ANGLIA RUSKIN UNIVERSITY

FACULTY OF ARTS, HUMANITIES AND SOCIAL SCIENCES

COURT OBSERVATIONS OF ENGLISH RAPE AND SEXUAL ASSAULT TRIALS: AN INTERSECTIONAL ANALYSIS

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ABSTRACT

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This PhD explored the role of rape myths and cultural narratives in serious sexual offences trials in England. The relationship between rape myths and cultural narratives that reflect structural oppressions such as sexism, classism, and ableism, is important to examine in the context of trials because attrition evidence shows that minoritised and marginalised women face particular barriers when accessing criminal justice.

Court observations were used because they provide insight into the overarching trial narrative that is unaffected by participant recall (as would be the case in using interview and survey methods). Data were analysed using an intersectional feminist frame informed by critical discourse analysis, both of which focus on power structures.

The key findings were that rape myths continue to permeate trial narratives, that they are re/produced by oppressive cultural narratives, and that these work together to undermine the credibility of victim-survivors. Structural inequalities and systems of oppression are reflected, often subtly, in the narratives deployed by barristers at trial and thus the credibility of victim-survivors is undermined in relation to how they are perceived and portrayed.

These findings show that it is important to look beyond rape myths as an explanation for poor justice outcomes for victim-survivors of sexual violence and that structural inequalities and systems of oppression should be properly considered in future research, policy, and reform.

Key words: Rape; Rape Myths; Cultural Narratives; Criminal Justice; Court; Victim-survivors.

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Chapter 1 Introduction

This chapter introduces the research problem and sets out the objectives of the project. An overview of the thesis is then given before key terminology and definitions are provided.

1.1 The research problem

It has been claimed that poor criminal justice responses to rape in England and Wales (E&W) have resulted in the effective decriminalisation of rape (Bindel, 2019; Centre for Women's Justice [CWJ] et al., 2020; Siddique, 2020). Such claims stem from a rapid decline in prosecution and conviction rates, which are currently at an all-time low (CWJ, et al., 2020). This means victim-survivors who choose to make a report to the police have an incredibly low chance of seeing their case result in a conviction. Whilst low prosecution rates mean a smaller proportion of cases are reaching court than ever before, the courtroom remains a crucial area for research because assumptions about what may happen in court inform earlier decisions in the criminal justice process, such as the decision not to prosecute (Brown et al., 2010a; CWJ, 2020; Smith and Daly, 2020).

Rape myths are commonly used as an explanatory model for low conviction rates (Temkin and Krahé, 2008; Dinos, et al., 2015; Willmott, Boduszek and Booth, 2017). Indeed, evidence has consistently shown that rape myths are frequently used in court as tools to undermine the credibility of victim-survivors (Adler, 1987; Lees, 2002; Temkin and Krahé, 2008; Temkin, 2010; Smith and Skinner, 2017; Smith, 2018; Temkin, Gray and Barrett, 2018). But rape myths alone cannot explain why the existing evidence suggests that victim-survivors from minoritised and marginalised groups have a particularly low chance of seeing a conviction (Kelly, Lovett and Regan, 2005; Lovett et al., 2007; Munro and Kelly, 2009; Hester, 2013; Hester and Lilley, 2017). For example, victim-survivors with learning disabilities or mental health conditions have been found to have a lower chance of conviction in their cases (Harris and Grace, 1999; Kelly, et al., 2005; Stanko and Williams, 2009; Hester, 2013), yet this cannot be explained by rape myths alone. Indeed, court observations from 2012 indicated that rape trial narratives *also* draw on cultural assumptions formed from systems of oppression (Smith, 2018).

It is therefore imperative that there is current evidence which explores what is happening in the courtroom and what mechanisms could be causing the disparity in chances of conviction. I therefore carried out court observations of sexual offences trials, using an intersectional feminist frame for analysis, in order to explore if and how cultural narratives are employed at trial and the ways in which they may interact with rape myths. Specifically, the objectives of this project were to:

- Identify whether legal practitioners use rape myths in serious sexual offences trials and if so, the context in which these are used.
- Identify whether legal practitioners use cultural narratives in serious sexual offences trials and if so, the context in which these are used.
- Analyse if and how the use of cultural narratives and rape myths reinforce one another.
- Outline potential avenues for improving the trial experience of victim-survivors.

1.1.1 Structure of the thesis

Before reviewing the relevant extant literature, I first provide some key definitions relevant to the project. The reviewed literature is then set out in Chapter Two. The review begins by outlining relevant aspects of the criminal justice system (CJS) in E&W before going on to explore its responses to sexual violence by examining rape attrition research and literature specific to the courtroom. The chapter sets out the gap in the literature that my thesis addresses: that some groups of victim-survivors are less likely to see convictions in their cases but that the existing court research does not adequately explain why or how this might be. Chapter Three details my methodological decisions and processes, including an outline of my intersectional feminist framework and the court observation method. Chapters Four to Seven set out my findings, with Chapters Four and Five focusing on rape myth narratives and Chapters Six and Seven focusing on the broader cultural narratives that intersected with the rape myths set out in the preceding chapters. Finally, Chapter Eight sets out my argument that rape myths are re/produced by oppressive cultural narratives in the courtroom and that this has important implications for research, policy, and practice. In short, it is essential that we look beyond rape myths as an explanation for poor justice outcomes by seeking to understand

the underlying structural inequalities and systems of oppression that shape courtroom narratives.

1.2 Introducing key terms and concepts

The following subsections define and justify key terms and concepts used throughout the thesis.

1.2.1 Victim-survivor

Throughout violence against women discourses there are differences in the way in which women who have been subjected to men's violence are framed linguistically. It is important that researchers be mindful of the labels they use and the potential effects of that labelling (Gavey, 1999; Papendick and Bohner, 2017); I therefore provide justification for my use of the term 'victim-survivor'.

The terms 'victim' and 'survivor' have separately been critiqued extensively with debate among feminists over which is the most appropriate term to use. The term 'victim' was used in early feminist activism and scholarship to acknowledge women's oppression and challenge the patriarchal society that cast misogynistic doubt over the legitimacy of women's experiences of male violence (Bourke, 2008), however during the 1980s there was growing concern regarding the negative connotations associated with the term. Barry (1979) noted that the term 'victim' had come to position women as passive victims, implying an inherent vulnerability and to some extent blaming them for their victimisation. Similarly, Kelly (1988) considered that the 'victim' label positioned women who had been victimised as powerless and damaged. This led to a shift towards using the term 'survivor' (Barry, 1979), which was used to signify that women have agency and are continually coping with, and resisting, men's violent oppression of women (Kelly, 1988).

Profitt (1996) argued that 'survivor' acknowledges both victimisation and strength and agency, whereas Lamb (1999) is critical of the term, positing that it overstates the trauma experienced because it intimates that the woman's life was at stake. However, Kelly (1988) explains that 'surviving' does not simply refer to the risk of death from the violence; it refers to the emotional

and mental survival as well as the physical, and it also encapsulates that many women take their own lives as a direct result of sexual violence.

The ‘victim’ and ‘survivor’ terminology were each viewed as valid but were positioned as binaries (Kelly, Burton and Regan, 1996). This dichotomy has been viewed as problematic because it does not acknowledge the complexities in navigating the victim and survivor identities, which are not necessarily static nor are they mutually exclusive (Leisenring, 2006; Papendick and Bohner, 2017). A person can hold the victim and survivor identities simultaneously (Dunn, 2005; Dunn, 2010; Dunn and Creek, 2015). An alternative to the individual terms that is seen quite frequently in contemporary feminist literature is ‘victim/survivor’. In writing, the virgule is used to indicate a choice between two things, representing the word ‘or’ and signifying the interchangeability of two words. It does not capture simultaneity. A hyphen can be used to indicate a connection between two words whilst keeping their meanings separate. Indeed, Jean-Charles (2014) uses a hyphen between victim and survivor to represent the process of surviving rape and West (1999) uses it to represent the duality of women’s experiences of being victimised and of surviving.

Another benefit of using ‘victim-survivor’ is that it incorporates the advantages of Boyle’s (2018) continuum thinking, which moves beyond a linear journey from victim to survivor. Victim and survivor are placed at either end of a continuum, but unlike the linear journey, Boyle (2018) stresses that “an individual’s movement across this continuum is not uni-directional or strictly chronological” (p. 8). That is, as with Kelly’s (1988) original concept of the continuum of sexual violence, women can be positioned at any point along the continuum at any point in time regardless of the points they have been at previously. The concept of a continuum captures the interconnectedness and fluidity of women’s self in relation to their experiences, that the victim and survivor identities cannot necessarily be easily distinguished from one another. This conceptualisation recognises that a woman can identify as a victim or as a survivor or both simultaneously at any time in her life during or after victimisation; she can feel like a survivor one minute and like a victim the next; she can feel like both at the same time. There remain limitations to using the term ‘victim-survivor’ to categorise the collective of women who have

been subjected to male violence, such as that it cannot easily capture those who reject both terms or those who feel they have transcended survivorship (Young and Maguire, 2003). The victim-survivor continuum is, however, flexible and can encapsulate a diverse range of lived experiences. It thus seems least likely to impose unwanted labels onto the women I observed.

Consideration must also be given to the specific context of this research when choosing terminology. This research is situated within the context of the CJS and so it is reasonable to assume that the women observed will have, at least to some extent, labelled their experiences as criminal. That is not to say that they will have necessarily chosen to identify as a victim, because women can feel obliged to present themselves as a victim in order to seek justice, regardless of the extent to which they identify with that label (Dunn, 2001; Leisenring, 2006). Within the CJS women who have experienced sexual violence are referred to as victims, as with any other crime, and within court specifically they are referred to as 'complainants' in order to reflect the presumption of innocence with regards to the defendant. 'Complainant' does not reflect the prospect of secondary victimisation in court (Temkin and Kráhe, 2008; Jordan, 2013) and so, given the focus of this research on the experiences of victim-survivors in the courtroom, it does not feel the most appropriate term to use. The inclusion of 'victim' in the term victim-survivor makes it suitable for the criminal justice context of this research whilst at the same time recognising the complex lived experiences of women subjected to sexual violence.

1.2.2 Defendant

A variety of terms can be used to refer to a person who has committed sexual offences. The terms perpetrator, offender, accused, and defendant are used throughout criminological research. Perpetrator is a broad term used to refer to a person who has committed a crime, but whom may or may not have been identified, whereas an offender is a person who has been convicted of a crime. Both of these terms therefore imply guilt, which is important to consider because at the point at which I was observing guilt had not been established (although in two cases the trials did end in conviction) and therefore would not be appropriate to use in this context.

The term accused is also commonly used within the existing literature, however this term can refer to any point in the CJS between charge and conviction, whereas defendant is a term that specifically relates to trial (HM Courts and Tribunal Service, 2012). I will therefore use the term defendant to refer to those accused of sexual offences. This is in keeping with the conventions for the criminal trial context and reflects that guilt has not been established at that point in the CJS. The use of the term defendant is consistent with other criminological research, particularly court observation research (e.g., Carlen, 1974; Rock, 1991; Lees, 2002; Konradi, 2007; Darbyshire, 2011).

A similar argument regarding the use of the term defendant can be used to argue for use of the term complainant in place of victim-survivor. However, it is not the victim whose guilt is being established by trial. Use of the term victim is commonplace in criminological research and it is common in court observation research in particular. Further, a defendant being found not guilty does not mean that no crime has taken place, because the purpose of a criminal trial is to establish whether there is enough evidence to convict a person of the crime with which they have been charged, not to determine innocence (Davies, 2015). My previously outlined argument for the use of the term victim-survivor therefore stands.

1.2.3 Rape and sexual assault

When referring to rape and sexual assault, I refer to them as they are defined in law in order to remain consistent with the way the terms are used in the context of criminal trial. The definitions of rape and sexual assault (including assault by penetration) are set out in the *Sexual Offences Act 2003* as follows:

> "A person (A) commits [rape] 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."
>
> "A person (A) commits [assault by penetration] if (a) he intentionally penetrates the vagina or anus of another person (B) with a part of his body or anything else; (b) the penetration is sexual; (c) B does not consent to the penetration, and (d) A does not reasonably believe that B consents."

> "A person (A) commits [sexual assault] if (a) he intentionally touches another person (B); (b) the touching is sexual; (c) B does not consent to the touching, and (d) A does not reasonably believe that B consents."

The *SOA* saw the introduction of a legal definition of consent, defined as being when "a person…agrees by choice, and has the freedom and capacity to make that choice", and stipulated that the belief in consent must be "reasonable". The *Act* further provides a list of circumstances in which it can be presumed that consent was not given, for example a person cannot consent if they are asleep or unconscious. The definition of consent introduced in the *SOA* put the onus on the defendant to demonstrate a reasonable belief in consent, as opposed to the victim-survivor having to demonstrate an active denial of consent (Crown Prosecution Service [CPS], n.d.(a)). Whilst the introduction of this definition marked a significant step forward, the provisions regarding consent are problematic because key concepts, such as reasonableness, freedom, choice, and capacity, are left open to interpretation (Elvin, 2008). The requirement for reasonable belief in consent means that lack of consent does not necessarily mean an offence has been committed, meaning that it is up to juries to decide what reasonable belief *is*. This leaves the interpretation of consent open to prejudices held by jurors (Simpson, 2016). This has a significant bearing on the types of narratives that barristers can employ in the courtroom, as is demonstrated in Chapter 4. Additionally, consent-based models have long been viewed by some as problematic because the vagueness of the definitions fail to account for power dimensions and societal inequalities, which can often constrain free choice (Munro, 2010).

Despite their limitations, using the statutory definitions for rape and sexual assault is appropriate for this project because it means that my definitions are in line with those being used at trial, and can consequently be presumed to be in line with the definitions intended by participants. A possible exception to this could be witness participants, particularly victim-survivors who may have chosen to define their experiences outside the legislative context. Legislative categories for sexual offences do not capture the complexity of victim-survivors' experiences of sexual violence, partly because not all acts of sexual violence are legislated

against but also because sexual offences are not mutually exclusive from one another nor from forms of sexual violence not defined in law (Kelly, 2012).

According to Kelly (1988), sexual violence can be situated along a non-hierarchical continuum where different forms of sexual violence bear the same common character—that is, acts of "abuse, intimidation, coercion, intrusion, threat and force" (p.76)—and cannot necessarily be easily distinguished from one another. The concept of the continuum of sexual violence recognises that sexual aggression does not happen in a vacuum, rather it is an extension of the backdrop of societal attitudes, beliefs and norms that produce and reproduce conducive contexts for, what is primarily, men's violence against women to occur (Kelly, 1988). Some of these attitudes and beliefs are reflected in society's response to sexual violence, particularly rape and sexual assault, as what are commonly known as rape myths. It is widely believed that rape myths have a serious impact on the CJS's effectiveness in responding to sexual offences and are therefore discussed throughout Chapter Two. Indeed, rape myths formed a central part of my analysis, especially in Chapters Four and Five. It is therefore important to first provide an introductory discussion to the concept of rape myths.

1.2.4 Rape myths

Rape myths are widely discussed within the literature and a range of definitions have been offered over recent decades. The term 'rape myth' was first used in the 1970s and is usually attributed to Brownmiller (1975) and Estrich (1976) as scholars who brought it to the fore in academia. The discussions of rape myths focused on conceptualisation until Feild (1978) and Burt (1980) began to develop an evidence base examining the influence of them on members of society. The research on rape myth acceptance is extensive and it is beyond the scope of this project to discuss in full. Therefore, aside from the present background discussion, rape myths will be reviewed in relation to the CJS throughout Chapter Two, as this is the aspect of the rape myth literature that is key to my overall thesis. That is, that rape myths remain

prevalent in courtroom narratives and that they are re/produced by oppressive cultural narratives[1] in the courtroom.

Rape myths have broadly been defined as widely held and generally false beliefs about rape, rapists, and rape victim-survivors (Brownmiller, 1975; Burt, 1980; Lonsway and Fitzgerald, 1994). Gerger et al. (2007) compellingly argued that the reference to false beliefs is problematic because falsehood cannot always be empirically supported and that defining rape myths as widely held implies that they will cease to be defined as such if fewer people believe them and will thus no longer be of concern. To address these issues, Gerger et al. (2007) define rape myths as

> "descriptive or prescriptive beliefs about rape (i.e. about its causes, context, consequences, perpetrators, victims, and their interaction) that serve to deny, downplay or justify sexual violence that men commit against women" (Bohner, 1998 cited in Gerger, et al., 2007, p.423).

This is the definition that will be adopted for this piece of research, particularly because its focus on the function of rape myths seems most fitting for observational courtroom research that seeks to explore the use of rape myths and their interaction with cultural narratives.

Rape myths are numerous and cannot easily be captured as an exhaustive and definitive list.[2] The function of rape myths is to blame the victim-survivor for the rape, express disbelief that rape has occurred, and/or exonerate the perpetrator (Eyssel and Bohner, 2008). Rape myths therefore legitimise sexual violence against women, and in doing so reinforce patriarchal ideologies that position women as subordinate to men (Edwards et al., 2011). The ways in which rape myths are expressed have changed over time as society has begun to take sexual violence more seriously, however the functions have not changed. Modern rape myths are worded more subtly than in the past in order for them to appear more socially acceptable (Eyssel and Bohner, 2008; McMahon and Farmer, 2011). This had implications for this research project because it meant that a prescriptive predetermined tick list of rape myths would not have been sufficient in identifying rape myths within trial narratives. It is nevertheless

[1] See section 3.5.3.1 for my conceptualisation of 'cultural narratives'.
[2] Appendix A lists some commonly identified rape myths however this is by no means an exhaustive list, its purpose is to give context to some discussions within this thesis.

important to explore some of the common myths and their impacts on the CJS in order to give context to the discussions within this thesis.

The majority of the rape myths in Appendix A fit the 'real rape' and 'ideal victim' stereotypes. Over 30 years ago Estrich (1987) outlined the 'real rape' stereotype as a rape perpetrated by a stranger in an outdoor or public place using physical force and violence that the victim-survivor actively attempts to fight. Estrich (1987) argued that this scenario was not the usual reality of rape. Indeed, subsequent research has shown that in fact most perpetrators of rape are known to the victim-survivor (Kelly, et al., 2005; Feist, et al., 2007; Ministry of Justice [MoJ], Home Office and Office for National Statistics [ONS], 2013). As there is a stereotype of what a 'real rape' looks like, there is also a stereotype of what an 'ideal victim' looks like. Christie (1986) surmises that the 'ideal victim' is virtuous, blameless, and weak in relation to the perpetrator. This can lead to victim-blaming attitudes when a case involves, for example, a victim-survivor who wore revealing clothing, had consumed alcohol, had mental health problems, or was involved in prostitution (Burt, 1980; Koss and Harvey, 1987; Lonsway and Fitzgerald, 1994; Kelly, et al., 2005; Horvath and Brown, 2006; Sims, Noel and Maisto, 2007; Grubb and Turner, 2012; Hohl and Conway, 2017). Some of Christie's (1986) picture of the ideal victim overlaps with Estrich's (1987) 'real rape' in that the perpetrator is a stranger and is physically strong or intimidating. Further beliefs about the 'ideal victim' include that they report to the police immediately, that they remember the event clearly and can therefore recount the experience with perfect consistency each time (Burt, 1980; Lonsway and Fitzgerald, 1994; Lees, 2002; Gerger, et al., 2007). In fact, evidence shows that victim-survivors often delay reporting to the police (Temkin, 2010), if they choose to report at all, and that traumatic experiences tend to impair memory (Hohl and Conway, 2017).

Although the evidence base relating to rape myths is vast and widely accepted, it is not without its critiques. Barristers Wolchover and Heaton-Armstrong (2008) argued that too much focus is put on rape myths as a reason for low rape conviction rates. Their argument centres on a conviction rate of 47% which is misleading as it ignores attrition points that come before a case reaches trial (see 2.3.1 for more on conviction rates). Further, they argue that juror

acceptance of rape myths is irrelevant because most cases do not reach trial. This ignores the wider cultural implications of rape myth acceptance because, for example, it ignores a victim-survivor's capacity to know that rape myths may impact trial outcomes and thus decide not to seek criminal justice. The claims of Wolchover and Heaton-Armstrong (2008) were not backed up by robust evidence, rather they used quotes from powerful men that showed no critical understanding of the political nature of sexual violence. Their writing itself was filled with rape myths, for example they referred to false allegations as if they are commonplace, which has since been evidenced not to be the case (Kelly, 2010; CPS, 2013). They argue that there is no evidence to support that jury decisions are influenced by myths and stereotypes, using only criminal justice statistics to support this conclusion. Notably, however, recent research from Thomas (2020), which was conducted with real jurors, claims that jurors do not believe rape myths. Whilst this research is important and significant, the methodology used cannot justify the sweeping claim that jurors do not believe rape myths. Section 2.4.2 gives a fuller critique of Thomas's work and argues that a consideration of the wider evidence base developed from a range of disciplines does in fact strongly indicate that jury decision-making is impacted by myths and stereotypes. Indeed, my conclusions in Chapter 8 demonstrate further why Thomas' (2020) claims are flawed.

Further critique of rape myths comes from Reece (2013), who argued that the prevalence and effect of rape myths have been overstated. She argued that some of the commonly discussed rape myths are in fact not myths because they cannot be proven to be false or can in some instances be true. An example discussed in the literature relates to the 'coffee myth': that a woman inviting a man in for coffee is an indication of consent to sexual activity. This posits that a woman need not verbally consent. Reece (2013), and more recently Gurnham (2016), argued that passive consent is possible and therefore there is an overlap between traditional sexual scripts and rape, rather than the two being part of the same continuum. Whilst it is of course true that some women may passively consent, the same situation can be experienced as rape for other women. Indeed, as Smith and Skinner (2017) pointed out, Gurnham's argument fails to acknowledge that consent is an ongoing process. A woman's passive

consent to the initiation of sexual intercourse is not automatic consent to every conceivable sexual act. Smith and Skinner (2017) further noted that a reasonable person might seek clarification of consent in an ambiguous situation, such as one involving passivity. Critics of rape myths question the robustness of the evidence of the existence of specific myths and therefore their relevance in sexual violence research. However, numerous observation studies have found that rape myths are frequently employed by legal professionals in the courtroom (Adler, 1987; Burman et al., 2007; Lees, 2002; Temkin and Krahé, 2008; Smith, 2018) and can impact on juror decision-making (Willmott et al., 2018; Leverick, 2020).

Chapter 2 Sexual violence and the 'justice gap'

2.1 Introduction

This chapter constitutes my review of the existing literature relevant to the research problem and highlights the gap in knowledge that my research sought to address. The chapter begins broadly by examining the CJS and reforms in relation to rape law. It then moves on to focus on attrition stages for rape within the CJS, with a focus on the perceived credibility of victim-survivors. Although the research project focused on courts, literature that looks at the earlier stages of the process provides illumination as to what impacts perceived credibility of victim-survivors. Finally, the court specific literature is explored. Overall, the review highlights that some groups of victim-survivors are less likely to see convictions in their cases but that the existing court research does not adequately explain why or how this might be.

2.2 The English and Welsh CJS

Criminal justice in E&W is underpinned by adversarial principles, as opposed to the inquisitorial approach present in much of continental Europe. Inquisitorial CJSs tend to appoint truth-seeking officials to investigate and determine the facts of a case, whereas adversarial systems do not primarily seek to establish the truth of what happened, rather they aim to ensure cases are dealt with justly at a fair trial in order to avoid wrongful convictions (Davies, 2015; Brants and Field, 2016). Whilst it is not possible to neatly distinguish between adversarial and inquisitorial legal systems because many incorporate principles from both (Jackson, 2002; Summers, 2007), it can still be useful in exploring a jurisdiction's approach to criminal justice (Field, 2009; Hodgson, 2010).

The adversarial system is based on a distrust of the state, which is why trial by a jury of peers is seen as a fundamental part of ensuring a fair trial in E&W (Carrabine, 2014). The adversarial system involves two separate parties presenting competing narratives, with a jury deciding which side they believe and a judge overseeing the trial to ensure it is fair (Davies, 2015). While defence barristers represent defendants, prosecution barristers represent the state; this means that the victims of crime are not legally represented at trial. The prosecution bring the

case on behalf of the state and thus the burden of proof lies with the prosecution rather than the defence, with the standard of proof being 'beyond reasonable doubt'. This standard of proof protects innocent people from conviction, but by consequence also protects the guilty where there is not enough evidence to convict. Acquittal therefore does not equate to innocence and as such at no point in the CJS in E&W is innocence established (Davies, 2015).

Adversarial and inquisitorial systems are diverse and tend to have parts of each other reflected in them, so no two systems are identical and are neither purely inquisitorial nor purely adversarial (Hodgson, 2010). Some argue that the adversarial nature of the justice system in E&W may not be its dominant feature because only a small portion of crimes end up being tried by a jury (Jackson, 2002). For instance, there were 1.51 million cases received by the Magistrates' Courts in 2017, versus 114,300 cases received by the Crown Courts (MoJ, 2018). However, the possibility for jury trial shapes the preceding points of the CJS, such as police investigation and gathering of evidence, and so the system in E&W can still be considered broadly adversarial as a whole even though it has arguably moved away from the tradition in some ways (Hodgson, 2010; Davies, 2015).

Adversarial trials see evidence presented and challenged in a question-and-answer format between barristers and witnesses. Witnesses are limited to answering only the questions asked of them; they are not allowed to provide a free narrative of their evidence and they are unable to argue or question the content or manner of the questions posed by the barristers (Brown, et al., 2010; Ainsworth, 2015). There have been concerns with the treatment of victims and witnesses in court with regards to barristers' questioning techniques, which can often be used to confuse and intimidate witnesses and distort the witness' evidence in order to suit their own narrative (Jackson, 2002; Brown, et al., 2010). Smith (2018) discusses how the combative nature of barrister conduct in adversarial trials, and the focus on winning, contributes to the use of stereotypes in rape trial narratives. Barristers are entitled to use any means legally at their disposal in order to serve their client to the best of their ability (Bar Standards Board [BSB], 2020). This is often justified as being fair because both parties are able to act in the same manner, however Smith (2018) found that prosecution barristers often failed to

challenge the use of rape myths and stereotypes by the defence and judges did not intervene when they had grounds to do so. This is likely due to the importance the adversarial system puts on judges having a passive role in the trial process, meaning judges could feel hesitant to intervene even when they would be justified in doing so (Darbyshire, 2011; Davies, 2015; Smith, 2018). Asserting that combative questioning techniques are fair because both sides use and challenge them is therefore problematic, this includes invoking stereotypes and rape myths that may mislead the jury (Lees, 2002; Ellison, 2000; Ellison, 2002; Smith and Skinner, 2012; Smith, 2018). This is discussed further in section 2.4.1.

2.2.1 Inequality in the CJS

Law is not made in a vacuum. As MacKinnon (1983) argued: “The law sees and treats women the way men see and treat women” (p.644). That is, the legal system was created by men and was thus founded on patriarchal masculine principles (Martin, 2005). The legal system therefore serves to reinforce patriarchal hegemony because the law has been, and arguably remains, predominantly made, interpreted, and applied by and for men (White and Easteal, 2016). It is not simply that men are the predominant actors in law, but that the lauded ideals of neutrality and objectivity embedded within it reflect patriarchal values (MacKinnon, 1987), and the law is therefore “an important signifier of masculine power” (Smart, 1989, p.2). Importantly, Smart (1995) contends that analysing the law as gendered, rather than as male serving, illuminates the practices reinforcing rigid gender norms rather than focusing on men and women as homogenous classes.

Acknowledging the heterogeneity of men and women reveals further inequalities perpetuated by and within the CJS. MacKinnon (2005) noted that legal procedures are established from middle-class values and, similarly, Naffine (1990) and Hudson (2006) noted the salience of white elitism in criminal justice discourses and practices. That is, classism and racism are reproduced within the CJS and therefore the treatment of the men and women who encounter it is determined by the extent to which they are perceived to resemble the white middle-class male (Hudson, 2006). Indeed, research suggests that minoritised men and women are routinely treated with suspicion by criminal justice practitioners due to racial and ethnic

stereotyping (Cemlyn et al., 2009; Mason et al., 2009; Parmar, 2011; Quinton, 2011; Minhas and Walsh, 2018) and they are more likely to be prosecuted and imprisoned for some crimes, including domestic and sexual violence (Lammy, 2017). Some argue that this could be because the legal profession is over-representative of white men and the educational and social elite (McLaughlin and Muncie, 1996; Judicial Diversity Taskforce, 2012; Judicial Diversity Committee, 2017; Justice, 2017; MoJ, 2020). Indeed, those working within the legal profession have publicly noted the embedded racism within it, referring not only to those encountering the system but also those working within it (Herbert, 2016; Kentish, 2017). This was further reflected by Black barristers drawing attention to the frequency with which they are mistaken for defendants by colleagues and court staff (Blackall, 2020; Bowcott, 2020; Rhone-Adrien, 2020).

The reproduction of structural inequalities within the CJS is part of the reason it has been argued that legal reforms, particularly in relation to male violence against women, can in fact serve to reinforce oppressions in the long-term whilst appearing ameliorative in the short-term (Wishik, 1986; Russell, 2016). It is therefore useful to explore some of the key reforms to rape law in E&W.

2.2.2 Reforms to rape law – a brief history

Over recent decades there have been numerous reforms to policy and practice regarding rape in the CJS. The treatment of rape victim-survivors in the English and Welsh CJS came under intense scrutiny from feminist activists in the 1970s following the judgement from the House of Lords in *DPP v Morgan* [1975] UKHL 3, where it found that a belief in consent must be genuine and honest but need not be *reasonable*, as had been ruled by the judge in the original case. This established the standard of *mens rea* for rape as subjective rather than objective, making it a lower standard than for the majority of other criminal offences and prioritising the rights of defendants over the rights of victim-survivors (Alexander, 1995). In response to the increased feminist concern regarding the treatment of victim-survivors by the CJS, a rape law advisory committee was formed by the government, which went on to address concerns

regarding the misuse of sexual history evidence at trial through the *Sexual Offences (Amendment) Act 1976*, but failed to address the *Morgan* judgement (McGlynn, 2010).

The 1990s saw three significant reforms to rape law in E&W. In 1992, it was recognised in case law (*R v R* [1992] 1 AC 599) that husbands can perpetrate rape against their wives. This was important because historically rape had been considered a crime against property, where women were viewed as the property of their husbands (Bennice and Resick, 2003). The second significant reform of the 1990s was the *Criminal Justice and Public Order Act 1994,* which, in addition to formalising the recognition of marital rape, gave legal recognition of male victim-survivors and removed the requirement for judges to warn juries against convicting based on uncorroborated evidence from the victim-survivor. Thirdly, following continued criticisms and a Home Office review regarding the continued reliance on evidence relating to victim-survivors' previous sexual behaviour, section 41 of the *Youth Justice and Criminal Evidence Act 1999 (YJCEA)* restricted the use of sexual history evidence in rape trials, except in exceptional circumstances. The effectiveness of this reform has been subject of much research and debate and is explored further in section 2.4.1.1.

In 1999 a Sex Offences Review began which sought to provide advice on creating clarity around sexual offences and ensuring appropriate punishment in compatibility with human rights legislation. As a result of this review the *Sexual Offences Act 2003* was introduced, overhauling much of the previous rape legislation. The reformed legislation included an extension of the definition of rape to include oral rape and the inclusion of a statutory definition of consent specifying that there must be a reasonable belief in consent and that the victim-survivor must have had capacity to freely give consent (see discussion in section 1.2.3). Reception of these reforms has been mixed, particularly with regard to their effectiveness (McGlynn, 2010; Horvath, Tong and Williams, 2011).

Whilst there has been success in as much as achieving reform, the reforms have been piecemeal and the policy changes have generally not been reflected in practice (HM Crown Prosecution Service Inspectorate, 2007; Payne, 2009; Brown, et al., 2010; Stern, 2010). Cook (2011) concluded that criminal justice policy and practice reforms have had little effect in

improving responses to sexual violence. However, Brown (2011) argued that it is not possible to discern how much policy reforms have improved criminal justice responses to rape and sexual assault because there is not a strong evaluative evidence base with which to make comparisons. Brown et al. (2010) noted that whilst, in theory rather than practice, the *Sexual Offences Act 2003* had been largely welcomed, there was significant confusion, both for the general public and legal professionals, around the issue of drunken consent as it was not well addressed in the legislation. Indeed, contemporary high profile cases involving victim-survivors who had consumed alcohol illustrate that this confusion remains an issue (e.g., Ched Evans in Wales, and Stuart Olding and Paddy Jackson in Northern Ireland where the consent law mirrors that of E&W).

If measuring the success of reform by conviction rates, it is clear that reforms have been unsuccessful because the number of prosecutions has dropped while the number of reports has increased (ONS, 2018). Indeed, a Government review referenced by McGlynn (2010) and Brown et al. (2010) found that the *Sexual Offences Act 2003* has been ineffective in increasing convictions for rape. However, when considering the broader victim-focused aims of reform, small improvements have been made, though they have been unjustifiably slow (McGlynn, 2010); for example, reports of rape are increasing, however it remains a significantly underreported crime with underfunded support and advocacy services for victim-survivors. Furthermore, repeated calls for reform that would align legislation, policy, and practice in E&W with other Westernised adversarial systems have been disregarded, such as the law on sexual history evidence and the introduction of independent legal representation for victim-survivors (e.g., Raitt, 2010; Smith, 2018). Carline and Gunby (2017) discuss the co-opting of political feminist reforms by political parties to further their standing in the eyes of the electorate by being tough on crime, which forgets the importance of, and fails to achieve, improvement to the experience of victim-survivors.

2.3 Rape attrition in the criminal justice system

The CJS receives much criticism in relation to conviction rates for rape (Stern, 2010) because they have remained consistently and disproportionately low since the 1970s (Feist, et al.,

2007; Lovett and Kelly, 2009; Walby, Armstrong and Strid, 2010). These criticisms are levied at all stages of the CJS from police reporting to the courtroom. The process by which rape cases 'drop out' of the CJS is known as attrition and this section explores the research that investigates that process.

2.3.1 Rape prevalence and conviction rates

2.3.1.1 Prevalence of rape in England and Wales

National prevalence surveys aim to estimate the prevalence of particular phenomena (such as rape) within the population. The Crime Survey England and Wales (CSEW) is used to provide national data on crime victimisation. According to this data, the lifetime prevalence rate for sexual assault is 12.1%, which is equivalent to approximately 4 million victim-survivors. Of this, 3.4% (1.1 million) relate to rape or sexual assault by penetration (ONS, 2017b). The CSEW also measures prevalence over the preceding 12 months. This measure shows the rate for all sexual assault as 2% and rape or assault by penetration accounts for one quarter of this (ONS, 2017b).

There are several limitations with the CSEW data, particularly in terms of sampling. The age range of participants is limited to 16-59, which excludes the experiences of children and all adults aged 60 and above, which is a large portion of the population in E&W. In the UK, 18% of the population is aged 65 and over (ONS, 2017c) and though this parameter is different from the CSEW in terms of age and nations of the UK, it goes some way to demonstrating that the CSEW statistics on sexual violence are not representative of the population as a whole. That said, despite the CSEW's limitations, it gives the best available estimate of the prevalence of sexual violence in E&W (Walby and Towers, 2017).

The CSEW data reveals that rape and sexual assault are not uncommon crimes in E&W, yet comparing the data with police recorded crime data (ONS, 2017a) shows significant discrepancies. The rates of police recorded sexual offences are far lower than the rates reported in the CSEW. There are methodological differences such as age ranges and offences included, however it is the police recorded crime data that has the wider parameters so presumably if the parameters were adjusted to match that of the CSEW there would be a much

larger discrepancy. The police recorded crime data does not include incidents that have been reported to the police but subsequently recorded as 'no crime', which means that the number of reports to the police would be higher than the recorded crime rates. However, the difference between CSEW and police recorded crime data cannot be explained by these factors alone, suggesting that rape and sexual assault are grossly under reported crimes.

Indeed, multiple studies have drawn the same conclusion (Kelly, et al., 2005; Wolitzky-Taylor, et al., 2011; Hohl and Stanko, 2015; Wilson and Miller, 2016). According to a government review based on aggregated CSEW data from 2009-2012, only 15% of female victim-survivors reported rape and serious sexual assault to the police (MoJ, Home Office andONS, 2013). Of this small portion of incidents that do get reported to the police, few result in a conviction (Kelly, et al., 2005; Temkin and Krahé, 2008; Hohl and Stanko, 2015).

2.3.1.2 Rape conviction rates in England and Wales

The most comprehensive way to measure conviction rates would be to calculate the number of convictions against the number of crimes committed (Walby, et al., 2010). However, it is not possible to do this accurately because, whilst many women who do not report to the police do identify their experience as rape and consciously choose not to report it, research suggests there are also a significant number of victim-survivors who do not recognise what has happened to them as rape or assault (Payne, 2009; Jordan, 2012; Wilson and Miller, 2016) and therefore would not have reported it. Although the CSEW questions for sexual victimisation are behaviour-based, describing rape behaviours rather than asking whether a person has been raped, victim-survivors who do not identify their experiences as rape or assault still may not identify their experiences as such when asked behaviour-based questions. This means that whilst the estimate presented by the MOJ, Home Office and ONS (2013) is that only 15% of female victim-survivors reported rape and serious sexual assault to the police, the true figure could in fact be much lower. Therefore, conviction rates are best measured as the number of police recorded rapes that result in a conviction (Walby, et al., 2010).

In the year ending March 2020 the police recorded 55,130 rapes (ONS, 2020) and according to CPS data, 2,102 rape-flagged[3] cases were prosecuted (CPS, 2020d) and there were 1,439 convictions (CPS, 2020d). The figures for rape-only-flagged prosecutions and convictions were much smaller, with 711 completed prosecutions and 416 convictions (CPS, 2020d). This shows that at best, the conviction rate for rape was 2.6% and at worst less than 1.3%. These figures represent a significant drop from three years earlier, which has caused many women's organisations and commentators to call it the effective decriminalisation of rape (Bindel, 2019; CWJ et al., 2020; Siddique, 2020).

A significant drawback of the national figures outlined thus far is that they can only tell the story of victim-survivors as a homogenous group, yet it is known that factors such as age can impact on prevalence rates. For example, victim-survivors aged 16-24 were significantly more likely than other age groups to experience sexual assault in the 12 months up to March 2017 (ONS, 2018). Relatedly, students were more likely to experience sexual assault during that same year compared to adults in any other occupation (ONS, 2018). A survey of 4,491 students and recent graduates from 153 higher education institutions found that sexual assault victimisation was significantly higher for female and non-binary students than for male students (48% and 46% versus 17%) and that 54% of disabled students had experienced sexual assault (The Student Room and Revolt Sexual Assault, 2018). Although not all young people are students and not all students are young people, statistics show that approximately 1 in 3 people aged 18-24 are in full-time education (ONS, 2016) and the number of students aged over 25 declined between 2010 and 2016, with only a slight rise in 2016/17 (Universities, 2018). Thus, whilst student data cannot be correlated with age, it does still provide useful insights into prevalence in relation to age.

[3] According to the CPS: "The CPS records data in relation to 'rape flagged' cases. The data does not constitute official statistics. The flag is applied to CPS files from the start of the case following an initial allegation of rape. This flag will remain in place even if the decision is taken to charge an offence other than rape, or where a rape charge is subsequently amended. Data on rape prosecutions includes not only cases resulting in a conviction for rape, but also cases initially flagged as rape where a conviction was obtained for an alternative or lesser offence" (CPS, 2018 [FOI letter]). This means that some of the prosecutions and convictions in the figures will not be for s.1 rape.

There is limited evidence available regarding sexual violence victimisation of older people (aged 60 and over) because the CSEW only covers ages 16-59 on the intimate violence module and it is an under-studied area in criminology. The evidence that is available suggests prevalence rates of between 0.9% and 5.2% and suggests that white older women are more at risk than older women of Colour; however because of the paucity of research in this area there are significant limitations to these estimates (Bows, 2017). Research by Bows and Westmarland (2017) using police recorded crime data showed that in the older population it is overwhelmingly women who are victimised and that the perpetrators were usually known males who were younger than them. They also found that there were a significant minority of cases where the perpetrator was the victim-survivor's carer (Bows and Westmarland, 2017), which could be related to research with disabled people that indicates women in institutional settings experience high levels of sexual victimisation (Balderston, 2013).

Relatedly, the age of the defendant appears to be a factor that impacts on conviction rates, according to a freedom of information request made by Ann Coffey MP in 2018 which showed that men aged 18-24 had the lowest CPS conviction rate compared to older men (Topping and Barr, 2018), suggesting that juries are reluctant to convict young men of sexual offences. This reluctance has also been reflected in high profile cases of lenient sentencing imposed by judges in cases involving young men (Tierney, 2018).

A further significant drawback of the national crime figures is that they are not collated in a way that enables researchers to explore underlying complexities and links to social inequalities (Parmar, 2017). This makes it incredibly difficult to understand whether some groups of victim-survivors find it harder to access criminal justice or experience lower conviction rates than others. There have been some rape attrition studies that to some extent address this issue, however this was usually not the main focus, meaning that discussions were limited. Such studies have highlighted that minoritised and marginalised groups of victim-survivors do have diminished chances of seeing a conviction in their case. For example, studies have shown that Black and Asian victim-survivors see lower conviction rates than white victim-survivors, with Black victim-survivors the least likely to see a conviction (2.4 compared to 7.6 for white)

(Munro and Kelly, 2009). Lovett et al. (2007) also found that Asian victim-survivors saw a lower conviction rate than white victim-survivors (5.5 vs 7.5) and Munro and Kelly (2009) found that 80% of Asian victim-survivors' cases resulted in attrition. These groupings provide limited understanding, though, because it homogenises groups with significant diversities within them (Aspinall, 2020). Such disparities in conviction rates are reflected in other marginalised groups. For example, Lovett et al. (2007) found that unemployed victim-survivors saw lower conviction rates as did victim-survivors who were classed as living in vulnerable housing, both of which are often associated with mental illness (Savage, 2016; Trades Union Congress, 2017) and could also be indicators of low socioeconomic positioning.

National statistics show that women with a long-term illness or disability are more likely to have experienced sexual assault in the year up to March 2017 than were those without a long-term illness or disability (ONS, 2018). It is worrying then that the conviction rate for disabled victim-survivors has been found to be half that of their non-disabled counterparts, although there was no detailed analysis of this figure, so it is unclear whether it was a direct result of disability (Kelly et al., 2005). Similarly, Hester (2013) found that victim-survivors having a mental health condition significantly lowered the chance of conviction. However, the impact of mental health conditions[4] on conviction rates does not appear to be straightforward because Hester and Lilley (2017) found that for victim-survivors with mental health problems whose cases were for historical child sexual abuse, conviction rates were higher than for other cases.

In contrast to the disparities set out above, a study examining attrition rates specifically for victim-survivors who were involved in prostitution showed that their cases had a significantly higher rate of conviction than for other victim-survivors (Lea et al., 2016). Lea et al. (2016) surmise that this could be because there are high levels of underreporting and greater risk of victimisation for women in this group. It may therefore be that rapes involving particularly high levels of violence and serious injury were reported which could lead to a better criminal justice response, especially given that the majority of the perpetrators were strangers, all of which fits with the 'real rape' stereotype (Lea et al., 2016).

[4] It is important to note that mental illness is often a symptom of the impacts of sexual violence

The figures outlined throughout this section show that the CJS is failing to produce justice for victim-survivors of rape and sexual assault, but conviction rates cannot explain *how* this happens. The following two sections will further explore the rape attrition literature as a starting point for explaining why conviction rates for rape and sexual assault remain low and why some groups of victim-survivors experience worse outcomes throughout the criminal justice process.

2.3.2 Underreporting of sexual violence

Attrition research usually separates case exit points into distinct attrition points within the CJS, which whilst valuable in examining the issues that could be causing it, does not take account of the underreporting of sexual violence. Some therefore view the decision to report to the police as the first attrition point (Brown, Hamilton and O'Neill, 2007; Munro and Kelly, 2009). The prevalence research outlined in section 2.3.1 demonstrates that there is a very large gap between the estimated occurrence of rape and the number of rapes reported to the police each year.

Research shows that the decision to report to police is complex and is impacted by a wide range of factors including fear of not being believed, fear of retraumatisation, shame or embarrassment, and a lack of trust in the CJS (Myhill and Allen, 2002; Stern, 2010; Brown, 2011; Hohl and Stanko, 2015; Smith and Daly, 2020). The lack of trust in the CJS can be exacerbated for minoritised and marginalised victim-survivors. For instance, lack of trust in the police caused by a long history of institutional racism can have an impact on minoritised victim-survivors' decisions to report to police (Harrison and Gill, 2019).

Cultural factors can also play a significant role in victim-survivors' decision-making. For example, sexual violence is often not talked about in British South Asian communities and so South Asian women tend to be less likely to disclose rape or sexual assault to authorities such as the police (Cowburn, Gill and Harrison, 2015). A lack of cultural understanding within the police (both perceived and actual) also presents a barrier for women from South Asian communities (Gill and Harrison, 2016; Harrison and Gill, 2019). Munro and Kelly (2009) found that Black victim-survivors were least likely to report compared to Asian and white victim-survivors, with Asian victim-survivors being the most likely to report. Whilst their finding that

Asian victim-survivors were most likely to report may seem to contradict findings from Cowburn et al. (2015) and Harrison and Gill (2019), it could be explained by the broad categorisations of Asian victim-survivors, as this homogenises (as it also does with Black victim-survivors) incredibly diverse groups within which there would be myriad differing cultural factors at play that impact on decision-making.

Similarly, Jobe and Williams (2020) found that many victim-survivors with learning disabilities are reluctant to make a report to the police, and fear of not being believed or listened to was part of this. Likewise, it is worth noting here that, in relation to crime in general, people with mental health problems can be cautious about reporting to the police because of a fear that they will not be believed or will not be taken seriously due to their mental health problems (Mind, 2007; Pettitt, et al., 2013).

2.3.3 The role of perceived victim-survivor credibility in rape attrition

A wealth of research exists exploring the gap between the estimated prevalence of rape and the drastically lower rate of convictions, that is, the attrition mechanisms for rape and sexual assault. This section will provide an overview of research exploring points of attrition with a particular focus on the perceived credibility of victim-survivors. Focusing on the role played by credibility in earlier points in the CJS helps demonstrate why researching court is important despite incredibly low prosecution rates meaning very few cases reach that stage.

2.3.3.1 Victim-survivors' fear of not being believed

Attrition at the police and CPS stages of the CJS is usually attributed either to victim-survivors withdrawing complaints or police/CPS deciding not to progress the report. Hohl and Stanko's (2015) study, which examined 587 rape cases reported to the London Metropolitan Police Service over a 2-month period in 2012, found that victim-survivors withdrawing their complaint accounted for 48% of attrition, with victim-survivors most commonly making the decision during the police investigation stage. Whilst the results from the study are not generalisable to the whole of E&W, the case outcomes of the Metropolitan Police Service at that time were average when compared with other English and Welsh police forces and the rates of attrition found were similar to the national rates. This suggests that the results provide a good insight

to the national picture of attrition at the time (Hohl and Stanko, 2015). Hohl and Stanko's (2015) findings are similar to those of Kelly et al. (2005) who conducted an earlier study of attrition in rape cases. The most commonly cited reasons for withdrawal were that the victim-survivors feared that they were not believed by police, feared they would not be believed later in the process, or felt revictimised by the questioning processes (Estrich, 1987; Myhill and Allen, 2002; Stern, 2010; Hohl and Stanko, 2015). McMillan (2018) found that when victim-survivors withdraw their complaints, police officers tend to view it with suspicion and as an indicator of a 'false' allegation. Also of note in relation to victim-survivor withdrawal of complaints is that they may not always formally withdraw the complaint, it can also occur through disengagement with the CJS (i.e. ceasing any contact with police) (Brown et al., 2007).

2.3.3.2 Police perceptions of victim-survivor credibility

Police decision-making can result in attrition in two ways, first in recording that 'no crime' has been committed and second in deciding to take no further action in an investigation. In the former, however, the withdrawal of a complaint by the victim-survivor can serve as the reason for recording 'no crime' (Kelly et al., 2005). Another reason for a report being recorded as 'no crime' is if it is deemed there is evidence to the contrary of the allegations (Kelly et al., 2005). Indeed, police interviewees in Brown et al.'s (2007) study agreed that cases were only 'no crimed' if the allegation was deemed false. Research by Hohl and Stanko (2015) found that the police decision to record a case as 'no crime' accounted for 19% of attrition, whilst the highest portion of attrition, 67%, could be attributed to the police deciding to take no further action. This latter figure is significantly higher than has been found in previous studies, where Gregory and Lees (1996) found a figure of 5%, Brown et al. (2007) found 14%, Harris and Grace (1999) found 31%, and Lea et al. (2003) found 33%.

In Hohl and Stanko's (2015) study, key factors in police decision-making were the presence of evidence that appears to undermine the victim-survivor's account, police doubting the victim-survivor's credibility, and there being a record of a previous false allegation made by the victim-survivor. It is important to note that there was no way to verify whether or not the

record of a false allegation was accurate, and it is worth considering that the rate of false allegations recorded in the sample of police case files in Hohl and Stanko (2015) is significantly out of line with the national and European evidence on false allegations (Kelly, 2010; Hohl and Stanko, 2015). Furthermore, the practice of recording of false allegations is problematic because research has consistently shown a significant disparity between estimated rates of false allegations in research studies and police officer estimates of false allegations (Saunders, 2012), with Kelly et al. (2005) describing a "culture of scepticism" (p.83) within the police. Indeed, Jordan (2004) pointed to an underlying, deeply embedded misogyny within the police resulting in the disbelief of rape victim-survivors.

As well as these attitudes of disbelief, the disparity between assumed and actual false complaints has also partly been attributed to differing ideas about what constitutes a 'false' allegation (Saunders, 2012). Indeed, McMillan (2018) noted that her case file analysis showed there were numerous reasons police categorised allegations as 'false', few of which were malicious. Interviews with officers revealed that factors those officers associated with 'false' allegations, such as inconsistencies, a lack of detail, and level of alcohol consumption, largely reflected common rape myths (McMillan, 2018). Thus, the perceived credibility of victim-survivors appears to play a key role in the early stages of attrition. Indeed, Maddox, Lee and Barker (2011) found that police officers considered a victim-survivor's credibility as a significant factor in attrition.

2.3.3.3 CPS perceptions of victim-survivor credibility

The perception of limited victim-survivor credibility has also long been found to be a significant factor in CPS decisions to take no further action (Gregory and Lees, 2002; Lovett et al., 2005; Brown et al., 2007; Hohl and Stanko, 2015). In the most recent of these studies (Hohl and Stanko, 2015), CPS decision-making could be attributed to 14% of attrition. This continued focus on victim-survivor credibility reflects Temkin and Krahé's (2008) finding that both the police and CPS chose to take no further action because they believed that the case would not result in conviction at trial. That is, they based their decisions on what they believed a jury might think (Brown et al., 2007). Indeed, the Divisional Court decision in *R(B) v DPP* [2009]

EWHC Admin 106 regarding the proper application of the CPS' evidential test led to the introduction of a merits-based approach, which sought to ensure prosecution decisions were based on the evidential merit of a case rather than being based on assumptions about jury decision-making. However, it has been argued that the significant drop in prosecutions since 2017 (see section 2.3.1) is a symptom of a return to risk-averse CPS decision-making that is based on predictions of jury responses (CWJ et al., 2020), thus making the perceived credibility of victim-survivors a focal point once again.

Evidence suggests that the police and CPS seek to gather extensive evidence about victim-survivors to establish whether their credibility can be undermined (Smith and Daly, 2020). This usually involved accessing private data from victim-survivors' digital devices and social media, as well as records held by third-parties such as medical, third-sector, and local authority records (Smith and Daly, 2020). An investigation by the Information Commissioner's Office (ICO) criticised police and CPS practice regarding digital data, finding that properly informed consent from all parties for whom data is held on private digital devices is not possible (i.e., friends and family of the victim-survivor as well as the victim-survivor herself) and therefore data should only be requested when it is *strictly* necessary—with an emphasis on "the challenge of the high threshold, i.e. 'strictly necessary' is more than 'necessary'" (ICO, 2020, p.37). Furthermore, the ruling in *Bater-James and Mohammed v R* [2020] EWCA Crim 790 stated that speculative searches of victim-survivors' private records do not constitute a reasonable line of enquiry. It is worth noting, however, that previous similar rulings regarding accessing victim-survivors' data did not appear to have an impact on police and CPS practice (Smith and Daly, 2020).

