



**THE 'EFFECTIVE DECRIMINALISATION' OF
ACQUAINTANCE RAPE:
RAPE MYTH ACCEPTANCE, SECONDARY VICTIMISATION
AND ANTI-RAPE CAMPAIGNS**

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Abstract

This article examines the role that rape myth acceptance (RMA) and societal misconceptions play, in shaping the experience that victims of acquaintance rape are presented with, both culturally and legally. The utilisation of RMA by all bodies of the criminal justice system (CJS) as an essential movement away from the merits-based approach as set out in the Sexual Offences Act 2003 will be analysed in detail. Legal fictions surrounding the presumption of innocence, inclusion of third party and prior sexual history evidence alongside perceived complainant credibility and veracity can all be considered as factors influencing the unprecedentedly low prosecution rate for acquaintance rape. Taking into consideration the current High Court action against the CPS for their failings to prosecute rape cases at the same rate as other violent crimes, this article will examine the legitimacy of Andrea Simon's (EVAW) comment that there has been an 'effective decriminalisation of rape'.² In light of this statement, the role that campaigns advocating for gender equality, victim empowerment and legal reform, will play in the future development of rape law will also be examined.

Keywords: Acquaintance Rape, RMA, Victimisation, Justice Gap, Anti-Rape Campaigns

Introduction

Sexual violence has historically been utilised as 'a pervasive, systemic method of creating and sustaining male dominance over women,'³ as such rape myths seek to further justify

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² End Violence Against Women, Rape convictions lowest since records begun' (12 September 2019) <<https://www.endviolenceagainstwomen.org.uk/rape-convictions-lowest-since-records-begun/>>

³ Karen Busby, "Sex Was in the Air - Pernicious Myths and Other Problems with Sexual Violence Prosecutions" in Elizabeth Comack, *Locating Law* (Fernwood Publishing, 2014) 258.

and regulate male sexual aggression through the creation and perpetuation of social norms. Former Canadian Supreme Court Justice Claire L'Heureux-Dubé theorises that rape myths: 'Divorce the law from contemporary knowledge because they have more to do with fiction... [and are] therefore, incompatible with the truth-seeking function of the legal system.'⁴ It is important to note the transition from RMA to legal fiction, with the latter a postulation of a supposed truth in which 'a legal rule or institution is diverted from its original purpose to accomplish indirectly some other object.'⁵

In analysing the development of this area of rape law, the first issue to address is the presence of rape myths throughout a criminal justice system which 'appears to have effectively decriminalised rape'⁶ as a result of the dramatic loss of cases through key stages resulting in the lowest prosecution rates since records began. This will be followed by an exploration of the systemic lack of specialised training and the correlation to law enforcement's proclivity for no-crime reporting, alongside their reliance on the image of an 'ideal victim'. Aspects of victims' post-attack experiences such as the 'rhetorical skills of charismatic oratory found in courtroom talk [and] the manipulation of words'⁷ that enable the perpetuation of RMA will be examined in relation to the 'judicial rape' experienced in the courtroom. During the twenty-first century there has been a call for sexual and gender equality and greater support and justice for victims of rape through the emergence of anti-rape campaigns. This piece will thus argue whether the adversarial system is the most proficient method of securing justice with specific emphasis placed on the exploration of restorative justice and its appropriateness in offering a solution to the 'justice gap'. The argument for essential reform will also be examined, with Temkin theorising, that without progressive systematic change 'the plight of rape victims within the criminal justice system is unlikely to improve.'⁸

1 A Changing of Attitudes: The Anti-Rape Campaigns

In the 1980s, Susan Estrich coined the term 'real rape' defining the stereotype as instances involving 'a white, young victim who is attacked at night by a stranger who is motivated by

⁴ 'Beyond the Myths' 89.

⁵ Black's Law Dictionary (10th ed, 2014).

⁶ Rebecca Hitchens as quoted by, Caelainn Barr 'Women's rights group sues CPS over failure to pursue rape cases' *The Guardian* (24 September 2019).

⁷ Gregory M. Matoesian, *Reproducing Rape: Domination Through Talk in the Courtroom* (University of Chicago Press 1993) 1.

⁸ Jennifer Temkin, 'Reporting Rape in London: A Qualitative Study' *The Howard Journal* 38(1) (1999) 38.

sexual gratification.⁹ Despite the plethora of research that followed the anti-rape movements of the early 1970s, RMA is still unfortunately reflected in today's society, perpetuated by the media with 'isolated incidents that are in accordance with the myth tending to be widely publicised.'¹⁰ Normalisation of rape myths emanate from the prevailing normative constructions of gender socio-political structures which highlight sexual violence as a fundamental component of the social control of women. RMA, therefore, serves to regulate 'the rules governing the permissibility of speaking about rape, tacitly enforcing the shame that surrounds sexual violence.'¹¹ This ultimately promotes the 'acceptance of rape by normalising sexually aggressive behaviour.'¹²

Whilst 'penal and popular understandings of what 'real rape' looks like continue to be dominated by the imagery of a sudden, surprise attack by an unknown assailant,'¹³ the ubiquity of rape myths is unlikely to diminish. Acquaintance rape, therefore, is continually undermined by the existence of a stereotype that seeks to belittle and downplay its authenticity. Despite precedent depicting that active resistance need not be proven,¹⁴ resistance narratives continue to saturate adversarial criminal rape trials. Complainants who are socially and legally acknowledged as victims are those who reported: 'using greater resistance, indicated clear refusal to the perpetrator, and perceived the assault as more forceful.'¹⁵ It is also important to note that progressive change is possible as notions of complainant credibility 'do not operate in a vacuum, but rather, are influenced by gender relations and patriarchal ideology.'¹⁶

Since the 1970s anti-rape movements have 'attempted to shift public perceptions about rape from the register of tragedy to an understanding of how utterly ordinary it is.'¹⁷ Technological advancements have given a public platform to anti-rape movements and they have consequently evolved from vigilante street politics to consciousness raising speak-outs. An

⁹ Hannah Bows, 'Rape of Older People in the United Kingdom: Challenging the 'Real-rape' Stereotype' *The British Journal of Criminology* 57 (2017) 3.

¹⁰ 'Rape myths: In review' 134-135.

¹¹ Rachel Loney-Howes, 'Shifting the Rape Script: "Coming Out" Online as a Rape Victim' *Frontiers A Journal of Women Studies* 39(2) (2018) 26.

¹² Luke Gittos, *Why Rape Culture is a Dangerous Myth: From Steubenville to Ched Evans* (Societas, 2015) 3.

¹³ Louise Ellison and Vanessa Munroe, 'Better the devil you know? "Real rape" stereotypes and the relevance of a previous relationship in (mock) juror deliberations' *International Journal of Evidence & Proof* 17(4) (2013) 301.

¹⁴ *Larter and Castleton* [1995] Crim LR 75.

¹⁵ Elizabeth D. Kolivas, 'Assessing sexual aggression: Addressing the gap between rape victimization and perpetration prevalence rates' *Aggression and Violent Behaviour* 12 (2007) 320.

¹⁶ 'Understanding Complainant Credibility in Rape Appeals' 436.

¹⁷ Rachel Hall, "'It Can Happen to You": Rape Prevention in the Age of Risk Management' *Hypatia* 19(3) (2004) 10.

analysis of the narratives regarding women's sexual suffering and vulnerability present in prevailing understandings of rape and the work of anti-rape campaigns in broadening the representation of rape follows.

#MeToo

The #MeToo movement is perhaps the shining light 'at the centre of the labyrinth of patriarchal culture.'¹⁸ Although founded in 2006 by civil rights activist Tarana Burke, the movement did not amass a substantial following until it was polarised by Hollywood actresses. American actress turned political activist, Alyssa Milano, highlighted the magnitude of the issue when she implored her Twitter followers to share their stories with 609,000 posts containing #MeToo flooding social media the very next day. The accessible, supportive nature of the campaign created a platform for women in 'smaller, less-well-covered industries to speak up, find each other and effect change.'¹⁹ Ultimately, realising Burke's aim to 'empower through empathy, countering the cruelty of sexual assault,'²⁰ through the collective sensation of shared stories and experiences. A transcript of a recorded conversation between the President of the United States, Donald Trump, and American radio host, Billy Bush, highlights the continued correlation between 'male-centric social norms which stem from patriarchal systems'²¹ and sexual assault. Trump epitomises male entitlement by stating: 'I am automatically attracted to beautiful - I just start kissing them. It's like a magnet. Just kiss. I don't even wait. And when you're a star... you can do anything.'²²

The extent of this issue was further highlighted by Justice Hayden in a recent case where he lamented that there cannot be an 'any more obviously fundamental human right than the right of a man to have sex with his wife,'²³ disregarding the woman's rights in one fell swoop. Despite the awareness that #MeToo has raised, a shortcoming of the movement, undermining its future, is its lack of inclusivity as:

So much of the first year of #MeToo has been dominated by the comparatively privileged voices of white female Hollywood actors, by guidelines and plans

¹⁸ Sandra M. Gilbert 'In the Labyrinth of #MeToo' *The American Scholar* 4 June 2018.

