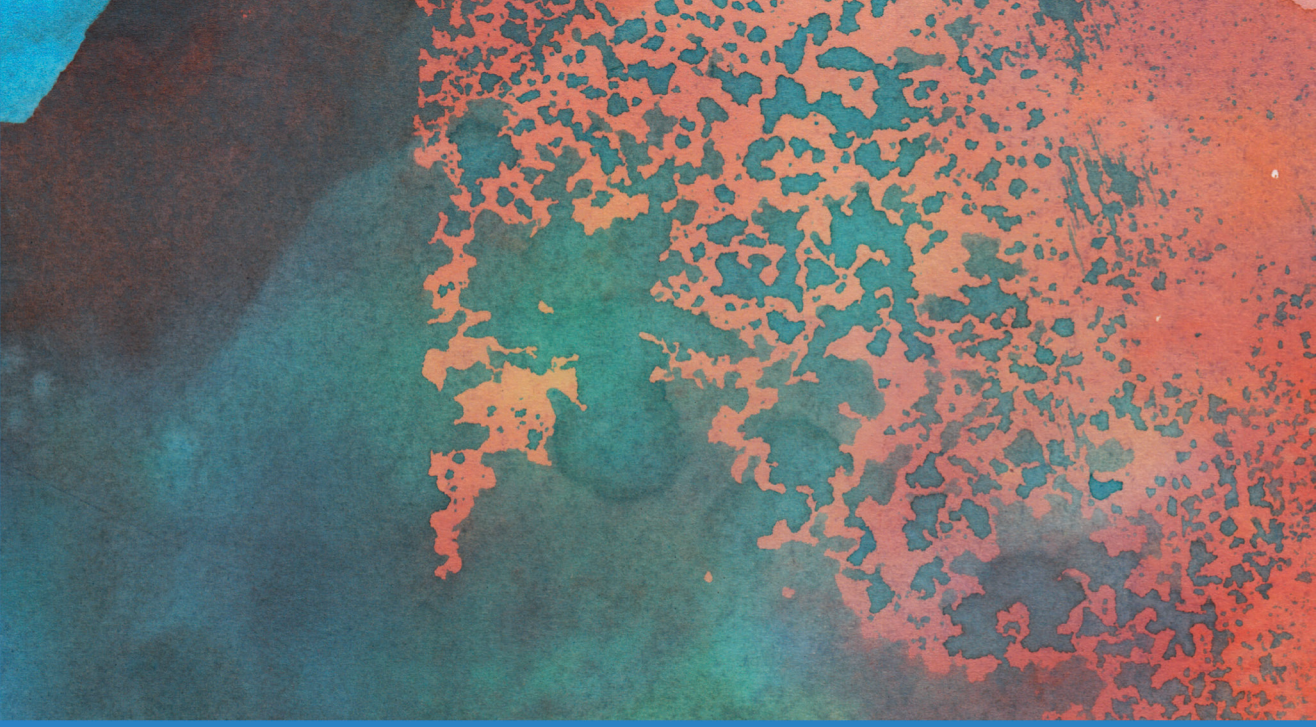

Routledge Frontiers of Criminal Justice

SEXUAL HISTORY EVIDENCE IN RAPE TRIALS

IS THE JURY OUT?

Charlotte Herriott

Sexual History Evidence in Rape Trials

This book provides an in-depth examination of current, high-profile debates about the use of sexual history evidence in rape trials and its impact on jurors. In doing so, it presents findings of the first mock jury dataset in England and Wales to explore how jurors interpret, discuss, and rely upon such evidence within their deliberations.

Drawing on both qualitative and quantitative insights from the 18 mock jury panels, the book highlights the complex, nuanced and intersectional impact of sexual history evidence within the deliberative ideal. Indeed, findings exemplified routine and ongoing prejudicial framings of sexual history amongst jurors, and frequent endorsement of rape myths that served to mistakenly infer relevance and undermine the perceived credibility of the complainant. The findings discussed within this book are therefore key to addressing the current knowledge gap around the impact of sexual history evidence and are embedded within broader discussions about evidential legitimacy in rape trials. The book draws on good practice observed in other jurisdictions to makes numerous recommendations for change.

Aiming to inform academic, policy, and legislative discussions in this area, Sexual History Evidence in Rape Trials will be of great interest to students and scholars of Criminal Law and Criminology, as well as policy makers and legal practitioners.

Charlotte Herriott is a Lecturer in Criminology and Policing at Anglia Ruskin University, UK. Charlotte's PhD, on which this book is based, was the first research in England and Wales to examine the impact of sexual history evidence on mock jury deliberations in rape trials. Her current research interests relate to sexual violence, particularly criminal justice responses and sexual violence within the UK armed forces. Charlotte is working with colleagues within ARU's Veteran's and Families Institute, examining the service justice system response to sexual offending and exploring military-specific factors which may complicate responses to sexual offending. She teaches on a variety of modules across the criminology programme, focusing mainly on areas of violence, sexual violence, and the criminal justice system.

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1 Introduction
Situating the Debate

In 2016, the high-profile retrial of professional footballer Ched Evans captured public interest and reignited decade-old debates about the legitimacy of including a complainant's previous sexual history as evidence in a rape trial. This debate reached the forefront of public discussion when Evans was granted an appeal to adduce evidence of the complainant's previous sexual behaviour with two third-party men, as evidence at retrial, and was ultimately acquitted of rape. Whilst safeguards under the Contempt of Court Act (1981) make it impossible to establish whether sexual history evidence prompted the acquittal verdict, the trial outcome polarised public, academic, and legal opinion and raised key questions about sexual history evidence in rape trials.

Indeed, evidence of a complainant's previous sexual history remains perhaps the most contentious and emotive type of evidence that can be introduced in modern rape trials (Thomason, 2018). Put simply, it refers to any material introduced during trial, relating to the complainant's previous sexual behaviour, whether with the defendant or third party/parties. Historically, such evidence was considered pivotal to rape trials, as a means of introducing evidence of prostitution or 'notorious bad character' into trial (McGlynn, 2017). However, the prejudicial nature of these assumptions has since been recognised, and consequently sexual history evidence has been restricted in England and Wales for some decades through a raft of legislative efforts. Currently, restrictive provisions fall under s.41–43 *Youth Justice and Criminal Evidence Act [YJCEA] (1999)* [s.41 herein], which dictate that the admission of sexual history evidence at trial 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.

These legislative restrictions, referred to internationally as 'rape shield' provisions, have invariably been implemented to counter inappropriate reliance on the so-called 'twin-myths.' These myths, being 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)

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These inferences, based upon historic and antiquated ideals of female chastity, are inevitably now discredited (Dufraimont, 2019), as it is recognised that previous consent 'does not in itself increase the logical probability that she consented…nor does it make her a liar' (*R v Seaboyer*, 1991: 634). Nevertheless, despite these legislative restrictions, research has continued to illustrate ongoing affirmation of these ideals within justice discourse (Bowcott, 2018; Smith, 2018; Cowan, 2020), which in turn can interplay with 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 has thereby been criticised in some instances, as exacerbating an already troubling culture of sexism and rape myths in the criminal justice system's [CJS] response to sexual offending (Hey, 2012).

Importantly, it must be noted that significant discord and contestation exists regarding the reliance on and impact of sexual history in modern rape trials and will be discussed throughout the current book. However, research has repeatedly evidenced that the inappropriate admission of such evidence at trial, either directly or indirectly, happens 'all too often' under s.41 (Smith, 2018; Temkin et al., 2018; Gillen, 2019; Daly, 2021) and routinely in a manner that seeks to pivot trial onto the complainant's character and credibility (Smith, 2018; Daly, 2021). In turn, previous research has emphasised that the inclusion of this evidence at trial can deter reporting, traumatise complainants, correlate to increased chance of acquittal, and potentially influence juror perceptions of evidence and final verdicts (Catton, 1975; Schuller and Hastings, 2002; Kelly et al., 2006). It thereby remains highly contentious and has triggered numerous impassioned debates across academic, legal, and public discourse.

At the heart of these considerations remains the complex task of balancing the relevance of sexual history evidence to maintain and safe and just verdict, with the potential prejudicial value that could award credence to the misguided twin myths. Though the supposedly rigorous s.41 provisions initially attracted broad support for balancing these interests, the practical implementation and application has attracted strong critique (Durham et al., 2016; McGlynn, 2017; Smith, 2018) and prompted numerous calls for reform. Thus, in response to mounting disquiet, in 2021 the Law Commission were tasked with reviewing and scrutinising how evidence is used in the criminal prosecution of sexual offences cases, including to examine whether reforming the law on sexual history evidence is warranted, and to consider how we might counter rape myths in the jury room (Law Commission, 2021). Outcomes of this review are expected in mid-2023, and it is hoped that findings discussed throughout current book will assist in holistically informing such debates.

Indeed, this book collates the findings of the first mock jury dataset in England and Wales that has explored the impact of sexual history evidence on jurors. Prior to this research, we have relied on two outdated international

studies which, though providing useful insights about the impact of sexual history on jurors, were relatively rudimentary in their analysis (Catton, 1975; Schuller and Hastings, 2002). Yet, as ultimate deciders of verdict, insight into how jurors interpret and rely on sexual history in their deliberations is arguably pivotal to ensuring effective and meaningful reform. In drawing on findings of my mock jury simulations, therefore, this book offers a fresh perspective for analysis and a unique contribution to ongoing reform debates. I will argue throughout the book that the impact of sexual history evidence on jurors (and thereby trial outcomes) is distinctly complex and nuanced, and therefore holistic and meticulous scrutiny of key issues is vital to ensure meaningful and effective legal and social change. The remainder of the introduction will set the scene for these debates, outlining pertinent critiques of the CJS response to rape in England and Wales and rationalising my focus on juror decision making. However, before doing, so, I outline the chosen terminology and definitions used throughout the book.

1.1 Terminology and Definitions

Before scrutinising debates and research on sexual history evidence, it is necessary to define key terms and rationalise the chosen terminology. As a book 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):

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 is not to disregard a wide and useful body of literature that has critiqued the somewhat constrained applicability of the legal definition, such as the work of Kelly (1988) who posits sexual violence on a continuum which cannot be fully recognised by law. Yet, as a book focused on the legal response to rape and evidential burdens in the courtroom, it is helpful to reflect consistency of terminology with the CJS.

The most recent definition of rape expanded the requirements 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 for this volume, it also introduced the first statutory definition of consent (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, but 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, it is not clear whether this goal has been achieved (Smith, 2018); however, findings of my mock jury dataset continue to reflect a substantial focus on the complainant's perceived behaviour and credibility, as opposed to the defendant's, suggesting that the aim has not been fulfilled. This will be considered in further detail in Chapters 5 to 7 of the current volume.

In line with the legalistic approach towards definitions, the legal definition of sexual history will be used as set out in s.41(2)(c) *YJCEA* (1999) as:

> *any sexual behaviour of the complainant.*

This approach was initially widely praised for providing broad protection of complainants from unwarranted examination on *any* form of their previous sexual conduct; however, the lack of explicit and comprehensive definition of 'sexual behaviour' has engendered critique and uncertainty (Kelly et al., 2006). These debates will be considered in more detail in Chapters 7 and 8; however, it is worth noting from the outset that there is some ambiguity as to what may be considered sexual behaviour under s.41 provisions. As such, my mock jury simulations included two different 'sexual behaviours' (sexual intercourse and 'sexting') into the research design to establish whether this altered the way that jurors responded. My findings ultimately revealed distinct prejudice associated with both sexting and sexual intercourse evidence, perhaps highlighting the necessity for a comprehensive and all-encompassing definition going forward.

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 et al., 1996; Young and Maguire, 2003; Hockett and Saucier, 2015). 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 book.

Yet, whilst not overlooking the importance of such debates, as a book firmly rooted within criminal justice discourse, I 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, I recognise that these may still be contested. 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, these terms are still deemed to be most appropriate for this book so as to remain consistent with established CJS procedure.

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

This book focuses predominantly on debates about sexual history evidence; however before examining these, it is important to acknowledge the wider context in which these debates exist. In the era of #MeToo, #IBeliveHer, and #ThisIsNotConsent, we are experiencing unprecedented visibility of sexual violence (Gilmore, 2017). Yet concurrently, criminal justice responses to rape in England and Wales have come under increasing scrutiny, and despite greater public interest, we have witnessed a steep decline in prosecution and conviction rates (ONS, 2021). Whilst Stern (2010) argued that focus on convictions and attrition has somewhat unhelpfully 'taken over the debate,' such figures are seemingly indicative of the ongoing problematic nature of sexual crime investigation in England and Wales (McKee, 2021) and remain useful to situate and contextualise wider critiques of criminal justice discourse. Attrition, prosecution, and conviction figures will therefore be used within this introduction to set the scene for latter debates about sexual history evidence and juror decision making in rape trials.

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 (CSEW, 2021). Reasons for under-reporting are diverse, but responses from the Crime Survey of England and Wales [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 since 2014 [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] has coined this as the 'effective decriminalisation of rape' (EVAW, 2019), with statistics revealing record low prosecutions of just 0.6% in December 2021 (HC Deb 14 December 2021). Meanwhile, adult 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). Though conviction figures at court have reached 68.3% [July 2022] (CPS, 2022), these figures are colossally lower when measured for initial report due to decreased prosecutions, and thus it is widely agreed that current figures are highly unsatisfactory (HM Government, 2020).

In response to this substantial drop in rape prosecutions, the Centre for Women's Justice (CWJ) and End Violence Against Women Coalition (EVAW) initiated judicial review against the CPS in September 2018. They alleged that there had been a change in CPS charging policy, from a merits-based approach, which considered the strength of evidence put forward, to a so-called bookmakers' approach which relies on extra-legal myths and stereotypes within prosecution decisions. In March 2020, the Court of Appeal ruled that there had been no change 'of legal substance' in CPS charging policy; however, the Government's end-to-end rape review highlighted falling prosecutions as distinctly unacceptable (HM Government, 2020). Irrespective of cause, this substantial drop in prosecutions represents unsatisfactory outcomes for the vast majority of rape complainants and must be acknowledged as a cause of concern.

Alongside falling prosecution and conviction figures, research has repeatedly 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.

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. This provides important contextual background to the current book, and is

intrinsic to debates about sexual history evidence, which is theorised as both increasing attrition and hampering conviction rates (Kelly et al., 2006). It thereby provides a backdrop against which discussions about sexual history evidence will be framed.

1.2.1 The Influence and Impact of so-called Rape Myths

Attrition and conviction figures present a concerning picture; however, these figures alone arguably only reflect a fraction of the wider, persistent issues within the CJS response to rape and sexual offending (Stern, 2010). Perhaps most notably, the influence of so-called rape myths is widely theorised as pivotal to precipitating these concerning statistical outcomes (Burt, 1980; Gray and Horvath, 2018; Daly et al., 2020; McDonald, 2020; Cowan, 2021; Tinsley et al., 2021). Whilst numerous definitions of rape myths exist, in this book I adopt Gray and Horvath's (2018) 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. Crucially, these stereotypical beliefs about sexual violence are said to 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 the accused (Gray and Horvath, 2018).

As such, it has become increasingly acknowledged that rape myths can be especially dangerous in the legal context (Gray and Horvath, 2018; Smith, 2018; Cowan, 2021). They hold the potential to influence each stage of the justice process (Angolini, 2015; Hohl and Stanko, 2015; Waterhouse et al., 2016), from the reporting behaviour of victims to the decision-making behaviour of CJS investigators and prosecutors to the narratives at trial, and ultimately the jurors' final assessment of the 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 (Temkin, 2010; Dinos et al., 2015; McDonald, 2020), creating a perception of rape that encourages victim blame, whilst exonerating offenders (Bohner et al., 2013).

Nevertheless, the extent to which rape myths are endorsed within CJS discourse remains strongly contested. A minority of commentators have submitted that the impact of rape myths has been overstated, and have claimed

there is a lack of evidence to substantiate claims that they influence low convictions and high attrition (Wolchover, 2008; Reece, 2013). However, these assessments are considerably outweighed by significant and extensive academic research which suggests precisely the opposite (Willmott, 2017; Smith, 2018; Temkin et al., 2018; Ormston et al., 2019; Leverick, 2020; McDonald, 2020; Chalmers et al., 2021a). Indeed, victim-focused research has exemplified that victims themselves often internalise rape myths, serving to blame themselves and act as a barrier to formal reporting (Hanna, 2021; Jackson, 2021). Meanwhile, research with police officers has shown frequent reliance on stereotypical framings of real rape within investigative stages (Jordan, 2004; Venema, 2016; McMillan, 2018), though recent evidence positively shows such reliance to be declining (Rumney, 2021). Further, numerous studies across jurisdictions have consistently highlighted widespread reliance on rape myths during trial, pivoting the presentation of evidence around the perceived character and credibility of the complainant (Craig, 2018; Smith, 2018; Temkin et al., 2018; Daly, 2021).

Thus, whilst research findings are increasingly showing rape myth endorsement to have become more subtle and covert over time (McMahon and Farmer, 2011), there ultimately remains a degree mainstream academic acceptance that rape mythology continues to influence justice discourse, perpetuating heteronormative, patriarchal cultural narratives which act as a cultural scaffolding of rape (Gavey, 2013; Daly, 2021; Smith, 2021). Debates about introducing sexual history evidence at trial and the potential prejudicial impact of this are embedded within this wider framing of rape mythology and stereotypes regarding appropriate socio-sexual behaviour (McGlynn, 2017; Smith, 2018; Gillen, 2019). As such, discussion of rape myths is pivotal to discussions of sexual history evidence and will be drawn upon throughout the remainder of the book. However, first, my focus on the jury system and jury decision-making processes will be delineated below.

1.3 Why Focus on Juries?

As stated above, this book presents the first findings in England and Wales to examine how [mock] jurors interpret, respond to, and rely upon sexual history evidence in deliberations. As such, I focus predominantly on trial and jury deliberative stages in this book rather than earlier stages such as the decision to report, police investigation, and CPS decision to charge. This is not to overlook distinct problematic practices that occur at earlier stages of the criminal justice process, with pivotal research having exemplified, inter alia, the role of sexual history evidence as a deterrent to reporting (Kelly et al., 2006) and the obstacles presented by sexual history in case of preparation and investigation (Flowe et al., 2006). However, the trial and jury decision-making task represent a culmination of all earlier investigative stages and maintain key

symbolic importance within our adversarial justice ideology (Smith, 2018). Ultimately, jurors are responsible for the final verdict determination, and thereby examination of their role, operation, and influence in justice discourse cannot be understated.

Trial by jury has been enshrined in English and Welsh legal tradition since the 11th century (*Magna Carta,* 1215), and is upheld by many as a 'bastion of democracy' (Asimow, 2004) by encouraging lay participation in the legal system and enshrining principles of fairness and representation in law (Lloyd-Bodstock and Thomas, 2001). However, in recent decades, the suitability of juries to execute justice in rape trials specifically has become a matter of high-profile public, academic, and legal contention (Willmott et al., 2021). Specifically, the idea that jurors customarily rely on inaccurate and biased extra-legal myths and stereotypes about sexual violence has been posited as the core reason to do away with juries in rape trials (Bindel, 2018). Much of the debate around jury abolition and legal legitimacy lies beyond the remit of this book; however, the overarching question of whether juries endorse myths and stereotypes when considering evidence in rape deliberations is central to my research.

Indeed, despite the backdrop of legislative reform and distinguished debate about the supposed (ir)relevance of sexual history evidence and consequential (in)appropriateness of current restrictions, there has been very little direct investigation as to how this evidence impacts upon jurors and their judgements of the case. As ultimate arbitrators of verdict, however, it may be argued that the effect of legislative reform and efficacy of current academic debate about sexual history is limited without this vital knowledge of how sexual history is discussed and interpreted by jurors in coming to a final verdict.

Previous, albeit potentially outdated, research has shown the inclusion of sexual history evidence at trial to strongly correlate with an increased chance of acquittal (Kelly et al., 2006). More recently, Tinsley et al. (2021) interviews with real jurors in New Zealand revealed enduring problematic reliance on the propensity narrative within deliberations. Yet ultimately, only two simulation studies internationally (Catton, 1975; Schuller and Hastings, 2002), conducted in Canada and the United States respectively, have attempted to assess the impact of sexual history evidence on jurors since the widespread implementation of rape shield legislation from the 1970s onwards. Both, however, were somewhat limited in scope, using relatively impoverished trial stimuli,[1] recruiting undergraduate students to act as jurors and neither including a deliberative element. Yet, despite the somewhat artificial and perfunctory execution, both studies illustrated that juror participants found the complainant less credible and were less likely to convict, whereby sexual history evidence had been introduced at trial. These findings seemingly therefore illustrate a clear need to understand and consider how jurors interpret and rely upon sexual history evidence in deliberations, with such insight crucial to current and ongoing reform debates.

1.3.1 Do Jurors Endorse Rape Myths?

In light of the paucity of empirical evidence to assess the impact of sexual history evidence on jurors, it is useful to draw on what has been established in regard to jurors' endorsement of rape myths more generally. Notably, much like many areas of rape justice, the level to which jurors are said to endorse rape myths and for these to affect decision making is highly contested. On the one hand, a vast body of research has recurrently emphasised the substantial influence of rape myths on jurors' evaluations of evidence (Ellison and Munro, 2010; Dinos et al., 2015; Willmott, 2017; Leverick, 2020; Tinsley et al., 2021), describing these as 'a major challenge to the concept of fair trial' (Gillen, 2019: 54). Yet, against this backdrop, a minority of prominent critics have sought to situate rape myth endorsement as a historic aberration that is no longer widespread within juror decision making (Thomas, 2010; 2020; Reece, 2013).

Perhaps most notable of these critiques is the recent work of Professor Cheryl Thomas (2020), who asked real jurors in England and Wales to complete a rape myth acceptance questionnaire upon completion of their jury service. From her findings, Thomas concluded that claims of juror bias are not valid and that jurors no longer rely on rape myths in decision-making. Her assertion that 'hardly any jurors believe what are often referred to as widespread rape myths,' has been presented in mainstream discourse as groundbreaking 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 to the methodology used, which has since been widely critiqued (Daly et al., 2020.; Chalmers et al., 2021b; Tinsley et al., 2021). Firstly for instance, Thomas (2020) relied on participant questionnaire data and did not use a validated rape myth acceptance scale or validated wording to interrogate myth endorsement. Nor did she utilise standard practice of a Likert scale, but instead required participants to respond 'agree,' 'unsure,' or 'disagree' (Daly et al., 2020). Consequently, this disregards a significant body of research which has suggested that rape myth endorsement has become far more subtle and nuanced over time (Gerger et al., 2007; McMahon and Farmer, 2011), meaning Thomas's findings may reflect a level of social desirability bias and perhaps failed to uncover the true extent or nuance of embedded myth endorsement (Daly et al., 2020; Tinsley et al., 2021). Indeed, previous rape myth acceptance research has shown that social desirability bias may impact on a range of rape myth indicators, with participants often able to *recognise* a socially acceptable answer even if they do not hold such a view (Venema, 2018; Jann et al., 2019). This is not to say that such findings are not insightful, as indeed participant awareness of socially desirable answers does suggest a growing level of awareness and education; however, this must not

be conflated with participants *believing* these assumptions (Daly et al., 2020). Thomas's lack of interrogation of issues surrounding social desirability, however, inevitably limits our understanding of these issues.

Furthermore, it may be argued that Thomas's (2020) empirical findings sit somewhat at odds with her claim that hardly any jurors endorse rape myths. Her findings, for example, revealed that 43% of jurors would expect a complainant to be very emotional when giving evidence in court about the rape, with this rising to 78% when including participants who were 'unsure' on this. Similarly, 59% agreed or were unsure about the statement 'many women who claim they were raped agreed to have sex and then regretted it afterwards' and 61% agreed or were unsure that if both people are drunk it is hard to know if it was really rape. This crucially reflects distinctly problematic attitudes amongst this large dataset of real jurors and poignant rape myth endorsement that should not be dismissed or overlooked. In doing so, these findings seemingly add credence to the vast body of existing rape myth research, which has tended to reveal frequent and widespread endorsement of rape myth narratives amongst participant jurors (Ellison and Munro, 2009b; Willmott, 2017; Ormston et al., 2019; Leverick, 2020; Tinsley et al., 2021).

For example, in her analysis of previous mock jury simulations, Leverick (2020) reported near unanimous findings across 29 peer reviewed studies, showing significant relationships between complainant and defendant blame, and jurors' rape myth acceptance. 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. (2021a) amongst Scottish jurors. In turn, qualitative studies have recurrently illustrated jurors' reliance on rape myths relating to, inter alia, intoxication (Finch and Munro, 2005), lack of physical resistance or injury (Temkin and Krahe, 2008; Chalmers et al., 2021a), 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 (2010) positively found that the stranger rape stereotype has become less persuasive, seemingly according with Thomas's (2020) more recent findings with real jurors. However, they found continued reliance on multiple other myths including physical resistance, delayed reporting, false allegations, mixed signals, and so on (Ellison and Munro, 2010). 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. Similarly, more recently, both Chalmers et al. (2021a) in Scotland and Tinsley et al. (2021) in New Zealand found that whilst challenge to rape myths did occur in jury deliberations, endorsement of mythical ideals regarding lack of resistance, injury, the need for corroboration, and the spectre of false allegations and the real rape narrative continue to be highly influential for modern day jurors in Western jurisdictions. Crucially, therefore, the majority of mock jury research to date has highlighted the continued impact of rape myths on jurors' attributions of guilt and perceptions of witnesses in sexual

offences trials (Stewart and Jacquin, 2010; Hammond et al., 2011; Gray and Horvath, 2018).

Thus, whilst I do not seek to simply dismiss Thomas's (2020) findings, I suggest that it is important not to consider these in isolation or as invalidating broader claims of rape myth endorsement, but rather as part of a wider knowledge base that potentially highlights the increased subtlety and nuance of rape myth endorsement amongst 21st century jurors. Like Chalmers et al. (2021b: 3) submit, Thomas's (2020) research 'important a contribution as it is, [does not] overturn the findings of the extensive body of research that already exists in this area.' My deliberative findings seemingly affirm this stance, showing greater awareness amongst some jurors regarding the inaccuracy of certain rape myths but an ongoing, engrained endorsement of these attitudes within the deliberative ideal, as discussed in Chapters 5 to 7.

1.4 Map of the Book

The current book has been structured into nine distinct chapters, each examining a key controversy or debate about the ongoing reliance on sexual history evidence at trial. Having provided contextual background to some of the central arguments throughout this chapter, Chapter 2 will outline the mock jury simulation methodology and approach to data collection used within my research. Following this, Chapter 3 will situate current debates from academic and policy discourse, outlining the rationale behind restricting sexual history evidence at trial, as well as contention surrounding determinations of the relevance versus prejudicial impact of this evidence. In doing so, this chapter will present a chronology of the legislative regime in England and Wales before Chapter 4 and then discuss the perceived successes and shortcomings of the current legislative provisions under *s.41 YJCEA* (1999).

Having situated these important debates, Chapters 5 to 7 present the findings of my mock jury dataset, presenting highly original and novel insights into the impact of sexual history evidence on juror determinations of evidence. These findings are scrutinised with reference to the existing literature and theorisation about the impact of sexual history evidence and ultimately highlight ongoing prejudicial interpretations of such evidence amongst participant jurors. Chapter 5 outlines juror focus on sexual history evidence within wider discussion of typical heteronormative scripts, whilst Chapter 6 analyses focus on the complainant's character and credibility. Meanwhile, Chapter 7 exemplifies an impact of sexual history that has been somewhat less prominent in previous debates, inspecting the way in which sexual history evidence seemingly complicated the deliberative process and engendered a degree of confusion and uncertainty amongst participant jurors.

Finally, having examined the novel findings of my mock jury dataset, Chapter 8 explores international responses towards the restriction of sexual history and considers lessons that may be learnt through such comparative

analysis. To conclude, Chapter 9 considers the potential impact of my mock jury findings and directions for future practice and potential reform.

Note

1 Catton (1975) required participants to read an overview of a rape situation, while Schuller and Hastings (2002) asked participants to listen to an audio-recording of trial. Both required jurors to return individualised judgements, rather than requiring any group discussion or deliberation.

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2 Mock Jury Simulations
Insights through the Looking Glass

Before I unpack my mock jury findings, it is important to locate these results within a discussion of the methodological approach taken. The findings discussed in this book are drawn from a mock jury dataset in which 119 volunteer members of the public performed the role of [mock] jurors, deliberating towards a verdict of guilty or not guilty in one of 18 mock jury panels. Juror participants were required to watch a 60-minute pre-recorded filmed reconstruction of a rape trial, in which the level of sexual history evidence was altered, alongside the supposed consistency in the complainant's account. Focus was given to assessing how jurors interpreted and relied upon sexual history evidence within their deliberations to understand the impact of this evidence on juror framings of the case, and ultimately to establish whether ongoing debate about the prejudicial impact of this evidence remains relevant for a 21st century jury. The research thereby fills a substantial gap in the existing knowledge base as the first mock jury simulation in England and Wales to specifically assess the impact of sexual history evidence on jurors.

Due to time and resource constraints, my mock simulations focused solely on sexual history evidence with the defendant as opposed to third parties. This is not to dismiss the problematic inferences that may be drawn from third party evidence; however, there is generally broader agreement and clarity (though not consensus) that third party evidence is typically irrelevant and should thereby be heavily restricted at trial (McGlynn, 2017; Gillen, 2019). Moreover, my findings and the remainder of this book focus on sexual violence perpetrated by a male defendant against a female complainant, with the previous sexual history adhering to this typical heteronormative model. Again, this is not an attempt to disregard or dismiss male victimisation or sexual history that does not follow the typical heteronormative model, but to remain reflective of the majority of sexual victimisation reported in English and Welsh legal discourse (ONS, 2022). It also serves to reflect distinct gendered inferences surrounding sexual history evidence, which tends to be imbued with stereotypical framings of gender roles and supposed 'appropriate' socio-sexual scripts, according to historic conceptions that female chastity is implicitly linked to character and credibility (Kelly et al. 2006; McGlynn, 2017; Smith, 2018).

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Finally, it must be noted from the outset that the research is further novel in its perspective, as it was conducted entirely online, as a direct result of the Covid-19 pandemic and associated lockdowns. Whilst a largely unavoidable amendment to the traditional face-to-face mock jury methodology, it will be argued that the digital approach brings some distinct benefits to the research process although limitations will also be considered. The remainder of the chapter will outline my methodological and analytical approach.

2.1 Why Jury Simulation Research?

Juries, comprised of randomly selected, lay members of the public, perform the ultimate function of justice in the majority of Crown Court trials, determining a verdict of guilty or not guilty based on the evidence presented to them during trial. Yet, despite being a central aspect of adversarial process, the operation of the jury system tends to remain somewhat concealed as research with jurors is prohibited under the Contempt of Court Act (1981). Whilst this is inevitably a vital safeguard to protect jurors from undue outside influence (Thomas, 2010), it engenders a paucity of knowledge about juror decision-making processes and their comprehension of evidence. Thereby, mock jury simulations attempt to fill this gap in knowledge by providing valuable, albeit simulated, insights into the jury room using volunteer participants.

Mock jury simulations seek to replicate the process of a real trial as far as practicably possible, using volunteer participants to act in the role of real jurors as if they were determining a real trial. As such, this methodology enables examination of the content and dynamic of jury deliberations, providing researchers' insight into not only *what* verdicts jurors reach but *how* and *why* they reach these (Finch and Munro, 2008). This methodology therefore allowed me to gather first-hand empirical data about how jurors understood and used sexual history evidence in verdict determination, where the study of real jurors was not possible.[1]

Markedly, early examples of mock jury simulations were often met with scepticism and critique due to frequent reliance on highly artificial trial stimuli (Bornstein et al., 2017), unrepresentative all-student participant samples (Wiener et al., 2011), and lack of realistic deliberative element (Finch and Munro, 2008). Consequently, the mock jury simulation methodology was traditionally relatively rarely utilised in sexual violence research, with most studies favouring interview, survey, observation, or case analysis methods. However, more recently, a more rigorous and robust approach to methodological decisions has enhanced the realism and ecological validity of mock jury simulation research, leading to increased acceptance and utilisation of this method (Ellison and Munro, 2009; Willmott, 2017; Ormston et al., 2019; Chalmers et al., 2021).

Nevertheless it is important here to address recent concerns put forward by Professor Cheryl Thomas (2020:1), who dismissed mock jury research as a 'fundamentally flawed method of understanding what real jurors think and

how real juries work.' Thomas (2020) proclaimed that real jurors are fundamentally different from mock jurors due to the voluntary nature of participation, and argued that mock jurors do not hold the same beliefs as real jurors in court. I do not seek to disregard Thomas's (2020) research as it remains an important contribution to the research trajectory, reflecting a highly novel perspective through her access to real jurors; however, I maintain that these categorical dismissals of all previous mock jury research must be interpreted cautiously.

Thomas's (2020) primary criticism of mock jury research seemingly centres on the assertion that self-selection bias amongst volunteer mock jurors invalidates mock jury research findings, on the suggestion that these cannot be generalised to real jurors. Inevitably, concerns surrounding the impact of self-selection bias and potentially skewed participant samples should not be disregarded as this can posit a potential risk to the generalisability of findings. However, to dismiss all mock jury datasets on this basis, even where substantial measures have been taken to ensure diverse samples (see for example, excellent sampling techniques used by Ellison and Munro, 2010; Willmott, 2017; Ormston et al., 2019), appears disproportionate and would serve to 'rule out a vast portion of fruitful social research' (Winship and Mare, 1992: 328 as cited in Daly et al., 2020). Meanwhile, Daly et al. (2020) emphasised that in practice, whilst Thomas's (2020) participants had completed jury duty, these participants had not necessarily served on a sexual offences trial, and there was no suggestion that they had been influenced by their jury experience. Thereby, in practice, there is no evidence to suggest that Thomas's (2020) study was any more ecologically valid than any other mock jury research (Daly et al., 2020), and indeed self-selection bias remains a risk no matter whether studying real or mock jurors as all relies on voluntary participation (Chalmers et al., 2021).

Further, Thomas (2020) situates her claim that mock jury research is flawed on the basis that her dataset with real jurors seemingly showed a lack of rape myth endorsement, whilst previous mock jury studies have tended to emphasise frequent and extensive rape myth endorsement. I have already noted in the introduction that Thomas's findings seemingly did illustrate some level of myth endorsement, but building on this, it is also useful to interrogate methodological choices. Rather than dismissing the generalisability of mock jury findings, it is perhaps more prudent to suggest that this variation reveals important findings about the nuance and complexity of modern rape myth endorsement. Indeed, Chalmers et al. (2021) highlight that recent mock jury research has tended to utilise detailed trial reconstructions and highly immersive deliberative tasks. As such, findings of these projects seemingly reflect engrained and embedded endorsement of rape myth narratives that may not be evident when analysing questionnaire responses. It is well theorised that rape myth endorsement is becoming more complex and subtle over time (Gerger et al., 2007; McMahon and Farmer, 2011) and whilst individuals may be aware of the supposed 'correct' attitude towards *abstract* rape myth

stimulus such as those in questionnaires statements, when *applying* this to a case study or stimulus, rape myth endorsement becomes more evident (Ellison and Munro, 2010; Smith et al., 2022). For example, following the large-scale Scottish jury project, Chalmers et al. (2021:8) noted that, 'attitudes that, in the abstract, would be (and often, in fact, were) rejected by participants nonetheless come to be relied upon in deliberations.' Thus, rather than dismissing the value of mock jury findings, I argue that it is useful to scrutinise all jury research collectively to build a comprehensive overview of current issues.

