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The Use of Arguments about Myths and Stereotypes to Appeal Sexual Assault Convictions in Canada

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THE USE OF ARGUMENTS ABOUT MYTHS AND STEREOTYPES TO APPEAL SEXUAL ASSAULT CONVICTIONS IN CANADA

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ABSTRACT

Canadian defence counsel have recently begun appealing sexual assault convictions by arguing that a trial judge applied myths and stereotypes (M&S) against the accused. This phenomenon is surprising because this country's focus on M&S in sexual assault law has almost exclusively concerned improper assumptions that operate against the complainant and the Crown and risk producing perverse acquittals. This thesis reviews this new defence strategy with reference to three decades of appellate case law and scholarship. It advances definitions of M&S as well as principles for understanding the evidentiary effects of their recognition as such, and it categorizes various defence attempts to invoke M&S in conviction appeals, concluding that some have more merit than others. Emerging from this analysis is a more consistent, coherent role for the M&S doctrine in sexual assault law – one which should assist the Canadian bench, bar and academy in distinguishing legitimate M&S arguments from strained ones.

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EPIGRAPH

Offering an entirely different tactic to *thought*, Deleuze reminds us that: 'thought has other misadventures besides error.' He names: madness, stupidity, malevolence and superstition, absurdity, ignorance, forgetting, vulgarity, alienation and 'inner illusion.' To this list we can add: paradox, incoherence, uncertainty, indecision, and aporea.

These 'adventures of thought' aren't simply the outcome of momentary lapses on the part of the thinking subject to get the facts right. Something else is happening, in thought, as thinking. And yet by handling those occasions through the dogmatic image of thought—that is, as a momentary privation of fact or powers of reasoning—we completely miss, hence fail to philosophically explore, what these other phenomena suggest about the nature of thinking and thought.

In the dominant view of morality we see this postulate of the dogmatic image of thought expressed in the sense of irresponsibility, consisting of an error of judgment, will or imagination on the part of the moral agent. 'Normal ethics' doesn't seem to let us think about moral thinking other than in terms of having gotten it either right or wrong.

But some 'misadventures of thought' that take place in response to moral moments ought not to be dismissed out of hand as errors of moral reasoning, thus opposed to, or irrelevant for, thinking through an ethically potent situation. […] They might in fact be expressing or pointing to some fecund unexplored region of moral insight.

Karen Houle, *Responsibility, Complexity, and Abortion: Toward a New Image of Ethical Thought* (New York: Lexington, 2014) at 161

COMMONLY USED INITIALISMS

ABCA	Court of Appeal of Alberta
BCCA	British Columbia Court of Appeal
M&S	myths and stereotypes myths or stereotypes a myth or a stereotype
ONCA	Court of Appeal for Ontario
QCCA	Cour d'appel du Québec
SCC	Supreme Court of Canada
SKCA	Court of Appeal for Saskatchewan
UCSA	ungrounded common-sense assumption

INTRODUCTION

Overview: Content, Context and Conclusions

A surprising phenomenon has visited sexual assault law in Canada over the past six years. Defence counsel have begun arguing at provincial and territorial appellate courts that certain lines of reasoning advanced by the Crown and/or relied on by trial judges in sexual assault cases evince myths and stereotypes (M&S) and risk founding wrongful convictions. This development is striking because Canadian law's longstanding and still-evolving jurisprudence on M&S in sexual assault law has been overwhelmingly concerned with arguments, typically raised by the Crown, that some lines of reasoning espoused by defence counsel and/or trial judges risk producing perverse acquittals. This thesis addresses this new defence strategy and casts it as involving "defence-raised M&S". The more established case law and scholarship in this area will be referred to as concerning "Crown-raised M&S".[1]

Most Crown-raised M&S reflect assumptions about women being sexually available for the taking and/or how a 'normal' victim would react to a sexual assault. They include improper inferences that tend to undermine the credibility of a complainant's claim of non-consent, or that tend to support an accused's belief that the complainant was communicating consent, based on the complainant's failure to resist or object to the touching, her sexual activity on other occasions, or her failure to promptly report the alleged offence or avoid the accused after the fact. Defence-raised M&S, by contrast, involve improper inferences that tend to support a complainant's credibility or undermine that of an accused. This strategy includes arguments that

- attack assumptions about female sexual timidity (e.g., the unlikelihood that a complainant would initiate sexual contact or consent to it in certain circumstances)

[1] The use of these labels is not intended to suggest that it falls solely to the defence or the Crown to flag myths and stereotypes to the court, as judges can of course 'raise' them of their own accord. The labels simply designate the party in whose interest it is to flag them, and to what end.

- attack assumptions about male sexual opportunism (e.g., the unlikelihood that a man would decline sex or assiduously inquire about consent, or the use of an accused's sexual history on other occasions to argue that he is inclined to commit sexual offences and/or unworthy of belief)

- try to harness the recognition of Crown-raised M&S for defence purposes

    - by arguing that the accused is the *victim* of sexual assault by the *complainant*, and that an adverse inference was drawn against the accused for failing to report the incident or to avoid the complainant thereafter

    - by contending that a complainant's timing or manner of reporting or her avoidance of the accused after the alleged offence was improperly used to find her credible, on the basis that the law prohibits the use of her *delayed* reporting or *continued* association with the accused to undermine her credibility

- seek to impugn every inference drawn at trial as disclosing reliance on M&S (e.g., inferences concerning physiological reactions, how sexual encounters unfold and interactions unrelated to the sexual context of the charge(s))

This thesis takes the position that there is a pressing need to categorize defence attempts to invoke M&S in sexual assault appeals and to appraise their legitimacy, including with reference to their Crown-raised counterparts.

Several factors motivate the analysis undertaken in this thesis. First, defence arguments about M&S have come to occupy a substantial proportion of Canadian appellate court dockets and, on several occasions, have resulted in orders for new trials, whose social and financial costs are many.[2] Second, provincial and territorial courts of appeal have been dealing with these arguments with scant guidance from the Supreme Court of Canada (SCC) or legal academics, much less Parliament. These actors have instead concerned themselves primarily with Crown-raised M&S, and their silence on defence-raised M&S may reflect a legitimate worry that these latter arguments amount only to a distortion or a ruse. Lastly, intermediate appellate courts have

[2] For an eloquent account of the social costs at play, see Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montréal/Kingston: McGill-Queen's University Press, 2018) at 191-192 and 203 [Elaine Craig, *Putting Trials on Trial*].

tended so far to analyze defence-raised M&S as part of a global framework that includes their Crown-raised counterparts. This inclination, while understandable and salutary in certain respects, obscures key differences between the two types of M&S and risks erecting an "ahistorical and regressive" equivalency between them.[3]

This thesis concludes that this new defence strategy cannot be painted with a single brushstroke. It argues that two categories of defence-raised M&S – those concerning assumptions about women's sexual timidity and men's sexual opportunism – should be recognized as part of the M&S doctrine, and can be so recognized without undermining the recognition of Crown-raised M&S. What is more, recognizing these defence-raised M&S and reconciling them with their Crown-raised counterparts offer opportunities to improve our understanding of sexuality and sexual assault and to lend greater integrity to the doctrine of M&S as a whole. By contrast, this thesis contends that most defence efforts to harness the recognition of Crown-raised M&S for the accused's benefit and to attack every common-sense inference drawn at trial are ill-conceived and, accordingly, less worthy of retention in the law. In this failure, however, lies an opportunity to draw lessons from – and inform in turn – a parallel failure in the law on Crown-raised M&S, namely "when Crown prosecutors and trial judges embrace an overly broad understanding of what is prohibited"[4] by the recognition of such M&S.

Intended Readership and Scholarly Interlocutors

This thesis is intended to reach a readership comprising members of the Canadian bench, bar and academy who deal regularly with sexual assault law. It joins a scholarly conversation on

[3] Lisa Dufraimont, "Current Complications in the Law on Myths and Stereotypes" (2021) 99:3 *Can Bar Rev* 536 at 563-564 [Lisa Dufraimont, "Current Complications"].
[4] Lisa Dufraimont, "Current Complications," *ibid* at 554.

M&S in this area that has unfolded over the past 30 years, organizing its interlocutors into three groups:

- *equality*[5]: Scholars such as Janine Benedet, Christine Boyle, Elaine Craig, Emma Cunliffe, Lise Gotell, Isabel Grant, Melanie Randall, David Tanovich and Lucinda Vandervort emphasize Canada's constitutional guarantee of equality as warranting both a prevailing focus on our right to be free from unwanted sexual contact and expansive views of what the recognition of Crown-raised M&S prohibits. They often call for strict limits on the admissibility and/or use of evidence that could invite the application of a Crown-raised M&S and thereby result in an improper acquittal.

- *due process*: Scholars such as Lisa Dufraimont, David Paciocco (as he then was[6]) and Don Stuart show more marked concern for the accused's constitutional right to make full answer and defence. They worry about bare invocations of equality and an impoverished concept of relevance driving the recognition of Crown-raised M&S and expansive views of what such recognition prohibits. These scholars favour a more flexible regime governing the admissibility of evidence and call for greater clarity about the impermissible and permissible inferences that can be drawn therefrom.

- *agency*: Scholars such as Michael Plaxton, and some of Elaine Craig's work, advance an account of sexual agency that can supplement a focus on sex equality. In their view, sexual assault law should account for our right to enjoy wanted sexual contact no less than our right to be free from unwanted sexual contact, albeit in ways that work nimbly around well-recognized Crown-raised M&S. These rights, for them, are simply two sides of the same sexual autonomy coin.

The use of shorthand labels to designate these scholarly clusters is not intended to sow greater division between them than already exists. All of these academics have valid concerns about the doctrine of M&S and are committed to legitimate visions of justice in Canadian sexual assault law. The three labels noted above simply reflect the right or value that those who fall under them see as the most important – or the most imperilled – in the adjudication of sexual assault cases. To be sure, these scholars routinely observe the importance of the different values

[5] This thesis declines to use the term "feminist" to describe this group of scholars, on the basis that "[f]eminism has many voices": Elaine Craig, *Troubling Sex: Towards a Legal Theory of Sexual Integrity* (Vancouver: UBC Press, 2011) at 64 [Elaine Craig, *Troubling Sex*]. Some of these voices are reflected in the other groups of scholars described here.

[6] David Paciocco is now a Justice of the Court of Appeal for Ontario. This thesis's characterizations of his academic work do not purport to reflect his judicial approach or present-day personal views.

championed by their colleagues[7] and make concessions in their favour.[8] Moreover, some of them straddle more than one camp,[9] and others have migrated from one camp to another over the years.[10]

Scope and Terminology

This thesis takes the criminal trial of sexual assault allegations as its primary focus and attends in particular to judicial decisions about the admissibility of evidence and the liability of the accused. It does not deal with decisions to investigate, charge or prosecute sexual assault allegations or with the sentencing of sexual offenders. It focuses mainly on charges of sexual assault under sections 271 and following of the *Criminal Code*, and only incidentally on sexual offences involving complainants who lack capacity to consent because they are underage. Its coverage is limited to Canadian law current to July 31, 2022, and it generally does not draw on extralegal sources except to the extent that they have been filtered through Canadian legal scholarship.

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[7] See, e.g., Elaine Craig's validation of due process concerns in *Putting Trials on Trial*, *supra* note 2 at 11, 13, 15, 133 and 220-223; and Don Stuart's validation of equality concerns in *Canadian Criminal Law: A Treatise*, 8/e (Toronto: Carswell, 2020) at 77-78 [Don Stuart, *Canadian Criminal Law*].

[8] See, e.g., Don Stuart, "The Supreme Court Adds Unjust Rigidity to Rape Shield Protections" (2019) 55 *CR* (7th) 292 at 293, where he concedes that arguments that evidence of a complainant's other sexual activity should be admitted as part of the narrative or to supply context are "a notorious device in the law of evidence sometimes resorted to by judges to avoid exclusionary rules considered to be too rigid" [Don Stuart, "Unjust Rigidity"]; and Janine Benedet, "Judicial Misconduct in the Sexual Assault Trial" (2019) 52:1 *UBC L Rev* 1 at paras 69, 107 and 110, where she makes concessions about the legitimacy of certain defence arguments [Janine Benedet, "Judicial Misconduct"].

[9] Compare Elaine Craig's equality-oriented work in *Putting Trials on Trial*, *supra* note 2 with the agency-oriented elements of her work in *Troubling Sex*, *supra* note 5; "Capacity to Consent to Sexual Risk" (2014) 17:1 *New Crim L Rev* 103 [Elaine Craig, "Capacity to Consent to Sexual Risk"]; and "The Legal Regulation of Sadomasochism and the So-Called 'Rough Sex Defence'" (2021) 37 *Windsor YB Access to Just* 402 [Elaine Craig, "The Legal Regulation of Sadomasochism"].

[10] Compare David Tanovich's agency-oriented work in "Criminalizing Sex at the Margins" (2010) 74 *CR* (6th) 86 with his equality-oriented writing in "'Whack' No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases" (2013-2014) 45 *Ottawa L Rev* 495 [David Tanovich, "'Whack' No More"].

As suggested above, this thesis uses the term "raised" to indicate which party – the Crown or the defence – can be expected to flag M&S when they are uncertain that a court will do so. Similarly, it uses the word "recognition" to describe when a M&S is acknowledged *as being a M&S* and thus as an instance of impermissible reasoning. By contrast, it simply uses the term "M&S" to designate *the M&S itself* and describes these M&S as "operating" or being "applied" or "relied on" when they are left unchecked.

Like most scholarship in this area, this thesis defaults to masculine pronouns when referring to accused persons and offenders, and to feminine pronouns when referring to complainants and victims, in recognition that most sexual assaults are committed by cisgender men against cisgender women and girls.[11] This approach is not intended to obscure the fact that individuals across the sex and gender spectrum can and do experience sexual assault either as victims or perpetrators.[12]

Perspectives on the Legal and Social Context of Sexual Assault

Recent years in Canada have seen an "unprecedented" explosion of legal and lay commentary on sexual assault, much of it focused on the mistreatment of complainants in the

[11] Statistics Canada, *Self-reported sexual assault in Canada, 2014*, by Shana Conroy and Adam Cotter, Catalogue No 85-002-X (Ottawa: Statistics Canada, 11 July 2017) at 6 and 13-14 [Statistics Canada, *Self-reported sexual assault*]; Statistics Canada, *Police-reported sexual assaults in Canada, 2009 to 2014: A statistical profile*, by Cristine Rotenberg, Catalogue No 85-002-X (Ottawa: Statistics Canada, 3 October 2017) at 3, 13 and 18-19 [Statistics Canada, *Police-reported sexual assaults*]. See also Statistics Canada, *From arrest to conviction: Court outcomes of police-reported sexual assaults in Canada, 2009 to 2014*, by Cristine Rotenberg, Catalogue No 85-002-X (Ottawa: Statistics Canada, 26 October 2017) at 47 [Statistics Canada, *From arrest to conviction*]; and Statistics Canada, *Police-reported sexual assaults in Canada before and after #MeToo, 2016 and 2017*, by Cristine Rotenberg and Adam Cotter, Catalogue No 85-002-X (Ottawa: Statistics Canada, 8 November 2018) at 3 and 13.

[12] See the sources cited at the previous note, as well as the following: Elaine Craig, *Putting Trials on Trial*, *supra* note 2 at 16; Statistics Canada, *Experiences of violent victimization and unwanted sexual behaviours among gay, lesbian, bisexual and other sexual minority people, and the transgender population, in Canada, 2018*, by Brianna Jaffray, Catalogue No 85-002-X (Ottawa: Statistics Canada, 9 September 2020) at 12 and 25; *R v Barton*, 2019 SCC 33 at footnote 1 [*Barton*]; *R v Friesen*, 2020 SCC 9 at paras 68-69 [*Friesen*]; and *R v Kirkpatrick*, 2022 SCC 33 at para 62 [*Kirkpatrick*].

criminal justice process.[13] Readers of this thesis will likely find, by contrast, prominent consideration for the accused, along with a tendency to align with the due process and agency clusters of scholarship noted above. This does not mean that it amounts to "backlash to the effect that the pendulum has already swung too far in favour of sexual assault complainants."[14] Rather, this thesis aims to be hospitable and accountable to the perspectives of all actors in this conversation. The following passages aim to convey how it does so, while also highlighting notable points of view reflected in this thesis that are seldom seen in Canadian judicial and academic discourse concerning sexual assault.

The governing law and the fundamental values it reflects

This thesis works with, and generally does not dispute, the substantive and evidentiary law that governs sexual assault in Canada, including as it has been informed by the recognition of Crown-raised M&S. It acknowledges that Crown-raised M&S are the predominant and most longstanding types of M&S in this area, and it fully accepts the need to root them out of the law. While this thesis argues for the recognition of certain defence-raised M&S and disputes some interpretations of what follows from the recognition of their Crown-raised counterparts, such arguments are intended to push the law further.[15] In other words, the thrust of this thesis is that the work required to recognize both Crown- and defence-raised M&S strengthens the doctrine as

[13] Elaine Craig, *Putting Trials on Trial*, *ibid* at 3. See also Lisa Dufraimont, "Current Complications," *supra* note 3 at 537.
[14] Janine Benedet, "Judicial Misconduct," *supra* note 8 at para 111. See other invocations of the "pendulum" motif in Elaine Craig, *Putting Trials on Trial*, *ibid* at 25-27 and 59; and Don Stuart, *Canadian Criminal Law*, *supra* note 7 at 356 and 363. With thanks to Palma Paciocco for the seeds of this insight, this thesis considers the imagery of a pendulum to be inapt in any event, because it implies that a choice must be made between the rights of complainants and those of accused persons. The arguments in this thesis aim to show that the protections resulting from the recognition of M&S can inure to the benefit of both types of witnesses.
[15] See Michael Plaxton, *Implied Consent and Sexual Assault: Intimate Relationships, Autonomy, and Voice* (Montréal-Kingston: McGill-Queen's University Press, 2015) at 6, where he uses this phrase in relation to an argument favouring the revival of a modified doctrine of implied consent in sexual assault law [Michael Plaxton, *Implied Consent*].

a whole, including in ways that help correct for overreach on the part of both the Crown and the defence.

This thesis also accepts that ensuring we can be free from unwanted sexual contact is a very high priority. It takes the view, however, that properly understanding sexuality *and* sexual assault requires that we also appreciate the value in ensuring we can enjoy the sexual contact that we do want. Accordingly, it treats these priorities as intertwined and sees no obstacles to their simultaneous pursuit.[16] Underlying this position is the view that our grasp of sexuality and sexual assault could be enhanced further by deeper theoretical analyses of power (e.g., whether ridding sexual relationships of power differentials is possible or even ideal) and desire (e.g., whether law can effectively regulate desire, and how to understand sexual desire that seems not to be consistent with personal dignity or to meet certain conditions of mutuality). For the most part, however, this thesis opts to meet its interlocutors on their own terms, eschewing metaphysical inquiry in favour of the "practical reason" typically employed by doctrinal jurists.[17]

Statistical realities and sociolegal responses

This thesis acknowledges that the processing of sexual assault complaints in the criminal justice system is hobbled by the operation of Crown-raised M&S and that this is a major reason why only a minuscule proportion of all sexual assaults are reported, charged, prosecuted and convicted.[18] At the same time, this thesis bears in mind a number of statistics that are seldom noted in Canadian judicial and scholarly treatment of sexual assault: first, most sexual assault allegations falter due to attrition that occurs well before judicial determinations of liability;[19] and

[16] See Elaine Craig, "The Legal Regulation of Sadomasochism," *supra* note 9 at 405-406, where she aspires to take this view but ultimately concludes that the former priority trumps the latter in importance.
[17] See Robert J Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018) at 13-15 and 275 for an account of this "practical reason" [Robert Sharpe, *Good Judgment*].
[18] Statistics Canada, *Self-reported sexual assault*, *supra* note 11 at 16-18; Statistics Canada, *Police-reported sexual assaults*, *supra* note 11 at 3 and 7; and Statistics Canada, *From arrest to conviction*, *supra* note 11 at 3-12 and 34.
[19] Statistics Canada, *From arrest to conviction*, *ibid* at 3, 6, 10, 14, 34 and 46; see also 17.

next, for those that proceed to a full trial, the conviction rate in sexual assault cases is both substantial and comparable to that in physical assault cases, while true acquittals are quite rare in both types of cases.[20] This thesis suggests that these statistics should give us pause when reflecting on the degree of responsibility that the judiciary bears for the low conviction rate attaching to self-reported sexual assaults overall and for applying Crown-raised M&S at trial in particular.

This thesis is also mindful that the most common reasons cited by victims for not reporting sexual assault to police are "that the crime was minor and it was not worth taking the time to report (71%), that the incident was a private or personal matter and it was handled informally (67%), and that no one was harmed during the incident (63%)[.]"[21] Equality scholar Melanie Randall interprets similar statistics as reflecting the internalization of "victim-blaming attitudes […] by women who have been sexually assaulted."[22] This thesis takes a different view – namely, that *how we think about sex in the first place* can affect whether we perceive ourselves to have been sexually assaulted and, if so, how troubling we find that to be. This is not merely a matter of whether a given sexual assault victim understands the law of consent. It is also a matter of acknowledging that *where* a given instance of unwanted sexual touching falls on the vast range of conduct subject to criminalization – from the lightest touch to penetrative rape

[20] Statistics Canada, *From arrest to conviction, ibid* at 3, 10, 13-15, 17 and 49. The rate of conviction in cases involving a sexual assault charge is 55%; 81% of these convictions are for the sexual assault charge. The rate of conviction in cases involving a physical assault charge is 59%; no data are provided to indicate what proportion of these convictions are for the physical assault charge. Five percent (5%) of sexual assault cases and 1% of physical assault cases result in an acquittal. Other dispositions, such as stays, referrals to alternative or extrajudicial or restorative programs, withdrawals, dismissals and discharges at preliminary inquiries, account for 39% of dispositions in cases involving a sexual assault charge and in those involving a physical assault charge.
[21] Statistics Canada, *Self-reported sexual assault, supra* note 11 at 17.
[22] Melanie Randall, "Sexual Assault, Credibility, and 'Ideal Victims': Consent, Resistance, and Victim Blaming" (2010) 22 *Can J Women & L* 397 at 431 [Melanie Randall, "Ideal Victims"].

combined with additional physical violence[23] – can have an influence on victims' perceptions of its occurrence and/or impact.

This thesis accepts the SCC's recognition that "even mild non-consensual touching of a sexual nature can have profound implications" for its recipient,[24] and it is mindful that the SCC has identified "encouraging the reporting of sexual assault" as a principle of fundamental justice in Canada.[25] It simply declines to find victims' reasons for *not* reporting to be invariably unsettling or inherently worthy of intervention.

Institutional actors and the judicial role

This thesis accepts that police officers, Crown prosecutors, defence counsel and judges all share responsibility for applying Crown-raised M&S to sexual assault complainants at different stages of the criminal justice process.[26] As noted above, however, it focuses on judicial reasoning about M&S in determining the admissibility of evidence and the liability of the accused. It accepts that failures by trial judges to apply the law and to show respect toward sexual assault complainants are entirely worthy of criticism and, in exceptional cases, can rise to the level of misconduct warranting removal or resignation from the bench.[27] Moreover, it takes it as beyond dispute that judges presiding over sexual trials should have an adequate understanding of the governing law.[28]

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[23] See reminders of this breadth in Michael Plaxton, "Sexual Assault's Strangely Intractable Fault Problem" (2022) 70 *CLQ* 33 at 36 and 59-60 [Michael Plaxton, "Strangely Intractable"]; and Morris Manning and Peter Sankoff, *Manning, Mewett & Sankoff: Criminal Law*, 5/e (Markham: LexisNexis, 2015) at ¶21.118 and ¶21.120 [*Manning, Mewett & Sankoff: Criminal Law*].
[24] *R v JA*, 2011 SCC 28 at para 63 [*JA*]. See also *Friesen*, *supra* note 12 at paras 140-147.
[25] *R v JJ*, 2022 SCC 28 at para 120 [*JJ* (SCC)]; *R v Darrach*, 2000 SCC 46 at para 25 [*Darrach*].
[26] This shared responsibility is acknowledged throughout Elaine Craig, *Putting Trials on Trial*, *supra* note 2.
[27] See a version of this argument in Janine Benedet, "Judicial Misconduct," *supra* note 8.
[28] See a version of this argument in Elaine Craig, *Putting Trials on Trial*, *supra* note 2 at 206-215. See also Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: CJC, 2021) at 27 (III.C) and 30-32 (3.C.1-3.C.8) [CJC, *Ethical Principles*].

At the same time, this thesis observes that the Canadian judiciary has always included seasoned criminal law experts who have, quite literally, made sexual assault law what it is[29] – including by identifying and repudiating Crown-raised M&S. While some commentators perceive judges as caring only about the rights of the accused,[30] it must be borne in mind that all major political parties in Canada have considered themselves bound for decades to legislate in favour of the rights of sexual assault complainants.[31] By contrast, the judiciary's "removal from political pressure"[32] and its mandate, in criminal proceedings, to resolve disputes between the State and the accused make it only natural that judges should take seriously the latter's interests. This mandate extends, in any event, to implementing the increasing array of statutory protections for complainants noted above, as well as interpreting key constitutional rights from the perspectives of multiple justice system participants and observers.[33] Moreover, recent years have found the SCC ruling in favour of the Crown in dozens of consecutive sexual assault appeals[34]

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[29] For an account of judges' law-making function, see Robert Sharpe, *Good Judgment*, *supra* note 17 at 77-97.
[30] See, e.g., John McInnes and Christine Boyle, "Judging Sexual Assault Law against a Standard of Equality" (1995) 29 *UBC L Rev* 341 at paras 4-13 [John McInnes and Christine Boyle, "Judging Sexual Assault Law"]. See also Elaine Craig, *Putting Trials on Trial*, *supra* note 2 at 58, where she notes that "retired Justice Marie Corbett recently concluded that […] ensuring due process for the accused has perhaps become the *only* function of the trial judge" [emphasis in original].
[31] See acknowledgments of this trend in Don Stuart, *Canadian Criminal Law*, *supra* note 7 at vi and 60; and David M Paciocco, "Competing Constitutional Rights in an Age of Deference: A Bad Time to Be Accused" (2001) 14 *Sup Ct L Rev* (2d) 111 at para 46 [David Paciocco, "A Bad Time to Be Accused"]. See also the following selected Parliamentary bills: *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, 1st Sess, 32nd Parl, 1983 (assented to 3 January 1983), SC 1980-81-82-83, c 125; Bill C-49, *An Act to amend the Criminal Code (sexual assault)*, 3rd Sess, 34th Parl, 1992 (assented to 23 June 1992), SC 1992, c 38; Bill C-46, *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, 2nd Sess, 35th Parl, 1997 (assented to 25 April 1997), SC 1997, c 30; Bill C-32, *An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts*, 2nd Sess, 41st Parl, 2015 (assented to 23 April 2015), SC 2015, c 13; Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, 1st Sess, 42nd Parl, 2018 (assented to 13 December 2018), SC 2018, c 29; and Bill C-3, *An Act to amend the Judges Act and the Criminal Code*, 2nd Sess, 43rd Parl, 2021 (assented to 6 May 2021), SC 2021, c 8.
[32] David Paciocco, "A Bad Time to Be Accused," *ibid* at para 46.
[33] *JJ* (SCC), *supra* note 25 at para 121: "the right to make full answer and defence and the right to a fair trial are considered from the perspectives of the accused, the complainant, the community and the criminal justice system at large"; see also para 125. See also *R v Mills*, [1999] 3 SCR 668 at paras 72-73 [*Mills*].
[34] Sean Fine, "Supreme Court of Canada backs victims in 34 sex-assault cases in a row, a Globe analysis finds", *Globe and Mail* (30 May 2022), online: https://www.theglobeandmail.com/canada/article-supreme-court-rulings-sex-assault-cases-metoo/. This thesis is mindful that this trend might not reflect the SCC's inclination in this area of

and admonishing intermediate appellate courts for allowing appeals from conviction for sexual assault too routinely.[35] It is against this multi-faceted backdrop that this thesis situates its arguments about judicial reasoning in sexual assault law.

The complainant and the accused

This thesis accepts that both sexual assault and the attrition of sexual assault complaints in the criminal justice system can have devastating long-term impacts on victims, many of whom are already marginalized on multiple fronts.[36] As Elaine Craig chronicles, complainants are especially vulnerable when sexual assault trials do occur because they are susceptible to mistreatment flowing from the application of Crown-raised M&S by all justice system actors at all stages of the criminal justice process.[37] This recognition of complainants' vulnerability does not foreclose a parallel concern for the humanity and dignity of the accused (whether or not he belongs to one or more marginalized group(s)[38]). This thesis takes as a given that the accused, too, is uniquely vulnerable, particularly in the face of a well-resourced State apparatus,[39] and that in sexual assault matters, he is one of the most maligned figures in contemporary Canadian society. Accordingly, it takes the position that sexual assault law – and the role that the doctrine of M&S plays within it – can and should attend to this joint vulnerability in equal measure.[40]

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the law but rather a strategic policy on the part of the Crown not to appeal cases it considers it cannot win. It is mindful, too, that many of these SCC rulings include spirited dissents.

[35] *R v GF*, 2021 SCC 20 at paras 68-82 [*GF*].

[36] Elaine Craig, *Putting Trials on Trial*, *supra* note 2 at 10, 75, 151 and 223-224. See also *R v Goldfinch*, 2019 SCC 38 at para 37 [*Goldfinch*]; and *Kirkpatrick*, *supra* note 12 at paras 61-62.

[37] See Elaine Craig, *Putting Trials on Trial*, *ibid* at 135 and 151 for an account of this vulnerability.

[38] Elaine Craig, *Putting Trials on Trial*, *ibid* at 75.

[39] See David Paciocco, "A Bad Time to Be Accused," *supra* note 31 at para 25 and footnote 65 for an account of this vulnerability. See also Marie Henein, *Nothing But the Truth: A Memoir* (Toronto: Signal, 2021) at 143 and 177-180.

[40] See *R v NS*, 2010 ONCA 670 (affirmed: 2012 SCC 72) at paras 45-46 for an account of this joint vulnerability.

Chapter Breakdown and Methodology

Chapter 1

Chapter 1 of this thesis aims to provide sufficient background on Canadian sexual assault law and the history of Crown-raised M&S within it to understand the advent of defence-raised M&S. It begins by proposing definitions of "stereotype" and "myth" that its interlocutors might be expected to accept, and by illustrating how the law of evidence understands and deals with M&S in judicial reasoning. The primary sources for these threshold endeavours are the interdisciplinary efforts of legal scholars and leading authorities on evidence law, respectively. The chapter then shifts to a consideration of Crown-raised M&S, both generally and in particular, by looking at how the SCC, Parliament and equality and due process scholars have grappled with them over the past three decades. While this review reveals nearly universal recognition of Crown-raised M&S as a priority concern, it also shows enduring disputes about the evidentiary consequences of recognizing such reasoning as flawed.

The chapter closes by highlighting a recent trend at the intermediate appellate level, whereby some due process scholarship and several courts of appeal have identified "overreach" on the part of some Crown prosecutors and trial judges in their determinations of what exactly offends the prohibition against M&S. Accounting for this phenomenon allows us to see, more clearly, two interrelated insights that build up incrementally over the course of this chapter: first, the evidence in a given case might afford an inference that is *consistent* with that which would flow from a M&S; and second, recognizing M&S as such should be understood to have a *neutralizing* effect, in that such recognition precludes reliance on the assumption reflected in the M&S but does not give rise to a contrary assumption.

Chapter 2

Chapter 2 introduces a categorization of defence arguments about M&S that have been made in intermediate appellate courts since 2017. This exercise is necessary because such arguments have varied greatly in their nature and success rate, and they have largely eluded the attention of legal scholars and the SCC. It is also necessary because provincial and territorial courts of appeal have tended to treat defence-raised M&S together with their Crown-raised counterparts in a global, gender-neutral and non-partisan framework. This trend raises concerns that the historical and contemporary problem of Crown-raised M&S might fade from our attention. The primary sources for this chapter are the very cases that have treated defence-raised M&S, but it draws also on the work of equality and agency scholars – as well as key insights about M&S from Chapter 1 – in assessing the legitimacy of these defence arguments.

This review shows that two broad types of defence-raised M&S – namely, those concerning women's sexual timidity and men's sexual opportunism – have received widespread recognition by provincial and territorial courts of appeal. It argues that these M&S can be recognized in sexual assault law because they meet the definitions of M&S advanced in Chapter 1 and because they generally work with, rather than distort, the substantive and evidentiary law governing sexual assault. What is more, accommodating their recognition offers us an opportunity to see the *consistency* and *neutralization* principles, advanced in Chapter 1, in action. Intermediate appellate courts have shown comfort with finding that the evidence in a given case legitimately supports a finding that is consistent with that which would flow from a M&S alleged by the defence. In addition, taking the view that recognizing these defence-raised M&S simply neutralizes the assumptions they reflect helps us understand how this recognition need not be seen as reviving their Crown-raised counterparts. Accordingly, this development will not open

the floodgates to mass acquittals, and it can sensibly and equitably form part of the M&S doctrine more generally.

By contrast, Chapter 2 finds that most defence attempts to harness Crown-raised M&S to their own ends and to attack every common-sense inference drawn at trial have been unsuccessful. Defence arguments that the accused was the victim of the complainant and was subject to adverse inferences regarding his (or her) failure to report immediately or avoid the complainant are usually belied by the facts of the case and, even when they are not, they do not tell us anything new or interesting about these Crown-raised M&S. Arguments that evidence of a complainant's timing or manner of reporting or avoidance of the accused should receive no weight generally appear preposterous, even as they point to uneven treatment of a complainant's after-the-fact conduct in sexual assault law more generally. Lastly, defence attempts to impugn inferences concerning physiological reactions, how sexual encounters unfold and interactions unrelated to the sexual context of the charge(s) rightly fall flat. Even if some of them might be said to attack genuinely improper reasoning, such reasoning is not a good fit for the M&S doctrine and, in many cases, it is questionable whether the inference attacked was even drawn.

Conclusion and Ultimate Aspirations

The Conclusion to this thesis begins by recapitulating the contributions and proposals that were advanced in Chapters 1 and 2. It then closes with some reflections on its implications for the adjudication of sexual assault cases. The hope of this thesis is that Canadian appellate courts will consider the definitions of M&S advanced therein and, whatever they make of them, come to achieve greater clarity and consistency in articulating what M&S *are* and what follows from recognizing them. This is crucial to ensuring that the criminal justice system can distinguish

between M&S arguments both legitimate and strained, with a view to reducing the risk of wrongful convictions and perverse acquittals alike in sexual assault cases.

CHAPTER 1: UNDERSTANDING THE HISTORY OF CROWN-RAISED MYTHS AND STEREOTYPES IN CANADIAN SEXUAL ASSAULT LAW

Introduction

It is not possible to appreciate the nature and import of the advent of defence-raised M&S without some understanding of Canadian sexual assault law and the history of Crown-raised M&S within it. This chapter provides that backdrop, in part by contending that the story of sexual assault law reform in this country can be understood as one of gradually reflecting the recognition of Crown-raised M&S. It begins, however, by proposing definitions for "stereotype" and "myth" and an account of how they can arise and be overcome in judicial reasoning generally. This groundwork helps us grasp the contingency of how M&S have come to acquire such negative connotations in law generally and a close association with sexist reasoning in sexual assault law in particular. So too does it equip us to conceive of new forms of M&S and to acknowledge that M&S-based reasoning cannot be neatly excised from the cognitive processes of judges or, for that matter, anyone else.

The chapter then proceeds to examine the treatment of Crown-raised M&S by the SCC, Parliament and scholars drawn primarily from the equality and due process groups, both in general and by individually canvassing three Crown-raised M&S that have received concerted attention in recent decades. A key trend emerging from this review is that equality and due process scholars disagree over what should follow, in law, from the recognition of a Crown-raised M&S. Depending on the M&S in question, equality scholars tend to argue that certain evidence should be excluded (that of a complainant's other sexual activity), given no weight (that of a complainant's delayed disclosure or continued association with the accused) or even be taken to show something contrary to what it has typically been used to show (that of a complainant's silence or passivity during sexual contact with the accused). Due process scholars

dispute these interpretations of what recognizing Crown-raised M&S compels. On balance, the efforts of the SCC and Parliament to refine sexual assault law have tended to favour the views of equality scholars, while still leaving modest scope for due process concerns.