¹⁹ Riley Griffin, '#MeToo: One Year On' *Bloomberg* 5 October 2018.

²⁰ Michelle Rodino-Colocino, '#MeToo: countering cruelty with empathy' *Communication and Critical/Cultural Studies* 15 (2018) 96.

²¹ Etchells et al, 'White Male Privilege: An intersectional deconstruction' *Journal of Ethnic and Cultural Studies* 4 (2017) 13.

²² Penn Bullock 'Transcript: Donald Trump's Taped Comments About Women' *The New York Times* 8 October 2016.

²³ Owen Bowcott, 'English judge says man having sex with wife is 'fundamental human right' *The Guardian* 3 April 2019.

announced but not necessarily put to the test, and a focus on individual rather than collective action.²⁴

#IBelieveHer and #Cuéntalo

Anti-rape campaigns are rooted in and fuelled by public outrage, none more so than the #IBelieveHer campaign. In 2018, four Irish rugby players were acquitted of rape charges after the defence counsel presented the victim's lacy underwear in court in an attempt to demonstrate her sexual intentions and discount her credibility. Inevitably, the trial has been a catalyst for talks of reform with followers suggesting a move to Iceland's system for consent to be proven or even Scotland's 'not proven' verdict. Thacker argues that a large part of the victim's re-victimisation in such public trials occurs in the media with:

News services and social media posters alike tending to home in on the victim, calling her names and questioning her past sexual history, or completely ignoring [the victim] in favour of sympathising with her rapists.²⁵

The #IBelieveHer campaign, therefore, encapsulates the important reality of the need to remove the kneejerk disbelief that seems to be unique to rape. Similarly, Spain's #Cuéntalo campaign following the 'incendiary acquittal of five men on rape charges in Pamplona,'²⁶ gave a voice to many women who felt they had been silenced by society. In giving a platform for everyday women to speak about the injustices they face, the movement 'led Spain's conservative government to...consider changing rape laws,'²⁷ with the judgement overturned at a retrial earlier this year. Ultimately, the movements have generated a power of connection highlighting that 'sexual violence is not about people's individual actions but that it is a systemic problem.'²⁸

An Identity Paradigm: The Survivor/Victim Dichotomy

The drawbacks of 'subsuming (the problem of rape) under a broad term like 'rape culture' obscures the identities of both rapist and raped.'²⁹ This envelopment of identity is prevalent in the debate between victimhood and survivorship with the former often received with a 'pejorative tone.'³⁰ Leisenring laments that 'current cultural discourses surrounding violence

²⁴ Pamela Hutchinson 'MeToo and Hollywood: what's changed in the industry a year on?' *The Guardian* 8 October 2018.

²⁵ Lily K. Thacker, 'Rape Culture, Victim Blaming, and the Role of Media in the Criminal Justice System' *Kentucky Journal of Undergraduate Scholarship* 1 (2017) 91.

²⁶ Tom Phillips, '#Cuéntalo: Latin American women rally around sexual violence hashtag' *The Guardian* 3 May 2018.

²⁷ Fiona Govan, '#Cuéntalo: Spanish women launch their own #Metoo movement' *The Local* 30 April 2018.

²⁸ Amy Goodman and Juan Gonzalez, Interview with Alicia Garza, founder of Black Lives Matter, and Tarana Burke, founder of #MeToo 17 October 2017.

²⁹ *Why Rape Culture is a Dangerous Myth*, 6.

³⁰ 'Beyond Victim or Survivor' in *Sexualizing the Social* 77.

against women, commonly depict them as blameworthy or as weak and powerless,³¹ contributing to conflict surrounding victimhood. Jordan progresses this explanation as being the result of an 'implied linear progression from the negative state of victimisation,³² to one of survivorship. Language has the ability to conjure 'salient images, models, or templates for self-construction'³³ offering a rationale for the victim/survivor dichotomy. The strong connotations of a survivor are apposite to the cultural nuances of a victim who is passive and helpless. Society's proclivity to associate victim status with blame has meant that several women have felt pressured into discarding their 'victim identity because they did not want to be perceived as being culpable for the violence they experienced.'³⁴ Rape campaigns must therefore do more to legitimise the various ways in which these women seek to protect themselves and survive both during and after the assault. There is a belief that to accept the use of the term victim would be to return society 'to a victimology paradigm,'³⁵ ultimately re-moralising sex. However, for all the increased concern, acquaintance rape remains underrepresented in crime statistics as highlighted by a 32.8% drop in completed prosecutions and a 26.9% decrease in convictions³⁶ since last year despite a 4,610 increase³⁷ in the number of rapes recorded. #MeToo's penchant for survivorship has also caused women difficulty in:

Piecing together parts of different discourses to create a narrative that fits with both the complexities of their lives and the way they wanted to construct and understand themselves.³⁸

Women's experiences and their psychological state after rape 'cannot be contained within the dichotomy of "victim or survivor" trauma, and humans, are much more complex than these two labels.'³⁹ Consequently, both victimisation and survival are important dimensions of the experiences of rape complainants.

³¹ Amy Leisenring, 'Confronting "Victim" Discourses: The Identity Work of Battered Women' *Society for the Study of Symbolic Interaction* 29 (2006) 307.

³² 'From victim to survivor - and from survivor to victim' 48.

³³ James A. Holstein, *Institutional Selves: Troubled Identities in a Postmodern World* (New York: Oxford University Press 2001) 11.

³⁴ Confronting "Victim" Discourses' 318.

³⁵ Letty Cottin Pogrebin, 'Has #MeToo Gone Too Far?' *The New York Times* 13 January 2018.

³⁶ CPS 'Violence Against Women and Girls Report 2018-19' 14.

³⁷ Statista Research Department 'Number of rape offences in England and Wales 2002-2019' (9 August 2019) <<https://www.statista.com/statistics/283100/recorded-rape-offences-in-england-and-wales/>>

³⁸ Joel Best 'Victimization and the Victim Industry' *Society* 34 (1997) as referenced in 'Confronting "Victim" Discourses' (2006) 327.

³⁹ Jessica Eaton '#IWD2018 – Are women victims, survivors, none or both... and does rape really make us stronger?' *VictimFocus* 7 March 2018.

Whilst change is not necessarily linear and positive, to dwell on MeToo's limitations would ignore its achievements and advances in a patriarchal world that pushes against change. It allowed for the shift in societal norms surrounding sexual harassment and cultivation of sister movements (#IBelieveHer and #Cuéntalo) more centred on deconstructing rape stereotypes. Nevertheless, with 60% of rape survivors⁴⁰ not acknowledging they have been raped we are faced with living in an environment where women 'internalise rape as a normal part of their sex lives.'⁴¹ As such, anti-rape campaigns need to address the issues still facing rape law in order to dispel the toxic rape culture and RMA that surrounds acquaintance rape.

2 Police Attitudes to Acquaintance Rape

Rape perceptions, gender role attitudes and victim–perpetrator acquaintance are factors that attribute negative perspectives surrounding acquaintance rape. It is the connection between these 'variables that is important in understanding the theoretical framework of rape analysis.'⁴² Renauer comments that

Law enforcement agencies are arguably the most visible government institution to the public, public perceptions of law enforcement institutions can have broad ramifications for the legitimacy of police and social control in general.⁴³

One potential explanation as to why rape is the most underreported violent crime with only 14 to 18% of victims in (England and Wales)⁴⁴ filing police reports is RMA noted by Grubb as 'a form of general cognitive schema which serves to unconsciously influence the way blame is attributed to rape scenarios.'⁴⁵ Rape schemas are as such, 'irrational, non-scientific narratives used by human beings to explain what they do not fully understand.'⁴⁶ This can be seen through the negative perceptions surrounding acquaintance rape, as it is too difficult to comprehend that a perpetrator can have emotional ties to the victim, yet it 'accounts for between 80% and 90% of rapes.'⁴⁷ Schemas such as victim precipitation and victim fabrication serve to comfort the social whole. Subsequently, whilst 'policing does not occur in

⁴⁰ Laura C Wilson and Katherine E Miller 'Meta-Analysis of the prevalence of Unacknowledged Rape' *Trauma, Violence, Abuse* (2015).

⁴¹ *Why Rape Culture is a Dangerous Myth*, 3.

⁴² Sarah Ben-David, 'Rape Perceptions, Gender Role Attitudes, and Victim–Perpetrator Acquaintance,' *Sex Roles* 53 (2005) 388.

⁴³ Brian C. Renauer and Emma Covelli, 'Examining the relationship between police experiences and perceptions of police bias,' *Policing: An International Journal of Police Strategies & Management* 34 (2011) 497.

⁴⁴ Kathleen Daly and Brigitte Bouhours, 'Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries', *Crime and Justice* 39 (2010) 6.

⁴⁵ Amy Grubb, 'Attribution of blame in rape cases: A review of the impact of rape myth acceptance, gender role conformity and substance use on victim blaming', *Aggression and Violent Behaviour* 17 (2012) 13.

