and is distinct from above reform proposals in the literature as it encourages a victim-centric and victim supportive approach to justice. This proposal was endorsed by findings of the Fawcett Society (2018) based on research with ISVAs, and seemingly rebalances the scales towards a preservation of the complainant's interests and wellbeing. Such an approach has already been implemented in the Irish context under s.34 *Sex Offenders Act (2001)*, with notable success despite some implementation issues (Iliadis, 2020). Further research examining the benefits of this approach in the English and Welsh context would be extremely valuable in informing reform debates.

Nevertheless, such amendments to the law on sexual history have since been removed from the bill and will therefore not be enacted under this provision. Instead, in the end-to-end rape review (2020: 48), the government have committed to asking the Law Commission to examine current "law, guidance and practice" relating to evidence in serious sexual offences cases, including the use of sexual history evidence. Harman (2021) responded in stating that the Law Commission should sit on this matter with an independent reference group, and a time limit should exist to undertake such an investigation. However, outcomes of this investigation remain to be seen.

Yet, taken together, discussions in the current section have highlighted the ongoing and wide-ranging debate about how to best reform (or not) the current s.41 provisions. Yet, whilst

44.74% of respondent barristers in Hoyano's (2019) large-scale research agreed that for some form of amendment or reform to s.41 is necessary, there remains a distinct lack of agreement in regards to best practice and no such reforms have yet been implemented. The current thesis argues that insight into how jurors interpret and rely upon sexual history evidence to inform verdict, is vital to knowing how to direct these reform efforts.

3.8 Jurors and Sexual History Evidence

Against the backdrop of legislative reform and tightening of restrictions to sexual history evidence, there has been very little direct investigation as to how this evidence impacts upon jurors and their judgements of the case. Yet, as the ultimate arbitrators of verdict, it may be argued that the effect of legislative reform is limited without this vital knowledge of how sexual history is discussed and interpreted by jurors in coming to a final verdict. The current study seeks to fill this knowledge gap, providing the first empirical insight into juror deliberations regarding sexual history in England and Wales.

It has previously been observed that the inclusion of sexual history evidence correlates to an increased chance of acquittal (Kelly *et al.* 2006). However, the extent and way in which sexual history evidence impacts upon deliberations and assessment of the evidence, remains largely unknown. Only two studies (Catton, 1975; Schuller and Hastings, 2002), conducted in Canada and the United States respectively, have ever attempted to assess the impact of sexual history evidence upon jurors' judgements, since the widespread implementation of rape shield legislation from the 1970s onwards.

In Schuller and Hastings' (2002) study, 169 undergraduate participants listened to an audiotape of a sexual assault trial. The level of sexual history between complainant and defendant was systemically varied, from sexual intercourse to kissing/petting and none in the control study. Participants returned an individual verdict of guilty or not guilty. The results demonstrated that participant 'jurors' tended to view the complainant as less credible, more blameworthy and more likely to have consented whereby sexual history evidence had been

included. This attribution of blame was greater in sexual intercourse variations, than kissing/petting variations and therefore supported Monson, Byrd and Langhinrichsen-Rohling (1996) hypothesis that sexual history evidence is most damaging where sexual intercourse has occurred.

Yet, whilst sexual history evidence dramatically impacted upon juror judgements and perceptions of the complainant, it did not have any significant effect on judgements of the defendant or his belief in consent (Schuller and Hastings, 2002). This demonstrates that reliance on sexual history evidence was used in an inappropriate manner to place judgement on the complainant and not utilised in its legal capacity as a means to assess to actions of the defendant. Moreover, where judicial limiting instructions were introduced to direct the jury not to use sexual history to place judgement on the complainant, these were deemed ineffective (Schuller and Hastings, 2002).

Whilst Schuller and Hastings' (2002) study may be criticised for its artificiality of task, homogenous group of participants and lack of a deliberation exercise; the trends found in this study indicate important implications for the inclusion of sexual history at trial. It highlights the potential prejudicial impact of sexual history evidence on jurors and arguably demonstrates the necessity for robust restrictions.

Catton's (1975) earlier study was more perfunctory in its analysis, having been conducted before the invocation of formal rape shield legislation in Canada. 60 simulated jurors read the facts of a hypothetical case (approximately 300 words) and were then asked questions regarding their opinions. In total five separate case conditions were formulated, one of which being a control with no sexual history evidence, whilst in the remaining four, the complainant's answers were varied during her cross-examination on her sexual history with named third party men. Participants were asked to give a) a verdict, b) a sentence and were then told the defendant in question was sentenced to 11 years imprisonment, being a typical rape sentence. Following this, 'jurors' were asked to c) provide their feelings on the justness of this outcome.

Ultimately, the results showed that the inclusion of sexual history evidence, decreased perception of the defendant's guilt amongst jurors. Moreover, where the complainant admitted that the sexual history occurred, this further decreased perceptions of the defendant's guilt.

Both Schuller and Hastings' (2002) and Catton's (1975) studies demonstrated that the character and credibility of the complainant was a key operative factor in jurors' determination of guilt where sexual history was included. Whilst the artificiality and perfunctory execution of these studies may be criticised, the findings present significant and pertinent material to assess how and why to govern sexual history evidence at trial. The current study seeks to build on these findings by providing an up-to-date, jurisdiction specific exploration of sexual history evidence in England and Wales, which examines the deliberative process as well as individual verdict preferences.

3.9 Chapter Summary

This chapter has scrutinised the use of sexual history evidence at trial in England and Wales and situated key debates regarding continued reliance upon this evidence. It outlined critiques relating to the frequent irrelevance of this evidence as a marker of consent, potential detrimental impact of this evidence on the complainant and the potential prejudicial impact on jurors, through the so-called twin myths. Yet, whilst such critiques have broadly called for tighter restrictions or more robust application of current restrictions; these are equally met by a large body of dissenting voices who call for greater flexibility in restrictions to continue to ensure a fair trial for the defendant.

Thus, whilst calls for reform have been widespread, this chapter has emphasised lack of practical agreement amongst commentators. In scrutinising such debates however, the chapter outlined chronological advancements in the legal response to sexual history evidence at trial and scrutinised the performance and effectiveness of current s.41 provisions. Ultimately, it highlighted ongoing inadequacies with current s.41 provisions and outlined proposals to reform these restrictions. In doing so, this chapter informed background literature

for the overarching study aim of trying to assess the impact of sexual history evidence on jurors, and full this fundamental knowledge gap.

Chapter Four: Methodology

4.1 Aims and Objectives

This thesis examines how the inclusion of sexual history evidence in rape trials impacts on [mock] juror judgements and narratives themes advanced in deliberations. In light of this major gap in the knowledge base regarding *how* jurors interpret such evidence, together with evidence that has shown frequent oversight of current s.41 restrictions by legal counsel, the research objectives were to:

1. Determine whether/how the inclusion of sexual history evidence at trial quantifiably impacts upon mock jurors' perceptions of witnesses and final verdicts
    a. To analyse whether these perceptions are influenced by different forms of sexual history evidence
    b. To establish the interplay, if any, between sexual history evidence and other rape myths, for example demeanour or the level of consistency in the complainant's account
2. Examine whether/how mock jurors discuss the potential relevance of sexual history evidence in their deliberations.
3. Establish whether/how the inclusion of sexual history evidence at trial impacts upon mock juror perceptions of witness credibility within deliberations

All methodological decisions were rooted in achieving these objectives, whilst ensuring feasibility and adherence to the researcher's theoretical perspective. The following section begins by outlining the epistemological and ontological underpinnings of the research, followed by an overview of mock jury simulations as the chosen method. The remainder of the chapter is divided into each phase of methodological design, outlining the existing literature on this and then describing the methodological approach taken in the current research. The chapter concludes by highlighting ethical considerations and the analytical strategies used to interpret the data collected. Again, it must be noted that the research was conducted entirely online, as a direct result of the Covid-19 pandemic and associated lockdowns.

4.2 Theoretical Framework

The current project is underpinned by a critical realist ontology and epistemology, with an overarching radical feminist influence. Whilst the feminist influence seeks to establish rape – a crime disproportionately committed against women and girls (ONS, 2018) – as a result of structural inequality within society (Hagemann-White, Kelly and Meysen, 2019), critical realism ties into this by asserting that our understanding of the social world stems from our own perspectives, experiences and construction of knowledge (Baskhar, 1975). Whilst not one, single unified theory (Archer *et al.* 2016), critical realism represents an alternative paradigm to more rigid, traditional positivist and interpretivist/constructivist philosophical standpoints.

Positivism fundamentally assumes that an objective reality exists independently of the perceptions of those who observe it (Bachman and Schutt, 2010). Positivist research thus presupposed that we may observe and measure stable social realities, entirely objectively and without interfering with the phenomena that is being studied (Davison, 1998), so long as these empirical observations are conducted 'neutrally' (Gill, 2000). As such, positivism has become widely rejected and critiqued by many social researchers, who submit that it represents a vast oversimplification of social contexts (Bachman and Schutt, 2010; Prasad, 2018). Indeed, the premise that relationships between social phenomena can be observed objectively and without prejudice, fails to properly understand the complex dynamics of social structures or the inevitable impact of the researcher's own theoretical lens and bias, upon the research findings (Davison, 1998; Bachman and Schutt, 2010; Prasad, 2018). Smart (1977) theorised that positivism lies fundamentally at odds with feminist criminology as it simply reflects oversimplified, androcentric perspectives that fail to deconstruct inherent power relations such as gender, embedded with social contexts (Naffine, 1987; Mason and Stubbs, 2014). The intrinsic feminist nature of the current study is therefore discordant to the positivist assertation that research can produce an objective and universal truth.

Conversely, interpretivism (also known as constructivism) supposes that reality is a wholly socially constructed concept and therefore suggests that different stakeholders construct their beliefs in different ways (Bachman and Schutt, 2010). Interpretivism favours qualitative data to examine more holistically, people and their social behaviour (McLaughlin, 2014). The goal of interpretivist researchers, being to understand what meanings different people attach to reality. The key weakness of interpretivism however, emanates from the notion that there is no right or wrong as everyone's truth is constructed, and each person's construction is deemed equally valid. This lies at odds with the feminist foundation of the current study as for example, the notion that women should be equal to men becomes both valid and invalid depending on who's construction of this supposition is being measured.

Ultimately, the current study favours critical realism, which sits between traditional positivist and interpretivist paradigms. In doing so, the study endorses some aspects of positivism such as the controlled nature of the experimental design, whilst also acknowledging interpretivist ideas such as differing social constructions, to examine juror deliberations holistically.

4.2.1 Critical Realism

Critical realism does not constitute one unitary framework, set of beliefs or methodology, but instead represents a broad alliance of assumptions and investigations to inform empirical research. Originally developed by philosopher Roy Baskhar (1975) and popularised in the 1980s, critical realism has become a leading theoretical framework within social science (Archer *et al.* 2016). Having emerged out of "positivist/constructivist 'paradigm wars'" (Fletcher, 2017: 181) critical realism combines components of both traditional approaches, whilst representing an alternative to each (Denzin and Lincoln, 2018; Archer *et al.* 2016). It combines realist ontology - the theory of the nature of reality (Oppong, 2014) – with an interpretive epistemology – the study of knowledge and justified belief (Steup, 2005; Archer *et al.* 1998). However importantly, it deviates from both positivism and constructivism in

submitting that ontology is not reducible to epistemology, as human knowledge only captures a small aspect of a much vaster, deeper reality (Fletcher, 2017).

Ontological realism is central to critical realist suppositions, which assert that considerable aspects of reality exist and operate independently of our own knowledge and awareness of this (Archer *et al.* 2016). Whist positivism suggests that there is an objective reality that we can empirically measure (Saunders, Lewis and Thornhill, 2019), critical realism asserts that reality is stratified; made up of three primary layers (the real, the actual and the empirical[5]), of which only the empirical is observable and measurable (Baskhar, 1975). Whilst not denying that a 'real' and objective social world exists, and that researchers may attempt to understand this using theory; critical realists highlight that our knowledge of the world is always relative to who we are and how we acquire understanding (Sorrell, 2018).

Nevertheless despite assuming that research judgements are relative, critical realism deviates from interpretivism in that it acknowledges that some models or theories of reality are inevitably more or less plausible/truth-like than others (Danermark *et al.* 2005; Archer *et al.* 2016). These theories help us to get closer to accessing reality, by identifying causal mechanisms within the unobservable and immeasurable aspects of the social world which interplay with the empirical (Fletcher, 2017). This examination and causal analysis can be used by critical realists to analyse complex social problems and suggest solutions for social change (Fletcher, 2017). For example, power relations and imbalances are not directly observable however these can be inferred from their effects within the social world such as class conflict, racial inequalities and exploitation (Frauley and Pearce, 2007). The current

[5] Critical realists assert that the real is comprised of underlying mechanisms and structures that we cannot observe but are responsible for creating observable phenomena e.g. gravity. The actual, they suggest constitutes observable events, which are caused by mechanisms within the real e.g. an object falling at a certain rate, to show the existence of gravity. Finally, the empirical is an observable experience e.g. the position of the researcher who observes objects falling and speculates about the existence of gravity (Foster, 2013).

study seeks to explore how manifestations of gender bias, rape myths and stereotypes within the 'actual' can be explored through the study of what is said during mock juror deliberations.

The epistemological underpinnings of critical realism correspond to an interpretivist paradigm which acknowledges the impact of the researcher upon the research findings. Unlike positivism, which suggests that the social world can be measured neutrally and objectively (Corbetta, 2011), critical realism concedes that knowledge of reality is inevitably always historically, socially and culturally situated according the position of the researcher (Archer *et al.* 2016). Critical realists however, defend and embrace this use of emotionality in research (Lawson, 2003; Archer *et al*. 2016), suggesting that no one truth exists outside the scope and context of how we perceive our world (Archer *et al.* 2016). It asserts that knowledge exists from various standpoints according to various influences and is always constrained and transformed by human activity (Gorski, 2013; Archer *et al.* 2016). This standpoint incidentally, is mirrored within feminist epistemologies which have, for many years, recognised the existence of emotion in research to achieve a truly reflexive research process (Wilcock and Quaid, 2019).

4.2.2 Feminist Influence

As critical realism is a metatheory, rather than a comprehensive scientific philosophy, it is compatible with a number of further substantive theoretical positions, one of which being feminism (New, 1998; Frauley and Pearce, 2007). Alongside critical realism therefore, this project is also intrinsically influenced by feminism, as women and girls remain vastly disproportionate complainants of sexual violence (ONS, 2018) and are more likely to engage in CJS processes following victimisation (Walker *et al.* 2021). Moreover, sexual history evidence in particular, as discussed in Chapter Three, tends to be raised at trial in consonance with stereotypical notions of appropriate femininity (see Phipps, 2009) and thereby epitomizes the androcentric bias that feminist jurisprudence seeks to challenge (Hesse-Biber, 2014). Whilst feminism has developed incrementally into multiple different strands, in general all

feminist theory is united in its concern of basic structures and ideologies that function to oppress women in society, whilst striving for social change (Wesmarland and Bows, 2018).

The data in this project was collected using radical feminism as a guiding theoretical framework, alongside critical realism. Radical feminism submits that violence against women arises as a result of the patriarchal gender order, whereby constructions of gender and sexuality within broader systems of male power, subordinate women and legitimise male control and violence (Orr, 2007; Whisnant, 2017). Rather than considering rape as individual, personal violations; radical feminists view rape as political, being a cultural and systematic enforcement of patriarchal gender roles and a product of a larger rape culture which condones and excuses male violence (McPhail, 2016). Section 2.2 outlined markers of this rape culture, whilst Section 3.6 further established adherence to this embedded patriarchal gender order in which sexual history evidence is regularly introduced at trial according to normative standards of 'appropriate' femininity.

When considering feminist research methodology, this translates to an inherent commitment to breaking down power imbalances between the researcher and researched through promoting processes of reflexivity within the research process, whilst also championing qualitative methods (Smart, 2009; Mason and Stubbs, 2014). Again, this corresponds to the current project design, which gathers extensive qualitative data, whilst according the deliberative power to participants.

4.3 Method: Mock Jury Simulations

Mock jury simulations were the chosen method in the current study, to produce rich, qualitative data which captured the complexity of the research questions. Indeed, simulation research enables insight into not only which verdicts jurors come to, but importantly '*why?'* and '*how?'* they reach these verdicts, and *'what?'* evidence is held to be of most value when making such decisions. This befits the study's aims of isolating sexual history evidence to examine what

effect this has upon the content and dynamic of deliberations, in a context whereby research with real juries is prohibited under s.8 *Contempt of Court Act (1981)*.

Moreover, this qualitative methodology accords with the project's underlying critical realist epistemology, which champions qualitative datasets to analyse complex social problems and the interplays between various social factors and the observable social world. Whilst numerous other qualitative methodologies were available such as surveys, interviews, and court observations; mock jury simulations were deemed most compatible with the current project's aim of gathering first-hand empirical data regarding the impact of sexual history evidence on jurors. These simulations were also buttressed by three additional quantitative questionnaires, to more objectively assess the impact of sexual history evidence on participant jurors, as shown in Figure 4.1. This range of approaches to data collection, provided extensive data from which to assess the project's aims and objectives, and are discussed in more detail in Section 4.6.

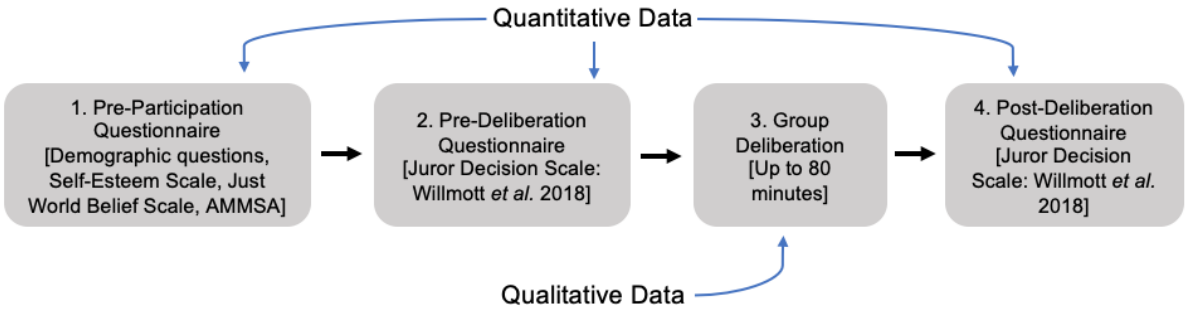

Figure 4.1: Aspects of Data Collection in the Current Study

Yet, before considering means of data collection, it is crucial to first outline the various stages of development required for the mock jury methodological design. Notably, the quality and standard of jury simulation research can vary considerably based on the numerous stages of development, which are outlined by Figure 4.2.

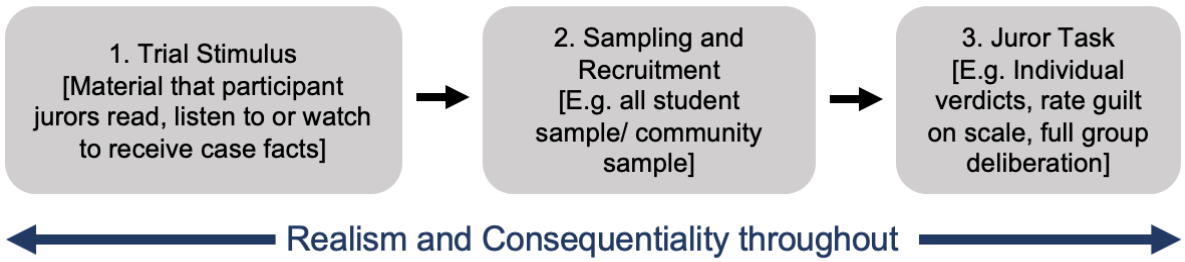

Figure 4.2: Stages of Developing a Mock Jury Simulation Study

The remainder of the chapter will be divided according to each of these stages of methodological development; first outlining discussions from the literature and lessons from previous jury simulation research, before then describing how each stage was developed in practice as part of the current research design.

4.4 Trial Stimulus

Trial stimulus lies at the heart of a mock jury simulation as the core trial material that participants read, listen to or watch before being asked to return a group or individual verdict (Finch and Munro, 2008). Many jury simulations to date however, have been characterised by a relatively impoverished trial stimulus concurrent with a lack of deliberative exercise and have therefore been heavily criticised for their artificiality, lack of realism and low ecological validity (Keller and Wiener, 2011; Wiener *et al.* 2011; Bornstein *et al.* 2017).

Trial stimuli can range from short written overviews of a crime scenario, written trial scripts [based on real or fictional trials], audio-recordings, video-recordings or even live re-enactments of trial (Finch and Munro, 2008). Moreover, the setting of trial stimulus may vary significantly from classrooms, mock court rooms or even real courtrooms, thus reflecting varying levels of artificiality of task to participants, who may or may not take the task seriously as a result (Bornstein, 1999).

The impact that these differing stimuli may have upon a study's findings is almost impossible to isolate and measure, due to the variety of interchangeable factors in a mock jury exercise

(Bornstein, 1999). However, it has become increasingly recognised that the more detailed and engaging a trial stimulus, the greater the ability of participants to suspend disbelief and engage more deeply with the deliberations (Finch and Munro, 2008). For example, allowing jurors to observe non-verbal behaviour of parties within a stimulus has been praised as providing a key information source and greater realism and complexity of task (Lieberman and Sales, 1997; Finch and Munro, 2008).

Nevertheless, some aspects of trial stimulus remain contentious. For example, Finch and Munro (2008) advocated live re-enactments of trial, arguing that a video-recorded stimulus may replicate television and create a distance between participants and the stimulus. However, a video-recorded stimulus ensures a standardisation of performance and therefore may be considered favourable to achieve a controlled experimental design (Herriott, 2022b). Moreover, some practical limitations of a trial stimulus are arguably impossible to overcome. For example, stimuli are typically significantly abbreviated with the mundane realities of delays, unconstrained waiting periods and lengthy deliberations, not replicated (Munro, 2018; Leverick, 2020). This is necessary to limit participant time commitment, however it inevitably represents a deviation from the task of real jurors and may be critiqued.

Ultimately however, Finch and Munro (2008) asserted that a realistic and engaging trial stimulus is essential to achieve high confidence in a simulation study's findings. This increases both the verisimilitude of the study and seriousness of task accorded by participant jurors (Ellison and Munro, 2010b). Consequently, deliberate measures were taken in the current research design to ensure that the trial stimulus closely represented the dynamics of a 'real' trial as far as practicable, within the boundaries of an experimental design and in line with time and cost constraints. As such, a 60-minute video-recorded trial was developed, based on real case facts, with roles acted out by student actors in a moot court room, as explored below.

4.4.1 Developing the Trial Stimulus

Creating the trial stimulus for the current study required multiple stages of development which are outlined by Figure 4.3:

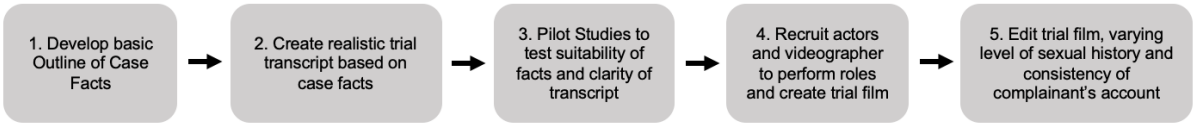

Figure 4.3: Stages of Developing the Trial Stimulus

4.4.1.1. Developing Case Facts

The case facts for the trial stimulus were developed using Court of Appeal judgements to find real case facts involving s.41 applications. These were accessed using Lexis Library, with 'S.41,' 'Rape' and 'Youth Justice and Criminal Evidence Act' being key search terms used to obtain appropriate trial scenarios. A table of all search results was created, and each judgement systematically analysed in order to find one that most fitted the study's aims.

The clear majority of relevant judgements involved an acquaintance rape scenario, and this was also deemed as most suited to the experimental design, which sought to examine sexual history evidence with the accused and varied the level of sexual history between scenarios. It was also determined that whilst many of the s.41 appeals revolved around nightclub or party situations, often in the early hours of the morning, this type of case was not suited to the current research design due to clear separate issues of intoxication by alcohol or drugs. These issues are known to endorse further myths and stereotypes and therefore held the potential to distract participant attention away from the sexual history matter being studied. Ultimately, the case of *R v Andrade* (2015 EWCA Crim 1722)[6] was selected through this systematic narrowing as a basis for the case facts, although some details adapted to suit the current research aims.

[6] Not the well-known trial of Frances Andrade

The basic facts of the scenario involved a daytime barbeque situation[7], attended by the complainant, defendant, and their friendship group of college aged individuals. The alleged rape took place in the upstairs bathroom of the property, with the complainant coming out of the bathroom to then come across the defendant standing on the landing area. It is alleged that there was a short conversation between the two, followed by sexual intercourse in the bathroom, ending when the defendant's phone rang, causing him to leave the bathroom and allegedly explain that he would meet the complainant downstairs.

It was the Crown's case that the intercourse was entirely non-consensual, with the complainant making her non-consent clear by crying and telling the defendant to stop. The Crown alleged that the defendant ignored these protestations and proceeded to rape the complainant, fully aware of her non-consent. The defendant however, admitted that sexual intercourse had occurred, but maintained that all contact was consensual throughout, and this approach was taken by the defence.

These facts remained constant throughout each trial scenario, however small adjustments were made to the level and type of sexual history evidence included, and also to the perceived credibility of the complainant (Table 4.1). This ability to adjust and control experimental variables is recognised as a key merit of the jury simulation methods (Willmott, 2017) as it offers insight into *how* variables may or may not impact upon outcomes (Manzo, 2019).

[7] In R v Andrade (2015) the case began in a pub, however this detail was adapted to avoid contemporaneous focus on intoxication

Table 4.1: Scenario Design

	No Inconsistency in the Complainant's Account	Minor Inconsistency in the Complainant's Account	Minor Inconsistency in the Complainant's Account and No Real Rape Reaction
Previous Sexual Intercourse with the Defendant	Scenario 1	Scenario 2	Scenario 3
Previous 'Sexting' with the 'Defendant'	Scenario 4	Scenario 5	Scenario 6
Control [No Sexual History Evidence Included]	Scenario 7	Scenario 8	Scenario 9

The level and nature of sexual history evidence was adjusted from previous sexual intercourse (s.41(3)(c)), to 'sexting' (s.41(5)), to a control scenario with no sexual history. Whilst S.41 makes no distinction between different forms of sexual history, and simply stipulates that all 'sexual behaviour' is restricted under its provisions, there has been no UK research to date, that has examined whether a practical differentiation does exist amongst jurors. Schuller and Hastings (2002) however, found an incremental increase in complainant blameworthiness between the control scenario, kissing/petting condition, and sexual intercourse condition. Thereby, the current research sought to examine whether a similar such impact continues to exist. Moreover, as sexting has become a rapidly emerging phenomenon (Krishna, 2019), which is increasingly relevant to rape trials especially in light on new disclosure rules (Section 1.3.3), it was deemed important to increase understanding of how such activity may be viewed by jurors.

Alongside variation of sexual history however, the current study also varied the level of consistency in the complainant's account. This went from no inconsistency to a minor inconsistency regarding how much she spoke to the defendant at the barbeque, to this minor inconsistency *and* the removal of her supposed real rape reaction. In this third condition, rather than running from the house immediately to disclose to a friend whilst visibly crying, the complainant reportedly returned to the barbeque for 30 minutes and was quiet before then ringing a friend to disclose.

The premise of adapting this level of consistency concurrently with the level of sexual history, was implemented on the basis that observational research has shown that sexual history evidence is routinely embedded in wider discussion and ideals of female credibility. Indeed, historically previous sexual history was considered pivotal to determining the complainant's 'morally credibility' (McColgan, 1996; Farrell, 2017) and theorisation of the twin-myths continues to substantiate the association between sexual history evidence and complainant credibility. At trial, this association is often perpetuated, with sexual history evidence continuing to be introduced as a means to undermine the complainant's credibility (Smith, 2018a; Daly, 2021a). Thus, in a context whereby women's morality and credibility continue to be presented as being inherently linked to their sexual behaviour (Smith, 2018a), the current study sought to measure not only how sexual history impacts upon deliberation, but importantly how discussion of sexual history changes whereby the perceived credibility of the complainant is put into question.

4.3.1.2 Developing the Transcript

Using basic case facts from the appellate judgement of *R v Andrade* (2015 EWCA Crim 1722), a full transcript of the trial was developed using 11 genuine Crown Court sexual offences trial transcripts as authority, to ensure realistic wording and narratives that are currently used by advocates in England and Wales. These transcripts were gained during the researcher's previous court observation research, and during Smith's (2018) fieldwork. They enabled the researcher to develop a highly realistic, albeit shortened, transcript of trial as the basis of the stimulus in the study.

The trial format included opening and closing speeches by each barrister and the judge, written testimony from the host of the barbeque, and oral testimony from the complainant, defendant, officer in the case and complainant's friend to whom the initial report was made. Judicial directions specific to sexual offences were introduced in all scenarios as is typical in current sexual offences trials and deemed best practice in the Crown Court Bench Book (Judicial College, 2010). Furthermore written 'Routes to Verdict' directions were also provided

to all jurors at the beginning of deliberation, in line with 90% of judges favouring this procedure (Judicial College, 2018).

4.3.1.3 Pilot Studies

Following development of the written transcript, two pilot studies were undertaken using undergraduate criminology students, to test the clarity and initial perceptions of the case. In the first, approximately 40 students were given an outline of the case facts and asked to discuss the interpretations and verdict preference, in groups of 8-10. In the second, two[8] further students were given a full copy of the trial transcript to read in-depth and were then asked questions regarding their understanding and prioritisation of evidence. In both studies, student participants reported to have a good understanding of the case facts and immediately mentioned the potential influence of the sexual history evidence on determinations of the evidence. Whilst all students suggested that this evidence played no significance to themselves,[9] they consistently suggested that members of the public might be prejudiced by such information. In both pilot studies, a key question to arise in reference to the evidence was whether the complainant was intoxicated at the time of the alleged rape. A brief sentence to identify the complainant's lack of intoxication was therefore included in the transcript, so as to prevent speculation over this within the simulations. Beyond this, the transcript was deemed appropriate for the study and therefore nothing further was changed.

4.3.1.4 Video-Recorded Stimulus

A video-recorded recreation of the trial transcript was chosen to form the trial stimulus. Thus, overcoming critiques about minimally complex and artificial stimuli seen in much previous jury simulation research (Finch and Munro, 2008; Munro, 2018), whilst still maintaining a standardisation of performance. The video-recorded stimulus enabled participant jurors to hear necessary evidence and observe the demeanour and characteristics of witnesses (Munro, 2018), replicating the task of real jurors, albeit without a live re-enactment. Whilst a

[8] Originally 5 students were recruited to do this, however there was a high drop-out rate
[9] It is of note that this had just been covered as a topic in the curriculum

live re-enactment may have represented the task of *real* jurors more closely, the video-recording also maintained the experimental design. Indeed, basic presentation of trial and demeanour of witnesses remained constant throughout all video-recordings, meaning only material relating to the manipulated variables was adjusted (Ross *et al.* 1994; Ellison and Munro, 2013).

The actors within the simulation were a mixture of undergraduate and postgraduate law, criminology, and drama students. Law students took on the roles of legal professionals and drama and criminology students, witnesses, and court usher. Whilst student actors were typically younger than most legal professionals, and thereby this held the potential to slightly detract from the realism of the study; students were chosen due to ease of access, relative low cost and inherent knowledge of the subject area. There is little evidence to suggest how this may affect the overall simulation. There is, however, evidence to suggest that the attractiveness of actors may impact upon deliberations, yet the highly controlled experimental design which utilised the same actors and same core presentation of trial across all juries, eliminated this limitation.

The final trial film, therefore, although missing the mundane realities of courtroom setting such as delays, reflected a relatively long trial stimulus lasting for approximately one hour. Moreover, trial filming took place in a realistic moot court room, and actors wore correct legal dress as shown in Figure 4.4. in order to boost realism for jurors and verisimilitude of the study.

Figure 4.4 Image of Video-Recorded Trial Stimulus

4.5 Sampling and Recruitment in Mock Jury Research

Sampling is perhaps the most contentious aspect of mock jury research, due to frequent use of wholly undergraduate student samples which are unrepresentative of the wider jury eligible population (Bornstein *et al.* 2017). While students are typically jury eligible and usually chosen as a matter of convenience due relative ease of access and low-cost (Finch and Munro, 2008; Leverick, 2020), they tend to be younger, more educated and from higher socio-economic backgrounds than the population as a whole (HESA, 2019), meaning they do not represent a typical cross-section of the population (Leverick, 2020). The extent to which this impacts upon research findings however remains debated.

Bornstein *et al.* (2017) found that in terms of rating guilt, there was no statistical difference between student and 'normal' jurors. Simon and Mahan (1971) however, suggested that student jurors are more likely to acquit, while Sealy and Cornish (1973) found precisely the opposite with students more likely to convict. Yet, Weiten and Diamond (1979) proposed that it is not necessarily attitudinal difference, but cognitive difference which creates the distinction between student and 'normal' jurors; with students typically possessing superior cognitive ability than the wider population. Bornstein (1999) addressed these concerns, collating a table of 26 previous mock jury studies and found only six of these suggested any difference between student or civilian juries. Whilst initially promising, a true meta-analysis is called for in order to comprehensively determine such effect (Wiener *et al.* 2011).

Further in the present context, rape myth acceptance scores tend to be lower amongst young people and those with higher educational levels (Willmott, 2017), meaning a student sample would likely under-estimate the extent to which rape myths impact upon juror decision-making (Leverick, 2020).

In light of this debate, Wiener *et al.* (2011) submitted that mock juror recruitment techniques must be diversified, arguing that the advent of the internet has made this possible. More recently therefore, jury simulation research has reflected more diversified samples through market research companies, various forms of advertising and mock summons to gather diverse community jurors (Ellison and Munro, 2009b; c; a; Willmott, 2017).

Nevertheless, sampling remains an inherent limitation of mock jury simulation research as it inevitably requires a self-selecting sample, meaning participants will invariably be socially engaged citizens, often with a particular interest in the topic or a disposition toward engaging in community activities (Finch and Munro, 2008; Ellison and Munro, 2013). Attention therefore must be paid to the demographic profiles of the sample in assessing findings, however the impact of juror differences on the substantive task remains unclear (Munro, 2018). Ultimately, jurors actions are not linear or predictable, but in a constant state of flux depending on divergent contexts and circumstances (Ellison and Munro, 2014). Moreover, the requirement for deliberation has been shown to mitigate against individual bias (Kaplan and Miller, 1978; Finch and Munro, 2008) and therefore, even a skewed sample arguably provides somewhat reflective insights.

4.5.1 Participant Sample

Despite the lack of agreement about the potential impact of an all-student versus community sample on research findings, the current study sought to recruit a diverse community sample to mimic the composition of a real jury as far as possible. A mixture of online recruitment and mock juror summons were used to gather a large and varied participant pool.

Online recruitment advertisements were placed on social media platforms 'Twitter' and 'Facebook,' recruitment website 'CallforParticipants,' and University student and staff bulletin boards. On social media platforms, processes of 'tagging' interest groups, posting on community pages and gaining 'retweets' represented an online form of snowball sampling (Moore, McKee and McCoughlin, 2015). Other online platforms equally offered significant reach of advertising, with relative low cost and effort (Temple and Brown, 2011).

Alongside online methods, mock juror summons (*n*=200) were sent to random addresses in the research area to mirror the process of 'real' juror recruitment, albeit without the compulsory element. In practice however, very few individuals (*n*=6) responded to these mock summons, meaning they were not a particularly beneficial recruitment strategy in the current project. Nevertheless, this method has proven fundamentally successful in other mock jury simulation projects, such as Willmott (2017). Notably however, Willmott (2017) offered financial incentives to all participants taking, perhaps accounting for the substantially increased response rate.

All forms of advertisement outlined participant eligibility criteria and instructed interested individuals to email the research email address to express their interest. Once they had registered their interest, all potential participants were sent a digital participant information sheet and given following instructions if and when they agreed to participate. In total 167 participants volunteered to take part in the study and were assigned a juror ID number. A small dropout rate *(n=16)* resulted in 151 completing the initial pre-participation questionnaire and signing up to jury deliberation slots via Eventbrite. Whilst only one formal withdrawal occurred in the study, a moderate drop-out rate was encountered (*n= 32)* due to inter alia participant illness, last-minute work commitments, internet and technology issues or simply failing to attend. The final deliberative research thus consisted of 119 participants distributed across a total of 18 mock juries.

The study utilised an entirely community based, volunteer sample, in order to overcome critiques associated with generalisability of findings. Thus, whilst the sample remained slightly skewed in some areas due to inherent difficulties associated with voluntary sampling, a generally broad and diverse participant pool was gathered (Figures 4.5- 4.12).

