

The Ethical Obligations of Defence Counsel in Sexual Assault Cases

Elaine Craig

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The Ethical Obligations of Defence Counsel in Sexual Assault Cases

Abstract

The treatment of sexual assault complainants by defence counsel has been the site of significant debate for legal ethicists. Even those with the strongest commitment to the ethics of zealous advocacy struggle with how to approach the cross-examination of sexual assault complainants. One of the most contentious issues in this debate pertains to the use of bias, stereotype and discriminatory tactics to advance one's client's position. This paper focuses on the professional responsibilities defence lawyers bear in sexual assault cases. Its central claim is as follows: Defence counsel are ethically obligated to restrict their carriage of a sexual assault case (including the evidence they seek to admit, the lines of examination and cross-examination they pursue and the closing arguments they submit) to conduct that supports finding of facts within the bounds of law. Put another way, defence counsel are ethically precluded from using strategies and advancing arguments that rely for their probative value on three social assumptions about sexual violence that have been legally rejected as baseless and irrelevant.

Keywords

Criminal defense lawyers; Sex crimes--Trial practice; Legal ethics; Canada

The Ethical Obligations of Defence Counsel in Sexual Assault Cases

Elaine Craig*

The treatment of sexual assault complainants by defence counsel has been the site of significant debate for legal ethicists. Even those with the strongest commitment to the ethics of zealous advocacy struggle with how to approach the cross-examination of sexual assault complainants. One of the most contentious issues in this debate pertains to the use of bias, stereotype and discriminatory tactics to advance one's client's position. This paper focuses on the professional responsibilities defence lawyers bear in sexual assault cases. Its central claim is as follows: Defence counsel are ethically obligated to restrict their carriage of a sexual assault case (including the evidence they seek to admit, the lines of examination and cross-examination they pursue and the closing arguments they submit) to conduct that supports finding of facts within the bounds of law. Put another way, defence counsel are ethically precluded from using strategies and advancing arguments that rely for their probative value on three social assumptions about sexual violence that have been legally rejected as baseless and irrelevant.

La manière dont les avocats de la défense traitent les plaignants d'agression sexuelle a fait l'objet d'un vaste débat en éthique juridique. Même ceux qui militent le plus fortement envers l'éthique hésitent quant à la manière d'aborder le contre interrogatoire des plaignants d'agression sexuelle. L'une des questions les plus litigieuses de ce débat porte sur l'usage du parti pris, des stéréotypes et des tactiques discriminatoires pour rehausser la position de

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leur client. Cet article met l'accent sur les responsabilités professionnelles qui incombent aux avocats de la défense dans les causes d'agression sexuelle. Sa principale revendication est la suivante : les avocats de la défense doivent éthiquement s'en tenir, dans les causes d'agression sexuelle (y compris dans la preuve qu'ils cherchent à faire admettre, la teneur des interrogatoires et du contre interrogatoire qu'ils mènent et le plaidoyer final qu'ils présentent) à une conduite qui soutient la constatation des faits dans les limites de la loi. Autrement dit, il devrait sur le plan éthique être interdit aux avocats de la défense d'avoir recours à des stratégies et des plaidoyers reposant sur la force probante de trois hypothèses sociales relatives à la violence sexuelle qui ont été rejetées légalement comme non fondées et non pertinentes.

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I. FOUR MEN ON ONE WOMAN TIMES TWO... AND AN INTRODUCTION

ON HER FIFTEENTH BIRTHDAY, she was lured away from the bus stop where she waited to go to school by four young men. She had dated one of the men for several weeks and they had broken up before her birthday. She knew the others a little or not at all. They convinced her to go to the home of one of them, promising they would return her to the bus stop in time for her afternoon classes. She boarded a bus with the four men, arriving fifteen minutes later at a home she had never been to before. She had no money for return transportation.

When they arrived at the apartment the four men forced her to engage in sexual acts. They penetrated her vaginally. They tried to force her to perform oral sex. They ejaculated on her. She spent the fourteenth of May 2002 being repeatedly sexually assaulted by these four men.

George Aristos, Joseph Paradiso, Gerald Yasskin, and Nadir Sachak acted for the accused at their trial.¹ None of the accused testified nor were any defence witnesses called. The case turned almost entirely on her evidence. She spent the fifteenth of September 2003 being extensively cross-examined by these four men.

Defence counsel asked her why she did not just run away.² Why did she not call out for help?³ Why did she not tell the police immediately?⁴ Why did she tell her friend before she told the police?⁵ Why did she wait six days to tell her mother?⁶ Why did she not tell the first person she saw in the elevator after the attack, or the bus driver, or the shopkeeper, or any of the other strangers she crossed paths with on the way home?⁷

Defence counsel for one of the accused suggested to her that his client was just “goofing around” when on a previous occasion he lured her into a bathroom, forced his hand into her pants, and penetrated her digitally.⁸ He asserted that she had engaged in sex with other individuals on that day, suggesting that this behavior made it more likely that she would have consented to the digital penetration by his client.⁹

Defence counsel called her a liar.¹⁰ They said she was evasive and outright dishonest.¹¹ She was accused of perjury.¹² It was suggested that she made the whole thing up out of animus against one of the accused, who had broken up with her a few weeks before her birthday.¹³

Defence counsel questioned her on her failure to resist the assaults physically, apart from one slap to the face of one of the young men.¹⁴ Contradictorily,

1. *R v AA*, 2004 ONCJ 101, 62 WCB (2d) 405 [*R v AA*].

2. *Ibid* at para 9.

3. *Ibid* at para 16.

4. *Ibid* at para 20.

5. *Ibid* at para 21.

6. *Ibid* at para 41.

7. *Ibid* at para 39.

8. *Ibid* at para 26. The trial judge in this case also convicted this accused of sexual assault as a result of this prior incident involving forced digital penetration (*ibid* at para 72).

9. *Ibid* at para 46.

10. *Ibid* at paras 35-36.

11. *Ibid* at para 35.

12. *Ibid*.

13. *Ibid* at para 37.

14. *Ibid* at para 43.

counsel also argued that she should be disbelieved because she slapped one of them in the face (and denied giving another one of them a “blow job”).¹⁵ They asserted that such feistiness in response to the four men suggested that any sexual activity that happened that day was consensual.¹⁶ Some of the defence lawyers argued that she should be disbelieved because of a lack of evidence of significant physical injury.¹⁷ If she had been attacked as she said, why did she not have any injuries to show for it?

The four young men were convicted of sexual assault.

In this article, I focus on the professional responsibilities defence lawyers bear in sexual assault cases. I advance two central claims. First, that specific reforms to the substantive and procedural/evidentiary law of sexual assault impose ethical obligations on defence counsel to refrain from strategies that invoke or trigger the underpinning social assumptions rejected by these reforms. Second, that despite these law reforms and the ethical obligations arising from them, defence counsel in Canada continue to invoke these strategies. While a broader claim about what constitutes an ethical defence of someone accused of sexual assault could be made, the argument advanced in this article is intentionally narrow: Defence counsel are ethically obliged to restrict their carriage of a sexual assault case (including the evidence they seek to admit, the lines of examination and cross-examination they pursue, and the closing arguments they submit) to conduct that supports findings of facts within the bounds of law. Put another way, defence counsel are ethically precluded from using strategies and advancing arguments that rely for their probative value on three social assumptions about sexual violence that have been legally rejected as baseless and irrelevant: (1) the assumption that once a woman’s chastity has been lost she is more likely to have sex with anyone and less likely to tell the truth; (2) the assumption that women who were actually raped will tell someone immediately and, correlatively, that women who do not report an attack promptly are lying; and (3) the assumption that women who genuinely do not want to engage in sex will physically resist or attempt escape.

The remainder of this article is divided into three parts. Part II elucidates the three social assumptions or narratives about sexual violence that have been explicitly rejected through law reforms. Part III demonstrates the ways in which, despite changes to the law, defence counsel often continue to rely on these rejected social assumptions about sexual violence. Parts II and III establish the foundation

15. *Ibid* at para 42.

16. *Ibid*.

17. *Ibid* at para 44.

for the claims advanced in Part IV. Part IV examines the relationship among the three legal reforms outlined in Part II, the internal and external limitations on the constitutionally guaranteed right to make full answer and defence, and the impact of schematic thinking on assessments of complainant credibility. An examination of this relationship demonstrates that, in Canada, even legal ethicists strongly committed to the concept of zealous advocacy should accept that there is an ethical obligation not to invoke, rely upon, and consequently perpetuate these three legally rejected social assumptions about sexual violence.

II. THREE OUTDATED SOCIAL ASSUMPTIONS ABOUT SEXUAL VIOLENCE HAVE BEEN EXPLICITLY REJECTED BY LAW REFORMS

For decades, feminists and other law reformers have worked to eliminate from the substantive criminal law and the rules of evidence the baseless and discriminatory social assumptions about women in general, and sexual violence in particular, upon which much of the law of sexual violence was structured.¹⁸ Statutory reforms and judicial decisions have pursued that result both directly and indirectly.¹⁹ Three social assumptions or narratives about sexual violence have been explicitly rejected through legislative and jurisprudential law reforms in Canada: (1) the baseless assumption that once a woman's chastity has been lost she is more likely to have sex with anyone and less likely to tell the truth; (2) the assumption that women who were actually raped will tell someone immediately and, correlatively, that women who do not report an attack promptly are lying; and (3) the assumption

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18. Christine Boyle provides a comprehensive discussion of the early reforms and their relationship to the rejection of the stereotypical attitudes about women that underpinned the criminal law in Canada. See Christine LM Boyle, *Sexual Assault* (Toronto: Carswell Company, 1984).
19. See e.g. *Criminal Law Amendment Act 1975*, SC 1974-75-76, c 93 (removing the requirement that judges warn juries that it is unsafe to convict solely on the uncorroborated evidence of the complainant); *An Act to Amend the Criminal Code in relation to sexual offences and other offences against the person*, SC 1980-81-82-83, c 125, s 19, amending *Criminal Code*, RSC 1970, c 34 [*Criminal Code Amendment, Sexual Offences*] (repealing the corroboration rule altogether, removing rape and adding sexual assault, removing the marital rape exemption). These reforms, as well as others including statutory limits on access to third party records, were aimed at responding to some of the following discriminatory attitudes about sexual violence: women cannot be trusted; women who act a certain way and dress a certain way are partly to blame for the infliction of sexual violence; poor women, women of colour, and women employed in the sex industry tend to lie about rape; women cannot really be forced to have sex against their will; women are inclined to lie about rape out of spite.

that women who genuinely do not want to engage in sex will physically resist or attempt escape.²⁰

A. DISTRUSTING THE UNCHASTE WOMAN—REJECTED BY SECTION 276

Consider first the relevance of a complainant's prior sexual experiences to allegations of sexual assault. Thirty-five years ago, Chief Justice Bray of the Australian Court of Appeal recognized the irrelevance of prior sexual history in many contexts:

I find it hard to believe that any reasonable person at *the present time* could assent to any of the following *absurd propositions*:

1. That a willingness to have sexual intercourse outside marriage with someone is equivalent to a willingness to have sexual intercourse outside marriage with anyone.
2. That the unchaste are also liable to be the untruthful.
3. That a woman who has had sexual intercourse outside marriage is a fallen woman and deserves any sexual fate that comes her way.²¹

In Canada, Parliament and the courts have also rejected these same absurd propositions, at least on the face of the law.²² The *Criminal Code of Canada* prohibits the admission of a complainant's prior sexual history for the purpose of discrediting her on the basis of a lack of chastity, or for the purpose of inferring that prior sexual experience alone makes her more likely to have consented to the sex at issue in the allegation.²³ The sexual nature of prior activity with the accused or a third party is irrelevant to the matter of whether she consented to the sexual touching at issue or whether she is a credible witness.²⁴

A change to the law occurred in the early 1990s with the enactment of section 276 of the *Criminal Code*. It explicitly rejected two related social assumptions about rape. First, it rejected the narrative that women who are "loose" are untrustworthy. Second, it rejected the assumption that women with previous sexual experience are more likely to consent than are women who are "chaste"—*i.e.*, the absurd proposition that once a woman has had sex with one man, she becomes less discriminating in her sexual choices. This is not to suggest

20. For further elaboration on the distinction between explicit, direct rejection of discriminatory assumptions about rape and indirect pursuit of this objective, see the discussion in Part IV, below, on internal and external parameters on the right to full answer and defence.

21. *The Queen v Gun; ex parte Stephenson* (1977), 17 SASR 165 at 168 (SASC) [emphasis added].

22. See *Criminal Code*, RSC 1985, c C-46, s 276 [*Criminal Code*]; *R v Seaboyer; R v Gayme* [1991] 2 SCR 577, 66 CCC (3d) 321 [*Seaboyer* cited to SCR].

23. *Criminal Code*, *supra* note 22.