The chapter closes by observing that Canada's provincial and territorial courts have recently accommodated some due process concerns in their treatment of Crown-raised M&S. They have done so by allowing for certain evidence that has historically been used to fuel these M&S to be used instead to draw permissible inferences. This phenomenon can helpfully be understood as correcting for "overreach" by some Crown prosecutors and trial judges in relation to the implications of recognizing a Crown-raised M&S. Tracking it helps us see, more clearly, two principles that develop incrementally throughout the chapter as a whole: first, the evidence in a given case can support a finding that is *consistent* with that which might flow from a given Crown-raised M&S; and second, recognizing these M&S as such does not compel the acceptance of contrary assumptions but has a *neutralizing* effect, restoring triers of fact to uncertainty and obliging them to attend closely to the evidence when deciding whom to believe about specific disputed facts. Chapter 2 will apply these principles, and the definitions of M&S advanced in the present chapter, in validating the recognition of certain defence-raised M&S and identifying overreach in other defence arguments about M&S.

What Is Stereotyping? What Are Myths?

M&S in sexual assault law are identified more than they are defined in Canadian appellate case law and scholarship. Still less are myths distinguished from stereotypes in these sources.[41] This section of the chapter proposes working definitions of "stereotype" and "myth"

[41] One oft-cited definition of M&S stems from *R v CMG*, 2016 ABQB 368, a trial-level decision by Justice Sheilah Martin in a sexual assault case. However, it neither distinguishes myths from stereotypes nor articulates what

that its readers might be expected to accept based on common uses of these terms beyond and/or within sexual assault law. In particular, its definition of "stereotype" aligns with sexual assault scholars' efforts to draw on the treatment of this concept in other disciplines, while its definition of "myth" accords with the SCC's treatment of this term. These definitions will be refined as the chapter proceeds, notably as it comes to focus on the meaning and role that Crown-raised M&S have taken on in Canadian sexual assault law.

At a threshold level, this thesis defines "stereotype" as an empirical claim about the (un)likelihood or (im)plausibility of someone behaving in a certain way by virtue of their belonging to a particular demographic.[42] Such demographics might be defined in terms that are relatively immutable (e.g., sex and gender identity, race and ethnicity, sexual orientation, certain disabilities), more contingent or situational (e.g., victims and perpetrators of crime) or somewhere between these poles (e.g., age, poverty, addiction, other disabilities). By contrast, this thesis defines "myth" as a logical claim that *depends* on a stereotype. In other words, a myth assumes the validity of the stereotypical assumption and draws a further inference therefrom, in a relation marked by "false logic."[43] (This thesis acknowledges that there are other ways of

characterizes M&S that are distinctive to, or especially pernicious in, sexual assault law (whereas this chapter attempts to do both): "Broadly speaking, myths and stereotypes rest on untested and unstated assumptions about how the world works or how certain people behave in particular situations. They often involve an idealized standard of conduct against which particular individuals are measured. Sometimes general, assumed or attributed characteristics are applied to a particular individual or circumstance, often without an analysis of whether there is any merit in the general assumption or whether it truly applies in a particular situation" (para 60). The Alberta Court of Appeal recently declined a proposal from defence counsel that myths be distinguished from stereotypes: see *R v BEM*, 2022 ABCA 207 at paras 70-71 (application for leave to appeal filed: [2022] SCCA No 276).

[42] This definition aligns with the accounts of stereotyping advanced in Emma Cunliffe, "Sexual Assault Cases in the Supreme Court of Canada: Losing Sight of Substantive Equality?" (2012) 57 *Sup Ct L Rev* (2d) 295 at 299 (citing Sophia Moreau) [Emma Cunliffe, "Losing Sight of Substantive Equality?"]; Emma Cunliffe, "Judging, Fast and Slow: Using Decision-Making Theory to Explore Judicial Fact Determination" (2014) 18:2 *Int'l J Evidence & Proof* 139 at 150 and 152 (citing Daniel Kahneman) [Emma Cunliffe, "Judging, Fast and Slow"]; and Michael Plaxton, *Implied Consent*, *supra* note 15 at 148 (citing Lawrence Blum).

[43] In *Barton*, *supra* note 12 at para 60, the SCC characterized the "twin myths" relating to evidence of a complainant's other sexual activity (reviewed later in this chapter) using the term "false logic," citing *R v Boone*, 2016 ONCA 227 at para 37.

defining and distinguishing these concepts;[44] it simply suggests that this is one way that proves workable in the analysis that follows, and posits that it is better to have some firm criteria rather than none.)

Framing these concepts in this way helps us understand how some Crown-raised M&S can be phrased as either a stereotype (e.g., victims of sexual assault generally report the offence at their earliest opportunity) or a myth (e.g., delay in reporting sexual assault signals a complainant's dishonesty). It also offers us a starting point for conceiving that multiple myths can flow from, or be (il)logical expressions of, the same stereotype: as a later section of this chapter will show, various Crown-raised myths can be linked back to a "foundational" stereotype that women regularly falsify sexual assault complaints (e.g., by being dishonest or inaccurate about having consented or about sexual activity having occurred at all).

To be sure, this thesis will continue to employ the abbreviation of "M&S" as a default concept and simply suggests that it is instructive to attend to whether a given assumption is formulated as a stereotype or a myth. However, because the framing above identifies stereotypes as more fundamental than myths,[45] the next paragraphs of this section devote special attention to the nature of stereotyping. The purpose of this review is to loosen the concept of stereotyping from its close association with sexist reasoning in sexual assault law. In turn, this review will yield a number of preliminary principles that fuel the attempts of this thesis to grapple with defence-raised M&S and how they might be squared with their Crown-raised counterparts.

[44] For instance, stereotypes might also involve claims about the (un)likelihood or (im)plausibility of someone having a certain *capacity or aptitude*; however, criminal trials tend to be concerned with retrospective inquiries as to how individuals have behaved rather than prospective assessments of a litigant's capacity for the future. This thesis also distances itself from suggestions that "myths" are (i) just a more absolute form of the empirical assumptions reflected in stereotypes (e.g., that "women *always* consent" or that "victims *always* report sexual assault at their earliest opportunity); or (ii) mistakes about legal understandings of consent that might *flow from* a M&S (e.g., implied consent).

[45] In other words, on the view of this thesis, stereotypes are ontologically prior to myths; in plainer terms, there would be no myths if it were not for stereotypes.

Several Canadian scholars of sexual assault law have reached beyond legal discourse to draw on the work of cognitive psychologists and philosophers to better understand stereotyping.[46] One insight flowing from these interdisciplinary inquiries is that stereotypes can be favourable or unfavourable.[47] Someone might be stereotyped, by virtue of their demographic makeup, as being inclined toward a comportment that is considered positive or negative (e.g., industriousness or laziness, selflessness or greed, pacifism or violence). Understanding this relative 'neutrality' of stereotyping helps us acknowledge that it can often go unnoticed; we generally do not consider whether a positive stereotype has been applied to us – much less object more generally – when we qualify for a loan, get hired for a job or are trusted to care for children. By contrast, we are apt to suspect stereotyping when it may have grounded a decision adverse to our interests. This may arise from an unfavourable stereotype being applied against us, or a favourable stereotype being applied to some other person, with the effect of our being denied some benefit or entitlement.

Beyond adversarial or competitive contexts, the application of favourable stereotypes does not necessarily result in unfairness, let alone discrimination. This is the case, for instance, for the elderly woman who is stereotyped as unlikely to be violent, or for the religious or spiritual leader who is stereotyped as unlikely to steal; in situations where these characters are not being favoured over others with different demographic markers, we are hard pressed to identify any victim of unfairness even though stereotyping has clearly taken place. Taken together, these nuances help us understand that stereotyping is neither inherently bad nor

[46] See the sources cited at note 42 and those cited in the notes immediately following the present one.
[47] Anna SP Wong, "*R v ARJD*: It's Time to Move Beyond Stereotypes-Bound Advocacy and Decision-Making" (2019) 49 *The Advocate's Quarterly* 222 at 225 [Anna Wong, "Time to Move Beyond Stereotypes-Bound Advocacy"]. See also Michelle A Alton, "The Evolution of Impartiality and the Need for Cultural Competency when Assessing Credibility" (2022) 35 *Can J Admin L & Prac* 27 at 34-36 [Michelle Alton, "The Evolution of Impartiality"].

invariably linked to discrimination, despite its close association with these attributes in the prevailing treatment of M&S in sexual assault law.

Another insight from this literature is that stereotyping is a natural part of our cognitive processes.[48] In fact, we *need* to engage in the mental shortcuts that stereotypes afford because assessing every datum of our sensory experience would overload and exhaust us.[49] Stereotyping is especially likely to take place when we are operating in circumstances of uncertainty and a quick decision needs to be made, or when we lack the time or energy needed for careful discernment.[50] To imagine this process in action, we need only think of the actual or assumed demographic markers we rely on when we drive a car and predict whether a pedestrian, cyclist or other driver will be brazen or cautious, or when we try to detect whether a stranger is harmless or threatening before walking by them on the street.

Compounding this risk as it arises under such conditions is that stereotyping frequently operates under the radar, in the sense that we often do not consciously or intentionally harbour stereotypes but rather internalize them and apply them implicitly.[51] Michael Plaxton explains how such implicit stereotyping is rooted in "norms" that we are socialized to treat as universally or typically true about one demographic or another. The very fact that these norms have become entrenched among a community or broader society makes them challenging to correct for even

[48] Emma Cunliffe, "Judging, Fast and Slow," *supra* note 42 at 150-151 and 178 (citing Daniel Kahneman and colleagues).
[49] Anna Wong, "Time to Move Beyond Stereotypes-Bound Advocacy," *supra* note 47 at 225 (citing Walter Lippman). See also Michelle Alton, "The Evolution of Impartiality," *supra* note 47 at 34-35.
[50] Elaine Craig, *Putting Trials on Trial*, *supra* note 2 at 123 (citing Nancy Levit); Anna Wong, "Time to Move Beyond Stereotypes-Bound Advocacy," *ibid* at 226 (citing Galen V Bodenhausen). See also Michelle Alton, "The Evolution of Impartiality," *ibid* at 36.
[51] Emma Cunliffe, "Judging, Fast and Slow," *supra* note 42 at 152-154 and 178 (citing Mahzarin Banaji and colleagues); Michael Plaxton, *Implied Consent*, *supra* note 15 at 149-150 (citing Lawrence Blum). See also Michelle Alton, "The Evolution of Impartiality," *ibid* at 34-35.

when we recognize their nature and impacts.[52] The universality and often subconscious nature of stereotyping helps us contextualize the risk of it arising in judicial reasoning (which the next section of this chapter will broach more expressly).

Lastly, the interdisciplinary efforts of sexual assault scholars indicate that stereotypes may or may not be accurate for the individual who is subject to them. In other words, it is not necessarily the case that no members of the demographic in question are liable to behave (or not to behave) in the way the stereotype describes.[53] The issue is that stereotyping assumes that a given member of that demographic is prone to act (or not to act) in a certain way, without sufficient inquiry into their individual traits and circumstances.[54] This helps us understand how finding that an individual behaves in a manner *consistent* with a stereotype is not necessarily the consequence of stereotyping. Rather, when considering individuals fairly and contextually rather than stereotyping them, we will sometimes encounter consistency with a stereotype.[55] This principle of consistency will come to play a clearer and very important role in our treatment of M&S as this chapter proceeds, and all the more so in Chapter 2.

[52] Michael Plaxton, *Implied Consent*, *ibid* at 148-150 (citing Lawrence Blum). See a similar analysis in Emma Cunliffe, "Judging, Fast and Slow," *ibid* at 153. Consider also *R v Find*, 2001 SCC 32 at para 103 [*Find*]: "These myths and stereotypes […] are particularly invidious because they comprise part of the fabric of social 'common sense' in which we are daily immersed."
[53] Emma Cunliffe, "Judging, Fast and Slow," *ibid* at 153. See also Christine Boyle and Marilyn MacCrimmon, "To Serve the Cause of Justice: Disciplining Fact Determination" (2001) 20 *Windsor YB Access to Just* 55 at 83 [Christine Boyle and Marilyn MacCrimmon, "Disciplining Fact Determination"]: "It is not that harmful stereotypes are never descriptive, but that their operation inflicts grave social costs and is inconsistent with norms such as human dignity, autonomy and equality."
[54] Michael Plaxton, *Implied Consent*, *supra* note 15 at 148-149 and 158-159 (citing Lawrence Blum); Emma Cunliffe, "Losing Sight of Substantive Equality?", *supra* note 42 at 299 (citing Sophia Moreau).
[55] Michael Plaxton, *Implied Consent*, *ibid* at 148-149 (citing Lawrence Blum).

A General Account of M&S in Judicial Reasoning

In contrast with the treatment of stereotyping in other disciplines, M&S have taken on an entirely unfavourable connotation in legal circles.[56] By virtue of Canada's adversarial system of justice, when a M&S is applied to the detriment of a party or witness, it generally operates to the advantage of another party or witness, and *vice versa*. The law generally appears to be concerned with M&S because of this resulting unfairness, rather than as a mere matter of abstract principle. Before proceeding to consider Crown-raised M&S and the impact that their recognition has had on sexual assault cases, it is helpful to inquire into how the law of evidence understands M&S to arise in judicial reasoning and the ways it seeks to overcome them. This analysis builds on that undertaken in the preceding section to show that the avoidance of stereotyping, and of myths that rest on such stereotypes, is not as straightforward as might commonly be thought.

The law divides evidence into two main categories. Direct evidence refers to a witness's testimony about their first-hand sensory experience of a material issue in a case. Circumstantial evidence, by contrast, refers to testimony or other evidence that tends to prove a material issue only indirectly.[57] The direct evidence of a witness called by one party, when believed, can be dispositive in some cases, but no witness enjoys a presumption of honesty or accuracy[58] and the opposing party often resorts to circumstantial evidence to refute key aspects of that witness's testimony. While the relevance of direct evidence is self-evident because it bears "directly" on a matter in issue, the relevance of circumstantial evidence depends on a process of inductive

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[56] Emma Cunliffe, "Judging, Fast and Slow," *supra* note 42 at 152; Anna Wong, "Time to Move Beyond Stereotypes-Bound Advocacy," *supra* note 47 at 222.
[57] David M Paciocco, Palma Paciocco and Lee Stuesser, *The Law of Evidence*, 8/e (Toronto: Irwin Law, 2020) at 36 [Pacioccos and Stuesser, *The Law of Evidence*]. See also S Casey Hill, David M Tanovich and Louis P Strezos, *McWilliams' Canadian Criminal Evidence*, 5/e (Toronto: Canada Law Book, 2017 (loose-leaf updated 2019)) at § 31:2 and § 31:3 [*McWilliams' Canadian Criminal Evidence*].
[58] Pacioccos and Stuesser, *The Law of Evidence*, *ibid* at 45 and 592; *McWilliams' Canadian Criminal Evidence*, *ibid* at § 30:1 and § 31:2. See also Lisa Dufraimont, "Myth, Inference and Evidence in Sexual Assault Trials" (2019) 44:2 *Queen's LJ* 316 at 324-325 [Lisa Dufraimont, "Myth, Inference and Evidence"].

reasoning.[59] This process requires the trier of fact to employ a generalization that serves as an inferential bridge between the evidence and the matter to be proved. By default, the trier of fact resorts to their own faculty of logic and funds of common sense and experience to perform this operation.[60] Stereotyping can arise where the "private beliefs" informing these sources result in an empirical claim which lacks grounding in reality and/or is applied to a witness without evidence linking it to their individual circumstances.[61] On the view of this thesis, myths can arise when one *builds* on a stereotype to draw a connection between that generalization and the evidence in relation to a material issue; this reasoning process is marked by "false logic." (To be sure, false logic can arise in other ways, such as when an inference is unreasonable, speculative or "too equivocal."[62])

The risk of M&S arising from circumstantial evidence can be appreciated only by understanding the law governing relevance and admissibility. Relevance concerns the tendency of one fact to show that a proposition is more or less likely to be true than it would otherwise be.[63] This is a "low bar," and all evidence that meets this test is generally admissible unless it is subject to an exclusionary rule or a judicial discretion to exclude it.[64] This discretion is most

[59] Pacioccos and Stuesser, *The Law of Evidence*, *ibid* at 37; *McWilliams' Canadian Criminal Evidence*, *ibid* at § 31:2.
[60] David M Tanovich, "Regulating Inductive Reasoning in Sexual Assault Cases" in Benjamin L Berger, Emma Cunliffe and James Stribopoulos, eds, *To Ensure that Justice Is Done: Essays in Memory of Marc Rosenberg* (Toronto: Thomson Reuters, 2017) at 75-76 [David Tanovich, "Regulating Inductive Reasoning"]; Christine Boyle and Marilyn MacCrimmon, "Disciplining Fact Determination," *supra* note 53 at 82. See also *McWilliams' Canadian Criminal Evidence*, *ibid* at § 4:4, § 31:3 and § 31:16.
[61] *McWilliams' Canadian Criminal Evidence*, *ibid* at § 4:5; Lisa Dufraimont, "Myth, Inference and Evidence," *supra* note 58 at 330; David Tanovich, "Regulating Inductive Reasoning," *ibid* at 75-76; and John McInnes and Christine Boyle, "Judging Sexual Assault Law," *supra* note 30 at para 36. The language of "private beliefs" derives from Justice L'Heureux-Dubé's partial dissent in *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577 at para 196 [*Seaboyer*].
[62] Pacioccos and Stuesser, *The Law of Evidence*, *supra* note 57 at 38-39; *McWilliams' Canadian Criminal Evidence*, *ibid* at § 31:17 and § 31:25 through § 31:27.
[63] Pacioccos and Stuesser, *The Law of Evidence*, *ibid* at 37; Lisa Dufraimont, "Myth, Inference and Evidence," *supra* note 58 at 320; Christine Boyle and Marilyn MacCrimmon, "Disciplining Fact Determination," *supra* note 53 at 82.
[64] Lisa Dufraimont, "Myth, Inference and Evidence," *ibid* at 319 and 321.

commonly invoked in relation to whether the potential prejudice of the evidence outweighs its probative value.[65] (In the case of defence evidence, the exclusionary discretion may be applied only where the potential prejudice *substantially* outweighs its probative value.[66]) "Prejudice" does not simply connote conventional understandings of discrimination; rather, it is "a complex concept that includes the tendency of the evidence to create unfairness against the opposing party, to generate confusion or waste time in the trial, or to invite prohibited lines of reasoning."[67]

For all the risks of prejudice reflected in this compendious definition, the law generally favours an "inclusionary policy"[68] for the admissibility of evidence, and that policy in turn sheds light on three other important aspects of the relevance concept. First, a determination that evidence is relevant does not make it dispositive of the matter it tends to prove; it is for the trier of fact to decide how useful that evidence is in the context of all other evidence in the case.[69] Second, the relevance of evidence is context-dependent, again with reference to other evidence in the case; accordingly, "[r]elevance may become apparent only when other evidence is adduced."[70] Lastly – and most controversially in this area – evidence can be relevant for some

[65] Pacioccos and Stuesser, *The Law of Evidence*, *supra* note 57 at 32, 47 and 52-53.
[66] Pacioccos and Stuesser, *The Law of Evidence*, *ibid* at 48; Lisa Dufraimont, "Myth, Inference and Evidence," *supra* note 58 at 322. See also *McWilliams' Canadian Criminal Evidence*, *supra* note 57 at § 5:4.
[67] Lisa Dufraimont, "Myth, Inference and Evidence," *ibid* at 321. Note that evidence can also be excluded pursuant to judicial discretion where it was obtained in such a manner that it would work an unfairness on the party against whom it is tendered: see Pacioccos and Stuesser, *The Law of Evidence*, *ibid* at 47.
[68] Pacioccos and Stuesser, *The Law of Evidence*, *ibid* at 39 (see also 3, regarding the basic principle of access to evidence, and 54, regarding other reasons for courts' "restraint in applying the discretion"); Lisa Dufraimont, "Myth, Inference and Evidence," *ibid* at 320-321.
[69] Pacioccos and Stuesser, *The Law of Evidence*, *ibid* at 37; Lisa Dufraimont, "Myth, Inference and Evidence," *ibid* at 320. Note that this includes a consideration of "the strength of the logical inference yielded by [the] circumstantial evidence" in question: see Pacioccos and Stuesser, *The Law of Evidence* at 46; see also *McWilliams' Canadian Criminal Evidence*, *supra* note 57 at § 31:21.
[70] Pacioccos and Stuesser, *The Law of Evidence*, *ibid* at 38; Lisa Dufraimont, "Myth, Inference and Evidence," *ibid* at 319 and 321.

purposes but not for others, raising questions about the ability of triers of fact to employ permissible lines of reasoning while avoiding their impermissible counterparts.[71]

Trial judges are restricted in their ability to advance or question generalizations born of logic, common sense and experience in their daily work. Where the aptness of a novel inference is "urged" (or that of a longstanding inference is "disputed") without evidence in a given case, they must ensure that the proposition they are being asked to accept meets the conditions for judicial notice; this requires that the 'fact' in question be "so notorious or generally accepted as not to be the subject of debate among reasonable persons" or "capable of immediate and accurate demonstration by resort to readily available sources of indisputable accuracy."[72] Because of the stringency of this test, the law generally counsels that generalizations that are beyond truly common knowledge be supplied or debunked by expert witnesses who are called by the parties and subjected to cross-examination.[73]

Trial judges may also check the appropriateness of their generalizations by consulting appellate court holdings that have recognized certain social-scientific realities with the assistance of academic literature.[74] Appellate courts consider themselves entitled to draw on such sources to the extent that they are determining matters of legislative fact (i.e., how the law should evolve based on the social policy concerns at play)[75] or social context (i.e., the lived realities out of which the legal dispute in question arose).[76] Their treatment of such sources can be used by trial

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[71] Lisa Dufraimont, "Myth, Inference and Evidence," *ibid* at 322.
[72] Pacioccos and Stuesser, *The Law of Evidence*, *supra* note 57 at 574-575.
[73] Pacioccos and Stuesser, *The Law of Evidence*, *ibid* at 579-582; Robert Sharpe, *Good Judgment*, *supra* note 17 at 186; *McWilliams' Canadian Criminal Evidence*, *supra* note 57 at § 26:10; *R v JM*, 2021 ONCA 150 at para 35.
[74] In *Find*, *supra* note 52 at para 101, the SCC described its recognition of M&S as being "[b]ased on overwhelming evidence from relevant social science literature[.]"
[75] Pacioccos and Stuesser, *The Law of Evidence*, *supra* note 57 at 574 and 578.
[76] Pacioccos and Stuesser, *The Law of Evidence*, *ibid* at 574 and 579-582; Robert Sharpe, *Good Judgment*, *supra* note 17 at 184. This is so despite the fact that the standards governing the taking of judicial notice formally apply to appellate and trial courts alike.

judges in appreciating the social context of the parties before them, and even in informing questions of adjudicative fact (i.e., concerning "who did what, where, when, how and with what intent"[77]) on the condition that it is linked to the evidence and limited to the role of a "lens" through which to view that evidence.[78] Trial judges are cautioned, however, not to interpret and draw on such social context authorities themselves.[79]

This section has gone some way to put the issue of judicial reliance on M&S into perspective. Judges can and must resort to generalizations in determining the relevance of circumstantial evidence, and such evidence often plays a decisive role in resolving conflicting accounts that arise from the direct evidence called by both parties. Judicial fact-finding cannot straightforwardly be gutted of reliance on the "private beliefs" that can spawn M&S, because triers of fact necessarily draw on their logic, common sense and experience to determine the relevance of circumstantial evidence, and the relevance standard, in turn, is a low threshold. What is more, trial judges have limited scope for refining the generalizations they use in this inference-drawing process so as to avoid reliance on M&S. To do so, they can resort only to the stringent regime of judicial notice, the evidence of experts that one or both parties may call, and the social-scientific findings adopted in appellate holdings. It is against this backdrop on the nature of judicial reasoning that this chapter now brings the problem of Crown-raised M&S in sexual assault into relief.

[77] Pacioccos and Stuesser, *The Law of Evidence*, *ibid* at 576.
[78] Pacioccos and Stuesser, *The Law of Evidence*, *ibid* at 581.
[79] *R v Hamilton*, [2004] OJ No 3252 (C.A.) at paras 126-128; Richard F Devlin and Matthew Sherrard, "The Big Chill?: Contextual Judgment after *R v Hamilton and Mason*" (2005) 28 *Dalhousie LJ* 409 at 436-439.

Crown-Raised M&S in Sexual Assault Law

General discourse at the Supreme Court of Canada

This chapter now turns to a consideration of Crown-raised M&S recognized in Canadian sexual assault law. The words "myth" and "stereotype" do not appear in the *Criminal Code*, but every legal academic addressed in this thesis agrees that this area of the law cannot be understood without an appreciation of the history and ongoing problem of M&S.[80] The reason for this seeming disjuncture is that M&S have largely been a discursive category employed by the SCC. The roots of this phenomenon in sexual assault law lie most directly in the SCC's 1991 decision in *R v Seaboyer; R v Gayme*, where the Court dealt with an earlier version of the *Code*'s treatment of evidence of a complainant's other sexual activity. While both the majority and partially dissenting judgments in that case recognized and repudiated the "twin myths" in this area (reviewed below),[81] the latter judgment by Justice Claire L'Heureux-Dubé went on to criticize at great length how M&S operating against women and/or complainants pervade social understandings of sexual assault and infect the treatment of sexual assault allegations throughout the criminal justice process.[82] Her ruling also reproduces and annotates a social-scientific catalogue of M&S about sexual assault, its victims and its perpetrators.[83]

In the three decades since *Seaboyer*, the discursive role of M&S has risen in importance in the SCC's disposition of sexual assault appeals. This discourse has focused "almost

[80] Consider, e.g., Elaine Craig, *Putting Trials on Trial*, *supra* note 2 at 141: "It is difficult to imagine an area of law in which both factual findings and legal reasoning are more at risk of influence by stereotypical assumptions about how people behave"; and Michael Plaxton, *Implied Consent*, *supra* note 15 at 148: "One cannot disentangle sexual assault law from the aim of abolishing gender stereotypes." See also Lisa Dufraimont, "Myth, Inference and Evidence," *supra* note 58 at 317-318; Pacioccos and Stuesser, *The Law of Evidence*, *supra* note 57 at 12 and 39; *McWilliams' Canadian Criminal Evidence*, *supra* note 57 at § 3:6 and § 30:6.
[81] *Seaboyer*, *supra* note 61 at paras 23 and 91 (*per* the majority) and at paras 194, 207-208, 214 and 220-221 (*per* the partial dissent).
[82] *Seaboyer*, *ibid* at paras 137-163.
[83] *Seaboyer*, *ibid* at para 141 (citing L Holmstrom and A Burgess).

exclusively" on what this thesis terms Crown-raised M&S and has cast these primarily as a matter of sexist reasoning operating against complainants.[84] As the 1990s wore on, the SCC's emphasis on the problem of M&S gradually migrated from the dissenting or concurring judgments of Justice L'Heureux-Dubé[85] to the unanimous or majority judgments of the Court.[86] The Court often itemizes specific M&S, or cites the category of "M&S" generally, in the body of its decisions when assessing the constitutionality of amendments to the *Criminal Code*, which it tends to uphold despite their limitations on defence access to certain evidence or the admissibility of defence evidence.[87] It also invokes M&S in similar ways when refining the common law and/or negotiating its interplay with statutory interpretation, which generally results in tightening the substantive and evidentiary law governing sexual assault in ways favourable to the Crown.[88] Parliament then codifies these holdings, or its responses thereto, without using the language of M&S.

The past four years have seen an intensification of the SCC's emphasis on M&S in sexual assault law; increasingly, the Court invokes them at the very outset of its judgments as a self-evident spectre that looms over cases in this area.[89] The net effect of the discursive shifts just

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[84] Lisa Dufraimont, "Current Complications," *supra* note 3 at 563.
[85] See, e.g., *R v Osolin*, [1993] 4 SCR 595 at paras 49-50, 55, 67 and 76 (but see paras 168-170) [*Osolin*]; *R v Park*, [1995] 2 SCR 836 at paras 38-48 (but see para 2); *R v O'Connor*, [1995] 4 SCR 411 at paras 124, 132, 140, 143 and 148 [*O'Connor*]; *R v Ewanchuk*, [1999] 1 SCR 330 at paras 82 and 95 (but see para 103) [*Ewanchuk*].
[86] See, e.g., *Mills*, *supra* note 33 at paras 58, 90 and 119; *Find*, *supra* note 52 at paras 101 and 103; *R v Shearing*, 2002 SCC 58 at paras 76-77, 79, 108-109 and 122 (but see paras 172-178).
[87] See, e.g., *Mills*, *ibid*, upholding the regime that restricts the production and disclosure of third party records pertaining to a complainant; *Darrach*, *supra* note 25, upholding the regime that restricts the admissibility of evidence of a complainant's other sexual activity; and *JJ* (SCC), *supra* note 25, upholding the regime that restricts the admissibility of private records pertaining to the complainant that are in the possession or control of the accused.
[88] See, e.g., the sources cited at note 85 as well as the following: *JA*, *supra* note 24 at para 65; *R v Quesnelle*, 2014 SCC 46 at para 17 [*Quesnelle*]. Note also the many references to M&S in *Barton*, *supra* note 12; *Goldfinch*, *supra* note 36; *R v RV*, 2019 SCC 41 [*RV*].
[89] *Barton*, *ibid* at para 1: "We live in a time where myths, stereotypes and sexual violence against women […] are tragically common"; *Goldfinch*, *ibid* at para 2: "[T]he investigation and prosecution of sexual assault continues to be plagued by myths"; *JJ* (SCC), *supra* note 25 at para 1: "The criminal trial process can be invasive, humiliating, and degrading for victims of sexual offences, in part because myths and stereotypes continue to haunt the criminal justice system."

noted is that the SCC has come to construe Crown-raised M&S as a priority concern and as something to be eradicated altogether from the adjudication of sexual assault charges. One suggestion of this thesis is that if the defence-raised M&S reviewed in Chapter 2 are recognized as similarly improper, the SCC's concerns about Crown-raised M&S would tend to support rooting them out of the law as well. By contrast, if defence-raised M&S are seen to distort the doctrine, they ought to be considered futile at best and a matter of bad faith at worst.

Scope of inquiry: judicial reliance on M&S about sex and gender

Before proceeding further, let us narrow the scope of our inquiry in two important respects – namely, to that of a focus on *judicial reliance* on M&S about *sex and gender*. This is necessary because (i) M&S can be applied by various actors, and not only judges, in the treatment of sexual assault complaints; and (ii) the SCC has recognized the operation of M&S against demographics both more broadly and more specifically than those of sex and gender.

Refreshing the work initiated by Justice L'Heureux-Dubé in *Seaboyer*, Elaine Craig recently documented the manifold ways that Crown-raised M&S can infect criminal proceedings for sexual assault once a prosecution is underway. These include defence strategies at the pre-trial stage, such as threatening to bring an application to adduce evidence of the complainant's other sexual activity, notably in cases where such an application has weak prospects because of its reliance on discriminatory thinking. They also include inappropriate cross-examinations of complainants by defence counsel and corresponding failures by Crown prosecutors to object or by trial judges to intervene when necessary, and can extend to judicial reasoning in decisions regarding the admissibility of evidence or the liability of the accused.[90] This last aspect of sexual assault cases is the main focus of this thesis. As such, while literature abounds in particular on

[90] Elaine Craig, *Putting Trials on Trial*, *supra* note 2 at Chapters 2 through 7.

the role of defence counsel in perpetuating Crown-raised M&S in sexual assault trials, this thesis does not draw on it at any length.[91]

It is helpful to build on the account of judicial reasoning in the preceding section of this chapter and to note certain factors that explain why judges might fall prey to M&S when presiding over sexual assault cases. First, evidence in these trials is often limited to the testimony of the complainant and, at times, the accused. The direct evidence of these witnesses on the events giving rise to the charge is, of course, almost always disputed by the defence and the Crown, respectively, and circumstantial evidence (also typically arising from these witnesses' testimony) often plays a pivotal role in determining its credibility.[92] As explained earlier, relevance determinations made in respect of circumstantial evidence depend on generalizations that form an inferential bridge between such evidence and a material fact in the case; such generalizations may simply be inaccurate and/or operate unfairly against the complainant, whether by way of their application to her with insufficient inquiry into her individuality or through an operation of "false logic."

The limited sources of evidence available in most sexual assault trials also underscore the "conditions of uncertainty" under which judges must operate when presiding over them.[93] At many points during sexual assault trials, judges must make decisions about the admissibility of evidence (including the proper limits of cross-examination) without the luxuries of time and

[91] See, e.g., the equality-oriented work that focuses on this issue in Elaine Craig, "The Ethical Obligations of Defence Counsel in Sexual Assault Cases" (2014) 51:2 *Osgoode Hall LJ* 427; David M Tanovich, "'Whack' No More," *supra* note 10; and Susan Ehrlich, "Perpetuating – and Resisting – Rape Myths in Trial Discourse" in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) at 389. See also a due process perspective in Nathan Gorham, "*Schmaltz*: The Need for Caution When Limiting Relevant Defence Cross-Examination in Sexual Assault Cases" (2015) 17 *CR* (7th) 312.
[92] Elaine Craig, *Putting Trials on Trial*, *supra* note 2 at 206: "Sexual assault trials often require drawing conclusions about events that occurred in private, without any third-party witnesses, and that frequently feature two very different accounts of what occurred."
[93] Elaine Craig, *Putting Trials on Trial*, *ibid* at 123-124 and 205-206.

reflection. As the first section of this chapter showed us, the need to make quick decisions in circumstances of uncertainty is liable to trigger stereotyping on anyone's part by virtue of our cognitive makeup and its limitations. While judges generally benefit from additional time and reflection in their post-trial deliberations, they must still grapple with uncertainty arising from the evidence – not to mention competing demands on their attention – in reaching a verdict and preparing their reasons.

This thesis is also mindful that the SCC has recognized the operation of M&S in other areas of the criminal law and beyond those concerning sex and gender. This can be seen in its treatment of cases involving domestic violence;[94] the evidence of children,[95] women who work in the sex trade,[96] and persons living with intellectual disabilities;[97] and cases involving allegations of bias in relation to race and Indigeneity.[98] M&S in all these areas can also – and often do – arise in sexual assault cases. Relatedly, Janine Benedet and Isabel Grant have devoted several publications to identifying and denouncing M&S that operate against subdemographics of sexual offence complainants, from those living with disabilities or who were intoxicated at the time of the alleged offence to women of advanced age, adolescent girls and young children.[99]

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[94] *R v Lavallee*, [1990] 1 SCR 852 at paras 34-35, 53-54 and 60; *R v Malott*, [1998] 1 SCR 123 at paras 36 and 43.
[95] *R v RW*, [1992] 2 SCR 122 at para 25 [*RW*]; see also *R v DD*, 2000 SCC 43 at para 63 [*DD*].
[96] *Seaboyer*, *supra* note 61 at para 220; *R v Esau*, [1997] 2 SCR 777 at para 84 [*Esau*]; *Quesnelle*, *supra* note 88 at para 17; *Barton*, *supra* note 12 at paras 1, 198, 200-201, 214-215, 230-231 and 234.
[97] *R v Slatter*, 2020 SCC 36 at para 2.
[98] *R v Williams*, [1998] 1 SCR 1128 at paras 21, 25, 28, 48 and 58; *Barton*, *supra* note 12 at paras 1, 199-201, 204 and 231-233). See also *McWilliams' Canadian Criminal Evidence*, *supra* note 57 at § 3:7 and § 30:7.
[99] See, e.g., Isabel Grant and Janine Benedet, "Unreasonable Steps: Trying to Make Sense of *R v Morrison*" (2019) 67 *CLQ* 14; Isabel Grant and Janine Benedet, "Confronting the Sexual Assault of Teenage Girls: The Mistake of Age Defence in Canadian Sexual Assault Law" (2019) 97 *Can Bar Rev* 1; Janine Benedet, "Sentencing for Sexual Offences against Children and Youth: Mandatory Minimums, Proportionality and Unintended Consequences" (2019) 44 *Queen's LJ* 284; Isabel Grant and Janine Benedet, "Capacity to Consent and Intoxicated Complainants in Sexual Assault Prosecutions" (2017) 37 *CR* (7th) 375; Isabel Grant and Janine Benedet, "The Sexual Assault of Older Women: Criminal Justice Responses in Canada" (2016) 62 *McGill LJ* 41; and Janine Benedet and Isabel Grant, "Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases" (2012) 50 *Osgoode Hall LJ* 1.