2.3.3.4 Are some victim-survivors perceived as more credible than others?

Whilst the above factors are illuminating in a general sense, they do not explain the disparity in outcomes for some groups of victim-survivors. There is a paucity of research on how decision-making within the criminal justice process may be impacted by victim-survivor demographics or characteristics. The data discussed thus far centres on the perceived credibility of victim-survivors in a general sense; however the disproportionate effects on case

outcomes identified in section 2.3.1 suggest that some groups of victim-survivors may be deemed more or less credible than others. That police and CPS decisions to take no further action is so tied up in the perceived credibility of victim-survivors is not surprising. In light of the differences in conviction rates for minoritised and marginalised women, it is pertinent to explore whether these groups are perceived as less credible by legal practitioners.

Stanko and Williams (2009) and Ellison et al. (2015) found that victim-survivors with a recorded mental health condition had the highest attrition rate, with them being more likely to have their cases drop out of the CJS as a result of decisions made by the police or CPS compared to victim-survivors without a mental health condition recorded. The research by Ellison et al. (2015) strongly indicates that this is likely a result of increased factors that would cause practitioners to view them as a non-credible witness, suggesting that they are influenced by stereotypes and prejudices regarding mental health and misconceptions about credibility. Indeed, Hester (2013) noted that police officers commented on the credibility of victim-survivors with mental health conditions, stating that they perceived them as *"*difficult to understand, confused or even delusional*"* (p.13). Likewise, McMillan (2018) found that police officers in her sample often referenced victim-survivors' mental health when considering whether a complaint was a 'false' allegation. Earlier studies also found similar references to mental ill health, delusions and 'unstable females' (Lees and Gregory, 1996; Lea et al., 2003), demonstrating the persistence and pervasiveness of such narratives. This is an embedded notion that has long been reflected across multiple Westernised jurisdictions, often reflected through 'unstable women' narratives (e.g., Minch and Linden, 1987; Aiken, 1993; Raitt and Zeedyk, 2003; Ellison and Munro, 2010).

Similarly, disabled victim-survivors in Kelly et al.'s (2005) study were twice as likely as non-disabled victim-survivors to have their report recorded as false. Harris and Grace (1999) found that victim-survivors with a learning disability or mental health condition who had their cases dropped at the police stage did so because they were deemed to have made false allegations or would not make a credible witness. Similarly, Hester (2013) found that cases for victim-survivors with a learning disability or mental health condition were least likely to be recorded

as crimes by the police. That victim-survivors with recorded mental health conditions have a lower chance of their case reaching a conviction is concerning, given that women with serious mental health conditions are more likely to experience sexual violence in their lives than women without serious mental health conditions (Khalifeh, et al., 2016). Nuanced understanding is crucial though, because research has also indicated that particular case characteristics may impact positively on attrition for victim-survivors with mental health problems (Hester and Lilley, 2017).

More recent research (Jobe and Williams, 2020) demonstrates that issues persist for victim-survivors with learning disabilities, who face numerous barriers throughout the criminal justice process including inadequate consideration of disabilities, inadequate communication, and poor access to appropriate adults[5] and intermediaries.[6] Significantly, the problematic notion that victim-survivors with learning disabilities cannot make credible or reliable witnesses remained persistent and impacted the quality and progression of investigations (Jobe and Williams, 2020).

As with disabled victim-survivors, evidence outlined in section 2.3.2.1 showed that ethnically and racially minoritised victim-survivors can be less likely to report to police in the first place. Worryingly though, for those minoritised victim-survivors who do choose to make a report to the police, evidence suggests that victim-survivor race and ethnicity impacts on police and CPS decision-making, with victim-survivors of colour being less likely to have their case progressed to court than white victim-survivors (Hohl and Stanko, 2015). A study exploring a wider range of gender-based violence similarly found that Black and other minoritised victim-survivors were less likely than white victim-survivors to see an investigation and charge in relation to their complaints (Gangoli et al., 2020). It is worth noting that neither study is statistically generalisable, however no such data currently exists so these provide the best insights. Relatedly, suspects of colour have been found to be more likely to have a case

[5] Appropriate adults support and safeguard the interests and rights of children or vulnerable adults who are being detained or questioned by the police because they are suspected of committing a crime.

[6] Intermediaries facilitate communication between any vulnerable witnesses and the police, prosecution, defence, and the court in order to ensure that the communication is as complete, coherent and accurate as possible.

progressed against them than white suspects (Hohl and Stanko, 2015). Indeed, the Lammy Review (2017) found that Black and 'Chinese and Other' suspects were more likely to be prosecuted for domestic and sexual violence. This demonstrates myriad impacts of embedded institutional racism. Research examining the impact of victim-survivor race or ethnicity on criminal justice proceedings is sparse, as most research relating to race and the CJS focuses on the latter point; that is, suspect/defendant race and ethnicity.

Interview data from Gangoli et al. (2020) suggest that some minoritised victim-survivors consider that institutional racism had tangible impacts on their ability to access justice, and those with insecure immigration status felt this more acutely and said that their status was a barrier to criminal justice for them. Indeed, Mason et al. (2009) found that victim-survivors with insecure immigration status are significantly limited in their ability to access justice by their confusion about their legal status. Research from the US has noted that the perception of racially minoritised victim-survivors as being likely to make false reports is also tied up with their socioeconomic positioning (Belknap, 2010; Armstrong and Hamilton, 2013; Loya, 2014). Whilst this cannot simply be applied to the context of E&W, it does in part reflect Phipps' (2009) assertion that working-class victim-survivors are viewed as less credible than those from higher socioeconomic backgrounds. This is particularly notable because social class remains a significant system of oppression in the UK (Marshall et al., 1988; Payne, 2013; Savage et al., 2013) and often plays a role in the policing of women's sexual behaviour (Skeggs, 1997).

As noted earlier, in deciding whether to take a case forward, the police and CPS make judgements on jurors' likely perceptions of the victim-survivor and the impact that might have on securing a conviction (Brown et al., 2007). This in turn can impact on future attrition rates at earlier stages because the reluctance to prosecute those cases means that victim-survivors who do not conform to the 'ideal victim' stereotype or rapes which do not conform to the 'real rape' stereotype are not being brought to public attention, meaning that the public (who are potential jurors) continue to see the same 'type' of victim or 'type' of rape being tried at Crown Court, and only sometimes resulting in conviction (Munro and Kelly, 2009). Non-conforming victim-survivors and cases should be brought to court to enable the possibility for the

stereotypical view of a ‘real’ or ‘good’ victim-survivor-witness to be challenged. If it is left unchallenged the cycle will not be broken and these victim-survivors will remain obscured from the public conscious and the ‘real rape’ and ‘ideal victim’ archetypes remain the public prototype for sexual violence (Munro and Kelly, 2009; Hohl and Stanko, 2015; Carline and Gunby, 2017). Prosecuting only cases that fit these archetypes also sends a message to victim-survivors that they will not receive justice and could therefore discourage them from reporting to the police when they otherwise may have, thereby impacting on attrition rates (Rossetti, Mayes and Moroz, 2017; Cowan, 2019; Smith and Daly, 2020).

2.4 Victim-survivor credibility in the courtroom

As has been established through the rape attrition research outlined in section 2.3.3, perceived victim-survivor credibility is central to the decision-making processes by the police and CPS. The literature also revealed that this extends to the final stage of attrition as well, that is, the courtroom. As will be outlined throughout this section, the credibility of victim-survivors is undermined at trial in myriad ways and it is widely believed that rape myths play a key role in these processes (Brownmiller, 1975; Burt, 1980; Temkin, 2010).

2.4.1 Cross-examination of victim-survivors

Cross-examination is considered a fundamental element of adversarial trials because it is the process by which the opposing party can test a witness’ evidence (Evans, 1995). Thus, the main purpose of cross-examination is to undermine evidence which damages the other party’s argument and to draw out evidence which supports their own arguments (Choo, 2018). Fear of this process is a common reason for victim-survivors withdrawing from the CJS (Feist, et al., 2007; Stanko and Williams, 2009). Indeed, high profile stories in the media have highlighted the devastating impact giving evidence in court can have on victim-survivors of sexual violence (Cramb, 2002; Burman, 2009; Walker, 2013; Storey, 2015) and this has also been observed in academic research (Smith, 2018; Hester and Lilley, 2018). Victim-survivors often report feeling silenced, confused, and humiliated by cross-examination, leading to retraumatisation and claims that victim-survivors feel that it is them on trial rather than the defendant (Adler, 1987; Lees, 2002; Konradi, 2007; Kebbell, O'Kelly and Gilchrist, 2007;

Wheatcroft, Wagstaff and Moran, 2009; Smith and Daly, 2020). Similar feelings have been highlighted in relation to people with mental health problems who have been victims of assault more generally (Pettitt, et al., 2013) and interestingly the majority of the victims quoted in Pettitt et al.'s (2013) research in relation to negative court experiences were female and were referring to sexual or domestic violence.

Accordingly, cross-examination of victim-survivors in rape trials has received much criticism, particularly regarding questioning practices which are often manipulative and aggressive and draw heavily on rape myths (Adler, 1987; Lees, 2002; Taslitz, 1999; Raitt, 2010; Smith, 2018). Cross-examination typically involves looking for inaccuracies and inconsistencies and using them to undermine the credibility of a witness (Evans, 1995; Choo, 2018). This is particularly significant in relation to cases of sexual violence because of the myth that 'true' victims should be able to provide detailed accounts that remain consistent over time. This means that victim-survivors are held to an expectation of consistency and detail that is known to be unrealistic because of the effect trauma has on memory (Conway, Justice and Morrison, 2014; Howe and Knott, 2015; Hohl and Conway, 2016). Indeed, Segovia, Strange and Takarangi (2017) found that trauma memories are susceptible to suggestive cross-examination questioning, which demonstrates that standard cross-examination tactics are not compatible with best evidence. For example, a favoured tactic for cross-examination is the use of closed, leading questions because they are known to contaminate memory and lead to answers more consistent with the question as opposed to fact (Loftus, Miller, and Burns, 1978; Sharman and Powell, 2012). Furthermore, Kebbell et al. (2007) found that cross-examination of victim-survivors often focuses on very minute details, again demonstrating reliance on the unrealistic expectation that victim-survivors have highly detailed memories of the event.

In mapping changes over time (1950s compared to 1990s-2000s) in the use of questioning styles in sexual assault trials, Westera et al. (2017) found that prosecution use of open-ended questions had increased over time, perhaps indicating an awareness of the body of evidence suggesting this style is most conducive for accuracy of memory recall. Despite this, Kebbell et al. (2003) found that rape victim-survivors' testimony was highly constrained, even during

evidence-in-chief, and that they were not given opportunity to give their full account, especially during cross-examination. Despite open-ended questions being regarded as the most accurate and best approach for evidence-in-chief, Kebbell et al.'s (2003) finding that closed questions were frequently used in this context could be explained by assertions that longer victim-survivor testimony increases opportunity for defence barristers to find inconsistencies and inaccuracies (Burrows and Powell, 2013; Stern 2010; Westera et al., 2016).

Questions asked of victim-survivors during cross-examination are regularly deemed irrelevant to the facts and intrusive in nature (Lees, 2002), often focusing on accusing the victim-survivor of lying (Lees, 2002; Smith, 2018). An exploratory analysis in the US found that defence lawyers use similar strategies across type of assault trial (i.e. sexual and non-sexual assault), but that the sexual assault trials involved implicit suggestions of victim-survivor impropriety and unreliability, whereas the non-sexual assault trials tended to make such suggestions explicitly (Gales and Solan, 2017). The authors suggested that this reflected the existence of laws restricting the questions defence counsel can ask about a victim-survivor's sexual history (sexual history evidence is addressed further in section 2.4.1.1), suggesting barristers are able to circumvent such laws with relative ease through drawing on rape myths. Whilst Gales and Solan's study was based on only one sexual assault trial transcript, the findings are in line with rape trial studies elsewhere, including E&W, which found subtle and implicit deployment of rape myths in trial narratives (Smith, 2018). Smith (2018) also found that defence barristers used questioning and 'logical reasoning' to manipulate the jury by using language that implied what they were stating was fact by presenting their argument as the only 'logical' conclusion, often by drawing on 'rational' ideals and rape myths in their arguments.

Rape myths, explicit and implicit, have long been found to be a key element in the formation of defence barristers' narratives in trials (Adler, 1987; Lees, 2002; Smith and Skinner, 2012, 2017; Temkin et al., 2016; Smith, 2018). Court observation research has shown that barristers invoke rape myths in order to portray victim-survivors as irrational and suspicious, as well as to impugn their sexual character (Adler, 1987; Lees, 2002; Burman et al., 2007; Temkin et al., 2018; Smith, 2018). Indeed, such tactics have been reflected in interviews with barristers

(Temkin, 2000; Carline and Gunby, 2011). These studies highlight that commonly deployed rape myths relate to delayed reporting and the expected consistency of the victim-survivor's accounts, as well as their level of resistance, their sexual behaviour, and their moral character.

A small body of observational research goes beyond exploring rape myths in cross-examination, taking an intersectional feminist approach to explore how minoritised and marginalised victim-survivors may be differently undermined through defence counsel drawing on a range of stereotypes. Powell et al. (2017) observed child sexual assault trials in the US, identifying courtroom narratives that drew on established gender, race, class, and age stereotypes in order to undermine the credibility of victim-survivors. Their analysis drew attention to the role of structural inequalities and systems of oppression in courtroom narratives. Powell et al. (2017) identified three core cultural narratives in their observations: invisible wounds, rebellious adolescents, and dysfunctional families. Each of these narratives were interwoven with rape myths. For example, when drawing on the notion of rebellious adolescents, defence counsel were relying on the myth that false allegations are common and the associated gendered cultural narrative that women lie about rape.

In E&W, Smith (2018) carried out an intersectional analysis of her trial observations. Like Powell et al. (2017), she found that rape trial narratives were permeated by oppressive cultural narratives. Although Smith's (2018) analysis did not highlight common narrative themes across the sample, it did delineate individual trial narratives related to social class, disability, race, ethnicity, and nationality stereotyping. Again, the stereotyping identified by Smith (2018) interlinked with rape myth narratives to bolster defence counsel's undermining of victim-survivors' credibility. For example, Smith's (2018) observations reflected the intersections of class and gender described by Anthias (2014), Phipps (2009) and Skeggs (1997). That is, the notion of respectability. For Skeggs (1997, 2005), traditional femininity was constructed based on middle-class ideals of 'respectability' and working-class women's purported excessiveness, regarding both sex and alcohol, was therefore viewed as deviant (Lawler, 2005; Anthias, 2014). These undermining narratives at the intersection of class and gender, linking alcohol consumption and sexuality, had also been noted in Lees (2002) trial observation research.

Beyond the narratives employed through questioning, another noted cross-examination tactic is to confuse victim-survivors (Matoesian, 1993; Konradi 2007), for example through the use of complex syntax, double negatives, and multi-part questions (Ellison and Wheatcroft, 2010; Kebbell et al., 2010; Henderson, 2015). This enables the defence to undermine the credibility of the victim-survivor by positioning her as unreliable. Additionally, closed questions are used frequently throughout cross-examination to constrain victim-survivors' testimony (Kebbell et al., 2003; Zajac and Cannan, 2009). A noted tactic for defence barristers is the use of closed questions to subtly build manipulative arguments tied up through the use of rape myth rhetoric in closing arguments which presents manipulated testimony as fact (Matoesian 1993; Smith 2018). Furthermore, Smith's (2016) commentary outlined that closed questions can be used to stress victim-survivors during cross-examination. Similarly, both Smith (2018) and Matoesian (1993) found that barristers frequently interrupted witness testimony in order to control and direct their accounts to suit the defendant's version of events. In her court observations, Smith (2018) found that victim-survivors were constrained in every trial and that repetitive questioning led to victim-survivors changing their testimony through diminished denials. Likewise, Zajac and Cannan (2009) found that both adult and child victim-survivors changed their testimony when pushed with credibility challenging questions and leading questions (see Cossins, 2020, for a detailed review of cross-examination of child victim-survivors). Their findings also showed that victim-survivors were highly compliant with leading questions and did not usually seek clarification when asked complex, ambiguous, or nonsensical questions.

Cross-examination styles have remained consistent over time, with leading questions forming the bulk of questions and with victim-survivor compliance with this type of question remaining high (Westera et al., 2017). Analysis of court transcripts has shown that questioning tactics employed by defence barristers have changed very little since the 1950s and continue to utilise common rape myths as a tool for undermining victim-survivors (Zydervelt et al., 2016). Questions aimed to undermine the plausibility of the allegations as well as the credibility, reliability, and character of the victim-survivors (Zydervelt et al., 2016). Additionally, Westera et al. (2017) found that the length of cross-examination had increased over time, meaning that

victim-survivors were exposed to a higher proportion (34%) of questions, most of which were leading.

Prosecutors are encouraged to challenge rape myths that are deployed through defence cross-examination (Burrowes, 2013), but court observation research has found that this often does not happen (Durham et al., 2016; Smith, 2018). Temkin (2010) exemplifies how some common rape myths are easily challengeable in court and that acquittals based on some of them would arguably be a contravention of the law because, for example, there is no legal requirement for a woman to attempt to fight off the perpetrator. Whilst Smith (2018) found that prosecution counsel did occasionally challenge manipulative questioning, she observed that interventions were not made at the time of the questioning and that interventions usually related to points of law rather than addressing the defence use of rape myths. It appeared that judges were more willing to make challenges of the defence's questioning tactics than were prosecutors, with examples of judges' interventions related to repetitive, manipulative, or confusing questioning (Smith, 2018). Smith's (2018) observations showed that in one case a judge intervened because the victim-survivor became very frustrated at the manipulation of her words by the defence barrister. Barristers rely on judges to intervene if their questioning becomes inappropriate, however as was observed by Smith (2018), this rarely happens. In defence of the nature of cross-examination in rape trials, Smith (2016) noted that prosecutors who do not challenge or intervene also bear some responsibility for the poor treatment of victim-survivors.

Carline et al.'s (2020) interviews with barristers revealed a perception that cross-examination has become 'more restricted' over time, which the authors contended may have resulted from developments in practice guidance relating to vulnerable and intimidated witnesses as well as a broader shift in legal practice culture. Interestingly, these interviews also revealed a belief that this shift in practice disadvantaged victim-survivors as well as defendants because it limited their ability to offer explanations for inconsistencies and limited space for impactful, emotional answers (Carline et al., 2020). Elsewhere, research suggests that barristers do not believe that the questioning practices used are necessarily problematic and do not view it as

their responsibility to protect the victim-survivors (Temkin 2000). This is likely because barristers value adversarial principles, such as winning at any cost, and thus view intensive and upsetting cross-examination as an inevitable part of trial (Ellison, 2001; Smith, 2016; Carline et al., 2020). This is not to say that all defence barristers are insensitive to victim-survivors' needs (Smith, 2018; Gunby and Carline, 2019; Carline et al., 2020), however the fact remains that it is the defence barrister's job to advance the defendant's case by any means legally available to them (BSB, 2020). The barrister's 'performance' during cross-examination shows the defendant, their client, that they are doing their job effectively. Even though there are more effective ways of doing cross-examination in terms of achieving accurate evidence, such methods are not effective for demonstrating effort to lay people.

2.4.1.1 The use of sexual history evidence

Cross-examination regularly focuses on victim-survivors' past sexual behaviours in order to undermine their credibility and influence juror decisions (Brown et al., 1993; Kelly et al., 2006; Payne, 2009; Smith, 2018). It is widely believed that this happens because victim-survivors' sexual behaviour is linked to rape myths and other gendered stereotypes around consent and normative sexual behaviour (Kelly et al., 2006). This is because historically the purpose of introducing previous sexual behaviour was to imply consent through the victim survivor's involvement in prostitution or 'promiscuous' behaviour (Temkin, 1984), which implied that women who are sexually active are less credible and more likely to consent—these are commonly referred to as the 'twin myths' (McGlynn, 2017). There has been much debate on the issue of relevance and admissibility of sexual history evidence, usually centring on the defendant's right to a fair trial versus the victim-survivor's right to privacy (McGlynn, 2017).

There have been attempts to reform the law in relation to the permissibility of sexual history[7] evidence, however these are widely viewed to have been unsuccessful. Restrictions to the use of victim-survivors' sexual history evidence were introduced in the *Sexual Offences (Amendment) Act 1976*; however the restrictions fell short of those recommended by a

[7] The term 'sexual history evidence' also often includes behaviour between the date of the allegation and the trial.

preceding government review (McGlynn, 2017) and research in courts showed that such evidence continued to be frequently introduced (Adler, 1987; Gregory and Lees, 2002; Lees, 2002). Following continued criticisms and a Home Office review, section 41 of the *Youth Justice and Criminal Evidence Act 1999 (YJCEA)* prohibited the use of sexual history evidence in rape trials, except in exceptional circumstances.

Section 41 of the *Act* applies when evidence is relevant and does not relate to consent (s.41 (3)(a)); or it relates to consent and the sexual behaviour in question took place at or around the same time as the alleged offence (s.41 (3)(b)); or it relates to consent and the sexual behaviour in question is so similar to the behaviour at the time of the alleged offence that it cannot reasonably be explained as coincidence (s.41 (3)(c)); or the evidence rebuts or explains prosecution evidence relating to the complainant's sexual behaviour (s.41 (5)). Applications must be made to the judge in writing in advance of the trial and should include a list of the questions to be asked *(YJCEA 1999)*.

Shortly after its introduction s.41 of the *YJCEA 1999* was challenged under the *Human Rights Act 1998* in *R v A.* It was ruled that sexual history evidence relating to behaviour with the defendant did not need to be 'unusual or bizarre' because otherwise the requirements could be so narrow that they impinge on the defendant's right to a fair trial. This ruling resulted in greater judicial discretion in deciding when to allow sexual history evidence into court. This ruling has been criticised by McGlynn (2017) for relying on the 'twin myths'. She argues that previous sexual behaviour is irrelevant to the issue of consent because consent is an ongoing process that is specific to each encounter and each act within an encounter. Similar arguments have been made by Smith (2018) and Pisconti (2013). Dent and Paul (2017) argue that this assertion misunderstands the law regarding consent in rape cases because previous sexual behaviours can point to a defendant's reasonable belief in consent. However, McGlynn (2018) points out that laws in Canada prohibit the use of sexual history evidence to demonstrate consent, and so to argue for a similar approach is not a misunderstanding, rather a call for reform.

McGlynn (2017) contends that *R v A* was misinterpreted in a subsequent ruling in the high-profile retrial of Ched Evans in 2016 *(R v Evans [2016])*. It was ruled that evidence relating to the victim-survivor's sexual behaviour with third-parties could be adduced because it was sufficiently similar as it showed the victim-survivor had used similar phrases and sexual positions with other sexual partners. This ruling is criticised because *R v A* was not intended to relate to third-party sexual encounters (McGlynn, 2017). Further criticism has come because the sexual behaviour in question is unremarkable when considered against pornographic tropes and popular sexual behaviours (Smith 2018). This broadens the meaning of "unusual and bizarre" to become relevant for everyday sexual encounters because the behaviour in question *could* reasonably be considered a coincidence (McGlynn 2018). Thus McGlynn (2017, 2018) considers *R v Evans* has widened the scope of evidence that can be adduced under s.41 of the *YJCEA*.

This assertion has been criticised by Dent and Paul (2017) who use case law to demonstrate that the 'floodgates' have not been opened with regards to what evidence can be adduced on the grounds of similarity, however as McGlynn (2018) pointed out, not a great deal of time had passed for concerns to be rebutted and their comparisons were problematic because of differences in the type of evidence. Thomason (2018) also asserts that concerns about the 'floodgates' are unfounded, arguing that the Court of Appeal's rationale is so unclear in *Evans* that it is unlikely to be useable as case law.

There is little contemporary research relating to the use of sexual history evidence in court. Kelly et al. (2006) evaluated the use of sexual history evidence and found that the *YJCEA* was ineffective, with rules and procedures often not being properly followed by legal personnel. This evaluation is widely cited but is now dated and has been criticised for its narrow focus on rape and female victim-survivors only (Hoyano, 2019). Whilst subsequent studies have supported the findings of Kelly et al. (2006), the methodologies have not been as robust (Hoyano, 2019). Where Kelly et al. (2006) used a multiple method approach specifically to examine the use of s.41, most subsequent studies (Durham, et al., 2017; Temkin, et al., 2018; Smith, 2018) have primarily used court observations and have had a broader focus than s.41.

Research from other jurisdictions, however, demonstrates that the use of sexual history evidence is a widespread problem that remains pervasive despite a range of attempts at reform (Burman et al., 2007; Burman, 2009; Hanly et al., 2009; MacDonald and Tinsley, 2011; Spohn and Horney, 2013; Cowan, 2020).

Temkin, et al.'s (2018) observations found that third party sexual history evidence was admitted without application in four of eight trials. Conversely, Smith (2018) found that applications were made in 90% of trials where sexual history evidence was adduced, but that the applications were not usually made in advance. A court observer scheme introduced in Northumbria found that applications were rarely made despite the use of sexual history evidence being commonplace in their observed trials (Durham et al., 2017). This study was heavily criticised by Hoyano (2019) who contended that the use of lay people led to a fundamental misunderstanding of s.41, confusion between s.41 and s.100 *(SOA 2003)* applications and the adversarial trial procedure in general. The observational findings that s.41 rules were circumvented were defended by Hoyano (2019) as a misunderstanding of informal trial practices which are intended to ease pressure on Crown Courts.

Hoyano's (2019) survey of barristers who had practiced in sexual offences cases found that respondents generally believed that s.41 "worked in the interests of justice" (p.29) and that it should not be made more restrictive than it currently is. Hoyano (2019) argued that the study provided no evidence to support claims that late applications are made tactically by defence counsel, however this assertion failed to acknowledge the potential for social desirability response bias (see Furr, 2012). Furthermore, barristers want to uphold adversarial principles which means that they are unlikely to criticise the implementation of laws. Another significant finding from Hoyano (2019) was that s.41 is a complex piece of law that even experienced barristers need to re-read frequently and there was a strong consensus that it should be redrafted for clarity. This is important because following the *Evans* ruling several proposals for amending s.41 to increase its effectiveness were put forward but were unsuccessful due to the political climate in E&W after the EU referendum (Thomason, 2018). Whilst Hoyano (2019) does conclude that the law is being used correctly, she agrees with analyses from Thomason

(2018) and Stark (2017) who argue for redrafting s.41 because it is complex and unwieldly in its current form. Thus, whilst the effectiveness and implementation of s.41 remains contested, scholars from both sides seem to agree that s.41 should be amended, albeit for different reasons.

It is worth noting that in April 2018 procedural amendments for adducing sexual history evidence came into force (Practice Direction (*CA Crim Div: Criminal Practice Directions 2015: Amendment No.6)* [2018] EWCA Crim 516). The amendments seek to ensure compliance regarding sexual history evidence restrictions and that rules are applied consistently and not circumvented (Brewis, 2018). The research and commentary previously outlined in this section pre-date this change and there is currently no research available that examines what impacts this change has had in practice.

2.4.1.2 The use of mental health records

Kelly et al. (2006) found that third-party evidence relating to victim-survivors' health and social care history is often sought, usually via records from social services, medical records, and/or counselling records (see also, Smith and Daly, 2020). Concerns have been raised by multiple charities, as well as within academia, regarding the use of mental health records by defence barristers as a tool for undermining victim-survivor credibility (Temkin, 2002; Ellison, 2009). It is argued that such records are used to portray the victim-survivor as 'crazy', damaged, disturbed and untrustworthy, and thus someone who cannot be trusted to provide reliable evidence (Temkin, 2002; Ellison, 2009). Indeed, precisely these attitudes have been highlighted in research related to earlier stages of attrition (see section 2.3.3.4). These portrayals play into rape myths regarding false accusations and stereotypes about 'hysterical' women. They also play into prejudices and misconceptions about mental health more generally which are common in the English population (Mehta, et al., 2009; Evans-Lacko, Henderson and Thornicroft, 2013).

Ellison (2009) outlined a case where a depression diagnosis was seemingly used to imply that the victim-survivor was 'emotionally unstable' and was therefore likely to have lied. In another example discussed by Ellison (2009), a victim-survivor's childhood self-harming was used to

imply that she deliberately sought out harm, thus consented to the incident in question. In both these cases, the mental health problems discussed were historic rather than current (Ellison, 2009), arguably further adding to their irrelevance to the cases on trial. Repeat victimisation, despite being common, is also used to undermine the credibility of victim-survivors. International research has indicated that diagnoses of post-traumatic stress disorder/syndrome have been used to suggest that victim-survivors were experiencing flashbacks at the time of the assault and were therefore confused about the nature of the encounter (Wilkinson-Ryan, 2005).

The Court of Appeal ruling in *R v Tine* (in relation to burglary) upheld that psychiatric history was irrelevant to the credibility of the witness and was therefore disallowed, however it offered no guidance as to determining relevance nor to the potential prejudicial impact of such questioning (Ellison, 2009). This means it remains up to individual judges to determine whether mental health history can be relevant for cross-examination. Ellison (2009) argues that even where evidence regarding mental health history is disallowed during trial by the judge, the prejudicial damage with regards to juror perceptions of credibility may already have been done.

Notably, looking to Scots Law, the appeal court in *Branney v HM Advocate* [2014] HCJAC 78 asserted that:

> "It is by no means clear that…a bare statement that a complainer had suffered from severe depression as a result of the appellant's conduct would have provided legitimate ground for exploring her mental health in evidence. We are unaware of any automatic association between depression and lack of credibility."

This reflects Ellison's (2009) argument "that cross-examination intended to impugn credibility should be allowed only if it is shown that a witness's capacity or disposition to provide reliable evidence is negatively affected by a mental illness or disorder" (p.43), however this has not been successfully taken up as a matter for reform in E&W so victim-survivors continue to have limited protections with regards to mental health history being used to undermine their credibility during cross-examination (Ellison and Munro, 2017).

In addition to the potential impact on perceived credibility and juror decision-making, the use of third-party records relating to mental health can negatively impact a victim-survivor's recovery. This is because it is widely acknowledged within the CJS that these records are regularly used at trial by defence barristers, so victim-survivors were often advised by police and CPS not to seek therapy or counselling prior to trial because the defence could use it to challenge the validity of their evidence (Temkin, 2002; Rossetti, Mayes and Moroz, 2017). This limits victim-survivors' access to support following victimisation and is counter to the Government's *Victims Strategy* (HM Government, 2018) which includes a promise to "make it easier for people who have suffered a crime to cope, recover, and move on with rebuilding their lives" (p.6). It is reassuring that new draft guidance made available by the CPS in October 2020 recognises and seeks to address this issue through the formulation of a toolkit for prosecutors (CPS, 2020b, 2020c), however it is too soon to tell what the impacts of this change will be going forward.

2.4.2 Impact of rape myths on jury decision-making

The impact of rape myths on jury decision-making has been subject of much academic research. This is because it is believed that many jurors may hold prejudicial views that influence their deliberations and verdicts (Conaghan and Russell, 2014). This notion is strongly contested, however, as will be outlined later in this section (see also discussion in 1.2.4). There is a wealth of research that suggests rape myth acceptance is relatively high within the general population (see, for example, Gerger, et al., 2007; Bohner, et al., 2009), which is arguably relevant because jurors come from the general population, however it is beyond the scope of this review to explore that body of evidence. This section therefore focuses on literature explicitly related to juries.

2.4.2.1 Do jurors believe rape myths?

The *Juries Act 1974* (s.20) was amended by s.74 of the *Criminal Justice and Courts Act 2015* to provide that it is an offence to "disclose information about statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in proceedings before a court". Prior to this, similar provisions were made under

the *Contempt of Court Act 1981*. Thus, research with real jurors is not permitted in E&W. An exception to this was made for a recently published research project (Thomas, 2020).[8] Thomas' (2020) research involved asking people who had just finished serving on a jury whether they agreed with rape myth statements. Most jurors overwhelmingly said they did not agree with the rape myth statements. Thomas therefore asserted that:

> "the claim…that "Research shows that jurors accept commonly held rape myths resulting in many incorrect not guilty verdicts" is incorrect. The research also reveals that previous claims of widespread "juror bias" in sexual offences cases are not valid. Jurors at court do not hold the same views on these issues as reported in public opinion polls and "mock" jury research using students and volunteers" (p.15).

This assertion is problematic, however. First, it flatly dismisses a substantial body of evidence gathered over several decades across a wide range of disciplines using a wide range of methods (outlined below). Whilst Thomas' (2020) study is important, it does not invalidate the existing evidence base. Secondly, there are a number of significant limitations to the study. For example, Leverick (2020) argued that research with actual jurors would have inherent flaws because it would rely on self-reporting. Moreover, the statements jurors were asked about were clear rape myth statements that were void of any context, for example: "If a person doesn't physically fight back, you can't really say it was a rape" and "If a woman sends seriously explicit texts or messages to a man she should not accuse him of rape later on" (see Thomas, 2020, pp.12-15, for other example statements). Such statements have clear socially acceptable answers (Leverick, 2020) and thus answers are subject to social desirability bias (Fisher, 1993).

Decades of court observation research shows that rape myths are rarely deployed in such plain terms by barristers (Adler, 1987; Lees, 2002; Temkin et al., 2018; Smith, 2018). Indeed, the majority of Thomas' (2020) jurors had not served on sexual offences trials and thus were highly unlikely to have been exposed to rape myths in the context in which they are deployed at trial. Furthermore, Ellison and Munro (2010a) found that even jurors who rated low on rape

[8] Therefore, any reference to findings about juries/jurors within this section refers to *mock* juries/jurors except when discussing Thomas (2020).

myth acceptance scales voiced problematic views during deliberations. Indeed, it is well established that asking people whether they believe rape myths in the abstract produces different results to asking people about them in an applied context (Chalmers et al., 2019; Leverick, 2020). To illustrate, Page (2010) found that 93% of police officers in her study said they believe that any woman can be raped, yet 19% said they were unlikely to believe the victim-survivor in a case of marital rape and 44% said they were unlikely to believe a woman in prostitution who reported being raped. This highlights the nuances within narratives and the complexity in how rape myths impact decision-making, which demonstrates that lists of myths are not able to fully capture the wide range of ways in which beliefs manifest.

Quantitative-based mock jury research consistently shows that rape myths do influence jury decision-making. A meta-analysis by Dinos et al. (2015) revealed that individuals who hold mythic beliefs about rape are more likely to acquit. Leverick (2020) built on Dinos et al.'s (2015) meta-analysis, adding a further 19 studies for analysis. Like Dinos et al. (2015), Leverick (2020) found a significant relationship between rape myth acceptance and guilt judgements. Leverick's (2020) extensive analysis also overwhelmingly found a significant relationship between high rape myth acceptance and victim-blaming attitudes in relation to the given scenario in each study. Though the quantitative studies included in the analyses were on the lower end of realism (e.g., no re-enactments (live nor video) and no group deliberations), it is significant that they find abstract views do translate to views about a specific case (Leverick, 2020).

2.4.2.2 Do rape myths feature in jury deliberations?

As a consequence of the restrictions on jury deliberations, research on this topic tends to use the mock jury method. The method itself has many variations within it, for example some use vignettes whereas others use highly realistic reconstructions with real legal practitioners, and not all studies include group deliberations (see Leverick, 2020 for a wider discussion of mock jury methods).

Research has shown that jurors (on non-rape cases) tend to perceive witness testimony as credible if it contains vivid detail, regardless of that detail's relevance to the case, and

credibility is undermined if the witness cannot recall a specific detail when asked, regardless of the insignificance of that detail (Bell and Loftus, 1989; Brewer et al., 1999; Potter and Brewer, 1999; Brewer and Burke, 2002; Borckardt, Sprohge and Nash, 2003). Westera, et al. (2016) have argued that detailed accounts from victim-survivors could be deemed more credible than vague accounts, noting that ‘gruesome details’ are better. Indeed, Ellison and Munro’s (2015) mock jury research specific to rape trials found that jurors considered the consistency of a story to be an indicator of credibility. As previously discussed in section 2.4.1, the expectation of consistent and detailed accounts is unrealistic because of the impact trauma has on memory. Relatedly, Batchelder et al., (2004), Taylor and Joudo (2005) and Ellison and Munro (2009a, 2013) found that jurors held strong expectations consistent with rape myths about how much distress victim-survivors should show when giving their accounts; that is, that credible victim-survivors show distress.

Ellison and Munro (2009a; 2009b; 2009c) also found that, contrary to the 'real rape' myth, their mock jurors understood that most rape is committed by someone known to the victim. Whilst this is a reassuring finding, that same study did however find that the jurors held persistent beliefs around the level of resistance a victim-survivor should give and the level of injury they should sustain in order for them to be deemed credible (Ellison and Munro, 2009a; 2009b; 2009c). The expectation of resistance and injury was also found in earlier (Taylor and Joudo, 2005; Finch and Munro, 2006) and subsequent (Ellison and Munro, 2013; Chalmers et al., 2019) mock jury research. In addition to the expectation of resistance, Taylor and Joudo (2005) found other juror attitudes consistent with rape myths relating to victim-survivors’ behaviour before, during, and after rape, such as delaying reporting and maintaining contact with the defendant. Thus, when victim-survivors had not acted in congruence with the jurors’ expectations, it undermined the credibility of the victim-survivor and for some jurors served as a rationale for delivering a verdict of not guilty (Taylor and Joudo, 2005). Indeed, Franiuk, Luca and Robinson (2019) found that victim-survivor behaviour is the most important factor for consideration for jurors and that consideration only moves to the defendant when the victim-survivor’s behaviour is consistent with juror expectations.

Batchelder et al. (2004) found that rape myths were a regular feature in deliberations in their study, including the notion of regretted drunken sex. Indeed, Gunby et al. (2012) found this was a common narrative in their focus group research, with it being linked to the common misconception that false allegations of rape are widespread. Indeed, the notion of widespread false allegations of rape was a common finding across mock jury studies (Ellison and Munro, 2009b, 2010b, 2013; Chalmers et al., 2019), even though false allegations of rape are rare (CPS, 2013; Weiser, 2017). In addition to the idea of 'regretful sex', the narratives raised in deliberations included references to scorned, vengeful, and vindictive women (Chalmers et al., 2019, Ellison and Munro 2010a, 2013).

Additionally, Ellison and Munro (2009b, 2010a) found that jurors commonly referred to the myth that men have uncontrollable sexual urges, and this was offered as justification for the defendant's reasonable belief in consent. This reflects Larcombe et al.'s (2016) assertion that the test of 'reasonable belief' in consent can be interpreted widely and thus invites scrutiny of victim-survivors' behaviour and creates space for jurors to give consideration to extra-legal factors (Rumney, 2001; Temkin and Ashworth, 2004; Finch and Munro, 2005). Indeed, mock jurors have been seen to consider the victim-survivor's past sexual history with third-parties (Finch and Munro, 2005), the victim-survivor's voluntary intoxication (Finch and Munro, 2005, 2007), and the victim-survivor's pre-assault behaviour, such as perceived flirtations or lesser sexual acts (Ellison and Munro, 2010a). Accordingly, interview research with barristers highlighted the view that it is not difficult to establish reasonable belief in consent and that barristers regularly reference rape myths and stereotypes in order to do so (Temkin, 2000; Carline and Gunby, 2011). Similarly, research from Scotland highlighted that a key defence tactic was to "create a smokescreen of immorality" (Brown et al., 1993, p.26) around victim-survivors.

Rape myths were challenged by some jurors during deliberations, but such challenges appeared ineffective in altering others' opinions (Ellison and Munro, 2009a, 2013; Chalmers et al., 2019). Similarly, Ellison and Munro's (2009c) research showed that beliefs about false allegations persisted even when educational guidance was provided to the jurors, whereas, in

contrast, educational guidance did have an impact regarding beliefs around delayed reporting and the demeanour of victim-survivors in the courtroom (see section 2.4.4 for further discussion).

Ellison and Munro (2009b; 2010a; 2010b) found that jurors tended to 'fill in the gaps' in the narrative provided in witness testimony with their own pre-existing understandings and beliefs about what constitutes normal and acceptable socio-sexual behaviour. Indeed, this is in line with Stygall's (1994) research with jurors in the US where she found that jurors ignore evidence and directions they do not understand and build their own narratives to surround the evidence they have heard. Ellison and Munro (2015) found further support for this, using the story model as an explanatory framework (see also Taslitz, 1999; Darbyshire, 2011). Willmott et al. (2018) built further on the story model framework, developing the Juror Decision Scale in order to empirically test the story model. Wilmott et al. (2018) tested their scale using a mock rape trial with mock jurors, finding support for previous research that asserts that juror belief in rape myths *does* impact their verdict decision-making.

2.4.3 Impact of cultural narratives on jury decision-making

Rape myths are not the only factors that can influence juror decision-making. Research suggests that in considering witness testimony, jurors are influenced by factors such as gender and age of the witness (Brodsky et al. 2010; Nagle et al. 2014), however there is a paucity of research on these topics. There is, however, a small body of research that addresses the race of victim-survivors in jury deliberations. Research has consistently found that white jurors were more likely to deliver guilty verdicts and recommend harsher sentencing in cases where the victim was white and the defendant was Black (Johnson, 1941; Bernard, 1979; Foley and Chamblin, 1982; Hans and Vidmar, 1986). This has also been shown to be the case in studies that specifically examined rape cases (Ugwuegbu, 1979; Klein and Creech, 1982). Later studies have found this relationship to also be true for white defendants where the victim was Black (Hymes et al., 1993; Dupuis and Clay, 2013). Conversely, George and Martínez (2002) found that both Black and white victim-survivors were blamed more in interracial rape scenarios than in intraracial scenarios, thus defendants in interracial cases were seen as less

culpable. Whilst the impact of victim-survivor race remains unclear, the studies do agree that the impact of race is complex and that it is but one of many extra-legal factors jurors consider. Thus, whilst research on juries demonstrates clearly that rape myths do impact on trial outcomes, there is little that aids in understanding whether cultural narratives identified in trial observations (Powell et al., 2017; Smith, 2018) impact on juror decision-making.

2.4.4 Ameliorative 'special measures' addressing victim-survivor retraumatisation

In an attempt to improve the experience of giving evidence for victim-survivors, the *Youth Justice and Criminal Evidence Act 1999* made provisions for special measures for victim-survivors of sexual offences. These measures included, for example, the ability to give evidence via video link or from behind a screen and were found to be helpful for victim-survivors in a study by Hamlyn, et al. (2004). There are, however, practical disadvantages associated with the use of special measures such causing delays at trial, due to faulty equipment for example, which can add to anxiety experienced by victim-survivors in court (Smith, 2018).

There have been some concerns raised regarding the potential impact of special measures on juror decision-making, particularly pre-recorded video evidence, with fears that it could unfairly impact victim-survivors and defendants (Temkin, 2000; Hamlyn, et al., 2004; Burton, Evans and Sanders, 2007; Payne, 2009). Indeed, barristers tend to have a strong preference for victim-survivors to give at least some of their evidence from the witness box, even if evidence-in-chief is given via pre-recorded video (Carline et al., 2020). Mock jury research has, however, indicated that pre-recorded video evidence is likely to have little to no impact on juror decision-making (Ellison and Munro, 2014; Westera, et al., 2015) and as Carline et al. (2020) point out, conviction rates remained stable over the time that pre-recorded evidence-in-chief was widely rolled out. Nonetheless, barristers have expressed strong feelings regarding what they believe constitutes the best way for victim-survivors to give evidence and this can be seen reflected in their practice, for example by attempting to change victim-survivors' decisions on how they would like to give evidence (Carline et al., 2020). This is a concerning practice because it attempts to remove autonomy and control from victim-survivors

at a very difficult time, which could not only prove counter-productive but could also negatively impact on their experience and recovery.

2.4.5 Ameliorative 'myth-busting' measures addressing rape myths

As a result of the recognition of juror beliefs in rape myths, efforts have been made to introduce 'myth-busting' measures into the courtroom. Suggestions for reform included informational myth-busting videos or leaflets for juries, expert evidence, and judicial directions (Temkin, 2010). The option taken forward by the Solicitor General was judicial directions (Temkin, 2010). This means that judges can, but are not obliged to, give myth-busting judicial directions to the jury and there are sample illustrations laid out in the *Crown Court Compendium Part I* (Judicial College, 2020) to assist them with this.

The optimum time to deliver judicial directions has been questioned (Ellison, 2019) and the *Criminal Procedure Rules 2015* state that directions can be given at any point that will be helpful to the jury in considering the evidence. Chalmers and Leverick's review (2018) found that instructions given before the trial improved jurors' memory and understanding of the directions. Reassuringly, then, Durham et al. (2016) observed that a number of judges in Northumbria did give some myth-busting directions at the outset of trials. Other observations (Temkin et al., 2018; Smith and Skinner, 2017) did, however, reveal that relevant directions were not given in all cases. Indeed, this was also reflected in barrister interviews (Carline et al., 2020).

More generally (non-rape specific), judicial directions are considered to be problematic because research suggests that jurors struggle to understand and apply them correctly (Darbyshire et al., 2002; Ellison and Munro, 2009c; Chalmers and Leverick, 2018). Adult literacy, legal jargon, and complex language inhibit juror comprehension of judicial directions (Steele and Thornburg, 1991; Dumas, 2000; Rose and Ogloff, 2001). This is problematic because it is believed that if jurors do not understand complex legal directions, they will likely rely on 'common sense' that is probably incorrect (Hans and Vidmar, 1986; Lieberman and Sales, 1997; Darbyshire et al., 2002), which Temkin (2010) argued is probably also the case with rape myths.

Carline et al. (2020) found that there was near unanimity in barristers' favourable views on the use of myth-busting judicial directions, including the view that they are effective. Whilst Ellison and Munro (2009c) considered judicial directions to be effective in addressing some rape myths (but not others), Temkin (2010) was wary of their optimism, noting that their results showed little impact on the outcome of deliberations. Thus, Temkin (2010) argued, judicial directions are not an effective myth-busting tool at trial[9] because some rape myths are too entrenched (Cowan, 2019). Indeed, Smith and Skinner (2017) found that judicial directions were easily undermined by defence closing arguments. Furthermore, Willmott et al. (2018) posited that their mock jury study suggested jurors place more importance on their own interpretation of the evidence than on the legal directions given by the judge. Interestingly, however, Carline et al.'s (2020) barrister interviews revealed that there could be a deterrent effect associated with judicial directions, which was reflected in comments from one participant who stated it had become "pointless" to ask certain rape mythic questions during cross-examination (p.55).

Temkin (2010) argued that the use of complex language in the sample illustrations risks jurors misunderstanding instructions and may result in the rape myths being reinforced in the jurors' minds. This is because repeating the myths can reinforce them and a highly credible source, such as a judge, repeating it can *strongly* reinforce it (Temkin, 2010). Barristers share the view that the judge's words carry more weight with the jury (Carline et al., 2020), although this was in regard to the positive effectiveness of myth-busting directions. The wording used by judges should, therefore, be chosen carefully so that they do not repeat myths as they attempt to dispel them (Temkin, 2010; Callandar, 2016). Indeed, there were calls for the original illustrations laid out in the Crown Court Bench Book (Judicial Studies Board, 2010) to be re-written in simpler English that can be more easily understood by lay people (Thomas, 2010; Darbyshire, 2011). The most recent versions of the illustrations, found in the *Crown Court Compendium* (Judicial College, 2020), are indeed markedly different from the originals and

[9] It is worth noting, however, that judicial directions could form a useful part of dismantling rape myths in wider society, by providing recognition that rape myths are wrong and thus do not have a place in the courtroom (Temkin, 2010).

the language has been simplified. This is unlikely to be entirely effective though because of the impacts of heuristics, sexual scripts, and hindsight bias when processing information (Ellison and Munro, 2009c; Temkin, 2010; Bornstein and Greene, 2011).

2.5 Chapter Summary

This chapter has reviewed the existing literature relevant to the research problem, highlighting that some groups of victim-survivors of sexual violence are less likely to see convictions in their cases. Some research on earlier stages of the criminal justice process has gone some way to addressing why this may be, however there is a paucity of such research. There is even less which addresses the issue in relation to the trial stage. There is a gap in the literature because the existing court research does not adequately explain why or how some victim-survivors are more likely to see a conviction than others. This is because scholars have tended to look to rape myths as an explanation for the poor experiences of victim-survivors without looking to underlying social structures. The present research project thus sought to develop further understanding in this area.

Chapter 3 Methodology

3.1 Introduction

There are multiple ways to approach a research question so researchers must properly consider the theory and methods used to frame their project. Research methodology should be informed by the aims and objectives of the research project. The aim of this project was to explore if and how rape myths and wider cultural narratives are used in English sexual offences trials. The objectives of this project were to:

- Identify whether legal practitioners use rape myths in serious sexual offences trials and if so, the context in which these are used.
- Identify whether legal practitioners use cultural narratives in serious sexual offences trials and if so, the context in which these are used.
- Analyse if and how the use of cultural narratives and rape myths reinforce one another.
- Outline potential avenues for improving the trial experience of victim-survivors.

Methodological decisions were made with these aims and objectives in mind as well as my theoretical perspectives. Theoretical perspectives of the researcher influence their decisions on which methods to use for data sampling, collection, and analysis. These theories and methods impact on the outcomes of a project and so it is important for researchers to clearly describe their methodology to allow for critical evaluation of their findings. This chapter outlines my theoretical framework and research design and will also discuss research quality and ethical considerations.

3.2 Theoretical framework

This research is underpinned by feminist theory because women and girls are disproportionately affected by sexual violence (ONS, 2018b) and comprise the majority of victim-survivors engaging with the CJS (ONS, 2018a). Whilst there are a range of differing feminisms, there are overarching core principles that link them. As a general starting point, feminist theories are concerned with the oppression of women and so feminist research seeks to make women's experiences within society visible and strives for social change (Westmarland and Bows, 2018). Because of the diverse and wide-ranging nature of feminist

theory it is important to be specific about which particular parts underpin this project. While different types of feminism have distinct priorities, it can be difficult to draw clear borders between them as there is much overlapping thought (Mackay, 2015). Mackay (2015) noted that some feminists choose aspects from different types in order to form their own brand of feminism, rather than being guided by a single school of thought. This project has been influenced by both radical and intersectional feminisms.

Radical feminism forms part of my theoretical framework in that my point of departure is that violence against women is the product of structural inequalities that subordinate women and privilege men and that discrete acts of male violence against women, such as rape, sexual assault, or a pattern of sexual violence, serve to reinforce the patriarchal gender order (Whisnant, 2017). Westmarland and Bows (2018) assert that all violence and abuse research should be informed by intersectionality. Intersectional feminist thought allows for an analysis of oppression beyond gender, which is important because previous research has shown that victim-survivors from minoritised and marginalised groups experience worse outcomes in the CJS (see Chapter 2). McCall (2005) noted that 'thick descriptions' provided by qualitative research are a good source of data for scholars interested in intersectionality and in-depth case studies are an effective way to obtain such data. As such, intersectional feminist thought formed the dominant basis of my theoretical framework and heavily influenced my data collection and analysis and will therefore be discussed in more depth in the following section.

3.2.1 Intersectional feminism

It is first useful to outline the history of intersectionality in order to help contextualise the discussions regarding contemporary debates and conceptualisations that follow. The ways in which these discussions inform my data analysis strategy will be discussed in section 3.5.2.

3.2.1.1 A brief history[10]

The term intersectionality was first used in the late 1980s and early 90s (Crenshaw, 1989, 1991) to name the interlocking systems of oppression experienced by Black women, whose

[10] An extensive review of the origins of intersectionality is beyond the scope of this project, but for more thorough discussions of the historical origins of intersectionality see May (2015), Potter (2015), Collins and Bilge (2016) and Romero (2018).

needs and concerns were not articulated in dominant feminist and anti-racist discourses (Matsuda, 1991; Grillo and Wildman, 1991). Feminist thought was concerned with issues of sexism primarily affecting middle-class white women and race studies was concerned with issues of racism primarily affecting Black men, thus neither discourse reflected the unique oppression experienced by Black women as a result of the interaction of their sex and race (Collins and Bilge, 2016). Racism and sexism combine and result in oppression that cannot be explained by sexism or racism alone, nor by adding the two together. This is because the interaction between identities has a multiplicative effect, not an additive effect. It is also the *interaction* of systems of oppression (such as racism and sexism) that have an effect. Addressing inequality and oppression cannot be achieved based on gender only, race only, or class only analyses (Collins and Bilge, 2016).