⁴⁶ Claire L'Heureux-Dubé, 'Beyond the Myths: Equality, Impartiality, and Justice' *Journal of Social Distress and the Homeless* 10(1) (2010) 89.

⁴⁷ Gloria Cowan, 'Beliefs About the Causes of Four Types of Rape,' *Sex Roles* 42 (2000) 807.

a social vacuum... as long as the wider social context reflects [rape myths] they will be reflected within.¹⁴⁸

Unsurprisingly, female precipitation is perhaps the most common rape myth as 'normal functioning female sexuality'¹⁴⁹ was once classified as a mental illness with Warren reasoning that female hysteria was 'two sides of the same coin of the patriarchal... control of female sexuality.'¹⁵⁰ Stanko further laments that 'the intractable 'respectable woman' image is significant... [with] a history of consensual sex with the perpetrator... explaining police decisions to discontinue a case'.¹⁵¹ This trend can be seen through police demands for full access to a complainant's social media, enquiries about prior sexual history and relationship to the perpetrator. Jordan found that the arduous nature of stereotype laden police investigations often 'replicated the violation felt in the rape itself.'¹⁵² For the justice gap to be bridged 'the continued double victimisation of rape victims by the apparatus of the legal system'¹⁵³ must be reduced as law enforcement and rape culture cannot run parallel to one another.

Human predilection for black-and-white scenarios mean that in the '42.1 per cent of rape cases'¹⁵⁴ where there is no conviction, society will jump to the assumption that no crime occurred; the victim was lying. However, rape law's grey nuanced areas create an ambiguity mirrored by the scope of classifications in operation amongst police perspectives ranging from 'false allegations relating to... poor recollection of details, delays in reporting, witness retractions, and... malicious [intent]'.¹⁵⁵ A Home Office study highlighted the extent of the police's proclivity to presume malicious allegations, as while only 3% of cases were classified as malicious, an earlier figure of 9% was still deemed to be 'considerably lower than the extent of false reporting estimated by police officers.'¹⁵⁶ Such statistics have only

⁴⁸ 'Examining the relationship between police experiences and perceptions of police bias,' 49.7

⁴⁹ Rachel P. Maines, *The Technology of Orgasm: "Hysteria", the Vibrator, and Women's Sexual Satisfaction* (The Johns Hopkins University Press 1999) 23.

⁵⁰ Carol A.B. Warren 'Genital surgeries and stimulation in nineteenth century psychiatry' *Advances in Gender Research* 8 (2004) in M. T. Segal & V. Demos (eds.) *Gender perspectives on reproduction and sexuality* (Emerald 2004) 165.

⁵¹ Stanko et al, 'Complaints of Rape and the Criminal Justice System, Fresh evidence on the attrition problem in England and Wales,' *European Journal of Criminology* (2015) 15.

⁵² Jan Jordan, 'Worlds Apart? Women, Rape and the Police Reporting Process' *The British Journal of Criminology* 41 (2001) 679.

⁵³ Susan Caringella, *Addressing Rape Reform in Law and Practice*, (Columbia University Press 2009) 285.

⁵⁴ The Secret Barrister, *The Secret Barrister: Stories of the Law and How It's Broken* (Macmillan Publishers, 2018).

⁵⁵ Burton et al, 'Understanding the progression of serious cases through the Criminal Justice System, Evidence drawn from a selection of case files,' *Ministry of Justice research* (2012) 19.

⁵⁶ Kelly et al, 'A gap or a chasm? Attrition in reported rape cases,' *Home Office Research Study* 293 (2005) 11.

amplified 'victims' feelings of powerlessness and magnified... apprehension about police interviews,⁵⁷ accounting for the under-reporting of rape. RMA within law enforcement leads to blind ignorance to the fact that 'under-reporting of sexual offences is numerically far more prevalent than malicious complaints.'⁵⁸ The US Department of Justice has argued that as a result, victims who 'pose prosecutorial difficulties [and] challenge old notions,⁵⁹ are often discounted.

Automatic Belief

Society post MeToo has been described by Greer and Morgan as too politically correct with the snowflake generation harming society under the guise of progressive movement. In light of the belief mantra of anti-rape campaigns, law enforcement adopted a policy of automatic belief which has since been discredited by Metropolitan Police Commissioner, Cressida Dick. Dogmatic implementation resulted in flawed investigations such as Operation Midland precipitating an independent review of police protocols. 'Profound and long-lasting damage'⁶⁰ can be caused in cases of malicious allegations, exemplified by the trauma Cliff Richards suffered as a result of a persistent media witch-hunt. Henriques asserted that the term 'victim' can lead to a lack of 'confidence in the neutrality of the investigator,'⁶¹ perhaps change should not be solely linear to victims' rights but also in line with the perpetrators'. However, the issue of false allegations in rape cases cannot be understood without reference to the ways in which rape law and its interpretation has historically problematized 'the words of a woman' when what they were speaking about was sexual violation.⁶² Patriarchal dominance over the centuries has meant that the voice of a woman is held at a lesser value than that of a man's. Therefore, when compared to the level of scrutiny that complainants are subjected to throughout all levels of the criminal justice system the rebalancing of rights is arguably a more pressing issue.

Attrition and the Epidemic of 'No-crime' Reports

⁵⁷ Karen Rich, 'Trauma-Informed Police Responses to Rape Victims' *Journal of Aggression, Maltreatment & Trauma* (2018) 7.

⁵⁸ HM Inspectorate of Constabulary, 'Crime-recording: making the victim count,' (2014) as referenced in *The Secret Barrister* (2018).

⁵⁹ American Bar Association Center on Children and the Law (2000) 'Victim-Oriented MULTIDISCIPLINARY Responses to Statutory Rape', US Department of Justice

⁶⁰ Justin Rushbrooke QC as quoted in Chris Baynes, 'Cliff Richard entitled to 'substantial' damages over BBC coverage of police raid, lawyers tell court' *The Independent* 12 April 2018.

⁶¹ Sir Richard Henriques (2016) *An Independent Review of the Metropolitan Police Service's Handling of Non-Recent Sexual Offence Investigations Alleged Against Persons of Public Prominence*, 9.

⁶² Liz Kelly, 'The (In)credible Words of Women: False Allegations in European Rape Research' *Violence Against Women* 16(12) (2010) 1345.

RMA has also been shown to have an impact upon the process by which cases get lost 'within the criminal justice chain, especially from police to conviction level.'⁶³ A HMCI report found that in 2012/13 the 'average no-crime rate for rape complaints was 12%, six times higher than for other victim-based crimes.'⁶⁴ This can perhaps be explained through the extensive incorporation of stereotypes in investigative protocols. Stanko theorised that schemas are not solely reserved for victim perception; the respectability of the suspect also plays an important role. These stereotypes have been shown to be integral in whether the police decide to go forward with an allegation or not. Stanko (2015) provides an example of this as:

Whether the suspect is a credible criminal with a prior police record rather than a law-abiding 'respectable' white man mattered at all stages as... police appeared more hesitant to dismiss a case if the suspect had a prior police record.⁶⁵

Stanko's research has been pivotal in showing that at all stages of a police investigation perceptions play a central role as 'only 2% of complaints in which police officers noted doubt... resulted in a CPS charge.'⁶⁶ The process of police investigations, specifically their avidity for no-crime classification, can 'prevent offenders from being held responsible for their actions but it has a negative impact on survivors,'⁶⁷ offering an explanation for attrition. Consequently, those who suffer secondary victimisation as a result of poor treatment are more likely to withdraw their reports. In relation to perpetrator blame, research by Emma Sleath has found significant differences between officers who were specially trained and those who were not,⁶⁸ highlighting a possibility for progressive change.

3 The Requirement for Specialist Training

Police Attitudes: Recognition of Victim's Needs

'Negative interactions with system personnel exacerbate the trauma of the assault,'⁶⁹ with a 2012 Ministry of Justice report highlighting that police reports are affected by:

⁶³ Jörg-Martin Jehle, 'Attrition and Conviction Rates of Sexual Offences in Europe: Definitions and Criminal Justice Responses', *Eur J Crim Policy Res* (2012) 145.

⁶⁴ HMIC (2014) 'Rape Monitoring Group: Adult and child rape data 2012/13' 6.

⁶⁵ 'Complaints of Rape and the Criminal Justice System' 15-16.

⁶⁶ *Ibid* 17.

⁶⁷ Shaw et al, 'Beyond Surveys and Scales: How Rape Myths Manifest in Sexual Assault Police Records,' *Psychology of Violence* 7 (2017) 603.

⁶⁸ Emma Sleath, 'Comparing Rape Victim and Perpetrator Blaming in a Police Officer Sample: Differences Between Police Officers With and Without Special Training', *Criminal Justice and Behaviour* 39 (2012) 646.

⁶⁹ *Ibid*.