Ultimately, it may be argued that when 'undertaken with an eye to maximising verisimilitude,' mock jury research can provide valuable insights into the jury room. Thus, my research design was planned to ensure a realistic yet standardised mock jury procedure within time and resource constraints. Each stage of simulation development is explored throughout the remainder of this section.

2.2 Developing the Simulation

Designing a mock jury simulation exercise necessitates numerous stages of development, meaning methodological rigour can vary substantially (Chalmers et al., 2021). Broadly, however, there are three central stages in the development of a mock jury simulation: development of the trial stimulus, decisions around sampling and recruitment, and the final substantive juror task. Historically, the use of impoverished stimuli, all student samples, and a lack of deliberative element for mock jurors has engendered some scepticism towards the validity and generalisability of the mock jury method. However, increasingly greater realism and methodological rigour has improved ecological validity and verisimilitude, with these approaches taken into account to enhance the rigour and generalisability of my findings.

2.2.1 Development of Trial Stimulus

The trial stimulus is central to a mock jury simulation as the material that participants read, listen to, or watch before being asked to undertake the juror task. It is becoming 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, meaning that higher confidence may be placed in the study's findings (Finch and Munro, 2008). Thus, whilst much previous mock jury research has relied on relatively basic stimuli such as written outlines and vignettes, I took deliberate measures to represent the dynamics of a 'real' trial as far as practicable.

2.2.1.1 Trial Facts

Firstly, the case facts for the trial stimulus were developed using Court of Appeal judgements whereby a s.41 application was granted. This meant that

the case facts were realistic, and that the inclusion of sexual history evidence in the trial simulation fell within the remit of s.41 restrictions. Judgements involving an acquaintance rape scenario were deemed as most suited to the experimental design, which sought to examine sexual history evidence with the accused. Meanwhile, scenarios involving clear separate issues such as intoxication by alcohol or drugs were avoided due to the potential to divert jurors' focus from the central issue of sexual history evidence being studied.

The basic facts of the scenario involved a daytime barbeque situation, 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 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 consistency in the complainant's account, as shown in Table 2.1:

Table 2.1 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

This ability to adjust and control experimental variables is recognised as a key merit of the jury simulation method (Willmott, 2017; Tinsley et al., 2021) as it offers insight into how variables may or may not impact upon outcomes and deliberative content (Manzo, 2019).

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 some contention around what sexual behaviour should be taken to include. Academic debate on this matter is discussed in further detail in Chapter 4; however, against this backdrop, I sought to examine whether a practical differentiation existed amongst jurors. I therefore adjusted the level of sexual history between sexual intercourse evidence, evidence of previous 'sexting,' and control scenarios that included no sexual history evidence. This is similar to Schuller and Hastings' (2002) Canadian research, in which they varied the level of sexual history between sexual intercourse, kissing/petting and a control. Notably, they found that jurors perceived the complainant as most blameworthy where they had heard evidence of previous sexual intercourse, with this incrementally decreasing the lesser the sexual history evidence introduced at trial. In my methodological design, rather than kissing/petting evidence, I introduced sexting evidence, as this is a rapidly increasing phenomenon in everyday culture (Krishna, 2019), and seemingly ever more relevant to rape trials following numerous high-profile discussions about the disclosure of digital evidence (BBC, 2018; EVAW, 2019; Fouzder, 2020).

Meanwhile, alongside variation of sexual history, I also varied the level of consistency in the complainant's account at trial. This went from no apparent inconsistency in her evidence to a minor inconsistency regarding how much she spoke to the defendant at the barbeque, and finally, 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 calling a friend to disclose.

The variation to the consistency in the complainant's account was implemented on account of substantial theorised and observational research which has closely linked the inclusion of sexual history evidence to complainant character and credibility. Indeed historically, previous sexual history was considered pivotal to determining the complainant's supposed 'morally credibility' and character as a witness (McColgan, 1996; Farrell, 2017) based on the assumption that promiscuous women were somehow less credible in their accounts to the court (*R v Seaboyer*, 1991). At trial, this association continues to be perpetuated, with observational research showing that sexual history evidence is often introduced in a way that seeks to undermine or question the complainant's credibility (Smith, 2018; Daly, 2021). Thus, in a context whereby women's morality and credibility continue to be presented as being inherently linked to their sexual behaviour (Smith, 2018), the current study sought to measure not only how sexual history impacts upon deliberation, but

importantly how discussion of sexual history perhaps changes, whereby the perceived credibility and consistency of the complainant is put into question.

2.2.1.2 Trial Transcript

Using the basic case facts of the chosen appellate judgement, I developed a full written trial transcript, using 11 genuine Crown Court sexual offences transcripts as authority. These transcripts were gained during my own previous court observation research and Smith's (2018) fieldwork, and were used to ensure realistic wording and narratives that are currently used by advocates in England and Wales.

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 for 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, with 90% of judges favouring this procedure (Judicial College, 2018).

2.2.1.3 Audio-Visual Stimulus

Following development of the transcript, a video-recorded trial stimulus was created. This 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 live re-enactment may have represented the task of *real* jurors more closely, the video recording also maintained the experimental design to ensure a standardisation of performance, with only the material relating to the manipulated variables being adjusted (Ross et al., 1994; Ellison and Munro, 2013).

In this audio-visual stimulus, a mixture of undergraduate and postgraduate law, criminology, and drama students were recruited to perform roles of legal counsel and witnesses. Law students took on the roles of legal professionals, whilst drama and criminology students acted as 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; however, it is likely to have reduced realism to some extent, meaning participants were potentially more aware of the mock nature of their task. Nevertheless, the impact of this was seemingly relatively minor in practice, as participant jurors routinely cited the potential real-life consequences of their decision and appeared actively engaged in the deliberative task.

The final trial film, although missing the mundane realities of courtroom setting such as delays,[2] 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 to boost realism for jurors and verisimilitude of the study.

2.2.2 Sampling and Recruitment

Sampling and recruitment are perhaps the most contentious aspects of a mock jury simulation, with much of the previous research having relied on all student samples, as a matter of convenience and low-cost (Finch and Munro, 2008; Leverick, 2020). Yet, despite typically being jury eligible, students 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 and are less representative of a 'real' jury (Bornstein et al., 2017; Leverick, 2020). In acknowledging these limitations, I sought to obtain a diverse community sample that would mimic the composition of a 'real' jury as far as possible to provide valid and generalisable insights into the jury room. In doing so, a mixture of online recruitment and mock jury summons were used to recruit a 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 et al., 2015). 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, these garnered few responses, meaning they were not a particularly beneficial recruitment strategy in my research. However, this method has proven fundamentally successful in other mock jury simulation projects such as Willmott (2017). Notably, Willmott (2017) offered financial incentives to all participants, and this perhaps accounts for the substantially increased response rate.

All forms of advertisement outlined participant eligibility criteria, which mimicked those of the 'real' jury eligibility criteria in England and Wales, except the five-year residency requirement, which was changed to one year to increase diversity of the sample. The final sample was entirely community-based volunteers, with 119 participants[3] distributed across 18 mock juries.[4]

My sample avoided many of the limitations associated with all-student juror panels; however, it is important to note that some aspects of the sample remained skewed in places. Broadly, demographic profiles relating to employment status, ethnicity, religious views, political stance, and level of political engagement all reflected a varied and diverse participant pool. However, the

final sample reflected more women, younger age ranges, and more educated individuals. This skewing may perhaps be attributed in part to online recruitment techniques, which tend to target younger individuals, as well as the subject area of rape trials being especially pertinent to the female population. However, the skewing may also reflect inherent challenges associated with voluntary sampling and jury research which invariably tends to attract more educated and socially engaged individuals.

Whilst it is impossible to isolate or precisely measure the impact of these skewed distributions, substantial research has shown that women, younger individuals, and more educated individuals tend to hold lower levels of rape myth endorsement than the wider population (Suarez and Gadalla, 2010; Hockett et al., 2016; Johnson and Beech, 2017). This was reflected in the average Acceptance of Modern Myths about Sexual Aggression (AMMSA) score of the sample, which was somewhat lower than would be expected of the general population.[5,6] Thus, whilst the research provides crucial evidence regarding the way in which potential jurors interpret and respond to sexual history evidence during deliberations, it must be noted that the findings of the current research likely *underestimate* the extent of the issue.

2.2.3 Adapting to Online Methods

Before discussing stages of data collection, it is important to examine justifications and considerations associated with conducting a mock jury project online. As stated in the introduction, the research discussed in this book was undertaken entirely online as a direct result of the Covid-19 pandemic and associated lockdowns. This represents a distinctly novel approach to mock jury simulation research which, though incurs some limitations, arguably also holds distinct advantages, and arguably should not be dismissed as a research method.

The premise of online virtual jury trials gained significant prominence in response to the Covid-19 pandemic. Whilst such a move was mooted but not implemented in England and Wales, multiple US states did conduct online jury trials to minimise backlog (Morris, 2020; Adler, 2021). Inevitably, there were mixed responses towards the constitutional legitimacy of this for 'real' trials (Biesenthal et al., 2019; Shammas, 2020); however, the process of online juries proved largely effective (Morris, 2020). Similarly, in England and Wales, legal organisation JUSTICE piloted online mock juries, using volunteer participants. Mulcahy et al. (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 of cases that emerged as a result of the pandemic.

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 is used by prosecutors to 'test' individual case

evidence before taking it to court; however, Marder (2006) commended the use of cyberjuries, suggesting these are a cheap and quick alternative to traditional face-to-face jury research.

It is also 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. As such, whilst the online format inevitably does represent a deviation from the task of 'real' jurors, there is seemingly precedence and justification for the adaption for mock jury simulations.[7]

Nevertheless, understanding the impact of the online versus face-to-face format remains unknown and is particularly complex to assess due to the wealth of variables at play in any mock jury simulation. Literature has, however, compared online versus face-to-face *focus groups*. Kite and Phongsavan (2017), for example, 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), which in turn can increase honesty and willingness to offer opinions, even where these are controversial (Murgado-Armenteros et al., 2012). Indeed, anonymity removes concerns surrounding personal ramifications of controversial opinions, meaning virtual environments can in fact *enhance* disclosure by participants (Fox et al., 2012). This is particularly advantageous in mock jury research as researchers can gain honest and realistic insights when researching controversial topics such as rape. 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 them to seek support where necessary.

On the other hand, Fern (2001) submits that online research removes non-verbal cues between participants and therefore diminishes interpersonal exchanges in online focus groups.[8] However, contradictory research has shown no evidence of interpersonal exchanges being diminished by the virtual environment (Moore et al., 2015). In my research, participants did on occasion talk over one another during the online deliberation; however typically discussions flowed well, and deliberations remained highly discursive. Thus, Fox et al. (2012) have praised online focus groups as an 'important development' in the focus group research tradition, and I argue that online mock juries represent a positive extension of this methodological development.

Moreover, practically, online simulations offer several 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 (Boydell et al., 2014; Moore et al., 2015). 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 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 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, 2022).

2.2.3.1 Data Collection: The Mock Jury Task

Following development of the trial stimulus and participant recruitment, the data collection process could begin. Again, there were numerous stages to my methodological design to gather both qualitative and quantitative data regarding juror interpretations of and responses to sexual history evidence. Before I detail each of these stages, Figure 2.1 usefully provides an overview of the methodological design from the point that an individual participant registered their interest in taking part through to the final outcome of the group deliberation.

Upon agreeing to participate in the research, all jurors were assigned a unique juror ID number to track their responses throughout the study and to preserve their anonymity. They were then sent a link to an online pre-participation questionnaire, which gathered demographic and attitudinal data about each participant, including an AMSA rape myth acceptance scale. This allowed me to assess the representativeness of my sample. At the end of this questionnaire, participants were given another link to register for a deliberation slot via Eventbrite. Slots offered ranged across weekdays and weekends, daytime and evening, 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.[9]

Once all participants had joined the Zoom deliberation slot, a full briefing was given about what participation involved, alongside the opportunity to ask questions or withdraw from the study. An extended caution about taking part in the potentially emotive and distressing exercise, given the added pressures of social isolation and heightened societal anxiety during the Covid-19 pandemic, was also given and the importance of participant wellbeing emphasised.

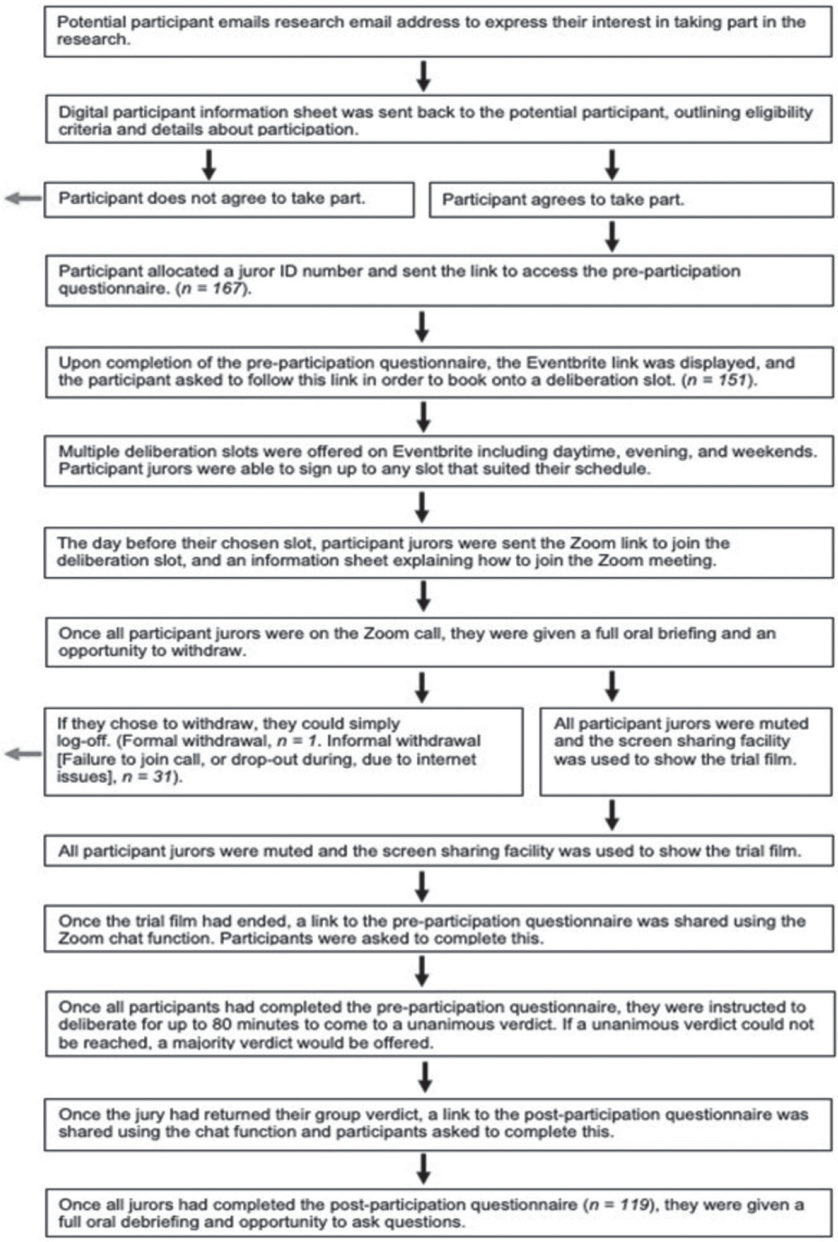

Figure 2.1 Participant Journey through the Data Collection Process.

Following the briefing, a randomly selected evidential scenario was chosen, and the trial film played to all participants in real-time through the screen-sharing facility. All participants were muted during this time to limit background distractions. Inevitably, viewing the trial through a screen represents a deviation from the task of real jurors; however, the real-time viewing followed by a group deliberation exercise did mimic the real jury process and offered realism to the participant task.

After having observed the trial film, all participants were asked to complete a five-minute pre-deliberation questionnaire, which embedded Willmott et al.'s (2018) juror decision scale [JDS]. This is a valid, empirical tool that provides insight into individual juror judgements of complainant and defendant believability, individual verdict preference, and decision confidence. Legally, jurors should not make individual decisions without deliberation; however, most writers acknowledge that there typically is a pre-deliberation verdict preference (Kalven and Zeisel, 1966). As such, the JDS provided crucial insight into these early assessments of evidence and showed how individual opinions could be altered by the deliberative process. A comparable questionnaire, with embedded JDS, was also implemented post-deliberation. Responses to these questionnaires formed the primary quantitative data obtained in my research.

2.2.3.1.1 THE DELIBERATIVE TASK

As discussed previously, the deliberation task formed the centrality of data collection in my study. The deliberation aspect not only replicates the realities of real jury service, 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). Previous analyses of sexual history evidence by Catton (1975) and Schuller and Hastings (2002) notably did not include a deliberative element, and therefore insights into juror comprehension, interpretation, and reliance on sexual history evidence were much more limited. The findings discussed in Chapters 5 to 7 of this book are thereby highly novel and represent unique insights into the complexity and nuance with which jurors deliberated about previous sexual history evidence.

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 would not take much longer (Ellison and Munro, 2013) and, indeed, deliberations in my dataset lasted an average of 43 minutes. 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 until conversation was no longer productive. If a unanimous verdict could still not

be reached, jurors were advised that a majority may now be accepted. This mirrors the task of real juries and thus increased verisimilitude.

Each jury in the study was composed of 6–8[10,11] 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). This reduction was implemented to ensure greater manageability of the group within the shortened deliberation time and to allow all jurors a chance to contribute to the deliberation, encouraging in-depth discussion during the limited timeframe. The significance of jury size for deliberations remains contested within the literature (Ellison and Munro, 2010; Ormston et al., 2019); however, several studies have suggested the only significant impact of smaller jury sizes is greater participation amongst jurors (Kessler, 1973; Ormston et al., 2019). Thus, a size restriction is seemingly justifiable for research purposes, with some research suggesting that groups of eight may be optimal in terms of maximising a range of substantive contributions (Ellison and Munro, 2013).

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.

2.3 Data Analysis

Drawing first on the qualitative data obtained in deliberation transcripts, critical thematic analysis was used to identify, organise, and report on key themes. Examination of these themes enabled a structured and organised approach to analysis (Nowell et al., 2017), as well as examination of similar and competing perspectives amongst participants. This made it ideally suited to analysing jury deliberations, whereby some conflict and difference of opinion is expected (Braun and Clarke, 2006). Meanwhile, the critical element allowed for examination of power relations, hidden assumptions, and social identities within the jury panels (Fairclough, 1989). An iterative coding process was utilised, moving back and forth between the coding frame and transcripts (Barbour, 2018) to develop comprehensive insights into the dataset. This also enabled refinement and development of codes, giving a flexibility of approach that suited the exploratory nature of this research, being the first of its kind in England and Wales. Ultimately, the established themes and content of deliberations is presented throughout Chapters 5 to 7, using direct quotes from the deliberative transcripts to illustrate and exemplify key findings.

In regard to the quantitative data obtained from the JDS and simple quantitative measures of the deliberations,[12] a mixture of statistical analysis techniques were used dependent on the variables being considered. Statistical analysis was conducted using SPSS software, with each statistical test outlined

and justified within Chapters 5 to 7. It is worth noting from the outset that, due to the relatively small sample size, I do not seek to make broad generalised claims about how sexual history evidence impacts *all* juries or jurors. Instead, I seek to highlight notable trends that emerged from my findings that provide important comparative insights between juries and emphasise problematic areas that may be considered within policy and practice discussions.

2.4 Chapter Summary

Mock jury simulations provide unique insights into the function and operation of trial by jury, in a context whereby research with real juries is prohibited (Contempt of Court Act, 1981). Whilst there remains some discord regarding the validity and generalisability of mock jury findings (Thomas, 2020), researchers have recurrently highlighted the merits of simulation projects in providing intricate and applied research knowledge about the operation of this central, yet otherwise largely concealed, aspect of the adversarial justice process (Finch and Munro, 2008; Willmott, 2017). Despite some historic critique regarding the often-perfunctory methodological design of mock jury projects, increasingly, the stimulus, sample, and task in mock jury simulations have more closely mirrored that of a 'real' jury, resulting in greater confidence in the findings (Finch and Munro, 2008). As such, a high degree of methodological rigour was applied when designing my mock jury research, including development of a relatively long audio-visual trial stimulus, which was filmed in a moot courtroom with actors in correct legal dress, an entirely community sample, and a full deliberative element. Thus, notwithstanding some limitations including some skewing in the sample and a shortened trial and deliberation, my study offers important and novel insights into the jury room.

Notes

1 It is perhaps worth noting here that Thomas (2020) was granted permission to access real jurors in her recent Home Office commissioned research; however, this right has not been afforded to researchers more broadly. Nevertheless, Thomas's (2020) research of real jurors did not involve access to live cases or deliberations, but instead boasted a sample of individuals who had been summoned for real jury service, completing questionnaires.
2 This tends to be a limitation of all mock jury research due to time constraints.
3 In total, 167 participants volunteered to participate and were assigned a juror ID. A small drop-out rate *(n = 16)* resulted in 151 completing the pre-participation questionnaire and signing for a deliberation slot. Whilst only one formal withdrawal occurred, 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.
4 There are 6–8 participants per jury panel (except for one group of five in a control scenario). This was done to ensure manageability of the group within the shortened deliberation time (see 2.1.3).

5 Average AMMSA score of my sample was 2.42, compared to an estimated 2.96 female and 3.32 male mean average (Megias et al. 2011).
6 There remains substantial discussion around whether rape myth acceptance [RMA] scales accurately measure RMA, as it is generally accepted that rape myths have become more subtle and covert over time (McMahon and Farmer, 2011). AMMSA is generally accepted as the most accurate in capturing this subtlety (Willmott, 2017), but limitations and social desirability bias remain a risk.
7 I am not suggesting that online formats should be used for real jury trials, and such discussion is far beyond the remit of this book.
8 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 observe non-verbal cues.
9 The self-care sheet was an additional ethical measure implemented due to added social pressures of the pandemic and outlined ways for participants to 'decompress' following participation and contact details for support.
10 And one group of 5 jurors, due to drop-out during the call. This was during a control scenario.
11 For every jury slot, 8 or 9 jurors were recruited; however, online technical difficulties and a small drop-out rate led to groups of 6–8 jurors across all simulations. This arguably reflects a distinct limitation of online methods, in which participant drop-out is arguably more likely and over-recruiting practices more difficult.
12 For example, verdict determination, deliberation time, and whether verdicts were unanimous.

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3 Sexual History Evidence

"The Canary in the Criminal Justice Mine?"

'Having long been perceived as the canary in the criminal justice mine' (Smith, 2018:119), sexual history evidence is a highly complex area of evidence, imbued with problematic stereotypes and engrained rape myths. Indeed, it is perhaps incontrovertible that historical misconceptions once held during trial, that toted promiscuous or 'insatiable' women as supposedly 'un-rapeable' (Farrell, 2017), would have reverberated across case outcomes (Easton, 2000). However, the question as to whether sexual history evidence continues to engender these same sacrificial pronouncements remains fiercely debated.

Seemingly long gone in the everyday popular culture of England and Wales is the perception that sexually active women are somewhat less credible, deviant, or morally inferior (McColgan, 1996). Yet, numerous recent observational studies have illustrated that the framing of sexual history evidence *at trial* remains somewhat less distinguishable from these perceptions of [usually female] character and credibility (Durham et al., 2016b; Smith, 2018; Daly, 2021). In the most recent published observational analysis of sexual offences trials in England and Wales, Daly (2021) noted that sexual history evidence was frequently introduced during cross-examination upon irrelevant or spurious grounds, in a way that sought to discredit the complainant and her allegation. Similarly, research in both New Zealand (McDonald, 2020; Tinsley et al., 2021) and Canada (Craig, 2018) has equally exemplified distressing, irrational, and misguided cross-examination and 'badgering' of complainants based on their previous sexual activity, disposition in sexual matters and sexual character, according to inappropriate culturally embedded tropes of victimhood. Ultimately, Kelly et al.'s (2006) analysis of sex offence case files, though potentially outdated, importantly uncovered a statistically significant association between a s.41 sexual history application being granted and increased chance of acquittal.

Alongside these findings, numerous commentators have identified the perceived threat of having one's sexual history evidence introduced at trial as a clear deterrent to reporting sexual offences (Rape Crisis Network Ireland, 2012; Durham et al., 2016a; Gillen, 2019); and where this is introduced at trial, it is often associated with increased trauma suffered by complainants (Hanna, 2021). It is due to these collateral outcomes, alongside greater recognition that

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questioning on previous sexual behaviour is unlikely to be relevant to trial (Smith, 2018), that calls to restrict sexual history evidence have emerged.

Whilst there tends to be some agreement throughout 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 unintended collateral outcomes, preserve fairness of trial, and protect complainants' privacy and wellbeing, remains equally important (McGlynn, 2017; Smith, 2018; Daly, 2021).

The following chapter will begin by unpacking the existing academic commentary around the need to restrict sexual history evidence at trial before outlining how current restrictions have been enacted over recent decades. It should be noted from the outset that there is currently a distinct lack of agreement surrounding whether current restrictions are (a) appropriate, (b) effectively adhered to in practice, and (c) how reform should look. These questions will be considered throughout this book, with the current chapter providing a backdrop of notable academic debates.

3.1 Sexual History Evidence: A Question of Relevance?

At the heart of debates about the inclusion of sexual history evidence at trial lay pivotal questions around relevance and admissibility (Kibble, 2001; Stark, 2017; Thomason, 2018; Brewis and Jackson, 2020). There is no denying that where sexual history evidence is relevant to central issues of the case 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). However, equally, there is broad agreement that some legislative restrictions are necessary to limit the inclusion of sexual history evidence to only strictly *relevant* instances, to protect complainants' privacy and avoid unwarranted prejudice (McGlynn, 2017; Stark, 2017). In establishing relevance, therefore, a balance must be struck between the complainant's wellbeing and right to privacy,[1] versus the defendant's right to advance cogent evidence to preserve a fair trial (Marsh and Dein, 2021; Smyth, 2021). Yet, at the heart of these tensions remain important and salient concerns that 'the concept of relevance [in relation to sexual history evidence] has been imbued with stereotypical notions of female complainants and sexual assault' (*R v* Seaboyer, 1991). Achieving the balance of relevance in practice, therefore, has proven distinctly challenging to resolve.

It is perhaps pertinent to begin this discussion by drawing on the analyses of Stark (2017) who submitted that conceptualisations of relevance are in fact socially constructed, nebulous framings based on shifting and subjective definitions rather than objective fact or logic. With this in mind, he emphasised that establishing logical relevance or perhaps more suitably 'probative value' is very difficult to assess and remains highly contested (Stark, 2017). As such, I do not seek to dwell on the legal theorisation of relevance as it remains a

highly complex evidential area which lies somewhat within the remit of this book. Indeed, current s.41 provisions have rendered a closed list of gateways in which relevance may be established (though these may be contested), and it is beyond the remit of my research to conceptualise any conclusive legislative changes. However, some consideration of the established academic debate on relative remains important to establishing what may be put before a jury, and how jurors interpret relevance in their deliberations.

Notably conceptualisations of relevance are fraught with complexity and nuance (Marsh and Dein, 2021), meaning that there are no longer two straightforward, opposing, or antithetical sides of the debate, as such. Instead, what appears is more of a graduation of attitudes and perspectives about how relevance may be framed, often deriving from individualised case facts and contested judgements.

At one end of the spectrum, older and perhaps more outmoded analyses of commentators such as Birch (2002) and Lord Bingham (HL Deb Vol 597 Col 55, 1999) have claimed that there are a myriad of factual contexts in which questioning about previous sexual history may be relevant, citing this as a rational or common-sense assumption, on the suggestion that previous consent makes latter non-consent highly unlikely. On the contrary, early critics such as Easton (2000) have proclaimed that it is hard to see how 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.

More recently, prominent commentators such as McGlynn (2017), Stark (2017), and Thomason (2018) have developed more intricate and multi-faceted analyses of these issues. All of whom have submitted that neither total abolition nor complete, unrestricted inclusion of sexual history evidence at trial are favourable. McGlynn (2017) advocated a narrow interpretation of relevance, emphasising the risks and potentially distorting impact of introducing irrelevant and prejudicial sexual history evidence at trial. Drawing on the now (in) famous case of Ched Evans (Chapter 4), she contended that barristers have largely relied on misguided, shared assumptions of relevance, 'buoyed by high success rates to admit sexual history applications' (p.392), and in doing so have undermined the aims of the restrictive legislation.

Yet contrastingly, both Stark (2017) and Thomason (2018) advocated greater flexibility of approach towards establishing relevance. Thomason (2018) developed a detailed exploration of legal discourse on relevance, exclaiming that whilst the common law confers no legal test of relevance, it is generally settled to mean the same as it does in reason and logic. As such, he argued that determinations of relevance may draw on common sense and general knowledge, in accordance with Lord Steyn's assertions in *R v A [No.2]*

(2001: 31) that 'to be relevant the evidence need merely have some tendency in logic and common sense.' However, as McGlynn (2017) asserted, these common-sense pronouncements that previous consent may be indicative of latter consent profoundly challenge the legal definition of consent, which is person, situation, and time specific, to be given afresh on each occasion.

Meanwhile, Stark (2017) based his comments on examination of supposed logical relevance, asking whether the sexual history evidence in question may increase or decrease the probability around a disputed fact. On this note, he stated that to exclude logically relevant evidence is unjustified and contended that this should not be constrained by concerns of prejudice. Yet, Judge L'Heureux-Dubé helpfully articulated a key contention here that, 'there are certain areas of inquiry where experience, common sense and logic are informed by stereotype and myth' (*R v Seaboyer,* 1991: 228). Indeed, Smith (2018) found that barristers at trial routinely relied on assertions of supposed logic, reason, and rationality to advance rape myths and manipulate juror focus, including during discussions of a complainant's previous sexual history.

Thus, returning to McGlynn's (2017) argument, restrictions to sexual history evidence must not instinctively be seen as detracting from the defendant's right to fair trial, nor as a contest between the rights of the defendant and complainant, but instead as enhancing the fairness of trial and protecting the legitimate interests of all. As such, the potential collateral prejudicial associations linked to sexual history evidence must not be understated as somewhat of an expected and inevitable biproduct. This is not to say that sufficiently probative material should be excluded, but that it is important to evaluate what the probative value may be. McGlynn (2017), for example, suggested that, even where sexual history is deemed as relevant at trial, this relevance must be weighed up against its potential prejudicial impact. Thus, 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. Indeed, returning to Thomason's (2018) discussion of legal relevance, we may draw on the definition proposed by Wigmore (1983) that evidence must be both logically relevant and have sufficient probative value to be worthy of admission. Thus, the balancing of probative value versus prejudicial impact is perhaps a reasonable approach towards relevance.

Yet, ultimately, in the absence of an agreed definition or test for determining the relevance of sexual history evidence, consensus about when and why sexual history evidence may be deemed relevant to trial remains divided. Having outlined these contentions, it is important now to consider the potential influence of the so-called twin myths on these constructions of relevance.

3.1.1 The Twin Myths

Judge L'Heureux-Dubé conceptualised framings of the twin myths in the Canadian case of *Seaboyer (1991:197),* stating that engrained, stereotypical

attitudes about a complainant's previous sexual history regularly promote endorsement of two distinct, problematic narratives. Namely that:

a) previous consent may be indicative of future consent and
b) women with extensive sexual histories are less credible.

Notably, each of these framings are grounded in historical foundations of sexual history evidence that posited promiscuous women as always consenting to sex and therefore somewhat un-rapeable (Wallach, 1997; Farrell, 2017). And, which framed supposed promiscuity as a smear upon an individual's (particularly a female's) character and respectability, and in turn, her reliability as a witness (McColgan, 1996; Sheehy, 2002; Phipps, 2009). Yet, despite the clear historic foundations of these assumptions, adherence to the twin myths continues to be observed within courtroom narratives (Smith, 2018; Daly, 2021) and, sequentially, is widely suggested to permeate into jury deliberations (McGlynn, 2010; Baird, 2016). Inevitably, endorsement of these attitudes at trial and, in particular, within jury deliberations, poses a substantial, prejudicial risk to the content and outcome of sexual offences trials.

Consequently, the perceived ongoing influence and acceptance of the twin myths throughout CJS discourse is regularly cited as perhaps the primary reason for needing to restrict the inclusion of sexual history evidence at trial (McGlynn, 2017). It must be noted here that these arguments 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. However, perhaps unsurprisingly, there remains a lack of agreement in academic and legal discourse on whether these attitudes continue to hold sway for 21st-century jurors. Thus, before outlining findings of my mock jury dataset in Chapters 5 to 7, I unpack the existing literature on this matter below.

3.1.1.1 Propensity to Consent

Plainly, the idea of propensity to consent asserts that previous consent may be indicative of future consent or make future consent more likely. As stated above, it challenges the legal framing of consent, which states that this should be a person-, time-, and situation-specific enterprise, given afresh on each occasion (McGlynn, 2017). However, echoing some of the prominent debates about the perceived relevance of sexual history evidence outlined above, discussions about the supposed legitimacy of endorsing the propensity assertion (at least to some extent) have engendered significant academic and legal debate. Again, McGlynn (2017) and Thomason (2018) have authored leading literature in this area.

Thomason (2018) relied on psychological 'trait theory' to suggest that previous behaviours readily influence future decision-making. He thus submitted that 'the bare fact of an individual having a large number of sexual partners may indicate a propensity to consent' (p.349) or to enter 'consent-conducive

situations.' Importantly, he caveated this with a caution that situational factors should also be considered when determining whether a propensity was present in the specific situation and case facts; however, it may be argued that his analysis still represents a vast oversimplification of sexual consent contexts.

Indeed, McGlynn (2017) noted that narratives around propensity ultimately fail to acknowledge the variety of contexts and relationships in which sexual victimisation can occur. She highlights, for example, that an abusive ex-partner (or even perhaps any ex-partner) may in fact be the least likely person that one would consent to in future, despite previous consent having been present. Given the volume of rape trials involving partners or ex-partners (ONS, 2020), endorsement of these propensity inferences seemingly risks removing a complainant's autonomy to say no in any instances where she had previously said yes. McGlynn (2017) thereby likened the propensity argument to the highly erroneous and outdated presumption of assumed consent in marriage and suggested that it shows little improvement from this once-held legal assumption.

Similarly, Easton (2000) denoted that propensity to consent arguments represent somewhat of 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. This seemingly, plainly highlights the potential danger posed by allowing propensity inferences, removing complainant autonomy, and perhaps facilitating unequal power dynamics and the potential for exploitation.

There is some suggestion, however, that the propensity narrative has become somewhat of a historic misconception, with modern rape trials no longer advocating the suggestion that latter consent may be inferred from previous consent (Thomason, 2018; Hoyano, 2019). Indeed, a recent large-scale study by Hoyano (2019) which scrutinised the grounds of s.41 applications, maybe promisingly, revealed that the majority of s.41 applications were made upon grounds which did *not* pertain to the issue of consent. Meanwhile, Thomason (2018) contended that propensity critiques largely appear to be unaware of, or predate, bad character legislation contained in the Criminal Justice Act (2003). He noted that bad character legislation and previous sexual history legislation are in fact notably similar in that both aim to shield witnesses from the introduction of private evidence that may be of low probative value and could cause distress. He argued the implementation of bad character legislation has reversed the traditional common law inference of propensity and, in doing so, equally restricts the inclusion of sexual history evidence, e.g. evidence of sex work at trial, where it is included to support a propensity inference.