It is crucial to note that the core conceptual ideas of intersectionality existed long before its naming. Texts forming an analysis based on gender, race and class can be identified from the 19th century, throughout the American civil rights movement and into the 20th century (Potter, 2015; Collins and Bilge, 2016; Romero, 2018). The core ideas were born from activism and social justice movements in the US and gained momentum during the latter half of the 20th century. Collins and Bilge (2016) discuss the 'elaboration' of the core ideas of intersectionality by women of Colour in the US during the 1960s and 1970s, where shared oppressions based on race and class were at the forefront, ignoring issues of gender. Black women, Native American women, Chicanas, Latinas, Puerto Rican women and Asian American women developed a shared framework for understanding their experiences of oppression that were being rendered invisible within their dominant social movements (Potter, 2015; Collins and Bilge, 2016; Romero, 2018). The Combahee River Collective, as a group of Black lesbian feminists, notably extended this framework to include sexuality (Combahee River Collective, 1983) and work by Lourde has noted age as a further important category for analysis (Romero, 2018).

During the 1980s, civil rights-based social movements became less prominent and instead these ideas of interlocking systems of oppression linked to identity began to become

incorporated into academia as race/class/gender studies in the US (Collins and Bilge, 2016). In the UK, studies of social division shaped what has now become known as intersectionality (Anthias and Yuval-Davis, 1983; Anthias, 1998; Anthias, 2012; Yuval-Davis, 2016). Since the early 1990s, intersectionality as a field of study has grown exponentially and has been defined and conceptualised in varying ways throughout and outside of academia (Collins and Bilge, 2016).

3.2.1.2 Contemporary conceptualisations of intersectionality

Intersectionality has been defined and conceptualised in many differing ways by scholars and practitioners and was thus subjected to increased debate throughout the 2000s and 2010s. As Nash (2017) argued:

> "nearly everything about intersectionality is disputed: its histories and origins, its methodologies, its efficacy, its politics, its relationship to identity and identity politics, its central metaphor, its juridical orientations, its relationship to “black woman” and to black feminism" (p.118).

There have been attempts to refine intersectionality, for example McCall (2005) and Choo and Ferree (2010) conceived typologies for intersectional approaches to analysis, while others have formulated it as a paradigm (Collins, 2000; Hancock, 2007a), a heuristic device (Anthias, 1998; Lutz, 2015) or a framework (Garry, 2011). Davis (2016) noted that intersectionality has been articulated in a wide variety of ways (as a theory, as a concept, as a heuristic device, as an analytical tool) across a wide range of disciplines and questions why a seemingly vague theory has become widely proclaimed as cutting edge in feminist scholarship, and whether it needs a coherent methodology or conceptual framework. Davis (2016) therefore warned that intersectionality’s ubiquity and popularity may have rendered it a buzzword and thus something that has, by some, been referred to superficially in an attempt to show knowledge of the latest developments in feminist theory without genuine engagement. This is a caution also put forward by others, including Lykke (2016; see also Carastathis, 2016), who argued that this lack of meaningful engagement can lead to an oversimplified analysis that focuses simply on identity groups rather than an examination of power differentials and the mutual construction of inequality, exclusion, oppression, and marginalisation. While noting similar

concerns, Cho, Crenshaw and McCall (2013) proposed a collaborative approach to the advancement of intersectional theory across disciplines. Similarly, Lykke (2016) viewed intersectionality as a discursive site for critical feminist thought and as a useful analytical tool that should be celebrated whilst also being thought about critically. Bilge (2010) and Nash (2016) argued against attempting a unified version of intersectionality, preferring to embrace its open-endedness, transformations, and multiplicity. Similarly, Collins' (2015) position was that a finalised definition of or single framework for intersectionality is not possible nor desirable, as it would ignore its complexities.

Despite the wide-ranging articulations of intersectionality, there does appear to be consensus that it is a way of understanding and analysing the interconnected nature and mutual constitution of social processes and identity categories and the ways in which these are linked to systems of power and oppression which shape social inequalities (Bilge, 2010; Collins, 2015; Ferree, 2016; Collins and Bilge, 2016; Nash, 2016; Romero, 2018). Intersectionality is concerned with challenging and dismantling the social inequalities that are perpetuated by social, political, and economic systems of power (Romero, 2018). Of particular salience is the recognition that social processes and identity categories are co-produced and mutually transforming (Cho et al., 2013; Lykke, 2016).

There are concerns that some conceptualisations of intersectionality have become overly focused on identity narratives at the expense of a structural analysis (Ehrenreich, 2002; Christensen and Jensen, 2012). For Bilge (2010), this appeared to be a difference between North American and European traditions in intersectionality, with the former carrying a stronger focus on structural analysis. Crenshaw's (1991) articulation noted the importance of considering the interaction between macro and micro levels, that is, structural inequalities (macro) and subjective experiences (micro). Thus, a focus on identity categories alone tends to be seen as an oversimplification of intersectionality (Choo and Ferree, 2010; Christensen and Jensen, 2012).

Some argue that theorising identity categories as mutually constitutive can be problematic because it can lead to the specific nature of a social category being overlooked and can tend

towards a strict focus on multiple-marginalisation without acknowledgment that a subject can be privileged at the same time as being marginalised (Nash, 2008; Anthias, 2012; Christensen and Jensen, 2012). Nash (2008) therefore suggested that identity categories be understood as social processes that are both co-constitutive and distinct and are historically contingent, meaning that these processes coincide to subordinate and privilege subjects in particular social moments. Christensen and Jensen (2012) highlighted the importance of recognising that the systems of domination (e.g. racism, sexism) associated with each category (e.g. race, gender) are ontologically diverse, meaning they do not operate in identical ways. Whilst there is agreement that intersectionality posits that multiple identities are experienced simultaneously, there is disagreement between scholars over which categories should be included for analysis. Some argue that categories should be limited to those present in the roots of the theory—race, gender and class—because doing otherwise risks obscuring the historical context of intersectionality and erasing Black women and other women of Colour from its origins (Alexander-Floyd, 2012; Bilge, 2013). However, others argue that certain identities may be more salient at different times or in different contexts and so analytic categories can be extended to include those relevant to a given project, for example nationality, ethnicity, age, (dis)ability, migrant status (Dill and Zambrana, 2009; Lutz, 2015; Yuval-Davis, 2016). Anthias (2012) agreed that the saliency of categories is dependent on context, with some becoming more or less important in different social times and spaces as well as in different social practices and social institutions.

Some scholars have warned that simplistic and lengthy categorisation can lead to competing assertions over which categories are more important or more oppressed (Ehrenreich, 2002; Hancock, 2007a; Anthias, 2012). Ehrenreich (2002) pointed out that acknowledging that any facets of identity can lead to marginalisation in certain contexts risks depoliticising inequality because it can imply that everyone is oppressed, giving terms such as ‘honkey’ as much credence as racial slurs against Black people for example, which ignores how systems of subordination work to cause oppression for some and privilege for others. This demonstrates the importance of including a macro level (structural) analysis (Crenshaw, 1991).

Other scholars have cautioned that the listing of categories can become infinite and cause analysis to become diluted to a point where no meaningful insight is gained (Ludvig, 2006; Anthias, 2012; Carastathis, 2016). Further, a narrow focus in terms of categories can risk viewing groups as homogenous and can thus fail to account for intra-group differences (Dill and Zambrana, 2009; Christensen and Jensen, 2012). For example, some racial or ethnic categories are problematic because they position a large group of women as homogeneous when in fact their cultures, nationalities, or religions are heterogeneous. Thus, it is important, where possible, to conduct an analysis that attends to differences and inequities within groups as well as between groups (May, 2015). Indeed, Nash (2008) argued that it is important to examine how people are privileged by one identity and oppressed by another.

Generally, intersectionality has excluded analysis of privileged identities, such as whiteness or masculinity, in favour of highlighting multiple oppressions (Nash, 2008). Ehrenreich (2002) argued that intersectionally analysing those who are not multiply-marginalised (e.g., white women) can still provide important insights into how power works. Anthias and Yuval-Davis (1983; Anthias, 2012; Yuval-Davis, 2016) suggest that an intersectional framework should view all power dimensions as relevant for analysing complex webs of inequality and social stratification, therefore viewing intersectionality as an analytic tool that can be used to explore privilege as well as marginalisation. This is similar to the 'majority inclusive principle' (Staunæs, 2003), which posits that focusing only on marginalised groups leaves privilege unexplored (Christensen and Jensen, 2012). Choo and Ferree (2010) also noted the importance of analysing in both directions, from oppression and from privilege, as this can highlight processes that are reproducing inequalities which may otherwise have remained hidden. Intersectionality, therefore, does not only explore oppression, but also explores the privilege that oppression creates for other groups and the underlying dimensions of power and domination that interact to create and reproduce those oppressions and privileges (Dill and Zambrana, 2009; Christensen and Jensen, 2012; Lykke, 2016). Analysing in this way might reveal hidden ways in which, for example, gender and class work together to oppress some over others. When taking this approach, it is important to differentiate between groups that are

marginalised and groups that are privileged (Christensen and Jensen, 2012b; Carbado, 2013) in order to avoid reproducing privilege within the analysis.

According to Potter (2015), criminological intersectional research does not require a new method because there are plenty of existing methods that are appropriate for intersectional analysis:

> "Instead, it is possible to develop an *intersectional methodology* that determines how a research project can be guided by issues raised by intersectionality and then establishes the most appropriate methods to be used to answer the research question while being mindful of an intersectional framework" (Potter, 2015, pp.77-78, emphasis in original).

I will therefore indicate throughout this chapter, most particularly in section 3.5, the ways in which my methodological choices were fitting for my intersectional perspective.

3.3 Data collection

Qualitative research methods are best positioned to provide rich data that can be used to explore context-specific and complex social processes (Berg and Lune, 2014). Qualitative methods are therefore best suited to my intersectional framework and to answering the research questions of this project. An observational method was used for data collection, specifically courtroom observations. Observations of six Crown Court trials were made from the public gallery. The data collection period for this project took place over one year and in three Crown Courts in England (see section 3.4 for further discussion).

Observational research is widely considered the best method for “getting at ‘real life’ in the real world” (Robson and McCartan, 2016, p.320) as it provides an opportunity to gather data that goes beyond participants’ stated opinions and interpretations (Gray, 2018) and thus avoids participant biases such as recall bias and social desirability response bias (Robson and McCartan, 2016; Gray, 2018). As Smith (2018) noted, this is particularly pertinent for court observations because research has shown that barristers believe that questioning tactics appropriately follow guidance in rape trials, however observation research has shown that this is not always true. The insights that observations provide are particularly useful for developing

understandings of complex interactions, subconscious or instinctive actions, and pressure to conform to expected behaviours (Nicholls, Mills and Kotecha, 2014). This is important for court observations in this context because biases and stereotypical views may be exhibited by participants subconsciously and may be the result of influences of expected or normative behaviour in wider society. Further, there are norms and behaviours that barristers are expected to conform to within the context of the adversarial CJS. Importantly, observational research provides rich and naturalistic data which is crucial for developing a robust intersectional analysis.

A significant disadvantage to using observations is that they are time consuming (Crow and Semmens, 2008; Robson and McCartan, 2016), however the research questions in this project require rich data that enables a nuanced analysis, which justifies the time-consuming method. Another disadvantage is that observations can only explore directly observable phenomena (Crow and Semmens, 2008). For instance, I can observe an interaction between two participants and record what happens and how it happens, but I cannot know the motivations, meanings, or attitudes behind those actions. This means that researchers draw their own inferences and can be biased by their theoretical perspectives (Gray, 2018). For this reason, it is important for validity checks to be incorporated in the research design (Crow and Semmens, 2008), which is discussed further in section 3.6.

The presence of a researcher can result in reactivity because the behaviour of participants may change due to the presence of the researcher, which may impact outcomes (Robson and McCartan, 2016; Gray, 2018). Smith (2014) and Kelly et al. (2006) noted reactivity during sexual history applications at rape and sexual assault trials, but Smith (2014) found that reactivity lessened over time, likely due to frequent participants becoming more familiar with her presence. For this reason, I initially planned to spend blocks of time at each court as far as was feasible, for example two months at one court, two months at another and so on. This would also help ensure I understood the culture of each court and could take those cultures into consideration when analysing my data (Smith, 2020). This was, however, not possible in reality because of the sampling issues I experienced (see section 3.4).

Another way of avoiding participant reactivity is to use covert observations, however this approach to research is usually considered unethical because it is not possible to gain informed consent from participants (Gray, 2018). This research was not entirely covert, because I explained my presence to court staff, however witnesses, including victim-survivors, may not have been aware. Further discussion of covert research is therefore warranted (see section 3.7).

Observational research generally takes either a formal or informal approach. Formal observations are strictly structured, and the researcher will have a pre-determined protocol as to what is of relevance and should be recorded (Robson and McCartan, 2016). This formal approach provides high validity and reliability, but it does not allow for complexity or adjustment, whereas informal observations allow for nuanced explorations (Robson and McCartan, 2016). This research took an informal approach to observations because it enabled rich data to be gathered, however a data collection schema (Appendix B) was also utilised in order to ensure consistent records of key aspects of trial, for example the characteristics of participants and the trial outcomes.

The researcher's level of participation in observational research is usually viewed as occurring along a spectrum from 'complete participant' to 'complete observer', with 'observer as participant' and 'participant as observer' marking roles that fall in between (Nicholls et al., 2014). For my observations, I arguably took an 'observer as participant' role because I although I took no part in the activity and some participants were aware of my presence, most participants were unaware. Indeed, from the view of witnesses, I was in a 'complete observer' role (Robson and McCartan, 2016). Robson and McCartan (2016) noted that it is disputable whether the researcher in an 'observer as participant' role can ever be considered to be truly observing from outside the activity because the researcher becomes part of the wider group. For instance, in this project the court included the public gallery, of which I was part. Robson and McCartan's (2016) discussion of the 'marginal participant' role, which is characterised by a low level of participation by adopting a passive role as an accepted participant, is useful in finding a place between traditional observer roles. I could be considered a marginal participant

to some degree as my presence would likely be accepted by witnesses because it is not unusual for there to be unfamiliar people in the public gallery, for example journalists and students.

There are practical limitations specific to observational research taking place in the courtroom that need to be considered. Unfamiliarity with legal terminology could pose difficulties in understanding, although Smith (2014) noted that this can be addressed by the use of legal dictionaries and seeking clarification on interpretation of events wherever possible. Delays are common in rape and sexual assault trials (Smith and Skinner, 2012), making observations more time consuming, but Smith (2014) found that delays also provided an opportunity to talk to legal practitioners as a way of enriching her understanding and perspective. The *Contempt of Court Act 1981* prohibits the use of recording equipment in court; therefore, data must be recorded by hand. I recorded my data using speedwriting code to increase efficiency and ability to record verbatim quotes from participants as much as possible. I predetermined the focus for verbatim notes, for example focusing on defence barristers addressing victim-survivors, and data collection proforma were used to ensure consistent recording of important data (Burman et al., 2007; Smith, 2020).

3.4 Sampling

Sampling is an important part of research design because it impacts on the usefulness of information available for analysis, and therefore on the value of the research findings (Ritchie, et al., 2014). For this project, a combination of non-probability sampling methods was used. It was not possible to obtain in advance a list of all sexual offences trials that would take place during the data collection period. This meant that the trials for observation were selected through availability sampling because the selection took place based on what was available at the time (Ritchie, et al., 2014). This sampling approach is limited in terms of validity of findings because it tends not to be representative of the population concerned due to the inability to target specific characteristics of the population (Daniel, 2012). To mitigate against this a purposive sampling approach was initially used to select the courts in which the

observations took place because it enabled strategic selection based on relevance to the research questions (Bryman, 2016; Gray, 2018).

The non-probability approach to sampling does not allow for the generalisation of findings in the same way that random sampling does, however it is better able to produce in-depth understandings of complex human behaviour (Matthews and Ross, 2010; Gray, 2018). Strategically selection can, therefore, provide more useful data than random sampling. To improve validity in this project, sampling involved multiple sites.

3.4.1 Court sampling

Previous English and Welsh court observation research has tended to take place in a single Crown Court (Smith, 2020), however the intersectional aim of this project required that the sample of victim-survivors be diverse and sampling trials from a single court was unlikely to be sufficient in achieving this. Further, research concerning processes that occur across multiple locations, such as Crown Courts, should involve observations that take place at a range of sites in order to increase validity (Nicholls et al., 2014). Kelly et al. (2006), Burman et al. (2007), and Temkin et al. (2018) used multiple Crown Courts for their studies. Indeed, a review by Smith (2020) demonstrated that between one and four courts has been the norm for previous court observation research. I therefore chose to conduct my observations over three courts, striking a balance between wider scope and feasibility.

According to Hancock (2007b), researchers should use intersectional theory to inform their data collection strategies because this changes the information that will be available for analysis. My literature review indicated that rape and sexual assault cases involving victim-survivors from minoritised and marginalised groups have a lower chance of resulting in conviction. The groups identified were Black and Asian victim-survivors, disabled victim-survivors and unemployed victim-survivors. It was therefore important to try to represent these groups in my sample. I could not know case details before the commencement of each trial therefore to increase the chances of achieving a diverse sample I wanted to purposively select three court locations based on population demographics. Originally, I followed Windsong's (2018) approach to site selection in intersectional research, using a range of national statistics

to identify local authority areas with diverse populations relevant to the findings in my literature review. Three sites were chosen accordingly, however a change in personal circumstances meant I was no longer able to travel the long distances that this required. This meant my court sampling ultimately had to incorporate a convenience strategy also. Three alternative courts were therefore chosen in the East of England, representing areas of diversity in terms of social class, but not in terms of race and ethnicity. To help maintain anonymity of participants the specific locations of the courts will not be named.

The change in court sampling meant I was not able to address some important elements that were highlighted in my literature review. For example, all the victim-survivors and defendants in my sample were racialised as white. This meant I could not explore narratives relating to victim-survivors or perpetrators from minoritised racial or ethnic groups. This is an important area for future research that deserves to be the main focus of a project design. That said, my sample remains justifiable as it was still able to offer important insights into the operation of narratives based on gender, class, age, and disability.

3.4.2 Trial sampling

Trials were observed if they involved any serious sexual offence and the main witness for the prosecution was the victim-survivor. Court observations are time intensive for the researcher because court proceedings involve a lot of waiting around and 34% of Crown Court trials crack on the first day, meaning they do not take place as planned (MoJ, 2018). This can impact on the efficiency of data collection, therefore I tried to mitigate against it by engaging with independent support professionals to obtain court dates weeks in advance, rather than arriving at court and hoping a relevant trial was taking place. Although this approach did not directly limit the risk of cracked trials, it helped make trial sampling more efficient overall. All trials I attended went ahead as planned and were completed.

While some previous court observation studies have used gatekeepers to access their trials (Kelly et al., 2006; Burman et al., 2007), it should be noted that independent support professionals are not gatekeepers because trials can be accessed without engaging with them. Solely obtaining trial dates in advance from independent support professionals would

have resulted in the sample being biased to victim-survivors receiving independent support. For this project efficient data collection outweighed the potential sampling bias because it was important to try to gain as large a sample as possible for the intersectional analysis. In total, 14 trial dates were provided by independent support professionals, however of these only 3 were observed. In some cases this was due to a clash with other court dates, some trials were out of area, and some were cracked and/or re-listed prior to the first day of trial.

I therefore used opportunity sampling to bolster my sample, which lessened the bias towards victim-survivors with independent support. This sampling strategy involved checking court listings each week and hoping that there was a serious sexual offences trial taking place. I used Temkin et al.'s (2018) technique which entailed phoning my selected courts on the Friday of each week to determine any relevant trials for the following week. I observed a further 3 trials as a result of this strategy, one of which did have an independent support worker.

3.4.3 Sample size

My sample size of six trials was small due to the limitations of court observations identified in the preceding sections. I took steps during my data collection period to try to increase my sample size. For example, I twice extended my data collection period. First by a period of 3 months to the end of 2019, which resulted in one additional trial. I then decided to further extend my data collection period to run concurrently with my data analysis, however coronavirus quickly became a concern in 2020 and so no further trials were observed. All trials were observed in 2019. This is significant because it coincided with prosecution rates for rape falling by 52% over 2 years and reaching a 10-year low (CPS, 2020), meaning there were fewer trials available for observation than for previous studies. This was particularly true for the Eastern CPS region (the region covering the courts in this sample), which saw an almost 40% decline in rape charges for the year ending 2018, which was a significantly higher decrease than any other region, with the next highest decrease at approximately 25% (CWJ et al., 2020).

My small sample is justified because large sample sizes are not always necessary for qualitative research (Bernard, 2013), and Patton posits that "there are no rules for sample size

in qualitative inquiry" (2002, p.244). Indeed, it is not unusual for a single text (or participant) to be the only subject of an in-depth analysis (Braun and Clarke, 2013). This research does not aim to make statements regarding incidence or prevalence and therefore does not require a large sample size (Ritchie, et al., 2014). Further, observational research yields rich and thick data that requires careful analysis, therefore keeping sample sizes small helps to ensure timeframes and budgets are adhered to (Ritchie, et al., 2014).

There is a large variation in sample sizes in previous court observation research. Smith (2020) provided a useful summary showing a range of samples, which, though not comparable by number because of differences in design and scope, demonstrated the wide-ranging sample sizes. Further justification for small samples can be found from looking to studies based on court transcript analysis. For example, Matoesian (1993) based his analysis of courtroom talk in rape trials on three trials and it remains an influential study.

Smith (2020) noted the importance of transparency in reporting court observation samples because, for example, sample sizes can be inflated by the inclusion of cracked or ineffective trials. All six trials I observed were completed and were therefore 'full trials'. It is also important to note the length of trials because this has a knock-on effect on data collection. This is because trials are usually listed to start on a Monday, therefore if a trial goes into the following week it removes a data collection opportunity from the researcher. Three of the trials in my sample lasted five days, one lasted three days, one lasted six days and the final trial lasted seven days. One of the five-day trials went into a second week because of a bank holiday. This means that half of the trials I observed went into a second week.

My observations resulted in 670 pages of data for analysis, an average of 112 pages per trial. This rich and thick data provided critical, analytical, in-depth insights that will help better inform policy and practice. For example, I was invited to give evidence to the Government's Rape Review in February 2020 because court observation research is highly valued for its ability to provide insight into practice 'on the ground'. It is also useful for intersectional analysis to take a smaller sample and robustly consider the rich data on the various oppressions and privileges that cannot be achieved in a larger sample.

3.5 Data analysis

Data analysis was influenced by intersectionality and critical discourse analysis (CDA). Discourse analysis is useful because it is concerned not only with what is said but also with the strategies and styles used in communicating (Robson and McCartan, 2016). Discourse analysis is diverse with a range of approaches from varied disciplines and theoretical perspectives (Phillips and Hardy, 2002). One such approach is CDA, which is well suited to this project because it examines the relationships between power and discourse and ideology and discourse. It can explore how language is used to empower or disempower people and it can expose hidden or taken-for-granted ideological assumptions that reproduce inequalities for and marginalisation of certain groups (van Dijk, 1993; Wodak, 2001; Bryman, 2016). This fits well with my intersectional framework because both are concerned with examining power and structure. Like intersectionality, CDA is problem-oriented, focusing on social problems and creating social change (Wodak, 2004).

3.5.1 Critical discourse analysis

Critical discourse analysis is itself a broad term covering a variety of methodological approaches with similar theoretical perspectives and there is no specific formulaic way of conducting a critical discourse analysis (Wodak and Meyer, 2016). I chose to draw influence primarily from Fairclough's (2016) dialectical-relational approach to CDA because it fits well with my intersectional perspective in that it enables examination of the ways in which discourse relates to cultural values and social identities. Meaningful engagement with intersectionality requires an analysis of the relationships between power, structure and identity (Crenshaw, 1991; Ehrenreich, 2002; Bilge, 2010; Choo and Ferree, 2010; Christensen and Jensen, 2012b; Lykke, 2016).

Fairclough's (2010) dialectical-relational framework viewed semiosis[11] as an integral part of material social processes. Social life is viewed as being made up of diverse and interconnected networks of social practices, and social practices are made up of dialectically

[11] The term 'semiosis' is used to further define discourse within this framework. Semiosis refers to meaning-making through language, visual imagery and body language (Fairclough, 2010).

related elements, such as semiosis, cultural values, and social identities (Fairclough, 2001). For Fairclough, CDA "is analysis of the dialectical relationships between semiosis…and other elements of social practices" (2001, p.122). These relationships vary across institutions and in different locations in place and time, hence the need for analysis. Because of these differences, CDA must be theorised specifically for each individual research project. The aim of the analysis is to determine how semiosis impacts on power relations, thereby offering explanations for how dominant thought is challenged by social actors and enabling the identification of ways to overcome obstacles to addressing social wrongs (Fairclough, 2010).

According to Fairclough's CDA (2010), social practices networked in a particular way constitute a social order. For this project, the English and Welsh CJS is the social order of concern. The order of discourse within the CJS is made up of a structure of genres, discourses, and styles (see Fairclough, 2010). There are genres, discourses, and styles within the CJS that are particularly associated with criminal trials taking place at Crown Court. Heffer (2005) considered the jury trial to be a complex genre, made up of sub-genres such as cross-examination. Legal professionals, such as defence and prosecution barristers, and lay people, such as jurors and witnesses, adopt particular styles in the performances of their roles. Witnesses are constrained in their ability to provide their own narrative by the question-and-answer tradition, and jurors are silenced (Stygall, 1994). Dominance is a key aspect of orders of discourse because there are ideologies and discourses that are dominant in social orders, and others that are marginal (Fairclough, 2010). The adversarial system is dominated by the elite white ideologies it was developed under (MacKinnon, 2006), but there are alternative ideologies that resist this and seek criminal justice reform, such as feminism.

3.5.1.1 Stages of dialectical-relational critical discourse analysis

Although there is no set method for undertaking CDA, Fairclough (2010) does offer some practical guidance for carrying out dialectical-relational CDA. I have primarily engaged with stage one as a basis for theorising my research problem and stage two as a basis for structuring my data analysis.

Stage one of dialectical-relational CDA helped me to further theorise my research problem by encouraging a wider consideration of relevant theories. This stage involves identifying and theorising a social wrong and a research topic that relates to it (Fairclough, 2010). The social wrong in this case had already been identified as sexual violence, with the related topic as the treatment of victim-survivors at Crown Court trials for serious sexual offences. Theorising the object for research involved identifying and exploring relevant theories from various disciplines (Fairclough, 2010). This has included theories relating to intersectionality, adversarial justice, victimology, rape myths, stereotypes and identity, and sociolinguistics and forensic linguistics. Fairclough (2016) stressed that his steps are not necessarily sequential and can be attended to more than once, therefore this step was returned to throughout the course of data analysis to ensure engagement with additional theories relevant to the results of analysis. For example, social class became a dominant theme throughout the trial narratives, therefore I sought out additional literature and theory on social class to incorporate into my analysis.

Stage two involved identifying obstacles to addressing the social wrong (Fairclough, 2001). This involved considering: the way social practices are networked together in the context of trials; the ways in which semiosis relates to other elements of these social practices, for instance linking gendered stereotypes to social/cultural contexts using theories of sexism and patriarchy; and consideration of the features of the interactions within the chosen texts, in this case transcripts from court observations, through interdiscursive and linguistic analysis (Fairclough, 2001). Interdiscursive analysis involves exploring which genres, discourses, and styles are drawn upon and how they are articulated together (Fairclough, 2001). I drew on guidelines available in Fairclough's (1992) earlier work as a practical guide to this aspect of the data analysis (Jørgensen and Phillips, 2002). Stygall's (1994) analysis of discursive formations in the legal genre at trial was a useful complementary tool here, as was Matoesian's (2001) work on linguistic devices used at rape trials. Similarly, Eades' (2012) work on language ideologies in the courtroom and the reproduction of social inequalities informed my analysis strategy. It was also important to ensure that each stage of analysis was carried out from the

different participant positions, including from the position of the jury as passive consumers unable to speak, question, or clarify.

The final stages of Fairclough's (2010) dialectical-relational CDA provided a useful way of thinking about the results of analysis. Stage three requires the researcher to consider whether the social wrong is needed to maintain the social order and whether it can be addressed within the social order or only by changing the social order. Stage four involves identifying possibilities within the existing social process for overcoming obstacles to addressing the social wrong. This can be in highlighting gaps or failings within the dominant ideologies and discourses of the social order, or it may be highlighting difference and resistance with the social order (Fairclough, 2001). The potential for identifying resistance is another aspect of dialectical-relational CDA that is complimentary to an intersectional framework because resistance is viewed as a key way of destabilising dominant ideologies and disrupting power and oppression (Hankivsky, 2014). I therefore considered the possible policy implications of my findings and have explicitly related these considerations to my data.

3.5.1.2 Drawbacks of critical discourse analysis

It is important to note that there are disadvantages to using CDA, most significant of which is that data is analysed according to the researcher's own interpretations rather than that of the creators or consumers of the discourse being analysed (Blommaert and Bulcaen, 2000; Vaara and Tienari, 2010). Although arguably, I could also be considered a consumer in my position in the public gallery. Another criticism of CDA is that researchers find evidence to support their pre-existing beliefs, rather than being open to differing perspectives (Widdowson, 1995, 1998; Blommaert and Bulcaen, 2000; Vaara and Tienari, 2010). However, according to the feminist approach to research, no research (especially qualitative research) can be truly neutral (Westmarland and Bows, 2018), therefore some level of bias is inevitable regardless of the methods chosen. These issues can be mitigated against through quality assurance measures such as reflexivity, which is a key aspect of feminist research (Maynard, 1994), and is discussed further in section 3.6.

3.5.2 Intersectional influences on analysis

The wide range of conceptualisations of intersectionality means there are a multitude of ways it can be utilised in a particular project. To discuss all contemporary articulations of intersectionality was beyond the scope of this project and I did not follow any particular one, rather I was informed by the central tenets of intersectionality and a range of conceptualisations, as discussed in section 3.2.1.2. Much like dialectical-relational CDA, intersectionality should be theorised and moulded to the particular project (Potter, 2015).

As discussed in section 3.2.1.2, some of the common debates in intersectional scholarship are around how many and which social categories to include in an analysis. I outlined the benefits of using an intersectional framework that applies to all members of society in order to develop an analysis of power in relation to both oppression and privilege, which will help expose power dynamics that can remain hidden when only oppression is analysed. In practice, this could mean, for example, asking not only what the impact of blackness is, but also what the impact of whiteness is, and how that might differ for males and for females (Choo and Ferree, 2010).

Selecting categories is a strategic choice for each project because the salience of categories can depend on the social practices and institutions being researched (Anthias, 2012). This keeps the categories limited and manageable, meaning that focus can be given to categories deemed most important for a particular research question (Christensen and Jensen, 2012). It is important to be specific about contexts and political genealogies within and between different social movements, such as the disability rights movement or the civil rights movement, therefore each project should thoroughly contextualise and reflect upon political-theoretical genealogies of specific intersections (Lykke, 2016). This was done throughout the analysis of my data as relevant categories were identified.

The categories included for analysis in this project depended on my data. Characteristics of participants became salient at trial without the choice of the victim-survivor or defendant because their perceived affiliation to a particular group was imposed on them by barristers, or simplified by judicial summings-up, through the narratives they employed. I was unable to

know which characteristics would be drawn upon by barristers, and so I was open to possibilities beyond the core intersectional categories of gender, race, and class. Indeed, as discussed in Chapter 2, attrition research has indicated that (dis)ability, age, homelessness and involvement in prostitution are factors that can marginalise victim-survivors within the CJS (Harris and Grace, 1999; Gray-Eurom, Seaberg and Wears, 2002; Kelly, et al., 2005; Lovett, et al., 2007; Munro and Kelly, 2009; Stanko and Williams, 2009; Hester, 2013; Ellison, et al., 2015; Lea, et al., 2016; Hester and Lilley, 2017; Stacey, Martin and Brick, 2017). Further, rape myth acceptance research shows that victim-survivors from some of these groups are likely to be deemed to have more culpability in their own rape or assault by the public (who are potential jurors) (Miller and Schwartz, 1995; White, Strube and Fisher, 1998; George and Martínez, 2002; Donovan and Williams, 2002). That categories in this project were largely dictated by the content of barristers' arguments shows the importance of ensuring my analysis went beyond the micro level and paid attention to wider structures of inequality and systems of domination.

Throughout my analysis I focused on instances of semiosis that draw on aspects of identity and personal characteristics, both implicitly and explicitly. Drawing on dialectical-relational CDA enabled me to link these to wider cultural values and discourses to show what meanings can be created by the narratives used. Identifying implicit data can be more challenging than identifying explicit data, therefore Bowleg's (2008) work was useful in offering guidance on dealing with implicit intersectionality data. To help deepen my analysis I used Matsuda's (1991) 'ask the other question' technique, as is advocated by Lutz (2015) and Lykke (2016):

> "When I see something that looks racist, I ask, "Where is the patriarchy in this?" When I see something that looks sexist, I ask, "Where is the heterosexism in this?" When I see something that looks homophobic, I ask, "Where are the class interests in this?" Working in coalition forces us to look for both the obvious and non-obvious relationships of domination, helping us to realize that no form of subordination ever stands alone" (Matsuda, 1991, p.1189).

3.5.3 Analysing the data

My aim for data analysis was to identify patterns within the narratives whilst focusing on social practices (see 3.5.1.1). For this reason, I began by immersing myself in the data by reading and re-reading the transcripts. This enabled me to have an overall view of my data and begin to notice patterns in the narratives. It is an important step in data analysis because it helps enable analytic sensibility which in turns helps researchers see beyond the surface of their data throughout the following phases of analysis (Braun and Clarke, 2013). Next, I carried out an inductive thematic coding of my transcripts to identify dominant themes and narratives. Inductive analysis was appropriate here because it has an exploratory orientation (Guest, MacQueen and Namey, 2012). I then analysed the narrative themes giving considerations to the specific formations of language, as outlined in section 3.5.1.1. This approach allowed me to, for example, note the key role of grammatical constructions of agency in the formation of trial narratives. Furthermore, giving consideration to interdiscursivity and intertextuality illuminated key findings about the role of digital evidence within the trial narratives.

To give a broad illustrative example, the first stage of analysis identified narratives around alcohol, and subsequent stages of analysis identified that these narratives often linked to cultural narratives around class, age, and gender. This enabled me to see beyond alcohol consumption as a tool for undermining credibility in and of itself and allowed me to develop a nuanced understanding of how broader cultural narratives (see section 3.5.3.1) allow alcohol narratives to undermine or bolster credibility of participants in different ways dependent on, for example, their gender and age, thereby showing how jurors could be influenced by explicit and implicit references or use of cultural attitudes and values.

A limitation to this analysis strategy is that my transcripts are made from direct observations rather than recordings, so it is not always verbatim. A combination of observation field notes and official transcripts would provide a stronger basis for analysis strategies based on CDA, however that approach is cost prohibitive in E&W. My strategy did not primarily focus on the technicalities of language, rather it focused on cultural narratives produced in the trial context,

and therefore hand-written transcripts remained a suitable dataset from which to base my analyses.

3.5.3.1 Defining cultural narratives

I used the concept of cultural narratives throughout my analysis; therefore, it is important to be clear about my use of the term and its relationship to rape myths. Before defining cultural narratives specifically, it is worth briefly addressing definitional issues with 'narrative' more broadly. 'Narrative' has been variously defined and conceptualised across academic disciplines (Ryan, 2007). It has broadly been defined within the field of narratology as an act of representing a sequence of events, including events, actors, and locations with distinct characteristics (Rudrum, 2005; Bal, 2009). Some critics surmise that through the narrative turn in social science and the humanities, the term 'narrative' has become overused and simplistically conflated with other concepts such as belief and experience (Ryan, 2007). It is however widely agreed that narratives play a crucial role in people's meaning-making of the world, their own lives, and the lives of others (Ewick and Silbey, 1995; Ryan, 2007). Indeed, for Herman (2007, p.3), narrative is "a basic human strategy for coming to terms with time, process, and change". The narrative turn has led to a wide range of theoretical and methodological conceptualisations being used across the social sciences, including within socio-legal studies and the field of violence against women. There have been varying terms used throughout the literature, sometimes with the same term being conceptualised using differing theoretical frameworks (Loseke, 2007; Lafrance and McKenzie-Mohr, 2014). It is therefore necessary to define the use of 'cultural narratives' in the specific context of this project.

According to Fivush (2010) cultural narratives provide a "shared understanding of the shape of a life and how a life is to be understood" (p.90). They "describe those stories about persons, places, or things that contain consistent storylines and thematic content across individuals and settings" within a culture (Glover, 2003, p.193). These narratives provide frameworks for understanding how people and places are embedded within a particular culture and enable people to make sense of their lives, interactions, and experiences (Richardson, 1997; McLean,

et al., 2018). Cultural narratives are also a framework for understanding what it means to be part of a particular social category, such as ‘woman’ or ‘heterosexual’ (McLean and Syed, 2016; Hammack and Toolis, 2016), and enable people to make sense of their positioning within the world in relation to others (McKenzie-Mohr and Lafrance, 2011). This is because power and oppression play a crucial role in shaping cultural narratives (McLean, et al., 2018).

It is commonly understood that cultural narratives produce and reproduce power structures, thereby helping to maintain the status quo for the powerful (Stanley, 2007; McKenzie-Mohr and Lafrance, 2011; Lafrance and McKenzie-Mohr, 2014). For example, in writing about the trope of the American Dream, Hsu (1996) and Pierre (2004) demonstrate how cultural narratives of ethnicity serve to reinforce the dominant white middle-class ideology through the production and reproduction of ‘cultural racism’. Following a similar vein, within this thesis I conceptualise cultural narratives as narratives that reflect structural inequalities and systems of oppression within our society. Myths and stereotypes permeate cultural narratives and serve to subtly dictate the ‘proper’ way to behave according to the dominant ideology; that is, cultural narratives are “designed to maintain and buttress the values and interests of the dominant group, and to do so in such a way as to remove all but the most banal signs of the center’s rule” (Hsu, 1996, p.38).

Some scholars have conceptualised cultural narratives as purely hegemonic. For example, for Powell et al. (2017), cultural narratives are the “shared perspectives of dominant groups” (p.459), which implies there are no cultural narratives available for those not part of a dominant group. In contrast, other scholars understand cultural narratives as made up of master narratives and counter narratives (Yamamoto, Haia and Kalama, 1994; Richardson, 1997). As with other narrative terms, ‘master’ and ‘counter’ narratives are not always named as such and are not necessarily consistently theorised. But broadly, master narratives are those that frame the dominant understanding of or within a cultural group, and counter narratives are those that oppose or are not congruent with master narratives. It is the master narratives which are hegemonic because they are created by the powerful to maintain their interests (Richardson, 1997). These master narratives determine what is expected and unexpected in

a life experience and what therefore comes to be taken for granted and accepted as truth (Lafrance and McKenzie-Mohr, 2014; McLean, et al., 2018). This makes these narratives "both more 'tellable' and 'hearable' than their marginalized alternatives" (Lafrance and McKenzie-Mohr, 2014, p.3) because those who are marginalised in society are silenced and unheard (Stanley, 2007).

These 'marginalized alternatives', or counter narratives, are narratives that provide an alternative, or resistant, understanding of the world and of self to those who are oppressed by master narratives (Nelson, 2001). The role of these narratives is to "expose the lies which hold together the ideological armour of privilege, domination and oppression" (Harris, Carney and Fine, 2001, p.14). This quality of resistance led some to refer to them as 'resistance narratives' (Fivush, 2010). These theoretical perspectives have emancipatory aims, therefore consideration of resistance narratives is important because these narratives can play an important role in cultural change (McLean, et al., 2018). Decades of feminist scholarship and activism have produced resistance narratives, but some "remain heavily individualized and medicalized through the language of trauma and post-traumatic stress disorder" (Lafrance and McKenzie-Mohr, 2014, p.2). This demonstrates the rigid and persistent nature of master narratives and the difficulty faced in forming effective resistance narratives. To view or produce resistance narratives as a binary counter to a master narrative is simplistic and to construct a resistance narrative as the opposite of a master narrative constrains its ability to counter, which can lead to resistance narratives that both challenge *and* reproduce hegemonic master narratives (Lafrance and McKenzie-Mohr, 2014; McLean, et al., 2018).

Cultural narratives, both master and resistance, cannot capture the complexity of how things are experienced. As Brown (2013) puts it,

> "no single story can encompass the richness of experience and much goes untold. Women's stories reveal gaps and contradictions in a selective process about what information to include" (p.7).

Indeed, Loseke (2001) argues that what she calls the 'formula story' of wife abuse glosses over the nuances and complexities of women's lived experience in favour of "lurid accounts of

heinous behaviour, depraved perpetrators, and helpless victims" (p.107). Formula stories are theorised similarly to master narratives in that both "refer to narratives of typical actors engaging in typical behaviours within typical plots leading to expectable moral evaluations" (Loseke, 2007, p.664). Following Loseke (2001), then, rape myths can be viewed as part of the master narrative for rape in that they reflect the notion of the distinctive actors of 'aggressive man' as perpetrator and 'blameless woman' as victim (O'Hara, 2012; Schwark, 2017; DiBennardo, 2018; Nilsson, 2019). The attitudes and beliefs expressed through rape myths are reflected in the formation of the master narrative and are reproduced by it. This is often conceptualised as 'rape culture', which refers to the multifarious societal attitudes and beliefs that create a conducive context for sexual violence to occur and that normalise and encourage said violence (Buchwald et al., 1993). The concept therefore looks beyond the individual to the underlying cultural practices and narratives that act as cultural scaffolding for rape (see Gavey, 2005). Rape culture is a symptom of a patriarchal, heteronormative society (Brownmiller, 1975; Herman, 1984), and cultural narratives that re/produce rape myths serve to perpetuate rape culture and thus reinforce patriarchal and heteronormative ideologies. It is not only sexism and heteronormativity that are reinforced by rape culture, because rape culture also produces and reproduces other oppressions along, for example, ableist and classist lines (Fanghanel, 2020). Indeed, an intersectional feminist perspective recognises that:

> "although all women and girls are in some way subject to gender discrimination, all women and girls are not discriminated against in the same way…, hierarchical structures interact and intersect with gender inequality, and [manifest differently] according to other markers of a woman's or a girl's social location." (Vera-Gray, 2017, p.128)

These 'hierarchical structures' are produced and reproduced in cultural narratives. Utilising the concept of cultural narratives was therefore useful in exploring the research problem set out in section 1.1 and was congruent with my intersectional feminist theoretical framework because it enabled me to identify narratives at trial that drew on structures of inequality and oppression and explore their relationship with rape myths.

3.6 Quality assurance

Lincoln and Guba (1985) propose that qualitative research should be assessed using alternative, parallel criteria to quantitative research: credibility, transferability, dependability and confirmability. Ensuring credibility involves seeking confirmation from the members of the group being studied that the researcher's interpretations are accurate (Bryman, 2016). For this project, findings were checked with representatives from the legal profession and the specialist sexual violence support sector by presenting the findings at practitioner-attended conferences. This reflects the process used in similar previous research (Smith, 2014). To meet the transferability criteria, the research findings are described in rich detail in order to enable others to determine the transferability of the findings (Bryman, 2016). Dependability of research requires that detailed records of the project processes are kept and checked with suitable peers, which in this case was achieved through regular supervisions. Confirmability ensures that researchers have accounted for possible personal and theoretical biases and can be checked in a similar way to dependability (Bryman, 2016).

Reflexivity is important in social research because it allows the researcher to consider their own position within the research and the influence of their methods, decisions, values and biases on the knowledge they produce (Bryman, 2016), which in observational research can help to enrich a researcher's understandings of what they are observing and their subsequent analysis (Nicholls et al., 2014). A reflexive diary can aid researchers in mapping and understanding their assumptions, biases, and decision-making throughout the research process (Ortlipp, 2008). I employed this strategy in this project, and it proved particularly useful in acknowledging my position of privilege as a white, non-disabled, middle-class woman throughout my observations and into data analysis.

3.7 Ethical considerations

There are a number of ethical considerations that warrant discussion for this project. There is a plethora of ethical guidance available in the literature, which has been used to guide my discussions here. What is lacking is guidance specifically for court researchers, which has

recently been addressed by Smith (2020), so I have largely used her discussions to reflect on the specific dilemmas of court research.

This research will involve observing human participants at Crown Court trials. The use of human participants is justified because although court transcripts could be used to inform this project, they would omit the non-verbal communications that are essential to the richness of data and enable a quality, nuanced analysis of trial narratives (Matoesian 2008). The participants were not contacted directly, and they did not take part in any activities they were not already doing as part of the court process.

The data collection method used in this project required some ethical consideration. This research might be considered covert because it was not always possible to gain fully informed consent from everyone being observed during the trials. Spicker (2011) made an important distinction between covert and deceptive research, where covert research can be ethically justified and deceptive research cannot. I was not actively misleading participants; therefore the research was not deceptive. Ethical guidelines from the British Sociological Association (2017) and the Economic and Social Research Council (2015) note the importance of giving full consideration to the circumstances and reasons for conducting covert research and state that covert research can be justified in certain circumstances. Spicker (2011) argued that researching and reporting on trials is "desirable" (p. 124) and forms part of the public accountability of the CJS. Further, Smith (2020) posits that given the widespread public criticism of the CJS regarding rape trials, neglecting to research courts in this way can perpetuate the revictimisation of victim-survivors. Therefore, the benefits of covert research can outweigh the potential harm to participants (Gray, 2018). I considered that to be the case for this study because I had discussed the issue of harm versus informed consent with specialist advocacy professionals whose views were that this research presented an opportunity to improve court experiences for victim-survivors and that outweighed concerns regarding the semi-covert nature of data collection (discussed further below).

Calvey (2017; 2019) views covert research on a continuum and delineates the extensive scholarly debates around covert methodologies. Of particular relevance for the ethical

considerations of this project were the debates Calvey (2017) set out around ‘informed consent’. Many social science researchers argue that the concept of informed consent is flawed because it can ultimately never be ‘fully’ informed, especially when researching vulnerable groups and sensitive topics (see Calvey, 2017). Court trials fall within the public domain (Baldwin, 2008) and as such it is not necessary to gain informed consent from those involved in the trial. The specialist advocacy professionals I consulted advocate for the rights of victim-survivors of sexual violence and provide them with support services, they were therefore well-placed to consider the impacts this project may have had on victim-survivors being observed in court. I considered using relationships with independent support professionals to obtain informed consent from victim-survivors before trial. The impact of this on the victim-survivors had the potential for both negative and positive consequences. A potential positive was that asking for consent, even though it is not needed, gives the victim-survivor the opportunity to say no, in which case I would have respected their decision and not observed that trial.

The main potential negative discussed by the professionals was that victim-survivors would be likely to consent but that the knowledge of my presence would increase their overall anxiety about the trial. This could be especially true for victim-survivors making use of special measures for giving evidence who would not otherwise even be aware of my presence. As the trial experience is already a distressing event for the victim-survivor (Adler, 1987; Lees, 2002; Temkin and Krahé, 2008), it was the professional opinion of the specialist advocates that the covert approach posed the least risk of undue harm. Indeed, this was reflective of arguments made by Griffiths (2008) that deciding not to seek informed consent can constitute an ‘ethic of care’. As an additional consideration, when the victim-survivor was in the courtroom I paid careful attention to them and if there had been signs of distress at my presence, I was prepared to leave the public gallery and exclude that data from the research. Smith (2014) made similar considerations but found her presence did not seem to cause distress to the victim-survivors and so there were no occasions where she left the courtroom for this reason. The same was true for my observations.

In order to protect the confidentiality and anonymity of participants, the specific court locations are not named and only a vague geographical indicator has been given: courts in the East of England. Similarly, trial participants are not named and potentially identifying information specific to the cases was omitted as much as possible, for example no dates or locations were recorded. It should be noted that the aim of the research requires that certain personal characteristics be mentioned, such as gender and disability. Therefore, there is potential for a combination of personal and case characteristics to make it possible for a victim-survivor to be identified. For example, a victim-survivor in the North East who is an Asian woman with a physical disability and a mental health condition could potentially be identified from this information when combined with case details more easily than could a white female non-disabled victim-survivor. This is justified because the courtroom is a public space and trials are often reported in local press, so the data collected is not private. I used a 'marginal gains' approach whereby as many small details were removed as possible to allow context but remove a level of unnecessary identifying detail.

Consideration has been given to the risk of harm to those being researched. Participants must be protected from undue harm and whilst the situation is likely to be distressing for the victim-survivor, it is not a situation created by the research. That said, I was prepared to exit the court if it appeared my presence was causing distress, but this was not in the end necessary for any of my observations. I recognised there is a risk of harm to researchers investigating trauma and violence and that support mechanisms and networks are therefore of high importance. For this reason, an additional consideration when selecting courts was my available informal support in those areas. My employment history provides me with a range of coping strategies for emotionally demanding work and I have previously received training on vicarious trauma and strategies for protecting against it. Supervision provided a space for debriefing and discussion of any difficulties that arose. A background in supporting victim-survivors of sexual violence means I had a good understanding of what to expect from the content of serious sexual offences trials. I also had an awareness of the impact emotions could have on the research outcomes and recommendations, though as Campbell (2002) argues, there are

benefits to conducting research with a level of emotion. I kept a reflexive diary throughout the data collection period, and beyond, to help provide transparency and credibility of data analysis.

At the beginning of each trial, I sought permission from the judge, via court staff, to take notes in the public gallery. Smith (2014) described her method for seeking informed consent from the judge, barristers and defendant, but noted the limitation of how informed this truly was because any discussion was brief and the barristers were disinterested. For this project, I had an information sheet available for any participants who requested further detail, with consideration given as to the level of detail provided so that reactivity as a result of demand characteristics would be minimised. Ultimately, however, nobody asked any questions about my presence and so I did not give a sheet to anyone.

3.8 Trial synopses

This section sets out synopses for each of the observed trials in order to give context for the analysis chapters.

3.8.1 Trial 1

<table>
<tr><td colspan="2">Indictment</td><td colspan="2">Two counts of rape</td></tr>
<tr><td colspan="2">Verdict</td><td colspan="2">Not guilty on both counts</td></tr>
<tr><td colspan="2">Victim-survivor/defendant relationship</td><td colspan="2">The victim-survivor and defendants were long-time friends</td></tr>
<tr><td colspan="4">Victim-survivor demographics</td></tr>
<tr><td>Gender

Female</td><td>Age

Early 20s</td><td>Race

White (not explicitly stated)</td><td>Disability

None mentioned</td></tr>
<tr><td colspan="4">Defendant demographics</td></tr>
<tr><td>Gender

Male</td><td>Age

Early 30s</td><td>Race

White (not explicitly stated)</td><td>Disability

None mentioned</td></tr>
<tr><td colspan="2">Victim-survivor special measures</td><td colspan="2">ABE, screens</td></tr>
<tr><td colspan="2">Defendant gave live evidence</td><td colspan="2">Yes</td></tr>
</table>

Defendant asked about sexual history with victim-survivor	Yes
Prosecution central arguments	
The prosecution case was that on two separate occasions the defendant had sex with the victim-survivor while she slept after they had been out drinking heavily together. The prosecution argued that because the victim-survivor was asleep she could not have consented, nor could the defendant have reasonably believed she was consenting, and therefore it was rape. The victim-survivor resisted when she was roused from sleep and the defendant stopped on one occasion and continued on the latter occasion. The victim-survivor did not fully rouse from sleep because she was tired and drunk.	
Defence central arguments	
The defence case was that the sex happened but that it was consensual. Their arguments centred on 'regretted drunken sex'.	