This thesis recognizes the M&S just noted as entirely worthy of attention and repudiation. It focuses, however, on M&S about sex and gender that can arise in sexual assault trials of any sort, and not only those that risk being applied to a witness who belongs to a subdemographic of sex and gender categories. In other words, some but not all sexual assault trials involve concerns about improper reasoning in relation to race and Indigeneity, disability, advanced age, intoxication, prostitution or long-term abusive relationships. (Sexual violence cases involving an adult and a minor, for their part, often turn on *Criminal Code* provisions other than those governing sexual assault.) By contrast, all sexual assault cases involve members of at least one sex and gender identity, and the vast majority of them involve a cisgender male accused and a cisgender female complainant.

Michael Plaxton's discussion of "social norms" offers us a further anchor for addressing M&S in sexual assault law predominantly as matters of assumptions about sex and gender. As he explains, the prevalence of sexual assault *and* stereotyping about it are driven by widespread social expectations of male sexual aggression and dominance, and of female submission and passivity.[100] Many equality scholars identify these social norms as underlying the same phenomena.[101] Moreover, recall that sexual assault is widely considered to be a gendered offence; while other demographic markers may heighten a person's vulnerability to sexual assault and risk attracting improper assumptions, these sites of difference are not seen as

[100] Michael Plaxton, *Implied Consent*, *supra* note 15 at 12, 21, 145 and 148.
[101] See, e.g., Lise Gotell, "Thinly Construing the Nature of the Act Legally Consented to: The Corrosive Impact of *R v Hutchinson* on the Law of Consent" (2020) 53 *UBC L Rev* 53 at 57 [Lise Gotell, "Thinly Construing"]; Lise Gotell, "Governing Heterosexuality through Specific Consent: Interrogating the Governmental Effects of *R v JA*" (2012) 24 *Can J Women & L* 359 at 372 [Lise Gotell, "Governing Heterosexuality"]; Elaine Craig, *Troubling Sex*, *supra* note 5 at 66; Melanie Randall, "Ideal Victims," *supra* note 22 at 420 and 432-433; Lise Gotell, "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women" (2008) 41 *Akron L Rev* 865 at 877 [Lise Gotell, "Rethinking Affirmative Consent"]; Lise Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the *Charter* for Sexual Assault Law" (2002) 40 *Osgoode Hall LJ* 251 at 258.

characterizing sexual assault to the same degree that sex and gender are. On this basis, and refining our definitions of M&S from the outset of this chapter, this thesis focuses chiefly on stereotypes that reflect assumptions about how someone will act in a sexual context generally, or in a sexually violative context in particular, by virtue of their sex and gender, and with myths that depend on such stereotypes for their (il)logical force.

Three Crown-raised M&S: statutory, judicial and scholarly treatment

Let us now consider the treatment of specific Crown-raised M&S in Canadian sexual assault law by Parliament, the SCC and legal academics. The subsections below select three such M&S for review because they have arguably received the most attention by these actors and they are necessary to understand in order to appreciate the nature and import of the defence-raised M&S reviewed in Chapter 2. These subsections locate the origins of their recognition as M&S, identify reforms to the common law and *Criminal Code* that reflect such recognition, and canvass the divergent views of equality and due process scholars about what follows from this recognition. This review shows that the evidentiary effects of recognizing these M&S are contentious and, in some respects, remain fraught with uncertainty.

To be sure, the SCC has made clear that reliance on Crown-raised M&S in sexual assault cases amounts to an error of law, as do mistakes about what qualifies as consent or what can found an honest but mistaken belief in its communication *insofar as these rest* on such M&S.[102] Strictly speaking, the recognition of a M&S simply obliges a trier of fact to remove that generalization from the inferential reasoning process that they apply to the circumstantial evidence in a given case. Debates between equality and due process scholars intensify, however, over (i) whether this recognition requires that certain evidence be presumptively excluded, given

[102] *R v ARJD*, 2018 SCC 5 at para 2 [*ARJD* (SCC)]; *Barton*, *supra* note 12 at paras 95 and following; *R v AE*, 2022 SCC 4 at para 1.

no weight or even be treated as grounding a contrary inference; or (ii) whether legitimate and permissible inferences consistent with these M&S can flow from other evidence and/or coexist with certain evidence that is said to trigger them. The subsections below chart out those debates and the respective success they have found at the SCC and Parliament.

One additional preliminary remark is in order before proceeding. Recall the suggestion from earlier in this chapter that multiple myths can stem from a single stereotype. The assumptions reviewed below are all formulated as myths; however, as several equality scholars make clear, they are rooted in a more "foundational" stereotype that false complaints of sexual assault are markedly more common than false complaints of other offences.[103] This supposition has been judicially and statistically observed to be untrue;[104] Parliament recognized this 40 years ago by abrogating a common law rule that required judges to warn a jury that it was unsafe to enter a conviction for a sexual offence absent corroboration of the complainant's testimony.[105] The three myths addressed in this section of the chapter are linked to the foundational stereotype of routine falsification in that they operate, when left unchecked, to undermine a complainant's credibility.

The conceptual effects of recognizing this foundational stereotype as such are not abundantly obvious. Some might infer from this recognition a presumption that complainants are

[103] See, e.g., Isabel Grant and Janine Benedet, "The Meaning of Capacity and Consent in Sexual Assault: *R v GF*" (2022) 70 *CLQ* 78 at 109 [Isabel Grant and Janine Benedet, "Capacity and Consent"]; Janine Benedet, "Absence of Motive in Sexual Assault Cases" (2019) 55 *CR* (7th) 18 at 20; Janine Benedet, "Sexual Assault Cases at the Alberta Court of Appeal: The Roots of *Ewanchuk* and the Unfinished Revolution" (2014) 52:1 *Alta L Rev* 127 at para 27 [Janine Benedet, "Sexual Assault Cases at the ABCA"]; Emma Cunliffe, "Losing Sight of Substantive Equality?", *supra* note 42 at 315; Claire L'Heureux-Dubé, "Foreword: Still Punished for Being Female" in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012) at 1; Melanie Randall, "Ideal Victims," *supra* note 22 at 420; Jennifer Koshan, "Disclosure and Production in Sexual Violence Cases: Situating *Stinchcombe*" (2002) 40 *Alta L Rev* 655 at 659.

[104] See, e.g., *Seaboyer*, *supra* note 61 at paras 171 and 221; *Osolin*, *supra* note 85 at paras 49-50; *O'Connor*, *supra* note 85 at para 123; and *R v AG*, 2000 SCC 17 at para 3. See also Robyn Doolittle, *Had It Coming: What's Fair in the Age of #MeToo?* (Toronto: Allen Lane, 2019) at 8, 123, 132-133 and 143 [Robyn Doolittle, *Had It Coming*].

[105] See s. 274 of the *Criminal Code*.

generally truthful and accurate in respect of their claims of non-consent;[106] we have already seen, however, that the law of evidence prohibits a presumption of believability on the part of any witness. (Indeed, Lisa Dufraimont reminds us that sexual assault complainants – like all witnesses – can be "dishonest or mistaken" in the testimony they offer in a given case.[107]) The final section of this chapter will offer support for the suggestion that recognizing M&S as such should have a *neutralizing* effect, rather than giving rise to contrary assumptions. In other words, while it is wrong to approach the evidence of complainants, or that of any witness, as though they begin at a credibility deficit, the corrective for this is not to presume their veracity and accuracy but instead to treat their testimony with the same uncertainty and open-mindedness that every witness warrants.[108]

Myths: Consent can be inferred from a complainant's silence or passivity (or despite her objection or resistance)

It has been clear since the early 1990s in Canada that a complainant's consent cannot be inferred from her silence or passivity at the time of the accused's sexual contact with her. Still less can it be found despite her vocal objections or physical efforts to resist the accused. The SCC has not always described these aspects of sexual assault law as "myths,"[109] but it often has,[110] and it has also recognized and repudiated alternative formulations of them.[111] These

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[106] This thesis respectfully suggests that this view is implicit in Isabel Grant and Janine Benedet, "Capacity and Consent," *supra* note 103 at 109, where they write that "[i]n most sexual assault cases, the complainant testifies to a series of events that clearly meet the definition of sexual assault, and the defence attacks the credibility of the complainant" using arguments that are "rooted in deeply held sexist myths and stereotypes."
[107] Lisa Dufraimont, "Myth, Inference and Evidence," *supra* note 58 at 324-325.
[108] The Conclusion to this thesis expounds on the roles of uncertainty and open-mindedness in judicial deliberation.
[109] See, e.g., *R v MLM*, [1994] 2 SCR 3 at para 2 [*MLM*]; *Esau*, *supra* note 96 at paras 20, 70 and 76-77; and *Ewanchuk*, *supra* note 85 at paras 51-52.
[110] See, e.g., *Esau*, *ibid* at paras 39 and 82; *Ewanchuk*, *ibid* at para 82; *Find*, *supra* note 52 at para 101; and *Friesen*, *supra* note 12 at para 151.
[111] These include assumptions that women can prevent rape if they want to (*Seaboyer*, *supra* note 61 at para 141(1)); that women are consenting unless or until they resist or object (*Ewanchuk*, *ibid* at paras 97 and 103; see also *Barton*, *supra* note 12 at paras 98 and 105); that real victims fight back (*Ewanchuk* at para 93); and that "no" can mean "yes," "maybe" or "try again" (*Seaboyer* at para 153; *Ewanchuk* at paras 87 and 89; *Kirkpatrick*, *supra* note 12 at para 54).

myths are rooted in the foundational stereotype of routine falsification in that they reflect the view that women routinely consent to sexual activity and therefore their allegations of sexual assault are often untrue.

This subsection traces how the substantive law of sexual assault, as articulated by the SCC and Parliament, has evolved to reflect recognition of these myths and identifies the scope of doctrinal uncertainty and debate that is ongoing in this area. Accounting for these trends shows us that recognizing these myths has narrowed the scope for triers of fact to find a complainant's consent (or a reasonable doubt about its absence) or an accused's honest but mistaken belief in its communication. What is more, there appears to be a shift underway to cast the recognition of these myths as requiring the view that evidence of a complainant's silence or passivity tends to show her *lack* of subjective consent rather than mere *uncertainty* thereabout. This would involve using the recognition of a myth to find that certain evidence should be treated as supporting an inference (i.e., a lack of consent) that is *contrary* to that which would flow from applying the myth (i.e., consent).

A complainant's lack of consent must be proved by the Crown beyond a reasonable doubt as an element of the *actus reus* of sexual assault.[112] This involves an inquiry into her subjective state of mind and whether it involved or lacked "voluntary agreement" to the sexual touching at the time it occurred.[113] Proof of this state of mind can be established through the complainant's direct evidence or through circumstantial evidence of her words and conduct before and during the touching, which can stem from her testimony or from other evidence.[114] This aspect of sexual

[112] *Ewanchuk*, *ibid* at para 25; *JA*, *supra* note 24 at para 23; *Barton*, *ibid* at para 87; *GF*, *supra* note 35 at para 25; *Kirkpatrick*, *ibid* at para 28.
[113] *Ewanchuk*, *ibid* at paras 26 and 48; *JA*, *ibid* at para 34; *Barton*, *ibid* at paras 88-89; *Kirkpatrick*, *ibid* at paras 28, 31 and 50; s. 273.1(1).
[114] *Ewanchuk*, *ibid* at paras 29-30; see also *Barton*, *ibid* at para 89; Lisa Dufraimont, "Myth, Inference and Evidence," *supra* note 58 at 322, 324-325 and 328-329.

assault law reflects recognition of the myths noted above by way of several clarifications made by the SCC and Parliament in recent decades.

First, consent cannot be implied by the complainant's silence, passivity or ambiguous conduct[115] or by a pre-existing relationship she had with the accused.[116] Next, for non-consent to be made out the complainant need not say "no" or physically resist,[117] but evidence that she did so, if believed, will establish her non-consent.[118] Lastly, a complainant cannot be said to have consented in advance to sexual activity, whether generally or to one or "a suite" of particular sexual act(s).[119] Her subjective state of mind is instead assessed contemporaneously with the sexual activity in question,[120] including each and every sexual act engaged in,[121] such that any consent she has given is at all times capable of revocation.[122] The law also provides for certain conditions under which no subjective consent can be found[123] and others under which any subjective consent given can be found to have "no force or effect."[124] Most of these stipulations underscore that any consent given must be that of the complainant herself (rather than a third party purporting to give it on her behalf)[125] and that she can do so only with an operating

[115] *Ewanchuk*, *ibid* at paras 51 and 103; see also *JA*, *supra* note 24 at para 37.
[116] *JA*, *ibid* at paras 47 and 64; *Barton*, *supra* note 12 at para 98; *Goldfinch*, *supra* note 36 at para 44; *GF*, *supra* note 35 at paras 1 and 32; *Kirkpatrick*, *supra* note 12 at para 53.
[117] *MLM*, *supra* note 109 at para 2.
[118] *Ewanchuk*, *supra* note 85 at para 31; *Barton*, *supra* note 12 at para 89; *Kirkpatrick*, *supra* note 12 at para 47; ss. 273.1(2)(d)-(e).
[119] *JA*, *supra* note 24 at paras 39 and 44-48; see also *Barton*, *ibid* at para 99.
[120] *Barton*, *ibid* at para 99; *GF*, *supra* note 35 at paras 44-45 and 56; s. 273.1(1.1). The "sexual activity in question" refers to the particular physical act(s), their sexual nature and the identity of one's partner(s): *R v Hutchinson*, 2014 SCC 19 at paras 55 and 57 [*Hutchinson*]; *Barton* at para 88; *GF* at para 29.
[121] *JA*, *supra* note 24 at para 34; see also *Hutchinson*, *ibid* at para 54; *Kirkpatrick*, *supra* note 12 at paras 44, 49 and 53-54.
[122] *JA*, *ibid* at paras 40 and 43-44; s. 273.1(2)(e).
[123] *GF*, *supra* note 35 at paras 44 and 55-58; *Kirkpatrick*, *supra* note 12 at paras 32, 34-35 and 47.
[124] *GF*, *ibid* at paras 33-34, 36, 39-40 and 44; *Kirkpatrick*, *ibid* at paras 33-35.
[125] See s. 273.1(2)(a), which forecloses a finding of subjective consent when someone other than the complainant purported to give it on her behalf; and ss. 273.1(2)(d)-(e), which foreclose it when the complainant expresses a lack of agreement by words or conduct [see also *GF*, *ibid* at para 44].

mind,[126] ample awareness of key circumstances on which her consent might depend,[127] and genuine freedom of choice.[128]

The Crown must also prove beyond a reasonable doubt, as an element of the *mens rea*, that the accused knew that the complainant was not consenting or was wilfully blind or reckless on this point.[129] There is ongoing debate as to what the Crown must do to prove this element,[130] and this subsection reviews only its basics, as generally agreed on by all interlocutors of this thesis, with a view to showing the context it provides for understanding *actus reus* consent. In short, an accused can argue that the mental element of the offence has not been made out if he establishes that he had an honest but mistaken belief that the complainant was affirmatively communicating consent to him by words or conduct.[131] This aspect of sexual assault law, too, reflects recognition of the myths addressed in this subsection.

For purposes of disputing the *mens rea* of sexual assault, an accused cannot simply argue that he thought the complainant was consenting by virtue of her silence or passivity or despite her stated objections or efforts to resist him. Rather, the defence must point to some evidence, direct or circumstantial, that grounds an air of reality to his claimed belief in her communicated

[126] See ss. 273.1(2)(a.1)-(b), which foreclose a finding of subjective consent where the complainant is unconscious or lacks capacity to consent on other bases [see also *GF*, *ibid* at paras 55-58].
[127] *Ibid*; see also s. 265(3), which vitiates any subjective consent given when it was induced by fraud rising to the level of the "reprehensible character of criminal acts" [see also *GF*, *ibid* at paras 39-40].
[128] See ss. 265(3)(a)-(b), which vitiate any subjective consent given when it was induced by the application of force, or by threats or the fear of such force, to the complainant or another person [see also *GF*, *ibid* at para 44; *Ewanchuk*, *supra* note 85 at paras 39 and 62]; and ss. 265(3)(d) and 273.1(2)(c), which vitiate any subjective consent given when it was induced by the exercise of authority or the abuse of a position of trust, power or authority, respectively [see also *GF*, *ibid* at para 44; *R v Lutoslawski*, 2010 ONCA 207 at para 12 (affirmed: 2010 SCC 49); and *R v Snelgrove*, 2019 SCC 16 at paras 3-4].
[129] *Ewanchuk*, *ibid* at para 42; *Barton*, *supra* note 12 at para 98; *GF*, *ibid* at para 25; *Kirkpatrick*, *supra* note 12 at para 28.
[130] See, e.g., Hamish Stewart, "The Fault Element of Sexual Assault" (2022) 70 *CLQ* 4; Michael Plaxton, "Strangely Intractable," *supra* note 23; *R v HW*, 2022 ONCA 15.
[131] *Barton*, *supra* note 12 at para 90; s. 273.2(c). See also *Ewanchuk*, *supra* note 85 at paras 47 and 49; *GF*, *supra* note 35 at para 25.

consent before this argument can even be considered.[132] This threshold requirement, and the 'defence' of honest but mistaken belief itself, require the accused to have taken reasonable steps to ascertain that the complainant was communicating consent.[133] These reasonable steps cannot be premised on a legal mistake about what consent requires, including the myths noted above.[134] In particular, they cannot be fulfilled by way of arguing that the complainant's consent was implied, was given in advance or is ever-present by way of a propensity.[135]

Equality scholarship has tended to take a strong view of what flows from recognizing that consent cannot be inferred from passivity or silence. Janine Benedet once argued, for instance, that passivity always amounts to non-consent (as opposed to allowing for the possibility that consent and passivity can coexist so long as the former is inferred from evidence *other than* passivity).[136] More strikingly, Benedet and other equality scholars have drawn on the requirement that consent must have been communicated for the accused to refute the *mens rea* to argue that Canada has an "affirmative consent" standard; sometimes this label is clearly linked to the *mens rea* analysis,[137] and at other times it is applied more generally or ambiguously.[138] The strongest form of this argument lies in the work of Lucinda Vandervort, who expressly takes the

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[132] *Barton*, *ibid* at para 121; see also *Ewanchuk*, *ibid* at paras 46 and 49. This evidence can come from any source: *Ewanchuk* at paras 44 and 55; Lisa Dufraimont, "Myth, Inference and Evidence," *supra* note 58 at 342-325 and 329. Note also that an honest but mistaken belief cannot stem from the accused's intoxication, recklessness or wilful blindness: ss. 273.2(a)(i)-(ii).

[133] *Barton*, *ibid* at para 121; s. 273.2(b). See also *R v Gagnon*, 2018 SCC 41 at para 2. There must also be "reasonable grounds" for the accused's belief (s. 265(4)), though this criterion is typically met where reasonable *steps* were taken: *Barton* at para 113.

[134] *Barton*, *ibid* at paras 107 and 109; *Ewanchuk*, *supra* note 85 at paras 51-52. To be sure, an accused's honest but mistaken belief cannot result from a condition that the law deems as precluding or vitiating consent: s. 273.2(a)(iii); see also *Barton* at para 95; ss. 19 and 273.1(1.2).

[135] *Barton*, *ibid* at paras 97-100.

[136] Janine Benedet, "Sexual Assault Cases at the ABCA," *supra* note 103 at paras 33-35 and 53. Note, however, a retreat from this position in Janine Benedet, "*Barton*: 'She knew what she was coming for': Sexual Assault, Prostitution and the Meaning of Consent" (2017) 38 *CR* (7th) 445 at 450 [Janine Benedet, "*Barton*"].

[137] See, e.g., Elaine Craig, *Troubling Sex*, *supra* note 5 at 84-85; Elaine Craig, "The Legal Regulation of Sadomasochism," *supra* note 9 at 414-415 and 418.

[138] See, e.g., Janine Benedet, "Sexual Assault Cases at the ABCA," *supra* note 103 at paras 53 and 58; Lise Gotell, "Governing Heterosexuality," *supra* note 101 at 365.

substantive law as requiring a complainant to have not only an affirmative *mindset* of consent, but also that she have communicated her consent as part of that "voluntary agreement," for purposes of denying the *actus reus*.[139] On this view, an inquiry into the accused's state of mind and any reasonable steps he took to ascertain consent would often be "redundant";[140] if the complainant's consent is made out by her lack of affirmative communication, and if evidence that she did not communicate consent is accepted, it is impossible for the accused to have perceived such communication.

Due process scholarship has resisted this understanding of what recognizing these myths requires of the law. Don Stuart argues that a complainant's passivity or silence does not necessarily foreclose a finding of her consent for *actus reus* purposes.[141] He disputes characterizations of Canada's consent standard as "affirmative" in its communicative sense,[142] relying heavily on Parliament's choice of "voluntary agreement" over "unequivocal expression" when it defined consent in its 1992 amendments to the *Criminal Code*.[143] More generally, Stuart and Lisa Dufraimont have expressed concern about the SCC's occasional slippage between "implied" and "inferred" consent. While they agree that consent cannot be implied by silence, passivity or a pre-existing relationship, they take issue with judicial statements that it cannot be "implied" by the circumstances.[144] This is because the complainant's state of mind, like that of

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[139] Lucinda Vandervort, "Affirmative Sexual Consent in Canadian Law, Jurisprudence, and Legal Theory" (2012) 23:2 *Colum J Gender & Law* 395 at 403-405, 413-414, 416, 418, 424-425 and 439 [Lucinda Vandervort, "Affirmative Sexual Consent"].

[140] This argument is developed further in Lucinda Vandervort, "The Prejudicial Effects of 'Reasonable Steps' in Analysis of *Mens Rea* and Sexual Consent" (2018) 55:4 *Alta L Rev* 933, notably at 936, 941, 947-948 and 964.

[141] Don Stuart, *Canadian Criminal Law*, *supra* note 7 at 653.

[142] Don Stuart, "*Barton*: Sexual Assault Trials Must Be Fair Not Fixed" (2017) 38 *CR* (7th) 438 at 441 [Don Stuart, "*Barton*"]; Don Stuart, "Unjust Rigidity," *supra* note 8 at 294-295. See also Don Stuart, *Canadian Criminal Law*, *ibid* at 650.

[143] Don Stuart, "*Barton*," *ibid* at 441; Don Stuart, "Unjust Rigidity," *ibid* at 294-295; Don Stuart, *Canadian Criminal Law*, *ibid* at 643 and following. See also Don Stuart, "*Ewanchuk*: Asserting 'No Means No' at the Expense of Fault and Proportionality Principles" (1999) 22 *CR* (5th) 39 at 45-46; Michael Plaxton, *Implied Consent*, *supra* note 15 at 89-90.

[144] See, e.g., *Barton*, *supra* note 12 at para 98. Consider also *Kirkpatrick*, *supra* note 12 at para 53.

any witness, can be proved by direct or circumstantial evidence; if consent cannot be *inferred* from circumstantial evidence, this tends to leave the complainant's direct evidence of non-consent as the sole source of information on this issue.[145] Further due process concerns have been raised about whether advance consent ought to have been ruled out entirely[146] and, even if so, whether its demise can be interpreted as making evidence of prior sexual communications (including flirtation) entirely irrelevant to the question of the complainant's subjective consent.[147]

Recent years have seen the SCC inching toward equality scholars' interpretation of what the recognition of these myths compels of the substantive law of sexual assault. While the SCC continues to hold that subjective consent or its absence is a matter of the complainant's subjective state of mind,[148] it has increasingly suggested that a complainant's consent must be communicated, including in passages that rise above and beyond its *mens rea* analyses. In its 2019 decision in *R v Goldfinch*, a majority of the Court held that "contemporaneous, affirmatively communicated consent must be given for each and every sexual act […]. Nothing less than positive affirmation is required."[149] Moreover, in its 2022 decision in *R v Kirkpatrick*, references to Canada's consent standard as "affirmative" pepper both the majority and dissenting judgments in general statements untethered to the *mens rea*.[150]

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[145] Don Stuart, *Canadian Criminal Law*, *ibid* at 643-648; Lisa Dufraimont, "*R v Barton*: Progress on Myths and Stereotypes in Sexual Assault" (2019) 54 *CR* (7th) 317 at 323.
[146] *Manning, Mewett & Sankoff: Criminal Law*, *supra* note 23 at ¶21.20 through ¶21. 27. Consider also Don Stuart, *Canadian Criminal Law*, *ibid* at 646-649.
[147] See Lisa Dufraimont, "Myth, Inference and Evidence," *supra* note 58 at 327-328, taking issue with interpretations of flirtation as irrelevant to consent, notably as argued in Elaine Craig, *Putting Trials on Trial*, *supra* note 2 at 182-184.
[148] See, e.g., *GF*, *supra* note 35 at paras 1, 25, 29 and 32; *Kirkpatrick*, *supra* note 12 at paras 28 and 50.
[149] *Goldfinch*, *supra* note 36 at para 44.
[150] *Kirkpatrick*, *supra* note 12 at paras 45, 49, 55, 94, 110, 153, 273 and 285; see also para 54.

It remains narrowly arguable for now in Canadian law that a complainant might have been consenting even while passive or silent, on the basis that *actus reus* consent concerns a state of mind, and that an accused simply takes a serious risk if he cannot perceive any communicated indication of her subjective state of mind. However, the SCC appears to be courting the notion that recognizing the myths reviewed in this subsection might require something more: a positive obligation that a complainant's consent must be communicated, even for purposes of raising a reasonable doubt in the *actus reus* analysis. Should this trend continue, questions about the distinction between the *actus reus* and *mens rea* of sexual assault will need to be addressed. More markedly for our purposes, so too will the question of the relevance of evidence from sources other than the complainant.

Canadian law has properly recognized that the suggestions that consent can be found by virtue of a complainant's silence or passivity, or despite her objections or resistance, are improper. Interpretations by the SCC and equality scholars of what recognizing these myths compels, however, have tended to suggest that consent cannot coexist with silence and passivity and that it must have been communicated contemporaneously even for purposes of disputing the *actus reus*. The effect of this suggestion is that evidence of a complainant's passivity or silence is increasingly seen as showing her lack of subjective consent, whereas it was once seen as showing its presence. This development has lessened the scope of possibility for defence counsel to argue that silence and passivity simply trigger *uncertainty* about consent and its absence, and that other circumstantial evidence might raise a reasonable doubt about the complainant's lack of subjective consent.

Myths: Consent or unworthiness of belief can be inferred from a complainant's sexual activity on other occasions

Canadian law has recognized for decades that evidence of a complainant's sexual activity at times other than that of the alleged offence risks giving rise to "twin myths" – namely, that such evidence supports an inference that she consented on the occasion in question or is unworthy of belief. These twin myths build on the stereotype that women generally consent to sexual activity and the related foundational stereotype that women routinely falsify sexual assault allegations. Their recognition by Parliament lies at the heart of an elaborate statutory regime governing evidence of complainants' other sexual activity. The present subsection does not review this regime in full but instead traces its general features and judicial and academic interpretations thereof. Taking stock of these Crown-raised myths is important for two reasons: they offer an example of a strong trend toward excluding evidence that might otherwise be helpful to the defence; and, as Chapter 2 of this thesis will show, defence counsel have recently succeeded in overturning sexual assault convictions in cases where a trial judge drew improper inferences from the sexual history of the *accused*.

Subsection 276(1) of the *Criminal Code* categorically excludes evidence of a complainant's sexual activity other than that which gave rise to the charge(s) in a given case for purposes of inferring that she is more likely to have consented, or less worthy of belief, by virtue of the sexual nature of that activity.[151] When tendered by the defence, such evidence is presumptively inadmissible; it can be admitted only if it is adduced for a purpose other than that of advancing the twin myths, and if it is relevant to a material issue, concerns "specific instances" of sexual activity, and has significant probative value that is not substantially

[151] Note also that s. 277 of the *Code* bars all use of evidence of a complainant's sexual reputation for purposes of "challenging or supporting the credibility of the complainant." See Paciocco and Stuesser, *The Law of Evidence*, *supra* note 57 at 118-119 for more detail.

outweighed by its potential prejudice.[152] These determinations are made with reference to a list of eight factors,[153] including one which further emphasizes "the need to remove from the fact-finding process any discriminatory belief or bias."[154]

The SCC has confirmed that this regime has a vast breadth: it applies to any "proceedings in respect of" an alleged sexual offence[155] and "regardless of whether the accused seeks to introduce evidence to establish a defence or to challenge inferences urged by the Crown."[156] It covers any evidence of a complainant's sexual activity from before or after the alleged offence,[157] whether consensual or non-consensual,[158] and whether it involved the accused and/or some other person(s).[159] It also applies to communications "whose content is of a sexual nature" or that were "made for a sexual purpose" when these involve references to, or depictions of, the complainant's sexual activity other than that forming the subject matter of the charge.[160] (When

[152] See s. 276(2) of the *Criminal Code*. The SCC has repeatedly misstated this criterion in recent years, casting it as requiring that such evidence have probative value that substantially outweighs its potential prejudice in order to be admitted: *Goldfinch*, *supra* 36 at paras 107 and 131 (consider also paras 200 and 203); *RV*, *supra* note 88 at para 45. See Lisa Dufraimont, "*R v Goldfinch* and the Problem of Relationship Evidence" (2019) 55 *CR* (7th) 282 at 286-287 for a description of this error as a "disturbing lack of attention to the express requirements of the *Criminal Code* and the constitutional entitlements that underlie them" [Lisa Dufraimont, "*Goldfinch*"]. These same cases also include several accurate articulations of this criterion (see *Goldfinch* at paras 32, 49, 128 and 179-180; *RV* at paras 80, 78 and 112), but the error has regrettably been reproduced in leading evidence textbooks: *McWilliams' Canadian Criminal Evidence*, *supra* note 57 at § 16:22; Paciocco and Stuesser, *The Law of Evidence*, *ibid* at 118.

[153] See s. 276(3). Some SCC holdings and evidence authorities suggest that only the balancing of probative value and prejudice need be assessed in light of these factors: *Goldfinch*, *ibid* at para 69; *RV*, *ibid* at para 60; Paciocco and Stuesser, *The Law of Evidence*, *ibid* at 128. However, the wording of s. 276(3) of the *Criminal Code* and a recent provincial appellate case suggest that all four determinations in s. 276(2) must be conducted in light of the factors listed in s. 276(3): see *R v Ravelo-Corvo*, 2022 BCCA 19 at paras 31-40.

[154] See s. 276(3)(d).

[155] *Barton*, *supra* note 12 at para 76; see also the wording of ss. 276(1)-(2).

[156] *RV*, *supra* note 88 at para 32; *Barton*, *ibid* at paras 80-81. See also *McWilliams' Canadian Criminal Evidence*, *supra* note 57 at § 16:7. Note also that a common law regime applies where the Crown seeks to adduce evidence of the complainant's other sexual activity: *Barton* at para 80; *Goldfinch*, *supra* note 36 at paras 75 and 142; *RV* at paras 71 and 78.

[157] *Goldfinch*, *ibid* at footnote 10; see also *McWilliams' Canadian Criminal Evidence*, *ibid* § 16:11.

[158] *Darrach*, *supra* note 25 at para 33.

[159] See s. 276(2). There is ongoing uncertainty about the regime's applicability to sexual *inactivity* evidence, including evidence of virginity: see *RV*, *supra* note 88 at paras 81-82; *McWilliams' Canadian Criminal Evidence*, *supra* note 57 at § 16:9.

[160] See s. 276(4); *JJ* (SCC), *supra* note 25 at paras 34, 65-67 and 69. Such communications may be electronic or non-electronic, and can either directly involve the complainant (e.g., communications between her and the accused

such communications concern the sexual activity at the heart of the charge, they are subject to a comparable admissibility regime in the *Criminal Code*.[161]) The mere fact of an existing relationship that implies sexual activity between the complainant and the accused suffices to trigger the application of the regime,[162] and bare assertions by the defence that such evidence forms part of the narrative, supplies context or is relevant to the complainant's credibility cannot ground a decision to admit it.[163]

For all its expansive scope, the s. 276 regime does not amount to a "blanket exclusion," and "inferences from […] potentially relevant features" of this evidence (i.e., other than its sexual nature) can be permissible.[164] The most commonly described bases for admitting this evidence are when it reveals a material inconsistency in the complainant's evidence or a distinctive pattern in her conduct;[165] when it shows how the complainant previously communicated consent to the accused (so as to be capable of grounding the defence of honest but mistaken belief);[166] and when it provides an explanation for some physical condition that might otherwise be thought to stem from the alleged offence (e.g., pregnancy, injury, disease or the presence of semen).[167] In rare cases, such evidence can be capable of admission where the sexual aspect of the relationship between the complainant and the accused is "fundamental to the coherence of the defence narrative."[168]

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about her other sexual activity) or simply pertain to her (e.g., communications between others *about* the complainant's other sexual activity): *JJ* (SCC) at paras 61-64.

[161] See ss. 278.92; *JJ* (SCC), *ibid* at paras 65 and 67.

[162] *Goldfinch*, *supra* note 36 at paras 4 and 42-47; consider also para 104.

[163] *Goldfinch*, *ibid* at paras 5, 51, 56-57 and 65-68; consider also paras 95, 117-120, 124 and 131.

[164] *Darrach*, *supra* note 25 at paras 35-36.

[165] *Darrach*, *ibid* at para 35; *Goldfinch*, *supra* note 36 at paras 63-64. See also *Barton*, *supra* note 12 at para 65; *R v Crosby*, [1995] 2 SCR 912 at paras 12-14.

[166] *Barton*, *ibid* at paras 91-94; *Goldfinch*, *ibid* at para 62; *Darrach*, *ibid* at para 59 (see also paras 51-52); Pacioccos and Stuesser, *The Law of Evidence*, *supra* note 57 at 126-127.

[167] *RV*, *supra* note 88; *Seaboyer*, *supra* note 61 at paras 52 and 200.

[168] *Goldfinch*, *supra* note 36 at para 66; see also para 65.

The statutory regime governing this evidence, and recognition of the "twin myths" underlying it, received extensive attention from the SCC in the 2019 trilogy of *R v Barton*, *R v Goldfinch* and *R v RV*. Particularly in *Goldfinch*, the SCC's treatment of sexual history evidence reflects the adoption of key views advanced by equality scholars in recent years. These scholars tend to favour, if not a total ban on this evidence, the most restrictive interpretation possible of its admissibility. This is partly due to their opinion, exemplified by Janine Benedet and Elaine Craig, that M&S-based inferences other than the "twin myths" can and do arise from the admission of evidence of a complainant's other sexual activity.[169] Benedet also urged and welcomed the regime's application to evidence of flirtation[170] and its bar on sexual history evidence when brought solely as part of the narrative or to supply context.[171] Other equality scholarship has stressed that the discretion accorded to judges in this area renders the regime too "permeable" and has objected to it being framed as mainly protecting the complainant's right to privacy rather than as concerning her right to equality as well.[172]

The concerns of due process scholars, largely concerning the potential relevance of sexual activity evidence pertaining to a complainant, have generally gone unheeded. Lisa

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[169] Elaine Craig, *Putting Trials on Trial*, *supra* note 2 at 41 and 169; Janine Benedet, "Judicial Misconduct," *supra* note 8 at para 55. See also Janine Benedet, "*R v Goldfinch*: Narrative, Context and Evidence of Other Sexual Activity with the Accused" (2019) 55 *CR* (7th) 288 at 288 [Janine Benedet, "*Goldfinch*"]; *McWilliams' Canadian Criminal Evidence*, *supra* note 57 at § 16:1 and § 16:5.

[170] Janine Benedet, "Judicial Misconduct," *ibid* at paras 70-71, writing after s. 276(4) came into force but in relation to a case decided before it had.

[171] Janine Benedet, "*Barton*," *supra* note 136 at 447-448; Janine Benedet, "*Goldfinch*," *supra* note 169 at 289-290. Note that Benedet concedes that sexual activity evidence concerning the complainant and tendered by the defence can be admitted if it challenges a Crown argument "that the complainant ought to be believed because the parties were no more than bare acquaintances; because the complainant had rejected the accused in the past; or because the complainant would never have sex with someone like the accused": "*Goldfinch*" at 290. See also Emma Cunliffe, "Judging, Fast and Slow," *supra* note 42 at 150.

[172] Lise Gotell, "When Privacy Is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" (2006) 43 *Alta L Rev* 743 at 746, 755-760 and 766-768 [Lise Gotell, "When Privacy Is Not Enough"]. See also Emma Cunliffe, "Losing Sight of Substantive Equality?", *supra* note 42 at 298-301; Janine Benedet, "Probity, Prejudice and the Continuing Misuse of Sexual History Evidence" (2009) 64 *CR* (6th) 72 at 73.

