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Sense and sensibilities

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SENSE AND SENSIBILITIES: A FEMINIST CRITIQUE OF LEGAL INTERVENTIONS AGAINST SEXUAL VIOLENCE

*Sharon Cowan**

A. INTRODUCTION

Feminists have spent decades trying to reform laws and evidential procedures relating to sexual assault. Using the current Scottish context as a case study, I will argue in this article that while efforts to reform the text of the substantive as well as evidential and procedural aspects of the law have been largely successful, in practice the impact of these reforms has not always been felt. Drawing on contemporary examples from Scotland, and setting these within the broader context of similar problems and arguments in other jurisdictions such as England and Wales, and Canada, I will examine the ways in which the ‘laws on the books’ have not always translated smoothly through to ‘law in action’. Ultimately, I argue that our all too frequent failures to punish sexual violence in a meaningful way suggests that we need to think again about how we deal with issues of sexual violence in contemporary society.¹

* University of Edinburgh School of Law. Thanks to the editors of ELR for their encouragement and editorial assistance, and for very helpful suggestions from an anonymous reviewer. Thanks also to Chiara Cooper for helping with referencing; and to Heather Douglas, who invited me to give a version of this paper at the University of Queensland, as a keynote at the ‘Gendered Violence: Linking Global and Local Perspectives’ conference, October 2017; to Lindsay Farmer, who discussed these issues with me at some length, bringing crucial issues to my attention; and to my friend Dr Daniel J Carr, who very kindly read an earlier version. I am grateful to him for spotting what would have certainly been embarrassing mistakes and offering – as ever – thoughtful comments. Any outstanding errors are of course my own.

¹ Taking sexual offending seriously does not necessarily mean resort to the most punitive and stigmatic responses such as long-term imprisonment. Feminists and other critical scholars have been exploring other, non-carceral responses to sexual violence. See for example S Lambie “Queer Investments in Punishment: Sexual Citizenship, Social Movements and the Expanding Carceral State”, in J Haritaworn, A Kuntsman, & S Posocco (eds) *Queer Necropolitics* (2013); K Daly “Sexual Assault and Restorative Justice” in Strang and Braithwaite (eds) *Restorative Justice and Family Violence* (2001). With respect to sexual violence specifically see A Powell, N Henry and A Flynn (eds), *Rape Justice: Beyond the Criminal Law* (2015); C McGlynn, “Feminism, Rape and the Search for Justice” (2011) 31 *Oxford Journal of Legal Studies* 825; I Cairns “‘Access to Justice’ for Complainers? The Pitfalls of the Scottish Government’s Case to Abolish Corroboration” in P Duff and P Ferguson (eds) *Scottish Criminal Evidence Law: Current Developments and Future Trends*, 41 -66; C McGlynn, N Westmarland, and N Godden “‘I just wanted him to hear me’: sexual violence and the possibilities of restorative justice” (2012) 39 *Journal of Law and Society* 213.

By examining sexual assault law reforms, current statistics and research findings on sexual violence, as well as three recent Scottish sexual assault cases, I demonstrate some of the key ways in which myths and stereotypes about sexual assault, and about gendered social relations generally, subsist, notwithstanding laws designed to enshrine principles and values that protect sexual autonomy and gender equality.² I will argue that if feminist scholars try to press for change primarily through law, we should not be surprised when our attempts to have meaningful impact on the way we see and deal with sexual assault fail.

In examining the opportunities and constraints offered by law, I suggest that the law is ultimately inadequate to address deeply engrained social injustices such as sexual violence. The aim here is to highlight an ongoing failure on the part of those charged with applying the law (judges, legal professionals, juries) to do so appropriately, raising the question of whether it makes sense for feminist scholars to try to engage with what seems like the entrenched ‘sensibilities’ of criminal law. It may well be that the contemporary battle ground is not over legal territory as such, but over whose voices are heard in public debates on sexual violence. This is not to say that feminists must abandon the field; rather that we must work to politically engage – and challenge - the gendered ‘common’ sense and sensibilities of those who implement the law, and the cultural milieu within which sexual assault law is interpreted and applied.