Nevertheless, whilst these insights are inevitably useful in the research trajectory, they are somewhat limited without concurrent examination of courtroom narratives to assess the practical applications. Notably, findings of recent court observation research reflect somewhat less optimism. Indeed,

whilst noting that rape myth endorsement has become distinctly more subtle and nuanced in the courtroom, Smith (2018) observed that barristers often sought to frame similarities between previous, consensual sexual history evidence and the latter alleged rape. This shows implicit and indirect endorsement of the propensity narrative, inferring that the previous, similar consent may be indicative of latter consent. In doing so, this serves to direct focus away from the alleged wrongdoing of the defendant and seemingly puts a greater onus onto the complainant to more clearly communicate her non-consent, especially where previous consent has been given. Daly (2021) observed similar such narratives. Therefore, despite some argument that problematic propensity narratives are no longer an issue in sexual offences trials, empirical findings continue to evidence challenging and engrained myth endorsement and the propensity to consent assertion.

3.1.1.2 Credibility

Turning now to the second of the twin myths, it is important to consider links between sexual history evidence and constructions of complainant credibility. This is particularly notable since evidence has shown that jurors' evaluation of a complainant in a rape trial is often pivotal to their verdict determination (Sealy and Wain, 1980).

Again, misconceptions linking sexual history evidence to perceptions of complainant credibility were borne out of antiquated perceptions that unchaste women were likely to be dishonest and unreliable, all underpinned by the broader presumption that rape allegations are routinely fabricated (Sheehy, 2002; Peterson, 2019). Whilst, in modern day Britain, such narratives overtly linking a woman's chastity and sexual behaviour to her reputation and character are rarely now endorsed; ongoing inferences regarding a complainant's supposed 'moral credibility' are arguably still applicable in justice discourse (McColgan, 1996; McGlynn, 2017; Smith, 2018). 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).

Indeed, 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. Both Smith (2018) and Daly (2021) have supported this assertion, observing sexual history evidence to be routinely introduced by barristers at trial, in attempts to discredit and malign the complainant and her moral character. Such narratives routinely frame sexual history around myths and stereotypes of 'appropriate' female behaviour and sexuality, seemingly exemplifying the adherence to misguided notions of moral credibility (Smith, 2018; Temkin et al., 2018; Daly, 2021). In doing so, notions of 'appropriate' sexual behaviour and female sexual reputation are used to reinforce persistent stereotypes of 'good' or 'bad' women and ideal victimhood (Farrell, 2017). This 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 revealed 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). Nevertheless, in Hoyano's (2019) more recent interviews with barristers, she concluded that there was no evidence to support the idea that barristers were attempting to manipulate court processes or ploying to prejudice the prosecution case through s.41 applications. Whilst promising, there was no consideration in this research of the potential for social desirability bias amongst responses, and no explicit exploration around reliance on myths, stereotypes, or attempts to discredit the complainant. A such, this finding should not be taken to override the breadth of research, particularly observational studies, which have continued to link previous sexual history evidence with attacks on the character and credibility of complainants.

Indeed, returning to observational findings, sexual history evidence continues to be viewed as a tactic employed by defence counsel[2] 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, 2018; Ubell, 2018). Thus, despite being outdated, sexist, and fundamentally incorrect (Simon-Kerr, 2008), it reflects ongoing adherence to rape myths and highlights the prejudicial potential of sexual history at trial.

Interestingly, however, Birch (2002) contended that evidence of a defendant's bad character is far more open to prejudice than that of the complainant previous sexual history evidence, thus suggesting reappraisal of these debates. Ultimately, whilst minimal research has tested this assumption, making it impossible to affirm or refute such a claim, I argue that the prejudicial impact of sexual history evidence must not be understated. Indeed, 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 that sexual history only holds minimal prejudicial potential. Moreover, it may be argued that Birch's (2002) assertion also ignores extensive research findings showing the continued potency of rape myths throughout society, which again emphasise the potential to prejudice a jury (Willmott, 2017; Leverick, 2020).

Like many broader rape myth narratives, prejudicial assumptions about sexual history appear embedded in an underlying gendered context of

traditional, socio-sexual norms in which rape myths arise and by which they are reinforced (Temkin, 2003; Smith, 2021). 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, 2018), 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 (2012) 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, noting that this is likely to permeate jurors' perceptions. My mock juror findings, discussed through Chapters 5 to 7, add further credence and novel empirical findings to support these claims.

3.2 Development of the Law on Sexual History Evidence

Having unpacked arguments about why it is necessary to restrict sexual history evidence at trial, it is essential to examine how such restrictions have been implemented in the English and Welsh context. Current legislative restrictions are embedded within *s.41–43 YJCEA* (1999); however, the law in this area has developed in somewhat of a piecemeal fashion over the past four decades (Hey, 2012). Therefore, before examining the current legislative procedure of s.41, I scrutinise the evolution of such legislation to comprehensively understand both the successes and shortcomings.

Historically, evidence of a complainant's 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,' 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 19th century, this relaxed approach to the admissibility of such evidence became crystallised in the common law (Temkin, 1984; Thomason, 2018) and led to 'degrading, diminishing and functionally deficient cross-examination' in many trials (Hunter, 2014).

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). The

House of Lords judgement of *DPP v Morgan* (1975) arguably 'sparked' feminist activism in this area (McGlynn, 2010: 139), whereby it was ruled that if a man had an honest, even if unreasonable, belief that the complainant had been consenting, then he could not be found guilty of rape. Denounced by Temkin (2002:119) as the supposed 'rapist's charter' and prompting widespread condemnation of the treatment of complainants in the CJS, this judgement seemingly became the final straw in pressuring governmental action. In England and Wales, an Advisory Group on the Law of Rape was assembled in response to widespread 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).

3.2.1 The Heilbron Report (1975)

The Heilbron Report specifically aimed to assess areas of rape law in need of 'urgent' amendments to reduce the ordeal of 'the genuine rape victim' (Heilbron Committee, 1975:22), whilst equally ensuring a fair and impartial trial for the accused. Perhaps on an eerily similar note to the most recent 'End-to-End Rape Review' (HM Government, 2020), it was hoped that Heilbron recommendations 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.

Whilst not solely focused on sexual history evidence, the curtailment of cross-examination about sexual history was deemed by the Heilbron Committee as 'probably one of the most important and urgent reforms' (p.219). Positively, the committee 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. It was deemed that sexual history evidence with a third party should generally be 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.

At the time, these recommendations were widely welcomed by the House of Lords as appropriately strict, whilst continuing to award some space for judicial discretion where necessary through subjective statutory measures (HL Deb 22 October 1976). Perhaps retrospectively, it is easier to critique

the allowance for subjectivity, which enabled differing or inconsistent case outcomes, dependant on the perspective and decisions of each individual trial judge. Indeed, the Heilbron recommendations put substantial faith on the perceived impartiality of judges –something that perhaps with hindsight was regrettable, particularly during the 1970s 'when views of a woman's sexuality were even less progressive than they are today' (Hey, 2012:20). Hey (2012) has also since critiqued the assertion that sexual history with the defendant may sometimes be relevant, suggesting that this admits the rape myth that previous consent can be indicative of future consent and thereby entrenches the propensity to consent assumption into law. As already noted, the perception of where relevance may lie, particularly in regard to previous sexual history with the defendant, is widely contested in practice, and both supporting and counter arguments to that of Hey (2012) will be discussed throughout the current book.

Nevertheless, following the Heilbron Committee (1975) recommendations, statutory restrictions to sexual history evidence were imposed within the SOA (1976), albeit arguably not in the way intended or recommended.

3.2.2 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 (McGlynn, 2017). Whilst initially, 'cautiously welcomed by many feminists' (McGlynn, 2010: 140), in practice, the discretionary approach was found to be severely lacking (Thomason, 2018) and did little to stem the flow of sexual history being admitted at trial (Temkin, 2002; McGlynn, 2017). In fact, analysis of s.2 provisions indicated that not only was s.2 failing to achieve its aim of restricting sexual history evidence at trial, but paradoxically it also appeared to seemingly grant legal counsel greater flexibility to introduce such evidence under the subjective, discretionary approach (Temkin, 1984).

Adler (1982) contended that, at face value, the Act appeared to overrule 19th-century precedents about the perceived relevance of sexual history but cautioned against the level of judicial discretion awarded. Similarly, Temkin (2002:198) condemned the faith placed in judicial discretion, protesting that it effectively gave judges 'carte blanche' to allow sexual history evidence after they had been the ones who were 'largely responsible for the problem in the first place.' Broadly, commentators noted that perhaps the main obstacle to the discretionary approach was that despite new recommendations being embedded in law, existing and persistent myths and stereotypes from the common law approach continued to be (and arguably remain) entrenched (Adler, 1987; Lees, 1996; Temkin, 2002; Hey, 2012). Consequently, counsel continued to ask questions regarding the complainant's previous sexual

history, and though rarely relevant, focus of trial remained routinely on women's behaviour (McGlynn, 2010).

Often such evidence was introduced at trial 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, for example, reported a 75% success rate for 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 (1975) and s.2 provisions 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 in the case of *R v Viola* (1982). 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, therefore, this verdict indicated that attacks on complainant credibility may on occasion continue to be deemed relevant despite the new statutory governance, thus crucially undermining 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, many subsequent observational studies emphasised the opposite (Adler, 1987; Lees, 1996). Thus, despite dissenting voices, it became clear that introduction of sexual history evidence at trial was far from exceptional, and resultantly a growing sense of unease developed around the (in)effectiveness of the s.2 approach and its (in)ability to protect complainants. Calls for reform became widespread, and the government ultimately responded in 1999. The Home Office 'Speaking up for Justice' Report (1999) was commissioned to address concerns that the law was not operating effectively. The report concluded that s.2 provisions were not working and that law reform was necessary to provide a more structured approach to sexual history decisions. Therein consultation began about how to enact such legislation, and s.41 YJCEA (1999) was ultimately incepted (Hargreaves, 2020).

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

Sections 41–43 of the *YJCEA* (1999) are the most recent statutory attempts to restrict the inclusion of sexual history evidence at trial in England and Wales. 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 not an issue of consent
- 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, s.41 specifies that 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' (HL Deb 23 March, 1999). Thereby, replacing the widely criticised 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, 2018). 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' (HL Deb 23 March, 1999).

Some aspects of the s.41 provisions, 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. However,

some disquiet and debate equally emerged. Broadly, feminist academics welcomed the move away from judicial discretion towards a more rigid statutory approach in the hope that it would limit the inclusion of sexual history evidence at trial (Hey, 2012). Nevertheless, the more rigorous s.41 approach equally 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).

In practice, however, it is arguably difficult to truly assess the efficacy of the legislation, as just days after the implementation of s.41 provisions, these were challenged under the *Human Rights Act* (1998) in the case of *R v A [No.2]*, (2001). The following chapter outlines the legislative aims of s.41 alongside outcomes of the legal challenge and explores commentary surrounding practical implementation and effectiveness of the current approach, highlighting areas of good practice and calls for further reform.

3.3 Chapter Summary

The inappropriate reliance on sexual history evidence at trial has been widely condemned by feminist critics in the criminal evidence field (Temkin, 2003; Campbell and Cowan, 2017; McGlynn, 2017; Thomason, 2018) and identified as a deeply embedded obstacle to the right to survivor justice (Smith, 2018). Whilst there tends to be broad consensus across the debate that there may be limited instances in which sexual history evidence could be relevant to case facts, contention arises around where, when, and how this line of relevance ought to be drawn. Indeed, it is without dispute that any evidence that holds sufficient probative value and can help to avoid wrongful convictions must be adduced to preserve the right to fair trial and justness of our legal system. However, this of course must be balanced against the dangers of introducing irrelevant evidence or evidence to support illegitimate purposes, such as inferring a generalised propensity to consent or as a mechanism 'to tarnish the complainant's moral character' (Brewis and Jackson, 2020:59).

The introduction of legislative restrictions to limit the inclusion of sexual history evidence at trial has ultimately sought to balance these interests and govern the admission of prejudicial narratives at trial. However, again, though broadly welcomed in essence as necessary boundaries to enquiry, the substantive content and practical implementation of legislative attempts have been widely critiqued, resulting in fragmentary and piecemeal reform. The most recent legislative attempt, under *s.41 YJCEA* (1999), has been the most restrictive rape shield legislation to date, revoking the highly criticised discretionary elements of s.2 and the common law approach. Yet, despite some initial commendation towards the s.41 approach, the practical implementation and contested high-profile case law have engendered substantial debate about its efficacy, as will be discussed in Chapter 4.

Notes

1 Though, important to note that in the English and Welsh adversarial setting, standards of fairness relate primarily to the accused, as the complainant is not a represented party at trial (Marsh and Dein, 2021). However, it is equally, increasingly recognised that a more victim-centric approach is necessary to build trust and encourage reporting (Criminal Justice Joint Inspectorate, 2022).
2 Hoyano (2019) refutes claims surrounding the tactical admission of sexual history evidence and timing of s.41 applications. This argument will therefore be explored in more detail in Chapter 4.

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4 Taking Stock
S.41 in Operation

As noted in Chapter 3, s.41's rigid approach to the admissibility of sexual history evidence seemingly curtailed judicial discretion and was therefore widely welcomed by feminist commentators who had extensively condemned the discretionary blueprint of *s.2 SOA* (1976). Yet, despite supposedly removing the heavily criticised discretionary element from rape shield legislation, the practical implementation of s.41 provisions has not been without controversy. Most notably, the cases of *R v A [No.2]* (2001) and *R v Evans* (2016) have reignited debates regarding the implementation, interpretation, and suitability of s.41 restrictions to protect the complainant and operate in the interests of justice for the accused. Thus, almost immediately after its implementation, widespread calls for further reform resurfaced.

Thereby, before beginning any analyses of the findings of my mock jury dataset, it is important to first outline ongoing critiques and assessments about the foundations and implementation of s.41 provisions. This provides an important backdrop to all ongoing reform debates. The chapter will begin by scrutinising the high-profile and controversial judgements of *R v A [No.2]* (2001) and *R v Evans* (2016) which both stimulated widespread debate around Parliamentary intention and the discretionary implementation of the s.41 gateways approach. This is followed by an examination of the academic commentary on s.41, scrutinising the frequency of questioning on sexual history evidence at trial, the grounds for s.41 applications, and adherence to procedural and substantive safeguards. The chapter concludes by outlining recurring critiques of the s.41 approach and considers some approaches to amendments and reform.

4.1 R v A *(No 2)* (2001) [Sexual History with the Defendant]

It is arguably impossible to discuss the efficacy of s.41 without first outlining the landmark judgement of *R v A (No 2)* which, as stated previously, provoked a substantial legal challenge to the legitimacy of s.41 provisions, just months after these were enshrined in law. *R v A (No 2)* was the culmination of a legal challenge, which suggested that the inflexibility of s.41 provisions had contravened a defendant's right to fair trial, as protected under

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Article 6 European Convention on Human Rights (1953). The central question put before the Law Lords was to establish whether the rigidity of s.41 had forged an overly restrictive approach to the admissibility of this evidence and, indeed, prompted the question as to whether a declaration of incompatibility was warranted under *s.4 Human Rights Act* (1998). Perhaps unsurprisingly, therefore, this judgement attracted intense academic and policy scrutiny, and has become pivotal to commentaries focusing on the efficacy and implementation of s.41 provisions to this date.

The defendant in *R v A (No 2)* had been charged with rape; however, it was his defence that the sexual intercourse had been consensual or that he had, at least, had a reasonable belief in consent. At first instance, a s.41 application was made to adduce evidence of a previous three-week period of consensual sexual activity with the complainant, with the most recent sexual intercourse having taken place just a week before the alleged rape. 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. The trial judge, however, rejected this application, deeming that this sexual history evidence was inadmissible under s.41. This ruling was later reversed by the Court of Appeal, who ruled that, whilst such questioning was not admissible to the issue of consent, it could be adduced under s.41(3)(a) to show a *reasonable belief* in consent.

On the appeal to the House of Lords, however, the defendant argued that by restricting the inclusion of sexual history as evidence of consent, s.41 was contravening his right to fair trial. As such, the intrinsic question of balancing the interests of complainant protection and relevance of sexual history with the right to fair trial of the defendant re-emerged. Despite acknowledging the legislative aims of s.41 to exclude irrelevant or prejudicial sexual history material, Lord Steyn equally noted that:

> *After all, good sense suggests that it may be relevant to an issue of consent whether the complainant and the accused were ongoing lovers or strangers. To exclude such material creates the risk of disembodying the case before the jury.*
>
> (*R v A [No.2]*, 2001:32)

Ultimately, therefore, it was ruled that a blanket exclusion of sexual history evidence could interfere with a defendant's right to fair trial, but crucially a declaration of incompatibility was not declared. Instead, 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). Invoking this interpretative approach to the similarity gateway [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 [No.2]*, 2001:46). 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' to be relevant, as to invoke a too narrow approach to relevance could impact upon the defendant's right to a fair trial (*R v A [No.2]*, 2001:135). Leave was thus granted to include sexual history evidence under the similarity exception, which needs to be 'not so unremarkable' or differ from regular sexual conduct in order to adhere to Article 6.

Perhaps unsurprisingly, the ruling of *R v A [No 2]* prompted mixed reactions. Whilst some supporters praised the judgement, arguing that without this, s.41 would have been an unworkable legal straitjacket that could render unsafe decisions (Kibble, 2001), the approach taken by the Lords equally engendered substantial critique. The Lords were accused of 'judicial activism' (Bhola-Dare and Fletcher, 2020), effectively taking it upon themselves to re-write the s.41 provisions (Nicol, 2004). In doing so, arguably disregarding Parliamentary intention and 'straying beyond the permissible limits of judicial interpretation' (Bronitt, 2005:5). Whilst the Lords were clear that they did not intend this decision to widen the remit of s.41, the judgement ultimately reintroduced judicial discretion back into the test of admissibility. Hey (2012) therefore argued that this judgement 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. This submission is generally rejected by lawyers, who have maintained that the interpretative decision of *R v A [No 2]* enabled s.41 to work in the interests of justice (Hoyano, 2019). However, perhaps regardless of the legitimacy of this decision, both Ellison (2010) and McGlynn (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. Without this, critics have argued that the lack of clear, well-founded reasoning within the judgement of *R v A [No 2]* has engendered legal uncertainty and undermined the purpose of the 1999 legislation (Ellison, 2010).

Meanwhile, and possibly more notably, alongside these procedural critiques, feminist commentators have widely condemned the *reasoning* on which the *R v A [No 2]* judgement was granted. Indeed, Lord Steyn submitted not only that it was a matter of 'common sense' that previous consent may be relevant to latter consent, but ultimately suggested that this evidence 'may throw light on the complainant's state of mind' (31). This rationale, seemingly giving explicit credence to the propensity to consent myth, suggests that s.41 was implemented to tackle and acutely challenge the supposed person-, time-, and situation-specific nature of consent (Ellison, 2010; McGlynn, 2017). In doing so, it seemingly diminishes the notion of women's sexual autonomy by reinforcing discriminatory stereotypes depicting women as sexually accessible (Boyle and MacCrimmon, 1998).

Birch (2002) has countered this argument by suggesting that the sexual history evidence in *R v A [No 2] 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 should be considered with respect to the potential prejudicial effects of admitting such evidence (McGlynn, 2017). The Law Lords seemingly acknowledged in the appeal judgement, with Lord Hutton emphasising the potential of sexual history evidence to divert the jury's attention away from key issues and distort the course of trial. Smith (2018), however, contended that the final judgement 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. Correspondingly, Gurnham (2018) exclaimed that, whilst the *R v A [No 2]* approach may be correct as a matter of the narrowly construed law, it ultimately failed to take due account of the risks surrounding exposing the jury to such prejudicial material.

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 [No 2]* undermined this ethos (Hey, 2012). Instead, *R v A* arguably served to muddy the waters in respect to this central issue, acting to the detriment of complainants and the fair administration of justice (Ellison, 2010).

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

As stated in the introduction, the debate about the inclusion of sexual history evidence at trial 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 arguably widening s.41 restrictions even further than *R v A [No 2]* (Smith, 2018). Notably, whilst the Evans case pertains to third party sexual history evidence, which was beyond the remit of my mock jury research discussed in this book, it prompted numerous high-profile calls to reform s.41 and thereby remains pivotal to these discussions.

In May 2011, Evans and fellow footballer Clayton McDonald had sexual intercourse 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 to gain a key. After having sexual intercourse with the complainant, Evans left via the fire escape. The complainant awoke in the morning, without recollection of what had happened and consulted the police. At first instance, Evans was convicted of rape, whilst McDonald was acquitted. However, Evans' family appealed for new information, hiring private investigators, and offering a £50,000 reward for new information, thereby keeping the case in the public eye. Although his first appeal was refused, Evans' defence team and private investigators later found two new witnesses who had had consensual sexual intercourse 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.'*
>
> (*R v Evans*, 2016)

Evans' defence team relied upon Lord Clyde's obiter statements in *R v A [No 2]* that the sexual history in question need not be unusual or bizarre to fall under the similarity gateway (s.41(3)(c)). This, arguably, despite clear intention of the Lords in *R v A [No 2]* (2001) that such test of admissibility related only to sexual history with the accused and not third parties (UKHL 25:131).[1]

Unsurprisingly, the prosecution counsel argued that the behaviour in question was commonplace and far from remarkable, meaning it could naturally be explained as a coincidence and certainly not evidence from which consent could be inferred. Indeed, assessments of popular culture in England and Wales 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). Meanwhile, evidence from one of the third-party witnesses detailed that the phrase and position in question was adopted just once across five or six occasions of sexual activity with the complainant, and thus, seemingly, the pattern in question was far from established.

Nevertheless, despite 'a considerable degree of hesitation' (74), the Court of Appeal judges ruled in favour of the defence, suggesting that there are rare cases where it may be necessary to examine sexual history evidence with third parties in order to satisfy the requirements of fair trial. In granting the appeal, therefore, it was upheld that similarity evidence with third parties need not be unusual or bizarre to fall within scope of the similarity gateway, and the sexual history evidence in question was thereby admitted at re-trial. Evans was subsequently acquitted at this retrial; however, due to the safeguards around jury deliberations, it is impossible to assess whether the sexual history evidence factored into this decision.

Much like *R v A [No 2]*, the Evans judgement prompted diverse reactions amongst legal and academic commentators, but also notably provoked substantial public outcry and disquiet. Prominent critics of the judgement contended that the everyday nature of the sexual history in question was far from sufficient to reach the admissibility threshold, and instead should have been considered a coincidence (Baird, 2016; McGlynn, 2017). To include it,

they therefore suggested, represented a further unjust widening of s.41, even beyond the *R v A [No 2]* judgement which was not intended to relate to third-party evidence (McGlynn, 2017). Proponents of the judgement have, however, maintained that the Evans judgement was a simple application of the law (Dent and Paul, 2017) with no radical reinterpretation (Newton, 2016) and suggested that it was inaccurate media reporting, rather than the judgement itself, which caused the furore (Thomason, 2018; Hoyano, 2019).

Indeed, the Court of Appeal maintained that *R v Evans* presented a 'rare case' and did not foresee that this would set a precedent for future cases (EWCA Crim 2559:74). Evans was, undeniably, somewhat unusual in the sense that the complainant did not give evidence of non-consent, but rather that she could not remember what had happened. Therefore, commentators have suggested that the sexual history evidence included in the case was not to confirm Evans' reasonable belief in consent, but rather to direct focus towards the complainant's capacity to consent or, at least, give the indication that she was consenting (Brewis and Jackson, 2020). As such, Thomason (2018) makes the case that Evans should be considered an ECHR gloss case as opposed to a similarity one, thereby dismissing suggestions of any inappropriate widening to s.41(3)(c). Dent and Paul (2017) similarly submitted that the jury's verdict in Evans did not set a legal precedent and was confined solely to the facts of the case in question. However, a distinct lack of clear rationale to explain the basis upon which the Court of Appeal determined admissibility has left the judgement open to substantial critique and legal uncertainty (Thomason, 2018).

McGlynn (2017) maintained 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, 2016). Dent and Paul (2017) decried this critique on the basis that it falsely suggests defendants routinely fabricate these accounts, exclaiming that, in practice, this is unlikely to occur. Yet, arguably, the Evans case exemplifies a situation in which witnesses came forward as a result of public campaigning by the Evans' family, and seemingly illustrates that McGlynn and Philips' critique may be warranted.

As such, Harman and Baird (2017) alongside numerous other academics, suggested that the Evans case sets a dangerous precedent about how a complainant of rape (usually a woman) has previously behaved and noted 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) 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.'

Rather than probative credibility, therefore, the inclusion of sexual history evidence in this instance seemingly invoked challenges to perceived moral credibility of the complainant in attempts to distract juror attention from the consideration of rape towards that of sex (Sous, 2020).

Ultimately, whilst impossible to corroborate or refute the assertion that sexual history evidence prompted moral judgements of the complainant by the jury in this case, popular discourse and reporting illustrated distinct moral judgements and high levels of victim blame. A simple twitter search of '#ChedEvans,' for example, returned 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) therefore 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. Indeed, it is important to note that the complainant's behaviour in the Evans case was far from the actions of a gatekeeper and therefore violates traditional feminine socio-sexual norms. It is this, Gurnham (2018) asserted, that carries significant prejudicial risk to the outcome of the case. In the wake of the Evans judgement, therefore, numerous calls for reform have been proposed and are discussed in detail in Section 4.5.

4.3 The Broader Operation of S.41

Whilst the Evans case captured the attention of the millions, the evidential contention surrounding sexual history evidence in rape trials is far from an isolated issue. In particular, the notion of whether s.41 has achieved its primary aim of reducing the inclusion of sexual history evidence at trial, to only rare and relevant instances, continues to invoke considerable debate.

Responding to the controversy of the Evans judgement, the Criminal Bar Association submitted that s.41 has been an overwhelming success, maintaining that sexual history evidence is rarely introduced at trial and only done so where strictly relevant (Morris, 2016). Likewise, a Crown Prosecution Service (CPS) commissioned audit conducted by the Ministry of Justice [MOJ] claimed that sexual history evidence was included in just 8% of finalised rape trials in 2016, concluding s.41 to be an effective safeguard

(MOJ, 2017). The methodological approach utilised within this MOJ research may however be critiqued. Indeed, the sample included guilty pleas whereby no trial took place (Harman and Baird, 2017), trials of child complainants where sexual history evidence is inherently less likely to be included (Kelly et al. 2006) and only represented instances where a pre-trial application had been made (Green, 2019). In doing so, it may be argued that the MOJ sought to portray a favourable assessment of s.41 but failed to truly reflect current challenges (Harman and Baird, 2017; Bowcott, 2018).

More recently, Hoyano (2019) was commissioned by the Criminal Bar Association to conduct the largest ever empirical study into the operation of s.41, analysing 377 sexual offences case records and anonymously interviewing 140 barristers. Hoyano (2019) concluded that current s.41 provisions *are* working in the interests of justice and suggested that the admission of sexual history evidence remains exceptional, with judges and prosecuting counsel vigilant in ensuring relevance. However, findings of Hoyano's analysis seemingly indicate a much less favourable assessment of prevalence than that of the MOJ dataset, with 18.6% of complainants in the sample being the subject of a s.41 agreement or order. Whilst Hoyano (2019) was careful to note that this could be an overestimation, due to the cautious methodology used in quantifying the data, it may equally be argued that some risk of underestimation is also present. Indeed, the sample only analysed cases where an application had been made, whereas observational research has repeatedly highlighted that sexual history is often introduced in the apparent absence of a formal application (Smith, 2018; Temkin et al., 2018). Furthermore, the sample contained child and male complainants, whereby sexual history evidence is inherently less likely to be introduced. Indeed, Hoyano's own analysis illustrated that 5.3% of male complainants in the sample were subject to a s.41 application, compared to 31.5% of female complainants. Thereby, whilst Hoyano uses the 18.6% figure to dismiss the widely cited feminist claim that sexual history evidence is introduced in approximately one third of rape trials, upon closer inspection of just female complainants, it appears that the one-third figure is far from inaccurate.

Regardless of true accuracy, however, the figure obtained ultimately does not represent a rarity of s.41 applications. Moreover, of the s.41 applications made in this sample, 73% of these resulted in some measure of success for the defence, again indicating greater commonality of sexual history evidence in modern rape trials than previous MOJ research may have suggested.

Alongside Hoyano's (2019) research, it is equally important to inspect findings of recent observational analyses. Whilst observational researchers typically obtain smaller samples, making it more difficult to advance major statistical claims, they arguably reveal a more holistic reflection of current challenges, presenting a lack of formal s.41 applications and improper questioning of complainants as routine grievances in practice (Smith, 2018; Temkin et al., 2018; Daly, 2021). These findings are synthesised in Table 4.1:

Table 4.1 Research Examining the Prevalence of Sexual History Evidence at Trial

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 (2018)	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)
Hoyano (2019)	18.6% of complainants (565 in sample)	34.72% applications were late	All sexual offences trials including children
Daly (2021)	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

Notably, these recent observational studies have illustrated extensive questioning about a complainant's previous sexual history evidence at trial, which is in direct conflict to the MOJ (2017) report and Hoyano's (2019) conclusions of rarity.

Meanwhile, alongside the academic research, a national survey of *Independent Sexual Violence Advisers* (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). Hoyano (2019) heavily critiqued the

methodological choices of this survey by asserting that ISVAs were unclear on legislative restrictions and that findings were based on mere estimates. Indeed, I agree that the estimate figures do represent a limitation of the research; however, importantly, the findings illustrate dissatisfaction and unease of s.41 restrictions amongst frontline support workers. Irrespective of true and accurate prevalence claims, therefore, at the very least this research represents an important finding about practitioner perceptions of s.41 and poor complainant experiences at trial.

4.3.1 S.41 Applications in Practice

Alongside research highlighting the potentially troubling frequency with which sexual history evidence continues to be introduced at trial, numerous studies have also illuminated the often-erroneous context and purpose for raising s.41 applications (McGlynn, 2017). Firstly, it is important to address claims of late applications being tactical before examining the content of sexual history narratives during trial.

LimeCulture's (2017) report and the observation studies outlined in Table 4.1, all cited a lack of pre-trial applications, which in turn serves to amplify the distress of complainants (Brewis, 2018). Significantly, Kelly et al. (2006) theorised that some late applications were perhaps a tactic of defence counsel to disadvantage the prosecution, by removing their chance to consult with the CPS or raise objections. Ultimately, Hoyano (2019) strongly dismissed this claim, citing a lack of empirical evidence to support it. Indeed, it is inherently difficult to prove or disprove claims of tactical applications. However, Smith (2018) noted that when an application was late, there was often no reason given for the lateness, and these were rarely challenged by the judge or prosecution. Therefore, regardless of reasoning behind such timing, it appeared that there were limited repercussions for failing to adhere to this procedural safeguard.

Positively, since Smith's (2018) research, Part 22 of the Criminal Procedure (Amendment) Rules (2018) has set out further requirements regarding the defence's notice of intention to adduce sexual history evidence (Crim PR 22.4) and the Criminal Practice Directions (Amendment No.6) attempt to ensure more stringent compliance (Brewis, 2018). In turn, Daly's (2021) more recent dataset has optimistically indicated greater adherence to these procedural requirements within her sample, with no evidence of applications during trial and some reference to pre-trial applications, though she did not observe the s.41 application hearings themselves. Her findings thereby seemingly indicate increasingly positive practice through greater procedural compliance and must be interpreted optimistically. Yet, despite greater adherence to these procedural requirements, Daly (2021) continued to observe irrelevant and intrusive content of questioning.

This problematic content of questioning has been a key finding of observational research. For example, whilst 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], Temkin et al. (2018) noted that questioning on sexual history would often go beyond legitimate purposes, invoking rape myths about the complainant and her supposed propensity to consent. Smith (2018) similarly observed that sexual history evidence regularly served to undermine the complainant's credibility by suggesting that her prior consent somehow indicated falsity of the allegation. She noted that these narratives were often invoked alongside the mythical suggestion that rape and consensual sex are fundamentally different, inferring that similarities between the alleged rape and prior consensual sexual activity demonstrated latter consent.

Hoyano's (2019) analysis of s.41 application data was commissioned as a result of this culmination of critiques. Her analysis was somewhat unique as the first study to scrutinise the grounds upon which sexual history applications are made, and through achieving a much larger sample size than has been possible in much of the previous research in this area. Encouragingly, some positive practice can be observed throughout Hoyano's (2019) sample, with just 3.58% of cases erroneously introducing sexual history evidence without the necessary application. Meanwhile, in 53.6% of cases, the questions about sexual history evidence had been agreed by the trial judge in advance, and in a further 21.4% cases these questions were at least agreed by counsel. Yet these figures, though positive for the majority of cases, do still highlight that the erroneous admission of sexual history without adherence to procedural safeguards does continue to be an issue. Indeed, these findings show that in 25% cases questioning on sexual history was not agreed by parties in advance, and in 46.4% of cases it was not approved by the trial judge. Furthermore, in 7.17% of cases, sexual history evidence was introduced despite a s.41 application being unsuccessful, thereby resulting in an objection by prosecution counsel. Thereby, though these shortcomings do represent a minority of cases analysed, it is important not to disregard the fact that they are distinctly problematic.

Whilst Hoyano (2019) ultimately concluded from the case analysis that s.41 is operating in the interests of justice, it is important not to overstate these claims or use them to disregard findings of the feminist and observational analyses considered in Table 4.1. Indeed, whilst Hoyano's case analysis helps us to build a holistic picture about the frequency and grounds of s.41 applications, these findings must be scrutinised in conjunction with further analyses of different stages of the criminal justice system (CJS) response. The case analysis data, for example, does not provide thorough insight into the content and framing of cross-examinations on sexual history evidence at trial; however, this is provided through court observation data (Smith, 2018; Daly, 2021). It is thus essential to consider all available empirical data cohesively to build comprehensive insight into the efficacy and shortcomings of s.41.

4.3.2 What Amounts to Sexual Behaviour?

Within discussions about the grounds upon which s.41 applications tend to be granted, a sub-debate about what evidence falls within the remit of s.41 provisions has also emerged. S.41 was initially praised for covering 'all sexual behaviour' including 'other sexual experience' [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 some 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) and must be decided on individualised case facts. However, the enforcement of judicial discretion here appears to be at odds with the rigidity of the s.41 gateways and seemingly instead reverts to the discretionary approach of s.2. Inevitably, there is a body of commentators who support greater discretion than s.41 currently permits (Kibble, 2004; Hoyano, 2019; Marsh and Dein, 2021); however, ambiguity about the basic scope of s.41 has also engendered criticism and uncertainty.

McGlynn (2017), for example, contended that the opaque nature of the definition and lack of clear rationale behind this legislative approach has given rise to ambiguity within the law, creating uncertainty for complainants, practitioners, and justice outcomes more broadly. Similarly, both Kibble (2004) and Kelly et al. (2006) suggested that ill-defined terms like sexual behaviour have rendered s.41 provisions hard to understand and potentially provided an opportunity for defence barristers to evade restrictive provisions. The decision of what falls within the remit of s.42(1)(c) has thus 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), it was ruled that engaging in sexually charged messaging did amount to sexual behaviour and therefore did fall within the scope of s.41. Thus, illustrating how a lack of clear legislative regulation inevitably engenders subjectivity in the application of the law and can result in divergence and inconsistency for both complainants and defendants at trial.

Importantly, whilst Hoyano (2019) acknowledged this area of contention in her large-scale examination of s.41 case records, her analysis and engagement with the topic was arguably somewhat fleeting. Hoyano (2019) noted Kelly et al.'s (2006) concerns, but stated that the problem has largely been resolved via appellate case law. Yet crucially in making these claims, Hoyano did not reference any notable appellate judgement nor demystify the current accepted regime in respect to what does and does not count as sexual

behaviour evidence. Furthermore, even whereby case law does exist, this may be critiqued as promoting individualised, piecemeal judgements that add another layer of complexity to the already intricate s.41 approach.