A variety of definitions of false allegations of rape were found to be in operation... including recording intoxicated victims, delayed reporting, victim retraction, and lack of physical injury / medical evidence as false allegations.⁷⁰

The requirement for specialist training in an ever-expanding sensitive field seems to be a necessity. There has been a response to the call for a more victim-orientated approach through the development of Sexual Assault Referral Centres (SARCs). 'Established as a way of combining the needs of victims... and criminal justice requirements,'⁷¹ Stern remarked that their development:

Has transformed the experience of complainants reporting rape... enabling the police to provide a much more effective service... offering sympathetic... support, regardless of what happens... in the legal system.⁷²

Yet, 'there are currently [only] 43 SARC services across England,'⁷³ predominantly situated in urban areas. Therefore, in order for attrition rates to be lower, such centres should be made accessible on a larger scale with future SARCs 'set up in a way which promotes cross-agency working in responding to rape complainants,'⁷⁴ so that quality of care is not dependent on geography. Victims of sexual assault have suffered considerable trauma, something which police investigations need to acknowledge and be sensitive to. Trauma-informed protocols are founded on 'understanding the... triggers of trauma survivors, that traditional... approaches may exacerbate,'⁷⁵ such as the heavy focus on the retrieval of indisputable evidence. Victim-based protocols are perhaps more successful as they are 'built on five core values of safety, trustworthiness, choice, collaboration, and empowerment.'⁷⁶ This allows for a safe space, free of judgement, acting as reassurance for victims who are hesitant in coming forward. However, there are obstacles in implementing trauma-based care such as 'institutional inertia, conformity to habit, resistance to outside influence, the expense to implement agency-wide training... [and the] inability to understand the relationship of trauma.'⁷⁷ A prolonged lack of understanding and specialist training has potentially created a public mistrust in the ability of the law to secure justice and failings surrounding Operation Yewtree and the Worboys⁷⁸ case have shown that 'unfortunately, too

⁷⁰ 'Understanding the progression of serious cases through the Criminal Justice System' 5.

⁷¹ Kelly et al, *A gap or a chasm?* (2005) 3.

⁷² The Stern Review (2010) Government Equalities Office and Home Office, 67.

⁷³ NHS (2017) 'The effectiveness of Sexual Assault Referral Centres' (Commissioning Brief – Supporting Information 16/117) 3.

⁷⁴ The Stern Review (2010) 67.

⁷⁵ NCTSN (2012) 'Creating trauma informed child and family serving systems: A definition,' as cited in Wilson et al, 'Trauma-informed care,' *Encyclopaedia of Social Work* (2013) 6.

⁷⁶ Roger Fallot and Maxine Harris, 'Creating Cultures of Trauma-Informed Care (CCTIC): A Self-Assessment and Planning Protocol' *Community Connections* (2009) 3.

⁷⁷ Rich, 'Trauma-Informed Police Responses to Rape Victims' 6.

⁷⁸ *Commissioner of Police of the Metropolis (Appellant) v DSD and another (Respondents)* [2018] UKSC 11

often the work of the Commission seems to exacerbate public mistrust, rather than mend it.⁷⁹ These issues must be overcome if the law is to elicit useful evidence and increase rape reporting, preventing the re-victimisation of survivors as until the needs of the victim are properly acknowledged, there will continue to be issues of attrition.

CPS Attitudes: The Necessity of Specialist Training

The Crown Prosecution Service holds several responsibilities as the foremost prosecution authority, including advising the police on cases for possible prosecution; reviewing cases submitted by the police; determining any charges in more serious or complex cases; preparing cases for court and presenting cases at court.⁸⁰ For the most part, acquaintance-rape cases remain undetected 'mainly because [the CPS] advised not to charge the suspect due to a lack of evidence.'⁸¹ The detached nature of the CPS 'relying solely on the file presented by the police,'⁸² dehumanises the victim easier facilitating RMA. Therefore, 'rape victims occupy a unique position in that, although they are the targets of assault, they may not be perceived sympathetically.'⁸³ Rape myths have been theorised as playing an integral role in CPS decision-making with the CPS now said to be second-guessing jury prejudices to boost conviction rates. Angiolini highlighted that there was 'little evidence of the prosecution discussing strategies to combat'⁸⁴ RMA, meaning that ubiquitous rape schemas within the CPS ultimately mirror the underlying scepticism that sexual assault survivors face.

The complex and challenging nature of rape investigations means that specialist training is a necessity, the demands of knowledge and skill required are at a significantly higher level than that of traditional training. Despite the need for dedicated rape and serious sexual offence units it was not until 2013 that such units emerged with a critical HMCPSI report stating that the inconsistency of procedure implementation resulted in 'insufficient regard to the sensitivity of the case or the vulnerability of victims.'⁸⁵ Arguably, the highest priority in rape investigations should be victim support with Stern lamenting that the obligations of the State 'are much wider than working for the conviction of a perpetrator.'⁸⁶ The implementation of a collaborative model such as the Thuthuzela Care Centres (TCC) model established in South Africa in 2007, extended the care provided to rape victims while providing legal

⁷⁹ HCHAC (2013) 7.

⁸⁰ HMIC (2014) Crime-recording: making the victim count 9.

⁸¹ Waterhouse et al, 'Myths and legends: The reality of rape offences reported to a UK police force' *The European Journal of Psychology Applied to Legal Context* 8 (2016) 4.

⁸² Jacqueline M. Wheatcroft, 'Revictimizing the Victim? How Rape Victims Experience the UK Legal System' *International Journal of Evidence-based Research, Policy, and Practice* 4 (2009) 269.

⁸³ 'Understanding Attribution of Blame in Cases of Rape' 63.

⁸⁴ Jennifer Temkin, 'Different functions of rape myth use in court: findings from a trial observation study', *Feminist Criminology* 13 (2018) 207-208.

⁸⁵ HMCPSI (2016) Thematic Review of the CPS Rape and Serious Sexual Offences Units 1-35.

⁸⁶ Stern Review (2010) 11.

guidance to care professionals. This ultimately allowed for 'effective investigation and prosecutions of rape cases, a reduction in cycle times and increase in conviction rates,'⁸⁷ whilst reducing secondary victimisation. Similar models and appropriate training on key issues such as stereotypes and vulnerability of victims will fundamentally reduce the justice gap 'improving conviction rates by strengthening investigations and prosecutions.'⁸⁸

A plethora of research has exemplified that both the police and the CPS play a significant role in 'any attempt to implement a strategy designed to close the gap between the official condemnation of male violence as enshrined in law and the realities of male violence as enshrined in practice.'⁸⁹ The police have been shown to be failing victims, as '7% of allegations were police no crimed, 40% ending with a police decision to take no further action.'⁹⁰ These statistics shine a substantiated light on the justice gap. Whilst the 'reciprocal nature of attitude leading to law - both de jure and de facto - and law leading to attitude can be mutually reinforcing,'⁹¹ systematic change is essential to reduce rates of attrition, unsubstantiated no-crime reporting and victim retraction. Harriet Wistrich asserts that the historically low rates of CPS prosecuting rape are a 'comparable human rights failure to those witnessed in the investigation of serial rapist John Worboys,'⁹² therefore change must be implemented if victims are to receive the justice they deserve.

4 Legal Attitudes Affecting Acquaintance Rape Prosecution

The recognition of the RMA endemic that has contributed to an environment in which rape flourishes is imperative if the law is to fully address and resolve the influence they have upon our legal institutions. Huemer theorises that recommendations for reform can be put in place by understanding that 'on many issues of sexual conduct, we tend to have attitudes that conform to parochial cultural mores.'⁹³ Smith reasons that the stereotypification of acquaintance rape is 'not simply about ignorant attitudes, but also the logic used to establish

⁸⁷ Sexual Offences and Community Affairs Unit, 'Report on the feasibility and location of Thuthuzela Care Centres Phase 2 Report' *National Prosecuting Authority* (2008) 11.

⁸⁸ Caroline Taylor, 'Stemming the flow: challenges for policing adult sexual assault with regard to attrition rates and under-reporting of sexual offences' *Police Practice and Research: An International Journal* 11 (2010) 247.

⁸⁹ Gregory and Lees, *Policing Sexual Assault*, 3.

⁹⁰ Home Office and Ministry of Justice (2013) 'An Overview of Sexual Offending in England and Wales, Sexual offending overview tables' as cited in Stanko et al, 'Complaints of Rape and the Criminal Justice System' *European Journal of Criminology* (2015) 14.

⁹¹ *Addressing Rape Reform in Law and Practice*, 285

⁹² Harriet Wistrich as quoted in Meg Lewis 'Sexual violence: CPS rejects allegation of dropping rape cases to boost prosecution rates' *International Bar Association* (6 September 2019).

⁹³ Michael Huemer, 'Revisionary Intuitionism' *Social Philosophy and Policy* 25 (2008) 388.

truth at court.⁹⁴ Ingrained cultural attitudes ultimately impact on how 'a rape case is processed, interpreted and organised'⁹⁵ acting as a barrier to an egalitarian justice system. The relationship between the role of jurors and victim testimony in adversarial schematic decision-making when exposed to latent outside influences will now be surmised with focus on the effect this has on the justice gap.