24. *Seaboyer*, *supra* note 22.

that evidence of sexual activity is always inadmissible, or even always inadmissible as relevant to consent. Evidence of prior sexual activity is admissible if it is relied upon to give rise to an inference not based on one of these two outdated social assumptions.²⁵

**B. FAILURE TO RAISE A HUE AND CRY SUGGESTS FABRICATION—
REJECTED IN *R v DD***

The second social assumption explicitly rejected through law reform pertains to the length of time between the alleged sexual assault and the complainant's disclosure of the incident. The amendment to the *Criminal Code* abrogating the doctrine of recent complaint,²⁶ combined with the Supreme Court of Canada (the Court) ruling in *R v DD*,²⁷ has now made the timing of disclosure of a sexual assault, by itself, irrelevant to the matter of whether a sexual assault complainant is a credible witness.

It is an error of law to draw an adverse inference as to a complainant's credibility solely on the basis that disclosure of the incident was delayed.²⁸ The social assumption rejected by this reform to the law is that a woman who is sexually violated will, at first opportunity, "raise a hue and cry"—that the natural

25. For example, defence counsel could introduce evidence of a complainant's sexual activity with someone other than the accused in order to explain the physical conditions on which the Crown relies to establish intercourse or the use of force (such as the presence of semen or injury). Evidence of prior sexual activity can be used to attack the complainant's credibility by demonstrating a motive to fabricate. Justice McLachlin (as she then was) uses the example of a father accused of sexual acts with his young daughter who sought to present evidence that the source of the accusation was his earlier discovery of the fact that the girl and her brother were engaged in sexual relations. The defence argued that the daughter accused him of the act out of animus against him after he stopped the sibling relationship. *Seaboyer, supra* note 22 at para 51.

26. *Criminal Law Amendment Act*, SC 1980-81-82-83, c 125, s 19. For an explanation of the doctrine of recent complaint, see D Fletcher Dawson, "The Abrogation of Recent Complaint: Where Do We Stand Now?" (1984) 27 *Crim LQ* 59 [Dawson, "Abrogation"].

27. 2000 SCC 43 at paras 63-65, 2 SCR 275 [*R v DD*]. In *R v DD*, Justice Major stated the following:

The significance of the complainant's failure to make a timely complaint must not be the subject of any presumptive adverse inference based upon now rejected stereotypical assumptions of how persons ... react to acts of sexual abuse... . A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant [emphasis in original].

28. *R v RW*, [1992] 2 SCR 122, 13 CR (4th) 257.

time to disclose a sexual assault is as soon as possible after it has happened.²⁹ Prior to these reforms, it was “a strong, but not a conclusive, presumption against a woman that she made no complaint in a reasonable time after the fact.”³⁰ It is no longer permissible, according to the Court, to rely on the timing of disclosure alone to draw an adverse inference as to the complainant’s credibility.³¹

C. FAILURE TO FIGHT BACK DEMONSTRATES CONSENT—REJECTED BY SECTION 273 AND *R v EWANCHUK*

The third reform relates to the affirmative definition of consent established by amendments to the consent provisions of the *Criminal Code* in combination with the decision in *R v Ewanchuk*.³² The Court in *Ewanchuk* determined that consent to sexual touching is based on the complainant’s subjective state of mind at the time of the incident and that to establish a mistaken belief in consent defence requires a belief that the complainant communicated consent through words or actions.³³ An accused’s belief that a complainant did not say no will not exculpate the accused nor will his belief that she said no but meant yes. A complainant’s passivity is not a defence.³⁴ It is only a mistaken belief that the complainant *communicated* consent, where the accused took reasonable steps to ascertain that it was present, which will raise a reasonable doubt as to *mens rea*.³⁵ The social

29. *R v DD*, *supra* note 27. The phrase “raise a hue and cry,” which originated in the early 13th century, meant that a victim of sexual assault was required to immediately alert others of the wrong committed against her should she want to be considered credible. Her failure to raise a hue and cry made it unlikely that she would be believed. As per Justice Major, “Owing to the inflexibility of the common law, the notion of hue and cry persisted throughout most of the 20th century.” *R v DD*, *supra* note 27 at paras 60-61.

30. *Ibid* at para 60, citing *R v Lillyman*, [1896] 2 QB 167 at 170; Dawson, “Abrogation,” *supra* note 26.

31. *R v DD*, *supra* note 27; *R v RW*, *supra* note 28.

32. [1999] 1 SCR 330, 169 DLR (4th) 193 [*Ewanchuk*]. The *Criminal Code* defines the legal meaning of consent (*Criminal Code*, *supra* note 22, s 273.1) and establishes the reasonable steps requirement for the defence of mistaken belief in consent (*ibid*, s 273.2).

33. *Ewanchuk*, *supra* note 32 at para 36; *Criminal Code*, *supra* note 22, s 273.1. Under both the common law and section 273.1 of the *Criminal Code*, consent must be freely given in order to be legally effective. Thus, duress, abuse of trust, and coercion all vitiate consent to sexual touching.

34. *R v MLM*, [1994] 2 SCR 3, 131 NSR (2d) 79.

35. Section 265(3) of the *Criminal Code* defining consent (or belief in consent) as a defence to assault stipulates that no consent is obtained where the complainant submits or does not resist by reason of the application of force, threats, fear of the application of force, fraud, or the exercise of authority. *Criminal Code*, *supra* note 22, s 265(3). Section 273.2(b) of the *Criminal Code* establishes that the defence of mistaken belief in consent will not be available

assumption rejected by these changes to the law is that a woman cannot be raped against her will—that a woman who actually does not want to engage in sex will fight a man off.³⁶

To summarize, the law of sexual assault in Canada explicitly rejects inferential reasoning premised on the assumptions that sexually active women are both more likely to have said yes and more likely to lie on the stand, that women who are actually raped will raise a hue and cry at first opportunity, and that women who failed to fight back actually “wanted it.” To draw inferences reliant upon any of these three social assumptions about sexual violence constitutes an error of law. The enactment of section 276 of the *Criminal Code*, the abrogation of the doctrine of recent complaint followed by the Court’s ruling in *R v DD*, and the definition of consent adopted in *Ewanchuk* and in sections 273.1 and 273.2 of the *Criminal Code* all arose because of a recognition that these social assumptions about sexual violence are, to use Chief Justice Bray’s word from thirty-five years ago, absurd.

As will be discussed in Part IV, the absurdity of these narratives makes evidence reliant on them for its relevance inadmissible. More than just absurd, these social assumptions or stereotypes are irrelevant, discriminatory, harmful, and outrageously outdated. It seems implausible that members of the legal profession would invoke them today. Yet these are the stories that defence lawyers in Canada often continue to tell about the women who have accused their clients of rape.³⁷ Part III of this article details the continued reliance on antiquated and unethical strategies to discredit complainants by invoking the very social assumptions rejected by these law reforms.

III. DISCREDITED ASSUMPTIONS ABOUT WOMEN CONTINUE TO RECEIVE WIDESPREAD ENDORSEMENT

Consider again the conduct of defence counsel in the case with which this article opened: *R v AA*.³⁸ Together, the four lawyers, through vigorous and lengthy cross-examination, explicitly and repeatedly invoked all three of these

where the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain consent. *Ibid*, s 273.2(b).

36. Lynda Lytle Holmstrom & Ann Wolbert Burgess, *The Victim of Rape: Institutional Reactions* (New Brunswick, NJ: Transaction Books, 1983).

37. See the discussion regarding relevant cases in Part III, below.

38. *R v AA*, *supra* note 1.

discriminatory attitudes and baseless factual inferences about sexual violence.³⁹ They attempted to discredit her because she did not run from the apartment screaming rape to the strangers in the elevator or to the bus driver.⁴⁰ They argued that her failure to resist and physically fight these four men off suggested that she must have actually consented to any sexual acts that occurred.⁴¹ It was suggested she had previously been involved in an orgy and that this implied she had consented to other sexual acts.⁴²

These lawyers, who encouraged the Ontario Court of Justice to assume that a fifteen year old girl who has *actually* spent hours being gang raped by four men would reveal this profound violation to strangers sharing an elevator with her minutes after the attack, might well have quoted from this archaic passage cited by John Henry Wigmore in 1923:

When therefore a virgin has been so deflowered and overpowered ... forthwith and while the act is fresh she ought to repair with hue and cry to the neighboring vills and there display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress...⁴³

Similarly, they could have relied for authority on a note from the 1952 Yale Law Journal to support the suggestion that she must have wanted to be repeatedly penetrated vaginally by the penises and hands of four different men, otherwise she would have fought back: “[A] woman’s need for sexual satisfaction may lead to the unconscious desire for forceful penetration, the coercion serving neatly to avoid the guilt feelings which might arise after willing participation.”⁴⁴

They could have pointed to the words of Wigmore, quoted in the 1970 edition of his seminal evidence law text, to support their proposition that the complainant’s choice to engage in consensual sex earlier in the day suggests that she was also consenting when one of the accused followed her into the bathroom and forced his fingers into her vagina: “The unchaste ... mentality finds incidental

39. The trial judge variously described their cross-examination of the complainant as vigorous, lengthy, probing, extensive, and repetitive. *Ibid* at paras 19-21, 38-39, 48.

40. *Ibid* at paras 9, 16, 20-21, 39.

41. *Ibid* at para 43.

42. *Ibid* at para 46.

43. *R v DD*, *supra* note 27 at para 60 [citations omitted]. Justice Major quotes from an archaic passage cited in a work by Wigmore. See John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of all Jurisdictions of the United States and Canada*, 2d ed, vol 3 (Boston: Little, Brown, and Company, 1923) at 764.

44. “Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard” (1952) 62:1 Yale LJ 55 at 67 [citations omitted].

but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim.”⁴⁵

The parallels between the assertions made by the lawyers in *R v AA* and these outdated passages are not noted merely in an effort to be inflammatory. It is important to be clear that lawyers who make the kinds of arguments and pursue the lines of cross-examination engaged in by defence counsel in *R v AA* are making the same types of claims, underpinned by the very same assumptions about women, that seem so obviously outrageous and offensive when phrased in the way they were articulated by Wigmore and his ilk forty, sixty, or ninety years ago.

The lawyers’ conduct in *R v AA* is not anomalous. Continued reliance by defence counsel on these discriminatory stereotypes is not uncommon. The practices highlighted so well in *R v AA* reveal a systemic problem. They are not the practices of a few problematic lawyers. Indeed, an examination of recent case law reveals that in many sexual assault cases in Canada, defence counsel invoke these social assumptions explicitly and seemingly unapologetically.⁴⁶

45. John Henry Wigmore, *Evidence in Trials at Common Law*, ed by James Harmon Chadbourne (Boston: Little, Brown, and Company, 1970) vol 3A at 736.

46. See e.g. *R v AA*, *supra* note 1; *R v HT*, 2008 NLTD 106 (available on QL); *R v Nitsiza*, 2007 NWTSC 53, 74 WCB (2d) 495; *R v R(JW)*, 2007 BCCA 452, 268 BCAC 320; *R v LF*, [2006] 71 WCB (2d) (available on QL) (Ont Sup Ct); *R v Sandfly* (2008), 330 SaskR 6, 64 CR (6th) 48 (Sask QB); *R v BJW*, 2006 ONCJ 455, 72 WCB (2d) 29; *R v CDR* (2002), 53 WCB (2d) 127 (available on QL) (NL Prov Ct); *R v B(FF)*, [1993] 1 SCR 697, 120 NSR (2d) 1; *R v OA* (2005), 63 WCB (2d) 303 (available on QL) (Ont Sup Ct); *R v PC*, 2004 ONCJ 160, 72 WCB (2d) 788; *R v Hoosein*, 2010 ONSC 4452 (available on QL); *R v H(H)*, 2009 ONCJ 730 (available on CanLII); *R v L(F)*, 2002 CarswellOnt 178 (WL Can) (Ont Sup Ct); *R v Skunk*, 2010 ONCJ 209 (available on QL); *R v C(DA)*, 2010 SKQB 194 (available on WL Can); *R v Oickle*, 2010 NSSC 182 (available on QL); *R v Nayanookeesic*, 2010 ONCJ 47 (available on QL); *R v K(M)*, 2006 CarswellOnt 7933 (WL Can) (Ont Sup Ct); *R v BM*, 2007 NSPC 56, 76 WCB (2d) 97; *R v M(J)*, 2004 CarswellOnt 6693 (WL Can) (Ont Sup Ct); *R v L(HA)*, 2002 CarswellMan 370 (WL Can) at para 46 (Man Prov Ct); *R v Palardy*, 2007 CarswellOnt 9687 (WL Can) at para 108 (Ont Sup Ct); *R v C(R)*, 2008 CarswellOnt 812 (WL Can) at para 86 (Ont Sup Ct); *R v Pikayuk*, 2009 NUCJ 14 (available on QL); *R v S(TH)*, 2002 CarswellOnt 5313 (WL Can) (Ont Ct J); *R v AA*, 2009 NUCJ 1, (available on QL). See also Elizabeth Comack & Gillian Balfour, “Whacking the Complainant Hard: Law and Sexual Assault” in *The Power to Criminalize: Violence, Inequality and Law* (Manitoba: Fernwood, 2004) 110 at 111 (discussing the use of stereotypes to discredit sexual assault complainants and quoting a statement made at a 1988 meeting of criminal defence lawyers in which an Ottawa lawyer asserted that “you’ve got to attack the complainant hard with all you’ve got”); Jennifer Temkin, “Prosecuting and Defending Rape: Perspectives From the Bar” (2000) 27:2 JL & Soc’y 219 [Temkin, “Defending Rape”] (observing that the lawyers she interviewed in the United Kingdom did not report any ethical quandary with invoking these types of stereotypes).