In section B below, I provide some contextual information on the evolution of sexual assault law reform projects over the last decade, particularly but not only in Scotland, before relaying the statistical incidence of sexual assault in Scotland. In section C, more qualitative research findings on the prevalence and treatment of sexual assault will be examined, with section 4 offering a critically analysis of three recent Scottish rape cases: *Mutebi v HMA* 2014 SCCR 52; *HMA v Cooperwhite* [2013] HCJAC 88; and *HMA v SSK* [2015] HCJAC 114. This analysis will demonstrate the gap, frequently cited by socio-legal scholars, between ‘law on the books’ and ‘law in action’; but also highlights the persistent power of law and legal techniques to define what constitutes sexual assault, and the tenacious hold that problematic social

² Scottish Government, Official Report, Scottish Law Commission, *Report on Rape and Other Sexual Offences* (2007) para 1.25 -1.29.

conceptions of sex and consent have - not only upon those who interpret and apply the law, but also upon those to whom the law is applied.

B. THE SCOTTISH CONTEXT: SEXUAL ASSAULT REFORMS, FACTS AND FIGURES

Many gains, both symbolic and practical, have been made because of law reform efforts. For example, the Sexual Offences (Scotland) Act 2009 widened the definition of rape to include anal and oral rape (section 1), thereby also recognising for the first time that men could be victims of rape. The Act also included a specific offence of non-penile sexual penetration (section 2), sexual assault (section 3) and a variety of other sexual offences (sections 4-11); and introduced for the first time a statutory definition of consent as ‘free agreement’ (section 12), outlining situations in which consent was absent (sections 13-15).

The Act defines the *mens rea* of the offences in sections 1-11 as a lack of reasonable belief in consent, and section 16 states that in assessing the reasonableness of the belief, regard should be had to any steps the accused took to establish whether there was consent.³ Sexual history evidence has been restricted, most markedly by sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995, as amended.⁴ Provisions on ‘special measures’ for vulnerable witnesses were first introduced by section 271 of that Act, and extended by other statutes, most notably the Vulnerable Witnesses (Scotland) Act 2004⁵ and the Victims and Witnesses (Scotland) Act 2014. There is also now a National Sexual Crimes Unit in Scotland, based in the Crown Office

³ For discussion of the Scottish reforms brought about by the 2009 Act see S Cowan, “All Change or Business as Usual? Reforming the Law of Rape in Scotland” in C McGlynn and V E Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (2010)

⁴ As amended by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002. The first attempt to limit the use of sexual history and character evidence in criminal proceedings in Scotland was s. 36 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, amending the Criminal Procedure (Scotland) Act 1975, and introducing restrictions on the use of sexual history and sexual character evidence of complainants in sexual offence trials. For a recent discussion of sexual history evidence rules in Scotland see L Campbell and S Cowan, “The relevance of sexual history and vulnerability in the prosecution of sexual offences” in P Duff, P R Ferguson (ed.) *Scottish Criminal Evidence Law* (2017)

⁵ See L Sharp and M Ross, *The Vulnerable Witnesses (Scotland) Act 2004: Text and Commentary* (2008).

and Procurator Fiscals Service (COPFS), that deals specifically with sexual offences, with dedicated prosecutors and offering sensitive treatment for complainers. This was established in 2009 to assuage some concerns about how complainers were treated when they reported sexual assault.⁶

The changes to substantive laws on sexual assault largely followed in the wake of similar changes in England and Wales. Under the Sexual Offences Act 2003, the definition of the act of rape has been expanded to recognize the harm of non-consensual penile penetration not only of the vagina but also the mouth and anus; non-penile penetration of the anus and vagina; and offences of trafficking for sexual purposes, offences of “sex tourism” and offences involving an abuse of a position of trust, amongst others.⁷ Since 1999 The Youth Justice and Criminal Evidence Act (YCEA) has provided some safeguards against the complainant’s sexual history being used as evidence of consent in a sexual offences trial (though recent events have led some to call for reforms of these provisions in order to strengthen their protective shield).⁸ This Act also introduced ‘special measures’ for vulnerable and intimidated witnesses to protect them from the trauma of giving evidence in court (sections 16-33).