3.8.2 Trial 2

Indictment		One count of rape	
Verdict		Not guilty	
Victim-survivor/defendant relationship		The victim-survivor and defendant were in a long-term co-habiting relationship	
Victim-survivor demographics			
Gender Female	**Age** Early 20s	**Race** White (not explicitly stated)	**Disability** None mentioned
Defendant demographics			
Gender Male	**Age** Early 20s	**Race** White (not explicitly stated)	**Disability** None mentioned
Victim-survivor special measures		None	
Defendant gave live evidence		Yes	
Defendant asked about sexual history with victim-survivor		Yes	
Prosecution central arguments			
The prosecution case was that the defendant initiated sex with the victim-survivor and despite her verbal and physical resistance he continued, therefore it was rape. There was digital evidence that the prosecution argued amounted to the defendant admitting and apologising for rape.			

Defence central arguments
The defence case was that the defendant did not remember the specific incident but had never had non-consensual sex with victim-survivor. They focused on undermining the digital evidence and providing a motive for lying.

3.8.3 Trial 3

Indictment		One count of sexual assault by touching. One count of sexual assault by penetration.	
Verdict		Guilty (by majority) on both counts.	
Victim-survivor/defendant relationship		Online acquaintances.	
Victim-survivor demographics			
Gender Female	**Age** 30s	**Race** White (not explicitly stated)	**Disability** None mentioned
Defendant demographics			
Gender Male	**Age** 40s	**Race** White (not explicitly stated)	**Disability** None mentioned
Victim-survivor special measures		Screens	
Defendant gave live evidence		Yes	
Defendant asked about sexual history with victim-survivor		Yes (digital messages)	
Prosecution central arguments			
The prosecution case was that under the pretence of massage sexually assaulted the victim-survivor by touching her breasts and by digitally penetrating her vagina. The victim-survivor acquiesced to the breast touching because she thought it was part of a professional massage but did not consent to digital penetration. Because the defendant had entered her home under false pretences as a 'masseur', the breast touching amounted to sexual assault because the victim-survivor's consent had been vitiated by that deception.			
Defence central arguments			
The defence case was that no sexual touching occurred, only a massage.			

3.8.4 Trial 4

Indictment		Six counts of rape. One count of kidnap with intent to commit a sexual offence. One count of assault by beating.	
Verdict		Guilty on two counts of rape. Guilty on assault by beating. Crown offered no evidence on kidnapping count. Defendant also entered 4 guilty pleas to charges of assault and criminal damage at the outset of the trial (all in relation to domestic abuse against the victim-survivor).	
Victim-survivor/defendant relationship		Ex-partners. At the time of the offences, the defendant was subject to probation conditions (for previous assaults against the victim-survivor) which meat he was not to have any contact with the victim-survivor.	
Victim-survivor demographics			
Gender Female	**Age** 40s	**Race** White (not explicitly stated)	**Disability** Learning disability
Defendant demographics			
Gender Male	**Age** 40s	**Race** White (not explicitly stated)	**Disability** Judge/defence suggested undiagnosed learning disability
Victim-survivor special measures		Screens, intermediary	
Defendant gave live evidence		No	
Defendant asked about sexual history with victim-survivor		N/A	
Prosecution central arguments			
The prosecution case was that the victim-survivor had sex (oral and vaginal) with the defendant over the course of two days and that none of it was consensual because she was scared of the defendant due to the domestic abuse he had subjected her to.			
Defence central arguments			
The defence argued that the victim-survivor consented, and that defendant could reasonably believe that the victim-survivor was consenting because she acted like a willing participant.			

3.8.5 Trial 5

Indictment		Two counts of sexual assault of a child aged under 13, plus one additional 'multiple occasions' count. One count of causing or inciting a child aged under 13 to engage in sexual activity.	
Verdict		Not guilty on all counts.	
Victim-survivor/defendant relationship		The defendant was a long-term partner of the victim-survivor (a child) at the time of the offences.	
Victim-survivor demographics			
Gender Male	**Age** Under 10	**Race** White (not explicitly stated)	**Disability** None mentioned
Defendant demographics			
Gender Male	**Age** 40s	**Race** White (not explicitly stated)	**Disability** None mentioned
Victim-survivor special measures		Live link, removal of wigs and gowns, introduced to counsel and judge beforehand, intermediary.	
Defendant gave live evidence		Yes	
Defendant asked about sexual history with victim-survivor		N/A	
Prosecution central arguments			
The prosecution case was that on several occasions the defendant had sexually assaulted the victim-survivor (a pre-pubescent child) whilst in the child's home.			
Defence central arguments			
The defence case was that none of the touching happened and the victim-survivor was lying.			

3.8.6 Trial 6

Indictment	One count of indecent assault (SOA 1956). Two counts of sexual assault, with one additional 'multiple occasions' count. Four counts of sexual activity with a child, with two additional 'multiple occasions' counts.

		One count of sexual assault by penetration with an additional 'multiple occasions' count.	
Verdict		Not guilty on all counts.	
Victim-survivor/defendant relationship		There were two sister victim-survivors. The defendant was the partner of their mother around the time of the alleged offences. The defendant was later in a relationship with victim-survivor1 when she was approximately 16.	
Victim-survivor1 demographics			
Gender Female	**Age** Early 30s	**Race** White (not explicitly stated)	**Disability** None mentioned
Victim-survivor2 demographics			
Gender Female	**Age** Late 20s	**Race** White (not explicitly stated)	**Disability** None mentioned
Defendant demographics			
Gender Male	**Age** 50s	**Race** White (not explicitly stated)	**Disability** None mentioned
Victim-survivor1 special measures		Live link, removal of wigs and gowns, intermediary	
Victim-survivor2 special measures		ABE, live link, removal of wigs and gowns, intermediary	
Defendant gave live evidence		Yes	
Defendant asked about sexual history with victim-survivor		Yes	
Prosecution central arguments			
This was a historic case. The prosecution case was that the defendant had raped and sexually assaulted both victim-survivors multiple times throughout their teenage years whilst under the age of consent.			
Defence central arguments			
The defence case was that the allegations relating to victim-survivor2 were entirely made up. In relation to victim-survivor1, the defendant's case was that he had engaged in sexual activity with her but that it only happened after she reached the legal age of consent.			

3.8.7 Presentation of the data

Extracts from the transcripts are provided in support of the analysis presented throughout chapters Four to Seven. These extracts include direct quotes and paraphrased quotes. Paraphrased quotes are signified by box brackets and although I refer to these quotes as paraphrased, it is more accurate to describe them as almost-verbatim. That said, a small number of paraphrased quotes were edited beyond what was recorded in the transcript in order to provide clarity of meaning; that is, where the quote became unclear when removed from the wider context of the transcript. Extracts have been numbered for ease of reference because the nature of the analysis, that is, the interlinked narratives, meant that cross-referencing was required at times. Numbering the extracts therefore avoided the need for repetition of data. The extracts are numbered according to chapter number with accompanying letter(s) to denote order of appearance (i.e., 4a, 4b, 4c, 5a, 5b, 5c, and so on).

To help maintain anonymity, dates, locations, and other distinctive information have been removed or changed, and names have been replaced either by the person's role at trial (e.g., Prosecution) or their relationship to the participants (e.g., Friend), also in box brackets. Finally, actions and tone are denoted by angle brackets. For example, where a barrister reads from the evidence bundle or makes an obvious non-verbal communication, such as <clicked fingers> or <surprised tone>.

Chapter 4 Undermining the story of rape: consent and 'reasonable' belief

4.1 Introduction

The following chapters outline the key themes revealed from analysis of my observations. This chapter and Chapter Five focus on how 'stories' of rape are undermined through the use of rape myths in courtroom narratives. Here, the 'story' relates to the allegations presented at trial, which are constituted of conflicting accounts provided by victim-survivor and defendant. Chapter Six then focuses on how the victim-survivors are undermined through reliance on wider cultural narratives and Chapter Seven focuses on the bolstering effect of cultural narratives for defendants.

A brief synopsis of each trial and the parties involved was provided in section 3.8. As outlined in section 3.8.1, the analysis presented will include direct quotes and paraphrased quotes, with paraphrased quotes signified by box brackets. To help maintain anonymity, distinctive information has been removed or changed, and names have been replaced by the person's role at trial or relationship to the participants.

The rape myths observed can be categorised into four core groups, although there is inevitably some overlap. This chapter and Chapter Five are organised accordingly, with this chapter focusing on myths related to consent and defendants' reasonable belief in consent and Chapter Five focusing on myths relating to victim-survivors' post-assault behaviour and the expected consistency of their accounts. This chapter establishes that rape myths were used in every trial, primarily by the defence, and served as a mechanism to undermine the victim-survivor's account of the allegations. This supports my thesis that rape myths remain prevalent in serious sexual offences trials despite suggestions they are not a problem.

4.2 Myths about consent

Rape myths were often related to issues of consent. The model of consent in E&W is discussed in section 1.2.3. To summarise, consent to a sexual act is given when a person "agrees by choice…and has the freedom and capacity to make that choice" (SOA 2003). This

model of consent employs what Dowds (2019) refers to as a mixed definition of consent that has both positive (freely made choice) and negative (ways in which consent can be vitiated) elements. Most commonly, myths about consent related to victim-survivors' sexual history, but two of the trials also touched on presumptions about the capacity to consent outlined in the SOA 2003.

4.2.1 The use of victim-survivors' sexual history

Narratives about victim-survivors' sexual behaviour were common in the observed trials and related to flirting, sexual history, or both. These narratives were present in all but T5, where the victim-survivor was a child, however even in this case his mother's sexual history was used to discredit her. All trials therefore scrutinised the sexual behaviour of women. Narratives about flirting as sexual behaviour are discussed in section 4.3.2 where they were used to discuss the defendant's reasonable belief in consent, however there is clear overlap between that and the sexual history evidence discussed here. As my discussions in both sections will show, it is therefore difficult to see where the line should be drawn on what 'counts' as sexual history evidence.

The use of sexual history evidence is restricted in sexual offences through s.41 of the *YJCEA 1999* (see section 2.4.1.1) and applications for the introduction of sexual history evidence should be made in advance of a trial. In previous observation studies these applications have been seen to be made at the time of the trial, rather than in advance, or not made at all (Kelly et al., 2006; Burman et al., 2007; Durham, et al., 2017; Temkin, et al., 2018; Smith, 2018). In contrast, my observations saw no applications being made during trial, which would be good practice so long as applications were indeed made beyond the scope of these observations. This change from previous research may be the result of *Criminal Practice Directions 2015 (Amendment No. 6)* [2018] EWCA Crim 516, which aimed to ensure consistent and appropriate application of s.41 (Brewis 2018). Whilst it is not possible to say whether or not applications were made in advance of all the observed trials, s.41 was explicitly mentioned in two cases. Despite this, some uses of the sexual history evidence were not clearly relevant

and in one trial (T3) an exchange between the judge and defence seemed to indicate that an application had not been made (discussed further below, from extract 4k).

Good practice with regards to s.41 was observed in two trials, T1 and T6. In T6, there was clear reference to a s.41 ruling and how to adhere to its parameters. In this case, defence counsel wished to bring evidence of a third-party relationship of one of the victim-survivors. The ruling had prohibited it but the defence wanted to ask about the relationship without referencing anything sexual. The judge did not allow this because of the risk it could easily unintentionally adduce sexual history evidence:

EXTRACT 4a

Judge	[Section 41, we spent a great deal of time on and I ruled on it.]
Defence	Would I be able to put it to the witness that she was in a relationship with [name] and that is why she knows bus times and uniforms?
Judge	No, because it's still asking about what was a sexual relationship … [What's the link? Why can't you ask…] innuendo is so difficult to avoid [in these circumstances. Prosecution, what's your position]?
Prosecution	[The way around it that I suggested to [previous defence counsel] last time was to put it to her that she knows other drivers well].
Judge	Yes, and there can be no objection to that. [Defence, you just have to be very careful to avoid any implications. Can I just ask that you run the wording past me beforehand in the absence of the jury]?
Defence	Can I ask 'you know [name]'?
Judge	No. What is the relevance of the name?
Defence	Well if I ask that she knew other drivers well and she answers no.
Judge	[Yes in that circumstance it's okay. Please run the words past me beforehand]. (T6)

The line of questioning was ultimately not pursued by the defence so there was not an opportunity to see how this might have played out in practice, but nevertheless remains an example of good practice.

In T1, s.41 was mentioned in passing but it was not clear whether an application had been made. There were however clear examples of good practice in relation to s.41 in the same trial. For example, the judge questioned the defence when she thought he had raised sexual history evidence from a previous sexual encounter between the victim-survivor and the defendant:

EXTRACT 4b

Judge	[[Defence], Section 41, did a previous judge make a ruling on that?]
Defence	[No, but I don't think I crossed into that.]
Judge	[Oh yes, you're right, there's no suggestion that anything sexual happened on the night the photos were taken.]
Defence	No. (T1)

This demonstrates a judge actively seeking to identify areas of questioning that could need s.41 rulings. On another occasion the judge intervened to prevent a similar line of questioning by the prosecution:

EXTRACT 4c

Prosecution	…You said you remember him pulling your hand towards him?
Victim-survivor	Yes, several times.
Prosecution	And you remember that?
Victim-survivor	Yes. I didn't want it to happen.
Prosecution	Have you ever touched him-
Judge	Not relevant.
Prosecution	Ok. I am prepared to leave it. (T1)

Although s.41 does not apply to the prosecution in E&W, anything raised by them is open for explanation or rebuttal by the defence under subsection 5. This means that by stopping prosecution counsel, the judge prevented defence counsel from being able to discuss

irrelevant sexual history (see Smith, 2018, on the prevalence of s.41(5) as justification for the introduction of sexual history).

Alongside these examples of good practice, however, there was another line of questioning in the same trial that, even if allowed by a s.41 ruling, seemed entirely irrelevant. The defence questioned the victim-survivor about whether she would usually keep her bra on during consensual sex:

EXTRACT 4d

Defence	Your knickers were removed but you kept your bra on.
Victim-survivor	I don't remember.
Defence	Now, please don't think I'm being rude because I'm not. Did you have a complex about your nipples? <pause> You look confused.
Victim-survivor	Yeah
Defence	Would you keep your bra on because you felt self-conscious about your nipples?
Victim-survivor	Yes
Defence	But would you keep the bra on if you were having consensual sex?
Victim-survivor	Not necessarily.
Defence	But you might?
Victim-survivor	Yes.
Defence	I suggest that you had consensual sex… (T1)

This questioning was referring generally to the victim-survivor's sexual encounters and was therefore asking about third-parties. The defence's implication was that the victim-survivor *might* keep her bra on during consensual sex and so that it remained on during the alleged rape could be taken to indicate that she consented. As McGlynn (2017) argued, sexual encounters with third-parties has no bearing on the consideration of consent with someone else, unless it is "so similar…that the similarity cannot reasonably be explained as a coincidence" (*YJCEA 1999* s.41 (3)(c)). However, the ruling in *R v Evans* took commonplace sexual activities, namely 'doggy style' and a woman saying 'fuck me harder', as sufficiently unusual and similar to allow inclusion (McGlynn, 2017).

There was no direction to the jury as to how they were permitted to use this evidence and it was not referenced directly in either of the closing speeches. It is therefore unclear what the relevance of this evidence was or why it was adduced. Whether a s.41 ruling was made or not, it remains a line of questioning that is more prejudicial than probative and therefore adds to the existing evidence base showing the inefficacy of the s.41 provisions (Kelly et al. 2006; Temkin et al. 2016; McGlynn, 2017; Smith, 2018). A woman keeping her bra on during sex should not constitute something so sufficiently out of the ordinary as to qualify as an exception under the s.41 (3)(c) provision, particularly when related to third-parties. It is a standard depiction of sex in television and film. Not only this, but the questioning here was needlessly intrusive. The defence could establish the same facts without resorting to asking intimate details about the victim-survivor's body image. Arguably it may be beneficial for the defence to make such remarks because it highlights an insecurity in the victim-survivor. Smith (2018) found that defence barristers asked questions about victim-survivors' emotional vulnerabilities and linked these to narratives about mental health and women as pathological in order to portray them as 'damaged goods'. Drawing on this victim-survivor's insecurity could therefore have bolstered the defence's narrative about this victim-survivor as "hysterical" and the defendant's characterisation of her as "crazy" and "psycho", which are discussed in section 6.3.2.

Whilst in T1 the sexual history questioning related to the victim-survivor's behaviour prior to the alleged rapes, the questioning in T2 related to the victim-survivor's sexual behaviour in the aftermath of the alleged rape. There was no reference to s.41 during T2, so it is not possible to know whether an application had been made. In the cross-examination of the victim-survivor, the defence asked when she and the defendant, who had been in a long-term co-habiting relationship, next had sex:

EXTRACT 4e

Defence	I say it was consensual. Do you agree or disagree?
Victim-survivor	Disagree.
Defence	When was the next time you had sex?
Victim-survivor	I don't know.

Defence	Couple of months later? Couple of weeks?
Victim-survivor	I don't know. (T2)

This questioning suggests that the length of time between an alleged rape and consensual sex bears relevance to matters of consent or credibility. The implication made by the defence was that because the victim-survivor did not end the relationship and that it continued to be sexual she must be lying about her lack of consent. This drew on problematic ideas of rational behaviour in suggesting that someone who was raped would not continue to have sex with the person that raped her. Section 5.1 sets out that it is in fact not uncommon for victim-survivors to maintain relationships with their perpetrators. It is irrelevant how soon after the alleged rape she had sex with him again, especially considering that her evidence was that she tried to forget about it, wanted things to be normal between them, and took a long time to come to terms with it. Indeed, Redmayne (2003) argued that sexual history evidence can be used by prosecution to argue non-consent because women in relationships are at an increased risk of rape.

In T3 it appeared that no s.41 application was made. The parties in this trial met online and had not met in person before the assault, therefore the sexual history evidence stemmed from digital communications. Due to the defendant's deception about who he was, at the time of the assault the victim-survivor was unaware that the man in her house was the same person she had been talking to via digital media. The defence used the flirtatious exchanges to portray the victim-survivor as 'promiscuous', including by misrepresenting the content of a redacted image to such an extent that the judge intervened to ensure the jury was not misled (see below). This makes it difficult to separate out the flirting from the sexual history in this case (further trial narratives around flirting are discussed in section 4.3.2). For this reason, and because the admitted deception in this case meant that the flirting had no bearing on the defendant's reasonable belief, all aspects of the victim-survivor's sexual behaviour related to consent, and so are discussed together here.

In cross-examination of the victim-survivor, the defence used digital evidence (a combination of phone records and WhatsApp messages) to demonstrate a flirtatious exchange between the victim-survivor and the defendant:

EXTRACT 4f

Defence	It becomes a bit flirty.
Victim-survivor	Yes.
Defence	[You said you were laying naked on your bed].
Victim-survivor	I don't recall saying that, no. (T3)

This questioning positioned the victim-survivor as the instigator of sexual behaviour. The defence then asked how the exchange of photos came about:

EXTRACT 4g

Defence	[Because we can see you send them after the conversation].
Victim-survivor	Yes.
Defence	[Photos of your own choosing?]
Victim-survivor	Yes. (T3)

The defence clearly highlighted the victim-survivor's agency in the exchange of photos through the clarification in the above excerpt. The questioning continued in this vein:

EXTRACT 4h

Defence	[Moving on to [page number]. You would agree there was a discussion regarding photos, you initiate a conversation about the size of your breasts]?
Victim-survivor	Yes. (T3)

The above extract shows how the defence again highlighted the victim-survivor's agency in the flirtation and positioned her as the instigator. It continued:

EXTRACT 4i

Defence	[[page number X of the bundle], another photo shared from [defendant] to you]
Victim-survivor	Yes.
Defence	[Then you say 'I'm sure you've had enough photos of me'].
Victim-survivor	Yes.
Defence	[Then there's another photo of you].
Victim-survivor	Yes.

Defence	That you deliberately chose to send to him?
Victim-survivor	Yes. (T3)

This questioning positioned the victim-survivor as the agentive sexual provocateur. First the defence barrister suggested that during a phone call she told the defendant she was nude and then that she had initiated a conversation about her breasts, both of which place her as instigator. In two places the defence highlighted the victim-survivor's agency in sending the images: "[Photos of your own choosing?]" and "That you deliberately chose to send to him". Furthermore, in pointing out that the victim-survivor said "'I'm sure you've had enough photos of me'" and shortly thereafter sent another image of herself, the defence barrister drew on the notion of 'token resistance' (see section 4.3.1).

In discussing the photographs, the defence barrister never described the content of the defendant's images, but he did describe what the victim-survivor sent:

EXTRACT 4j

Defence	[…you say 'I would send you a pic of my butt but I don't want anyone seeing it', then you send a photo, which is redacted, of your semi-naked backside, a close-up].
Victim-survivor	Yes.
Defence	[A little while later, he says he hopes you're thinking about the massage, you say 'indeed I am'. Now, you would agree this is in the context of a fairly explicit exchange]?
Victim-survivor	Yes. (T3)

After a further two questions about the massage the judge sent the jury out while she intervened with regards to the defence's description in the above example:

EXTRACT 4k

Judge	Sorry to interrupt. [I'm concerned about the way this photo has been described, it's not anatomically graphic. It was sent in response to a penis photo so you need to put it into context, no implying a provocative first move on [victim-survivor's] part. Secondly, it was not in your defence

	statement that you would take this line of questioning, was it?]
Defence	No.
Judge	I would expect it to be. [Can you help me see where you're going with this?]
Defence	Not much further. [It's just to show she went back to explicit messaging…]
Judge	[Are you saying she thought the massage would be sexual?]
Defence	No.
Judge	That's the impression you're giving…
Defence	[It's just positioning that there was exaggerated sexual fantasy]
Judge	[… I wonder whether you find, [prosecution], that you want to show the intimate images? I'm keen the jury understand the context but don't necessarily want to show them the image of the penis, but perhaps you want to make it clear? It's the sort of thing you'd see on a beach in Brazil].
Prosecution	Yes […].
Judge	[I think it's important the jury understand].
Prosecution	They may think it's worse than it is.
Judge	Exactly. That's what I'm worried about. I don't want them speculating. [What's important is that the jury don't have an inaccurate impression of what's in those images].
Defence	I think it's best dealt with in re-examination.
Judge	[Yes. I'm happy on the basis that you said you're not going much further]. (T3)

During this intervention the judge expressed her surprise at the line of questioning because it was not in the defence statement, which suggests that no s.41 application had been made in relation to this evidence. This is even more surprising and seemingly inappropriate considering that the primary issue in this case is not one of consent because the argument from the defence was that the actions never happened at all. It is therefore difficult to see why this evidence would be relevant. The judge's intervention was reassuring, but because it was the line of questioning that was unexpected rather than the photo (which would have been in the evidence bundle provided prior to trial), she could have gone further at an earlier stage and

not allowed the photo evidence to be adduced in the first place. This also raises the question of where the line should be drawn as to what *counts* as sexual history evidence, because evidence about victim-survivors sexual character aside from physical sexual encounters is often used to the detriment of victim-survivors with no clear probative value other than to encourage the jury to make negative moral judgements about the victim-survivor's character (Kelly et al., 2006; Burman, 2009; McGlynn, 2017).

After the judge's intervention, the defence immediately moved on from that line of questioning, which suggests he may have been purposely pushing the boundaries. It is a noted tactic that barristers will pursue a line of questioning they know to be inappropriate or irrelevant until the judge intervenes (Darbyshire, 2011; Smith, 2018). It also highlights the importance of robust judicial intervention and management of such evidence. The defence did not directly relate the messages to consent, and their overall argument was not about consent because they asserted that no sexual touching took place. The tactic here seemed to be building up a picture of the victim-survivor based on rape myths irrelevant to the defence argument, knowing the likely influence on the jury. That is, the defence had been allowed to portray the victim-survivor as being sexually experienced (the implication being that she would be more likely to have consented), which cast her as less credible to the jury, using an argument that is irrelevant to their actual defence. This reflects McGlynn's (2018) argument that sexual behaviour is likely judged according to 'moral credibility', rather than truthfulness. Furthermore, Redmayne (2003) has posited that sexual history evidence should in fact be used to argue that consent is less likely, rather than more likely, because women in relationships and women who have a higher number of sexual partners are more likely to experience sexual victimisation. Additionally, research has shown that women with more extensive sexual experience are least likely to define something as rape and no more likely to make a false allegation (Flowe et al., 2007).

In establishing the chronology of contact between the parties and the communication platforms used, the defence established agency with the victim-survivor making the digital 'first move':

EXTRACT 4l

Defence	And on this particular site, if there's a match, the female is required to send the first message?
Defendant	Yes. (T3)

This is completely irrelevant to consent because consent is specific to each act. More significantly, the victim-survivor was expressing interest in a persona invented by the defendant, not in the defendant himself. Indeed, as the defence argument was that no sexual contact had even occurred, there is no issue of consent for this to be relevant for. Baroness Kennedy expressed concern about the impact of dating apps on the perception of women at trial, suggesting that judges and juries often assume women who use such apps "would have sex with anyone" (Gibb and Ames, 2018). Indeed, since the time of these observations the CPS has introduced new guidelines for rape prosecutions that specifically address such concerns. These updated guidelines clarify for prosecutors that the use of dating apps cannot be taken to imply consent (CPS, 2020). In T3, the allusion to such rape myths appears to be a tactic of misdirection. By playing into the myth that women imply consent to sex through their actions (Burgin and Powell, 2019), such as sending the first message on a dating app or sending a photograph of themselves, defence counsel may hope that this portrayal of the victim-survivor as provocative may damage the prosecution's case. Indeed, barristers in Carline and Gunby's (2011) study noted how easily consent can be established through a focus on irrelevant aspects of the victim-survivor's behaviour prior to the rape or assault.

There has been some debate in other jurisdictions as to whether digital evidence should be covered by so-called 'rape shield' laws (Sweeny and Slack, 2017). In E&W, s.41 does cover evidence obtained from digital devices (CPS, 2019), and the example from T3 demonstrates why this is important. What T3 also demonstrates, though, is that a wider discussion and consideration of s.41 with specific thought to digital evidence is required. This is because digital evidence is often assumed to be neutral, however as Dodge (2018) argued, it is not: it is open to interpretation and can be manipulated to fit competing narratives at trial (see also Hlavka and Mulla, 2018). Consideration must therefore be given as to whether references to

sexual history contained within digital communications are given as much scrutiny as, for example, verbal evidence in investigations and s.41 hearings.

It is important to note that regardless of whether or not rulings were made in the cases discussed in this section, the findings feed into the wider discussion of the relevance of sexual history evidence and the efficacy of s.41. If rulings were made in the problematic examples discussed above, then either the evidence adduced was deemed relevant and allowed or the evidence was not deemed relevant but was adduced without challenge anyway, both of which show the inefficacy of s.41. If the evidence was not the subject of a s.41 application, that too signifies inefficacy. It seems clear, then, that s.41 does not work as intended and that reform is necessary, and this is discussed further in section 8.3.2.

4.2.1.1 The use of sexual history of victim-survivors' mothers

The sexual history of other witnesses in rape trials is not protected by s.41. However, my observations in the two trials involving child sex offences (one with a child victim-survivor, one a historic case with two adult victim-survivors) indicate that the sexual history of the mothers is used to undermine the credibility of the family as a whole, and as such undermines the victim-survivors.

In T5, the mother of the child victim-survivor was subjected to intrusive questioning about her lifestyle and parenting skills, seemingly to undermine her credibility and bolster the narrative of her as vindictive (see section 6.3.1.1). In addition, there was a question regarding her sexual history with the defendant, where the question was worded in such a way as to suggest casual sex, drawing on middle-class ideals of respectability which suggest women who have sex outside of relationships are 'promiscuous' (see section 6.2 for classed narratives of respectability).

EXTRACT 4m

Defence	You broke up, then some time later he came round, you end up in bed together and that's when [youngest son] was created.
Mother	I don't remember, maybe. (T5)

Whilst on its own this question may not seem inflammatory, it was set within a context of questions that suggested the witness had involvement with social services and portrayed her as a 'benefit cheat', drawing on classed narratives of 'single mothers' (see section 6.2.3). Therefore, the use of this mother's sexual history, which has no relevance as to whether or not the defendant abused her child, was used to undermine her credibility and, by proxy, the credibility of her son.

Similarly, classed narratives positioned the family in T6 as not conforming to ideals of respectability. The mother's sexual relationship with the defendant was referred to on multiple occasions. The defence insinuated that the daughters were aware of the mother's sexual habits with the defendant and had used that to bolster their 'invented' allegations. For example, the defence drew attention to the sexual relationship between the mother and the defendant:

EXTRACT 4n

Defence	[Did you do sexual acts on the bus?]
Mother	Yes
Defence	Where were your daughters when that happened?
Mother	9 out of 10 times it was a double decker so we would be upstairs.
…	
Defence	Would it be sexual intercourse?
Mother	Yes. (T6)

The defence later raised this in relation to the victim-survivors:

EXTRACT 4o

Defence	They were young teenagers at the time?
Mother	I can't remember.
Defence	Would you agree you'd talk to them about the affair?
Mother	Now and again, not very often.
Defence	Did you tell them about sexual things?
Mother	No.
Defence	I suggest you told them you had sex on the bus.
Mother	No.

Defence	Were they aware you had sex on the bus?
Mother	I don't know if they were or not.
Defence	No more questions. (T6)

These examples show that with regards to child sexual offences, victim-survivors' credibility can not only be undermined through adducing evidence relating to their own sexual history, but also by that of their mothers. This is because women have historically been positioned as untrustworthy, particularly with regards to their sexual behaviour (Phipps, 2009). The gendered cultural narratives regarding the untrustworthiness of women are discussed further in section 6.3.1. The use of mothers' sexual history in child sexual offences trials does not appear to be an area previously explored in the literature and is certainly an area that warrants further investigation.

4.2.2 Vitiated consent through deception

In T3, the defendant pretended to be two different people, one of which was a masseur sent to the victim-survivor's home by the other person the defendant had been pretending to be. On the second count of sexual assault, the defendant had touched the victim-survivor's breasts during the massage. The victim-survivor said she thought it strange but acquiesced because she thought it was part of a professional massage. Whilst it was the defence's case that this touching had not happened, they argued that if the jury decided it *had* happened, the victim-survivor had consented in her acquiescence. This meant the question of consent on this count was about whether the jury believed the victim-survivor had been sufficiently deceived so as to remove her freedom to consent. The defence therefore argued that the victim-survivor knew it was not a professional massage, thus if the jury believed the defendant had touched her breasts (it was their case that he did not) the victim-survivor had consented to the touching. The jury was therefore directed as follows:

> EXTRACT 4p
>
> "[the touching of her breasts she accepted assuming it was a proper part of the massage… it is up to you to decide whether she was deceived. Defence say it was clearly a friend, prosecution say it was clearly a professional. It will be for you to decide on the extent of the deception about the appointment, you can then

decide whether such deception removed her freedom of choice to consent]" (Judge, T3)

During cross-examination of the victim-survivor, the defence had specifically asked about the victim-survivor's expectation of the massage:

EXTRACT 4q

Defence	[Did he say it would be a professional massage?]
Victim-survivor	Yes, definitely.
Defence	I suggest he never said it would be a paid professional.
Victim-survivor	[He said he knew a qualified person, that he was very nice and professional]. That's exactly what he said. (T3).

This questioning came directly after the defence had cross-examined the victim-survivor about sexualised messages between her and the defendant, and just before the judge intervened regarding the misleading depiction of those messages by the defence (see section 4.2.1.1). The questions were therefore within the context of painting the victim-survivor as promiscuous and, as the judge pointed out, appeared to be creating the impression that the victim-survivor was expecting a sexual massage (see extract 4k). The victim-survivor was clear in subsequent testimony that she thought it was to be a professional massage:

EXTRACT 4r

Defence	[You say he massaged your breasts firmly].
Victim-survivor	Yes.
Defence	You didn't think at that stage it was-
Victim-survivor	I thought it was odd [I've never had a full body massage before, I didn't know if that was included].
…	
Defence	Then you let the massage continue?
Victim-survivor	Yes, like I said, I wasn't sure. (T3)

The victim-survivor pre-empted the defence's question here which enabled her to give a clear statement without her answer being framed by the defence barrister's words. Earlier in the cross-examination the defence attempted to establish that the victim-survivor had reason to

suspect the defendant was not a professional masseur and in doing so openly called her behaviour stupid:

EXTRACT 4s

Defence	You didn't ask for ID?
Victim-survivor	No.
Defence	You didn't ask for a card?
Victim-survivor	No.
Defence	Your explanation [for saying to [friend] that you did ask was that] you thought you had been stupid.
Victim-survivor	I thought ***he*** would think that.
Defence	Do you agree you had been a little bit stupid?
Victim-survivor	I was worried [friend] would think so. (T3)

Whilst this line of questioning was arguably relevant to the victim-survivor's belief that the defendant was a professional, and therefore to her freedom to consent, it seems unnecessary and irrelevant to refer to her actions as stupid. By framing the victim-survivor's actions as reckless, the defence was arguably relying on victim-blaming narratives. The extract began with what Thornborrow (2013) calls 'blame-implicative' questioning, that is, questioning that positions the victim-survivor as wholly or partially responsible for the actions of the defendant.

Whilst this excerpt was not directly about consent, it was maintaining a focus on the victim-survivor's agency in an attempt to obscure the defendant's acts of admitted deception. This excerpt positioned the victim-survivor as in some part responsible for letting the defendant into her home. This draws on victim-blaming attitudes that are prevalent in our society by focusing on what the victim-survivor 'could' or 'should' have done to protect herself, rather than tackling the predatory, violent behaviour of men. This framing serves as a tool for downplaying the seriousness of the defendant's actions. The phrasing of the questions positioned the victim-survivor's agency at the forefront and thus obscured the agency of the defendant who intentionally deceived her by pretending to be not one but two fictitious characters. In his closing remarks, the defence linked the victim-blaming questioning about the victim-survivor's pre-assault behaviour to the issue of vitiated consent:

EXTRACT 4t

> "… just how naïve [victim-survivor] was. [No ID, no massage table, massage not happening in the living room or the conservatory], so at what point did [victim-survivor] fail to understand that this was not a professional massage?" (Defence, T3).

The implication here is that the victim-survivor thought it was a professional massage because she had been "naïve" and "stupid" and this was why she thought the defendant was a professional masseur, which deflected from and obscured that the defendant had engaged in a purposeful drawn-out deception on multiple levels.

4.2.3 Victim-survivors' capacity to consent

Alcohol intoxication often plays a prominent role in rape cases (HMCPSI, 2007; Lovett and Horvath, 2009; Hester, 2013; MOPAC, 2019). My sample, however, included only two trials with mention of alcohol. In T1, alcohol played a prominent role in the narrative about capacity to consent. Additionally, victim-survivors' alcohol consumption was used to form classed and gendered narratives about 'respectable' sexualities in both T1 and T4 (see section 6.2.2). The discussion here will focus on T1 and the capacity to consent, the focus of which for the jury was clearly stated by the judge:

EXTRACT 4u

> "Consent is the issue. Drunken consent is still consent… A regretted drunken consent is not non-consent." (Judge, T1)

In T1 both alleged rapes took place after the victim-survivor and defendant had been out drinking together. There was therefore a lot of questioning focused on alcohol consumption in order to determine the level of intoxication of both the victim-survivor and the defendant. The prosecution's case was that the victim-survivor was passed out asleep after consuming large amounts of alcohol and therefore had no capacity to consent:

EXTRACT 4v

> "This message is significant: 'How did I end up without clothes on?'. Her concerns are clear. [[Victim-survivor] says she challenged him the morning after, the defendant says she didn't. Reasonable people would talk about consensual

sex, therefore it is significant that he did not tell her about it.] She said 'I really hope we didn't have sex'. [That is clear that she didn't want to, she didn't want it to happen.] The defendant says that it stopped because they both decided. The Crown is saying no, something happened that meant it stopped, she woke up. She cannot consent when asleep, she was unconscious from sleep. The Crown says that is why he was scared to tell her about it." (Prosecution, T1)

Whereas the defence's case was that the victim-survivor was not as drunk as she claimed, suggesting she was not indeed asleep, and so had consented to sexual intercourse with the defendant:

EXTRACT 4w

"[Victim] says she was sooooo drunk that she doesn't remember, that she was asleep, comatose, drifting in and out of consciousness. Yet the back calculation on alcohol shows she was not so drunk that she would be comatose." (Defence, T1)

Here the defence used scientific evidence to support his argument that the victim-survivor was not as drunk as she claimed and in doing so had distanced her from the prosecution's portrayal of her as unconscious at the time of the initiation of the alleged offence. He then used the victim-survivor's mother's testimony to bolster that argument: "You heard from her mother that she was fine, not drunk" (Defence, T1). She had not in fact testified as such:

EXTRACT 4x

Judge	You spoke to her the night before?
Mother	Yes, several times. Once before midnight, again after 2am, she called to say goodnight, cos that's the kind of relationship we had.
Judge	And she sounded fine?
Mother	Yes!
Defence	You had no difficulty understanding her?
Mother	No! (T1)

The victim-survivor's mother had said she sounded fine, but she had not said that she was not drunk. The defence had therefore given a certainty of meaning to the mother's words that was not there. The mother having no difficulty understanding her daughter does not equate to the

daughter not being drunk. Furthermore, in using this to bolster his argument, he ignored the testimony of two other witnesses who testified that the victim-survivor was drunk and falling asleep on the way home, whereas the mother had spoken to the victim-survivor on the phone, she had not seen her. This practice is what Rosulek (2015) terms 'silencing' and 'de-emphasising', whereby a barrister gives very little or no attention to inconvenient evidence that contests the argument they are putting forth in their closing remarks.

In her summing-up of the evidence, the judge directed the jury to read a specific section of the digital bundle carefully and then drew their attention to one message in particular sent from victim-survivor to defendant: "She says 'I know I have a drink problem, I get fucked all the time now'" (Judge, T1). It is unclear what the relevance of this piece of evidence could have been to the issues the jury was to decide about. The statement the judge made would not help the jury in deciding whether or not there was consent. That this message was included in the evidence was questionable enough, but for the judge to directly draw the jury's attention to it as a point to consider regarding the credibility of her account seems to be drawing directly on narratives that position women who have consumed alcohol as unreliable and incredible. As is discussed in Chapter Six, much of the questioning around this victim-survivor's alcohol consumption drew on gendered and classed cultural narratives of respectability, and thus helped to undermine her credibility.

The assertion of the defence in T1, that the victim-survivor was not raped and instead had consensual sex whilst drunk which she later regretted, is not unusual. It reflects a common rape myth, that women often lie about rape after regretful sex. Indeed, previous court observation studies have shown this defence argument is not uncommon (Temkin et al. 2016; Lees 1996). Research has found that in cases involving intoxication jurors are likely to raise this myth during their deliberations (Gunby et al., 2012). Defence barristers are of course entitled to make this argument, and jurors entitled to consider it, however the notion itself draws on problematic gendered narratives firmly shaped by a long history of scrutinising women's sexuality. This narrative is valuable to defence barristers because of the widespread belief that women lie about rape. Furthermore, focusing on the victim-survivor's intoxication

draws on victim-blaming attitudes. This is because there is a tendency for people to attribute more blame and responsibility to victim-survivors who were voluntarily intoxicated when they were raped (Schuller and Wall, 1998; ICM, 2005; Finch and Munro, 2005; Finch and Munro, 2007; Gunby et al. 2012). All witnesses in the trial were questioned by both the defence and prosecution about the victim-survivor's level of intoxication. There was far less focus on the defendant's level of intoxication, which reflects the double standard previously noted by Finch and Munro (2005) whereby whilst intoxicated victim-survivors are viewed as more blameworthy, intoxicated perpetrators are viewed as less blameworthy (Grubb and Turner, 2012).

The above extracts also provide an avenue to offer a critique of the evidential presumptions. Had the prosecution been able to convince the jury that the victim-survivor was asleep, an evidential presumption would mean the burden of proof was shifted and the defence would have some responsibility to show that the victim-survivor had indeed consented.

The defence deflected from this with the argument that the back calculation of blood alcohol levels proved the victim-survivor would not have been unconscious from alcohol. The prosecution had not suggested that she was. The prosecution's position was that she had drunk a lot of alcohol and they had been out very late, therefore her tiredness had made it more difficult to rouse from sleep when the defendant began sexual activity. The defence therefore used the alcohol to distract from the issue of sleep meaning there was no capacity for consent:

> EXTRACT 4y
>
> "Moving on to the victim's claims that she was asleep. What she describes is not being asleep, she says comatose, drifting, frozen. These are not words indicative of being asleep." (Defence, T1)

The defence ignored that colloquial uses of words do not always match their literal or original meanings and stated that 'drifting' is not congruent with sleeping, despite that fact that it is commonly associated with states of sleep/sleepiness. He presented the victim-survivor's consciousness as binary (either she was or she was not conscious) and fixed, ignoring that

that it was quite possible for the victim-survivor to have been in various states of consciousness throughout the incident. He further ignored that 'freezing' is a common response to rape (see section 4.3.1.1 for more on 'freezing'). The prosecution missed opportunities to push back against this tactic, for example that the text exchanges appeared to support a lack of consciousness when sexual activity took place. Previous interviews with barristers have demonstrated that there is a confusion about and reluctance to engage with the presumptions outlined in s.75 of the SOA (Carline and Gunby, 2011). My observations support this, as the presumptions were not mentioned in court despite their apparent relevance and the prosecution barrister missed an opportunity to use them by allowing the defence to detract from the evidence that the victim-survivor was asleep, not simply unconscious from alcohol consumption.

4.3 Myths about the defendant's reasonable belief in consent

The law on consent in E&W says that there must be a reasonable belief in consent. This standard allows defence barristers to argue that even where a woman says she did not consent, the defendant 'reasonably' believed that she did. To demonstrate a defendant's reasonable belief, defence barristers in my observations used resistance narratives and narratives that focused on the victim-survivor's pre-assault behaviour. Agency was a clear theme throughout these narratives. Aspects of pre-assault behaviour that came under scrutiny were flirting and variations of the 'coffee myth', which wrongly suggests that consent is implied when a woman offers or accepts an invitation to go inside (for coffee) with a man after a night out.

4.3.1 Victim-survivors' resistance

Resistance narratives formed part of the overarching narrative defence barristers used to demonstrate defendants' reasonable belief in consent through drawing on the misconception that women should and always do actively resist rape. The narratives employed by defence counsel differed according to the level of resistance a victim-survivor had made, and so the discussion is split between those who made little or no resistance and those who made active resistance.

4.3.1.1 Making little or no resistance

Victim-survivors making little or no resistance was used by defence barristers to argue that the defendants had reasonable belief in consent. This narrative was employed in T1, T3 and T4. Scholars have previously noted the linguistic constructions of agency and non-agency in rape trial narratives. For example, Susan Ehrlich's (2001) concept of a grammar of non-agency identifies ways in which defendants use a "variety of linguistic resources that all work to represent him as innocent of unlawful sexual acts of aggression" (p.38). The use of particular grammatical constructions helps defendants mitigate, diffuse, and obscure their agency, as well as relocate agentive acts to the victim-survivors (Coates, Bavelas and Gibson, 1994; Ehrlich, 2001). Put another way, the linguistic choices of defendants and their barristers wholly or partially remove agency from the defendant and place it with the victim-survivor, thus implying a reasonable belief in consent. The following example from T1 exemplifies this:

EXTRACT 4z

Defence	You put a film on, then what happens?
Defendant	We lay on the bed, flirting, full on kissing.
Defence	Were you both fully clothed?
Defendant	Yeah.
Defence	Then what?
Defendant	She was touching me and I was touching her back
Defence	Over or under clothes?
Defendant	Over at first.
Defence	How did it progress?
…	
Defendant	More kissing, then we took our clothes off.
Judge	Who took whose clothes off?
Defendant	We took our own clothes off.
Defence	Did you talk at all?
Defendant	We were talking, yes. (T1)

In this exchange the defendant framed all actions as mutual and the only time he said "I" was as a response to the victim-survivor's actions: "She was touching me and I was touching her back". Through this exchange he placed more agency with the victim-survivor's actions, thus distancing himself from the instigation of sexual activity. This shifted the focus onto the victim-

survivor's behaviour. The next example from the same part of the trial illustrates how agentless passives were used by the defence barrister to form a grammar of non-agency for the defendant:

EXTRACT 4aa

Defence	Clothing came off, her underwear was removed but she kept her bra on?
Defendant	Yeah. (T1)

The only agency attribution in this example was placed with the victim-survivor. Agency was placed with the defendant only where it benefited his overall narrative of reasonable belief in consent, the rest of the time a grammar of non-agency was employed. Thus, as the questioning continued the defendant did accept agency where it strengthened his claim to innocence:

EXTRACT 4ab

Defence	Did you put your penis in her vagina?
Defendant	Yes.
Defence	How long did it last?
Defendant	Not that long.
Defence	Why did it stop?
Defendant	She said she didn't want to do it.
Defence	So you stopped?
Defendant	Yes. (T1)

Here the defendant acknowledged verbal resistance from the victim-survivor (although the prosecution's case was that the victim-survivor was asleep so could not have consented) and accepted agency (at least in part) in stopping. By accepting his agency at this point, the defendant distanced himself from 'rape' and 'rapist'. This was in contrast to the prosecution's representation:

EXTRACT 4ac

Prosecution	You said she said, 'No not now', were you having sex when she said that?
Defendant	Yeah.

Prosecution	I suggest you entered her while she was asleep, so you did not get her consent.
Defendant	No, never.
Prosecution	She woke up after you had penetrated her and that's when she said, 'No not now'.
Defendant	No. (T1)

Here the prosecution presented the victim-survivor as passive through sleep and making the verbal resistance when she woke. The victim-survivor was not questioned about this verbal resistance as she had not remembered saying it and so it was not in her evidence. This extract related to the first alleged rape, whereas the victim-survivor did recall making resistance in the second alleged rape, which she detailed in her ABE:

EXTRACT 4ad

Police	Did you make any verbal resistance?
Victim-survivor	I said 'Get off' when he kept pulling my hand to him…I don't remember him saying anything.
…	
Police	So you said stop 3 times?
Victim-survivor	Yeah. (ABE interview, T1)

There was no cross-examination on this because the victim-survivor said she could no longer remember. The prosecution could have raised this part of her ABE in re-examination in order to clarify, however, whilst he did ask about the defendant pulling her hand towards him, he fell short of asking about her pulling it away. Although it was arguably implied in the victim-survivor saying it happened "several times" and saying "I didn't want it to happen", it was not made clear at this point that she had actively resisted by repeatedly pulling her hand away.

In contrast, the cross-examination of the victim-survivors in T3 and T4 drew directly on the misconception that women should and do always actively resist. As in T1, the defence in T3 used a grammar of agency to bring scrutiny to the victim-survivor's actions through saying that she "let" it continue, again the connotation being that it was her responsibility to stop it through active resistance:

EXTRACT 4ae

Defence […] then you let the massage continue.
Victim-survivor Yes, like I said, I wasn't sure […] (T3)

This framing reflected the 'inferred consent' narrative Ehrlich (2015) found in a Canadian context, where the victim-survivor's passivity was taken to imply consent. This stance completely ignores that it is common for victim-survivors to freeze during a sexual assault (Galliano et al., 1993; Rothschild, 2000; Nurius et al., 2004; Heidi et al., 2005). Indeed, this is precisely how the victim-survivor had described it in her ABE and reiterated during cross-examination:

EXTRACT 4af

"It was almost like I sort of froze, thinking, 'Is this normal? No. What should I do?' so I just stayed there and let him finish." (ABE interview, T3)

The defence explicitly framed the victim-survivor's response as abnormal in his closing speech:

EXTRACT 4ag

"[Her Honour has directed you about not making assumptions about reactions, but in this case you may…] you may find it somewhat surprising as to why she took no action at all" (Defence, T3)

Whilst the defence acknowledged the judge's 'myth-busting' direction, he went on to explain to the jury that this case was an exception; a tactic also noted by Smith (2018). He bolstered this claim through continuing to frame the victim-survivor's post-assault behaviour as suspicious, which is discussed further in section 5.2. The defence's assertions drew on rational ideals that suggest there is a 'normal' way to respond to rape, when in fact it is well established that there is no such thing (Rothschild, 2000; Lodrick 2007). Furthermore, by placing agency with the victim-survivors defence barristers are able to frame a lack of resistance as an indicator of consent. The implicit argument being that if a victim-survivor did not resist, it would be reasonable for a defendant to believe she was consenting. Indeed, that argument was explicitly made by defence counsel in T4, as is later shown in extract 4aj. Similarly to T3,

defence counsel in T4 pointed out opportunities where the victim-survivor could have made resistance and additionally drew on the absence of force to bolster his narrative:

EXTRACT 4ah

Defence	You didn't say that you didn't want to?
Victim-survivor	No.
Defence	He didn't force you?
Victim-survivor	No.
Defence	To be clear, he undid his trousers, not you?
Victim-survivor	Yeah.
Defence	[You pulled into the layby… Why didn't you just get out of the car then?]
Victim-survivor	Where would I go? In a field?
Defence	[There was a lorry in the layby…]
Victim-survivor	Yeah.
Defence	[Did you get out of the car, scream, bang on the door of the lorry?]
Victim-survivor	No, I didn't. (T4)

The defendant in T4 had multiple convictions related to domestic abuse against the victim-survivor, including some that he pleaded guilty to at the outset of the trial. The prosecution's case was that the victim-survivor did not freely consent, and the defendant did not reasonably believe that she was consenting, therefore the consent narratives in this trial centered on coercion, compliance, and resistance. Later in the cross-examination the defence barrister used the victim-survivor's agentive acts and the absence of verbal resistance to suggest consent:

EXTRACT 4ai

Defence	You were on top.
Victim-survivor	Yeah.
Defence	How did you get in that position?
Victim-survivor	Just rolling about.
Judge	You got on top of him?
Victim-survivor	Yeah.
Defence	[Knees either side?]
Victim-survivor	Yeah.

Defence	Was it something that just happened?
Victim-survivor	Yeah.
Defence	[A follow on from touching each other sexually?]
Victim-survivor	Yeah.
Defence	[You didn't tell [defendant] at any time you didn't want to do that?]
Victim-survivor	No, I didn't. (T4)

The implicit suggestion here is that rape can only happen in certain sexual positions, that 'woman on top' cannot be rape, and was summed up clearly in defence counsel's closing speech:

> EXTRACT 4aj
>
> "[there was no indication from her of a lack of willingness on her part. He didn't have to repeat what he said, he didn't have to lean over … 'It just happened', she says, 'We touched each other sexually, I took my own clothes off, had sex without any discussion, I just went on top, rolling around and I ended up on top'. She did that unprompted, without being asked, no force or threat.] Dare I say, that woman on top during sex may not be what you imagine when the word rape is mentioned…you may think that suggests an element of control for the woman…wouldn't it be entirely reasonable for [defendant] to presume consent?" (Defence, T4)

This assertion completely obscured the power dynamics involved in intimate partner violence. Men who are violent towards their partners often do not need to resort to violence or threat in order to obtain sex because the underlying pattern of abuse works as an effective tool of coercion (Kelly, 1987; Hamby and Koss, 2003). Becoming an active participant in this context offers women a way to manage risk (Dowds, 2020). That women can be raped even as an active participant demonstrates the problematic nature of defence assertions that a victim-survivor's limited resistance can be taken to prove a defendant's reasonable belief in consent. In this case, the jury appeared to recognise this because they found the defendant guilty, thereby rejecting the defence's apparent assertion that rape can only happen in 'submissive' sex positions. That is, however, not to say that the law in this area is easily applied by jurors or even clearly explained by judges (see Dowds, 2020 for a discussion).