Consider the hue and cry myth. In many cases, lawyers explicitly rely on delayed disclosure to discredit the complainant.⁴⁷ The cross-examination of the complainant in *R v JU* provides an illustration.⁴⁸ Defence counsel suggested to the complainant that the reason she delayed disclosure was because she was making it up. He asserted that the reason she did not tell her brother about the assault was because it never happened.⁴⁹ It would be an error of law for a trier of fact to draw an adverse inference of credibility based on such evidence and argument.⁵⁰

As occurred in *R v AA*, defence counsel in many cases rely on prior sexual history to prove that the complainants are unreliable or are more likely to have consented to the sexual acts at issue in the allegation.⁵¹ In *R v S(TM)*, for example, defence counsel argued that a complainant's flirtatious behavior with other girls at a party—*i.e.*, her sexually suggestive dancing—both impacted negatively on her credibility and was evidence in support of a mistaken belief in consent.⁵² The defence's argument was that the complainant's "dirty dancing" at the party earlier on the evening of the attack made her less believable and made her appear sexually uninhibited and "open" such that the defendant mistakenly believed she was consenting when he wandered into a bedroom where she had passed out and proceeded to penetrate her with his penis.⁵³ Appropriately, the trial judge in *R v S(TM)* was unable to see any logical value at all to the defence counsel's argument:⁵⁴

47. See the cases cited in *supra* note 46. In an earlier work, I discuss the limited circumstances in which delayed disclosure may give rise to an adverse inference without resorting to the hue and cry myth. See Elaine Craig, "The Relevance of Delayed Disclosure to Complainant Credibility in Cases of Sexual Offence" (2011) 36:2 Queen's LJ 1.

48. 2011 ONCJ 457 at para 50, 97 WCB (2d) 149.

49. *Ibid.*

50. *R v DD*, *supra* note 27.

51. See *R v P(NA)*, 2001 CarswellOnt 1527 (WL Can) at para 15 (Ont Sup Ct); *R v Carrie*, 2012 ONSC 1678 at paras 16-17, 100 WCB (2d) 108; *R v Mondesir*, 2004 CarswellOnt 6405 (WL Can) (Ont Sup Ct) [*Mondesir*]; *R v A(ADJ)*, 1998 CarswellBC 854 (WL Can) (BC Sup Ct); *R v Hicks*, 2009 CarswellOnt 920 (WL Can) at para 17 (Ont Sup Ct); *R v Nepinak*, 2010 BCSC 1677, 82 CR (6th) 362; *R v Drost* (1998), 198 NBR (2d) 72 at para 6, 37 WCB (2d) 427; *R v Roper*, [1997] 32 OR (3d) 204, 98 OAC 22598; *R v BB*, 64 CR (6th) 58 (available on WL Can) (Ont Sup Ct) [*R v BB*]; *R v B(AJ)*, 2007 MBCA 95, 225 CCC (3d) 171; *R v Squires*, 2012 NLCA 20, 289 CCC (3d) 429; *R v S(TM)*, 1998 CarswellOnt 5239 (WL Can) (Ont Ct J (Gen Div)) [*R v S(TM)*]; *R v Kergan*, 2007 CarswellOnt 930 (WL Can) at para 51 (Ont Sup Ct) [*Kergan*]; *R v Muvunga*, 2013 ONSC 3076, 107 WCB (2d) 736.

52. *R v S(TM)*, *supra* note 51 at paras 12-17.

53. *Ibid* at paras 17, 22.

54. *Ibid* at paras 39, 45.

[T]he submission, in my view, is still reduced to an assertion that the complainant was likely consenting because she had earlier enjoyed, with others, being engaged in sexual activities. This however repeats the illogic and stereotypical offensiveness of the prior sexual conduct mythology.⁵⁵

Similarly, as Janine Benedet has observed, in cases involving allegations of sexual violence between spouses and other ongoing sexual partners, counsel commonly seek to cross-examine a complainant on her sexual relationship with the accused to show that she had a preference for “kinky” sexual behavior as evidence of a mistaken belief in consent.⁵⁶ This defence technique still occurs despite the fact that under the affirmative definition of consent established in *Ewanchuk*, a preference for kinky sex is not relevant to the defence of mistaken belief in consent. As Benedet explains, if the focus of the mistaken belief defence is on whether the complainant communicated her voluntary agreement to the accused, the only past history that is arguably relevant relates to how voluntary agreement was communicated by the complainant to the accused in the past.⁵⁷ Yet, instead, lawyers in these kinds of cases tender evidence of prior kinky sex to show that an accused reasonably believed that a woman who has consented to kinky sex in the past would have consented to the supposedly kinky sex at issue in the allegation.⁵⁸

Defence counsel in some cases invoke the social assumptions about women and sex that were rejected by the definition of consent established in *Ewanchuk* and section 273.2 of the *Criminal Code*.⁵⁹ Recall that the legal definition of consent to sexual touching turns on the complainant’s subjective willingness to participate and that the defence of mistaken belief requires evidence of a complainant’s affirmative indication of consent through words or conduct. This definition rejects the proposition that a woman’s passivity or failure to physically resist indicates a secret willingness to engage in the sexual conduct at issue. *Ewanchuk* and sections 265 and 273 of the *Criminal Code* render evidence of passivity irrelevant if its purpose is to prove either consent or mistaken belief

55. *Ibid* at para 46.

56. See Janine Benedet, “Probity, Prejudice and the Continuing Misuse of Sexual History Evidence” (2009) 64 CR (6th) 72 [Benedet, “Continuing Misuse”]. See also *Mondesir*, *supra* note 51; *R v BB*, *supra* note 51.

57. Janine Benedet, Case Comment on *R v B(AJ)*, 2007 MBCA 95, 51 CR (6th) 336.

58. *R v S(TM)*, *supra* note 51 at paras 39, 45.

59. See *e.g.* *Kergan*, *supra* note 51 at paras 41, 50; *R v RJ*, 2004 CarswellOnt 904 (WL Can) at para 19 (Ont Sup Ct); *R v CDA*, 2010 SKQB 194, (available on WL Can); *R v LeBlanc*, 2011 CMAC 4, 8 WCB (2d) 620; *R v Rhodes*, 2011 MBCA 98, 281 CCC (3d) 29 (Factum of the Appellant) [*Rhodes*, FOA].

in consent based on the inference that a woman who does not want to have sex will fight back.⁶⁰ Evidence aimed at invoking these legally rejected stereotypes is irrelevant. However, despite this legal definition of consent, some lawyers argue, as they did in *R v AA*,⁶¹ that evidence of passivity, lack of evidence of physical injury, or failure to attempt escape suggests that the complainant was consenting.⁶²

The lawyers in these cases appear to ignore both the legal reforms prohibiting reliance on these social assumptions and the reasons why these reforms were instigated. They explicitly invoke stereotypes and discriminatory beliefs by seeking to introduce irrelevant evidence and to advance impermissible lines of reasoning.

In other cases, defence counsel acknowledge the existence of a rule in form, such as section 276 of the *Criminal Code*, but then pursue strategies that subvert the intent of the rule.⁶³ For example, in *R v Tapper* counsel for the accused sought to cross-examine the thirteen-year-old complainant on previous acts of oral sex with individuals other than the accused.⁶⁴ As discussed above, section 276 of the *Criminal Code* categorically prohibits evidence of a complainant's sexual history (with the accused or anyone else) when it is being used to support either the inference that a person is more likely to have consented to the alleged assault due to the sexual nature of prior activity, or that she is less credible by virtue of her sexual history (these two assumptions have together been termed the "twin myths").⁶⁵ However, such evidence will be admissible if introduced to substantiate other inferences. To be admissible on this basis it must relate to specific instances of sexual activity, it must be relevant to an issue at trial, and its probative value must outweigh its prejudicial effect.⁶⁶ In *Tapper*, defence counsel

60. *Criminal Code*, *supra* note 22, ss 265, 273; *Ewanchuk*, *supra* note 32.

61. *R v AA*, *supra* note 1.

62. See cases in *supra* note 59.

63. See e.g. *R v S(DR)*, 1999 ABQB 330 at para 7, 247 AR 315; *R v Quesnelle*, 2010 ONSC 2698 at paras 3-5, 76 CR (6th) 146, *R v JWB* (1994), 25 WCB (2d) 131 at paras 19-21 (available on WL Can) (Alta Prov Ct); *R v Tapper*, 2009 NLTD 142, 289 Nfld & PEIR 303 [*Tapper*].

64. *Tapper*, *ibid* at paras 2-4, 9. The accused also sought to cross-examine the complainant's boyfriend regarding his sexual history with the complainant. *Ibid* at paras 1, 4, 9.

65. *R v Darrach*, 2000 SCC 46, 2 SCR 443 [*Darrach*]. Justice Gonthier made the following remarks in his delivery of the Court's judgment:

Far from being a "blanket exclusion", [section] 276(1) only prohibits the use of evidence of past sexual activity when it is offered to support two specific, illegitimate inferences. These are known as the "twin myths", namely that a complainant is more likely to have consented or that she is less worthy of belief "by reason of the sexual nature of [the] activity" she once engaged in.

Ibid at para 32.

66. *Criminal Code*, *supra* note 22, s 276(2).

argued that “[t]he statement of S.M. [to the police] that she performed oral sex on multiple partners and has had intercourse suggests a greater likelihood that she also had sexual relations with Mi.T. Mi.T. was her boyfriend at the time...”⁶⁷ He argued that section 276 did not apply in this circumstance because he was not using the evidence of prior oral sex acts to discredit the complainant nor to raise a reasonable doubt as to consent. Instead, he suggested that he was relying on the prior sexual acts to show that the Crown’s physical evidence of recent sexual intercourse was with the complainant’s boyfriend and not the accused. In other words, the evidence of prior sexual history was not being used to prove that she had consented to sex with the accused but to prove that she had consented to sex with her boyfriend. It is true that this is the reason defence counsel tendered the evidence. However, consider the reasoning the defence was suggesting: The fact that the thirteen year old complainant performed oral sex on other men suggests she must also have been having consensual sex with her boyfriend.

In other words, that she consented to sex with person A should be taken to prove that she also consented to sex with person B. The relevance of this evidence was contingent on the very inference that courts have repeatedly said is baseless and discriminatory⁶⁸ and that Parliament has taken steps to preclude through section 276 of the *Criminal Code*. In refusing the accused’s application, the court in *Tapper* recognized that to permit such cross-examination would “undermine the very reasons why Parliament included section 276 in the *Criminal Code*.”⁶⁹ The court recognized that such evidence is speculative, misleading, highly prejudicial, and likely to introduce bias or discriminatory beliefs in the minds of the jurors.⁷⁰ Reasoning reliant on any of these three social assumptions constitutes an error of law. Why then do lawyers continue to invoke these narratives about women and sexual assault?

Some scholars have offered an efficiency rationale based on the reality of *pro forma* defences to explain why defence counsel continue to employ these strategies.⁷¹ Given the “formulaic character of defending in criminal cases,” writes Jennifer Temkin, “counsel do not devise utterly new forensic methods for every trial. They rely on standard stories.”⁷² The argument is that “constraints of time

67. *Tapper*, *supra* note 63 at para 4.

68. *Seaboyer*, *supra* note 22; *Darrach*, *supra* note 65.

69. *Tapper*, *supra* note 63 at para 22.

70. *Ibid* at paras 20, 23.

71. See Temkin, “Defending Rape,” *supra* note 46 at 241.

72. *Ibid* at 241, citing Paul Rock, *The Social World of an English Crown Court: Witness and Professionals in the Crown Court Centre at Wood Green* (Oxford: Oxford University Press, 1993) at 83.

and money operate to encourage a system in which events are reconstructed into a limited range of stories.⁷³ Yet, this may be an overly innocuous explanation. Certainly a review of Canadian sexual assault cases demonstrates that lawyers and the judicial process more broadly tell the same stories about rape over and over again. However, it may be that many defence counsel rely on evidence and lines of argument that invoke these ingrained stereotypes about sexual violence either because they themselves continue to understand the issue of sexual violence through these social scripts (as is likely true of broader society) or because they believe that invoking them will be effective for their client's defence. In other words, they pursue these strategies not for the sake of efficiency but, rather, because of an expectation that triers of fact will make the impermissible, legally rejected inferences that these law reforms reject. In short, the defence hopes to activate or trigger the biasing effects of these legally rejected social assumptions.