Dufraimont has cautioned that excluding relationship evidence risks giving rise to sexual assault cases being decided on "a fictitious set of facts,"[173] and Don Stuart has long argued that the regime should not apply at all to a complainant's other sexual activity with the accused.[174] More granularly, David Paciocco advocated in the 1990s that the twin myths be interpreted restrictively to "general" inferences that a complainant's other sexual activity shows that she is "the type to consent, or the type who should not be believed," such that "other specific inferences relating to consent and untrustworthiness" could still be drawn from this evidence.[175] This distinction between "general" and "specific" inferences has not survived, and evidence of a complainant's sexual history is now more likely than ever to be excluded when it *can* be construed as relying on the twin myths.

Treatment of the twin myths by the SCC and Parliament, as reviewed in this subsection, shows an expansive interpretation of what their recognition *as myths* entails – namely, the presumptive exclusion and the limited bases for admissibility of evidence of a complainant's other sexual activity. This thesis does not resist this interpretation but rather observes that it deprives the defence of most uses of such evidence to raise a reasonable doubt in sexual assault cases. As noted above, Chapter 2 will reveal attempts by defence counsel to similarly curtail attempts by the Crown to use evidence of an *accused*'s other sexual activity in support of a conviction.

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[173] Lisa Dufraimont, "Myth, Inference and Evidence," *supra* note 58 at 341; see also Lisa Dufraimont, "*Goldfinch*," *supra* note 152 at 282-284.
[174] Don Stuart, *Canadian Criminal Law*, *supra* note 7 at 84; Don Stuart, "Unjust Rigidity," *supra* note 8 at 292-293; Don Stuart, "Twin Myth Hypotheses in Rape Shield Laws Are Too Rigid and *Darrach* Is Unclear" (2009) 64 *CR* (6th) 74.
[175] David M Paciocco, "The New Rape Shield Provisions in Section 276 Should Survive *Charter* Challenge" (1993) 21 *CR* (4th) 223 at 226; see 225-234 more generally. See also Pacioccos and Stuesser, *The Law of Evidence*, *supra* note 57 at 124-125 for a recapitulation of this view and an acknowledgment that "[t]he law has changed" in the wake of *Goldfinch*.

Myths: A lack of credibility can be inferred from a complainant's delayed disclosure or continued association with the accused

The law on Crown-raised M&S in sexual assault matters also deals with the complainant's after-the-fact conduct, meaning her behaviour after the alleged offence. This area has been far less bounded by statutory regulation and SCC authority than the M&S canvassed above. While we have already observed that post-incident sexual activity falls under the s. 276 regime, the SCC's treatment of the complainant's subjective consent has tended to focus on her "words and actions, before and during the incident"[176] and not thereafter. We have not yet examined whether and, if so, under what circumstances a complainant's after-the-fact conduct can affect her credibility on the occurrence of the alleged sexual contact or, where such contact is proven or conceded, her evidence of non-consent in respect thereof.

This subsection deals with two related myths that the law has recognized in this area – namely, that a complainant's delay in reporting sexual assault or her failure to avoid the accused after the alleged offence supports an inference that her claim of non-consensual sexual contact should not be believed. These myths depend on the stereotypes that victims generally report sexual assault at their earliest opportunity and avoid the perpetrator in its immediate and long-term aftermath. They are linked, in turn, to the foundational stereotype that women routinely falsify sexual assault complaints, in that most victims of sexual assault are women. It is important to take account of these myths because, as later parts of this thesis will show, intermediate appellate courts continue to wrestle with arguments from Crown and defence counsel alike about whether any inferences can be drawn from a complainant's post-incident conduct, and if so, what those might be.

[176] *Ewanchuk*, *supra* note 85 at para 29.

The starting point for this review is s. 275 of the *Criminal Code*, which was introduced in 1983 and which expressly abrogated the doctrine of "recent complaint." Like the corroboration requirement discussed earlier, this doctrine reflected the stereotype that women routinely falsify complaints of sexual assault. It allowed the Crown to adduce evidence of a complainant's prompt reporting to rebut a common-sense inference, and/or the urging of defence counsel, that delayed disclosure cast doubt on the credibility of her allegation.[177] Where there was no evidence of prompt reporting, or where the evidence showed delayed disclosure, the recent complaint doctrine required judges to warn the jury that it was unsafe to convict.[178] The implications of abrogating the doctrine took some time to settle in the jurisprudence, particularly in relation to reporting by child complainants.[179] In its 2000 decision in *R v DD*, the SCC ruled that trial judges should recognize the following as a matter of law and instruct juries accordingly:

> [T]here is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse. Reasons for delay are many and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge. In assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant.[180]

Strictly speaking, this instruction does not frame delayed reporting of sexual assault as categorically irrelevant; rather, it suggests that such evidence might sometimes be relevant in the context of other evidence in the case.[181] The intermediate appellate case law and related scholarship share broad agreement on this interpretation but have seldom articulated specific

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[177] This was an exception to the rule against prior consistent statements: see Pacioccos and Stuesser, *The Law of Evidence*, *supra* note 57 at 637-638.
[178] Lisa Dufraimont, "Myth, Inference and Evidence," *supra* note 58 at 343-344.
[179] See, e.g., *RW*, *supra* note 95; see also *R v Marquard*, [1993] 4 SCR 223.
[180] *DD*, *supra* note 95 at para 65.
[181] This is because the Court holds that "delay means nothing 'standing alone'" and that "it is 'one circumstance to consider in the factual mosaic of a particular case'": Lisa Dufraimont, "Myth, Inference and Evidence," *supra* note 58 at 345.

situations in which other evidence *would* make delayed disclosure relevant.[182] What is more, some appellate courts – including the SCC – have declined to advert to the possibility that this evidence could ever be relevant,[183] and equality scholars often group delayed reporting together with other Crown-raised M&S in a manner that tends to suggest its general irrelevance.[184]

The first sentence of the *DD* passage reproduced above – namely, that "there is no inviolable rule on how" sexual assault victims behave – paved the way for recognition of another Crown-raised myth. This is the myth that a complainant's failure to avoid the accused after the alleged offence can support an inference that she is not credible about either the sexual contact having taken place or, if so, whether it was non-consensual. In Canadian sexual assault law, this myth has come to be recognized only recently relative to other Crown-raised M&S, and its implications are still being fleshed out.

Most appellate cases on this issue have dealt with child complainants' non-avoidance of an adult accused;[185] a few others have dealt with an adult complainant's non-avoidance of a fellow adult accused in the context of a long-term abusive relationship.[186] It is easy to understand, at the level of common sense, that any relevance such evidence could have, on its

[182] See, e.g., *R v ADG*, 2015 ABCA 149 at paras 30-36; *Savard c R*, 2016 QCCA 380 at paras 51-53 [affirmed: 2017 SCC 21]; *Simard c R*, 2016 QCCA 880 at paras 29-30; *Alie c R*, 2017 QCCA 18 at para 9; *R v Marshall*, 2017 ONCA 1013 at paras 12-21; *R v Lacombe*, 2019 ONCA 938 at paras 40-42; *R v EH*, 2020 ONCA 405 at paras 102-105; Lisa Dufraimont, "Myth, Inference and Evidence," *ibid* at 345; and Elaine Craig, "The Relevance of Delayed Disclosure to Complainant Credibility in Cases of Sexual Offence" (2011) 36:2 *Queen's LJ* 551 at 563-564. See also Pacioccos and Stuesser, *The Law of Evidence*, *supra* note 57 at 638.

[183] See, e.g., *R v Garon*, 2009 ONCA 4 at para 72; *R v Caesar*, 2015 NWTCA 4 at para 6 [*Caesar*]; *CO c R*, 2016 QCCA 440 at para 48; *R v JJGL*, 2017 MBCA 19 at para 15; *Alipoor c R*, 2017 QCCA 636 at paras 39-41; *JF c R*, 2018 QCCA 986 at paras 8, 10 and 12 [*JF*]; and *JJ* (SCC), *supra* note 25 at para 132.

[184] See, e.g., David Tanovich, "'Whack' No More," *supra* note 10 at 498-499; and David Tanovich, "Regulating Inductive Reasoning," *supra* note 60 at 83-87. Consider also the examples cited in Elaine Craig, *Putting Trials on Trial*, *supra* note 2 at 32-35, 88-89 and 129, which do not address whether other evidence in the cases in question might have made delayed disclosure relevant.

[185] See, e.g., *Bernatchez c R*, 2013 QCCA 700; *Caesar*, *supra* note 183 [see the earlier sentencing decision relating to Mr. Caesar, which confirms that the complainant was his underage niece: 2013 NWTSC 88]; *Takri c R*, 2015 QCCA 690 (leave to appeal refused: [2016] SCCA No 202); and *JF*, *supra* note 183.

[186] See, e.g., *R v CAM*, 2017 MBCA 70.

own, is attenuated by these complainants' limited ability to distance themselves from their alleged assailants. However, no appellate authority to date has attended to potential M&S arising from this evidence in the context of preliminary or casual dating relationships, where there might seem to be no constraints on a complainant's ability to avoid the accused and, indeed, some positive effort on her part to continue associating with him. The interest of this thesis lies in the broad question of whether this evidence is ever relevant and, if so, admissible and/or deserving of some weight.

Some equality scholarship and appellate case law have tended to treat evidence of the complainant's post-incident association with the accused as categorically irrelevant. Writing in the early 1990s, Crown prosecutor Hart Schwartz argued that consensual sexual activity between the complainant and the accused following an alleged sexual assault should fall under s. 276. In so doing, he set out compelling reasons why a complainant may want to continue a sexual relationship with her attacker:

> Sometimes, the victim will see the man who raped her again in order to turn the rape into an experience of sexual intercourse over which, this time, she will have some control, or to place it in the context of an on-going relationship, to 'sort of legitimize what happened'.[187]

Such post-incident sexual activity, in Schwartz's view, is irrelevant to the question of consent at the time of the alleged offence.[188] Some intermediate appellate treatment of continued association by a child complainant with an adult accused has cast this evidence as irrelevant even where it does not involve sexual activity. In *R v ARJD*, a majority of the Alberta Court of Appeal (ABCA) found that "absence of avoidant behaviour or a change in behaviour as a generalization

[187] Hart Schwartz, "Sex with the Accused on Other Occasions: The Evisceration of Rape Shield Protection" (1994) 31 *CR* (4th) 232 at 244 [Hart Schwartz, "Sex with the Accused on Other Occasions"].
[188] Hart Schwartz, "Sex with the Accused on Other Occasions," *ibid* at 245. Consider also Elaine Craig, "Private Records, Sexual Activity Evidence, and the *Charter of Rights and Freedoms*" (2021) 58:4 *Alta L Rev* 773 at 793.

is logically irrelevant and as such, cannot form the basis of a credibility assessment leading to a reasonable doubt."[189]

Other intermediate appellate treatment and some due process scholarship have taken a different view of the potential relevance of this evidence. In *R v LS*, the Ontario Court of Appeal (ONCA) found that consensual sexual activity between a complainant and an accused after an alleged sexual assault, while not relevant to the complainant's consent at the time in question, was relevant (though not determinative) of whether the sexual assault had taken place.[190] More generally, some due process scholarship argues that evidence of continued association should be treated as potentially relevant for two reasons: the Crown often relies on evidence of a complainant's efforts to avoid the accused as tending to show that a sexual assault occurred; and after-the-fact conduct by an accused is regularly relied on in criminal cases of all kinds as tending to show his state of mind.[191] Lisa Dufraimont puts it this way: "It hardly seems consistent with the presumption of innocence to hold that a particular species of evidence can be admissible when it assists the Crown but inadmissible when it assists the defence."[192] This view is also reflected in the dissenting opinion at the ABCA in *ARJD*.[193]

The SCC has weighed in on this issue only in a cursory manner. In affirming the majority decision in *ARJD*, it stopped short of holding that evidence of continued association is categorically irrelevant and simply ruled that the trial judge had "judged the complainant's credibility based solely on the correspondence between her behaviour and the expected

[189] *R v ARJD*, 2017 ABCA 237 at para 58; see also para 39 [*ARJD* (ABCA); affirmed: 2018 SCC 6]: "[W]hat, if anything, can evidence of a lack of avoidant behaviour by a complainant tell a trier of fact about a sexual assault allegation? The answer is simple—nothing."
[190] *R v LS*, 2017 ONCA 485 at paras 88-89, 97 and 100. See treatment of this case in Lisa Dufraimont, "Myth, Inference and Evidence," *supra* note 58 at 352.
[191] Lisa Dufraimont, "Myth, Inference and Evidence," *ibid* at 351 and footnote 191.
[192] Lisa Dufraimont, "Myth, Inference and Evidence," *ibid* at 351.
[193] *ARJD* (ABCA), *supra* note 189 at para 96.

behaviour of the stereotypical victim of sexual assault."[194] More recently, the SCC flagged as a M&S that "a 'real victim' will avoid all contact with the perpetrator after the fact" but provided no guidance beyond that.[195] We might surmise that, as with evidence about the timing of reporting, evidence of the complainant's non-avoidance of the accused might be made relevant by other evidence in the case.[196] However, inquiries into the potential relevance of this evidence, and what can trigger it, will remain unexplored so long as the cases in which it is raised involve complainants who have little realistic scope of action beyond maintaining some relationship with the accused.

Recognizing the myths reviewed in this subsection properly bars bare reliance on after-the-fact evidence to infer a complainant's lack of credibility as to her claim of non-consent or the occurrence of the sexual activity that gave rise to the charge(s) to begin with. However, if the law deems irrelevant all evidence of delayed disclosure or non-avoidance, this risks making unavailable to the trier of fact virtually all information deriving from the period following an alleged sexual assault from which a reasonable doubt might be inferred. This would compound the trends we observed in respect of the Crown-raised M&S reviewed earlier in this section, which relate primarily to the time at which the alleged offence took place or beforehand. Against this uneven backdrop, the next section of this chapter reveals fresh efforts by intermediate appellate courts to deal with evidence of delayed reporting without giving rise to the myth that it alone tells against a complainant's honesty and accuracy.

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[194] *ARJD* (SCC), *supra* note 102 at para 2.
[195] *JJ* (SCC), *supra* note 25 at para 132.
[196] This view is taken in Daniel Brown and Jill Witkin, *Prosecuting and Defending Sexual Offence Cases*, 2/e (Toronto: Emond, 2020) at 211-212 and 216-218 [Daniel Brown and Jill Witkin, *Prosecuting and Defending Sexual Offence Cases*].

Collectively, the foregoing review shows that the recognition of Crown-raised M&S has had a dramatic impact on the law that governs sexual assault. In a very real sense, the story of Canadian sexual assault law reform can be told through the prism of the gradual and ongoing recognition of these M&S. This story is one in which equality scholars rightly take credit for influencing legislative and judicial reforms to this effect[197] and continue to push for further changes that would limit the admissibility of certain types of evidence and/or limit the ability of triers of fact to find consent, or honest but mistaken belief in the communication thereof, to be made out in a given case. Due process scholars in this conversation worry deeply about the wholesale exclusion of types of evidence and contest certain reforms to sexual assault law, or interpretations thereof, that are said by the SCC and equality scholars to counteract Crown-raised M&S. By and large, equality scholars' views of M&S have carried the day at the SCC and Parliament, even as these latter institutions leave some scope for due process concerns.

Crown "Overreach" and Two Emerging Principles

This chapter closes by considering a recent trend that has taken root in Canada's intermediate courts of appeal when dealing with Crown-raised M&S in sexual assault cases. To this point, we have reviewed how the recognition of these M&S has had a dramatic impact on sexual assault law. On the view of many equality scholars and, to a more moderate extent, the SCC and Parliament, recognizing these instances of prohibited reasoning also warrants excluding certain types of evidence, assigning others no weight, or finding that others still invite findings

[197] See, e.g., Lise Gotell, "Thinly Construing," *supra* note 101 at 56; Elaine Craig, *Putting Trials on Trial*, *supra* note 2 at 120-121; Janine Benedet, "Sexual Assault Cases at the ABCA," *supra* note 103 at para 13; Janine Benedet, "Marital Rape, Polygamy, and Prostitution: Trading Sex Equality for Agency and Choice?" (2013) 18:2 *Rev Const Stud* 161 at 162 [Janine Benedet, "Trading Sex Equality for Agency and Choice?"]; Lise Gotell, "Governing Heterosexuality," *supra* note 101 at 363; Elaine Craig, *Troubling Sex*, *supra* note 5 at 64; Melanie Randall, "Ideal Victims," *supra* note 22 at 398 and 401-402; and Lise Gotell, "Rethinking Affirmative Consent," *supra* note 101 at 867.

contrary to those that applying a M&S would yield. The mere spectre of reliance on Crown-raised M&S has given trial judges reason to be exceedingly nervous, lest they be reversed on appeal and, in extreme cases, face disciplinary proceedings[198] and related public rebuke. This has spawned an unexpected development in recent years: some provincial and territorial courts of appeal have found individual Crown prosecutors and/or trial judges to have taken an overbroad understanding of what recognizing Crown-raised M&S entails. This section traces the roots and fruits of this development. In so doing, it gives flesh to two principles regarding M&S that this chapter has hinted at in earlier sections: namely, that the evidence can support a finding that is *consistent* with that which would flow from the application of a M&S; and that recognizing a M&S has a *neutralizing* effect rather than gives rise to a contrary assumption.

In 2019, due process scholar Lisa Dufraimont published an article entitled "Myth, Inference and Evidence in Sexual Assault Trials." In it, she argued that the doctrine of M&S does not make particular categories of evidence inadmissible but rather simply prohibits certain inferences from being drawn therefrom.[199] Excluding entire types of evidence risks disabling an accused person from making full answer and defence;[200] finders of fact should instead have access to the broadest range of relevant evidence possible,[201] and trial judges should be trusted to distinguish between permissible and impermissible lines of reasoning arising from such evidence and to instruct themselves and juries accordingly.[202] It falls to appellate courts, and especially the SCC, to offer further guidance on the line between permissible and impermissible inferences

[198] See, e.g., Canadian Judicial Council, *In the Matter of an Inquiry Pursuant to s. 63(1) of the* Judges Act *Regarding the Honourable Justice Robin Camp: Report and Recommendations of the Inquiry Committee to the Canadian Judicial Council* (29 November 2016) and related commentary in Janine Benedet, "Judicial Misconduct," *supra* note 8.
[199] Lisa Dufraimont, "Myth, Inference and Evidence," *supra* note 58 at 346 and 353; see also 345-346.
[200] Lisa Dufraimont, "Myth, Inference and Evidence," *ibid* at 318, 347 and 353.
[201] Lisa Dufraimont, "Myth, Inference and Evidence," *ibid* at 320-322; see also 329-330 and 341.
[202] Lisa Dufraimont, "Myth, Inference and Evidence," *ibid* at 346-348.

arising from the same evidence.[203] As might be surmised from earlier passages in this chapter, Dufraimont's proposal did not advance a new view of the law. Rather, it offered a refresher on the longstanding concept of relevance, including its "elastic" and context-dependent character, lying at the heart of Canadian evidence law.[204] What made it necessary and remarkable was its treatment of judicial and scholarly inclinations to cast certain types of evidence as grounding only illegitimate, M&S-based inferences. In this respect, we can understand Dufraimont's intervention as counteracting "overreach" in determining what the recognition of M&S compels.

To date, Dufraimont's scholarship has not been taken up by equality scholars or the SCC. It has had an important impact, however, in recent sexual assault decisions by provincial and territorial appellate courts. It was first adopted and applied at this level of court in cases involving the timing of a complainant's disclosure of sexual assault. In *R v Roth*, the British Columbia Court of Appeal (BCCA) found that the fact that a complainant did not call the police or tell a taxi driver that she had been sexually assaulted soon after the alleged offence was clearly irrelevant to her credibility in general, absent reliance on M&S about delayed disclosure. This evidence became relevant, however, in light of her testimony that her reason for not so reporting was that she was still under the accused's control, because the taxi driver had given evidence tending to show this was not the case.[205] Similarly, in *R v Cooke*, the Nova Scotia Court of Appeal found that it did not amount to reliance on M&S to deal with inconsistencies in a complainant's evidence about her reasons for not disclosing an alleged sexual assault to medical professionals she saw soon after and for declining to undergo a nurse's examination. What is more, the trial judge had improperly found that the complainant's delay in reporting the incident

[203] Lisa Dufraimont, "Myth, Inference and Evidence," *ibid* at 354; see also 343.
[204] Lisa Dufraimont, "Myth, Inference and Evidence," *ibid* at 319-322 and 353.
[205] *R v Roth*, 2020 BCCA 240 at paras 129-136 [*Roth*].

actually lent credibility to her evidence as opposed to being a neutral factor.[206] In light of the preceding subsection of this chapter, *Roth* and *Cooke* offer rare – even novel – instances of Canadian appellate courts finding relevance in the timing of disclosure based on other evidence in the case, and distinguishing this from drawing an adverse inference from "delayed disclosure, standing alone."

"Myth, Inference and Evidence" was also drawn on in *R v JC*, an ONCA decision which has itself had far-reaching influence at the intermediate appellate level[207] and been unaddressed by equality scholars and the SCC. Writing for the Court, Justice Paciocco took the opportunity posed by the appeal to set out two distinct but overlapping rules in the law of evidence. The first of these is "the rule against stereotypical inferences," pursuant to which it is an error to rely on stereotypes (defined as "erroneous common-sense assumptions" or "prejudicial generalizations") about how a complainant or accused is expected to behave.[208] Justice Paciocco qualified this rule in two main ways. First, it does not bar the use of all common sense and human experience to draw inferences, as those sources drive the very operation of logic that underlies the law governing relevance generally.[209] Second, this rule does not bar the admissibility or use of *types* of evidence; consequently, the permissible use of evidence will sometimes yield findings that are *consistent* with a stereotype without having resulted from the operation of stereotyping itself.[210]

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[206] *R v Cooke*, 2020 NSCA 66 at paras 24-35 [*Cooke*].
[207] *R v JC*, 2021 ONCA 131 [*JC*]. See references to *JC* in the following cases, many of which deal with defence arguments about M&S in appeals from conviction and, accordingly, are dealt with in the next chapter of this thesis: *R v Drydgen*, 2021 BCCA 125 at para 45; *R v Pastro*, 2021 BCCA 149 at para 40 [*Pastro*]; *R v Greif*, 2021 BCCA 187 at paras 60 and 64-65 [*Greif*; leave to appeal refused: [2021] SCCA No 182]; *JL c R*, 2021 QCCA 1509 at para 78; *R v Adebogun*, 2021 SKCA 136 at paras 26 and 29 [*Adebogun*]; *GG c R*, 2021 QCCA 1835 at paras 35 and 45 [*GG*]; *R v Al-Rawi*, 2021 NSCA 86 at para 67 [*Al-Rawi*]; *JP c R*, 2022 QCCA 104 at para 30 [*JP*]; *R v LL*, 2022 ONCA 50 at paras 16 and 20 [*LL*]; *R v Lapierre*, 2022 NSCA 12 at para 79; *R c X*, 2022 QCCA 505 at para 15; *Kritik-Langer c R*, 2022 QCCA 657 at paras 27 and 38 [*Kritik-Langer*].
[208] *JC*, *ibid* at paras 63 and 65.
[209] *JC*, *ibid* at paras 65-67.
[210] *JC*, *ibid* at paras 68-70.

The other rule set out in *JC* is "the rule against ungrounded common-sense assumptions" (UCSAs), which bars the use of speculation, under the guise of common sense, to draw inferences that are neither grounded in the evidence nor supportable by judicial notice.[211] While it is both permissible and necessary to draw inferences from evidence using common sense and experience, these latter sources cannot be used to "introduce new considerations, not arising from evidence, into the decision-making process, including considerations about human behaviour."[212]

Further insights into stereotyping arise from Justice Paciocco's application of his framework to the grounds of appeal before the Court. We learn, for example, that it also amounts to error to exclude an inference as being based on stereotype when it is not so based.[213] In *JC*, the trial judge rejected, as reliant on stereotyping, a defence theory that the complainant had fabricated the sexual assault allegation to conceal from her boyfriend that she had cheated on him with the accused. Justice Paciocco found this to be incorrect and improper, as there was case-specific evidence supporting the complainant's motive to lie: she and her boyfriend were experiencing relationship difficulties, and her boyfriend became very upset upon learning of her sexual activity with the accused and urged her to report it to police as a sexual assault. What is more, the trial judge's rejection of the defence theory itself rested on stereotypes, including assumptions that the complainant would have a motive to lie only if her boyfriend had been "aggressive" and "jealous" enough to confront the accused directly, and that the complainant was presumptively believable because she would not endure the rigours of a criminal trial on the basis of a concocted allegation.[214]

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[211] *JC*, *ibid* at para 58.
[212] *JC*, *ibid* at paras 59-61.
[213] *JC*, *ibid* at para 75.
[214] *JC*, *ibid* at paras 75-92.

Lisa Dufraimont addressed *JC* in a 2021 article entitled "Current Complications in the Law on Myths and Stereotypes." She aligned Justice Paciocco's treatment of the 'motive to lie' ground with a cluster of recent cases, including *Roth* and *Cooke*, in which intermediate courts of appeal have found that "legitimate inferences [had been] misidentified as stereotypes."[215] At play in these cases is "overreach" by some Crown prosecutors and/or trial judges in what the recognition of Crown-raised M&S requires of the law; the effect of this overreach is to imperil the ability of the accused to make full answer and defence.[216] Dufraimont endorsed the appellate treatment of these cases, all of which were decided in favour of the defence. In relation to the 'motive to lie' ground in both *JC* and another recent ONCA case,[217] she clarified that while it is an impermissible stereotype to reason "that sexual assault complainants are generally untrustworthy," it is also wrong for a court to rely on the prohibition against stereotyping to rule out the possibility "that a particular complainant had a specific motive to lie" where the evidence in a given case is capable of supporting that suggestion.[218]

JC and Dufraimont's treatment thereof offer a basis for understanding, in a new light, the foundational stereotype of routine falsification and the three specific myths this chapter has reviewed. Recognizing these M&S does not compel a finding that women or sexual assault complainants are always truthful or accurate in their claims of non-consent; rather, the evidence in a given case can sometimes support findings that are *consistent* with these M&S, such that a trier of fact can find a specific complainant to be lacking in credibility or reliability without having relied improperly on evidence of her passivity or silence at the time in question, her

[215] Lisa Dufraimont, "Current Complications," *supra* note 3 at 550-554.
[216] Lisa Dufraimont, "Current Complications," *ibid* at 550 and 554.
[217] *R v Esquivel-Benitez*, 2020 ONCA 160.
[218] Lisa Dufraimont, "Current Complications," *supra* note 3 at 552-553. See a more recent example of an appellate court rejecting Crown overreach of this sort in *R v WDM*, 2022 SKCA 64 at paras 32-33.

sexual activity on other occasions, her delayed reporting or her continued association with the accused. In turn, this shows us the *neutralizing* effect of recognizing M&S; this recognition does not give rise to contrary assumptions about complainants' veracity so much as 'reset the scale' so that their evidence, like that of all witnesses, is approached without preconceptions.

Fleshing out the implications of these principles with respect to the Crown-raised M&S reviewed in this chapter is important work that should be undertaken, but it is not the business of this thesis. Rather, this thesis asks us to bear in mind the principles of consistency and neutralization for purposes of grappling with the advent of defence-raised M&S. As Chapter 2 will show, finding that the evidence supports consistency with certain defence-raised M&S has emerged as a major technique for managing such arguments. Moreover, bearing in mind that recognizing certain defence-raised M&S does not require giving effect to contrary assumptions is key to appreciating that the recognition of Crown- and defence-raised M&S can coexist sensibly and equitably.

Before closing this section, this thesis acknowledges that *JC*'s framework governing stereotyping and UCSAs does not align perfectly with the definitions of M&S set out in this chapter. Justice Paciocco does not describe stereotyping as specifically involving the application, to an individual, of empirical claims based on that person's membership in a given demographic. Nor does he raise the possibility of myth, described in this thesis as operations of "false logic" that themselves depend on a stereotype. What is more, Justice Paciocco's statement of the rule against UCSAs adds a layer of complexity to these issues that this thesis cannot accommodate, for all the deeper inquiry it merits. Instead, this thesis will retain its focus on M&S and do so for two reasons: first, defence counsel have been using the language of M&S more often and for longer than they have that of UCSAs; and second, that language is more likely to trigger

concerns about the distortion of the body of law relating to Crown-raised M&S in sexual assault cases. That said, later sections of this thesis will refer occasionally to UCSAs as a complement or counterpoint for understanding and applying the criteria for M&S set out in this chapter. So too will these later sections draw out further insights by Dufraimont, and other aspects of *Roth* and *JC*, that are germane to our understanding of the advent of defence-raised M&S in sexual assault appeals.

The scholarship and cases reviewed in this section address recent and regrettable instances of trial judges accepting arguments about Crown-raised M&S that stretch the doctrine beyond reasonable limits. The point of this review has not been to suggest that such instances are especially common, or to single out overzealous Crown prosecutors or timorous trial judges for exaggerating what qualifies as M&S or what their recognition as such compels. It has instead been to show that a collective failure to clearly and consistently articulate these aspects of the doctrine can sometimes result in the improper rejection of "relevant defence evidence and legitimate inferences favourable to the defence" and lead to unsafe convictions.[219] We will see in Chapter 2 that these same factors can risk improper acquittals, because some defence counsel have come to exploit these same weaknesses in the M&S doctrine. Just as the cases reviewed in the present section have circumscribed the doctrine by holding that *consistency* with a stereotype can arise from the evidence rather than from impermissible reasoning, the cases covered in the next chapter will show that appellate courts have been addressing overreach using this same technique. Moreover, the insight that recognizing Crown-raised M&S ought not to give rise to contrary assumptions will assist us in reconciling the recognition of defence-raised M&S with their Crown-raised counterparts.

[219] Lisa Dufraimont, "Current Complications," *ibid* at 554; see also 551.

Conclusion

This chapter has reviewed how the problem of Crown-raised M&S has assumed pride of place in sexual assault law. The core of the chapter showed that these M&S have preoccupied all actors in this area and that their recognition has prompted far-reaching reforms to the substantive and evidentiary rules governing these cases. All interlocutors addressed in this thesis agree that Canadian law is properly concerned with identifying and repudiating M&S that can lead to improper acquittals by virtue of flawed empirical and logical claims about the behaviour of women and sexual assault complainants.

Equality scholars and, to a significant degree, the SCC and Parliament have adopted expansive views of what recognizing these M&S compels, whether it is the exclusion of certain types of evidence (that of a complainant's other sexual activity), giving others no weight (that of a complainant's delayed disclosure or continued association with the accused) or using some evidence to support inferences contrary to those that the M&S would support (that of a complainant's passivity or silence at the time of sexual touching by the accused). Due process efforts to resist these trends have largely gone unheeded. The prevailing interpretations just noted have given trial judges reason to be highly anxious about dealing with evidence from sources other than the direct evidence of the complainant.

Other currents running through this chapter have offered new ways of thinking about M&S within and beyond sexual assault law. Interdisciplinary efforts by legal scholars of sexual assault, together with Canadian authorities on the law of evidence, show us that stereotyping is neither invariably unfavourable nor susceptible of excision from our thinking. Resort to generalizations is necessary as a matter of our cognitive processing of the world around us and, in judicial reasoning, it is essential to determining the relevance of circumstantial evidence. Such

determinations, in turn, are central in resolving many criminal cases because no witness's direct evidence attracts a presumption of believability. What is necessary to guard against are groundless generalizations that are prejudicial, in a sense that includes but exceeds that of conventional notions of discrimination. Applying stereotypes to individuals without a fair and contextual inquiry into their conditions, and applying myths that rely on such stereotypes in an operation of "false logic," is undoubtedly wrong. However, conducting such a fair and contextual inquiry based on the evidence of an individual's conditions will sometimes yield an inference about that individual that is consistent with that which might flow from applying a M&S.

Recent due process scholarship and intermediate appellate case law have enabled the insights just noted to coalesce into two principles that, this thesis argues, should inform our understanding of M&S: those of the potential for evidence-based *consistency* with M&S and the *neutralizing* effect of recognizing M&S as such. On the view of these authorities, attending to the evidence in a given case can yield a finding of *consistency* with a M&S that does not, on that account, amount to impermissible reasoning. The potential for this evidence-based consistency, in turn, signals that recognizing M&S as such simply *neutralizes* the generalization in question. In more concrete terms, this shows that recognizing Crown-raised M&S about women's sexual availability or 'normal' victim behaviour need not – and should not – give rise to contrary assumptions that sexual assault complainants are generally truthful and accurate. Rather, a specific complainant can be found to have consented, or to have otherwise lied or been inaccurate about the events underlying the charge(s) in a given case, when a contextual view of the evidence in the case supports such findings. These inferential possibilities supply a basis for resisting trends to treat certain types of evidence as categorically irrelevant.

Chapter 2 will carry the principles of *consistency* and *neutralization* into its treatment of defence-raised M&S in appeals from conviction for sexual assault. As we will see, a genuine issue has arisen recently from the use of arguments about M&S by defence counsel in this context and the mixed results this strategy has borne. Some such defence efforts seem novel and compelling, but others appear to range from strained to nonsensical. The two principles just noted, and the definitions of M&S advanced in the present chapter, will equip us to sort the wheat from the chaff in this area. What ultimately results from this analysis is a conclusion that the recognition of Crown- and (some) defence-raised M&S can coexist sensibly and equitably. However, what this requires is greater clarity and consistency in articulating what qualifies as M&S and the evidentiary consequences of their recognition. Should imprecision continue to reign in these determinations, it seems that some defence *and* Crown counsel alike will continue to make "overreaching" arguments about M&S that risk unjust acquittals and convictions, respectively.

CHAPTER 2: GRAPPLING WITH THE ADVENT OF DEFENCE-RAISED MYTHS AND STEREOTYPES IN CANADA'S INTERMEDIATE APPELLATE COURTS

Introduction

This thesis now turns to its main subject of inquiry – namely, efforts by defence counsel to overturn convictions for sexual assault using arguments about M&S. As noted in the Introduction, this strategy arose only six years ago but has steadily preoccupied Canadian intermediate appellate courts since then and has succeeded in securing several orders for new trials. This is a striking development because the SCC, Parliament and legal scholars have long concerned themselves instead with identifying and repudiating Crown-raised M&S (understood as assumptions about women's propensity to consent and/or falsify sexual assault allegations). Indeed, these actors have scarcely acknowledged the advent of defence-raised M&S,[220] and provincial and territorial courts of appeal have accordingly had to forge ahead in this area with negligible external guidance.

This development has yielded an uneven state of affairs: defence counsel continue to deploy this strategy, sometimes with apparent legitimacy and sometimes not, and no one seems to share an understanding of the conditions of its success or a curiosity about its mixed results. This thesis suggests that such disarray may simply signal a lack of clarity and consistency within the doctrine of M&S more broadly, particularly absent a controlling definition of *what M&S are* to begin with and consensus over the evidentiary effects of their recognition. Let us consider

[220] The main scholarly exception to this trend is Lisa Dufraimont, "Current Complications," *ibid* at 546-550. See also the coverage in Pacioccos and Stuesser, *The Law of Evidence*, *supra* note 57 at 39-41; Daniel Brown and Jill Witkin, *Prosecuting and Defending Sexual Offence Cases*, *supra* note 196 at 210, 214 and 218. This thesis acknowledges that the SCC is limited to dealing only with the cases that come before it and has had only limited opportunities to broach the matter of defence-raised M&S. In *R v Quartey*, 2018 SCC 59 and *R v Delmas*, 2020 SCC 39, the Court dealt with defence-raised M&S in two appeals as of right and disposed of them in brief oral reasons, finding that the alleged stereotype was not made out on the record. The Crown has yet to appeal an intermediate appellate judgment that ordered a new trial on the basis of a defence-raised M&S. It has, however, appealed *R v Kruk*, 2022 BCCA 18 [*Kruk*], in which the Court of Appeal overturned a conviction on the basis that the trial judge had employed a UCSA: [2022] SCCA No 76.

another trend that compounds this disordered situation before proceeding to outline the substance of this chapter.