Juror Attitudes: from Commencement to Sentencing

While Wilmott reasons that the acceptance of stereotypical perceptions affects 'juror's propensities to believe a rape complainant,'⁹⁶ Temkin shows that even when given the opportunity to systematically process evidence 'the relative ease of relying on pre-existing beliefs... encouraged quicker... less effortful heuristic processing.'⁹⁷ Cramer comments that 'numerous extra-legal factors such as demographics and self-presentation can affect the way jurors perceive perpetrators,⁹⁸ and victims alike. Common stereotypes included victim resistance and prior consensual acts granting the 'green light to further intimacy.'⁹⁹ Coined as the miscommunication hypothesis, research conducted by Ellison and Munroe conveyed that despite direction as to the seriousness of acquaintance rape:

Jurors continued to struggle to convict because of engrained expectations regarding resistance and sexual miscommunication... heightened [by]... the fact of a previous sexual relationship.¹⁰⁰

The extent of RMA within the justice system led to an influx of research leading to numerous independent reviews and official reports addressing the matter. Questions have been raised by Rape Crisis regarding the stagnated pattern of recycled recommendations emerging from 'previous rape reviews in 2001, 2002, 2005 and 2007.'¹⁰¹ Ellison argues that confining the explanation of the justice gap to the acceptance of rape stereotypes, 'risks oversimplifying the myriad complexities that are at play in the process of... [prosecuting] non-stranger rape complaints.'¹⁰²

⁹⁴ Olivia Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Springer International Publishing AG 2018) 64.

⁹⁵ Dinos et al, 'A systematic review of juries' assessment of rape victims: Do rape myths impact on juror decision making?' *International Journal of Law, Crime and Justice* 43 (2015) 39.

⁹⁶ Wilmott et al, 'Introduction and Validation of the Juror Decision Scale (JDS): An Empirical Investigation of the Story Model' *Journal of Criminal Justice* 57 (2018).

⁹⁷ 'Different functions of rape myth use in court:' 20.7

⁹⁸ Cramer et al, 'Blame Attribution in Court: Conceptualization and Measurement of Perpetrator Blame' *Victims and Offenders* 8 (2013) 43.

⁹⁹ 'Better the devil you know? "Real rape" stereotypes' 314.

¹⁰⁰ 'Better the devil you know' 314.

¹⁰¹ Rachel Williams, 'Focus on rape conviction rates stopping women coming forward, warns Stern' *The Guardian* 15 March 2010.

¹⁰² Ellison 'Better the devil you know?' 300.

Revictimisation on the Stand

Witness testimony is necessary in ‘case conceptualisation and... the primary means by which information is presented’¹⁰³ therefore victim perception plays a pivotal role in the success of the case. Complainant credibility is defined by Barn as ‘a narrative that attests to the veracity of the crime of rape.’¹⁰⁴ Research by Balfour signifies that the ideal victim archetype ‘is tethered to law’s recognition of... the types of harms she experiences, the perceived seriousness of those harms, and how she copes with those harms’.¹⁰⁵ The most influential being ‘the emotions displayed during testimony, with an upset, despairing victim being... much more credible than... an emotionally neutral... positive, relaxed’¹⁰⁶ victim. Mock jurors’ denial of the ‘realistic possibility that a victim of sexual assault may be labile in her emotional reactions and unable to present a consistent image,’¹⁰⁷ essentially reiterates the rhetoric of a hysterical victim. Gotell argues that the law must, ‘demarcate revised boundaries of good and bad victimhood,’¹⁰⁸ if attrition rates are to be overcome. The finely balanced evidential conflict between he said/she said testimony is especially prevalent when defendants have character witnesses to ‘defend their good name, while complainants risk their reputations being slandered by defence lawyers.’¹⁰⁹ During the twentieth century rape shield laws have been implemented to block overt expressions of victim blaming, restricting the discussion of rape victims’ sexual histories.¹¹⁰ They do not provide a blanket ban of prior sexual history evidence being used as it is still permissible when deemed relevant.¹¹¹ Tuerkheimer reasons that reform must take place if RMA, ‘having migrated from formal legal rules to informal practices... [creating] an enduring system of disbelief,’¹¹² is to be dislodged. Moving forward ‘identifying the pre-existing attitudes [and] biases... which jurors bring into

¹⁰³ Marcus Boccaccini, ‘Believability of Expert and Lay Witnesses: Implications for Trial Consultation’ *Professional Psychology: Research and Practice* 33 (2002) in Tasha A. Menaker, ‘The Victim as Witness: Strategies for Increasing Credibility Among Rape Victim-Witnesses in Court’ *Journal of Forensic Psychology Practice* 12 (2012) 424.

¹⁰⁴ Understanding Complainant Credibility in Rape Appeals’ 435.

¹⁰⁵ Balfour et al, “‘To This Day She Continues to Struggle with the Terror Imposed upon Her’”: Rape Narratives in Victim Impact Statements’ *Women & Criminal Justice* 28 (2018) 58.

¹⁰⁶ Bollingmo et al, ‘Credibility of the emotional witness: A study of ratings by police investigators’ *Psychology, Crime & Law* 14 (2008) as referenced in Bollingmo et al, ‘The effect of biased and non-biased information on judgments of witness credibility’ *Psychology, Crime & Law* 15 (2009) 62.

¹⁰⁷ Marc A. Klippenstine, ‘Perceptions of Sexual Assault: Expectancies Regarding the Emotional Response of a Rape Victim over Time’ *Psychology, Crime & Law* 18 (2012) 92.

¹⁰⁸ Lise Gotell, ‘Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal sexual subjects and risky women’ *Akron Law Review*, 41 (2009) 879.

¹⁰⁹ ‘Here we go round the review-go-round’ 243

¹¹⁰ Youth Justice and Criminal Evidence Act 1999, s.41

¹¹¹ *R v Andrade* [2015] EWCA Crim 1722.

¹¹² Deborah Tuerkheimer, ‘Incredible Women: Sexual Violence and the Credibility Discount’ *University of Pennsylvania Law Review* 166 (2017) 1.

the courtroom... would greatly assist in understanding what types of attitudes lead to what types of outcomes in sexual assault trials'.¹¹³

It is unclear whether the legal culture of rape myth acceptance results from:

An unconscious misogyny... deep-rooted conservatism, uncompromising formalism, lack of empathy for the victim... or an incomplete sense of justice but... reform is necessary if [rape victims] are not to be unfairly and unnecessarily disadvantaged in the legal process.¹¹⁴

The implementation of specialist training has been shown to reduce schematic decision-making, preserving 'the complainant's human rights',¹¹⁵ to a merits-based protocol. Reluctance to implement and monitor recommendations thereby breeds a culture that is resistant to change. Jordan displays the difficulty in offering reassurance to complainants as to what kind of experience they may have, 'when fundamentally the scales of justice are still operated by the wheel of fortune'.¹¹⁶

5 The Drawbacks of the Presumption of Innocence

All criminal trials are circumscribed by 'legal instructions conveying the summary legal requirements of proof and include presumption of innocence, burden of proof, and reasonable doubt'.¹¹⁷ The former arguably governs them all through the standing of a defendant's Article 6 right to a fair trial in public opinion. Presumption of innocence is a 'principle that protects litigants against the punitive power of the state',¹¹⁸ and must be maintained for justice to be possible. Waterhouse-Watson argues it must also balance 'the need to challenge victim-blaming, sexist stereotypes and assumptions about rape, as myths persist in the public imagination and contribute to historically low conviction rates'.¹¹⁹

¹¹³ Natalie Taylor and Jacqueline Joudo, *The Impact of Pre-recorded Video and Closed-Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-making: an Experimental Study* (Australian Institute of Criminology 2005) 13.

¹¹⁴ Edmund Walter Thomas, 'The Evidence Act 2006 and women' *New Zealand Law Journal* (2008) 172.

¹¹⁵ Angiolini, *Independent Review of The Investigation and Prosecution of Rape in London* (2015) 111.

¹¹⁶ 'Here we go round the review-go-round' 245.

¹¹⁷ Isbell et al 'Guilty or Innocent? Women's Reliance on Inadmissible Evidence in a Simulated Rape Case' *Journal of Applied Social Psychology* 37 (2007) 720.

¹¹⁸ Michaël Lessard, 'Public Denunciations of Sexual Assault: Misuse of the Presumption of Innocence' *Canadian Journal of Women and the Law* 29 (2017) 401.

¹¹⁹ Deb Waterhouse-Watson, 'News Media on Trial: Towards a Feminist Ethics of Reporting Footballer Sexual Assault Trials' *Feminist Media Studies* 16 (2016) 954.

Whilst the legitimacy of 'Anglo criminal procedure and practice is premised upon the general presumption of innocence,'¹²⁰ Lessard theorises that when invoked in the public sphere it 'places the victims in an aggressive process of questioning their credibility while protecting the aggressors.'¹²¹ It can consequently be deduced that it is arguably rape victims who are in essence on trial. The underlying context of trials as a means for facilitating RMA will be discussed alongside the potential infringement upon complainant's human rights and an 'unattainable burden'¹²² of proof.