This explanation raises empirical questions. Do lawyers subscribe to these rejected social assumptions about sexual violence? Do lawyers believe that triers of fact are inclined to subscribe to them? An affirmative answer to either question supports the conclusion that indeed lawyers do invoke these social assumptions intentionally and strategically.

In a UK based study by Jennifer Temkin, barristers reported that “juries ‘were not very good (at convicting) when somebody can be depicted as a slut.’”⁷⁴ Participant lawyers agreed that the complainant's sexual character and manner of dress influence trial outcomes and that nonconsensual sex between ongoing sexual partners—*i.e.*, where the accused has a sexual history with the complainant—is not as serious a violation as is forced sex between strangers.⁷⁵ Some of the barristers interviewed interpreted the victim's behavior at the time of the incident as a key factor in whether there would be a conviction. Barristers reported that juries would not convict where the women were viewed as putting themselves at risk by acting provocatively or by dressing in a certain manner.⁷⁶ Furthermore, lawyers interviewed for Temkin's study reported consistently that sexual history is almost always relevant to consent. They reported that a woman who has had a lot of sexual experience is more likely to have consented to the sex at issue in the charge.⁷⁷

73. Temkin, “Defending Rape,” *supra* note 46 at 241.

74. *Ibid* at 225.

75. *Ibid* at 224-26, 233-34.

76. *Ibid* at 225, 234.

77. *Ibid* at 234-35.

Temkin's study is over ten years old and its subjects were members of a bar of the United Kingdom (a jurisdiction where sexual assault law reforms occurred later and in different forms than in Canada).⁷⁸ That stated, Ruth Lazar has completed empirical work in the Canadian context that suggests similar views among Canadian lawyers. She has demonstrated the prevalence of stereotypical attitudes on the part of defence counsel in marital rape cases in Ontario, such as the view that "consent is continuous and persisting in intimate relationships."⁷⁹

More generally, a significant body of empirical research confirms the tenacity of these social assumptions among the public, the impact these stereotypes have on the reporting and prosecution of sexual violence, and the continued relationship between acceptance of these social assumptions about sexual violence and negative credibility assessments regarding sexual assault complainants.⁸⁰ It is important for

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78. Significant reform to the substantive law of sexual assault did not occur in Britain until 2003. See *Sexual Offences Act* (2003) c 42, UK. Reforms to many of the same types of laws addressed by this act occurred years earlier in Canada. Beginning in 1982 with *An Act to Amend the Criminal Code in relation to sexual offences and other offences against the person* (*Criminal Code* Amendment, Sexual Offences, *supra* note 19) and continuing in 1987 (SC 1987, c 34, ss 1-8), 1992 (SC 1992, c 38, ss 1-3), and 1997 (RSC 1997, c 30, ss 1-3).
79. Ruth Lazar, "Negotiating Sex: The Legal Construct of Consent in Cases of Wife Rape in Ontario, Canada" (2010) 22:2 CJWL 329 at 340. See also Jennifer Koshan, "The Legal Treatment of Marital Rape and Women's Equality: An Analysis of the Canadian Experience" (September 2010), online: <theequalityeffect.org/pdfs/maritalrapecanadexperience.pdf>.
80. In a 2005 study commissioned by Amnesty International (surveying one thousand members of the general public in the United Kingdom) twenty-six per cent of participants thought a woman was totally or partially to blame if she was dressed provocatively. Twenty-two per cent thought that a woman was totally or partially to blame if it was known that she had several past sexual partners. See Amnesty International, Press Release, "UK: New Poll Finds a Third of People Believe Women Who Flirt Partially Responsible for Being Raped" (21 November 2005), online: Amnesty International UK <<http://www.amnesty.org.uk/press-releases/archive/2005/11>>. See also Shannon Sampert, "Let Me Tell You a Story: English-Canadian Newspapers and Sexual Assault Myths" (2010) 22:2 CJWL 301 (examining media discourse about sexual assault, the author demonstrates the prevalence of stereotypes about sexual assault in English Canadian newspapers); Marc A Klippenstine & Regina Schuller, "Perceptions of Sexual Assault: Expectancies Regarding the Emotional Response of a Rape Victim Over Time" (2012) 18:1 Psych Crime & L 79 (showing that participants' perceptions of sexual assault complainants were negatively influenced where the complainants' post-assault behavior did not comply with how participants expected a victim of sexual assault to act); Allyson K Clarke & Karen L Lawson, "Women's Judgments of a Sexual Assault Scenario: The Role of Prejudicial Attitudes and Victim Weight" (2009) 24:2 Violence and Victims 248 (demonstrating that attributions of victim fault were positively associated with adherence to rape myths and were higher towards thin victims than overweight victims); Marian M Morry & Erica Winkler, "Student Acceptance and Expectation of Sexual Assault" (2001) 33:3 Can J Behav Sci 188 (demonstrating that attributions of victim fault were

the purposes of this discussion to underscore the availability of this empirical evidence demonstrating the ubiquity, entrenched nature, and impact of these legally rejected narratives about rape. As will be discussed below, because of the schematic way in which triers of fact reason in sexual assault cases, the empirical reality of these engrained social assumptions about sexual violence informs the contours of the professional responsibility not to invoke them.

IV. LEGAL REJECTION OF SOCIAL ASSUMPTIONS CREATES ETHICAL OBLIGATIONS ON DEFENCE COUNSEL

Joshua Cain was charged with aggravated sexual assault, choking to overcome resistance, and threatening death.⁸¹ He and the complainant met at a music event and decided to go for a walk. During the walk they kissed consensually. In response to the complainant's request that they cease kissing, Cain allegedly threatened to kill her, put his hand around her throat, choked her into unconsciousness, and penetrated her vaginally while she was blacked out.⁸² Cain admitted to choking the complainant and having sex with her, but claimed it was consensual. In a portion of his statement to the police, which was excluded at trial, Cain told the police he needed help so that he would never again "hurt girls, choke girls,

positively associated with adherence to rape myths); Jennifer Temkin & Barbra Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Oxford: Hart, 2008); Stacy Futter & Walter R Mebane Jr, "The Effects of Rape Law Reform on Rape Case Processing" (2001) 16:1 Berkeley Women's LJ 72 at 83 (reviewing a number of empirical studies demonstrating the limited impact of rape law reform in the American context); Ashley A Wenger & Brian H Bornstein, "The Effects of Victim's Substance Use and Relationship Closeness on Mock Jurors' Judgments in an Acquaintance Rape Case" (2006) 54:7-8 Sex Roles 547 (concluding that less rape myth acceptance meant higher victim credibility assessments by participants); Louise Ellison & Vanessa E Munro, "Jury Deliberation and Complainant Credibility in Rape Trials" in Clare McGlyn & Vanessa E Munro, eds, *Rethinking Rape Law: International and Comparative Perspectives* (New York: Routledge, 2010) at 281; Sarah Ben-David & Ofra Schneider, "Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance" (2005) 53:5 Sex Roles 385 (demonstrating significant negative correlations between gender-role attitudes and four measures of rape perception); Janice Du Mont, Karen-Lee Miller & Terri L Myhr, "The Role of 'Real Rape' and 'Real Victim' Stereotypes in the Police Reporting Practices of Sexually Assaulted Women" (2003) 9:4 Violence Against Women 466 (showing that women were more likely to report a sexual assault to the police in cases that involved the use of physical force and the occurrence of physical injury); Janice Du Mont & Terri L Myhr, "So Few Convictions: The Role of Client-Related Characteristics in the Legal Processing of Sexual Assaults" (2000) 6:10 Violence Against Women 1109 (showing that cases where the women did not physically resist were less likely to result in a charge).

81. *R v Cain*, 2010 ABCA 371 at para 3, 502 AR 322.

82. *Ibid* at para 4.

rape girls.”⁸³ During closing submissions, defence counsel for Cain, Naeem Rauf, suggested that the complainant’s failure to call her parents immediately or to leave the music event were inconsistent with her allegations of assault. (She reported the attack to police at six o’clock the following morning.) To support his assertion that her post-assault conduct was not consistent with someone who had been raped, Rauf argued:

Look at what’s on her pink T-shirt the day after she’s raped, she says. A picture of a penis. Does this suggest to you a young woman who has suffered trauma? A young woman who said, I would never do that; I would never lie down on the ground. Well, for heaven’s sakes. She’s been raped? You would think that would sober her up, but instead, she’s going around sporting a T-shirt with a picture of a penis.⁸⁴

Rauf went on to suggest that “if she [was] hurt emotionally, you’d think she’d be traumatized, she’d want to go home, she’d want to be with family, somebody who could comfort her, not partying away and then dawning [sic] a T-shirt on which somebody has drawn a male penis.”⁸⁵ Both the trial judge and the Court of Appeal concluded that it was far from obvious that there even was a penis drawn on her shirt.⁸⁶ Note that in fact it does not matter whether she had a penis on her shirt. The suggestion that a woman is soliciting sex or is sexually promiscuous because she dresses provocatively has long been discredited as a discriminatory stereotype.

More pertinent to this discussion is that the hue and cry myth has been rejected at law. Why would Rauf make these kinds of arguments? Doubtless he made these comments either because he believed them or because he thought they would work with the jury—which they did: Cain was acquitted. However, Cain’s jury acquittal was subsequently quashed by the Alberta Court of Appeal. The appeal court accepted the Crown’s challenge to Rauf’s conduct of the case.⁸⁷ (Presumably the complainant will now undergo the ordeal of another trial.)

83. *Ibid* at para 17. Note that after having this segment of his testimony excluded, Cain’s lawyer proceeded to ask Cain what he meant (in earlier portions of his statement) when he said he needed help. Cain testified that he meant that he needed help with his drinking, leaving the jury with a misleading impression of his statement. *Ibid* at para 20.

84. *Ibid* at para 22.

85. *Ibid*.

86. *Ibid* at para 30.

87. Rauf also suggested that an emergency room physician who saw the complainant after the incident must have disbelieved her because he did not x-ray her neck. On appeal the Crown argued, and the court accepted, that these comments were both factually and legally improper. Not only had Rauf misstated the physician’s evidence, but it was also improper to ask one witness to testify as to the credibility of another witness in this regard. *Ibid* at paras 26-28.

The arguments of defence counsel in this case were improper at law—were they also unethical?

The remainder of this discussion demonstrates why even the most zealous advocates should agree that the law reforms described in Part II give rise to ethical obligations not to trigger the social assumptions that unchaste women are untrustworthy and indiscriminate, that passivity communicates consent, and that delayed disclosure suggests false allegations.

The treatment of sexual assault complainants by defence counsel has been the site of significant debate for legal ethicists.⁸⁸ Even those with the strongest commitment to the ethics of zealous advocacy struggle with how to approach the cross-examination of sexual assault complainants.⁸⁹ The issue is often characterized

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88. Some scholars have made arguments that favour certain limits on vigorous or aggressive cross-examination of truthful sexual assault complainants. See Michel Proulx & David Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001); David Layton, "The Criminal Defence Lawyer's Role" (2004) 27 Dal LJ 379 [Layton, "Criminal Defence Lawyer's Role"]. The literature on this issue is much richer in the American context. See Robert Lawry, "Cross-Examining the Truthful Witness: The Ideal Within the Central Moral Tradition of Lawyering" (1995) 100:3 Dick L Rev 563; William H Simon, "The Ethics of Criminal Defense" (1993) 91:7 Mich L Rev 1703 [Simon, "The Ethics of Criminal Defense"]; R George Wright, "Cross-Examining Legal Ethics: The Roles of Intentions, Outcomes and Character" (1995) 83:4 Ky LJ 801; Harry I Subin, "The Criminal Lawyer's 'Different Mission: Reflections on the 'Right' to Present A False Case" (1988) 1:1 Geo J Legal Ethics 125 [Subin, "Different Mission"]; Harry I Subin, "Is This Lie Necessary? Further Reflections on the Right to Present a False Defense" (1988) 1:4 Geo J Legal Ethics 689. William Simon has provided arguments in favour of establishing ethical boundaries that would circumscribe defence counsel conduct by resorting to external principles or values, such as those underpinning the Constitution. See William H Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge: Harvard University Press, 1998). Monroe H Freedman provides arguments for a very strong commitment to the need for zealous cross-examination of all Crown witnesses. See Monroe H Freedman, "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions" (1966) 64:8 Mich L Rev 1469 [Freedman, "Three Hardest Questions"]; Eleanor W Myers & Edward D Ohlbaum, "Discrediting The Truthful Witness: Demonstrating the Reality of Adversary Advocacy" (2001) 69:3 Fordham L Rev 1055; Abbe Smith, "Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things" (2000) 28:4 Hostfra L Rev 925 [Smith, "Defending Defending"]; Tim Dare, "Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers" (2004) 7:1 Legal Ethics 24 (distinguishing between zeal and hyper zeal).
89. See Monroe H Freedman, *Understanding Lawyers' Ethics* (New York: Matthew Bender and Company, 1990) at 168. Freedman concedes that the harm done to the truthful sexual assault complainant through vigorous cross-examination is severe and, because of this, he notes that he personally refuses to do so. *Ibid* at 168, n 20. See also Monroe H Freedman & Abbe Smith, *Understanding Lawyers' Ethics*, 4d ed (Newark, NJ: Lexis Nexis/Matthew Bender, 2004).

as one of particular concern in circumstances where the defence lawyer knows that the complainant is telling the truth.⁹⁰

One of the most contentious issues in this debate pertains to the use of bias, stereotypes, and discriminatory tactics to advance the position of one's client. Lawyers have a duty of loyalty to their clients.⁹¹ In defending a client against allegations of criminal wrongdoing, this duty requires lawyers to raise every issue, advance every argument, and ask every question, however distasteful, that they think will help their client.⁹² Is an ethical obligation not to employ strategies reliant on discriminatory attitudes and assumptions inconsistent with this duty of loyalty?