To the extent that intermediate courts of appeal have recognized defence-raised M&S as such, they have tended to group them together with their Crown-raised counterparts in their general statements of the law governing M&S in sexual assault matters. This has sometimes resulted in a global, gender-neutral and non-partisan understanding of M&S at this level of court. Some early decisions on defence-raised M&S cast their recognition as a matter of fairness, or desirable symmetry, with that of their Crown-raised counterparts,[221] and only a few have remarked that the latter have "historically" been the law's overwhelming preoccupation.[222] *Roth* and *JC* marked a shift in this case law toward more abstract and/or neutral analyses of M&S.[223] This, in turn, has led subsequent cases to frame M&S in a manner that blurs or collapses distinctions about the party raising the claim or the sex and gender of those to whom these assumptions might apply.[224]

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[221] See, e.g., *R v Kodwat*, 2017 YKCA 11 at para 36 [*Kodwat*]: "[M]yths and stereotypes pervade public perceptions of sexual assault. Some favour the accused, others the Crown"; *R v Quartey*, 2018 ABCA 12 at para 2 [*Quartey*; affirmed: 2018 SCC 59]: "Applying stereotypes is inappropriate whether it is directed at assessing the behavior of a person accused of sexual assault or that of a complainant" (see also para 66); *Robbins c R*, 2018 QCCA 1181 at para 35 [*Robbins*]: "S'il est acquis que '[l]es plaignants devraient être en mesure de compter sur un système libre de mythes et de stérérotypes […]', *a fortiori* doit-il être de même pour l'accusé." See also *R v Paulos*, 2018 ABCA 433 at para 26 [*Paulos*; leave to appeal refused: [2019] SCCA No 136]; *R v CMM*, 2020 BCCA 56 at para 139 [*CMM*]; *Lemire-Tousignant c R*, 2020 QCCA 1065 at para 10; *R v Chen*, 2020 BCCA 329 at para 25 [*Chen*].

[222] See, e.g., *R v Grant*, 2019 BCCA 369 at para 26 [*Grant*]: "It must be recognized, of course, that there is room for special protections that apply to complainants, who may be particularly vulnerable and who have, historically, been subjected to abuses while giving evidence. That extra protection might be afforded complainants, however, does not take away from the proposition that myth-based evidence […] should not be allowed to be used as a basis for conviction in a criminal trial." See also *R v Cepic*, 2019 ONCA 541 at para 14 [*Cepic*]; *R v TL*, 2020 NUCA 10 at para 35 [*TL*].

[223] *Roth*, *supra* note 205 at para 64: "[A]s a matter of legal principle, it is wrong for a judge to make a negative credibility finding based on a 'stereotypical assumption or generalization' that is lacking in an evidentiary foundation" (see also paras 65 and 73; but note para 129 for its specific recognition of Crown-raised M&S); *JC*, *supra* note 207 at 63: it is "equally wrong to draw inferences from stereotypes about the way accused persons are expected to act" as it is "to rely on stereotypes […] about how a sexual offence complainant is expected to act, to either bolster or compromise their credibility" (see also para 66).

[224] See, e.g., *Pastro*, *supra* note 207 at para 42: "The spectre of judicial reliance on ungrounded assumptions or stereotypes will not arise where the reasons clearly reflect that findings of fact and credibility do not rest on a subjective assessment of what a hypothetical complainant or accused might reasonably be expected to do in the

Lisa Dufraimont heralds *JC*'s framework as being capable of "account[ing] for all the complexities that have developed in the law on [M&S]." She also flags, however, that this very "capaciousness" risks obscuring "the particular problem of gender-based stereotyping of female sexual assault complainants" in ways that are "ahistorical and regressive."[225] This chapter accepts this reservation. It attempts to rise to the challenge of looking squarely at defence-raised M&S and assessing their legitimacy with reference to the analyses undertaken in Chapter 1. It does not contend that defence-raised M&S operate nearly as often as do their Crown-raised counterparts or that they warrant the same magnitude of concern. Rather, it seeks only to discern whether they are worthy of recognition as M&S at all in cases where they are alleged or found to have operated and, if so, what that might tell us about the doctrine of M&S as a whole.

This chapter categorizes defence arguments about M&S germane to sexual assault cases that have been made in Canada's intermediate appellate courts. This is a tall order given their varied nature and success rate. To do this work, the chapter deploys the definitions of M&S advanced in Chapter 1 – namely, that of stereotypes as empirical claims about the (un)likelihood or (im)plausibility of someone behaving in a certain way in a sexual context generally, or in a sexually violative context in particular, by virtue of their demographic membership at the sites of sex and gender; and that of myths as false logical claims that *depend* on such stereotypes for their force. So too does it carry into this analysis the two principles about M&S that emerged from the previous chapter. These are the principles of *consistency* (i.e., that the evidence in a case can legitimately support a finding that is *consistent* with that which would flow from a

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circumstances, but on what the evidence establishes the complainant and accused did or did not do in the context of the case being tried" (though see para 49 for its specific recognition of Crown-raised M&S); *Pierre c R*, 2021 QCCA 1261 at para 25 [*Pierre*]: "[T]he appellant's suggestion that the judge relied upon generalisations or stereotypes cannot succeed unless his reasons disclose reliance upon preconceptions about relations between people in comparable circumstances and thus not upon an evaluation of the facts presented in this case."

[225] Lisa Dufraimont, "Current Complications," *supra* note 3 at 561 and 563-564.

M&S) and *neutralization* (i.e., that recognizing a M&S as such *neutralizes* the assumption in question rather than gives rise to a contrary assumption).

This chapter finds that intermediate appellate courts have widely recognized two sets of defence-raised M&S:

- those concerning women's sexual timidity (i.e., the unlikelihood that a woman would initiate or escalate sexual contact or simply consent thereto under certain conditions); and
- those concerning men's sexual opportunism (i.e., the unlikelihood that a man would decline sex or assiduously inquire about consent, or the use of an accused's other sexual activity to argue that he is unworthy of belief and/or inclined to commit sexual offences).

The case law in this area shows that defence invocations of these M&S have resulted in a number of orders for new trials. However, in many cases the court of appeal recognizes these M&S only implicitly and dismisses the argument on the basis that the evidence supports the impugned inference despite its *consistency* with the putative M&S.

This thesis endorses these trends and finds that these M&S are worthy of recognition in Canadian sexual assault law for three reasons. First, they meet the criteria for M&S advanced in Chapter 1 of this thesis; second, they work with, rather than distort, the legal framework governing sexual assault, including its reforms flowing from the recognition of Crown-raised M&S; and third, the principle of *neutralization* suggests that recognizing these defence-raised M&S does not revive, or undermine the recognition of, their Crown-raised counterparts. That said, this chapter's coverage of these M&S goes on to suggest a number of factors that courts should bear in mind when deciding whether they have been applied or whether the evidence can ground findings that are *consistent* with those that would flow from their application. These factors derive from sociolegal understandings of consent that are reflected in Canadian equality and agency scholarship and from a recollection of key aspects of sexual assault law set forth in Chapter 1. This analysis is intended to help ensure that the recognition of these defence-raised

M&S does not simply afford "an obvious loophole to exploit" or an opportunity to "game the law"[226] in cases where the evidence fairly supports conviction.

By contrast, this chapter finds that other defence arguments about M&S have largely failed to gain traction. It proceeds to categorize and discuss these arguments but does so in a more integrated manner than that employed in the first two sections of the chapter. One group of such arguments involves attempts to harness the recognition of certain *Crown*-raised M&S to the benefit of the accused, through either

- a "role reversal" claim, whereby the defence argues that the *complainant* victimized the *accused* and that an adverse inference was drawn against the accused for failing to promptly report the offence or avoid the complainant thereafter; or

- a "doubling down" on *DD* and *ARJD*, whereby the defence contends that evidence of a complainant's prompt reporting, emotional distress or efforts to avoid the accused should not be used to support a conviction on the basis that her *failure* to demonstrate these behaviours is understood to be incapable of grounding an acquittal absent reliance on M&S.

These arguments do not involve novel articulations of M&S, and so our Chapter 1 definitions are of little assistance in dealing with them. They do involve arguments about the evidentiary effects of recognizing the Crown-raised M&S on which they are based, and so they invite connections with Chapter 1's coverage of *DD* and *ARJD*.

This thesis finds that "role reversal" arguments can occasionally be successful and legitimate from the defence perspective, but even when they are, they show us only that in exceptional cases the wrong person has been charged. It finds that "doubling down" arguments are always unsuccessful and typically come off as ludicrous, and that their sole virtue is to oblige courts to observe that a complainant's after-the-fact conduct can sometimes be relevant for some purposes. Courts of appeal rightly manage potential overreach in both types of arguments by

[226] See Michael Plaxton, *Implied Consent*, *supra* note 15 at 190-191, where he addresses these concerns in relation to his proposal for reviving a modified doctrine of implied consent in Canadian sexual assault law.

assessing whether the evidence at trial supports findings that are *consistent* with that which would flow from the M&S alleged by the defence. Greater clarity would be welcome on the permissible inferences that a complainant's after-the-fact conduct can afford, but this thesis leaves that work to others.

The other defence arguments about M&S that seem to overreach involve attempts to impugn every common-sense inference (allegedly) drawn at trial as evincing reliance on M&S. These *are* novel articulations of M&S, and so our definitions of M&S from Chapter 1 assist us in evaluating them. The case law finds that none of these claims qualify as M&S but generally does not explain why, except by addressing them instead as a matter of UCSAs or related speculative reasoning, or by finding that the evidence supported a conviction in any event. This chapter suggests that these residual sundry attempts by defence counsel to invoke M&S are all missing at least one ingredient of the definitions advanced in this thesis. If courts of appeal adopt these or comparable definitions of M&S, this thesis argues, they will be better equipped to explain why the impugned reasoning is a poor fit for the doctrine and to deter defence counsel from bringing such specious arguments going forward.

Defence-Raised Stereotypes about Women's Sexual Timidity

Recent attempts by defence counsel to invoke M&S on appeal from convictions for sexual assault are sometimes taken as concerning "M&S about men and/or accused persons."[227] This framing fails to capture one of the most significant categories of defence-raised M&S, which is that concerning women's sexual timidity. Recall that Crown-raised M&S are rooted in assumptions about women routinely consenting to sex and/or falsifying sexual assault

[227] See, e.g., the sources cited at note 220.

complaints. Chapter 1 charted how the consequences of recognizing these M&S, as generally accepted by the SCC and Parliament, narrow the avenues for a fact-finder to decide that the Crown has failed to prove beyond a reasonable doubt that a complainant did not subjectively consent or that an accused knew that she was not communicating consent or was wilfully blind or reckless as to this fact. Defence-raised M&S about women's sexual timidity, by contrast, concern assumptions about women being *unlikely* to consent in certain scenarios or to initiate or escalate sexual contact. The recognition of these M&S has the potential to enable triers of fact to acknowledge that women's sexuality can take on active and adventurous forms. Put another way, it eliminates an inferential shortcut that might otherwise be used to find that the Crown has proven the *actus reus* element of the complainant's lack of subjective consent.

Defence attacks on assumptions about women's sexual timidity have tended to focus on their formulation as stereotypes (i.e., as empirical claims) rather than myths (i.e., as (il)logical claims). Many such claims have been brought before Canada's provincial and territorial courts of appeal, and they have found widespread recognition in this forum in one of two ways. In some cases, the appellate court has found the purported stereotype to have been relied on by the trial judge and ordered a new trial accordingly. In other cases, the court has expressly or implicitly accepted that the alleged stereotype *is one* but found that the impugned inference was justified by the evidence adduced at trial. The following review neither endorses nor disputes these latter findings in individual cases; instead, it focuses on intermediate appellate recognition of the defence-raised stereotype in question and observes that this judicial treatment shows ample comfort with finding *consistency* with this stereotype where it deems the inference at issue to be supported by the evidence.

Following the review of case law below, this section of the chapter argues that the recognition of stereotypes about women's sexual timidity is worthy of validation in Canadian law. These stereotypes meet the definition proposed in Chapter 1 and, bearing in mind the *neutralizing* effect that this thesis has proposed for the recognition of M&S more generally, recognizing these stereotypes will not revive, or undermine the recognition of, Crown-raised M&S about women's propensity to consent or to bring false complaints. The section then proposes a set of considerations to bear in mind when construing the effects of recognizing stereotypes about women's sexual timidity in a given case and, specifically, what sorts of evidence can support *consistency* with these stereotypes. This is done by drawing from both equality and agency scholarship that advances certain sociolegal understandings of consent and from the overview of the substantive law of sexual assault that emerged from Chapter 1.

This analytical work is necessary so that the invocation of stereotypes about women's sexual timidity is not overrelied on in cases where the evidence justifies findings that a complainant did not consent or, in other words, where it supports a finding that would be *consistent* with that which would flow from these stereotypes. At the same time, this work should help allay concerns that recognizing these stereotypes necessarily or routinely involves ignoring key elements of sexual assault law and thereby allows too wide a scope of possibility for perverse acquittals.

Stereotype: Women generally do not consent to sexual activity with older men

The first kind of defence-raised stereotypes about female sexual timidity concerns an assumption that women normally do not consent to sex with men who are significantly older. Decided in June 2017, *R v Kodwat*[228] was the first case in Canada to allow an appeal from

[228] *Kodwat*, *supra* note 221.

conviction for sexual assault on the basis of a defence-raised M&S. The complainant was intoxicated by alcohol at the time of the alleged offence and could not remember it; at trial, she did not testify as to her lack of consent. In rejecting the defence argument that the complainant had consented, the trial judge stated that it was "inconceivable that an attractive 17-year-old girl would consent to kiss for 20 to 25 minutes and then have unprotected sexual intercourse with the accused who meant nothing to her and whom she did not remember – and furthermore, who was 28 years her senior."[229] The Yukon Court of Appeal accepted the defence argument that this reasoning amounted to "stereotypical reasoning and speculation"[230] and ordered a new trial. While there was circumstantial evidence from which the trial judge could have inferred the complainant's lack of subjective consent, his decision to convict based on the implausibility of a young woman's consent to sex "with an unfamiliar man of the appellant's age" rested on "a stereotypical assumption or generalization lacking in an evidentiary foundation."[231]

Direct reliance on *Kodwat* has not proven fruitful for defence counsel in subsequent appeals from conviction in cases involving an age gap between the complainant and the accused. These more recent cases, however, confirm that judicial reliance on the generalization that a younger woman would not consent to sex with an older man amounts to stereotyping if not grounded in the evidence at trial. The most prominent of them is *R v Pastro*,[232] in which a 17-

[229] *R v Kodwat*, 2016 YKTC 58 at para 30, reproduced in *Kodwat*, *ibid* at para 27.
[230] *Kodwat*, *ibid* at para 31.
[231] *Kodwat*, *ibid* at para 41; see also para 28.
[232] *Pastro*, *supra* note 207. See also *R v Mann*, 2020 BCCA 353, which involved an 18-year-old complainant who could not recall the alleged offence (having ingested "a toxically high dose of MDMA" before it took place) but testified that she neither consented nor would have consented to sex with the 22-year-old accused. The trial judge convicted Mr. Mann, relying in part on findings that he was "a complete stranger" to the complainant, "considerably older" than her and, "at least based on his demeanour as a witness, not a warm or alluring person": para 58. The BCCA rejected the defence argument that this statement was "akin to what the trial judge concluded in *Kodwat*: a finding that *no* attractive 18-year-old woman would consent to sex with a man who was several years her senior": para 69; see also para 62. Whereas *Kodwat* involved the use of "stereotypical reasoning to overcome a lack of evidence," the trial judge's statement in *Mann* formed only part of his credibility assessment and was "grounded in the evidence" relating to the witnesses: paras 70 and 72.

year-old complainant alleged that she was sexually assaulted by a 49-year-old accused, who was "an old and trusted friend of [her] father."[233] At trial, the defence suggested that the complainant encouraged or enjoyed the accused's advances. The trial judge convicted Mr. Pastro, finding it "unbelievable" that the complainant

> would flirt with him and act in a sexual manner towards him […] During the relevant time period, [she] was 17 years old and living with her boyfriend of the same age. The assertion that she was sexually attracted to a 49-year-old friend of her father's is unbelievable.[234]

The BCCA dismissed a defence argument that the trial judge had convicted based on "a stereotypic understanding of the improbability of any teenaged woman being sexually attracted to a much older male." Instead, the trial judge had conducted "an evidence-based and context-specific assessment of the testimony of the appellant and the complainant." This included accounting for "the complainant's evidence that she found [Mr. Pastro's] sexual attentions to be 'creepy', 'weird', 'inappropriate' and 'disgusting'" and that she "felt ashamed and disgusted by what had occurred as it involved someone she referred to as 'Uncle Dino'." Accordingly, while the BCCA endorsed *Kodwat*, it found that the trial judge in *Pastro* had not relied on "any perceived universal truths" and had instead determined "how this 17-year-old female in fact responded to the sexual attentions of the appellant."[235]

Kodwat and its successors, despite their varying success, reflect consistent recognition that it amounts to stereotyping to suggest that young women are categorically uninterested in sex with older men. As *Pastro* shows, however, courts of appeal are wary of finding reliance on this stereotype to be made out where there is an evidentiary basis for finding that the complainant in a given case did not want to engage in sexual activity with the older accused. This does not dull

[233] *Pastro, ibid* at para 11.
[234] Reproduced in *Pastro, ibid* at paras 36 and 64.
[235] *Pastro, ibid* at paras 66-67 [emphasis added by the BCCA].

the recognition of the stereotype so much as it shows that courts can find *consistency* therewith provided that this stems from the evidence adduced at trial.

Stereotype: Women generally do not consent in certain physical settings or personal circumstances

The second type of defence-raised stereotypes about female sexual timidity concerns assumptions that women will not consent to sex in certain locations or in particular bodily or emotional circumstances. The most prominent case in which consent in a physical setting was at issue is *R v JL*,[236] in which an alleged sexual assault involving two teenaged students took place outdoors during a high school dance. In convicting the accused, the trial judge said that he could not "accept that a young woman would go outside wearing a dress in mid-December, lie down in dirt, gravel and wet grass and engage in consensual sexual activity." The ONCA overturned the conviction and ordered a new trial, finding that "by relying on an assumption regarding what young women will and will not do, as if it were a fact, and in light of the centrality of that assumption to the trial judge's reasoning, his finding of guilt was tainted by error."[237] This is express recognition of the stereotype that women generally do not consent to sex in certain physical locations.

Subsequent cases show that this stereotyping error is not made out where there is an evidentiary basis for the impugned inference. In *R v FBP*,[238] the ONCA rejected a defence argument that the trial judge had relied on "stereotypical inferences" in rejecting the claim that the accused and the complainant had engaged in consensual sex on a hotel room balcony shortly before the alleged sexual assault occurred on a bed in that same room. Instead, the trial judge had legitimately used common sense on this point, in light of evidence that the complainant "had

[236] *R v JL*, 2018 ONCA 756 [*JL*].
[237] *JL*, *ibid* at paras 46-47.
[238] *R v FBP*, 2019 ONCA 157 [*FBP*].

shown no interest" in the accused before or after their time on the balcony and that "there was a bedroom nearby[.]"[239] Similarly, in *R v JJ*[240] the same Court rejected a defence claim of stereotyping based on a trial judge's finding that the complainant would not have consented to sex in a "basement side room [that] reeked of urine, had no door, and was immediately adjacent to the room where the appellant's friends were drinking." The ONCA found that the trial judge's conclusion was properly anchored in "his assessment of the evidence as a whole," including his finding "that the complainant was a young, shy, immature girl. […] He was not relying on pre-conceived views about how sexual assault victims would behave but on how the complainant behaved."[241] While *FBP* and *JJ* may seem to dull the import of *JL*, all three cases hold directly or by implication that a trial judge would err by hinging a conviction on a generalization that a young woman would not consent to sex in a particular locale, whether because it is uncomfortable, open to public view or unsanitary.

A notable case dealing with a defence-raised stereotype relating to consent in certain bodily circumstances is *R v TL*.[242] The Nunavut Court of Appeal allowed an appeal from conviction because the trial judge's reasons "failed to meet the purposes of either intelligibility or reviewability" overall.[243] However, it also addressed a defence argument that alleged stereotyping based on the following statement in those reasons: "It is also difficult to believe that

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[239] *FBP*, *ibid* at para 9.
[240] *R v JJ*, 2021 ONCA 351 [*JJ* (ONCA)].
[241] *JJ* (ONCA), *ibid* at paras 21-22.
[242] *TL*, *supra* note 222. See also *Paulos*, *supra* note 221, where the ABCA agreed with defence counsel that the trial judge had erred in finding that the complainant would not have consented to sex "with a stranger, given that she did not know when he 'last washed,' 'how clean he was,' and 'whether he had any sexually transmitted diseases or infections'": para 20; see also para 29. The ABCA found this to be an "unfounded assumption" because "[t]he complainant never testified about this topic and there was no evidentiary basis for attributing these views to [her]": paras 34 and 39. They declined to quash Mr. Paulos' conviction, however, because they found that the trial judge's "credibility finding would have been the same" even absent reliance on this assumption, in view of other aspects of the evidence: para 47; see also paras 44-48 more generally.
[243] *TL*, *ibid* at para 4.

[the complainant] consented to sex while she was menstruating."[244] The Court of Appeal found this remark to be "problematic" but "decline[d] to reach a final conclusion" about whether it amounted to stereotyping; this is because it was impossible to discern whether there was specific evidence in the court below that this specific complainant would have refused sex on this basis.[245] Despite this ambivalence, *TL* suggests that the trial judge would have committed reversible error had he hinged the conviction on a blanket assumption that no woman would consent to sex while menstruating.

Lastly, one appellate case has dealt with a defence claim of stereotyping in relation to consent in certain emotional circumstances. In *Gélinas c R*,[246] the defence appealed a sexual assault conviction by attacking the following statement made by the trial judge: "Le Tribunal est convaincu que madame n'est pas en amour avec l'accusé. Elle aime sa compagnie sans plus."[247] The Quebec Court of Appeal (QCCA) rejected the argument that Mr. Gélinas' conviction resulted from stereotyping; it found instead that the impugned comment was a response to the defence suggestion that the complainant "avait mis de faux espoirs en l'appelant, qu'elle attendait plus de lui, qu'elle voulait une relation sexuelle avec de l'amour, avec une naissance d'amour, etc." Accordingly, the trial judge had not inferred from the complainant's lack of romantic love for the accused that a sexual assault had occurred.[248] The Court of Appeal's reasoning, however, suggests that it would amount to stereotyping to assume that a woman would not consent to loveless sex and that the operative concern is whether the trial record shows an evidentiary grounding for applying this finding to the complainant.

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[244] Reproduced in *TL*, *ibid* at para 34.
[245] *TL*, *ibid* at para 48.
[246] *Gélinas c R*, 2020 QCCA 1693 [*Gélinas*].
[247] *R c Gélinas*, 2020 QCCQ 8903 at para 47.
[248] *Gélinas*, *supra* note 246 at para 8.

For all the variability in their outcomes, the cases just reviewed all recognize that assuming that women will not consent to sex in certain physical settings or under particular bodily or emotional conditions can run afoul of the prohibition against stereotyping. Once more, however, they turn on whether some evidence in the case in question can support a finding that is *consistent* with this stereotype – namely, that a specific complainant did not consent in one or more of those circumstances.

Stereotype: Women generally do not initiate or escalate sexual contact

The final type of defence-raised stereotypes about women's sexual timidity involves assumptions that women will not initiate or escalate sexual activity. This was first argued on appeal in *R v Roberts*.[249] The complainant testified that she went to bed upset after an argument with her common-law partner, who decided to sleep elsewhere that night. She awoke to find the accused, a neighbour and friend of her partner's, penetrating her vagina with his penis; when she resisted, he struck her unconscious and continued to sexually assault her. On the accused's account, the complainant welcomed him into her home in a friendly manner and initiated sex with him twice. The trial judge convicted Mr. Roberts and found his testimony "implausible" in the following terms:

> On the accused's evidence, every aspect of the sexual encounter between the accused and [the complainant] is instigated by [the complainant]. While that is not impossible, it certainly seems improbable. [The complainant] goes from upset, mad, and crying to happy and giggling in a short period of time and then initiates multiple encounters with the accused, whom she barely knows.[250]

The Northwest Territories Court of Appeal rejected the defence argument that this passage showed reliance on M&S.[251] Instead, the trial judge found that "in the factual matrix of *this* case,

[249] *R v Roberts*, 2017 NWTCA 9 [*Roberts*].
[250] Reproduced in *Roberts*, *ibid* at paras 32, 55 and 67.
[251] *Roberts*, *ibid* at paras 51, 62 and 65-66; see also paras 3, 56 and 64.

this complainant would not have instigated multiple sexual encounters with the appellant."[252] This matrix included conflicting evidence from the complainant's common-law partner and another friend who had seen her earlier that night, as well as several injuries the complainant had sustained to her face and legs.[253] The Court of Appeal's reasoning, however, suggests it would have accepted the defence claim of stereotyping absent such an evidentiary foundation.

Starker recognition of this defence-raised stereotype materialized in *R v Cepic*.[254] The complainant attended a male strip club where the accused worked as a dancer, and she paid him for two lap dances, the second of which took place in a private VIP room. On her account, the accused forced her into oral and vaginal intercourse in the VIP lounge, while the accused testified that all sexual contact between them was consensual. One issue at trial was whether the complainant had reached into the accused's pants to touch his penis during the first dance in the main room of the club. In convicting the accused, the trial judge found this "implausible" because the complainant had "never had a lap dance before" and "never been in a strip club before" and so would not have "know[n] what to expect."[255]

The ONCA accepted the defence argument that this reasoning rested on "behavioural assumptions and stereotypes."[256] The trial judge had "started from the assumption about what a young woman would do in a strip club and carried that theme throughout her analysis."[257] Her determinations on this and related issues[258] amounted to "blatant assumptions, unsupported by

[252] *Roberts*, *ibid* at para 66.
[253] *Roberts*, *ibid* at paras 62 and 65-69.
[254] *Cepic*, *supra* note 222.
[255] Reproduced in *Cepic*, *ibid* at para 16.
[256] *Cepic*, *ibid* at para 1; see also para 11.
[257] *Cepic*, *ibid* at paras 15-16; see also paras 23 and 27.
[258] The trial judge also found two other defence claims to be "implausible and nonsensical" (i.e., that the complainant told the accused she had a boyfriend right before he ejaculated) or to "ma[ke] no sense" (i.e., the accused's account of their physical positions during intercourse, which contradicted the complainant's testimony that she was trying to push him off of her): see *Cepic*, *ibid* at paras 17-18.

the evidence" about "what 'made no sense' or was 'implausible'."[259] Moreover, the trial judge had failed to account for "the uncontroverted evidence that the complainant actively pursued the appellant for dances." While this evidence was obviously not determinative of consent, it could not be ignored to make way for a finding "that the complainant could not have been the sexual aggressor and was stunned and confused" by Mr. Cepic's conduct.[260]

Subsequent appellate cases have shown consistent recognition of the stereotype that women are unlikely to initiate or escalate sexual contact, even when they find the impugned inference had an evidentiary basis. The QCCA has expressly recognized in two recent cases that such an assumption would amount to stereotyping were it not grounded in the evidence.[261] Other courts of appeal have offered more tacit recognition, in that their treatment and rejection of the defence argument implies acceptance of the possibility of stereotyping on this basis.[262] While only *Cepic* succeeded in securing an order for a new trial, all of these judgments suggest that a trial judge would err by finding that a complainant did not consent to sex on the basis of an assumption that women usually do not instigate or intensify sexual activity. It is simply that appellate courts are loath to find this error to be made out when the evidence shows why the trial judge did not believe that a complainant acted as the defence claims she did. Once more, this is a finding that the evidence can support a finding that is *consistent* with that which would flow from applying the stereotype.

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[259] *Cepic*, *ibid* at para 19.
[260] *Cepic*, *ibid* at para 26.
[261] *DP c R*, 2022 QCCA 42 at paras 6-7 [*DP*]; *Kritik-Langer*, *supra* note 207 at para 38. Both of these cases also involve defence arguments that the trial judge relied on the stereotype that women do not ordinarily consent to sex with older men.
[262] See, e.g., *R v Kuzmich*, 2020 ONCA 359 at paras 100-101; *R v Conway*, 2021 BCCA 460 at paras 46-47 and 60; *R v Bowers*, 2022 ABCA 149 at paras 55-56.

Discussion

The specific stereotypes reviewed in this section of the chapter are all instances of a more general stereotype that women, by virtue of being women, are prone to sexual timidity. Accordingly, they fulfill the criteria for stereotyping that is distinctive to sexual assault law set out earlier in this thesis. What is more, the defence counsel who have raised them in appeals from conviction for sexual assault have generally done so in a way that works with, rather than disputes, the law that governs this offence, including its reforms that flow from the recognition of Crown-raised M&S.

All of these stereotypes have been made out at least once on appeal and been found to justify an order for a new trial. That said, these defence successes are outnumbered by their corresponding failures, and intermediate appellate courts make short work of these stereotyping claims where the evidence supports a finding (i.e., a lack of the complainant's consent) that is *consistent* with that which would flow from the stereotype in question. This application of the consistency principle, moreover, aligns with that of the *neutralization* principle. The recognition of stereotypes about women's sexual timidity need not revive, or undermine the recognition of, Crown-raised M&S concerning women's propensity to consent or to bring false complaints. Instead, it can neutralize these assumptions and restore courts to a healthy uncertainty and open-mindedness as to whom to believe about key facts in dispute, such that they are motivated to attend closely to the evidence at hand and what inferences can be drawn therefrom.

For all these caveats, it is worthwhile to expound at greater length on certain factors about which courts should be mindful when hearing arguments that stereotypes about women's sexual timidity may have founded a conviction. This is a matter of ensuring they know what to look for when determining whether the evidence supports a finding that might be consistent with

that which would flow from such a stereotype. On this basis, the following discussion reviews key elements of equality and agency scholarship which rise above the black letter law of the *Criminal Code* and SCC holdings to advance certain sociolegal understandings of consent. In the result, we will be better equipped to situate stereotypes about women's sexual timidity within the legal *and* social context of sexual assault in Canada and to guard against overreliance on them in cases where the evidence fairly supports conviction. This discussion will be both drawn on and extended once this chapter has reviewed the appellate case law dealing with M&S about men's sexual opportunism.

Running through Canadian equality scholarship is a somewhat surprising concern about the effects of a concerted focus on consent in sexual assault law – including, if not especially, in its most "affirmative" form. For Lise Gotell and Melanie Randall, our present-day "context of neoliberal governance" diverts us from the need for systemic responses to sex inequality and sexual assault and toward a "privatizing" and "responsibilizing" framework that imagines sexual partners as rational, self-interested free agents. This framework leads us to look for "atomized" moments of agreement to sexual activity, without considering the ways in which women's choices might be constrained, notably by power imbalances between them and their male sexual partners or by broader social disadvantage they might experience.[263] As a result, "ideal" feminine subjects are defined in terms of their aptitude for "risk management." Women are expected to manage their risk of sexual violence by avoiding activities and settings that are linked to unwanted sexual activity (if only in the popular imagination). When they fail in this, they are

[263] Lise Gotell, "Thinly Construing," *supra* note 101 at 60-61; Lise Gotell, "Governing Heterosexuality," *supra* note 101 at 361-362, 365-366, 370-372 and 378-381; Melanie Randall, "Ideal Victims," *supra* note 22 at 409; Lise Gotell, "Rethinking Affirmative Consent," *supra* note 101 at 873-875; Lise Gotell, "When Privacy Is Not Enough," *supra* note 172 at 746-747 and 750-753.

held responsible for not being more careful or, worse, assumed to have chosen – and therefore consented to – any sexual contact that occurred during such activities or in such settings.[264]

Related currents in equality scholarship have illustrated these issues more concretely. This literature includes several expressions of concern about women marginalized at the sites of race and Indigeneity, disability and socioeconomic status, women in long-term abusive relationships and women who are intoxicated.[265] These women are targeted for sexual assault precisely because of constraints on their scope of action, but the prevailing focus on consent in sexual assault law – coupled with a default assumption that we generally make rational choices in our own interest – may lead courts to find their consent (or a reasonable doubt about its absence) without inquiring into those constraints. Other threads of this literature worry about courts too readily finding consent in relation to certain forms of sexual activity, such as prostitution and sadomasochism, in which women might appear to choose sexual activity that they do not truly want, that may cause them lasting harm and/or that simply exemplifies sex inequality.[266]

Lastly, and more generally, some equality scholarship emphasizes that sexual activity should not be deemed consensual if it was merely "agreed to" but rather only if it was truly "wanted." Janine Benedet and Isabel Grant envision this as requiring that "both parties […] be

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[264] Lise Gotell, "Thinly Construing," *ibid* at 53-54 and 60-61; Lise Gotell, "Governing Heterosexuality," *ibid* at 366-367; Melanie Randall, "Ideal Victims," *ibid* at 409 and 414-415; Lise Gotell, "Rethinking Affirmative Consent," *ibid* at 875 and 878-882; Lise Gotell, "When Privacy Is Not Enough," *ibid* at 769-770.
[265] Janine Benedet, "Sexual Assault Cases at the ABCA," *supra* note 103 at para 58; Janine Benedet, "Trading Sex Equality for Agency and Choice?", *supra* note 197 at 170-171, 174 and 182; Lucinda Vandervort, "Affirmative Sexual Consent," *supra* note 139 at 404-406; Lise Gotell, "Governing Heterosexuality," *ibid* at 367; Melanie Randall, "Ideal Victims," *ibid* at 409-411 and 414; Lise Gotell, "When Privacy Is Not Enough," *ibid* at 748-749.
[266] Janine Benedet, "*Barton*," *supra* note 136 at 445 (see also 450-452); Janine Benedet, "Trading Sex Equality for Agency and Choice?", *ibid* at 182-183 and 186; Karen Busby, "Every Breath You Take: Erotic Asphyxiation, Vengeful Wives, and Other Enduring Myths in Spousal Sexual Assault Prosecutions" (2012) 24 *Can J Women & L* 328 at 346, 349-350, 352 and 358. See also Elaine Craig, "The Legal Regulation of Sadomasochism," *supra* note 9 at 416-417.

[…] feeling something that is mutually pleasurable or desirable in some sense" when they engage in sexual contact.[267] Absent this mutuality, the *Criminal Code*'s definition of consent as entailing "voluntary agreement" risks being found to be made out in circumstances of bare acquiescence or submission secured, for example, by actual or threatened force, a misuse of trust, power or authority, or the exploitation of incapacity.[268]

The agency scholarship of Michael Plaxton and Elaine Craig offers an important complement to the equality concerns just raised. For them, our understanding of sexuality and sexual assault must allow significant breadth for valuing and pursuing the sexual contact we do want.[269] This emphasis on our positive autonomy interest is not unconstrained by a criterion of mutuality, but it does involve a wider view of the conditions that can fulfill that criterion. For Plaxton, mutuality can be found even absent contemporaneous consent, provided the sexual touching in question is relatively non-intrusive and is carried out in the context of a long-term relationship marked by loyalty and in which both partners have ample "voice" in determining the norms that govern them and an ongoing opportunity for "exit."[270] Craig, for her part, contends that mutuality can be met even where only one sexual partner experiences pleasure[271] and even where the other partner might "desire" the contact for reasons other than their own pleasure.[272]

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[267] Janine Benedet and Isabel Grant, "*R v A(J)*: Confusing Unconsciousness with Autonomy" (2010) 74 *CR* (6th) 80 at 83.

[268] Consider the following illustration in Isabel Grant and Janine Benedet, "Capacity and Consent," *supra* note 103 at 103: "There are numerous reasons why a complainant submits to sexual activity that she does not want to happen: the victim of domestic assault who wants to calm down her partner so that he will stop hurting her; the drug user who wants access to her supply that the accused controls; or the low-wage worker concerned for her continued employment if she does not go along with her employer's advances" (see also 81, 92, 93-94, 98, 99-100 and 102).

[269] For general statements to this effect, see Michael Plaxton, *Implied Consent*, *supra* note 15 at 17-18, 23, 25, 46, 57-58 and 65-66 (see also 95-100); Elaine Craig, *Troubling Sex*, *supra* note 5 at 2, 7-8, 71-74, 125, 130 and 153. See also Elaine Craig, "The Legal Regulation of Sadomasochism," *supra* note 9 at 404-405; and Elaine Craig, "Capacity to Consent to Sexual Risk," *supra* note 9 at 105-107.

[270] Michael Plaxton, *Implied Consent*, *ibid* at 23-24, 104-144, 165 and 190.

[271] Elaine Craig, *Troubling Sex*, *supra* note 5 at 112-114.