It is clear then that the last four decades or so have seen countless recursive attempts to refine central concepts of rape law, such as consent and capacity. This is true not only of UK jurisdictions; many internationally comparative conversations are ongoing regarding the best approach to defining rape,⁹ including questions such as: Should the *mens rea* of rape be lack of honest belief or lack of reasonable belief in

⁶ People of all genders can be victims of sexual assault, and feminists who campaign for legal reform do not demand protections only for women. However, in this article I will sometimes refer to the victim or complainer (or complainant in England and Wales) of sexual assault as she, and the accused (or defendant in England and Wales) as he, because this reflects both the statistical reality, and the facts of the cases I have discussed herein.

⁷ For discussion of the English reforms enshrined in the 2003 Act see C McGlynn, “Feminist Activism and Rape Law Reform in England and Wales: A Sisyphean Struggle?” (eds) in C McGlynn and V E Munro, *Rethinking Rape Law: International and Comparative Perspectives* (2010) 139-153.

⁸ These came following the Ched Evans acquittal – see: <https://www.theguardian.com/society/2018/jan/29/uk-rape-complainants-unfair-questions-sexual-history>. See also L Kelly, J Temkin, and S Griffiths, “Section 41: An Evaluation of New Legislation Limiting Sexual History in Rape Trials” (2006) Home Office Official Report, available at: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.628.3925&rep=rep1&type=pdf>

⁹ See for example C McGlynn and V E Munro (eds) *Rethinking Rape Law: International and Comparative Perspectives* (2010); N Westmarland and G Gangoli (eds) *International Approaches to Rape* (2011)

consent? Should law embrace a 'positive' communicative model of consent? Should we keep the nominate offence of rape at the top of a hierarchy of sexual assaults, or reject rape as a specific offence and move to a framework of graded sexual assault as the Canadians have done? Should the *actus reus* of rape include oral penetration as it does in Scotland, and in England and Wales? Should women be included as potential perpetrators of rape, as they are in Finland? Jurisdictions have engaged in Law Commission consultation exercises and reports, data gathering, comparative analysis, and finally proposed reforms, all designed to address the failings of the previous law.¹⁰ These reform projects tend to focus on the fine tuning and perfecting of legal provisions – through drafting and redrafting – to ensure appropriate language that would enable a final definition to be agreed upon and correctly articulated. The level of investment in such processes is not necessarily misguided, since it is important to 'get it right', but it can be taken to imply that there is magic linguistic formula, which, if only it could be found, would solve the 'rape problem'.

We might ask, then: is it the case that legislative reforms have made a significant impact on the incidence of sexual violence, the willingness of women to report rape, the conviction rate,¹¹ or the way in which victims of sexual violence are treated by the criminal justice system? For McGlynn, writing about English law, the answer is no: "*Reforming rape law feels like a Sisyphean task with constant pressure leading to reforms, only to have such 'successes' neutralized in practice; the boulder falling back down the mountain*".¹²

Even where reforms have been achieved, critics have pointed out several problems with the substantive laws in various jurisdictions, regarding for example: what constitutes 'reasonable' belief in consent; what counts as a 'reasonable step' in establishing whether or not consent existed; or how to assess the level of intoxication

¹⁰ See for example Scottish Law Commission, *ibid*; Home Office Setting the Boundaries: Reforming the Law on Sexual Offences (2000); Victorian Law Reform Commission Sexual Offences: Final Report (2004).

¹¹ Wendy Larcombe has argued that aiming to increase the conviction rate for rape is not in itself a valid feminist law reform goal, and that rather the goal should be to have rape complaints dealt with as "occasions of respect"; W Larcombe, "Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law" (2011) 19 *Feminist Legal Studies* 27.