Abbe Smith, who along with Monroe Freedman is likely the best-known proponent of zealous and unmitigated advocacy, asserts that “[t]here is nothing unethical about using racial, gender, ethnic, or sexual stereotypes in criminal defense. It is simply an aspect of zealous advocacy.”⁹³ She notes, “Of course, most bias and prejudice works *against* the accused, disproportionate numbers of whom are poor and nonwhite.”⁹⁴ Smith maintains that one cannot “zealously represent the criminally accused and simultaneously tend to the feelings of others.”⁹⁵ According to Smith, defence lawyers should recognize that prejudice is a fact of life and use whatever strategies are available to them.⁹⁶

Others have argued that it is unethical for lawyers to conduct their cases in a manner that perpetuates racist and sexist attitudes and hierarchies.⁹⁷ William Simon asserts that lawyers' ethics are not defined simply by the overarching principle of duty to the client.⁹⁸ He suggests that a lawyer's ethical obligations should be dictated by legal values. The particular values should be determined on a case-by-case basis and assessed with a view to what will, in a particular case,

90. Freedman, “Three Hardest Questions,” *supra* note 88 at 1469. Freedman asks, “Is it proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth?”. See also Layton, “Criminal Defence Lawyer's Role,” *supra* note 88; Subin, “Different Mission,” *supra* note 88.

91. Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: Federation of Law Societies of Canada, 2011, ch 2.04 commentary [FLSC *Model Code*].

92. *Ibid*, ch 4.01.

93. Smith, “Defending Defending,” *supra* note 88 at 954 [citations omitted].

94. *Ibid* [emphasis in original].

95. *Ibid* at 951 [citations omitted].

96. *Ibid* at 955.

97. See *e.g.* Anthony V Alfieri, “Defending Racial Violence” (1995) 95:5 Colum L Rev 1301 at 1331-33 [Alfieri, “Racial Violence”]; Anthony V Alfieri, “Race Trials” (1998) 76:6 Tex L Rev 1293 [Alfieri, “Race Trials”]; Simon, “The Ethics of Criminal Defence,” *supra* note 88.

98. *Ibid*.

do the most to advance justice.⁹⁹ Similarly, Anthony Alfieri suggests that lawyers should be more community centered.¹⁰⁰ Lawyers should adopt a “color-conscious, pluralist approach to advocacy that honors the integrity of diverse individual and collective racial identities *without* sacrificing effective representation.”¹⁰¹

The point of tension in this ethical debate relates to differing conceptions of the lawyer’s duty of loyalty. Is it a duty owed only to one’s client or is there some broader duty owed by lawyers to the community? This same tension is reflected in legal terms. With respect to the use of discriminatory stereotypes in sexual assault trials, the legal issue is typically framed as an ostensible conflict between a defendant’s right to full answer and defence and a complainant’s privacy and equality interests.¹⁰² The relationship between this legal tension and the ethical obligations on defence counsel is explained below.

A. THE JUSTIFICATION FOR IMPOSING ETHICAL OBLIGATIONS NOT TO TRIGGER THESE SOCIAL ASSUMPTIONS

Ethical lawyering confines advocates to practice within the bounds of law. To establish the claim that lawyers have an ethical obligation not to rely on strategies that invoke the three discriminatory social assumptions reviewed above, the remaining discussion demonstrates both that refraining from such strategies is not a violation of one’s duty of loyalty to the client and that persisting in such tactics is a violation of other ethical duties owed by the lawyer. In the paragraphs to follow, I argue that the rationale for the law reforms noted previously, considered in conjunction with the jurisprudence interpreting the content of the right to full answer and defence, and the intransigent nature of these social assumptions, once triggered, establishes that: (i) an ethical obligation on defence counsel to refrain from such strategies does not circumscribe the defendant’s constitutional rights, and (ii) this ethical obligation flows as an inevitable consequence of these reforms to the law of sexual assault in Canada.

99. *Ibid.*

100. Alfieri, “Racial Violence,” *supra* note 97 at 1307.

101. Alfieri, “Race Trials,” *supra* note 97 at 1295 [emphasis added].

102. Apparent conflicts between different constitutional guarantees are resolved through a balancing process in which each right is defined through a contextual interpretation that accommodates the other. See *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835, 120 DLR (4th) 12 [*Dagenais*]; *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31, 1 SCR 772; *R v Osolin*, [1993] 4 SCR 595, 162 NR 1 [*Osolin*].

1. THE RIGHT TO FULL ANSWER AND DEFENCE HAS BOTH INTERNAL AND EXTERNAL LIMITS

One key aspect of a defence lawyer's duty of loyalty to his or her client entails the protection of the client's constitutional right to make full answer and defence.¹⁰³ The right to full answer and defence against allegations brought by the coercive authority of the state is a fundamental component of democracy. This is not debatable. Nevertheless, as with all constitutional guarantees, the right to full answer and defence is not without limits.¹⁰⁴ It is a guarantee of due process. It is not a right to pursue any and every defence possible.¹⁰⁵ For instance, the right to cross-examination, a fundamental component of full answer and defence, is not boundless.¹⁰⁶ The right to cross-examine is circumscribed by concepts of reasonableness and good faith. For example, a cross-examiner is not entitled to raise a particular defence unless he or she has some knowledge, experience, or reasonable hypothesis to support it.¹⁰⁷

The principles of fundamental justice do not entitle an accused to "the most favorable procedures that could possibly be imagined."¹⁰⁸ The parameters of full answer and defence are informed by other guarantees, such as the constitutional protection of equality and privacy.¹⁰⁹ Where there is an apparent conflict between these rights, the content of each is to be interpreted through a balancing process.¹¹⁰ (In other words, the conflict is resolved at the definitional stage and is therefore more apparent than real.¹¹¹) John McInnis and Christine Boyle explain that "[w]hen the protected rights of two individuals come into conflict ... *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights."¹¹² Significant to this discussion, such balancing is to be done contextually.¹¹³ This suggests that in cases involving allegations of sexual violence

103. *Canadian Charter of Rights and Freedoms*, s 7-14, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

104. *Seaboyer*, *supra* note 22; *R v Mills*, [1999] 3 SCR 668, 180 DLR (4th) 1 [*Mills*]; *R v Lyons*, [1987] 2 SCR 309, 44 DLR (4th) 193 [*Lyons*].

105. *Ibid.*

106. *R v Lyttle*, 2004 SCC 5, 1 SCR 193 [*Lyttle*].

107. *Ibid* at para 118.

108. *Lyons*, *supra* note 104 at para 88.

109. *Seaboyer*, *supra* note 22; *Osolin*, *supra* note 102.

110. *Dagenais*, *supra* note 102.

111. See John McInnis & Christine Boyle, "Judging Sexual Assault Law Against a Standard of Equality" (1995) 29:2 UBC L Rev 341 [McInnis & Boyle, "Judging Sexual Assault Law"].

112. *Ibid* at 356.

113. *Mills*, *supra* note 104 at para 64.

“an appreciation of myths and stereotypes ... is essential to delineate properly the boundaries of full answer and defence.”¹¹⁴ The following two examples demonstrate how these legal principles have been conceptualized in the sexual assault context.

As discussed above, evidence of a complainant’s sexual history is categorically prohibited where the defence seeks to admit it in order to imply that solely because of this sexual experience, the complainant is more likely to have consented to sex with the accused or is less credible.¹¹⁵ Recall, however, that the accused is entitled to introduce evidence of specific instances of previous sexual activity to give rise to other inferences if that evidence has significant probative value that is not substantially outweighed by the prejudice it poses to the administration of justice.¹¹⁶ In this sense there are two layers to section 276. First, it is designed to exclude irrelevant information. Second, it is designed to exclude evidence that is relevant but has a prejudicial effect on the administration of justice that outweighs its probative value.¹¹⁷ In this latter circumstance, when assessing whether the probative value of the complainant’s sexual history is substantially outweighed by its prejudicial effect, a court must balance factors such as the right of the accused to make full answer and defence, the need to encourage the reporting of sexual assaults, the need to remove discrimination and bias from the fact finding process, and the potential prejudice to the complainant’s dignity and privacy.¹¹⁸ Whether a particular accused’s right to full answer and defence entitles him to introduce evidence of a complainant’s prior sexual history (to raise an inference other than one of the “twin myths”) is to be determined in part by weighing the accused’s interests against the impact that admitting it would have on the complainant’s equality interests. Will it cause humiliation to the complainant? Will allowing it discourage other complainants from reporting incidents of assault? Is its relevance outweighed by its potential to trigger discriminatory attitudes and bias?

Consider another example. Section 278 of the *Criminal Code* limits an accused’s access to third party records containing personal information about the complainant.¹¹⁹ It establishes a multi-stage procedure aimed at protecting the privacy interests of complainants by denying access where the request for disclosure is based on discriminatory rationales.¹²⁰ In determining whether to order the production of records (in which the complainant has a reasonable

114. *Ibid* at para 90.

115. *Criminal Code*, *supra* note 22, s 276(1).

116. *Ibid*, s 276(2).

117. *Darrach*, *supra* note 65 at para 43.

118. *Criminal Code*, *supra* note 22, s 276.3.

119. *Ibid*, ss 278.1-278.91.

120. *Ibid*.

expectation of privacy), the judge is required to balance the accused's right to full answer and defence with the privacy and equality rights of the person to whom the record relates.¹²¹ In finding this balance, judges are required to consider the accused's interests, the complainant's rights, and broader societal concerns such as the need to encourage complainants to obtain treatment.¹²²

The content of the right to make full answer and defence is interpreted in part by its relationship to these other constitutional concerns; however, there are other limits on this guarantee. For the purposes of this discussion, the parameters of the right to full answer and defence should be divided into two categories: internal limits and external limits. Together they define the content of the right to make full answer and defence.

Limits derived from the balance between the right to full answer and defence and other constitutional guarantees, such as those discussed in the preceding two examples, might be described as external limits. Internal limits are those that are derived from interests internal to the guarantee itself. Inherent in the right to full answer and defence is a right to a fair trial.¹²³ An accused does not have the right to admit irrelevant evidence nor evidence for which the probative value is outweighed by the prejudicial effect on the trial process. As the Court stated in *R v Mills*, "It is clear that the right to full answer and defence is not engaged where the accused seeks information that will only serve to distort the truth-seeking purpose of a trial."¹²⁴ Therefore, the right is limited to evidence, cross-examination, and argument that are consistent with a fair trial. This limit on the right is internal in the sense that both the right and the limit are underpinned by the same principle: fairness. Evidence or argument that distorts the truth-seeking purpose of a trial compromises its fairness.

Internal limits, in contrast to external limits, are not interpreted by balancing the right to full answer and defence against other *Charter* guarantees. They are derived from general rules of evidence: "Counsel are bound by the rules of relevancy and barred from resorting to harassment, misrepresentation, repetitiousness or, more generally, from putting questions whose prejudicial effect outweighs their probative value."¹²⁵ Lawyers need a good faith basis to pursue a line of questioning.¹²⁶ According to the Court, a good faith basis means a hypothesis that is honestly advanced on the strength of *reasonable* inference.¹²⁷

121. *Ibid*, s 278.5.

122. *Ibid*.

123. *Charter*, *supra* note 103, s 11(d).

124. *Mills*, *supra* note 104 at para 94.

125. *Lytle*, *supra* note 106 at para 44.

126. *Ibid* at para 47.

127. *Ibid* at para 48.

Lawyers are barred from posing questions or introducing evidence that is irrelevant, not based on a reasonable assumption, or calculated to mislead.¹²⁸

The legal reforms obligating defence counsel not to invoke the three social assumptions previously discussed constitute internal limits on the right to full answer and defence. There is no good faith basis upon which to ask questions or introduce evidence aimed at invoking reasoning that is reliant on one of these three rejected social assumptions. Consider, for example, the issue of delayed disclosure. To draw an adverse inference as to the credibility of a complainant based solely on the timing of the complaint is an error of law. Consequently, evidence of the timing of a complaint is irrelevant if introduced for the purposes of suggesting that a delay alone raises questions regarding the veracity of a complainant. Such evidence is introduced in order to give rise to an impermissible inference. In other words, the evidence is probative of an inference that, if adopted, constitutes an error of law. As Justice McLachlin (as she then was) stated in *R v Seaboyer* with respect to the use of prior sexual history to trigger the twin myths, when evidence is introduced for this purpose, its prejudicial value will always outweigh its probative effect.¹²⁹ Because they are baseless and irrelevant, such inferences risk distorting the truth-seeking process.