In some further discussion of this issue, Hoyano (2019) also noted that instances of texting and Facebook messages, for example, may depend on specific facts to determine whether it falls under the scope of s.41. However, she emphasised that if defence counsel seeks to contend that the behaviour in question is not subject to s.41 provisions, they remain under a professional obligation to apply for a ruling that s.41 is *not* triggered. This seemingly functions as an important safeguard; however, the extent to which this is executed in practice remains unknown and, in fact, Hoyano (2019) noted that this is often simply agreed with prosecution counsel, indicating that the formal ruling is often absent. Again, thereby, engendering some subjectivity and ambiguity in the application of the law.

Notably, establishing clarity about the scope of s.41 provisions is becoming ever more pressing, given growing issues surrounding the disclosure of digital evidence in sexual offences trials (EVAW, 2019; HC Deb, 2019) and the rapidly emerging phenomenon of sexting (Hales, 2018). Indeed, Daly (2021) observed in her dataset that digital sexual conversations were often drawn upon during trial 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 to respond to these challenges.

Whilst the recent Bater-James approach[2] (*Bater-James and Mohammed v The Queen*, 2020) to the admissibility of digital evidence seemingly represents a step in the right direction by ensuring that only reasonable lines of enquiry will be pursued, Smith and Daly (2020) cautioned that previous, similar rulings did not effectuate changes in practice. Moreover, this judgement did not specifically address any questions around the influence of s.41 in responding to digital disclosure. Daly (2021) therefore asserted that clear guidance and training, which addresses how s.41 governs digital evidence in practice, is needed.

Given the paucity of research examining how different forms of sexual behaviour may impact on case outcomes, the sexting phenomenon was built into my mock jury dataset. In Chapters 5 to 7, I discuss juror interpretations of and reliance on both sexual intercourse evidence and sexting evidence, ultimately showing little practical differentiation in terms of rape myth narratives and prejudicial assumptions. From this, I contend that further clarification surrounding what amounts to sexual behaviour is needed to ensure adequate and equitable provisions for all in line with s.41's drafting to cover all sexual behaviour.

4.3.3 Complainant Protection under s.41

Whilst the central aim of s.41 was to restrict irrelevant questioning about sexual history at trial, an important rationale underpinning this was the

necessity to protect complainants from unnecessary harm or trauma during trial. However, given the findings of recent court observation research, which has shown ongoing and routine reliance on sexual history evidence to attack and impugn the character and credibility of the complainant (McGlynn, 2017; Smith, 2018; Temkin et al., 2018), s.41 has been critiqued as failing to achieve this aim.

It is now widely acknowledged that the perceived threat of having one's previous sexual history introduced as evidence at trial can act as a deterrent to reporting (Kelly et al. 2006; McGlynn, 2018). Meanwhile, where such evidence is introduced at trial, it can add to trauma and victimisation suffered by complainants (Payne, 2009; LimeCulture, 2017; Hanna, 2021) and lead to disenchantment with the justice process (Gillen, 2019). Yet, whilst significant literature has highlighted the potential traumatic impact of this evidence on complainants (McGlynn, 2017; Smith, 2018), there remains controversy about whether s.41 provisions have been successful in easing this burden. And, perhaps more importantly, the extent to which complainant protection is achievable whilst maintaining the defendant's right to fair trial.

Following the decision of *R v A [No 2]*, complainant protection has been routinely presented as somewhat at odds with the defendant's right to fair trial. Indeed, Brewis and Jackson (2020), whilst not disputing that that complainants may endure appalling treatment and questioning on their sexual history at trial, asserted that this may be unavoidable where fair trial arguments deem it necessary and relevant. Similarly, the House of Lords in R v Hamadi (2007) 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 (2018) equally observed the defendant's right to fair trial often seemingly prioritised over the complainant's wellbeing and right to privacy.

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, Hoyano (2019) has positively contended that the rights of the complainant and defendant should not be perceived as incompatible with one another. She suggested that her findings illustrated the success of s.41 in maintaining the rights of both complainant and defendant in practice; however, other recent analyses seemingly counter this suggestion. Indeed, recent research has shown that questioning on sexual history under s.41 continues to be 'humiliating' (Eleftheriou-Smith, 2017), attack the complainant's privacy, dignity, and emotions (Levanon, 2012), and can result in 'irreparable harm' (Waxham, 2017) to stop other victims from coming forward.

Thus, drawing on all the available research on this matter, it appears somewhat premature to suggest that s.41 provisions have suitably balanced the interests of fair trial with protection of the complainant. It appears that

the defendant's interests seemingly often take precedence over protection of the complainant (Smith 2018; McGlynn, 2017), leaving complainants routinely traumatised and contributing towards attrition (Rape Crisis Network Ireland, 2012). Thus, as a matter of both morality and the efficacy of the CJS, prioritising complainant protection should be an overriding objective of s.41 reform debates.

4.4 Is Reform Needed?

Given the substantial controversy surrounding the implementation and application of s.41 restrictions, particularly following the landmark cases of *A [No 2]* and *Evans*, calls to reform or amend s.41 have been wide-ranging. Whilst the Law Commission are currently considering whether reform is warranted, it is important to acknowledge that substantial discord exists about whether current provisions are too rigorous or perhaps too lax, leading to conflicting suggestions about reform.

I will begin by first outlining the earlier critiques which emerged much before the *Evans* judgement and tended to focus on the perceived threat posed by the removal of judicial discretion in the gateways approach. Birch (2002), for example, labelled the s.41 approach as 'draconian' in eliminating judicial discretion and thus leaving judges 'no room to manoeuvre.' She advocated for the elimination of s.41 altogether, with an entirely discretionary approach instead implemented in its wake. On a similar note, Young (2001:223) asserted that s.41 provisions are 'logically flawed' because the removal of judicial discretion deprived the court of opportunities to balance determinations of admissibility and, therefore, risks the exclusion of relevant evidence at trial. Later analysis of judicial attitudes equally endorsed these assertions, submitting that the rigidity of s.41 would have been 'unworkable' had it not been for the decision of *R v A [No 2]* whereby judicial discretion was reinstated (Kibble, 2004). Interestingly, Kelly et al.'s (2006) interviews with judges notably demonstrated some defiance towards the s.41 regime, with participants noting that they would forego the gateways approach and implement their own discretion where they deemed it necessary. This analysis also revealed a widespread consensus amongst judges that the *R v A (No 2)* judgement granted broad residual discretion to ensure a fair trial. This misunderstanding, however, seemingly reflected a level of impunity and contravention of the rigid s.41 approach.

On the contrary, feminist commentators such as Temkin (2003) defended the rigid gateways approach, noting that that the gateways were sufficiently wide to enable the inclusion of relevant evidence and indeed notably wider than those seen in some other jurisdictions such as the United States. Likewise, McGlynn (2010) remarked on some positive rulings that reflected the rigidity and stringency of s.41 provisions and posited that the perception of increased judicial discretion following *R v A [No 2]* was a substantial risk. Ultimately, Temkin (2003) rejected submissions for greater judicial discretion, suggesting it would 'take us back even further to a pre-Heilbron approach.'

More recently, these debates about reform and the efficacy of s.41 provisions were inevitably reignited following the high-profile Evans judgement. Of the 140 barristers who took part in Hoyano's (2019) research, 60% considered that s.41 was working in the interests of justice, and only 27% suggested that it was not working. Perhaps most significantly, however, none were in favour of reforming s.41 to make it more restrictive. Similarly, Marsh and Dein (2021) called for greater flexibility of restrictions, framing *R v Evans* as a supposed 'poster trial' for the need for judicial discretion, emphasising that the inclusion of sexual history evidence can impact crucially on the outcome of trial. A critical counter assertion here, however, remains the query as to whether, firstly, it was definitely the inclusion of sexual history evidence at re-trial that altered the jury's final verdict. Secondly, whether the jury's interpretations of this sexual history evidence were legitimate and relevant or whether they were based in misguided, mythical assertions about propensity to consent, complainant blame, and appropriate socio-sexual behaviour. I would argue from my findings discussed in Chapters 5 to 7 that it is highly likely that prejudicial inferences about sexual history influenced juror perceptions.

On the opposite side of the debate, campaigners and feminist researchers have maintained that s.41 provisions remain too lax, arguing that both *R v A (2002)* and *R v Evans* (2016) contradicted Parliamentary intention, resulting in an unlawful and unintended widening of restrictions. Whilst staunch defenders of the Evans judgement (often, though not exclusively lawyers) have maintained that s.41 provides a high threshold for the inclusion of sexual history evidence at trial, which is rarely met (Dent and Paul, 2017), McGlynn (2018) fiercely rebutted this claim using *R v Evans* (2016) to highlight the laxity and flexibility with which the gateways have become interpreted. Corroborating these claims, multiple recent observational studies have highlighted the continued, persistent inclusion of sexual history evidence at trial, often overlooking or flouting necessary safeguards (Durham et al., 2016; Smith, 2018; Temkin et al., 2018). Indeed, Smith (2018) observed 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 dataset to deny an application under s.41(5). It is perhaps pertinent here to re-emphasise that, even in Hoyano's (2019) dataset whereby she asserted that the inclusion of sexual history evidence at trial is now rare, 31.5% of female complainants remained subject to a s.41 application and 73% of all applications resulted in some measure of success. Thus, despite positive claims made about the supposed stringency of s.41 as a safeguard, it is seemingly abundantly evident that the threshold for including such evidence at trial is far from restrictive. As such, particularly in the immediate wake of the Evans judgement, wide-ranging calls to increase the stringency of sexual history legislation became widespread, invoking debates about Parliamentary intention to promote further retraction of judicial discretion.

Nevertheless, whilst there remains a distinct lack of agreement about whether more stringent or more lax provisions are necessary, it has been

relatively widely agreed that some re-drafting and simplifying of s.41 provisions is appropriate. Indeed, Hoyano (2019) described s.41 as 'so labyrinthine' that counsel must continually revisit and decipher the legislation when trying sexual offences cases. Among the barristers she sampled, 36% agreed that an amendment to clarify s.41 provisions would be beneficial. In building on this, Marsh and Dein (2021) 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.

4.4.1 Proposals for Reform

Given these widespread critiques of s.41, numerous proposals for reform have been suggested. Perhaps most pertinent have been those from Liz Saville Roberts MP and Harriet Harman MP, who both advanced reform suggestions in the wake of the Evans judgement. Roberts proposed modifying current provisions using the *Sexual Offences (Amendment) Bill* 2016–17 to effectively bar all sexual history evidence with third parties, except whereby it would be manifestly unjust to do so. Harman expressed 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, these proposals engendered further debate and were met with scepticism by numerous 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. 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.

Yet in response to these critiques, I reiterate observational findings which have repeatedly shown s.41 restrictions to be circumvented and ignored (Durham et al., 2016; Smith, 2018; Temkin et al., 2018; Gillen, 2019; Daly, 2021). Meanwhile mock jury research – though outdated – has equally highlighted the prejudicial impact of this evidence on jurors (Schuller and Hastings, 2002). Consequently, whilst concerns regarding total abolition of sexual history evidence at trial are warranted, unremitting critiques about practical adherence to legislation 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 s.41, with feminist critics

continuing to argue that urgent legislative reform is vital to tighten current restrictions and encourage reporting (McGlynn, 2017; Smith, 2018; Daly, 2021). 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 were favourable, but failing this stricter implementation enhanced clarity of the legislation remains essential.

Indeed numerous commentators have asserted that focus on procedural guidelines, rather than legislative reform, is necessary to address myths and stereotypes (Corker Binning Chambers, 2017; Green, 2018), suggesting that 'it is the gatekeeper and not the gate that requires further scrutiny' (Corker Binning Chambers, 2017). Yet, whilst there tends to be broad agreement that the procedural implementation of s.41 requires attention, Hargreaves (2020) of Carmelite Chambers asserted that legislative reforms are also needed to reintroduce clarity into the law. Likewise, Hoyano (2019) highlighted a good case for redrafting the current legislation (within its current scope as 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):

> *Refusal of leave [to include sexual history] might have the result of rendering unsafe a conclusion of the jury or the court on any relevant issue in the case*

be brought to the forefront of s.41 legislation in place of the gateways approach. This would refocus 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 forward. 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, using international rape shields 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. Alternatively, Marsh and Dein (2021) proposed an 'interests of justice' model, used for hearsay provisions under *s.114 Criminal Justice Act* (2003). It contrasts to Stark (2017) proposal, favouring a positive interests of

justice requirement rather than the negative unsafe conviction approach of s.41(2)(b). However, it may be criticised as re-introducing judicial discretion into the law.

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 than has been discussed in the literature to date and draw on lessons learnt from the academic literature in this area (Durham et al., 2016; McGlynn, 2017; Smith, 2018). Proposals for independent legal representation for s.41 applications, for example, are widely welcomed amongst feminist academics (Chalmers, 2014; Keane and Convery, 2020; Iliadis et al., 2021) and frontline professionals, seemingly rebalancing the scales towards a victim-supportive approach (Fawcett Society, 2018). A comparable approach has already been implemented in the Irish context, for example (*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 and is discussed in greater detail in Chapter 8 of the current volume.

Ultimately, the proposals put forward by Harman were removed from Police, Crime, Sentencing and Courts Bill (2020), with the government instead tasking the Law Commission with examining the law on sexual history evidence and considering proposals for reform. Findings of this review are anticipated in mid-2023; however, ultimately there remains a clear lack of consensus about how to best reform (or not) the current s.41 provisions.

4.5 Chapter Summary

S.41 has ultimately attracted widespread academic, political, and public scrutiny since its implementation. Markedly, the controversial judgements of *R v A [No 2]* and *R v Evans* were both lambasted by feminist commentators, who asserted that each represented an unjust widening of the rigid, legislative

gateways and effectuated an overly tolerant approach to the inclusion of sexual history evidence at trial (Temkin, 2003; Baird, 2016; McGlynn, 2018). Quite the contrary, however, legal commentators have widely defended these appellate judgements as necessarily re-introducing essential judicial discretion into practice, which has been imperative to preserve the interests of fair trial and safeguard defendants' human rights (Kibble, 2004; Dent and Paul, 2017). Yet, it may be argued that these comments about judicial discretion crucially sit at odds with Parliamentary intention, whereby residual judicial discretion was purposely removed to ensure objectivity and equity across judgements.

Nevertheless, in practice there remains fierce debate about the efficacy and success of s.41 provisions. Observational research has condemned the ongoing frequency with which sexual history is introduced at trial, suggesting that there remains a lack of adherence to procedural safeguards and that questioning often remains inappropriate and prejudicial (Smith, 2018; Temkin et al., 2018; Daly, 2021). Yet, defenders have retorted by suggesting that the bar to include sexual history evidence at trial remains high, and that s.41 has been a success (Dent and Paul, 2017; Hoyano, 2019).

Ultimately, though there remains controversy surrounding whether a more restrictive or flexible approach is favourable, calls to reform s.41 provisions have been widespread. Whilst specific avenues to reform will be discussed in detail in Chapters 8 and 9, it is important to note that existing debate about reform has often involved little more than 'the exchange of assertion and counter-assertion' (Kibble, 2008:93) in the absence of clear empirical evidence regarding the impact of this evidence. Indeed, whilst recent observational research (Smith, 2018; Daly, 2021) and a large-scale analysis of s.41 application data in conjunction with barrister interviews (Hoyano, 2019) have all been extremely valuable in developing an overview of the relevance and questioning about sexual history at trial, there has been a distinct paucity of empirical data regarding the impact of sexual history on case outcomes. What comes in Chapters 5–7 thereby is original data outlining juror interpretations and narratives about sexual history evidence in deliberations, which in turn provides a highly novel perspective from which we may assess these ongoing reform debates.

Notes

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

2 In this case, the Court of Appeal outlined four principles to govern a 'reasonable line of enquiry' regarding digital data. These included meeting the disclosure test, being proportionate and relevant, keeping the complainant informed and considering the consequences of refusal. For a more detailed analysis see CPS (2021) Rape and Sexual Offences – Chapter Three: Case Building. Crown Copyright. [Online] www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-3-case-building#:~:text=In%20R%20v%20Bater%2DJames,relevant%20passages%2C%20phrases%20and%20identifiers. 26.07.2022.

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5 ‘No doesn’t always mean no’

Socio-Sexual Stereotypes and Heteronormativity

Having begun to unpack existing debates about when and how sexual history evidence may be legitimately introduced at trial, I now turn to the issue of juror interpretations of this evidence. As ultimate arbiters of criminal liability, jurors perform the utmost function of justice within the English and Welsh adversarial ideal. Yet pertinently, for rape and sexual offences cases, the decision-making role of jurors has been a matter of mounting concern for a number of years (Booth et al., 2017; Munro, 2019). Indeed, in a context whereby sexual offences trials are often simply a matter of ‘he said, she said’ with a routine absence of eye-witness testimony or clear forensic proof, research has suggested that jurors often rely on extra-legal stereotypes, rape myths, and supposed ‘common-sense’ assumptions to evaluate evidence (Ellison and Munro, 2009; Willmott, 2017; Leverick, 2020). As noted in Chapter 1, it is widely suggested that jurors often arrive in court with existing schemata or prototypes about what rape is, who tends to be involved, and how individuals would or should react (Pack, 2019), which can, in turn, serve to prejudice their assessments of case evidence (Ellison and Munro, 2010; Willmott et al., 2021).

Against this backdrop, sexual history evidence is thought to be a key factor that influences these stereotypical attributions (Monson et al., 1996), meaning examination of jurors’ scripts and expectations of such evidence is vital to situate wider reform debates. In previous, international research of both Catton (1975) and Schuller and Hastings (2002), sexual history evidence was found to prejudice juror assessments of complainant credibility and divert juror attention away from the central issue of consent.

Within the next three chapters, I thereby draw on prominent substantive themes that emerged about sexual history within my mock jury deliberative dataset. In doing so, I present direct quotes from deliberations to illustrate points of convergence and shared conjecture amongst mock jurors. I will begin each chapter by outlining positive practice through so-called ‘myth-busting,’ before outlining ongoing myth endorsement. By drawing on both individual narratives and juror interactions, we may scrutinise discourses that shape and constrain beliefs, values, and attitudes about sexual history within the deliberative context (Conley and Conley, 2009). Such findings, therefore,

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contribute to our understanding about how this evidence is interpreted and discussed by jurors, which ultimately must be considered centrally within ongoing reform discussions.

Despite some inevitable disconnect between the simulated role of mock jurors and tangible decision making of 'real' jurors, emergent themes from the mock jury dataset help to illustrate important patterns and repetition (Maguire and Delahunt, 2017) to help bridge the knowledge gap and 'provide useful glimpses into what may well be going on within jury rooms in real cases' (Ellison and Munro, 2009a: 292). Pointedly, the central themes extrapolated from the deliberative transcripts in my research accorded to those put forward some three decades ago by Judge L'Heureux-Dubé as the 'twin myths' (R v Seaboyer, 1991), albeit in potentially more subtle and varied ways than perhaps once hypothesised. I begin this chapter by outlining the extent of discussion about sexual history throughout my deliberative dataset. The remainder of the chapter will then scrutinise jurors' attributions of relevance towards sexual history and ongoing endorsement of the propensity to consent assertion. Chapter 6 will then situate narratives in which sexual history evidence influenced jurors' perceptions of witness credibility. Additionally, a third theme relating to the complex nature of sexual history as a potential complicating factor within the deliberative ideal is outlined in Chapter 7.

5.1 Extent of Discussion about Sexual History Evidence

Before examining the core qualitative themes that emerged throughout my dataset, I will situate my analysis by outlining the extent to which sexual history evidence was discussed in each of the deliberations. Markedly, sexual history evidence was referenced on at least one occasion by jurors in *every deliberation* 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 juror's perceptions of the trial evidence and played a key role in jurors' assessments of the case.

Indeed, Pennington and Hastie's (1992) story model – being perhaps the most widely endorsed theory of jury decision making – 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). This can be problematic if story construction has been based on mistaken stereotypical beliefs and rape myths, such as the twin myths (Tinsley et al., 2021). Ultimately, 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 almost all

deliberations, therefore, indicates that such evidence is regularly held at the core of individual narrative construction and suggests significant substantive value is awarded to this evidence within story construction.

The extent of discussion inevitably varied considerably between juries, as illustrated in Table 5.1. This 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 Nvivo software, coding each reference to sexual history evidence.

Table 5.1 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

This 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,[1] nor between early discussion of sexual history evidence and a greater number of dialogues.

5.2 Situating Relevance: Heteronormative Ideals

Turning now to the substantive content of deliberations, the way in which jurors attributed relevance to sexual history evidence within their deliberative discussions is arguably the foremost indicator about how sexual history evidence impacts on juries. To date, whilst academic and policy discussions about determining whether sexual history evidence may be relevant *to trial* has been extensive (see Chapter 3), contention about *juror* determinations of relevance has remained largely speculative. The following findings

therefore provide unique insights into how such evidence may be interpreted and utilised by jurors, and how this may impact on wider perceptions of the case.

Ultimately, underpinning all debate about the potential relevance of sexual history evidence and purpose of rape shield provisions is the aim to avoid irrelevant speculation by jurors about the complainant's previous sexual activity. Restrictions thereby attempt to avert reliance on the misguided propensity to consent paradigm and prevent jurors inferring consent based on outdated perceptions of chastity and sexual character.

Positively, overt and explicit prejudicial links between the complainant's previous sexual history and the outright assertion that she must have consented were not evident amongst jurors in my dataset. However, this is not to say that problematic attitudes did not arise. Indeed, jurors across the dataset regularly attributed clear relevance towards the complainant's previous sexual history based on problematic conjecture about consent and normative behaviour, albeit in more subtle and nuanced framings than those traditionally theorised. Typically, these deliberative narratives scrutinised the sexual history evidence according to wider stereotypical ideals of heteronormativity to inappropriately attribute blame to the complainant, excuse the defendant, and normalise the alleged rape into sex.

Heteronormativity refers to attitudes and assumptions that reinforce stereotypical or 'normative' sex role stereotypes, such as the perception that men are sexual instigators, whilst women act as the gatekeepers to sexual relations. 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). It is well established that rape myths often serve to impose this binary, heteronormative model by advancing assumptions, for example, that men are often unable to control their sexual urges, whilst women are sexually passive, for example, by 'playing hard to get' (Cowan, 2021).

Observational research has repeatedly referenced adherence to these ideals 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 et al., 2008). 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, 2009; Krahé and Temkin, 2013). In my research, the findings discussed below illustrate an

apparent extension of these heteronormative attitudes within jurors' considerations of sexual history evidence.

5.3 Positive Attitudes and Myth-Busting

To begin with, it is important to recognise good practice and positive attitudes that emerged from my findings. The so-called 'myth-busters' that sought to dismiss the relevance of sexual history evidence as a marker of consent were advanced by at least 1 juror in 10 out of the 12 mock jury panels that were exposed to sexual history evidence at trial. These comments were often unprompted and tended to be explicit in stating that previous consent could not be used to determine latter consent:

> *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)

> *It just means I'm happy to flirt with you. But that doesn't give consent to sex on 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)

This unprompted resistance to the propensity to consent narrative is positive in illustrating clear challenge to the perceived relevance of sexual history evidence within the deliberative discussion. 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, all demonstrates an appropriate comprehension of consent law by these jurors. Participant jurors also challenged the notion that consent to one sexual behaviour can indicate consent to a different sexual behaviour:

J097: *I would say that that obviously doesn't give 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)

Again, this illustrates a positive and nuanced understanding of consent law amongst these jurors, rejecting the propensity assumption whilst also serving to respect notions of female autonomy and the right to say no at any point. In doing so, these findings illustrate a distinct level of 'rape myth wisdom' amongst participant jurors and provide novel insights into the way in which jurors reject perceived rape myth endorsement delivered at trial.

Alongside these challenges, jurors in 3 of the 12 sexual history juries went beyond simple myth-busting to express scepticism about why defence counsel had introduced sexual history evidence at trial at all:

> *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.*
>
> (J112, Scenario 5: Sexting, Minor Inconsistency)

Not only do these narratives reflect strong myth-busting and rejection of the propensity narrative, but equally some awareness amongst jurors about evidential legitimacy in sexual offences trials and avoiding discrediting the complainant. This finding is particularly important as, whilst s.41 inevitably seeks to confine narratives about sexual history to only relevant and objective portrayals, observational research continues to show how sexual experience may be drawn upon by barristers to cast the complainant as less credible or pursue irrelevant lines of questioning in attempts to influence the jury (Daly, 2021). Such myth-busting, therefore, perhaps initially alleviates some of the concerns regarding the impact of manifest rape myth endorsement at trial (Smith, 2018a; Daly, 2021); however, I must caveat this finding with a clear proclamation that such myth-busting arose alongside routine and engrained myth endorsement as will be discussed throughout the remainder of the chapter.[2]

Nevertheless, taken together, these myth-busting attempts should be seen as a cause for optimism, indicating that some challenge towards myths about sexual history evidence is likely to occur in 21st century English and Welsh juries. Unequivocally, they represent an awareness amongst at least some of

the jury eligible population of the inaccuracy of overt myths and stereotypes surrounding sexual history evidence and illustrate a rejection of the once-held attitude that previous sexual history is a relevant marker of latter consent. Of course, given the experimental nature of this research, these findings may have reflected some level of social desirability bias;[3] however, they seemingly support a growing body of literature which suggests that individuals are becoming more aware of the inaccuracy (or at least undesirability) of explicit rape myth narratives (Thomas, 2020; Beshers and DiVita, 2021).

Yet, whilst positive that myth-busters about sexual history arose in 10 of the 12 sexual history juries, these findings should be considered with respect to the dataset as a whole. Firstly, it must be acknowledged that participants in the current research typically exhibited lower levels of rape myth acceptance than would be expected of the broader population, and therefore it is likely that the current findings *underestimate* the level of rape myth endorsement compared to a 'real' jury.[4] In stating this, I am not seeking to dismiss these myth-busters as a mere consequence of a skewed participant pool. In fact, on the contrary, I submit that these findings are potentially an indicator of changing social attitudes towards sexual violence and rape mythology that must be praised. However, I submit that it equally remains important to not dismiss the ongoing prejudicial threat posed by rape myth endorsement amongst jurors on the basis of these myth-busting findings. Indeed, it will be discussed below that despite myth-busting, endorsement of rape myths about sexual history continued to permeate the current dataset extensively. Moreover, whilst myth-busters towards the inaccuracy of the propensity assumption are positive, these were substantially less frequent than myth-busters about, for example, the complainant's failure to shout for help or lack of injury. Thus, seemingly indicating that myths about sexual history remain perhaps more engrained and pervasive than other, broader rape myths and stereotypes. It is clear from the following findings that prejudicial assessments of sexual history evidence continue to permeate jury decision making and must be considered when thinking about reform efforts.

5.4 Just Sex?

At the heart of perhaps all enduring myths about sexual violence is the implicit assertion that rape remains inherently different from supposedly 'normal' and consensual sexual relations. Whilst, crucially, this assumption is wholly unfounded, and instead it is more prudent to rely on Kelly's (1988) theory that sexual violence lies within a continuum alongside everyday, typical sexual practices, we continue to witness widespread and routine adherence to this false dichotomy throughout trials. From the misguided assertion that rape will typically result in physical injury to the suggestion that women who have experienced rape will immediately cut all ties with the perpetrator, the differentiation between rape and sex continues to be accentuated throughout sexual offences trials to the modern day (Smith, 2018b; Temkin

et al., 2018; Daly, 2021). In doing so, it may be attested that the task of the defence in sexual offences trials has largely become to assimilate details of the alleged wrongdoing into normalised socio-sexual behaviour as a means to divert jurors consideration from that of rape to that of sex (McGlynn, 2017). Naturally, this suggestion is highly contestable, and a significant body of legal scholars would posit rape myths as very much a historic transgression that are no longer relevant to modern day trials (Reece, 2013). However, I draw here on numerous court observation studies that illustrate extensive and routine myth endorsement across modern sexual offences trials (Temkin et al., 2018; Smith, 2020; Daly, 2021).

Turning now to sexual history evidence specifically, defence narratives arguably often play into this normalisation model (McColgan, 1996). Indeed, if the defence can submit that the complainant had engaged in consensual sexual activity previously and draw on similarities between this previous consensual incident and alleged rape, this can ultimately serve to divert juror focus away from the consideration of rape and towards that of sex (McColgan, 1996; McGlynn, 2017). Smith (2018a) observed this practice in the largest observational dataset of its kind in recent years, with sexual history evidence often introduced in a way that highlighted similarities between previous consensual sex and the alleged rape, seemingly presenting rape as occurring within a vacuum separated distinctly from normative sexual activity. As stated already, this overlooks Kelly's (1988) respected hypothesis that rape is in fact more accurately viewed on a continuum and often shares numerous overlaps with consensual sexual activity. Yet, findings of my mock jury dataset illustrated that lay jurors widely endorsed this presumption of rape as fundamentally different to consensual sex and relied on this repeatedly in their assessments of the relevance of sexual history evidence.

In Scenario 5, 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)

Despite some initial, somewhat superficial, attempt at myth-busting, J116 evidenced rape myth endorsement by drawing on stereotypes about expected socio-sexual interactions. 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 into 'just sex' (Gavey, 2005). Thus, whilst not overtly attributing relevance to sexual history evidence as a marker that she consented, the normalisation of the incident as compounded with that of her previous sexual history seemingly trivialises and downplays the assertion of rape (McGlynn, 2017). Further, the suggestion that 'the woman acts coy' and 'expects the guy to take the first step' not only endorses inaccurate assumptions of females as gatekeepers but also infers a level of culpability of the complainant for failing to clearly communicate her non-consent. Thus, reversing the attribution of responsibility to obtain consent, J116's ultimate conclusion that the defendant did not have the malice of rape represents the risks of this myth-endorsement, serving to alleviate the defendant of blame, de-legitimise the complainant's allegation, and belittle the necessity of both parties to obtain clear and unequivocal consent.

Markedly, responses to this narrative were mixed. Whilst strong myth-busting was advanced by J126, J117 demonstrated further endorsement:

> *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 dispelled the 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, demonstrated further rape myth endorsement by stating that the complainant had agreed to kiss the defendant and thereby implied that this could have been an indication of consent. This contravenes the legal definition of consent in which consent to one activity does not indicate consent to another. It also demonstrates continued adherence to the gatekeeper model by attributing responsibility to the complainant to clearly communicate her non-consent rather than establishing how the defendant seemingly ascertained affirmative consent.

However, this exchange between jurors about whether the previous sexual history evidence or kissing was an indicator of consent was not clearly resolved, with neither juror seemingly changing stance. This dialogue instead continued into discussion of false allegations, in which J117 submitted that

false rape allegations do 'occasionally happen.' Whilst the assertion itself is not incorrect, the narrative seemingly exemplifies conflation and overlap between discussion of sexual history and wider rape myths that serve to hinder or de-legitimise the complainant's claim. Notably, these misunderstandings of consent and attempts to normalise rape into the heteronormative gatekeeper model of sex arose repeatedly across 10 of the 12 sexual history juries in the dataset.

Likewise in five juries, sexual history evidence was drawn upon to suggest that the complainant, as a female, may have been more emotionally invested in the relationship. Again, this relied on the heteronormative model in which females tend to be portrayed as more emotional (Shields, 2013), and served to trivialise or normalise the allegation of rape into sex.

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)

This suggestion was not underpinned by any clear trial evidence, but instead seemingly drew on wider norms and stereotypes about how women behave in sexual situations. In doing so, these narratives routinely relied on the stereotypical portrayal of males and females as being inherently different in sexual relationships:

> *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)

> *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.*
> (J040, Scenario 5: Sexting, Minor Inconsistency)

Thus exemplifying adherence to the stereotypical heteronormative model, in which women tend to be positioned as more invested and emotional (Shields, 2013), whereas men, as sexual instigators, are perceived as expectant of sexual intercourse, especially whereby previous consent has been given. Resultantly, this suggestion that male and female approaches to sexual

relations are fundamentally different represents ongoing endorsement of a sexual double standard, in which casual sex continues to be considered less acceptable or desirable for women, according to traditional gendered codes of heterosexuality (Farvid et al., 2017). In doing so, such narratives served to excuse the defendant's belief in consent as innocently mistaken based on outmoded heteronormative ideals, and instead attached some level of culpability to the complainant as at least partly responsible for her victimisation. Thereby, whilst myth endorsement here was more subtle than the outright suggestion that latter consent may be inferred as a result of previous consent, the inference remained the same. As such, these framings continue to represent misguided adherence to the propensity assertion through the normalisation of rape into sex based on misguided and oversimplified heteronormative ideas of socio-sexual roles (Ellison and Munro, 2009).

Meanwhile from this narrative, we again see conflation of these heteronormative ideals with further rape myths about false allegations and vengeful complaints. The suggestion that the complainant was 'probably hurt afterwards' not only awards credence to the emotional complainant stereotype but equally infers some motive behind her allegation. Again, this serves to de-legitimise the complainant's allegation based on speculative ideals and inherent rape myth endorsement about the supposed threat and prevalence of false allegations in rape trials.

5.4.1 False Allegations

This link between the complainant's previous sexual history and the perceived threat of false or vengeful allegations emerged as a routine theme within my dataset; however, it did so in two distinct ways. The first of which, discussed here, posited sexual history evidence as a potential reason behind a false allegation, drawing on the same gendered and heteronormative framings of women as discussed above. The second framing discussed in Chapter 7 showed reference to false or vengeful allegations as emerging almost exclusively in deliberations where sexual history evidence had been introduced at trial, and therefore suggested an indirect link between sexual history evidence and juror perceptions about the validity and truth of an allegation.

The first premise, which seemingly asserted the threat of false allegations as more likely, given the previous sexual history evidence, was advanced across eight juries. Again, this rape myth endorsement was often compounded, with jurors relying on suggestions of supposed 'normal' heterosexual relations and the perceived emotionally invested female complainant as a possible rationale behind a vengeful claim of rape:

> *So maybe there was some type of connection reigniting for that day. And perhaps, she may have just been flirting and 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)

The suggestion that there had been a 'connection reigniting' infers a perception that the complainant may have originally consented to intercourse, but then regretted it following the defendant's behaviour. The narrative thereby draws on the sexual history evidence as a potential context from which consent was perceived, and from which a vengeful allegation was perhaps more likely. In doing so, this demonstrates adherence to the propensity to consent paradigm, whilst also illustrating conflation between sexual history evidence and wider rape myths. Indeed, this awards credence to the scorned woman stereotype (Reeves, 1996), in which it is suggested that rape allegations are weaponised by emotional female complainants as a means to enact revenge against a sexual partner who has spurned them, ultimately serving to discredit the allegation of rape.

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)

The suggestion that the complainant had been willingly flirting but then felt 'very degraded' following the incident again serves to minimise the harm alleged by complainant away from that of rape. The idea that things 'picked up' and the two were 'flirting again quite easily' seemingly endorsed the propensity to consent ideal in inferring a greater likelihood of consent based on the previous sexual history evidence. This, followed by the suggestion that the complainant then felt degraded, again gives credence to the notion that she had originally consented only to then revoke this consent *after* the alleged incident. Again, such a framing served to normalise the alleged rape into typical heterosexual sex, and thus illustrated how sexual history evidence may be drawn upon to undermine the claim of rape and alter juror perceptions of both the complainant and defendant.