¹² C McGlynn (n 1) 150.

that undermines capacity to consent.¹³ But many have also noted that notwithstanding attempts to progressively reform the law on the books, there are still worryingly low rates of reporting, recording, prosecution and conviction of rape and sexual assault. This is a story that knows practically no jurisdictional boundaries.¹⁴

Turning to Scotland specifically, these reforms have been in place for almost a decade. So, what is the current picture of sexual violence in Scotland? According to the most recent figures available, the crime rate generally has been on a downward trend since 1991: in 2016-17, recorded crime overall had decreased by 3% from the previous year, to 238,651, the lowest crime rate since 1974.¹⁵ On the other hand, the recording of sexual crimes in Scotland has continued to increase and by 2014-15 was at its highest level since 1971, the first year for which comparable crime groups are available.¹⁶ Sexual crimes rose by another 7% in 2015-16, and another 5% in 2016-17, to 10,822, amounting to a 65% rise since 2007-8.¹⁷ With regard to rape specifically, police recorded incidents of rape and attempted rape increased by 66% between 2010-11 and 2016-17, to 1,878 incidents, up nearly 4% (1,809 incidents in 2015-16).¹⁸ The 2017

¹³ S Cowan, "Freedom and Capacity to Make a Choice: A Feminist Analysis of Consent in the Criminal Law" in V Munro and C F Stychin (eds), *Sexuality and the Law: Feminist Engagements* (2007); V E Munro, "Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy" (2008) 41 *Akron Law Review* 923; P Ferguson, "Reforming Rape and Other Sexual Offences Analysis" (2008) 12 *Edinburgh Law Review* 302; S Cowan, "All Change or Business as Usual? Reforming the Law of Rape in Scotland" in C McGlynn and V E Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (2010); C McGlynn; S Cowan, "The Trouble with Drink: Intoxication, (In)Capacity and the Evaporation of Consent to Sex", (2008), 41 *Akron Law Review* 899; C McDiarmid "Finding Free Agreement: the meaning of consent in sexual offences in Scots criminal law" in A Reed M Bohlander, N Wake, E Smith (eds) *Consent: Domestic and Comparative Perspectives* (2017).

¹⁴ For example see L Kelly, J Lovett and L Regan, "A Gap or a Chasm? Attrition in Reported Rape Cases" Home Office Research, Official Report (2005). W Larcombe (n 11); L Gotell, "Reassessing the Place of Criminal Law Reform in the Struggle Against Sexual Violence" in A Powell, N Henry and A Flynn (eds) *Rape Justice: Beyond the Criminal Law* (2015) (English, Canadian, and Australian perspectives). Powell, Henry and Flynn (eds) and Westmorland and Gangoli (eds) contain essays, echoing these concerns, from many jurisdictions.

¹⁵ Scottish Government, Official Report, Safer Communities Directorate, *Recorded Crime in Scotland 2016-17*, available at: <https://beta.gov.scot/publications/recorded-crime-scotland-2016-17/>

¹⁶ Scottish Government, Official Report, Safer Communities Directorate, *Recorded Crime in Scotland 2014-15*, available at: <http://www.gov.scot/Resource/0048/00484776.pdf>

¹⁷ Scottish Government, Official Report, Safer Communities Directorate, *Recorded Crime in Scotland 2016-17*, available at: <https://beta.gov.scot/publications/recorded-crime-scotland-2016-17/>

¹⁸ Scottish Government, Official Report, Safer Communities Directorate, *Recorded Crime in Scotland 2016-17*, available at: <https://beta.gov.scot/publications/recorded-crime-scotland-2016-17/>

Inspectorate of Prosecutions Report found that sexual crimes now make up 75% of COPFS High Court work, up from 50% in 2015.¹⁹

The upward trend in recorded crime may be due to a higher incidence of offending, or a higher reporting rate, as awareness grows and police practice improves, or both, but it is highly unlikely that the increase can be wholly explained by increased reporting alone.²⁰ The police recorded crime bulletin for 2016-17 explains the increase in recorded sexual offences overall as a natural consequence of the rise in frequency of reported incidents: “Police Scotland have cited that increased reporting, including that of historic crimes, *may in part* be responsible for the increase in recorded sexual crime. The successful outcome of cases featuring historic offending may have highlighted to survivors that cases will be listened to by the police, regardless of how long ago they occurred. Media coverage may also have led to the identification of further survivors who previously may not have reported crimes to the police”.²¹ No other potential reasons for the increase in recorded offences is given, but it is at the very least conceivable that there has also been a corresponding rise in the ‘real world’ incidence of sexual offences. Nor is there is recognition that what are portrayed here as ‘successes’ in increased reporting do not translate into increased proceedings or convictions for rape/attempted rape.