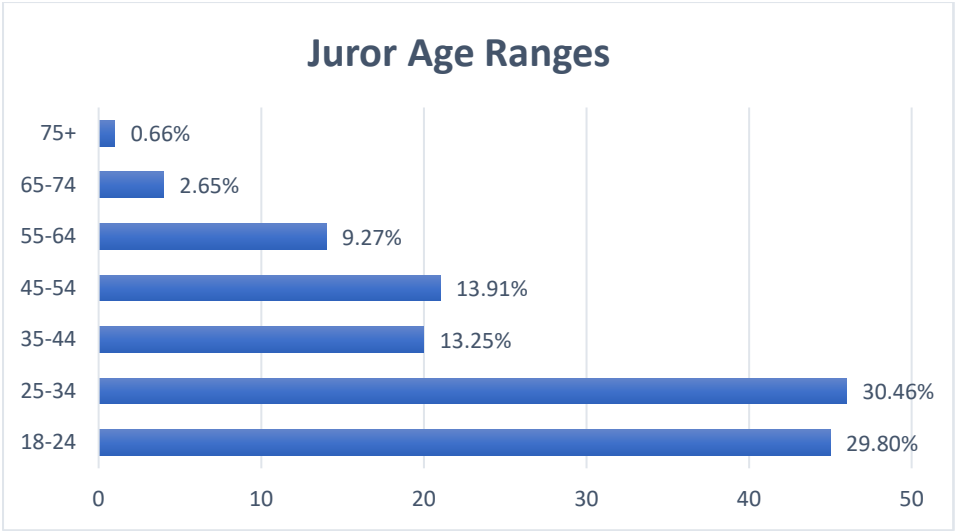

Figure 4.5: Participant Gender

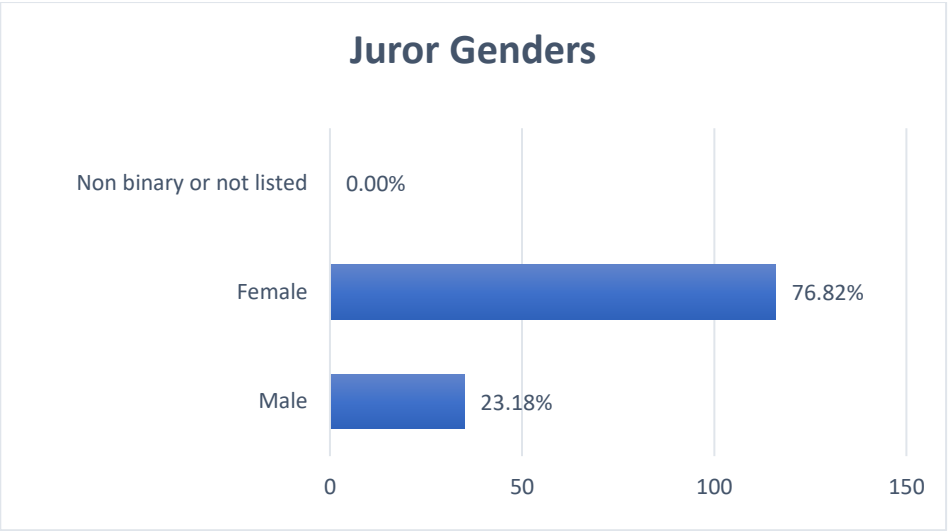

Figure 4.4 Image of Video-Recorded Trial Stimulus

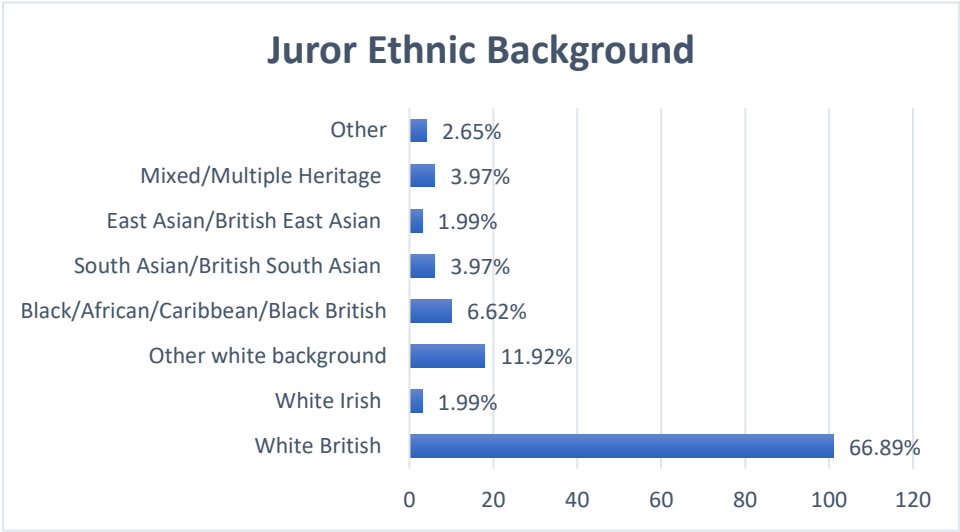

Figure 4.7: Participant Ethnic Background

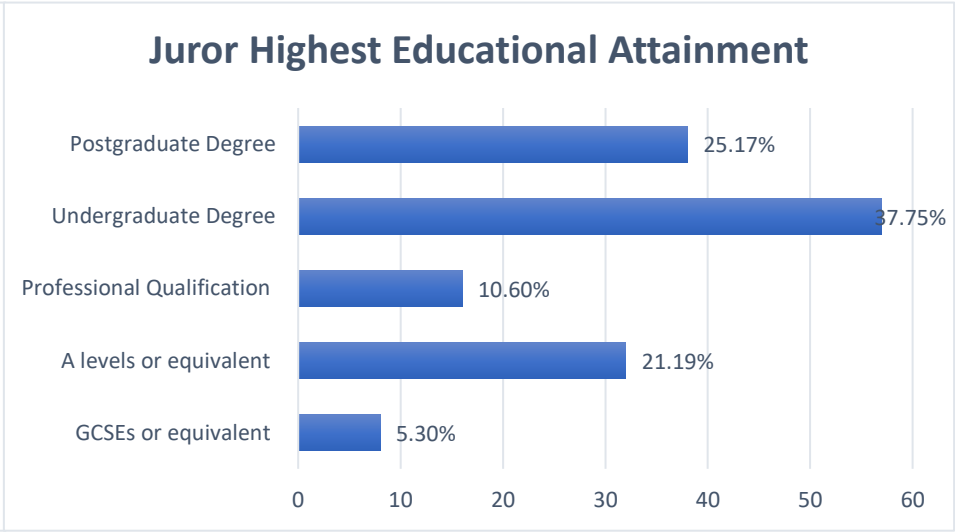

Figure 4.8: Participant Educational Attainment

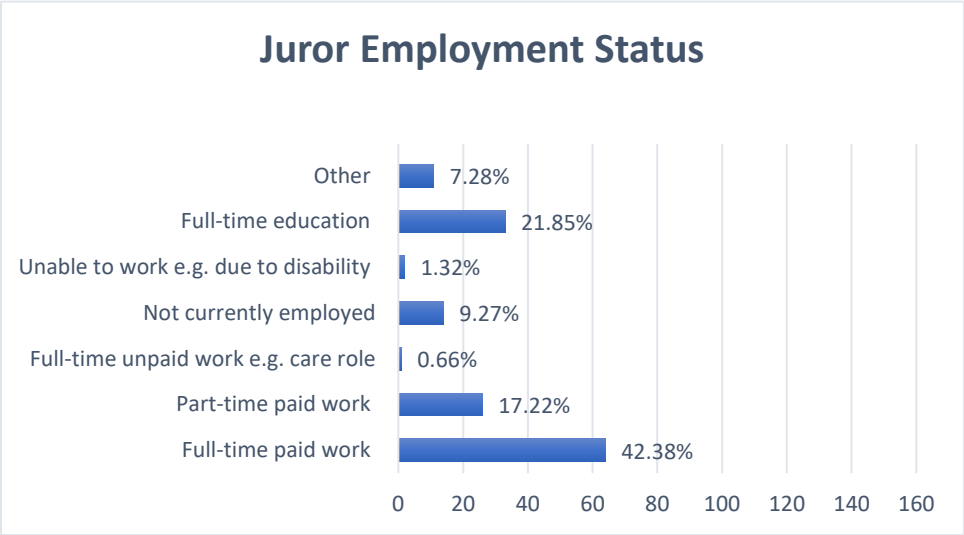

Figure 4.9: Employment Status

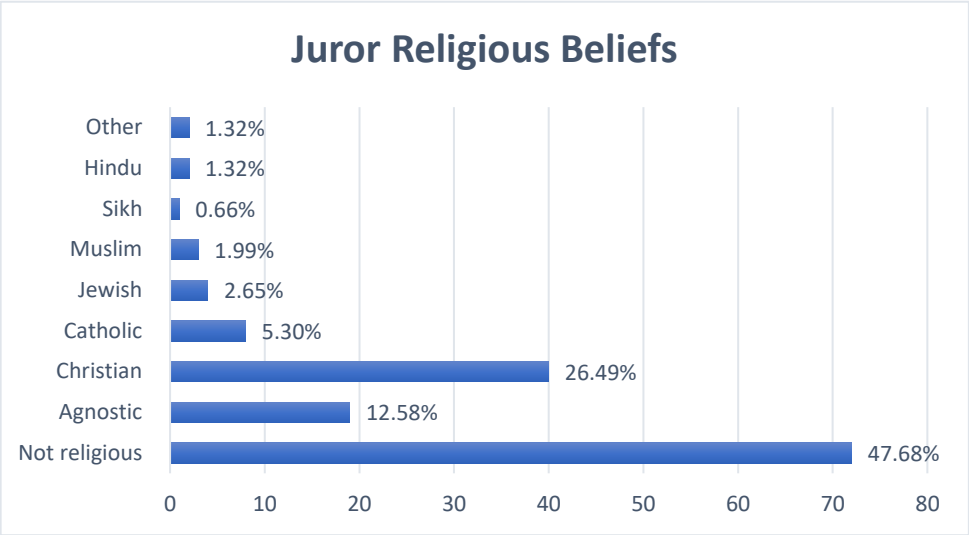

Figure 4.10: Participant Religious Beliefs

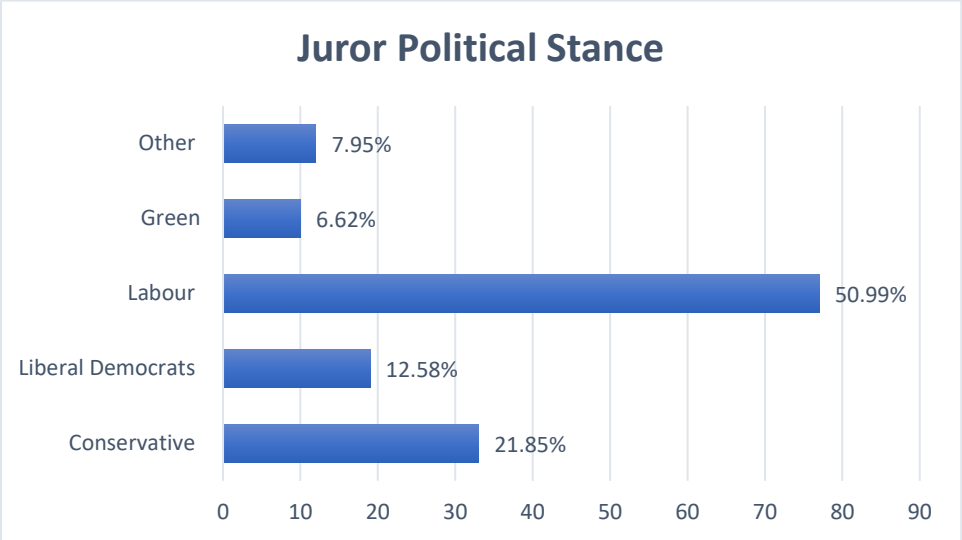

Figure 4.11: Participant Political Stance

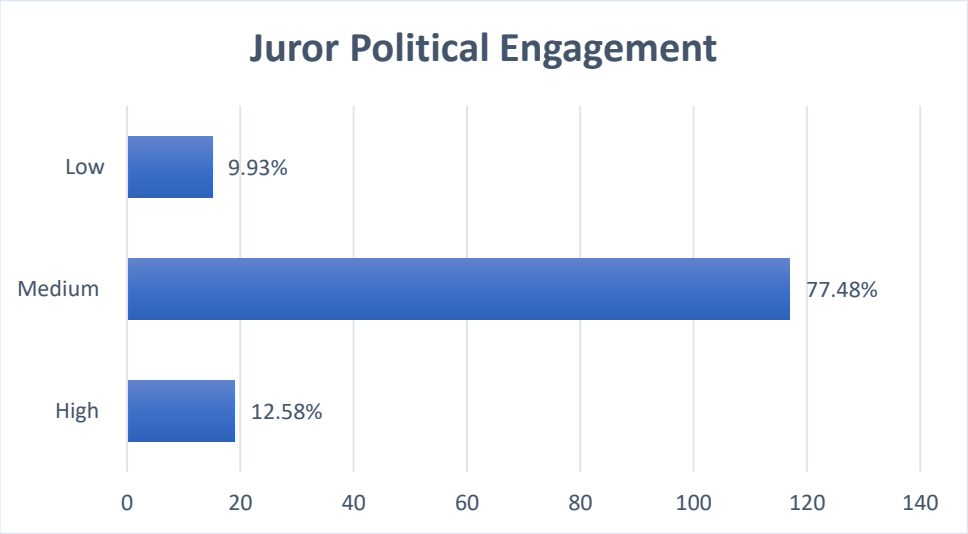

Figure 4.12: Participant Political Engagement Level

Participant employment status, ethnic background, religious views, political stance and level of political engagement all demonstrated a varied and diverse participant pool (Figures 4.7, 4.9-4.12). Yet, the most skewed demographic distribution was participant gender, with 76.8% of participants identifying as female, compared to 23.2% as male (Figure 4.5). This is perhaps due to the gendered nature of sexual violence, typically affecting women far more than men, and thereby resulting in greater interest from female volunteers. Moreover, participant ages were also slightly skewed towards younger generations (Figure 4.6). This may have been due to the online nature of the study requiring a degree of computer literacy, and much of the advertisements equally being online. Finally, jurors in the current study were typically more educated that the population as a whole, with 62.9% holding either an undergraduate or postgraduate degree, compared 42% of the wider UK population (ONS, 2017). This is likely an inherent limitation of jury research, which typically attracts more educated and socially engaged individuals.

Whilst the effects of these skewed distributions cannot be isolated or precisely measured, substantial research has shown that women, younger individuals, and more educated individuals hold lower levels of rape myth endorsement than the wider population. This perhaps accounts for the average AMMSA score of the current sample being 2.42, which is slightly lower than the 2.96 female mean average and 3.32 male mean average (Megías *et al.* 2011). As such it may be asserted that the findings of the current study, likely show lower levels of rape myth endorsement than would be expected in 'real' juries across England and Wales. Nevertheless, the study's findings remain informative in relation to the way in which jurors understand and interpret sexual history evidence, and how this impacts on deliberations.

4.6 Juror Task

The task assigned to participant jurors is the aspect of the study design in which the core research data is collected. Section 4.6.1 below outlines the juror tasks used in the current

project, whilst this section outlines insights from the literature on mock jury simulations which justified and guided these methodological choices.

Arguably, the key merit of mock jury simulations is the ability to replicate the verdict deliberation process in controlled conditions (Finch and Munro, 2008). This enables insight into the processes and substantive factors which influence deliberations, group discussion dynamics and to test jurors' understanding of evidence, factual and legal issues (Martin *et al.* 2007; Finch and Munro, 2008). This is of particular value in rape cases, as it is well established that strong opinions, stereotypes and myths often influence jury verdicts (Dinos *et al.* 2015; Willmott *et al.* 2018), and therefore understanding this influence is vital.

Nevertheless, relatively few mock jury studies to date have included a group deliberation element or even requirement for a group verdict (Finch and Munro, 2008). Instead, jurors are often required to return individual verdicts, rate guilty on a graded scale or assert differing attributions of responsibility to the complainant or defendant (Ellison and Munro, 2010b; Leverick, 2020). Whilst a cheaper and quicker alternative, justified on the basis of Kalven and Zeisel's (1966) finding that first individual juror ballots are typically indicative of final whole jury verdicts; these tasks fail to equate to the task of real jurors and can therefore be criticised for lacking verisimilitude and threatening both internal and construct validity (Bornstein *et al.* 2017; Cook and Campbell, 1979). Without a deliberation, researchers cannot be sure of which substantive factors they are measuring or whether individual jurors have correctly understood the task and/or evidence presented (Keller and Wiener, 2011; Bornstein *et al.* 2017). It is unclear how this lack of verisimilitude affects the overall research findings (Bornstein *et al.* 2017), however such drawbacks have engendered a degree of scepticism amongst policy makers and legal professionals about mock jury research, thus effectuating limited policy impact policy (Monahan and Walker, 2011).

More recently, jury researchers have recognised these shortcomings and thus sought to produce far more realistic simulations (see for example, studies by Ellison and Munro, Willmott

and Ormston *at al.*). This has enabled key insights into the processes in which collective jury engagement can confirm, challenge and potentially change individual preferences within the jury room (Ellison and Munro, 2010b). It closely reflects the task of real jurors, in which deliberation towards a unanimous decision of 'guilty' or 'not guilty' is pivotal (Devine *et al.* 2001; Ellison and Munro, 2010b). Since - particularly in rape trials - jurors often bring with them expectations and preconceptions to help them make causal sense of the events described (Devine *et al.* 2001), this insight into substantive reasoning behind final verdict is valuable, to reflect whether judgements are reached using the evidence presented or by relying on extra-legal myths and stereotypes.

Furthermore, Kaplan and Miller (1978) found that the group discussion element actually mitigates against individual juror biases and therefore the value of the deliberative exercise, especially when researching rape trials, must not be understated. Moreover, contrary to Kalven and Zeisel (1966) claim that individual initial verdict is typically representative of final group verdict, Young, Cameron and Tinsley (1999) found that in most cases deliberations were a highly significant part of the process. Ormston *et al.* (2019) equally found that jurors' views may shift during the deliberative exercise and Izzett and Leginski (1974) highlighted the potential for deliberations to lead to a Eureka type moment amongst jurors, thus becoming fundamental to case outcomes.

It is therefore suggested that a deliberative element is crucial, to provide comprehensive and holistic insight into jury decision-making processes. This allows insight into justifications and explanations of verdict decisions, as well as content analysis of group dynamics including disagreements, social interactions, opinion formulation and social desirability of key themes and narratives (Ellison and Munro, 2014). A full deliberative exercise was therefore included in the current research design, as discussed below.

4.6.1 Developing the Juror Task

Based on the literature discussed above, in the current research a full group deliberation exercise was central to the methodological design. However, this was also bolstered by three quantitative questionnaires to gain further data. The process of data collection is outlined in Figure 4.13, which encompasses each stage of data collection from participants' initial expression of interest, through to completion of the study. Each of these stages is discussed throughout the current section.

It is worth noting beforehand however, that originally the study design planned for face-to-face deliberations, but this was made impossible as a result of the Covid-19 pandemic and associated lockdowns. The methodology was therefore comprehensively re-designed to utilise online platforms, as reflected in Figure 4.13, and is the first mock jury study to do so [to the author's knowledge]. This, therefore represents an innovative approach to traditional mock jury methodology. Nevertheless, the justification for online methods is arguably substantial and potentially presents new opportunities for jury researchers, as discussed in the next section.

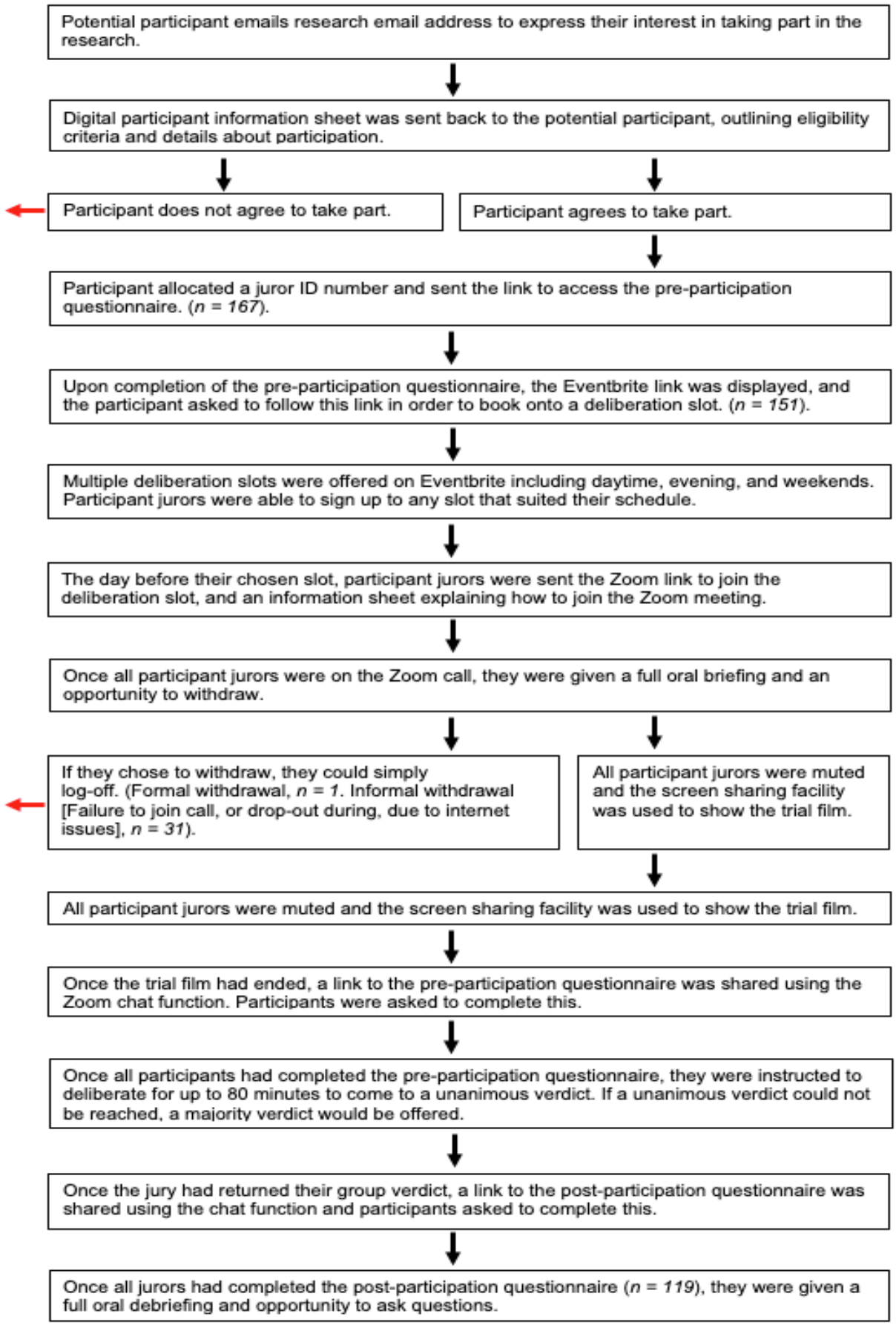

Figure 4.13: Flowchart of Data Collection Processes

4.6.2 Justifying Online Mock Jury Simulations

Before discussing stages of data collection, it is important to examine justifications and considerations associated with conducting a mock jury project online. Whilst this was done in the current study purely as a result of the pandemic, it is arguably a highly justifiable adaption to the traditional face-to-face method.

The premise of online virtual juries gained significant prominence in response to the Covid-19 pandemic, with multiple US states conducting online 'real' jury trials to minimise backlog in both civil and criminal trials (Morris, 2020; Adler, 2021). Whilst there were mixed responses towards the constitutional legitimacy of this for 'real' trials (Shammas, 2020; Biesenthal, Chung and Grode, 2019), the process of online juries proved largely effective (Morris, 2020) and therefore may be used to justify the process of online mock juries.

A similar move was mooted in the UK, however was deemed overly complex to implement for jury trials due to considerations of privacy and set-up costs (Hamilton and Flemming, 2020), however online trials were used for the Supreme Court and Tribunals system. Moreover in light of these discussions, legal organisation JUSTICE piloted online mock juries in England and Wales, using volunteer participants. Mulcahy, Rowden and Teeder (2020) provide an excellent evaluation of this pilot, presenting it as a notable success and suggesting that there is a "convincing case" to roll this out further, to process the dangerous backlog emerging as a result of the pandemic. Again, the success of this pilot scheme, may be used to justify the execution of online mock jury research.

Alongside these debates, virtual jury pools or 'cyberjuries' have been used widely and effectively within US jury research for many years (Marder, 2006). It is important to recognise that this 'jury research' is not analogous to the current jury research, but it used by prosecutors to 'test' individual case evidence on individuals, before taking this to court; however it does follow a similar format to the mock jury simulation research being discussed in this thesis. Marder (2006) commended the use of cyberjuries, suggesting these are a cheap and quick

alternative to traditional face-to-face juries, whilst maintaining the vital safeguards associated with the jury process.

In light of this growing evidence base, the use of online methodologies to facilitate mock jury simulations is arguably both justifiable and necessary. Whilst it inevitably does represent a deviation from the task of 'real' jurors, the impact of this remains unknown and is overwhelmingly complex to ascertain. Nevertheless, it is worth noting that special measures under the YJCEA (1999) and the Coronavirus Act (2020) have expanded the availability of video and audio link evidence in real court proceedings, and thereby this method of evidence delivery is not wholly different to that used in real courtrooms in England and Wales.

Additionally, whilst the multitude of different variables in mock jury simulations make it hard to ascertain the impact of this methodological change, significant literature comparing online vs face-to-face focus groups may be drawn upon to examine this impact. Online methods are becoming an increasingly popular as technology has improved and have been widely praised. Kite and Phongsavan (2017) found that participants in online focus groups were actively engaged and attentive, with similar interaction between participants as would be expected in face-to-face groups. Fox *et al.* (2012) also suggested that online focus groups are 'less threatening' for participants, who can take part without having to travel to an unfamiliar location or meet other participants face-to-face.

This increases a sense of anonymity amongst participants (Archibald *et al.* 2019) and Murgado-Armenteros *et al.* (2012) suggest that in turn, this increases honesty and willingness to offer opinions, even where these are controversial. Indeed, anonymity removes concerns surrounding personal ramifications of controversial opinions and therefore Fox *et al.* (2012) submit that virtual environments can in fact *enhance* disclosure by participants. This is particularly advantageous in mock jury research, as researchers can gain honest and realistic insights when researching controversial topics. Additionally, from an ethical and wellbeing perspective, online software provides the facility for individual participants to contact the

facilitator directly should there be any issues (Brüggen and Willems, 2009). This again, eases any burdens of participation for participants and encourages participants to seek support where necessary.

On the other hand however, Fern (2001) submits that online research removes non-verbal cues between participants and therefore diminishes interpersonal exchanges in online focus groups[10]. Ultimately however, Moore *et al.* (2015) in their comparison between online and face-to-face focus groups, found no evidence of interpersonal exchanges being diminished by the virtual environment. Meanwhile, Fox *et al*. (2012:546) have praised online focus groups as an "important development" in the focus group research tradition.

Moreover, practically, online simulations offer a number of benefits. Principally, these eliminate temporal and spatial barriers to sampling, increasing the research recruitment area and allowing geographically dispersed groups and those with busy schedules to engage in the research (Moore, McKee and McCoughlin, 2015; Boydell *et al*. 2014). It therefore enlarges the potential participant pool and enables flexibility for both participants and the researcher (Tates *et al*. 2009). Online simulations equally remove overhead costs and resource constraints of room-hire and refreshments, again increasing ease and accessibility to gather a larger sample. These benefits arguably remove some of the greatest challenges associated with previous mock jury research, and seemingly highlight a case for future use of this methodological approach.

Whilst there are drawbacks of online methods, such as technology difficulties, background distractions in people's homes and the inability to comprehensively verify that participants are who they say they are (Brüggen and Willems, 2009; Kite and Phongsavan, 2017); the online method boasts a wealth of benefits and enabled continuation of the current research during

[10] It must be noted that the current research only used audio functions for jurors to deliberate, due to the emotive nature of the subject area and participants taking part in their own homes. Future researchers, however, may wish to utilise audio-visual functions on video-conferencing software to enable mock jurors to observed non-verbal cues.

the Covid-19 pandemic. It equally offers future mock jury researchers more accessibility and flexibility and thereby arguably, should not be discounted as a research method even beyond the Covid-19 pandemic (Herriott, 2022a).

4.6.3 Data Collection Phase One: Pre-Participation

Once participants had agreed to participate in the research, they were each assigned a unique juror ID number to track their responses and sent a link to complete the pre-participation questionnaire. This 15-minute online questionnaire gathered demographic and attitudinal data, with embedded rape myth acceptance, self-esteem and just world belief's scales[11]. Data collected gave insight into the demographics of participants to assess how closely the sample represented that of the wider jury eligible population, while attitudinal data provided insight into the attitudes and beliefs of participants. Future analysis, beyond the remit of this thesis, will scrutinise associations between juror attitudes or characteristics, and their verdict preferences or attributions of blame.

Upon completion of the online questionnaire, a link was given to register for a 'jury slot' via Eventbrite This slot would be where participants would be shown the trial stimulus and deliberate with fellow jurors. Slots offered ranged across weekdays and weekends, daytime, and evening, in order to suit a diverse participant pool. Once registered for a slot, participants were emailed the Zoom joining link, an instruction sheet of how to join the call and a self-care sheet (discussed in Section 4.8.1).

[11] Acceptance of Modern Myths About Sexual Aggression (AMMSA) scale [Gerger *et al.* 2007]. Self-Esteem [Rosenberg Self-Esteem Scale, 1965]. Just World Beliefs [The general belief in a just world scale: Dalbert, Montada and Schmitt, 1987]

4.6.4 Data Collection Phase Two: Juror Decision Scale and Deliberative Procedure

Once on the zoom call, participants were given a full briefing regarding their participation in the study and an extended caution regarding taking part in this potentially emotive and distressing exercise, given the added pressures of social isolation, and heightened societal anxiety. An opportunity to withdraw was presented alongside an opportunity to ask questions, and the importance of participant wellbeing emphasised. Following the briefing, the trial film of one randomly selected scenario, was shown to all participants in real-time through the screen sharing facility. Following this, participants were asked to complete a second online questionnaire, pre-deliberation. The pre-deliberation questionnaire used Willmott *et al.*'s (2018) juror decision scale [JDS] to assess individual jurors' judgements of complainant and defendant believability, individual verdict and decision confidence, having received the trial evidence. A comparable post-deliberation questionnaire, with embedded JDS, was used to assess the juror decision-making journey following deliberation.

4.6.4.1 Juror Decision Scale

Willmott *et al.*'s (2018) 'Juror Decision Scale' [JDS] serves as valid empirical measure of individual juror decision-making in criminal trials. Whilst not explicitly examining rape myth acceptance amongst jurors, it provides insight into individual juror perceptions of witnesses and how these change as a result of the deliberation process.

Legally jurors should not make individual decisions without deliberation, however most writers acknowledge that there typically is a pre-deliberation verdict preference (see Kalven and Zeisel, 1966). As such, the JDS provides crucial insight into these early assessments of evidence and explores how these may change as a result of the deliberative process.

Whilst several competing theoretical models have been advanced to explain the ways in which jurors go about both individual decision formation and collective group decision-making, arguably no such theory has been as widely adopted and endorsed as Pennington and

Hastie's (1992) Story Model. This is therefore the model upon which Willmott *et al.*'s (2018) scale is based.

The story model holds the construction of a 'story' or creation of a narrative summary of the facts, as the central cognitive process within juror decision-making (Hastie, 2008). Principally, the theory asserts that when hearing competing accounts of an incident at trial, individual jurors construct differing interpretations of the narrative, and then select one such narrative as dominant before beginning deliberations (Willmott *et al.* 2018). Whilst the Story Model has been widely accepted, a lack of empirical evidence existed to verify important features of the theory. As such, Willmott *et al*.'s (2018) JDS was developed as a measure of individual juror decision-making, incorporating and testing key features of Pennington and Hastie's (1992) model.

The JDS is a 16 item self-report measure of individual juror decision-making in criminal trials, incorporating 3 subscales of decision confidence, complainant believability and defendant believability. The scale is fully validated and substantiates claims behind the story model whilst also allowing multi-dimensional analysis of individual juror interpretations of the evidence both pre and post deliberation. It was therefore used in the current study, to gain quantitative data on individual juror journeys throughout the mock jury process.

4.6.4.2 Deliberative Procedure

As discussed previously, the deliberation aspect of the research formed the centrality of the study, since this enables inference of causal connection between the independent variables (sexual history evidence and complainant credibility), and the dependant variable of deliberation content and final verdicts (Wiener *et al.* 2011). The deliberation aspect not only replicates the realities of jury service more accurately, it also enables thematic analysis of group decision-making, whereby individual opinions may be reinforced, challenged and perhaps changed, before reconciling a communal decision (Finch and Munro, 2008). Jurors were directed to deliberate towards a unanimous verdict, by the trial judge at the end of the

trial film, with deliberations lasting up to 80 minutes. This time restriction is a departure from real juries, implemented only for practicality purposes, however ample research indicates that 'real' juries often wouldn't take much longer (Ellison and Munro, 2013). In practice deliberations lasted an average of 43 minutes across the dataset. Where jurors were unable to reach a unanimous decision and approached the facilitator to request a majority verdict, they were instructed that only unanimous verdicts could be accepted and were left to deliberate for a further 10-15 minutes, before being brought back in, and advised that a majority may now be accepted. This premise of reaching a unanimous or failing that majority verdict, mirrors the task of real juries and thus increases verisimilitude.

Zoom software was chosen to facilitate the online deliberative exercise as an easy to use online technology. `participants in Archibald *et al*.'s (2019) research, typically rated zoom above other video-conferencing services. Importantly, it does not require users to download an app or setup an account, thereby minimising the level of technical proficiency required. It also enables the researcher to change participant screen names quickly and easily, to juror ID numbers, to ensure participant anonymity. This represents a substantial benefit of Zoom over other platforms, which often display participant email addresses and thereby compromise the anonymity of a study. Finally, Zoom software also provided the facility to create password protected meetings which again helped to protect the integrity and confidentiality of the research.

Each jury in the study was composed of 6-8[12] individual mock juror participants, a departure from the traditional 12 individuals seen in real juries, but a commonplace reduction across the mock jury simulation literature (e.g. Ellison and Munro). Such reduction was implemented so as to ensure greater manageability of the group within the shortened deliberation time, and to allow all jurors to contribute to the deliberation with in-depth discussion during the limited time. The significance of jury size for deliberations remains contested within the literature (Ellison

[12] And one group of 5 jurors, due to drop-out during the call.

and Munro, 2010b; Ormston *et al.* 2019), however some research suggests that groups of eight may be optimal in terms of maximising a range of substantive contributions (Ellison and Munro, 2013).

In the current study, 8 or 9 jurors were recruited for every jury slot, however technical difficulties associated with the online deliberation and a small drop-out rate, led to groups of 6-8 jurors across all simulations[13]. This arguably reflects a distinct limitation of online methods, in which participant drop-out is arguably more likely and over-recruiting practices more difficult. Indeed, in much of the previous simulation research, researchers have routinely over-recruited jurors to account for drop out, and simply asked 'spare' jurors to engage in separate tasks. This is more difficult when using online rooms as it becomes harder to assign spare jurors to a separate task. This therefore accounts for the range in jury size in the current research.

Following deliberation, all participant jurors were asked to complete the post-deliberation questionnaire and were then given a full de-briefing in which the study's explicit focus on sexual history evidence was disclosed and an opportunity to ask questions was given. All deliberation discussions were recorded and later transcribed to form the primary, qualitative dataset for the research.

4.7 Consequentiality and Realism

The final common critique of mock jury simulations relates to overall realism and consequentiality of task. Jury simulations are inherently a role-playing exercise, with jurors typically aware of the artificial nature of the research and consequently, that their decisions do not have real life consequences (Ellison and Munro, 2013; Leverick, 2020). This critique is almost impossible to overcome since ethical treatment of participants necessitates fully-informed consent and full disclosure (Finch and Munro, 2008). Whilst therefore, posing a

[13] Except one jury, where only 5 jurors were present due to drop-out during the call. This was the result of bad internet connection of two participants and must be considered as a limitation of the online method. This was a control scenario.

somewhat inevitable disconnect between the gravity of task imposed upon real jurors compared to mock jurors (Darbyshire, Maughan and Stewart, 2002), the significance of this role-playing dimension may be mitigated by methodological choices.

Research suggests that a more accurate and engaging stimulus can positively correlate to mock jurors becoming more immersed in the task and taking the role more seriously (Finch and Munro, 2008; Leverick, 2020). Multiple previous simulations have indicated that mock juries typically take their task very seriously, becoming markedly engaged, animated and highly involved in deliberations (Ellison and Munro, 2013; Ormston *et al.* 2019). This engagement is shown through inter alia, jurors remarking on the stress of the deliberative exercise, commenting on implications for the complainant and defendant's lives and becoming animated in disagreements with fellow participants (Ellison and Munro, 2010b, 2013; Ormston *et al.* 2019). This was all observed in the findings of the current research. Finch and Munro (2008) even proposed that mock jurors potentially take the task more seriously than real juror counterparts, remaining largely focused on the task in hand and not voicing desire to leave or precipitate proceedings.

Yet ultimately, the debate remains split as to how the mock nature of mock jury simulations impacts upon juror actions and verdicts. Whilst some studies have suggested that mock jurors are more punitive than their 'real' counterparts (Wilson and Donnerstein, 1977; Zeisel and Diamond, 1978), others suggest that there is no substantial difference (Kerr, Nerenz and Herrick, 1979). Nevertheless, it is generally agreed that high realism of task can serve to mitigate against this impact, albeit not suspend it altogether.

The current chapter has highlighted how the research design was developed to create a highly realistic stimulus and task for participant jurors, despite the mock nature. This minimised concerns regarding consequentiality of task, and indeed findings demonstrated that participants were largely actively engaged in these deliberations, routinely citing the potential life-changing consequences of their verdict upon both defendant and complainant. These

discussions often became animated where jurors did not agree and thereby reflected the weight and gravity that participant jurors attached to the task in hand.

4.8 Ethical Considerations

Ethics are a critical aspect of the research process (Williams, 2003), regulating research procedure (Wisker, 2008) and contributing to research integrity within the discipline and wider afield (BSC, 2015). Ethics distinguish methodological decisions of morality and amorality to ensure that the research process does not infringe on human rights, cause any harm to participants, the researcher or the wider public and does not reveal confidential information regarding participants (Wisker, 2008).

Whilst the simulation nature of the study minimises many of the ethical concerns compared with researching a 'real' jury (Bornstein *et al.* 2017), by nature - as an exercise using human participants and discussing crime (rape) - mock jury simulations carry a number of ethical concerns. However, as a still relatively uncommon research technique, the ethical literature regarding mock jury simulations is far from comprehensive. Indeed, much of the violence against women literature concerns directly researching victims or perpetrators, whilst much of the criminology ethics literature again focuses upon studying crime and criminals; meaning that ethical guidelines regarding studying *reactions* to crime against these marginalised groups, is somewhat lacking. The European Research Council proposes that there are six core principles which inform the research ethics framework and are outlined below.

4.8.1 Fully Informed Consent

Fully informed consent lies at the heart of social research ethics to ensure that all research with human participants is conducted openly and without deception (Westmarland, 2013). It requires that all pertinent aspects of the research are disclosed to participants before they choose whether to take part (Homan, 1991).

In the current study, all participants were sent a digital participant information sheet upon expressing their interest in the research. This outlined the nature and intended impact of the research, the particulars of participation, the governance of their data and potential disadvantages associated with taking part. These sheets excluded specialist or academic terminology and highlighted the potentially sensitive and emotive nature of the research topic. For actor participants who agreed to take part, they were then sent a copy of the trial transcript to read in their own time and again evaluate whether they were comfortable with performing the proposed scenario.

For juror participants, informed consent was slightly more complex in that the specific focus on sexual history evidence was not disclosed due to potential of biasing the study or encouraging socially desirable statements in deliberation. Ultimately, this was not deemed to obstruct fully informed consent, as the task of jurors was disclosed from the outset. Moreover, the focus on sexual history was fully disclosed following deliberation.

All actor and juror participants were given written consent forms at the beginning of participation, as is deemed best practice (Oliver, 2010). A full oral briefing was also given, and mock jurors were given additional warnings about the potentially contentious nature of the deliberative exercise in which opinions could be challenged. Extended caution was also advised in light of the contemporaneous national lockdown period and as such a full 'self-care' sheet which outlined ideas of how to decompress after the study and gave links to potentially helpful resources and support services, was given to all participants. Furthermore, all participants were notified of their right to withdraw at any point during the study, making consent an ongoing and open ended process, continually open to revision (Westmarland, 2013). Finally, all participants were given a full and thorough debrief upon completion of their participation and offered the opportunity to ask questions.

4.8.2 Confidentiality and Anonymity

Confidentiality and anonymity is fundamental for ethical practice and every effort was therefore made to ensure that participant data could not be traced back to the individual (Crow and Wiles, 2008). This was particularly pertinent in the current study, as rape remains a very controversial topic surrounded by myths and stereotypes, and therefore anonymity was crucial to ensure a safe space to share these controversial opinions. No personal information was collected from actor participants meaning the only identifiable information was their appearance within the filmed scenario. Actors were all alerted to this before they took part in the study and were equally instructed that the film could not and would not be shared in any public sphere. Indeed, manifestly identifiable information such as names or date of birth were not collected and demographic profiles only reported on in terms of group statistics in order to prevent deductive disclosure (Kaiser, 2009).

Meanwhile, juror participants were all assigned a unique juror ID number at the commencement of participation and were only identified by this number throughout the exercise. 'Zoom' web conferencing software was purposefully chosen as it enables participants to join the call, without any of their personal details or even their name being exposed to other participants. Moreover, cameras were turned off, due to the emotive nature of participation and participants taking part in their own home. This again, minimised the risk of deductive disclosure.

4.8.3 Voluntary Participation

Voluntary participation is protected under the Nuremberg Code (1946), to ensure free will and choice to participate. Researchers must not pressure individuals into participation (Silverman, 2011) and not to exercise improper influence which results in coercion (Grant, 2006). It was thus highlighted at every stage of the recruitment process in the current study that participation was entirely optional and voluntary, and that individuals had the right to withdraw at any stage of the process.

Entry into a prize draw were offered to all mock juror participants as a Thank you for participation. This was not deemed to amount to an incentive to take part or to risk the coercion of individuals to take part in the study, due to relatively small amount and uncertainty of 'winning.' It instead acted merely a gesture of gratitude to those individuals who gave up a considerable amount of time to participate in the project.

4.8.4 Avoidance of Harm

This ethical guideline submits that research should avoid the risk of harm to participants, the researcher, and the general public. In social science research, this concept of harm often transpires as subjective assessments of distress, anxiety and embarrassment; thus being much more difficult to assess than perhaps physical harm, and not properly defined within the literature (Mulla and Hlavka, 2011; Boddy *et al.* 2019).

Yet, the risk of harm remains of particular concern in violence against women research (Mulla and Hlavka, 2011), such as the current study. Whilst the current study did not require participants to discuss personal experience or their own victimhood, it did require participants to discuss a true-to-life rape trial situation and thereby posed some risk of emotional harm or distress. Accordingly, multiple risk minimisation strategies were adopted, to ensure the wellbeing of all participants (Israel and Hay, 2006).

It was acknowledged from the outset that some participants may have personal experience of sexual violence, making participation traumatic. However, it was deemed that individuals themselves were best placed to make the decision of whether to take part, as excluding these individuals would equally remove autonomy and power, thereby potentially causing further trauma and harm. Where personal victimisation was disclosed to the researcher, the research team worked closely alongside rape crisis to ensure the necessary support was offered if needed.

Furthermore, the mock juror deliberative exercise was identified as a potential risk factor for harm. The topic is notoriously interspersed with stereotypes, misunderstandings, and myths, therefore during the formal briefing participants were forewarned of standards of respect expected of them. Additionally, the researcher remained present as a facilitator during all deliberation exercises, to ensure that such standards of behaviour were followed and that no participant became overly distressed during their participation.

4.8.5 Independent and Impartial Researcher

The researcher remained independent and impartial throughout the deliberative exercise and did not join in discussion at any point. There are no conflicts of interest between the project or any member of the research team or funding organisation (Anglia Ruskin University).

4.8.6 Research Integrity and Quality

Good research quality and integrity are vital to ensure generalisability and value of the research. This is typically determined through traditional concepts of validity, reliability, generalisability, and replicability; however, these principles are skewed towards positivist, quantitative research. The relevance of these concepts to the current qualitative project embedded in critical realist and radical feminist epistemology, may therefore be debated (Smith, 2020). As such, Lincoln, Guba and Pilotta (1985) theorised a parallel framework to accommodate qualitative research using criteria of credibility, dependability, transferability, and confirmability. Whilst not without critique (see discussion in Smith, 2020), this framework has become extensively applied to evaluate qualitative research (Cope, 2014).

Credibility is concerned with the 'truth' of the research findings (Cope, 2014) whilst confirmability refers to the degree of neutrality reflected in the findings (RWJF, 2008). In this study, both credibility and confirmability stem from the rigorous critical thematic analysis conducted on each transcript to fully uncover participant views and opinions, as is discussed further in section 4.9. Meanwhile transferability focuses on demonstrating that the research

findings can be applied to other contexts (Erlandson, 1993) and dependability on showing that findings are consistent and could be repeated (Koch, 2006). The realistic nature of the trial stimulus and task of juries, maintaining a controlled experimental design, both reflect these standards of quality in the research process.

4.9 Data Analytic Plan

Having explored the methodological design and outlined the nature of data collected, it is crucial to examine the data analytic plan used to interpret findings from the research. The mix of qualitative and quantitative datasets gathered in the current project necessitated two separate analysis techniques: critical thematic analysis and statistical analysis. Statistical analysis of quantitative data is presented in Chapter Five, whilst thematic analysis of deliberative discussions is presented in Chapters Six and Seven.

The quantitative data obtained from the JDS findings[14] was analysed using statistical analysis techniques to highlight important statistical findings and relationships between variables. Excel and SPSS software were both used to organise and delineate information, with various statistical tests executed to explore relationships within the data. This statistical analysis is illustrated in Table 4.2 and presented in further detail throughout Chapter 5.

[14] Whilst attitudinal and demographic data was also collected, initial statistical testing illustrated a lack of statistically significant trends relating to sexual history and therefore these were deemed beyond the remit of the current thesis. Further analysis of these trends will be presented in a later paper.