4.3.1.2 Making active resistance

In T2, the victim-survivor made physical and verbal resistance when the defendant (her long-term boyfriend) instigated sex. Her physical and verbal resistance was laid out in minute detail through the prosecution's questioning and in the statement she gave to police. The defence barrister cross-examined extensively about the exact timing of when the victim-survivor verbally resisted in relation to when the defendant penetrated her:

EXTRACT 4ak

Defence	[You say you told him 'no get off me', it appears to me that you said it before he had actually penetrated you]
Victim-survivor	I told him to get off me.
Defence	Look at your statement, all the words that you say you said happen before he penetrated you.
Victim-survivor	No.
Judge	<Re-worded defence's question>
Victim-survivor	It says I ***kept*** telling him. (T2)

In an attempt to demonstrate her point, the defence barrister then read out part of the victim-survivor's police statement where she described what happened, then continued her argument:

EXTRACT 4al

Defence	So in your statement, all the words are before.
Victim-survivor	It says I kept telling him.
Defence	But that was before.
Victim-survivor	[It says I kept telling him].
Defence	Then he replied.
Victim-survivor	Yeah and I kept telling him throughout.
Defence	Well that is a matter for the jury.
Judge	[You have to put it in the whole context].
Defence	<Reads the whole section of the statement>. [You felt him get on top, then he tried to put his penis in your vagina.] All of your words in your statement come before that part where you say he put his penis in your vagina.
Victim-survivor	Yes.
Defence	I say it was consensual. Do you agree or disagree?
Victim-survivor	Disagree. (T2)

Here the defence was arguing that saying 'no' *before* the penetration took place was not an indication of non-consent. Through this questioning, the defence implied that the defendant could have reasonably believed the victim-survivor was consenting because she did not say 'no' *after* he penetrated her, which is plainly wrong and a worrying assertion. Accordingly, the judge made clear in his summing-up that the timing of the verbal resistance does not need to be after penetration. That said, it is unclear why such a line of questioning was allowed to continue when it was irrelevant and arguably misleading.

Resistance is not required or common in rape, but is seen as an element that bolsters a victim-survivor's story. This is clearly demonstrated in the way prosecution use resistance narratives to strengthen their cases (see section 4.3.1.3). It therefore becomes beneficial for the defence to undermine any claims of resistance, as in the extract above. This narrative drew on the persistent myth that women often offer token resistance to sex (Edwards, et al., 2011), i.e. 'when women say no they really mean yes', which leads to this notion of not having resisted *enough* for it to be non-consensual. Burgin (2018) linked the token resistance myth to socio-sexual scripts that form a narrative of 'seduction' whereby upon hearing a woman's 'no' it becomes the man's role to persuade her to have sex and that this constitutes a romantic interaction. This is indeed reflected in the above example, in that the defence had framed the victim-survivor's 'no' as being before penetration and therefore it was not rape, the implication being that the defendant had 'successfully convinced' her to consent. Ehrlich (1998) also noted the influence of token resistance, where she identified ways in which defendants attempt to redefine consent to fit their own narrative. Again, this is precisely what the defence in this example attempted to do in her interrogation of the timing of penetration.

The victim-survivor in T2 had confronted the defendant via digital messaging about him ignoring her resistance. The message extracts are provided and discussed in section 7.4.1, so the following is a brief summary to give context for the current discussion. The victim-survivor used the phrase "you climbed on top of me when I said no" in her challenge to the defendant, which he did not respond to. The prosecution posited that because the defendant did not reply with a denial, he had effectively admitted the victim-survivor's characterisation

was accurate. The defendant therefore claimed that he thought the victim-survivor was talking about “the way [he’d] argue with her and stand over her” (T2). In doing this he undermined the resistance narrative through what Hlavka and Mulla (2018) term the ‘animation’ of digital evidence. That is, digital evidence being made corroborative through the manner in which it is deployed at trial. Digital messaging captures the exact wording used, therefore through the ‘animation’ of digital evidence the prosecution and the defence were able to attribute entirely different meanings to a commonly used colloquial term. In this case, the jury acquitted the defendant and whilst it is not possible to know the reasoning behind the jury’s decision, it is notable that the resistance narrative and the defendant’s reinterpretation of the digital messaging evidence were central to the arguments throughout. Even if the jury did accept the prosecution’s argument with regards to the meaning of “you climbed on top me when I said no”, the not guilty verdict would mean that the verbal resistance of saying ‘no’ was not considered *enough* to count as non-consent, which goes back to the myth of token resistance.

Myths about resistance stem from the ‘real rape’ stereotype that says women who are raped call out for help, try to fight off their attacker and sustain injury as a result. Rape laws in E&W were historically constructed based on this assumption and the assumption that women often make false allegations of rape (Munro, 2010). Whilst there has been a growing awareness among the public that ‘real rape’ does not accurately reflect the most common experiences of rape, these narratives remain persistent. In E&W there is no longer a requirement for a woman to be subjected to force and to verbally or physically resist in order to demonstrate non-consent. Yet research from multiple jurisdictions frequently points to the existence of resistance narratives at rape trials (Ehrlich, 2001; Burgin, 2019; Smith, 2018). Smith and Skinner (2017) found that trial narratives often focused on the resistance of victim-survivors and what they did to remove consent, rather than the steps taken by the defendant to obtain it. Although the English and Welsh model of consent does not require that defendants take steps to ascertain consent, they are required to explain to investigators what steps, if any, they did take (CPS, undated). This leads to juries considering resistance as a factor relevant to consent in their deliberations and to the prosecution’s continued reliance on resistance

narratives (Burgin, 2019; Dowds, 2020). Accordingly, the next sub-section explores prosecution reliance on resistance narratives.

4.3.1.3 Prosecution use of resistance narratives

Although the English and Welsh model of consent means there is no requirement that a victim-survivor make verbal or physical resistance, resistance narratives are commonly employed by prosecution barristers as a way of strengthening their case. In T1, T2 and T3, the prosecution used resistance narratives to bolster their cases because, as outlined above, the victim-survivors did make resistance.

In T4, where in contrast to the other adult cases the victim-survivor did not make resistance, the prosecution questioning sought to justify the absence of active resistance:

EXTRACT 4am

Prosecution	Did you want to give oral sex?
Victim-survivor	No.
Judge	Did you say that?
Victim-survivor	No.
Prosecution	Did you have a choice?
Victim-survivor	[No, I didn't think I did, I just wanted to keep the peace and get away, I would have done anything to get away, I dunno maybe I'm gone in the head].
Prosecution	You say you never said no.
Victim-survivor	No.
Prosecution	Did you think you had a choice?
Victim-survivor	No, I just had to keep the peace so I could get away.
…	
Prosecution	Generally about the sex at [defendant's] flat, did you think you had a choice?
Victim-survivor	No, <crying> I just wanted to keep him happy, it never worked, I just weren't good enough, I'd have done anything for him. (T4)

In this example the judge intervened to ask whether the victim-survivor had voiced her non-consent, which is especially troubling given that she later gives a direction to the jury regarding the difference between reluctant consent and submission. The judge interrupting to ask this

may give the false impression that it is a point salient to the issue of consent. This is because in adversarial legal systems, judges are considered by those involved, including juries, to be impartial referees and are therefore trusted to be balanced (Smith, 2018). Indeed, Carline et al. (2020) found that barristers shared the view that juries give weight to the judge's words.

Whilst there is no obligation on a defendant to have taken steps to ascertain consent (Judicial College, 2019), they are required to explain to police and prosecutors what steps, if any, they did take (CPS <what is consent? doc>, n.d.). Dowds (2020) suggests that this may lead a jury to wrongly conclude there was consent or reasonable belief in consent based on an absence of clear resistance. Relatedly, Smith and Skinner (2017) argued that prosecuting barristers' reliance on resistance narratives draws on the 'real rape' stereotype and as a result legitimates the defence's use of it. Burgin (2019) made a similar argument in an Australian context.

Hovdestad and Renner (2021), however, argue that the prosecution bringing evidence of a victim-survivor's resistance does not constitute a rape myth and should therefore not be seen as problematic. This is because consensual sexual encounters do not usually involve one party resisting it.[12] The absence of resistance, however, cannot be said to indicate consent because it is known that victim-survivors often do not resist. Therefore, when defence barristers point to lack of resistance as justifying a reasonable belief in consent, they are drawing on a rape myth (Hovdestad and Renner, 2021). Hovdestad and Renner further argue that the prosecution bringing evidence of resistance does not legitimate defence arguments that are based on the 'real rape' myth. Prosecutors can therefore correctly argue that acts of resistance are *consistent* with rape and support the allegations, but defence counsel cannot correctly argue that a lack of resistance is consistent with consensual sex and therefore undermines the allegations (Hovdestad and Renner, 2021). It would be right for the defence to rebut the evidence brought by the prosecution, but if they simply point to a lack of resistance as an indicator of consent or reasonable belief then it has no relevance.

[12] Where elements of 'real rape' may appear in consensual sex, such as in BDSM, explicit conversations about boundaries and consent are considered paramount (Pitagora, 2013).

The ease with which the ‘real rape’ stereotype can pervade trial narratives was also evident in the persistence of the stereotype in victim-survivors’ own narratives at trial. My observations show that the ‘real rape’ stereotype remained relevant for women in identifying their experiences. For example, in T2 the victim-survivor twice referenced it when giving her evidence-in-chief:

EXTRACT 4an

Victim-survivor	Well, it was hard to come to terms with [because when you think about rape you normally think about strangers and shouting and screaming]. I only told [friend].
…	
Prosecution	So you were at your mum’s and the relationship is over. You messaged [friend] saying ‘I think I was raped but I’m not sure if it counts, I wasn’t kicking and screaming but I said no the whole time’.
Victim-survivor	Yeah.
Prosecution	[Tell us the thought process about ‘not sure if it counts’]
Victim-survivor	Well because we were in a relationship, and when you think of rape you think of a back alley with some guy you don’t know. (T2)

Similarly, in the above previous extract from T4, when the victim-survivor was questioned to justify her lack of resistance, she gave her explanation but then seemed to second guess herself when she said, “I dunno, maybe I’m gone in the head” (T4). Also of note in T4 is that the victim-survivor had never used the word rape to describe her experiences. As the officer in the case (OIC) stated in her live testimony: “she never said she has been raped. She said she’d had sex under certain conditions because she was in fear of him” (T4). This again demonstrates the difficulty victim-survivors have in reconciling their experiences against the ‘real rape’ stereotype and that this difficulty can in part be attributed to the expectation of resistance.

The resistance narratives discussed in this section overlap with narratives about the victim-survivor’s pre-assault behaviour (such as perceived flirtations; see section 4.3.2) to form narratives of what has been termed ‘inferred consent’ (Ehrlich, 2015) or ‘implied consent’

(Burgin and Flynn, 2019). Cossins (2020) posits that these narratives emerge at trial, even though implied consent forms no part of substantive law in E&W, because the court allows defence counsel to raise the 'moral propriety' of victim-survivors and thus jurors are permitted to scrutinise a victim-survivor's character and behaviour through consideration of extra-legal factors. Jurors are then invited to use their 'common sense' and 'life experience' in deciding their verdict, which amounts to permissive reliance on rape myths and broader cultural narratives to form judgements on victim-survivors' character, behaviour, and morality as a proxy for deciding on consent (Cossins, 2020).

4.3.2 Victim-survivors perceived flirting as sexual provocation

Reasonable belief in consent was also established using references to flirtation between the victim-survivor and defendant. For example, in T1, the victim-survivor was frequently accused of leading the defendant on, both implicitly and explicitly because of apparent flirting:

EXTRACT 4ao

Defence	…You would spend a lot of time together. You would argue a lot. In fact, some people would say that you were like a married couple.
Victim-survivor	No.
…	
Defence	You would cuddle. You would ask him for a cuddle.
Victim-survivor	Yeah like you cuddle your friends, like you cuddle girl friends.
Defence	[Okay. You would cuddle, you would ask him for a cuddle. He had told you that he was in love with you, you were well aware of his feelings and you were desperate not to lose him as a friend].
Victim-survivor	Yes.
Defence	There came a time when he said he didn't want to carry on the friendship.
Victim-survivor	Yes.
Defence	In fact, there was no talk or contact for a time.
Victim-survivor	Yes. (T1)

In the extract above, the defence highlighted the closeness between the victim-survivor and the defendant. The defence put it to her that “you would ask him for a cuddle” positioning her as the instigator of close contact. When her reply clarified it as platonic contact the defence counsel repeated the statement “you would ask him for a cuddle” before directly referencing her awareness of the defendant’s feelings towards her. This also draws on victim-blaming narratives that position women who ‘tease’ men as more culpable for their own rape, i.e. they were ‘asking for it’, and defendants as less culpable (Abrams et al., 2003; Krahé, Temkin and Bieneck, 2007; Fraser, 2015).

As the following extract shows, the defence immediately went on to frame the victim-survivor’s actions as selfish:

EXTRACT 4ap

Defence	[But you didn’t want to lose him, so you initiated contact, knowing that it would hurt him. You contacted him to rekindle the relationship].
Victim-survivor	Friendship.
Defence	[I’m not suggesting it was a sexual relationship. You were at the club, happy to see each other. Is it true that you asked him to go on a date?]
Victim-survivor	No, he asked me.
Defence	But you used the term date when you were speaking about it.
Victim-survivor	Best friends day out.
Defence	Did you use that term?
Victim-survivor	I said it’s a day out just for us.
Defence	He was pleased, he used the term date.
Victim-survivor	*He* did. (T1)

These examples illustrate part of the defence’s overarching narrative that the victim-survivor knew the defendant had feelings for her, selfishly lead him on, had sex with him then regretted it and so lied about rape. The idea that women lie about rape has been embedded in the legal system for hundreds of years (Smith, forthcoming) and is reflected in the persistently common misconception that false allegations of rape are common (see section 6.3.1). The narrative in T1 also drew on the myth that flirting signals consent, which positions women as gatekeepers

to sex. It suggests that had the victim-survivor not encouraged the defendant then the incidents would not have occurred, thereby simultaneously blaming the victim-survivor and excusing the defendant's alleged actions. The idea that women lie about rape after regretful sex is discussed further in section 6.3.1. For now, the discussion will focus on the notion of perceived sexual provocation as establishing a reasonable belief in consent. Scholars have previously noted the linguistic constructions of agency and non-agency in rape trial narratives. In the above excerpt, the defence uses a grammar of agency (Ehrlich 2001) when speaking about the victim-survivor's actions, thereby placing her behaviour at the centre rather than the defendant's.

The defence also drew on the defendant's unrequited feelings for the victim-survivor to garner sympathy (discussed further in section 7.3). The defence positioned the victim-survivor as having power over the defendant, which is in stark contrast to the power dynamics of rape. It draws on the sexist idea that women often lead men on for attention or validation, with some even going so far as to argue that women 'leading men on' constitutes sexual abuse (e.g. Mantyla, 2018). Studies have found increased blame attribution when perceived sexual provocation was involved (see Gravelin, Biernat and Bucher, 2019, for an overview). In particular, studies have shown that women who initiate contact or dates are viewed as more culpable if they are raped and that some men view being 'led on' as a justification for rape (Muehlenhard and Linton, 1987; Muehlenhard, 1988; Muehlenhard and MacNaughton, 1988). These public attitudes remain prevalent (e.g., ICM 2005, End Violence Against Women Coalition [EVAW] 2018), and therefore it can be assumed that some jurors may subscribe to these views. This gives sway to defence narratives that frame victim-survivors as sexual provocateurs. Indeed, McGlynn (2017) points out how these vague references to victim-survivors' sexual character serve to undermine their 'moral credibility', thus positioning them as undeserving of sympathy and minimising the defendant's actions. This narrative was used by the defendant in T1, who gave a conflicting account of who had suggested a date and placed the victim-survivor as the agentive party in flirting and instigating intimate contact:

EXTRACT 4aq

Defence	And there was talk of going on a date?
Defendant	Yeah, she said to me 'If you wouldn't mind, I'd love for you to take me on a date' and I said I'd love to.
Defence	[So you bought her drinks all evening?]
Defendant	Yes.
Defence	[How was she acting towards you in the club?]
Defendant	[Different, she was flirty, always wanting to cuddle me, always wanting to kiss me. Full on kissing like snogging.] (T1)

This drew on the myth that if a woman flirts with a man she must want to have sex with him, and that flirting implies consent for later sexual activity (McGlynn, 2017; Burgin and Flynn 2019). The purpose appears to be to draw on that rape myth to suggest consent, or that the defendant could have reasonably believed there was consent, which is a tactic noted by defence barristers in Carline and Gunby's research (2011). In T1, this tactic was made clear in the defence's closing remarks:

EXTRACT 4ar

> "[You know that they frequently shared a bed together. She knew that he was in love with her, that he was infatuated. You know she knew he broke it off because she couldn't feel the same. You know she got desperate to be back with him, you know she said that she wanted to see if she had sexual feelings for him. You know she was snogging him. You know they were like a couple that night, no flirting with others. You know that.]" (Defence, T1)

This narrative worked together with resistance narratives in this trial (see section 4.3.1) and both narratives relied on the grammar of agency and non-agency to shift focus and blame onto the victim-survivor's actions. The framing of women's everyday behaviour as indicating consent is referred to by Ehrlich (2015) as 'inferred consent' and by Burgin and Flynn (2019) as 'implied consent' (see also Cossins, 2020). In the context of Australian rape trials, Burgin and Flynn (2019) argued that narratives of implied consent function at trial to provide defendants an 'objective' claim to reasonable belief in consent and therefore constitute legally sanctioned victim-blaming.

In T6, the defendant admitted to a sexual relationship with one of the victim-survivors but claimed that it began only after the victim-survivor had turned 16, whereas she claimed it began when she was 15. In the following example the defence highlighted the victim-survivor's consent whilst ignoring the broader context of age of consent violations:

EXTRACT 4as

Defence	… I'm going to suggest that your evidence is that you wanted to kiss and have sex with [defendant].
Victim-survivor1	Yes.
Defence	[So what you told the police is you consented to everything sexual with [defendant].
Victim-survivor1	Yes. (T6)

This narrative serves to excuse or minimise the defendant's behaviour by highlighting the victim-survivor's agency. The historical context of age of consent laws and surrounding discourses shows how this may be a valuable narrative for a defence barrister to draw on. For example, historically men were often excused for statutory rape if they claimed the victim-survivor was promiscuous (Bourke, 2008). By highlighting the sexual agency of this victim-survivor, the defence distanced her from the 'innocence' often attributed to children and ignored that contemporary discourses around age of consent focus on protecting against exploitation (Waites, 2005; Benedet, 2010) rather than protecting 'virginity' (Bourke, 2008). Some research has however indicated that this type of narrative, that which aims to highlight victim-survivor promiscuity in age of consent cases, does not necessarily work in favour of the defendant and may in fact work against them (Horvath and Giner-Sorolla, 2007).

Throughout this trial the defence sought to downplay the defendant's relationship with the victim-survivors' mother:

EXTRACT 4at

Defence	Before he was kicked out, you were not partners, it was just sexual?
Mother	Yeah.
Defence	He wasn't a stepfather?
Mother	He was a stepfather figure. (T6)

This arguably attempted to distance the defendant from cultural narratives of incest and child sexual abuse, ignoring that the defendant had been in a relationship with the mother through the victim-survivors' early teenage years. Narratives of child sexual abuse position the younger party as lacking in agency (Waites, 2005), therefore highlighting the victim-survivor's agency can distance the defendant from that narrative. The narrative in this trial obscured the power dynamics whilst positioning the victim-survivor as a willing participant, and thus minimised the defendant's actions. The above extract also provides another example of victim-survivors' mothers' sexual history being used in trial to undermine the claims and credibility of victim-survivors (see section 4.2.1.1).

4.3.3 Accepting and offering invitations to private spaces

Victim-survivors' pre-assault behaviour was portrayed as an indicator of consent through framing it as sexual provocation, and therefore relied heavily on narratives of agency. As well as narratives about the victim-survivor's sexual behaviour (see section 4.2.1), there were variations on what has become known as the 'coffee myth'. The 'coffee myth' refers to the belief that the acceptance or offering of an invitation to go inside a residence with a man implies a willingness to engage in sexual activity with that man. Whilst this line of thinking did not present exactly as that in the trials observed in this study, there were narratives that were clearly formed on the same premise. These narratives were mainly evident in T1 and T4.

In T1 the defence focused on the victim-survivor's agency in meeting the defendant, and when the defendant answered that it was his suggestion that they go to his house the defence subsequently asked whether the victim-survivor agreed, thus placing the agency with her acceptance of the invitation rather than the defendant's offer:

EXTRACT 4au

Defence	Whose idea was it to meet up that evening?
Defendant	Hers.
Defence	She came to meet you?
Defendant	Yeah.
…	
Defence	Whose idea was it to go back to yours?

Defendant	Mine.
Defence	Did [victim-survivor] agree?
Defendant	Yes.
Defence	When you got back where in the house did you go?
Defendant	My bedroom. (T1)

This plays into the so-called 'coffee myth', which is the assumption that because a woman invites someone in or agrees to go to someone else's, she is agreeing to sex. Drawing on this myth presented an avenue for the defendant's actions to be minimised and the victim-survivor held to bear some responsibility by focusing on her acceptance of the invitation. Arguably, it was not necessary for the defence to ask whether the victim-survivor had agreed as that was implied by the context of the questioning, therefore it appears that the purpose of that question was to draw attention to the victim-survivor's agency. The defence's argument was that the sex was consensual, therefore drawing on that rape myth and placing agency with the victim-survivor in this way could be used as a tool in constructing a narrative of reasonable belief in consent. The implication was that the defendant could reasonably believe she was consenting because of her actions. This again reflects the notion of inferred (Ehrlich, 2015) or implied consent (Burgin and Flynn, 2019; Cossins, 2020). It was not unusual for the victim-survivor to stay at the defendant's house, so the defence took a normal behaviour and recast it as a signal of consent, or a signal the defendant could read as consent. This was bolstered by the frequent references to flirtatious behaviour made throughout this trial, as outlined in section 4.3.2.

Similarly, the defence in T4 drew attention to the victim-survivor's agency in entering, and not subsequently leaving, the defendant's car and home, and used it to bolster his narrative of the defendant's reasonable belief in consent:

EXTRACT 4av

> "[Defendant] had no wish to keep her against her will, he was hardly concerned about locking doors, she's not interacting with people saying 'fuck, I've just been kidnapped and raped' … [defendant] had no concerns about [victim-survivor] being in the company of [friend] or others. Why wouldn't he think that she was there willingly when he comes out and she's still sat in his car?! … She went in his flat willingly, she could have left at any time." (Defence, T4)

The narrative was bolstered through ignoring the wider context of domestic abuse in this case. As previously discussed in relation to the resistance narratives in this trial, men who are violent and controlling towards their partners often do not need to use explicit force or threat to obtain sex because the underlying context of abuse serves as an effective tool of coercion (Kelly, 1987; Hamby and Koss, 2003). This can be extended to the defence's argument that the victim-survivor went willingly into the defendant's home and could have left at any point. Women with abusive partners often acquiesce to their partner's requests because of a fear of what may happen if they do not (Stark, 2007).

4.4 Chapter summary

This chapter has provided fresh evidence of the continued reliance on rape myths about consent and defendants' reasonable belief in consent in courtroom narratives. These myths and the surrounding narratives served to undermine the victim-survivors' stories of rape and sexual assault.

Women's sexual behaviour was scrutinised in all trials and this included trials where s.41 rulings had been made. Whilst in two trials there was evidence of good practice in relation to s.41, these were outnumbered by examples of questionable evidence being allowed or unchallenged. Furthermore, the evidence presented demonstrates the difficulties in establishing what is covered by the 'sexual behaviour' terminology within the legislation. My observations suggest that in practice the phrase is being interpreted narrowly, the consequence of which is that jurors are encouraged to make moral judgements about victim-survivors' behaviour in terms of perceived flirtations and their 'sexting' digital communications. Additionally, it was not only victim-survivors' sexual behaviour that was scrutinised, as was demonstrated in the two trials involving child sexual offences. In these trials, the victim-survivors' mothers were questioned about their own sexual behaviour and such was used as a mechanism to undermine the victim-survivors' allegations. The evidence presented in this chapter in relation to s.41 adds to the existing evidence base that questions its efficacy and the implications of this are discussed in Chapter Eight.

In addition to narratives about sexual behaviour, victim-blaming narratives and narratives that focused on the agency of victim-survivors were used by defendants and defence barristers to reinforce rape myths about consent and 'reasonable' belief in consent. Narratives that focused on the victim-survivors' agency were most commonly utilised with regards to the defendants' 'reasonable' belief on consent and manifested through reference to aspects of the 'real rape' stereotype that suggests women always can and do actively resist rape and sexual assault. Agency narratives were also deployed against victim-survivors in order to reference the 'coffee myth', which invited the jury to draw on victim-blaming attitudes to make further moral judgements about victim-survivors' pre-assault behaviour.

Overall, the findings discussed in this chapter support my thesis that rape myths remain a prevalent feature of trial narratives. The following chapter bolsters this point through providing evidence of the use of rape myths relating to victim-survivors' post-assault behaviour and the expected consistency of their stories. In further support of my thesis, this chapter has also begun to highlight ways in which rape myths interact with broader cultural narratives to undermine the credibility of victim-survivors. Further such interactions will be noted throughout Chapter Five before full discussion in Chapters Six and Seven.

Chapter 5 Undermining the teller of rape: post-assault behaviour and (in)consistency

5.1 Introduction

The observations set out in Chapter 4 delineated the ways in which rape myths about consent and reasonable belief in consent permeated trial narratives. This chapter builds on this evidence to show that rape myths relating to victim-survivors' post-assault behaviour and the expected consistency of their stories were also prevalent. These myths often manifested through characterisations of victim-survivors' stories as irrational or unbelievable, and interacted with broader cultural narratives that position the victim-survivors as untrustworthy or unreliable. The findings in this chapter therefore support my thesis that rape myths remain prevalent in serious sexual offences trials and that they interact with broader cultural narratives to further disadvantage victim-survivors.

5.2 Myths about the victim-survivor's post-assault behaviour

The victim-survivors' post-assault behaviour was framed as irrational and thereby used to undermine their story and their credibility. Rape myths about post-assault behaviour are based upon ignorance or misunderstandings about trauma responses and compare victim-survivors' behaviour to what is considered 'rational' (Smith, 2018). For example, victim-survivors who remain in a relationship with a perpetrator or continue to have contact with them after an assault are often treated with suspicion. Similarly, victim-survivors who do not report to the police immediately are often treated with suspicion. The section unpacks the narratives that formed around the victim-survivors' immediate responses, their continued contact with defendants, and their decisions about when to report to the police.

5.2.1 Victim-survivors staying in the situation

Victim-survivors' immediate responses were regularly scrutinised and held up against ideas about what a 'rational' person might do. For example, in T4 the victim-survivor's post-assault behaviour was scrutinised and framed as 'choice' in much the same way as her pre-assault behaviour had been (see section 4.3), as the following example demonstrates:

EXTRACT 5a

> "the fact that [victim-survivor] chose to stay with [defendant], [you know from your own common sense that she could have left at any point …]" (Defence, T4)

By framing the victim-survivor's response as a choice, the defence placed agency with the victim-survivor and presented it as "fact". By urging the jury to draw on their "common sense" when considering the victim-survivor's actions, the defence implied that her behaviour did not match with what a rational person would do in that situation. The victim-survivor was also criticised for remaining in the defendant's car when he had left her alone whilst he went inside a friend's house. This narrative was bolstered by evidence elicited from defence witnesses who encountered her and the defendant together in the aftermath of the rapes, whereby the victim-survivor was described as appearing "fine" and "normal":

EXTRACT 5b

Defence	What were you talking about?
Defendant's sister	Her new cat.
Defence	Who started the conversation?
Defendant's sister	[Victim-survivor] did.
Defence	Anything else?
Defendant's sister	No, just laughing.
Defence	All of you?
Defendant's sister	Yeah, all 3 of us.
Defence	How did [victim-survivor] appear to you?
Defendant's sister	She seemed okay, [defendant] did too, both their normal self. (T4)

This was a case where the defendant had multiple convictions relating to domestic violence against the victim-survivor. The 'why didn't she leave' narrative so commonly associated with domestic abuse (see Duggan, 2018) permeated questioning about this victim-survivor's behaviour and her reaction to the various acts of aggression and sexual violence. It was drawn together in the closing remarks:

EXTRACT 5c

> "…more opportunities for her to have got away than I could possibly even begin to suggest]...[There is one single thing that I say against [victim-survivor] saying

she was so fearful], when she gave her evidence to police in her video, she said that she lay in his bed with him, [waiting for him to go to sleep, but she dozed off first]. I make no apologies for perhaps sounding harsh, [prosecution say she was kidnapped, raped 4 times, petrified, desperate to escape], but she just dozed off? I don't know what sort of things keep you awake at night, […work, an argument…there are some things you just can't switch off from and go to sleep]." (Defence, T4)

The defence minimised the victim-survivor's trauma by comparing it to work stresses or an argument. Counsel's argument also positioned the only 'rational' response as to leave as soon as possible. Whilst this victim-survivor's post-assault behaviour might not seem rational to some, it is well established that victim-survivors of intimate partner violence often form strong attachments to the perpetrator through trauma bonding (Reid, et al., 2013). Similarly, another common response to trauma is to befriend the perpetrator. This is what Lodrick (2007) refers to as the 'friend' response to trauma. The 'friend' response is the use of social engagement as a way of minimising further harm (Lodrick, 2007). This response was also seen in the victim-survivors in T1, T2, T3 and T6 to varying degrees and was presented by the defence in each trial as something that undermined the victim-survivors' stories. The victim-survivor in T3 described what could be considered a 'friend' response:

EXTRACT 5d

Victim-survivor	…Can I just say something else?
Defence	<looks taken aback, looks to Judge>
Judge	If it's in answer to the question.
Victim-survivor	It's related. [I didn't know what to do, I got dressed and we went downstairs] <says the rest whilst crying> [I just wanted to feel normal and so I played this piano piece to him cos I'd said that I would.] Cos that's what you're gonna ask me next, 'Why did you do that?'
…	
Defence	He asked you to play piano.
Victim-survivor	Yes.
Defence	[You played three songs].
Victim-survivor	[No, I played one. I can tell you what it was: [music artist]]. (T3)

In pre-empting the defence's question, the victim-survivor was able to explain her response to the jury, positioning it as a way of regaining some sense of normalcy. Her acquiescence to the defendant's request of her to play piano for him can be seen as a reaction to fear of further harm. Furthermore, it demonstrates that the 'friend' response is not only a subconscious reaction, but that it can be an actively chosen form of passivity. Similarly, in T4 the prosecution's closing speech focuses heavily on the difference between consent and compliance and the role of fear in compliance. In doing this, the prosecution had rationalised the victim-survivor's post-assault responses for the jury. The defendants in these two trials, T3 and T4, were both found guilty, so arguably the counter-narratives employed by victim-survivors and prosecution barristers did enough to broaden the narrow confines of what is presented as reasonable by the defence.

In T1, T2 and T6, the 'friend' responses and associated scrutiny from the defence barristers usually manifested in relation to the 'continued contact' myth, which says that the 'rational' response to rape is to cut-off all contact with the perpetrator. This forms the basis for discussion in the following sub-section.

5.2.2 Victim-survivors maintaining relationships with defendants

That the victim-survivors in T1, T2 and T6 had maintained contact with the defendants after alleged incidents of rape was treated with suspicion by the defence barristers, which reflects previous findings from rape trial observations (Smith and Skinner 2017). In T1, the defence directly referred to continued contact between the victim-survivor and defendant after the first alleged rape and used it to suggest that the victim-survivor had consented:

EXTRACT 5e

Defence	I submit that you do remember it all and you had consensual sex [with the defendant].
Victim-survivor	No.
Defence	[He is suggesting that you weren't that drunk, he checks with you whether you still want to go on a date. You say, 'Now I've done that I've really fucked you around'. You still

	want to go on a date with him to see how you feel, and this is after you've had sex.]
Victim-survivor	Yes.
Defence	The events of that night don't stop you from seeing each other and spending time together.
Victim-survivor	No. (T1)

Here the defence presented the victim-survivor's continued contact with the defendant and agreement to a 'date' as incompatible with an absence of consent. Similarly, in T2 the defence used continued contact as a tool to undermine the victim-survivor's narrative of non-consent:

EXTRACT 5f

Defence	[That summer you went to festivals, spent time with his family…]
Victim-survivor	Yes.
Defence	So not all bad then?
Victim-survivor	Yeah. (T2)

In this case the victim-survivor and defendant were in a long-term relationship when the alleged rape occurred, and they remained in a relationship for approximately six months afterwards. The victim-survivor reported to the police two months after the end of the relationship. In both examples above the defence implied consent or untruthfulness by pointing to continued contact, which ignores the complexities women face in labelling their experiences as rape. The 'real rape' myth positions the rapist as a deviant 'other', which makes it difficult for victim-survivors who are raped by someone close to them, be it a friend, family member or intimate partner, to reconcile this image with the person who was harmed them (Kahn, et al., 2003; Peterson and Muehlenhard, 2011). This means it often takes time for women to recognise or accept what has happened to them as rape. This is also true of acquaintance rape (Angiolini, 2015). Indeed, the victim-survivor in T1 stated "I didn't want to believe it" when cross-examined about why she had not immediately identified the experience as rape. In the above extract from T2 the defence's characterisation of the relationship not being "all bad" after the alleged rape seemed to present a false dichotomy of relationships as either wholly good or bad (Smith and Skinner, 2017), which is an oversimplification that serves to undermine

the victim-survivor's story. The prosecution attempted to resist this narrative through reference to youth and immaturity:

EXTRACT 5g

> "[Victim-survivor] was very young girl and what happened in [month] was clearly very distressing for her and continued to be beyond then." (Prosecution, T2)

EXTRACT 5h

> "[Victim-survivor] was young, she stayed. You heard that she stopped giving blowjobs to [defendant], and you may think that is an indication that someone might stop doing that because of being raped." (Prosecution, T2)

In these examples the prosecutor implied that the victim-survivor stayed in the relationship after the alleged rape because she was "young" and "immature", and these were words she used throughout her closing speech. This narrative served to infantilise the victim-survivor, which presumably aimed to position her as 'victim' in the eyes of the jury. The narrative was patronising, which is particularly important in this case because the victim-survivor was observing the trial from the public gallery and was therefore listening to what was being said. What this narrative also implied was that older women would have left, which is by no means necessarily the case—women stay with violent and abusive men for many complex reasons (Duggan, 2018). The prosecution therefore reinforced the problematic and pervasive cultural narrative that asks, 'why didn't she leave?'. Whether or not this may have been a damaging narrative in this trial, it served to reinforce the narrative for those hearing it, including the victim-survivor, which could have wider social implications. The prosecutor could have instead addressed the defence's assertions by challenging the broader structural mechanisms that impact these decisions for women, rather than by pointing to individual characteristics of the victim-survivor, which reinforced victim-blaming narratives.

In T2, not only was the victim-survivor's behaviour questioned because she had continued the relationship but also because she had continued sexual contact with the defendant after the end of the relationship:

EXTRACT 5i

Defence	In some of that time he had tried to get back together with you.
Victim-survivor	Yeah.
Defence	I'm going to say that there were times between when you were intimate together.
Victim-survivor	Yeah. (T2)

Defence counsel also attempted to get a prosecution witness, the victim-survivor's friend, to confirm post-relationship sexual encounters between the victim-survivor and the defendant, through asking him to interpret social media messages he had received from her:

EXTRACT 5j

Defence	Look at page 4 please, the message that starts 'I try and I try…', please read that in your head then I will ask you about it. <pause> If I was to suggest that [victim-survivor] and [defendant] were still having sex-
Judge	How can he answer that?
Prosecution	Yes, he can't answer that.

It is reassuring that both the judge and prosecution immediately took issue with this line of questioning and intervened, however the judge then accepted the defence's reasoning:

EXTRACT 5k

Defence	I just want his understanding of the relationship.
Judge	Okay.
Defence	Was that your impression?
Friend	I wouldn't know.
Defence	Was your understanding that it had ended?
Friend	Yeah that was my impression.

Defence counsel also questioned the OIC about it:

EXTRACT 5l

Defence	It remains her stance that she had ended communication with [defendant].
OIC	No, she said the relationship ended, not that she stopped all contact.

Defence	Did she tell you or anyone else that she had continued to have sex with [defendant] through [month after break-up]?
OIC	I never asked that question and I wouldn't want to assume.
Defence	Was it your impression that [defendant's] sexual advances were unwanted?
OIC	Yes.
Defence	[When did you become aware that [victim-survivor] had had sexual relations with [defendant] in that time?]
OIC	I can't recall.
Defence	[That is not something she puts in any police statement].
OIC	I can't recall. (T2)

Here the defence seemed to be implying that the victim-survivor had deliberately omitted the information, which feeds into portrayals of women as calculating liars (discussed in section 6.3.1). Again, this line of questioning ignored what is known about trauma responses. The implied reasoning is that a woman would not continue to have sex with her rapist, however, it is known that women often stay in relationships with men who have assaulted them, be that physically or sexually, for myriad complex reasons (e.g. Duggan, 2018). The defence therefore oversimplified an extremely complex issue in order to imply that the victim-survivor either must have consented or must be lying. The prosecution in T2 anticipated the defence's reliance on misunderstandings about continued contact and addressed it in her closing remarks:

EXTRACT 5m

> "As I said to you at the start of this case, there are many ways victims react to rape. It is easy to say 'why didn't she leave?' and think 'I wouldn't have put up with that'. [Value judgements are easy to make but they have no place here]." (Prosecution, T2)

Whilst it is not possible to say whether or to what degree the jury might have considered this aspect of the trial narrative in their decision to acquit the defendant, it may be fair to assume it had some bearing given that the defence relied heavily on it as a tool for undermining the victim-survivor in her closing remarks:

EXTRACT 5n

> "What you do know about [victim-survivor's] credibility is that she also reported to the police that [defendant] was pestering her, sending unwanted messages to

her asking for sex, [and she tells the police that is not something she is interested in because they split for good in [month] and she wants nothing to do with him, she signs that statement, she produces messages, and then what we can see is that there is a wealth of communication both ways, she gives a number of statements,] does she say in any of them that she carried on sleeping with him? Now that doesn't help you with the rape, but it does help you with credibility, doesn't it?" (Defence, closing T2)

Here the defence explicitly suggested that the victim-survivor was not credible because she had not included the continued sexual relationship in her statements. The defence also refers to the "wealth of communication both ways", drawing on the misconception that victim-survivors never communicate with their rapists. This narrative also demonstrates how evidence about a victim-survivor's sexual behaviour can be adduced and used to undermine her (see also section 4.2.1 on victim-survivor's sexual history evidence).

The previous extracts in this section from T1 and T2 showed that defence barristers were able to use digital communications between victim-survivors and defendants to cast doubt on the prosecution cases by evidencing continued contact between the parties. In contrast, the defence in T6 used a single piece of digital communication to do this:

EXTRACT 5o

Defence	…Did you send [defendant] a happy birthday message on Facebook [10 years after alleged rapes]?
Victim-survivor2	Yeah. (T6)

That was the final question in the cross-examination of that victim-survivor and was completely unrelated to the previous questions about whether she had discussed allegations with her sister. Again, the suggestion that a 'happy birthday' message from victim-survivor to defendant a decade after the alleged incidents could be relevant to credibility completely ignored the potential for trauma bonding and the friend response discussed earlier, particularly because this victim-survivor had viewed the defendant as a stepfather figure. Furthermore, there was no digital evidence bundle in this case, which suggests that a 'fishing exercise' may have been carried out in an attempt to find evidence of communication to undermine credibility, which is a well-known tactic used by defence teams in 'Western' adversarial jurisdictions (Browning,

2011; Diss, 2013; Carmico et al. 2016; Smith and Daly, 2020). That this tactic is so widely used is indicative of its value and demonstrates how pervasive rape myths, in this case myths about continued contact, can be used as tools to undermine victim-survivors' credibility. Indeed, analysis by Howell and Heberlig (2007) demonstrates that even before the ubiquity of smart phones, digital evidence had long been recognised as a useful tool for undermining the claims of victim-survivors in court.

5.2.3 Victim-survivors delaying disclosures and reporting

Another common rape myth reflected in my observations related to the timeframes within which victim-survivors chose to make their reports to police or to third parties. A common rape myth suggests that it is suspicious if a victim-survivor does not report a rape to the police immediately. In T2, T5 and T6 the victim-survivors did not make police reports straightaway. However this was not treated with suspicion in all cases. Both T5 and T6 related to child sex offences, and in T5 the victim-survivor was still a child at the time of the trial. This victim-survivor's delayed reporting was not treated as suspicious, which may have been because he was a young child and because his mother gave evidence that he had tried to disclose the alleged abuse to her earlier but she had not taken it seriously. In contrast, the victim-survivors in T6 were adults when they made historic allegations against the defendant. The delay in their reporting to police was met with suspicion, though not due to the delay in reporting as such, but rather the delay in the full allegations being made to police. Victim-survivor2 had begun to make a complaint five years after the alleged rape and sexual assaults but then declined to give a statement. Then five years later the allegations were made again, and victim-survivor1 added her complaint a few months later. The defence used these delays and staggered disclosures to help build a gendered narrative of collusion, which is explored further in 6.3.1

The victim-survivor in T2 disclosed to a friend around six months after the alleged rape, via social media messaging, before reporting to the police two months later. The defence used the fact that her disclosure was digital to suggest that she could have told her friend sooner

because the digital means by which she disclosed were available to her from the time of the alleged rape:

EXTRACT 5p

Defence	So, [if she wanted to, she could have spoken to you at that time, you weren't working abroad, your phone wasn't broken?]
Friend	No, [there was nothing to stop her, but I do feel that it was easier for her to speak more freely about these issues post-relationship]
Defence	Obviously you just have [victim-survivor's] side of events, because you've never spoken to [defendant]. (T2)

The victim-survivor's friend gave reasoning for why she may have delayed reporting, however the defence dismissed it as biased, using minimising language to do so. The reasoning articulated by the victim-survivor's friend was in line with what is known about disclosures of sexual violence, thus the defence's dismissal aimed to downplay the fact that delayed reporting is common and rational. The defence in this trial used the delay in reporting to bolster her gendered narrative of women as vengeful liars, which is discussed more in section 6.3.1.

Despite it being recognised that delayed reporting of rape is not uncommon, it has often been used as a tool for undermining victim-survivors in court (Adler 1987; Bronitt 1998; Brereton 1997; Raitt 2004; Smith, 2018). Mock jury research has shown that jurors do often reference this myth in deliberation (Taylor and Joudo, 2005; Temkin, 2009; Ellison and Munro 2009). Arguably, this is because delayed reporting remains a commonly held rape myth in wider society (Ellison and Munro, 2009a; Raitt, 2004; Rose et al., 2006).

5.2.3.1 Victim-survivors reporting to police within 24 hours

In both T1 and T3 the victim-survivors disclosed to friends within 24 hours of the incidents (in T1 it was the second incident). Both women confided in their friends (in T1 this was after the report to police, in T3 it was before), and these disclosures were treated as suspicious by the defence barristers. For example, the defence in T1 employed a gendered narrative of women as scheming, calculating liars:

EXTRACT 5q

> "In the time between her report and ABE she messaged people to tell them something really bad had happened that was so difficult for her to talk about, yet she keeps telling people. This, we submit, is a way for her to garner support and sympathy to keep up her charade." (Defence, T1)

The defence were not able to undermine the prosecution's case by arguing that the victim-survivor had delayed reporting to the police and therefore behaved suspiciously, but by reframing it as an act of manipulation he was able to undermine what might otherwise be framed as the victim-survivor's 'rational' behaviour as problematic. This was also a tactic used in T3 where the defence implied the victim-survivor had colluded with her friend (see section 6.3.1 for further discussion of gendered narratives of women as liars). These findings from T1 and T3, as well as the preceding finding from T2, suggest that it could be *who* the victim-survivors tell, rather than *when*, that have more of a bearing for the narratives of suspicion deployed by defence barristers. Whilst judges usually give judicial directions explaining that there is no typical response to rape and that a delayed report does not mean a false report, the direction does not go so far as to explain that victim-survivors of sexual violence often speak to third-parties, including friends and family, before deciding whether to make a report to police (Smith and Daly, 2020). It should therefore be considered a normal and rational response to trauma, rather than treated with suspicion.

As well as being treated with suspicion for telling her friends about the sexual assaults, the victim-survivor in T3 was criticized for not calling someone immediately (and whilst the defendant was still there), even though she did call someone within hours of the assaults and went to the police in under 24 hours:

EXTRACT 5r

Defence	You didn't think at that stage it was-
Victim-survivor	I thought it was odd [I've never had a full body massage before, I didn't know if that was included] […]
Defence	You could have called [friend].
Victim-survivor	My phone wasn't near me.

Defence	[QandA about [friend] having been at her house earlier that afternoon and saying she could call him if she felt uncomfortable with the massage]. Why didn't you call [friend]?
Victim-survivor	[I called him as soon as [defendant] left].
Defence	You didn't call the police?
Victim-survivor	No. (T3)

This example from T3 also calls into question what is regarded as *soon enough*. The defence argued that the victim-survivor could have called her friend as soon as she felt uncomfortable with the way the massage was going. This is significant because the defence was then by implication suggesting that what the victim-survivor *should* have done was to call her friend not even in the immediate aftermath of the assaults, but whilst the defendant still had his hands on her.

EXTRACT 5s

> "We know that her good friend [friend] has been with her that day, he told her how the massage might happen, she asked about how a professional massage happens. So we have there a clear indication that he said she could ring him, and he told her he would come round if she called" (Defence, T3)

Whilst delayed reporting has long been held against victim-survivors and prompt reporting therefore lauded as a way to help toward being believed and viewed as credible, these examples show ways in which the power of the 'women lie about rape' myth can be used by defence barristers to undermine them 'doing the right thing' by reporting promptly. This produces an alarming 'damned if they do, damned if they don't' predicament for victim-survivors.

5.3 Myths about (in)consistent stories of rape and sexual assault

Prosecution and defence counsel in all trials pointed to consistencies and inconsistencies, respectively, in the victim-survivors' accounts. Barristers usually recognised that accounts will inevitably bear some inconsistencies and so they focused on the *levels* of consistency. For

example, in T3 the prosecution characterised the victim-survivor's accounts as having "no meaningful inconsistencies":

> EXTRACT 5t
>
> "She immediately told 3 friends and all accounts are consistent with what she told the police, there are no ***meaningful*** inconsistencies, and I stress the word meaningful, there of course are some, but you are sensible people, you understand why some of these exist." (Prosecution, T3, emphasis added)

Whereas the defence asked the jury to consider whether those same accounts were "internally consistent":

> EXTRACT 5u
>
> "Consistency, is her account consistent? [You can't say you're sure], is it ***internally*** consistent?...[I'm sure you will give very careful consideration. Consider the evidence very, very carefully]. Single unsupported, inconsistent word [is not enough to make you sure enough to return a guilty verdict]." (Defence, T3, emphasis added)

Despite asking whether it was "internally consistent" and thereby implicitly conceding that some inconsistencies with other witnesses are inevitable, the defence went on to say that the victim-survivor's "unsupported, inconsistent word" was not enough to make them sure beyond a reasonable doubt that she was being truthful. This ignores modern understandings of memory (see Hohl and Conway, 2017) and the extensive neuropsychological evidence about the impact of trauma on memory coding (see Lodrick, 2007), as the implication is that the victim-survivor's story will be consistent if truthful, when this is not the case. Such arguments hark back to the corroboration warning that judges used to be required to give to juries in sexual offences trials, warning them of the dangers of convicting based on the unsupported word of a victim-survivor. The mandatory warning was based on historic gendered narratives that positioned women as untrustworthy and the belief that false allegations of rape were common (Leahy, 2014). Indeed, it is perfectly possible in English law to make a conviction based on the testimony of a single witness. The defence barrister's words, then, were rooted in those same gendered narratives. Though it is no longer mandatory, judges may at their own

discretion give a corroboration warning, however the judge in T3 did not deem it necessary to do so.

Similarly to T3, consistency in T5 was qualified as 'fundamentally' true by the prosecution:

EXTRACT 5v

> "Detail is important, but not the be all and end all, [each individual experience of it will be remembered differently, the Learned Judge has given you a number of warnings, be careful, then stand back and consider where we are. Although details differ, the fundamental story is not untrue. I'm sure you have heard people tell stories of something you've witnessed, and you've thought 'hang on, that's not how he told it last time', but you know the story to be true]" (Prosecution, T5)

Whereas again the defence seemed to call for nothing but 100% accuracy:

EXTRACT 5w

> "Accuracy, reliability, truthfulness. That's what this case is about… because it stands and falls on the word of one little boy…It is a fact that children lie, it is a fact that adults lie. Children make things up…[his] evidence is peppered with inconsistencies [and worryingly this is a child who has also been found to say a host of different things… He may not have set out deliberately doing this, it takes courage to say you were lying, imagine how hard it is for a child to admit to mum, school, grandmother, aunts, that it wasn't true.]" (Defence, T5)

These suggestions from the defence barristers in T3 and T5 that only complete accuracy was sufficient to make the jury sure enough to convict reflects the false dichotomy observed by Smith and Skinner (2017) that presented victim-survivors' accounts as either wholly truthful or wholly untruthful. It is also interesting considering that Munro and Kelly (2009) found that being too consistent may work against victim-survivors. This suggests there is a narrow margin in which victim-survivors will be deemed honest and credible (Smith 2018).

The focus on consistency in T2 presented slightly differently to the examples above. Whilst both the defence and prosecution pointed the jury to consider consistency of the victim-survivor's accounts, the focus was on different parts of her accounts:

EXTRACT 5x

> "She decides to tell her friend about it and she later tells the police the same account as she gave to her friend.] She gives a very simple, utterly truthful

> account. The defence's case is that she made it up […]. But she never wavers, never embellishes, she simply says it how it is." (Prosecution, T2)

Here the prosecution pointed to the consistency between the victim-survivor's account of the alleged rape given to her friend, the police and in her live testimony. The level of consistency in these accounts left the defence without opportunity to point the jury towards inconsistencies in how she described what had happened. The tactic taken by the defence was instead to point to inconsistencies in peripheral areas:

> EXTRACT 5y
>
> "You can see whether things have a ring of truth to them…, [she says she only mentioned it via text, but then she has said in interview that she had said it in arguments]. These are not conversations about who forgot to buy the milk, you would think she would remember talking about it, [… she would] have flashbacks, she would have it clear in her mind. [She says she can't remember what was said], does that ring true to you? Can you be satisfied?" (Defence, T2).

The defence highlighted inconsistencies in the victim-survivor's recollection of how and when she had confronted the defendant about the alleged rape. Defence counsel drew on ideas of what a rational person might remember and treated the victim-survivor's poor recollection of conversations from two and a half years prior with suspicion. By making the comparison with conversations about mundane everyday conversation, the defence implied that a normal person would remember every conversation about a traumatic event. This completely misrepresents and obscures what is known about the effects of trauma on memory (Lodrick, 2007; Hohl and Conway, 2017) and that men's aggression can become a mundane feature of life for many women (Stanko, 2013). It also ignored the complexities women face in recognising rape, especially in romantic relationships (see discussion in section 5.2). To argue that the victim-survivor should remember all conversations she had with the defendant relating to the alleged rape merely because rape is traumatic assumes that the victim-survivor had *at the time* fully recognised that trauma.

Furthermore, the defence argued that the victim-survivor would have had flashbacks to the conversations because of the trauma. Whilst it is true that flashbacks are a common trauma

response (Duke et al., 2008), it is not a universal response and the defence was not talking about the traumatic event itself but conversations about that event. It therefore seems that the defence was implying that the victim-survivor was lying because she had not said she had flashbacks to *conversations* (not the alleged rape itself). With the final remark in the above extract the defence clearly suggested to the jury that the victim-survivor was not being truthful because she cannot, two and a half years on, remember in detail all of the times she confronted the defendant about the alleged rape. The implication, then, seemed to be that she was lying about the confrontations so she was not trustworthy and thus the jury could not be sure she was not lying about the alleged rape. The defendant in this case was acquitted so it seems that the defence's attempts to undermine the victim-survivor's consistent accounts were successful. Although it is not possible to know the basis on which the jury made their decision, it is clear that they did not find the victim-survivor credible enough to convict based on her testimony.

Digital evidence has also provided a new way for barristers to undermine the credibility of both victim-survivors' and defendants' stories (see section 7.4.1 for discussion related to defendants), by focusing on inconsistencies in their recollections of conversations which often largely took place via digital platforms. For example, if a victim-survivor stated that she could not remember saying something, and it was subsequently shown in digital evidence, it was used to accuse her of lying. The following excerpt demonstrates this:

> EXTRACT 5z
>
> "She said she 'wasn't prepared', she said she couldn't remember saying it, but when she was shown the messages it was clear that she had said that." (Defence, T1)

The focus on inconsistencies in victim-survivors' evidence ignores a large established evidence base which shows that in fact truthful accounts are not told in the same way each time, that small details do change, that human memory and recall is imperfect (Temkin, 2000; McMillan 2007). To expect a consistent account each time is unreasonable. Nevertheless, defence barristers frequently turn to consistency as an indicator of truth and painstakingly

highlight every inconsistency in victim-survivors' accounts and testimonies, whilst prosecution barristers draw on consistencies in victim-survivors' accounts to bolster the victim-survivor's credibility. This ignores that human recall is imperfect and positions victim-survivors' evidence as either wholly accurate or wholly inaccurate (Smith, 2018). This does ignore the reality that there will inevitably be both accurate and inaccurate elements of each account because of the limitations to human memory and the added issue of passing time degrading memories.