[272] Consider the following illustration in Elaine Craig, *Troubling Sex*, *ibid* at 84: "People consent to sex for money, out of boredom or curiosity, or even out of pity. People consent to sex because they are too tired to argue with their partner and they know that next time around it might be them initiating. People consent to sex to gain social capital

Equality scholars raise compelling points that courts should take into account to the extent that they recognize stereotypes about women generally not consenting to sex under certain conditions. It is true that courts should not limit themselves to considering consent (or its absence) in terms reduced to the basic norms of contractual exchange as these might apply to parties assumed to be similarly situated. They should also attend to any potential coercion or exploitation on the part of an accused and consider whether the complainant's mindset at the relevant time was one of truly voluntary agreement. Agency scholars do not purport to displace these concerns by appealing to our positive autonomy interest; rather, they view this interest as simply the flip side of our negative autonomy interest, in a unified concept of sexual agency or integrity. That said, Plaxton and Craig remind us that we should not necessarily rush to findings of non-consent by adhering to stringent requirements of symmetry for sexual pleasure or desire, or by invalidating all decisions made by women that appear not to align with sex equality. Both of these scholarly currents can inform our understanding of stereotypes about women's sexual timidity.

The intermediate appellate cases dealing with these defence-raised stereotypes do not involve sexual activity to which some equality scholars contend we cannot (or should not be able to) consent, such as prostitution or sadomasochism. Nor do they seem on their face to raise concerns about the complainant's marginalization at the sites of race or Indigeneity, disability or socioeconomic status (at least as compared to that of the accused), and none of them features an

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or to affirm their identity. […] In all of [these circumstances], an interest is present, and so mutuality and thus sexual integrity is maintained. The need for mutuality to preserve sexual integrity does not suggest that power imbalances necessarily vitiate consent. People with less (or different kinds of) power can consent to people with more power and mutuality is still maintained. Mutuality is compromised where consent flows only as a result of power, whether perceived or real, whether exercised or not" (see also 115). See also Robyn Doolittle, *Had It Coming*, *supra* note 104 at 82: "[T]here's no law that says you have to be excited about having intercourse. (Think of a couple in a long-term relationship. There are all sorts of reasons why one partner may agree to sex, even though they aren't feeling very 'enthusiastic' about it.)"

accused and a complainant in a long-term relationship, much less one marked by abuse. Many of these cases, to be sure, do involve intoxication by alcohol or drugs on the part of the complainant (and, often enough, the accused). Courts should indeed scrutinize the evidence in a given case to assess whether any verbal or physical agreement they find was given by the complainant may have been induced by fear, threats or force[273] or the misuse of trust, power or authority[274] on the part of the accused. They ought also to consider, of course, whether a complainant's capacity to give consent was impaired at the relevant time by her intoxication, disability or other causes.[275] Lastly, they should also consider the full duration and variety of sexual contact in question in case the complainant lacked consent at other points in time or in relation to certain acts.[276]

Recognizing stereotypes about women's sexual timidity need not be a matter of sweeping these concerns aside. It can instead be one of leaving *some* inferential space for the possibility of an active and adventurous female sexuality when this arises on the evidence (and when such a possibility is not belied by factors that legally preclude or invalidate a finding of the complainant's consent). Recall, after all, that equality and agency scholars alike agree that a widespread expectation of female submissiveness or passivity contributes to both sexual assault and stereotyping about it.[277] This same scholarship seems also to aspire for a world in which women are neither assumed nor socialized to be sexually timid and are free to explore their

[273] See ss. 265(3)(a)-(b) of the *Criminal Code*.
[274] See ss. 265(3)(d) and 273.1(2)(c) of the *Criminal Code*.
[275] See ss. 273.1(2)(a.1)-(b) of the *Criminal Code*. Note that in *GF*, *supra* note 35 at para 84, the SCC observed that "[o]bviously, equating *any* degree of intoxication with incapacity would be wrong in law" [emphasis in original]; see also para 5.
[276] In *GF*, *ibid* at para 63, the SCC observed that "[t]here is no reason why the entire course of sexual activity must be blanketed with a single finding of consent, non-consent, or incapacity." See also *Hutchinson*, *supra* note 120 at para 54 and *Kirkpatrick*, *supra* note 12 at paras 53 and 94, where the SCC notes that "agreement to one form of penetration is not agreement to any or all forms of penetration and agreement to sexual touching on one part of the body is not agreement to all sexual touching."
[277] See Michael Plaxton, *Implied Consent*, *supra* note 15 at 12, 21, 45 and 148 and the equality scholarship cited at note 101.

sexuality within and beyond conventional contexts.[278] An important first step toward moving beyond the social norm of female sexual submissiveness or passivity is to recognize those occasions, however limited in the case law, that demonstrate that women can be sexually adventurous.

In the result, the problem of M&S in sexual assault can be construed not only as a matter of dispelling assumptions about women's routine consent, dishonesty or inaccuracy, but also as extending to the disavowal of assumptions about their sexual timidity. Recognition of both of these sets of assumptions can function sensibly and equitably, provided the recognition of one is not seen to revive the other and that such recognition has a *neutralizing* effect. In turn, Canadian courts are prompted to consider the evidence in a given case closely and contextually with a view to determining if it supports a finding that is *consistent* with that which would flow from one or more such assumption(s). This would seem to align well with equality scholars' call for sexual assault law to look beyond "atomized" moments of agreement and to take account of the broader dynamic between the complainant and the accused.

Defence-Raised Stereotypes and Myths about Men's Sexual Opportunism

The next category of defence-raised M&S squarely concerns assumptions about men and/or accused persons which, as flagged above, are sometimes taken to compose the principal defence intervention in this area. These M&S involve generalizations about men's sexual opportunism, and they have taken three forms. The first two are stereotypes: one involves the empirical claim that men are so driven by their impulses that they are unlikely to pass up an

[278] See, e.g., Elaine Craig, "The Legal Regulation of Sadomasochism," *supra* note 9 at 404-405; and Melanie Randall, "Ideal Victims," *supra* note 22 at 423, on "the project of developing an expanded space of autonomy and agency in women's lives."

opportunity for sexual contact, while the other involves an empirical claim that men normally do not carefully inquire about their partners' consent. Recognizing these assumptions as stereotypes has the potential to open up triers of fact to the possibility that men may not always be interested in sex and that, when they are, they can show genuine concern about their partners' agreement. This recognition has the effect of eliminating a shortcut to finding that the *actus reus* element of sexual touching, or that a lack of consent for purposes of the *actus reus* and *mens rea*, has been made out beyond a reasonable doubt.

The third assumption actually consists of a pair of myths and concerns the (il)logical connections between a man's extensive history and his lack of credibility or likelihood of sexual offending. Recognizing these myths as such tends to bar mere reliance on an accused's active sex life to support a conviction. As with the stereotypes noted above, this recognition deprives the trier of fact of reasoning shortcuts they might otherwise use to find that the alleged sexual touching occurred and/or that any such touching transpired without the complainant's consent (and that the accused knew or was wilfully blind or reckless as to this fact). Analyzing this pair of myths will show their resonance with the Crown-raised 'twin myths' relating to evidence of complainants' sexual activity, which were reviewed in Chapter 1.

Defence appeals based on M&S about men's sexual opportunism have also garnered mixed success in Canada's intermediate appellate courts. All three formulations reviewed in this section of the chapter have been recognized as M&S and been found, at least once, to be made out on the record and to warrant a new trial. However, courts of appeal also make sure to inquire carefully into whether some evidentiary basis at trial could support the impugned inference; when they find such a basis, they are prone to dismiss the appeal from conviction. Once more, this section withholds from opining on whether the appellate panel is correct in finding such an

evidentiary basis. Instead, it focuses on these courts' explicit or implicit recognition of the purported M&S and their comfort in finding *consistency* therewith when this flows from the evidence pertaining to the principal witnesses.

The case law review below is followed by a proposal that Canadian law should affirm and retain the recognition of M&S about men's sexual opportunism. These M&S meet the criteria proposed in Chapter 1, and they need not be seen as reviving Crown-raised M&S about women's consent, mendacity or inaccuracy if we bear in mind that recognizing them has only a *neutralizing* effect. This section of the chapter will then close by offering a set of considerations that appellate courts can use in determining what follows from recognizing M&S about men's sexual opportunism; these considerations are tailored to the various formulations of these M&S noted above. This analysis draws on the same equality and agency scholarship invoked in the preceding section and, once again, the account of sexual assault law that Chapter 1 yielded. It aims to ensure that M&S about men's sexual opportunism are not unduly invoked by the defence where the evidence supports findings that tend toward conviction, even where such findings might be *consistent* with those that would flow from applying these M&S. Again, this is a matter of guarding against the misuse of the recognition of M&S about men's sexual opportunism to obscure important aspects of sexual assault law, so that this recognition alone does not open the door to scandalous acquittals or dubious reversals of conviction.

Stereotype: Men generally do not decline sex for lack of interest

The first defence-raised M&S about men's sexual opportunism is the stereotype that men are rarely uninterested in, and so generally do not decline, sexual contact. This assumption was first attacked in a provincial court of appeal in *R v Quartey*.[279] At issue was an instance of

[279] *Quartey*, *supra* note 221.

vaginal intercourse to which the complainant testified she did not consent; Mr. Quartey testified that she had consented but also that he was trying to avoid having sex with her because he was tired and had to work early the next day. On his account, they had sex only because he "unfortunately" found two condoms and only after she confirmed her consent three times in response to his queries. He also testified that the complainant tried to fellate him before they had intercourse, but he pushed her head away "because I don't like that." In convicting the accused, the trial judge remarked that much of his evidence on these issues amounted to "unbelievable explanation[s]."[280]

A majority of the ABCA rejected the defence argument that Mr. Quartey was convicted based on stereotyping that "men would never be reticent to engage in sexual behavior or to refuse fellatio."[281] They found that many internal contradictions in the accused's testimony grounded the trial judge's disbelief that he was not interested in sex with the complainant. While the majority conceded that "[i]f viewed in isolation some of the trial judge's statements might raise a concern about stereotypical male thinking and attitudes," reviewing the judgment as a whole showed that "his views were about the appellant, not men in general."[282] The SCC dismissed a further appeal in brief oral reasons that endorsed the majority's findings on this issue.[283] While neither appellate court in *Quartey* expressly recognized the stereotype that men rarely decline sex, Lisa Dufraimont has noted that the case's "clear implication […] is that the accused's appeal would have succeeded if the trial judge had indeed relied on stereotypes about

[280] See *Quartey*, *ibid* at paras 12 and 70-72.
[281] *Quartey*, *ibid* at para 14(ii).
[282] *Quartey*, *ibid* at para 34; see also para 21. A dissenting judgment found that the trial judge had "impermissibl[y] rel[ied] upon generalizations […] for which there [was] no evidentiary support" and had rejected Mr. Quartey's version of events by measuring them against "some normal or 'idealized standards of conduct'" said to apply to individuals accused of sexual assault: see paras 73 and 87.
[283] *R v Quartey*, 2018 SCC 59 at para 3.

men and male sexuality."[284] Indeed, by simply rejecting that the alleged stereotype was in fact relied on, both the ABCA and the SCC implicitly accepted that it *would* qualify as a stereotype to suggest that men would never be uninterested in, or decline, sexual contact.

Firmer appellate recognition of this defence-raised stereotype arose in *Robbins c R.*[285] The complainant testified that Mr. Robbins held her down on a bathroom floor while another man penetrated her vagina without her consent, and then proceeded to penetrate her himself. Mr. Robbins testified that although he entered the bathroom, he did so only to brush his teeth and left once he saw the complainant fellating the other man. In convicting Mr. Robbins, the trial judge noted that she "did not believe that he quickly left the bathroom when [the co-accused] was having sex with [the complainant]. For any normal young man, it is an exciting scene to look at."[286] The QCCA accepted the defence argument that Mr. Robbins had been disbelieved on the basis of "des préjugés et des stéréotypes" and ordered a new trial. While there was evidence that could have supported the trial judge's finding that Mr. Robbins did not leave the bathroom as he claimed, her reasons suggested reliance instead on an assumption that "en raison de son jeune âge, il ne pouvait que vouloir assister, voire participer à l'activité sexuelle en cours."[287] This case stands out as the most prominent appellate recognition of the stereotype that men (or young men) are invariably interested in sex and, as a result, unlikely to turn down the chance to partake in it.

More recent appellate cases have dealt with variations on this stereotype and shown comparable recognition thereof even as they dismiss the appeals from conviction at issue. In *R v Kelkas*,[288] the ONCA rejected a defence claim that the trial judge had engaged in stereotyping by

[284] Lisa Dufraimont, "Current Complications," *supra* note 3 at 548.
[285] *Robbins*, *supra* note 221.
[286] Reproduced in *Robbins*, *ibid* at para 22.
[287] *Robbins*, *ibid* at para 36; see also para 37.
[288] *R v Kelkas*, 2021 ONCA 664 [*Kelkas*].

finding it "incredible" that the accused was "turned off" by the complainant while they were having vaginal intercourse. Instead, this finding was based "on the evidence that the appellant said he was attracted to [the complainant] and that he had taken her to the store to buy condoms." This, combined with "the appellant's history of lying," afforded the trial judge a basis to disbelieve Mr. Kelkas' claim that he was not interested in sex with the complainant and his related evidence that she had largely initiated their sexual contact.[289] In *Kritik-Langer c R*,[290] the defence attacked statements by the trial judge that the accused was "totally dependent on his impulses" and "driven by his drive to have sex with complainant [sic]." While the QCCA expressed concern that there was "weak support in the evidence" for these comments, it found that the trial judge was entitled to disbelieve Mr. Kritik-Langer's claim that he intended only to rest when he attended the residence where the complainant was babysitting. This is because he had emphasized in his testimony that she had shown interest in him earlier that night, and his "level of inebriation gave the judge good cause to question his recollection of events."[291]

As in *Quartey*, these defence appeals based on alleged stereotyping about men seldom declining sex for lack of interest did not succeed. *Robbins* remains the only case in this area where the stereotype was made out for lack of an evidentiary foundation. The reasoning in all of these cases, however, suggests that intermediate appellate courts recognize this stereotype as such and that reversible error can occur absent evidence to support the impugned findings. This is a matter of their comfort with ruling that such evidence can ground a finding that is *consistent* with that which might flow from applying the stereotype.

[289] *Kelkas*, *ibid* at 9; see para 4 for more context.
[290] *Kritik-Langer*, *supra* note 207.
[291] *Kritik-Langer*, *ibid* at paras 31-35.

Stereotype: Men generally do not inquire assiduously about their partners' consent

A second defence-raised stereotype about men's sexual opportunism concerns an assumption that men do not routinely take care to ensure that their partners are consenting. The strongest recognition of this stereotype derives from *R v JC*,[292] which this thesis reviewed more generally toward the end of Chapter 1. The accused testified at trial that, on the occasion at issue, he carried out his usual practice of inquiring about the complainant's consent with every escalation of their sexual activity. In his reasons for conviction, the trial judge repeatedly expressed doubt about Mr. C's credibility on this point, finding it to be both "too perfect, too mechanical, too rehearsed, and too politically correct to be believed" and "not in accord with common sense and experience about how sexual encounters unfold."[293]

Justice Paciocco, writing for the ONCA, found that the trial judge had breached both the rule against UCSAs and the rule against stereotyping. The former rule was violated because the trial judge had made "a bald generalization" with no evidentiary basis in finding that the accused's testimony defied common sense and experience.[294] The latter rule was breached because the trial judge had "invok[ed] a stereotype that people engaged in sexual activity simply do not achieve the 'politically correct' ideal of expressly discussing consent to progressive sexual acts."[295] What is more, some measure of irony was at play, in that the trial judge disbelieved the accused's testimony essentially on the basis that he claimed to have done exactly, if not more than, what the law required of him in the circumstances.[296] Justice Paciocco ordered a new trial based on these and other errors relating to stereotyping and UCSAs.

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[292] *JC*, *supra* note 207.
[293] Reproduced in *JC*, *ibid* at paras 50-51; see also paras 52 and 54.
[294] *JC*, *ibid* at para 96.
[295] *JC*, *ibid* at para 97.
[296] *JC*, *ibid* at para 98: "In fact, the behaviour the trial judge rejected as 'too perfect', 'too mechanical', and 'too politically correct' to be believed is encouraged by the law, […] certainly prudent [and] not [to be] believed *ab initio*."

A comparable defence-raised stereotyping claim was made in another appellate case decided before *JC*. In *R v CMM*,[297] the complainant testified that the accused "dragged or pulled" her into a washroom cubicle at a night club and subjected her to non-consensual sex. On the accused's account, he and the complainant entered the washroom after agreeing to find somewhere they could be alone. After some initial sexual activity, he asked her "if she wanted to have sex and she said 'yeah'." They engaged in vaginal intercourse, and there was undisputed evidence that this resulted in a vaginal injury, causing the complainant to bleed onto the floor. The accused testified that he asked the complainant "if she was alright" and "[s]he told him she was fine" before he left the stall.[298] In convicting the accused, the trial judge suggested that it "d[id] not make sense" that the accused would ask the complainant about her consent "just before the intercourse occurred, rather than at the start of the activity in the cubicle." He also found that the accused had "show[n] no concern at all" for the complainant's "well-being" at the end of their encounter and found that this tended to show that their sexual activity was forced.[299] Such a lack of concern was "at odds with what someone would reasonably expect any man to do if he just had engaged in consensual sex with a woman."[300]

The BCCA allowed the accused's appeal from conviction on other grounds[301] and, as a result, declined to decide "whether the [trial] judge's impugned comments amount[ed] to unfairly prejudicial speculative reasoning, or an erroneous application of generalizations and stereotypes." The Court did register two strong cautions, however, namely "that speculative reasoning relying on 'common sense' propositions that are not grounded in the evidence can give

[297] *CMM*, *supra* note 221.
[298] *CMM*, *ibid* at para 17.
[299] *CMM*, *ibid* at paras 134-135.
[300] *R v CMM*, 2017 BCPC 443 at para 60(c), reproduced in *CMM*, *ibid* at para 135 [emphasis removed].
[301] *CMM*, *ibid* at paras 65-110 and 132.

rise to reversible error" and "that a negative assessment of credibility based on an unfounded stereotype constitutes an error of law[.]"[302] As such, it recognized the dangers of reasoning that men generally do not inquire about their partner's consent before escalating sexual activity. (So too did it caution against assuming that men normally show concern about their partners' well-being following consensual sex.)

JC and its more modest forerunner, *CMM*, exemplify appellate recognition of the defence-raised stereotype that men are normally not so concerned about the consent of their partners as to inquire about it with every escalation of sexual contact. To be sure, they show that it is open to a trial judge to find that an accused did not so inquire based on evidence, and thus to find permissible *consistency* with this stereotype. However, their takeaway message is that it is an error to disbelieve an accused's testimony to this effect based on prejudicial generalizations that "no-one would be this careful"[303] or that men do not habitually behave in this way.

Myths: A propensity for sexual offending or unworthiness of belief can be inferred from an accused's sexual activity on other occasions

The final defence-raised M&S reflecting assumptions about men's sexual opportunism consists of two myths – namely, that the sexual history of an accused tends to show his lack of credibility or his inclination toward sexual offending. Recall from Chapter 1 that evidence of a complainant's other sexual activity is tightly regulated by the *Criminal Code* and SCC authority. It is presumptively inadmissible generally, and it is categorically inadmissible when adduced in support of one of the 'twin myths'. These myths involve false logical relations between a complainant's sexual history and her likelihood of having consented on the occasion in question

[302] *CMM*, *ibid* at paras 138-139.
[303] *JC*, *supra* note 207 at para 97.

or her unworthiness of belief. The defence-raised M&S reviewed in the present subsection are essentially a twist on these same myths.

In *R v Grant*,[304] the accused was cross-examined at trial on his use of Tinder, the dating app through which he met the complainant. He agreed with the Crown's suggestion that he had "met a lot of women" on Tinder for "hookups" in the two years preceding the alleged offence but testified that he could not remember how many times this occurred or the details of any of these other encounters. In convicting Mr. Grant, the trial judge found that he had "no doubt that the accused looked upon his intended meeting with the complainant as one more 'hookup'" and was "skeptical" of his evidence that he could not remember how many hookups he had arranged through Tinder.[305] The BCCA allowed an appeal from conviction based on the defence argument that the trial judge had drawn improper inferences from the sexual history evidence elicited by the Crown.

The Court of Appeal reviewed the longstanding protections relating to evidence of complainants' other sexual activity and ruled that similar evidence pertaining to an accused should also "be treated cautiously, and not routinely admitted." When such evidence is admitted, "precautions should be taken to ensure that it is not misused to simply label the accused as a person unworthy of credit or respect."[306] In this case, the BCCA found that the Crown had invited evidence of Mr. Grant's other sexual activity with a view "to paint[ing] him as a person who was promiscuous and a sexual opportunist." Put another way, "the Crown was seeking to rely on an inference that a promiscuous person is likely to be indifferent to the issue of consent,

[304] *Grant*, *supra* note 222.
[305] *R v Grant*, 2018 BCSC 413 at paras 178-179, reproduced in *Grant*, *ibid* at para 21.
[306] *Grant, ibid* at para 30. The Court added at para 32 that "[w]e cannot countenance an asymmetry in which tenuously relevant evidence of the complainant's sexual history is excluded, but equally dubious evidence of the accused's sexual history is used to draw questionable inferences."

and is more likely to be dishonest than someone whose sexual habits are more restrained."[307] Mr. Grant's conviction was tainted by the trial judge's "problematic"[308] reliance on this evidence, and a new trial was required. This case makes clear that the admission and use of evidence of an accused's sexual history risks inviting the prejudicial inferences that he is unworthy of belief or careless about his partners' consent.

Similar reasoning took hold in *GG c R*,[309] a case involving charges of historical sexual abuse involving the accused and his young female relatives and which turned only on whether the sexual touching in question occurred. The trial judge noted that Mr. G and his spouse had "une moralité de vie" that he found "particulière" and even "questionnable." While he stated that this could not inform his fact-finding, he observed all the same that "la sexualité occupait une place importante dans la vie de l'accusé."[310] These comments were rooted in evidence that the accused and his wife habitually engaged in nudism, swinging, strip poker and watching pornographic videos. The trial judge further found that the accused's testimony that he needed to make love three to four times a day amounted to a "[t]rès belle démonstration de son obsession continuelle sur le sexe."[311]

The QCCA allowed Mr. G's appeal from conviction upon accepting the defence argument that the trial judge's credibility assessment was carried out "à l'aune de préjugés."[312] The Court of Appeal noted that sexual history evidence relating to the accused, like that relating to the complainant, is presumptively inadmissible.[313] In this case, the trial judge had failed to

[307] *Grant*, *ibid* at para 31.
[308] *Grant*, *ibid* at para 33.
[309] *GG*, *supra* note 207.
[310] Reproduced in *GG*, *ibid* at para 15; see also paras 38-39.
[311] Reproduced in *GG*, *ibid* at para 47.
[312] This argument was made as part of a more general ground of appeal alleging a reasonable apprehension of bias on the trial judge's part.
[313] *GG*, *supra* note 207 at paras 31 and 40-43.

explain the relevance of his statements about Mr. G's sexual history, and the nature of those comments left the QCCA hard pressed to believe that they had not informed his assessment of the accused's credibility.[314] Like *Grant, GG* stands out as a case that recognizes that men whose lives are suffused with sexual enthusiasm are vulnerable to improper reasoning about their credibility and their propensity to sexually offend. While both cases focus on treating evidence of an accused's sexual history as a species of bad character evidence, they clearly recognize that it can trigger reliance on one of the traditional 'twin myths' (i.e., unworthiness of belief) and an additional myth that an extensive sexual history signals a propensity for sexual offending.[315]

Other defence appeals have advanced variations on the arguments made in *Grant* and *GG* based on the accused's membership in a subdemographic of men. In *R v Massey-Patel,*[316] the ONCA considered a defence claim that the trial judge had convicted the accused, a dancer at a male strip club, based on improper reasoning that male sex workers are "less worthy of belief, or more likely to commit sexual offences."[317] The Court of Appeal rejected this argument, finding that the trial judge's comments about "the sexualized culture of the club" and Mr. Massey-Patel's "general routine during private dances" were legitimate in the context of the evidence in

[314] *GG, ibid* at paras 39 and 51-52.
[315] For coverage of the rules of evidence governing an accused's bad character, see Paciocco and Stuesser, *The Law of Evidence*, *supra* note 57 at Chapter 3. In short, evidence of an accused's prior bad acts other than the conduct in relation to which he has been charged is inadmissible unless the defence puts the accused's character in issue or unless the acts in question meet the test for similar fact evidence articulated in *R v Handy*, 2002 SCC 56 (namely, that its probative value in relation to a material issue exceeds its potential for "moral prejudice" and "reasoning prejudice" in the context of the case). In *Goldfinch, supra* note 36, the SCC invoked this area of evidence law as a prelude to its restrictive interpretation of the statutory framework governing *complainants*' other sexual activity: see paras 31 and following. The courts of appeal in *Grant* and *GG*, in turn, drew on these same passages in *Goldfinch* to support their conclusions in respect of an *accused*'s sexual history: see *Grant, supra* note 222 at para 25; *GG, ibid* at paras 31, 40 and 42.
[316] *R v Massey-Patel*, 2021 ONCA 860 [*Massey-Patel*].
[317] *Massey-Patel, ibid* at para 16; see also para 15.

the case.[318] Next, in *R v KBW*[319] the Saskatchewan Court of Appeal (SKCA) rejected a defence argument that the accused's conviction for sexual offences involving an underage complainant rested on an assumption that "gay men are hyper-interested in sex, especially with younger males."[320] This is because the trial judge had made "no derogatory or discriminatory reference to gay men or to their supposed habits," and the complainant had testified "that KBW had told him that he wanted him to come to [KBW's] trailer so he could 'milk [him] dry'."[321]

Implicit in both *Massey-Patel* and *KBW*, however, is that a trial judge would err by relying on myths about the credibility or licentiousness of male sex workers or gay men based on their proven or presumed sexual history. Accordingly, these cases supplement *Grant* and *GG* by clarifying that *assumptions about* an accused's other sexual activity, even absent specific evidence thereof, can also amount to M&S-based reasoning. These assumptions may be especially likely to take hold in relation to subdemographics of accused persons defined primarily by their sexual practices or preferences.

The cases reviewed in this subsection reflect recognition of defence-raised myths that an accused's unworthiness of belief or inclination toward sexual offending can be inferred from evidence about his other sexual activity. However, while *Grant* and *GG* call for the presumptive exclusion of such evidence, they refrain from finding it categorically inadmissible for any and all inferential purposes. *Massey-Patel* and *KBW*, for their part, show that evidence of an accused's

[318] *Massey-Patel*, *ibid* at paras 15-16. The ONCA also rejected several other defence-raised M&S claims, including that the trial judge had "relied on the stereotype of the sexually naïve woman to bolster the complainant's credibility or to undermine the appellant's credibility": para 17; and that she had "evoked the stereotype that sexual activity with a sex worker is 'naughty' and something to be ashamed of": para 19.
[319] *R v KBW*, 2022 SKCA 8 [*KBW*].
[320] *KBW*, *ibid* at paras 30 and 32. The SKCA also rejected a defence argument that the trial judge relied on an assumption that gay men "would prefer stereotypically to have sex in a clean place": see paras 30 and 32.
[321] *KBW*, *ibid* at paras 32-33.

sexual history is not always neatly susceptible of exclusion in any event.[322] Collectively, these cases suggest that a particular accused's lack of credibility, or his sexual offending, might properly be found within a factual matrix that *includes* evidence of his other sexual activity. It is simply that these findings, if made, must flow from specific features of this evidence or be grounded in *other* evidence in the case, rather than from general inferences that the mere fact of an accused's active sex life signals his penchant for dishonesty or sexual criminality. Once more, this is a matter of allowing for legitimate inferences *consistent* with those that would flow from these 'twin myths' when the evidence that is admitted (or proves difficult to exclude) supports them. The discussion below will further draw out these suggestions and their implications.

Discussion

The two stereotypes and pair of myths reviewed in this section of the chapter all concern empirical or (il)logical assumptions about men, by virtue of being men, acting opportunistically in sexual matters. As with the stereotypes relating to women's sexual timidity reviewed earlier, these assumptions fulfill the criteria for M&S, set out in Chapter 1, that are especially susceptible of application in sexual assault trials. Moreover, efforts by defence counsel to raise them in appeals from conviction do not involve contesting core elements of sexual assault law. Each of these M&S, too, has been recognized expressly or implicitly as such by Canada's intermediate appellate courts, sometimes to the effect of compelling a new trial. That said, these courts have shown themselves apt to carefully review the evidence adduced at trial to determine whether it

[322] Consider, too, *R v DM*, 2022 BCCA 120 at paras 13-26, in which the BCCA rejected a defence argument that the trial judge relied on M&S by using the accused's sexualized comments to his own child, the complainant, as a basis for finding his liability. The admissibility of these comments seems not to have been disputed, and the Court of Appeal simply found that the accused's conviction was well grounded in the evidence quite apart from them. The defence formulated its argument in a manner similar to the twist on the 'twin myths' reviewed in the present subsection but did not quite cast the comments as evidence of other sexual activity, even though they would seem to qualify both as other sexual activity generally, and as "communication[s] made for a sexual purpose or whose content is of a sexual nature" in particular. By virtue of s. 276 of the *Criminal Code*, these communications would be presumptively excluded if they were evidence of the *complainant*'s other sexual activity.

supports the findings impugned by the defence (i.e., the occurrence of sexual touching and/or a lack of consent in the *actus reus* or *mens rea* sense), even if these might be *consistent* with findings that would flow from the application of these M&S.

This inquiry into consistency also suggests that recognizing these M&S has a *neutralizing* effect. Courts are not being asked to find, and are not so finding, that men routinely decline sex for lack of interest or are generally careful about confirming consent, or that they cannot be found to have offended or been dishonest in cases where specific evidence of their other sexual activity is admitted or where their general sexual preferences or practices prove tricky to extract from the balance of the evidence. They are instead asked to consider what inferences legitimately flow from a close look at all the evidence, and to forego the reasoning shortcuts that facile or flawed assumptions might afford.

As in the preceding section, it is helpful to canvass considerations that courts should bear in mind when determining whether the evidence in a case supports a finding that is *consistent* with that which might otherwise flow from M&S about men's sexual opportunism. This analysis largely mirrors the earlier discussion on stereotypes about women's sexual timidity, though it is more expressly informed by equality scholarship (as Canadian agency scholars have tended not to expound on men's sexual agency to the same extent as that of women). Once more, the purpose of this analysis is to better understand how to situate these defence-raised M&S within the legal *and* social context of sexual assault and to guard against their misuse in cases where a conviction fairly flowed from the evidence at trial. The following passages focus first, and primarily, on the stereotype that men are disinclined to care about confirming consent, but we will later come to consider the stereotype that men generally do not decline sex for lack of interest and the "twin myths" relating to an accused's sexual history.

Recall that some currents of equality scholarship express concerns that a primordial focus on consent in our contemporary "neoliberal" context can obscure power imbalances between sexual partners by focusing on "atomized" moments of agreement. One result of this schema, as reviewed in the preceding section of this chapter, is that women are held responsible for choices they are presumed to have made freely and in their self-interest, even if their realistic scope of action was limited in the circumstances.[323] This same scholarship worries that neoliberal understandings of consent frame "ideal" *masculine* subjects, too, in terms of their capacity for "risk management." Lise Gotell explains that men are expected to manage their risk by seeking consent, but primarily with a view to avoiding criminal liability rather than as a matter of "insistence on respect for sexual autonomy or recognition of the harmful consequence of coerced sex."[324] In turn, our attention focuses on any agreement ostensibly given by a complainant in a sexual assault case, while the accused's role in shaping or inducing such behaviour is obscured. This contributes to what Melanie Randall describes as a phenomenon of "disappearing perpetrators."[325]

In more concrete terms, validating recognition of the stereotype that men are generally disinclined to confirm the consent of their partners may raise a concern that courts will focus on evidence of such consent-seeking without considering whether a complainant could realistically decline sexual contact with the accused. Socio-contextually, this calls for attention to whether a complainant's scope of action was limited by a power imbalance between the accused and/or any social disadvantage she might experience more generally, such that any "agreement" she gave to

[323] See the sources cited at note 263.
[324] Lise Gotell, "Rethinking Affirmative Consent," *supra* note 101 at 876 (see also 879). Consider also Lise Gotell, "Thinly Construing," *supra* note 101 at 60-61; Lise Gotell, "Governing Heterosexuality," *supra* note 101 at 366 and 381.
[325] Melanie Randall, "Ideal Victims," *supra* note 22 at 423-424.

sexual activity was not truly voluntary.[326] Legally, it requires attention to whether any agreement given by the complainant was extracted through the accused's use of fear, threats or force,[327] his misuse of trust, power or authority[328] or his exploitation of her incapacity.[329] So too must courts consider the entirety of sexual contact at issue in case any agreement given by the complainant was limited, either temporally or in relation to particular acts, and may have been exceeded by the accused.[330]

The coverage of Canadian agency scholarship in the preceding section of this chapter helpfully nuances this analysis. Recall, for instance, Elaine Craig's position that the mutuality required for consensual sex need not be devoid of power dynamics or asymmetrical experiences of pleasure.[331] Pairing this insight with the equality scholarship reviewed above helps us to better contextualize recognition of the stereotype that men are generally disinclined to confirm consent: while courts should be concerned about coercion or exploitation on the accused's part and/or mere acquiescence or submission on that of the complainant, Craig's analysis suggests that they should neither assume nor rush to such findings absent specific evidence on these points, even in cases where there might seem to be some power differential between the parties or some pleasure differential in their sexual activity. Accordingly, where evidence of an accused's consent-seeking is accepted, even if only as an effort to manage his risk of criminal liability, this should not necessarily arouse suspicion but rather tend to exculpate him unless *other* evidence establishes that he was merely extracting a "yes" from a complainant who lacked a mindset of voluntary

[326] This concern may be exacerbated, on the view of some equality scholars, in the context of prostitution or sadomasochism, where mutual "wanting" of the sexual activity might be more challenging to fathom or might spawn worries in any event about its potential harms or incompatibility with sex equality: recall the sources cited at note 266.
[327] See ss. 265(3)(a)-(b) of the *Criminal Code*.
[328] See ss. 265(3)(d) and 273.1(2)(c) of the *Criminal Code*.
[329] See ss. 273.1(2)(a.1)-(b) of the *Criminal Code*.
[330] Recall the sources cited at note 276.
[331] See the sources cited at notes 269-272.

agreement. Other evidence in the case may well show his coercion or exploitation and/or her mere acquiescence or submission, but in some cases it will not, and in others the evidence will be unclear or lacking.

Recognizing the stereotype that men generally do not inquire assiduously about consent simply requires leaving *some* inferential space for the possibility that the accused duly and meaningfully confirmed the complainant's consent rather than assuming, without evidence, that this is implausible. Courts can certainly find *consistency* with this stereotype (i.e., a lack of consent in the *actus reus* and/or *mens rea* sense(s)) by looking at the evidence particular to the principal witnesses and their circumstances. But as *JC* notes, they must not presumptively disbelieve an accused, much less fault him, for claiming to do exactly what the law requires of him.[332]

Let us now devote some attention to the other defence-raised M&S reviewed in this section, starting with the stereotype that men rarely decline sex for lack of interest. *Robbins*[333] showed us that raising this stereotype can be successful in overturning a conviction where the defence contends that the sexual contact in question did not even occur and that the accused's evidence of disinterest was disbelieved based on this ungrounded assumption. *Quartey*,[334] *Kelkas*[335] and *Kritik-Langer*,[336] however, found convictions to be safe where the evidence showed that sexual activity *did* occur (and that the complainant did not consent and the accused had the requisite mental fault), even as they showed some unease with the defence claim of stereotyping and the accused's evidence that he was not interested in the sexual activity in

[332] *JC*, *supra* note 207 at para 98.
[333] *Robbins*, *supra* note 221.
[334] *Quartey*, *supra* note 221.
[335] *Kelkas*, *supra* note 288.
[336] *Kritik-Langer*, *supra* note 207.

question. Together, these cases tell us that courts can find *consistency* with a finding that would flow from the stereotype that men are seldom uninterested in sex where the evidence shows that an accused proceeded to engage in sexual contact with the complainant in any event. It is primarily where the defence claims that no sexual activity occurred (or that any that did occur was at the complainant's instigation[337]), and a conviction follows all the same, that raising this stereotype may be legitimate on appeal.