Table 4.2: Table of Statistical Analysis Tests and Justifications

Relationship	Section in Chapter	Statistical Test used	Justification
Did scenario variation impact on initial individual juror verdict?	5.2.1	Chi Squared Test of Association	Determine if an association exists between two categorical variables.
Did scenario variation impact on final jury verdict?	5.2.2	Goodman and Kruskal's λ	Test association between categorical independent variable and categorical dependent variable
Did scenario variation impact on unanimity of verdict?	5.2.2.1	Goodman and Kruskal's λ	Test association between categorical independent variable and categorical dependent variable
Did scenario variation impact on deliberation time?	5.2.2.2	Kruskal Wallace Test	Test association between categorical independent variable and continuous dependent variable
Did variation in the level of sexual history impact on deliberation time?		Kendall's tau-b	Determine if an association exists between the independent variable and ordinal dependent variable.
Did scenario variation impact on juror perceptions of complainant believability (as measured by the JDS)?	5.3.1	Two-way ANOVA	To assess the interaction effect of two categorial independent variables, on the continuous dependent variable.
Did scenario variation impact on juror perceptions of defendant believability (as measured by the JDS)?	5.3.2	Two-way ANOVA	To assess the interaction effect of two categorial independent variables, on the continuous dependent variable.

Critical thematic analysis was the chosen method of qualitative analysis as it enables the researcher to identify, organise and report key themes found within the dataset. The critical element allows for examination of power relations, hidden assumptions and social identities within the jury panels and examination of how these power dynamics are established and

reinforced through the deliberative exercise (Fairclough, 1989). Thematic analysis befits extracting features from a large data set as it forces researchers to take a structured approach to data handling to produce clear and organised codes and themes (Nowell *et al.* 2017). Moreover, it enables examination of similar and competing perspectives amongst different participants (Braun and Clarke, 2006), making it ideally suited to analysing jury deliberations whereby some conflict and difference of opinion is expected.

The iterative coding process associated with thematic analysis is suited to the dataset, as it allows the researcher to move back and forth between the coding frame and transcripts (Barbour, 2018) to develop comprehensive insights into the dataset. Indeed, a pragmatic version of grounded theory was used, allowing participants' views and insights that arose within the transcripts to lead the development and refinement of the codes and coding process. This flexibility suits the exploratory nature of jury simulation research whereby it is largely unknown what ideas and themes may arise. Finally, identifying themes and sub-themes within the data set highlights links and relationships between various viewpoints to further comprehend the results of the research.

Chapter Five: Quantifiable Impact of Sexual History Evidence

5.1 Introduction

The following chapters outline the key findings that emerged from the mock jury dataset in regard to the impact of sexual history evidence upon participant jurors. The current chapter will focus on quantitative findings, illustrating the quantifiable impact of sexual history evidence upon verdicts and scores of the JDS. This fulfils research aim one, being to determine whether/how the inclusion of sexual history evidence at trial impacts upon juror verdicts and quantifiable framings of both the complainant and defendant, by participant jurors. The subsequent two chapters will then scrutinise qualitative themes within juror discussions of sexual history evidence, fulfilling research aims two and three respectively. These being, to assess the relevance attributed to sexual history by participant jurors and examine whether/how this impacted on perceptions of credibility. These qualitative findings positively demonstrated some myth-busting attempts, however they equally showed ongoing problematic and prejudicial attitudes towards sexual history, notions of heteronormativity and perceptions of complainant credibility.

This chapter examines statistical findings which illustrate relationships between scenario variation, juror verdicts and findings of Willmott *et al*.'s (2018) JDS. The statistical tests undertaken and initial findings are outlined in Table 5.1, and discussed in-depth throughout the chapter.

Table 5.1: Outline of Statistical Testing Undertaken and Summary of Results

Relationship	Hypothesis	Section in Chapter	Statistical Test used	Statistical significance?
Did scenario variation impact on initial individual juror verdict?	The greater the level of sexual history evidence included, and the more that the complainant's credibility is in question, the fewer guilty verdicts will be returned.	5.2.1	Chi Squared Test of Association	No
Did scenario variation impact on final jury verdict?	The greater the level of sexual history evidence included, and the more that the complainant's credibility is in question, the fewer guilty verdicts will be returned.	5.2.2	Goodman and Kruskal's λ	No
Did scenario variation impact on unanimity of verdict?	The greater the level of sexual history evidence included, and the more that the complainant's credibility is in question, the less likely a unanimous verdict would be reached.	5.2.2.1	Goodman and Kruskal's λ	Yes
Did scenario variation impact on deliberation time? Did variation in the level of sexual history impact on deliberation time?	The greater the level of sexual history evidence included, and the more that the complainant's credibility is in question, the longer the deliberation.	5.2.2.2	Kruskal Wallace Test Kendall's tau-b	No Yes
Did scenario variation impact on juror perceptions of complainant believability (as measured by the JDS)?	The greater the level of sexual history evidence included, and the more that the complainant's credibility is in question, the less believable the complainant will be perceived.	5.3.1	Two-way ANOVA	Yes

Did scenario variation impact on juror perceptions of defendant believability (as measured by the JDS)?	The greater the level of sexual history evidence included, and the more that the complainant's credibility is in question, the more believable the defendant will be perceived.	5.3.2	Two-way ANOVA	Yes

The statistical findings support the thesis argument, that the inclusion of sexual history evidence at trial can negatively prejudice a jury. However, these findings demonstrated a far more nuanced and complex impact of sexual history evidence, than is currently theorised within the literature.

5.2 Verdict Trends

Introductory statistical analysis was used to examine whether relationships existed between scenario variations of the methodological design and verdict outcomes. Verdict outcomes were collected at three instances during participation: individual verdict before deliberations, group unanimous or majority verdicts upon completion of deliberations, and individual juror verdicts after deliberation. Table 5.2 outlines verdict trends at each of these instances:

Table 5.2: Verdict Outcomes at each stage of participation

	Guilty N *(%)*	**Not Guilty N *(%)***	**Hung Jury N *(%)***
Individual Verdict Pre-Deliberation	50 *(42.02%)*	69 *(57.98%)*	-
Group Verdict	8 (*44.44%)*	9 *(50%)*	1 *(5.56%)*
Individual Verdict Post-Deliberation	56 *(47.06%)*	63 *(52.94%)*	-

Each verdict point demonstrates a fairly even distribution of guilty and not guilty verdicts, with guilty verdicts increasing through time points. These observed verdict trends are somewhat reflective of 'real' jury verdict trends, which show an average conviction rate in rape trials of somewhere between 42% (CWJ *et al.* 2020) and 69% (CPS, 2020). The following sections examine how these verdict trends were influenced by scenario variations, namely variation to the level of sexual history and complainant consistency.

5.2.1 Initial Individual Juror Verdicts

When completing the pre-deliberation JDS, all jurors returned an initial verdict preference. This illustrated individual juror verdict preferences immediately after having watched the trial film and before discussing the case with fellow jurors. Of these initial juror verdicts, 42.02%

returned a guilty verdict and 57.98% a not guilty verdict. Figure 5.1 illustrates these verdict preferences, according to the scenario variation implemented in the methodological design.

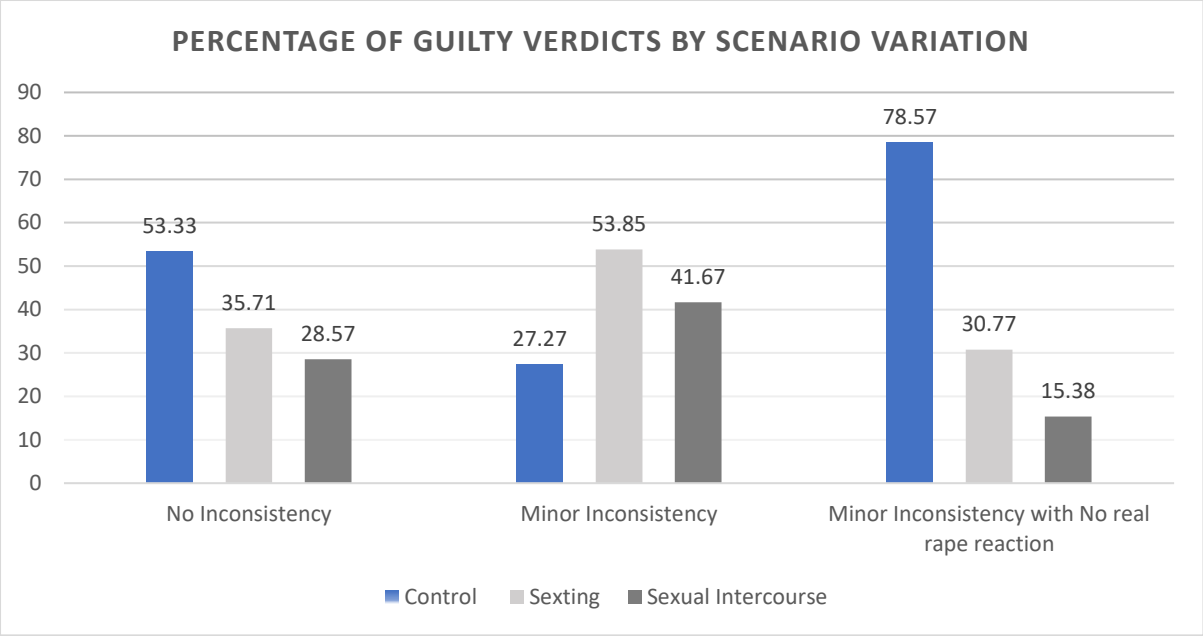

Figure 5.1: Chart of Initial Individual Guilty Verdicts according to Scenario Variation

Visually, these findings suggest (with the exception of Scenario 8 – Control/Minor Inconsistency), that guilty verdicts *decrease* the *greater* the level of sexual history introduced at trial. Indeed, in both the 'no inconsistency' and 'no real rape reaction' consistency variations, guilty verdicts are highest in the control scenario, lower in the sexting scenario and lower again in the sexual intercourse scenario. This reflects an expected trend in which the greater the level of sexual history evidence included, the lesser the likelihood of conviction. This trend was particularly pronounced in the 'no real rape reaction' consistency variation, suggesting that the impact of sexual history evidence was greatest, whereby the complainant's narrative was seen to be least consistent.

Nevertheless, the 'minor inconsistency' variation does not mirror this trend. Whilst the proportion of guilty verdicts dropped between sexting and sexual intercourse variations, it was lowest in the control scenario. This control scenario [scenario 8] therefore presents somewhat of an anomaly to both the observed and expected trends regarding verdict preference. The reason for this finding is unexpected and not clear, and further research using a larger sample

size is necessary in order to see assess whether such finding remains, and if so, to further establish reasoning behind this.

Nonetheless, statistical analysis was performed on the current dataset to examine whether statistically significant trends existed. Two Chi-Squared tests of association were conducted to examine whether an association existed between individual initial verdict and level of sexual history evidence *or* level of consistency in the complainant's account[15].

The first examined whether an association existed between the level of consistency in the complainant's account and initial individual verdict, however this did not return a statistically significant association, $x^2(1) = .080$, $p = .961$. Whilst it would be hypothesised that increased inconsistency in the complainant's account would result in less convictions; this lack of statistical relationship could relate to the small sample size or the concurrent variation in the level and nature of sexual history evidence.

The second Chi-Squared test examined whether an association existed between sexual history evidence and initial individual juror verdict. This also did not return a statistically significant association, $x^2(1) = 5.888$, $p = .053$. Nevertheless, this result was *approaching* statistical significance ($p = .053$) and therefore, whilst it did not meet the threshold for significance, it may still be taken as informative. The cross-tabulation data showed fewer guilty verdicts than expected where sexual intercourse evidence was introduced [*n=11, expected = 16.1*] and more guilty verdicts than expected in the control scenarios where no sexual history was introduced [*n=22, expected = 16.5*] (Figure 5.2).

[15] A chi-squared test of association was initially conducted to examine whether an association existed between scenario number [1-9] and initial individual verdict. A statistically significant association was observed $x^2(1) = 15.981$, $p = .043$, however two cells produced an expected count less than 5, thus lowering the validity of the test findings. As a result of these low expected counts, the scenario category was collapsed and two separate chi-squared tests run according to each independent variable, so as to utilise increased expected cell counts.

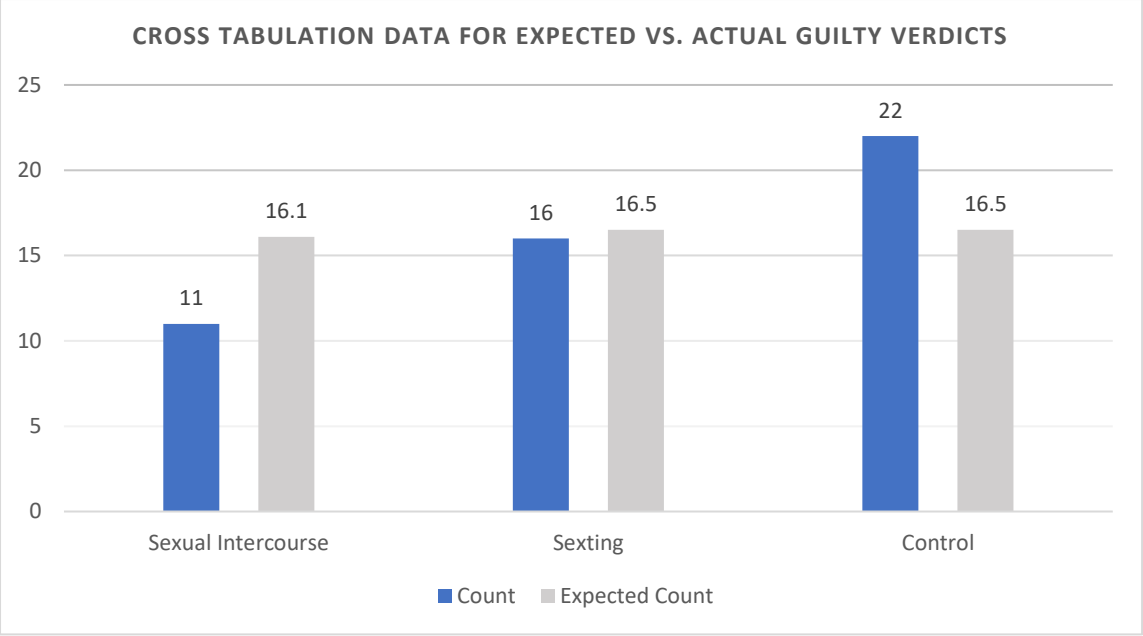

Figure 5.2: Cross Tabulation Data showing Variation of Sexual History Evidence and Initial Individual Guilty Verdicts, expected and actual.

This finding suggests that the inclusion of sexual history evidence at trial, corresponds with an increased likelihood of acquittal. This lends support for the widespread assertion in the literature (Kelly *et al.* 2006; McGlynn, 2017), that the inclusion of sexual history evidence at trial is likely to decrease the likelihood of conviction. It also indicates that variation in the level of sexual history evidence included, also alters the impact on juries, with the impact of sexual intercourse evidence on verdict outcome more pronounced than that of sexting. However, it must be highlighted that the current findings did *not* establish this association as statistically significant and thereby further research using larger sample sizes is necessary and justified, in order to verify this claim.

5.2.2 Group Verdicts

Having deliberated as a group, each jury was required to return a unanimous or majority verdict. These are illustrated in Table 5.3, alongside the deliberation time of each jury:

Table 5.3: Group Verdicts and Deliberation Time, according to Scenario Variation

Scenario		Final Group Verdict		Unanimous Verdict?	Deliberation Time
No Apparent Inconsistency	Sexual Intercourse **(Scenario 1)**	Jury 1	Guilty	No	01:03:09
		Jury 16	Not Guilty	Yes	00:27:03
	Sexting **(Scenario 4)**	Jury 3	Not Guilty	Yes	00:27:15
		Jury 17	Hung	No	00:55:10
	Control **(Scenario 7)**	Jury 2	Guilty	No	00:49:57
		Jury 18	Not Guilty	Yes	00:31:54
Minor Inconsistency	Sexual Intercourse **(Scenario 2)**	Jury 4	Not Guilty	No	00:46:56
		Jury 13	Guilty	No	00:57:20
	Sexting **(Scenario 5)**	Jury 5	Guilty	No	00:53:09
		Jury 14	Guilty	No	01:01:00
	Control **(Scenario 8)**	Jury 6	Not Guilty	Yes	00:47:44
		Jury 15	Not Guilty	Yes	00:25:14
Minor Inconsistency and No real rape reaction	Sexual Intercourse **(Scenario 3)**	Jury 7	Not Guilty	No	01:02:48
		Jury 10	Not Guilty	Yes	00:14:36
	Sexting **(Scenario 6)**	Jury 8	Guilty	Yes	00:47:06
		Jury 11	Not Guilty	Yes	00:52:52
	Control **(Scenario 9)**	Jury 9	Guilty	Yes	00:04:58
		Jury 12	Guilty	Yes	00:25:02

Figure 5.3 presents these group verdicts, according to the scenario variations used:

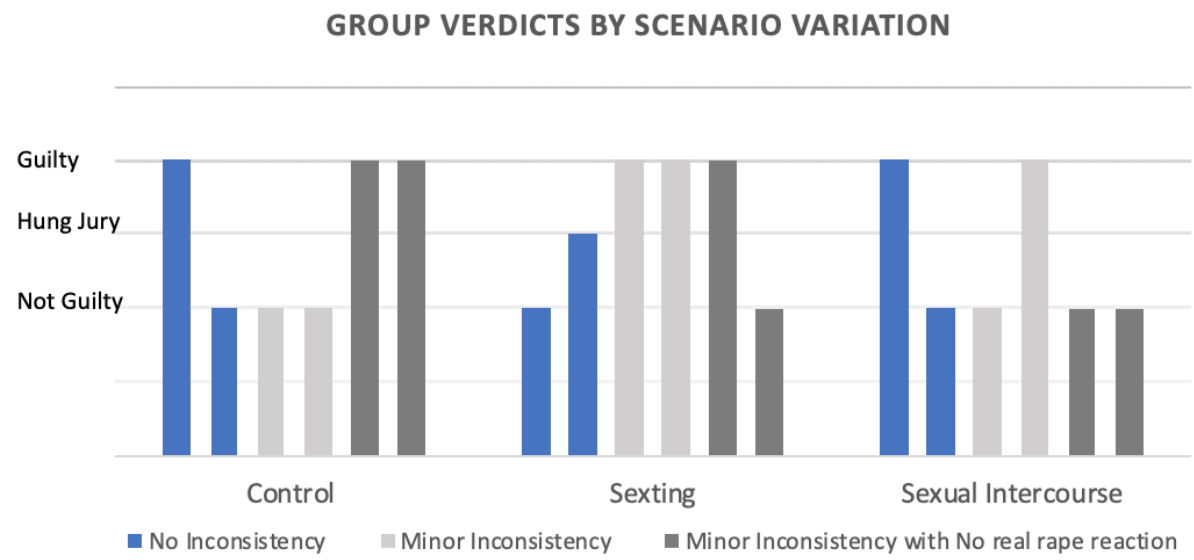

Figure 5.3: Chart of Group Jury Verdicts, according to Scenario Variation

These findings do not indicate an obvious trend between the level of sexual history or consistency, upon final group verdicts. However, it does show that there were least guilty verdicts in the sexual intercourse scenarios, as would be expected from theorisation in the literature on sexual history.

Due to the smaller sample size and introduction of 'hung' verdicts, a Chi-Squared test of association was not suitable in this instance. Instead, a Goodman and Kruskal's λ was run to determine whether an association existed between scenario variation [1-9] and final group verdict [guilty, not guilty, hung jury]. Goodman and Kruskal's λ was .444 and did not reach statistical significance (p=.230).

However, due to findings of the Chi-Squared test of association between the level of sexual history and initial individual verdict, which were approaching statistical significance; a second Goodman and Kruskal's λ was run to determine whether this association increased or decreased within final group verdicts. Table 5.4 illustrates final group verdicts, split only by the sexual history variable:

Table 5.4: Group Verdicts according to Level of Sexual History

Sexual History Evidence	Guilty Verdicts	Not Guilty Verdicts	Hung Jury
Sexual Intercourse	2 (33.33%)	4 (66.67%)	0 (00.00%)
Sexting	3 (50.00%)	2 (33.33%)	1 (16.67%)
Control	3 (50.00%)	3 (50.00%)	0 (00.00%)

Table 5.4 points towards a trend of a higher proportion of not guilty verdicts (acquittals), the greater the level of sexual history evidence that was introduced at trial. However, due to the small sample size it is very difficult to assess whether such trend exists, and further research would be crucial in order to better assess this issue. Goodman and Kruskal's λ was .111 and again did not reach statistical significance (p = .762). Ultimately therefore no statistically significant trend was observed between the level and nature of sexual history evidence introduced at trial, and the final jury verdict delivered.

5.2.2.1 Unanimity

Alongside trends between scenario and verdict, statistical analysis was also performed to explore whether trends existed between scenario and unanimity of verdict. These findings are presented in Table 5.3 and below in Figure 5.4:

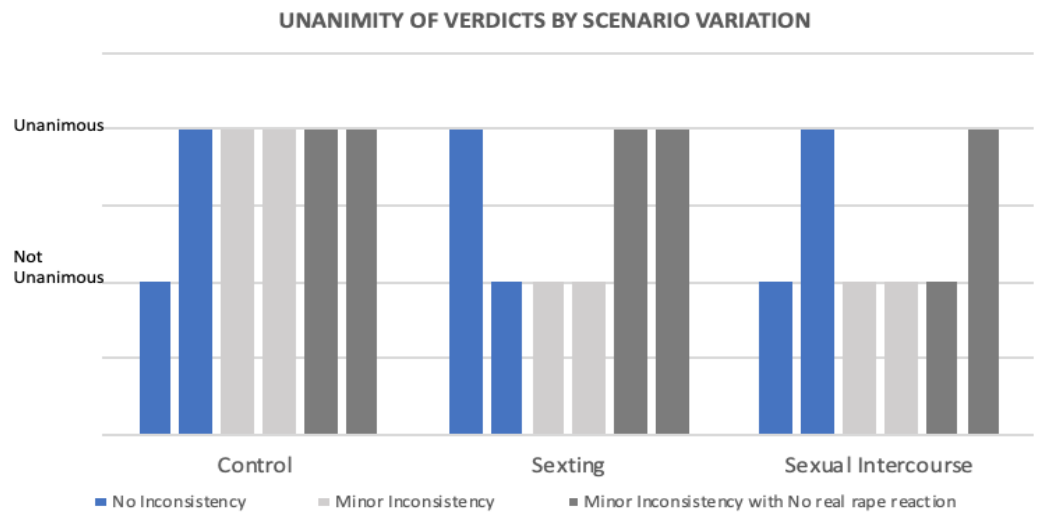

Figure 5.4: Chart of Unanimity of Group Verdicts according to Scenario Variation

Figure 5.4 shows that unanimous verdicts occurred more often in the control scenarios than any sexual history scenarios, and slightly more often in the sexting scenarios than sexual intercourse ones. This lends weight to the assertion that the inclusion of sexual history evidence at trial complicates deliberations and causes polarisation of views amongst jurors.

A Goodman and Kruskal's λ was run to determine whether a statistical association existed between scenario variation [1-9] and unanimity of verdict. Goodman and Kruskal's λ was .500 and this did reach statistical significance (*p*= .023). Thus, a statistically significant association between sexual history and the likelihood of achieving a unanimous verdict, did exist. These findings support the qualitative findings of the current dataset (Chapter 6 and 7), which showed that the inclusion of sexual history evidence at trial complicated deliberations and divided opinions amongst jurors.

5.2.2.2 Deliberation Time

Alongside the statistically significant association between scenario and unanimity of verdict, jury deliberation times were also measured. Average deliberation times were highest in the sexting scenarios (*n= 49:50),* decreasing slightly in the sexual intercourse scenarios (*n= 45:33),* and decreasing more substantially in the control scenarios (*n=30.83).* Figure 5.5 illustrates these findings:

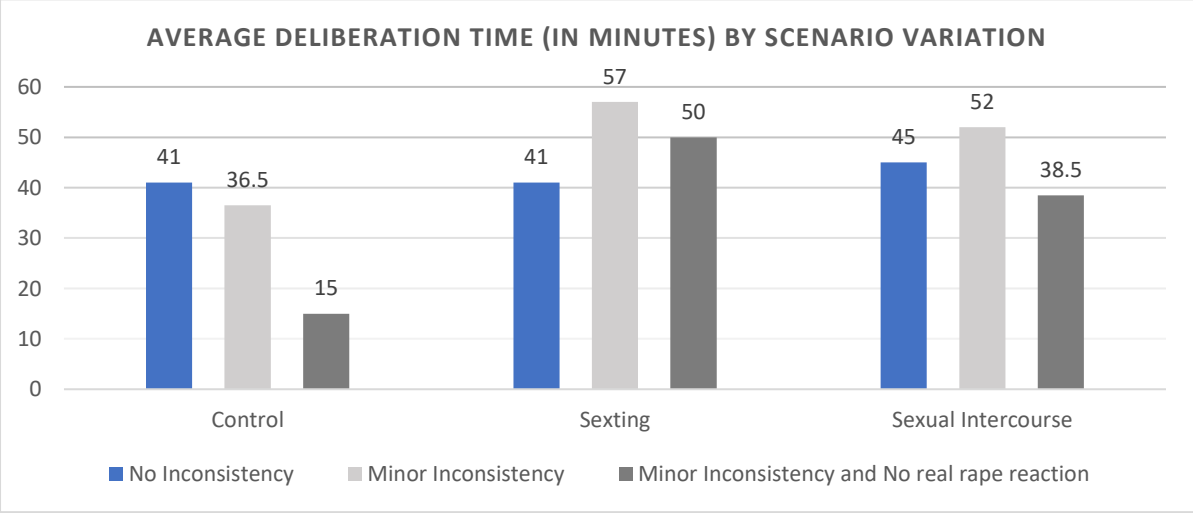

Figure 5.5: Group Deliberation Time according to Scenario Variation

This finding shows that deliberations were longer, where sexual history evidence had been introduced at trial. A Kruskal-Wallis test was conducted to examine whether this trend was statistically significant. The first test examined whether variations in deliberation time differed as a result of the *scenario* jurors were given. Distribution scores for deliberation time were not similar for all groups, as assessed by visual inspection of a boxplot. Moreover, a statistically significant trend was not found (p =.572) and therefore the null hypothesis was retained.

However, due to observable trends in mean averages, in which deliberation time appeared to differ depending on simply whether sexual history evidence was included or not (e.g. Yes – Sexual Intercourse and Sexting, vs No – Control), further testing was conducted. A Kendall's tau-b correlation was run to determine the relationship between deliberation time and the dichotomous inclusion of sexual history or not. It showed a statistically significant association between the inclusion of sexual history evidence and deliberation time (p = .039). This illustrated that deliberation times increased, whereby jurors have been exposed to sexual history evidence at trial.

Whilst it cannot be unquestionably suggested that the inclusion of sexual history was the sole cause of this finding, in that it may simply be reflective of slow talkers or long silences for example, the finding does indicate that the inclusion of sexual history evidence at trial prompted longer and more complex deliberations. This supports both previous assertion in the literature (Schuller and Hastings, 2002), and the qualitative trends of the current study (Chapter 6 and 7), by showing that the inclusion of sexual history evidence at trial – whether sexting or intercourse evidence – significantly increased deliberation time and complicated the deliberation amongst jurors. It is however, important to emphasise, that this is a small sample size and therefore further research which utilises a larger sample size, is required to further robustly support this trend.

5.2.3 Verdict Trends: Key Conclusions

The current findings illustrate some statistically significant quantitative findings between the inclusion of sexual history evidence at trial and verdict trends within the dataset. Statistically significant associations occurred between scenario variation and the unanimity of verdicts, and between the inclusion of sexual history at trial and deliberation time. These findings illustrated that the inclusion of sexual history evidence at trial can ultimately polarise jurors against one another and complicate the deliberation. This finding is supported by thematic analysis of the content of deliberations, as discussed in Chapters 6 and 7. Furthermore, Ormston *et al.* (2019) in the largest mock jury project to date, found that longer deliberations were often characterised by entrenched difference in opinion amongst jurors, causing disagreement, frustration, and ultimately longer deliberations. This finding supports these quantitative trends in the current study, which are further validated by qualitative findings discussed in Chapters 6 and 7. Taken together thereby, current findings highlighted that the inclusion of sexual history evidence at trial often prompted strongly polarised opinions and engendered confusion amongst jurors.

Moreover, these quantitative findings support Heilbron's (1975: Para 133) assertion that the exclusion of sexual history evidence from trial “will make it easier for juries to arrive at a true verdict.” Indeed, assertions throughout the literature on sexual history evidence have argued that the inclusion of this evidence at trial may distort the truth-finding role of the jury and distract them from the task in hand (*R v A* [No.2] UKHL 25, [2001]; McGlynn, 2017). Whilst this theorisation is scrutinised more closely in relation to qualitative themes discussed in Chapters 6 and 7, these statistically significant associations between sexual history, unanimity and deliberation time ultimately verify the assertion that sexual history evidence complicates and lengthens the deliberation process.

Contrary to expectations from the literature however, the current study did not find a statistically significant association between sexual history or level of consistency, upon initial

individual or final group verdicts. This finding contradicts Kelly *et al.*'s (2006) research which found a substantial correlation between the inclusion of sexual history evidence at trial and fewer guilty verdicts emerging, following deliberation. Possible reasons for this may be that jurors are no longer prejudiced by sexual history evidence in the same way, that the current sample did not endorse prejudices about sexual history as strongly as the real juries studied in Kelly *et al.*'s (2006) research, or perhaps that the current sample size was too small to generate this statistically significant association.

Indeed, whilst verdict trends did not reach statistical significance in the current study, charts and tables did seemingly indicate some early observable trends in which the inclusion of sexual history evidence decreased the likelihood of conviction (Figures 5.1 and 5.2). Moreover, the trend between the level of sexual history evidence on initial individual verdicts was *approaching* statistical significance (p =.053), again therefore highlighting the need for further, up-to-date research in this area.

Moreover, whilst this did not reach the threshold of statistical significance, a growing body of literature has argued against excessive dependence on the statistical significance requirement, highlighting that a lack of statistical significance does not mean that a trend does not exist (Amrhein, Greenland and McShane, 2019). Amrhein *et al.* (2019) highlighted the dangers associated with this dichotomisation of significant vs non-significant results and outlined a case to remove statistical significance from analyses. Whilst these discussions are beyond the remit of the current paper, and indeed the current paper is not arguing that statistical significance is not an important indicator of findings; it is arguing that even non-significant trends in the current findings do provide useful insights and justify calls for further research on this topic to understand these trends more clearly.

Ultimately, in accepting that some trend may exist in which the inclusion of sexual history makes initial individual guilty verdicts less likely; this lends credence to the argument that the inclusion of this evidence at trial can ultimately prejudice a jury a reduce the chance of

conviction (McColgan, 1996; Baird, 2016; McGlynn, 2018). Positively, in the current dataset, this trend became less pronounced following deliberation, therefore lending some weight to the assertion that a deliberative element mitigates against individual biases (Kaplan and Miller, 1978; Finch and Munro, 2008). Nevertheless, the deliberation arguably did not wholly eradicate such trend, and equally posited further trends regarding unanimity and deliberation time. Therefore, holistically these findings continue to illustrate ongoing prejudicial impact of sexual history evidence upon jurors and their deliberations. A note of caution must be given due to the relatively small sample size used in the current study; however, these findings arguably highlight the need for further research in this area, which utilises larger participant pools to assess these directional measures more robustly.

5.3 Juror Decision Scale Trends

Alongside verdict trends, trends from the JDS were also statistically analysed. Willmott *et al*.'s (2018) JDS is a validated, self-report measure of juror decision-making. It is comprised of sixteen items, divided over three factors: decision confidence, complainant believability and defendant believability. Decision Confidence is measured on a scale of 2-10, whilst both complainant and defendant believability are measured on a scale of 7-35. The following section examines key trends that emerged from JDS findings.

No trend arose between scenario variation and decision confidence. However, a clear trend arose in all but one jury panel (Jury 15), in which decision confidence increased following the deliberative element (Figure, 5.6). This arguably highlights the importance of the deliberative element in both the study's methodological design and in the role of real jury decision-making.

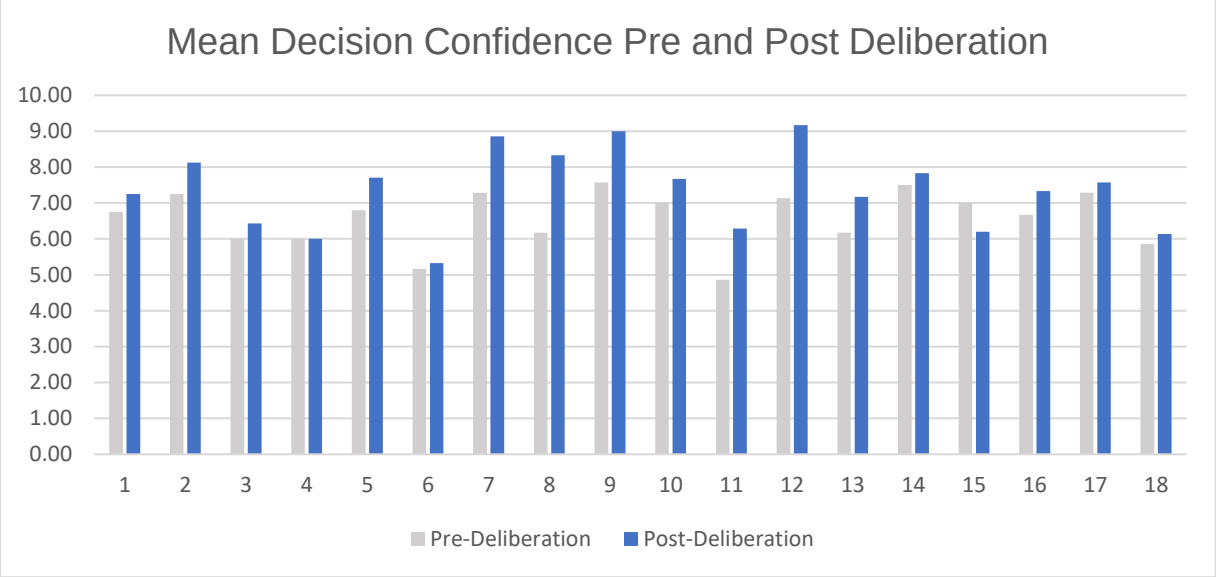

Figure 5.6: Chart of Juror Decision Confidence Pre and Post Deliberation

Clear trends however, emerged in relation to juror perceptions of both complainant and defendant believability, as a result of scenario variations introduced in the methodological design. These are explored throughout the remainder of the chapter.

5.3.1 Complainant Believability

Complainant believability was measured in the JDS to examine individual juror perceptions of the completeness, plausibility, coherence, and overall presentation of the complainant's account at trial. This was assessed via 7 questions in the JDS and marked on a scale of 7 to 35. Table 5.5 illustrates descriptive statistics of scores of complainant believability pre and post deliberation, grouped according to the scenario variation. Figures 5.7 [Pre-Deliberation] and 5.8 [Post-Deliberation] then illustrate these findings more visually.

Table 5.5: Complainant Believability Scores by Scenario, Pre and Post Deliberation

Scenario		Pre-Deliberation				Post-Deliberation			
		Mean	***SD***	***Observed Min.***	***Observed Max.***	***Mean***	***SD***	***Observed Min.***	***Observed Max.***
No Apparent Inconsistency	Sexual Intercourse [Sc.1]	22.98	5.35	17	32	23.88	4.58	17	35
	Sexting [Sc.4]	23.50	5.33	16	33	23.29	3.75	16	35
	Control [Sc.7]	23.76	4.81	16	31	23.57	4.41	16	34
Minor Inconsistency	Sexual Intercourse [Sc.2]	24.42	5.47	18	32	25.34	4.29	17	31
	Sexting [Sc.5]	25.09	5.67	15	33	24.12	6.10	11	33
	Control [Sc.8]	21.57	4.48	17	28	20.85	3.42	14	30
Minor Inconsistency and No Real Rape Reaction	Sexual Intercourse [Sc.3]	20.66	3.12	17	27	18.52	5.65	7	26
	Sexting [Sc.6]	22.93	5.05	14	33	24.86	4.86	14	32
	Control [Sc.9]	25.50	4.49	16	32	29.59	4.40	17	35

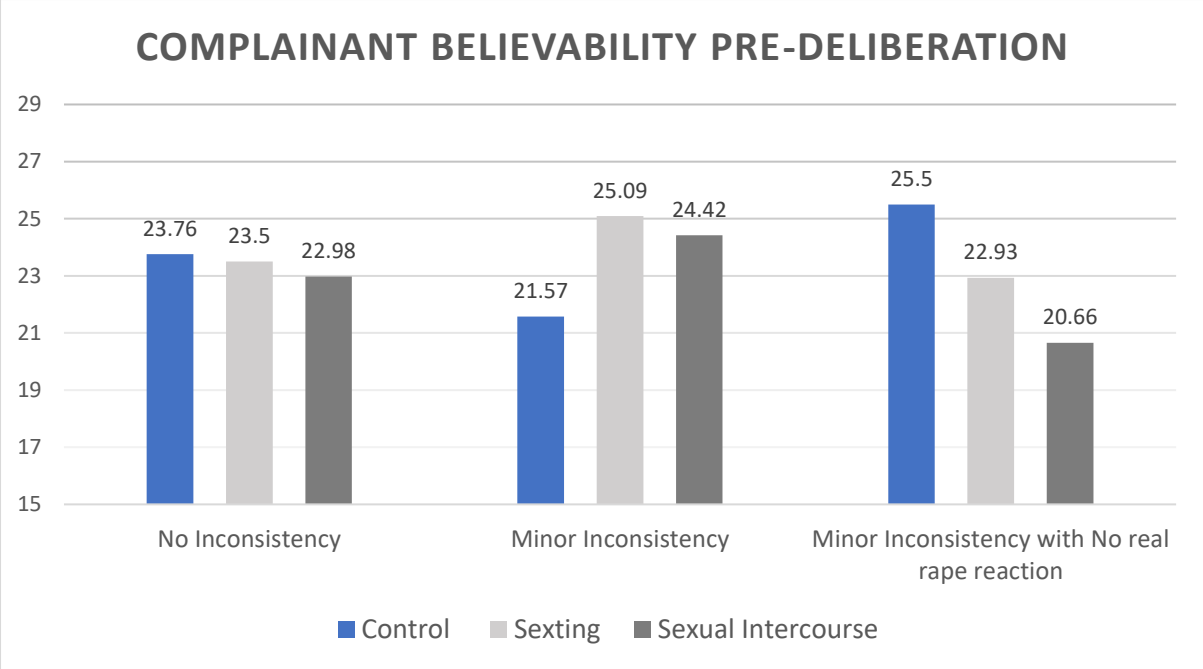

Figure 5.7: Chart of Complainant Believability Scores Pre-Deliberation

Figure 5.7 illustrates pre-deliberation scores of complainant believability, according to the scenario variation. In both the 'no inconsistency' and 'no real rape reaction' consistency variations, the complainant was seen as most believable in the control variations which included no sexual history, with this decreasing in sexting variations and decreasing again in sexual intercourse variations. This illustrates an incremental decrease in complainant believability, the 'more' sexual history that was introduced. This incremental decrease was substantially more pronounced in the 'no real rape reaction' scenario, suggesting that the impact of sexual history became emphasised whereby there was greater inconsistency in the complainant's account.

However crucially, the 'minor inconsistency variation' did not illustrate the same trend. Scenario 8 – being a control scenario in the minor inconsistency variation – reported the lowest levels of complainant believability, rather than highest, thus not conforming to the trend in which it would be expected that the complainant would be seen as most – rather than least – believable here. Possible reasons for this are unknown, although due to the small sample it may be theorised that this was simply an anomaly presented by individual jurors. It seemingly

justifies calls for further research in this area, using a larger sample size in order to more robustly establish or rebut this trend.

Moreover, in regard to consistency variations, there was a lack of clear trend regarding complainant believability, dependent on consistency in her account. In both sexual history scenarios, the complainant was perceived as most believable in the minor inconsistency variation and least in the no real rape reaction variation. However, control scenarios did not conform to this trend. Reasons for this are again unknown and highlight the need for further research.

Figure 5.8 now illustrates trends of complainant believability, post-deliberation:

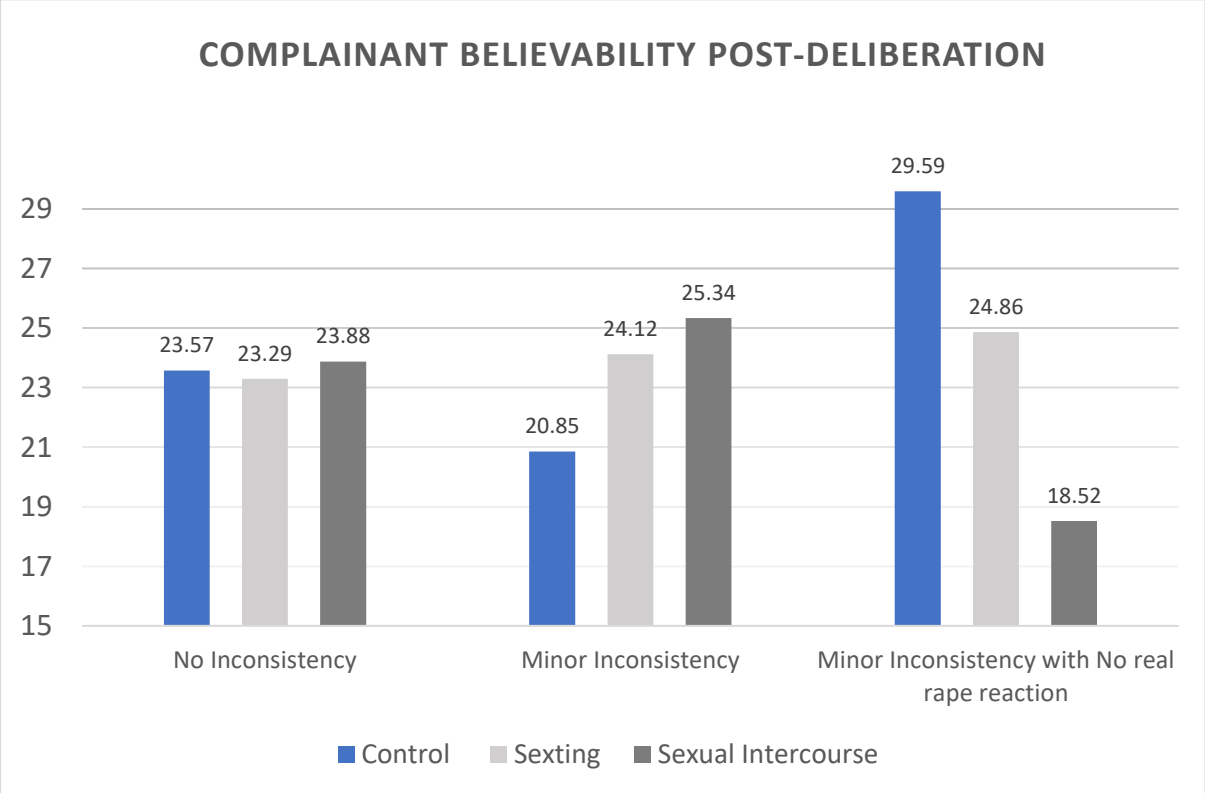

Figure 5.8: Chart of Complainant Believability Scores Post-Deliberation

Figure 5.8 shows that pre-deliberation trends regarding complainant believability, lessened following the deliberative exercise in both the 'no inconsistency' and 'minor inconsistency' variations. However interestingly, the impact of sexual history in the 'no real rape reaction' variation *increased* following the deliberative exercise to become even more prominent. This

crucially highlights the complex and nuanced impact of sexual history evidence, as dependent upon various other factors such as consistency in the complainant's account and adherence to further myths and stereotypes.