Evidence Disclosure: A Balancing Act

Everyone has a right to respect for his private and family life, his home and his correspondence and the Court must ensure that any interference with the right to privacy under article 8 is in accordance with the law and is necessary in pursuit of a legitimate public interest. Through the course of a criminal prosecution there are 'several competing interests at play: [with] the defendant's fair trial rights... and the victim's interests in privacy,'¹²³ resulting in a delicate balancing act between the two conflicting rights.

Ironically dubbed by Estrich as the simple rape, acquaintance rape was defined 'as a rape by a lone acquaintance with... no visible injury to the victim.'¹²⁴ The evidential realities of which are arguably, 'weakened by the absence of other types of corroborative evidence,'¹²⁵ such as signs of resistance. Consequently, practices regarding evidence collection, retainment and disclosure have been heavily scrutinised. Complainants now face a complete loss of privacy as routine demands for mobile data are ultimately infringing upon their article 8 rights to a private life. Justification for this scope of discretion¹²⁶ is coined as a balancing exercise, in which securing a fair trial 'takes precedence over confidentiality issues.'¹²⁷ Lord Steyn commented that prior consensual sexual relationship might in some circumstances be relevant to the issues that face proving acquaintance rape in court, thus 'its exclusion could infringe Art.6.'¹²⁸ However:

¹²⁰ Chris Corns, 'The science of justice and the justice in science' *Law Context* 10 (1992) as cited in Simon J. Walsh, 'Legal Perceptions of Forensic DNA Profiling, Part I: A Review of the Legal Literature' *Forensic Science International* 155 (2005) 53.

¹²¹ 'Public Denunciations of Sexual Assault' 402.

¹²² Dorothy K. Kagehiro, *Handbook of Psychology and Law* (Springer Science & Business Media, 2013) 264.

¹²³ The Center for Law & Public Policy on Sexual Violence 'Confidentiality and Sexual Violence Survivors: A Toolkit for State Coalitions' *National Crime Victim Law Institute* (2005) 38.

¹²⁴ Susan Estrich, *Real Rape*, as referenced in Tellis et al, 'The Sexual Stratification Hypothesis Revisited: Testing Assumptions About Simple Versus Aggravated Rape' *Journal of Criminal Justice* 36 (2008) 253.

¹²⁵ Eleni Coundouriotis, "'You Only Have Your Word:" Rape and Testimony' *Human Rights Quarterly* 36 (2013) 366.

¹²⁶ Council of Europe (2018) Guide on Article 8 of the European Convention on Human Rights 9.

¹²⁷ *R (on the application of B) v Stafford Combined Court* [2007] 1 All ER 102.

¹²⁸ *R v A* [2001] UKHL.

Given the weight of history behind beliefs in women's propensity to lie about rape, any representation that reinforces such myths, or undermines the complainant's credibility is problematic.¹²⁹

This is mirrored by Rape Crisis' concerns over the police's habitual request for complainants to 'surrender all of their personal digital data and sign away their right to privacy while a suspected rapist doesn't endure the same level of scrutiny.'¹³⁰ Despite a recent case ruling that mobile data should not be 'examined as a matter of course in every case: the decision is fact specific in each and every case,¹³¹ Kelly theorises that law enforcement excessively focuses on complainant credibility, 'rather than other [less intrusive] aspects of evidence gathering.'¹³²

Third Party Evidence and Prior Sexual History

Since the 1990s the law surrounding evidence disclosure has expanded and evolved greatly with the hope of providing a system better suited to the needs of victims of extreme sexual assault. Section 41 of the Youth Justice and Criminal Evidence Act 1999 provides that 'except with the leave of the court, no evidence may be adduced, and no question may be asked in cross-examination... about any sexual behaviour of the complainant. The statute, however, proffers four exceptions in which evidence pertaining to the complainant's prior sexual history is deemed relevant.¹³³ The similarity exception in recent judgments like *R v Ched Evans*¹³⁴ arguably has the potential to 'open the floodgates to allowing sexual history evidence into trials.'¹³⁵ McGlynn reasons that 'the admission of sexual history evidence may perpetuate victim-blaming,'¹³⁶ acting as a deterrent for complainants seeking justice. The courts, nevertheless, see the inclusion of sexual history and third-party evidence as essential in maintaining a system that upholds the liberty of the people. It is perhaps this mismatched balancing act between two 'countervailing forces that inevitably leads to a conflict of

¹²⁹ 'News Media on Trial' 954.

¹³⁰ Rape Crisis England & Wales, 'Disclosure Crisis Reveals Rape Investigations are Still All About Victim 'Credibility'' *End Violence Against Women* (05 June 2018) <<https://www.endviolenceagainstwomen.org.uk/disclosure-crisis-reveals-rape-investigations-are-still-all-about-victim-credibility/>>

¹³¹ *R v E* [2018] EWCA 2426 (Crim).

¹³² Elizabeth A. Kelly, 'Routes to (in)justice: a research review on the reporting, investigation and prosecution of rape cases' *Her Majesty's Crown Prosecution Service Inspectorate* (2001) 23.

¹³³ Section 41(3).

¹³⁴ *R v Chedwyn Michael Evans and Clayton Rodney McDonald* [2012] EWCA Crim 2559.

¹³⁵ 'Challenging the Law on Sexual History Evidence' 216.

¹³⁶ *Ibid.*

interest.¹³⁷ In order to avoid a cyclic legal tangle, emphasis must be placed upon evidence disclosures' 'discernible role in attrition at both the investigative and prosecutorial stages.'¹³⁸

The Unattainable Burden: A Barrier to Criminal Justice

To satisfy the burden of proof in criminal cases, reasonable doubt cannot be present and 'contrary to the adage, as the burden... is on the prosecution and not on the defence,'¹³⁹ acquaintance rape is difficult to prove. This difficulty was highlighted by Walsh who showed despite: 'the existence of DNA evidence... being a strong predictor of whether a sexual assault case will go to court, it did not show any significant effect in producing guilty [verdicts]'.¹⁴⁰ If irrefutable evidence does not secure a conviction, then the slight evidence accessible in cases of acquaintance rape arguably has little hope. Research by Ellison has also theorised that the maximum life sentence carried by rape leads to a 'severity bias,' with the irrevocable social ostracism resulting from being labelled a rapist creating a 'significant shift towards leniency.'¹⁴¹ Conviction rates for rape exemplifies the reluctance to deliver a guilty verdict as, merely '7% of rapes recorded by the police in England and Wales result in a conviction.'¹⁴²

In England and Wales, the high standard of proof 'means that a jury must acquit even if they believe the defendant is... almost certainly - guilty,'¹⁴³ consequently creating a reluctance of jurors to deliver a guilty verdict. This has been epitomised in Scottish law through the introduction of a third verdict of 'not proven', given where a 'defendant is presumed guilty but the jury is unable to choose this verdict because the evidence did not prove guilt beyond reasonable doubt.'¹⁴⁴ The difficulties that surround a rape scenario in which there are no witnesses inevitably influence the jury's schematic decision-making, further strengthening the foothold that defence lawyers possess in disproving a complainant's integrity. The defence's reliance upon innocence narratives enables the manipulation of the imagery

¹³⁷ Marijo A. Ford, 'The Victim's Right to Privacy: Imperfect Protection from the Criminal Justice System' *Journal of Civil Rights and Economic Development* 8 (1992) 207.

¹³⁸ Jennifer M. Brown, 'Characteristics associated with rape attrition and the role played by scepticism or legal rationality by investigators and prosecutors' *Psychology, Crime and Law* 13 (2007) 368.

¹³⁹ Jennifer Temkin, 'Different functions of rape myth use in court: findings from a trial observation study' *Feminist Criminology* 13 (2018) 213.

¹⁴⁰ Simon J. Walsh, 'Legal Perceptions of Forensic DNA Profiling, Part I: A Review of the Legal Literature' *Forensic Science International* 155 (2005) 54.

¹⁴¹ Louise Ellison, 'Getting to (not) guilty: examining jurors' deliberative processes in, and beyond, the context of a mock rape trial' *Legal Studies* 30 (2010) 97.

¹⁴² Ministry of Justice, Home Office, & the Office for National Statistics (2013) *An Overview of Sexual Offending in England and Wales (Statistics Bulletin)* referenced in Temkin, 'Different functions of rape myth use in court' 213.

¹⁴³ 'News Media on Trial' 961.