The noted law reforms explicitly reject these three social assumptions about sexual violence. In conjunction with the basic law of evidence¹³⁰ and the legal limits on cross-examination, they create internal limits on the content of the right to full answer and defence by rendering inferences based on these rejected assumptions categorically irrelevant. In short, an accused's right to full answer and defence does not include a right to rely on these legally rejected social assumptions. It follows logically that a defence lawyer is not compromising the duty to protect his or her client's right to full answer and defence by refusing to trigger these legally rejected social assumptions.¹³¹

The fact that it is unnecessary to balance an accused's right to make full answer and defence with the constitutional guarantee of equality should not be understood to undermine the role of equality in establishing these ethical

128. *Ibid.*

129. *Seaboyer*, *supra* note 22 at 248.

130. Irrelevant evidence is inadmissible. Evidence is inadmissible where its probative value is outweighed by its prejudicial effect. See Alan W Bryant, Sidney N Lederman & Michelle K Fuerst, *Sopinka and Lederman: The Law of Evidence in Canada*, 3d ed (Toronto: LexisNexis Canada, 2009).

131. This is the case whether the lawyer believes he or she is cross-examining a truthful witness or not. This dispenses with the criticism that placing ethical limits of this nature on defence counsel will deter clients from being forthcoming with their lawyers.

boundaries. To be clear, these internal limits are informed by concepts of equality just as the external limits discussed above aim, in part, to protect the administration of justice. None of these constitutionally guaranteed interests are antinomical. Feminists convinced legislators and courts that reforms to the substantive law of sexual assault and the law of evidence must reflect the irrelevance, groundlessness, and sexism of these three social assumptions about sexual violence.¹³² The principle of equality is ever-present in this analysis: It has been internalized into the substantive and evidentiary law. Recognition of the irrelevance and total unreliability of these assumptions (which is also recognition in the equality of women) is internal to the assessment of probative value. Where a determination of irrelevance has been incorporated into the substantive law or the law of evidence itself, there is no balancing required. In this sense, there is no ostensible conflict between the rights of the accused and those of the complainant or the community at large with respect to preclusion of inferences premised on these three social assumptions.¹³³

2. THESE ETHICAL OBLIGATIONS DO NOT REQUIRE LAWYERS TO DIVIDE THEIR LOYALTIES

Returning to the debate instigated by the words of Lord Brougham and taken up by legal ethicists like Freedman and Simon: Does an advocate “know but one person in all of the world”¹³⁴ or are the loyalties of lawyers divided between the client and the community, as Alfieri argues?¹³⁵ Fortunately, in Canada, with respect to defence counsel strategies that elicit evidence or reasoning that breaches

132. See Renate M Mohr & Julian V Roberts, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994); *Ewanchuk*, *supra* note 32; *R v Ewanchuk*, [1999] 1 SCR 330, 169 DLR (4th) 193 (Factum of the Intervener, Women’s Legal Education and Action Fund).

133. See *e.g.* *Mills*, *supra* note 104 at para 89. With regards to accessing third party records, the Court stated, “the accused will have no right to the records in question insofar as they contain information that is either irrelevant or would serve to distort the search for truth...” This means that one need not even consider other interests such as the privacy interests of the complainant or the need to support the complainant’s ability to access counseling. Thus, the apparent conflict and need to balance only arises in cases where the evidence has some relevant and probative value. The Court goes on to note that where there is a conflict (for example, where the records do have some probative value), the rights must be defined contextually.

134. Monroe Freedman, “Henry Lord Brougham: Advocating at the Edge For Human Rights” (2000) 36:2 Hofstra L Rev 311 at 311, citing *The Authenticated Journals of the House of Peers, The Trial At Large Of Her Majesty, Caroline Amelia Elizabeth, Queen Of Great Britain; In The House Of Lords, On Charges Of Adulterous Intercourse* (London: Printed for T Kelly, 1821) [Freedman, “Henry Lord Brougham”].

135. Alfieri, “Racial Violence,” *supra* note 97.

the internal limits on the right to full answer and defence, the answer does not matter. There is no balancing to be done. Judges (and lawyers) do not need to engage in contextual interpretation, nor do they need to weigh the factors or the interests at stake to assess the relationship between reliance on this type of evidence or argument and an accused's right to full answer and defence: "Lawyers may not cross-examine witnesses in a way that is abusive or offensive, and may only ask questions that are relevant, admissible, based on a good faith belief and which are not specifically precluded by the law of evidence."¹³⁶

Justifying the imposition of an ethical obligation on lawyers to pursue defence strategies only if they strike a just balance between their clients' interests, the complainants' interests, and broader societal interests requires subscribing to something like Simon's jurisprudential ethics or Alfieri's assertion that lawyers be more community centered.¹³⁷ Although that is a more ambitious claim than the one made in this article,¹³⁸ it is a claim that should be advanced, and one that

136. Alice Woolley, *Understanding Lawyers' Ethics in Canada* (Markham: LexisNexis, 2011) at 207 [Woolley, *Lawyers' Ethics*].

137. Alfieri, "Racial Violence," *supra* note 97. See also Simon, "The Ethics of Criminal Defence," *supra* note 88.

138. See McInnis & Boyle, "Judging Sexual Assault Law," *supra* note 111 at 344. McInnis and Boyle argue that "in some judicial settings, the mere suggestion that gender equality is relevant to the delineation of the rights of an accused person, or to the assessment of the relevance of evidence, sets one apart as a hysterical crusader, rather than as a responsible and thorough advocate." Some scholars have argued that in a contest between an accused's right to full answer and defence, and the equality and privacy interests of a third party to a criminal proceeding, the accused's rights tend to prevail despite the Court's interpretations. *Ibid.* If this is the case, it is not difficult to imagine significant resistance to the claim that, not only must courts delineate the rights of the accused by balancing them with the interests of the complainant and the community, but also that lawyers have an ethical obligation to do the same. Proponents of the traditional concept of legal ethical obligations as limited to application of some concept of role morality would argue that requiring lawyers to do the type of balancing suggested here would lead to lawyers imposing their personally held views. The consequence would be uneven protection for the rights of the accused. For a discussion on this point, see Katherine Kruse, "The Jurisprudential Turn in Legal Ethics" (2011) 53:2 *Ariz L Rev* 493. Some research demonstrates the failure by courts to strike the right balance in the context of the production of third party records. See Lise Gotell, "When Privacy Is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records" (2006) 43:3 *Alta L Rev* 743; Lise Gotell, "The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law" (2002) 40:3&4 *Osgoode Hall LJ* 251; Melanie Randall, "Sexual Assault in Spousal Relationships, 'Continuous Consent', and the Law: Honest but Mistaken Judicial Beliefs" (2006) 32:1 *Man LJ* 144 [Randall, "Sexual Assault in Spousal Relationships"].

is supported in Canada by both legal principles and legal ethicists.¹³⁹ It is also a reflection of how far there is to go that even the modest claim that ethical lawyers litigate within the bounds of law has yet to be widely accepted.

That it is narrow in its application means that the argument should be persuasive, regardless of one's perspective about to whom a lawyer owes a duty of loyalty. Lawyers have an ethical obligation to conduct their cases within the bounds of law.¹⁴⁰ The law reforms reviewed above clearly delineate the bounds of law. The ethical obligations arising from these legal limits should be obvious even to those lawyers "who know but one person in all of the world."¹⁴¹ Again, there is no balancing to be done. Nor does it matter whether the cross-examiner believes the complainant to be truthful.¹⁴² Lawyers need only ask themselves whether the evidence they seek to admit relies for its probative value on one of these three underlying social assumptions. If the answer is yes, its use is unethical. This is the case whether or not one's model of legal ethics includes duties of loyalty to the community as well as the accused. Even those

139. See Woolley, *Lawyers' Ethics*, *supra* note 136 at 212. Woolley notes:

The identification of what is proper cross-examination, both in terms of how it is done and the type of questions that are asked, needs to take into account broader analysis of how to ensure the most effective adjudication of legal cases. Decisions must factor in fairness to all parties (and third parties) and the broader legal goals that a democratic society seeks to achieve.

See also Alice Woolley, "Integrity in Zealousness: Comparing the Standard Conceptions of the Canadian and American Lawyer" (1996) 9:1 Can JL & Jur 61 (arguing that in Canada, the traditional conceptions of the zealous advocate and role morality are modified by concepts like integrity).

140. There are strategic reasons for confining this discussion to an examination of the ethical duties arising as a consequence of the internal limits on the right to make full answer and defence. Judges are not required to make a finding in which the substantive rights of a third party or broader social concerns trump the due process rights that they have been charged with protecting; a finding which may wrongly be understood as one that threatens the legitimacy of the judicial institution itself. Manfredi discusses how this concern is reflected in the distinction between the Court's approaches to substantive issues in sexual assault law and procedural issues. See Christopher P Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (Vancouver: UBC Press, 2004); Christopher P Manfredi & Scott Lemieux, "Judicial Discretion and Fundamental Justice: Sexual Assault in the Supreme Court of Canada" (1999) 47:3 Am J Comp L 489.
141. Freedman, "Henry Lord Brougham," *supra* note 134.
142. Support for placing ethically-based limits on aggressive cross-examination is often confined to truthful complainants. See *e.g.* Layton, "Criminal Defence Lawyer's Role," *supra* note 88. One criticism of this position is that placing such obligations on defence counsel will create a disincentive for accused persons to be forthcoming with their lawyers. This objection is baseless in a context where the limit is unrelated to the truthfulness of the witness.

advocates who consider themselves bound in loyalty to the Holmesian “bad man” are also bound by law.¹⁴³ Legal limits give rise to ethical obligations.

This claim should not be controversial. Professional codes of conduct in Canada require of lawyers that every question posed be discharged by fair and honourable means and without illegality in a manner that respects the tribunal and promotes a fair trial.¹⁴⁴ Fair, honourable, and without illegality must mean within the bounds of law. Within the bounds of law in this context must mean consistent with law reforms that have categorically precluded the admission of some types of evidence, certain lines of cross-examination, and certain arguments if introduced in an effort to invoke a stereotype that has been legally rejected. Certainly, the Court, in establishing a good faith/reasonable hypothesis basis as the standard for permissible cross-examination, discussed the issue in both legal and ethical terms.¹⁴⁵ Alice Woolley, who describes herself as a proponent of zealous advocacy, also couches the issue in ethical terms.¹⁴⁶ In discussing the ethics of advocacy, she maintains that “a lawyer should cross-examine witnesses within the rules established by the law of evidence.”¹⁴⁷

143. See OW Holmes, “The Path of Law” (Address delivered at the Boston University School of Law, 8 January 1897), (1897) 10:8 Harv L Rev 457 at 459. In his address, Justice Holmes suggested that:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

144. FLSC *Model Code*, *supra* note 91, ch 4.01 commentary.

145. In *Lyttle*, the Court stated: “This appeal concerns the constraint on cross-examination arising from the ethical and legal duties of counsel...” *Lyttle*, *supra* note 106 at para 46. The Court went on to state:

A trial judge must balance the rights of an accused to receive a fair trial with the need to prevent unethical cross-examination. There will thus be instances where a trial judge will want to ensure that “counsel [is] not merely taking a random shot at a reputation imprudently exposed or asking a groundless question to waft an unwarranted innuendo into the jury box.

Ibid at para 51.

146. Woolley, *Lawyers’ Ethics*, *supra* note 136.

147. *Ibid* at 212. To be clear, Woolley couches this discussion in the positive rather than the restrictive. She states for example that “where the law clearly permits the line of cross-examination to be pursued, and where the client instructs the lawyer to pursue it, then ethical representation of that client requires the lawyer to cross-examine the witness in that way...” *Ibid*. That stated, presumably she would agree that the converse is also true: Where the law clearly prohibits a line of cross-examination, ethical representation of the client requires that a lawyer not cross-examine a witness in that way. Certainly her discussion of

The combination of the cognitive suasion that these social assumptions continue to carry and the need to provide defence lawyers with a wide latitude in the conduct of their cases explains why the duty not to invoke the social assumptions rejected through the three law reforms discussed in Part II must be understood as an ethical (as well as a legal) standard. That is to say, the relationship between the ubiquity and intransigence of these social assumptions (discussed above in Part III),¹⁴⁸ the leeway that defence counsel must be given in the conduct of their cases, and the absence of any issue of divided loyalties (due to the categorical rejection of these particular social assumptions as a consequence of these law reforms) demonstrate why these particular legal limits give rise to obvious ethical obligations.