While the rate of recorded rape/attempted rape rose by almost 4% in 2016-17, the number of people *convicted* of these offences fell, this time by 7%, from 105 to 98, even though the *number of people proceeded against for those offences rose by 16% in the same 12-month period*.²² This gives an overall conviction rate in 2016-17 of just over 5% of recorded rape and attempted rape cases;²³ and 39% of cases proceeded

¹⁹ Inspectorate of Prosecution in Scotland, Official Report, Justice Directorate, *Thematic Review of the Investigation and Prosecution of Sexual Crimes by the Crown Office and Procurator Fiscal Service*, (2017) available at: <https://beta.gov.scot/publications/thematic-review-investigation-prosecution-sexual-crimes/pages/16/>

²⁰ *ibid.*

²¹ Emphasis added. Scottish Government, Official Report, Safer Communities Directorate, *Recorded Crime in Scotland 2016-17*, available at: <https://beta.gov.scot/publications/recorded-crime-scotland-2016-17/> 30 ff.

²² Scottish Government, Official Report, Justice Directorate, *Criminal Proceedings in Scotland: 2016-2017* available at: <https://beta.gov.scot/publications/criminal-proceedings-scotland-2016-17/> tables 4a and 4b, 53-54 ff.

²³ This is calculated from the number of people convicted of rape/attempted rape in 2016-17 (98) as a percentage of the number of recorded cases of rape/attempted rape in 2016-17 (1878). See

against - the lowest conviction rate of all offences by quite some margin,²⁴ demonstrating the relative difficulty with achieving convictions in rape cases. In short, the increase in reported incidents is accompanied by an even larger decrease in the number of prosecutions, and in the number of convictions. This problem is not confined to Scotland; researchers have shown a common pattern, across European countries, of a rise in reporting and recording, alongside a falling prosecution and conviction rate.²⁵ No reference to this discrepancy between recorded crime figures and the conviction rate is made in the Scottish official statistics – presumably because recorded crime figures are provided by Police Scotland, while criminal proceedings statistics are provided by COPFS, and neither agency is responsible for ‘joining up the dots’.²⁶

Equally troubling is the fact that of the total number of all recorded rapes/attempted rapes in Scotland in 2016-17 (n=1878), only 251 people were proceeded against for rape/attempted rape – i.e. 13.4% of recorded incidences. For all sexual crimes, the figure is 14%. Lord Hope suggested that this figure was not much better in 2002, when it stood at 20%.²⁷ Evidently the much-hailed increase in reporting is not smoothly translating into increased proceedings or convictions. This is perhaps because, in fact, some of those cases which would not have normally or previously have been reported but for recent media attention and feminist activism, such as historical cases or ‘acquaintance’ cases, are the hardest to prove.

Scottish Government, Official Report, Justice Directorate, *Criminal Proceedings in Scotland: 2016-2017* available at: <https://beta.gov.scot/publications/criminal-proceedings-scotland-2016-17/> and Scottish Government, Official Report, Safer Communities Directorate, *Recorded Crime in Scotland 2016-17*, available at: <https://beta.gov.scot/publications/recorded-crime-scotland-2016-17/>

²⁴ Scottish Government, Official Report, Justice Directorate, *Criminal Proceedings in Scotland: 2016-2017* available at: <https://beta.gov.scot/publications/criminal-proceedings-scotland-2016-17/> table 4c, 55 ff. This figure of 39% is down a startling 10% from the already low figure of 49% in the previous year.

²⁵ Albeit at a different rate depending on the country concerned. For discussion see: M Burman, J Lovett, and L Kelly, Scotland Country Report, Child and Women Abuse Studies Unit London Metropolitan University “Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases in Eleven Countries” (2009) available at: [http://www.sccjr.ac.uk/wp-content/uploads/2012/11/Daphne_Scotland_Briefing-Different_Systems_similar_outcomes\(3\).pdf](http://www.sccjr.ac.uk/wp-content/uploads/2012/11/Daphne_Scotland_Briefing-Different_Systems_similar_outcomes(3).pdf). Thanks to an anonymous reviewer for reminding me of this reference.