5.5 Mixed Signals

In conjunction with the heteronormative gatekeeper script that places responsibility onto the complainant to adequately communicate her

non-consent, reliance on supposed miscommunication theory equally emerged. Miscommunication or the idea of supposed mixed signals remains a commonly cited cause of sexual violence despite extensive evidence which has shown this to be a very unlikely determinant (O'Byrne et al., 2008; Beres et al., 2014; Maryn, 2021). Again, miscommunication theory demonstrates adherence to the heteronormative gatekeeper paradigm, whereby perhaps 'well-intentioned' men may not understand non-consent if the gatekeeper complainant 'failed' to send clear signals that she did not want sex (Gravelin, 2018). Credence is thereby given to the fundamentally inaccurate rape myth that women often say no when they mean yes (Shafer et al. 2018), creating ambiguity of what counts as 'real' rape (Dardis et al. 2021), and again, normalising and trivialising the complainant's potential victimisation into 'just sex.'

The miscommunication label arguably becomes even more pervasive where a prior sexual relationship has existed (Maryn, 2021), with evidence illustrating that where a sexual precedence has been set (e.g. prior consent had been given), the notion of mixed signals or defendant excusal may become more pronounced (Monson et al., 2000; Littleton and Axsom, 2003). Perhaps unsurprisingly, therefore, suggestion of supposed mixed signals or miscommunication emerged repeatedly in discussions of sexual history, and was particularly prominent in Scenario 1:

> *I worry that it's because they have previous relationship...that it was mixed communication*
>
> (J002, Scenario 1: Sexual Intercourse, No Inconsistency)

J002: and maybe there was mixed messages going on between them
J006: yeah so I think that…

The link between the previous sexual history and the miscommunication narrative serves to ratify the propensity assumption by normalising the assumption of consent based on previous consent. In doing so, this narrative seeks to dismiss the complainant's victimisation as a matter of mere misunderstanding as opposed to clear wrongdoing, which in turn excuses the behaviour of the defendant. Notably, J002's focus on miscommunication theory arose in the pre-deliberation questionnaire, and therefore illustrates how pre-conceived ideas and myth endorsement of individual jurors may influence the wider deliberative dynamic and content of deliberations.

> *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)

Interestingly, J002 identified her own sexual victimisation experience within this narrative, and whilst she did make some attempt to myth-bust by 'no way condoning' the behaviour, she then followed this up with distinct myth endorsement about mixed signals. The notion 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 female gatekeeper role. This narrative therefore not only reflects problematic assumptions about the ongoing nature of consent but also crucially illustrates that victims themselves can internalise and endorse rape mythology and advance victim blaming narratives.

Responses to J002's assertion of mixed signals in this jury illustrated agreement by two fellow participants, but notably also prompted two attempts at myth-busting:

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: 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)

The notion that 'sex is like a cup of tea' appears to reference a public awareness campaign created by Thames Valley Police in 2015 that sought to educate the public on rape myths. As such, it illustrates that public advertisements and educational campaigns can have an impact on myth endorsement; however, it is worth noting that such an observation was limited to one juror across the entirety of the dataset. Nevertheless, rejection of the propensity myth by J003 and J012 reflected dismissals of the idea of assumed consent and reiterated the legal requirement of consent to be clear and unequivocal, given fresh on each occasion.

Despite this positive practice, however, the myth-busting attempts did not appear to alter the myth-endorsement of J002, who then followed her discussion of mixed signals with further, explicit myth-endorsement:

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)

Again, this illustrates links between judgements of sexual history evidence and wider rape myth-endorsement, particularly within the heteronormative gatekeeper model which asserts that women act coy or shy when it comes to sexual consent. Meanwhile, whilst J021 and J003 were seemingly uncomfortable with this assertion, J006 and J002 show some level of agreement. Whilst J006 made an attempt to distance this myth from the case in hand, she, nevertheless, did endorse the suggestion that sexual consent may be ambiguous and female sexual autonomy inconclusive. In doing so, these claims advance outdated heterosexual assumptions of male dominance and female submission, inferring that male persuasion may override a complainant's autonomy to say no in some instances.

Whilst Scenario 1 was used to exemplify these framings throughout a deliberation element, these assertions were in no way limited to single jury and ultimately represent troubling attributions of relevance to previous sexual history evidence amongst participant jurors. Claims of consent miscommunication serve to both diminish the harm and experiences of the complainant, justify the perpetrator's behaviour, and ultimately infer that, had the complainant made her non-consent clearer, then her victimisation would not have happened (Hansen et al., 2010; Deming et al., 2013; Myran, 2021). Again, therefore highlighting distinctly problematic and challenging attitudes to emerge from discussion of sexual history evidence, showing how this may distract juror focus and prompt prejudicial sentiments towards the complainant and her status as a victim.

5.6 Excusing the Defendant

It is perhaps unsurprising that, to date, the vast bulk of research scrutinising sexual history evidence has tended to focus on framings of the complainant. Indeed, from historic links between the complainant's previous sexual experience and the perception of whether she was 'rape-able' (Farrell, 2017) to more recent research which continues to reveal widespread, unmerited questioning which serves to attack complainants' credibility and imply consent (Daly, 2021), sexual history has been identified as a deeply embedded obstacle to survivor justice (Smith, 2018a). Nevertheless, alongside these evaluations which detract from the credibility of the complainant, McGlynn (2017) also theorised that sexual history evidence may in fact *bolster* perceptions of the defendant. In accordance, Farrell (2017) submitted that parallel to imagery of victim blame associated with sexual history evidence, symbolism relating to the supposed 'heroic' defendant acting on 'masculine impulse' also often emerges. Interestingly, Schuller and Hastings (2002) found no association

between the inclusion of sexual history and juror judgements of the defendant or his belief in consent; however, such a finding was clear in my research.

In 8 of the 12 sexual history juries, sexual history evidence was drawn upon to advance narratives about the defendant's potential mistaken belief in consent, confusion towards the complainant's signals or his inability to control his sexual urges. Each of these, served – at least to some extent – to alleviate the defendant of blame, dismissing his perceived malice or intent based on his previous sexual relationship with the complainant. Again, adherence to the heteronormative gatekeeper paradigm was evident throughout these narratives, upholding the male instigator role and propensity to consent narrative:

> *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)

> *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)

It is worth noting here that, of course, *if* the defendant is deemed to hold a *reasonable* belief in consent, *s.1(1)(c) SOA* (2003) dictates that he cannot be convicted of rape, and in turn, *s.41(3)(a) YJCEA* (1999) allows the inclusion of sexual history evidence to support a reasonable belief defence. However, the extent to which sexual history evidence may legitimately support such a belief has been contentious (see Brewis (2014)). S.1(1)(c) ultimately overruled the controversial judgement of *DPP v Morgan* (1975) that the belief in consent must be *reasonable* and Lord Woolf later emphasised in *R v Bahador* (2005) that reasonableness must be determined by considering all the circumstances, including steps taken to ascertain consent. Meanwhile, O'Connor LJ cautioned in *R v A [No.2] (2001)* that 'previous conduct pertaining to the defendant's belief in consent fades into insignificance when compared to the complainant's conduct at the time of the alleged assault' (cited in Brewis, 2014:293).

Thus, whilst I do not seek to dismiss the legitimacy of focus on the defendant's potential reasonable belief, I assert that the problematic nature of the above juror narratives arose from the suggestion that it was previous consent, rather than consideration of any steps taken, that was used to infer a potential mistaken belief in consent. Rather than acknowledging the responsibility of the defendant to actively ascertain consent (which must be given afresh on each and every occasion), these narratives drew solely on the previous relationship

evidence to alleviate the defendant of malice or blameworthiness. In doing so, these legitimised the propensity narrative and ultimately inferred that once consent had been given on one occasion, it becomes the responsibility of the female gatekeeper to make evident if she wishes to withdraw consent, as the male instigator cannot be held responsible for presuming consent as ongoing. Evidently this framing contravenes legal requirements which put an onus onto the suspect to ascertain whether consent was given and outline the steps that they had taken to ensure consent (CPS, n.d.), and thereby illustrates problematic inferences arising in response to previous sexual history evidence.

Further, the 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)

These assertions served to minimise and trivialise the harm alleged, rationalising the incident in a matter of confusion or crossed wires. In doing so, it detracts from the alleged wrongdoing and again represents clear endorsement of the propensity myth, neglecting any consideration of steps taken to establish consent.

Meanwhile, within these framings of the defendant's supposed mistaken belief in consent, the complainant often became portrayed as at least partially accountable for her victimisation:

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)

This narrative is problematic on a number of levels. Firstly, it minimises the necessity for each party to ascertain clear and unequivocal consent to each sexual act, irrespective of whether previous consent has been given, or consent to another act has been given. In legitimising the defendant's presumed consent, it diverts attention away from any steps taken by the defendant to clearly establish consent and excuses his actions. Further, in doing so, some level of blame is seemingly attributed to the complainant, for perhaps 'leading him on' and failing to perform her gatekeeper role by making her non-consent clear. Finally, it represents a disposition by these jurors 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. Again, these framings of both complainant

and defendant illustrate the distinct prejudicial potential associated with previous relationship evidence.

Moreover, alongside suggestions of the defendant's supposed mistaken belief in consent, the idea that the defendant simply did not think was also regularly advanced:

> *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)

The association between the previous sexual history evidence and the defendant's lack of thought about consent gives credence to the heteronormative myth regarding uncontrollable male sexual urges. The suggestion being that once consent had been given on one occasion, the male defendant could be innocently mistaken in believing that it would be given again. And, once sexual contact had begun, the defendant then could not think for himself or cease sexual conduct. This framing of sexual history as the 'reason' behind the defendant's failure to establish consent thereby validated and normalised notions of assumed consent and reinforced the responsibility of the female gatekeeper role.

5.7 Chapter Summary

Whilst the prejudicial impact of sexual history evidence on jurors has been theorised for some years (Temkin, 2003; McGlynn, 2010; Cowan and Campbell, 2018), the findings discussed in this chapter provide novel insights into the way in which jurors interpret and utilise such evidence within their deliberations. Beginning on a positive note, findings of my dataset illustrated that some jurors were able to identify and reject explicit myths surrounding the propensity to consent narrative and the perceived relevance of sexual history evidence. This must be seen as a cause for optimism, suggesting that some myth-busting of this kind is likely to occur in real juries and potentially indicating changing attitudes amongst the jury eligible population. Myth-busting of this kind goes some way to support Thomas's (2020) recent claims that jurors can identify and reject obvious rape myths, though I must caveat this with the stipulation that I refer only to obvious and explicit rape myths here and note that such myth-busting is often relatively superficial.

Indeed, alongside outward myth-busting, my dataset also revealed ongoing and engrained rape myth endorsement in discussions of sexual history evidence. Notably, these narratives illustrated an increased subtlety and nuance

towards rape myth endorsement, relying on wider, stereotypical ideals of heteronormativity to advance myth-endorsing assumptions and attribute relevance to the sexual history evidence. Gendered perceptions of the female gatekeeper and cultural inferences about female emotionality were regularly drawn upon by jurors in attempts to normalise the allegation of rape into that of consensual sex, using the previous sexual history evidence as authority. Likewise, gendered ideals of uncontrollable male sexual urges were used to posit the defendant as a naive misbeliever of consent, given his previous sexual history with the complainant.

Each of these ultimately served to trivialise and dismiss the complainant's allegation of rape and, in turn, alleviate the defendant of malice and blame. Unequivocally, therefore, reflecting how dangerous and prejudicial inferences may be advanced by jurors in response to sexual history evidence. It is therefore insufficient to locate the propensity framing or twin myths as a historic aberration, but instead essential to consider these modern risk factors within ongoing reform debates.

Notes

1 Multiple eta (η) coefficient tests were conducted to statistically test whether an association existed; however, none of these produced statistically significant findings.
2 Equally, it must be noted that rape myth usage at trial is not only problematic for juror decision making, but also complainant wellbeing and protection (Hanna, 2021).
3 Although, this is impossible to measure.
4 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).

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6 'Was she that type of girl?'

Sexual History Evidence and Constructions of Complainant Credibility

Following on from the findings discussed in Chapter 5 about jurors' perceptions of the relevance of sexual history evidence, the current chapter centres upon constructions of complainant and defendant credibility that emerged within discussions of such evidence. Dating back to the historical foundations of rape trials, links between evidence of a complainant's previous sexual history and her perceived credit in the eyes of the jury have been well established (Durston, 1998). Some commentators have, however, argued that sexual history evidence no longer plays a substantive role in juror's assessments of a complainant due to changing social mores (O'Malley, 2013; Thomason, 2018); yet, my findings continue to situate juror discussions of sexual history as inextricably linked to perceptions of both complainant and defendant credibility.

Much like findings relating to relevance, some good practice in the form of overt myth-busting was observed by participant jurors; however, endorsement of myths linking sexual history evidence to witness credibility pervaded through 10 of the 12 sexual history juries in my dataset. Notably, much like the heteronormative narratives discussed in Chapter 5, most of these framings were not overt and explicit, but instead discussed in a seemingly more socially desirable and subtle way. However, this is not to say that such narratives were not distinctly problematic. Indeed throughout panels, jurors drew on sexual history evidence to posit the complainant as a deceptive and untrustworthy witness, meaning she was 'othered' and routinely portrayed as undeserving of the court's sympathy. Concurrently, the defendant tended to be portrayed as being more open about the previous sexual history evidence, thereby making him a more trustworthy and believable witness. Whilst some myth-busting was present, this was notably much more limited than myth-busting about the supposed relevance of sexual history evidence, indicating the potentially more engrained nature of these attitudes amongst participant jurors.

As with Chapter 5, I will begin the chapter by situating and reiterating what we know about the links between sexual history evidence and perceptions of witness credibility. I will then draw, for the first time, on notable quantitative findings that emerged from juror responses to Willmott et al.'s (2018) juror decision scale, which showed quantifiable links between the inclusion

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of sexual history evidence at trial and altered juror perceptions of witness credibility. For the remainder of the chapter, I will continue to scrutinise deliberative narratives that emerged throughout my dataset, firstly illustrating myth-busting and then exemplifying problematic credibility narratives.

6.1 Situating Credibility Narratives

Prior to the implementation of rape shield provisions, evidence of previous sexual history was widely considered relevant at trial to judge the credibility and virtue of a female complainant (Levanon, 2012). Early rulings held that questions about sexual history may be asked to illustrate a female complainant's general 'light character' (*R v James Barker*, 1829 cited in Durston, 1998), and cross-examination on sexual history to show evidence of 'general bad character' (*R v Moses Martin and Aaron Martin*, 1834 cited in Durston, 1998) or prostitution (McGlynn, 2017) was routinely deemed relevant to her credit and thereby permissible in court. These historic representations customarily held evidence of promiscuity as synonymous with untrustworthiness (Farrell, 2017) and indeed, where corroboration evidence did not exist, determinations of the complainant's supposed moral credibility were central to deciding whether her word as a woman could be believed by the court (Farrell, 2017; Smith, 2018). Dishonesty was ultimately widely portrayed as a peculiarly feminine trait, with unchaste women particularly unbelievable as witnesses (Wigmore, 1913).

Inevitably, these historic and outright assertions of sexually experienced women as untrustworthy liars are no longer sanctioned in the 21st century English and Welsh society; however, the implicit link between sexual history evidence and the perceived credit of a complainant arguably remains pervasive in the courtroom. Research has shown that where a lack of tangible forensic or third-party evidence exists, assessments of a complainant's credibility invariably lay at the heart of jurors' judgements of evidence in a rape trial (McDonald, 1994; Easteal and Judd, 2008). These judgements often hinge substantially upon pre-existing attitudes, expectations, and beliefs about how a 'real' rape victim would or should behave (Taylor and Judo, 2005; Dinos et al., 2015), with evidence of un-chasteness largely incompatible with these idealised misconceptions of victimhood (Easteal and Judd, 2008; Phipps, 2009). Schuller and Hastings' (2002) findings, for example, revealed that where jurors had heard evidence of the complainant's previous sexual relationship with the defendant, they typically reported more negative evaluations of the female complainant and higher levels of victim blame. Similarly, 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.'

Critics may be quick to point out that the above findings are somewhat outdated and may instead draw on Thomas's (2020) recent findings as evidence of changing attitudes amongst jurors, positing rape myth endorsement

as a defunct issue. Inevitably, Thomas's findings add to the research trajectory, illustrating that modern-day jurors can recognise the inaccuracy or, at least, undesirability of explicit, written rape myth statements. However, against this, the recent larges-cale Scottish jury research exemplified ongoing and widespread myth endorsement, with jurors tending to focus on the complainant's actions and credibility rather than those of the accused (Chalmers et al., 2021). Meanwhile, numerous recent observational studies have continued to highlight ongoing links between sexual history evidence and framings of complainant credibility in the English and Welsh courtroom (Smith, 2018; Temkin et al., 2018). Daly (2021), for example, described narratives in which complainants were portrayed as flirtatious and sexually experienced, seemingly not only to infer an increased likelihood of consent but also serving to delegitimise the complainant's character and moral credibility before the jury. Whilst observational research cannot assess how such narratives influenced juror interpretations and perceptions of the case, my mock jury findings exemplify this focus on the complainant's character and credibility as explicitly linked to her previous sexual history.

6.2 Juror Decision Scale Trends

Willmott et al.'s (2018) juror decision scale [JDS] is a validated, self-report measure of juror decision-making, comprised of 16 items, divided over three factors: decision confidence, complainant believability, and defendant believability. As stated in Chapter 2, all participants in my research were required to complete a JDS both before and after deliberations to assess individual perceptions of the trial evidence and witnesses. This provided important quantitative data about juror perceptions of the case as well as insights into each participant's deliberative journey. Whilst some of these results sit beyond the remit of the current book, important findings about the complex impact of sexual history evidence on juror determinations of witness believability will be discussed throughout the current section.

Before outlining these trends, it is important to remark from the outset that the sample obtained in my research was relatively small and therefore I am not seeking to make exhaustive or universal statistical claims about juror decision-making processes. Indeed, differences amongst juror characteristics, demographic information, attitudes, and case evidence mean that conclusive, wholly generalisable claims about jury decision-making are nigh-on impossible, even where a large sample is used, whether scrutinising real or mock jurors. What I am seeking to present, however, is novel and original data that offers important insights into the *potential* distorting risk posed by sexual history evidence and its potential interaction with wider rape myths and stereotypes, illustrated by a community sample of jury eligible individuals. In doing so, I submit that sexual history evidence ultimately holds the potential (and is likely) to prejudice juror determinations of witness credibility, and this

very real risk must be considered as a collateral impact when thinking about reforming the current legislative regime.

Indeed in my dataset, analyses of the JDS revealed statistically significant findings between my scenario variations and juror perceptions of witness credibility. These showed a clear interaction effect, between the level of sexual history evidence and level of consistency in the trial scenario, on jurors' perceptions of both complainant and defendant believability, across pre- and post-deliberation scales.[1] In essence, these findings generally showed that the complainant was perceived as less believable, and the defendant more so, where sexual history evidence had been introduced. Yet, a second and more novel finding showed that the impact of sexual history evidence on juror perceptions of complainant and defendant believability was highly dependent on the level of consistency in the complainant's account. Where the complainant's narrative at trial was presented as wholly consistent, the impact of sexual history evidence was minimal. However, crucially, where the complainant's account at trial was not seen to be consistent and her stereotypical 'real rape' reaction was altered,[2] the impact of sexual history evidence became substantial. These findings are displayed in profile plots in figures 6.1–6.4.

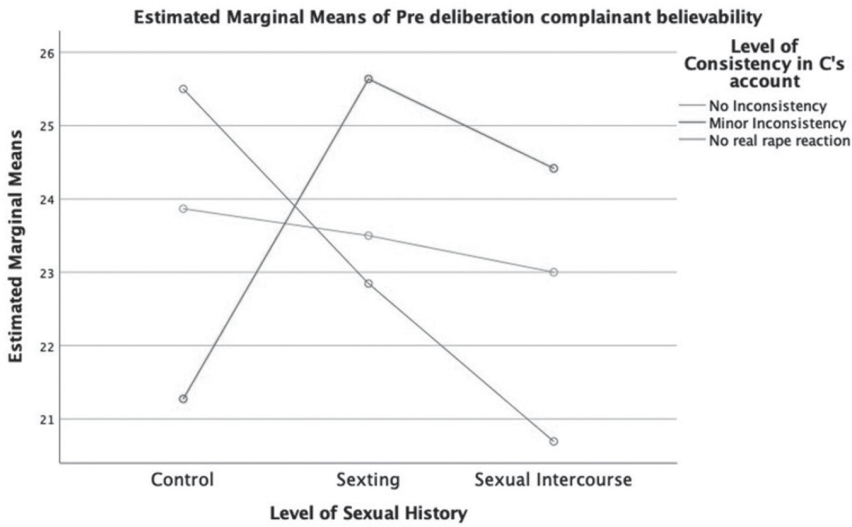

Figure 6.1 Profile Plot for Pre-Deliberation Complainant Believability.

Again, it is important to acknowledge that the above stated trends are not without some deviation, which can be seen on the profile plots. This is most likely a result of the relatively small sample size, meaning that anomalies and deviations in the dataset are exemplified. For example Scenario

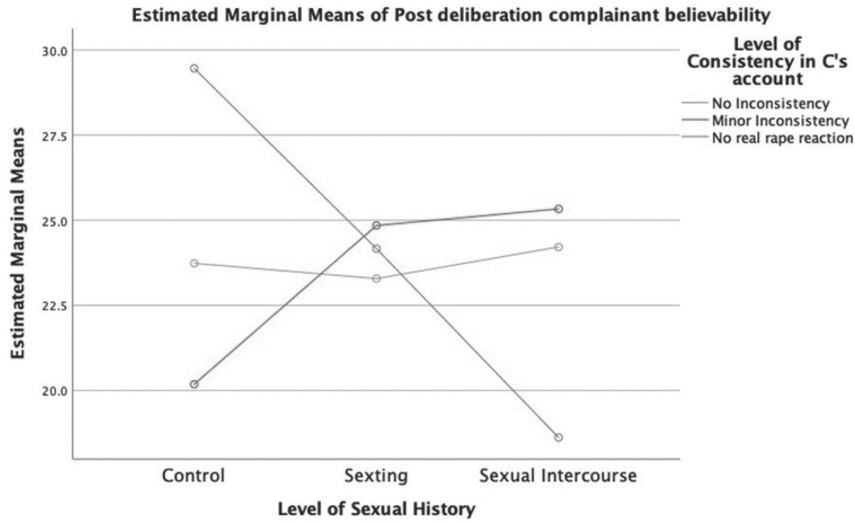

Figure 6.2 Profile Plot for Post-Deliberation Complainant Believability.

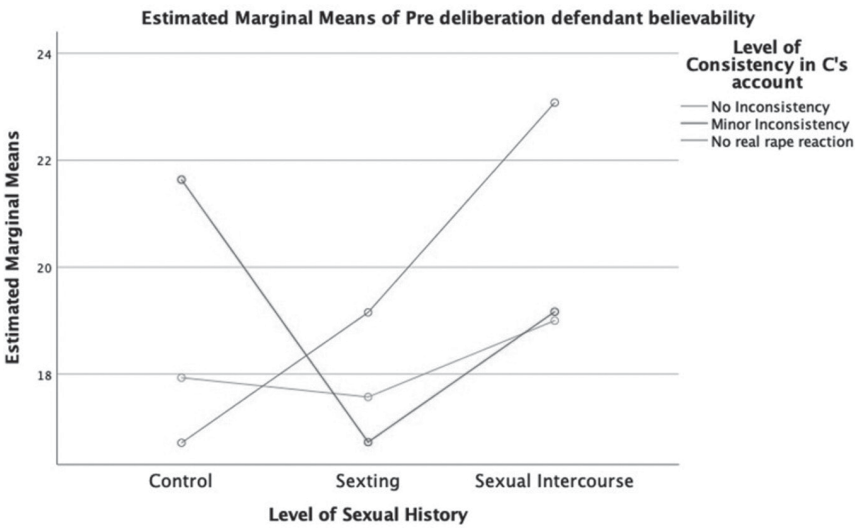

Figure 6.3 Profile Plot for Pre-Deliberation Defendant Believability.

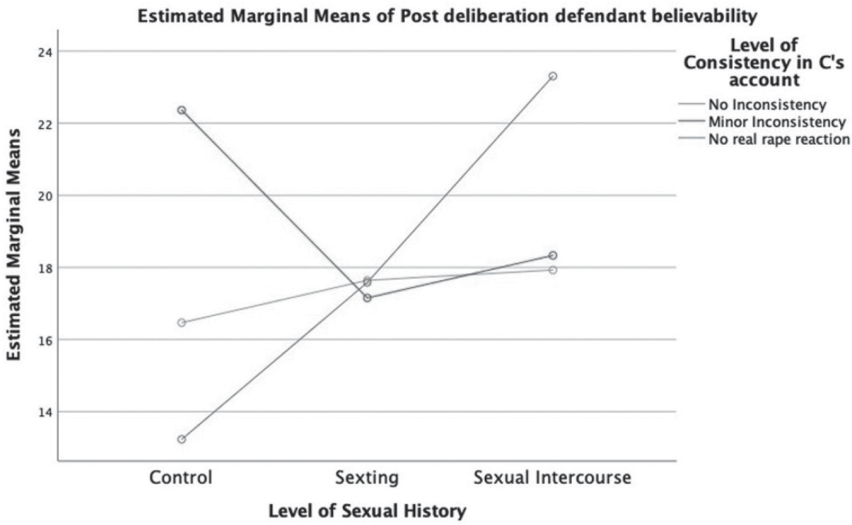

Figure 6.4 Profile Plot for Post-Deliberation Defendant Believability.

8, being the control/minor inconsistency scenario, deviates from the wider trends in all of the above instances and thereby skews the trends of all of the minor inconsistency scenarios. This inevitably represents a limitation of my findings and emphasises the need for further, large-scale research on this topic. Nevertheless, I argue that it is important not to completely dismiss statistical insights on this basis, as there remain pertinent and novel trends which provide crucial insight into the impact of sexual history evidence and rape mythology more broadly on juror perceptions of complainant and defendant believability. These, though exploratory, provide vital and novel insights to ongoing s.41 reform debates.

At their core, these findings affirm what has been suggested by feminist commentators for decades: that the inclusion of sexual history evidence at trial is likely to decrease the perceived credibility of the complainant amongst jurors (McColgan, 1996; Easton, 2000; Temkin, 2003; Bhola-Dare and Fletcher, 2020). Thus, despite substantial progress of gender equality and women's movements in recent years (McMahon, 2011), these findings reflect similar outcomes to those gathered by Catton (1975) and Schuller and Hastings (2002) some decades ago. Whilst this is not to say that no progress has been made in terms of juror's adherence to rape myths around previous sexual history evidence and more generally – in fact, I believe the current dataset shows that the opposite is true – but crucially that more work is necessary to continue to expel the overarching prejudicial impact of this evidence on jurors.

The interaction effect between sexual history and the level of consistency/adherence to rape myths in the complainant's account is particularly pertinent and highly consequential to reform discussions. It undoubtedly illustrates a complex and nuanced impact of this evidence and exemplifies the necessity to consider reform debates holistically, with reference to wider case facts and the broader 'rape culture' of society and the courtroom. Indeed, whilst the premise of an interplay between sexual history evidence and wider rape mythology is not a new or novel projection (Hey, 2012; McGlynn, 2018; Bhola-Dare and Fletcher, 2020), these findings verify such theorisation and exemplify the wider harms posed by sexual history within juror case evaluation.

I must draw attention particularly to the impact of sexual history evidence in each of the 'no real rape reaction' consistency variations. These findings are without anomalies and show a clear and substantial trend towards the perceived credit of both the complainant and defendant, where sexual history evidence had been introduced at trial. From this I argue, we must consider that the prejudicial threat posed by sexual history evidence is substantial, particularly in trials whereby the complainant does not fit the stereotypical 'ideal victim' trope (Christie, 1986) (both in her testimony and reaction at the time of the alleged rape). This is a highly problematic finding in itself, but especially so, when we consider recent observational datasets of Smith (2018) and Daly (2021) who have emphasised defence barristers' routine reliance on rape myths, rational ideals, and representations of ideal victimhood. Drawing on these findings in conjunction with my own, therefore, it may be argued that the likelihood of sexual history evidence substantially altering juror determinations of witness credibility is likely, in a context whereby the veracity of her allegation is already often put on trial.

Such a finding, therefore, represents a clear intersectional impact of sexual history evidence, which interacts with notions of complainant credibility, believability, and respectability (Phipps, 2009; McGlynn, 2017) and must not be understated. Consideration of this interplay should be reflected in both legislative debates about reform and wider practical discussions about how sexual history evidence is introduced at trial to potentially minimise the prejudicial potential.

6.3 Positive Attitudes and Myth-Busting

Much like framings towards the relevance of sexual history evidence discussed in Chapter 5, narratives around credibility were also met with some myth-busting and positive practice. Whilst these myth-busting narratives were relatively rare, occurring on limited instances in 4 of the 12 sexual history juries, they positively emphasised that it is inappropriate to draw inferences about complainant credibility from her previous sexual history. In doing so, each showed overt challenge to the myths linking sexual history evidence with determinations of character and credibility.

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)

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)

The recognition that sexual history evidence holds the potential to 'discredit her character' based on 'old clichés' reflects some level of understanding amongst these participant jurors towards the inaccuracy of outmoded rape myths about sexual character and reputation. In doing so, these narratives seek to dismiss any suggestion that the complainant's credibility may be diminished as a result of her sexual history, and more broadly seek to reject any such inferences or suggestions of victim blame made by defence counsel.

It is interesting to note here that, in practice, rape myths were not used during questioning of sexual history in the trial stimulus. However, the above juror narratives seemingly represent an awareness of the potential victim-blaming implications of sexual history evidence amongst these jurors. Meanwhile, the narratives themselves – whilst demonstrating strong myth-busting sentiments – all show a generalised focus on rape trials broadly, rather than applying these myth-busters specifically to the case in hand. None mentioned specific details of the case in hand, but instead made broader remarks about how evidence is often introduced in rape trials. As such, this seemingly illustrates that whilst these jurors were very aware of the potential improper influence of rape myths on justice discourse, particularly within the defence case, they were less able to identify and reject *applied* myth-endorsement in the specific case they had been given, or indeed the more subtle and implicit myth-endorsement put forward by fellow jurors within deliberations. This inevitably represents an important finding about the applied and engrained nature of rape myth endorsement that is much harder to tackle and overcome than explicit and overt myth endorsement such as that tested in Thomas's (2020) recent real jury research.

A second theme of myth-busting credibility narratives tended to denote the difficulties that a complainant may face in having their sexual history brought before the court. These myth-busting attempts sought to justify and rationalise the complainant's perceived reluctance to discuss such evidence openly before the court to dismiss suggestions that she was not a trustworthy witness.

> *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 and recognised the realities of perusing a rape allegation. This reflects strong myth-busting sentiment and served to acknowledge and justify the complainant's reluctance, seeking to dismiss focus on the complainant's credibility. Yet, whilst strong, such statements were notably rare, occurring on just three occasions throughout the dataset, two of which were in the same jury.

Meanwhile the efficacy of such narratives appeared notably low, with none of these statements being directly responded to, or prompting any further discussion about the potential difficulties a complainant may face in having her sexual history evidence discussed before the court. Such reluctance to discuss these complexities for complainants therefore seemingly illustrates the engrained nature of assumptions regarding the relevance of this evidence and the perceived necessity for it to be raised in court. Thereby, whilst myth-busting must not be understated as a distinct positive, in practice, it often seemingly did little to alter engrained opinions and attitudes of fellow jurors.

6.4 The Deceptive Complainant

Despite some myth-busting, myth-endorsement remained routine in my dataset and supported findings of the JDS by showing links between sexual history evidence and juror perceptions of the complainant as a less credible, untrustworthy, and even deceptive witness (Easton, 2000; McGlynn, 2017). Much like narratives discussed in Chapter 5, these were often more subtle than traditional assumptions which suggested that supposed promiscuous or unchaste women simply could not be trusted by the court (Farrell, 2017). Yet, despite their subtlety, the implications of the narratives I observed continued to be highly problematic.

For example, participant jurors widely suggested that the complainant had appeared deceptive during cross-examination on her previous sexual history, and as a result, she was perceived as less or not at all trustworthy as a witness:

> *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)

Interestingly, the reference to supposed 'guilt' and suggestion that this was a 'cause for concern' both exemplify framings and narratives that we might ordinarily associate with those *accused* of a crime as opposed to complainants. Thus, whilst not overtly suggesting that the complainant should not be believed as a direct result of her sexual history, these framings legitimised scrutiny of the complainant's credibility as a witness, following her perceived evasive response to questioning at trial. This narrative is complex in that some analysis of the complainant's evidence is inherently legitimate and may lawfully be influential to juror determinations of trial evidence (McEwan, 2005; Thomason, 2018). However, the problematic nature of these narratives arises through the apparent diversionary impact of sexual history evidence, serving to put the complainant on trial as opposed to the defendant (Payne, 2009), and holding perceptions of complainant credibility as central to determinations of evidence. In doing so, such narratives also seemingly give implicit credence to the idea that rape victims will respond to questioning in a rational or prescribed manner. The fact the complainant deviated from this expectation in the observed case ultimately resulted in jurors framing the complainant as less credible and, in turn, even attributing terms associated with wrongdoing and guilt to her.

It seems prudent at this juncture to draw on philosophical jury literature and discuss Puddifoot's (2020) 'overcritical juror argument.' Puddifoot's (2020) analysis presents evidence showing that, where jurors hold an initial distrust towards a witness, they are more likely to perceive errors and inconsistencies in their testimony as an intention to deceive, even where such inconsistencies may be trivial. In turn, they are more likely to perceive this witness as incredible and deceptive and not convict on this basis, even where such errors are seemingly relatively inconsequential to broader case evidence. Whilst Puddifoot's (2020) analysis is focused on eyewitness testimony rather than complainant testimony, the argument is seemingly applicable to my findings. Indeed, rape victims are infamously widely met with scepticism and distrust at trial due to stereotypes overstating the spectre of false allegations (Kelly, 2010). Embedded within such scepticism are implicit framings of how a 'real' victim would behave and respond at trial (Estrich, 1987), and therefore, where the complainant was perceived not to have presented evidence in the 'appropriate' way, she was deemed as deceptive and incredible. This equally accords with Smith's (2018) findings, in which she observed a dichotomy to be presented between the wholly credible and wholly incredible complainant, meaning that where inconsistencies or a supposed lack of rationality arose, the complainant was presented as *entirely* untrustworthy to the court. My findings arguably exemplify how such attitudes permeate into the jury room.

The premise that the complainant had purposefully withheld her sexual history as a matter of deception further engendered perceptions of her incredibility 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 due to her supposed deception about her sexual history seemingly highlights a distinct difficulty faced by complainants in modern trials. Indeed, rather than exploring the reasons as to why the complainant may have been nervous or anxious to discuss this evidence in open court, jurors instead posited her as an unreliable witness because of this. In practice, sexual history is noted as potentially the most emotive and difficult type of evidence for complainants to discuss before the court, acting as a distinct deterrent to even pursuing an allegation (Kelly et al. 2006; Hanna, 2021). Yet, rather than exploring this as a potential justification of the complainant's perceived evasiveness, it was instead used to attack her overarching credibility. As a result of her perceived deception, jurors exemplified notions of dislike or distrust towards

the complainant, again therefore illustrating the potential of such evidence to wholly re-direct and re-frame jurors' assessments of trial and their perception of the complainant's character and credibility.

Furthermore, the assertation that 'surely that's evidence worth saying' appeared to openly assert that sexual history evidence is *relevant* to the trial facts. This, despite earlier assertion by the same juror that sexual history evidence 'should having no bearing.' The discussion by this juror is thereby highly contradictory, because if J120 believed that sexual history evidence should not impact on judgements of the complainant or her consent, then there should have been no reason that the complainant *ought* to have introduced this at trial. This finding exemplifies the complexity and nuance associated with sexual history evidence and myth endorsement more generally, because even if jurors can recognise overt and explicit rape myths, they may still rely on more implicit and subtle mythology. In doing so, it may be theorised that the findings exemplify some level of social desirability associated with myth-busting narratives, as opposed to jurors' clear understanding of the true irrelevance of such evidence. Thus, whilst recognition of overt and explicit myth endorsement must be seen as a positive, the engrained and embedded nature of myth endorsement must remain a cause for concern.