The effect of the passage of time on memory was particularly pertinent in T6 because the allegations related to historic sexual abuse. The defence relied heavily on inconsistencies in the accounts from both victim-survivors. The prosecution preempted this:

> EXTRACT 5aa
>
> "There are a number of inconsistencies between what you heard, I am not going to go through them, they are there. … insofar as these inconsistencies are concerned, you may think for example that in [victim-survivor2's] first account [there was a discrepancy of 1 year], well we all have difficulty with years don't we? … It is important for you to consider [the inconsistencies] … [Given the effect of people dealing with the passage of time, is it surprising? You may come to the conclusion that actually [victim-survivors] have been quite consistent about what they say, and when we apply it to known dates it all starts to fit into place]" (Prosecution, T6)

The prosecution attempted to rationalise the inconsistencies for the jury through first pointing out that it is common for people, including rape victim-survivors, to have difficulty accurately placing time in memories (London et al., 2008). Second, the barrister pointed to the consistent elements of the testimony, much like the "meaningful" (T3) and "fundamental" (T5) consistencies in T3 and T5. The defence barrister spent a significant portion of her closing speech delineating inconsistencies in the victim-survivors' stories, especially victim-survivor2, and had prefaced this with the following:

> EXTRACT 5ab
>
> "[regarding [victim-survivor2] it means being sure that not only is she trustworthy but is she accurate and reliable, and we say you can't be sure about that. Her evidence is clearly inconsistent and unreliable, and my learned friend says well

> that's time, that's not a case of getting small things wrong, it's enormous inconsistencies, each account is entirely different]." (Defence, T6)

The defence's assertion that each account was entirely different was at odds with the prosecution's characterisation of consistency. The inconsistencies largely came from the difficulty the victim-survivors had with time and location in their accounts, which has been established as a common issue with memory (London et al., 2008). The emphasis on such peripheral details has long been a noted tactic used by defence barristers in rape trials (Temkin, 2000; Ellison, 2001; Wheatcroft and Wagstaff, 2009). The defence barrister in T6 also sought to undermine victim-survivor2's explanation for some of her consistencies, which was that she did not recount her experiences in her ABE in a linear way:

> EXTRACT 5ac
>
> "[her account in court was] completely different to her account to [police officer] … when challenged she said she was just saying things, not in order, but you have it there in the ABE transcript, you have the connecting words … you would know if it was oral, you would know if it was intercourse … she's in a safe space in the police station, no-one is giving her a hard time." (Defence, T6)

The defence therefore suggested that stories must be linear in order to be considered true and consistent, however evidence has shown that victim-survivors are often unable to articulate their stories with linearity in their ABEs (Gilmore, 2001; McMillan and Thomas, 2009).

Not only do victim-survivors' accounts have to be suitably consistent, their accounts must also be whole and complete with every detail from the first disclosure. The omission of details was used against the victim-survivors in T2 and T6 as a way of portraying them as untrustworthy, thus undermining their credibility. As outlined in section 5.1.2, the victim-survivor in T2 did not tell the police that she had had sexual contact with the defendant after they broke up and this was used by the defence as a tool in the cross-examination of not just the victim-survivor but also the OIC. In her closing remarks, defence counsel pointed to this omission as an indication of dishonesty:

EXTRACT 5ad

> "What you do know about [victim-survivor's] credibility is that she also reported to the police that [defendant] was pestering her, sending unwanted messages to her asking for sex, [and she tells the police that is not something she is interested in because they split for good in [month] and she wants nothing to do with him, she signs that statement, she produces messages, and then what we can see is that there is a wealth of communication both ways, she gives a number of statements], does she say in any of them that she carried on sleeping with him? Now that doesn't help you with the rape, but it does help you with credibility, doesn't it?" (Defence, T2)

Similarly, in T6 omissions in both victim-survivors stories were highlighted by the defence in her closing remarks:

EXTRACT 5ae

> "[other inconsistencies include at [specific event], there was no mention of oral in the ABE]." (Defence, T6)

EXTRACT 5af

> "[having made up allegations about [defendant] kissing her when she was a child, which none of us had heard before, then when she was challenged she backtracks and says it was when she was 15. She says it happened [in specific place], but you know [defendant] wasn't working [in specific place]." (Defence, T6)

There are many reasons a victim-survivor may (consciously or unconsciously) hold back some details or information when disclosing sexual violence. For instance, MacMillan and Thomas (2009) found that victim-survivors were not always able to recall or provide specific details in their police interviews. Furthermore, the majority of victim-survivors have a fear of not being believed (Victims' Commissioner, 2020), and so it stands to reason that they may choose not to give certain details to the police when they make a report. Moreover, victim-survivors are well aware of rape myths and these factor into their decisions about whether to tell, when to tell, who to tell, and what they tell (Smith and Daly, 2020; Victims' Commissioner, 2020).

5.4 Chapter summary

This chapter has built on the findings presented in Chapter 4 which demonstrated that rape myths related to consent and reasonable belief in consent remain prevalent features in courtroom narratives. The evidence presented within the present chapter demonstrated that the same is true of rape myths related to victim-survivors' post-assault behaviour and the expected consistency of their stories of rape and sexual assault.

Rational ideals permeated the narratives outlined in this chapter, which reflected victim-blaming attitudes that are common in society. Indeed, it was not only defence barristers who drew these problematic ideas, a prosecution barrister also reinforced damaging narrative about victim-survivors of intimate partner violence. Victim-survivors who did not immediately cease contact with the defendants were presented as suspicious by defence barristers. This was contrary to established evidence bases that show there are many varied, equally valid responses to trauma and sexual victimisation.

Digital communications evidence played a significant role in defence characterisations of victim-survivors' post-assault behaviour as irrational, especially in relation to continued contact with the defendant and delayed reporting. With regards to delayed reporting, the findings presented suggest that *who* victim-survivors tell and *how* they tell them, rather than *when*, may have more of an impact on the narratives of suspicious reporting deployed by defence barristers. In addition to this, the findings demonstrated that no matter how soon victim-survivors disclose their experiences, defence counsel can still manage to cast suspicion by implying it was not soon *enough*.

Digital evidence also played a significant role in defence counsel pointing to inconsistencies to undermine victim-survivors' stories. Defence barristers looked to digital messages to compare to flawed recollections in live testimony to 'prove' that victim-survivors' were at best unreliable or at worst liars. These narratives ignored contemporary evidence on how trauma and time affect memory. Whilst prosecution barristers focused on the common thread of victim-survivors' accounts to demonstrate consistency, defence barristers called for only

absolute accuracy, with complete consistency being presented as the marker for this. Defence counsel routinely looked beyond the core aspects of victim-survivors' accounts to point to inconsistencies in recall of conversations, inaccurate recollection of dates and locations, non-linear recollections of events, and the omission of details in previous accounts. Again, ignoring contemporary research on memory.

Overall, the findings discussed in this chapter support my thesis that rape myths remain a prevalent feature of trial narratives. This chapter has demonstrated that trial narratives were constructed through the deployment of rape myths about victim-survivors' responses to sexual violence and the expectation that victim-survivors' make consistent and accurate accounts of their experiences. In further support of my thesis, this chapter has continued to signal to ways in which rape myths interact with broader cultural narratives to undermine the credibility of victim-survivors as the 'tellers' of rape. The following chapter explores this in greater depth.

Chapter 6 Victim-survivors as (in)credible tellers of rape

6.1 Introduction

The preceding two chapters showed that rape myths remain a prominent feature in courtroom narratives in serious sexual offences trials and serve to undermine stories of rape and sexual assault. Chapters Six and Seven build on this by establishing ways in which those myths are scaffolded by and interact with broader cultural narratives and systems of oppression to further disadvantage victim-survivors and benefit defendants. Chapter Six will focus on the victim-survivors as the 'tellers' of rape, then Chapter Seven will focus on the defendants as storytellers.

Sexism, classism, ageism and ableism intersected at varying points in the construction of narratives about respectability and honesty, and this chapter is arranged accordingly. In support of my thesis, this chapter therefore shows that broader cultural narratives interact with rape myths to undermine victim-survivors and their stories of rape and sexual assault.

6.2 Narratives of respectability

Narratives of respectability permeated all six trials. These narratives drew on middle-class ideals of respectability whilst also drawing on working-class stereotypes, thereby positioning victim-survivors, and some other prosecution witnesses, as not credible because they did not adhere to middle-class ideals. This section shows how these narratives were formulated at the intersection of gender, class and age. According to Skeggs (1997), respectability is a significant marker by which class is measured and ascribed. As such, I first establish how barristers highlighted parts of witnesses' personal circumstances that were congruent with wider cultural narratives about working-class people in Britain. Then, the intersections of gender, class and age are explored through two prevalent narrative themes: sexuality and motherhood.

6.2.1 Establishing social class in trial narratives

Social class was often indicated within the trial narratives through 'micro-examinations'. I use the term 'micro-examination' to distinguish smaller chunks of questioning within the sub-genres of trial (that is, evidence-in-chief, cross-examination, and re-examination). In the context of how social class was signified, the micro-examinations consisted of short sets of introductory or scene-setting questions used to characterise the background of the witnesses. The questions were brief and subtly pointed to stigmatising cultural narratives, thus they could be seen as akin to microaggressions (see Sue et al., 2007). These micro-examinations worked to underpin working-class[13] narratives within the observed trials. The working-class narratives, therefore, were rarely formed through direct reference to working-class stereotypes, rather they were built through small details throughout the trial narratives that culminated in a working-class backdrop. All victim-survivors, defendants and other witnesses in the trials were racialised as white and were therefore racially privileged. This racialisation did however help form the working-class narratives because whiteness is salient in dominant working-class stereotypes in Britain, with a delineation between respectable and non-respectable working-class whites (Skeggs, 2004; Watts, 2006; Lawler, 2012). The discussions of class throughout this and the following chapter therefore specifically relate to narratives about white working-class[14], specifically white British working-class.[15]

Through micro-examinations of victim-survivors and defendants, small details were presented which when taken together pointed toward being working-class. These details included reference to the towns and villages they resided in, which in all but T3 included areas

[13] There are varying definitions of working-class and the usefulness of the term in the 21st century is contested (Harvey, 2005; Payne, 2013), however for my purposes I am using the term not to define the people in the trials but to reflect a set of stereotypes that exist in our society about people perceived to be from working-class communities or low socioeconomic backgrounds. This is not a comment on whether the participants were or were not working-class or would identify themselves as such.

[14] I note that race in general and whiteness in particular, are not objective truths, rather social constructions shaped by social, political and historical contexts that have tangible effects on lived experience (e.g. Frankenberg, 1993; Rasmussen et al., 2001; Byrne, 2006; and Feagin, 2020).

[15] Nationality is key to both racialisation and class narratives. For example, EU migrants and white Irish are differently stereotyped to white British working-classes. I therefore acknowledge that the use of white British is not unproblematic as it homogenises a diverse group that includes generational descendants of, for example, EU migrants.

considered deprived[16] (Department for Communities and Local Government, 2015), and the types of accommodation they lived in, for example social housing (T4) or 'council estates' (T5, T6) or caravans (T6). All of the trials involved some allegations that took place in domestic settings therefore descriptions of those dwellings were relevant, but these 'crumbs' elicited through micro-examinations underpinned the wider narrative.

The types of (un)employment of victim-survivors and defendants were also detailed in each trial. In all trials, victim-survivors and defendants who were employed, or had been around the time of the alleged incidents, were in types of employment[17] and/or working patterns typically considered working-class in contemporary society according analysis by Roberts (2011), and in some cases this was characterised by the precarity of their employment (Skeggs 2011). The victim-survivor and defendant in T2 were in receipt of housing benefit, which was introduced into the narrative through the defendant's police interview transcript which was read into evidence in court. The defendant was explaining to the police officers what he thought had led to the deterioration of their relationship since the time of the alleged rape. It is unclear why the reference to state welfare was not edited out of the transcript, as it is difficult to see what relevance this level of detail could have to the case. Simply commenting that there were arguments about finances would have sufficed to make the same point, and there was no suggestion from the defence that these difficulties were a motive for the victim-survivor to stay in the relationship or to lie about rape.

The victim-survivor in T4 and the victim-survivor's mother in T5 were long-term unemployed because of disability (T4) and full-time parenting responsibilities (T5), and were in receipt of social welfare. This was directly raised by the defence in both trials. For example:

EXTRACT 6a

Defence There were texts between you and [friend]?

[16] Living in an area considered deprived does not mean all the people living there are deprived, however for the purpose of this analysis it is the 'reputation' of these areas as deprived that informs the narratives. It is not a comment on whether the individuals in these trials were themselves necessarily deprived.

[17] In order to help protect confidentiality these jobs cannot be specified.

Victim-survivor	Yeah.
Defence	Talking about your benefits?
Victim-survivor	Yeah.
Defence	Then you text her a few days later to update her after you've been to the police?
Victim-survivor	Yeah. (T4)

In this extract the defence counsel mentioned state welfare to reference a text message exchange between the victim-survivor and a friend, however it was irrelevant to the case and because it formed no part of any arguments put forth by either barrister, it did not need to be asked. The defence could have established that the victim-survivor had texted her friend without referencing state welfare. Removing the question "Talking about your benefits?" would not have altered the information elicited. By drawing the jury's attention to the victim-survivor being in receipt of state welfare, the defence arguably relied on stereotypes of 'scroungers' and the 'underserving poor' (Hancock and Mooney, 2011; Romano, 2018; Morrison, 2019). Such narratives have long been pervasive in Britain, with 'the poor' being scapegoated for perceived economic and social ills (Welshman, 2013; Morrison, 2019). In particular, Murray's (1990; 1994; 1996) widely criticised work on 'the underclass', which depicted 'the poor' as 'feckless' and reliant on state welfare, strongly influenced policy and media portrayals throughout the 1990s and into the 2000s, with a resurgence under Coalition and Conservative Governments in the 2010s (MacDonald et al., 2020). This framing ignores structural inequalities, viewing poverty as resultant of individual failure or laziness, and understands 'respectability' as something achieved through participating in the workforce (Patrick, 2016). These political and media discourses are also reflected in popular culture through 'reality' TV shows such as *Benefits Street*, and thus powerful 'scrounger' narratives have become culturally embedded in Britain (Patrick, 2016; Day et al., 2020). Reflecting these narratives in the courtroom can therefore be beneficial to barristers wishing to portray a witness as objectionable or untrustworthy.

In T5, the defence counsel mentioned state welfare in a more overtly disparaging way, compared with T4, during cross-examination of the child victim-survivor's mother:

EXTRACT 6b

Defence	I'm going to suggest that he moved in with you.
Mother	No, my neighbour.
Defence	I know you talked about 'officially', but we don't care about officially, we don't care about what you did to keep benefits. (T5)

Defence counsel later repeated this reference:

EXTRACT 6c

Defence	And you struggled at this time with chores around the house?
Mother	Yeah.
Defence	And that is when [defendant] moved in next door, because you didn't want to lose benefits?
Mother	Yeah. (T5)

In both these extracts there was direct reference to the 'benefits cheat' stereotype commonly associated with working-class women (Gelsthorpe 2010). The pertinent issue was that the victim-survivor and defendant began co-habiting, which could have been established without needing to explain the reason for any decisions. An analysis of results from the British Social Attitudes survey found that although public beliefs about the prevalence and morality of benefit fraud has decreased in recent years, it remains more harshly judged than the similar offence of tax avoidance (Geiger et al. 2017). This double standard arguably reflects the tendency for poorer people, particularly social welfare claimants, to be judged more negatively than those who are more affluent (Geiger et al. 2017). Media portrayals are often critical of benefits claimants, reinforce stereotypes about working-class people (Biressi and Nunn 2010; Jensen 2014; Button and Tunley 2015), and draw on the idea of the 'underclass' (see Murray, 1990; 2001) and 'underserving poor' willing to obtain state benefits through fraudulent means (Lundstrom 2013; Geiger et al. 2017). Drawing on these cultural narratives therefore arguably sought to present the mother in T5 as unlikeable to the jury.

In particular, in T4, the defence barrister effectively othered both the victim-survivor and the defendant along classed lines through the following phrasing:

EXTRACT 6d

> "[Prosecution's opening statement sounded like the plot from a feature film], but this is real life, real people. They may live very different lives to you …" (Defence, T4)

This positioned the victim-survivor and defendant as distinctly separate from the jurors, creating an avenue for class-based morality judgements to be made. Whilst the defence claimed to be treating the victim-survivor and defendant as "real people" and asked the jury not to 'other' them, he actually did just that and reinforced the othering in stating that they "live very different lives", thereby giving a contradictory message to the jury. Interestingly, this case was one of only two trials ending in conviction and the working-class connotations were strongest here given the context outlined above as well as a context of domestic violence. Arguably a reflection of Phipps' (2009) assertion that working-class men are perceived as more likely to commit violence (see also Bourke, 2008). Smith (2018) noted a similar tactic for othering in her observations, relating to race and class, through use of the phrase "some types of people" (p.148).

Other aspects of trial narratives further fed into the broad working-class narratives, such as framings of alcohol consumption and domestic abuse, which will be discussed in more detail throughout this and the following chapter as they are points with marked salience to other gendered, aged and ableist narratives relating to sexual violence.

6.2.2 Working-class femininities as 'unrespectable'

Women's femininity has long been judged and policed in terms of excessiveness, particularly with regards to sex and alcohol (Mackiewicz, 2015) and particularly for women perceived as working-class (Skeggs, 1997). This was reflected in T1 and T4, where alcohol formed an integral part of constructing classed and gendered narratives. Alcohol was a prominent feature in T1 and a peripheral feature in T4, whereas it was not talked about in any of the other trials. In both T1 and T4 the narratives involving alcohol drew on notions of respectability by referencing the victim-survivors' heavy alcohol consumption, which they each stated in

evidence adduced to the court. For example, in T4 the victim-survivor referred to her heavy drinking during her ABE:

EXTRACT 6e

> "I went to my friend's house and had three cans of beer…5% beers, [didn't affect me much cos I used to drink more than that, I've stopped drinking now, it would just have given me a little tingle in me ear nothing more]." (Victim-survivor, ABE, T4)

In this extract she suggested that she had previously had difficulty with alcohol, but had stopped drinking heavily by the time of the rapes, which was also confirmed by the defendant in his police interview:

EXTRACT 6f

> "[<*Q&A*>*:* Asked if victim-survivor has mental health issues, defendant says yes and references the accident she had. Defendant says that she self-harms and that she used to drink a lot of alcohol, he says she struggles to cope with things]." (Defendant, police interview, T4)

The defendant clearly linked the victim-survivor's drinking to her mental health. This was later built upon through the testimony of a mutual friend of the victim-survivor and defendant:

EXTRACT 6g

Defence	Regarding volatility, what does [victim-survivor] do to make you think she's volatile?
Friend	Drinking, the ways she acts.
Defence	And how often do you see that behaviour?
Friend	Occasionally. (T4)

The linking of volatility to alcohol consumption drew on classed and gendered notions of respectability. Gendered stereotypes about women as 'hysterical' and 'crazy' interlinked here with ableist narratives (see section 6.3.2) and classed notions of excess, where heavy drinking and violence, including intimate partner violence, have been conceived of as a working-class phenomenon (Phipps, 2009; Bourke, 2008). It had particular salience in the context of this relationship, where the defendant had several convictions relating to domestic abuse

perpetrated against the victim-survivor. This notion was arguably given congruence by the judge including it in her summing-up:

EXTRACT 6h

> "He said that [victim-survivor] has previously told him she's scared of [defendant], but that [victim-survivor] gave as good as she got and can be worse when drinking." (Judge, T4)

The wording the judge used, "gave as good as she got", is problematic because it minimised the defendant's known violent behaviour towards the victim-survivor whilst at the same time equating the victim-survivor's 'volatility' with the defendant's domestic abuse. This is reflective of cultural narratives that quickly villainise women but excuse men for violence, as was illustrated in discourses surrounding a court case involving Johnny Depp and Amanda Heard in the latter half of 2020 (see, for example, Peat, 2020). A similar narrative was found by Hlavka and Mulla (2018), where defence counsel used the term "gave as good as she got" to support their characterisation of a Black woman victim-survivor as aggressive, again in the context of intimate partner violence. Whilst the victim-survivor in T4 was privileged in this regard due to being racialised as white, the 'aggressive woman' narrative for both her and the victim-survivor in Hlavka and Mulla (2018), sought to distance them from the 'ideal victim' (Christie, 1986), thus minimising the male violence whilst shifting blame onto the victim-survivors.

In T1, the victim-survivor's drinking habits were put under far more scrutiny.

EXTRACT 6i

Defence	You get drunk quite often, you often can't remember how you got home. What were you drinking that night?
Victim-survivor	I can't remember.
Defence	You can't remember?
Victim-survivor	Alcohol.
Defence	Yes, well I got that. <chuckles> What type?
Victim-survivor	I don't remember.
Defence	I suggest that you weren't drunk. (T1)

Even though the defence barrister goes on to suggest that the victim-survivor was not drunk, he began by pointing out that she gets drunk often, to the point where she is unable to remember getting home. The supposition that the victim-survivor was not as drunk as she claimed was a key element in the defence, so it is unclear what the purpose of pointing to the victim-survivor's drinking habits prior to the alleged rapes could be other than to impeach her credibility. Whilst it could be argued they were establishing that she had a high tolerance for alcohol, doing so by stating that she often cannot remember how she got home seems incongruent with that purpose. Furthermore, by laughing at the victim-survivor's answer and stating "Yes, well I got that", the defence barrister arguably breached rule C7.1 of the BSB's (2020) code of conduct for barristers, which states: "you must not make statements or ask questions merely to insult, humiliate or annoy a witness or any other person". Rule C7 is one of the few rules without further guidance attached to it, so it is not clear where the line is, which is problematic both in terms of practice and accountability. This is important because questions with a purpose of insulting and humiliating may not be asked in isolation, rather there may be a range of 'subtle' questions that culminate as such. Whilst it may be argued that it goes towards credibility, it is difficult to see the probative value of laughing at a victim-survivor. Indeed, defence counsel later took advantage of an opportunity presented by the victim-survivor in a moment of jest to further comment on her drinking habits:

EXTRACT 6j

Judge and Defence	[Talking about what [strong liqueur] is, also mentioning vodka. Jokes between them about [strong liqueur]]
<Laughs from public gallery [defendant's supporters]>	
Victim-survivor	<jokingly> What, now?
<Laughs from the public gallery [defendant's supporters]>	
Defence	You developed a taste for it [vodka]?
Victim-survivor	It's alright, yeah.
Defence	Moving on to the second night… (T1)

To say someone has 'got a taste for something' is a term often used to indicate frequent consumption of or a strong inclination/desire for something. Within the digital evidence in this case there was a message from the victim-survivor to the defendant that says "I know I have

a drink problem, I get fucked all the time now" (T1). Given that barristers carefully choose their words, it seems reasonable to conclude that the barrister in this case likely saw an opportunity to strengthen the narrative of this victim-survivor as a 'problem drinker', especially given that he then immediately moved on to a new line of questioning. The value in this insinuation comes from drawing on wider cultural narratives that position 'excessive' substance use as an indicator of a person being unreliable and untrustworthy (Selseng, 2017).

The extract below follows on almost immediately from extract 6j and demonstrates that the defence were in fact arguing that the victim-survivor was not drunk.

EXTRACT 6k

Defence	[You walked over to McDonalds, walked fine]. How high were your heels?
Victim-survivor	High.
Defence	But you were walking fine. [You were aware enough to go to McDonalds. You weren't that drunk were you?]
Victim-survivor	I was quite drunk.
Defence	***Quite*** drunk. Okay. (T1)

Here the defence counsel used repetition and emphasis of the victim-survivor's own words to underscore his point, taking advantage of the differing strength of meaning attributed to the adjective 'quite' (it can mean fairly or very). Also of relevance in this excerpt is the question he used to make this point, that is, the question about the height of her heels. Whilst this was asked within the context of establishing her level of drunkenness, arguably giving relevance, the wider context of this trial's gendered and classed narratives creates further meaning. In addition to the remarks regarding the victim-survivor's drinking habits and the height of her heels, evidence was adduced through police questions in the ABE and through witness testimony regarding the length of her dress. For example, the prosecution asked directly about the victim-survivor's clothing, and the reasoning for this is unclear:

EXTRACT 6l

Friend	[[Victim-survivor] was sick before we went out, just once for maybe about ten minutes. We waited for about half an

	hour and she said she felt okay, so we decided to still go out].
Prosecution	What was [victim-survivor] wearing?
Friend	A dress, mini dress. Black or gold I think.
Prosecution	How much had [victim-survivor] drunk?
Friend	A substantial amount, but we were all the same level of drunk. (T1)

The prosecution asking about what the victim-survivor was wearing seems entirely irrelevant to this line of questioning and arguably to their case at all. Referring to victim-survivors' clothing without cause to could lead to the jury unnecessarily deeming it relevant. The defence later discussed the length of the victim-survivor's dress in the context of establishing the 'mechanics' of how the defendant touched her. Whilst the defence's reasoning for asking about clothing can be argued relevant, the prosecution question cannot. This built on the narratives discussed in section 4.3.2 regarding this victim-survivor's perceived flirtatious behaviour by drawing on embedded stereotypes at the intersection of gender and class which position female heavy-drinkers as sexually available (Blume 1991; Cozzarelli et al. 2002). A study by Spencer (2016) found that rape victim-survivors from low socioeconomic backgrounds were more often rated as 'promiscuous' than victim-survivors from higher socioeconomic backgrounds and that this correlated with higher levels of blame and negative attitudes towards victim-survivors from lower socioeconomic backgrounds. Furthermore, Riemer et al. (2018) found that by merely holding an alcoholic beverage, women were routinely dehumanised and assessed as sexually available.

As Skeggs (1997; 2005) notes, 'promiscuity' and excessiveness, including drunkenness, are commonly associated with working-class femininities. This relates to the middle-class ideal of respectability, which "is one of the most ubiquitous signifiers of class" (Skeggs, 1997, p.1). Traditional femininity was constructed based on middle-class ideals and respectability was used as a measure by which to hold certain groups of people as valued and legitimated whilst 'othering' those not deemed respectable (Skeggs, 1997; Lawler, 2005). Robinson (1983) historically situated these narratives in the obscuring and denial of women's sexuality and

desire, particularly along classed and racialised lines. Similarly, Clark (1987) delineated the significance of classed narratives in the construction of working women as unchaste and thus unrapable. Phipps (2009) and Anthias (2014) have articulated similar thoughts on the intersections of gender and class with regards to sexual violence and it has been a noted form of narrative in previous rape trial observation research (Lees, 2002; Smith, 2018).

The age of the victim-survivor was also of relevance in T1 with regards to these gendered narratives of respectability. The victim-survivor and defendant in T1 were both in their early twenties at the time of the trial and late-teens at the time of the alleged rapes, which added youth as a factor. The media and popular culture play a significant role in circulating images and representations that govern what is considered desirable and undesirable behaviour (Blackman and Walkerdine 2001). So-called 'reality' TV forms a significant part of contemporary popular media and within it there is an overrepresentation of young, white, working-class men and women (Wood and Skeggs 2008). Portrayals of them are often disparaging and aim to incite moral judgements of their behaviour (Skeggs and Wood 2012; Allen and Mendick, 2012). The portrayals on these TV shows are heavily gendered, with the young women depicted in forms of excess in relation to alcohol and sexuality (Nunn and Biressi, 2013; Wood 2017). That these portrayals are of young *white* men and women is significant because within these classed narratives whiteness becomes a marker of excess, positioning the white working-class as lacking in morals and thereby positioned as non-respectable subjects of disgust (Skeggs 2004; Lawler, 2005). Indeed, as Skeggs (1997, p.99) argued, both Black and white working-class women have been "coded as the sexual and deviant other against which femininity was defined", but it cannot, however, be assumed that this happens in the same way. Whiteness, therefore, is salient in this narrative in that it distinguishes a particular type of working-class femininity.

Shows such as *Geordie Shore* and *The Only Way Is Essex* contain images of young white working-class women drinking alcohol to excess and engaging in, or talking about, sexual acts, thus portraying them as hyper-sexualised and sexually available (Griffin et al., 2013; Stepney, 2015; Payne, 2016; Wood 2017). Alcohol is highly prevalent in 'reality' TV (Lowe et

al. 2018; Baker et al. 2019), as is highly gendered language which constructs women as irrationally emotional and objectified, sexualised beings (Payne, 2016). When barristers deploy these classed and gendered narratives about young working-class women, the impact of any sexual history evidence that is introduced is arguably compounded (Smith, 2018), such as in T1 (see section 4.2.1). That alcohol can play such an easy role in the formation of narratives about the sexual behaviour of victim-survivors is significant because alcohol is a prominent feature in many rape cases (HMCPSI, 2007; Lovett and Horvath, 2009; Hester, 2013; MOPAC, 2019).

The narratives in T1 therefore culminate in an image of a young, 'promiscuous', working-class woman, who binge drinks often and who does not therefore conform to middle-class ideals of respectability, thereby positioning her as untrustworthy and unreliable and drawing on victim-blaming myths about rape. As Brooks (2002) posits, rape trial narratives are often a reflection of cultural narratives about how women are "supposed to behave" (p.4). It appears that being perceived as a young working-class male can be used in favour of defendants in excusing their behaviour (see Chapter Seven), whereas being perceived as a young working-class female is used as a tool for undermining credibility by casting them against the image of the 'ideal victim' (Christie, 1986). Whilst this may seem at odds with Phipps' (2009) assertion that working-class men are perceived as more likely to commit rape, it speaks, rather, to the shamefully low conviction rate by providing an insight as to the mechanisms that may serve in the acquittal of even men who may be perceived as more likely to rape.

6.2.3 Working-class motherhood

Narratives about motherhood were present in T3, T5 and T6. Broadly, there were two types of motherhood narratives: respectable (good) mothers (T3) and unrespectable (bad) mothers (T5 and T6). The good mother narrative in T3 was, however, not substantial and was very peripheral to the case. The 'unrespectable mothers' narratives drew on classed stereotypes to portray mothers as respectable or not, and this was then used as a marker of credibility.

In T5, the parenting skills of the child victim-survivor's mother were frequently called into question.

EXTRACT 6m

Defence	[Did you catch them both playing video games that were too old for them?]
Mother	Yeah.
Defence	For example? Call of Duty?
Mother	Yeah.
Defence	[Did you catch them watching DVDs that were not age appropriate?]
Mother	Not really, Twilight.
Defence	[When you say to police that [victim-survivor] watches things he shouldn't, what things?]
Mother	Call of Duty. (T5)

In the above excerpt the defence barrister was questioning the mother about an assertion that her sons had been watching pornography. Whilst asking about DVDs could therefore be relevant, it is unclear why asking about video games, and specifically a violent video game with no sex or nudity, would be. It therefore seems that asking about *Call of Duty* was a way of building the portrayal of her as a 'bad mother'. The defence later returned to this point after pursuing several other lines of questioning.

EXTRACT 6n

Defence	Okay, was there a time you caught [victim-survivor] watching naked men and women?
Mother	No, I caught [eldest son].
Defence	How old was he?
Mother	Nine.
Defence	Was it age appropriate?
Mother	Very *in*appropriate.
Defence	Was it what would be classed adult pornography?
Mother	Yes. (T5)

The questioning about viewing pornography was relevant to the case as it was suggested that this could have informed a false allegation, however the above extract was all that was needed for the defence to establish this, which further demonstrates that asking about *Call of Duty* was merely a mechanism by which to portray her as a 'bad mother'. The 'bad mother' narrative was bolstered further in other lines of questioning. For example, during cross-examination the defence asked about the end of the mother's relationship with the father of her eldest two children:

EXTRACT 6o

Defence	You told [defendant] that things were tough when you broke up with [the boys'] dad.
Mother	Yeah.
Defence	What did you mean?
Mother	He used to be violent towards me.
Defence	Did the boys see?
Mother	I don't know, maybe. (T5)

It is difficult to see how this line of questioning could be relevant to the case. Eliciting from the mother that her children may have seen their father being violent towards her arguably drew on cultural narratives that position victims of domestic violence as failing to protect their children. The 'failure to protect' narrative pejoratively shifts blame and responsibility from the perpetrator to the mother (Humphreys et al., 2006) and is pervasive in society (Moulding et al., 2015). The line of questioning in the excerpt above therefore appears to be another way to portray the mother as a 'bad' parent. The defence then used this narrative to contrastingly portray the defendant as showing protective parenting behaviour, thereby distancing him from the allegations of sexual abuse:

EXTRACT 6p

Defence	When you confided in [defendant], did he say maybe they shouldn't see [their father] as much?
Mother	No, he moaned that he didn't have them enough.
Defence	I'm going to suggest that he did say 'don't you think they shouldn't have contact'.

Mother	No. (T5)

As well as the more subtle references to ‘poor parenting’ outlined above, the defence also made much more explicit insinuations.

EXTRACT 6q

Defence	During that time did you ever get angry at your kids?
Mother	All parents lose their temper with their children.
Defence	I’m only asking you.
Mother	Yeah. (T5)

The defence asked a question that almost any parent would be required to answer ‘yes’ to, and when the mother pointed that out in her response the defence drilled down further so that only an affirmative answer could be given. Middle-class ideals characterise calmness and congeniality as appropriate emotional behaviour (Wingfield, 2010), therefore portraying the mother as angry bolstered the classed narrative that already othered her as working-class. That the anger was directed at her children put this in the context of ‘bad parenting’. The defence barrister immediately continued to build on this narrative:

EXTRACT 6r

Defence	And the school had significant input with you regarding boundaries and managing behaviour?
Mother	Only for [eldest son].
Defence	And you struggled at this time with chores around the house?
Mother	Yeah. (T5)

Here the defence drew on the school’s involvement and phrased it in such a way that it responsibilised the mother. Furthermore, raising the point that the mother had struggled with household chores is further reflective of middle-class motherhood ideals, where the middle-class ‘home-maker’ is portrayed as a virtuous, capable housekeeper in contrast to the working-class slovenly, welfare-dependant mother (McRobbie, 2013). Indeed, Walkerdine and Lucey (1989) posited that housework is a gendered practice that is differently regulated for middle-

and working-class mothers and is inextricably linked to notions of ‘good’ and ‘bad’ mothering, respectively.

The above excerpt was immediately followed with questioning that framed the mother as a ‘benefits cheat’ (see section 6.2.1). Lone parents, in particular lone mothers, are commonly positioned as ‘deficient parents’ and ‘scroungers’ (Dermott and Pomati, 2016). Whilst the mother in T5 was in a relationship, questioning about the victim-survivor’s attitude towards his mother’s previous partners positioned her as having introduced multiple men into her children’s lives. Whilst the questioning was arguably relevant, it further fed into the narrative of her as a ‘bad mother’ by contrasting her against middle-class values of sexual respectability and the nuclear family. Lone mothers are often conceptualised as representing sexual immorality (Smart, 1992; Carabine, 2001) and Lehtonen (2018) has noted that policy documentation linked ‘multiple relationship transitions’ to poor outcomes for children and thus to ‘poor parenting’, reflecting the middle-class ideal of the nuclear family as the expected norm.

Lone parenthood, especially lone motherhood, has long been stigmatised in the UK (Smart, 1992; Skeggs, 2005). Political and media discourses frequently position lone mothers as being economically deprived and reliant on state benefits (Atkinson et al., 1998; Salter, 2018; Jun, 2019; Morris and Munt, 2019). These gendered and classed portrayals draw on Murray’s (1991) concept of an ‘underclass’ and remain embedded in contemporary society (Tihelková, 2015; Salter, 2018; Morris and Munt, 2019). These narratives draw on the notion of ‘benefits scroungers’ to frame lone mothers as undeserving (Tihelková, 2015) and thus as unrespectable and ‘other’ (Jun, 2019). Positioning victim-survivors and their mothers as the unrespectable ‘others’ in this way invites the jury to make moral judgements based on stigmatising cultural narratives formed on middle-class notions of respectability.

Working-class motherhood in general has long been scrutinised and viewed as inferior in the UK (Skeggs, 1997, 2004; Gillies, 2007). Indeed, Smart (1995) traced classed notions of ‘good mother’ through legislation dating back to the seventeenth century. Respectable parenting, especially motherhood, is characterised by middle-class values and ideals, and those who do

not meet those standards are blamed and vilified (Gillies, 2007). Working-class mothers have long been responsibilised for 'failings' or problems within their families by being made to feel inadequate in their caring skills and abilities. As a result, they constantly have to prove themselves against middle-class ideals of motherhood, for example through 'parenting courses' imposed or encouraged by social workers (Skeggs, 1997; Moran et al., 2004; Gillies, 2007). Though these courses are purported to be aimed at *all* families and at mothers *and* fathers, in practice they are "targeted at poor and disadvantaged mothers" (Gillies, 2007, p.7). Poor parenting (mothering) is conceptualised as an individual issue rather than the result of structural inequalities (Gillies, 2007; Stewart, 2016). Further, there is a persistent cultural narrative that "poor parents spawn damaged, antisocial children" (Gillies, 2007, p.8). Thus, framing the child victim-survivor's mother (T5) as an inferior parent through highlighting interventions from social services, the NSPCC, and the school, served to reinforce the portrayal of the victim-survivor as an untrustworthy, 'problem child' who tells antisocial lies (see section 6.3.1.2).

At the same time as positioning the mother as inferior, the defence portrayed the defendant as a respectable father-figure who took on responsibility for another man's children. For example:

EXTRACT 6s

Defence	Moving forward, [defendant] had contact with [defendant and mother's son]
Mother	Yeah.
Defence	He took them all out?
Mother	Sometimes yeah. (T5)

Here the defence drew attention to the defendant's continued contact with all three children as opposed to just his own child. This was reinforced through the defendant's evidence-in-chief. These narratives of 'good dad' versus 'bad mum' played out broader gendered narratives of 'good man' versus 'bad woman' which permeate rape trials through the portrayal of women as untrustworthy liars (see section 6.3.1) and cast men against the 'good men don't rape' fallacy (see section 7.2).

T6 also involved allegations of child sexual abuse, although they were historic accusations so the victim-survivors in the trial were both adults. The motherhood narrative that ran through this trial was to a lesser extent than T5 but was nevertheless a negatively framed narrative about the mother. The narrative drew on classed and gendered cultural narratives that position working-class women as 'promiscuous' (see 6.2.2) through drawing attention to the mother's sexual history with the defendant (see section 4.2.1.1). When asking about the relationship (see extract 4o) the defence stated the age of the victim-survivors as 'young teenagers' before asking questions about what the mother had told them about the relationship. In doing this, the defence arguably sought to portray it as an example of 'bad parenting'. Although not explicitly saying that, it seemed to invite the jury to make moral judgements about the family and the type of people they are. Particularly because this was subsequently used to suggest that victim-survivor2 had made up her allegations and had used her knowledge of the sexual relationship as a basis for those allegations. This narrative reflected stigmatising portrayals of working-class, lone mothers as sexually immoral (Smart, 1992; Carrabine, 2001; Skeggs, 2005) which was further supported through the defendant's distancing of himself as a stepfather figure in his characterisation of the relationship with the mother as a sexual arrangement rather than a committed relationship. This characterisation was contested by the victim-survivors, their mother, and evidence provided by a neighbour who described it as eventually becoming a co-habiting relationship.

6.3 Narratives of honesty

Credibility is considered central to rape and sexual assault trials. There is a pervasive misconception that false allegations of rape are common despite evidence that the opposite is true (Kelly, 2010; CPS, 2013; Weiser, 2017). Indeed, as former Canadian Supreme Court Justice asserted:

> "The most injurious myth is that women and children are not credible in this area of criminal law." (L'Heureux-Dubé, 2012, as cited in Cossins, 2020)

This section therefore explores the way narratives of belief and disbelief were constructed through gendered narratives that intersect with pejorative narratives about age and mental ill-health. These narratives of honesty further intersect with social class with a clear overlap with the respectability narratives discussed in the preceding section.

6.3.1 Women as liars

The misconception that false allegations of rape are common is often articulated through narratives that position women as liars for varying reasons, including that they are scorned and looking for vengeance or that they had drunken sex which they later regretted.

Narratives that positioned women as lying about being raped or assaulted were present in all trials with adult victim-survivors. In the remaining trial the victim-survivor, a boy child, was positioned as a lying 'problem child', and this is discussed further in section 6.3.1.2. The idea that women are inherently untrustworthy and deceitful and therefore lie about rape has been around for centuries (Jordan, 2004; Bourke, 2008). Sir Matthew Hale infamously stated that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent" (Hale, 1726, cited in Rumney, 2006). Assertions such as this persisted through the nineteenth and twentieth centuries (Bourke, 2008), and the following example from an American judge highlights how this notion was clearly articulated in ways that framed women as irrational:

> "There are few crimes in which false charges are more easily or confidently made than in rape. Experience has shown that unfounded charges of rape are brought for a variety of motives. The adage, 'Hell hath no fury like a woman scorned', is frequently encountered in rape prosecutions" (Ploscowe, 1951, cited in Jordan, 2004, p.32).

More contemporarily, an analysis of Twitter posts from 2016 showed that tweets accusing women of lying about rape were almost three times more common than posts validating victim-survivors (Stabile et al., 2019), which helps demonstrate the continued pervasiveness of the misconception that false allegations of rape are common.

In my observations all victim-survivors were portrayed as liars. The accusations of lying were put directly to the victim-survivors in cross-examination in some trials, whereas in others there were micro-examinations that lay the groundwork for the point to be made during closing speeches. For example, in T2 there were suggestions that the victim-survivor felt scorned or jealous of the defendant's new girlfriend, with the implication being she was lying for revenge. The defence began without making direct comment on motive for lying:

EXTRACT 6t

Defence	[You had a work colleague at [place of employment] and at the end of that year you had concerns about how close they were getting, then in the [month] she moved into [house victim-survivor had shared with defendant]. Originally it was a platonic, financial arrangement, but then later it became a relationship and remains so to this day].
Victim-survivor	Yeah.
Defence	You found out [the month before reporting], how did you feel?
Victim-survivor	I didn't really care at that point. (T2)

The defence barrister was setting the background for when she later asked about the timing of the victim-survivor's first disclosure of the alleged rape:

EXTRACT 6u

Defence	By this time you knew that [defendant's new girlfriend] had moved in.
Victim-survivor	I suspected but I didn't know for sure. (T2)

This built on the questioning in the preceding excerpt to imply the victim-survivor was lying out of jealousy. Later in the trial the defendant's police interview was read into court. In it he said: "[It] sounds like she is trying to get back at me for all of this" (T2). The prosecution cross-examined the defendant to address the suggestion the victim-survivor was jealous of his new relationship:

EXTRACT 6v

Prosecution	So she had no reason to think that she couldn't have you back if she wanted?

Defendant	No.
Prosecution	She had no reason to be jealous of [girlfriend] […] It is your argument that she made the accusation up because she was jealous of [girlfriend].
Defence	[Not relevant, that is not our argument, our argument is that there was no non-consensual sex].
Prosecution	There is a huge passage in his interview that talks about jealousy.
Judge	What's been put to him in interview is not put as motive.
Prosecution	Can we have the jury out please? (T2)

With the jury out there was a back and forth about the defence case and what wording the prosecutor was permitted to use in her questioning:

EXTRACT 6w

Prosecution	[He's put forward that she was jealous, it is repeatedly referred to as about [the girlfriend], the only inference that can be made from that is that he is saying she is making it up].
Judge	Where is jealousy referred to in this interview?
Prosecution	The word 'jealous' is not necessary in interview for me to raise it here.

[Long discussion about whether he had accused her of lying or being jealous of the new girlfriend]

Defence	[My concern is that [defendant] has not put forward a motive to get back at him, [defendant] is replying to questions, he is not asserting anything. It's not right to say that is his argument, all his case is, is that he did not rape her].
Prosecution	[Because he says she is making it up, I can't be confined to only asking questions using words from his interview.] Otherwise no-one would be able to ask anything!
Judge	[I agree, but that was not my point. You said jealous, I asked where in the interview that was said, you did not point it out] […]
Prosecution	[It has been edited out, my mistake. But am I entitled to ask without the word jealous?]

Judge	Yes. […] (T2).

Although the defence had been allowed to imply this reasoning in her cross-examination of the victim-survivor, the prosecution was limited in the way she was permitted to address that implication. The defence barrister chose to interpret what counts as a 'legal argument' narrowly in an attempt to limit the prosecution's ability to challenge previous assertions made by the defendant. It seemed, however, that the judge had not noticed or remembered that the defendant had said "she is trying to get back at me" in the police transcript that was read into court. It was a clear suggestion of motive for lying. It seemed unnecessarily harsh to limit the prosecution's line of questioning in this way, and further interrogation of the defence's position by the judge may have made that clearer by, for example, taking time to properly review the transcript. Nevertheless, the prosecution barrister did go on to effectively counter the assertion within her limited scope:

EXTRACT 6x

Prosecution	So you said in interview that [victim-survivor] would know from your contact that she was welcome back as your girlfriend.
Defendant	Yes.
Prosecution	She was welcome to move back to the flat.
Defendant	Yes.
Prosecution	And to engage in sexual relations.
Defendant	Yes.
Prosecution	You loved her and wanted to marry her.
Defendant	Yes.
Prosecution	So you couldn't have made it clearer.
Defendant	No.
Prosecution	So she had nothing to worry about.
Defendant	No.
Prosecution	She had no reason to do anything nasty to you because of [girlfriend].
Defendant	No.
Prosecution	So in terms of [girlfriend] getting between you, we can forget about that?
Defendant	Yes. (T2)

The prosecution skillfully challenged the defence's insinuation here by clearly and simply getting confirmation from the defendant that the suggested motive was immaterial. Whilst the defence had argued that their case was not that the victim-survivor was lying out of jealousy, and had limited the prosecution's cross-examination accordingly, in her closing argument the defence directly stated it:

EXTRACT 6y

> "[As for motive, it is not for him to prove, but you may be interested in the timing of the reports to the friend and the police. At that time we know that [girlfriend] had moved in and [victim-survivor] has said that she thought that had happened and said that she wasn't bothered by that time.] But what do you make of the timing? … [Every jury brings common sense. Yes you might agree that there is no such thing as a standard response to rape, but I ask you to look at the timing of that report.]" (Defence, T2)

It is significant that the defence had explicitly said that she was not arguing that the victim-survivor was lying out of jealousy but then went on to make exactly that point in her closing statement. This highlights precisely why it was important for the prosecution to be able to cross-examine the defendant on the issue, rather than being limited by the defence and the judge. At the time of this trial there was a considerable amount of media attention given to cases with disclosure failings that lead to the CPS dropping cases (e.g., BBC News, 2018; Bowcott, 2018; Evans, 2018). This had resulted in a heightened rhetoric around false allegations throughout 2018 and 2019 (e.g., Osborne, 2018; Davies, 2019; Fouzder, 2019; McKinney, 2019). It seems fair to assert, then, that jurors may likely have been aware of this high-profile media attention, which could have made the defence argument more compelling to them. Particularly because the defence barrister stated in her closing speech:

EXTRACT 6z

> "[Rape is a word that stirs up strong feelings. There is a lot in the news,] there's #metoo, it is a hot topic." (Defence, T2)

Saying “there is a lot in the news” arguably directed the jurors to think about the false allegations rhetoric, as that is what was dominating the British press regarding rape at the time. Pointing to this rhetoric, therefore, arguably made the value of drawing on the ‘jealous women lie’ narrative much stronger.

Another ‘motive for lying’ was put forward in T1. In this case the victim-survivor and defendant were friends who had been out drinking together and the defendant had unrequited romantic feelings for the victim-survivor. The victim-survivor was accused of regretting consensual sex seven times during cross-examination. One such example:

EXTRACT 6aa

Victim-survivor	I cried for half an hour first, because I knew something had happened.
Defence	I suggest you do remember and you know what happened. You felt disgusted and guilty out of regret for it happening again, and that’s why you got hysterical. (T1)

The use of the descriptor “hysterical” was significant because historically ‘hysterical’ women were viewed as prone to making false allegations (Jordan, 2004; Bourke, 2008). It also has connotations with mental ill-health and served to further undermine the victim-survivor’s credibility by portraying her as unstable (see section 6.3.2). ‘Regret’ as a motive for lying was a strong theme in the defence’s closing:

EXTRACT 6ab

> “She did remember. She did consent, she knows she did. She was embarrassed. She knew, that she said ‘I really hope we didn’t have sex’ is a clear indication that she remembered but regretted it… She said she felt disgusted, but was she not disgusted at herself for what she was doing to the defendant’s feelings? ... My learned friend says she has no motive for lying, I suggest that her motive is regret and disgust and embarrassment. The defendant is telling the truth. She is lying.” (Defence, T1)

These were the final words of the defence. Previous court observation studies have also found the notion of ‘regretted drunken consent’ to be used by defence counsel (Lees, 2002; Temkin et al., 2018). The idea that women make false allegations after regretful sex is embedded in

society, which makes this a valuable argument for defence barristers to put forth and probably a powerful note to end on. For example, Gunby et al. (2012) asked four focus groups to discuss a rape vignette and found that the idea of 'regretting it after' was discussed in three out of their four groups. Their findings also indicated that it was held against the victim-survivor that she did not immediately recognise the experience as rape, which was also the case for the victim-survivor in T1 (see section 5.2.2). The participants in Gunby et al. (2012) also framed alcohol as a factor in 'causing' women to make false allegations after regretful sex. Again, alcohol was a significant factor in T1 (see section 6.2.2).

These assumptions and narratives are rooted in patriarchal values where women were historically denied sexual desire and agency. For example, Degler (1974) documented some narratives in which women in nineteenth century Britain and America were viewed as having no sexual desire except in exceptional circumstances and those exceptions were viewed as abnormal and associated with the working-classes (see 6.2.2 for a discussion of working-class sexualities). Though Degler (1974) went on to argue that the ideologies prescribed through those narratives were not necessarily bought into by the majority of the public, the continued pervasiveness of such narratives cannot easily be denied. Indeed, Webb (2015) traced the existence of 'slut-shaming' as a means of suppressing women's sexuality back to ancient Rome, where, for example, type of clothing was used to distinguish between married women and prostitutes and female adultery was punishable by exile or death.

Robinson (1984) noted how women's sexuality had historically been denied and obscured, which therefore shrouded acknowledgement or performance of female sexuality in contemporary times with shame. The chastity of women was historically a primary marker of respectability and honour (Gowing,1996) and this was clearly reflected in early rape law which conceived of women as property of their fathers or husbands (Edwards et al., 2011). The value given to 'chastity' led to 'unchaste' women being viewed as dishonourable (Gowing, 1996). It was therefore thought of as a reason for women to lie to avoid scorn and shame when they were caught having sex and as a reason that men needed to be protected from these 'false' allegations (Sanday, 1997). This highly gendered narrative intersects with the 'respectable'

ideals that framed the expectations for women's sexuality (see section 6.2.2). For example, women in the nineteenth century were characterised in a false dichotomy that positioned women as either chaste and virtuous and therefore respectable or unchaste and unvirtuous and often labelled as prostitutes, thereby being *un*respectable (Sanday, 1997).