3. SCHEMATIC THINKING HEIGHTENS THE NEED FOR ETHICAL OBLIGATION

Stereotypes, including those discussed in this article, are a form of heuristic or schematic thinking. “One of the most significant lessons from cognitive psychology in the past quarter century,” Nancy Levit explains, “is the idea that when people make judgments under conditions of uncertainty, they use shorthand methods of decision making called ‘heuristics.’”¹⁴⁹ This lesson has important implications in legal contexts.¹⁵⁰ The role of schematic thinking in assessments of complainant credibility in sexual assault trials is well documented.¹⁵¹ According to Barbara Krahé Jennifer Temkin, Steffen Bieneck, and Anja Berger, “[d]espite the fact that legal decision making is normatively defined as data driven, i.e. relying exclusively

“ethical cross-examination” suggests that this is the case. *Ibid* at 207-13. I should also note that Woolley limits her discussion, in terms of examples, to the use of evidence of prior sexual history. However, there is nothing to preclude applying her analysis to the issue of delayed disclosure or the definition of consent.

148. See *supra* note 80. Several empirical studies have found evidence of the prevalence of discriminatory beliefs about sexual violence.

149. Nancy Levit, “Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory” (2006) 28:1 *Cardozo L Rev* 391 at 391 [Levit, “Heuristics Problem”].

150. See *e.g.* Kristin A Lane, Jerry Kang & Mahzarin R Banaji, “Implicit Social Cognition and Law” (2007) 3 *Ann Rev L & Soc Sci* 427 (examining the relationship between equal protection laws and implicit social cognition); Anders Kaye, “Schematic Psychology and Criminal Responsibility” (2009) 83:2 *St John’s L Rev* 565 at 569 (discussing, with respect to the issue of criminal responsibility, how “schematic blind spots and biases impair our ‘moral sensitivity’—and especially our sensitivity to morally significant facts about our circumstances—more often and more profoundly than we realize”).

151. Barbara Krahé et al, “Prospective Lawyers’ Rape Stereotypes and Schematic Decision Making About Rape Cases” (2008) 14:5 *Psych, Crime & L* 461 at 464 [Krahé et al, “Schematic Decision Making”]. See also the works cited in note 80, above.

on the facts and the evidence, there is plenty of scope for schematic conceptions about rape rooted in rape myths to infiltrate.”¹⁵² Fact finders in sexual assault trials may reason based on these ways of thinking without even realizing that they do so.¹⁵³

The prosecution of sexual assault reflects a judicial process with a long and deep-seated history of discriminatory beliefs about women, and a reality that in adjudicating allegations of sexual violation (which primarily means making credibility assessments), finders of fact are almost always asked to make decisions under conditions of uncertainty. This makes schematic thinking particularly challenging and problematic in sexual assault trials. When a lawyer suggests to a complainant that the reason she did not tell anyone immediately is because she is making it up, or points to a lack of physical injury as evidence of consent, he or she deploys a powerful heuristic that risks triggering reasoning that is both difficult to displace and legally wrong. The persuasiveness and intransigence of these entrenched stories about sexual violence divert reasoning from a process of legal findings based on relevant evidence. Lawyers who invoke these social assumptions distort the truth-seeking process.¹⁵⁴

It is insufficient to make legal rules precluding the admissibility of evidence that relies on one of these three social assumptions for its relevance.¹⁵⁵ As Alice

152. Krahé et al, “Schematic Decision Making,” *supra* note 151 at 462.

153. *Ibid* at 463. The authors state, “In combination, these studies provide evidence of schematic processing of information about rape cases that is incompatible with the normative prescription of data-driven information processing as a basis for decision making in this context.”

154. See Levit, “Heuristics Problem,” *supra* note 149. Levit notes that:

Given the egocentric biases that researchers have documented, coupled with the tendencies toward stereotypic classifications, when decision makers use simplifying heuristics, they are likely to make mistakes in the direction of their pre-existing biases. The combined effects of these proclivities mean that decision makers are anchored in conventional patterns of thinking and that those patterns contain perceptual biases.

Ibid at 394 [citations omitted]. Levit also summarizes the 1970s research of cognitive psychologists Amos Tversky and Daniel Kahneman: “[D]ecisionmaking often involves an abundance of information, time pressures, and an array of possible alternatives, people intuitively and unconsciously use cognitive shortcuts or ‘heuristics’ to make decisions about probabilities. These simplifying heuristics lead to some predictable patterns of decisional errors.” *Ibid* at 395-96.

155. With respect to prior sexual history, it is true that section 276 provides for a two-step *voir dire*, removing the finder of fact in those cases involving a jury. In most cases, however, the judge is the trier of fact. Jury trials are rare in superior courts and unavailable in provincial courts. Judges are steeped in the same culture as jurors and are therefore susceptible to the same social assumptions about a woman’s sexual experience as are jurors. Benedet addresses

Woolley remarks, “Not all improper cross-examination can be easily controlled by the trial judge given the ‘wide latitude’ which lawyers have to ask questions.”¹⁵⁶ In the interests of protecting due process, lawyers need to be given the latitude to demonstrate the relevance of their evidence and arguments. However, as a result, by the time it becomes apparent that a lawyer does not have a good faith/ reasonable basis for pursuing a line of questioning “it may be too late to repair the harm that arises.”¹⁵⁷ The nature of schematic thinking suggests that it will often already be too late when a judge tries to stop questions that trigger negative, legally rejected stereotypes. Given the power of these social assumptions to distort the truth-seeking process, the provision of this wide latitude to defence counsel demands a concomitant ethical obligation on these lawyers not to trigger these legally rejected social assumptions.

Defence counsel also have a fundamental obligation to “employ every legitimate means of testing the evidence.”¹⁵⁸ As Temkin notes, defence counsel should challenge every Crown witness on any aspect of their evidence that is unclear, inconsistent, or implausible.¹⁵⁹ They should test the complainant’s memory and reveal inconsistencies in Crown witness testimony. They should ensure that only admissible evidence is introduced by the Crown. They should challenge the credibility of the complainant, using legitimate means—unless they know or should know that she is testifying truthfully.¹⁶⁰ They should raise any technical arguments that are available. Ethical, resolute advocacy in a sexual assault trial requires defence counsel to test the prosecution’s evidence in an effort to reveal every reasonable doubt. Doubts premised on any one of these three social assumptions are not reasonable.

Lawyers know the ins and outs of their cases better than do judges. In those cases where the Crown has honoured its disclosure obligations, no party to a criminal proceeding is more informed than the defence. Given the nuance of

this issue in the following statement: “The trial judge in [*R v Sandfly*] discounted the possibility of prejudice or bias because the trial did not involve a jury. Regrettably, the judge went on to employ several lines of reasoning that relied on prejudicial stereotypes *en route* to acquitting the accused.” Benedet, “Continuing Misuse,” *supra* note 56 at 73. Moreover, as Melanie Randall’s work has demonstrated (particularly in cases involving allegations between ongoing sexual partners) evidence of prior sexual history is often admitted without anyone even raising the matter of a section 276 hearing. Randall, “Sexual Assault in Spousal Relationships,” *supra* note 138.

156. Woolley, *Lawyers’ Ethics*, *supra* note 136 at 208.

157. *Ibid.*

158. *R v Titus*, [1983] 1 SCR 259 at para 9, 144 DLR (3d) 577.

159. Temkin, “Defending Rape,” *supra* note 46 at 235-36.

160. See Layton, “Criminal Defence Lawyer’s Role,” *supra* note 88.

the legal limits imposed by the law reforms discussed in this article, defence counsel are singularly situated to ensure that these limits (*i.e.*, these protections of the truth-seeking process) are maintained. For example, it is the purpose for which evidence of sexual history or delayed disclosure is offered that determines whether it is improper. Advocates are the ones who know (or should know) whether the lines of questioning they pursue, or the arguments they advance, have a legitimate purpose. This is a function that the law and courts alone cannot perform adequately. Rulings of inadmissibility, admonishments to the jury, and sustained Crown objections may function retroactively and impotently.

B. CONTOURS OF THE ETHICAL OBLIGATION NOT TO TRIGGER LEGALLY REJECTED SOCIAL ASSUMPTIONS

Lawyers have an ethical obligation to be competent.¹⁶¹ They also have a duty not to discriminate.¹⁶² The duty not to discriminate and the requirement of basic competency make it incumbent upon any defence counsel whose practice includes defending individuals accused of sexual assault to educate themselves on the parameters that these three legal limits impose upon the conduct of a sexual assault trial. Competency in this context requires lawyers to be mindful, reflective, and aware of the assumptions motivating a particular strategy and of the relationship between these assumptions and the specific legal reforms discussed above. This requires lawyers to develop self-awareness of their own entrenched social assumptions. What heuristics do they rely upon in designing and evaluating the defence of a client accused of sexual assault?

Lawyers must ask themselves why they are seeking to introduce evidence of, or make arguments regarding, delayed disclosure, prior sexual history, or the complainant's passivity. For example, are they introducing evidence of delayed disclosure because the lapse in time is so significant that it raises questions about the complainant's ability to recall, or are they introducing this evidence to trigger the social assumption that if she really had been raped she would have told someone promptly? If the evidence they seek to admit, or the argument they advance, is reliant for its probative value on one of the three legally rejected social assumptions identified in this discussion, its use is unethical.

One might ask how these ethical obligations are to be instantiated. The relationship between ethical norms and rules, formal and informal sanctions, reputational harm, judicial regulation of lawyers, and professional disciplinary measures is the subject of a rich body of literature and fervid debate that is beyond

161. See *e.g.* FLSC *Model Code*, *supra* note 91, ch 201.(2).

162. *Ibid.*, r 6.3-5.

the scope of this discussion. The purpose of this discussion is to demonstrate that these ethical obligations exist. While developing the methods through which compliance with these ethical obligations might be actualized warrants a separate article, I will offer a few preliminary comments on the issue.

A purely positivist approach to legal ethics is unlikely to be successful, particularly in a context such as this. The limited empirical evidence that is available suggests that the judiciary is reluctant to exercise its inherent power to regulate or discipline the behavior of lawyers.¹⁶³ As mentioned previously, these three social assumptions are deeply embedded in our society and culture. What is required to effect change is a multi-pronged and interrelated approach aimed at changing social norms, changing legal culture, and educating the judiciary—the same triad that feminists have targeted for decades. In this endeavor, a variety of strategies should be developed, including some aimed at continuing judicial and legal education, some aimed at informal sanctions for misconduct such as admonishment from the bench, and, for the most egregious and intentional violations, strategies involving formal discipline by the profession's regulators.

Law societies in Canada are charged with protecting the public. The responsibility to do so includes creating policies and processes that sanction lawyers who threaten the administration of justice by distorting the truth-seeking process. Again, developing and articulating the specific strategies that should be employed to instantiate these ethical obligations should be the subject of future research and discussion.

The problematic stereotypes addressed in the above discussion are not the only social assumptions about sexual assault identified by courts as groundless and discriminatory. The argument in this discussion focuses on these three in particular because inferential reasoning premised on them has been explicitly rejected through reforms to the law of sexual assault. As a result, even the most zealous advocates should be compelled by the assertion that they are ethically obligated not to invoke them.

Myriad stereotypes about women, sexual violence, race, class, sexual orientation, and disability are invoked to discredit and oppress participants in the legal system in intersecting and compounding ways. This article has centered on gender discrimination as the paradigmatic problem in sexual assault law. As

163. See Judith A McMorrow, Jackie A Gardina & Salvatore Ricciardone, "Judicial Attitudes Toward Confronting Attorney Misconduct: A View From the Reported Decisions" (2004) 32:4 Hofstra L Rev 1425; Judith McMorrow, "The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice" (2005) 58:1 SMU L Rev 3. See also Eli Wald, "Should Judges Regulate Lawyers?" (2010) 42:1 McGeorge L Rev 149.

misleading and problematic as this focus is (women's oppression is, to borrow from Toni Williams, a function of inextricable "relations of ruling" based on ability, age, class, gender, heterosexuality, and race¹⁶⁴) it is also a function of the specific argument developed here. Sexual assault law reform has been informed by a particular feminist project—one that has, in a self-limiting way, centered primarily on gender discrimination. An argument that turns on invoking substantive and evidentiary law reforms that prohibit certain social assumptions will be driven by the particular social assumptions rejected. To date, in the sexual assault law context this means sexist assumptions. However, similar ethical obligations should arise in every instance where a baseless social assumption has been categorically rejected either through legislative or jurisprudential reform. Advocates should scrutinize significant changes to the law that result in legal rules governing the conduct of a trial. They should ask themselves whether the impetus for a particular reform was to incorporate into the substance of the legal rule a rejection of a discriminatory or problematic social assumption. If the answer is affirmative then the advocate is ethically obligated not to make arguments or pursue cross-examination that relies for its relevance or coherence on the rejected assumption.

To illustrate this point using a (currently) uncontroversial example, consider the legal rules governing testimonial competence. At common law a witness was only competent to testify if he or she could demonstrate, by swearing on the bible, a belief in both God and divine retribution.¹⁶⁵ The social assumption underpinning this law was that unless individuals feared God's punishment in the afterlife for lying under oath, they could not be trusted to testify truthfully. As a result, non-Christians could not testify. The law was initially reformed to allow oath ceremonies other than swearing on the bible.¹⁶⁶ Ultimately it was changed to allow witnesses to choose between affirming that they will tell the truth and taking an oath.¹⁶⁷ The impetus for changing the rule was the recognition that the assumptions about religion that underpinned it were outdated.¹⁶⁸ One's

164. Toni Williams, "Re-forming 'Women's' Truth: A Critique of the Report of the Royal Commission on the Status of Women in Canada" (1990) 22:3 Ottawa L Rev 725.