Meanwhile, the deceptive complainant narrative was not only used to discredit and question the trustworthiness of the complainant but also highlighted as a potential tactical decision by the complainant to better advance her case:

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)

Such narratives depict the complainant as misleading and underhanded by supposedly hiding this evidence in attempts to win favour or make her case appear more plausible. Such framings, therefore, show clear association between the complainant's previous sexual history and a focus on her credibility and character. Again, this framing serves to redirect focus from the steps of the defendant to ascertain consent onto an overarching focus about the truth and credibility of the complainant. Ultimately, it represents somewhat of a 'lose-lose situation' for complainants, who are judged negatively

where their sexual history is introduced but equally negatively for failing to introduce such information in the supposed 'correct' way.

This finding is particularly important to consider when discussing proposals for reform. 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. As such, it seemingly emphasises the necessity for s.41 applications to be decided before commencement of the trial and to avoid late applications wherever possible. This should ensure that where relevant, such evidence is clearly set out by all parties from the outset of trial to minimise prejudicial impact on the jury. Whilst I acknowledge that there may be limited instances whereby a pre-trial application may not be possible (Williams, 2020), the importance of early applications for both complainant wellbeing and trial preparation should ultimately not be understated.

Hoyano's (2019) research arguably indicates that fulfilment of this procedural requirement is currently inadequate, with 35% of sexual history applications analysed in her sample, filed after the prescribed time limit. Hoyano (2019) suggested that a dominant reason for this non-compliance is delayed prosecution disclosure, as well as issues arising late in the trial preparation process or during trial itself. Whilst establishing whether this is the prominent reason behind delayed applications is beyond the scope of this book, I argue that irrespective of cause, this proportion of late applications should be seen as a matter of key concern. Attempts to mitigate against the risk of late applications must therefore be treated with notable importance by both legal counsel and legislators alike.

6.4.1 The Trusted Defendant

In response to narratives about the supposed deceptive and evasive complainant, in 5 of the 12 sexual history juries emerged parallel narratives regarding the supposedly honest, open, and trustworthy defendant. Thus, reaffirming the quantitative JDS findings, 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. Whilst these framings of the defendant were rarer than those about the complainant, they were also even more sparsely myth-busted and thus seemingly served to bolster perceptions of the defendant (McGlynn, 2017). As such, scrutiny of these narratives is necessary to comprehensively assess the impact of sexual history evidence.

Comparisons of the complainant and defendant's response to the sexual history evidence introduced at trial tended to highlight flaws in the complainant's account, which in turn served to strengthen and bolster perceptions of the defendant's narrative and supposed 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 framing reflects a level of scepticism and distrust of the complainant's account as a result of her perceived evasiveness towards the sexual history questioning, and in doing so, seemingly awards this credit to the defendant. In drawing these direct comparisons, the narrative however failed to acknowledge potential reasons as to why the complainant may not have been as open about this evidence, and also failed to realise that the sexual history evidence was brought as part of the defence case. Crucially, it reflects how sexual history evidence can serve as a diversion tactic for defence counsel, 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 likeable witness.

Not only did these framings of the defendant as being more open about his sexual history increase the perceived credit of the defendant in relation to this evidence, but they also seemingly 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)

Both of these quotes exemplify a perceived association by jurors, between the defendant's supposed openness about his sexual history with the complainant and an increased trust towards his evidence as a whole. It illustrates how one piece of sexual history evidence can ultimately sway jurors' perspectives of the wider case or perception of witnesses and potentially impact on verdict preferences. In doing so, it seemingly justifies the need for robust legislative restrictions to avoid these unintended collateral impacts.

6.5 The Undeserving Complainant

Alongside framings that proclaimed the complainant as a deceptive and thereby untrustworthy *witness*, further narratives emerged which seemingly drew on the complainant's previous sexual history to call into question her character and credibility as an *individual*. Such narratives were not as frequent as other problematic narratives that I have discussed throughout the previous and current chapter, arising across 4 of the 12 sexual history juries.

Yet, these are perhaps more reflective of what has been proclaimed in high-profile critiques about the ongoing reliance on sexual history evidence at trial (McColgan, 1996; Baird, 2016), which has been argued as encouraging inappropriate reliance on ideals of character, respectability, and appropriate socio-sexual behaviour (Phipps, 2009; McGlynn, 2017).

Before scrutinising such narratives, it is perhaps useful to reiterate McColgan's (1996) theorisation of moral credibility. In this, she acknowledged that for some years it has been rarely suggested that sexually active women are less truthful but suggested that perceptions of certain complainant's as *morally* inferior and less deserving of the court's sympathy, remain. This idea of 'moral credibility' and influence of sexual character evidence perhaps helps to explain why even in modern trials the defence may continue to find value in introducing sexual history evidence at trial. Whilst it is argued by some that ongoing reliance on sexual history is limited to adducing only relevant evidence (Hoyano, 2019), observational findings have ultimately illustrated the opposite, with routine reliance on such evidence to call into question the credibility of the complainant (Smith, 2018; Temkin et al., 2018; Daly, 2021). It is therefore perhaps reasonable to suggest that such attitudes may in turn permeate perceptions in the jury room.

Indeed, turning to juror deliberative narratives in my dataset, focus on the complainant's supposed moral credibility was evident on numerous occasions and showed persistent associations between evidence of the complainants' previous sexual behaviour and her consequential perceived lack of credibility. For example, in Jury 17, 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 rather than accurately understanding this as legitimate statement of sexual autonomy. In turn, she suggested such a portrayal was at odds with evidence of the complainant's sexting relationship with the defendant, thereby illustrating highly problematic notions of victim blame based on the complainant's sexual behaviour and reputation. Significantly, the term '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 that 'sexting' evidence is somehow discordant with a 'squeaky clean image' thereby illustrates how evidence

of a complainant's sexual history may continue to engender prejudicial pronouncements about her character, and seemingly invite moral judgements amongst jurors. In doing so, this illustrates a shifting focus of trial from scrutiny of the defendant's actions towards the supposed respectability and moral character of the complainant, thereby also shifting legal and moral blame.

Similarly, in Jury 5, discussion amongst jurors illustrated moralistic judgements towards the character of the complainant, given her previous sexual history:

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)

The suggestion that the complainant had withheld telling her friend about her sexting behaviour infers that such behaviour is somewhat shameful or embarrassing, despite this being a widespread practice, particularly amongst younger generations (Crofts et al., 2016). More concerningly perhaps, the inference is given that sexting is incompatible with the good character that the complainant's friend had referenced during trial. Such narrative, therefore, shows a direct association between the complainant's previous sexual history evidence and juror focus on her sexual character, actions, and lifestyle in order to establish whether she was a credible witness. Again, I must emphasise that juror focus on the complainant's credibility as a witness is legitimate within their deliberations. However, what is illegitimate are these prejudicial framings of her personal character and credibility, prompted by stereotypical perceptions of respectability, virtue, and sexual reputation.

Similarly in Jury 5, jurors speculated as to whether the complainant 'is like that,' illustrating further scrutiny of the complainant's character and credibility, based upon evidence of her previous sexual history with the defendant:

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 and credibility of the complainant rather than defendant, in attempts to ascertain what 'type' of girl she was, and in turn it seems to determine whether she should be considered as a credible and deserving witness. These narratives represent a clear othering of rape complainants in general, attempting to differentiate between good and deserving complainants and the promiscuous other. In doing so, these seemingly add ongoing credence to Christie's (1986) conceptualisation of the 'ideal victim,' which theorised that complex social structures proclaim certain individuals to be considered as more deserving of victim status than others. These judgements of deservingness draw on representations of respectability and blamelessness (Phipps, 2009; Gravelin et al., 2019) to ultimately establish whether a complainant should be awarded victim status. Inevitably, this discussion in my juries was not as overt and explicit as historical links between a complainant's chasteness and determinations of whether she was 'rape-able' (Farrell, 2017); however, the underlying consideration of her victim status based on stereotypical framings of sexual character and reputation remained entrenched.

Further, we may also draw on Freud's (1905) conceptualisation of the 'Madonna-whore complex' which denotes two dimensions to female sexuality and character. This dichotomy attributes polarised factions of female sexuality as 'either good, chaste and pure Madonnas or as bad, promiscuous and seductive whores' (Bareket et al., 2018). Juror speculation towards the complainant as a certain 'type of girl' and inferences towards her status as a victim, arguably, represent adherence to this theorisation in response to her previous sexual history. Meanwhile, further suggestions in deliberations are that:

> *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)

This equally revealed strong adherence to this stereotypical perception of female sexual character and ongoing rape myth endorsement in response to previous sexual history evidence.

Fundamentally, each of the above narratives reflect improper consideration of the complainant's character and perceived deservingness as a victim, illustrating ongoing problematic links between the complainant's sexual history and perceptions of her credibility as an individual. They thereby add support to the suggestion that rape complainants are often treated as if the allegation of rape was a commentary on their previous sexual behaviour or sexual character (Phipps, 2009), with their credibility as a 'non-consenter' often hinging upon stereotypes about her sexual history and reputation (Stanko, 1985; Phipps, 2009).

Despite their subtlety, these inferences remained problematic in giving ongoing credence to outdated and misguided rape myths. Further, perhaps given the subtlety of these narratives, myth-busting remained limited and

instead tended to be met with broad agreement amongst jury panels. Thus, seemingly indicating that where myth advancement is put forward more subtly, more individuals will readily endorse and affirm such views. Again therefore, prompting somewhat of a lose-lose or catch-22 situation for complainants, whereby if she seemingly failed to openly discuss her sexual history before the court, she was perceived as deceptive. Yet, where this evidence was adduced, she was often perceived as morally inferior and non-credible.

6.6 Chapter Summary

Extensive literature has theorised the potential for sexual history evidence to detract from juror perceptions of complainant credibility, based on outdated stereotypical ideals of respectability, virtue, and morality (Easton, 2000; Phipps, 2009; Baird, 2016; McGlynn, 2017). More recently, some commentators have sought to argue that these associations no longer hold weight due to changing social norms around sex and gender (O'Malley, 2013; Thomason, 2018; Thomas, 2020). Yet, whilst findings discussed throughout this chapter have shown increased subtlety of these myths, alongside some positive myth-busting, distinct prejudicial attitudes remained prevalent and problematic. It is thereby perhaps pragmatic to suggest that such myth endorsement has eased, rather than been eliminated (Farrell, 2017).

Indeed, I do not seek to argue that juror interpretations of sexual history continue to give credence to once held historic assumptions of women as 'insatiable and sinful sirens' (Farrell, 2017), 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.

For example, findings of the JDS illustrated how sexual history evidence may serve to detract from perceptions of the complainant's believability and bolster those of the defendant. These trends were amplified where the complainant was also perceived as less consistent and where her reaction did not accord with stereotypical assumptions about how a victim would or should behave, thereby building on the current knowledge base by highlighting the complex and nuanced impact of this evidence.

Meanwhile, my findings also hold significant implications about how *the introduction* of sexual history evidence at trial can alter juror reactions. Whilst the complainant's hesitance to discuss sexual history evidence before an open court, I argue, is entirely understandable given that it is highly private and emotive (Hanna, 2021), jurors often framed the complainant as deceptive or tactical as a result. In turn, the defendant and his overall case tended to be deemed as believable on account of this. Meanwhile, my sample also revealed problematic narratives serving to 'other' the complainant as an undeserving witness, based upon evidence of her sexual history, echoing outmoded assumptions of the ideal victim trope and Madonna-whore complex.

From this, we may argue that complainant's often find themselves in a lose-lose situation at trial, whereby they may be judged negatively for appearing to hide her sexual history from the court, but concurrently may also be judged negatively as a supposed 'promiscuous' complainant. Inevitably, these findings therefore represent a clear necessity to robustly restrict sexual history evidence to only very relevant instances and follow procedural safeguards around timing of applications and content of questioning narratives to ensure that the prejudicial impact is mitigated against.

Notes

1 Two-way ANOVA tests were run for both complainant and defendant believability scores pre- and post-deliberation. The 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.
2 Rather than running away from the house immediately and ringing a friend in tears to report her victimisation, the complainant instead returned to the BBQ for 30 minutes and was simply described as quiet.

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7 Sexual History Evidence
A Complicating Factor?

Typically, the bulk of literature scrutinising the impact of sexual history evidence has tended to focus on potential endorsement of the so-called twin myths (*R v Seaboyer*, 1991) as discussed in Chapters 5 and 6 of this book. Yet alongside the problematic nature of these assumptions, a major and often overlooked challenge in sexual history debates is how such evidence may impact on the wider deliberative dynamic. By deliberative dynamic, I refer to the processes in which jurors form their narrative interpretation of the case, challenge and affirm opinions, interpret, and rely upon case evidence and ultimately operate collectively to consider and reach a group verdict. As there has been a distinct paucity of empirical research examining the impact of sexual history on jury deliberations, both in England and Wales and globally,[1] this area of contention has seemingly been somewhat unobserved and concealed.

From the limited theorisation that does exist in this area, it has been suggested that the inclusion of sexual history evidence at trial may distort the truth-finding role of the jury or distract from the central task of determining whether consent was present (*R v A [No.2],* (2001); McGlynn, 2017). Members of the Heilbron Committee (1975:Para133) even went as far as to suggest that the exclusion of sexual history evidence from trial 'will make it easier for juries to arrive at a true verdict.' I want to clarify here that I am not suggesting in any sense that *relevant* sexual history evidence should ever be excluded from trial, even where this could complicate the deliberative ideal; however, I do feel it important to consider how sexual history evidence fits into the wider deliberative ideal as part of ongoing reform discussions.

Given the range of potential variables and determinants that may impact on any jury simulation, I must caveat the remainder of the chapter as not seeking to provide an all-encompassing synopsis of the deliberative process or juror determinations of guilt. Instead, I seek to spotlight and accentuate a number of key insights that emerged throughout my simulation research and call these to attention within wider debates around the impact of sexual history evidence. I begin this analysis with a brief examination of verdict trends, which, despite the small sample size of my research, provide useful insights into the potentially complicating impact of sexual history evidence.

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I then buttress this with similar findings that emerged from the qualitative transcripts. The second half of the chapter focuses upon the indirect and implicit impact of sexual history evidence, influencing juror perceptions of complainant credibility and false allegation narratives.

7.1 Verdict Trends

Some of the most dominant media narratives and politicised claims about sexual history evidence have tended to pivot around the suggestion that the inclusion of such evidence at trial is likely to decrease the chance of conviction and thereby leave guilty men walking free of justice (Mirror, 2009; England, 2016; Wharton, 2018). In practice, legal safeguards that uphold the confidentiality of jury decision-making (Contempt of Court Act, 1981) make such a claim somewhat unfeasible to truly assess, and academic research on this matter has remained both limited and inconsistent (Hoyano, 2019; Kelly et al., 2006). Nevertheless, Kelly et al.'s (2006) analysis of case tracking data did reveal a statistically significant relationship between a s.41 application being granted and an increased chance of acquittal.[2] Whilst the methodological approach used naturally inhibits a definite causal connection being drawn due to the absence of juror reasoning, their finding does indicate that jurors are hesitant to convict whereby they have heard evidence of the complainant's previous sexual history. As such, this finding has been routinely cited in arguments that call for further restrictions to sexual history evidence at trial (Baird, 2016; Harman and Baird, 2017). However, numerous critics have sought to dismiss Kelly et al.'s findings as outdated (Thomason, 2018) or incredible (Hoyano, 2019). In the most recent case analysis of s.41 applications, Hoyano (2019) did not attempt to examine any causal connection between a sexual history application and conviction rates, remarking that it would be impossible to design such an assessment. Whilst I do not seek to discount or overlook the difficulty (or arguably impossibility) in establishing a true causal connection between sexual history applications and conviction rates, I do maintain that some insight and analysis into correlations and trends continues to provide some useful insights into the impact of this highly controversial piece of evidence.

Therefore, whilst I do not wish to dwell on verdict trends that emerged from my mock jury research, in part due to the relatively small sample size which inevitably reduces the generalisability of these findings and equally because of the range of factors present in any jury deliberation that can impact on final verdicts, I do think it is important to highlight some of the key statistical trends that did arise. Some caution must undoubtedly be applied to this in terms of widespread application of these findings; however, the observable trends illuminate important insights for ongoing reform discussions.

Firstly, it is important to remark that my dataset did not reveal a statistically significant association between the inclusion of sexual history evidence at trial and final verdict trends. As such, I do not seek to make any definitive

claims relating to the impact of sexual history evidence on the chances of acquittal or conviction. Nevertheless, some interesting trends did emerge. A chi-squared test of association between sexual history evidence and initial individual juror verdicts did not reach statistical significance, but markedly was *approaching* this figure ($p = .053$). Thereby, whilst I cannot make any statistically generalisable claims here, the cross-tabulation trend did indicate less guilty verdicts than expected in the sexual intercourse scenarios and more than expected in the control scenarios. Despite the lack of statistical significance,[3] this remains informative in highlighting the *potential* influence of sexual history evidence on individual jurors' initial narrative interpretation of case facts (Pennington and Hastie, 1992). Positively, this trend lessened in post-deliberation, adding support to the assertion that the deliberation process can mitigate against individual biases and reduce the impact of these on final case outcomes (Kaplan and Miller, 1978; Finch and Munro, 2008). Yet, the trend towards less initial, individual guilty verdicts in cases where sexual history evidence had been introduced illustrates the potential of sexual history evidence to alter juror determinations of the case, and thereby should arguably be considered when thinking about the probative value versus prejudicial nature of such evidence.

Alongside verdict outcomes, a statistically significant association was observed, showing unanimous verdicts to be significantly *less likely* where sexual history evidence had been introduced during the trial scenario ($p = .023$).[4] There was a unanimous verdict for 83.33% of control scenarios, compared to 50% of sexting scenarios and just 33.33% of sexual intercourse scenarios. Notably, I acknowledge that the shortened deliberation time could decrease the likelihood of unanimous verdicts; however, this must not detract from the observed finding that jury unanimity altered when the level of sexual history was altered. Again, whilst a definitive causal relationship between these two variables is impossible to establish, the trend itself seemingly points towards sexual history evidence being a complicating factor during the deliberation process. This inference is equally bolstered by the qualitative findings discussed in Chapters 5 and 6, which revealed the contentious and controversial nature of deliberative narratives about sexual history evidence.

In conjunction with this finding, trends also emerged between the inclusion of sexual history evidence and deliberation time. Interestingly, 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 ($n = 30.83$). This finding was somewhat unexpected, seemingly indicating that sexting evidence introduced more complication and contestation into deliberations than previous intercourse evidence. A Kruskal-Wallis test was conducted to examine whether a statistically significant finding could be observed; however, a statistically significant trend was not found ($p = .572$). It is quite possible that a lack of statistical trend here was due to the small sample size used in my research and therefore a second statistical test was conducted, this time assessing sexual history evidence as a

dichotomous variable.[5] In this instance a Kendall's tau-b correlation returned a statistically significant association between the inclusion of sexual history evidence and deliberation time ($p = .039$). Once again, I must reiterate that due to the potential variety of variables at play in each and every deliberation, I am not seeking to advance a definitive causal connection. Nevertheless, it remains important to consider this trend when thinking about reform efforts such as judicial directions.

Indeed, the trend between sexual history and longer, less unanimous deliberations adds support to much previous theorisation that sexual history evidence can act as a complicating factor for juries within verdict determination (Heilbron Committee, 1975; Schuller and Hastings, 2002; McGlynn, 2017). It is well established, and perhaps even common sense, that the more complexity introduced at trial, the longer juries generally take to reach a verdict (Brunell et al., 2009). Whilst longer deliberations in themselves are not necessarily negative, and indeed, may be reflective of greater participation amongst jurors and more opportunity for each juror to be heard, they may also be indicative of inefficiencies and disorganisation (Ormston et al., 2019). In the largest mock jury research to date, Ormston et al. (2019) found that longer deliberations tended to be characterised by entrenched difference of opinion amongst jurors which led to greater disagreement and often frustration. Drawing back to my qualitative findings discussed in Chapters 5, 6 and the remainder of this chapter, these illustrated contention and controversy within jury discussions of sexual history evidence. Hence, it may be conceivably hypothesised that the introduction of sexual history evidence in trial adds substantial complexity to deliberations, resulting in more conflict and time spent convincing fellow jurors in order to arrive at a verdict (Waters and Hans, 2009).

Importantly, by drawing on this finding I am in no way suggesting that sexual history should be further restricted simply on the basis that it can add complexity and thereby time to the deliberative process. Where such evidence is deemed relevant to preserve the right to fair trial, it certainly should not be excluded on the basis of efficiency arguments. Nevertheless, this trend does illustrate that where relevance is marginal or absent, the risks of including such evidence not only relate to endorsement of prejudice and traumatisation of complainants but also poses a threat to the efficiency of trials. This is particularly problematic given the current backlog being experienced by the crown courts in England and Wales (HM Government, 2022), and thereby reiterates the need for rigorous and well-enforced restrictions.

Furthermore, this finding adds support to the idea of additional, enhanced judicial directions or guidance to be given to jurors where sexual history evidence is included at trial to make clear the extent to which they may *legitimately* interpret and rely upon such evidence within their deliberations. Specialist sexual offences judicial directions (Maddison et al., 2021) have been routinely implemented in rape trials since 2010 (Judicial College, 2010) and have been widely praised in mitigating against the influence of rape myths

(Chalmers and Leverick, 2018; Ellison and Munro, 2009b; Stern, 2010). Given my findings, I argue that further specialised and enhanced guidance relating specifically to sexual history evidence could further strengthen the implementation of judicial directions and mitigate against this complicating nature of sexual history evidence. I discuss this in greater depth in Chapter 9; however, arguably, such a provision would not interfere with the defendant's right to fair trial but could serve to clarify and streamline jurors' approach to sexual history evidence within deliberative discussions.

7.2 Confusion and Uncertainty in Deliberations

Alongside increased deliberation time and fewer unanimous verdicts, qualitative narratives also revealed a degree of uncertainty and confusion amongst jurors about how they might legitimately rely on sexual history evidence in their deliberations. On a positive note, this emphasised a strong degree of juror rigour and gravitas regarding their role in verdict determination. Indeed, jurors frequently denoted the supposed real-life consequences of their decision and emphasised the need to consider legal safeguards seriously:

> *Like you could influence the rest of someone's life because I like obviously once you've got a criminal record and you're on the sex offenders list, like, it kind of destroys the remainder of your life. And I'm not sure if we've had enough evidence to prove provide a concrete, like 100% they definitely did it.*
> (J077, Scenario 6: Sexting, No Real Rape Reaction)

> *So it's not concrete. This has to be concrete. It can't be hearsay. You know we could be condemning an innocent man to jail. You know we have to be*
> (J025, Scenario 4: Control, No Inconsistency)

> *And both both sides are equally [pause]. But because if you put an innocent man in jail, you are destroying the life of someone, if you put him on the street and he's guilty, you will be destroying the life of the next victim. So it's just*
> (J055, Scenario 3: Sexual Intercourse, No Real Rape Reaction)

J038: *And for me as well, I guess you know, we look at it from a, you know we don't want to have a guilty verdict for somebody and ruin their life*
J044: *of course not*
J038: *But I suppose on the flip side to that is...well you know what if we have a not guilty verdict when somebody has been raped*
J044: *yeah*
J038: *and actually you're potentially saying to them we don't believe you*
J044: *yep*
J038: *erm, and actually you know, ruin their lives. So actually either decision we make there's going to be a judgement made on somebody*
(Deliberation, Scenario 5: Sexting, Minor Inconsistency)

These narratives accentuate the accountability and conscientiousness with which jurors approached the mock jury task, as has been reflected in numerous earlier mock jury exercises (Finch and Munro, 2008; Ellison and Munro, 2010b; Willmott, 2017; Ormston et al., 2019). In doing so, these framings seemingly mitigate against some previously mooted concerns about the lack of consequentiality in mock jury simulation methodology, which has led some to assert that participants do not take their role seriously (Thomas, 2020). Instead, they support the claim that mock jurors often become immersed, animated, and engaged with the deliberative task, thereby providing important insights into the jury room (Finch and Munro, 2008; Chalmers and Leverick, 2016). Equally, extrapolating this to the task of 'real' jurors, it seemingly illustrates a level of conscientiousness and attention during the deliberative task. Thus, whilst the question of whether to retain or discontinue juries in sexual offences cases remains a debate far larger in scope than can ever be explored in the current volume (Bindel, 2018; Willmott et al., 2021), this finding does seemingly award some support for the potential integrity and virtue of the jury system (Thomas, 2010).

Nevertheless, a collateral outcome of these examples of juror conscientiousness was concurrent examples of uncertainty and confusion amongst participant jurors when discussing *how* they may interpret and rely upon the complainant's previous sexual history evidence. Positively, this further illustrated a level of diligence and carefulness with which participant jurors approached the deliberative task, as conscious not to endorse misguided or inappropriate assumptions about such evidence. Indeed, jurors typically demonstrated a clear desire to avoid myth endorsement in their determinations of the sexual history evidence:

> *You're shifting away from a topic because in in our routes the verdict like we have been strictly told that we should not consider a common world or any previous or separate facts, we should just consider the evidence of this case and give the verdict and not think about the common world.*
>
> (J061, Scenario 3: Sexual Intercourse, No Real Rape Reaction)

However, much like we have observed within academic discussions regarding when sexual history may be deemed relevant to trial, jurors echoed such uncertainty when reflecting on how they may legitimately attribute relevance in the deliberative forum. These examples tended to reference the judge's judicial directions and routes to verdict guidance, but often left jurors uncertain as to whether they were making permissible assumptions or relying on rape myths:

> *mmm yeah, that that entered my head. head as well. And then I was wondering whether I was making an assumption based on prior experience, which I think*
>
> (J085, Scenario 3: Sexual Intercourse, No real rape reaction)

> *Or are we using anything to do with preconceptions or speculating or are we applying our common sense, which the judge said is okay to do?*
> (J115, Scenario 2: Sexual Intercourse, Minor Inconsistency)

Thus, despite the inclusion of judicial directions and an extended caution regarding the potential improper reliance on sexual history evidence, uncertainty remained amongst participant jurors. This is reflective of results of The Arizona Jury Project (2017) and New York Civil Jury Project (2015) that revealed, whilst jurors tend to take judicial directions very seriously, they often do not fully comprehend how to *apply* these. This is perhaps especially so when considering a highly contentious and challenging piece of evidence such as sexual history which is inherently sensitive and imbued amongst historical foundations of myth endorsement.

Indeed, drawing on observational research of trial, Smith (2018) observed that sexual history evidence is often introduced under vague terms, with a lack of clear instruction to explain the relevance and application of this evidence to trial facts. She noted that defence barristers routinely presented sexual history evidence simply as background context to the case, but in practice framed this in a way which served to call into question the credibility of the complainant. In turn, she found that judges were often vague in their instruction to jurors about how they may legitimately treat such evidence within deliberations, regularly warning that this must not be used to provide evidence of consent but failing to clarify how jurors *were* entitled to rely on and interpret this evidence within their verdict determination. Similarly, Daly (2021) observed lack of clear directions to the jury about how they were permitted to rely on sexual history evidence, with questioning at trial often largely irrelevant and prejudicial.

It is therefore perhaps unsurprising that this uncertain and vague approach towards the relevance of sexual history evidence is mirrored in the jury room. Indeed, if academic and legal commentators have consistently struggled to agree upon where the line of relevance may be drawn to prevent myth endorsement (Dent and Paul, 2017; Stark, 2017; McGlynn, 2018; Thomason, 2018), then it is seemingly to be expected that lay jurors may also struggle with this interpretation.

Some staunch critics may dismiss this finding on the basis that my trial stimulus was unrealistic or judicial directions were not reflective of those given in 'real' trials. Firstly, I may reiterate that the judicial directions offered in my stimulus were developed using a series of 'real' Crown Court transcripts as the basis, and therefore, I would submit that these were highly reflective of those used typical sexual offence cases in England and Wales. However, pragmatically, critiques regarding realism and consequentiality somewhat miss the point in this sense. Ultimately, the key implication of this finding is to ensure that when sexual history *is* introduced at trial, the narrow relevance of this *must* be clearly established and emphasised to the jury during and after questioning. Meanwhile, judicial directions about sexual history again

must comprehensibly outline the relevance of such evidence and direct jurors towards legitimate (and perhaps illegitimate) inferences that they may draw from this evidence.

In making this recommendation, I am not disregarding the value of current judicial directions or suggesting that sexual history evidence is always introduced irrelevantly; however, I believe enhanced measures, given the highly contentious and complex nature of sexual history evidence, could mitigate against reliance on rape myths and juror uncertainty. Dissenters may argue that this risks unduly pushing jurors down the road to conviction, as was argued when judicial directions were first implemented (Carline and Gunby, 2011). However, the implementation of generalised judicial directions has arguably ameliorated these concerns and proven to be highly effective in lowering rape myth acceptance (Callander, 2016; Ellison and Munro, 2009b). Thus, enhanced and tailored directions that not only caution jurors against relying on rape myths about the complainant's sexual history but also clearly outline when and how such evidence may be used in verdict determination would be beneficial to preserve fairness and alleviate concerns about appropriate reliance on this evidence. This inevitably would not provide a fix-all approach, as we have illustrated the highly engrained nature of myths about sexual history evidence (Hanna, 2021), but could go some way to mitigate against improper reliance on this evidence in verdict determination.

7.3 Indirect Association between Sexual History Evidence and the Perception of False Allegations

So far, the findings of this book have focused on juror's outright discussions of the complainant's previous sexual history evidence within their deliberation. Yet, one unanticipated finding in my dataset was an indirect trend between sexual history evidence and juror discussion of false allegations. Indeed, reference to false allegations, lying and crying rape emerged almost exclusively in deliberations where sexual history evidence had been included at trial and, only on rare occasions, in the control dataset where sexual history evidence had not been raised. Whilst these narratives did not necessarily explicitly remark on the previous complainant's sexual history as a reason behind the consideration of a false allegation, the trend was highly established and thereby does indicate an implicit link. This trend was found by thematically coding all reference to false allegations, crying rape, and lying within each deliberation transcript, which the analysis software then established as a percentage of the overall transcript as shown in Table 7.1:

Given the historic association between sexual history evidence and the perceived veracity of a complainant's allegation (Phipps, 2009; Farrell, 2017), it is perhaps unsurprising that such a trend emerged. Indeed, it has been widely theorised for some time that sexual history evidence holds a potentially distorting impact on perceptions of the complainant (Brown et al., 1992; Kelly et al., 2006; McGlynn, 2018) and those with extensive sexual

Table 7.1 Scenario Variations

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%**

histories have routinely been portrayed in justice discourse as more likely to fabricate charges of rape (Flowe et al., 2007). This is in line with traditional legal assumptions that posited supposedly 'promiscuous' women as more likely to lie and thereby less credible in their accounts to the court (Temkin, 2003; McGlynn, 2017).

In practice, empirical research from the US has in fact illustrated precisely the opposite, finding that women with extensive sexual histories are less likely to take legal action following non-consensual sexual activity and no more likely to make a false allegation (Flowe et al., 2007). Nevertheless, observational studies internationally have continually revealed that sexual history evidence is still used to undermine the credibility of the complainant at trial (Durham et al., 2016; Smith, 2018), and to construct false allegation scenarios (Brown et al., 1992; McDonald, 2020; Tinsley et al., 2021). In turn, previous mock jury research, though not exploring sexual history specifically, has shown a substantial trend towards jurors overstating the prevalence and extent of false allegations in rape trials (Chalmers et al., 2021) premised on century old assertions that rape is an easy accusation to make (Hale, 1736).

As such, the focus amongst my mock jurors on the perceived risk and threat of a false allegation is perhaps to be excepted, and thus whilst it must not be understated as a cause for concern, it remains consistent with previous literature (Ellison and Munro, 2009a; Chalmers et al., 2021). What is most concerning about this, however, is the *implicit* connection between the inclusion of sexual history evidence and the increased focus on false allegations. Indeed, these false allegation narratives tended not to explicitly reference the sexual history as a reason to distrust the complainant but the established trend indicates that this was a key determinant factor in influencing these narratives. What is both concerning and intriguing, therefore, is the implication that sexual history evidence alters jurors' perceptions of wider case evidence and may encourage implicit myth endorsement that even jurors themselves are perhaps somewhat unaware of. This combination of findings holds great consequence for reform discussions as it emphasises an overlap and entwinement between the inclusion of sexual history evidence (and direct

myth endorsement that surrounds this) and much broader, more implicit, and abstract myth endorsement that can influence jurors' wider perceptions of case evidence. As such, discussions around sexual history evidence must not be looked at in isolation but more holistically with reference to broader rape myths and obstacles to justice. The remainder of the chapter will outline the problematic impact of these false allegation narratives.

7.3.1 'False Allegations Are Common'

The suggestion that women often lie about rape is arguably the most widespread and enduring rape myth (McDonald, 1994; McMillan, 2018; Lazar, 2019) which remains pervasive in public and legal discourse on sexual violence (Rumney, 2006). It underpins numerous wider rape myth narratives, including suggestions of what the complainant had been wearing, whether she had flirted, whether she suffered injury, and whether she had had a previous sexual relationship with the defendant, which all implicitly call into question the veracity of her allegation. Both court observation and mock jury research have continually revealed narratives, both in court and the jury room, which contemplate the supposedly high prevalence of false allegations and threat posed by lying complainants (Ellison and Munro, 2009a; Smith, 2018; Temkin et al., 2018; Leverick, 2020; Chalmers et al., 2021). In the most recent observational research in this area, Daly (2021) revealed that *all* complainants in her dataset were portrayed as liars during trial. Likewise, Tinsley et al. (2021), whilst analysing trials in New Zealand, equally found overwhelming reference to lying, overacting, and manipulation by complainants, with one complainant in particular accused of lying ten times in just a 249-word cross-examination. Meanwhile, recent social media analysis of Twitter posts found that tweets accusing rape complainant of lying were three times more common that posts that validated these complainants, demonstrating the pervasiveness of these myths in mainstream culture (Stabile et al., 2019).

In reality, research has repeatedly shown that false allegations of sexual offences are rare and no higher-than-expected levels for other, non-sexual crimes (Kelly et al., 2005; Rumney, 2006; Kelly, 2010; Levitt and CPS Equality and Diversity Unit, 2013). Nevertheless, consistent with the previous literature in this area, my mock jury simulations revealed routine contemplation of the possibility of a false allegation, with the inference that this is a prominent threat within the criminal prosecution of rape. Yet, the fact that these narratives arose almost exclusively in juries that had heard evidence of the complainant's previous sexual history represents a further, problematic, and intersectional impact of sexual history evidence and an increased reticence amongst jurors to readily trust such complaints.

Whilst many of these problematic narratives in my dataset did not explicitly reference the complainant's previous sexual history, jurors who had heard the sexual history evidence were almost exclusively the ones who routinely overstated the spectre of false allegations:

> *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)

Whilst narratives like this tended to be more subtle than positing the complainant in the case at hand as a liar, the inference underpinning them was that numerous allegations of rape are lies. Inherently, such narratives are difficult to analyse in that some focus on the veracity of the complainant's allegation is acceptable and the job of conscientious jurors. However, the frequent consideration and overstatement about the scale and threat of potential false allegations reflects problematic myth endorsement. Indeed, not only does this contradict much previous research which has dismissed suggestions of widespread false allegations of rape (Lisak et al., 2010) but also represents an underlying distrust of complainants and the veracity of their allegations (Tinsley et al., 2021).