¹⁴⁴ Lee John Curley, 'Scotland's 'not proven' verdict helps juries communicate their belief of guilt when lack of evidence fails to convict' *The Conversation* (11 December 2018).

surrounding a defendant by framing witness testimony in ways that undermine the complainant's credibility. Kelly argues that as a result, current restrictions on sexual history evidence are 'evaded, circumvented and resisted.'¹⁴⁵ When this coalesces 'with the requirement that juries must reach their verdict beyond a reasonable doubt... it produces an unattainable burden of proof,'¹⁴⁶ constructing an unfair bias in favour of the defendant. A complainant, therefore, goes through humiliating cross-examination by defence lawyers who seek to desecrate and tear apart their character. The law does not appear to offer sufficient protection against this ordeal, instead focusing on the protection of defendants from the long term negative effects of being labelled a rapist, 'variously identified as the loss of career, reputation and relationships as well as liberty... insisting that a conviction would, in effect, 'ruin the defendant's life'.¹⁴⁷

Subsequently, Ellison has shown that jurors strongly exercised the belief that 'any lingering doubt, no matter how minimal... entailed that the defendant had to be acquitted.'¹⁴⁸ This arguably permits rape stereotypes such as the societal predilection to automatically subsume a victim's insincerity, to influence a juror's judgement. Research by Guttel depicted that the presence of stringent sentencing rules has meant that judges 'openly acknowledge that they hold the prosecution to a higher evidentiary standard.'¹⁴⁹ Artz argues that the significant burden has allowed for the 'investigation and prosecutorial methods, strategies or policies applied and considered useful in processing rape cases,'¹⁵⁰ to go beyond reasonable lines of inquiry. The instrumentalisation of such a high burden makes it almost 'impossible to obtain acquaintance rape convictions,'¹⁵¹ and reflects:

The sexually coercive society in which it operates, although frowning upon aggressive sexual behaviour at the extremes, our male-dominated society accepts a certain amount... as a normal... part of sexual encounters.¹⁵²

¹⁴⁵ Kelly et al, 'Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials' *Home Office Report* (2006) 77 referenced in Clare McGlynn, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' *The Journal of Criminal Law* 81 (2017) 374.

¹⁴⁶ Adriana Sinclair, 'Law, Caution: Towards a Better Understanding of Law for IR Theorists' *Review of International Studies* 37 (2011) 1111.

¹⁴⁷ 'Getting to (not) guilty' 84.

¹⁴⁸ *Ibid.*

¹⁴⁹ Ehud Guttel, 'Criminal Sanctions in the Defense of the Innocent' *Michigan Law Review* 110 (2012) 606.

¹⁵⁰ Lillian Artz, 'Case Attrition in Rape Cases: A Comparative Analysis' *South African Journal of Criminal Justice* 20 (2007) 176.

¹⁵¹ Daphne Edwards, 'Acquaintance Rape & The "Force" Element: When "No" is Not Enough' *Women's Law Forum* 26 (1996) 241.

¹⁵² Lani Anne Remick, 'Read Her Lips: An Argument for a Verbal Consent Standard in Rape' *University of Pennsylvania Law Review* 141 (1993) 1103-1104 cited in Aya Gruber, 'Pink Elephants in the Rape Trial: The Problem of Tort-Type Defenses in the Criminal Law of Rape' *William & Mary Journal of Women and the Law* 4 (1997) 204.

Smith therefore shows that 'legal discourses about the burden of proof reinforce the adoption of victim-blaming and vice versa.'¹⁵³

Discussion

Gruber synthesises that 'trials implicate extensive historical and social attitudes that reflect the existing patriarchy'¹⁵⁴ meaning that despite controversy 'one disturbing aspect of the victim's role continues to exist- the potential for loss of privacy.'¹⁵⁵ Guttel also highlights 'the interplay between sanction severity and evidentiary thresholds for conviction.'¹⁵⁶

Waterhouse-Watson subsequently argues that evidence cannot 'be presented as credible without presuming the guilt of the other'; the structure of the adversarial process thus 'evoking deeply entrenched stereotypes about women, and female rape complainants in particular.'¹⁵⁷ As the adversarial process itself is debatably the most significant barrier to fairer rape trials a fresh debate must take place revising and redefining the ethical boundaries of vigorous advocacy. Research by Sinclair has shown that current resolution methods are 'butting up against each other... [as] judges [are] singularly undermining legal reforms by allowing into the courtroom information which has been deemed as legally irrelevant.'¹⁵⁸

The legitimacy of rape should not be defined by the relationship between the complainant and the accused and the sooner the law clarifies and acknowledges this, the sooner progress will be made in maintaining the 'consistency and the fabric of law without... ossifying and being left behind by society.'¹⁵⁹

Conclusion

The wealth of research discussed undeniably shows victims of acquaintance rape are blamed to a higher degree than victims of stranger rape. At a time when more women than ever are reporting this heinous crime, Greer and others have shown the criminal justice system's continued predilection for 'real rape' stereotypes despite 'the reality [being] less

¹⁵³ *Observing Justice and Rethinking Rape Myths* 163.

¹⁵⁴ Aya Gruber, 'Pink Elephants in the Rape Trial: The Problem of Tort-Type Defenses in the Criminal Law of Rape' *William & Mary Journal of Women and the Law* 4 (1997) 203.

¹⁵⁵ Thomas C. Galligan, 'Raped Once, But Violated Twice: Constitutional Protections of a Rape Victim's Privacy' *St Johns Law Review* 66 (1992) 151-153 in Marijo A. Ford, 'The Victim's Right to Privacy: Imperfect Protection from the Criminal Justice System' *Journal of Civil Rights and Economic Development* 8 (1992) 206.

¹⁵⁶ 'Defence of the Innocent' 604.

¹⁵⁷ 'News Media on Trial' 954.

¹⁵⁸ 'Towards a Better Understanding of Law' 1111.

¹⁵⁹ Sinclair 'Towards a Better Understanding of Law' 1112.

spectacular, common, unapologetic and entirely unavenged.¹⁶⁰ Research underlines that an 'organisational culture that reflects a disbelief of rape allegations,¹⁶¹ has cultivated out of rape myths present at both institutional and societal levels. Therefore, 'the institutional resistance encountered by rape law reform indicates... the failure of the law to affect meaningful change,¹⁶² despite the efforts of anti-rape movements such as MeToo and I Believe Her. This article has conveyed the law's failure to articulate a 'positive vision of [victim's] rights to go along with their political and ideological critique of rape,¹⁶³ ultimately contributing to unprecedentedly low prosecution levels. Therefore, I will highlight possible suggestions for reforming the law on rape and potential avenues for remodelling the justice system.

Moving Forward: Reforming the Law

Rape reforms over the decades have been 'couched in the cramped technical language of statutory reform, rather than [imposing] far reaching demands on the state to recognise sexual violence as an... injustice against women.'¹⁶⁴ Germaine Greer suggests that in order to see higher conviction rates the law must 'separate the elements of assault for which consent is not an issue from the actual rape in which it is the only issue.'¹⁶⁵ The current system allows for a series of complex assaults to be categorised under the umbrella of rape; an 'area of the law [that] has been particularly prone to the utilisation of stereotypes.'¹⁶⁶ This is a startling reality showcased by the trial of four rugby players in Belfast, as despite the victim's 'bloodied thong'¹⁶⁷ being a clear sign of obscenely heinous behaviour the defendants were acquitted due to the myriad of problems surrounding the legal issue of consent. By separating the elements of rape, a conviction could be made on assaults that otherwise 'fall short of criminal [rape]' but are nonetheless 'a deep and awful wrong.'¹⁶⁸ Whilst the issue of consent is not the foundation of this article, it is one that cannot be ignored when discussing potential reform. Perhaps rape should not be classed as 'a sex crime but a hate crime,'¹⁶⁹

¹⁶⁰ *On Rape*, 12.

¹⁶¹ 'Here we go round the review-go-round' (2011) reference in Emma Sleath, 'Police perceptions of rape victims and the impact on case decision making: A systematic review' *Aggression and Violent Behaviour* 34 (2017) 103.

¹⁶² Ciara Molloy 'The Failure of Feminism? Rape Law Reform in the Republic of Ireland, 1980-2017' *Law and History Review* 36 (2018) 690.

¹⁶³ Rose Corrigan, *Up Against a Wall: Rape Reform and the Failure of Success* (NYU Press 2013) 22.

¹⁶⁴ *Ibid* 8.

¹⁶⁵ *On Rape*, 86.

¹⁶⁶ *R v Seaboyer* [1991] 2 SCR 577 at 228.

¹⁶⁷ Susan McKay, 'How the 'rugby rape trial' divided Ireland' *The Guardian* 4 December 2018.

¹⁶⁸ Sarah Ditum, 'After rape trials, is the court of public opinion now trumping the law?' *The Guardian* 15 April 2018.