In order to examine these trends more closely, two-way ANOVA tests were conducted on both the pre-deliberation and post-deliberation complainant believability scores. A two-way ANOVA was chosen as it enables testing of the interaction effect of two independent variables. For example, in the current study, to establish whether the interplay of *both* the level of sexual history evidence *and* the level of consistency in the complainant's account, interacted to impact on the dependent variable of complainant or defendant believability.

5.3.1.1 Pre-Deliberation Complainant Believability

The first two-way ANOVA examined complainant believability pre-deliberation[16]. The findings of this two-way ANOVA demonstrated a statistically significant interaction effect of the two independent variables on pre-deliberation complainant believability scores, F (4,108) =2.534, p= .044, partial n^2 =.086. Neither sexual history evidence alone (p= .499), nor consistency variation (p = .794), had an individually significant impact on complainant believability scores, however the interaction between both variables did reach statistical significance. This

[16] Residual analysis was performed to test for the assumptions of the two-way ANOVA. Outliers were assessed by inspection of a boxplot, which showed 6 outliers although none of these were extreme. Whilst therefore these may have simply been overlooked, as a matter of good practice each of the outliers was removed from the dataset and another two-way ANOVA conducted to assess the impact of outliers. This second two-way ANOVA continued to produce a statistically significant finding and therefore it was deemed that the impact of outliers had been inconsequential to statistical findings and did not invalidate the two-way ANOVA procedure. The outliers were therefore re-introduced to the dataset and all tests conducted to include these outliers.

A Shapiro-Wilk test of normality was run to assess whether the data was normally distributed (p > .05) in each cell of the design. Findings indicated that the assumption of normality was violated in 3 of the nine scenarios, however Maxwell and Delaney (2004) submitted that ANOVAs tend to be robust to deviations from normality and therefore the test continued to be run. Finally, there was homogeneity of variances, as assessed by Levene's test for equality of variances, (p= .366).

highlights the complex and nuanced impact of sexual history evidence on jurors' interpretations of complainant believability. This interaction effect is displayed in Figure 5.9.

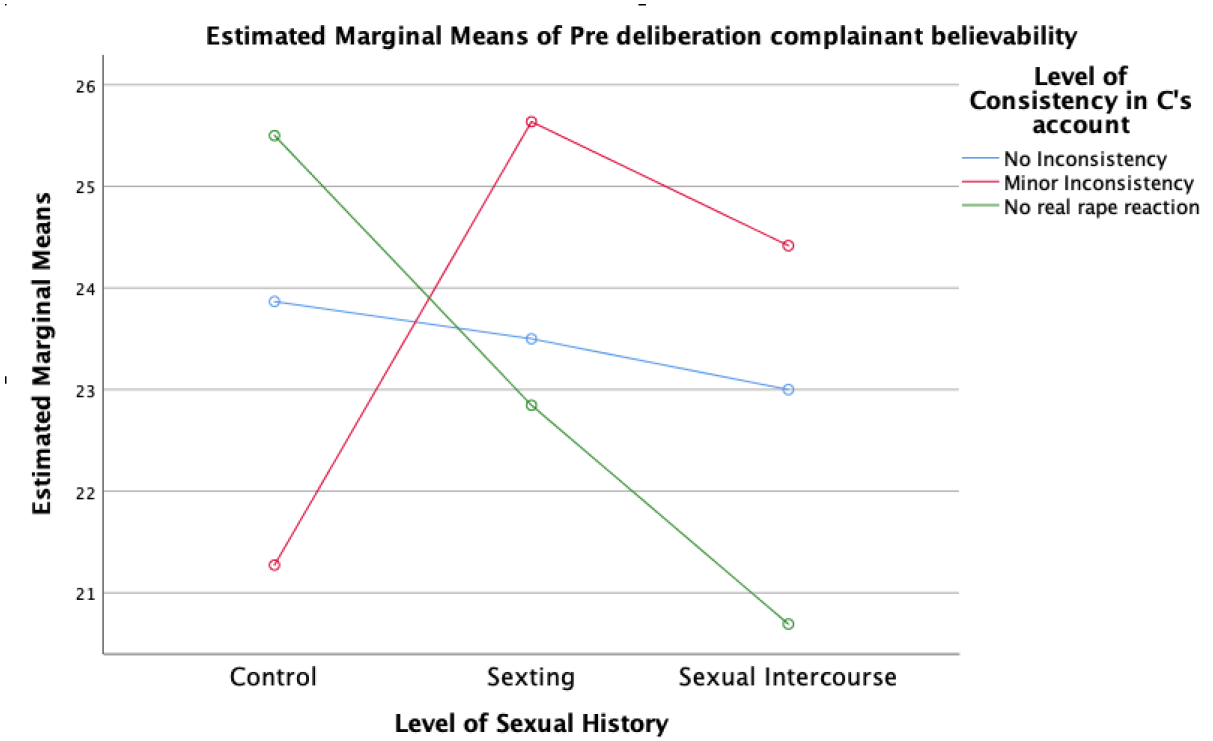

Figure 5.9: Profile Plot for Pre-Deliberation Complainant Believability Scores

Figure 5.9 visually illustrates the impact of both sexual history evidence and level of consistency, upon juror scores of pre-deliberation complainant believability in the JDS. It demonstrates distinct variation of impact of sexual history, dependant on the level of consistency in the complainant's account.

The blue line represents pre-deliberation complainant believability scores, where no apparent inconsistency existed in the complainant's account. As expected, complainant believability was highest in the control scenario where no sexual history was included, and lowest in the sexual intercourse scenario, with sexting between the two. However, the difference in complainant believability scores between sexual intercourse, sexting and control variations here, was minimal. Therefore, it shows that where the complainant's account at trial was wholly consistent, the impact of sexual history evidence was small.

Conversely, the green line which represents the scenario in which consistency of the complainant's account was most at question, highlights substantial impact of sexual history evidence upon perceptions of complainant believability. This illustrates very low perceptions of complainant believability in the sexual intercourse scenario, increasing substantially in the sexting scenario and increasing substantially again in the control scenario. Whilst these findings are similar to that observed in the no inconsistency variation [red line], the impact of sexual history variations here was far more pronounced.

This finding is both highly original and highly important when scrutinising the prejudicial nature of sexual history. It highlights that the impact of sexual history evidence upon juror perceptions of the complainant, is highly dependent upon wider factors surrounding consistency and adherence to myths and stereotypes in the complainant's account. It demonstrates that the prejudicial impact of sexual history evidence is not linear or predictable but highly complex and nuanced dependent on wider circumstances and case evidence.

The red line however, which reflects pre-deliberation complainant believability scores where minor inconsistency existed in the complainant's account, is much harder to decipher. As expected, complainant believability increased from the sexual intercourse scenario to the sexting scenario. However unexpectedly, complainant believability was at its lowest in the control scenario where no sexual history was introduced. As suggested above, this finding presents an anomaly to trends in the other consistency scenarios in the current dataset and also to trends theorised in the literature. It is difficult to assess whether this reflects a further interaction effect of sexual history, or perhaps more likely, whether it is simply an anomaly that arose as a result of the small dataset. Arguably this highlights the need for further research to explore this issue, in order to robustly explore these trends.

Nevertheless, expected trends in both blue and green lines not only highlight the continued prejudicial impact of sexual history on perceptions of the complainant, but also the variable impact of sexual history depending on wider circumstances of the case and evidence. This is

essential to understanding the intricate impact of sexual history evidence, as intertwined with various wider myths and stereotypes about sexual violence and complainant credibility.

5.3.1.2 Post-Deliberation Complainant Believability

A second two-way ANOVA was conducted to examine the effects of sexual history evidence and consistency in the complainant's account, on juror perceptions of complainant believability post-deliberation[17]. The findings of this two-way ANOVA showed a statistically significant interaction between the independent variables on jurors' interpretations of complainant believability post deliberation, F (4,108) =7.480, p= .000, partial n^2 =.217. The outcomes of this finding are illustrated in figure 5.10.

[17] Residual analysis was performed to test for the assumptions of the two-way ANOVA. Outliers were assessed by inspection of a boxplot, with 2 outliers emerging although neither of these were extreme outliers. Nevertheless, as a matter of good practice, both outliers were removed, and another two-way ANOVA conducted to examine the effect of these. The two-way ANOVA continued to produce statistical significance and therefore it was deemed that the impact of outliers had been inconsequential to statistical findings and did not invalidate the two-way ANOVA procedure. The outliers were therefore re-introduced to the dataset and all tests conducted to include these outliers. All but one scenario was normally distributed, as assessed by Shapiro-Wilk's test (p> .05). However upon Maxwell and Delaney (2004) assertion that ANOVAs tend to be robust to deviations from normality, the test continued to be run. There was homogeneity of variances, as assessed by Levene's test for equality of variances, (p= .905).

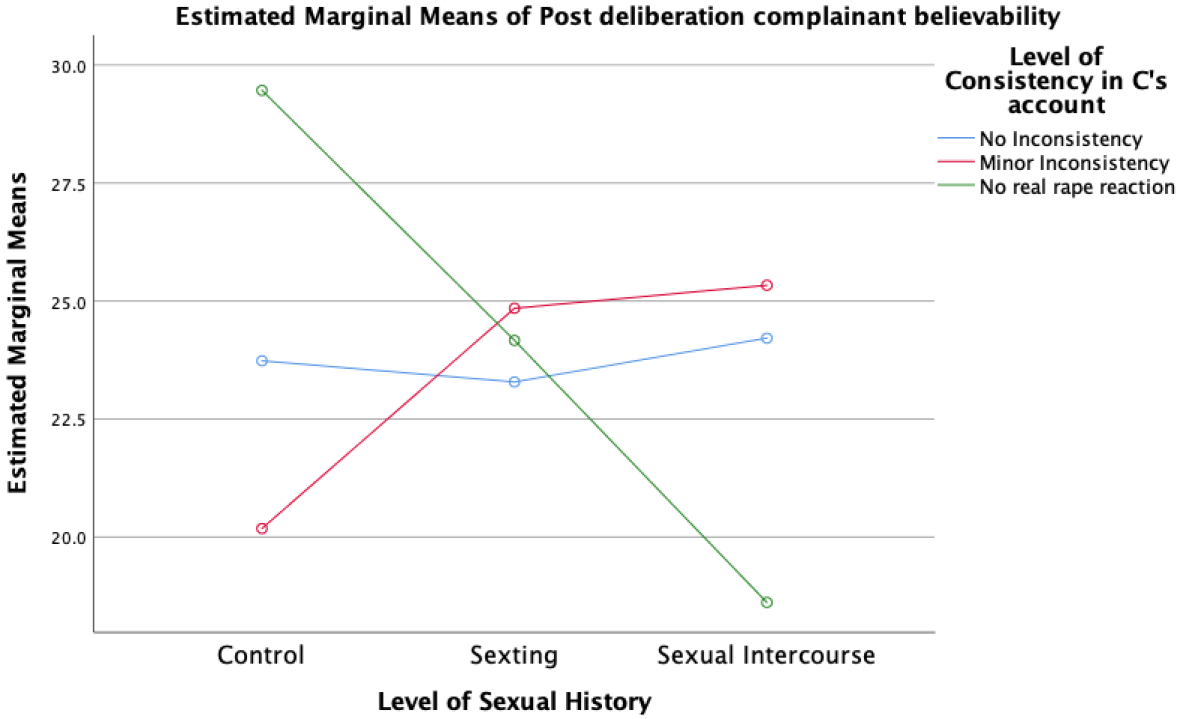

Figure 5.10: Profile Plot for Post-Deliberation Complainant Believability Scores

Interestingly whilst trends decreased in the no and minor inconsistency variations, the trend increased in the 'no real rape reaction' scenario to become yet more prominent. Possible explanations for this could be that myth-busters about sexual history evidence were more effective in the lesser inconsistency scenarios and were less effective where both consistency and adherence to rape mythology was at question. Ultimately however, it highlights the complex prejudicial nature of sexual history evidence and verifies the assertion that prejudicial assumptions surrounding sexual history are closely intertwined with wider factors such as consistency, credibility and adherence to wider rape myths. It also highlights the potential highly prejudicial impact of sexual history evidence, upon perceptions of the complainant, even where a deliberation takes place.

5.3.1.3 Summary of Complainant Believability Trends

It has been widely theorised in the literature on sexual history evidence, that the inclusion of this evidence at trial regularly prompts negative perceptions of the complainant amongst jurors (McGlynn, 2017). The current findings seemingly verify this assertion by showing that

complainants may be seen as less believable where sexual history evidence has been introduced but reveal the complex and nuanced nature of such relationship.

Indeed, the findings of the JDS have illustrated that the impact of sexual history evidence upon perceptions of complainant believability is not linear or clear-cut. Crucially it has highlighted that the impact of sexual history varies considerably dependant on the level of consistency in the complainant's account and adherence to wider myths and stereotypes about sexual violence. It therefore accentuates the association between sexual history evidence and wider notions of credibility, respectability and ultimately the character of the complainant, as highly influential to the impact of sexual history on jurors. It illustrates that the impact of sexual history is extensive, where adherence to these norms and stereotypes is absent. This highly original finding is critical to understanding the nuanced impact of sexual history and highlights the need for further intersectional research in this area.

Moreover, the findings demonstrated that the impact of sexual history evidence upon perceptions of complainant believability became less pronounced in the 'no and minor inconsistency' scenarios where a deliberation had taken place. This highlights the impact of the deliberative exercise in mitigating against individual bias about sexual history evidence and therefore should be seen as an area of good practice. Nevertheless, in the 'no real rape reaction' consistency scenario, the impact of sexual history became *more* pronounced following the deliberative exercise and again attests to the complex and nuanced impact of this evidence, dependent on adherence to wider myths and stereotypes.

Ultimately however, the current findings verify the hypothesis that the inclusion of sexual history evidence at trial can negatively impact upon jurors' perceptions of the complainant. This quantifiable impact supports existing literature and is further supported by qualitative trends discussed in Chapters 6 and 7.

5.3.2 Defendant Believability

Like complainant believability, defendant believability was measured in the JDS to examine individual juror perceptions of the completeness, plausibility, coherence and overall presentation of the defendant's account at trial. This was assessed via 7 questions in the JDS and marked on a scale of 7 to 35. Table 5.6 illustrates scores of defendant believability pre and post deliberation, grouped according to the scenario variation.

Table 5.6: Defendant Believability Scores by Scenario, Pre and Post Deliberation

Scenario		Pre-Deliberation				Post-Deliberation			
		Mean	***SD***	***Observed Min.***	***Observed Max.***	***Mean***	***SD***	***Observed Min.***	***Observed Max.***
No Apparent Inconsistency	Sexual Intercourse [Sc.1]	19.21	3.96	11	27	18.34	4.58	11	25
	Sexting [Sc.4]	17.58	3.41	12	24	17.64	3.75	10	24
	Control [Sc.7]	17.97	4.03	13	24	16.63	4.41	8	23
Minor Inconsistency	Sexual Intercourse [Sc.2]	19.17	4.26	13	26	18.34	4.29	13	26
	Sexting [Sc.5]	16.72	6.21	8	24	17.60	6.10	9	26
	Control [Sc.8]	21.07	3.57	15	28	21.92	3.42	15	27
Minor Inconsistency and No Real Rape Reaction	Sexual Intercourse [Sc.3]	23.10	4.7	15	30	23.42	5.65	13	32
	Sexting [Sc.6]	19.46	3.76	12	25	16.90	4.86	9	26
	Control [Sc.9]	16.72	4.39	10	28	12.99	4.40	7	19

Whilst the bulk of the literature on sexual history evidence has tended focus upon the impact of this upon perceptions of the complainant, Figure 5.11 illustrates that some trends equally emerged between scenario variation and juror perceptions of *defendant* believability. The findings of this table are visually illustrated in Figures 5.11 [Pre-Deliberation] and 5.12 [Post-Deliberation] below:

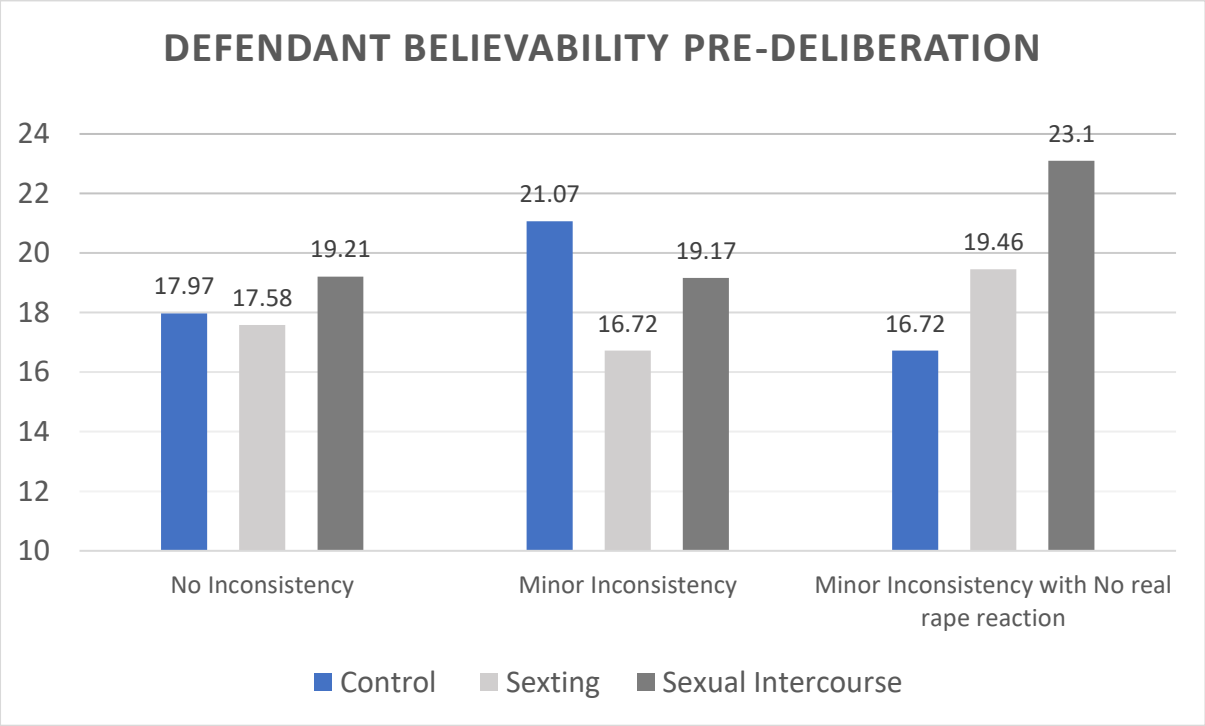

Figure 5.11: Pre-Deliberation Defendant Believability Scores

Unlike complainant believability, there was no clear trend in terms of defendant believability scores for the no and minor inconsistency scenarios. However, as with complainant believability, a pronounced trend emerged regarding the impact of sexual history on defendant believability, in the no real rape reaction scenario. This trend showed the defendant to be perceived as least believable in the control scenario where no sexual history evidence was introduced, with this increasing in the sexting scenario and increasing again where sexual intercourse evidence was introduced. Conversely to complainant believability therefore, this trend showed that the inclusion of sexual history evidence supported the defendant's case amongst jurors.

Figure 5.12 illustrates how these trends changed, post-deliberation:

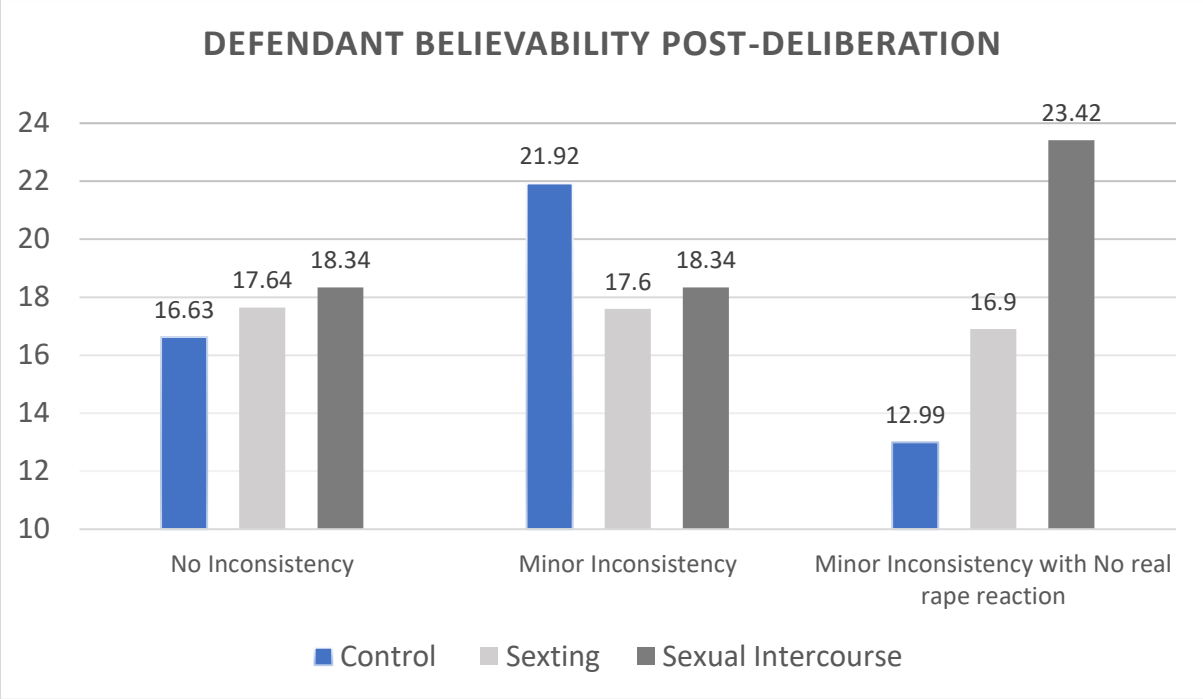

Figure 5.12: Post-Deliberation Defendant Believability Scores

Unlike the findings of complainant believability, trend of defendant believability actually became *more* pronounced post-deliberation, than pre-deliberation. Again, with the exception of scenario 8, the defendant was seen as *most* believable where sexual intercourse evidence was introduced, with this decreasing in sexting variations and decreasing again in control variations. This impact was most pronounced in the no real rape reaction variation and again highlights the impact of sexual history evidence being emphasised whereby the case adheres less to myths and stereotypes. Ultimately, it reflects the reverse impact of sexual history evidence on perceptions of the complainant, with the introduction of this evidence causing the complainant to be perceived as *less* credible and the defendant correspondingly *more so.* This trend was also observed in qualitative findings, as outlined in Chapters 6 and 7.

In order to examine these trends more closely, two-way ANOVA tests were conducted on both the pre-deliberation and post-deliberation defendant believability scores, as discussed below.

5.3.2.1 Pre-Deliberation Defendant Believability

A two-way ANOVA was conducted to examine the effects of level of sexual history and level of consistency, on juror perceptions of defendant believability pre-deliberation[18]. The findings showed a statistically significant interaction between sexual history evidence and level of consistency, upon jurors' interpretations of defendant believability pre-deliberation, F (4,108) =3.864, p= .006, partial n^2 =.125. There was also a statistically significant interaction for sexual history as a single individual variable, F (2,108) =3.529, p= .033, partial n^2 =.061. This impact of the interaction effect is illustrated visually in the profile plot below (Fig. 5.13):

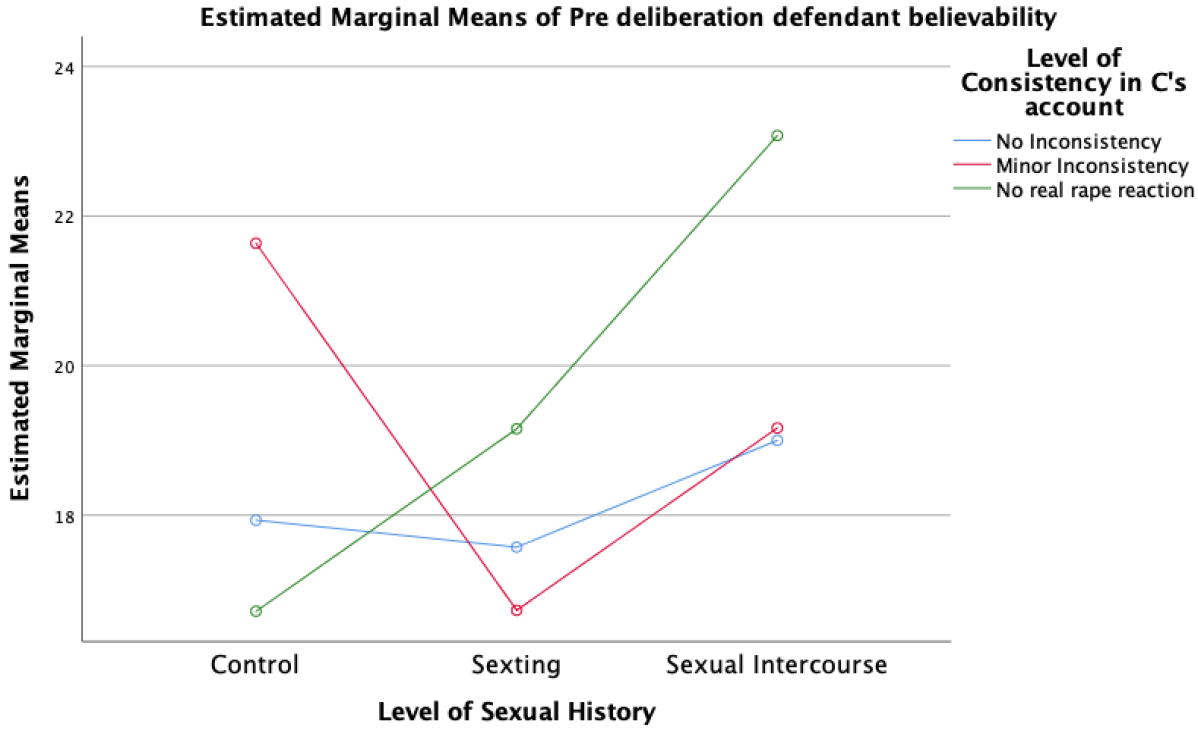

Figure 5.13: Profile Plot for Pre-Deliberation Defendant Believability

[18] Residual analysis was performed to test for the assumptions of the two-way ANOVA. 3 outliers emerged, as assessed by inspection of a boxplot although none of these were extreme. These were removed and the two-way ANOVA re-run, which continued to show statistically significant findings and therefore the impact of outliers deemed inconsequential and these re-introduced into the dataset. Data was normally distributed, as assessed by Shapiro-Wilk's test (p> .05) and there was homogeneity of variances, as assessed by Levene's test for equality of variances, (p= .418).

This profile plot illustrates how sexual history impacts upon not only complainant believability, but also defendant believability. It highlights, in much the same way as complainant believability, that this impact is complex and nuanced, varying substantially depending on the level of consistency in the complainant's account. However, as stated above trends of defendant believability were not clear pre-deliberation, except in the no real rape reaction scenario.

Unexpectedly, in both the 'no apparent inconsistency' variation [blue line], and 'minor inconsistency' variation [red line], the defendant was perceived to be *least* believable where sexting evidence had been introduced. Perhaps indicating the sexting evidence may harm the defence case. This equally corresponded with qualitative juror discussions in deliberations, whereby sexting evidence was routinely cited alongside the notion that the defendant had unlawfully assumed consent or felt entitled (Section 6.3.2).

As hypothesised however, the blue line illustrates that the defendant was seen as most believable where sexual intercourse evidence was introduced, and less believable in the control scenario where no sexual history evidence had been introduced. This accords with theorisation in the literature, that sexual history evidence may be included at trial as a defence tactic to bolster the defence case. Again however, scenario 8 presents somewhat of an anomaly to this trend, thereby necessity the need for further research using a larger sample to ascertain such trends more robustly.

Yet crucially, these findings continue to show that where the complainant's consistency was most in question [green line], the impact of sexual history evidence became far more pronounced. In this instance, defendant believability scores were very high where sexual intercourse evidence was introduced, incrementally decreased where sexting evidence was introduced and decreased again whereby no sexual history evidence was introduced. This supports the hypothesised impact of sexual history evidence, which is typically suggested to increase perceptions of defendant believability, seemingly excusing his behaviour as 'not

rape.' This trend is also supported by qualitative findings of sexual history discussed in Chapters 6 and 7 in which sexual history was routinely drawn upon to seemingly excuse the defendant's actions.

5.3.2.2 Post-Deliberation Defendant Believability

Another two-way ANOVA was conducted to examine trends in defendant believability post-deliberation[19]. Findings of the two-way ANOVA illustrated a statistically significant interaction between the level of sexual history evidence and level of inconsistency in the complainant's account, on jurors' interpretations of post-deliberation defendant believability, F (4,108) =8.115, p= .000, partial n^2 =.231. There was also a statistically significant interaction for sexual history as an individual variable, upon post-deliberation defendant believability F (2,108) =3.709, p= .028, partial n^2 =.064. The interaction effect is illustrated visually in the profile plot below (Fig. 5.14):

[19] Residual analysis was performed to test for the assumptions of the two-way ANOVA. Outliers were assessed by inspection of a boxplot, with 4 outliers emerging, one of which was extreme. These were removed from the dataset and the two-way ANOVA re-run. This second two-way ANOVA continued to produce a statistically significant finding and therefore it was deemed that the impact of outliers had been inconsequential to statistical findings and did not invalidate the two-way ANOVA procedure. The outliers were therefore re-introduced to the dataset and all tests conducted to include these outliers. All data was normally distributed, as assessed by Shapiro-Wilk's test of normality (p> .05), and there was homogeneity of variances, as assessed by Levene's test for equality of variances, (p= .463).

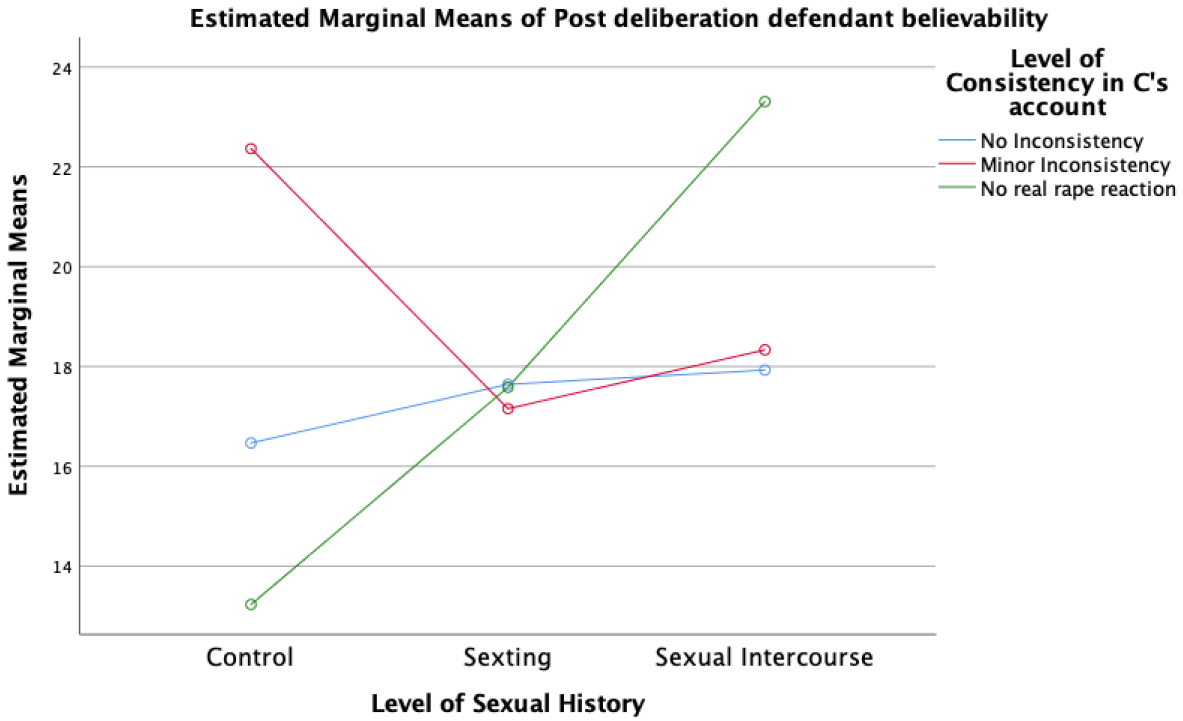

Figure 5.14: Profile Plot for Post-Deliberation Defendant Believability

Much like previous findings, this profile plot shows that the impact of sexual history evidence on defendant believability is influenced by the level of consistency in the complainant's account and vice versa. However, these findings post deliberation show a more pronounced impact of sexual history, than those pre-deliberation. This is the opposite finding to that of complainant believability, in which the trend was more pronounced pre-deliberation. This suggests that whilst the deliberative element mitigated against biases about the complainant, it seemingly intensified biases to bolster perceptions of the defendant.

Where there was no apparent inconsistency in the complainant's account [blue line], variation of sexual history caused little variation in defendant believability. Nevertheless, the trend emerged as hypothesised post-deliberation in which the defendant was seen as least believable in the control variation, with this increasing incrementally the greater the level of sexual history evidence introduced.

In the minor inconsistency scenarios [red line], there remained a lack of clear trend regarding the impact of sexual history evidence. Defendant believability here decreased from sexual

intercourse to sexting, as would be expected. However, it was highest in the control scenario where no sexual history was introduced. This again illustrates scenario 8 as somewhat of an anomaly compared to other trends illustrated in the profile plots, with reasons for this unknown and further research needed to explore this further.

Finally, however where the complainant's consistency was most in question [green line], the impact of sexual history evidence was again most pronounced. In this instance, defendant believability scores were very high where sexual intercourse evidence was introduced, incrementally decreased where sexting evidence was introduced and decreased again whereby no sexual history evidence was introduced. This supports the hypothesised impact of sexual history evidence as increasing believability of the defendant and bolstering the defence case. Much like with all above trends, this suggests that the impact of sexual history evidence is most pronounced when the complainant's consistency is most at question and illustrates the intersectional, nuanced impact of sexual history evidence on jurors.

5.3.2.3 Summary of Defendant Believability Trends

Whilst the majority of existing literature on sexual history evidence has focused on the impact of such evidence on judgements of the complainant, the current findings highlight its concurrent impact of perceptions of the defendant. These findings highlight the positive impact of sexual history evidence for the defence case, in increasing the perceived believability of the defendant amongst jurors. In doing so therefore, the inclusion of this evidence at trial acts to typically bolster the defence case.

Yet, in the same way as sexual history evidence impacted upon judgements of the complainant, the impact of sexual history on judgements of the defendant was equally dependent on the level of consistency in the complainant's account. Where the complainant was wholly consistent at trial, the defendant was typically viewed as slightly more believable where sexual history had been introduced, however the impact of this was minimal. Whereas where the complainant's consistency was most in question and her narrative did not adhere

to wider myths and stereotypes, the impact of sexual history upon perceptions of the defendant was substantial. This crucially highlights the notion that sexual history evidence must not be scrutinised in isolation, but interlinks closely with various wider factors regarding trial evidence, causing a substantially varied impact on jurors.

Furthermore, trends regarding the impact of sexual history evidence on perceptions of defendant believability, were *more* pronounced following the deliberative exercise. The contrasts to trends of complainant believability and counters research to suggest that the deliberative exercise mitigates against individual biases. A possible explanation for this, is that many jurors appeared acutely aware of the inaccuracy of negatively judging the complainant as a result of her sexual history, however appeared less mindful of drawing upon previous sexual history to invoke judgements of the defendant. This is discussed further in Chapter 6 and 7, but potentially highlights the impact of social desirability impacting upon jurors' perceptions of the case evidence.

5.3.3 What can be learnt from these JDS findings?

Taken together, findings of the JDS have highlighted the ongoing prejudicial nature of sexual history evidence, which has been theorised extensively within the literature (Temkin, 2003; McGlynn, 2017; Smith, 2018a). However, these trends have built substantially upon the existing literature about sexual history evidence, by highlighting that the impact of this evidence is highly contingent upon additional case facts and adherence to stereotypes, to produce a complex and changeable impact of sexual history evidence upon jurors' perceptions of the case.

The current findings have shown that the inclusion of sexual history evidence at trial typically results in lower perceptions of complainant believability amongst jurors. This ultimately confirms widespread assertions by feminist critics, that the inclusion of sexual history evidence at trial risks prejudicing the jury against the complainant (Temkin, 2003; Kelly *et al.* 2006; Baird, 2016; McGlynn, 2018). It affirms Schuller and Hastings' (2002) mock jury findings, in

which the inclusion of sexual history evidence at trial resulted in more negative judgements of the complainant amongst participant jurors.

Whilst the majority of literature on sexual history to date has tended to focus upon the impact of such evidence on perceptions of the complainant, the current study equally highlighted that this evidence may also bolster the credibility of the defendant and defence case. This contradicts previous mock jury research of Schuller and Hastings (2002), which found that the inclusion of sexual history evidence at trial did not impact upon perceptions of the defendant. However, it arguably represents a more holistic impact of sexual history evidence and accords with wider rape mythology research which shows that myths are routinely drawn upon not only to attack the complainant but also to excuse the defendant (Leverick, 2020). This finding builds upon McGlynn's (2017) assertion that sexual history at is often invoked at trial to bolster the defence case, with the current findings demonstrating how this also translates from trial framings into the jury room.

Finally, and perhaps most importantly, results of the JDS showed that the impact of sexual history evidence on both complainant and defendant believability was highly influenced by concurrent aspects of consistency at trial to produce a complex, intersectional impact of this evidence upon jurors. Whilst the connection between sexual history evidence and framings of complainant credibility, believability and respectability have been theorised for many years (Phipps, 2009; McGlynn, 2017), the current findings clearly illustrate the importance of these concurrent factors in determining the impact of sexual history evidence. This crucially highlights that sexual history evidence must not be scrutinised in isolation, but within a holistic approach to myths, stereotypes and patriarchal adversarial ideals more generally. A large-scale intersectional study to further scrutinise these trends is therefore seemingly necessary.

5.4 Chapter Summary

This chapter has illustrated numerous quantitative findings that exemplify the ongoing, potential prejudicial influence of sexual history evidence on jury deliberations. Key findings are synthesised in Table 5.7:

Table 5.7: Summary Table of Quantitative Findings

	Relationship Measured	Section	Statistical Test	Statistical Significance	Finding
Verdict Trends	Did scenario variation impact on initial individual juror verdict?	5.2.1	Chi Squared Test of Association	No	Whilst this did not reach statistical significance, a trend approaching significance was observed in which the greater the level of sexual history introduced at trial, the less likely a guilty verdict.
	Did scenario variation impact on final jury verdict?	5.2.2	Goodman and Kruskal's λ	No	A statistically significant trend was not established and due to small sample size, it is difficult to assess emerging trends.
	Did scenario variation impact on unanimity of verdict?	5.2.2.1	Goodman and Kruskal's λ	Yes	This statistically significant trend showed a greater number of unanimous verdicts in the control scenarios, where no sexual history evidence was included. This lends weight to the assertion that the inclusion of sexual history evidence at trial, complicates deliberations and polarises juror attitudes.
	Did scenario variation impact on deliberation time? Did variation in the level of sexual history impact on deliberation time?	5.2.2.2	Kruskal Wallace Test Kendall's tau-b	No Yes	Whilst statistical significance was not observed between scenario variations and deliberation time, it was found between the inclusion of sexual history evidence and deliberation time. Again this lends weight to the assertion that the inclusion of sexual history evidence at trial, complicates deliberations and polarises juror attitudes.
Juror Decision Scale Findings	Did scenario variation impact on juror perceptions of complainant believability (as measured by the JDS)?	5.3.1	Two-way ANOVA	Yes	These statistically significant finings illustrated that the inclusion of sexual history evidence decreased perceptions of complainant believability and increased defendant believability as expected. However, they also highlighted the complex impact of sexual history, which was emphasised whereby

	Did scenario variation impact on juror perceptions of defendant believability (as measured by the JDS)?	5.3.2	Two-way ANOVA	Yes	greater inconsistency was introduced into the complainant's account. This demonstrates the intersectional nature of this evidence as highly dependent upon wider adherence to rape myths and perceptions of complainant consistency and credibility.