Meanwhile, within these claims of widespread false allegations emerged a further group of narratives which, initially, correctly acknowledged that false allegations are a minority issue, but then contradictorily posed the perceived risk of false allegations as a significant threat that must be considered:

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)

Again, these are difficult to analyse since it is the duty of the jury to assess whether an allegation is genuine; however, the frequent consideration of a potential false allegation seemingly reaffirms the claim that it is often the complainant, rather than defendant, who is put on trial in sexual offences cases (Payne, 2009). These framings ultimately 'othered' and responsibilised complainants as having to *prove* their victimisation and credibility by illustrating they do not have the 'specific trait' that might cause them to make a false allegation. In doing so, jurors regularly awarded disproportionate focus to this perceived threat and cautionary tales of women as liars, seemingly adding ongoing credence to Sir Hale's now infamous diction that rape 'is an accusation easily to be made and hard to be proved' (Hale, 1736).

On a more positive note, one juror in the deliberation did show clear and detailed myth-busting regarding the spectre of false allegations, dismissing the notion that false allegations are common:

> *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 law students, meaning they likely had deeper awareness and insight into these issues than most of the jury eligible population. Thus, despite the positive myth-busting intent, which potentially served to educate jurors on the specific jury panel, such narratives were far from widespread and likely not indicative of the bulk of 'real' juries. Moreover, the framing of this narrative served to dismiss generalised claims that false allegations are common, but interestingly did not develop on *applying* this more narrowly to the case facts in question. It thus illustrates a distance between myth-busting and determinations of verdict for the case in hand.

7.3.2 'Women Often Cry Rape'

The assumption that women will frequently 'cry' rape following a consensual sexual encounter is an unambiguously prejudicial pronouncement regarding the threat and spectre of false allegations in sexual offences cases. Borne out of the old literary adage of 'crying wolf,' the moral lesson cautions against making false claims for help, warning that nobody will believe these calls when help genuinely is needed (Oxford Dictionary, n.d.). Assimilating this cautionary fable to claims of 'crying rape,' it inherently supports the suggestion that false rape allegations are routine, and further endorses claims of rape allegations being weaponised as a means to attract attention, sympathy, or revenge. The premise also overlaps with broader heteronormative ideals discussed in Chapter 5, regarding women as highly emotional and vindictive in nature (Smith, 2021).

Despite these clear prejudicial associations, the notion of crying rape remains a frequent connotation in mainstream discourse. Indeed, analysis by the Guardian newspaper (Wiseman, 2013) revealed that the term 'cried rape' had been used in 54 Daily Mail headlines in the previous year and remains a term banded widely across newspaper headlines, song lyrics, TV/film plot lines and popular literature. It is perhaps unsurprising, therefore, that reference to

crying rape emerged repeatedly within my mock jury deliberations. However, what is surprising is that these narratives emerged exclusively in the sexual history dataset (8 of 12), again substantiating 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.

Crucially, within framings of 'crying rape,' fundamental undertones of distrust of female complainants emerged, with the risk of false allegations presented as a core, intrinsic problem for jurors to consider:

> *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 as 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 posits the risk of false, uncorroborated claims of rape as a key danger that could snowball into a distinct societal issue. It again adds credence to Sir Hale's assertion of rape claims being 'easily made,' thereby contradicting the research evidence (Kelly et al., 2005; Burton et al., 2012; Levitt and CPS Equality and Diversity Unit, 2013) and overlooking the fact that claims of rape rarely even reach trial, let alone conviction (Centre for Women's Justice et al., 2020; HM Government, 2020; Temkin and Krahe, 2008). As such, these cautionary narratives amongst jurors that the complainant could make numerous false claims against multiple men and the defendant could 'just get locked up like that,' whilst not necessarily untrue, are unrealistic and award credence to rape myths.

Again, these framings were used to 'other' sexual offences complainants based on stereotypical attributions of victimhood:

> *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)

This speculation regarding whether the complainant was the 'type' of woman to make a false allegation illustrates explicit moral judgements towards the credibility and character of the complainant, again putting the complainant on trial (Payne, 2009). Whilst these did not advance the suggestion that the

complainant in *this* case would have 'cried rape,' as she did not come across 'a psycho' or 'vindictive,' they ultimately posited 'crying rape' as a problem in rape trials more generally, and therefore sustained misguided assumptions of rape allegations as a form of female weaponry.

In turn, these suggestions routinely prompted further myth endorsement, scrutinising the actions and behaviour of the complainant so as to determine whether she had *cried rape:*

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)

Again these framings posited the risk of the complainant 'lying' and 'screaming rape' as a central issue within verdict determination, therefore once more signifying a disproportionate focus on this as a potential threat. Interestingly, the complainant's lack of adherence to stereotypical assumptions of reporting here seemingly naturalised and dismissed the perceived threat of a false allegation amongst jurors. Thus, whilst somewhat positive that jurors did not deem this to be a false allegation, it is problematic that such scrutiny relied on broader ideals of 'appropriate' or 'rational' actions.

7.3.3 'Many Rape Allegations Are Made out of Revenge'

Finally, within these false allegation narratives, perceptions of the rape complainants as scorned or vengeful, seeking to enact an exercise of revenge on an unsuspecting male defendant, also permeated my dataset (Reeves, 1996; Smith, 2021). Again, these misguided assumptions hold their foundations in historic framings of sexual offences trials in which female complainants were positioned as liars, who often fabricate rape allegations driven by emotionality and feelings of revenge or hatred (Temkin, 2002; Lazar, 2019; Smith, 2021). There are, therefore, distinct overlaps between this misconception of the supposed scorned or vengeful complainant and wider heteronormative ideals that continue to posit women as driven by emotionality (Shields, 2002; Smith, 2021). Thus, despite the removal of some problematic legal mandates, such as the corroboration requirement (Gavey, 2013; Leahy, 2014), claims of female complainants as 'hysterical,' 'spiteful,' and 'regretful' have continued to permeate modern trial narratives (Daly, 2021; Smith, 2021) and juror deliberations alike (Ellison and Munro, 2010a; Chalmers et al., 2021). In my dataset, discussions about a potential vengeful allegation emerged in 8 of the 18 mock jury panels, all of which occurred in sexual history scenarios.

These narratives tended to advance suggestions of a potential vengeful allegation as a cautionary tale to highlight the danger of readily believing the complainant's account:

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)

The foreboding pronouncement that 'many, many girlfriends or potential girlfriends that have done a bit of "he raped me"' serves as a cautionary forewarning to fellow jurors about the perceived widespread threat of false, vengeful allegations. It represents an inherent distrust of female complainants on the basis that a substantial proportion of 'scorned' girlfriends or lovers have made an unfounded accusation of rape out of 'bitterness.' This narrative, therefore, unambiguously illustrates endorsement of the claim that rape is an accusation 'easily made' (Hale, 1736), and indicates a lack of understanding amongst these jurors regarding the well-established difficulties and challenges that victims face when making an allegation of sexual violence (Hanna, 2021). The narrative further downplays the seriousness of making a rape allegation and instead suggests that tactical rape allegations made out of 'having a gripe with that person' are commonplace. It ultimately therefore demonstrates a distinct false impression regarding the spectre of false allegations, and in doing so, legitimises scrutiny of the complainant's character and credibility, again serving to put *her* on trial (Payne, 2009).

Such assessments towards the perceived credit of the complainant often progressed into an assessment of her supposed reasons and motivations for making the allegation of rape:

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)

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?*
>
> (J098, Scenario 6: Sexting, No real rape reaction)

Such speculation around supposed 'motives' inherently reflects discussion that would ordinarily be associated with assessments of the *accused* and therefore exemplifies how the complainant was put on trial within deliberations. Conjecture about the timing of her allegation and when she 'decided' it was rape not only serves to de-legitimise the complainant's allegation as false but equally infers the complainant to be calculating and malicious and diverts juror focus away from consideration of consent.

Interestingly, such speculation of potential illegitimate motives was dismissed through assessments of rationality and her supposedly *appropriate* reactions following the alleged rape. Rather than illustrating myth-busting, these framings exemplified interconnection and associations between different rape myths – particularly the stereotypical assumption that a 'real' rape victim will report immediately – to establish an agreed narrative of events.

> *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)

Ultimately, whilst these narratives did dismiss the idea of a vengeful allegation, they continue to illustrate pervasive reliance on rape myths. Rather than acknowledging that vengeful allegations are rare, or noting the difficulties associated with pursuing a rape allegation, these narratives instead relied on the complainant's immediate report and ideal victim tropes to discharge any suggestion of revenge. It seemingly begs the question that if the complainant had not acted in this idealised manner of making an immediate report, would jurors' contemplation of a potential vengeful allegation have been so easily dismissed?

7.4 Chapter Summary

Postulation about the influence of sexual history evidence on endorsement of the twin myths has been considerable across existing research; however, focus on the potential wider impact of such evidence on the deliberative process has been notably more limited. This chapter has provided novel and

unique insights about the potential diversionary and complicating nature of sexual history on the jury deliberative ideal, which are important to note when considering ongoing reform discussions.

It is apparent from my findings that whilst jurors often approached the task of considering sexual history with caution and importance, uncertainty and confusion about how they should or could rely on such evidence in their deliberations remained frequent. Meanwhile, where sexual history was introduced, it correlated to longer and less unanimous deliberations. Taken together, these findings support the premise that the inclusion of sexual history evidence at trial can serve to complicate the deliberative process and cause greater polarisation of attitudes amongst jurors. Inevitably, this does not justify a complete exclusion of all sexual history evidence on the basis of efficiency, however, is arguably important to consider if we are to begin weighing up the probative value of sexual history versus the prejudicial or diversionary impact (McGlynn, 2017).

Meanwhile, insights regarding the indirect influence of sexual history evidence on juror perceptions of false allegations are also extremely pertinent to reform considerations. This link between sexual history evidence and broader rape myth narratives – particularly those around complainant credibility – is far from novel (McDonald, 1994; Schuller and Hastings, 2002; Sheehy, 2002). Yet, my findings are original in illustrating the implicit and wide-reaching influence of these narratives *beyond* explicit discussions of sexual history evidence to alter juror determinations of the evidence as a whole. In doing so, my findings highlight the necessity to consider efforts for reform, holistically and comprehensively, with reference to the broader influence of *all* rape myths, rather than considering the impact of sexual history evidence in isolation.

Notes

1 Catton (1975) and Schuller and Hastings (2002) both conducted mock jury research to assess the impact of sexual history evidence; however, neither utilised a deliberative element.
2 Ninety per cent of trials where a sexual history application was granted resulted in an acquittal.
3 There is a growing body of literature that has sought to highlight issues associated with this dichotomisation of significant versus non-significant results and has outlined a case to remove statistical significance from analyses (Amrhein et al., 2019). Whilst these discussions are beyond the remit of the current book, and indeed the current book does not argue that statistical significance is not an important indicator of findings, it does that even non-significant trends do provide useful insights.
4 This association was found using a Goodman and Kruskal's λ between scenario variation and unanimity of verdict. Goodman and Kruskal's λ was .500 and this did reach statistical significance ($p = .023$).
5 Either 'yes' sexual history evidence was included (sexting and sexual intercourse evidence), or 'not' it was not included (control scenarios).

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8 Lessons to Be Learnt from Other Jurisdictions?

So far, I have focused explicitly on concerns surrounding the use of sexual history evidence in the English and Welsh context; however, contention about this evidence has been a matter of mounting international disquiet across Western jurisdictions for many years. The first wave of rape shield provisions, which aimed to restrict reliance on sexual history evidence at trial, were implemented during the late 1970s and early 1980s across commonwealth jurisdictions including Canada, the United States, New Zealand, Australia, and England and Wales (Levanon, 2012). In the years and decades that followed, similar such provisions were enacted across most Western jurisdictions (Gilchrist, 2009) as part of the so-called 'anti-rape movement' (Roman, 2011; Klein, 2015). These reflected growing concerns globally about the treatment of sexual offences complainants in the justice system (Gillespie and King, 2016), and though varying in formulation and scope, generally sought to protect rape complainants from unnecessary public scrutiny of their private sexual endeavours (Anderson, 2002) and challenge ideals that gave credence to the misguided twin myths (Gillen, 2019).

Though there was, and arguably continues to be, some concern about the legitimacy of rape shield laws on the basis that these could impinge upon the defendant's right to fair trial (Cassidy, 2020; Klein, 2015; Roman, 2011), these provisions were ultimately implemented widely and have become perhaps 'one of the most significant and far-reaching changes in the prosecution of rape' (Klein, 2015: 990). In the United States, for example, President Jimmy Carter proclaimed that these provisions would 'end the public degradation of rape victims' and 'prevent a defendant from making the victim's private life the issue in the trial' (Carter, 1978). As we have seen from discussion throughout this book, this idealistic intention is arguably still some way away across jurisdictions; however, the legislation does arguably represent an international consciousness towards improvement.

Whilst, inevitably, provisions vary between jurisdictions, the core objective of protecting complainants from unnecessary and irrelevant intrusion, whilst preserving the defendant's right to fair trial, tends to invoke clear overlap, and has been grappled with in largely similar ways (Gillen, 2019; McNabb and Baker, 2021). Yet, much like we have seen in England and Wales, international

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rape shield provisions have been subject to repeated legislative and judicial revision over time, developing in somewhat of a piecemeal fashion (McNabb and Baker, 2021). Thus, whilst no single jurisdictional response may be seen as panacea in itself, we may draw on lessons learnt across jurisdictions to inform approaches to good practice. Indeed, Temkin (2003) proposed that whilst s.41 is a vast improvement on previous s.2 provisions, she maintained that comparable legislation in fellow common law jurisdictions, such as the US, Canada, and Australia, has tended to be significantly more stringent.

Thus, in the context of s.41 reform debates, the following chapter will consider lessons that we may learn by drawing on the experience and expertise of international jurisdictions. As stated above, this is not to hail one single jurisdiction as a panacea for change, or to provide an exhaustive list of international rape shield legislation, but rather to draw upon key aspects that may represent favourable approaches to effectively managing this evidence at trial. I will scrutinise these international approaches alongside existing recommendations to reform s.41 and findings of my own mock jury dataset to address core areas of contention. My discussion will be divided into the three central aims of rape shield provisions, being (a) the avoidance of prejudice, (b) limiting sexual history to only *relevant* instances, and (c) safeguarding complainant wellbeing.

8.1 Acknowledging Prejudice

As I have reiterated throughout the current volume, the primary concern about the admission of sexual history evidence at trial tends to be the prejudicial risk posed by potential endorsement of the twin myths (*R v Seaboyer* (1991). My mock jury findings have exemplified ongoing reliance on these attitudes within juror deliberations, which can inappropriately alter determinations of case evidence. Consequently, to explicitly acknowledge the risk posed by these misguided ideals is perhaps a favourable approach to rape shield legislation, with a widely praised example of this being s.276–278 of the Canadian Criminal Code.

S.276, like s.41, begins with the presumption that sexual history should *not* be included at trial and thereby – theoretically at least – limits its admission to only rare instances. S.276(1), however, then builds on this precaution by clearly stipulating the rationale behind these restrictions, namely, to avoid endorsement of either assumption underpinning the twin myths. Both Gillen (2019) and McGlynn (2017) have commended this clear statement of principle, arguing that an equivalent provision would substantially strengthen English and Welsh law, by reiterating the sentiment that consent is person, time, and situation specific and potentially shifting cognisance back onto the necessity and rationale for this legislative safeguard. Indeed, reflecting on the mock jury findings discussed throughout this book, alongside existing court observation research which has exemplified continued reliance on the twin myths, it appears that an unambiguous statement of principle to denote this

potential prejudicial risk could be extremely beneficial. Given current reform debates in England and Wales, this simple change of legislative wording arguably offers a relatively straightforward amendment to current provisions, but one which would explicitly recognise the law's aspiration to eliminate reliance on these discriminatory narratives at trial (Dufraimont, 2019) and potentially thereby prompt greater appreciation of restrictions.

Nevertheless, implementation issues associated with s.276 equally illustrate key lessons to be learnt. Craig (2016) found that despite supposedly rigorous legislative restrictions, s.276 continues to be characterised by misunderstandings and misapplication. She noted that judges often mistakenly presumed that s.276(1) *only* prohibits the inclusion of sexual history evidence where it is used to endorse the twin myths; however, in fact, this is simply the first safeguard. If an application is deemed not to endorse the twin myths, s.276(2) outlines further exclusionary exceptions in which sexual history may be deemed relevant. However, this latter safeguard was frequently overlooked or misapplied (Craig, 2016), although this has since been tightened through the most recent amendments enacted in 2018. Meanwhile, McNabb and Baker (2021) highlighted that, in practice, judges often struggled to establish a direct link between the sexual history evidence in question and the twin myths. It thereby seems apparent that should such a provision be implemented into a reformed s.41, the staged nature of such an approach should be clearly set out and legal training offered to ensure comprehension about (a) how to apply the law and (b) the ideals underpinning the twin myths.

Alongside direct statements about the twin myths, the Canadian provisions have also been praised for acknowledging the prejudicial risk posed by sexual history evidence, stipulating that such evidence must hold 'significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice' (S.276(2)(d)). A similar clause can be seen under s.275(1)(c) in Scotland, and one, denoting the potential 'inflammatory value' of sexual history evidence, is used in Michigan's legislation (MCL, 750.520j). Meanwhile, in determining the probative value and relevance, s.276(3) of the Canadian Criminal Code provides a list of factors for judges to consider, including:

a. *the interests of justice,*
b. *society's interest to encourage reporting,*
c. *whether there is a reasonable chance that the evidence will assist the jury in determining a just verdict,*
d. *the need to remove bias and discriminatory beliefs from fact-finding,*
e. *the risk of prejudice, sympathy, or hostility in the jury,*
f. *the potential prejudice to the complainant's personal dignity and right of privacy,*
g. *the complainant's right to personal security, full protection, and benefit of the law,*
h. *any other factor that the judge considers relevant*.[1]

These provisions emphasise the risks associated with including previous sexual history evidence at trial, denoting not only the risk to the dignity and privacy of the complainant but also the potential risk to the administration of justice (Gillen, 2019). As such, all sexual history applications are determined through a 'prejudicial effect lens' which serves to limit potential unwarranted prejudicial outcomes that may arise alongside the introduction of sexual history and could distort the truth-seeking function of trial (Craig, 2016; McCallum and Ng, 2020). Such an approach does not infringe of the rights of the accused; however, it crucially serves to recognise the prejudicial potential that continues to be associated with sexual history evidence, as I have proven through my empirical findings in Chapters 5 to 7. As such, Murphy (2006) proclaimed Canadian provisions as an excellent example for other common law jurisdictions, boasting clarity of provisions for complainants and legal professional alike, whilst continuing to uphold the rights of fair trial for defendants.

Both Gillen (2019) and McGlynn (2017) thereby considered the Canadian model as a potential format upon which a reformed s.41 provision could be modelled. This would represent a move away from the widely critiqued and arguably low threshold of admissibility governed under s.41 (McGlynn, 2018) and seemingly enable judges in the English and Welsh context to take a more robust approach to the exclusion of such evidence (Gillen, 2019; McGlynn, 2017). Indeed, my findings have exemplified that a clear prejudicial risk continues to permeate framings of sexual history for jurors, and thereby the law can no longer simply disregard or overlook this threat. However, and perhaps most crucially, it must also be noted that even where stringent legislative provisions are imposed, these must equally be bolstered by stringent and robust implementation – something which has not always been observed even within the widely praised Canadian provisions (Craig, 2016; Dufraimont, 2019; McNabb and Baker, 2021).

8.1.1 Sexual Behaviour Evidence

Whilst the potential prejudicial risk associated with sexual history evidence has been well theorised, there remains some debate as to what constitutes 'sexual behaviour' and whether s.41 provisions appropriately govern wider sexual practices such as sexual messaging, imagery, etc. As noted in Chapter 4, the broadening of legislation in s.41 to include all 'sexual behaviour' (s.42(1)(c) was initially widely welcomed; however, the lack of legislative definition has arguably culminated in some legal uncertainty and conflicting precedents (Kelly et al., 2006; Kibble, 2004; McGlynn, 2017). Hoyano (2018) briefly covered such discussion but seemingly dismissed these concerns by stating that appellate case law has provided clarity and guidance on the matter. Nevertheless, given findings of my mock jury dataset, showing that previous sexting evidence broadly engendered the same prejudicial pronouncements

as previous intercourse evidence, I submit that some legislative articulation about the scope of s.41 would be beneficial.

Again, I draw on Canadian provisions as evidence of good practice in this regard, with 2018 amendments to s.276 expanding the definition of 'sexual activity' to include 'any communication made for a sexual purpose or whose content is of a sexual nature' (s. 276(4)). Thereby, reflecting a broad range of potential behaviours and capturing emails, text messages, images, and videos of a sexual nature (McNabb and Baker, 2021). Similarly in US federal law, notes of the advisory committee for Federal Laws of Evidence: Rule 412[2] submitted a definition in which 'past sexual behaviour connotes all activities that involve actual physical conduct, i.e. sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact.' While this definition remains notably broad, the stipulation towards actual or implied conduct is helpful to delineate the wide scope of the provisions and could easily include digital evidence such as sexting (Sweeny and Slack, 2017). Positively, recent CPS (2019) guidance has clarified that digital evidence of a sexual nature does fall within the scope of s.41; however, arguably, some legislative definition of this nature would remain useful to ensure adherence to this approach.

More generally, numerous jurisdictions like the UK do not provide an explicit definition to cover the scope of their rape shield provision. However, many of these jurisdictions go further than the UK approach by covering evidence of sexual character or reputation rather than just sexual behaviour. For example in New Zealand, restrictions pertain to sexual experience, sexual disposition, or sexual reputation (S.44A Evidence Act, 2006), whilst Michigan legislation and most states in Australia also cover the sexual reputation of the complainant alongside sexual experience (Australian Law Reform Commission, 2010; Grabel and Associates, 2021). Whilst, further, clear definitions would still be favourable (McGlynn, 2017), the focus on reputation as opposed to just behaviour may be praised as recognising the underlying prejudicial links between sexual history evidence and misguided perceptions of complainant credibility. Indeed, the Australian Law Reform Commission (2010) stressed that sexual reputation must be seen as distinguishable from sexual experience evidence and emphasised that in almost all instances sexual reputation could not be admissible at trial. This recognition of underlying prejudices when determining the scope of the legislation therefore must be seen as positive.

Drawing on these approaches, it seems apparent that some legislative clarification towards the scope of rape shield provisions in England and Wales would be beneficial. It is positive that CPS guidance has recognised the scope of s.41 to cover digital evidence; however, clear legislative guidance covering both the actual and implied nature of such evidence would help to strengthen provisions further (McGlynn, 2017). This would enable greater clarity for all parties at trial and ensure standardisation of procedure throughout trials, rather than relying on case law and appellate judgements.

8.2 Procedural Requirements

As much as stringent and comprehensible legislation is vital to ensure appropriate restrictions for sexual history evidence at trial, so too is proper implementation and procedural guidelines. Procedural safeguards serve to maintain the interests of all parties and provide some clarity to both complainants and defendants pre-trial, as to whether such evidence will be permitted. They also serve to ensure that only relevant evidence is adduced at trial, which is imperative to mitigate risks associated with the prejudicial impact of such evidence which has been exemplified throughout Chapters 5 to 7.

Positively, recent amendments to the procedural requirements in the English and Welsh context appear to have been relatively robust (Criminal Practice Directions (Amendment 6) 2015; Criminal Procedure Rules, 2020) and perhaps an example of good practice from which other jurisdictions may learn.[3] *Part 22 of the* Criminal Procedure Rules (2020) introduced the latest, updated guidance, reiterating the requirement for a written application made no more than 10 days after the prosecution has complied with s.3[4] disclosure requirements. The written application should give particulars of the material that the defence seek to introduce, outline the questions that they wish to ask, and identify the appropriate gateway of s.41 to which the material relates. This approach is in line with some of the more stringent rape shield provisions such as Michigan and Canada, and may be praised over jurisdictions such as Ireland, who simply stipulate that a notice of intention to include sexual history evidence must be made 'before, or as soon as practicable after, the commencement of the trial' (S.4A Criminal Law (Rape) Act, 1981) which has been criticised for its loose and vague wording (Rape Crisis Network Ireland, 2012).

Interestingly, the requirement to make the application ten days *after the disclosure* varies from much of the existing rape shield legislation (for example Canada, Michigan, and Scotland) which dictates the time *before commencement of trial*. Inevitably, there are benefits and limitations of each approach. Acknowledging that sexual history applications tend to be dependent on disclosure of evidence, arguably, represents a holistic approach that acknowledges the multi-faceted nature of sexual history evidence, which does not sit in isolation. However, clearly setting out a time frame for which an application is to be made in advance of trial seemingly reflects the necessity for applications to be made in a timely manner before trial to limit uncertainty for witnesses and ensure appropriate disclosure to jurors throughout trial. It is also worth noting that in practice, 35% of applications in Hoyano's (2019) dataset were late, measured against the 2018 requirement to file these within *28 days* of prosecution disclosure. Hoyano (2019) blamed the majority of these late applications on late or piecemeal disclosure by prosecution counsel, whilst some barristers in her study commented that the deadline was usually impossible to meet in practice. Thus, whilst there is inevitably merit in prescribing a short turnaround time to ensure promptness of applications, this

must equally be realistic to ensure that compliance is widespread. Indeed, the given timeline ultimately must be seen as an important procedural safeguard to ensure a timely resolution to sexual history contention, to limit unintended collateral outcomes and ensure certainty for all parties. It must not be seen as an arbitrary measure that is implemented so that something is being seen to be done but often disregarded in practice.

Additionally, the Criminal Practice Directions (2015) *(Amendment No.6),* which came into force in April 2018, attempt to ensure rigorous compliance with procedural restrictions (Brewis, 2018). These stipulate that the defence must outline individual questions about the sexual history rather than simply identifying a topic of questioning, and judges should, in turn, award the usual level of scrutiny associated with a ground rules hearing, meaning they should determine the relevance of each and every question. It is stipulated that late applications should be subject to increased scrutiny, particularly if there is any indication of tactical gameplay behind the timing of the application. If it is deemed that the applicant is simply seeking to manipulate the court process, the trial judge is entitled to refuse the application (*R v Musone*, 2007). And finally, where a late application is made, the impact of this potential delay upon a witness should be considered. These provisions are seemingly rigorous and positively set out clear implications for failing to follow procedural requirements. Nevertheless, they may be argued to be less stringent than some comparable international approaches.

Canadian provisions, for example, seemingly accord with the criminal practice directions by dictating that late applications require more robust scrutiny and consideration. However, these also stipulate that judges take into account numerous social ramifications of such evidence before permitting this to be included at trial (s.278.5). Meanwhile, in Michigan, the failure to provide written notice in advance can lead to the exclusion of this evidence altogether, even if this could have otherwise been admissible. Inevitably, this creates a contentious point of law as it remains fundamental that rape shield provisions do not infringe on the rights of the accused in any way. Nevertheless, a robust approach to minimise late applications remains crucial to ensuring the legitimacy of these applications and minimise the impact on the wellbeing on the complainant. Cautiously, it may be attested that aspects of the most recent procedural safeguards in England and Wales seemingly reflect relatively robust and stringent regulations whilst maintaining the defendant's right to fair trial. However, I must caveat this with the warning that there is a paucity of empirical data to assess how this procedure is being implemented in practice, and therefore it may be premature to make conclusive claims on this matter.

Indeed, to date, it has become widely apparent across jurisdictions that even where legislation is seemingly favourable, the practical implementation of provisions may be the area which continues to let us down (Gillen, 2019). Indeed, data that pre-dates the implementation of the Criminal Practice Directions (2015) makes it apparent that late or missing applications remained

frequent (Hoyano, 2019; Smith, 2018), with questioning often going beyond what may be considered relevant and instead serving to attack the credibility of the complainant (Durham et al., 2016; Smith, 2018). More recently, Daly's (2021) observational analysis, which was conducted after the implementation of the Criminal Practice Directions (2015), revealed no applications being made during trial, seemingly indicating good practice in suggesting that such applications took place in advance of trial. Daly (2021) did however find that, despite tightening of procedural requirements, questioning on sexual history often remained irrelevant and served to impugn the supposed credibility of the complainant. Thus, whilst adherence to procedural requirements is seemingly improving, it is important to reiterate that this must not simply be seen as a simple formality – especially given my findings, which indicated that the way in which sexual history evidence is introduced at trial can significantly impact juror perceptions of the complainant and the perceived credibility of her allegation.

One measure that is argued as potentially prompting greater adherence to procedural safeguards is the addition of complainant participation or representation during sexual history hearings.

In England and Wales, complainants are not considered interested parties at trial and therefore not invited to a pre-trial s.41 hearing. In the equivalent Canadian voir dire hearing, however, recent amendments to s.278.94(2) dictate that complainants are given the option to attend. During this hearing, complainants are offered independent legal representation [s.278.94(2)] [discussed in depth below] to advance and represent their interests, which may notably differ from those of the prosecution. Whilst limited empirical research has assessed the impact of this, it ensures that the complainant's interests are being considered and thereby could prompt greater adherence to procedural safeguards. Alongside procedural benefits, it is equally likely to alleviate or remove some existing critiques associated with complainants feeling as if they are simply a third party to proceedings (Hanna, 2021) and could potentially mitigate against some of the fears associated with having one's sexual history evidence introduced at trial (Hanna, 2021; Rape Crisis Network Ireland, 2012). Some additional safeguards may need to be implemented to avoid any assertions of 'coaching' complainants before trial; however, this is already implemented in numerous jurisdictions including Canada, Ireland, and the US military, showing that it is possible.

8.3 Complainant Wellbeing: Independent Legal Representation

With regard to complainant wellbeing, it has been well established that the inclusion of sexual history evidence at trial can be particularly traumatic and upsetting, acting as a deterrent to reporting, contributor to attrition, and leaving many complainants secondarily victimised (Hanna, 2021; Kelly et al., 2006). Whilst, universally, rape shields have attempted to mitigate against this risk, research with victims has broadly illustrated that unpleasant and

invasive questioning about sexual history continues and contributes substantially to additional trauma of complainants (Rape Crisis Network Ireland, 2012). Perhaps it is therefore appropriate here to consider the growing body of literature which calls for independent legal representation [ILR] for sexual offences complainants when a sexual history application is made. ILR aims to provide independent support and advocacy for complainants to prevent intrusive or irrelevant questioning at trial (Clarke et al., 2021) and preserve the interests of the complainant, which may differ from those of the prosecution (Keane and Convery, 2020).

Calls for ILR to challenge sexual history applications have been borne from international evidence showing unwarranted and intrusive questioning about previous sexual history as routine despite legislative safeguards (Iliadis et al., 2021). Crucially, it is argued that where a legal representative is present, inappropriate or inadmissible questioning regarding sexual history would decrease (Braun, 2014). For example, in Denmark (though not a purely adversarial system), it was found that where ILR was introduced in rape trials, cross-examination became substantially shorter and complainants more willing to give evidence (Temkin, 2002).

Indeed, the premise of an independent, complainant representative is a commonplace provision in numerous inquisitorial jurisdictions whereby the court assumes an active, investigative role and promotes the interests of both the complainant and defendant alike (Killean, 2021). In adversarial systems such as England and Wales, however, the suggestion of a complainant representative has traditionally been seen as much more contentious (Kirchengast, 2021) as it sits somewhat at odds with the traditional adversarial framework which considers trial as a 'fight' between the prosecution (acting on behalf of the overarching public interest) and the defence (who act solely on behalf of the defendant) (Creaton and Pakes, 2011; Sward, 1989). Complainants are positioned outside of this framework, simply as prosecution witnesses rather interested parties, and thus meaningful complainant participation in the justice process is not customary (Burton et al., 2007; Ellison, 2000). Nevertheless, as justice systems globally have moved towards a more victim-centric model of justice (Iliadis et al., 2021), particularly in cases of sexual violence, the introduction of some form of complainant representation (whether legal or non-legal) has become more common (Smith and Daly, 2020). This varies substantially between jurisdictions, but numerous adversarial systems including Canada, the United States, India, Ireland, New South Wales, South Australia and Scotland have all implemented some level of legal advocacy for complainants (see Smith and Daly, 2020).

Ideologically, there is inescapably some disquiet and apprehension towards the suggestion of ILR in adversarial systems such as England and Wales on the suggestion that third party representation could distract from the key issues of trial by introducing further contestation of events (Kirchengast, 2021), which could seemingly violate the rights of the accused (Auld, 2001). One of the most apparent concerns being around the possibility of legal

counsel 'coaching' complainants about how to answer or act during cross-examination or questioning, which could distort the focus of trial (Irish Law Reform Commission, 1987). Whilst in no way dismissing these concerns, calls for ILR around sexual history evidence have tended to focus predominantly on representation at the *pre-trial* application stage (Iliadis, 2020; Keane and Convery, 2020). This arguably overcomes much of the unease associated with perceived witness coaching and adversarial laws of evidence, perhaps making it a more realistic and achievable reform effort (Keane and Convery, 2020). This is not to say that broader implementation of ILR throughout the trial stage is not enviable, and I would urge anyone interested in this matter to explore work of Raitt (2011) and Smith and Daly (2020); however, that sits somewhat beyond the scope of the current book.

8.3.1 ILR for a Pre-Trial Sexual History Application

Despite the contention discussed above, there are multiple adversarial jurisdictions that have begun to implement complainant representation during pre-trial sexual history evidence hearings. In US federal law and several state jurisdictions,[5] complainants are allowed a legal representative to contest sexual history applications, though this tends to be privately funded (Doak, 2008; Smith and Daly, 2020). Meanwhile, in US military law, development of a military funded 'Special Victim Counsel' extends beyond sexual history hearings to full representation throughout proceedings. In Canadian legislation, complainants are again allowed representation to make submissions regarding a sexual history application and this is state funded in most areas (Raitt, 2011; Smith and Daly, 2020).

Perhaps the leading example of complainant representation for a sexual history application is the Irish provision under *s.34 of Sex Offenders Act* (2001). S.34 grants all complainants access to state-funded, independent legal representation to challenge the defence's application to include sexual history evidence at trial (*s.34 Sex Offenders Act*, 2001). This legislation marked the first provision of its kind in an adversarial jurisdiction (Iliadis, 2020) and reflects recognition of the 'triangulation of interests' between the defendant, the state, and the complainant in a sexual offence trial (Lord Steyn, 1999).

Promisingly, evaluations of s.34 have noted this provision as a considerable success and a 'significant milestone in the area of victim's rights' (Iliadis, 2020: 420). It addresses numerous of the key areas of contention that have traditionally been associated with sexual history evidence, including ensuring appropriate rationale behind an application, counteracting (to some extent) irrelevant narratives and cross-examination,[6] ensuring that complainant's feel supported and heard in pre-trial preparations, and giving complainants a sense that their procedural rights are being upheld (Iliadis, 2020). As such, it appears evident that ILR can lead to improved justice and well-being outcomes for both complainants and the CJS process alike (Smith and Daly, 2020). This supports earlier findings of Bacik et al. (1998), who

found a significant relationship between complainant representation and their overall satisfaction with the trial process, which in turn led to increased confidence when giving evidence. Drawing on this finding, both Iliadis (2020) and Rape Crisis Network Ireland (2012) submitted that ILR under s.34 is likely to not only improve complainant wellbeing but, in turn, reduce attrition and thereby result in more positive justice statistics for the Director of Public Prosecutions (DPP).