Consider now the "twin myths" that an accused's propensity for sexual offending or unworthiness of belief can be inferred from evidence of his extensive sex life. *Grant*[338] and *GG*[339] caution courts against allowing the routine admission of such evidence because it can invite these inferences, which are equally damaging as those which attach to complainants' other sexual activity. *Massey-Patel*[340] and *KBW*[341] complicated this cluster of cases by showing the possibility that *assumptions about* an accused's sexual history can also ground these improper inferences, and also that they defy simple excision from the evidence in a given case (for example, when an accused is identified as a male sex worker or a gay man). Together, these cases show that reliance on this twist on the "twin myths" is ideally avoided by excluding evidence of an accused's sexual activity on other occasions; however, where such evidence is admitted and/or its exclusion is not feasible, courts can find *consistency* with the findings that would flow from these myths (i.e., that an accused *did* sexually offend or his version of events *is* incredible) so long as they rely on specific features of this evidence that are relevant to a material issue, or where other evidence in the case supports such consistency in any event.

[337] See *DP*, *supra* note 261 for an example.
[338] *Grant*, *supra* note 222.
[339] *GG*, *supra* note 207.
[340] *Massey-Patel*, *supra* note 316.
[341] *KBW*, *supra* note 319.

The foregoing discussion has sought to show that there is a place in Canadian sexual assault law for recognizing M&S about men's sexual opportunism. Intermediate appellate courts have shown care in inquiring as to whether the findings impugned by the defence may have properly flowed from the evidence in the case, even if these findings are *consistent* with those which would flow from the M&S. This very operation also shows the *neutralization* principle in action: recognizing these M&S as such does not compel the views that men routinely *do* decline sex for lack of interest or confirm their partners' consent when they do have sex, or that a conviction cannot flow from evidence that might include or imply his other sexual activity. Neither does this recognition involve reviving, or undermining the recognition of, Crown-raised M&S about women's tendency to consent or to fabulate. It is simply a matter of reserving some inferential space for considering that male sexual desire might wax and wane and that men might genuinely prioritize their partners' consent over their immediate gratification.

This development should be seen as salutary, in light of the scholarship reviewed earlier in this thesis that suggests that widespread expectations of male dominance or aggression drive both sexual assault and stereotyping about it.[342] All of the interlocutors addressed in this thesis seem united in wanting to undo this social norm and its tenacious hold on male sexuality.[343] This thesis suggests that one major step toward such an undoing is to account for the case law, however limited, that shows that men can be duly attentive to consent or even uninterested in sex.

[342] See Michael Plaxton, *Implied Consent*, *supra* note 15 at 12, 21, 45 and 148 and the equality scholarship cited at note 101.
[343] Recall, e.g., Elaine Craig, "The Legal Regulation of Sadomasochism," *supra* note 9 at 404-405; Melanie Randall, "Ideal Victims," *supra* note 22 at 425. While these sources specifically yearn for a world in which women's sexual agency can flourish unfettered, this would implicitly require unravelling social norms of male aggression and domination no less than those of female passivity and submission.

Attempts to Harness the Recognition of Crown-Raised M&S for Defence Purposes

This chapter now shifts to more peculiar and contentious defence arguments about M&S in appeals from conviction for sexual assault. It addresses them by way of the case law that deals with them but analyzes them in an integrated manner, rather than reserving a discussion section for them at the end of each category. The present section deals with efforts by defence counsel to argue that the recognition of Crown-raised M&S should be extended or interpreted to the benefit of the accused. Accordingly, this strategy does not involve the articulation of novel M&S *per se* and instead concerns the evidentiary implications of recognizing Crown-raised M&S as such.

Recall from Chapter 1 that *R v DD* stands for both the general proposition that "there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave" and the specific proposition that "[a] delay in disclosure, standing alone will never give rise to an adverse inference against the credibility of the complainant."[344] In *R v ARJD*, the SCC effectively extended *DD*'s general proposition by ruling that it is an error to find a complainant's credibility to be undermined by a "lack of evidence" that she avoided the accused after the alleged offence(s).[345] Chapter 1 also observed that the precise implications of these holdings are still being contested in appeals where the Crown seeks to raise M&S about a complainant's after-the-fact conduct with a view to overturning an acquittal or affirming a conviction. The present section of this thesis, by contrast, deals with attempts by defence counsel to harness these holdings with a view to overturning convictions (though they could also have been argued by the defence in Crown appeals from acquittals).

[344] *DD*, *supra* note 95 at para 65.
[345] *ARJD* (SCC), *supra* note 102 at para 2.

‘Reversing the roles’ of the complainant and the accused

The first set of cases involving these defence attempts to invoke Crown-raised M&S arises in cases where the accused not only disputes the charge(s) against him (or her)[346] but also argues that he (or she) was sexually assaulted by the complainant. This thesis describes these cases using the term “role reversal.” While the present subsection finds that this defence strategy can be viable in exceptional cases, it is also considerably susceptible of abuse. Moreover, even when this strategy succeeds, it does not furnish us with any novel or interesting insights about the Crown-raised M&S whose recognition it harnesses to the benefit of the accused. Instead, it simply serves to alert triers of fact to consider the possibility that the wrong person was charged in a given case.

In *R v Chen*,[347] the adult female accused was charged with sexual offences in relation to a teenaged male complainant. Ms. Chen testified that the complainant had sexually assaulted *her* and that she could neither scream nor say “no” during the attack because she felt paralyzed. On her account, the complainant also told her not to tell anyone what had happened because she would be the one to get in trouble, given that he was a minor. In instructing the jury, the trial judge issued a general caution about M&S about sexual assault and specific warnings that they could “not use evidence regarding the way Ms. Chen dressed or observations of her relationship with [the complainant] to infer that she was likely to have engaged in sexual activity with him.”[348] These instructions also invited the jury, however, to consider “that Ms. Chen made no outcry,” as well as evidence of “her physical and emotional condition” during and following the incident, in determining the credibility of her claim that the complainant had sexually assaulted

[346] As this subsection will show, this is the one defence-raised M&S claim that has been levelled in appeals involving female accused.
[347] *Chen*, *supra* note 221.
[348] Reproduced in *Chen*, *ibid* at para 16.

her.[349] The BCCA allowed the appeal from conviction, accepting the defence argument that the trial judge had permitted the jury to rely on the M&S recognized in *DD* and *ARJD* about prompt reporting, emotional distress and avoidance of the perpetrator.[350]

Chen offers a strong example of when the recognition of Crown-raised M&S relating to complainants' after-the-fact conduct should be extended to apply to the accused.[351] On the facts, there was a credible case that Ms. Chen might have been the victim of the complainant rather than the other way around, and it would be perverse to deny her the protections afforded by recognition of M&S relating to sexual assault complainants. Other intermediate appellate cases, however, show that defence counsel are prepared to advance similar arguments even where the evidence belies their application to the facts.

R v Slatter[352] involved an adult female accused who was charged with sexual offences against her teenaged foster son. When questioned by police, Ms. Slatter claimed that the complainant had raped *her* three times and that he was strong enough to "pin her down, penetrate her, and render her incapable of escape."[353] The defence appealed Ms. Slatter's conviction by attacking the trial judge's findings that her version of events was incredible "on the basis that she did not lock her door after the first and second alleged sexual assaults, nor did she tell anyone"

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[349] Reproduced in *Chen*, *ibid* at para 14 [emphasis removed].
[350] *Chen*, *ibid* at paras 27-28. The Court of Appeal added that the trial judge's invitation to the jury "to look for independent evidence that supported [Ms. Chen's] testimony […] erroneously shifted the burden of proof to the defence": para 29; see also para 30.
[351] See also *Paulos*, *supra* note 221, in which the adult male accused, a taxi driver, claimed that the adult female complainant, his customer, pulled him inside her residence and forced him into sexual activity. The ABCA agreed with the defence that the trial judge erred in her treatment of Mr. Paulos' failure to disclose this alleged attack by relying on "stereotypical thinking about how victims of sexual assault behaved": para 38; see also para 39. However, other observations by the trial judge – including that Mr. Paulos did not try to escape the complainant or retain the video footage recorded inside his vehicle (where the complainant alleged that *he* had sexually assaulted *her*) were legitimate in the context of other evidence in the case: paras 36-37. The Court of Appeal upheld Mr. Paulos' conviction because they found that the trial judge's "credibility finding would have been the same" absent her error: para 47.
[352] *R v Slatter*, 2018 ONCA 962 [*Slatter*].
[353] *Slatter*, *ibid* at para 6.

about them or "want [the complainant] charged."[354] The ONCA rejected the argument that the conviction rested on stereotypes, finding instead that the trial judge properly relied on "the evidence presented at trial, its internal and external coherence, and common sense inferences."[355] The defence claim was simply not made out on the facts, which established that the accused stood over the complainant "in a position of trust" and had "control of the home where he lived," that she continued to pursue him and offer him alcohol, and that her weight was triple that of the complainant. Against this evidentiary backdrop, "the trial judge's impugned comments […] made sense."[356]

Slatter shows us that 'role reversal' arguments can be misused by defence counsel to harness the benefits of the recognition of Crown-raised M&S relating to complainants' after-the-fact conduct.[357] This misuse can be understood as factual overreach, where the evidence at trial shows that an accused person's claim of victimization at the hands of the complainant is preposterous on the facts. Courts of appeal have managed these claims not by arguing that the recognition of Crown-raised M&S should not be extended to the accused, but by finding that the evidence supports a finding *consistent* with that which might flow from the application of these M&S. It is true, as occurred in *Chen*, that an accused should benefit from the rules set out in *DD* and *ARJD* in cases where there is some plausibility to his or her claim of "role reversal."

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[354] *Slatter*, *ibid* at para 112.
[355] *Slatter*, *ibid* at para 113.
[356] *Slatter*, *ibid* at paras 114-115; see para 6 for additional context.
[357] See also *R v WJM*, 2018 NSCA 54, where the Court of Appeal rejected a defence argument that the trial judge applied M&S in rejecting the adult male accused's claim that his stepdaughter, the complainant, had sexually assaulted him. The trial judge found that it did "not seem plausible or even possible that someone could live with near constant harassment and not take steps to address it" by way of avoidance or reporting (reproduced at para 23). The Court of Appeal found that "the trial judge's assessment of the appellant's evidence was based not on stereotypical generalizations about how the appellant should have behaved, but [on] how he did behave": para 59; see also para 62. In particular, the accused had claimed that he did not report his stepdaughter's alleged abuse "because he feared it might get turned around on him" (reproduced at para 23), but during the same time period he "raised numerous other concerns about the complainant's behaviour": para 61.

However, we might imagine – and indeed hope – that cases in which the alleged perpetrator and victim are confused by police, prosecutors and trial judges are rare.

More generally, this thesis does not dwell on this category of defence-raised M&S because it does not yield any new or interesting insights about the doctrine of M&S as a whole even when it does succeed. It is instead a simple extension of the recognition of Crown-raised M&S to accused persons in the exceptional cases where they, and not the complainant, might be the true victim. On this basis, this thesis casts this strategy as being worthy of only limited recognition, and suggests that appellate courts be vigilant in guarding against factual overreach when it is raised.

'Doubling down' on what *DD* and *ARJD* hold

The second set of cases in which defence counsel try to harness the recognition of Crown-raised M&S to their client's benefit involves "doubling down" on certain interpretations of *DD* and *ARJD*. As noted earlier, these SCC holdings are generally taken to stand for the propositions that a complainant's credibility cannot be undermined by her failure to promptly report the alleged offence or to avoid the accused thereafter. They have also been interpreted as barring reliance on a complainant's neutral, calm or happy demeanour in the aftermath of the incident to impugn her credibility.[358] Chapter 1 of this thesis observed that Canadian appellate case law remains unsettled as to whether, and if so in what ways, a trier of fact can consider evidence of the complainant's behaviour along these lines. Compounding this murkiness, this same case law holds that while a complainant's *prompt* disclosure of sexual assault cannot be

[358] See, e.g., *R v Nyznik*, 2017 ONSC 4392 at para 193 for a vivid explanation along these lines: "[A] woman who has been the victim of a sexual assault will not necessarily exhibit immediate symptoms of trauma. She might, or might not, be weepy. She might, or might not, be depressed and withdrawn. She might, or might not, be hysterical. Or she might cover up any of those kinds of emotions with an exterior of jocularity. […] There simply is no 'normal' or 'typical.'" Although this passage does not cite *DD*, its implicit reliance on the premise that "there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave" is clear.

relied on to corroborate her testimonial account, it can be used "to show the fact and timing of [her] complaint, which may then assist the trier of fact in the assessment of [her] truthfulness or credibility."[359]

Many defence counsel have seized on this murkiness and argued on appeal that a trial judge erred by relying on certain after-the-fact evidence to support the complainant's version of events. In other words, where there is evidence that a complainant *did* promptly report the offence, appear distraught or avoid the accused thereafter, the defence has argued that this evidence cannot be used in any way to support her credibility. The reasoning underlying this argument is that such reliance involves comparing the complainant's conduct with "the expected behaviour of the stereotypical victim of sexual assault," which *ARJD* warns against.[360] In some cases, the defence contends more clearly that it is unfair to allow the Crown to rely on the *presence* of these factors when the defence cannot rely on their *absence*.

This strategy has proven completely fruitless from the defence perspective. The present subsection will show why this thesis finds that it is unworthy of validation. It seems misguided to suggest that a complainant's timing and manner of reporting, or her post-event avoidance of the accused, can in no way support a finding that she was sexually assaulted. What is more, it does not seem to be in the interest of the defence to contend that evidence of a complainant's after-the-fact conduct cannot be used for any inferential purpose. The only silver lining of such arguments, from the defence perspective, is that they oblige courts to consider unevenness in the treatment of evidence of a complainant's after-the-fact conduct and to adopt more modest interpretations of what *DD* and *ARJD* hold. This virtue and its implications are outlined below.

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[359] Daniel Brown and Jill Witkin, *Prosecuting and Defending Sexual Offence Cases*, *supra* note 196 at 189 (see also 183-184, 186 and 188). See also *R v Dinardo*, 2008 SCC 24 at para 37-40; and *R v Langan*, 2019 BCCA 467 at paras 90-95 and 98-101, adopted in *R v Langan*, 2020 SCC 33.
[360] *ARJD* (SCC), *supra* note 102 at para 2.

In *R v Mehari,*[361] the complainant testified that she woke up to find the accused penetrating her vagina with his penis, while the accused testified that the complainant was not only conscious but an active and willing participant in their sexual activity. The defence appealed Mr. Mehari's conviction by arguing, in part, that the trial judge's credibility assessment was "tainted by impermissible reliance on stereotypes and assumptions" based on her reliance on the complainant's evidence "that she was crying and ran from the room" as well as evidence from the accused that she was "hysterical" in the immediate aftermath of the incident.[362] The SKCA rejected this argument, finding there was no error in comparing the complainant's demeanour before and after the alleged offence, as "ordinarily there is a reason" when a person's demeanour changes suddenly. Connecting the complainant's "hysteria" to the alleged offence did not depend on "an impermissible stereotype that a victim of a sexual assault will act in a particular way." Rather, the fact that *some* victims act in the manner described by the witnesses "provided the permissible basis for the trial judge to draw the inference she did."[363]

The SKCA did not acknowledge that this defence argument was an effort to "double down" on *DD* and *ARJD* (and it is uncertain whether defence counsel so framed it). Instead, it reviewed the general prohibition against stereotyping and observed that it did not amount to error to draw "inferences that are tied to the actions of a particular person in particular circumstances" or that otherwise have a basis in the evidence."[364] It seems clear, however, that the reasoning underlying this defence argument is that if a trial judge cannot find a complainant incredible for

[361] *R v Mehari*, 2020 SKCA 37 (reversed: 2020 SCC 40) [*Mehari*].
[362] *Mehari*, *ibid* at para 77.
[363] *Mehari*, *ibid* at para 84. This reasoning derives from a dissenting judgment at the SKCA, as the majority found a different ground of appeal to warrant a new trial and declined to deal with the others. However, the SCC allowed a Crown appeal from this judgment and returned the case "to the Court of Appeal to decide the grounds of appeal the majority did not address": 2020 SCC 40 at para 2. The SKCA subsequently dismissed all of Mr. Mehari's arguments for the reasons given by the dissenting judge in the first appeal: 2021 SKCA 26 at para 5.
[364] *Mehari*, *ibid* at paras 78 and 83; see also paras 79-81.

failing to appear distraught or to avoid the accused after the fact, then she ought not to find her credible based on evidence that she *did* act in these ways.

The "doubling down" nature of the defence argument reviewed in this subsection becomes clearer in the case of *R v Greif*.[365] The complainant testified that the accused grabbed her thigh while she was giving him a haircut in her home and then pinned her to her bed and digitally penetrated her vagina over her attempts to physically resist him. The accused testified that none of this occurred. In convicting the accused, the trial judge relied on the timing of the complainant's disclosure to her mother and to police, and her "distraught" demeanour when so reporting, as a basis for accepting her evidence.[366] On appeal, the defence argued that this reliance amounted to stereotyping, in the sense that the trial judge had assessed the evidence relating to the complainant's after-the-fact conduct in terms of its "conformity with what he perceived to be behaviour that made sense in the aftermath of a sexual assault" and had "rel[ied] *solely* on the timing and circumstances of [her] disclosure as the basis for accepting the complainant's evidence."[367] The defence pressed further and asked the Court of Appeal to find that "the timing of disclosure and the emotional condition of a complainant after an alleged assault should be removed entirely as factors in the credibility analysis." In its view, "[a]n unfair imbalance exists where these factors cannot be used by the defence to critique the complainant's credibility, but they can be used by the Crown to bolster it."[368]

The BCCA rejected this defence argument, finding that while a complainant's timing and manner of disclosure cannot be assessed with reference to stereotypical expectations of how victims behave, such evidence is admissible and can be relied on for other permissible

[365] *Greif*, *supra* note 207.
[366] *R v Greif*, 2019 BCSC 288 at para 78, reproduced in *Greif*, *ibid* at para 56.
[367] *Greif*, *ibid* at paras 57 and 59 [emphasis added by the BCCA].
[368] *Greif*, *ibid* at para 58.

purposes.[369] In this case, the trial judge had drawn "permissible inferences from the evidence before him" rather than resorting to "stereotypes or generalizations about how he expected a complainant to react."[370] Unlike in *Mehari*, the BCCA in *Greif* more clearly grasps the defence claim of stereotyping as an effort to "double down" on *DD* and *ARJD*. It bears noting, however, that its disposition of this ground of appeal hinges on a moderate interpretation of what those cases hold – namely, that the defence, and not only the Crown, can use evidence about the timing or manner of a complainant's disclosure to advance inferences about her credibility if it does so in ways that do not rely on stereotyping. The only example it provides on this front is that of using "the timing of disclosure [to support] a defence argument that the complainant had a motive to fabricate the events."[371]

Defence attempts to "double down" on *DD* and *ARJD* continue to be made – and to fail – in Canada's intermediate appellate courts.[372] This strategy appears to amount only to senseless overreach in how they frame the evidentiary consequences of recognizing Crown-raised M&S about complainants' after-the-fact conduct and what *DD* and *ARJD* hold. A few insights can be gleaned, however, from this defence overreach. First, it depends on an extreme interpretation of *DD* and *ARJD* that would also qualify as overreach when advanced by the Crown – namely, that a complainant's prompt reporting, emotional distress or avoidance of the accused are irrelevant for any inferential purpose, just as the Crown sometimes argues that her delayed disclosure,

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[369] *Greif*, *ibid* at paras 62-66.
[370] *Greif*, *ibid* at para 72; see also para 68. The BCCA also noted that the trial judge had made no improper use of the complainant's prior consistent statement: para 69; observed that several cases make clear that "a complainant's post-event emotional condition may be considered in evaluating their credibility": para 70; and found that the timing and manner of disclosure by the complainant in this case were not "the sole basis on which the [trial] judge had accepted [her] evidence": para 71.
[371] *Greif*, *ibid* at para 63.
[372] See, e.g., *R v Rose*, 2021 ONCA 408 at paras 21-33; *R v RKK*, 2022 BCCA 17 at paras 27 and 37-44 (leave to appeal refused: [2022] SCCA No 67); *R v Davies*, 2022 BCCA 172 at paras 90-91; *R v AJK*, 2020 ONCA 487 at paras 37-43. See also *R v RR*, 2018 ABCA 287 at paras 3-9 for an example that predates *Mehari* and *Greif*.

composed or positive demeanour or continued association with the accused are altogether irrelevant. We saw toward the end of Chapter 1, however, that *Roth* and *Cooke* provide a basis for the defence to argue that a complainant's delayed disclosure can become relevant based on other evidence in the case, including in ways that undermine her credibility. This suggests that it is not in the interest of the defence to strive for a precedent according to which no inferences whatsoever can be drawn from a complainant's timing of disclosure or her post-event demeanour or rapport (or lack thereof) with the accused. Rather, such evidence will sometimes prove helpful.

Second, this defence strategy has the virtue of highlighting the differential and potentially unfair treatment of evidence of a complainant's after-the-fact conduct, in the sense that prevailing interpretations of *DD* and *ARJD* suggest that such evidence can be used only when it supports a conviction. Intermediate appellate courts appear uneasy when dealing with this question, either by declining to acknowledge the discrepancy or, as in *Greif*, opting for a more moderate interpretation of *DD* and *ARJD*. Linking *Mehari* and *Greif* with the discussion of *Roth* and *Cooke* in Chapter 1, it would seem sensible and fair for appellate courts to acknowledge – and for both the Crown and the defence to concede – that the evidence in a case can make a complainant's after-the-fact conduct relevant, including for purposes of inferences related to her credibility. Sometimes, as in *Roth* and *Cooke*, these inferences can adversely affect the complainant's credibility, whereas at other times, as in *Mehari* and *Greif*, they can support it. In neither case does this necessarily involve reliance on stereotypes about 'normal' victim behaviour or women's tendency to lie about sexual assault. Rather, it involves legitimate consideration of the evidence to yield findings that might be *consistent* with such stereotypes.

Residual Sundry Efforts by Defence Counsel to Raise M&S

This chapter closes by considering the weakest attempts by defence counsel to make M&S arguments in appeals from conviction for sexual assault. Unlike the attempts reviewed in the preceding section, the efforts reviewed here involve novel attempts to articulate M&S. They generally consist of attacks on every common-sense inference that the defence argues the trial judge drew in convicting the accused. This defence strategy is as unsuccessful as it is unrelenting. While it seldom yields appellate findings that a trial judge reasoned improperly – much less by way of reliance on M&S – defence counsel persist in exploiting the lack of a controlling definition of what M&S are and in senselessly arguing that their client's conviction resulted therefrom. The inferences attacked in these cases do not fulfill the criteria for M&S that are distinctive to sexual assault as these have been advanced in this thesis; in other words, they are all missing at least one element of this definition of M&S, understood as empirical or (il)logical claims about how someone is likely or unlikely to behave in a sexual, or sexually violative, context by virtue of their belonging to a certain demographic category.

Since this thesis was undertaken, the cases falling into the residual category reviewed here have become too numerous to cover exhaustively. Accordingly, this section will review three types of them:

- cases where the inference in question concerns a physiological assumption rather than a behavioural assumption;
- cases where the impugned inference involves assumptions about how sexual encounters unfold but that are unlinked to a demographic category; and
- cases involving attacks on behavioural inferences quite removed from the sexual context of the alleged offence(s).

It is not that such reasoning, when made out on the trial record, is necessarily permissible; in some cases, it might properly be impugned as instances of UCSAs.[373] However, the present section focuses on whether it fits with the doctrine of M&S as it has taken form in the context of sexual assault cases, and generally finds that it does not. In so doing, it observes that intermediate appellate courts are sometimes struggling to call out these arguments as inapt characterizations of M&S, lacking a clear definition of *what M&S are*.

Attacks on inferences about physiology rather than behaviour

Some appellate case law deals with defence arguments that ungrounded assumptions about human physiology, as opposed to behaviour, amount to M&S. These arguments have not proven successful, at least in the manner proposed by the defence. This thesis posits that they are a poor fit for the doctrine of M&S because they lack one ingredient of the definition of these terms as advanced in this thesis – namely, they do not concern assumptions about how someone is apt to *behave* in a sexual context by virtue of their demographic membership.

Roth[374] was reviewed in Chapter 1, and recalled in the preceding section of this chapter, as a rare instance of an appellate court finding relevance in the timing of a complainant's reporting of sexual assault to her credibility based on other evidence in the case. This appeal also involved a defence-raised M&S claim. Part of the complainant's allegation was that Mr. Roth kissed her and reached into her pants without her consent during a taxi ride earlier in the evening. The accused testified that the sexual touching was mutual, and the taxi driver testified that the accused had fallen asleep by the time they arrived at the complainant's residence. In convicting

[373] To be sure, the appellate case law on UCSAs has begun to burgeon, with mixed success from the defence perspective, since this concept was articulated in *JC*, *supra* note 207: see, e.g., *Adebogun*, *supra* note 207 at paras 9-14, 19-21 and 31-37; *R v Dhaliwal*, 2021 BCCA 479 at paras 62-68; *Al-Rawi*, *supra* note 207 at paras 61-71; *Kruk*, *supra* note 220 at paras 4, 30 and 41-69; *R v MPH*, 2022 BCCA 216 at paras 57-79. However, as noted in Chapter 1, this thesis lacks the scope to delve into these decisions with the depth of attention they deserve.
[374] *Roth*, *supra* note 205.

the accused, the trial judge found that it "ma[de] no sense" that he would fall asleep in light of the sexual activity described, his testimony that he was not drunk and the fact that "he was a fit and healthy young man who regularly worked out and trained as a power lifter."[375]

The BCCA rejected a defence argument that Mr. Roth's conviction rested on the trial judge's "use of a stereotype or generalization about how people who train as powerlifters to asses[s] his credibility."[376] It expressly found the defence argument that the trial judge had relied on "stereotypes of male behaviour" on this issue amounted to overreach. However, the Court of Appeal did find that the trial judge had relied on "a speculative assumption about *this* appellant's ability to sustain prolonged physical effort based on his training as a powerlifter," and that this amounted to reversible error: "Implicit in the judge's analysis is the assumption that because of the appellant's level of fitness as a powerlifter, he would not have fallen asleep had there been the type and duration of sexual interaction that he described in his evidence."[377]

Recall that *JC*, though decided after *Roth*, cast speculative reasoning of this sort as UCSAs and observed that stereotyping and UCSAs can co-occur. On this basis (and with the benefit of hindsight), it is arguable that the BCCA in *Roth* could have done more to explain why the inference noted above did not run afoul of the prohibition against stereotyping. Hewing to the definitions advanced in Chapter 1, it is plain that the inference concerned an assumption rooted in a subdemographic of men in a sexual context. However, the assumption was *physiological* in nature, and this thesis has suggested that the doctrine of M&S be reserved for prejudicial generalizations about how someone is likely (or unlikely) to *behave*, in the sense of a volitional choice. Demographically linked assumptions about physiology in sexual contexts may well be

[375] Reproduced in *Roth*, *ibid* at para 56.
[376] *Roth*, *ibid* at para 63.
[377] *Roth*, *ibid* at paras 67-68; see also paras 69-73.

improper and, indeed, qualify as reversible error when they amount to UCSAs.[378] However, they are a poor fit for the doctrine of M&S as it has come to be understood in sexual assault law.

Attacks on inferences about sexual behaviour unrelated to demographic markers

Other intermediate appellate cases have dealt with defence attempts to raise M&S by impugning every common-sense inference allegedly drawn by a trial judge as to how sexual encounters unfold. These arguments, too, have all failed. Some of this case law rejects such arguments by finding that no inference was drawn from the evidence in question or that, if one was, this did not amount to reliance on M&S but rather to a legitimate, evidence-based exercise of logic and common sense. In at least one case, however, the appellate court found the alleged M&S to be made out. This thesis respectfully suggests that the former approach is unsatisfactory and that the latter finding is incorrect. Instead, the definitions of M&S advanced in this thesis show that the main problem with these defence arguments is that they are missing an important criterion: that of a linkage to the demographic category in respect of which the alleged inference was drawn.

Gélinas[379] was reviewed earlier in this chapter for its treatment of a defence suggestion that the trial judge had reasoned that a woman would not consent to loveless sex and that this amounted to stereotyping. Defence counsel in this case also seized on other aspects of the trial judge's reasons as evincing reliance on M&S, including suggestions that consenting sexual partners normally take a shower before and after sex, that sexual encounters involve participants changing positions several times, and that someone who was giving fellatio consensually would not vomit.[380] The QCCA found that the first assumption about showering was indeed a

[378] Indeed, in *Kruk*, *supra* note 220, the BCCA has suggested that the assumption that a woman would be able to sense that she had been penetrated while unconscious, when unsupported by the evidence, amounts to a UCSA.
[379] *Gélinas*, *supra* note 246.
[380] *Gélinas*, *ibid* at para 5.

stereotype relied on by the trial judge; it presumed that particular hygienic practices attach to consensual sexual encounters, such that their absence permits an inference of non-consent. The Court declined to allow the appeal on this basis, however, because this stereotype had not played "un rôle déterminant dans la décision du juge."[381] The QCCA found that the other two alleged assumptions did not amount to stereotypes, but its reasoning for so ruling addressed only whether the assumptions were even relied on. In its view, the alleged assumption concerning changes of position was simply an "observation" made with reference to the complainant's testimony about the sequence of sexual acts engaged in, while the one concerning the nature of consensual fellatio flowed from the trial judge's assessment of the evidence and so did not amount to a stereotype "dans le contexte de l'affaire."[382]

None of the stereotypes alleged by the defence in *Gélinas* meets the criteria for M&S advanced in this thesis. The suggestion that someone who is performing fellatio consensually would not vomit is a physiological assumption rather than a generalization about volitional behaviour in a sexual context; what is more, it is not an assumption rooted in a demographic category, given that individuals across the sex and gender spectrum perform fellatio. The other two alleged assumptions concern behaviour in a sexual scenario, but they do not depend for their force on a given actor's membership in a particular demographic. The Court of Appeal in *Gélinas* struggles to articulate whether and why these assumptions qualify (or do not qualify) as stereotypes. Whether by accepting one such assumption as a stereotype too hastily, or by dodging the question in relation to others, the QCCA's judgment did not give good reason for defence counsel to cease raising such specious arguments going forward.

[381] *Gélinas*, *ibid* at para 12.
[382] *Gélinas*, *ibid* at paras 7 and 10.

Comparable defence arguments were raised and rejected, indeed more firmly, in *Pierre c R.*[383] The complainant testified that the accused penetrated her vagina with his penis without her consent, while the accused testified that the complainant initiated their sexual activity. In appealing Mr. Pierre's conviction, defence counsel alleged three instances of stereotyping in the trial judge's reasons: first, that he had used "evidence of mutual attraction" between the complainant and the accused to infer that Mr. Pierre "had devised a strategy […] to have intimate relations with the complainant"; second, that he had used evidence that the accused had set out wine and glasses to infer that he "wanted intimate relations and not only time in which to know the complainant better"; and third, that he had rejected the accused's testimony "that he would not kiss the complainant because such an act would be more intimate than an act of sexual intercourse." The QCCA made short work of these arguments, finding expressly that none of these alleged assumptions could "sensibly be characterised as an inappropriate stereotype" and that defence counsel herself was engaging in "speculation" by raising them at all. Instead, the trial judge's "observations and inferences" in determining the accused's liability were "rooted firmly in the evidence as presented at trial and not in extraneous perceptions of any kind."[384]

On the view of this thesis, the Court of Appeal was correct to find that the trial judge did not rely on stereotyping. However, its main reason for so finding was that the inferences in question were not even drawn. As in *Gélinas*, had the QCCA in *Pierre* expounded on its suggestion that these were but "so-called stereotypes" to begin with, and had it been equipped with something like the M&S definitions advanced in this thesis, it might have observed that these propositions are all missing a key ingredient thereof: namely, that of a link to the demographic membership of the person(s) to whom the assumption is applied. In other words,

[383] *Pierre*, *supra* note 224.
[384] *Pierre*, *ibid* at paras 25-26.

while the alleged stereotypes raised by the defence in *Pierre* do involve assumptions about how people behave in a sexual context, they are not assumptions made by virtue of someone belonging to a particular demographic category. Clarifying this shortcoming would have done more to convey to the defence bar that reasoning of this sort could not amount to M&S even if it were made out on the record in the court below.[385] What is more, it would have made plain that some legitimate inferences about how sexual encounters unfold can be drawn from the evidence in a given case by way of permissible reliance on logic, common sense and experience.

Attacks on inferences about behaviour unrelated to the sexual context of the charge

Still other intermediate appellate cases have dealt with defence allegations of M&S arising from a trial judge's treatment of evidence that is quite removed from the sexual context of the charge(s) at issue. In these cases, too, the court of appeal avoids deciding whether the alleged assumption could ever amount to stereotyping and disposes of the issue by finding that it was justified by the evidence in the case. As with the cases reviewed in the preceding subsection, this thesis finds this approach to be inadequate. It proposes instead that hewing to the definitions of M&S that this thesis has advanced would better equip courts to explain that the assumptions in question are missing (at least) one of its criteria: namely, its connection to the sexual context of the alleged offence. This, in turn, would reinforce to the defence bar that the mere fact that a case concerns allegations of sexual assault (or other sexual offences) does not necessarily make it ripe for attacks based on M&S. While some of the alleged inferences noted below may well be improper when ungrounded in the evidence, none of them is a good fit for the doctrine of M&S as it has come to be understood in Canadian sexual assault law.

[385] Whether such reasoning could amount to a UCSA is a question that this thesis does not broach.

In *JP c R*,[386] the accused was convicted of several historical offences against his young relatives. At trial, he explained certain inconsistencies between his police statement and his testimony on the basis that he was nervous when speaking with the police investigator. The trial judge rejected this explanation, finding that it was "contradite par le fait que l'appelant avait fait preuve d'une certaine aisance en complimentant l'enquêtrice et en ajoutant que, comme retraité, il avait tout son temps et était même disposé à aller terminer l'interrogatoire chez elle toute la nuit." The QCCA rejected the defence contention that these comments amounted to stereotypical reasoning, finding that the trial judge had instead drawn her findings from "la preuve propre au comportement de l'appelant dans la présente affaire."[387] It is striking that the trial judge's statement was even argued by defence counsel as amounting to stereotypical reasoning. The comment neither amounts to, nor flows from, a generalization, much less one that is rooted in the accused's status as a man or that concerns his sexual practices. It seems arguable that the defence thought a stereotyping argument was plausible simply on the basis that the remark was made in the context of a trial for sexual offences. A clearer definition as to what amounts to M&S that are distinctive to sexual assault cases would have equipped the QCCA to more roundly dismiss the defence suggestion that the impugned statement could amount to stereotyping even if it were not grounded in the evidence.

A similar example arose in *R v LL*,[388] another case involving convictions for sexual offences against a young relative of the accused. The complainant testified that the accused, her stepfather, engaged her in sexual activity hundreds of times when she was between the ages of

[386] *JP*, *supra* note 207.
[387] *JP*, *ibid* at para 30. The QCCA also rejected defence arguments that the trial judge's findings resulted from an inference rooted in speculation or unsupportable by judicial notice.
[388] *LL*, *supra* note 207.

11 and 19. When questioned by police, the accused said, "She is 19[,] not 10."[389] The defence conceded at trial that Mr. L had had sex with the complainant when she was approaching the age of 19, but argued that his police statement amounted to a denial that sexual activity between them had occurred when she was younger. The trial judge disagreed, finding that the evidence about how the undisputed sexual activity unfolded made it "implausible" that there had not also been an "earlier routine" in the years prior.[390] The ONCA rejected a defence argument that this reasoning evinced reliance on stereotyping, finding instead that it was properly linked to the trial judge's "evidence-based credibility assessment."[391] As in *JP*, the impugned inference in *LL* does not meet the criteria for M&S advanced in this thesis. Not only is it far removed from the sexual context of the charges at issue, but it does not even amount to a behavioural generalization, let alone one that is purported to apply to someone by virtue of their demographic membership. Once more, this thesis suggests that clearer criteria for what qualifies as M&S would have enabled the ONCA to explain why the impugned statement could not amount to stereotyping even if it did lack an evidentiary foundation.

* * *

The cases reviewed in this section show that many defence arguments about M&S are instances of overreach, contributing to the chaotic state of affairs currently affecting Canadian intermediate appellate courts in this area. This is overreach not merely in terms of the evidentiary consequences of recognizing a given M&S but in articulating what qualifies as a M&S to begin with. Absent a clear definition of M&S in sexual assault cases, some defence counsel have proven all too ready to cast every common-sense inference conceivably drawn by the trial judge

[389] *LL*, *ibid* at para 7.
[390] Reproduced in *LL*, *ibid* at para 12.
[391] *LL*, *ibid* at para 21; see also para 22. The ONCA also rejected defence arguments that the trial judge's findings flowed from an UCSA or propensity reasoning.

as evincing reliance on M&S. In turn, most courts of appeal fall short in calling out these defence arguments as inapt instances of M&S and focus instead on whether the impugned inference was even drawn and, if so, whether it had an evidentiary grounding.