²⁶ Thanks to Daniel Carr for pressing me to highlight this point.

²⁷ ‘Corroboration and Distress, a Lecture in honour of Gerald Gordon in Edinburgh (2009) available at: https://www.supremecourt.uk/docs/speech_090612.pdf.

It should also be noted that these are Police Scotland *recorded* crime statistics and as such they do not present a complete picture of the incidence of sexual offences. As crime surveys and other research findings have long highlighted, much if not most sexual assault is never reported to the police, much less recorded by the police. The most recent Scottish Crime and Justice Survey (SCJS) findings from 2014-15 suggest that only around 17% of those who had recounted a rape and 13% of those who had recounted an attempted rape had reported the incident to the police,²⁸ and it is safe to say that not all of those interviewed who have experienced rape or sexual assault will have felt comfortable reporting it to the SCJS team. Clearly, the relationship between incidence, reporting and recording of sexual assault – or indeed any crime - is not straightforward. Furthermore, according to the survey, most (87.4%) of the adults in Scotland who reported having experienced ‘serious sexual assault’²⁹ said that that they knew the offender in some way, while 54.8% said that the perpetrator was their partner.³⁰ This indicates that very few rapes are committed by complete strangers,³¹ with the result that most allegations of rape, attempted rape, and serious sexual offences hinge on the presence or otherwise of consent, rather than the identity of the perpetrator.

As Smith and Skinner³² have pointed out, one of the worrying things about a low conviction rate – other than the prospects for justice for individual victims of sexual assault – is its impact further back in the criminal justice ‘chain’. In other words, it is not only the *number* of convictions that might deter a complainant from reporting, but the knowledge of the *kinds* of cases that are successfully prosecuted, tried and convicted can affect who reports and wants to proceed with a sexual assault allegation. Social

²⁸ Scottish Government, Official Report, *Scottish Crime and Justice Survey 2014/2015: Sexual Victimisation and Stalking*, available at: <http://www.gov.scot/Publications/2016/05/6129/328515> para 3.8.

²⁹ Serious sexual assault is defined as forcing or attempting to force someone to have sexual intercourse or other sexual activity: Scottish Government, Official Report, *Scottish Crime and Justice Survey 2014/15: Sexual Victimisation & Stalking*, available at: <http://www.gov.scot/Publications/2016/05/6129/328515> at 10. Less serious sexual offences include indecent exposure; sexual threats; or being touched sexually when it was not wanted (for example, groping or unwanted kissing), *ibid*, at 11.

³⁰ *Ibid*, at 36.

³¹ See also: L Adams, BBC News, *Sex attack victims usually know attacker, says new study* available at: <https://www.bbc.com/news/uk-scotland-43128350>

³² O Smith and T Skinner, "Observing Court Responses to Victims of Rape and Sexual Assault" (2012) 7 *Feminist Criminology* 298. See also O Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (2018).

scientists have shown that a sexual assault case can fall foul of criminal justice attrition when, amongst other things: the accused is known to the complainer; there has been a history of sexual activity or relationship between them; there is an absence of a weapon, violence or signs of resistance; the complainant has previously made allegations of sexual assault; the complainant is intoxicated; and where the complainant has a history of poor mental health.³³ In other words, as Susan Estrich argued decades ago, ‘real rapes’ – violent, stranger rapes in public spaces - are still easier to prove.³⁴ And a low conviction rate is the reason sometimes given for a decision not to record, investigate or prosecute sexual assault allegations,³⁵ despite simultaneous attempts by prosecutors to encourage *all* rape victims to come forward.³⁶ This seemingly intractable but notoriously vicious circle is noted by many researchers working in this field.³⁷