Taken together, these findings highlight the problematic impact of sexual history evidence, which holds the potential to prejudice juror judgements of both complainant and defendant and complicate the deliberative process. Whilst these findings do not support earlier findings of Kelly *et al.* (2006), in which sexual history evidence was found to be a strong predictor of increased acquittals; they did continue to illustrate the unfavourable impact of this evidence on the prosecution case via negative perceptions of the complainant. Meanwhile, these findings are also novel in their impact, by illustrating the highly interconnected nature of sexual history evidence with wider framings of complainant consistency and credibility. This exemplifies the complex and nuanced impact of sexual history evidence on juror framings of rape trials and demonstrates the need for wide-ranging and overarching reform efforts to tackle this prejudicial impact.

These quantitative findings have ultimately supported and re-iterated assertions regarding the dangerous, prejudicial nature of sexual history evidence and justified calls for further research and concerted attempts to reform the current law. These findings are equally supported by qualitative themes emerging from the current deliberative dataset, as discussed throughout Chapter 6 and 7.

Chapter Six: Sexual History Evidence and Heteronormative Ideals

6.1 Introduction

Chapter 5 focused on research aim one, establishing quantitative findings regarding the impact of sexual history evidence on juror verdicts and outcomes of the juror decision scale. The present and following chapter will now examine qualitative themes to establish what effect previous sexual history evidence had upon the content and dynamics of the mock juror deliberations, fulfilling research aims two and three respectively.

Whilst discussions of sexual history evidence varied considerably within and between juries, clear and recurrent themes emerged across the deliberative dataset. In line with previous literature and theorisation of the so-called twin myths, discussion of sexual history evidence in the current dataset could be largely divided into two overarching themes. The first of these related to the supposed relevance of sexual history evidence as a marker of consent, and the second related to perceptions of the complainant's character and credibility as a result of the previous sexual history evidence. Whilst these broad themes inevitably produced some overlap throughout discussions, the current chapter will focus upon notions of relevance, whilst chapter 7 will scrutinise themes about credibility.

Each chapter will include direct quotes from the deliberation dataset in order to demonstrate core findings. Positive myth-busting will be highlighted alongside myth endorsement of sexual history and each section will conclude by examining what can be learnt from trends discussed. Ultimately, it will be asserted that the current findings support the thesis argument that the inclusion of a complainant's previous sexual history evidence at trial can encourage problematic narratives and interpretations by jurors, which ultimately influence the execution of justice in rape trials.

6.1.1 Extent of Discussion about Sexual History Evidence

Before examining the core qualitative narratives that emerged about sexual history evidence, the current section will situate these themes by outlining the extent to which sexual history evidence was discussed in each of the deliberations. Sexual history evidence was referenced on at least one occasion by jurors in *every deliberation* within the dataset, where this evidence had been introduced at trial. These discussions took place within the first five minutes for nine of the twelve scenarios where sexual history was introduced [J1, J4, J5, J7, J8, J10, J11, J13, J17], and was the first piece of evidence discussed in J5, J8 and J13 [Scenario 5, 6, 2]. This early discussion seemingly suggesting that sexual history evidence was important to jurors' perceptions of the trial evidence and played a key role in jurors' assessments of the case as a whole.

Nevertheless the extent to which sexual history evidence was discussed in deliberations varied considerably between juries. This variation is illustrated in Table 6.1, which depicts the number of dialogues about sexual history in each deliberation and the proportion of these dialogues as a percentage of the overall deliberative transcript. This data was produced using thematic analysis, by coding each reference to sexual history evidence and then using NVivo software to calculate percentages of these coded discussions as a percentage of the overall deliberative transcript.

Table 6.1: Number of Dialogues about Sexual History Evidence per Deliberation

Sexual History Variable	Consistency Variable	Jury	% of discussion	No. of Dialogues
Sexual Intercourse	No apparent inconsistency [Sc.1]	1	11.98%	8
		16	2.69%	1
	Minor Inconsistency [Sc.2]	4	9.74%	8
		13	27.78%	17
	Minor Inconsistency and No 'Real Rape' Reaction [Sc.3]	7	3.53%	2
		10	22.43%	4
Sexting	No apparent inconsistency [Sc.4]	3	2.96%	1
		17	12.23%	13
	Minor Inconsistency [Sc.5]	5	13.46%	13
		14	16.72%	10
	Minor Inconsistency and No 'Real Rape' Reaction [Sc.6]	8	10.23%	6
		11	14.14%	6

Table 6.1 exemplifies variations in the extent to which sexual history evidence was discussed in deliberations, ranging from just 1 exchange (2.69% and 2.96% of the full deliberation content) in Juries 16 and 3, compared to 17 exchanges (27.78% of the deliberation) in Jury 13. The mean number of dialogues referencing sexual history evidence across the dataset, was 7.4 (12.32% of the deliberation).

No clear trend however was observed between scenario variations and the extent to which sexual history evidence was discussed by jurors. Multiple eta (n) coefficient tests were conducted in order to statistically test whether such an association existed between scenario variation, level of sexual history or level of consistency in the complainant's account, upon the extent of discussion of sexual history by jurors. However, none of these produced statistically significant findings. Anecdotally, it appeared that discussion of sexual history evidence was highest where minor inconsistency was introduced into the complainant's account, however further research using a larger sample would be necessary in order to robustly investigate whether such trend existed.

Moreover, a further eta (n) coefficient was run to determine whether early discussion of sexual history evidence correlated to increased discussion of sexual history in the deliberation overall. Again, this did not reach statistical significance (p = .384). However, anecdotally those juries who did not discuss sexual history in the first five minutes (J1, J14, J16) typically discussed

sexual history to a lesser extent in the overall deliberation (1, 10 and 1 instances respectively). Again, this calls for further research using a larger sample in order to scrutinise whether such an association exists.

Ultimately however, whilst the nature and extent of discussions of sexual history varied considerably, reference to this evidence in *every* jury in the dataset - typically within the first five minutes of deliberations - lends support for the premise that sexual history evidence is important to jurors. Pennington and Hastie's (1992) story model posits that jurors play an active role in organising and ranking trial evidence to construct their favoured narrative interpretation of the case (Willmott, 2017). Therefore, the initial frame that jurors adopt in constructing their story is significant as it reflects foundational interpretations and understandings of the case (Tinsley, 2001). When deliberations begin, jurors advance their individual core narratives to initiate discussion and begin to develop a group narrative (Rossner, 2019). Early focus on sexual history evidence in the majority of deliberations, therefore, indicates that such evidence is regularly held at the core of individual narrative construction. This indicates significant substantive value regularly awarded to this type of evidence within story construction.

6.1.2 Situating Themes: Relevance and Heteronormativity

Having established an overview of the extent to which sexual history evidence was referenced and discussed by jurors in the current dataset, the remainder of the chapter will outline notions of relevance of sexual history evidence, as a potential marker of consent, that emerged within juror deliberations. These debates about whether sexual history evidence may ever be relevant to the issue of consent, lie at the heart of discussions about sexual history evidence, yet, the current research is the first in the UK to examine if and how *jurors* infer relevance.

Traditionally, sexual history evidence was considered by the courts as central to the issue of consent (Niculiu and Baiwa, 2016). Despite changing social norms and legislative s.41 restrictions, feminist academics have shown that sexual history evidence continues to be

routinely admitted at trial to try to infer consent and to fuel supposition of the propensity to consent narrative amongst jurors (McGlynn, 2017; Smith, 2018a). This idea of propensity, however, is argued by critics as contradicting the law on consent, which asserts that this is a person, time and situation specific enterprise to be given afresh on each occasion (McGlynn, 2017). However, observational evidence has shown that such narratives about sexual history are still routinely advocated at trial (Smith, 2018a; Daly, 2021a).

The findings of the current dataset positively showed myth-busting by jurors in 10 of the 12 sexual history juries, to dismiss notions of the relevance of sexual history evidence as an indicator of the complainant's consent. However, alongside outward myth-busting protestations, troubling attitudes towards the perceived relevance of the complainant's previous sexual history as a marker of consent, equally emerged in 10 of the 12 sexual history scenarios.

Typically, such myth endorsement was distinctly more subtle than has been previously theorised in the literature. For example, outward suggestions that previous consent may be taken to indicate latter consent were fundamentally rare. Instead, however, discussions of sexual history evidence typically relied upon wider stereotypical framings of heteronormativity and gendered ideals, to posit the supposed relevance of this evidence, blame the complainant and excuse the actions of the defendant.

The following section begins by outlining good practice in the form of myth-busting comments by jurors, who highlighted the irrelevance of sexual history evidence and rejected the propensity to consent narrative. However, this will then be followed by examination of continued juror endorsement of rape myths about sexual history, demonstrating adherence to and reliance upon wider heteronormative ideals in discussing this evidence. This section will be divided into beliefs that blame the complainant and beliefs that excuse the defendant, with each typically introduced according to culturally sanctioned, gendered ideals of appropriate sexual behaviour. This demonstrates how sexual history evidence remains imbued in the

wider patriarchal norms and mythical ideals regarding sex, sexual behaviour and sexual violence and can ultimately serve to prejudice a jury.

6.2 Myth-Busting: Propensity to Consent

Positively, at first glance, jurors in the current dataset widely rejected notions of the relevance of sexual history evidence and the propensity to consent assertion. In 10 of the 12 sexual history evidence deliberations, at least one juror asserted that sexual history was irrelevant to the question of consent and consequently should not be relied-upon in the decision-making process. Often, these assertions were unprompted by myth endorsement and thereby seemingly reflected a consciousness amongst some jurors regarding both the inaccuracy and potentially prejudicial nature of sexual history evidence.

> *And her previous sexual relationship with him should make absolutely no erm. Should take no account of it no is no. (J121, Scenario 2: Sexual Intercourse, Minor Inconsistency)*
>
> *And an overall they tried to discredit her because she'd flirted, but flirting doesn't mean that at that day at that time, it was okay to have sex. It just means I'm happy to flirt with you. But that doesn't give consent to sex a given day or time. And she had every right initially been flirting to say actually, no, I don't want sex with you. And I don't want it. (J112, Scenario 5: Sexting, Minor Inconsistency)*
>
> *Life is that yeah, even though they've had previous sexual relations, it doesn't mean that they can assume that every time is consensual (J008, Scenario 2: Sexual Intercourse, Minor Inconsistency)*

Each of these narratives demonstrate clear myth-busting sentiments to challenge the premise of presumed or increased likelihood of consent, as a result of prior consent. Messaging within these quotes - that “no is no,” that the complainant “had every right initially been flirting to say actually, no” and that one cannot “assume” consent following previous sexual relations - fundamentally disputes the notion of relevance of sexual history evidence and rejects the propensity to consent narrative.

Jurors advancing these myth-busting narratives were generally clear in the view that regardless of any previous sexual activity, this could not be used to deduce consent or any kind of context from which to infer consent.

> *And you know I just, I just do not see anything that she did on that day or in the week leading up to it, right, by sending naked pictures or anything like that, to amount to any form of consent (J164, Scenario 4: Sexting, No Inconsistency)*
>
> *I do believe he is guilty and committed rape. Even though Hannah's story is not clear to me, but there is not reason for rape even if you send flirty texts and nude pictures. (J099, Scenario 6: Sexting, No real rape reaction)*

Again, this illustrates clear outward challenge to the propensity narrative. Moreover J099's assertion even showed that whilst they did not necessarily believe or endorse the complainant's narrative of the case, they did not use this as a means to detract from the complainant's autonomy to consent or not consent as she wished. This demonstrates J099 was able to not only challenge the relevance of sexual history evidence as a marker of consent but also to separate such evidence from notions of perceived credibility, thus rejecting both of the twin myths.

Furthermore, the notion that consent to one sexual behaviour can indicate consent to a different sexual behaviour was challenged at points within the dataset. These jurors highlighted that previous flirting, or any previous sexual relationship did not equate to later consent to sexual intercourse and thereby could not be used to support the defendant's claim of consent.

> *J097: I would say that that obviously doesn't if the right of consent for every time obviously.*
> *J098: Absolutely. And that's that's a good point. Just because you're flirting before doesn't mean you give consent at that exact moment.*
> *J086: That is true*
> *J098: Yeah, and*
> *J094: even if they were in a sexual relationship prior it doesn't count that. (Deliberation, Scenario 6: Sexting, No real rape reaction)*

This framing shows greater understanding of the laws on consent, recognising that consent to one behaviour does not equate to consent to another. It therefore rejects assumptions of

propensity or assumed consent, whilst also serving the respect notions of female autonomy and the right to say no at any point. These myth-busting narratives were therefore positive in suggesting limited prejudicial impact of sexual history evidence amongst these jurors.

6.2.1 Scepticism of Defence Reliance on Sexual History Evidence

Alongside clear and repeated myth-busting in 10 of the 12 sexual history juries, jurors in 3 of these 12 juries also expressed scepticism of defence counsel for introducing sexual history evidence at trial:

> *Mm hmm.... Yeah. I don't agree with how the defence played out, you know, the messages that she sent, things like that, because even if she was flirting with the defendant, then that doesn't automatically provide consent, like at all in order for consent, you know, to be given. It has to be it has to be in the moment. It doesn't matter if she said, you know, weeks ago, I'll have sex with you... on the day. That is what matters. (J071, Scenario 6: Sexting, No real rape reaction)*

> *Makes no difference. And I was quite annoyed at the the lawyer for bringing that up in that way. (J130, Scenario 1: Sexual Intercourse, No Inconsistency)*

> *And overall, they tried to discredit her because she'd flirted, but flirting doesn't mean that at that day at that time, it was okay to have sex. It just means I'm happy to flirt with you. But that doesn't give consent to sex a given day or time. And she had every right initially been flirting to say -Actually, no, I don't want sex with you. And I don't want it. And she says she told him she didn't want it. (J112, Scenario 5: Sexting, Minor Inconsistency)*

Not only do these narratives reflect strong myth-busting and rejection of the propensity narrative by jurors, but equally illustrate an awareness by these jurors of the tactical reliance on sexual history evidence by defence counsel at trial. These narratives connected the inclusion of sexual history evidence, with notions of discrediting the complainant and distracting jurors. In doing so, these seemingly represent extremely positive understanding amongst these jurors, as to the often-inappropriate reliance upon sexual history evidence by advocates at trial.

Yet whilst positive, it is important to recognise that these narratives showing scepticism of defence counsel's reliance upon sexual history evidence, only arose on three occasions throughout the entire deliberative dataset. It seemingly thus suggests that this progressive understanding about the often tactical inclusion of sexual history by defence counsel remains limited, and these insights are therefore likely to permeate only a minority of 'real' juries in practice.

Markedly, scepticism towards defence counsel's reliance on broader rape myths such as the complainant's failure to shout for help and lack of injury, was expressed significantly more frequently by participant jurors in the current dataset. Indeed, these scepticism narratives arose on 22 occasions, within 8 of the 18 juries in the overall dataset. This, suggesting that jurors were more aware of the inaccuracy of these broader rape myth narratives, than they were of the inaccuracy and irrelevance of sexual history evidence in particular. This supports existing theorisation in the literature that sexual history evidence remains one of the most engrained and pervasive myths to continue to be relied upon in justice discourse (Thomason, 2018).

6.2.2 What can be learnt from this myth-busting?

Principally, these myth-busting attempts by jurors should be seen as a cause for optimism and sign of improving social attitudes amongst some of the jury eligible population. They suggest that individuals are growing increasingly aware of dangerous myths and stereotypes surrounding sexual history evidence and illustrate a rejection of the once-held perceived relevance of this evidence as a marker of consent. These narratives therefore must be seen as a cause for optimism and must not be understated as a sign of positivity.

Nevertheless, it is equally important to assess these myth-busters within the wider context of the whole deliberative dataset. Firstly, it must be acknowledged that participants in the current research typically scored relatively low on AMMSA (Section 4.5.1) and therefore endorsed

rape myths to a lesser extent than would be expected of the typical jury eligible population[20]. Whilst this must therefore be taken into account, the current thesis does not simply seek to overlook these findings as a mere consequence of a skewed participant pool. The frequent nature of these myth-busters may thereby be an indicator of changing social attitudes towards sexual violence and rape mythology. Whilst RMA amongst jurors has been discussed earlier in the thesis, it may be posited that the current findings reflect a shift in the acceptance or perhaps the content of modern rape myths. Beshers and DiVita (2021) for example, studied undergraduate students in the USA in both 2010 and 2017, and found a significant drop in rape myth acceptance in the 2017 sample. Reasons for this, they suggested, could be increased societal awareness and concern, and the implementation of sexual violence prevention strategies. Similarly Thomas's (2020) findings, although methodologically contentious (2.4.3), equally suggested a growing awareness amongst the jury eligible population in England and Wales, as to the inaccuracy or social undesirability of common rape myths. Perhaps therefore, the current myth-busting findings, to some extent, similarly reflect progressive attitudes to recognising the inaccuracy of rape mythology.

These changes in RMA may be explained as a result of unprecedented global debate about sexual violence, together with numerous expansive social media movements. Whilst limited research to date has explored societal impacts of these movements, research has demonstrated that social movements and campaigns more generally can ultimately achieve large scale societal change (Burstein and Linton, 2002; Wakefield, Loken and Hornik, 2010). Szekeres, Shuman and Saguy's (2020) research, indeed, found a drop in attitudes which dismissed sexual assault, following the #MeToo movement, with the effect persisting for at least 6 months beyond the peak of #MeToo. Moreover, it seems conceivable that, whilst general media reporting of sexual violence has been seen to sustain and enhance RMA (Cowan, 2021), polarised social media movements attempting to dismiss such myths and

[20]Average AMMSA score of the current sample was 2.42. Mean average of the Spanish validation of AMMSA in 2011 was 2.96 for females and 3.32 for males (Megias *et al.* 2011)

stereotypes would seemingly have the reverse impact. The myth-busting findings of the current research must thereby be seen as positive and must not be detracted from.

Nevertheless, deeper analysis of deliberations in the current dataset equally highlighted ongoing cause for concern. Whilst on the face of it, myth-busting narratives were frequent and clear; closer inspection of discussions about sexual history evidence highlighted ongoing and pervasive myth endorsement. This myth endorsement was typically subtly framed so as to avert overt links between sexual history and the supposed propensity to consent; instead relying upon wider heteronormative ideals to underpin stereotypical framings regarding the relevance of the complainant's previous sexual history. The remainder of the chapter therefore argues that whilst jurors seem more *aware* of the inaccuracy of rape myths, this does not equate to jurors no longer endorsing the *underpinnings* of these myths.

6.3 Heteronormative Scripts

Despite overt myth-busting about the relevance of sexual history evidence as discussed above, discussions of sexual history evidence were also routinely characterised by strong focus on notions of supposed normal heterosexual relations and gendered socio-sexual scripts. Suggestions that women frequently act coy in sexual situations or send mixed signals, men are often innocently mistaken in their belief of consent, vengeful allegations are common, and that rape can be fundamentally differentiated from sex, all emerged repeatedly within discussions of the complainant's previous sexual relationship with the defendant. In advancing these narratives, jurors endorsed outdated stereotypes in which women are portrayed as gatekeepers to sexual relations and men as sexual instigators (Scott and Graves, 2017; EVAW, 2019b).

Whilst these framings did not tend to overtly and explicitly link the complainant's previous sexual history evidence with the assertion that she consented, they inferred relevance of the sexual history evidence, by situating this within a perceived context of consent or likelihood to consent. In doing so, these narratives acted to a) attribute blame the complainant for her

victimisation as a result of failing to adhere to the heteronormative female gatekeeper role, and b) excuse the actions of the perpetrator by legitimising his actions within the male instigator role.

These framings of sexual history evidence according to heteronormative, gendered ideals occurred in 10 of the 12 juries exposed to sexual history evidence and trial. This demonstrates continued frequent endorsement of prejudices relating to the perceived relevance of sexual history evidence amongst jurors. Some positive attempts at myth-busting towards these endorsements did occur, however the prevalence of these prejudices must not be understated as a cause for concern. The following section is divided into beliefs that blame the complainant and beliefs that excuse the defendant and concludes by examining what can be learnt from these narratives.

6.3.1 Blaming the Complainant

Complainants of sexual violence are routinely subject to attitudes that blame and responsibilise them for their victimisation, through adherence to rape mythology (Suarez and Gadalla, 2010; Gravelin, Biernat and Bucher, 2019). Extensive research has shown that myths are frequently directed at trial as a means to discredit the complainant and responsibilise her for her victimisation, asking for example what she had been wearing, whether she had been flirting and whether she had screamed for help (Temkin *et al.* 2018; Smith, 2018a). These myths endorse the heteronormative gatekeeper model of sexual relations in which men are perceived as unable to control their sexual urges, meaning that women are held responsible for effectively communicating their non-consent, so as to avoid unwanted sexual advances (Scott and Graves, 2017). Where the complainant seemingly failed to execute this role, rape myths such as those mentioned above, were used to attribute some level of blame and culpability to the complainant.

The following section highlights the role of this gatekeeper model and heteronormative gendered ideals as central to jurors' discussion of sexual history evidence in the current dataset and used widely to attribute blame and responsibility to the complainant.

6.3.1.1. "Women Act Coy in Sexual Situations"

Within the heteronormative gatekeeper model, the 'expected' female role is supposedly passive and submissive and therefore the assertion that 'women act coy' in sexual situations remains widely pervasive. This outdated assumption fundamentally undermines female autonomy and women's right to say no, and perpetuates misguided perceptions of ambiguity in regard to sexual consent.

Nevertheless, this model of sexuality and inaccurate rape mythology was drawn upon by jurors in 4 of the 12 sexual history juries in the current dataset, within discussions of the complainant's previous sexual history. In Scenario Five for example, the complainant's previous sexual history evidence was highlighted as a potential marker of an increased likelihood that she was consenting due to the 'relationship context' in which it occurred. The suggestion was made, that within this heteronormative context, the complainant was perhaps simply shy and had expected the defendant to instigate sexual relations:

> *It does come down to a point that I brought up earlier, we do have, like, we have the consent element to it, whether the consent was given or not, but I also believe I genuinely do believe that there is there should be or like the man's belief in that sense, whether it was consensual or not, because I'm not saying that obviously women deserve it if it does happen, that's not what I'm saying. But at the same time, how many situations in relationships or couples seeing each other where the woman acts coy and will kind of, you know, make out that she's a little bit shy and because like she just expects the guy to take the first step. And I think this is the thing like if the man has been has this belief that you know, this relationship, whatever it is between them is progressing, he doesn't have the malice of rape. And that's where it comes down to for me, like I don't I don't think he genuinely had the malice to rape her (J116, Scenario 5: Sexting, Minor Inconsistency)*

Whilst J116 initially demonstrated some attempt at myth-busting in stating that "I'm not obviously saying that women deserve it," she then developed her point by invoking clear myth

endorsing assumptions. By directly comparing the behaviour of both the complainant and defendant to that of 'regular' "relationships or couples," it demonstrates an attempt by J116 to normalise the alleged rape in supposed typical heterosexual relations. The notion that "the woman acts coy" and "expects the guy to take the first step" endorses inaccurate assumptions of females as gatekeepers to sexual relations and infers a level of culpability of the complainant for failing to clearly communicate her non-consent. This normalisation of rape into typical heterosexual behaviour fundamentally served to de-legitimise the complainant's claim. Further, through this normalisation J116's conclusion that "I don't think he genuinely had the malice to rape her" as a result of their previous relationship, alleviates the defendant of all blame and criminal responsibility. This belittles the necessity of both parties to establish clear consent and endorses the premise that one can assume future consent following previous consent.

Responses to J116's narrative within the deliberation were, however, distinctly mixed. Whilst strong myth-busting was advanced by J126, J117 demonstrated further endorsement of these stereotypical perceptions.

> *So is she saying no, how can he be unclear about that? (J126, Scenario 5: Sexting, Minor Inconsistency)*
>
> *But like she was agreeing to it kissing him. She turned round and pulled her, pulled him into her. (J117, Scenario 5: Sexting, Minor Inconsistency)*

J126 strongly dispelled this stereotypical narrative of mixed signals or ambiguous non-consent, firmly submitting that saying no is a clear and effective symbol of non-consent. J117 however, further endorsed these mythical narratives, by stating that the complainant had agreed to kiss the defendant and thereby implied that this could have been an indication of consent or a context in which consent was assumed. This contravenes the legal definition of consent in which consent to one activity, does not indicate consent to another activity. It also demonstrates continued adherence to the gatekeeper model, by attributing responsibility to

the complainant to clearly communicate her consent or non-consent to different behaviours, rather than establishing how the defendant seemingly ascertained affirmative consent.

This exchange between jurors of whether the previous sexual history evidence or kissing was or was not an indicator of consent was not clearly resolved, with neither juror seemingly backing down or changing stance. This dialogue instead continued on, to discussion of false allegations, whereby J117 submitted that false rape allegations do "occasionally happen." It therefore demonstrates how various discourses of rape mythology are linked and may overlap in order to hinder and de-legitimise a complainant's claim of rape.

These misunderstandings of consent and attempts to normalise the alleged rape into normal heterosexual relations were not limited to a single jury. For example, in Scenario 1, J002 repeatedly suggested that there may have been "mixed signals" between the complainant and defendant, as a result of their previous relationship:

> *I worry that it's because they have previous relationship...that it was mixed communication (J002, Scenario 1: Sexual Intercourse, No Inconsistency)*
>
> *I think this is where the idea of mixed messages is coming into it (J002, Scenario 1: Sexual Intercourse, No Inconsistency)*

The premise of mixed signals or mixed communication as a result of the previous sexual relationship, ratifies the propensity to consent narrative, by normalising an assumption of consent based on previous consent. This perpetuates misunderstandings of legal consent and further serves to de-legitimise the complainant's claim of rape as a matter of mere confusion or misunderstanding. It also endorses the heteronormative female gatekeeper role by dismissing the notion of rape, as a result of the complainant's failure to clearly illustrate her non-consent. Thereby, dismissing her victimisation experience and trivialising the alleged rape into a matter of mere confusion or crossed wires, rather than 'true' victimisation.

J002's focus on potential mixed signals not only arose within the group deliberation but also in the pre-deliberation questionnaire.

> *As someone who has experienced sexual assault, I find it hard to believe that Hannah Cox had no recollection of things occurring. I also believe that, because of their previous sexual relations, there may have been mixed signals between them. I am in no way condoning the behaviour of the gentleman, but do not feel like this was a clear cut "rape case", due to there being too many loose ends. (J002, Pre-Deliberation Questionnaire, Scenario 1: Sexual Intercourse, No Apparent Inconsistency)*

This, therefore, demonstrates how individual juror judgements permeate and underpin latter discussions within the group deliberation process. Crucially here, whilst seemingly myth-busting in respect to "no way condoning" the defendant's behaviour, J002 equally endorsed mythical assumptions of mixed signals to excuse the defendant. This premise of mixed signals attributes a level of moral culpability to the complainant, who failed to properly communicate her non-consent and thereby seemingly failed in her role as gatekeeper to sexual relations. Additionally, within this narrative, J002 identified her own previous sexual victimisation. This arguably therefore demonstrates the fundamentally engrained nature of rape myth narratives, not only amongst the jury eligible population, but crucially amongst complainants themselves.

Moreover, where J002 advanced these notions of mixed signals as a result of the previous sexual history, responses were mixed amongst fellow jurors. Whilst some demonstrated strong myth-busting narratives, others seemingly agreed with J002's assertion that the alleged rape could have been the result of simple mixed signals between the complainant and defendant as a result of their previous sexual history:

> *J002: and maybe there was mixed messages going on between them*
> *J006: yeah so I think that...*
> *J003: I think the mixed messages thing is weird because she says she said no, and if she says she said no, then that's not her consent (Deliberation, Scenario 1: Sexual Intercourse, No Apparent Inconsistency)*

> *J002: I think this is where the idea of mixed messages is coming into it*
> *J018: Yeah (Deliberation, Scenario 1: Sexual Intercourse, No Apparent Inconsistency)*

These exchanges demonstrate the variation of myth acceptance amongst jurors. Positively, J003 demonstrated strong myth-busting by asserting that saying no is a clear sign of non-consent and therefore they strongly rejected the notion that the encounter could be attributed to mixed signals. However, both J006 and J018 exhibited some level of agreement to the idea of mixed signals. Therefore, whilst J002 was the only one to mention the premise of mixed signals in the pre-deliberation questionnaire, this exchange illustrates that adherence to this myth was potentially more widespread than this, once introduced by one juror.

Nevertheless, one particularly strong myth-buster must be mentioned here:

> *J002: I worry that it's because they have previous relationship...that it was mixed communication*
> *J012: I don't know, I think sex is like having a cup of tea, you can, sometimes you want it, sometimes you don't and if you don't want it then you shouldn't have it*
> *J003: yeah*
> *J002: but sometimes no doesn't mean no (Deliberation, Scenario 1: Sexual Intercourse, No Apparent Inconsistency)*

The notion that "sex is like a cup of tea" appears to reference a public awareness campaign created by Thames Valley Police in 2015. This campaign sought to educate the public on rape myths and remove perceptions of ambiguity in discussions of sexual consent. This unexpected finding therefore, affirms that public advertisements and educational campaigns have had an impact upon changing understandings of appropriate sexual behaviour and sexual violence.

Nevertheless, despite strong myth-busting as shown above, J002 continued to assert myth-based understandings of consent throughout the deliberation and even submitted that "sometimes no doesn't mean no." Again, this narrative draws on heteronormative ideals and female respectability, in which women are perceived passive, shy and coy in regard to sexual relations. It relies on outdated ideas of heterosexual dynamics of male dominance and female submission, inferring that male persuasion may override a complainant's autonomy to say no in some instances. Ultimately, this reference seemingly excuses the defendant's behaviour and represents extremely troubling attitudes towards the requirement of clear and unequivocal consent.

Yet, despite this explicit myth endorsement, responses to this assertion by J002, were again mixed.

> *J002: but sometimes no doesn't mean no*
> *J021: ermm*
> *J003: ooh*
> *J006: I mean if you going into the realms of kind of maybe kinks*
> *J002: Yep*
> *J006: then yeah, fair enough but this is a 3 time occasion I think they should definitely have involved that in the discussion previously...personally anyway*
> *J003: yeah*
> *J006: I think that that kind of side of things. Yeah no doesn't always mean no (Deliberation, Scenario 1: Sexual Intercourse, No Inconsistency)*

Whilst this discussion shows fellow jurors were largely uncomfortable and uneasy towards J002's assertion that no does not always mean no, they did not show any immediate direct myth-busting attempt. Furthermore, J006 did show some support for J002's assertion that no does not necessarily mean no when discussing sexual kinks. In stating this, J006 attempted to distance the myth endorsement from the case in hand, perhaps therefore recognising the prejudicial nature of such assertion. Nevertheless, in sympathising with this premise, J006 further endorsed stereotypical assumptions of ambiguity in consent and legitimised framings of female sexual autonomy as inconclusive.

This framing of the female complainant as gatekeeper to sexual relations, who held the onus to properly communicate her non-consent, was repeatedly endorsed in reference to discussions of her sexual history with the defendant.

> *They both agreed that they did talk to each other that they did send pictures to each other, that they were flirty with each other. Erm and that she didn't shout or scream for help. And she just left the party no one saw her leave in distress on I'm don't think there's enough evidence to say that he is guilty. That's my sort of brief. I've sort of made about 10 pages of notes, but in brief, so much notes it's unbelievable. (J141, Scenario 4, Sexting, No Inconsistency)*

This narrative illustrated a clear perceived link between evidence of previous sexting evidence and the notion that the complainant did not "shout or scream for help." Such framing therefore, groups previous sexual history evidence with wider mythical narratives and seemingly lists

potential reasons to distrust the complainant's allegation. Again, such framing reflecting the predisposition that it is the female role to effectively act as gatekeeper to sexual relations, and thereby failure to properly fulfil this role amounts to some level of culpability.

6.3.1.2 Female Emotionality

Alongside notions that women frequently act coy in sexual situations, sexual history evidence was also drawn upon to advance narratives relating to stereotypical assumptions of female emotionality. This premise of female emotionality endorses heteronormative, gendered ideals that females are complex and highly emotional beings when compared to male counterparts and underpins numerous rape myths such as that women often "cry" rape.

In the current dataset, it was repeatedly mooted that the female complainant appeared to be more emotionally invested in the previous sexual relationship, than the male defendant. This framing arose in 5 of the 12 sexual history juries, when discussing this previous sexual history evidence. It was typically used by jurors as a means to trivialise the complainant's allegation of rape and to seemingly normalise the incident into sex. Whilst this framing was based on no factual evidence presented in the trial scenario, it was repeatedly asserted in deliberations that the relationship had been more casual for the defendant than it was for the complainant:

> *J085: Yeah, I was thinking that one as well, just in terms of it seemed to come across as it was a very casual thing.*
> *J088: mmm*
> *J085: I think there was a little bit of hinting towards the fact that it was probably more casual for him than it was for her.*
> *J088: Yeah (Deliberation, Scenario 3, Sexual Intercourse, No real rape reaction)*

No trial evidence underpinned this suggestion and therefore it appeared to have been an interpretation made by jurors based upon wider norms and stereotypes of how women behave in sexual situations. It represents overlap between evidence of a previous sexual relationship and broader stereotypical understandings of heterosexual relations as a means to normalise rape into sex.

These narratives relied upon the stereotypical portrayal of males and females as being inherently different beings, especially in regard to sexual relationships:

> *Yeah see to me it was, just because you know, judging by his character, obviously they've had sex before in the bathroom, so I think he's thinking, I'll just be able to do her in the bathroom, that'll be me done but obviously a girl is different, a girl is going to be thinking, no he hasn't spoke to me, so I'm not going to sleep with him tonight (J007, Scenario 2, Sexual Intercourse, Minor Inconsistency)*

This narrative exemplifies adherence to the stereotypical female gatekeeper model and stereotypical constructs of female emotionality, with the complainant portrayed as withholding sexual relations due to lack of romance and affection. This compared to ideals of male instigators, in which the defendant is portrayed as *expecting* sexual intercourse as a result of previous consent. Whilst subtle in its framing, in not directly excusing the defendant, this narrative served to portray the defendant as innocently mistaken in his belief in consent, with the inference given that he simply did not understand the female brain. In doing so, it served to alleviate the defendant of responsibility and hold the complainant culpable for failure to make her thoughts clear. It ultimately portrays male and female approaches to sexual relations as fundamentally different, and therefore fails to acknowledge sexual consent as a joint endeavour.

Moreover, later in this dialogue, J004 continued to highlight these stereotypical 'differences' between the male and female approach to sexual relations and was met by general agreement by fellow jurors. Thereby, illustrating the continued pervasiveness of these gendered, socio-sexual norms.

> *J004: and I'm sure it's not gonna be a fringe position here to say that sometimes when a girl smiles at a guy, the guy tends to misread that as being definitely interested, whereas she thinks she's just being polite*
> *J008: oh yeah*
> *J014: yeah*
> *J007:mhmm*

Furthermore, within this gendered narrative of the emotionally invested female complainant and gendered approach sexual consent, the notion of a potential vengeful allegation emerged as a possible emotional reaction of this 'invested' female complainant.

> *But I'm thinking, maybe this guy took this more as a...it's a girl, I'm going to be flirting with her over text. And maybe she took it more seriously, so in the midst of everything that happened, this is just, let's just say she did agree as just an example. Let's say she did agree to have sex but she probably was hurt afterwards when he decided to take a call. You wouldn't be like (J040, Scenario 5, Sexting, Minor Inconsistency)*

Whilst more in-depth analysis of the vengeful complainant narrative is explored below, this inference demonstrates the convolution of multiple mythical assumptions impacting upon J040 framings of the case as a whole. This narrative again sought to portray male and female approaches to sexual relations as fundamentally different and in doing so, served to excuse the defendant as innocently mistaken. The complainant however was instead portrayed an emotional and scorned female who had potentially agreed at first and then retracted consent due to feeling "hurt afterwards" when the encounter had not gone as she had expected. This de-legitimised the complainant's allegation, and again illustrates speculation by jurors who relied upon stereotypical heteronormative ideals as opposed to core case evidence, in order to construct a hypothetical narrative of the case. This entire framing, therefore, fundamentally subscribes to acutely stereotypical framings of heterosexual relationships in which female emotionality is held to blame for this 'misunderstanding.'

6.3.1.3 Vengeful Allegations

As suggested above, jurors' discussions of supposed vengeful allegations made by scorned and emotional complainants, arose within discussions of sexual history evidence in 8 juries of the 12 exposed to sexual history evidence. These were interlinked with broader narratives of female emotionality and heteronormative ideals. It demonstrates distinct overlap between sexual history evidence and broader rape mythology in which women are portrayed as highly emotional, impulsive and irrational within sexual relationships and suggestions that false allegation as a result of revenge and regret are common.

These vengeful allegation narratives, however, arose in two distinct ways in the current dataset. The current section explores instances in which the vengeful allegation narrative was advanced in direct reference to the sexual history evidence, with sexual history posited as a potential reason behind such an allegation. This framing demonstrates adherence to the notion that sexual history evidence is relevant to central issue of consent. Chapter Seven then outlines how the notion of vengeful allegations emerged almost exclusively in the current dataset in sexual history scenarios, as opposed to control scenarios whereby no sexual history evidence was introduced. This, it will be argued, lends support for the premise that the inclusion of sexual history evidence at trial, at least implicitly, engenders greater levels and scepticism amongst jurors towards the complainant's account and ultimately, evidences how this evidence can discredit complainants in the eyes of jurors.

In terms of direct reference to sexual history evidence, the notion of regret and revenge were typically advanced as a motive behind a potential false allegation by an emotional complainant. The premise of a vengeful false allegation was explicitly tied to the notion that the complainant had been more emotionally invested in the relationship and made the allegation as a result of feeling rejected:

> *So maybe there was some type of connection reigniting for that day. And perhaps, she may have just been flirting in, it's got out of hand. And, you know, she wanted to back out or continue. And then the phone call came, and he ended up being a douchebag. And she regretted it. To me, there's just too many what ifs for it to be a definite so I can't say I can't convict somebody on not enough evidence and witnesses to, to give us a bit more insight. (J157, Scenario 2: Sexting, No Inconsistency)*

This suggestion that there had been a "connection reigniting" between the complainant and defendant, inferred a perception by J157 that the complainant may have originally consented to intercourse and therefore this invalidates her claim of rape. The premise that "he ended up being a douchebag. And she regretted it" was then advanced as a motive behind a potential false allegation. This framing adheres to the 'scorned woman' stereotype, in which rape allegations are weaponised by female complainants, as a means to enact revenge against a

sexual partner who has spurned them. This again, adheres to stereotypical constructs of female emotionality, and serves to discredit the complainant's claim of rape, by framing this as a simple over-reaction by a snubbed complainant.

This premise that the allegation was made due to a perceived rejection by the defendant by a complainant invested in the previous relationship - as opposed to being evidence of non-consent - sustained this vengeful allegation framing.

> *So I think if it was just like a young kind of relationship, I think it's quite easy to presume that these things just kind of fizzle out and then they pick up again, like on and off things as we all know, like when we're teenagers. So I can kind of imagine that at a party at that age. You see somebody after two weeks and you'll just pick up that flirting again quite easily. The thing for me is that...if she felt very degraded after the incident, if let's say she did come on to him, she kissed him. They went into the bathroom, he locked the door and they, he would have gone through, like, obviously the full intercourse had his phone not not rang. I think the way he left he picked up the phone. And she felt very degraded by that. (J116, Scenario 5, Sexting, Minor Inconsistency)*

This narrative inferred that the complainant had been willingly flirting with the defendant and had seemingly consented to sexual intercourse, only to then feel "very degraded" by the defendant's actions afterwards. Whilst it did not explicitly suggest that the complainant's allegation of rape had been false, it inferred that feelings of degradation, as opposed to non-consent, had prompted the allegation and therefore endorsed the vengeful allegation narrative. In doing so, this narrative drew explicitly upon evidence of the complainant and defendant's previous sexual relationship in order to infer greater likelihood of consent, suggesting that things "picked up" and the two were "flirting again quite easily." This reflects endorsement of the propensity to consent narrative and reliance on ideals around heteronormativity.

Nevertheless, whilst jurors were seemingly routinely aware of the inaccuracy of the propensity to consent narrative, they advanced the notion of a vengeful allegation as a result of a previous relationship, regardless of this:

> *No means no and I'm adamant about that, regardless of where you are, or whatever the circumstances are, but it could have been equally that she was upset that you know, perhaps it didn't go how she expected afterwards that he took the call. (J117, Scenario 5: Sexting, Minor Inconsistency)*
>
> *Obviously, they've been sending pictures. That doesn't mean that you should be raped, don't get me wrong. I'm not saying that at all. But I just want to know, the circumstances that led up to the to the party. What what, what their feelings towards each other before the party that were flirtatious, yes. And pictures? Yes. They've sort of fancied each other, potentially the sex, the phone call stopped that sex and broke that moment? And she felt frustrated after I don't you know, I don't know. (J141, Scenario 4, Sexting, No Inconsistency).*

These statements demonstrated some myth-busting by acknowledging "no means no" regardless of previous sexual history and that sending pictures "doesn't mean you should be raped." However, each then went on to endorse the notion that the complainant simply may have been "upset" or "frustrated" as "it didn't go how she expected." Whilst these did not overtly moot the premise of a false allegation out of spite or revenge, they both fundamentally inferred this. In doing so, each adhered to stereotypical constructs of female emotionality, by asserting that the allegation of rape could have been made as a result of "upset" or "frustration," thereby failing to recognise the gravity of a rape allegation and instead positing this as a disproportionate reaction by a scorned and emotional female complainant.

These narratives illustrate the subtlety and complex nature of juror endorsement of prejudicial ideals about sexual history, demonstrating how juror may overtly reject its' relevance in one sense but continue to endorse ideals of relevance concurrently in another sense. It highlights the nuanced impact of sexual history evidence on jurors in modern rape trials and emphasises the need for researchers to holistically scrutinise narratives, according to these modern subtle framings of myth endorsement. Overarchingly, reliance on stereotypical understandings of heteronormativity, illustrate how sexual history evidence was used to normalise rape into sex (Ellison and Munro 2009a).