165. *Omychund v Barker* (1744), 1 Atk 21, 26 ER 15 (CA).

166. See e.g. *R v Wooey* (1902), 9 BCR 569, 8 CCC 25 (BCSC).

167. See e.g. *Canada Evidence Act*, RSC 1985, c C-5, s 14(2).

168. *R v KJF* (1982), 1 CCC (3d) 370, (available on QL) at para 28 (Ont CA); *R v Horsburgh*, [1966] 1 OR 739, 55 DLR (2d) 289 (CA) [*Horsburgh*]. Regarding the requirement that witnesses hold religious beliefs to be deemed competent, Justice Laskin stated, "The contention that competency of a witness depends on demonstration that he or she is fearful of divine retribution ... is highly talismanic. The common law deserves better than that at the hands of the judiciary in the twentieth century." *Horsburgh*, *ibid* at para 46.

lack of devotion to God or any other supreme being is of no probative value to the credibility of a witness.¹⁶⁹ As a matter of law, it is irrelevant to the issue of credibility. It would be unethical for a lawyer to suggest that a trier of fact should draw an adverse inference as to credibility on the basis that a witness is Hindu, Buddhist, or atheist.

Given the ethical limits placed on lawyers by the changes to the law, the judicial process might be well served by further reforms to substantive and evidentiary laws that render irrelevant, in a categorical manner, those social assumptions now understood to be baseless and grounded in prejudice and bias.

V. CONCLUSION

One of the main feminist critiques of relying on the legal system to address sexual violence is that the criminal law focuses entirely on individual actors. Sexual violence is a social problem. Yet the criminal law does not provide a systemic response to this systemic problem. For many feminists the inevitable conclusion is that indeed “the master’s tools” did not “dismantle the master’s house.”¹⁷⁰ Feminists have questioned the plausibility of relying on the criminal justice system to promote equality at all:¹⁷¹

169. Some evidence scholars have even suggested that the option to swear an oath should be eliminated to avoid “invidious distinctions on issues of credibility between one witness who swears and another who affirms.” Bryant, Lederman & Fuerst, *The Law of Evidence In Canada*, *supra* note 130 at 876.

170. See Sheila McIntyre, “Redefining Reformism: The Consultations that Shaped Bill C-49” in Julian V Roberts & Renate M Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 293 at 295. In McIntyre’s discussion regarding the need for feminist-influenced law reform in the post-*Seaboyer* period, she states, “Whether the master’s tools can ever dismantle the master’s house remains a perennial question for those struggling for social change.”

171. See Constance Backhouse, “A Feminist Remedy for Sexual Assault: A Quest for Answers” in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 725; Elizabeth Bernstein, “The Sexual Politics of the ‘New Abolitionism’” (2007) 18:3 *Differences: Journal of Feminist Cultural Studies* 128. See also McInnis & Boyle, “Judging Sexual Assault Law,” *supra* note 111 at 348-49. According to McInnis and Boyle:

It is illogical to think that criminal law is *capable of* promoting equality of any kind... [T]he system in practice appears to be most concerned with the protection of those already invested with power—property owners, businesses, and individuals whose status means that their complaints to the police are likely to be taken seriously—with the protection of the vulnerable being an often neglected afterthought [emphasis in original].

Can a feminist reconstruction of sexual assault law, for example, truly promote egalitarian aims if other disadvantaged groups continue to form a disproportionately large percentage of those who get charged with sexual assault, and if the result of conviction is that they are incarcerated?¹⁷²

This is a compelling argument and one that should be broached in any discussion on legal responses to sexual violence. It is an argument, though, for why lawyers, public actors, and other individuals should develop non-judicial, non-carceral, and non-individualistic responses to sexual harm—responses aimed at addressing the social conditions, channels of power, and relations of oppression that produce sexual violence. However, for those who have chosen to practice justice from within the courtroom—regardless of what side of the bench or aisle they sit on—this is a peripheral point. If legal advocates can agree on nothing else, surely they can agree to assume responsibility for promoting justice in the justice system, regardless of their conceptions of what their roles in this will be.

In a recent Manitoba case, Justice Dewar of the Manitoba Court of Queen's Bench received (well deserved) public censure, criticism from the media, and even an admonishment from the Canadian Judicial Council as a result of comments he made in sentencing Kenneth Rhodes.¹⁷³ Rhodes was convicted of sexually assaulting a young Aboriginal woman.¹⁷⁴ Justice Dewar found that Rhodes sexually assaulted the complainant by penetrating her vaginally with

172. *Ibid* at 348.

173. See e.g. Dean Pritchard, "Judge's Rape Ruling 'Disgusting,'" *Toronto Sun* (26 February 2011), online: Canoe Sun Media <<http://www.torontosun.com/news/canada/2011/02/26/17418376.html>>; Mike McIntyre, "Rape Victim 'Inviting,' So No Jail," *Winnipeg Free Press* (24 February 2011), online: FP Newspaper <<http://www.winnipegfreepress.com/breakingnews/rape-victim-inviting-so-no-jail--rape-victim-inviting-so-no-jail-116801578.html>>; Paul Thompson, "Judge Facing Calls to Resign After He Let Rapist Go Free Because Victim Sent Out 'Sex Was in the Air' Signals," *The Daily Mail* (27 February 2011), online: Associated Newspapers <<http://www.dailymail.co.uk/news/article-1361248/Judge-facing-calls-resign-let-rapist-free-victim-sent-sex-air-signals.html>>; Christie Blatchford, "Manitoba Judge is Dead Wrong in Rape Case," *The Globe and Mail* (24 February 2011), online: <<http://www.theglobeandmail.com/news/national/manitoba-judge-is-dead-wrong-in-rape-case/article622513/>>. See also Canadian Judicial Council, News Release, "Canadian Judicial Council Completes Its Review of Complaints Made Against Justice Robert Dewar," (9 November 2011), online: <http://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_2011_1109_en.asp> [CJC, "Review of Complaints"]. The Canadian Judicial Council stated that Justice Dewar's remarks "showed a clear lack of sensitivity towards victims of sexual assault" and that his conduct "fell short of the high standard Canadians expect of all judges." *Ibid*.

174. *R v Rhodes*, [2011] MJ No 67 (QL) (MBQB) [*Rhodes*].

his fingers and his penis, penetrating her anally with his penis, and assaulting her genitals with his mouth. Despite these findings, Justice Dewar, in imposing a two-year conditional sentence to be served in the community, characterized Rhodes's conduct as that of a "clumsy Don Juan."¹⁷⁵ He stated that "[t]his is a case of misread signals and inconsiderate behavior. There is a different quality to these facts than found in many cases of serious sexual assault."¹⁷⁶ He pointed to the fact that she was wearing a tube top without a bra, makeup, and high heels and then suggested that "sex was in the air."¹⁷⁷ He emphasized that all of the parties had been drinking heavily, that there was no violence knowingly imposed by the accused, and that the complainant did not run away.¹⁷⁸

These comments are not just harmful to the complainant and an embarrassment to Justice Dewar (who apologized fully and unequivocally for the damage he caused);¹⁷⁹ conduct such as this also brings the legal profession and the judicial system as a whole into disrepute. It reflects poorly on the Canadian Judicial Council, which is responsible for training federally appointed judges and which, in the wake of Justice Dewar's decision, took the unusual step of publicly defending the training of the federal judiciary.¹⁸⁰ Similarly, it reflects badly on the federal government's judicial appointments process.

In all of the discussion regarding Justice Dewar's conduct, what was not focused on was whether defence counsel in this case played any role in harming the complainant and bringing the administration of justice into disrepute. Justice Dewar's emphasis on her attire, on her failure to resist, on her decision to leave with the men, and on her consumption of alcohol revealed stereotypical thinking about women, Aboriginal people, particularly Aboriginal women, and sexual violence. Did the lawyers in this case trigger for this undertrained judge particular social assumptions about this Aboriginal woman?¹⁸¹

175. *Ibid* at para 516.

176. *Ibid* at para 512.

177. *Ibid* at para 519.

178. *Ibid* at paras 320, 429-30, 500, 504, 512-17, 536.

179. From the news release issued by the Canadian Judicial Council: "Justice Dewar has offered a full and unequivocal apology to the victim for the hurt she experienced from his comments. He also is aware that his comments may have been traumatic to other women who were victims of sexual assault and expressed his sincere regret for this." CJC, "Review of Complaints," *supra* note 173.

180. Mia Rabson, "Judicial council defends training given to federally appointed judges," (3 April 2011), online: <<http://www.winnipegfreepress.com/local/judicial-council-defends-training-given-to-federally-appointed-judges-117393468.html>>.

181. From the news release issued by the Canadian Judicial Council: "In his desire to approach social justice issues with greater sensitivity in the future, Justice Dewar met with an expert on

On appeal, counsel for the accused explicitly invoked the social assumption rejected by reforms to the definition of consent. He argued that Justice Dewar erred:

[I]n his assessment of CP's credibility which lead [sic] to an unreasonable verdict when he failed to take into account CP's failure to run away from the Appellant during the sexual interaction. There is no evidence that the complainant was being restrained by the Appellant during the digital penetration or intercourse. Furthermore, during cross-examination the complainant admitted that during the oral sex, she was standing unrestrained and could have run away.¹⁸²

This is exactly the type of argument that lawyers should be ethically precluded from making:¹⁸³ "The story of failed [rape law] reforms is in part a story about the overriding importance of culture, about the seeming irrelevance of law."¹⁸⁴ A failure to impose ethical obligations on defence counsel to refrain from making arguments like the one presented to the Court of Appeal in *R v Rhodes* perpetuates rather than responds to this failure. Lawyers who rely on and correspondingly perpetuate racist, classist, ableist, and sexist beliefs bring the profession into disrepute. In the context of sexual assault cases, lawyers who conduct their cases in this manner compound the systemic effects of race-, class-, ableism-, sex-, and gender-based discrimination on people who make allegations of sexual violation, and compromise the integrity of the system aimed at responding to these allegations.¹⁸⁵

gender equality. He is pursuing further professional development in this area as part of his commitment to become a better judge." CJC, "Review of Complaints," *supra* note 173.

182. *Rhodes*, FOA, *supra* note 59 at para 41.

183. Rhodes successfully appealed his conviction and a new trial was ordered. See *Rhodes*, *supra* note 174.

184. Stephen Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Cambridge: Harvard University Press, 1998) at 17, cited in Corey Rayburn, "To Catch A Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials" (2006) 15:2 Colum J Gender & L 437 at 438.

185. This includes the perpetuation of discriminatory attitudes, the problem of disproportionate underreporting of sexual assault offences, and potential harm to the individual complainant arising as a consequence of participating in a judicial process that degrades, humiliates, and embarrasses her. It also risks further distortions to the truth-seeking process. Victims who sense that defence counsel are going to harass them about irrelevant personal details, or try to invoke degrading stereotypes, may alter the way they conduct themselves. Victims may be less forthcoming about details regarding their conduct that could lend themselves to these stereotypical narratives. In a legal context where the outcome often turns on a he-said versus she-said credibility contest, any evasion, under emphasis, or omission will be fatal to the complainant's credibility.

Limiting the focus of this article to the ethical obligations arising from reforms to the substance of a legal rule that results in a categorical prohibition of a particular social assumption does not fully resolve the question of whether lawyers also have an ethical obligation to refrain from invoking any of the many discriminatory and irrelevant attitudes that infect this system's judicial processes.

Lawyers are under a duty not to discriminate.¹⁸⁶ They are under a duty not to bring the administration of justice into disrepute.¹⁸⁷ Do lawyers' duties and responsibilities that extend beyond the interests of their clients include a broader ethical duty not to invoke discriminatory beliefs or biases? Presumably they do. However, one need not embrace this claim in order to subscribe to the ethical obligations articulated in this discussion. The strength of the argument developed in this article is that, given law reform in Canada, all lawyers should agree that it is unethical to distort the truth-seeking process by invoking the baseless assumptions that women who did not fight back secretly wanted it, that women who fail to raise a hue and cry are lying, or that women become untrustworthy and indiscriminate in their sexual choices once they have lost their chastity. As Woolley concludes, in this way the moral quandary for lawyers in Canada has been eliminated.¹⁸⁸ With respect to social assumptions that have been categorically rejected by law reform, lawyers are ethically obligated to practice equality. Where the protection and promotion of equality has been substantively incorporated into the content of fair process, all lawyers become charged with protecting it.

186. See *e.g.* FLSC *Model Code*, *supra* note 91, ch 5.03(5).

187. See *e.g. ibid.*, ch 3.01(2)(d).

188. Woolley, *Lawyers' Ethics*, *supra* note 136 at 212.