One additional problem related to successful prosecution and conviction of sexual assault in Scotland is corroboration. Every issue of fact in a Scottish criminal charge has to be corroborated by the Crown. According to some Scottish judges, this includes the *mens rea*. With regard to rape, *McKearney v HMA* (2004 JC 87) held that in forcible rape cases, evidence of force plus the complainer’s testimony would be sufficient to pass the evidential hurdle of corroboration. However, Lord McCluskey stated that in ‘non-forcible’ rape cases, it was necessary for the prosecution to provide more than one piece of evidence to demonstrate the state of mind of the accused; the

³³ The ground-breaking research on this, based on a large scale quantitative and qualitative investigation of all stages of the CJS was commissioned by the Home Office and published in 2005: L Kelly, J Lovett and L Regan, Home Office Research Study, “A gap or a chasm? Attrition in reported rape cases” (2005) 293. See also Burman et al (n 25).

³⁴ S Estrich, *Real Rape* (1988). See also S Estrich, “Rape” (1986) 95 Yale Law Journal 1087. See also Burman et al (n 25), who demonstrate that most cases ending in a conviction “reflect stereotypes of rapes and rapists”, 9 ff.

³⁵ Dame D.E Angiolini Crown Prosecution Service, Official Publication, “Report of the Independent Review into the Investigation and Prosecution of Rape in London” (2015), available at: <https://www.cps.gov.uk/publication/report-independent-review-investigation-and-prosecution-rape-london-rt-hon-dame-elish>.

³⁶ A ‘memorandum of agreement’ was recently signed between COPFS and Rape Crisis Scotland to work together to improve complainers’ experiences of the criminal justice process and encourage victims of sexual violence to report: Rape Crisis Scotland, “Improving criminal justice experience for sexual crime victims” (2017) available at <https://www.rapecrisisscotland.org.uk/news/news/improving-criminal-justice-experience-for-sexual-crime-victims/>.

³⁷ Smith and Skinner (n 37); Angiolini (n 35); V Munro, and L Kelly, “A vicious cycle?: attrition and conviction patterns in contemporary rape cases in England and Wales” in J Brown and M Horvath (eds), *Rape: Challenging Contemporary Thinking* (2009) 281-300.

testimony of the complainer as to the accused's state of mind is not by itself sufficient.³⁸ This has been followed in subsequent cases such as *HMA v Mutebi*,³⁹ discussed below.

However, this is a controversial issue. First, it is difficult to see how someone's mental state could be *directly* corroborated at all – no one can see inside the mind of another, and few rapists state their intentions explicitly: “Intention is a fact which may be inferred from proof by corroborated evidence of the crucial facts”.⁴⁰ Second, *mens rea* is crucial to all but strict liability offences, but as Lord Carloway has stated in the recent (“forcible”) rape case *Graham v HMA*,⁴¹ the relevant criminal intent does not need to be proven as a separate fact, but rather is an ‘inference drawn from facts’, raising the question of how one corroborates an inference. Lord Carloway's words in *Graham* echo his findings from his year-long review of Scots criminal law, evidence and procedure, where he was expressly asked to consider the requirement for corroboration generally. In his 2011 report, he stated the following: “Dicta to the effect that “*mens rea*” is a fact which requires to be corroborated are widely regarded as erroneous, even if this view continues to be advanced, especially in sexual offences cases. Intention is a fact which may be inferred from proof, by corroborated evidence, of the crucial facts”.⁴² In line with this, it has been argued that the complainer's distress *can* indirectly corroborate the accused's *mens rea* even where force has not been used,⁴³ if the distress is recent enough.⁴⁴

³⁸ At para 34. For a brief history of the law on corroboration in Scotland see Lord Hope's speech 'Corroboration and Distress' in honour of Gerald Gordon in Edinburgh, June 2009, available at https://www.supremecourt.uk/docs/speech_090612.pdf.

³⁹ *HMA v Mutebi* SCCR 52

⁴⁰ Lord Carloway, The Carloway Review: Report and Recommendations (2017) para 2.2.7, available at: <https://www.gov.scot/Resource/Doc/925/0122808.pdf>

⁴¹ *Graham v HMA* [2017] HCJAC 71, at para 23. I have emphasised forcible here as it is arguable that all rape and sexual assault involves some degree of force, making it difficult to distinguish forcible from non-forcible cases.