Nevertheless, evaluations of s.34 provisions have not been without critique, though these have tended to centre around practical implementation as opposed to legitimacy and rigour. Research has shown that defence lawyers often initiate a notice of intention to include sexual history evidence very close to the commencement of trial or even during trial (Legal Aid Board, 2019; Rape Crisis Network Ireland, 2012). This not only has significant emotional and psychological consequences for complainants but also results in a lack of adequate time for lawyers to prepare their case to counter the application, limits meaningful discussion between the complainant and legal representative, and can diminish the quality of the complainant's evidence (Iliadis, 2020). Iliadis (2020) also crucially noted that the success of s.34 is very much dependant on having a robust legislative framework that can effectively limit inclusion of sexual history to only narrowly relevant instances. Thereby, whilst an independent legal representative may assist in ensuring legislation is followed, this ultimately relies on stringent and efficient legislation to begin with.

As we have noted throughout the book, the efficacy of s.41 legislation is a highly contentious matter and not one that can be fully resolved through examination of my mock jury findings. What my mock jury findings do show, however, is that the prejudicial risk associated with sexual history evidence remains ongoing, and thereby strict and rigorous restrictions to ensure that only highly relevant material is advanced at trial is crucial to mitigate against such prejudice. As such, greater scrutiny of s.41 hearings by a legal representative acting on behalf of the complainant could mitigate against these risks.

Indeed, considering apparent successes of Irish s.34 provisions, similar approaches have been mooted across the UK and further afield. In Northern Ireland, for example, Sir John Gillen (2019) recommended that complainants should be granted publicly funded legal representation to contest a sexual history application during a pre-trial hearing. Iliadis et al. (2021) urged that such provision be implemented without delay, and a pilot of this approach was announced in March 2021 (Department of Justice, 2021).

Similarly, in the Scottish context, considerable debate has arisen regarding the question of ILR in sexual history hearings (Chalmers, 2014; Cowan, 2020; Keane and Convery, 2020). In 2015, the *Criminal Justice [Scotland] Bill* proposed state funded ILR for sexual history evidence hearings [s.725]; however, this was outvoted by 2–7. Nevertheless, in the case of *WF v Scottish Ministers* (2016), a complainer's access to ILR for challenging the admissibility of *medical records* in a rape trial was upheld. This reignited debate surrounding

the implementation of ILR for s.275 applications, with the suggestion that the WF principle could simply be extended to this end (Cowan, 2020). Positively, the Rt Hon Lady Dorrian recommended such a move for s.275 hearings in a recent government commissioned review of sexual offences cases (Dorrian, 2021), and thereby it is likely that a pilot similar to that in Northern Ireland will be seen in Scotland in the near future.

Returning now to the English and Welsh context, there has been suggestion that it lacks behind the rest of the UK as somewhat of an outlier in promoting complainant rights through ILR (Smith and Daly, 2020). However, this does not mean that debate about ILR for sexual history applications has been absent. The Labour government in 2005 advocated an IRL scheme for rape complainants; however, this was not enacted (Braun, 2019). More recently another proposal to implement ILR for complainants to oppose a s.41 application was advanced in the *Police, Crime, Sentencing and Courts Bill* (HC Deb 5 July, 2021). Again, this was not enacted, with the government instead commissioning a Law Commission review into the way in which evidence is introduced in sexual offences cases. Though the findings of this review are anticipated in the near future, drawing on international expertise it is seemingly apparent that ILR for sexual history applications is warranted and favourable to improve the management of sexual history evidence in England and Wales.

8.4 Chapter Summary

It is clear from scrutiny of rape shield provisions across jurisdictions that there is no apparent magic formula or quick-fix solution to ameliorate all concerns associated with sexual history evidence in justice discourse. As an intrinsically private and emotive type of evidence, imbued with prejudicial undertones, it is inevitably a complex and contentious area of law to resolve. Yet, by reflecting on the approach and experience of similar jurisdictions, we gather important insights, foresight, and expertise regarding potential good practice. Whilst the provisions explored through this chapter have been in no way an exhaustive list, they have illustrated constructive and practical approaches that target some of the most contentious aspects of restricting sexual history evidence that have been identified through previous literature and my mock jury findings. In particular, the ongoing and engrained reliance on prejudicial assumptions and rape myths – shown in court observation research and my mock jury findings – may be mitigated through explicit reference to these prejudices within legislation and through stringent procedural safeguards. Likewise – though perhaps more complex to implement – legal representation for complainants may further serve to mitigate against inappropriate reliance on sexual history evidence whilst equally supporting complainants' wellbeing. Thus, in the context of ongoing reform s.41 debates in the England and Wales, efforts to learn lessons from other jurisdictions offer valuable and practical considerations for reform.

Notes

1 Please note this is not the exact wording of the Act.
2 Rule 412. Federal Laws of Evidence: Rule Sex-Offense Case: The Victim. Legal Information Institute.
3 Although stringent procedural guidelines equally rely on stringent application to be effective.
4 *S.3 Criminal Procedure and Investigations Act* (1966). London: HM Stationery Office.
5 Including, for example, Wisconsin, New Hampshire, and West Virginia.
6 Much like s.41, there is a procedural requirement in Ireland that when a sexual history application is submitted, counsel should also submit a list of intended questions that will be asked at trial. An independent legal representative may thereby challenge these questions in the pre-trial application, however inevitably, may not step in during trial if questioning goes beyond the remit of that which was agreed in the pre-trial hearing. The judge or prosecution counsel may, however, perform this role during trial.

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9 Back to the Drawing Board?

In December 2021, the Law Commission announced a review to scrutinise how evidence is used in the criminal prosecution of sexual offences cases, and to consider the need for reform (Law Commission, 2021). Commissioned in response to widespread failures identified by the End-to-End Rape Review (HM Government, 2020), four areas of priority were established, including to assess whether reform to s.41 (*YJCEA*, 1999) is needed and to consider how we might counter the influence of rape myths in the jury room (Law Commission, 2021). Given these areas of priority, the debates considered throughout the current book are both timely and pertinent to contemporary legislative concerns and the broader government rhetoric surrounding the criminal prosecution of rape.

The dataset provides the first insights in England and Wales about how volunteer, community mock jurors across 18 mock jury panels interpreted and responded to the inclusion of sexual history evidence in a simulated trial scenario. As such, my findings offer unique and original contributions to this scrutiny of sexual history evidence and broader discussion about how rape myths permeate deliberative narratives amongst a group of 21st-century jury eligible individuals. Though I must emphasise that some evidence of myth-busting emerged in all deliberative datasets and indicates improvements amongst some juror attitudes, overarchingly my findings challenge the notion that jurors no longer readily accept rape myths (Thomas, 2020) and specifically illustrate enduring endorsement of the twin myths within discussions of sexual history evidence (*R v Seaboyer,* (1991). Thus, without dwelling, the following section serves to elucidate the most pertinent findings of my mock jury simulations whilst also acknowledging the limitations of the project. I then submit potential implications of my findings, outlining some recommendations for change and proposing various ideas for future research in this area. I ultimately conclude that legislators must not shy away from the substantial prejudicial risk posed by sexual history and thorough, meaningful changes are necessary to protect complainants and justice outcomes alike.

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9.1 Summary of Key Findings

This book set out to explore the potential impact of a complainant's previous sexual history evidence with the defendant on juror determinations of evidence and their deliberative narratives. Moving beyond previous academic and legal conjecture on the matter, the study was the first in England and Wales to assess the impact of this evidence on potential jurors themselves through mock jury simulation methodology. Though some limitations of my work inevitably exist and are discussed below, it produced several novel and important insights about the impact of this highly controversial and previously largely under-researched area of evidence. Ultimately, my findings showed that whilst some myth-busting was present amongst jurors and represents some cause for optimism regarding changing attitudes, endorsement of the twin myths remained embedded and routine throughout my dataset, albeit often advanced more subtly than has been previously theorised.

Chapter 5 exemplified how jurors frequently relied on misguided heteronormative ideals and stereotypes about 'normal' socio-sexual relations to inappropriately attribute relevance to the complainant's previous sexual history with the defendant. These narratives situated the female complainant within the supposed gatekeeper role, implicitly awarding her the responsibility to make her non-consent overtly clear and appropriately resist the defendant's advances to ensure that there were no 'mixed messages' at play. The suggestion being that, given her previous consensual sexual activity with the defendant, there was likely some ambiguity of consent and her role as the gatekeeper should have been to appropriately communicate her non-consent. In turn, the defendant was framed according to the male instigator role and portrayed as somewhat of an innocent or naive misbeliever of consent, given the previous relationship. In doing so, this turned juror focus away from the affirmative actions and steps taken by the defendant to establish consent and instead illustrated ongoing endorsement of the propensity ideal. Whilst such narratives were generally more subtly framed than previous mock jury research has shown, they ultimately continue to echo 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.

Meanwhile, findings discussed throughout Chapter 6 affirmed much of what has been theorised in previous literature that the inclusion of a complainant's previous sexual history at trial often prompts misguided judgements about her character and credibility. Indeed, recent court observation studies have shown that despite strict regulation offered under the s.41 gateways approach to the admissibility of sexual history evidence, such evidence continues to be drawn upon by defence barristers at trial to undermine or attack the complainant's credibility before the court (Smith, 2018; Temkin et al., 2018; Daly, 2021). My findings exemplify how such narratives

translate into the jury room, with sexual history evidence regularly drawn upon to frame the complainant as deceptive or undeserving, whilst equally bolstering the defendant as seemingly honest and credible – thus, exemplifying how knowledge of previous sexual history may prompt jurors to make judgements towards the 'moral credibility' of the complainant (McColgan, 1996), reiterating the embedded nature of stereotypical assumptions that have endured over time and through cultural changes.

Alongside these deliberative narratives, findings gathered through Willmott et al.'s juror decision scale also exemplified the distorting impact of sexual history evidence on juror perceptions of both the complainant and defendant. Whilst I acknowledge that a larger sample size would be preferable to add further weight to these quantitative findings, the insights gathered nonetheless highlight novel and important nuances about the impact of sexual history that should be central to reform considerations. My findings verify what has been theorised for some time that the introduction of sexual history evidence at trial holds the potential to detract from the credibility of the complainant and add to that of the defendant (Easton, 2000; Schuller and Hastings, 2002; McGlynn, 2017). Yet, the interaction between sexual history evidence with level of consistency and adherence to rape myths in the complainant's account provides fresh evidence for reform debates. This showed that where the complainants account was not wholly consistent and did not adhere to the stereotypical 'real rape' reaction, the impact of her previous sexual history became much more substantial and prompted significant decreases in her perceived credibility amongst jurors. Taken together, therefore, these findings exemplify the highly nuanced and complex impact of sexual history evidence, which must not be viewed in isolation but as part of a broader and more complex web of myths, stereotypes, and other evidential factors that can drastically alter the impact of sexual history at trial. As such, it must be acknowledged that the impact of sexual history on jurors is far from linear or predictable but highly intersectional.

Finally, Chapter 7 illustrated the potential complicating nature of sexual history evidence, with added complexity observed in deliberations where sexual history evidence had been introduced at trial. Jury panels that had heard the previous sexual history evidence were characterised by longer and less unanimous deliberations, thereby seemingly demonstrating the potential for sexual history to distract jurors from the task at hand and distort the truth-seeking function of the jury (*R v A [No.2]*, 2001; McGlynn, 2017). In doing so, this highlights why robust restrictions are necessary, not only to dispel prejudice but also to improve the efficiency of trials. Meanwhile, more unexpectedly, my dataset also showed that reference to false allegations and crying rape emerged almost exclusively in deliberations where sexual history evidence had been introduced at trial. Whilst these narratives did not always expressly reference the complainant's previous sexual history evidence, the observed trend represents a further indication about how sexual history may detract from the perceived credibility of the complainant and veracity

of her allegation. Again, this finding represents the embedded and engrained nature of prejudicial assumptions about a female's previous sexual history and highlights the interlinked nature of sexual history evidence and wider rape myths and stereotypes.

Taken together, my findings demonstrate ongoing and embedded prejudicial impact of sexual history evidence, with jurors continuing to show endorsement of the same assumptions that were theorised as the twin myths in 1991 (*R v Seaboyer* (1991). Despite more subtle and nuanced framing of myth endorsement, the prejudicial underpinnings and assumptions remained the same and must be considered centrally in reform discussions. This is not to say that myth-busting efforts should be dismissed as a cause for optimism; however, the embedded and routine nature of prejudicial pronouncements about sexual history suggests the rigorous and holistic restrictions to the inclusion of sexual history at trial remain vital. Ultimately, therefore, 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 framing of sexual history evidence at trial is both necessary and justifiable. As such, cautious recommendations for change are considered below, after I first outline the limitations of my research.

9.1.1 Limitations of This Research

Whilst the insights provided by my research contribute in several ways to our understanding of the impact of sexual history evidence and provide a novel basis for reform debates, it would be inappropriate to discuss these without some acknowledgement of the limitations and constraints of the research.

First and foremost, the sample I obtained, both in 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 and deliberating for up to 80 minutes provided substantial 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). Meanwhile, as stated previously, given that my sample was weighted towards females and younger, more educated individuals, it is likely that my findings *underestimate* the scale of myth endorsement amongst the jury eligible population. Indeed, numerous studies have illustrated that age and gender can be predictors of rape myth endorsement, with participants in my research exhibiting lower rape myth acceptance in the AMMSA responses than would be expected of a typical cross-section of the population. As such, it is likely that prejudicial pronouncements about sexual history are more extensive in a typical jury than has been illustrated throughout this book. A larger sample would 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, I must caveat such critiques by reiterating that jurors and juries are far from linear or predictable (Ellison and Munro, 2014), meaning that even the largest and most diverse sample (or a sample of real jurors) could not ever account for *all* possible variations and nuances that may arise in deliberations, as jurors, jury composition, and case facts will all be fundamentally unique to each and every trial. As such, I submit that whilst it may be easy to disregard my study's findings on the basis of the small sample, in practice, my findings illustrated routine and overlapping trends across jury panels, thereby indicating analytic generalisability (Yin, 2010). Thus, despite certain limitations, the unique and novel exploratory insights offered by my research must not simply be overlooked or disregarded as ungeneralisable.

Alongside sampling, the mock jury methodology has also attracted some critique due to its artificial, role-playing dimension (Thomas, 2020). Whilst, inevitably, this was an unavoidable limitation to maintain ethical research, the impact of this was seemingly limited. I found, much like previous mock jury researchers (Ellison and Munro, 2010; Ormston et al., 2019), that participant jurors were routinely animated in discussions and regularly noted the implications of their verdict on both the complainant and defendant's 'lives.' Thus, whilst it is impossible to assess the extent to which the artificial nature of task impacted on juror discussions and outcomes (Ormston et al., 2019), it must not negate the value of this research. Indeed, all research methods are arguably vulnerable to a greater or lesser degree of social desirability bias, including research with real jurors. The implications of this must therefore be acknowledged; however, I maintain that this should not discourage or dismiss research into these complex and otherwise concealed areas of the justice process.

Finally, as noted in Chapter 2, the entire research discussed in this book was undertaken online as a direct result of the Covid-19 pandemic. Again, this represents a deviation from the task of real jurors; however, it remains impossible to isolate and assess the impact of this deviance. Nonetheless, the online methodology held numerous practical benefits (Herriott, 2022), and the data gathered through deliberations and questionnaire responses remained rich and extensive. Online data collection has proved positive in broader focus group research (Fox et al. 2012; Kite and Phongsavan, 2017), and I argue that online mock jury simulations hold substantial value in the changing landscape of research methods.

Notwithstanding these limitations, the findings discussed throughout this book have contributed significantly to our knowledge and understanding of how sexual history evidence may impact upon jurors at trial. Yet, through acknowledging these limitations, this section has also highlighted several areas of potential additional research (see 9.3) which could further enhance the knowledge base in this area and contribute added ideas and recommendations to reform discussions.

9.2 Implications of My Findings

The findings discussed throughout this book bear numerous implications for policy and practice, as well as potential legislative redrafting. First and foremost, they proffer novel, empirical insights that illustrate the ongoing prejudicial risk posed by the inclusion of sexual history evidence at trial and, specifically, its impact on jurors. Accordingly, these findings raise important questions about (a) the function and operation of jurors in trials where sexual history evidence is introduced, and (b) highlight pertinent considerations for discussions about reforming or amending s.41 provisions.

I must emphasise here that I am not and do not profess to be a legal scholar, nor is my research focused specifically or exclusively on the legislative efficacy of s.41. Therefore, throughout the remainder of the chapter, I do not seek to pronounce direct or exacting *recommendations* for legislative reform, but instead I seek to emphasise important and original *implications* of my findings. In doing so, I consider the significance and ramifications of these findings, denoting novel insights about the practical impact of sexual history evidence on juror decision making, which in turn remain highly pivotal and consequential to wider, ongoing reform discussions. In essence, rather than seeking to denote *how* a reformed s.41 should look, the following section will emphasise vital considerations to reflect on to ensure effective and meaningful reform efforts.

9.2.1 Practical Implications for Juries

Jurors' routine subscription to generalised myths and stereotypes about sexual violence has been well established in academic literature[1] (Ellison and Munro, 2009a; 2013; Dinos et al., 2015; Willmott, 2017; Munro, 2019; Ormston et al., 2019; Leverick, 2020), and therefore it is perhaps unsurprising that my results illustrated ongoing and routine adherence to these same myths and stereotypes throughout deliberations. Whilst this book's focus is on sexual history evidence rather than broader rape mythology, and therefore I do not seek to labour this point, a key policy priority emerging from these findings – much like the previous work of Ellison and Munro (2013), Willmott (2017) and Ormston et al. (2019) amongst others – must be to more readily recognise and aim to dispel reliance on these misguided assumptions in the jury room.

Within this context of ongoing rape myth endorsement, the novelty of my findings relates to sexual history evidence specifically, illustrating enduring adherence to the twin myths within juror interpretations and discussions of such evidence. Accordingly, the overarching and perhaps most obvious implication of my research is to ensure greater appreciation and recognition of the potential bias posed by sexual history evidence for jurors. Indeed, given these research findings, we can no longer naïvely assume that the inclusion of sexual history evidence in a rape trial, even where this may be relevant under the s.41 gateways, does not pose a distinct risk to the impartiality and competency of

juror deliberations. This is certainly not to say that relevant sexual history evidence should be excluded from trial on this basis, but crucially it does substantiate and justify the need for some policy or procedural responses that help to mitigate against such risks. Current legislative restrictions (*S.41 YJCEA*, 1999) and procedural guidelines (*Criminal Practice Directions*, 2015; *Criminal Procedure Rules*, 2020) inevitably go some way to reducing the inclusion and impact of sexual history evidence at trial; however, further measures that explicitly focus on the function and operation of jurors and their responses to this highly complex type of evidence would be favourable.

Perhaps the most fiercely debated and certainly the most radical response to addressing juror endorsement of rape myths and stereotypes is the abolition of trial by jury, at least for certain types of offence such as sexual offences (Bindel, 2018; Dorrian, 2021; Willmott et al., 2021b). Though the feasibility and legitimacy of such a move is open to debate, abolitionists ultimately proclaim that jurors are unfit for purpose particularly when considering complex evidence, often endorsing erroneous misconceptions about what 'real' rape is and regularly arriving in court with misguided, pre-conceived attitudes that can alter their judgements of witnesses and evidence (see Dorrian, 2021 and Willmott et al., 2021 for further consideration of these arguments). Inevitably my findings echo some of these sentiments, illustrating how jurors continue to regularly advance assumptions underpinning the twin myths in their deliberations, and how the inclusion of sexual history evidence at trial can both explicitly and implicitly alter juror determinations of witnesses and the collective case evidence. Yet notwithstanding these concerns, I must concur with Munro (2019) and Leverick (2020) in proclaiming that it would be premature to advocate total or even partial abolition of jurors at this juncture, even in cases where complex and controversial sexual history evidence is raised.

Indeed, firstly, there remains limited research evidence and a lack of agreement about possible favourable alternatives to trial by jury. Trials by a single judge or even a panel of judges seemingly offer some advantages, such as the potential to institute professional training and require reasoning behind verdicts given (RT Hon Lady Dorrian, 2021). However, equally, there remains the risk that judges are still open to the same prejudices that are observed amongst the wider jury eligible population and reflect a very narrow perspective of societal views, given the typical older, white, middle-class composition of the judiciary (MOJ, 2021). Secondly, though my findings exemplified distinct and problematic rape myth endorsement, they also revealed encouraging myth rejection by a body of jurors and an unwavering diligence towards the deliberation, with jurors noting the potential real-world consequences of their decision and necessity to follow judicial directions. Consequently, whilst it remains imperative that problematic juror interpretations of sexual history evidence must be tackled, and evidently jury decision making carries many flaws in sexual offences cases (Willmott, 2017; Leverick, 2020), there seemingly remains some cause for optimism about the continued use of juries if

these problematic attitudes can be effectively challenged. Thus, before we can legitimately advocate for anything as extreme as the removal of juries in sexual offences cases, it is judicious to consider other and more pragmatic avenues to addressing these problematic attitudes. First and foremost of which is seemingly to ensure that the purpose to adducing sexual history evidence at trial is made apparent to the jury from the outset, so that they are aware of how they may legitimately interpret and use this evidence (McDonald, 2020).

Beyond this, my findings contribute to an existing body of research that makes a clear case for the enhanced use of juror education (Ellison and Munro, 2009b; Leverick, 2014; Chalmers and Leverick, 2018; McDonald, 2020; Tinsley et al., 2021), screening (Willmott, 2017), and/or expert testimony (Ellison and Munro, 2009c) in sexual offences cases. Each of these reform proposals holds substantial merit in attempting to mitigate against the risks posed by widespread myths, stereotypes, and pre-conceived biases in sexual offences cases; however, the practicality and research efficacy of each notably varies. Indeed, proposals of pre-trial juror screening, though potentially a relatively simple way to mitigate against rape myth acceptance and is already used to some extent in other jurisdictions such as the US (Willmott, 2017), seemingly does engender some query about the fairness of discerningly selecting jurors, and also creates some challenge in terms of the accuracy that screening can offer (Munro, 2019). Likewise, whilst expert testimony has been proven as a useful method to address juror ignorance around myths and stereotypes (Ellison and Munro, 2009c), in practice it is often impeded by cost and access constraints (Temkin and Krahe, 2008; Tinsley et al., 2021). Accordingly, arguably the most practical and efficient recommendation that I will devote the remainder of the section to is the use of specialist judicial directions.

Specialist sexual offences directions were implemented in 2010 (Judicial College, 2010) following the influential findings of Ellison and Munro (2009a,b,c) which revealed routine and widespread rape myth endorsement amongst mock jurors. Having now become routine practice across sexual offences trials in England and Wales (Judicial College, 2018), numerous empirical analyses have noted the effectiveness of these directions in targeting generalised rape myth endorsement amongst jurors, particularly when delivered in written format with reasoning given to explain why such guidance is needed (Ellison and Munro, 2009c; Leverick, 2014; Chalmers and Leverick, 2018). Indeed, jurors in my dataset often referenced the judge's directions within their deliberations, cautioning fellow jurors about reliance on rape myths and misapprehensions. Positively, the Crown Court Compendium (Judicial College, 2022) does outline specialist guidance that judges may choose to deliver where evidence of previous, consensual sexual activity has been raised. The exemplar direction denotes that previous consent does not amount to latter consent and also highlights that it does not necessarily equate to a defendant's reasonable belief in consent. This positively begins to challenge the propensity narrative, but given the findings

discussed throughout this book, I submit that enhanced guidance is necessary (McDonald, 2020; Tinsley et al., 2021) to further emphasise and challenge the problematic, prejudicial inferences that regularly underlie this highly controversial evidence.

Indeed, largely, jurors in my dataset were able to play lip service to the notion that previous consent does not necessarily equate to latter consent, thereby seemingly rejecting the propensity assumption. Yet belying these suggestions, frequent postulations endured, denoting for example that, given the previous consensual activity the complainant may have sent mixed signals or failed to communicate her non-consent clearly enough, whilst the defendant may have simply been a naive misbeliever in consent. Inherently, these narratives awarded credence to the propensity assertion, relying on misguided stereotypes of heteronormative sexual relations to both attribute blame to the complainant and excuse the defendant, thereby clearly influencing the deliberations. Alongside this, sexual history evidence was also regularly drawn upon to posit the complainant as less believable or trustworthy, and the defendant more so – a trend which was equally illustrated in findings of the JDS. Accordingly, it appears evident that a simple and superficial nod to the inaccuracy of the propensity assertion in judicial directions is simply not enough to truly dispel or at least mitigate against the clear prejudicial assumptions arising in deliberations. Instead, detailed and clear guidance that challenges *each* of the twin myths, makes clear to jurors the reason and implicit assumptions underlying such challenges, and perhaps even highlights where the *legitimate relevance* of such evidence lies (McDonald, 2020), would represent a more rigorous effort to diminish inappropriate reliance on such evidence by jurors. Importantly, such directions should be developed with care and attention to avoid *enhancing* juror focus on misconceptions and myths, as well as in conjunction with enhanced judicial education (Tinsley et al., 2021). Going forward, therefore, a pilot study to develop the content of these enhanced sexual history directions and to perhaps scrutinise the most effective mode/time of delivery must be the next step in the research trajectory.

Nevertheless, whilst further utilisation of specialist directions to tackle sexual history bias is inevitably a positive and relatively simple step towards mitigating against juror prejudice, I must equally acknowledge the limitations of jury education. Namely, given the engrained – and in my dataset, even implicit – nature of rape myths, it is hard to assume that directions will comprehensively tackle and prevent all rape myth endorsement (Hanna, 2021). As Willmott (2017) mooted, where bias lies 'below conscious awareness,' the degree to which any juror education can prevent bias remains questionable.

Thereby, alongside enhanced juror education efforts, wider educational initiatives that target these attitudes at a societal level are also pivotal to dispelling reliance on myths and stereotypes in the jury room. Inevitably, this represents a monumental task and cannot be solved by any quick fix or wave of the magic wand. However, Tinsley et al. (2021), for example, suggest that

perhaps social media and television campaigns aimed at collective societal education could have some degree of success in dispelling these attitudes and a societal/cultural level, which in turn could influence the jury room. Within this societal approach, I suggest that criminal justice and legislative amendments are useful starting points to trigger societal change, exerting powerful influence over societal morals, behaviour, and attitudes (Aksoy et al., 2020). The following section thereby considers implication of my research findings on ongoing s.41 reform debates.

9.2.2 Implications for Legislative Change

The Law Commission review of sexual history evidence provides a valuable opportunity to reflect on some of the key implications of my findings on the broader legislative regime. First and foremost, my findings clearly highlight the ongoing relevance of the twin myths in juror discussions of sexual history evidence. Thus, as alluded to above, greater acknowledgement of this potential bias in legislation as well as practice is pivotal to mitigating against improper influence of sexual history on deliberations.

Learning from the exemplary Canadian regime, the present results seemingly make a case for the revised s.41 to explicitly reference the twin myths as the core justification for legislative restrictions. Whilst this is unlikely to directly impact on jurors themselves, it makes clear to barristers and judges from the outset why such restrictions are in place and exemplifies the *inappropriate* inferences that sit alongside such evidence. Some may contend that such an approach is unnecessary, since Hoyano's (2019) recent findings declared that barristers do not generally make s.41 applications lightly. Yet concurrently, observational findings have shown routine inappropriate reliance on sexual history, with frequent references to myths and stereotypes during questioning (Durham et al., 2016; Smith, 2018; Daly, 2021), meaning some further attempt to dispel these attitudes from the courtroom is warranted.

Indeed in conjunction with this statement of purpose and again drawing on Canadian provisions, it would also be favourable for a reformed s.41 to require a balancing of interests between the probative value of sexual history evidence and the prejudicial risk posed. Thus, rather than solely examining the relevance of sexual history as s.41 currently does, such an approach would also embed consideration of prejudicial risks and influence of rape myths posed by introducing such evidence at trial and weigh these risks against the *value* of such evidence. In doing so, it serves as an acknowledgement that problematic attitudes exist in this area and goes some way to addressing these. Indeed, the findings discussed throughout this book provide the first clear insights into how jurors interpret and rely upon sexual history evidence in their deliberations in England and Wales. Therefore, having acquired this knowledge, it is important to translate it into practice to mitigate against these prejudicial risks and dispel influence of the twin myths from verdict reasoning.

Within these reform efforts, given the prejudicial inferences associated with not only sexual intercourse evidence but also evidence of previous sexting, a legislative definition of sexual behaviour would also be favourable to minimise prejudice. Again, this is particularly pertinent now, given the high-profile and ever-expanding debates surrounding the disclosure of digital evidence in sexual offences trials, and represents a further measure in which we can neutralise current flaws in the approach to sexual history. Whilst some of this is already delineated through common law precedents, an over-arching definition within legislation offers a clear and unambiguous message of scope to further bolster rape shield provisions.

Inevitably, numerous further legislative amendments are perhaps necessary to improve the rigour and efficacy of rape shield provisions in England and Wales; however, those listed represent clear and pertinent implications of my mock jury dataset, which offer a fresh perspective on reform debates. All are relatively straightforward and easy to implement within ongoing recommendations. However, the challenge then becomes ensuring effective and meaningful implementation of recommendations. Indeed, I must emphasise that legislative change must not sit in isolation but as part of wider efforts to revise and redevelop the way that sexual history evidence – and other evidence in sexual offences trials – is introduced and relied upon at trial. Indeed, on the Canadian context, Craig (2018) importantly emphasises that we must not simply interrogate the (perhaps relatively progressive) laws that exist in this area, but equally scrutinise the practical implementation, ethical responsibilities, and courtroom narratives. This is in no way intended as an attack on barristers, as indeed many of the issues observed in trials remain systemic and a result of broader, adversarial structures (Craig, 2016; Smith, 2021); however, ultimately, legislative change alone, nor practical change, can solve the extent of issues discussed throughout the current volume. Perhaps the first step, in conjunction with legislative change, is for barristers and judges to be given enhanced training which outlines some of the key practical consideration and consequences that have been revealed in the current book.

9.3 Future Research Directions

Admittedly, it can be frustrating when research concludes that further research of this nature would be beneficial; however, I cannot shy away from the fact that this remains one of my key findings. My research, though producing a wealth of interesting and original insights, could equally be bolstered by larger scale, more diverse research of this nature, as well as research that hones in on some of my key findings. For example, further examining the intersectional nature of sexual history with other rape myths narratives, or potential quantitative analysis that assesses whether the inclusion of sexual history evidence can alter verdict outcomes. Only by developing research in this area can we comprehensively mitigate against potential collateral risks

associated with the inclusion of this evidence at trial and avoid the pitfalls of vicious policy cycles that have been discussed above.

For clarity, table 9.1 summarises some key research directions. This is not intended as an exhaustive list, nor are the recommendations fully fledged research proposals, but will hopefully be a useful foundation to prompt conversations and ideas about 'what next.'

Table 9.1 Future Research Directions

1	Replicate the mock jury project described in this book, using a larger and more diverse participant pool of mock jurors to increase the validity and generalisability of findings.
2	Given Thomas's (2020) access to real jurors, there is perhaps scope to conduct a similar project to the one described in this book, however, this time using real jurors. However, I would argue that data collection must involve a deliberative element in order to provide comprehensive and valuable insights.
3	Conduct a jury simulation project focusing on an intersectional analysis of sexual history evidence. This would allow us to further explore how sexual history intertwines with broader rape myth narratives and could also enable examination of whether compounded oppressions, such as gender, age, class, or ethnicity (amongst others) of the complainant or defendant, alter the impact of sexual history evidence on jurors.
4	An up-to-date case file analysis to establish whether a correlation remains between the inclusion of sexual history evidence at trial and conviction rates. Kelly et al. (2006) revealed such an association; however, it would be beneficial to see if such an association remains in 2022.
5	Court observation research to assess how sexual history evidence is introduced at trial, following the implementation of recent changes in the Criminal Practice Directions.
6	Court observation research examining the inclusion of sexual history and associated trial narratives through an intersectional lens.

9.4 Concluding Remarks

Though the English and Welsh legislature have, from as early as the 1970s, committed to restricting sexual history evidence in sexual offences trials, the ongoing question about when and how to restrict such evidence at trial is arguably no less controversial now than when provisions were initially enacted more than four decades ago. Undeniably, sexual history remains an extremely sensitive and complex area of evidence, with various interests at play, not least of which is the need to ensure a fair trial for the defendant. Whilst several suggestions to reform s.41 have been proposed in recent years, these have ultimately been developed in the absence of clear empirical evidence about how jurors, as ultimate deciders of verdict, interpret and rely upon this evidence in their deliberations. The research discussed throughout this book has addressed this knowledge gap as the first mock jury research globally to assess

the impact of sexual history evidence on mock juror *deliberations* in rape trials. In doing so, my findings have illustrated the clear prejudicial risk posed by sexual history evidence and emphasised the need to recognise and mitigate against such risks to ensure a safe and fair justice process for all parties.

I must conclude at the current juncture that the jury remains *out* on sexual history evidence, meaning considerable reform and further research is necessary to improve justice responses for all parties involved. Indeed, the findings discussed throughout this volume have evidenced the engrained and embedded nature of prejudices surrounding sexual history, particularly the enduring relevance of the twin myths. Alongside these prejudices, sexual history evidence has also been shown to interplay with various other rape myth narratives about, for example, false allegations, appropriate or rational responses to rape, the perceived character and credibility of 'real complainants,' and so on. As such, I must conclude at the current juncture that the jury remains *out* on sexual history evidence, with reform efforts and further research necessary to improve justice responses for all parties involved and mitigate against these evident risks.

I have examined some of the potentially most pressing considerations for reform above and therefore do not seek to reiterate these here; however, what I must emphasise is that my data has ultimately shown that there cannot be one fix-all approach to reforming the law on sexual history and, more broadly, we cannot 'solve' all issues relating to sexual history without also assessing broader critiques of the CJS response to rape, particularly the ongoing influence of rape myths. Therefore, radical overhaul of underlying court cultures and structures is vital (Daly, 2021a) to fundamentally re-frame the evidence jurors hear at trial, especially those surrounding controversial and complex sexual history evidence. Meanwhile, juror and wider public education programmes are equally critical to counter bias and misapprehension amongst jurors (Willmott, 2017; Ellison, 2019), and should therefore be implemented in conjunction with meaningful policy and perhaps legislative change.

Indeed, I advocate some legislative and procedural change to more readily recognise the influence of myths and stereotypes on juror interpretations of sexual history evidence. However, I must caveat this with the caution that any changes must be holistic, far-reaching, and rigorously implemented so as to avoid unrelenting and repetitive policy cycles like those we have arguably seen to date (McNabb and Baker, 2021). Indeed, a rigorous legislative framework is pivotal to ensuring sexual history evidence is appropriately restricted at trial, as is effective and clear implementation. These must ultimately go some way in mitigating against the risk of juror prejudice illustrated throughout the current book. Yet importantly, we have already seen numerous attempts at legislative and policy reform of rape shields, both in England and Wales and internationally, often with little substantive effect. Thereby triggering further recurrent and often rudimentary reform attempts (McNabb and Baker, 2021). Thus, to avoid repeated and cyclical attempts at legislative and/or procedural reform, comprehensive and holistic consideration of all

relevant interests and all available empirical data on the matter is essential. McNabb and Baker (2021) theorise that to avoid ongoing policy cycles, reform efforts should address not only due process concerns and the content of legislative changes, but also implementation challenges, contentious social issues, funding awarded to complainant support bodies, and professional training to balance the interests of all parties. The novel mock jury findings discussed throughout this volume enable a fresh perspective for policy makers and legislative drafters that can be used holistically alongside existing research findings and academic theorisation to ensure effective and meaningful change.

Note

1 Though not without opposition (Thomas, 2020).

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