¹⁶⁹ *On Rape*, 69.

removing the consent issue. The 'onerous burden of proof'¹⁷⁰ also goes some way to explaining the justice gap as the civil courts are being forced to act as a means of providing justice for victims failed by the criminal courts. Epitomised in the Scottish civil case *AR v Coxen* a previously acquitted defendant was proven, on the balance of probabilities, to have taken 'advantage of the pursuer when she was incapable of giving meaningful consent... he continued to do so even after she manifested distress and a measure of physical resistance, and that he raped her.'¹⁷¹

Therefore, the difference in evidence needed to prove acquaintance rape beyond reasonable doubt compared to more likely than not is severe. Research has shown that the current system, arguably, deters 'survivors and victims of sexual assault from coming forward, while implying that perpetrators are unlikely to face consequences.'¹⁷² One possibility could be to adopt a system similar to America's Title IX. Whilst the anti-discrimination law governed by the Education Amendments Act 1972¹⁷³ is perhaps flawed it is also a 'necessary, all too human attempt, to recognise the rights of victims and bring some safety to the most intimate frontier of the bedroom.'¹⁷⁴ Although Title IX is a federal law, only applicable to American academic institutions, its premise of providing 'survivors with a prompt, adequate, and impartial investigation'¹⁷⁵ is sound. As evidenced by research, the criminal justice system could sorely use 'a statutory duty to investigate and... act in a reasonable manner in order to protect the victim,'¹⁷⁶ Seidman and Vickers subsequently arguing that

Sexual assault victims should be understood as suffering from a myriad of brutal consequences that impact their civil wellbeing and maybe remedied by the civil law... [rather than] putting them at risk of re-victimisation by the criminal justice process.¹⁷⁷

Adopting a system based on the principle of Title IX could offer foundations for progressive change in our legal system, but if the law is to abandon the stringent burden in favour of a lighter standard 'we will have to reduce the penalties for rape.'¹⁷⁸ Perhaps then, a shift in the

¹⁷⁰ Ed O'Loughlin, 'Acquittal in Irish Rugby Rape Case Deepens Debate on Sexual Consent' *The New York Times* 15 April 2018.

¹⁷¹ *AR v Coxen* [2018] SC EDIN 53 PN1880/16 at 206, 82-83

¹⁷² Camilla Turner, 'Cambridge University students demand lower burden of proof for sex crimes' *The Telegraph* 9 May 2018.

¹⁷³ Title IX of the Education Amendments of 1972

¹⁷⁴ Louis Theroux interview with Jordan Draper (Title IX Coordinator at College of New Jersey), 'The Night in Question' BBC 4 March 2019.

¹⁷⁵ End Rape on Campus, 'Title IX' < <https://endrapeoncampus.org/title-ix>>

¹⁷⁶ Dear Colleague (2011) Office for Civil Rights as referenced in Stader, 'Campus Sexual Assault, Institutional Betrayal, and Title IX' 200.

¹⁷⁷ Ilene Seidman & Susan Vickers, 'The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform' *Suffolk University Law Review* 38 (2005) 491.

¹⁷⁸ *On Rape*, 27-28.

placement of the burden of proof is the more appropriate solution. In Iceland the term used for a complainant is brotapolí which ‘means the one who has suffered and/or endured a violation.’¹⁷⁹ This differs to our system, as rather than rape being conceptualised as a crime against the state with the victim staged as a mere witness, it acknowledges the act as one perpetrated against the complainant. Icelandic law stipulates that the brotapolí can file for civil damages in conjunction with criminal proceedings,¹⁸⁰ whilst the removal of a jury system in favour of expert lay-judges reduces the role of RMA in schematic decision making. In addition to this, in 2018 Iceland passed a landmark bill which placed the onus on the accused to prove that they had the explicit consent of the victim.¹⁸¹ Therefore, the law must look to consider a shift to the Nordic system in order to truly reduce the justice gap.

Rethinking the System

A potential solution for the issues of secondary victimisation, legal stereotyping and attrition in acquaintance rape cases is the employment of a system ‘intrinsically more victim oriented and sensitive to the needs and wishes of victims.’¹⁸² One such system is restorative justice, Van Ness defining it as: ‘a theory of justice that emphasises repairing the harm caused... by criminal behaviour. It is best accomplished through cooperative processes that include all stakeholders.’¹⁸³ Daly subsequently reasons that there is no achievement in gauging ‘judicial recognition of harm against the length of the prison sentence imposed,’¹⁸⁴ as this creates a form of hyper-criminalisation which can lead to hesitation in convicting. Abridged by Greer, it is the ‘savagery of the sentence that pushes juries toward extending the benefit of doubt,’¹⁸⁵ presenting an argument towards moving away from stringent judicial recognition of harm. Restorative justice allows the needs of the victim to be at the forefront rather than those of the state creating the potential to reduce the high rates of complainant retraction which when ‘coupled with trial non-attendance are cited as... intractable challenges’¹⁸⁶ affecting the criminal justice system’s response to acquaintance rape.

¹⁷⁹ Hildur Fjóra Antonsdóttir ‘A Witness in My Own Case’: Victim–Survivors’ Views on the Criminal Justice Process in Iceland’ *Feminist Legal Studies* (2018) 310.

¹⁸⁰ Laws on Criminal Procedure (no. 88/2008)

¹⁸¹ Act on amendments to the Criminal Code, no. 19/1940, with subsequent amendments (sexual offences).

¹⁸² James Dignan, *Understanding Victims and Restorative Justice* (McGraw-Hill Education 2004) 132.

¹⁸³ Daniel W. Van Ness, *Restoring Justice: An Introduction to Restorative Justice* (Routledge, 2014) 45.

¹⁸⁴ Dianne Martin, ‘Retribution revisited: A reconsideration of feminist criminal law reform Strategies’ *Osgood Hall Law Journal* 36(1) (1998) 169 as referenced in Kathleen Daly, ‘Sexual Assault and Restorative Justice’ *School of Criminology and Criminal Justice, Griffith University* (2000) 2.

¹⁸⁵ *On Rape*, 65.

¹⁸⁶ Louise Ellison, ‘Credibility in Context: Jury Education and Intimate Partner Rape’ *International Journal of Evidence and Proof* (2018) 16.

Developing an 'affirmative, rights-based language to talk about the causes, or the harms... [of] gendered violence'¹⁸⁷ whether that be in a restorative or a retributive system seems to be key in reducing the justice gap. Hudson laments that 'If the aims and principles of retributive and restorative justice are integrated... with[in] the constraints of due process safeguards and standards such as proportionality and equitable treatment, then a better justice will be possible.'¹⁸⁸

Drawbacks to restorative justice, however, still remain and 'revolve around the type of cases for which restorative justice processes are appropriate.'¹⁸⁹ Restorative justice's appropriateness to deal with sexual violence is brought into question as these 'crimes, by design, shame and stigmatise the victim,' therefore a restorative justice model, 'which relies on traditional community standards, will inevitably fail, for the same reason that the conventional justice system fails.'¹⁹⁰ Judith Herman theorises that

Adapting restorative justice principles to crimes of sexual and domestic violence would require active feminist leadership close and active collaboration with the state authorities, in order to send a clear and consistent message that these crimes are taken seriously.¹⁹¹

Consequently, restorative justice is not a simple solution. An appropriate, unilateral, model must be hypothesised and formulated before the law can consider reform. Reflecting on research by pre-eminent scholars such as Temkin and Ellison, it is hard to envisage the law regaining its autonomy from rape myths as our justice system is ill-suited to dealing with cases which 'do not conform to the stereotypical rape.'¹⁹² Acquaintance rape is therefore: 'unique in the way it strikes at the bodily integrity and self-respect of the complainant, in the demands it makes on those public authorities required to respond to it and the controversy it generates.'¹⁹³

Until the law acknowledges this, secondary victimisation will continue to be 'a salient clinical issue for rape survivors.'¹⁹⁴ Reform is consequently a necessity, as 'it is not for survivors to lower their expectations of the criminal justice system... but for... the criminal justice system

¹⁸⁷ *Up Against a Wall*, 8.

¹⁸⁸ Barbara Hudson, 'Restorative Justice and Gendered Violence; Diversion or Effective Justice?' *British Journal of Criminology* 42 (2002) 631.

¹⁸⁹ *Ibid* 616.

¹⁹⁰ Judith Lewis Herman, 'Justice From the Victim's Perspective' *Violence Against Women* 11(5) (2005) 537

¹⁹¹ *Ibid*.

¹⁹² Debra Patterson and Rebecca Campbell, 'Why Rape Survivors Participate in the Criminal Justice System' *Journal of Community Psychology* 38 (2010) 192.

¹⁹³ *Stern Review* (2010) 23.

¹⁹⁴ Rebecca Campbell and Sheela Raja, 'Secondary Victimization of Rape Victims: Insights From Mental Health Professionals Who Treat Survivors of Violence' *Violence and Victims* 14 (1999) 261.

to raise their standards¹⁹⁵ in order to improve prosecution/conviction rates. Revision of a system which is 'poorly designed to provide a remedy for crimes that are both so widespread and so often socially condoned,¹⁹⁶ is thus essential in order to 'seek social justice and... change public consciousness about rape.'¹⁹⁷

¹⁹⁵ Caroline Taylor and Caroline Norma, 'The "Symbolic Protest" Behind Women's Reporting of Sexual Assault Crime to Police' *Feminist Criminology* 7 (2012) 45.

¹⁹⁶ 'Justice From the Victim's Perspective' 2.

¹⁹⁷ *Up Against a Wall*, 7.