Women were also historically thought of as conniving and cunning in their 'false allegations' (Bourke, 2008) and this, too, was reflected in my observations of T3 and T6. Similar accusations of women conniving were made in T1 and T5, where the victim-survivors' mothers were also implicated in the accusations of lying, and this is discussed separately in section 6.3.1.1. Defence counsel in T3 appeared to suggest that a gap in digital messaging between the victim-survivor and the defendant, which was taking place in the hours after the assault, provided an opportunity for her to be influenced by a friend:

EXTRACT 6ac

Defence	[There is an 11-minute gap].
Victim-survivor	Yes.
Defence	Then that's where you claim he had massaged inside your vagina?
Victim-survivor	Yes.
Defence	Did you speak to anyone in those 10 minutes?
Victim-survivor	Maybe.
Defence	Did you speak to [friend A]?
Victim-survivor	No, that was later.
Defence	<long pause> but maybe [friend B]?
Victim-survivor	Yes. (T3)

This is where the cross-examination ended. By first identifying a gap in the communications and determining that it was after that gap that the victim-survivor 'claimed' the defendant had sexually assaulted her, the defence was able to cast suspicion on the gap. Although it was not explicitly mentioned, it seemed that defence was listing friends until the victim-survivor said 'yes'. The long pause before "but maybe [friend H]?" could be indicative of this. There is no confirmation of communication nor any evidence of it, merely a suggestion from defence that there *could* have been and an acknowledgement from the victim-survivor that there *could* have

been. Yet to an observer, such as jurors, this could easily have added weight to the accusation that the victim-survivor was lying, by leaning on cultural narratives that position women as untrustworthy and conniving. This was also bolstered through portraying the victim-survivor as sexually provocative (see section 4.2.1). Indeed, in the closing speech, the defence said:

EXTRACT 6ad

> "[there has been a lot of sexual banter, sexually charged, sexual discussion. We have messages directly after, where [victim-survivor] says [reads messages], then there's a gap of 11 minutes then she says] 'but why did he massage inside my vagina?'. Her evidence is that she may have spoken to one of her friends between." (Defence, T3)

As noted earlier in this section and in section 6.2.2, gendered narratives of women's sexualities intersect with classed notions of what counts as 'respectable'. In the above example the defence barrister pointed the jury to his earlier characterisation of the victim-survivor as 'promiscuous' (see section 4.2.1) and linked that to his implicit suggestion that she was influenced in making her allegation after speaking to a friend. The prosecution addressed the accusation that the victim-survivor was lying in his closing speech:

EXTRACT 6ae

> "Unless mentally unhinged, [you don't go around making these things up. What reason could there be? You may be really struggling to come up with a logical reason for why [victim-survivor] might]. I can, and this is really stretching for an example, maybe [victim-survivor] is scorned, she could logically make something up. But that is not what has happened here. [According to [defendant] nothing happened, just a massage, then she immediately decides to make this up?] Why? There is no reason, what logical process might explain why she made it up? … You must find him guilty." (Prosecution, T3)

The prosecutor attempted to resist the false allegations myth by acknowledging the gendered narratives of 'scorned women' and arguing that that reasoning was illogical in this case. Whilst it is good that it was addressed, the way in which the argument was framed continued to reference the myth that in certain circumstances women do lie about rape and that it is women with mental ill-health who lie, not this 'ideal victim' in front of the jury. This framing drew on the

notion that 'hysterical' women lie about rape (see section 6.3.2). The victim-survivor in this trial did in many ways match up to the 'ideal victim' image (Christie, 1986), and even in the ways she deviated from that image they were what could be considered exceptional. For example, although 'sexting' deviates from the idea of 'chastity' associated with an ideal victim, this victim-survivor was demonstrably hesitant and reserved in the images she sent, therefore she only minimally, and 'reasonably', deviated from the ideals of respectability that formulate the 'ideal victim' stereotype (respectability is addressed in section 6.2). Another factor that could lend favour to the victim-survivor in this regard was that she thrice interrupted the defence barrister in order to rebut or preempt victim-blaming assertions. This is significant because Larcombe (2005) argued that "the 'successful rape complainant' is not necessarily one with an unblemished sexual history. Rather, she has a strong sense of herself and takes overt offence at...alternative or derogatory constructions of her character and credibility" (p.73).

The following excerpt from the defence's closing remarks demonstrate how easy it is to form a 'women lie' narrative with regard to even those who bear close resemblance to the 'ideal victim':

> EXTRACT 6af
>
> "[It is simply one word against another. Does [victim-survivor's] word have enough weight… or was it a young woman] a bit prone to exaggeration, perhaps very embarrassed as to the position she found herself in… 'I've been duped, [he's not who he says he is]'. Imagine how she'd feel having to tell people about it. [Remember her messages, she suspected. Did she, as a result of embarrassment, knowing she'd be told off by her friend, think] the way out of this is to…play the victim. ['I'm going to say I was sexually assaulted…create a wave of sympathy rather than intense embarrassment…and people thinking I'm stupid']… 'you've been playing with my feelings, I'm gonna make your life really difficult now'…and be really vindictive." (Defence, T3)

The defence barrister chose words and phrases with clear negative connotations: "exaggeration", "embarrassed", "play the victim", "vindictive". This relied on the gendered and classed narratives already discussed that posit that women lie about rape in order to avoid shame (Clark, 1987; Sanday, 1997; Stevenson, 2000; Bourke, 2008). For example, Bourke

noted a belief that "even 'respectable women' [could] 'imagine themselves the victims of a man's sexual passion'" (2008, p.33). The connotation of 'exaggeration' in the defence counsel's closing speech reflected the idea that women 'imagine themselves the victims'. Again, as with T2, the defence arguably took advantage of the strength of the 'women lie about rape' narratives in news and social media at the time of the trial observations.

As with T3, there were insinuations of conniving in T6. The case involved two sisters as victim-survivors who had made allegations against a previous partner of their mother. Defence counsel in this trial used the sisters' relationship to undermine their claims by alluding to collusion. For example:

EXTRACT 6ag

Defence	Is it because it didn't happen?
Victim-survivor1	No. It did. I won't be called a liar.
Defence	… isn't it the case that you made up the bus allegations to support your sister's allegations?
Victim-survivor1	No. (T6)

This assertion was then repeated in the context of inconsistencies with dates in the victim-survivor's accounts:

EXTRACT 6ah

Defence	I'm going to suggest you brought it forward three months.
Victim-survivor1	No.
Defence	Brought it forward to support [victim-survivor2's] allegations.
Victim-survivor1	No! (T6)

The defence framed both sisters as vindictive liars in her closing remarks:

EXTRACT 6ai

"… is she trying to make it worse for this defendant? It's not enough to accuse him of sex when she was 15, let's make it worse for him … [having made up allegations about kissing when she was a child which none of us had heard before]" (Defence, T6)

Here the defence clearly articulated a motive of vindictiveness and malice and used victim-survivor1's inconsistencies to bolster that assertion. Victim-survivor2 was also framed as a vindictive liar:

EXTRACT 6aj

> "Members of the jury you may think it quite telling that she says at the end of the ABE about being angry with [victim-survivor1] 'stealing her boyfriend', but no one says anything about that…[recaps burden of proof] … [Defendant] says she's odd … does this rivalry give an insight as to how [victim-survivor2's] mind works?" (Defence, T6)

The defence barrister portrayed victim-survivor2 as jealous, a narrative put forward by the defendant on multiple occasions, and vindictive and implied that a rivalry between the sisters could be seen as an indication of that vindictiveness. This characterisation of rivalry contrasts the earlier assertion that one sister had made up allegations in support of the other. Both characterisations, however, portray the victim-survivors as untrustworthy and provide motive for lying. These narratives drew on the gendered and classed narratives previously discussed that position working-class women as untrustworthy.

In contrast to the other trials discussed in this section, the victim-survivor in T4 had not used the word rape in her allegation, which closed off the opportunity for the defence to put a 'motive' for false allegations in the ways outlined above. Therefore, the defence barrister instead constructed the victim-survivor as a liar through focusing on her actions at the time of the rapes, rather than focusing on providing the jury with a motive for lying.

EXTRACT 6ak

> "Even the most socially adept people can be deceived by the actions of someone so intent on misleading. [That's what this case is about. [Victim-survivor] told you she was scared, in her mind felt scared of [defendant]. So whilst [victim-survivor] told you that she had fear in her mind, she sought to deceive [defendant] because she wanted him to believe they were back together…]" (Defence closing, T4)

This remark ignored the context of the history of domestic abuse perpetrated by the defendant against the victim-survivor. He referred to the victim-survivor as deceitful for not

communicating her fear to the defendant and framed it as intentional manipulation. A later remark in his closing argument reasserted this:

EXTRACT 6al

> "if this was a woman who was genuinely fearful and desperate to escape, she was masterful at hiding it." (Defence closing, T4)

The assertions in both these extracts ignored and obscured what is known about the power dynamics in intimate partner violence and draws on the myth that women should and always do actively resist rape (see section 4.3.1). Men who are violent towards their partners often do not need to resort to violence or threat in order to have their wishes met because the underlying pattern of abuse works as an effective tool of coercion (Kelly, 1987; Hamby and Koss, 2003). Cultural narratives, however, tend to obscure this by trivialising intimate partner rape, and this has been shown to influence charging decisions in a US context (O'Neal et al., 2015) and in mock jury research (Lynch et al., 2019).

6.3.1.1 Mothers as liars

So far, this section has demonstrated that all the adult victim-survivors were accused of lying by the defence barristers through the use of gendered and classed narratives that reflect hundreds of years of disbelief of women and shaming of their sexualities. The gendered nature of these narratives was further demonstrated in the ways in which victim-survivors' mothers were also framed as untrustworthy liars by defence counsel. Whilst there was one male victim-survivor, he was a child and so narratives about his age were used to illustrate his untrustworthiness (see section 6.3.1.2), however this was bolstered by gendered and classed narratives about his mother.

Section 6.2.3 discussed the ways in which the child victim-survivor's mother in T5 was cast as a bad mother through gendered and classed narratives. During cross-examination she was asked about the timing of the report to the police in relation to her being annoyed with the defendant for cancelling planned contact with the children.

EXTRACT 6am

Defence	Were there some messages after the breakup where [defendant] had to rearrange seeing the boys because of work?
Mother	No, it was because of his back.
Defence	I suggest there was a time he had to rearrange because he had a few days of work come up.
Mother	Maybe, I don't remember.
Defence	And shortly after it is when you call the police?
Mother	I don't remember, I mean I remember what you're saying but I don't remember when it was. (T5)

Casting suspicion on the timing of the allegations in this way drew on pervasive cultural narratives that wrongly suggest mothers often make false child sexual abuse allegations against their former partners (Penfold, 1995; Trocmé and Bala, 2005). These assumptions draw on gendered and classed narratives that position women as vindictive liars. For example, Bourke (2008) noted that during the nineteenth century working-class children were thought to often make malicious allegations and were spurred on to do so by their mothers. Given the classed narratives constructed around the mother in T5 by the defence (see section 6.2.3), the casting of suspicion over the timing of the allegations seems to reflect this historic narrative. This narrative was also reflected in T6, where the victim-survivors had been accused of fabricating their allegations and conniving together (see section 6.3.1). Their mother was brought into this narrative in the defence's closing speech:

EXTRACT 6an

> "[Did you think all three of them were challenged and backtracked to say 'I can't remember'. Are they helping you? Especially [mother]? That] throwaway remark 'I got dementia', really?! Really, members of the jury?" (Defence, T6)

The defence barrister suggested that all three had given untruthful accounts and "backtracked" when they were challenged over details. She pointed particularly to the mother. This mother, like the mother in T5, had been painted as a 'bad mother' by the defence through the use of classed and gendered narratives (see section 6.2.3). This intersected with unrealistic

expectations that wholly accurate and consistent accounts of sexual violence are given (see section 5.3).

As earlier examples show (extracts 6aa-6ab), the victim-survivor in T1 was accused of lying about being raped because she regretted having sex with the defendant. This narrative was bolstered through implying that the victim-survivor had conceded to a suggestion from her mother that it was rape, which was put forward as the source of the lie:

EXTRACT 6ao

Defence	You accused him of 'taking advantage'. Not rape.
Victim-survivor	I don't know what went on.
Defence	Exactly. You didn't accuse him of rape. You didn't tell your mum it was rape.
Victim-survivor	I didn't want to believe it.
Defence	It was your mum who first said it was rape. She put the idea in your head.
Victim-survivor	I don't agree.
Defence	You were not truthful to your mum about what happened. Then she suggested it was rape. (T1)

Here the defence used the term "put the idea in your head", which has clear negative connotations, to suggest that the victim-survivor had not believed it was rape. By then suggesting that the victim-survivor had not been truthful with her mother, he implied that she had misled her and did not correct her suggestion that it was rape. The implication was that she *should* have corrected her mother. This suggested that because the victim-survivor had not herself immediately labelled her experience as rape, her mother's assertion was invalid. This assumes that all 'true' victim-survivors are able to immediately accept or understand what has happened to them as rape, which ignores the difficulty women have in naming their experiences (McKenzie-Mohr and Lafrance, 2011; see also section 5.2.2). Indeed, Brooks-Hays (2019) found that it is common for victim-survivors to discuss their experiences with third-parties before reporting to the police and that these discussions are helpful in enabling them to 'name' their experiences. Nevertheless, the defence in T1 furthered his narrative in his cross-examination of the mother:

EXTRACT 6ap

Defence	[Am I right that…all she said was '[defendant] did things to me'. You thought she was embarrassed because you're her mum, and she said 'I was aware that he was doing stuff but I couldn't move'], she never said what 'stuff' is.
Mother	But I knew what she was saying, I know her, I'm her mum. I know what she meant when she said 'stuff'.
Defence	You assumed.
Mother	I don't think that's an assumption.
Defence	You assumed.
Mother	I know what she meant by how she said 'you know mum, '*stuff*''. [She was so upset, but she was fine a few hours earlier.]
…	
Defence	So, you made an assumption about what 'stuff' means.
Mother	No! (T1)

The defence barrister repeatedly used the word 'assumption' to cast doubt on the mother's account. He then continued by asking closed questions about the use (or not) of specific words:

EXTRACT 6aq

Defence	Did she use the word rape?
Mother	No.
Defence	Did she use the word penis?
Mother	No.
Defence	Did she use the word vagina?
Mother	No.
Judge	Do you use different words for body parts? You know some people have different words for things within families.
Mother	No. (T1)

The implication of the above exchange was that a victim-survivor's account must be clear and specific, however, as noted above regarding T6, this is an unrealistic expectation. The cross-

examination continued with the defence barrister returning to calling the mother's interpretation of her daughter's words an assumption:

EXTRACT 6ar

Judge	So you just thought that's what she meant from what she was saying?
Mother	Yes.
Defence	That's an assumption. She said the defendant had done 'stuff' to her, you made an assumption about what that meant. So the word rape came from you?
Mother	Yeah, and so what?!
Judge	You were first to use the word rape, that's what he's asking.
Mother	Yes.
Defence	Nothing further. (T1)

This whole line of questioning focuses in of the meaning of words. A pattern that has been clear in this and two other trials (T2 and T3, see section 7.4.1) is that commonly used words and phrases that are well established colloquially as referring to sexual activity were drilled down on and given alternative meanings. In this case that word is 'stuff'. It seems, therefore, that the language used to describe rape has to be precise, otherwise it is questioned and positioned as incredible or insignificant. This is a worrying finding, given the frequency of colloquialisms in the English language. Guidance for ABE interviewers recognises that descriptions contain imprecise language (MoJ, 2011), and indeed the use of imprecise language to give an account of rape is not a new phenomenon (see Bourke, 2008, p.21, for an example account from 1880). Women's accounts of sexual violence are shaped by cultural narratives that blame and shame them (Brown, 2013) and medicalise their experiences (McKenzie-Mohr and Lafrance, 2011). Their narratives of trauma are thus often filled with uncertainty and minimisation (Brown, 2013). It is, therefore, unrealistic to expect precise medicalised language in victim-survivors' accounts, most especially in their first accounts.

In the above extract, the act of a mother comforting her child and helping her identify what had happened to her was used to undermine the victim-survivor's credibility and position her as a liar. The defendant also made use of this narrative during his cross-examination:

EXTRACT 6as

Prosecution	Why would she say she didn't consent?
Defendant	Well, to be honest I think it was down to her mum.
Judge	That is speculation. (T1)

Whilst the judge rightly asserted that the defendant was speculating, she did not go further to explain to the jury that they should not give any consideration to speculation. As is standard, the judge did direct the jury in her summing-up that there is no place for speculation in a criminal trial, however she did not refer back to this intervention. It seems unlikely that the jury would independently remember this intervention by the end of trial when the judge gave her directions. Instead, they were left with the defence's narrative of calculating women, involving the mother as well as the victim-survivor, implied through the defence's closing remarks:

EXTRACT 6at

> "She never told her mum using words rape, penis or touching. Rape was her mother's idea. The timing of it all is interesting. Her mother said it was rape and off they went to the police station that very morning. In the time between her report and ABE she messaged people to tell them something really bad had happened that was so difficult for her to talk about, yet she keeps telling people. This, we submit, is a way for her to garner support and sympathy to keep up her charade." (Defence, T1)

The word "idea" carries connotations of scheming and brings the mother clearly into the narrative. Stating that "the timing of it all is interesting" again casts suspicion over the mother and daughter's intentions, seemingly implying an element of scheming. The victim-survivor confiding in her friends is treated as suspicious and a function of her "charade". As noted in section 5.2.3, this produces a 'damned if they do, damned if they don't' predicament for victim-survivors, where there are criticised for not telling but are also criticised when they do.

6.3.1.2 Children as liars

Best practice for the cross-examination of child witnesses is guided through the Equal Treatment Bench Book (ETBB; 2020), which outlines considerations and adjustments that can be made at the judge's discretion. For example, it specifies the manner in which questions should be phrased, that the defence case should not be directly put to the child, and that inconsistencies should be pointed out to the jury after rather than during the child's evidence. T5, the only observed trial with a child victim-survivor, provided an example of excellent practice in this regard. The questions were agreed in advance with the judge and intermediary, were phrased according to the guidelines in the ETBB, and were stuck to during cross-examination. The defence barrister used a manner appropriate for a child witness, that is, it was not aggressive or cold, rather it was friendly in tone. The mother of the child, however, was cross-examined in a manner akin to the cross-examination of adult victim-survivors, during which questions pertaining to child's motive for lying were put to her.

EXTRACT 6au

Defence	What was [victim-survivor's] reaction to [sibling] being born?
Mother	He loved him.
Defence	Wasn't he insanely jealous?
Mother	No.
Defence	Didn't he say he wanted him to die?
Mother	No. (T5)

The above extract shows how the victim-survivor was portrayed as harboring extreme jealousy towards his then-newborn half-brother. This reflects the gendered jealousy narrative discussed in section 6.3.1, and whilst that narrative was formed around women, as recently as the 1970s the belief that boys lie has been clearly articulated by the judiciary:

> "'It is well known that women in particular, and small boys, are liable to be untruthful and invent stories'" (Judge Sutcliffe, 1976, cited in Jordan, 2004).

Bourke (2008) traced historical narratives about children being disbelieved when making claims of sexual abuse, particularly children from working-class families. The classed nature

of this misconception is significant because in T5 the mother's parenting skills were routinely called into question by the defence (see section 6.2.3), arguably in an attempt to bolster the image of her child as a lying 'problem child':

EXTRACT 6av

Defence	Do you recall [victim-survivor] saying he was going to go to school and say you stabbed him?
Mother	Yep.
Defence	Did you stab him?
Mother	No. (T5)

Four other instances of historical lying were laid out in the same manner one after the other, building a concentrated image of this child's past behviour. This painted the victim-survivor as a child who tells lies in order to get people into trouble. 'Fanciful lying' is a trait associated with narratives of the 'problem child' (Horn, 1993). Horn (1993) demonstrated how the 'problem child' was constructed based on middle-class ideals in the twentieth century, where the 'proper' raising of children was seen to ameliorate social problems (see also section 6.2.3). Given that behavioural problems are associated with not guilty verdicts in child sex offences trials (Lewis, Klettke and Day 2014), drawing on the 'problem child' narrative could have been compelling for the jury. Indeed, a similar narrative has been observed in a US context, where Powell et al. (2017) identified narratives about 'rebellious adolescents' and 'dysfunctional families' being used to undermine the credibility of child victim-survivors.

EXTRACT 6aw

Defence	Has he ever told you anything bad about [current partner]?
Mother	No.
Defence	As far as you're concerned he loves him?
Mother	He sees him as a friend, likes him not love.
Defence	Has he ever told you he hates him?
Mother	Sometimes.
Defence	No more questions (T5)

These lines of questioning ignored the fact that it is not unusual for young children[18] to lie (Talwar and Crossman, 2012) or say they hate someone as a reaction to a perceived slight or to being told off (Einon and Potegal, 1994). Furthermore, lying about one thing does not mean they are lying about the alleged offences. This issue with credibility and past lies is a narrative that is applied to children in court as well as adults, and school records are commonly used to evidence histories of lying (e.g. Busby, 1997; Temkin and Krahe, 2008; Baird and Newlove, 2018). The prosecution in T5 addressed the narratives of both mother and child as liars directly with the defendant:

EXTRACT 6ax

Prosecution	[The mother] never showed any antagonism to you?
Defendant	No.
Prosecution	So if you're right, and he has made this up.
Defendant	Yeah.
Prosecution	There's nothing in your experience of him that gives any indication that he would?
Defendant	Well, when [sibling] was born I felt [victim-survivor] was jealous.
…	
Prosecution	So you're saying there were enough things she would be aware of to show that [victim-survivor] was hostile towards [sibling]?
Defendant	Yes.
Prosecution	So that's a pretty big lie from [mother]?
Defendant	Yes, it is.
Prosecution	… Are you sure you're not making this up?
Defendant	Yes.
…	
Prosecution	Or is it just a motive you have made up for [victim-survivor]?
Defendant	No. (T5)

The prosecution also addressed this, along with other rape myths, well in her closing speech:

[18] The child in this case was 9 when he gave evidence and the report had been made to police two years earlier.

EXTRACT 6ay

> "[You have to assess whether [victim-survivor] is fundamentally telling the truth]. You may think that all boys and girls lie, sometimes about important things, sometimes about trivial things [… what we do know] is that as soon as he's challenged he has retracted them… that is not something that happened here, [lying is not something that runs through the time of [defendant] and [mother's] relationship, it comes after]." (Prosecution, T5)

The defence's closing focused on positioning the victim-survivor as a liar and countering the prosecution's reasoning for viewing him as credible. She talked about children being known to lie and she couched her argument by saying perhaps he did not mean to tell such a lie:

EXTRACT 6az

> "He may not have set out deliberately doing this, it takes courage to say you were lying, imagine how hard it is for a child to admit to mum, school, grandmother, aunts, that it wasn't true." (Defence, T5).

She then, however, continued to draw on her earlier 'problem child' narrative:

EXTRACT 6ba

> "Very often in the experience of the court, perpetrators of child abuse will tell children to keep it a secret, very often that's the reason genuine abuse victims take so long to come forward. Here it was never suggested it was a secret, given what we know about him, do you really think he wouldn't have told anyone? For all these years?" (Defence, T5)

It could be argued that presenting a monologue attacking a 9-year-old child would not be a good look to a jury, therefore carefully couching it as outlined above lessens the severity thereby protecting the argument from potentially repelling the jury. In this last extract the defence was othering the child, seemingly simultaneously invoking an 'ideal victim' and a 'real child abuse' stereotype. Whilst 'secret keeping' is a common tactic used by perpetrators (e.g. Somer and Szwarcberg 2001), the absence of such a tactic is being used here to cast doubt on the legitimacy of the child's claims. Interestingly, in a review of transcripts from 133 child sexual abuse trials in Victoria (Australia), Lewis et al. (2014) found that evidence of a child 'acting out' after alleged sexual abuse was most strongly associated with guilty verdicts. As

noted above, the prosecution in T5 pointed out that the victim-survivor's 'acting out' behaviour began after the alleged assaults, therefore the defence's reframing of the child's behaviour as an issue related to 'bad' mothering served to work against the prosecution's narrative and subvert any causal association jurors may have made between the victim-survivor's behaviour and the allegations.

6.3.2 Mental ill-health as an indicator of untrustworthiness and unreliability

Narratives about mental ill-health were another way in which defence barristers relied on broader cultural narratives to undermine victim-survivors. In extract 6aa above, the defence barrister in T1 described the victim-survivor's reaction as "hysterical". Two witnesses in the trial also described her reaction as such. Studies have repeatedly found that the word 'hysterical' is associated both with femininity and with mental illness (Epting and Burchett, 2019). Indeed, Ussher (2013) noted that narratives about 'hysteria' can be traced as far back as the ancient Greeks, with the narratives later becoming commonplace in the seventeenth century. Though 'hysteria' was later broadened in diagnostic terms so that men too could receive such a 'diagnosis', the cultural narratives surrounding it remained clearly gendered, with women's hysteria considered 'natural' and men's hysteria considered 'morbid' (Ussher, 2013). In T1, the hysteria narrative fed into a wider narrative about the victim-survivor's mental health that was used to discredit her. The victim-survivor's depression was first adduced during her cross-examination through digital evidence:

EXTRACT 6bb

Defence	<Reads messages> [You said that you had come back off holiday feeling much more confident, that you were feeling much better especially since] you had been taking happy pills. I guess by that you don't mean anything illegal?
Victim-survivor	Anti-depressants. (T1)

Her anti-depressant use was also included in the toxicology report. According to the CPS, "where it is alleged that the victim was incapable, through alcohol consumption or drug inducement, toxicological evidence may provide strong support for a lack of capacity to

consent" (CPS, undated, unpaginated). Since the substance at issue in this trial was alcohol, it is unclear why the result pertaining to anti-depressants could not have been redacted from the report provided to the jury. The victim-survivor's anti-depressant use was also mentioned by the defendant in his police interview when discussing what others characterised as the victim-survivor's "hysterical" reaction:

EXTRACT 6bc

> "she's on anti-depressants, you dunno what that can do to someone if like they, like, haven't taken their tablets or something" (Defendant, police interview, T1).

The defendant brought up the victim-survivor's anti-depressants a further two times during his interview in much the same manner. The assertion the defendant made here was that the victim-survivor's behaviour was unprovoked and must have occurred because of her depression, insinuating that she behaved irrationally and that it was because she was on anti-depressants (not because he had raped her). During cross-examination of the defendant, the prosecution provided an avenue for this assertion to be made once again:

EXTRACT 6bd

Prosecution	You were shouting at her.
Defendant	I was trying to calm her down.
Prosecution	…it's not like she had mental problems.
Defendant	Yes, she was on anti-depressants. (T1)

It is disappointing that the prosecutor opened such an avenue for the defendant to reinforce his narrative. According to the testimony of multiple witnesses and the defendant's police interview, the defendant had in the immediate aftermath of the second alleged rape called the victim-survivor "crazy", "paranoid", a "psycho", and said she was "having a breakdown". These words demonstrate the reliance on this narrative as a tool for undermining the victim-survivor's credibility. Indeed, in the context of parental custody hearings, Zaccour (2017) found that mental health labels are used in court to undermine women's credibility. It has long been recognised that defence barristers adduce mental health evidence in rape trials as a way of undermining victim-survivors' credibility (Temkin, 2000; Ellison, 2009). When this type of

evidence is adduced with no relevance it infringes on victim-survivors' right to privacy and protection of medical details. A Court of Appeal ruling in *R v Tine* [2006] EWCA Crim 1788 upheld that psychiatric history was irrelevant to the credibility of the witness, although this was in relation to burglary (Ellison, 2009). Helpfully, looking to Scots law, in relation to sexual offences the appeal court in *Branney v HM Advocate* [2014] HCJAC 78 asserted that:

> "It is by no means clear that…a bare statement that a complainer had suffered from severe depression as a result of the appellant's conduct would have provided legitimate ground for exploring her mental health in evidence. We are unaware of any automatic association between depression and lack of credibility."

The usefulness of defence counsel adducing mental health evidence stems from the long history of women's distress being framed as madness (Busfield, 1996; Ussher, 2011). The continued pervasiveness of such narratives can arguably be demonstrated by the worldwide popularity of a song entitled '*Sweet but Psycho'* which spent four weeks at number 1 and 12 weeks in the top 10 of the UK music singles chart over the time period of this trial (Official Charts, undated). The lyrics of this song and accompanying video were widely criticised as sexist and stigmatizing of mental illness (e.g. Meaney, 2018; Daily Mail, 2019). The characterisation of the victim-survivor in T1 as 'crazy' was further galvanized by the defendant's following assertion during his cross-examination:

EXTRACT 6be

Prosecution	Did you feel scared about telling her about what had happened?
Defendant	Yeah, course.
Prosecution	…you were scared about how she would react?
Defendant	Yeah cos she's always had a temper. (T1)

This 'crazy woman' narrative draws on pervasive gendered stereotypes of women as overly emotional (Shields, 2013) and irrational (MacCormick et al., 2016). Women are perceived to be more emotional than men, with women often being viewed as *being* emotional as opposed to men *having* emotions (MacCormick, et al., 2016). Similar trial narratives were found by Smith (2018) which characterised women as, for example, delusional and erratic and therefore

untrustworthy. It is well-established that gendered stereotypes based on emotion impact people's assessment of other's emotion (Shields, 2013), therefore these narratives are likely to play a role in jurors' assessments at trial.

As Gilmore (2017) argues, "women's testimony is frequently associated with unreliability *because* it is women's testimony (p.19, emphasis added). Gilmore's (2017) analysis explores the intersections of race and class with gender, demonstrating that Black women's emotions and associated credibility are judged against different criteria than white women. All the victim-survivors in the observed trials were white women, so the classed narratives present in the trials demonstrates how they are both privileged and oppressed at the same time. Indeed, Wingfield (2010) found that rules regarding what is considered appropriate ways of displaying emotions are differently constructed for different racialised and classed groups. Wingfield (2010) posits that white, middle-class ideals shape what is considered appropriate emotional behaviour, characterised by calmness and congeniality. That the victim-survivor was framed using cultural narratives about young white working-class women therefore bolstered this narrative of her as being highly emotional because of mental ill-health rather than because of trauma.

The gendered narratives about emotionality and mental ill-health were also present in T2, T4 and T6 to varying extents. For example, similarly to T1, the victim-survivor in T2 was referred to as "paranoid" by the defendant and portrayed as behaving irrationally within their relationship:

> EXTRACT 6bf
>
> "We were arguing all the time, she was paranoid about [defendant's new girlfriend] we had pathetic arguments…she had been having a go at me for having a password on my phone even though she had loads and a thing where it took a photo of whoever tries to unlock your phone… but she knows how to wind me up, she would just dig, dig, dig, pushing me to the point when I feel like a cunt, then I shout" (Defendant, police interview, T2)

In this trial there was contestation over whether the breakdown of the relationship was due to the alleged rape, as was the prosecution's position, or not. By portraying the victim-survivor as irrational the defendant was able to refute that assertion and distance himself from his poor behaviour within the relationship.

EXTRACT 6bg

> "[I would always give her a kiss and a cuddle before I left for work no matter how early it was because she would get upset when I didn't]." (Defendant, police interview, T2)

In the following example the prosecution cross-examined the defendant about the reasons for the breakdown of the relationship:

EXTRACT 6bh

Defendant	Arguments, just too many arguments.
Prosecution	Like what?
Defendant	[Woman who later became defendant's new girlfriend], I wasn't doing the cleaning, wasn't helping out around the house, bills, silly little things like passwords on phones.
Prosecution	Okay, so let's take each of those things, not cleaning or helping around the house, presumably that was throughout the relationship?
Defendant	[No cos I got the new job and was working silly hours and she wanted me to clean when I'd get home, at like 3 or 4 in the morning she would want me to hoover].
Prosecution	*Right*. (T2)

The intonation in the prosecution's final word here seemed to be expressing disbelief at the defendant's explanation about the hoovering. In this same trial the prosecution made plain that she did not accept some of his other explanations, including regarding an alleged admission of harm relating to the rape allegation (see section 7.4.1). In her closing speech she therefore twice told the jury that the defendant "insults your intelligence", however the not guilty verdict in this case suggests that the jury did not find his explanations as ludicrous as the prosecutor did. Given the pervasiveness of gendered stereotypes about emotion and

mental health, the ‘crazy woman’ narrative employed by the defendant could well have had an impact on the jurors’ assessments of credibility.

In contrast, the prosecution in T3 drew on this same stereotype as a means of bolstering the credibility of the victim-survivor by contrasting her against that stereotype:

> EXTRACT 6bi
>
> “Unless mentally unhinged, you don’t go around making these things up. What reason could there be?” (Prosecution closing, T3)

The implication in this extract is that ‘unhinged’ women do lie about rape and this is presented as the only reason a woman would lie about rape. Furthermore, it produces a simplistic dichotomy that says parties are either being wholly truthful or wholly dishonest (Smith and Skinner, 2017), which does not allow for people holding differing interpretations of the same facts and thus hold differing truths of the same situation (Smart 1989). Whilst perhaps not a damaging remark with regards to this victim-survivor’s credibility in this trial, it is a remark that nevertheless demonstrates the pervasiveness of damaging narratives at trial and serves to generally reinforce these damaging social stereotypes.

6.4 Summary

This chapter has outlined ways in which rape myths were scaffolded by and interacted with wider cultural narratives and systems of oppression. Classed narratives were underpinned by subtle details that positioned witnesses in a working-class context. These were elicited through micro-examinations and included, for example, irrelevant reference to state welfare. Sexism, and to a lesser extent age, intersected with classism in narratives of respectability to scaffold rape myths about *who* an ‘ideal victim’ is and *how* she should behave. These morality judgements drew on middle-class femininity ideals that value chastity, calmness, and ‘good’ mothering, and were also deployed against victim-survivors’ mothers as a way to further undermine the credibility of the victim-survivors as ‘tellers’.

Gendered cultural narratives further intersected with classism, and to a lesser extent ableism, in narratives that constructed victim-survivors, and their mothers, as untrustworthy and unreliable. These narratives drew on the common misconception that women routinely lie about being raped. This was also evident for the boy child victim-survivor who was portrayed as a lying 'problem child'. Varying motives for lying were posed, including vengeance and regret, and even where it was not possible for defence barristers to put forward such a motive, the victim-survivor was characterised as unreliable as a means of undermining her. Drawing on gendered cultural narratives related to emotionality and mental health enabled defence barristers to characterise victim-survivors as unstable and manipulative. These narratives of victim-survivors as dishonest also intersected with narratives of respectability, for example in bolstering characterisations of victim-survivors, and their mothers, as untrustworthy through reference to their sexual behaviour. Sexual history evidence can therefore be compounded by cultural narratives as well as rape myths.

Overall, the findings discussed in this chapter support my thesis that broader cultural narratives interact with rape myths to further undermine the credibility of victim-survivors. The chapter has demonstrated how victim-survivors are undermined as credible 'tellers' through systems of oppression including sexism, classism, ageism and ableism which frame them as untrustworthy, unrespectable and unreliable. The following chapter will build on these findings by demonstrating how defendants are advantaged by the same systems of oppression that disadvantage victim-survivors.

Chapter 7 Defendants as credible storytellers

7.1 Introduction

Chapter Six explored the ways in which cultural narratives linked to gender, class and age were used to undermine victim-survivors as the tellers of their experiences. This chapter explores the other side of this: The ways in which defendants were constructed as credible storytellers through cultural narratives. Whilst the victim-survivors' credibility was largely undermined by rape myths and cultural narratives, they were used to bolster the defendant's credibility. In the observations relating to defendants as storytellers, their privilege around gender and class intersected at varying points. These narratives can be grouped into three core themes: narratives that presented the defendant as being a respectable man, narratives that garnered sympathy for the defendant, and narratives that provided excuses for the defendant's actions. This chapter therefore supports my overall thesis by building on the findings outlined in the preceding three chapters to further delineate the ways in which broader cultural narratives interact with rape myths to undermine victim-survivors and their stories of rape and sexual assault.

7.2 Respectable masculinities: The 'good men don't rape' fallacy

In contrast to the respectability narratives about victim-survivors (see section 6.2), narratives that focused on defendants tended to portray them as 'good men' using notions of respectability. For example, the defendant in T5 was portrayed as honest and courageous, because he had presented himself to the police upon hearing the allegations directly from the (child) victim-survivor's mother:

> EXTRACT 7a
>
> "[He didn't have to give evidence, he chose to give evidence. He presented himself to police because his heart was broken over the allegations. He has nothing to hide]. Doesn't it take courage to go to the police and say, 'Here I am'?" (Defence, T5)

Here, the defence framed the defendant's actions as commendable and self-sacrificial, thereby positioning him as morally respectable. This defendant had also been cast by the defence as a respectable father-figure who took on responsibility for another man's children (see also extract 6s):

EXTRACT 7b

Defence	Ok, would you spend time with the boys?
Defendant	Yeah.
Defence	What would you do with [eldest child]?
Defendant	Play football, games, computer games.
Defence	And [victim-survivor], how did you get on?
Defendant	Brilliantly, same as with [eldest child]. (T5)

These things combined to frame the defendant as a 'good man' and contrasted with the defence's characterisation of the victim-survivor as a 'problem-child' (see section 6.3.1.2) and the child's mother as a 'bad mother' (see section 6.2.3). Although the defendant had spent years in the children's lives as a co-parent, he was not subjected to the same narratives of blame and condemnation as the mother was with regards to the children's 'problem' behaviour. Rather, those narratives, combined with the 'good man' narratives, served to absolve him. Indeed, this is reflective of Gathings and Parrotta's (2013) observations in US courts where they found 'good man', and particularly 'good father', narratives were associated with lenient sentencing.

The narrative presenting the defendant as a 'good man' was far more overt in T3. In this trial, the defence asked the victim-survivor directly about the defendant's character:

EXTRACT 7c

Defence	You wouldn't describe what happened to you as good?
Victim-survivor	No.
Defence	[You wouldn't say the person that did it was nice?]
Victim-survivor	He was nice to me. Not aggressive, not angry. (T3)

Here the defence drew on a false dichotomy of people as either wholly good or wholly bad (Nilsson, 2019). He implied that "nice" people do not perpetrate rape, which ignores the complexity of human beings and that everyone is capable of doing both good and bad things. This response and argument, that 'good men don't rape', is what Jozkowski (2016) refers to as a "cultural fallacy" (p.255) that stems from pervasive rape culture. That is, it is a logically invalid argument. The defence continued with this narrative throughout the trial, with eight character references for the defendant being read into evidence. This was the only trial in which character references were used. The references referred to the defendant consistently as "a family man", as "a kind, caring and gentle man", as a "helpful" and "happy" man. All expressed their absolute shock at the allegations, with one saying that they trusted the defendant "wholeheartedly". The prosecution attempted to combat the portrayal of the defendant as a 'good, family man' by demonstrating that his actions had clear sexual motives:

EXTRACT 7d

> "He isn't looking for a kindred spirit, someone to get on with, because he squandered his opportunity for that. They have this unusual thing in common, [both have autistic sons, the difficulties that caused, she opens her heart to [defendant] about her son. His response is not to share], of course he doesn't have to tell her, but wouldn't that have been a very good opportunity to say, 'Goodness, I don't believe it, we have this thing in common'. [So if chat and connection was what he wanted then why didn't he do that? The answer, quite simply, is that was not his intent, his intent was sexual]." (Prosecution, T3).

The defence tried to resist the prosecution's portrayal of the defendant by summing up the character references in his closing speech:

EXTRACT 7e

> "[perhaps he is] not the type of person in fact that the Crown seek to portray him as…let's remind ourselves about the character references, loudly and consistently they say that this is a caring man, kind, <reads extracts picking out the sentences that contain the positive adjectives>. All, you might conclude, sitting very uneasily with [prosecution's] portrayal." (Defence, T3).

The ‘good man’ portrayal in this trial was at odds with the defendant’s admitted acts of deception. The type of deception he committed is colloquially known as ‘catfishing’ and has in fact been legislated against in some jurisdictions (e.g. Derzakarian 2017). The ‘good man’ narrative drew on the damaging portrayals and stereotypes about rapists which position them as a deviant ‘other’ (Jozkowski, 2016). These are portrayals which are persistently reinforced through the media (Kitzinger, 2009; O’Hara, 2012; Haygarth 2018). Franiuk et al. (2008) have argued that men’s endorsement of the ‘real rape’ myth is a way for them to distance themselves from rapists, thus creating a counter-narrative of ‘good men don’t rape’. Pascoe and Hollander (2016) argue that the ‘good men don’t rape’ narrative shifts focus away from structural inequalities and problematic actions and attitudes. The narrative thereby attempts to shift the focus onto individual characteristics. In the context of this trial then, the ‘good man’ narrative attempted to distinguish the defendant from the deviant ‘other’ of the ‘real rape’ myth.

The othering of rapists reinforces normative masculine hierarchies (Pascoe and Hollander, 2016; Messner 2016) and this othering often takes place along classed lines (Gavey 2019). The ‘good man’ is constructed of white middle-class values and ideals of respectability based on gendered and sexual behaviour (Skeggs, 1997). Although men’s sexual violence against women occurs across society, it has commonly been positioned as an issue of the working-classes and thereby acts as a means of distinguishing respectable, non-violent masculinity as middle-class (Phipps, 2009).

The term ‘family man’ is frequently used to describe men who are devoted to their families and who like to spend time with them. The term reflects a shift in values in the late twentieth century to fathers becoming more orientated around family rather than being relatively uninvolved in family life (Coltrane, 1996). Being a family man has become an increasingly valued characteristic in society because it can be viewed as a sign of progress towards gender equality (Meeussen et al., 2019). Characterising the defendant in T3 as a family man, therefore, implied that he was a man who acts in support of gender equality. However, as Pascoe and Hollander (2016) argue, attitudes and actions that appear on the surface to be supportive of equality can actually serve to reinforce gender, race and class hierarchies.

Indeed, it is important to note that the cultural narrative of the 'family man' obscures that there remains a significant imbalance in the time men and women spend on housework and child rearing activities (Dush, Yavorsky and Schoppe-Sullivan, 2017; DeGroot and Vik, 2019; Vagni, 2019). Furthermore, because rape is constructed as a masculine crime and by definition can only be committed by males, it may be advantageous to portray the defendant using descriptors associated with femininity as a distancing tool (e.g., kind, gentle, caring, helpful). This could also be true for the 'family man' descriptor, given that it somewhat distances men from traditional masculinities. This is significant because, as Martinez et al. argued:

> "It is difficult to hold men who perpetrate sexual violence accountable if guilt is difficult to attribute to men who have good characteristics in other aspects of their lives." (Martinez et al., 2018, p.7)

Martinez et al. (2018) also pointed out that positive character references were noted by the judge in the infamous Brock Turner case as a factor in his sentencing decision, which was later acknowledged as too lenient and resulted in the introduction of mandatory minimum sentencing (Associated Press, 2016; Edwards, 2016):

> "And, also, I have considered the character letters that have been provided by Mr. Turner's friends, family, which indicate a period of, essentially, good behavior [sic]." (Perksey, 2016, quoted in Levin, 2016)

This indicates that character references can and do influence people's perceptions and decision-making within the CJS. Indeed, that is the purpose of good character evidence because such evidence is adduced in order to boost the jury's presumption of innocence regarding the defendant (Ross, 2004). Research in the US regarding the impact of defendant character evidence on juror decision-making provided conflicting results, with Effron (2012) suggesting that jurors can 'soften' towards a defendant on the basis of such evidence, whereas mock jury has research suggested positive character evidence had little (Maeder and Hunt, 2011) or no impact on jurors (Hunt and Budesheim, 2004). The use of character evidence in the US is somewhat different to E&W; in the former, character witnesses give evidence in person and can be cross-examined, whereas in E&W it is more common practice

for written statements to be read into evidence. There appears to be no research on the use of good character witnesses or testimonials in E&W.

The *Turner* case was a high profile and controversial case and the judge was subsequently held to account by the public when he was recalled by public vote in his state of California– something which had not happened for over 80 years (Astor, 2018). There is no such check or accountability for juror decision-making in E&W. Looking to other jurisdictions could provide points for consideration with regards to jury accountability. For example, in Spain and Russia juries are required to provide judges with a written justification for their verdicts (Martín and Kaplan, 2006). Though this system is not unproblematic, it may offer insights as to how better to ensure jurors' verdicts are based on fact and correct application of the law. This is also particularly pertinent when considered in conjunction with the continued pervasiveness and reliance upon rape myths (see Chapters Four and Five) as well as the cultural narratives discussed here.

7.3 Constructing sympathy for the defendant

In all trials, defence counsel attempted to construct sympathy for the defendants. In two cases (T3 and T5), this built on the defence counsel's narratives that sought to portray the defendants as objectively 'good' men (see section 7.2).

In T5, the defence began her closing argument by encouraging the jury to identify with the defendant:

> EXTRACT 7f
>
> "Any single one of you who has contact with a child could be sitting where he is sitting." (Defence, T5)

This urged the jury to empathise with the defendant, it asked them to 'put themselves in his shoes' (see also extract 7g). Asking the jurors to imagine themselves in that position makes it harder for them to deliver a guilty verdict because they see themselves in the dock. This type of reasoning is known as Golden Rule reasoning and stems from the Christian edict "do unto

others as you would have them do unto you" (The Bible, Matthew 7:12). Urging jurors to engage in such reasoning is a practice that has long (see *Duchaine v Ray* [1939] 110 Vt. 313) been deemed improper in US courts because it encourages a departure from impartiality (Conner, 2001; Mangrum, 2015):

> "A golden rule argument—which asks 'jurors to place themselves in the position of a party'—is 'universally condemned' because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on evidence." (*Caudle v District of Columbia* [2013] 707 F.3d 354)

In T5, the defence's 'Golden Rule' argument also drew on the misconception that false allegations are common, especially the 'easy to make, hard to disprove' trope (see section 6.3.1). Encouraging the jury to put themselves in the defendant's shoes was also a tactic used in T6:

EXTRACT 7g

> "Put yourself in his shoes, you may think you would struggle to give an account of what you were doing 10-15 years before, then imagine that in the pressure of a police interview. Then four months later there are more allegations, a further interview" (Defence, T6)

These appeals for empathy are in stark contrast to this defence barrister's later claims that "emotion plays no role" and "moral judgement plays no part" in reference to the prosecution's case. The jury were encouraged to consider emotions so that they can empathise with the defendant, but then told that they should not consider emotion when assessing the victim-survivors' evidence or the prosecution's case.

In other trials the narratives constructing sympathy were woven throughout using so-called micro-examinations. For example, in T1 the defence elicited reference to low self-esteem from the defendant on three occasions. To give one such example:

EXTRACT 7h

Defence	Did you say anything to her about it?
Defendant	No.
Defence	Did you want to?

Defendant	Yeah.
Defence	Why didn't you?
Defendant	Cos I've got low confidence. (T1)

This narrative sought to elicit sympathy for the defendant. It was later expanded upon by positioning the defendant as the victim of unrequited love who was having his feelings knowingly hurt by the victim-survivor's sociable behaviour, which had been implied as flirtatious by the defence (see also section 4.3.2 regarding the victim-survivor's perceived sexual provocation):

EXTRACT 7i

Defence	Where was [victim-survivor] throughout the night?
Defendant	She kept disappearing, coming back with a boy or group of boys.
Defence	You weren't with them?
Defendant	No.
Defence	You saw [victim-survivor] later?
Defendant	Yeah she kept coming back to me and [friend].
Defence	How did you feel seeing her with other boys?
Defendant	I wasn't happy about it, I didn't wanna see that.
Defence	And [friend]?
Defendant	Not happy at all either. (T1)

The final question in this exchange asked what the defendant's female friend's feelings were about the victim-survivor "disappearing". This sought to bolster the defendant's characterisation of the behaviour as negative or morally improper. That the defence asked how the defendant (and his friend) felt seeing the victim-survivor with other men, is significant because earlier in the trial the judge had intervened when the prosecution asked the victim-survivor a 'how did that make you feel question', saying: "How someone feels is not relevant" (Judge, T1). The judge did not intervene in the above example in relation to the defendant (and his friend), which demonstrates an imbalance in the application of practice rules. The defence were allowed to garner sympathy for the defendant in ways that were not allowed for the prosecution and victim-survivor. This is reflective of Manne's (2020) concept of 'himpathy':

"the way…boys and men who commit acts of sexual violence or engage on other misogynistic behaviour often receive sympathy and concern over their female victims" (p.5).

Similarly, in T2, 'himpathy' was used to reframe the defendant as the victim of a capricious woman:

EXTRACT 7j

"I don't know why she's done this to me, the girl I wanted to marry, she hasn't even said if we have broken up or not" (Defendant, police interview, T2)

Here the defendant employed a narrative that portrayed himself as being strung along and hurt by the victim-survivor and this was built upon during his live evidence at trial:

EXTRACT 7k

Defence	You refer to your head being a bit of a mess at the moment.
Defendant	Yes.
Defence	Were you clear in your mind whether she did or did not want to be with you?
Defendant	No.
Defence	[So before, had there been times when she said she didn't want contact but then had been happy to have sex with you?]
Defendant	Yes. (T2)

Here, the defendant, who cried often throughout his testimony, exhibited remorse for his admitted anger and aggression towards the victim-survivor, for example "then I shout and she leaves and I sit and cry cos it's not how I meant to be" (T2), and when asked how he would feel afterwards: "Dreadful, I was ashamed of myself as well" (T2). Research has long shown that when defendants display emotions such as sadness, distress and remorse, they elicit more sympathy from the 'guilt assessor' (e.g. a jury) and improve their perceived credibility (Savitsky and Sim 1974; Rumsey, 1976; Robinson, Smith-Lovin and Tsoudis, 1994; MacLin et al. 2009). In T2, then, admitting aggression towards the victim-survivor whilst showing remorse may have worked in the defendant's favour. Indeed, this construction of sympathy was built into the defence's closing arguments:

EXTRACT 7l

> “His head was a mess. Of course it was. [If someone says they don’t want anything to do with you but then 2 days later has sex with you, maybe your head would be a mess, so to say ‘won’t take no for an answer’,] well that is one interpretation, but bear in mind this is a young man, maybe not as bright as [victim-survivor], [and this is an interpretation too]. He is not a young man who is a sex pest, but a young man whose head is a mess.” (Defence, T2)

Here the defence barrister discredited the idea that the defendant was a ‘sex pest’, thus distancing him from ‘deviant rapist’, whilst simultaneously constructing sympathy through the use of a classed and gendered portrayal of the victim-survivor as ‘promiscuous’ and capricious. The defence twice used the term “head is a mess”, which points to the notion of not thinking straight and making mistakes, which is not part of the law on consent. The term also has connotations of sadness and distress. As noted above, sadness and distress have been shown to influence juror’s perception of defendants, which is important because this defendant frequently displayed these emotions during his evidence and whilst sitting in the dock, including crying and heavy breathing. Wessel et al. (2012) explored the effect of the displays of emotion from men accused of rape and found that expressions of despair strongly increased their perceived credibility. This seemed to benefit the defendant in T2 because he was acquitted. The classed narratives within this trial may also have benefitted the defendant in relation to this because Thompson et al. (2011) found that as well as displaying upset emotions, being of low socioeconomic status made male defendants more likeable and more trustworthy compared to those from a higher socioeconomic status.

The sympathy narrative was most prominent in T3, where the defence used multiple aspects of the defendant’s personal life to construct an overarching sympathy narrative. These included asking about the defendant’s disabled child, his troubles at work and the difficulties in his marriage. For example:

EXTRACT 7m

Defence [How did that affect you?]

Defendant [It was very hard, our relationship was affected, it affected all aspects of my life including financial, we were living together but it was like we were living separately, I was trying to help her, but she was pushing me away and I felt rejected]. (T3)

The defendant's unsuccessful online dating experiences were added to this to expand on his feelings of rejection:

EXTRACT 7n

Defendant [A lot of rejection, negative comments] some more detrimental than others, [no interest at all], a lot of 'you're not what I'm looking for'.
Defence Your response to that?
Defendant [It hurt, it was even more rejection, I felt worthless], ugly...fat...completely worthless in myself. (T3)

The rejection added to an overall construction of a sympathy narrative and was then used to excuse the defendant's online deception ('catfishing') of the victim-survivor, first through his evidence-in-chief:

EXTRACT 7o

Defence Why did you use those photos?
Defendant [Because of the first experience I had, complete rejection, so I chose to use photos that might get more conversation with people]. (T3)

Then in the defence barrister's closing arguments:

EXTRACT 7p

"[Remember the space he was in in his life that year: demoted, wife redundant, [disabled] child, and remember he was portrayed as a dreamer. Affirmation perhaps.] He tried being himself and had been completely rejected [on the first dating site]." (Defence, T3)

The defendant's wife gave a character statement in this trial in which she stated that she wanted to work on her marriage and took responsibility for causing the defendant's actions regarding the online dating:

EXTRACT 7q

> "[I was not giving him enough attention when I was going through redundancy, [defendant] had work stress. [Defendant] is a wonderful, loving father and [volunteers in the community]. I realise we have taken each other for granted. I do not want to give up on our marriage. I want to have couples counselling.]" (Character statement, defendant's wife, T3).