6.3.2 Excusing the Defendant

The bulk of the literature on sexual history evidence to date has tended to focus on how sexual history evidence impacts upon judgements of the complainant and frames *her* behaviours. Indeed, the above section has explored how heteronormative ideals refocused juror discussion onto the complainant and perceptions of 'appropriate' female sexuality, as a means to attribute blame to the complainant (and implicitly thereby to excuse the defendant).

Yet, as illustrated in Chapter 5, sexual history evidence in the current dataset also impacted upon juror perceptions of the defendant. Building on these quantitative findings therefore, judgements of the defendant were also assessed in the qualitative deliberation dataset. In the current dataset, judgements of the defendant which referenced his previous sexual history with the complainant, arose in 8 of the 12 juries exposed to this evidence at trial. This again, demonstrates widespread impact of this evidence of juror perceptions of the case. These narratives typically relied upon the same heteronormative ideals discussed in relation to the complainant, but highlighted the defendants' supposed mistaken belief in consent, confusion or inability to control his sexual urges. These served to dismiss the notion of malice or intent by the defendant, and therefore ultimately, used heteronormative stereotypical ideals relating to sexual history, to relieve him of responsibility and blame.

6.3.2.1 Mistaken Belief in Consent

The idea that the defendant had somehow mistakenly inferred consent, as a result of his sexual history with the complainant, emerged in 6 of the 12 juries exposed to sexual history evidence at trial. This framing endorsed stereotypical notions of propensity to consent, by legitimising the defendant's perceived assumption that previous consent can be indicative of latter consent. This excuses the defendant of blame by portraying the allegation as an innocent misinterpretation of behaviour and thereby removed any sense of malice or wrongdoing, whilst also trivialising the harm caused.

The notion of mistaken belief in consent, however, was generally tightly justified by the evidence of the complainant and defendant's previous sexual history:

> *And I think this is the thing like if the man has been has this belief that you know, this relationship, whatever it is between them is progressing, he doesn't have the malice of rape. And that's where it comes down to for me, like I don't I don't think he genuinely had the malice to rape her. (J116, Scenario 5: Sexting, Minor Inconsistency)*

Ultimately, this framing removed the perception of the defendant's criminal liability by asserting that "he doesn't have the malice of rape." It used the previous sexual history evidence to justify this perception of consent, as he "has this belief that you know, this relationship…is progressing." Rather than acknowledging the responsibility of the defendant to actively ascertain consent and recognising the necessity for consent to be given afresh on each and every occasion; this narrative endorsed the propensity myth and consequently absolved the defendant of blameworthiness.

This notion of malice or intent appeared central to these excusal narratives, enabling jurors to justify the defendant's actions as a matter of mere mistake and confusion as opposed to criminality.

> *I believe that he went up there with the intent to have some kind of sexual gratification of some kind. I think it's just that the situation that happened while up there confused things and thought he was to continue. (J006, Scenario 1: Sexual Intercourse, No Inconsistency)*

Again, this served to minimise the necessity to establish clear consent and attempted to rationalise the defendant's conduct on the basis of the previous relationship evidence. The premise that the situation "confused things and he thought he was to continue" demonstrates a minimisation of non-consensual sexual activity and overlooks the harms caused to the complainant.

These narratives focused explicitly on the defendant's presumed belief in consent, but in doing so, inferred mythical ideals of propensity, as opposed to examining whether he took reasonable steps in order to gain consent.

> *It's a difficult it's a judgement call, isn't it? Because you could then argue the other way of, or she's done it before. So why isn't she doing it now in terms of what he'd be thinking? (J085, Scenario 3, Sexual Intercourse, No real rape reaction)*
>
> *J097: even her kissing him, I don't think that's consent*
> *J098: We have to prove that he didn't know it wasn't consent (Deliberation, Scenario 6, Sexting, No real rape reaction)*

These narratives gave credence to notions of propensity to consent, by legitimising the defendant's supposed belief in consent as a direct outcome of his previous sexual history with the complainant. They therefore inferred that previous consent may be indicative of future consent, or at least suggested that the defendant is excused in presuming this.

Alongside these notions of the defendant's mistaken belief in consent, the complainant often became portrayed as at least partially accountable, as has been illustrated above, due to her lack of clear non-consent.

> *J002: I think he thinks that consent was given when they were kissing and then she moved his hand and started touching him*
> *J003: that's what he says*
> *J002: I think he took it as non-verbal consent (Deliberation, Scenario 1: Sexual Intercourse, No Inconsistency)*

The premise that the defendant mistakenly believed the complainant to have given "non-verbal consent" again served to alleviate the defendant of blame by minimising the necessity for clear consent and instead seemingly attributed this blame to the complainant. It illustrates a clear misunderstanding of consent law in which consent to one behaviour does not equate to consent to another behaviour. It also demonstrates a disposition to believe the defendant's narrative of events, in which the complainant supposedly instigated sexual activity, as opposed to the complainant's narrative in which she asserted the defendant to have instigated it. Ultimately, this framing diverted attention away from any steps taken by the defendant to clearly establish consent and instead attributed blame to the complainant for seemingly 'leading him on.' In doing so, the inference was given that the complainant was at least partially culpable for the alleged rape and the defendant portrayed as innocently mistaken.

Finally, the perception of mistaken belief in consent was used to not only attribute blame to the complainant but also to nullify and invalidate her report of rape.

> *And but if in her mind, it's it was a complete no, then in her mind, it will always be rape. And that there is that difficult, like I think, obviously like there is always going to be this ethical scenario where you do have to think like if you've got somebody genuinely believing they didn't make a mistake, but then the other person believes and who do you choose? (J116, Scenario 5, Sexting: Minor Inconsistency)*

This narrative is subtle in its prejudicial framing. However, the inference was given that whilst the complaint *perceived* the alleged conduct to have been rape, the defendant did not hold the intent or malice associated with rape and thereby should not be held culpable. It serves to devalue and de-legitimise the complainant's allegation by making the suggestion that this is "in her mind." Thereby, adhering to myths surrounding 'dreaming' or 'fantasist' complainants, which are often raised in court. The notion of an "ethical scenario" in which the defendant held no malice, fundamentally pardoned the defendant presenting the alleged rape as an innocent mistake or result of crossed wires.

6.3.2.2 The Defendant 'Didn't Think'

Alongside narratives which excused the defendant due to his supposed mistaken belief in consent, the idea that defendant didn't think or didn't know that the complainant was not consenting was also raised in 4 of the 12 sexual history juries. Again, this served to alleviate the defendant of responsibility for his actions and overlooked his duty to clearly ascertain consent. Unlike the mistaken belief narrative this framing did not typically attribute blame to the complainant, however it was used to infer a lack of malice or intent by the defendant:

> *I think there is obviously a history of it happening before, but whether or not in this case he did not get consent or whether or not. He's just thinking he's got the green light because of their history (J018, Scenario 1: Sexual Intercourse, No Inconsistency)*

> *But if they had this sort of relationship, he may have just thought. He may have, he probably didn't think (J044, Scenario 5: Sexting, Minor Inconsistency)*

These narratives demonstrated a clear association between framings which excused the defendant and evidence of his previous sexual history with the complainant. The idea that he thought “he’s got the green light” and “didn’t think” legitimised the defendant’s failure to clearly ascertain consent and justified this on the basis of sexual history evidence. Moreover, these framings served to endorse and maintain the narrative that men cannot control their sexual urges, by inferring that once sexual contact has begun the defendant then cannot think for himself or cease sexual conduct.

Within this narrative, sexual history was posited as the “reason” behind the defendant’s failure to establish consent and thereby validated and normalised notions of assumed consent. This illustrates misunderstandings in the law of consent and justifies notions of propensity to consent. Whilst jurors here, did not outwardly endorse the premise that previous consent increases the likelihood of latter consent; they legitimised the defendant’s belief to this end. This again therefore, illustrating the complex and nuanced impact of sexual history evidence, beyond explicit and over myth endorsement.

6.3.2.3 Myth-Busting: Rejecting Assumed Consent

On the other hand however, myth-busting comments did arise in respect to this notion of the defendant’s mistaken or rather assumed belief in consent. These comments served to responsibilise the defendant, postulating that he may have assumed consent as a result of previous sexual activity, but recognised this to be a fault of his, as opposed to a reason to excuse his conduct. Such narratives thereby responsibilised the defendant for his failure to clearly and properly ascertain consent, whilst also rejecting the propensity to consent narrative. These myth-busters arose in 5 of the 12 juries exposed to sexual history evidence at trial, reflecting some cause for optimism, yet continuing to illustrate the need for more widespread change.

Whilst these narratives continued to advance the notion that the defendant assumed consent as a result of previous sexual history, these recognised this as a symbol of blame and entitlement as opposed to mistake without malice.

> *I feel like he knew she was going up there and given their history, thought he'd be able to sleep with her again in the bathroom, but yeah. I don't think he wanted it really. I feel like it's all too convenient that he followed her and yeah. I'm still with the guilty verdict I think (J007, Scenario 4: Sexting, No Inconsistency)*
>
> *And he decided he wanted sex on that occasion. She didn't. And he decided, well, tough. (J119, Scenario 2: Sexual Intercourse, Minor Inconsistency)*
>
> *Can I step in please... I think that he's guilty and I think that he assumed consent cos there was a very similar incident that happened within a bathroom previously. (J062, Scenario 3: Sexual Intercourse, No Real Rape Reaction)*

These narratives more accurately recognised the laws governing consent in which consent is to be given afresh on each occasion. Thereby rather than excusing the defendant due to his assumed consent, these narratives served to attribute blame to the defendant as a result of his failure to comply with these laws. Fundamentally, they rejected the notion of propensity to consent and ascribed guilt to the defendant on this basis.

6.3.3 What can be learnt from this adherence to Heteronormativity?

Taken together, these findings illustrate how participant jurors continued to attribute *relevance* to the complainant's previous sexual history with the accused, using heteronormative prejudicial framings to do so. Whilst this myth endorsement tended to be subtle in its framing, rather than overtly accepting of the propensity narrative; widespread reference to heteronormative ideals when discussing sexual history evidence, demonstrated continued endorsement of the gendered gatekeeper model. This builds on McGlynn's (2017) assertion that sexual history evidence is used *at trial* as a means to normalise rape into sex, and illustrates how such attitudes permeate the jury room. Similarly, this finding accords with previous mock jury research by Ellison and Munro (2009a), which equally highlighted jurors' reliance on perceived 'normal' socio-sexual scripts and adherence to the gatekeeper

paradigm, in order to situate perceptions of consent. Ultimately, such assumptions are seemingly grounded in jurors' everyday experiences (Ellison and Munro, 2009a) and this, therefore reflects the necessity of cultural change to limit reliance on myths and stereotypes in the jury room.

Within these traditional heteronormative socio-sexual ideals, females are inherently portrayed according to wider ideals of vulnerability, passivity and submissiveness, and must demonstrate sexual restraint to fulfil the gatekeeper role (Hlavka, 2014; EVAW, 2019b). Significantly, these ideals appeared to underpin a sense of 'expected' behaviour amongst jurors. Consequently, where the complainant was perceived not to have correctly fulfilled this gatekeeper role by appropriately and clearly communicating her non-consent, she was responsibilised and blamed through notions of acting coy and sending mixed signals. Such findings fundamentally echo decade old findings by (Ellison and Munro, 2009a), in which jurors routinely placed the burden of unequivocally communicating non-consent onto the complainant, whilst setting a low threshold of such communication to the defendant.

Moreover, narratives of female emotionality and vengeful allegations further highlighted complex interactions between sexual history evidence, heterosexuality and the perceived veracity of the allegation. Hlavka (2014) theorised, that heteronormative ideals, not only sustain female passivity and justify male dominance, but further endorse gendered messages surrounding commitment in sexual relationships. Within such framings, frequent causal sex is portrayed as normative for men and perhaps even a desirable expression of masculinity, whilst sexual restraint is considered appropriate and normative for women (Kim *et al.* 2007). These underlying assumptions appeared salient to jurors in the present dataset, through narratives of the female complainant being more emotionally invested in the relationship. Adherence to such assumptions perpetuates outdated and misguided assumptions of respectability and "appropriate" female sexuality and demonstrates a perception of ongoing relevance of sexual history evidence as a marker of consent.

Moreover, the trend of narratives which excused the defendant because of his previous sexual history with the complainant, endorsed a plethora of rape myths surrounding heterosexual norms and (mis)understandings of consent. Crucially these findings offer support for McGlynn's (2017) assertion that sexual history evidence is not only used to contest the credibility of the complainant but also to bolster that of the defendant. Thus, affirming Farrell's (2017) analysis that imagery of victim blame associated with sexual history evidence equally advances symbolism of “heroic” defendant’s acting on “masculine impulse” as a means to excuse their alleged behaviour.

The findings support a wealth of existing literature in demonstrating that rape myth schemas are routinely used as a framework to justify and legitimise actions of the defendant, so as to excuse his behaviour (Bohner *et al.* 2013; Leverick, 2020). Notions underpinning these excusal narratives, such as that males are sexual instigators, male sexuality is uncontrollable and rape is a crime of passion and desire, have already been outlined in previous research as persistent (Bohner *et al.* 2013; Burrowes, 2013). Significantly, the present findings reflect how sexual history evidence can be used by jurors to bolster these persistent prejudicial assumptions and how this evidence intertwines closely with wider rape mythology. The findings thereby, suggest that sexual history evidence enables and strengthens the wider schema of denial with regards to rape and sexual violence (Silver and Hovick, 2018), removing notions of blame or intent and thereby promoting sexual coercion as an extension of typical heterosexual relations.

Together, these findings continue to demonstrate a growing awareness amongst the jury eligible population as to the inaccuracy of rape myths, but equally illustrate the pervasiveness of ongoing, implicit myth endorsement. Whilst jurors were seemingly aware of obvious and explicit rape myths about sexual history evidence and routinely attempted to dismiss these, implicit and indirect prejudice appeared entrenched. Thus, despite being more subtle, the continued reliance on heteronormative ideals to attribute relevance to the sexual history evidence as marker to establish consent, illustrated ongoing endorsement of the propensity

to consent narrative. Ultimately therefore, the findings seemingly illustrate more *implicit* myth endorsement about sexual history. Such theory has been explored in relation to racism research, and asserts that, whilst individuals may consciously reject explicit racism, unconscious adherence to this wider social context of oppression remains embedded (Beattie, 2013). Further research of this kind, in relation to rape myth endorsement may therefore be justified.

6.4 Chapter Summary

The themes and narratives highlighted throughout this chapter reflect how perceptions of the relevance of sexual history evidence as a marker of consent, have evolved and developed amongst modern jurors. Key findings are:

- Sexual history was discussed by jurors to some extent, in every deliberation in the dataset. However, the content and frequency of these discussions varied considerably.
- Overt myth-busting towards the irrelevance of sexual history occurred in 10 of the 12 juries exposed to sexual history evidence.
- However, endorsement of myths about the relevance of sexual history evidence as a marker of consent also arose in 10 of the 12 juries
- Endorsement of myths about the relevance of sexual history typically followed heteronormative ideals and gendered narratives about consent, with the effect of normalising rape into sex, blaming the complainant and excusing the defendant.
- Nevertheless, endorsement of myths about sexual history evidence were typically more subtly framed than has been theorised in the existing literature.

The key findings outlined above have highlighted the ongoing prejudicial potential of sexual history evidence on juror deliberations, as has been theorised extensively across academic, feminist literature on such evidence (McGlynn, 2017; Temkin *et al.* 2018; Smith, 2018a; Gillen, 2019; Daly, 2021a). However, the current chapter also built upon the existing knowledge base, by highlighting the subtly of modern myth endorsement about sexual history and often

contradictory nature of juror discussions on the matter. Indeed, whilst some jurors overtly dismissed the relevance of sexual history evidence and the propensity to consent narrative, the current findings have demonstrated the ongoing engrained and subtle framings of relevance of sexual history which arose throughout the dataset, according to wider ideals of heteronormativity and 'appropriate' socio-sexual relations.

Gendered perceptions of the female gatekeeper role, notions of female emotionality and the scorned woman narrative were all endorsed within framings of sexual history evidence to portray the complainant as partially culpable for her victimisation or to present the allegation of rape as false. Meanwhile, gendered ideals of uncontrollable male sexual urges and differences between male and female approaches to sexual relations, were used in discussions of previous sexual history evidence to portray the defendant as innocently mistaken in his belief in consent so as to excuse him of criminal liability. These framings were routinely met with general agreement across the jury panel and highlight the subtle and nuanced prejudicial impact of sexual history amongst modern jurors. Indeed, whilst many jurors were widely aware of the 'obvious' irrelevance of sexual history evidence, they continued to endorse more implicit prejudicial framings of such evidence.

Ultimately, these findings highlight a growing awareness amongst jurors of the inaccuracy of the propensity to consent narrative and relevance of sexual history, however, highlight the battle is not yet won in this sense. Further attempts to limit reliance on sexual history evidence at trial and public and juror education programmes remain crucial to dispel the relevance of myths and stereotypes surrounding previous sexual history evidence.

Chapter Seven: Sexual History Evidence and Perceived Credibility

7.1 Introduction

In addition to discussions regarding heteronormativity and the perceived relevance of sexual history evidence, themes also emerged about the character and credibility of both the complainant and the defendant in reference to their previous sexual history. This chapter will explore how sexual history evidence was drawn upon both directly and indirectly within deliberations, as a measure of the perceived character and credibility of both the complainant and defendant. This builds upon findings of the JDS discussed in Chapter Five, whereby the inclusion of sexual history evidence at trial typically resulted in lower perceived believability of the complainant and higher believability of the defendant, amongst participant jurors.

As with Chapter Six, direct quotes from the deliberative datasets will be used to support and illustrate key assertions. Positive myth-busting efforts will be highlighted alongside myth endorsement and prejudicial narratives, in order to accurately represent the variation of views witnessed in the dataset. Each section will end with consideration of what can be learnt from these findings. Ultimately, it will be shown that these findings support the thesis argument, that the inclusion of previous sexual history evidence at trial can hold significant prejudicial impact and diminish the perceived credibility of the complainant amongst jurors.

7.1.1 Situating Sexual History Evidence with Credibility

Narratives linking sexual history evidence with framings of the character and credibility of the complainant or defendant, emerged in 10 of the 12 juries exposed to sexual history evidence at trial. In 8 of these 10 deliberations, such narratives inferred negative framings of the complainant, whilst 5 inferred positive framings of the defendant, in response to the previous sexual history evidence.

Whilst these narratives relating to the character and credibility of both the complainant and defendant arose slightly less frequently than those relating to the supposed relevance of sexual history as a marker of consent; they continued to emerge in the majority of juries and therefore must be scrutinised. Moreover, whilst these myth endorsing narratives were less routine than those about relevance, they were equally more sparsely myth-busted where they did arise.

Furthermore, alongside discussions which directly linked perceptions of character and credibility to sexual history evidence, a further clear trend emerged in regard to the indirect influence of sexual history evidence on perceptions of complainant character and credibility. Narratives referencing false allegations, lying or notions of "crying rape" arose almost exclusively in sexual history datasets compared to control datasets where no sexual history evidence had been introduced. Whilst these narratives did not explicitly reference the sexual history evidence, the trend of these emerging in virtually only sexual history datasets, indicates greater distrust of the complainant and her allegation where sexual history evidence had been advanced. This therefore illustrates indirect association between sexual history evidence and perceptions of credibility and believability of the complainant.

The remainder of the chapter will explore these themes in further depth. It first examines direct links between sexual history evidence and credibility through notions of the 'deceptive' complainant, the 'trusted' defendant and the 'undeserving' complainant. It equally explores myth-busting assertions made in response to these themes. Following this, the remainder of the chapter will explore indirect links between sexual history evidence and perceptions of credibility through narratives of false allegations, 'crying' rape, revenge, embarrassment and shame.

7.2 Direct Association Between Sexual History Evidence and Perceptions of Credibility

The following section will explore direct links between sexual history evidence and juror perceptions of the character and credibility of both the complainant and defendant. This encompasses instances whereby judgements about the credibility of either the complainant or defendant were made, in direct reference to the sexual history evidence.

7.2.1 The Deceptive Complainant

The most common, negative framing of the complainant's character and credibility in relation to her sexual history evidence, was the notion that she had been deceptive about her sexual history and was therefore not trustworthy. This framing arose in 6 juries of the 12 juries exposed to sexual history evidence at trial.

These perceptions of the complainant as a deceptive witness stemmed from the notion that she was not forthcoming about her previous sexual history with the defendant and was therefore, not a wholly truthful or trustworthy witness. Jurors were widely sceptical of the fact that sexual history evidence was introduced as part of the defence case, rather than being introduced by the complainant during her own examination in chief. Rather than acknowledging such evidence as irrelevant or exploring how this can be highly emotive evidence for the complainant to discuss before an open court; these narratives invoked perceptions of the complainant as an unreliable and deceptive witness.

These framings of the deceptive complainant illustrated an association between the complainant's supposed failure to present her own sexual history evidence to the court, and to her consequentially being perceived as a less, or not at all trustworthy witness, by jurors:

> *So I initially found the complainant largely compelling, although a little bit evasive when questioned about their prior history and their prior contact, and that that gave me a bit of cause for concern. (J144, Scenario 4: Sexting, No Inconsistency)*

> *Okay, I felt she was being not forthcoming about it. But I mean, she wasn't forthcoming about having a had a previous relationship. I'm not saying that indicates any guilt, I'm just saying, but that was one of the things that I thought it would have been better if she had been. (J106, Scenario 2: Sexual Intercourse, Minor Inconsistency)*

J144 highlighted this perceived evasiveness as a "cause for concern" whilst J106 even appeared to link this behaviour with the notion of "guilt." Both of these framings inferred a lack of trust of the complainant as a witness and hinted towards a lack of truthfulness and openness in her account to the court. Moreover, both of these descriptions of the complainant, typify phrasing which is usually associated with those *accused* of a crime as opposed to complainants. Thus, illustrating the ability of sexual history evidence to redirect juror focus onto the complainant and serve to victim blame, in line with the notion of putting the complainant on trial (Payne, 2009).

This notion that the complainant had purposefully withheld her sexual history as a matter of deception, ultimately caused the complainant to be perceived as less reputable and believable as a witness and even prompted some jurors to state that they had been "put off" her:

> *Surely, you'd think if that's happened between you and the person that you have had a casual thing with? Surely that's evidence worth saying because, you know, we find out later time that and from from the guy that that was the case, and it's put by the sounds of it, two or three of us off her? (J120, Scenario 2: Sexual Intercourse, Minor Inconsistency)*

This suggestion that multiple jurors were "put off" the complainant as a result of her perceived deception, exemplifies notions of dislike or distrust towards the complainant, as a direct result of this supposed lack of disclosure of her sexual history evidence.

Furthermore, the assertation by J120 that "surely that's evidence worth saying," appeared to openly assert that sexual history evidence is *relevant* to the trial facts. Therefore, not only did this narrative advance mythical assumptions towards the decreased credibility of the complainant in light of previous sexual history evidence, but it also endorsed the propensity to consent assertion by viewing prior consent as relevant contextual evidence for ascertaining consent on the alleged occasion.

Interestingly further, the above narrative by J120 arose following earlier assertion by the same juror that previous sexual relationship evidence "should having no bearing on whether she did this or not." This, therefore, reflects the nuanced and complex impact of sexual history evidence upon jurors, with jurors seemingly outwardly recognising the irrelevance of sexual history evidence and stating this, but then continuing to endorse more subtle and implicit myth endorsement surrounding sexual history evidence.

> *Like I agree as well like the any previous sexual relationship she had, should have no bearing on whether she did this or not, but the fact that she chose not to admit that shows that they she thinks that that's, you know, she didn't mention that. (J120, Scenario 2: Sexual Intercourse, Minor Inconsistency)*

This narrative exemplifies the nuanced impact of sexual history evidence across a range of differing aspects of the trial evidence and jurors' interpretations of these. Whilst J120 overtly rejected the notion that sexual history could be relevant to the issue of whether the behaviour constituted rape, she did hold it relevant to her framings of the complainant as a witness. Thereby, despite some strong myth-busting towards the notion of relevance, this narrative illustrates myth endorsement towards notions of credibility. It thereby continues to illustrate crucial impact of sexual history upon J120's perception of the case as a whole, despite her supposed understanding and rejection of the propensity narrative. It therefore represents the need for holistic awareness and education programmes to target all aspects of myth endorsement as one.

Furthermore, it may be suggested that whilst J120 outwardly dismissed the notion that sexual history evidence could be relevant to the issue of consent, her latter critique of the complainant for seemingly failing to disclose such evidence, could be argued as at odds with the original myth-busting statement. Indeed, it may be argued that if J120 really did see the sexual history evidence as wholly irrelevant, then she would not be suggesting that the complainant *ought to* have introduced this evidence at trial. Thus, potentially reflecting the social desirability of these dismissal narratives, as opposed to jurors' clear understanding of the true irrelevance of such evidence.

Moreover, this premise of the deceptive complainant was not only used to discredit and question the trustworthiness of the complainant as a witness, but also highlighted as a supposed tactical decision by the complainant, in order to better advance her case. The complainant was thereby depicted as misleading and underhanded, by supposedly hiding this evidence in attempts to win favour or make her case appear more plausible.

> *J086: what I also found interesting was the fact that she couldn't recall much about the prior relationship, yet. They erm they been, you know, doing a lot of flirty messages previously?*
> *J098: Yeah.*
> *J094: She may have felt like it wouldn't help her case to admit that there was some kind of relationship in that nature. (Scenario 6, Sexting, No real rape reaction)*

> *To me that's her...thinking, well, that's going to be a detriment to me if I say it, whereas I actually think if she had said that, but things were now off, it would have given us a bit more clarity. But the fact she almost tried to hide it makes her look less. (J120, Scenario 2: Sexual Intercourse, Minor Inconsistency)*

The idea that such evidence "wouldn't help her case" and would act to her "detriment" reflects an extent of juror awareness surrounding the potentially prejudicial nature of such evidence. However crucially, rather than recognising this and exploring potential reasoning of why the prosecution may not have introduced this evidence, participant jurors instead scrutinised the complainant and represented her as tactical and manipulative. Indeed, J120's exclamation that "she almost tried to hide it makes her look less [credible]", inferred scepticism of the complainant's account due to the way this evidence was introduced. Again, this served to refocus the attention of jurors onto the complainant's behaviour and reliability as opposed to the defendant's. Ultimately, it represents a 'lose, lose situation' for complainants, who are judged negatively where their sexual history is introduced, but equally judged negatively for failing to introduce such information.

This finding is highly important to the way in which sexual history evidence is introduced and framed at trial by defence counsel, as well as the procedure surrounding late applications. It crucially shows that where such evidence is introduced part-way through trial, and not by the prosecution, it can significantly hinder and distort the prosecution case. This, therefore

seemingly emphasises the necessity for s.41 applications to be decided before commencement of the trial, so as to ensure that where relevant, such evidence is clearly set out by all parties.

Moreover, this narrative, whilst predominantly illustrating associations between sexual history evidence a decreased complainant credibility; also builds on the knowledge base surrounding the propensity to consent assertion. Indeed, the underlying premise that the complainant ought to have introduced this evidence earlier, gives credence to the notion of relevance and propensity. Thus, despite routine outward protestations by jurors about the irrelevance of this evidence, it continued to be held as important to jurors in practice.

7.2.1.1 Contrast with The Trusted Defendant

In response to narratives of the deceptive and evasive complainant, emerged parallel narratives regarding the supposedly honest, open, and trustworthy defendant. Indeed, whilst the complainant's lack of early disclosure of her sexual history evidence led to framings to discredit her; such framings also appeared to increase credit awarded to the defendant. Thus, it appeared that declines in complainant's perceived credibility resulted in increases in the defendant's perceived credibility in somewhat of a zero-sum game. This was equally seen in scores of the JDS, as explored in Chapter Five.

These narratives of the trusted and open defendant emerged in 5 of the 12 sexual history juries. Thus, whilst less widespread than those which attacked the credibility of the complainant, they represent a clear association between sexual history evidence and greater trust of the defendant as a witness, again mirroring what was seen in the JDS.

These narratives typically made comparisons between the complainant's and defendant's testimony, and highlighted flaws in the complainant's account in order to strengthen and bolster perceptions of the defendant's narrative and credibility:

> *And she also didn't state that they had previous sexual relationship. Whereas the defendant was he was very open about it. He he had,*

> *you know, he was admitted, yes, I did lock the door. Whereas I feel that, you know, if, if it was consistent to the complainant (J088, Scenario 3: Sexual Intercourse, No real rape reaction)*

This narrative illustrates direct comparisons being drawn between the complainant's failure to "state that they had previous sexual relationships" and the defendant being perceived as "very open about it." These framings reflected a level of scepticism and distrust of the complainant's account, whilst opposingly reflecting the supposed trustworthiness of the defendant and his account. In doing so however, this narrative failed to acknowledge the potential reasons for why the complainant may not have been as open about this evidence. It also failed to realise that the sexual history evidence was brought as part of the defence case and thereby would invariably represent the defendant favourably. Yet, this crucially reflects how sexual history evidence can serve as a diversion tactic for defence counsel, to not only to undermine the complainant and prosecution case, but also to divert jurors' attention away from the alleged wrongful conduct and onto a perception of who is the more believable or even likable witness.

These framings of the defendant as *more* credible as a result of his perceived openness in regard to the sexual history evidence, illustrate how such evidence bolstered the overall defence case.

> *That's where I disagree actually, because I feel like there's more there's stronger evidence on his side for his favour, in his favour than for her like for her I didn't feel like she was very open about this relationship. (J116, Scenario 5: Sexting, Minor Inconsistency)*

> *Both versions are quite different, however there seems to be more historical reasons to believe the defendant (J057, Scenario 3, Sexual Intercourse, No Real Rape Reaction: Pre-Deliberation Questionnaire)*

> *Yeah I would say that's fair. Well cos I do believe parts of his. I feel like he goes into quite a lot of detail and stuff (J008, Scenario 2, Sexual Intercourse, Minor Inconsistency)*

These narratives reflect multiple jurors ultimately endorsing the defence case and notion of acquittal, as a direct result of the defendant's perceived credibility linked to his openness about his previous sexual relationship with the defendant. It illustrates how one piece of sexual history evidence can ultimately sway jurors' perspectives of the case as a whole and crucially

impact upon verdict preferences. Whilst this trend did not translate into a statistically significant verdict trend (Section 5.2), perhaps as a result of the small sample size; it does represent the substantial prejudicial potential of this evidence. In doing so, it seemingly justifies the need for robust legislative restrictions.

7.2.1.2 Myth-Busting Attempts

Whilst notions of the deceptive complainant and the consequential trusted defendant arose repeatedly in discussions of sexual history evidence in the current dataset, myth-busting of these narratives was relatively rare. Markedly, the premise that the complainant been deceptive or evasive about her sexual history was in fact only directly 'myth-busted' in three instances across the observed dataset, two of which occurred in the same jury.

Where these myth-busting challenges did occur however, they were strong in denoting the difficulties that a complainant may face in having their sexual history brought before the court. These therefore sought to justify and rationalise her reluctance to discuss such evidence openly before the court and dismissed the premise that the complainant was not a trustworthy witness for having not introduced this evidence herself.

> *Statistically is unlikely it's about 3% of all rape cases are fabricated. So statistically it's it's, it's rare because going through the whole court experience the police interviews, having your, your previous history etc brought up in in public isn't altogether easy, easy to do. (J119, Scenario 2: Sexual Intercourse, Minor Inconsistency)*
>
> *And having your whole life laid bare in court... about who you've slept with before, because that tends to be what happens. ermm (J121, Scenario 2: Sexual Intercourse, Minor Inconsistency)*
>
> *And I also think with her having to display the text messages, and she would have gone through this process, knowing that she would have had to display these messages that occurred a few weeks prior, it's not a thing that you would do lightly, and you wouldn't really want those personal and private messages being displayed, unless you were quite certain about what had happened. And because, you know, that's, that's fairly humiliating in itself that you have to display in quite private information. (J165, Scenario 2: Sexting, No Inconsistency)*

Each of these narratives highlighted the difficulty and humiliation that may be associated with having one's sexual history information laid before the court. They therefore recognised and

highlighted the realities of pursuing justice in cases of sexual victimisation and the anxieties associated with sexual history evidence in particular. This reflects strong myth-busting sentiment and served to acknowledge and justify the complainant's reluctance towards such evidence as legitimate and normal. In doing so, these narratives dismissed focus upon the complainant's credibility as a result of the sexual history evidence.

Nevertheless, whilst these myth-busting statements were strong, they were notably rare and none of them were directly responded to or prompted any discussion within the deliberation regarding the potential difficulties for a complainant to have her sexual history evidence discussed at court. Such reluctance to discuss these complexities for complainants, seemingly therefore illustrates the engrained nature of assumptions regarding the relevance of this evidence and perceived necessity for it to be raised in court.

7.2.2 The Undeserving Complainant

Alongside narratives of the supposed deceptive and untrustworthy complainant as a *witness*, arose further narratives which called in question her character and credibility as an *individual*. This recurrent theme, appeared to call into question the moral credibility of the complainant, drawing significantly of notions of respectability and 'appropriate' behaviour as a means to 'other' the complainant and portray her as perhaps, in part morally culpable for the alleged rape. As such, the complainant was seemingly perceived as undeserving of the court's sympathy, as she was the 'type' of girl to engage in these behaviours. This theme arose in 4 of the 12 juries exposed to sexual history evidence at trial.

This notion, that the complainant's character is intrinsically linked to her previous sexual history, ratifies the same misguided assumptions of promiscuity being evidence of bad character, that originally underpinned the inclusion of sexual history evidence in rape trials. Albeit more subtly framed, these narratives demonstrate persistent associations between evidence of a complainant's sexual history evidence and her consequential lack of credibility.

This framing was clearly evidenced in Jury 17, whereby J157 intonated that the complainant had attempted to portray a “squeaky clean image,” which was somewhat at odds with latter evidence of her previous sexual behaviour with the defendant.

> *First up with Hannah saying that she wasn't that type of girl, trying to give us a squeaky-clean image at the beginning, but then we find out that they've been in this texting thing for over two months (J157, Scenario 4: Sexting, No Inconsistency).*

This narrative was advanced in response to a comment made by the complainant during examination in chief, whereby she submitted that she would not have sex with someone just because they had flirted with her. J157 characterised this as the complainant attempting to portray a “squeaky clean image” of herself and suggested this to be at odds with evidence of the complainant’s sexting relationship with the defendant. This framing therefore evidenced the distinct prejudicial impact of sexual history evidence, being used to undermine the perceived credibility of the complainant, and jurors resultantly representing her as an unreliable and dishonest witness. Significantly, the central premise of a ‘squeaky clean image’ is defined in the Collins Dictionary as “always behaving in a completely moral and honest way”, with all definitions centring upon this idea of ‘morality’. The notion of ‘sexting’ as being discordant with a ‘squeaky clean image’ thereby illustrates the premise that the complainant’s sexual history invites moral judgements by jurors and portrays her as morally inferior.

Furthermore, this narrative clearly evidenced the impact of defence counsel’s attempts to use sexual history evidence as a way to contradict the prosecution case and undermine the complainant. Indeed, rather than accepting the complainants’ assertion that she did not want to have sexual intercourse with the defendant and would not simply do this because he had flirted with her; J157 drew upon the sexual history evidence introduced by the defence and consequently perceived the complainant as deceptive. Whilst, the defence may justify the inclusion of sexual history evidence here, as a means to ‘explain’ or ‘rebut’ the prosecution evidence (s.41(5)); this reaction clearly evidences how such information can divert jurors from

the question of consent and instead speculate on the character and credibility of the complainant.

This idea of a non-credible and deceptive complainant arose clearly again in Jury 5. Discussion amongst jurors illustrated two distinct narratives which endorsed mythical assumptions towards the complainant's credibility in relation to her sexual history. Firstly, it was speculated that perhaps the complainant's friend, whom she had first reported the alleged rape to, may not know that the complainant had previously engaged in sexting with the defendant. It was proposed that this behaviour is "private" and "behind closed doors" and therefore the inference made that it is somewhat shameful or embarrassing behaviour that she would not share with a friend. More subtly, this discussion also endorsed the premise that sexting behaviour is perhaps incompatible with the idea of 'good character' as the assertion was made that Millie (who gave evidence of the complainant being of good character) must have therefore been unaware of the sexting evidence.

> *J040: Ok I have another thing actually. So her friend Millie said that's not like her*
> *J038: mmm*
> *J040: Ok so I don't know if this is her best friend or not, but with her sending the nude pictures, I wonder is that like her*
> *J041: yeah*
> *J040: I don't know if her friend knows that she does that?*
> *J041: Yeah*
> *J041: Well that's behind closed doors isn't it*
> *J038: mmm*
> *J040: Exactly, and that's very private. So...how much does the friend actually know*
> *J038: mmmm (Deliberation, Scenario 5: Sexting, Minor Inconsistency)*

This discussion amongst jurors illustrates how sexual history evidence was drawn upon to prompt inquiry into the complainant's credibility and truthfulness as a witness, as a direct result of her sexual past. It turned the focus of deliberation onto the complainant's actions and lifestyle, intertwining narratives of truthfulness and credibility with those of supposed respectability and virtue.

Moreover, it is of note that this extract demonstrates discussion by multiple jurors who were all endorsing these myth-based narratives surrounding sexual history evidence. Thereby, it may be theorised that where myth endorsement manifests more subtly - rather than explicitly and outwardly stating that the complainant cannot be a credible source as a result of her sexting behaviour – more individuals will readily endorse and affirm such views. It indicates that the impact of sexual history evidence on deliberations and on framings of the complainant, can be extensive.

This association between credibility and sexual history evidence was then again advanced in Jury 5, in speculating as to whether the complainant "is like that."

> *J041: I mean if what he said was true maybe she is like that.*
> *Because he said that she was the one who initiated it with the kissing and pulled him into the bathroom*
> *J038: mmm (Deliberation, Scenario 5: Sexting, Minor Inconsistency)*

Again, this narrative awarded focus to the behaviour of the complainant rather than defendant, serving to ascertain the 'type' of girl that the complainant is. This othering of the complainant drew upon notions of respectability and appropriate behaviour to determine whether the complainant was viewed positively or negatively by jurors. As a consequence of her seemingly negative credibility and being that 'type of girl,' this narrative then used this framing of the complainant to infer that she was perhaps not credible in her account to the court and thereby seen as more morally culpable for the alleged rape.

Ultimately, these narratives illustrate a clear decline in the perceived credibility – and particularly moral credibility - of the complainant, by jurors as a result of her sexual history with the defendant. Whilst Section 7.2.1 explored perceptions of the complainant as somewhat deceptive for not openly introducing her sexual history to the court; these framings of 'undeserving-ness' arguably reflect a further lose/lose situation for complainants who are judged negatively either way. Indeed, where the complainant was not seen to be open about her sexual history, she was framed as deceptive and untrustworthy. Yet where the

complainant's sexual history was then introduced, she was perceived as morally in-credible and othered. Thus, presenting somewhat of a catch-22 situation for complainants.

7.2.2.1 Myth-Busting Attempts

Alongside narratives which called into question the moral credibility of the complainant as a result of her sexual history evidence, there were some myth-busting attempts. Again, these narratives were not as widely myth-busted as those which explored the relevance of sexual history evidence to the issue of consent, however, did occur in 4 of the 12 sexual history juries.

Positively, these myth-busters recognised the high levels of victim blame surrounding the complainant's sexual history as wrong and dismissed the premise that inferences could be drawn about the complainant's character, from her previous sexual history. Markedly however, they typically focused upon the defence's inclusion of sexual history evidence at trial, as opposed to directly myth-busting comments made by fellow jurors in deliberations:

> *J006: everything about the defence to me, seemed victim blaming rather than giving actually cold hard evidence*
> *J020: yeah definitely*
> *J006: more like well this happened before and that happened before*
> *J020: yeah*
> *J003: trying to discredit her character (Deliberation, Scenario 1: Sexual Intercourse, No Inconsistency)*

> *J047: And it comes across as victim blaming as well,*
> *J071: completely. And that's a massive issue within, you know, crown courts. You hear about all the time, especially when, you know, the defence will ask what underwear while they were and stuff like that none of that is relevant. All that matters is whether consent was given. (Deliberation, Scenario 6: Sexting, No real rape reaction)*

These narratives demonstrated strong myth-busting sentiments, by recognising the prejudicial nature of the defence's reliance on sexual history evidence at trial. These jurors recognised the inclusion of sexual history evidence as a form of "victim blaming" and attempts to "discredit her [the complainant's] character," and in doing, dismissed this evidence from the defence rhetoric. J012 even recognised the inaccuracy of the propensity inference as an "old cliché":

> *I think the point about the defence not bringing any evidence is quite apparent in that they're just trying to throw the old clichés in about*

> *discrediting witnesses and have had sex before and therefore it should be ok (J012, Scenario 1: Sexual Intercourse, No Inconsistency)*

This narrative highlighted the inaccurate association drawn between previous sexual history evidence as supposed indicator of propensity to consent, and the premise of attempting to discredit the complainant.

Nevertheless, whilst each of the above myth-busting narrative were strong, they all illustrated generalised focus on broader notions of rape trials in general, rather than applying these myth-busters specifically to the case in hand. They all focused upon the defence inclusion of this evidence at trial but were not stated direct response to subtle myth advancements put forward by fellow jurors within the deliberation itself. Thus, whilst positive in the sense of myth-busting, it indicates that jurors in the dataset were perhaps aware of 'obvious' explicit links between sexual history evidence and complainant credibility at trial but failed to recognise these links whereby they were advanced more subtly by fellow jurors in the deliberation. Again, this indicates nuanced and complex impact of sexual history evidence upon juror deliberations and juror understandings of the case evidence. Moreover, such myth-busters only arose in limited instances across one third of the sexual history juries, indicating that such understanding is not widespread.