This thesis proposes that adhering to its definitions of M&S that are distinctive to sexual assault cases can help curb these trends. All the cases reviewed in this subsection involved defence arguments that were missing at least one ingredient of these definitions, understood as empirical or (il)logical assumptions about how someone is *likely to behave*, by virtue of their *demographic membership*, in a *sexual or sexually violative* context. Referring to these (or similar) criteria in dealing with M&S arguments would assist appellate courts in deterring defence counsel from future distortions of the doctrine.

Conclusion

This chapter has revealed how defence efforts to appeal convictions for sexual assault using arguments about M&S have complicated the doctrine of M&S in Canadian sexual assault law in recent years. While this strategy has found mixed success in provincial and territorial courts of appeal, it has scarcely attracted the attention of legal scholars or the SCC, much less Parliament. The silence of these latter actors is striking given the dramatic role that recognizing Crown-raised M&S has long played in this country's sexual assault law reform. Compounding this unusual state of affairs is another factor – namely, that to the extent that intermediate appellate courts have recognized defence-raised M&S, they have tended to group them together with their Crown-raised counterparts in global and abstract analyses. This risks obscuring the longstanding history of discrimination against female sexual assault complainants which the doctrine of M&S was first enlisted to combat and which continues to mar the adjudication of

sexual assault cases. On these bases, the present chapter delved into the appellate case law on defence-raised M&S to assess the legitimacy of these arguments and the conditions of their success or failure.

Defence-raised M&S have taken many forms, and much of this chapter's work involved categorizing them using criteria advanced in Chapter 1. These include a definition of stereotypes as empirical assumptions about how someone is likely to behave, by virtue of their demographic membership (typically at the sites of sex and gender), in a sexual or sexually violative context; and a related definition of myths as false logical assumptions that depend on such stereotypes for their force. They also include principles of *consistency* and *neutralization*: courts can properly find that the evidence in a given case supports a finding that is *consistent* with that which would follow from the application of a M&S; and the effect of recognizing a M&S is to *neutralize* the assumption in question rather than give rise to a contrary assumption.

The first two sections of this chapter showed that Canada's intermediate courts of appeal have widely recognized defence-raised M&S about women's sexual timidity and men's sexual opportunism. Invoking these M&S has enabled defence counsel to overturn a fair number of convictions; however, appellate judges sometimes recognize these M&S only implicitly and are comfortable affirming findings that are *consistent* with them when the evidence so justifies. This chapter found that these M&S fulfill the criteria set out in Chapter 1 and that raising them in sexual assault appeals does not involve ignoring or distorting key aspects of sexual assault law. Moreover, these M&S can be recognized as such alongside their Crown-raised counterparts provided we bear in mind that this recognition simply has a *neutralizing* effect. This approach properly directs courts to consider the evidence in a given case, and what inferences legitimately flow therefrom, with open-mindedness and uncertainty rather than with preconceptions about the

credibility and reliability of either accused persons or complainants. With this in mind, the chapter set out various sociolegal considerations for Canadian courts to make in querying whether M&S about women's sexual timidity or men's sexual opportunism have been relied on or whether the evidence supports findings that would be *consistent* with their application.

In the result, we have a more complex body of M&S to grapple with in sexual assault law. This doctrine is not limited to Crown-raised M&S about women's propensity to consent or to bring false complaints, or even more generally to assumptions conventionally understood to be discriminatory. Rather, it extends to any assumptions about sexual behaviour, rooted in demographic markers of sex and gender, that improperly prejudice one party to a given case when there is no evidence-based grounding for their application.[392] Recognizing M&S about women's sexual timidity and men's sexual opportunism has other virtues still. It allows us to conceive more clearly of sexuality and sexual assault as concerning more than our protection from unwanted sexual contact and as extending to considerations about how to foster the sexual life we do want. So too does it provide us with one avenue for beginning to unravel longstanding and deeply entrenched social norms of male aggression and dominance and female passivity and submission.

The final two sections of this chapter reviewed less successful attempts by defence counsel to allege M&S on the part of a trial judge when appealing a sexual assault conviction. Most of these strategies amount to overreach on the facts, or in terms of what recognizing a M&S compels of the law, or as a matter of what can qualify as a M&S to begin with. The first of

[392] *JC*, *supra* note 207 at paras 65, 88 and 97. See also Michael Plaxton, *Implied Consent*, *supra* note 15 at 148-149, on "what makes stereotypes so damaging and wrongful": "they create the impression that it is pointless even to discuss giving the members of stereotyped groups greater opportunities and roles in our community. They treat individuals as inert objects with no meaningful subjectivity of their own. […] The question […] is whether individuals are treated as autonomous entities whose capacity to reject stereotypical modes of behaviour is respected and taken seriously."

these attempts involves "role reversal" claims, where the defence alleges that the *complainant* sexually assaulted the *accused* and that an adverse inference was drawn against the accused for failing to report the incident or avoid the complainant thereafter. While these claims can be legitimate and successful in exceptional cases, they are most often belied by the evidence pertaining to the principal witnesses. The limited value of this strategy seems to reside in alerting courts to the possibility that the wrong person may have been charged in the matter at hand. The second such strategy involves "doubling down" on certain interpretations of the SCC's holdings in *DD* and *ARJD*, to the effect that the defence asks the court of appeal to find that evidence of a complainant's prompt reporting, emotional distress or avoidance of the accused should not be relied on to support a conviction on the basis that her contrary comportments are understood to be irrelevant (absent reliance on Crown-raised M&S about 'normal' victim behaviour). This argument seems quite strained and has never succeeded. Its sole virtue seems to be that it obliges appellate courts to concede that a complainant's after-the-fact conduct can sometimes be relevant for some purposes.

The final defence strategy in this area has involved impugning inferences (allegedly) drawn by a trial judge that concern physiological reactions, how sexual encounters unfold and communicative exchanges unrelated to the sexual context of the charge(s) at issue. Intermediate courts of appeal normally, and quite rightly, reject arguments that these inferences amount to M&S (at least in any sense that is salient in sexual assault cases) but they usually dodge the issue by treating them instead as other forms of prohibited reasoning, or by finding either that the inference was not even drawn or that it was supported by the evidence in the case. If these courts were equipped with clearer criteria for defining M&S – whether those set out in this thesis or

something comparable – they would be better able to convey to the defence bar why such reasoning is a poor fit for the doctrine, even if some of it might be improper on other bases.

What this chapter – and indeed this thesis as a whole – tried to accomplish was an accounting of the peculiar twists and turns that the doctrine of M&S in sexual assault law has taken in recent years. In the result, this doctrine might appear more complex and nuanced than we have been accustomed to, such that it might require more careful thinking when invoked and applied in one sexual assault case or another.[393] This is right and proper, however, if we are to take seriously the perspectives of all members of the bench, bar and academy who are concerned with sexual assault law in Canada, and if we are committed to better understanding what the doctrine can and cannot do. This thesis does not purport to terminate healthy debates about what M&S are, the various ways they can rear their heads in sexual assault cases or what should be done about them. It hopes, however, that such debates will acknowledge the need to assure women and men alike that they will not be judged according to inapt behavioural assumptions of any sort when they are implicated as a party or witness in a sexual assault trial.

[393] In a similar vein, see Lisa Dufraimont, "Current Complications," *supra* note 3 at 561, where she notes that the framework for understanding stereotyping and UCSAs set out in *JC* "may seem to complicate the law" but ultimately "helpfully clarifies the law."

CONCLUSION

Recapitulation: Contributions and Proposals

This thesis has responded to a recent and understudied phenomenon arising in appeals from conviction for sexual assault in Canada: the advent of defence-raised M&S. Justice system actors and academics in this area have long associated M&S with sexist assumptions about women's propensity to consent and/or to make false allegations; it has typically fallen to Crown prosecutors to flag these M&S to courts as improper avenues to acquittal. Against this backdrop, defence arguments about M&S leading to inappropriate convictions might seem to be specious or born of bad faith. A closer look at these defence arguments in Canadian intermediate appellate case law, however, shows that only some of them are ill-conceived, while others are legitimate and deserve to be retained as integral components of the doctrine of M&S. The SCC's broader discourse on M&S in sexual assault trials (reviewed in Chapter 1) would suggest that these latter assumptions should be eradicated from decision-making in sexual assault cases no less than their Crown-raised counterparts.

The framework advanced in this thesis tries to compensate for a recent tendency on the part of provincial and territorial courts of appeal to advance global, non-partisan and gender-neutral accounts of M&S. For all their virtues, these accounts might fairly be construed as "ahistorical and regressive"[394] when set against the sociolegal context in which Canada has dealt with sexual assault over the past many decades. It is helpful, this thesis has posited, to reflect on arguments about M&S in terms of the party in whose interest it is to raise them and to what end. At one level, these distinctions allow us to articulate that Crown-raised M&S can and should continue to be acknowledged as the most common and pernicious instances of flawed reasoning

[394] Lisa Dufraimont, "Current Complications," *ibid* at 563-564.

that undermine the fair adjudication of sexual assault cases, and that the doctrine need only open a crack to accommodate the recognition of defence-raised M&S, which can occasionally pose a risk of wrongful conviction. Put another way, Crown- and defence-raised M&S may well be "equally wrong,"[395] but there is no need to imply that they operate at the same frequency or magnitude and no obvious legal or empirical basis for so suggesting.

At another level, grappling with the interplay between Crown- and defence-raised M&S challenges us to better discern the contours of the doctrine as a whole and its coherence in Canadian sexual assault law. Recognizing defence-raised M&S about women's sexual timidity and men's sexual opportunism pushes us beyond orthodox understandings of sexuality and sexual assault, such that these can concern not only our protection from unwanted sexual contact but also the conditions for our pursuit of a lively and enriching sex life. So too does it offer one way to begin moving beyond tenacious social norms of feminine passivity and submission and masculine aggression and dominance, which have been identified as driving sexual assault and stereotyping about it.[396] More concretely, reconciling the recognition of these defence-raised M&S with their Crown-raised counterparts has motivated us to define M&S more clearly and to develop and apply two principles that offer welcome order in this area.

This thesis has found it workable to define stereotypes in this area as concerning empirical assumptions about how someone is likely to behave in a sexual (or sexually violative) context by virtue of their demographic membership, typically at the sites of sex and gender; and to define myths as false logical assumptions that depend on such stereotypes for their force. It also elaborated a principle of *consistency*, first articulated in interdisciplinary legal scholarship[397]

[395] *JC*, *supra* note 207 at para 63.
[396] See the sources cited at notes 100-101.
[397] See the sources cited at notes 42 and 47-55.

and recent appellate case law,[398] whereby the evidence in a given case can support a finding that is *consistent* with that which would flow from the application of a M&S. This principle is intertwined with that of *neutralization*, according to which recognition of a M&S simply neutralizes the assumption it reflects rather than gives rise to a contrary inference.

These definitions and principles, in turn, have shown potential for combatting overreach by both the defence (as documented in the final two sections of Chapter 2) and the Crown (as documented in the final section of Chapter 1). Both of these parties have, on occasion, stretched the doctrine of M&S beyond reasonable limits. Some defence counsel have tried in vain to impugn legitimate exercises of logic, common sense and experience as reflecting M&S even when they do not concern assumptions about someone's sexual behaviour by virtue of their demographic markers; others have invoked M&S in an effort to sidestep relevant evidence that plainly and fairly supports conviction. Some Crown prosecutors, for their part, have argued that the recognition of Crown-raised M&S compels the exclusion of relevant defence evidence or rejection of legitimate inferences favourable to the defence, sometimes to the point of contending that a complainant's direct evidence can scarcely be challenged absent reliance on these assumptions.[399] This state of affairs is untenable and intolerable. Should it persist, however, the hope of this thesis is that the definitions and principles noted above will equip judges to reject these arguments more effectively than they have to date.

For the doctrine of M&S to cohere sensibly and equitably in sexual assault law, all justice system actors and observers need to reflect on its proper limits and make reasonable concessions in its application. To put this more bluntly, the Crown, the defence, the judiciary and the academy must be able to articulate what does and does not quality as M&S-based reasoning.

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[398] *JC*, *supra* note 207 at paras 68-70.
[399] Lisa Dufraimont, "Current Complications," *supra* note 3 at 550-554.

This will not gut the doctrine of its meaning but rather give it flesh and assign it a more coherent role, so that it can do the work it is supposed to do: make sexual assault trials fairer. It is challenging to circumscribe what M&S are and what their recognition entails, and this thesis does not purport to have had the last word. What this thesis has done is to contend that the M&S doctrine cannot sustain continued misuse, by either the Crown or the defence, to resist due consideration of the evidence in any given case.

Implications for the Adjudication of Sexual Assault Cases

Some Canadian justice system actors and legal academics might conceivably take this thesis as a step backward in the development of sexual assault law.[400] After all, this thesis has broadened the scope of the M&S doctrine beyond its traditional concern, such that raising M&S is no longer a strategy used only by the Crown to avoid or overturn perverse acquittals but one that can also be deployed by the defence to resist unsafe convictions. Moreover, its advancement of the principles of *consistency* and *neutralization* has resulted in a more modest account of what recognizing M&S compels of the law – one that calls for the careful use of a broad range of evidence rather than the presumptive exclusion of some types thereof. These proposed shifts to the doctrine of M&S call for some attention to what they imply for the adjudication of sexual assault cases in Canada.

The Introduction to this thesis observed that when complainants do report sexual assault, there is an alarming rate of pre- and mid-trial attrition;[401] however, for those cases that receive a

[400] Consider the concerns about low rates of reporting, prosecution and/or conviction expressed by scholars who have long focused on the problem of Crown-raised M&S in sexual assault cases: Elaine Craig, *Putting Trials on Trial*, *supra* note 2 at 3, 7-8, 11, 21, 27 and 219; David Tanovich, "'Whack' No More," *supra* note 10 at 502-503; Janine Benedet, "Trading Sex Equality for Agency and Choice?", *supra* note 197 at 166; Lucinda Vandervort, "Affirmative Sexual Consent," *supra* note 139 at 406, 410 and 438; Melanie Randall, "Ideal Victims," *supra* note 22 at 411-412; Lise Gotell, "When Privacy Is Not Enough," *supra* note 172 at 773-774.
[401] See the sources cited at notes 18-19.

full trial, conviction rates are substantial and acquittal rates are very low.[402] These statistics suggest that *judicial* reliance on Crown-raised M&S might, in our present context, be more of an exception than the rule it is often taken to be. In any event, this thesis respectfully urges a foundational reminder in respect of those reports of sexual assault that do proceed to a determination of criminal liability: namely, "that the purpose of a criminal prosecution is not to obtain a conviction."[403] This purpose, rather, is to determine *whether* the evidence in a given case warrants conviction or acquittal. This requires that each case be adjudicated on its merits by a judge with an open mind[404] and without preconceptions as to who is to be believed and what about.[405] The account of M&S that this thesis has advanced – and, in particular, its extension of M&S to assumptions about women's sexual timidity and men's sexual opportunism, and the *neutralization* principle – is intended to support this kind of judicial approach.

As this thesis has repeatedly suggested, judicial deliberation involves some measure of *uncertainty* when it is undertaken without recourse to M&S. Uncertainty over what evidence to accept, how much weight to assign to evidence that *is* accepted, and the legitimate inferences that can be drawn therefrom is uncomfortable for all those involved in a trial. Compounding this unease, plenty of scholarship acknowledges that judges begin their assessments of a case with an

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[402] See the sources cited at note 20.

[403] *Boucher v The Queen*, [1955] SCR 16 at 23; see also *R v Paterson*, 2017 SCC 15 at para 19: "A criminal trial is concerned with determining whether the accused is guilty of an offence" [emphasis added].

[404] See descriptions of the "open mind" required of judges in CJC, *Ethical Principles*, *supra* note 28 at 39 (5.A.4; see also 5.A.1 and 5.A.2); Robert Sharpe, *Good Judgment*, *supra* note 17 at 249-250: "The good judge is one who comes to the case with an open mind, determined to decide the case without fear or favour, on the basis of the evidence and the arguments presented in open court. […] The good judge is certainly aware of the prevailing public mood but cannot be swayed or influenced by fear of making a decision that is unpopular or controversial"; Michelle Alton, "The Evolution of Impartiality," *supra* note 47 at 28-30 and 38; and *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at paras 33-36.

[405] See CJC, *Ethical Principles*, *ibid* at 36 (4.C.1: "Judges do not make assumptions based on general characterizations or attach labels to people that invite stereotypical assumptions about their behaviour or characteristics. Stereotypes are simplistic mental short cuts that generate misleading perceptions and cause mistakes and errors in fact and in law."; see also 4.C.2 and 4.C.3), and consider also 33 (IV.C) and 34 (4.A.1 and 4.A.2); Robert Sharpe, *Good Judgment*, *ibid* at 258-261; Michelle Alton, "The Evolution of Impartiality," *ibid* at 34-38.

intuitive "hunch,"[406] and any trial that runs its full course must obviously end with some measure of finality: a decisive finding about liability. This thesis simply asks that, *between* these two temporal poles, a judicial decision-maker be prepared to give themselves over to uncertainty in determining what the evidence establishes, rather than fall back on the inferential shortcuts that M&S of any sort afford.

For as long as Canada "adopts the criminal justice process as a primary response to sexual violence,"[407] this thesis makes one main request: that the doctrine of M&S in this area not be restricted to improper assumptions that operate against complainants and the Crown. Some defence-raised M&S have properly alerted us to other assumptions that prejudice the accused. Reconciling these two sets of M&S offers an opportunity to lend greater integrity to the doctrine as a whole and to recall a broader set of values that should undergird our approach to sexuality and sexual assault. As expressed at the outset of this thesis, this opportunity can move the law further, even if we cannot fully envision what forms it will take on.

[406] For an account of this phenomenon and strategies for overcoming its undue influence on judicial decision-making, see Robert Sharpe, *Good Judgment*, *ibid* at 139-144 (drawing on the work of Albie Sachs, a former judge of the Constitutional Court of South Africa); Michelle Alton, "The Evolution of Impartiality," *ibid* at 36-38; and Peter D Lauwers, "Reflections on the Influence of Social Media on Judging" (2020) 18 *Can J L & Tech* 121 at 122-123 (both drawing on the work of psychologist Daniel Kahneman). See also, more generally, Emma Cunliffe, "Judging, Fast and Slow," *supra* note 42.
[407] Elaine Craig, *Putting Trials on Trial*, *supra* note 2 at 223.

BIBLIOGRAPHY

Judicial Decisions

Alie c R, 2017 QCCA 18

Alipoor c R, 2017 QCCA 636

Bernatchez c R, 2013 QCCA 700

Boucher v The Queen, [1955] SCR 16

CO c R, 2016 QCCA 440

DP c R, 2022 QCCA 42

Gélinas c R, 2020 QCCA 1693

GG c R, 2021 QCCA 1835

JF c R, 2018 QCCA 986

JL c R, 2021 QCCA 1509

JP c R, 2022 QCCA 104

Kritik-Langer c R, 2022 QCCA 657

Lemire-Tousignant c R, 2020 QCCA 1065

Pierre c R, 2021 QCCA 1261

R c Gélinas, 2020 QCCQ 8903 (affirmed: 2020 QCCA 1693)

R c X, 2022 QCCA 505

R v AG, 2000 SCC 17

R v ADG, 2015 ABCA 149

R v Adebogun, 2021 SKCA 136

R v AE, 2022 SCC 4

R v AJK, 2020 ONCA 487

R v Al-Rawi, 2021 NSCA 86

R v ARJD, 2017 ABCA 237 (affirmed: 2018 SCC 5)

R v ARJD, 2018 SCC 5

R v Barton, 2019 SCC 33

R v BEM, 2022 ABCA 207 (application for leave to appeal filed: [2022] SCCA No 276)

R v Boone, 2016 ONCA 227

R v Bowers, 2022 ABCA 149

R v Caesar, 2015 NWTCA 4

R v CAM, 2017 MBCA 70

R v Cepic, 2019 ONCA 541

R v CMG, 2016 ABQB 368

R v CMM, 2017 BCPC 443 (reversed: 2020 BCCA 56)

R v CMM, 2020 BCCA 56

R v Chen, 2020 BCCA 329

R v Conway, 2021 BCCA 460

R v Cooke, 2020 NSCA 66

R v Crosby, [1995] 2 SCR 912

R v Darrach, 2000 SCC 46

R v Davies, 2022 BCCA 172

R v DD, 2000 SCC 43

R v Delmas, 2020 SCC 39

R v Dhaliwal, 2021 BCCA 479

R v Dinardo, 2008 SCC 24

R v DM, 2022 BCCA 120

R v Drydgen, 2021 BCCA 125

R v Esau, [1997] 2 SCR 777

R v EH, 2020 ONCA 405

R v Esquivel-Benitez, 2020 ONCA 160

R v Ewanchuk, [1999] 1 SCR 330

R v FBP, 2019 ONCA 157

R v Find, 2001 SCC 32

R v Friesen, 2020 SCC 9

R v Gagnon, 2018 SCC 41

R v Garon, 2009 ONCA 4

R v GF, 2021 SCC 20

R v Goldfinch, 2019 SCC 38

R v Grant, 2018 BCSC 413 (reversed: 2019 BCCA 369)

R v Grant, 2019 BCCA 369

R v Greif, 2019 BCSC 288 (affirmed: 2021 BCCA 187)

R v Greif, 2021 BCCA 187 (leave to appeal refused: [2021] SCCA No 182)

R v Handy, 2002 SCC 56

R v Hamilton, [2004] OJ No 3252 (C.A.)

R v Hutchinson, 2014 SCC 19

R v HW, 2022 ONCA 15

R v JA, 2011 SCC 28

R v JC, 2021 ONCA 131

R v Marshall, 2017 ONCA 1013

R v Massey-Patel, 2021 ONCA 860

R v Mehari, 2020 SKCA 37 (reversed: 2020 SCC 40)

R v Mehari, 2021 SKCA 26

R v Mills, [1999] 3 SCR 668

R v MLM, [1994] 2 SCR 3

R v MPH, 2022 BCCA 216

R v NS, 2010 ONCA 670 (affirmed: 2012 SCC 72)

R v Nyznik, 2017 ONSC 4392

R v O'Connor, [1995] 4 SCR 411

R v Osolin, [1993] 4 SCR 595

R v Park, [1995] 2 SCR 836

R v Pastro, 2021 BCCA 149

R v Paterson, 2017 SCC 15

R v Paulos, 2018 ABCA 433 (leave to appeal refused: [2019] SCCA No 136)

R v Quartey, 2018 ABCA 12 (affirmed: 2018 SCC 59)

R v Quartey, 2018 SCC 59

R v Quesnelle, 2014 SCC 46

R v Ravelo-Corvo, 2022 BCCA 19

R v RKK, 2022 BCCA 17 (leave to appeal refused: [2022] SCCA No 67)

R v Roberts, 2017 NWTCA 9

R v Rose, 2021 ONCA 408

R v Roth, 2020 BCCA 240

R v RR, 2018 ABCA 287

R v RV, 2019 SCC 41

R v RW, [1992] 2 SCR 122

R v Seaboyer; R v Gayme, [1991] 2 SCR 577

R v Shearing, 2002 SCC 58

R v Snelgrove, 2019 SCC 16

R v Slatter, 2018 ONCA 962

R v Slatter, 2020 SCC 36

R v TL, 2020 NUCA 10

R v Williams, [1998] 1 SCR 1128

R v WDM, 2022 SKCA 64

R v WJM, 2018 NSCA 54

Robbins c R, 2018 QCCA 1181

Savard c R, 2016 QCCA 380 (affirmed: 2017 SCC 21)

Simard c R, 2016 QCCA 880

Takri c R, 2015 QCCA 690 (leave to appeal refused: [2016] SCCA No 202)

Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General), 2015 SCC 25

Books

Daniel Brown and Jill Witkin, *Prosecuting and Defending Sexual Offence Cases*, 2/e (Toronto: Emond, 2020)

Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montréal/Kingston: McGill-Queen's University Press, 2018)

Elaine Craig, *Troubling Sex: Towards a Legal Theory of Sexual Integrity* (Vancouver: UBC Press, 2011)

Robyn Doolittle, *Had It Coming: What's Fair in the Age of #MeToo?* (Toronto: Allen Lane, 2019)

Marie Henein, *Nothing But the Truth: A Memoir* (Toronto: Signal, 2021)

S Casey Hill, David M Tanovich and Louis P Strezos, *McWilliams' Canadian Criminal Evidence*, 5/e (Toronto: Canada Law Book, 2017 (loose-leaf updated 2019))

Morris Manning and Peter Sankoff, *Manning, Mewett & Sankoff: Criminal Law*, 5/e (Markham: LexisNexis, 2015)

David M Paciocco, Palma Paciocco and Lee Stuesser, *The Law of Evidence*, 8/e (Toronto: Irwin Law, 2020)

Michael Plaxton, *Implied Consent and Sexual Assault: Intimate Relationships, Autonomy, and Voice* (Montréal-Kingston: McGill-Queen's University Press, 2015)

Robert J Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018)

Don Stuart, *Canadian Criminal Law: A Treatise*, 8/e (Toronto: Carswell, 2020)

Articles and Book Chapters

Michelle A Alton, "The Evolution of Impartiality and the Need for Cultural Competency when Assessing Credibility" (2022) 35 *Can J Admin L & Prac* 27

Janine Benedet, "Absence of Motive in Sexual Assault Cases" (2019) 55 *CR* (7th) 18

Janine Benedet, "*Barton*: 'She knew what she was coming for': Sexual Assault, Prostitution and the Meaning of Consent" (2017) 38 *CR* (7th) 445

Janine Benedet, "Judicial Misconduct in the Sexual Assault Trial" (2019) 52:1 *UBC L Rev* 1

Janine Benedet, "Marital Rape, Polygamy, and Prostitution: Trading Sex Equality for Agency and Choice?" (2013) 18:2 *Rev Const* Stud 161

Janine Benedet, "Probity, Prejudice and the Continuing Misuse of Sexual History Evidence" (2009) 64 *CR* (6th) 72

Janine Benedet, "*R v Goldfinch*: Narrative, Context and Evidence of Other Sexual Activity with the Accused" (2019) 55 *CR* (7th) 288

Janine Benedet, "Sentencing for Sexual Offences against Children and Youth: Mandatory Minimums, Proportionality and Unintended Consequences" (2019) 44 *Queen's LJ* 284

Janine Benedet, “Sexual Assault Cases at the Alberta Court of Appeal: The Roots of *Ewanchuk* and the Unfinished Revolution” (2014) 52:1 *Alta L Rev* 127

Janine Benedet and Isabel Grant, “*R v A(J)*: Confusing Unconsciousness with Autonomy” (2010) 74 *CR* (6th) 80

Janine Benedet and Isabel Grant, “Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases” (2012) 50 *Osgoode Hall LJ* 1

Christine Boyle and Marilyn MacCrimmon, “To Serve the Cause of Justice: Disciplining Fact Determination” (2001) 20 *Windsor YB Access to Just* 55

Karen Busby, “Every Breath You Take: Erotic Asphyxiation, Vengeful Wives, and Other Enduring Myths in Spousal Sexual Assault Prosecutions” (2012) 24 *Can J Women & L* 328

Elaine Craig, “Capacity to Consent to Sexual Risk” (2014) 17:1 *New Crim L Rev* 103

Elaine Craig, “Private Records, Sexual Activity Evidence, and the *Charter of Rights and Freedoms*” (2021) 58:4 *Alta L Rev* 773

Elaine Craig, “The Ethical Obligations of Defence Counsel in Sexual Assault Cases” (2014) 51:2 *Osgoode Hall LJ* 427

Elaine Craig, “The Legal Regulation of Sadomasochism and the So-Called ‘Rough Sex Defence’” (2021) 37 *Windsor YB Access to Just* 402

Elaine Craig, “The Relevance of Delayed Disclosure to Complainant Credibility in Cases of Sexual Offence” (2011) 36:2 *Queen’s LJ* 551

Emma Cunliffe, “Judging, Fast and Slow: Using Decision-Making Theory to Explore Judicial Fact Determination” (2014) 18:2 *Int’l J Evidence & Proof* 139

Emma Cunliffe, “Sexual Assault Cases in the Supreme Court of Canada: Losing Sight of Substantive Equality?” (2012) 57 *Sup Ct L Rev* (2d) 295

Richard F Devlin and Matthew Sherrard, “The Big Chill?: Contextual Judgment after *R v Hamilton and Mason*” (2005) 28 *Dalhousie LJ* 409

Lisa Dufraimont, “Current Complications in the Law on Myths and Stereotypes” (2021) 99:3 *Can Bar Rev* 536

Lisa Dufraimont, “Myth, Inference and Evidence in Sexual Assault Trials” (2019) 44:2 *Queen’s LJ* 316

Lisa Dufraimont, “*R v Barton*: Progress on Myths and Stereotypes in Sexual Assault” (2019) 54 *CR* (7th) 317

Lisa Dufraimont, "*R v Goldfinch* and the Problem of Relationship Evidence" (2019) 55 *CR* (7th) 282

Susan Ehrlich, "Perpetuating – and Resisting – Rape Myths in Trial Discourse" in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012)

Nathan Gorham, "*Schmaltz*: The Need for Caution When Limiting Relevant Defence Cross-Examination in Sexual Assault Cases" (2015) 17 *CR* (7th) 312

Lise Gotell, "Governing Heterosexuality through Specific Consent: Interrogating the Governmental Effects of *R v JA*" (2012) 24 *Can J Women & L* 359

Lise Gotell, "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women" (2008) 41 *Akron L Rev* 865

Lise Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the *Charter* for Sexual Assault Law" (2002) 40 *Osgoode Hall LJ* 251

Lise Gotell, "Thinly Construing the Nature of the Act Legally Consented to: The Corrosive Impact of *R v Hutchinson* on the Law of Consent" (2020) 53 *UBC L Rev* 53

Lise Gotell, "When Privacy Is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" (2006) 43 *Alta L Rev* 743

Isabel Grant and Janine Benedet, "Capacity to Consent and Intoxicated Complainants in Sexual Assault Prosecutions" (2017) 37 *CR* (7th) 375

Isabel Grant and Janine Benedet, "Confronting the Sexual Assault of Teenage Girls: The Mistake of Age Defence in Canadian Sexual Assault Law" (2019) 97 *Can Bar Rev* 1

Isabel Grant and Janine Benedet, "The Meaning of Capacity and Consent in Sexual Assault: *R v GF*" (2022) 70 *CLQ* 78

Isabel Grant and Janine Benedet, "The Sexual Assault of Older Women: Criminal Justice Responses in Canada" (2016) 62 *McGill LJ* 41

Isabel Grant and Janine Benedet, "Unreasonable Steps: Trying to Make Sense of *R v Morrison*" (2019) 67 *CLQ* 14

Jennifer Koshan, "Disclosure and Production in Sexual Violence Cases: Situating *Stinchcombe*" (2002) 40 *Alta L Rev* 655

Peter D Lauwers, "Reflections on the Influence of Social Media on Judging" (2020) 18 *Can J L & Tech* 121

Claire L'Heureux-Dubé, "Foreword: Still Punished for Being Female" in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (Ottawa: University of Ottawa Press, 2012)

John McInnes and Christine Boyle, "Judging Sexual Assault Law against a Standard of Equality" (1995) 29 *UBC L Rev* 341

David M Paciocco, "Competing Constitutional Rights in an Age of Deference: A Bad Time to Be Accused" (2001) 14 *Sup Ct L Rev* (2d) 111

David M Paciocco, "The New Rape Shield Provisions in Section 276 Should Survive *Charter* Challenge" (1993) 21 *CR* (4th) 223

Michael Plaxton, "Sexual Assault's Strangely Intractable Fault Problem" (2022) 70 *CLQ* 33

Melanie Randall, "Sexual Assault, Credibility, and 'Ideal Victims': Consent, Resistance, and Victim Blaming" (2010) 22 *Can J Women & L* 397

Kent Roach, "Sexual Assault Law" (2022) 70 *CLQ* 1

Hart Schwartz, "Sex with the Accused on Other Occasions: The Evisceration of Rape Shield Protection" (1994) 31 *CR* (4th) 232

Hamish Stewart, "The Fault Element of Sexual Assault" (2022) 70 *CLQ* 4

Don Stuart, "*Barton*: Sexual Assault Trials Must Be Fair Not Fixed" (2017) 38 *CR* (7th) 438

Don Stuart, "*Ewanchuk*: Asserting 'No Means No' at the Expense of Fault and Proportionality Principles" (1999) 22 *CR* (5th) 39

Don Stuart, "The Supreme Court Adds Unjust Rigidity to Rape Shield Protections" (2019) 55 *CR* (7th) 292

Don Stuart, "Twin Myth Hypotheses in Rape Shield Laws Are Too Rigid and *Darrach* Is Unclear" (2009) 64 *CR* (6th) 74

David M Tanovich, "Criminalizing Sex at the Margins" (2010) 74 *CR* (6th) 86

David M Tanovich, "Regulating Inductive Reasoning in Sexual Assault Cases" in Benjamin L Berger, Emma Cunliffe and James Stribopoulos, eds, *To Ensure that Justice Is Done: Essays in Memory of Marc Rosenberg* (Toronto: Thomson Reuters, 2017) at 75-76

David M Tanovich, "'Whack' No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases" (2013-2014) 45 *Ottawa L Rev* 495

Lucinda Vandervort, "Affirmative Sexual Consent in Canadian Law, Jurisprudence, and Legal Theory" (2012) 23:2 *Colum J Gender & Law* 395

Lucinda Vandervort, "The Prejudicial Effects of 'Reasonable Steps' in Analysis of *Mens Rea* and Sexual Consent" (2018) 55:4 *Alta L Rev* 933

Anna SP Wong, "*R v ARJD*: It's Time to Move Beyond Stereotypes-Bound Advocacy and Decision-Making" (2019) 49 *The Advocate's Quarterly* 222

Government Reports

Statistics Canada, *Experiences of violent victimization and unwanted sexual behaviours among gay, lesbian, bisexual and other sexual minority people, and the transgender population, in Canada, 2018*, by Brianna Jaffray, Catalogue No 85-002-X (Ottawa: Statistics Canada, 9 September 2020)

Statistics Canada, *From arrest to conviction: Court outcomes of police-reported sexual assaults in Canada, 2009 to 2014*, by Cristine Rotenberg, Catalogue No 85-002-X (Ottawa: Statistics Canada, 26 October 2017)

Statistics Canada, *Police-reported sexual assaults in Canada, 2009 to 2014: A statistical profile*, by Cristine Rotenberg, Catalogue No 85-002-X (Ottawa: Statistics Canada, 3 October 2017)

Statistics Canada, *Police-reported sexual assaults in Canada before and after #MeToo, 2016 and 2017*, by Cristine Rotenberg and Adam Cotter, Catalogue No 85-002-X (Ottawa: Statistics Canada, 8 November 2018)

Statistics Canada, *Self-reported sexual assault in Canada, 2014*, by Shana Conroy and Adam Cotter, Catalogue No 85-002-X (Ottawa: Statistics Canada, 11 July 2017)

Parliamentary Bills

An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof, 1st Sess, 32nd Parl, 1983 (assented to 3 January 1983), SC 1980-81-82-83, c 125

Bill C-49, *An Act to amend the Criminal Code (sexual assault)*, 3rd Sess, 34th Parl, 1992 (assented to 23 June 1992), SC 1992, c 38

Bill C-46, *An Act to amend the Criminal Code (production of records in sexual offence proceedings)*, 2nd Sess, 35th Parl, 1997 (assented to 25 April 1997), SC 1997, c 30

Bill C-32, *An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts*, 2nd Sess, 41st Parl, 2015 (assented to 23 April 2015), SC 2015, c 13

Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, 1st Sess, 42nd Parl, 2018 (assented to 13 December 2018), SC 2018, c 29

Bill C-3, *An Act to amend the Judges Act and the Criminal Code*, 2nd Sess, 43rd Parl, 2021 (assented to 6 May 2021), SC 2021, c 8.

Other

Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 2021)

Canadian Judicial Council, *In the Matter of an Inquiry Pursuant to s. 63(1) of the* Judges Act *Regarding the Honourable Justice Robin Camp: Report and Recommendations of the Inquiry Committee to the Canadian Judicial Council* (29 November 2016)

Sean Fine, "Supreme Court of Canada backs victims in 34 sex-assault cases in a row, a Globe analysis finds", *Globe and Mail* (30 May 2022), online: https://www.theglobeandmail.com/canada/article-supreme-court-rulings-sex-assault-cases-metoo/