Her statement bolstered the sympathy narrative aimed at absolving or minimising the defendant's deceptive actions and thus attempted to make it seem less likely that he would have sexually assaulted the victim-survivor. The narrative ties into the myth that men have uncontrollable sex drives, which has been wrongly used to justify and explain men's sexual violence and aggression (Carabine, 1992; Bourke, 2008) and is a narrative that has been prevalent in mock jury deliberations (Leverick, 2020). Whilst sexual aggression is not an intrinsic element of maleness, narratives that position it as such form part of what Gavey (2019) calls the 'cultural scaffolding' of rape. These are narratives rooted in patriarchal values that prioritised men's sexual desire and often denied 'respectable' women any sexual desire at all (Seidman, 1991; Shorter, 1991).

Women were, and often continue to be, positioned as sexually passive objects that are awaiting to fulfil men's sexual urges rather than actively seeking to satisfy their own (Gavey, 2019). This situates women as gatekeepers to sex and excuses and minimises men's sexual aggression (Carabine, 1992). Positioning women as gatekeepers to sexual interactions is reflective of the embedded gendered and classed narratives that value women's chastity (see section 6.3.1). This positioning of women as passive gatekeepers therefore also implies that women who do not behave with sexual passivity and chastity are to blame for their sexual victimisation through 'inviting' men's sexual aggression. As demonstrated in section 6.3.1, this

consequently provides a space for gendered and classed cultural narratives to intersect and cast women against the idea of an 'ideal victim' (Christie, 1986). Narratives that draw on the notion of 'uncontrollable male urges' therefore also seek to excuse defendants' behaviour (see section 7.4).

7.4 Excusing defendants' admissions of harm

Over the course of the trials, most defendants admitted some level of harm to the victim-survivors. In some instances, those admissions related to behaviour peripheral to the allegations (T1, T2 and T4), such as aggression within an intimate relationship.[19] This is particularly true in T4 where the defendant pleaded guilty to a charge relating to domestic abuse at the outset of the trial and coercion was central to the arguments about consent (see section 4.3). In other instances, the admissions of harm related directly to the allegations of sexual violence being put to the defendants (T2 and T3). The narratives used to excuse the defendants and their admissions of harm drew on notions of youth and immaturity as well as intelligence and a lack of educational attainment. For example, in T1 the defendant used his youth as an excuse for his admitted bad behaviour towards the victim-survivor, in this case photographing her without her consent while she slept in her bra:

EXTRACT 7r

Prosecution	[In [month of second incident] you took photos, do you agree that [victim-survivor] didn't like you seeing her just wearing a bra?]
Defendant	No.
Judge	[Wait, that's unclear there are 2 ways that answer can be interpreted. Did [victim-survivor] let you see her in a bra?]
Defendant	No.
Judge	Why?
Defendant	She's never changed in front of me.
Prosecution	You knew she wouldn't like you taking those photos?
Defendant	Yeah.

[19] Though of course aggression within a relationship cannot necessarily be separated from rape within a relationship

Prosecution	You knew you shouldn't take them.
Defendant	Not at the time, I was young then, I didn't understand life. (T1)

The prosecution later argued that this behaviour demonstrated a history of the defendant violating the victim-survivor's bodily autonomy while she slept:

> EXTRACT 7s
>
> "It is clear that she didn't want him to see her in her bra. He does take photos of her when she's asleep knowing that she wouldn't like it. There is a clear pattern of him doing things to her that she wouldn't like when she is asleep." (Prosecution, T1)

The defence did not mention this at all during his closing arguments, which reflects a tactic Rosulek (2015) refers to as 'silencing'. That is, omitting a topic in hopes the jury will forget about it in their deliberations. This can be particularly effective because the defence speech comes after the prosecution speech in E&W.

In T2 the prosecution asserted that immaturity "is not an excuse for being a rapist". The defence sought to deflect that assertion through excusing and minimising the defendant's admitted bad behaviour towards the victim-survivor. For example, in her closing speech, defence counsel posited that the relationship deteriorated not because of the alleged rape, but because the victim-survivor "outgrew" the defendant. That remark trivialised the defendant's admitted aggression towards and harassment of the victim-survivor, thereby also attempting to excuse the alleged rape. The behaviour he had admitted to throughout the course of the trial was that he was routinely aggressive and domineering in arguments, that he was often angry towards the victim-survivor, that he would text the victim-survivor to request she bring home a pair of her sister's underwear, and that he had sent messages post-break-up to the victim-survivor requesting sex 10-12 times a day. The defence barrister's insinuation became clear in the final lines of her closing speech:

> EXTRACT 7t

> "but bear in mind this is a young man, maybe not as bright as [victim-survivor], [and this is an interpretation too.] He is not a young man who is a sex pest, but a young man whose head is a mess. [Is that an interpretation you could make of his mindset and if it is, is that not something that can cast doubt?] He is probably guilty of not behaving in the best way, what he is **not** guilty of is having sex with her when she said no. He might be stupid and immature, but he is not [victim-survivor's] rapist." (Defence, T2).

Firstly, the suggestion here that lack of consent requires a 'no' was misleading. Aside from this, defence counsel repeatedly referenced the defendant's youth and immaturity in such a way as to minimise and excuse the defendant's admitted and alleged actions. The defendant's admitted aggressive and harassing behaviour towards the victim-survivor was minimised and excused. Focusing on these peripheral aspects of the defendant's behaviour enabled the defence to distance the defendant from the cultural image of 'rapist' shaped by the 'real rape' myth that positions rapists as 'deviant other'. Furthermore, narratives that focus on a defendant's youth are useful to defence barristers because evidence suggests that juries are reluctant to convict young men of rape, particularly those under the age of 25 (Topping and Barr, 2018; see also section 2.3.1). In T2, the defendant was five years older than the victim-survivor and in his late twenties at the time of the alleged rape. Therefore, highlighting the defendant as young, and contrasting his 'immaturity' against the victim-survivor, invited the jury to consider him a young man and aligned him more with the 18-24 age range than the victim-survivor who was actually within that age range.

7.4.1 Defendants' digital admissions of harm

In T2 and T3 there was digital messaging evidence of what could be read as admissions of harm. In these trials the specific wording used by the defendants was thoroughly dissected by both the prosecution and the defence, with the prosecution barristers characterising the defendants' explanations for the messages as ridiculous. The defence in both cases, however, rationalised and excused the choice of words as being because the defendants were uneducated and unintelligent, that their words were not intended as admissions to rape or sexual assault and could be explained by their poor grasp of English vocabulary and grammar.

In T2, the victim-survivor had confronted the defendant about the alleged rape over digital messaging. The jury were provided with a report containing some of the digital communications between the victim-survivor and the defendant, which was handed to them during the victim-survivor's evidence-in-chief. The prosecution then drew their attention to particular parts of it through questions put to the victim-survivor. The following extract sets out the messages related to the defendant's admission of harm.

EXTRACT 7u

Prosecution	Then he messages you, 'we can talk when we both get home, I've told you I'm sorry about the other morning, there's nothing else I can do', then he says 'the text about the underwear was to wind you up on purpose'. Were both parts about the underwear?
Victim-survivor	No, the first part is about the other morning.
Prosecution	You said, 'But you shouldn't have done it in the first place, you climbed on top of me when I said no', is that in relation to the other morning?
Victim-survivor	Yeah.
Prosecution	'Don't ever do that to me again, you don't have the right […]', was that also in relation to the other morning?
Victim-survivor	Yeah.
Prosecution	'To be honest, you scare me, your anger towards me has got worse, what happens next time I say no and you're angry? I'm not having it.' [So that's your effort to engage him in conversation about it], did he reply?
Victim-survivor	No. (T2)

The prosecution and victim-survivor presented the text exchange as being about rape, and the prosecution's supposition was that the defendant's non-reply was an acceptance of what the victim-survivor had put to him in those messages. The prosecution argued, therefore, that this constituted an admission to the alleged rape by the defendant. To challenge this stance, the defence and defendant offered an alternative meaning to the victim-survivor's messages:

EXTRACT 7v

Defence	…as far as you were concerned, what was 'the other morning' referring to?
Defendant	An argument me and [victim-survivor] had where I slapped her phone out of her hand.
…	
Defence	…she says, 'but you shouldn't have done it in the first place', as far as you were concerned what do you think she was talking about?
Defendant	The argument with the phone, the way I argue with her and stand over her. (T2)

The prosecution subsequently explored this alternative meaning in more depth during cross-examination:

EXTRACT 7w

Prosecution	[Victim-survivor] said, 'you shouldn't have done it in the first place'. [Victim-survivor] very clearly knows what you're talking about.
Defendant	Yeah.
Prosecution	'You climbed on top of me…'
Defendant	Yeah.
Prosecution	[You say this is about an argument where you slapped her phone from her hand]?
Defendant	Yeah.
…	
Prosecution	You don't need to climb on top of someone to do that.
Defendant	No.
Prosecution	It's pretty obvious what 'climbing on top of someone' means. (T2)

The prosecution pointed out that the defendant's explanation did not make sense and that 'climbing on top of someone' is a well-known colloquial term that refers to sexual intercourse. The cross-examination continued in this way, with the two sides attributing entirely different meanings to the same words:

EXTRACT 7x

Defendant	[Yes, but I think these words are relating to the way I argue.]
Prosecution	These aren't words used to describe being close to someone's face.
Defendant	[Yes they were].
Prosecution	[[Victim-survivor] has a good grasp of English].
Defendant	Yes.
Prosecution	She has no trouble expressing what she means.
Defendant	No.
Prosecution	So why did she use those words?
Defendant	[Because of the way I am aggressive when I argue, how I stand over her].
Prosecution	Climbing is not what someone does when they stand over another person.
Defendant	[It was to do with the argument].
Prosecution	[What do you mean by standing over her?]
Defendant	Like, making myself the dominant one. (T2)

Prosecution counsel highlighted the victim-survivor's intelligence and used this to argue that the 'climbing on top of me' phrase was meant in the colloquial sense of sex, rather than 'getting in someone's face' as the defendant argued.

EXTRACT 7y

Prosecution	When she said ['climbed on top of me'] why didn't you ask what she meant?
Defendant	I thought it was about the argument with the phone.
Prosecution	She says, 'what happens next time you're angry and I say no', that's not about a phone. You don't ask someone for permission to slap a phone from their hands.
Defendant	It's not about the phone, it's my anger.
Prosecution	She's talking about something she had the right to say yes or no to.
Defendant	Yes.
Prosecution	[Would it not ring any alarm bells when you read it?]
Defendant	[I can't remember].
Prosecution	You knew she was talking about the rape.
Defendant	No.

Prosecution	You apologised and wanted her to forget about it.
Defendant	No. (T2)

The prosecution had repeatedly pointed out the flaws in the defendant's logic and in the following extract emphasised the defendant's lack of understanding:

EXTRACT 7z

Prosecution	Climbing on top of someone sounds more like sex than a slap doesn't it?
Defendant	I don't understand.
Defence	It is [defendant's] testimony that it doesn't refer to a slap, no wonder he is confused by the question.
Prosecution	I don't think it's confusing, but I'll put it another way. Climbing on top of someone sounds more like sex than being in someone's space, doesn't it?
Defendant	It can mean that. (T2)

In stating "I don't think it's confusing" the prosecution implied that the defendant should have no difficulty answering the question. This could have pointed jurors towards concluding the defendant was of lower intelligence or was acting as such. During re-examination, the defence barrister drew attention to the defendant saying he is not good with words and linked this to the messaging the prosecution said constituted an admission of harm:

EXTRACT 7aa

Defence	[One final thing, in your interview, the officer is asking you about who the aggressor was, and you admit it can be you a lot of the time]. You also say that you're not very good with words.
Defendant	Yes
Defence	You've had trouble with this 'climbing' phrase
Defendant	Yeah
…	
Defence	And what did you mean when you said you're not good with words?
Defendant	I'm not good at explaining myself, I don't understand big words. I didn't do well at school.

Defence	Did you ever climb on top of [victim-survivor] and have sex with her against her will.
Defendant	No
Defence	We close our case. (T2)

In linking this to the messages, the defence was able to cast doubt on the veracity of one of the prosecution's key pieces of evidence. The implication was that the defendant was not admitting harm because he did not understand what the victim-survivor had said because he was uneducated. This narrative about the defendant's intelligence made it easier for the jury to accept the new meaning given to the victim-survivor's words by the defendant, which in turn bolstered his claim to innocence. The prosecution resisted this narrative in her closing remarks:

EXTRACT 7ab

> "Of course, you will be told that the defence do not have to prove anything, which is true, but if [defendant] gives an explanation that beggars belief, that perhaps insults your intelligence, then you can take that into account. […] The messages support [victim-survivor's] claims, whereas his explanation doesn't make any sense. You have probably all got your own way of expressing 'get out of my face', [*gives some examples*], but you would never say, even if you were stupid, even if you're not good with words, 'don't climb on top of me' to express that. It is perfectly clear what [victim-survivor] means, it is plain. […] You have heard here that [defendant] is perfectly able to express himself with his limited vocabulary. [He has shown himself to be arrogant, he insults your intelligence. His narrative does not fit.]" (Prosecution, T2)

In her closing speech, the defence barrister continued to draw on the intelligence narrative by making a direct comparison of intelligence between the defendant and the victim-survivor: "but bear in mind this is a young man, maybe not as bright as [victim-survivor]" (see extract 7l). The victim-survivor was portrayed by both prosecution and defence as bright and intelligent with a good grasp of English. Contrasting the defendant's level of intelligence against that of the victim-survivor arguably played into gendered narratives of women as manipulative liars and the myth that women often lie about rape. The implication being that women, and this victim-survivor in particular, cannot be trusted, in contrast to the "stupid" man who is not

intelligent enough to lie convincingly to a jury. This narrative and the reinterpretation of the meaning of ‘climbing on top’ of someone seemed to be convincing for the jury, as this defendant was found not guilty.

Similarly to T2, the defendant in T3 had used a colloquial term associated with sexual activity in his messages when the victim-survivor questioned him about the sexual assaults. In this trial, the defendant had communicated with the victim-survivor online and via the phone having made up an alternative identify for himself. He then went to the victim-survivor’s home under the pretence of being a masseur that his first false identity had sent round to her as a gift. In the messages after the assaults, the victim-survivor asked why the masseur had digitally penetrated her, to which the defendant replied that he had asked for her to be given a “happy ending”.

EXTRACT 7ac

Defence	Later, <reads messages>, she asks ‘but why would he massage inside my vagina?’, why do you respond in the way that you do?
Defendant	[I wasn’t really reading it properly, I was cooking, my son was home and my wife was upstairs, so I fleetingly read it, I thought ‘what’s she on about?’. I said in the messages to her ‘I asked for a full body massage] with happy ending’ because I always leave a massage feeling happy.
Defence	You say, ‘did he do it?’
Defendant	Yeah cos I thought about it later like ‘well, did he do it?’ <surprised tone>, I thought she was being jovial. (T3)

As in T2, the defendant took a well-known colloquial phrase associated with sexual activity and provided an alternative, non-sexual meaning to it. However, in contrast to T2, this defendant was found guilty, which indicates that the jury did not accept his alterative meaning. Whilst there were striking similarities in these two cases in terms of the digital admissions of harm and the reinterpretation of colloquial phrases, there are any number of reasons that could have contributed to the differing outcomes, including differences in case characteristics as well as individual jury differences. One possible factor could have been the difference in

age of the defendants, as the defendant in T2 was over a decade younger than the defendant in T3 and had been consistently aligned with being 'a young man', which is of significance because juries appear to be less willing to convict young men (Topping and Barr, 2018). Another possible factor could have been the context of the rapes, in that T2 was in the context of a relationship whereas the deception in T3 made it more akin to a 'stranger rape' scenario which is more likely to result in conviction (Lovett and Kelly, 2009; Waterhouse, Reynolds and Egan, 2016; Lundrigan, Dhami and Agudelo, 2019). Interestingly, Lundrigan, Dhami and Agudelo's (2019) study also found that chance of conviction increased with victim-survivor age, and in T3 the victim-survivor was around 15 years older than the victim-survivor in T2. The authors posited that this could be due to a perceived increase in credibility with increasing age, and indeed this may also have been a factor in T3 because the victim-survivor aligned quite closely with the 'ideal victim' stereotype in a number of ways (Christie, 1986; see section 6.3.1).

The defendant's response in the above extract also drew on the sympathy narratives discussed in section 7.3 by bringing his wife and child into his explanation, which returned to this image of him as a 'good, family man' (see section 7.2) and reminded the jury of the difficulties he had been having at home (see section 7.3). The prosecution later questioned his explanation in cross-examination:

EXTRACT 7ad

Prosecution	You said, 'that's what [he] paid for' after you put your fingers in her vagina.
Defendant	No, I did not say that.
Prosecution	So why then in the message did you imply that is exactly what happened? ['including happy ending, that's what I asked for']. 'Happy ending', why did you say that?
Defendant	At the time I was distracted. When I said that, I meant how it makes me feel happy after having a massage.
Prosecution	But you know what it means when someone says it.
Defendant	[There are many contexts, for me it means feeling happy afterwards].

Prosecution	It means sex.
Defendant	It can.
Prosecution	So you know what it means.
Defendant	Yes.
Prosecution	So why would you choose to use that phrase?
Defendant	I was distracted. (T3)

Just as in T2, the defendant acknowledged the common understanding of the phrase but maintained that this was not what it meant to him. The prosecution went on to point out that the messages could be read as a confession to the sexual assault:

EXTRACT 7ae

Prosecution	You were trying to get her to see it as a good thing.
Defendant	[No]…
Prosecution	You're trying to talk her round, 'that's what I asked for'.
Defendant	I never put my fingers inside her, so no.
Prosecution	You wouldn't say that's a confession?
Defendant	It was not a confession.
Prosecution	[It was a confession and you trying to justify it.]
Defendant	No, it wasn't a justification cos nothing happened except the massage.
Prosecution	[Page X, you are maintaining the charade].
Defendant	Yes, I wanted to carry on talking to [victim-survivor].
Prosecution	[…] didn't you think at this stage you should come clean?
Defendant	[I was confused, didn't know what to do, didn't know whether we'd continue talking].
Prosecution	You could have said 'it was me, but I was hoping you might like me', you didn't think of that?
Defendant	No.
Prosecution	You continued the charade because you knew you had done something wrong.
Defendant	No, never, I just wanted to carry on talking to her cos it makes me feel good about myself. (T3)

The defendant made further excuses for his intentional deception of the victim-survivor in stating that he wanted to carry on talking to her because it made him feel good about himself. This is reflective of gendered narratives of male entitlement that are rooted in patriarchy and

place men's needs (including sexual urges) as of higher importance than women's and position women as responsible for nurturing men's feelings (Hill and Fischer, 2001).

In his closing remarks, the prosecution relied on the digital admission of harm as a key piece of evidence:

> EXTRACT 7af
>
> "[then we have the evidence he said 'happy ending', that he denied…But significantly, why does he say 'including happy ending, that's what I asked for'? If he didn't say it at the scene, then why did he mention it after?] Well that's easy, he can't hide from electronic messages, but he can deny saying something. So what I want you to draw from that is that this is a feeble denial and attempt to justify what he knows he has done." (Prosecution, T3)

Here the prosecution barrister demonstrated the view that digital evidence can be useful in strengthening cases against defendants because it cannot be 'hidden from'. This reflects the idea that digital evidence can act as a 'model witness' (Dodge, 2018) in supporting victim-survivor's reports of sexual violence (see also, Rumney and McPhee, 2020). The defendants' creation of new meanings in both T2 and T3, however, demonstrate the ease with which digital evidence can be moulded to fit opposing accounts at trial (Dodge, 2018; Hlavka and Mulla, 2018). Indeed, defence counsel in T3 overtly relied on this in his closing remarks:

> EXTRACT 7ag
>
> "Now, 'happy ending', [defendant] explained what he meant by that… The written word is one dimensional, [defendant] says the question 'did he do it?' was a question of surprise, not confirmatory. What do we know about [defendant], he's a man of good character." (Defence, T3)

The defence barrister noted that "the written word is one dimensional" and read the defendant's message with the same intonation as the defendant had in cross-examination (see extract 7ac). This is an example of what Hlavka and Mulla (2018) termed the 'animation' of digital evidence, whereby digital messages are given differing meanings by the manner in which they are deployed by barristers at trial.

7.4.1.1 (Re)interpreting victim-survivors' digital responses

Indeed, this 'animation' was also evident in relation to messages sent by the victim-survivors in both trials, where both defence barristers attached considerable meaning to single characters. In T2, this character was a question mark, which the victim-survivor had sent following a previous message she had sent which had not received a reply. In her closing remarks, the defence asked the jury to consider the question mark:

> EXTRACT 7ah
>
> "[[victim-survivor] doesn't get a reply, she sends another message, clearly agitated and frustrated]." (Defence, T2)

The defence said that the sending of a question mark "clearly" signified agitation and frustration, giving a sense of certainty to something that was actually very ambiguous. Similarly, in T3, defence counsel asked the jury to consider a message in which the victim-survivor sent two emojis:

> EXTRACT 7ai
>
> "Can I ask you to consider very carefully what [prosecution] has asked you to do. [He read the last messages, I just invite you to consider the very last one]: a laughing emoji followed by a monkey covering its eyes." (Defence, T3)

This was in the aftermath of the sexual assault where the victim-survivor had confronted the defendant about the digital penetration (what the defendant had referred to as a "happy ending"). The defence was therefore asking the jury to read a suspicious meaning of those two emojis, implying that a 'true' victim-survivor would not have sent such a message to the person who had sexually assaulted them. Again, the defence ignored that it is not uncommon for victim-survivors to exhibit a 'friend' response (Lodrick, 2007; see also section 5.2.2) and that this victim-survivor had been subjected to a drawn out deception that undoubtedly caused her confusion in her untangling the events that had occurred.

Both T2 and T3 provided examples of how easily digital evidence can be manipulated at trial to suit two completely opposing stories. In both trials, not only were defendants' digital admissions of harm challenged and reinterpreted, but also victim-survivors were cast as

suspicious based upon single characters. Furthermore, the defendants were given opportunity to present their alternate meanings as the messages were put to them in cross-examination, whereas the aspersions cast against victim-survivors were saved for closing remarks. This had the effect of silencing victim-survivors, depriving them of the opportunity to offer their explanations or for prosecution to counter the defence's narrative. This imbalance arguably represents yet another double standard by which women and men are differentially judged.

7.5 Chapter summary

This chapter has built on the findings in preceding chapters, and in particular has provided insight into the contrasting ways in which defendants are portrayed in comparison to victim-survivors. Gendered and classed narratives intersected to bolster the credibility of defendants as storytellers of counter-accounts to victim-survivors' allegations, often relying on fallacies, false dichotomies and double standards.

In stark contrast to narratives about victim-survivors, narratives about defendants sought to rely on the 'good men don't rape' fallacy. This was relied upon even in cases where defendants had admitted harmful behaviour towards the victim-survivors, which demonstrates the low bar that is set for defendants credibility in comparison with the incredibly high bar for victim-survivors. These narratives were strengthened by the contrasting narratives constructed about victim-survivors which relied on gendered and classed notions of respectability and trustworthiness. Furthermore, the 'good men don't rape' narrative provides an easy tool for defence barristers to use to distance defendants from the 'deviant' other of 'rapist' that is constructed through the 'real rape' myth. Defendants were distanced from 'rapist' through the use of gendered and classed cultural narratives about respectable masculinities and narratives that garner sympathy and provide excuses for harmful behaviour. Character references were a useful tool for this in one particular trial, where the defence sought to rely on an abundance of descriptors associated with femininity in order to distance the defendant from the image of 'rapist'.

In addition to the narratives relying on notions of respectable masculinities, narratives constructing sympathy for the defendants were also used to distance them from ‘rapist’. Often formed through micro-examinations, these narratives aimed to elicit empathy for the defendants with the jury, in some cases through directly urging the jury to put themselves ‘in the defendants’ shoes’. These narratives often relied on gendered double standards whereby women are more harshly judged than men in relation to behaviour and emotions. Furthermore, narratives drew on myths about uncontrollable male sexual urges, immaturity, and intelligence to minimise and excuse the admitted and alleged harmful behaviour of defendants. This was particularly evident in relation to digital admissions of harm, where the meaning of words was extensively scrutinised by both defence and prosecution. Additionally, this digital evidence presented another double standard whereby victim-survivors were cast as suspicious without opportunity to provide an alternative explanation, whereas defendants were indulged in being allowed to offer ‘new’ meanings to their own words and the words of victim-survivors.

Overall, these narratives that focused on defendants’ credibility were bolstered by the pervasive reliance on rape myths, particularly through drawing on the ‘real rape’ stereotype and the misconception that women often lie about rape. This chapter therefore supports my thesis that rape myths and wider cultural narratives interact to undermine the credibility of victim-survivors and their stories, often whilst bolstering the credibility of defendants and their counter-stories.

Chapter 8 Implications and Conclusion

8.1 Introduction

My research has evidenced that rape myths remain prevalent in courtroom narratives and that they interact with broader cultural narratives to undermine the credibility of victim-survivors of sexual violence. This challenges claims that rape myths are not a problem in rape trials and provides a deeper, more nuanced understanding of why some groups of victim-survivors are more likely to see a conviction than others. Structural inequalities and systems of oppression are reflected in the narratives deployed by barristers at trial and thus the credibility of victim-survivors is undermined in relation to how they are perceived and portrayed (regardless of any incongruence with who they are in reality). Narratives reflecting sexism, classism, ageism and ablism[20] were found to undermine victim-survivors whilst simultaneously working towards bolstering defendants' claims to innocence. This study has therefore addressed the gap in existing knowledge identified in Chapter 2 and offers a unique contribution to knowledge.

This chapter delineates how these findings relate to the research objectives, which are reiterated below. The implications of the research are set out, then the limitations of the research are discussed and future directions for research are outlined. Finally, the chapter ends by reasserting my thesis argument that rape myths and wider cultural narratives interact within sexual violence trials to undermine the credibility of victim-survivors and their stories.

The objectives of this study were to:

- Identify whether legal practitioners use rape myths in serious sexual offences trials and if so, the context in which these are used.
- Identify whether legal practitioners use cultural narratives in serious sexual offences trials and if so, the context in which these are used.
- Analyse if and how the use of cultural narratives and rape myths reinforce one another.
- Outline potential avenues for improving the trial experience of victim-survivors.

[20] The data sampling did not appear to be ethnically or racially diverse, therefore narratives relating to racially or ethnically minoritised victim-survivors were not observed, but this does not mean such narratives are not a problem.

8.2 Summary of Key Findings

8.2.1 Rape myths remain prevalent in courtroom narratives in sexual offences trials

My research has provided fresh evidence of legal practitioners' continued reliance on rape myths when making their legal arguments. The context in which these were used was largely reflective of the previous literature. That is, courtroom narratives reflected myths about consent, including defendants' 'reasonable' belief in consent, victim-survivors' post-assault behaviour and the expected consistency of their stories. Importantly, in addition to evidencing that these 'tried and tested' tactics are still in use, my observations also uncovered new ways in which some rape myths are deployed. For example, that even prompt reporting (i.e., within 24 hours of the assault) was constructed as suspicious by defence barristers through drawing on myths about what counts as 'reasonable' post-assault behaviour. The worrying dilemma this presents for victim-survivors, that their behaviour can always be portrayed as suspicious no matter what they do, could have serious implications for their faith in the CJS. So many 'traps' have been set for them, through inaccurate beliefs of what is rational, that it becomes near impossible to be seen as credible.

This fresh evidence demonstrates that despite decades of reform, rape myths are still pervasive in sexual offences trials. This is particularly important in light of new research that claims that jurors do not believe rape myths (Thomas, 2020). Thomas' (2020) research asked jurors directly about rape myths, which is problematic because, as my evidence shows, this is not how rape myths are presented to juries in sexual offences trials; they are referenced with far more subtlety than they are in rape myth acceptance scales. It is well established that asking people whether they believe rape myths in the abstract produces different results to asking people about them in an applied context (McMahon and Farmer, 2011). This is significant because my research, which was carried out at the same time as Thomas', shows that the way in which jurors in Thomas' study were asked about rape myths *was not reflective of the reality of how they were being deployed in practice*. My research thereby buttresses

previous research that says rape myths are mutably deployed and are problematic in the courtroom.

8.2.2 Oppressive cultural narratives permeate courtroom narratives

Cultural narratives that reflected structural inequalities and systems of oppression were used by barristers throughout trial narratives. These most commonly related to gender and social class, but also intersected with age and ableism, and framed victim-survivors as untrustworthy, unrespectable and unreliable. These references were made in constructing narratives about the respectability and honesty of victim-survivors as a means of undermining them as credible 'tellers', whilst simultaneously being used in attempts to bolster defendants' credibility. The presence of cultural narratives reflecting structural inequalities and systems of oppression are not unique to sexual offences, and they likely permeate trials for a wide range of crimes. For example, Hodson et al. (2005) found that subtle racism permeates the courtroom despite procedures aimed at creating fair treatment. However, what is key in my observations of sexual offences trials is that oppressive cultural narratives *interact* with rape myths, and thus prejudices are reproduced and compounded in an established and specific way directly related to the alleged crimes.

8.2.3 Rape myths and oppressive cultural narratives interact in courtroom narratives

My observations highlighted ways in which cultural narratives that reflect structural inequalities and systems of oppression produce and reproduce rape myths in courtroom narratives. It is well established within the literature that the function of rape myths is to blame women, undermine their stories, and excuse or minimise perpetrators (Eyssel and Bohner, 2008). This was clear in my observations, most especially in the interaction of rape myths and the broader cultural narratives that reflected structural inequalities and systems of oppression. The scrutiny of women's behaviour in the observed trials, including the sexual behaviour of both victim-survivors and their mothers, was clearly linked to the historic and continued tendency of our patriarchal society to police women's behaviour in ways in which men's behaviour is not. As such, rape myths were reinforced by portrayals of victim-survivors as irrational,

unstable and untrustworthy, and these portrayals were further transformed through classed, ageist and ableist narratives. Digital evidence provided a key mechanism for these narratives to be introduced and bolstered and it appeared that not enough scrutiny had been given to the records adduced to the court, consistent with findings elsewhere (Smith and Daly, 2020).

Oppressive cultural narratives reinforced the myths that some women are more to blame than others for their assault and that women routinely lie about being raped, and these were usually articulated in the form of narratives of respectability and honesty. Not only were narratives about victim-survivors constructed and deployed in this way, but in some cases so too were narratives about their mothers. That victim-survivors can be undermined through narratives that attack the character of other witnesses has important implications for research and policy, especially in relation to child sex offences trials (see section 8.3).

Gendered and classed narratives intersected to bolster the credibility of defendants as storytellers of counter-accounts to victim-survivors' allegations, often relying on fallacies, false dichotomies and double standards. Respectability narratives subtly reinforced the 'real rape' stereotype by seeking to distance defendants from the image of a rapist as 'deviant other', producing and reproducing the problematic fallacy that 'good men don't rape'. Defendants were distanced from 'rapist' through the use of gendered and classed cultural narratives about respectable masculinities and narratives that garner sympathy and provide excuses for harmful behaviour. Therefore, narratives of respectability served to undermine the credibility of victim-survivors whilst simultaneously serving to bolster defendants' claims to innocence. Furthermore, gendered, classed and aged narratives were used to excuse defendants' admitted and alleged harmful and aggressive behaviour towards victim-survivors through drawing on the fallacy that 'good men don't rape'.

My observations of the re/production of rape myths through oppressive cultural narratives in sexual offences trials demonstrate how Gavey's (2005, 2019) concept of cultural scaffolding operates in the courtroom. Micro-examinations were a specific mechanism through which oppressive narratives were seeded and showed that it is not about questions or arguments in

isolation, rather it is about the pattern of questions and the overall pictures these help build up, which culminate in character assassination in the closing arguments.

The nuance within my research with regards to the reliance on cultural narratives that reflect structural inequalities and systems of oppression, and their interaction with rape myths, further rebut claims that jurors do not believe rape myths (Thomas, 2020). Thomas' research, which claims that jurors do not believe rape myths, asked direct questions of jurors, most of whom had not been in sexual offences trials so had not been exposed to narratives which contained said myths. My research shows that rape myths are reinforced by broader cultural narratives that subtly infuse trial narratives. Therefore, overtly asking about rape myths fails to account for the subtlety and nuance with which they are produced and deployed in practice at trial and does not account for the reinforcing cultural narratives (see also Willmott et al., 2018)

Legal practitioners relied on fallacies, faulty logic, false dichotomies and double standards that were rooted in prejudicial cultural narratives. The current rules and procedures do not go far enough to protect victim-survivors, as is evidenced through the continued irrelevant reliance on rape myths and broader cultural narratives with no probative value other than to impugn their character. Overall, my findings make plain the low bar that is set for defendants' credibility in comparison with the incredibly high bar for victim-survivors. It is crucial that future policy, practice and research look at the whole picture, not just 'rape myths'. This is discussed in the following section and section 8.5.

8.3 Implications for Policy and Practice

The research findings have several key implications for existing knowledge and policy debates, which are set out in this section. The discussion outlines potential avenues for improving the trial experience of victim-survivors, and thus fulfils the final objective of the study.

Before setting out some specific implications and recommendations for reform, it is important to consider the past context of rape law reforms. As set out in Chapter 2, there have been a

range of reforms to policy and practice with regards to criminal justice responses to rape and the efficacy of those reforms is often questioned. In E&W and beyond it seems clear that policy reform in and of itself will remain largely ineffective as long as the underlying cultures and structures remain unchanged (Jordan, 2015; Carline and Gunby, 2017; Smith, 2018). As critiques of carceral feminism rightly point out, the whole system must be changed. However, this does not mean that shorter term fixes should not be sought. Whole system change does not happen quickly and there are thousands of victim-survivors choosing to report to the police every year—these victim-survivors deserve to feel confident in the system that they are engaging with and feel assured that it will not needlessly cause them additional harm. Two recent national surveys of victim-survivors found that faith in the CJS is incredibly low (Molina and Poppleton, 2020; Smith and Daly, 2020). Whilst a radical overhaul is needed, immediate change is also therefore crucial because to wait for whole system change would be a great disservice and injustice to those choosing to report *now*.

8.3.1 The importance of including an analysis of cultural narratives in future reforms

As noted above, policy reform is likely to remain ineffective so long as the underlying cultures and structures remain unchanged. Carline and Gunby (2017) found that barristers believed reforms have been ineffective because they do not account for the reality of the courtroom. Indeed, my findings demonstrate that simply understanding poor treatment and retraumatisation of victim-survivors as caused by the influence of rape myths is overly simplistic and ignores the wider social context. This is reflective of Gavey's (2005) cultural scaffolding and Jordan's (2015) argument that cultural and structural change is required to dismantle the underlying systems of oppression that produce and reproduce rape myths across society. Whilst Jordan is talking of patriarchy, her argument viewed through an intersectional lens tells us that all systems of oppression and domination must be considered and addressed. This is why it is essential to include an analysis of broader oppressive cultural narratives in any future reforms. The poor treatment and retraumatisation of victim-survivors stems from more than just patriarchy and sexism. As my findings have shown, courtroom narratives in rape trials are also drenched in classism, as well as ageism and ableism. To base

reforms solely on gendered analysis of patriarchy ignores and obscures the mechanisms that work to undermine victim-survivors based on their (perceived) background or identity and fails to address how and why some groups of victim-survivors are more likely to see a conviction than others.

8.3.2 Implications for section 41 of the Youth Justice and Criminal Evidence Act 1999

Section 41 of the *Youth Justice and Criminal Evidence Act 1999* prohibits the use of victim-survivors' sexual history evidence except in exceptional circumstances. The findings set out in section 4.2.1 have several implications in relation to this. Despite some clear instances of good practice, my observations support a growing body of evidence that shows that s.41 is not working effectively. My observations notably came after procedural changes introduced by *Criminal Practice Directions 2015 (Amendment No. 6)* [2018] EWCA Crim 516 which came into force in April 2018 and therefore reflect current practice. Whilst there has been ongoing debate as to whether s.41 is effective and works in the interests of fair justice for both the victim-survivors and the defendants (see section 2.4.1.1), there is agreement from those that oppose feminist critiques of the legislation that it is unwieldy and complex in its current form (Stark, 2017; Thomason, 2018; Hoyano, 2019). My observations demonstrate that despite the tightening of procedures, victim-survivors were still questioned about irrelevant aspects of their sexual history seemingly with the purpose of impugning their character. A renewed look at reforming s.41 is therefore justified.

There are also calls for further training and guidance for judges and barristers to ensure that s.41 applications are treated with appropriate scrutiny and not as a formality (Smith, 2018). My findings support the need for this. In particular, there is a need to consider sexual history evidence specifically in the context of digital communications evidence. Whilst the CPS are clear that digital evidence is subject to s.41, it would be beneficial for clear guidance and training that addresses what this may look like in practice. Digital evidence is often thought of as being neutral, however it is open to manipulation and careful consideration therefore needs to be given as to how conversations of a sexual nature may subvert s.41 and be used in an attempt to impugn a victim-survivor's character, as it was in T3. This is particularly pertinent

given the amount of digital evidence that is obtained from the routine downloads of many victim-survivors' entire mobile phone and social media data. There have been some promising developments during 2020 in relation to digital downloads, such as the ruling in *Bater-James and Mohammed v R* [2020] EWCA Crim 790 which stated that:

> "It is not a 'reasonable' line of inquiry if the investigator pursues fanciful or inherently speculative researches…There is no presumption that a complainant's mobile telephone or other devices should be inspected, retained or downloaded." (para.70, 78)

An ICO report (2020) similarly pointed to the problematic practice of routinely downloading mobile phone data and stated that requests must be "strictly necessary", highlighting that investigators "must fully consider the challenge of the high threshold, i.e. 'strictly necessary' is more than 'necessary'" (ICO, 2020, p.37). Whilst these two developments led to the withdrawal of a national 'consent' form for mobile phone downloads, it is worth noting that earlier similar rulings in *R v E* [2018] EWCA Crim 2426 and *R v McPartland and another* [2019] EWCA Crim 1782, which found that digital devices are not automatically relevant to sexual offences, did not translate to a change in practice (Smith and Daly, 2020). It is therefore still important to give particular consideration to the ways in which evidence related to sexual behaviour appears in digital communications and how s.41 is applied to it. It may even be that the developments during 2020 lead to sexual behaviour being used as a justification for access to digital communications, making it all the more important to specifically address the issue with clear and robust guidance.

There have long been calls to tighten the remit of s.41 (McGlynn, 2017, 2018; Smith, 2018; see also Burman, 2009 and Cowan, 2020 for similar calls in Scotland). Sexual history evidence is subject to stricter restrictions in some other adversarial jurisdictions, including Canada, New South Wales (Australia) and Michigan (United States), which demonstrates that there is room for workable reform in E&W (McGlynn, 2018). The view from the legal profession, however, seems to be that the legislation itself is adequate and does not need to be made stricter (Hoyano, 2019; Gillen, 2019). There have been suggestions to require the prosecution to have to make applications to adduce sexual history evidence as well as the defence (Smith, 2018).

This would aim to encourage more careful consideration of the contents of prosecution evidence, for example the editing of ABEs, to remove erroneous references to sexual history that inevitably arise from proper police investigation (Smith, 2018).

Scotland introduced this approach in 2002, however an evaluation study highlighted a number of lessons that can be learnt from this change. For example, the evaluation found that the measure actually increased the number of applications and that they cannot be attributed solely to a change in procedure (Burman et al. 2007). Burman (2009) detailed a 'scatter gun' approach being taken to applications in Scotland, whereby defence counsel included applications on multiple aspects of sexual history and expanded greatly on them during questioning. Again, lessons can be learnt from this regarding the scrutiny given to s.41 applications and the adherence to them at trial.

The findings outlined in section 4.2.1.1 demonstrate that it was not only victim-survivors' sexual behaviour that was scrutinised, but also, in some cases, that of their mothers. Whilst the sexual history of victim-survivors may be relevant in some circumstances, the sexual history of their mothers is rarely likely to be relevant and only serves to attack their character and credibility, and by extension that of the victim-survivor. Further research is needed to determine whether this is a widespread problem and if so, discussions should be had about extending the prohibition of sexual history evidence to all witnesses. Victim-survivors should not be able to be undermined based on the character assassination of their parents.

8.3.3 Implications for 'myth-busting' measures

It is clear that rape myths persistently permeate serious sexual offences trials despite a variety of measures, such as the previously discussed s.41, put in place. Judicial directions are another measure that were put in place in an attempt to mitigate the impact of rape myths on jury deliberations. Whilst the introduction of 'myth-busting' directions marked a positive step forward, it is clear that they are not enough to tackle the problem. For example, research has consistently shown that juries frequently misunderstand or fail to apply judicial directions (see section 2.4.4).

Furthermore, reflecting findings from previous court observations from 2012 (Smith, 2018), my observations have shown that it remains easy for defence barristers to subvert these directions through, for example, acknowledging that a rape myth exists but then going on to explain why the case is question is an exception to it. This can be particularly effective where judges have delivered a split summing-up, whereby the judicial directions are delivered *before* the closing speeches and the summing-up of the evidence given afterwards. This means that the specific 'myth-busting' directions given by the judge can be addressed by the defence in their closing arguments and this would be the final thing the jurors heard about it. Whilst judges are free to repeat myth-busting directions at any point in the trial, in my observations, where split summing-up was given the 'myth-busting' directions were not repeated after the closing speeches. The interaction with broader cultural narratives suggests that myth-busting measures are unlikely to have the desired effect without taking account of broader structural inequalities and systems of oppression.

Looking to other jurisdictions could provide points for consideration. For example, in Spain and Russia juries are required to provide judges with a written justification for their verdicts (Martín and Kaplan, 2006). Though this system is not unproblematic, it may offer insights as to how better to ensure fair verdicts based on facts and correct application of the law are returned. There is no accountability for juries and looking to processes in other jurisdictions demonstrate alternative ways of doing things that may provide a useful basis for discussion of reform. Although not unproblematic, the notion of juries having to justify their verdicts to the trial judge is an interesting one.

Consideration should also be given as to how to reduce the prevalence of rape myths in trial narratives, rather than attempts to mediate their impact. Whilst elements of rape myths do in some circumstances have legitimate relevance, they very often have no relevance and are used as a means of impugning the character of victim-survivors. Barristers who draw on rape myths to bolster their cases should be required to justify why and how their argument is relevant. This could ensure fairness for victim-survivors and the upholding of public interests whilst protecting the defendant's right to a fair trial.

8.3.4 Independent legal representation for victim-survivors

There have been growing calls for the introduction of independent legal representation for victim-survivors in E&W (Smith, 2018). Whilst it is commonly argued that this is incompatible with an adversarial legal system, the majority of adversarial systems do have models of representation for victim-survivors (Daly and Smith, 2020). These models vary and rarely reach levels comparable with representation and participation available in the majority of European jurisdictions, which are based largely on inquisitorial principles rather than adversarial principles. Nevertheless, adversarial systems are moving towards providing some sort of representation for victim-survivors, particularly in our closest jurisdictions.

For example, in Ireland victim-survivors are entitled to legal representation regarding applications to introduce sexual history evidence and counselling records, although there are a number of problems in the structure and delivery of this model (Iliadis, 2019). A rape review in Ireland recently recommended a move to a more extensive model (O'Malley, 2020) and the Gillen Review in Northern Ireland (Gillen, 2019) recommended the introduction of independent legal representation and this is due to be piloted in 2021 (Daly and Smith, 2020).

In Scotland there have long been calls for the introduction of legal representation (Raitt, 2010), most recently with a fresh report recommending the introduction of legal representation for victim-survivors in relation to sexual history and bad character evidence (Keane and Convery, 2020). Furthermore, a pilot scheme of independent legal representation for rape victim-survivors was evaluated in Northumbria (Smith and Daly, 2020) and found that it increased victim-survivors' confidence in the CJS, gave better protection of their rights, and resulted in improved practice within the police and the CPS in relation to the collection of victim-survivors' private data. It is clear then that legal representation for victim-survivors is seen as a necessary and important element in achieving fair justice in the majority of jurisdictions, and that there is renewed appetite in E&W. This and all other policy implications deserve full and open discussion and consideration.

8.4 Limitations of the Research

It is important to recognise and discuss the limitations to this research project. The court observation method provided several notable benefits over other methods, as discussed in Chapter 3, however there were also some limitations associated with this choice of method in relation to the research objectives. I was unable to predict or control *who* was in the trials which meant my intersectional analysis was limited to the systems of oppression reflected in those trials. That is, I was for example unable to analyse narratives deployed against racially or ethnically minoritised women. This means that some key intersections identified within the literature remain unexplored and thus presents important avenues for future research (see section 8.5). A further limitation of the court observation method in terms of the intersectional aims of the research was that observations are limited in the way they can analyse intersectionally, because victim-survivors' voices and experiences are missing. Nevertheless, understanding how problematic cultural narratives formed from sexism, classism, ageism and ablism are reflected through courtroom narratives goes some way to exploring how some groups of victim-survivors are less likely than others to see a conviction at trial.

Relatedly, choosing to use observations in isolation meant I could not triangulate my findings with, for example, interview data from victim-survivors to explore the extent of their awareness of the narratives and any impacts on their trial experience. However, victim-survivor experiences of trial have been covered elsewhere by the existing literature, though not in relation to the narratives found in this research. That said, for the aims of this research, it was not necessary to understand victim-survivors' awareness of the narratives, or any impacts of them, as the purpose was to highlight mechanisms which may be disadvantaging them in the courtroom; victim-survivors do not need to be aware of it for it be present or effective. Understanding jurors' awareness of narratives would however have been useful in understanding the efficacy of the narratives deployed by barristers, however this is not possible because research with real jurors is prohibited in the UK. Similarly, court observations could not examine the attitudes and beliefs of the legal professionals involved in the trials, including the barristers deploying the narratives. Having said that, this project was not

interested in whether practitioners actually hold or believe problematic myths or attitudes, rather it was concerned with how practitioners deploy and reference rape myths and cultural narratives in the courtroom.

The small sample size also presents a limitation to this research in that it is not possible to make generalisations or claim that the findings are reflective of what happens in courts across E&W. It cannot be assumed that the narratives identified in this research are present across all courts, although the findings regarding rape myths bare a remarkable consistency with other observation research from regions across England which have remained consistent over time. Similarly, although my sample was derived from three separate sites, these were all within the South Eastern circuit and therefore my findings could be influenced by a unique culture within that circuit. That said, the aim of the study was not to make generalisations, rather it was intersectional in its aims and thus required in-depth exploration in order to establish nuanced understandings and new perspectives on an already large evidence base (i.e., rape myths). Small samples sizes are acceptable in intersectional research and indeed large samples can become unwieldy with little or no added benefit (Cuadraz and Uttal, 1999).

I had originally intended to sample from a broader geographic range as a means of diversifying the sample with the hopes of being able to analyse a wider range of intersections. A change in personal circumstances meant this was no longer feasible and has highlighted the importance of incorporating contingency plans into research design. The original design relied on a personal network to make long-distance travel possible, however this was not a robust strategy and resulted in an overestimation of what could be achieved geographically in the original design. Whilst I was able to make adaptations to the sampling strategy to try to gain a larger sample size in light of the change in personal circumstances, these attempts were compounded by falling prosecution rates during 2019. Though in some ways I would have preferred a larger sample, there is in fact a wealth of data within the transcripts produced from the six trials, with many remaining avenues for further analysis beyond the scope of this thesis. This includes, for example: how the impacts of court practicalities have changed since Smith's (2018) observations in 2012, including attention paid to the myriad ways continued budget

cuts in the intervening years manifested, a focused analysis of the role of digital evidence in trial, and an analysis of the practice of special measures. Further directions for future research related to the findings within this thesis are delineated in the following section.

8.5 Future Directions for Research

Several areas for further research have been highlighted through this project. Firstly, court observation research in general is crucial for uncovering what is happening in practice and ensuring a level of public accountability and will be especially important in light of any reforms that may come from the Government's end-to-end rape review. More specifically, further court observation research to explore other crucial intersections is needed, including but not limited to race, ethnicity, nationality, sexual orientation, gender from a male victim-survivor perspective, as well further exploration of class, age, and ableism. Such studies, including the present study, must be triangulated with research directly with victim-survivors as well as legal professionals. Whilst the existing literature does address this, it is important that research also specifically addresses oppressive cultural narratives in the courtroom, rather than solely rape myths.

The findings relating to victim-survivors' mothers also highlight the need for an exploration of the role of parent-witnesses in sexual offences trials as there does not appear to be any existing research that addresses this. Such an exploration could provide crucial insights with regards to child sexual offences in particular because of the protections offered to child witnesses during cross-examination. Future research should investigate whether parent-witnesses of child victim-survivors are used as a proxy for the character assignation often faced by adult victim-survivors in the courtroom.

Further research is also needed to further explore how digital evidence is used in practice in the courtroom, particularly with a focus on private and sensitive data such as sexual and medical histories.

Finally, research with real jurors would prove incredibly useful in exploring the impact of oppressive cultural narratives and rape myths in the ways they are articulated in trial, as opposed to through questions from a rape myth acceptance scale. This would enable an opportunity to build on the one study that has been allowed to undertake research with real jurors (Thomas, 2020). Failing this, mock jury research should be carried out with these specific aims in mind. Whilst mock jury research has its limitations, methods have advanced to enable a very realistic substitute to real jurors (e.g., Willmott et al. 2018).

8.6 Concluding Remarks

Reforms are a sticking plaster on a system that is not fit for purpose and much more thought is needed on what justice means to victim-survivors and how this can be accomplished in a meaningful way without processes that retraumatise and cause further injustices. Understanding the subtlety and nuance presented in this thesis is key in understanding what is going wrong, that is, why so few victim-survivors get the justice they seek through the CJS. Developing an understanding of the mechanisms that undermine victim-survivors and impede their attempts to seek justice through the CJS is therefore crucial. The findings presented in this thesis add a unique contribution to knowledge in this regard by setting out the re/producing relationship between rape myths and oppressive cultural narratives.

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Appendix A: Common rape myths

Table adapted from Temkin (2010), Eyssel and Bohner (2008) and Burrowes (2013).

Myth	Function
Rape is rare and is usually committed by strangers outside or in public places. It involves physical force and violence, or threats thereof.	Expresses disbelief
It cannot be rape if someone does not scream and attempt to fight back or if they do not have physical injuries as a result of the rape.	Expresses disbelief
Someone who is drunk or has taken drugs has put themselves in a dangerous situation and is at least partly to blame for being raped.	Blames the victim
If someone has consented to sex previously or has consented to other sexual acts, it was not rape.	Exonerates the perpetrator
Women are asking to be raped by the way they dress or act.	Blames the victim
Women expect men to take the lead in sexual interactions so they say ‘no’ when they really mean ‘yes’.	Exonerates the perpetrator
If a woman invites a man over to her house it means she wants sex.	Exonerates the perpetrator
Pressuring a partner for sex isn’t rape.	Exonerates the perpetrator
People working in prostitution cannot be raped.	Blames the victim
Rape happens because men cannot help themselves once they are sexually aroused.	Exonerates the perpetrator
Only deviant men are rapists. Men from certain backgrounds are more likely to be rapists.	Expresses disbelief
False allegations of rape are common. Women often lie because they regret having sex or they want revenge or attention.	Expresses disbelief
People who have been raped report it immediately. They always give a consistent and thorough account and will be visibly upset.	Expresses disbelief

Appendix B: Data collection proforma

Trial No.:		**Region:**	
Duration (days):		**Delays:**	
Case Details			
Indictment(s)			
Time lapses	Incident –> report Report –> court		
Relationship between victim-survivor and defendant			
Special measures used			
Sexual history used, inc. when application was made	Sub-section used:		
Trial duration			
Verdict and sentence			
Participants Details Race, ethnicity, disability, gender, age (estimated range if not available)			
Judge			
Prosecution			
Defence			
Defendant			
Victim-survivor			
Jury (men/women, race/ethnicity, approx. ages, visible disability)			
Central Arguments			
Prosecution			
Defence			