7.2.3 What can be learnt from these framings of character and credibility?

The current findings build upon previous research and support existing theorisation that sexual history evidence is highly connected to wider perceptions of the of the character and credibility of the complainant (Easton, 2000; McGlynn, 2017). Indeed, extensive literature has suggested that assumptions of 'respectability' and 'moral credibility' continue to permeate framings of a female's sexual history in both public discourse and CJS contexts (Phipps, 2009; McGlynn, 2017). Smith (2018a) has illustrated how the inclusion of sexual history evidence *at trial* is therefore regularly used by defence barristers, as a means to call into question the credibility

of the complainant. The current findings build upon these assertions in demonstrating how this association between sexual history evidence and credibility, persists into the jury room.

While some commentators have argued that sexual history evidence no longer plays a substantive role in jurors assessments of a complainant, as a result of changing social mores (O'Malley, 2013; Thomason, 2018), the current findings appear to challenge such assumption. Whilst myth-busting did occur, equally so did myth endorsement and prejudicial framings of sexual history evidence. Perhaps more accurate therefore is Farrell's (2017) assertion that developments in modern law and social attitudes have eased, rather than eliminated, these vignettes of the 'ideal', 'pure' female complainant.

Indeed, the current research is not seeking to argue that evidence of sexual history continues to perpetuate historic assumptions of women as "insatiable and sinful sirens" (Farrell, 2017: 31), or suggest that female respectability continues to entirely hinge upon her sexual history (Phipps, 2009). Nevertheless, the findings do demonstrate persistent and engrained inferences towards such cultural ideology of the worthy or deserving complainant, at odds with the "whore, liar or seductress" (Farrell, 2017: 52).

Perhaps more fitting therefore is McColgan (1996) theorisation of 'moral credibility.' McColgan (1996) acknowledged that for some years it has been rarely suggested that sexually active women are less truthful yet suggested that notions 'moral credibility' - being the perception that the complainant is morally inferior and less deserving of the court's sympathy as a result of her sexual history – continue to persist. The current findings arguably verify McColgan's (1996) assertion by illustrating jurors' perceptions of a morally inferior complainant following the inclusion of her sexual history evidence at trial. Whilst jurors in the sexual history dataset did not explicitly dismiss the complainant's victimisation, they did routinely 'other' the complainant by portraying her as a deceptive or underserving witness, therefore fundamentally serving to dismiss or diminish her victim status.

These framings thereby reinforce Christie's (1986) conceptualisation of the 'ideal victim.' Christie (1986:18) ascribed the ideal victim as "a person or category of individuals, who, when hit by crime, most readily are given the complete and legitimate status of being a victim." Put simply, this theory asserts that complex social structures proclaim certain individuals to be considered as more deserving of victim status than others. Inherently, notions of respectability and blamelessness are central to framings of the 'ideal' rape victim (Phipps, 2009; Gravelin, Biernat and Bucher, 2019; Daly, 2021a). Historic framings that unchaste women could not be sexually victimised (Brownmiller, 1975) and that chasteness was inextricably linked to female morality (Farrell, 2017), exemplify outdated associations between a complainant's sexual history and her failure to comply with stereotypical victimhood. Ultimately, these assumptions deem sexual history evidence to be at odds with such framings of respectability, purity and blamelessness (Phipps, 2009). Whilst jurors in the present study were not so explicit in these framings, adherence to the premise of 'moral credibility' continues to evidence the pervasiveness of these underlying themes. Clear links between discussion of sexual history evidence and jurors' framings of a deceptive or undeserving complainant, fundamentally illustrate continued juror focus upon these notions of respectability as opposed to the issue of consent. This highlights the continued and enduring perception amongst some jurors, that sexual history evidence remains at odds with the complainant's conformity to ideal victimhood.

Again, this links to notions of respectability and supposed 'appropriate' femininity through a normative heterosexual lens, as discussed by Phipps (2009) and evidenced in Chapter 6 through notions of heteronormativity. Phipps (2009) asserted rape complainants are often treated as if the allegation of rape, was a commentary on their previous sexual behaviour or sexual character. Thus again, the othering of the complainant by jurors in the current dataset, as a result of her sexual history evidence, reinforces these perceptions of a lack of respectability or appropriate character and diminishes her victim status.

Furthermore, framings of the deceptive complainant and consequential open and trusted defendant equally reinforce Smith's (2018) commentary on the construction of the wholly

credible or wholly incredible witness. Smith (2018a) observed that at trial, barristers would routinely remark on small inconsistencies in a complainant's account, in order to portray her as a wholly incredible witness. This created a dichotomy of witnesses being presented as either wholly credible or not, and thereby failing to acknowledge credibility on a broader spectrum. This framing fundamentally echoes Freud's (1905) conceptualisation of the 'Madonna-whore complex' which denotes two dimensions to female sexuality and asserts that some men may only become aroused within the dimension where they degrade and reduce a partner to a sexual object. Bareket *et al.* (2018: 519) have since asserted that this dichotomy attributes polarised factions of female sexuality as "either good, chaste and pure Madonnas or as bad, promiscuous and seductive whores." The current dataset arguably reflects this framing within jurors' discussions of sexual history evidence and speculative narratives toward her credibility.

Fundamentally, speculation that the complainant had attempted to 'hide' her sexual history and that 'if she had lied about this then what else may she have lied about,' reveal strong adherence to this dichotomy. The complainant was thus perceived as wholly incredible as a result of these framings, and defendant correspondingly entirely honest, open and credible. Again, this seemingly stems back to the perceptions of the complainant's respectability and character and demonstrates enduring assumptions of ideal victimhood. Whilst it is positive that some myth-busting did occur in response to this perceived deception, ultimately this was substantially outweighed by highly prejudicial interpretations and thereby reflects the ongoing detrimental nature of sexual history evidence.

These overarching framings and speculative narratives of the credibility of the complainant, following the inclusion of sexual history evidence at trial, arguably represents a lose/lose situation for complainants of sexual violence. Existing research has crucially established that sexual history evidence remains particularly contentious and emotive for complainants of sexual violence and can fundamentally add to the trauma of pursuing a rape allegation through the justice process (Kelly *et al.* 2006). Therefore, hesitance to discuss such evidence before

an open court is entirely understandable and reasonable. Yet, where such evidence is then introduced by defence counsel rather than during the complainant's examination in chief, the present findings highlight the perception amongst jurors that the complainant has sought to hide this evidence and is incredible as a result. Whilst, when discussing this perceived 'deception' jurors in the current dataset emphasise that they would not negatively judge the complainant on the basis of this evidence, it has been shown throughout this chapter that implicit and indirect prejudice as a response to sexual history evidence remains widespread. Therefore, it may be argued that the complainant arrives in a lose/lose situation whereby she is judged negatively as a result of her sexual history evidence but equally judged negatively for appearing to hide such evidence from the court.

Perhaps it is therefore appropriate here, to consider the growing body of literature which calls for independent legal representation for complainants of sexual offences, particularly where sexual history evidence is introduced. Irish S.34 legislation[21] implements such an approach, allowing independent state-funded legal representation [ILR herein] for sexual assault complainants, to oppose a defendant's application to include sexual history evidence at trial. Whilst the implementation of S.34 is not without critique (see Iliadis (2020) for an excellent analysis of this topic), the premise behind such legislation is widely welcomed. Crucially, such provisions provide complainants with a meaningful voice in the trial process, enable testing of the rationale behind a defence's application to include sexual history, requires the defence to justify this application and ultimately therefore defends the interests of the complainant (Iliadis, 2020). Smith and Daly (2020) have thus campaigned for ILR to be introduced in England and Wales for all complainants of sexual violence, not just in response to a sexual history application. In their pilot study of this 'Sexual Violence Advocate Scheme,' Smith and Daly (2020) established obvious rationale behind such scheme and significant support for a national roll out. Whilst this pilot did not include support with sexual history applications due

[21] S.34 Sex Offenders Act (2001) inserted a new section 4A into the Criminal Law (Rape) Act 1981 [IRE]

to speculation associated with coaching complainants, a wider roll out to include such support was advocated. Moreover Keane and Convery (2020) have equally called for free ILR for sexual offences complainants in Scotland, as has Harman (2021) in England and Wales, to support and challenge applications to include sexual history evidence at trial. Ultimately therefore, within this context of growing support for ILR for complainants of sexual violence, especially where sexual history evidence is included, and in light of the current findings regarding the prejudicial impact of sexual history upon jurors; it is argued that such provision should be considered.

7.3 Indirect Association between Sexual History and Perceptions of Character and Credibility

So far, this chapter has explored instances whereby jurors directly drew upon sexual history evidence in order to advance narratives relating to the character and credibility of the complainant and defendant. The current section will now outline a trend that illustrated the *indirect* influence of sexual history upon perceptions of character and credibility. This observed trend being that, references to false allegations, lying or notions of "crying rape," emerged almost exclusively in deliberations whereby sexual history evidence had been included, compared to the control datasets where no sexual history evidence was introduced to jurors during trial. This trend is exemplified in Table 7.1:

Table 7.1: Proportion of each deliberation transcript which referenced false allegations, crying rape and 'lying.'

Sexual Intercourse		**Sexting**		**Control [No Sexual History]**	
Jury 1	4.50%	Jury 3	3.24%	Jury 2	1.06%
Jury 4	3.45%	Jury 5	2.51%	Jury 6	0.46%
Jury 7	0.85%	Jury 8	2.21%	Jury 9	0.00%
Jury 10	2.09%	Jury 11	1.73%	Jury 12	0.00%
Jury 13	2.75%	Jury 14	8.52%	Jury 15	0.00%
Jury 16	1.17%	Jury 17	5.85%	Jury 18	0.31%
Mean Average:	**2.47%**		**4.01%**		**0.31%**

Table 7.1 was collated by thematically coding all reference to false allegations, crying rape and 'lying' within each deliberation transcript. The thematic coding software then ascertained the percentage of each transcript that was coded according to these themes. These percentages are presented in Table 7.1, according to the level and nature of sexual history evidence.

Ultimately, Table 7.1 illustrates how reference to false allegations, lying and crying rape emerged almost exclusively in deliberations whereby sexual history evidence was included, compared to the control scenario which included no sexual history evidence. These narratives reflect rape myth endorsement, in line with widespread misguided assumptions that false allegations of sexual violence are extremely common, and often made out of anger or revenge. Moreover, each of these mythical narratives endorses and sustains perceptions that the complainant or her allegation are somewhat unbelievable or untrustworthy. This trend therefore, indicates an association between the inclusion of sexual history evidence at trial and increased myth endorsement which crucially served to diminish the perceived credibility of the complainant and her allegation.

The following section explores these juror narratives, in regard to the potential "motives" behind the complainant's allegation. It illustrates how these were discussions were framed during deliberations and highlights ongoing myth endorsement in the dataset, which served to diminish the perceived character and credibility of the complainant amongst participant jurors.

7.3.1 "False Allegations are Common"

The perception that false allegations of sexual offences are extremely common and arise substantially more frequently than false allegations of other crimes, remains a pervasive myth in public and media discourse of sexual violence (Rumney, 2006). Perhaps unsurprisingly thereby, reliance upon this myth was routine in the current dataset, occurring in 12 of the total 18 juries. Yet as suggested above, this arose predominantly in juries that had been exposed to sexual history evidence (11 of the 12), and therefore indicated an association between the

inclusion of sexual history evidence at trial, and an increased reticence amongst jurors to readily trust that a complaint of sexual violence was genuine.

Much like myths directly discussing sexual history evidence and credibility however, these myth endorsements were typically subtle in their framing. Rather than outwardly suggesting that the complainant in the case in hand, may have made a false allegation, this was often discussed in more abstract terms, referencing 'other' cases or *possible* scenarios:

> *J121: okay enough enough to take someone to court though*
> *J115: or enough to have someone found guilty of a sexual offence and everything that goes with*
> *J106: I unfortunately know somebody who did it. So yeah*
> *(Deliberation, Scenario 4, Sexting, Minor Inconsistency)*
>
> *J112: Why would she put herself in that position*
> *J117: but that does occasionally happen. Unfortunately*
> *(Deliberation, Scenario 5, Sexting, Minor Inconsistency)*
>
> *J111: I completely agree on that point. But I don't think it would stop some people*
> *J117: No*
> *J111: I know there is like, I'm not saying it applies to everybody, but there is obviously a very specific trait of some people that, you know, or some people will feel like they're in it too deep. So now they've got to see it all the way through and just hope that the person doesn't go to prison.*
> *(Deliberation, Scenario 5, Sexting, Minor Inconsistency)*
>
> *J157: It's a massive leap. But you know, women have gone that far.*
> *(J157, Scenario 4, Sexting, No Inconsistency)*

Whilst each of these narratives reflected jurors attempting to 'distance' the notion of false allegations from the case in hand, they continued to endorse the notion that false allegations of sexual violence are frequent. In doing so, they all posited the potential of the current allegation being false and highlighted this as a risk. This sustained and perpetuated misguided stereotypes regarding routine false allegations and notions that an allegation of sexual violence is an 'easy' means of revenge or vindication. Thus, despite describing this in abstract terms of 'other' cases or women, the perpetual advancement of these narratives served to cast doubt upon the complainant's allegation and de-legitimise her claim of rape.

Positively, the above narratives do show some myth-busting by fellow jurors regarding the inherent difficulties and traumas associated with pursuing a rape allegation through the CJS. However, these did not cause myth endorsers to retract their myth endorsements in any of the above discussions and therefore illustrate the engrained and deep-rooted nature of myths surrounding false allegations.

Nevertheless, myth-busters must be seen as cause for optimism and generally demonstrated a growing awareness amongst some jurors, of the inaccuracy of the perception that false allegations are common.

> *I would suggest it's quite a small number of people who would do that. I agree that it's possible. But is it fair to treat her like that because of small number of people who would? (J126, Scenario 5, Sexting, Minor Inconsistency)*
>
> *Statistically it's unlikely (J119, Scenario 2, Sexual Intercourse, Minor Inconsistency)*

Positively these myth-busters recognised the danger of assuming that false allegations of sexual violence are common and highlighted that this is not case. J126 emphasised ideals of fairness in the role of themselves as jurors, to dismiss this myth endorsement and instead rely upon what is statistically most likely. However markedly, responses to these myth-busters again, did not demonstrate a willingness amongst myth endorsers to challenge their views and therefore, this framing as a whole, reflects ongoing prejudice amongst the jury eligible population.

7.3.2 "Women Often Cry Rape"

Within narratives speculating upon the frequency of false allegations, evolved further narratives regarding the assumption that women will frequently 'cry' rape. This narrative emerged in 8 of the total juries 18, with all of these instances being in sexual history scenarios, and none arising in the control scenarios. Again, this substantiates the premise that the inclusion of sexual history evidence at trial increases interrogation of the complainant's credibility and heightens perceptions that she may be lying or cannot be trusted.

The premise that women often cry rape, lies firmly embedded within rape myth culture, and posits false allegations of rape as a weapon or tool used by scorned or vengeful complainants. It relies upon mythical assumptions of females as highly emotional and vindictive thereby overlapping with the heteronormative ideals discussed in Chapter 6, and feeds into supposition that false allegations of sexual violence are inherently frequent.

Much like the false allegation narratives discussed above, reference to crying rape was typically advanced by jurors in abstract terms, thus distancing this perception from the case in hand.

> *J157: Exactly, exactly. And, you know, it's a big thing for a woman to cry, rape and it not be rape.*
> *J133: Yeah correct (Deliberation, Scenario 4, Sexting, No Inconsistency)*

Whilst on the surface this discussion appears somewhat positive by acknowledging the severity of making a false allegation, and thereby potentially dismissing the likelihood of this in the current case; it equally illustrates ongoing troubling understandings regarding the weaponised nature of false allegations. Whilst not suggesting that the current complainant 'cried' rape, the underlying premise of this narrative recognises the notion of 'crying rape' as an ongoing problem, in which female complainants rely upon sexual violence allegations as a weapon.

Similar narratives which distanced this assumption of 'crying rape' from the case in hand, whilst still endorsing it as a widespread issue, emerged throughout discussions of crying rape. It was also framed by jurors as a way of othering the 'type' of women who would do this, whilst speculating that the complainant in the current case did not appear this 'type' of woman.

> *So I just think. I mean why. She seemed like a decent, normal person. Why would she cry rape and get this guy basically ruin his life… unless she's a pyscho (J044, Scenario 5, Sexting, Minor Inconsistency)*
>
> *I think, like, people don't tend to go along with someone just to kind of to, for want of a better phrase, cry rape people. I mean, you have*

to be pretty vindictive to do that. (J077, Scenario 6, Sexting, No real rape reaction)

Whilst these narratives were not endorsing the notion that the complainant in *this* case would have 'cried rape', as she did not come across "a psycho" or "vindictive," these narratives continued to highlight 'crying rape' as a problem in rape trials more generally. The narratives thereby perpetuated and sustained underlying misguided assumptions of rape allegations as a form of female weaponry and thereby reinforced supposition of female emotionality, and "scorned" or "vengeful" complainants. Fundamentally, this demonstrates persistent speculation as to the supposed credibility and character of the complainant, as a measure of the veracity of *her* allegation, as opposed to clear discussion of the alleged conduct and actions of the defendant.

Moreover, within such discussions, the notion was asserted that if she had 'cried raped,' her narrative to the court would have been different.

J006: one thing that I...took away from it, is that if you're going to make up a fake case and screaming rape, you don't tell the people that someone else said rape first
J003: mmm
J006: so if she is lying and she is calling rape when she shouldn't have done, surely she would've have said 'he raped me'.
(Deliberation, Scenario 1, Sexual Intercourse, No Inconsistency)

This premise not only continued to emphasise and exaggerate the issue of false allegations, and presented an inherent distrust of female complainants, but also drew upon wider myths surrounding 'ideal' victims and 'appropriate' actions. It presented the issue of "screaming" or "calling" rape at the forefront of discussion and presented the complainant as managing to neutralise this assumption, rather than correctly acknowledging false allegations as a rare occurrence. It also relied on misguided assumptions of *how* a 'real' victim would act, thus reinforcing focus upon *her* behaviour to prove or disprove the veracity of her allegation. In doing so, this narrative failed to recognise that there is no appropriate or set way to respond to a sexual offence but demonstrated the pervasive nature of myths and stereotypes.

Finally, within framings of 'crying rape,' fundamental undertones of distrust of female complainants emerged and false allegations were presented as a core, intrinsic problem for jurors to consider in sexual violence cases.

> *I'd like to just say like ...I feel like I have to tiptoe a little bit saying stuff as it says, I am a man. But if we do convict, convict this the defendant is guilty, then what's to stop? You know, future cases of girls crying and claiming somebody is a rapist, and then they just get locked up like that, based on their account. (J122, Scenario 5, Sexting, Minor Inconsistency)*

This narrative, whilst positively demonstrating diligence amongst participant jurors considering the impact of their verdicts, fundamentally asserted several myth-based undertones. It reflected pervasive assumptions regarding the 'significant problem' of false allegations in rape trials, despite extensive research proving this to be untrue. Yet perhaps more worryingly, it presented rape allegations as a tactic or tool of revenge which, if left unchecked, could continue to be undertaken against multiple men. Again, it turned focus onto the complainant's character and fundamentally presented her behaviour in a way which would typically be used to discuss the actions of a perpetrator or guilty party.

Ultimately, this frequent reference to crying rape, reflects deeply engrained connotations of false allegations and female emotionality, within public perceptions of sexual violence to institute a continued, inherent distrust of complainants. The fact this arose exclusively in the sexual history dataset, crucially demonstrates an increased focus upon the credibility and character of the complainant, in response to such evidence.

7.3.3 "Women Lie about Rape"

Within the wider narrative of false allegations, the premise that women often lie about rape emerged in 12 of the 18 juries in the dataset, with 9 of these being in sexual history evidence juries compared to 3 in the control juries. Again, this represents exaggerated focus on the possibility of false allegations, and a core focus amongst jurors upon the perceived credibility and character of the complainant. The fact that these narratives emerged disproportionately

in sexual history evidence datasets, further substantiates conjecture that sexual history evidence, at least implicitly, draws juror attention towards to supposed (in)credibility of the complainant.

Speculation that the complainant could be 'lying' about the allegation of rape, often emerged in direct response to perceived inconsistency in her account, due to the way that she discussed her sexual history evidence before the court. As discussed in Section 7.2.1, perceptions that the complainant had been deceptive about her sexual history were routine, and suggestions of lying were often directly linked back to such supposition.

> *Which makes me think even more that she'd lying [laughter] I feel bad (J041, Scenario 5, Sexting, Minor Inconsistency)*
>
> *So to me like she she is inconsistent um, I don't know I wouldn't say that every woman who goes to report this case and goes into court is lying (J111, Scenario 5, Sexting, Minor Inconsistency)*

These narratives illustrate the association between perceptions of inconsistency, the complainant's perceived attitude towards her sexual history evidence at trial and ultimately the notion that she could be lying about the allegation altogether. As discussed in 7.2.1 this perceived deception by the complainant, was widely endorsed and rarely myth-busted by jurors, meaning that the complainant was seen as less credible rather than exploring possible justifications for this. This framing of lying built upon these attacks of the complainant's credibility and crucially de-legitimised her allegation of rape and her perceived trustworthiness as a witness.

Moreover, notions of lying were frequently used to present a dichotomy of the complainant, as either a wholly credible or wholly incredible witness.

> *J002: it's very much that 2 different events happened in these people's heads*
> *J006: yeah...or one of them is lying (Deliberation, Scenario 1, Sexual Intercourse, No Inconsistency)*
>
> *And I think it was just that inconsistency that made me think, well, if she's lying, or mistaken, then what else is she either lying or*

> *mistaken about? (J085, Scenario 3, Sexual Intercourse, No real rape reaction)*

These framings illustrate how any inconsistency in the complainant's account, provoked interrogation of her whole evidence and the entirety of her allegation. It therefore illustrates a strong dichotomy of her as a witness. The suggestion that "what else is she either lying or mistaken about" demonstrates strong distrust of the complainant as a witness and a continuing fixation amongst jurors on the spectre of false allegations. Yet, as these narratives were not prevalent in control scenarios, it seems likely that the complainant was perceived much more credible where she was not seen to have acted 'inappropriately' or perhaps 'led the defendant on' within previous sexual encounters.

Furthermore, unlike other myth narratives discussed in this chapter, the perception that women often lie about rape was only myth-busted once throughout the dataset. This myth-busting attempt was notably strong in highlighting the inaccuracy of common portrayals of false allegations and lying complainants in sexual offences cases, however remained abstract in terms of generic allegations as opposed to focusing on the case in hand.

> *It is when police officers decide that they were too drunk or dress certain ways, or they don't have enough evidence, so they won't even bother or she pulled out because she's crying and she's scared. And they put it as false. But it's actually meant to be classified as unfounded or not enough evidence. The allegations are always the girl's lying, the girl's lying, the girl's lying but it's normally to go scared or there's not enough evidence or the police don't believe her and they won't take it to court. And now it's a false allegation, which is actually only 4% of all cases. Yeah, I am a law student. (J124, Scenario 5, Sexting, Minor Inconsistency)*

Whilst this myth-busting is positive, it must be noted that J124 identified themselves as a law student and thereby likely holds far deeper awareness and insight into these issues than the majority of the jury eligible population. Whilst this narrative therefore served to educate jurors in the specific jury, the lack of further myth-busting on this issue more widely indicates pervasive attitudes throughout wider public discourse and the majority of the jury eligible population.

7.3.4 "Many Rape Allegations are Made out of Revenge"

As discussed in Section 6.3.1.3, the premise of vengeful allegations arose repeatedly in the current dataset, both in direct reference to sexual history evidence as a marker of consent and indirectly as a marker of the complainant's credibility. This premise arose in 8 of the total 18 deliberations, with all of these in sexual history datasets and none in the control scenarios. Again therefore, demonstrating a trend between the inclusion of sexual history evidence at trial and assumptions of an untrustworthy, in-credible complainant. Indeed, this narrative drew upon numerous misguided assumptions of female emotionality, weaponizing rape allegations and the extent of false allegations of sexual violence, to diminish the credibility of the complainant.

These narratives were typically posited in regard to 'all' rape allegations and highlighted the supposed risk of a spiteful or vengeful allegation made by a scorned woman.

> *J141: I don't I disagree with that, because there are cases where, where people have been accused, and then they.. retract later or circumstances mean that,*
> *J157: yeah, there's been many, many girlfriends or potential girlfriends that have done a bit of 'he raped me' yeah,*
> *J141: and as I say and the opposite sex as well, you know, but it can be bitterness, it can be, you know, you've got a you've got a gripe with that person. And you know it can is an extreme way of doing it. That's why you need to know that person's character (Deliberation, Scenario 4, Sexting, No Inconsistency)*

This statement that "many girlfriends or potential girlfriends that have done a bit of 'he raped me,'" reinforced inaccurate stereotypes that sexual violence allegations are a frequent and common tactic used by "scorned" or "vengeful" women, seeking to enact an exercise of revenge onto an unsuspecting male acquaintance. Moreover, the suggestion that "it can be bitterness," again framed vengeful allegations as routine, and intonated that such an allegation is easy to make. This, representing ongoing adherence to Hale's 17th century dictum that rape allegations are "easily to be made and hard to be proved." This notion however, that vengeful allegations are routine, diverted attention away from that of the defendant and his actions, onto the perceived credibility of the complainant. The sense that "you need to know that

person's character," then legitimised this focus upon the character and credibility of the complainant and inferred that she seemingly had to 'prove' her character in the same that a defendant would.

This focus on the complainant's character and speculation as to her supposed "motives" to make a false allegation, fundamentally underpinned these discussions and demonstrated ongoing strong myth endorsement by some jurors in the dataset.

> *However, what I would have liked to have known is like whether there were any more kind of details that might indicate a vengeful allegation. (J111, Scenario 5, Sexting, Minor Inconsistency)*
>
> *Well, I'm not entirely sure about what this girl's motives are or whether she's actually being 100%. truthful in, in her facts are like in her account of the story. (J111, Scenario 5, Sexting, Minor Inconsistency)*

Again, this posited the focus of deliberation onto the perceived credibility and trustworthiness of the complainant, and reinforced misguided outdated assumptions about how complainants of sexual violence would or should act. The question of "motives" illustrates what has already been shown in the literature regarding female complainant being 'put on trial' rather than defendants.

Yet positively, despite routine endorsement, myth-busting the notion of a vengeful allegation was also routine in the current dataset.

> *If you had consented and then suddenly its almost err almost a spiteful thing, you wouldn't be to that level that quickly and you, you wouldn't have run out of the house (J006, Scenario 1, Sexual Intercourse, No Inconsistency)*
>
> *J018: if you think she's doing it from a revenge perspective then..*
> *J006: yeah*
> *J003: the next day she might have taken revenge if that was revenge (Deliberation, Scenario 1, Sexual Intercourse, No Inconsistency)*
>
> *Yeah....She believed Oh, that's the other thing too. We have to believe. Did she think it was rape then? Or did she choose that it was rape afterwards? Or does she believe that it was rape at that current time and then she made her decision afterwards? Because that was the whole defence thing about being is it is an action of being vindictive or being attacked, that she didn't get the emotional*

> *attention that she wanted. I don't think that's true. I Don't think that she would have done this act to just to spite him for not being emotionally available at the time. (J098, Scenario 6, Sexting, No real rape reaction)*

However, whilst these attempts to dismiss the idea of a vengeful allegation were potentially positive for the current case and complainant, they continued to evidence pervasive myth reliance. Indeed, these narratives did not acknowledge that vengeful allegations are not common, or recognise the distinct difficulties associated with pursuing a rape allegation through the justice system. Instead, these relied upon differing myths and stereotypes, regarding the complainant's prompt report and her adherence to notions of the 'ideal victim' to dismiss the notion of revenge. Thereby jurors were not in fact dismissing the notion that vengeful allegations are rare, and were therefore seemingly demonstrating adherence to this myth but distancing this from the case in hand.

One juror however did seemingly recognise that false allegations of sexual violence are not easily made and dismissed the notion of a vengeful allegation:

> *I just find the idea that she would take revenge by claiming rape as an act of like, after being humiliated, I just find that far too far-fetched (J164, Scenario 4, Sexting, No Inconsistency)*

This positively highlighted the notion of a false allegation as "far-fetched" and in doing so, seemingly acknowledged that making an allegation of rape is very difficult. Whilst a step in the right direction therefore, such attitudes were far from widespread and equally did not entirely dismiss the notion that false and vengeful rape allegations are a common weapon.

7.3.5 What can be learnt from this Indirect Impact of Sexual History Evidence on Complainant Credibility?

Chalmers *et al.* (2021) highlighted a substantial trend towards jurors overstating the spectre and risk of false allegations in rape trials, in the largest mock jury study in the UK to date. However, the current study builds upon this finding, emphasising not only jurors continued endorsement of the premise that false allegations are common, but equally illustrating

increased reliance on this premise where sexual history evidence had been introduced at trial. This finding is pivotal to reform debates, by emphasising overlap and entwinement between sexual history evidence and broader reliance on myths and stereotypes, that serve to discredit the complainant and her allegation.

In practice, research in the US has illustrated no empirical connection between this assumption that sexually experienced women are more likely to make false rape allegations (Flowe, Ebbesen and Putcha-Bhagavatula, 2007). Nevertheless, repeated observational studies have highlighted that defence barristers continue to connect previous sexual history evidence with narratives that undermine the credibility of the complainant (Durham *et al.* 2016a; Smith, 2018a), and to construct false allegation scenarios (Brown, Burman and Jamieson, 1992).

Taken together, these indirect associations between the inclusion of sexual history evidence at trial and disproportionate reference by jurors towards the possibility of false allegations, crying rape and lying; indicates a trend between sexual history and decreases in the perceived credibility of the complainant amongst jurors. This supports supposition in the existing literature regarding the distorting impact of sexual history evidence upon perceptions of the case evidence, and particularly on perceptions of the complainant (Brown *et al.* 1992; Kelly *et al.* 2006; McGlynn, 2018). Specifically, this trend supports the notion that the inclusion of sexual history evidence at trial, increases the propensity of jurors to treat this claim and the complainant, with scepticism. This equally affirms findings of the JDS discussed in Chapter Five.

Ultimately, therefore this perception amongst jurors in the current dataset of an association between sexual history evidence and increased focus on false allegations, highlights the highly prejudicial potential impact of sexual history evidence. In doing, it arguably justifies the need for tighter restrictions to the inclusion of sexual history, to recognise the prejudicial impact of this evidence on juror framings of the case.

7.4 Chapter Summary

This chapter has highlighted how sexual history evidence continues to prompt judgements regarding the character and credibility of both the complainant and defendant, amongst jurors within deliberations. Key findings are:

- Sexual history evidence was referenced during deliberations, to bolster portrayals of the perceived:
    - Deceptive complainant
    - Trusted defendant
    - Undeserving complainant
- The above framings highlight how sexual history evidence was drawn upon to diminish the perceived credibility of the complainant and bolster that of the defendant. This reflects findings of the juror decision scale as discussed in Chapter 5.
- Alongside direct association between sexual history evidence and diminished complainant credibility, indirect associations also became evident between the inclusion of sexual history at trial, and greater discussion of false allegations, lying and crying rape.

Within direct discussion of sexual history evidence, it was shown that jurors routinely perceived the complainant as a deceptive or untrustworthy witness when discussing her sexual history evidence before the court. Rather than exploring the potential reasons behind this or difficulties associated with having this evidence before the court, jurors in 8 of the 12 sexual history evidence juries instead portrayed this as a cause for concern. Alongside these narratives, jurors in 5 of the 12 sexual history evidence juries correspondingly discussed the defendant as open and trustworthy in relation to his discussion of the previous sexual history. These framings highlight how sexual history evidence continues to be endorsed to detract from complainant credibility and in doing so, seemingly award this credibility to the defendant. Narratives also exemplified critiques relating to ‘moral credibility’ of complainants, in which

complainants were generally perceived as lesser or are othered as a result of their sexual history being laid before the court. Ultimately these findings correspond with existing research which has shown that complainants are typically perceived as less believable where sexual history evidence is raised (Schuller and Hastings, 2002), and this likely to increase the chance of acquittal (Kelly *et al.* 2006).

Finally, perhaps more surprisingly, the current dataset has highlighted how narratives regarding the complainant's credibility and the credibility of the allegation itself, arose *indirectly* to the inclusion of sexual history evidence at trial. Section 7.3 illustrated clear trends of discussions relating to false allegations, crying rape and lying, as emerging almost exclusively in sexual history datasets rather than control datasets. This indicated that whilst jurors may have outwardly asserted the sexual history was irrelevant (Section 6.2), it seemingly impacted upon wider perceptions of the case as a whole and increased the perception amongst jurors that the allegation could be false. This reflects an extremely important impact of sexual history evidence, as not only impacting upon central discussions of that evidence but also framings of the wider case as a whole.

Ultimately therefore, these findings highlight the ongoing prejudicial impact of sexual history evidence upon judgements of witnesses at trial as well as upon the perceived veracity of the allegation itself. It reflects further education and awareness raising programmes are necessary in order to limit the prejudicial impact of including sexual history evidence at trial.

Chapter Eight: Conclusions and Implications

8.1 Introduction

This PhD has provided fresh evidence regarding the prejudicial impact of sexual history evidence in rape trials in England and Wales and offers a unique and original contribution to ongoing s.41 reform debates discussed in Chapter Three. These findings challenge the notion that jurors no longer accept rape myths (Thomas, 2020) and crucially highlight continued juror endorsement of the 'twin myths' (*R v Seaboyer*, 1991) which hold the potential to prejudice trial (McGlynn, 2017). Whilst jurors were often outwardly sceptical towards the supposed relevance of sexual history evidence as a marker of consent, a deeper and more nuanced analysis of deliberations reflected misguided notions of heteronormativity, continuing to underpin perceptions of the relevance of sexual history and normalise the alleged rape into sex. Meanwhile, deliberation narratives repeatedly drew upon sexual history evidence to undermine the credibility of the complainant or bolster that of the defendant. Furthermore, and perhaps most notably, findings of the JDS exemplified the highly complex, intersectional impact of sexual history evidence on juror perceptions of both complainant and defendant. Thus, whilst debates about sexual history evidence to date have tended to focus solely on the supposed prejudicial impact of this evidence, the current findings highlight the necessity to scrutinise sexual history evidence holistically, alongside perceptions of complainant credibility and broader rape myth ideology. This study has therefore addressed the gap in knowledge outlined in Chapter Three, as the first research in England and Wales to assess the impact of sexual history evidence on jurors in rape trials and holds numerous implications for further research and reform debates.

The current concluding chapter will reiterate the study's key findings and delineate how these relate to each of the research aims. It then provides a note regarding the innovative approach

to methodology developed in the current study, before then setting out limitations of the research, framing possible directions for future research and finally, implications of the current findings. It will conclude by reaffirming the thesis argument that sexual history evidence continues to hold distinct prejudicial impact for 21st century jurors, and further research to direct policy and/or procedural reform is necessary to ensure a fair trial for both defendant and complainant, and ultimately to protect future complainants from improper treatment at trial.

8.2 Research Aims and Findings

Chapters Five to Seven have outlined the core findings of the current dataset, to answer each of the research aims, which were to:

1. Determine whether/how the inclusion of sexual history evidence at trial quantifiably impacts upon mock jurors' perceptions of witnesses and final verdicts
    a. To analyse whether these perceptions are influenced by different forms of sexual history evidence
    b. To establish the interplay, if any, between sexual history evidence and other rape myths, for example demeanour or the level of consistency in the complainant's account
2. Examine whether/how mock jurors discuss the potential relevance of sexual history evidence in their deliberations.
3. Establish whether/how the inclusion of sexual history evidence at trial impacts upon mock juror perceptions of witness credibility within deliberations

This section will summarise how each of the three findings chapters befit the research aims and how these findings contribute to the existing knowledge base regarding sexual history evidence.

8.2.1 Sexual history evidence altered mock jurors' perceptions of witnesses but not final verdicts

Chapter Five scrutinised the quantifiable impact of sexual history evidence on verdict trends and on perceptions of witnesses, as measured by the JDS. Despite the small sample size, the

data did reveal multiple statistically significant findings and thereby provides valuable commentary on the substantive impact of sexual history evidence.

Contrasting to Kelly *et al.*'s (2006) analysis of real-life case data, the current dataset did not evidence a clear statistical association between sexual history evidence and juror verdict. Whilst this may indicate that sexual history evidence is becoming less influential to jurors than previous literature suggests, it is important to equally scrutinise the relatively small sample size of the current research, which may account for the lack of statistical trend. Indeed, findings did show a trend that was *approaching* statistical significance, towards less initial individual guilty verdicts, whereby sexual history evidence was included at trial. This early trend would support supposition from the existing literature, that the inclusion of sexual history evidence at trial increases the likelihood of acquittal (Temkin, 2000; McGlynn, 2017). Nevertheless, this trend was not statistically proven and was not evidenced when examining post-deliberation group verdicts. Again, this may be attributed to the small sample size, or may be indicative and the seemingly diminished impact of sexual history evidence on juror verdicts. Ultimately, further up-to-date research, perhaps mimicking Kelly *et al.*'s (2006) study, is necessary to further scrutinise this aim. Yet importantly, this lack of established trend must be examined in relation to wider findings of the current research, which clearly illustrate ongoing prejudicial influence of this evidence on jurors.

Indeed, the inclusion of sexual history evidence at trial, did significantly increase the length of juror deliberations and decreased the likelihood of a unanimous verdict. Thus, despite the small sample size, this trend highlighted sexual history as a complicator to the deliberation process, which increased polarisation of opinion amongst jurors. This finding reinforces theorisation in the existing literature, that sexual history evidence holds the potential to distract jurors from the task at hand and distort the truth-seeking function of the jury (*R v A [No.2]* UKHL 25, [2001]; McGlynn, 2017). In doing so, this arguably provides fresh justification to more robustly restrict the inclusion of sexual history evidence at trial, and clearly direct jurors about how they may *legitimately* rely on this evidence within deliberations.

Furthermore, findings of the JDS illustrated a strong interaction effect between sexual history evidence and level of consistency, upon juror perceptions of complainant and defendant believability. These findings showed that complainants were perceived as less believable and defendant's more so, where sexual history evidence had been introduced. This affirms significant previous theorisation that sexual history evidence typically bolsters perceptions of the defendant and detracts from those of the complainant (McGlynn, 2017; Easton, 2000; Baird, 2016).

Yet, importantly, these findings also revealed that the extent of this impact was highly dependent on the level of consistency and adherence to rape myths in the complainant's account. This highly original finding provides vital fresh evidence on debates about sexual history, as it illustrates that this evidence cannot be viewed in isolation, but as part of a complex web of myths, stereotypes and evidential factors which determines jurors' responses. Building on the literature which links sexual history evidence to ideals of heteronormativity and respectability (Phipps, 2009; McGlynn, 2017), these findings highlight the need for an overarching, intersectional response to restricting this evidence at trial. They demonstrate that the impact of sexual history on jurors should be seen as far from linear or predictable, and reforms must acknowledge the intersectional nature of this evidence in order to develop appropriate restrictions.

Taken together, these statistical findings have built significantly upon what is known about the impact of sexual history evidence and provide a novel perspective to inform reform debates. The findings equally however highlight the necessity to further largescale and intersectional research in this field, to comprehensively test statistical relationships and further understand the impact of this evidence on real-life jurors.

8.2.2 Jurors routinely relied on heteronormative ideals to proclaim relevance of sexual history evidence.

Heteronormative narratives which portrayed the female complainant as the gatekeeper to sexual relations and the male defendant as the sexual instigator, were typically central to juror discussions of sexual history evidence in deliberations. Despite some outward myth-busting by participant jurors, which asserted the sexual history evidence was irrelevant to the question of consent; frequent reference to heteronormativity and ambiguity of sexual consent where there had been a previous sexual relationship, exemplified embedded myth endorsement amongst jurors. Thus, despite increased subtly of these framings, these narratives illustrated continued reliance on sexual history evidence as a marker of consent and in doing so, showed continued perceived relevance of this evidence and the propensity to consent assertion. This finding affirms decade old findings of Ellison and Munro (2009a), in which jurors equally drew on expectations and conventions of heterosexual relationships to position the female complainant in the gatekeeper role and excuse the male defendant as the naive, sexual instigator. In doing so, these narratives attributed relevance to sexual history evidence or previous relationship evidence to determine whether consent was or was not given.

Moreover, this finding buttresses results of the JDS discussed above, which illustrated the interconnected and intersectional nature of sexual history evidence and wider rape myths. These narratives illustrate how sexual history evidence is intertwined with broader myths relating to heteronormativity, gender roles and 'appropriate' socio-sexual conduct. Both Smith (2018a) and Daly (2021a) noted that gendered narratives regarding supposed 'appropriate' or 'normative' sexual behaviour were routinely used at trial when introducing sexual history, whilst Ellison and Munro (2009a; 2010a; 2010b) have shown how this permeates the jury room, with jurors 'filling in the gaps' using pre-existing attitudes about what constitutes normal socio-sexual behaviour. Ultimately, the difficulty that this finding highlights is that the interconnected and engrained nature of sexual history evidence with broader myths and stereotypes, makes these attitudes more difficult to combat.

Moreover importantly, this finding challenges the widely publicised, recent research of Cheryl Thomas (2020), which claimed that jurors no longer believe rape myths. Whilst not disregarding the notion that jurors in the current research were indeed often aware of the inaccuracy of myths about the relevance of sexual history evidence; the current findings seemingly exemplify limitations associated with Thomas's (2020) research. Thomas (2020) asked jurors directly about rape myths and has thus been critiqued as incurring social desirability bias in her findings. The current findings seemingly affirm this notion, by highlighting that despite overt awareness of 'obvious' rape myths, deeper and more nuanced analysis showed ongoing endorsement and reliance on these ideals. The current research thus buttresses claims of previous mock jury research, that rape myths continue to problematic in the jury room (Ellison and Munro, 2009a,b,c; Willmott, 2018; Leverick, 2020).

8.2.3 Sexual history evidence prompted judgements about the credibility of both the complainant and defendant.

Numerous court observation studies have demonstrated that sexual history evidence is often introduced at trial as a means to undermine the complainant's credibility (Smith, 2018; Temkin *et al.* 2018; Daly, 2021a). The current findings have built upon this literature, illustrating that these narratives in turn permeate the jury room, with sexual history evidence drawn upon to frame the complainant as deceptive or undeserving, whilst equally bolstering the defendant as seemingly honest and credible. This lends continued support for McColgan's (1996) assertion that sexual history evidence invokes judgements towards the 'moral credibility' of the complainant and reiterates the embedded nature of these assumptions which have endured over time and through cultural changes. These findings are equally supported by findings of the JDS, which further highlight the impact of sexual history evidence on perceptions of witness credibility in the current study. Taken together, these findings signify the potentially distorting impact of sexual history evidence for jurors (McGlynn, 2017) and thereby highlight the need for robust and rigorous restrictions.

Meanwhile, somewhat unexpectedly, the current study also identified distinct, indirect influence of sexual history evidence on perceptions of credibility, with increased discussion of false allegations and crying rape whereby sexual history evidence had been introduced. This again, illustrates how sexual history evidence may lower the perceived credibility and trustworthiness of the complainant amongst jurors, whilst equally highlighting that, discussions of such evidence are often highly intertwined with wider myths and stereotypes about rape. Thus, whilst those have asserted that increased restrictions are unnecessary (Dent and Paul, 2017), by relying on s.41(4) which asserts that sexual history evidence must not be adduced whereby the main purpose for doing so is to "impugn the credibility of the complainant;" the strength of this argument in practice may be debated. Indeed, the current findings illustrate that judgements of the complainant's credibility are a common outcome of sexual history evidence, even where these do not directly relate to the evidence itself. This ultimately shows that perceptions of credibility cannot be isolated or seen as distinct from sexual history evidence, and as such s.41(4) is seemingly an insufficient safeguard. The nuance illustrated throughout this research, is therefore pivotal to informing reform debates.

8.3 A Note on Methodology

Alongside the study's findings, it is equally important to mention the methodological innovation developed in the current research. Whilst the online nature of the current simulations evolved in direct response to the Covid-19 pandemic, these have been shown to be an effective and efficient alternative to face-to-face simulations. Significant literature has already denoted the value of online focus group research (Fox *et al.* 2012; Kite and Phongsavan, 2017), and current findings have built on this, to illustrate similar success of online jury simulation methodology.

Whilst not without some technology related shortcomings, such as ensuring participant internet connections; the value of the online simulation method arguably outweighs limitations, enabling access to a larger participant pool, limiting time and cost constraints for both

researchers and participants, and removing resource barriers such as room bookings (Herriott, 2022b). In effect therefore, online mock jury simulations make this underused methodology, more accessible for future researchers including student researchers. This approach therefore holds substantial value in the changing landscape of research methods and will hopefully encourage more research into the central but often concealed and secretive, jury system.

8.4 Limitations of this Research

Whilst the current research has contributed substantially to the existing knowledge base on sexual history evidence, limitations of the research must also be recognised. In particular, the mock jury simulation method – whilst providing valuable insights where research with real juries is not possible - is constrained by differing methodological choices. Thus in the current project, aspects of the simulation were confined by time, resources, cost and ultimately implications of the Covid-19 pandemic. As argued in Chapter Four, these limitations were to extent unavoidable, and indeed an acceptable compromise, to gain valuable insights offered by the mock jury simulation method. However, the current section highlights limitations of the current project and methodological choices, and highlights areas which could be developed or improved within future research on this topic.

First and foremost, the sample used in the current research, in terms of both sample size and composition, represents a limitation to the study's findings. The total sample size of 119 participant jurors serving across 18 separate jury panels, provided extensive quantitative and qualitative data to inform the research aims and objectives. Nevertheless, this sample size is negligible when compared to the wider jury eligible population and the average 340 jury trials being heard across England and Wales each week (Sturge, 2020). A larger sample would therefore, more robustly substantiate the study's findings and likely reflect further nuances and detail that may be prevalent within the plethora of real jury trials heard in England and Wales each week. Having said this however, the current study did not seek to posit

generalisable statistical analysis of *all* jury deliberations, as these are far from linear or predictable and thereby researchers cannot account for, or predict, *all* possible variations and nuances (Ellison and Munro, 2014). Instead, the study favoured analytic generalisability (Yin, 2010), highlighting trends and likely transferability of findings based on theoretical analysis of sexual history evidence and hypotheses within the existing literature. In doing so, the study provided original insight into emerging statistical trends relating to the inclusion of sexual history at trial, and also more in-depth analysis of complex qualitative themes and trends emerging through juror discussions of sexual history.

Nonetheless, due to the nine separate scenarios being tested in the current project, a larger sample would highlight quantitative trends more clearly and diminish the risk of results being skewed by anomalies in the data. Further research using a larger sample would therefore, be valuable to further develop the knowledge base in this area.

Alongside sample size, the composition of the sample used in the current project was also identified as a limitation to the validity and generalisability of findings. Whilst the wholly community sample used was more diverse and thereby more generalisable than wholly undergraduate samples used in much of the mock jury research to date (Bornstein *et al.* 2017), it remained skewed in some areas and thus not entirely reflective of the wider jury eligible population. In particular, the sample was skewed towards females, younger participants, and those with higher educational backgrounds. This was arguably to some extent, a result of self-selection bias which is largely unavoidable in mock jury simulation research which uses volunteer participants (Wiener *et al.* 2011). However, some skewing can likely also be attributed to participant recruitment techniques, which were limited in the current study by resource and cost constraints. Importantly, the outcome of this skewing is that the participant sample in the current study typically held lower levels of rape myth acceptance than would be expected from the population as a whole. Consequently, findings of this research, likely under-represented the prejudicial impact of sexual history evidence upon jurors, compared to that of the wider jury-eligible population. Further research, which utilises a more sophisticated

participant recruitment technique to ensure a wider stratification of society, would be beneficial to scrutinise this further.

Alongside sampling, it is important to acknowledge the limitations of any research using the mock jury methodology. Chiefly, participants were aware that they were not acting as jurors in a real trial. Thus, whilst participants routinely became animated in discussions and regularly noted the implications of their verdict on both the complainant and defendant's 'lives,' it is impossible to control or assess the impact of the artificial nature of task (Ormston *et al*. 2019). Moreover, both the trial stimulus and deliberation were abbreviated to take account of participant time commitments. Whilst this is common practice in mock jury simulations (Finch and Munro, 2008) ,and to an extent unavoidable when relying on volunteer participants, it again represents a deviation from the task of real jurors and must be noted as a limitation of the research.

Nonetheless, despite these limitations, the current study has substantially added to the current knowledge based and understanding of the impact of sexual history evidence upon jurors. Thus, whilst limitations are recognised, these should not detract from the contribution to knowledge. Moreover, by acknowledging these limitations, this section has highlighted several areas for further research which would continue to build on our understanding of this evidence and ultimately direct reform efforts. This must ultimately, contribute to a more robust and fair response to sexual history evidence at trial, which protects complainants, whilst equally preserving fair trial safeguards for defendants.

8.5 Directions for Further Research and Implications for Policy and Practice

Despite limitations, the findings of this research have contributed substantially to the existing knowledge base on sexual history evidence, holding numerous implications for policy and practice debates. Ultimately, these findings contribute to a growing body of scrutiny which highlights the problematic nature of sexual history evidence and stresses that renewed

scrutiny of s.41 restrictions and reliance on sexual history evidence at trial, is both necessary and justifiable.

Whilst some cautious recommendations for change will be suggested, it is important to stress that further research into the reliance on, and impact of, sexual history evidence at trial, remains vital to appropriately and comprehensively advocate large-scale reform. Suggestions for future research are thereby outlined in Table 8.1 below:

Table 8.1: Future Research Directions

	Future Research Directions	**Section Reference**
1	A pilot study implementing specialist sexual history directions for jurors at trial. And a comparison of different modes of delivery e.g. educational video pre-trial, expert evidence, enhanced judicial directions etc.	Section 6.3 and 7.2
2	Further mock jury research using a larger and more varied participant pool, to further assess the impact of sexual history evidence on jurors.	Chapter 5
3	An up-to-date analysis of case file data, to examine whether a trend continues to exist between the inclusion of sexual history evidence at trial, and conviction rates.	Section 5.2
4	Mock jury research which specifically focuses upon an intersectional analysis to more clearly establish how sexual history evidence intertwines with compounded oppressions such as gender, age, class, ethnicity, adherence to socio-sexual norms etc.	Section 5.3
5	Court observation research to assess the impact of recent changes in the Criminal Practice Directions on the inclusion of sexual history evidence at trial	Section 3.5
6	Court observations to examine the introduction of sexual history evidence at trial through and intersection lens.	Chapter 7
7	A content analysis of a cross-section of s.41 pre-trial applications to assess reasoning and relevance of sexual history within these.	Section 6.3

Each of the above research projects would be valuable to further establish the impact of sexual history evidence on jurors and the justice process more widely and would help to contribute

to vital reform debates. Perhaps the most pressing, would be an analysis of specialist sexual history directions which would act as a relatively quick and easy-to-implement reform measure to guide jurors about their practical reliance on this evidence in their deliberations. This is because, the current research has highlighted jurors' conscientiousness in the deliberation process, but equally illustrated confusion and misunderstanding amongst jurors about prejudicial reliance on this evidence when deliberating.

Yet, notwithstanding the need for further research in this area, the current findings seemingly justify some short-term changes that will act to protect complainants from unwarranted intrusions into their sexual history, whilst promoting fair and robust enforcement of current s.41 provisions. Ultimately, whilst the current research does acknowledge that there may be limited instances in which sexual history evidence may be deemed as relevant to trial, and thereby does not propose complete prohibition of this evidence at trial; it does argue that restrictions are vital and must be strictly enforced, given the proven prejudicial impact of this evidence.

First and foremost, in light of the current evidence base, barristers and judges should be given enhanced training which outlines the practical consequences of the inclusion of sexual history at trial. This would arguably limit reliance on myths about sexual history by barristers and perhaps curtail the number of s.41 applications approved by judges. Meanwhile, prosecution barristers should also be given further training about the importance of promptly rebutting myths and stereotypes about sexual history, so that if these are invoked, barristers can immediately alert jurors as to the incorrect or prejudicial nature of these. Within such training, specific guidance on digital evidence should also be given to address the seemingly growing issue of disclosure of digital sexual history evidence at trial. The current findings have illustrated that digital sexual history evidence may prejudice jurors in the same way as traditional sexual history evidence, and therefore clarity of response for barristers and judges would be beneficial.

Whilst more largescale reform to legislative provisions relies on further research being done in this area, the current findings have identified some potential avenues to inform such reform debates. In light of the clear prejudicial impact of sexting evidence, the findings seemingly justify greater legislative clarification as to what amounts to 'sexual behaviour' and thereby falls within the remit of sexual history provisions. Similarly, given the clear prejudicial influence of sexual history, further clarification of 'relevance' should equally be included in provisions to robustly and clearly illustrate when such evidence can be legitimately admitted at trial. Finally, again given findings of the current study to illustrate the clear prejudicial impact of this evidence and reliance on heteronormative ideals, this thesis argues that the similarity gateway should be re-refined to a pre-*R v A* state, whereby only unusual or bizarre conduct may be admitted.

Nonetheless, the current findings have evidenced the engrained and embedded nature of prejudices surrounding sexual history and ultimately therefore argues that no reform effort will be wholly effective without largescale cultural change alongside this. Radical overhaul of underlying court cultures and structures is vital (Daly, 2021a) so as to fundamentally re-frame the evidence jurors hear at trial. Meanwhile, juror and wider public education programmes are equally seemingly critical to counter bias and misapprehension amongst jurors (Willmott, 2017; Ellison, 2019), and should therefore be implemented in conjunction with meaningful policy change.

8.6 Concluding Remarks

The current research has addressed the existing knowledge gap, as the first mock jury research globally to assess the impact of sexual history evidence on mock juror deliberations in rape trials. Ultimately, findings have shown that the jury should remain *out* on sexual history evidence, with further scrutiny of its' impact, essential.

Indeed, the focus now, must be on further understanding and assessing the impact of sexual history evidence, not only on modern day jurors, but also public perceptions, practice of CJS

officials, complainants, and defendants, in order to comprehensively direct reform efforts. Whilst there is general agreement throughout the literature that s.41 provisions are not operating effectively (section 3.6), directions for reform must be approached cautiously and conscientiously to avoid repeating mistakes or being caught in the vicious cycle of reform that has been seen to date. The current research has made a unique contribution to reform debates, illustrating the distinctly complex and nuanced influence of sexual history evidence on jurors and connections between sexual history and wider rape myths and misguided cultural narratives. Because of this, holistic and meticulous reform is vital to ensure meaningful and effective legal and social response for all involved, and therefore further research is crucial to inform these discussions.

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Appendices

Appendix One: Juror Recruitment Poster (A)

Ever wondered what it's like to serve on a real jury?

NOW IS YOUR CHANCE TO TAKE PART IN VITAL RESEARCH ON JUROR DECISION MAKING

This research seeks to improve court experiences for victims and achieve better outcomes in rape trials – Could you help?

a.r.u. | Anglia Ruskin University

You are invited to take part in an online mock jury trial, for an important research project being developed at Anglia Ruskin University in March and April.

You will be asked to watch a filmed reconstruction of a rape trial and hear all of the evidence as if you were a real juror. You will then join a virtual mock jury made up of 7 other members of the general public. Together, you will be instructed, as a real criminal jury would be, and asked to deliberate together to decide whether the defendant is guilty or not guilty of rape.

You will be given information on the law and operate in the same way as a real juror in the Criminal Justice System in England and Wales.

So, if you're **18 – 75 years old** and have a free couple of hours to take part – get more information and book your place now:

Email: ARUjuryresearch@gmail.com

PLEASE SHARE WITH FAMILY/FRIENDS WHO MAY BE INTERESTED

All participants are automatically entered into a prize draw to win a selection of retail vouchers up to £100

Appendix Two: Juror Recruitment Poster (B)

Research Invitation:

Act as a juror in an online criminal trial

You are invited to take part in research being carried out at Anglia Ruskin University on [mock] juror deliberations in rape trials. We want to explore how jurors understand and interpret evidence, including how they discuss their decision as a group. You are invited to act as a juror in this research and decide, alongside fellow participants, the verdict in a [mock] rape case.

Why have I received this letter?

You are receiving this letter as we are attempting to randomly select members of the public, in much the same way as a real jury is selected. We have generated a list of postcodes to send this invite, and yours has been chosen.

However, this letter does not require any action if you do not wish to participate in the research and we will not contact you again. Your participation in the study is entirely voluntary.

What does it involve?

The research is online so it can be done from the comfort of your own home.

If you decide you would like to take part, you will be sent a short online survey (taking 10-15 minutes to complete). Having completed the questionnaire, you will sign up for a jury slot that suits you – there are multiple date and times available to accommodate everyone's schedule.

During the jury slot, you will join a zoom call (audio only) with 5-7 other volunteers. You will then watch a filmed recreation (played by actors) of a rape trial scenario. Having watched the film, which lasts approximately 60 minutes, you will collectively discuss the case (average time is 44minutes, maximum of 80 minutes) and ultimately reach a verdict of guilty or not guilty. A facilitator will be present throughout the discussion to ensure that the conduct of the participants is appropriate and respectful.

After the deliberation, you will be asked to complete one final survey (taking 3-5 minutes to complete).

Appendix Three: Mock Juror Summons

What will I get out of it?

Taking part is completely voluntary, but as a thank you for your time we will enter all participants into a prize draw. You can win one of several voucher (your choice of Amazon or hight street vouchers) prizes, ranging in value from £10 up to £100. There is approximately a 1 in 8 chance of winning.

Why is the research being done?

Whilst the jury lies at the heart of the English Legal System, very little is known about the content and dynamics of jury deliberations. Your decisions will not have real implications for the defendant in question, but it will help us to better understand how evidence is understood by juries. In turn, it is hoped that this information can contribute to better policy-making in this area and so help to improve confidence in the criminal justice system.

How do I take part or get more information?

If you wish to take part in this study, and you meet the criteria set out below, please email ARUjuryresearch@gmail.com. To indicate your interest. We will then send you more detailed information about the study and answer any questions that you may have, to help you decide whether to take part or not.

Please note that by registering your interest you are not obliged to participate in the study and are free to withdraw your participation at any point until the completion of the final survey.

We hope to hear from you soon.

Charlotte Herriott, Lead Researcher

Eligibility criteria are as follows: [If you have any questions, please do not hesitate to get in touch]

- Between 18 – 75 years old
- Have lived in the UK for at least 1 years
- Have good comprehension of English
- No history of serious mental health issues (e.g. a lack capacity under Mental Health Act)
- No unspent criminal convictions

Please feel free to share this with family and friends who you think may be interested.

PARTICIPANT INFORMATION SHEET

Understanding the impact of sexual history evidence in mock juror deliberations of rape trials

You are invited to take part in a research study. Before you decide whether or not to take part, it is important for you to understand what the research is about and why it is being done. Please read this participant information sheet carefully and think about whether you would like to take part in the research study. You can also contact us via if would like more information: (charlotte.ahmed@pgr.anglia.ac.uk).

What is the research about?

We want to understand how jurors respond to evidence of a complainant's (victim's) sexual history in mock rape trials. In particular, we want to understand:

1. What themes arise during juror's deliberations of mock rape trials
2. How jurors interpret a complainant's sexual history and whether this impacts on their final verdict
3. Whether jurors continue to rely on stereotypes about rape
    - In particular whether jurors express prejudicial attitudes about the complainant's sexual history
4. Whether changing the type of sexual history, changes juror's attitudes and assumptions about the complainant

The basis of the study will be a realistic rape trial scenario. As an actor, you will be asked to perform the role of a legal professional or witness in this trial. Whilst the basis of the trial will be kept constant, minor details regarding the nature and extent of a complainant's sexual history will be changed so as to measure question 4. The trial will be filmed and the adjustments edited in, to form different scenarios.

Jurors will then be shown one of the films and asked to deliberate towards a verdict in a group. These deliberations will be recorded and the information used to answer the above questions about how jurors interpret sexual history evidence in mock rape trials.

Why is the research important?

Using a complainant's sexual history as evidence in a rape trial is currently restricted by law. However research shows that these restrictions are often disregarded by defence lawyers. This means that a complainant's past sexual relationships are often made public at trial, and are often used to portray her as not credible or trustworthy to the jury.

We know that the prospect of this evidence being brought up at trial, dissuades women from reporting their rape and also decreases the likelihood of a guilty verdict. However we do not currently know how jurors interpret this kind of evidence and whether outdated, prejudicial ideas about women's sexuality continue to be influential during deliberations. We therefore hope that by taking part in this research study, you can help us to understand

Appendix Four: Participant Information Sheet (Actors)

what effect this type of evidence has on jurors. In turn, it is hoped that this information will lead to policy reform so that the experience of rape complainant's at court will improve.

What will happen if I take part?

You will be sent a copy of the script to look through and become familiar with. You are not expected to learn the entire script as we will be able to pause filming whenever necessary to ensure that lines are followed. We will then seek to arrange a date and time whereby all of the actors are available for filming. Filming will take place at the University moot court in Helmore building. Filming will be a flexible, informal process and refreshments will be provided for all those taking part. We expect the process to take 3-4 hours however this can be flexible and could even take place over multiple sessions if this is easier for participants.

In return for participation all actors will be provided with a copy of the digital film, should they wish to use this for a digital C.V or drama portfolio. The film must not be shared on social media.

How do I take part?

You can choose to take part via email (charlotte.ahmed@pgr.anglia.ac.uk). We will then arrange convenient filming dates and times amongst all actors.

Do I have to take part in the research?

No. It is entirely up to you whether or not you would like to take part in this study. If you do decide to take part, you can still withdraw from the study at any time, by emailing to cancel your part or by simply speaking to the researcher at any point during the acting period.

What will happen after I take part?

After you have performed your role and the trial films have been created these will be shown to members of the public who have volunteered to be jurors. These jurors will be shown the film once and then asked to deliberate about the rape scenario that they have seen you act.

After the study has been completed, the film will no longer be used by the research team in any way. However copies of the film will be given to each actor who participated on the condition that this is not to be shared on social media.

Whilst the film will show your appearance, no other personal data about you will be used. This means that unless the viewer knows you, they will not be able to identify any personal information about you, from their participation in this study. If you are concerned about revealing your appearance, please speak to the researcher, as we may be able to ensure you are given a role in which you wear legal dress and a wig.

Thank you for taking the time to read this participant information sheet. If you have any questions about the research study, please contact Charlotte Ahmed via email (charlotte.ahmed@pgr.anglia.ac.uk)

PARTICIPANT INFORMATION SHEET

Mock juror deliberations in rape trials

You are invited to take part in a research study. Before you decide whether or not to take part, it is important for you to understand what the research is about and why it is being done. Please read this participant information sheet carefully and think about whether you would like to take part in the research study. You can also contact us via email if would like more information: ARUjuryresearch@gmail.com

What is the research about?

We want to understand key themes that arise during jurors deliberations of rape trials. As it is illegal to study a genuine jury in the UK, this research seeks to create a series of mock juries to establish how jurors respond to the evidence that they are shown in a rape trial.

Why is the research important?

Whilst the jury lays at the heart of the English Legal System, very little is known about the content and dynamics of jury deliberations and ultimately how jurors achieve a verdict. We therefore do not know how jurors understand and interpret differing pieces of evidence from trial, in coming to their final decision.

Whilst we know that strong opinions and beliefs surround the crime of rape in wider society, we are currently unaware of how these beliefs enter into the jury room. We therefore hope this research will help us to understand how evidence is interpreted by juries in rape trials, and what kind of evidence is considered most or least important in helping to achieve a verdict. In turn, it is hoped that this information can be used to help achieve policy reform and encourage more victims of rape to feel confident in the justice system's response.

What will happen if I take part?

If you choose to take part in this study, you will be asked to complete a short online pre-trial juror background questionnaire to tell us a bit about yourself. You will then be able to select a date and time which suits you to watch a filmed recreation of a rape trial scenario (60 mins) and then join an online conference call (audio only, no visual) with your fellow jurors to deliberate towards a verdict for the case. . In these groups you will be given 80 minutes to deliberate towards a verdict of guilty or not guilty, based on the evidence you have been given in the film. There will be a facilitator present in the conference call at all times to ensure the wellbeing of all participants throughout discussions.

In return for your time commitment, each participant will be entered into a prize draw, which includes multiple prizes from £10 to £100 Amazon or Love to Shop vouchers.

How long will it take?

The total time commitment for the study will be no longer than 2.5 hours. Multiple sessions will run on both weekdays and weekends to suit any other commitments you may have, so that you can fit your participation around your normal schedule.

Am I eligible?

You are eligible for this study as long as you meet the following criteria:

- Between 18 – 75 years old
- Have lived in the UK for at least 1 year and have a good comprehension of the English language
- No history of serious mental health issues (Have not, in the last 10 years lacked capacity under Mental Health Act)
- No serious criminal convictions that have resulted in imprisonment, community order or suspended sentence

Appendix Five: Participant Information Sheet (Jurors)

Do I have to take part in the research?

No. It is entirely up to you whether or not you would like to take part in this study. If you do decide to take part, you can still withdraw from the study at any time, by contacting the research team at ARUjuryresearch@gmail.com

What will I get in return for participating?

As a recognition of giving up your time to take part in the study, all participants will be entered into a prize draw for a number of amazon or love to shop vouchers. There will be a selection of £100, £50, £20 and £10 vouchers available.

What will happen after I take part?

The information we collect will be used to help us understand how juries respond to evidence in rape trials. It is hoped that this will help to inform legal and policy reform regarding how rape trials are carried out in future, with the ultimate aim to encourage more victims of sexual violence to come forward and feel supported in the criminal justice system. We will also write up the key messages for other audiences, such as academics or members of the public. This will not involve any personal information that can identify you, but may involve quoting some of your comments in a way that will not give away your identity. If you would like a copy of the final report, please contact ARUjuryresearch@gmail.com

What are the possible disadvantages of taking part?

It is possible that you may find the trial scenario distressing as this involves a realistic depiction of a genuine rape trial. It is also possible that you may find the views of your fellow participants distressing. It is therefore requested that all participants remain measured and respectful throughout the process, even if there is a view they are strongly opposed to. Participants are asked not to disclose personal information or personal experience of sexual violence, however should you wish to speak to someone about this, information of local support services will be made freely available throughout. A facilitator will remain present in the call at all times, should any issues arise. If at any point you wish to take a break or exit the research study then that is completely ok – you are under no obligation to stay and the wellbeing of all participants will remain paramount throughout the research process.

Will the things I say be kept confidential?

All of the information we collect during the course of the research will be kept confidential and there are strict laws which safeguard your privacy. Your comments will be typed up under a unique pseudonym and stored securely on a protected computer. Your name and any other identifiable information will be strictly excluded from the research. Similarly we ask all participants to adhere to our confidentiality standards and be sure to protect the anonymity of fellow participants.

How do I take part?

If you wish to take part in this study, please email the research team. We will assign you a juror number to ensure that all of the data you provide is completely anonymised, and ask that you complete a short attitude questionnaire first. You will then be able to choose a deliberation date and time slot that suits you, via Eventbrite. If you would like further information please do not hesitate to contact the research team.

Thank you for taking the time to read this participant information sheet. If you have any questions about the research study or would like to participate, please contact Charlotte Herriott: ARUjuryresearch@gmail.com

Appendix Six: Participant Consent Form

PARTICIPANT CONSENT FORM

Title of the project: Jury Decision Making in Rape Trials

Main investigator and contact details: Charlotte Herriott (ARUjuryresearch@gmail.com)

1. I agree to take part in the above research. I have read the Participant Information Sheet for the study. I understand what my role will be in this research, and all my questions have been answered to my satisfaction.
2. I understand that I am free to withdraw from the research at any time, without giving a reason.
3. I am free to ask any questions at any time before and during the study.
4. I understand what information will be collected from me for the study
5. For the purposes of the Data Protection Act (2018), if this project requires me to produce personal data, I have read and understood how Anglia Ruskin University will process it.
7 I understand what will happen to the data collected from me for the research.
8. I have been told about any disadvantages or risks regarding me taking part
9. I understand that quotes from me may be used in the dissemination of the research
10. I understand that the jury deliberation will be recorded
11. I have been informed how my data will be processed, how long it will be kept and when it will destroyed.
12. I have been provided with a copy of this form and the Participant Information Sheet

Name of participant (print)……

Signed……..…

Date……

I WISH TO WITHDRAW FROM THIS STUDY.

If you wish to withdraw from the research, please speak to the researcher or email them at ARUjuryresearch@gmail.com stating the title of the research or send them this withdrawal slip.

You do not have to give a reason for why you would like to withdraw.

Please let the researcher know whether or not you are happy for data that has been collected up to this point to still be used. You are completely free to ask for any data to also be removed should you wish it to be, as long as the data is not anonymised. When data is anonymised, it means personal data relating to it has been permanently removed, so the researcher will not know which belongs to you.

Date 01.04.20

Appendix Seven: Self Care Sheet

Self-Care after Participation

During these difficult times, where many people may be isolated or lacking a sense of normality, we as researchers, more than ever, want to make sure that no one experiences negative effects after having taken part in our study. We urge you to consider the following self-care practices following participation, so as to fully decompress after the study:

- Go for a walk and get some fresh air
- Do some exercise
- Call/ Talk to a friend or loved one
- Watch a comedy show
- Practice mindfulness

Some more ideas can be found at:

- https://youngminds.org.uk/blog/looking-after-your-mental-health-while-self-isolating/
- https://darebee.com/posters/lockdown-selfcare.html
- https://www.stylist.co.uk/life/coronavirus-how-to-look-after-mental-health-self-isolation-tips-self-care/366930

Some useful apps are:

- Headspace
- Calm
- BeejaMeditation
- Tide

If you feel you may need further support, do not be afraid to ask. Here are some great services:

- Samaritans - https://www.samaritans.org/
- Mind - https://www.mind.org.uk/
- National Rape Helpline - https://rapecrisis.org.uk/get-help/coronavirus/

Most importantly do not suffer in silence. If you need any help at all, please email ARUjuryresearch@gmail.com

Appendix Eight: Pre-Participation Questionnaire

Pre-Trial Questionnaire

Dear Participant,

Thank you for your willingness to take part in this study.

We assure that all of the information that you provide over the course of the study will remain strictly confidential and anonymous.

Before you book your place in a jury, we ask that you complete a brief demographic and attitudinal questionnaire, which should take approximately 15 minutes to complete. Please answer all questions honestly and carefully, as this of great importance for the success of our study.

You will be presented with a set of statements and asked to indicate the extent to which you agree or disagree with each. There are no right or wrong answers – we are only interested in your personal opinion.

---

1. I think basically the world is a just place
2. I believe that by and large, people get what they deserve
3. I am convinced that in the long run people will be compensated for injustices
4. I firmly believe that injustices in all areas of life (e.g. professional, family, politic) are the exception rather than the rule
5. I think that people try to be fair when making important decisions

[Strong agree, agree, slightly agree, slightly disagree, disagree, slightly disagree]

On the whole, I am satisfied with myself
At times, I think I am no good at all
I feel that I have a number of good qualities
I am able to do things as well as most other people
I feel I do not have much to be proud of
I certainly feel useless at times
I feel that I'm a person of worth, at least on an equal plane with others
I wish I could have more respect for myself
All in all, I am inclined to feel that I am a failure
I take a positive attitude towards myself

[Strongly agree, Agree, Disagree, Strongly Disagree]

When it comes to sexual contacts, women expect men to take the lead.
Once a man and a woman have started "making out", a woman's misgivings against sex will automatically disappear.
A lot of women strongly complain about sexual infringements for no real reason, just to appear emancipated.
To get custody for their children, women often falsely accuse their ex-husband of a tendency towards sexual violence.
Interpreting harmless gestures as "sexual harassment" is a popular weapon in the battle of the sexes.
It is a biological necessity for men to release sexual pressure from time to time.
After a rape, women nowadays receive ample support.
Nowadays, a large proportion of rapes is partly caused by the depiction of sexuality in the media as this raises the sex drive of potential perpetrators.
If a woman invites a man to her home for a cup of coffee after a night out this means that she wants to have sex.
As long as they don't go too far, suggestive remarks and allusions simply tell a woman that she is attractive.
Any woman who is careless enough to walk through "dark alleys" at night is partly to be blamed if she is raped.
When a woman starts a relationship with a man, she must be aware that the man will assert his right to have sex.
Most women prefer to be praised for their looks rather than their intelligence.
Because the fascination caused by sex is disproportionately large, our society's sensitivity to crimes in this area is disproportionate as well.
Women like to play coy. This does not mean that they do not want sex.
Many women tend to exaggerate the problem of male violence.
When a man urges his female partner to have sex, this cannot be called rape.
When a single woman invites a single man to her flat she signals that she is not averse to having sex.
When politicians deal with the topic of rape, they do so mainly because this topic is likely to attract the attention of the media.
When defining "marital rape", there is no clear-cut distinction between normal conjugal intercourse and rape.
A man's sexuality functions like a steam boiler – when the pressure gets too high, he has to "let off steam".
Women often accuse their husbands of marital rape just to retaliate for a failed relationship.
The discussion about sexual harassment on the job has mainly resulted in many a harmless behaviour being misinterpreted as harassment.
In dating situations the general expectation is that the woman "hits the brakes" and the man "pushes ahead".
Although the victims of armed robbery have to fear for their lives, they receive far less psychological support than do rape victims.
Alcohol is often the culprit when a man rapes a woman.
Many women tend to misinterpret a well-meant gesture as a "sexual assault".

Nowadays, the victims of sexual violence receive sufficient help in the form of women's shelters, therapy offers, and support groups.
Instead of worrying about alleged victims of sexual violence society should rather attend to more urgent problems, such as environmental destruction.
Nowadays, men who really sexually assault women are punished justly.

[completely agree 1 2 3 4 5 6 7 completely disagree]

Gender (Male/Female/Non Binary or not listed [Please specify]….)
Age (Tick boxes in age range e.g. 18-24,25-34 etc.)
Ethnicity (Tick boxes – White British, White Irish, Other white background[please specify], Black/African/Caribbean/Black British, South Asian/British South Asian, East Asian/British East Asian, Mixed/Multiple Heritage [please specify], Other ethnic group [please specify])

Highest completed educational qualification (Tick boxes – GCSEs (or equivalent), A levels (or equivalent), Professional qualification (please specify), undergraduate degree (please specify), postgraduate degree (please specify))

Employment status (retired, full-time paid work, part-time paid work, full-time unpaid work (e.g. care role), not currently employed, unable to work (e.g. due to disability), in full-time education)

Have you ever served as a juror before? (Yes, No)
If yes, how recently? Within the last year, last 2 years, last 5 years, last 10 years, more than 10 years

---

Which best describes your religious beliefs?
(Not religious, Agnostic, Christian, Hindu, Muslim, Sikh, Jewish, other please specify)

If religious, how often do you worship/pray/practice? (Not at all, less than once a week, once a week, twice a week, more than 3 times per week)

If a general election was to be called tomorrow, which political party would you like vote for? (Conservative, Labour, Liberal Democrats, Other (please specify))

Please tick which box you think best describes your political engagement.

- High engagement (Always/nearly always vote, and in the past year have volunteered or contributed to a campaign)
- Medium engagement (Always/nearly always vote, and HAVE NOT in the past year have volunteered or contributed to a campaign)
- Low engagement (Not registered to vote or vote infrequently)

The final section of this questionnaire will ask you about your personal experience of sexual crime. If you would like to end the survey here, please click here. If you feel comfortable answering the following questions, please click do so.

Have you ever experienced any of the following forms of sexual victimisation? (Please tick all that apply)
[Forced sex, attempted forced sex, other forced sexual acts, attempts other forced sexual acts, any other form of sexual assault (please specify), none, prefer not to say]

If yes, who was this committed by?
[Stranger, friend/acquaintance, family member, partner, other (please specify), N/A]

Has anyone close to you ever experienced any of the above forms of sexual victimisation?
[Yes, No, Prefer not to say]

If yes, what relation was this person to you? _____

Appendix Nine: Pre-Deliberation Questionnaire

Pre-Deliberation Questionnaire

Jury Date: _____
Juror ID Number: _____

Now that you have seen all of the evidence in the case, would you find the defendant 'guilty' or 'not guilty' beyond reasonable doubt?

Guilty Not Guilty

Please give your rating on different aspects of the evidence and <u>your own</u> decisions about the case below.	Not at all	Not Very	Somewhat	Very Much	Extremely
1. Thinking about your individual verdict decision of 'guilty' or 'not guilty', how confident are you that you have made the correct decision?					
2. How well did the evidence match and cover what the complainant said happened?					
3. How complete was the complainant's story in the sense that no aspects were missing or left unsupported by the evidence?					
4. How plausible was the complainant's version of events, in that you think what they said happened, is both possible and likely?					
5. How coherent was the complainant's story, meaning that the different stages described as happening were logically connected?					
6. How unique was the complainant's account, in that you feel it was the only possible explanation of the evidence heard?					
7. How consistent was the complainant's version of events with the evidence presented overall?					
8. Overall, how much do you believe the complainant's version of events?					
9. How well did the evidence match and cover what the defendant said happened?					
10. How complete was the defendant's story in the sense that no aspects were missing or left unsupported by the evidence?					
11. How plausible was the defendant's version of events, in that you think what they said happened, is both possible and likely?					
12. How coherent was the defendant's story, meaning that the different stages described as happening were logically connected?					
13. How unique was the defendant's account, in that you feel it was the only possible explanation of the evidence heard?					
14. How consistent was the defendant's version of events with the evidence presented overall?					
15. Overall, how much do you believe the defendant's version of events?					
16. Finally, how confident are you overall that you have reached the correct verdict decision in this case?					

If you feel able, please elaborate on why you hold these perspectives on the case?

_____
_____
_____
_____

Appendix Ten: Post-Deliberation Questionnaire

Post-Deliberation Questionnaire

Jury Date: _____
Juror ID Number: _____

Now that you have completed your jury discussion, please answer the following questions about your experience of jury deliberations and whether your perspective on the evidence changed at all throughout the process.

What verdict did you return as a jury?
Guilty Not Guilty

If this changed from your pre-deliberation questionnaire, why?_____
_____
_____

Please give your rating on different aspects of the evidence and your decisions about the case below.	Not at all	Not Very	Somewhat	Very Much	Extremely
1. Thinking about your individual verdict decision of 'guilty' or 'not guilty', how confident are you that you have made the correct decision?					
2. How well did the evidence match and cover what the complainant said happened?					
3. How complete was the complainant's story in the sense that no aspects were missing or left unsupported by the evidence?					
4. How plausible was the complainant's version of events, in that you think what they said happened, is both possible and likely?					
5. How coherent was the complainant's story, meaning that the different stages described as happening were logically connected?					
6. How unique was the complainant's account, in that you feel it was the only possible explanation of the evidence heard?					
7. How consistent was the complainant's version of events with the evidence presented overall?					
8. Overall, how much do you believe the complainant's version of events?					
9. How well did the evidence match and cover what the defendant said happened?					
10. How complete was the defendant's story in the sense that no aspects were missing or left unsupported by the evidence?					
11. How plausible was the defendant's version of events, in that you think what they said happened, is both possible and likely?					
12. How coherent was the defendant's story, meaning that the different stages described as happening were logically connected?					
13. How unique was the defendant's account, in that you feel it was the only possible explanation of the evidence heard?					
14. How consistent was the defendant's version of events with the evidence presented overall?					
15. Overall, how much do you believe the defendant's version of events?					
16. Finally, how confident are you overall that you have reached the correct verdict decision in this case?					

What do you feel are the key reasons **your jury** had for reaching their verdict?_____
_____
_____

How confident are you that the verdict **your jury** reached is the correct one?
[Very confident, somewhat confident, unsure, somewhat not confident, not confident at all]

Overall, how satisfied or dissatisfied were you with your experience of being a juror today?
[Very satisfied, Fairly satisfied, Neither satisfied nor dissatisfied, Fairly dissatisfied, Very dissatisfied]

Any further comments? _____
_____
_____
_____

Appendix Eleven: Jury Bundle

Jury Bundle

R v Baker (William Andrew)

Form of Indictment

(Criminal Procedure Rues, Part 10)

INDICTMENT

IN THE CROWN COURT AT: .....Chelmsford.....

THE QUEEN v. .....William Andrew Baker .....

charged as follows: -

STATEMENT OF OFFENCE

Count 1: Rape contrary to s.1 Sexual Offences Act (2003)

PARTICULARS

On the day of 17th July 2019, at the address of 19 Howard Street Haverhill, the defendant Mr William Andrew Baker, intentionally penetrated the vagina of Miss Hannah Abigail Cox, with his penis, without her consent and not reasonably believing that she did consent to the aforementioned act.

1

Brief Statement of Agreed Facts

Sexual intercourse occurred between Miss Hannah Abigail Cox and Mr William Andrew Baker in the bathroom of 19 Howard Road on the afternoon of 17th July 2019.

A forensic examination of Miss Hannah Abigail Cox, taken at Haverhill Police Station on 17th July 2019 confirms sexual intercourse with Mr William Andrew Baker, however there were no physical indications to establish whether this was consensual or not.

Intercourse was ceased upon the ringing of Mr William Andrew Baker's phone

Phone records retrieved by the Police, verify an incoming phone call to Mr Baker's phone at 17:34 and lasted for 3 minutes 12 seconds. The phone call has been verified as coming from the mobile phone number registered to Mr Christopher David Smith, whom it has been established is the owner of a construction company whom Mr Baker works on a casual basis as a labourer.

Mr Smith confirms that he spoke to Mr Baker on the 17th July, to offer him work for the following week, which Mr Baker accepted.

Statements from all attendees at the barbeque were taken in the days following the alleged rape, however with the exception of the host, Mr Luke Harris, these statements were not deemed by either prosecution or defence as providing sufficient evidence to bring to trial.

Exhibit A: Layout of 19 Howard Road

Exhibit B: Written Statement from Mr Luke Harris

WITNESS STATEMENT

(Criminal Procedure Rules 2011 R27.2, Criminal Justice Act 1967 S9, Magistrates Court Act 1980 S5B)

Statement of: **LUKE HARRIS**

Age if under 18: **OVER 18**

Occupation: **STUDENT**

This statement (consisting of page(s) each signed by me) is true to the best of my knowledge and belief and I make it knowing that, if it is entered in evidence, I shall be liable to prosecution if I have wilfully stated in it, anything I know to be false or do not believe to be true.

Signature: L Harris Date: 20/07/2019

I hosted a barbeque at my house, 19 Howard Road, on the 17th July for my friends from college. There were about 15 or 20 people there, including Will Baker and Hannah Cox. Everyone spent most of the afternoon/evening outside in the garden, chatting, playing some ball games and eating. I do not recall whether I saw Will and Hannah together through the course of the afternoon. However at some point in the early evening, I remember Will telling me that he had been upstairs with Hannah and he was smiling. He didn't tell me what had happened between them as I got called away to help with something. I didn't t see Hannah after Will told me this, but the barbeque continued for a couple more hours. Later that night, I got a number of texts from Will saying that he had been arrested for raping Hannah. He seemed very agitated and upset in these text messages and I was extremely shocked by the whole situation. I didn't hear anything further from Hannah.

Routes to Verdict

It is your task, as jurors, to decide upon the true facts of this case and come to a unanimous verdict of guilty or not guilty, beyond all reasonable doubt. You must try the case according to the evidence that you have heard within the courtroom and nothing more than that evidence. Should you have any queries or concerns as a jury, you may direct these to the trial judge through your jury foreperson.

Count 1: Rape (Contrary to S.1 Sexual Offences Act 2003)

(1) A person (A) commits an offence if—

(a) He intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,

(b) B does not consent to the penetration, and

(c) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.