⁴² Lord Carloway, The Carloway Review: Report and Recommendations (2017) para 2.2.7, available at: <https://www.gov.scot/Resource/Doc/925/0122808.pdf>. For discussion see I Cairns "Access to Justice' for Complainers? The Pitfalls of the Scottish Government's Case to Abolish Corroboration" in P Duff and P Ferguson, *Scottish Criminal Evidence Law: Current Developments and Future Trends* (2018). *Graham v HMA* 2017 HCJAC 71 at para 21 Lord Carloway suggests that this notion that *mens rea* in rape requires corroboration arises from an obiter statement in *Lord Advocate's Reference (No 1 of 2001)* 2002 SCCR 435, para 38, per Lord Justice General, Lord Cullen.

⁴³ J Chalmers, "Distress as Corroboration of Mens Rea" (2004) *Scots Law Times* (News) 141.

⁴⁴ *Smith v Lees* 1997 JC 73; *HMA v Graham* 2017 HCJAC 71.

Nonetheless, distress is often said to corroborate a complainer's claim of non-consent, rather than the accused's knowledge or belief in that non consent. Indeed, in one of the three recent rape cases analysed below, *HMA v Mutebi*, the court held that distress by itself *cannot* corroborate the accused's *mens rea*. The court in the more recent case of *Graham*, described by the court as 'forcible' rape, does not refer to the earlier case of *Mutebi*, which was not described as a "forcible" rape case. Given Lord Carloway's views about *mens rea* not requiring direct corroboration, failing to refer to *Mutebi* might be taken to suggest that the court in *Graham* disapproves this decision. However, since *Graham* is described as a case involving "forcible" rape, Lord Carloway's comments therein about corroboration of *mens rea* in rape cases could in future be interpreted narrowly as only applying to these sorts of cases. Certainly the wording of his model direction at the end of the judgment does not resolve the issue of what happens to corroboration if no force is involved: "Evidence, that a woman was observed to be in a distressed condition shortly after the act of intercourse, is capable of providing corroboration of her evidence that the intercourse occurred without her consent *and by means of the use of force*."⁴⁵ In summary, it is safe to say that there is judicial disagreement and a lack of clarity on this issue of corroboration in rape cases. All that can be said then is that since many if not most rapes have no other witnesses, if corroboration of *mens rea* is required, this makes the offence difficult to prove in practice.⁴⁶

Finally, and perhaps most importantly for complainers, successful prosecutions – and even convictions – are no measure of their experiences of engaging with what is often described as a damaging, traumatising and harmful criminal justice process. Some

⁴⁵ *Graham v HMA* [2017] HCJAC 71 at para 26 emphasis added. Many jurisdictions, including, historically, Scotland, have distinguished between rapes involving force and rapes involving lack of consent. The question of whether all rapes involve some degree of force, whether physical or psychological, and therefore how much force constitutes unlawful force for the purposes of sexual assault law, is important but beyond the scope of this article. See for example the debate between Donald Dripps and Robin West in the US: D Dripps "Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent" 92 *Columbia Law Review* 1780; R West "Legitimizing the Illegitimate: A Comment on Beyond Rape" 93 *Columbia Law Review* 1442

⁴⁶ Although the Scottish Government have not taken up Lord Carloway's recommendation to 'scrap' corroboration across the whole of Scottish criminal law, the current Lord Advocate, Lord Wolffe has recently suggested that the issue has not 'gone away' and might yet be considered by the government as part of a package of measures of criminal justice reforms. See: C Marshall, "Lord Advocate: Corroboration 'Could yet be Scrapped'" (2017) *The Scotsman* available at <https://www.scotsman.com/news/lord-advocate-corroboration-could-yet-be-scrapped-1-4472865>

feminists, such as Wendy Larcombe writing in the Australian context,⁴⁷ have queried the emphasis on conviction rates as a way of measuring feminist success in combatting sexual assault, and have argued that focusing on convictions is more likely to work against rather than for feminist aims because the process of criminalisation is not ‘victim centred’. Likewise, Elaine Craig has recently written on the Canadian criminal justice treatment of sexual assault complainants, concluding that the practice of criminal law can often further the shame and traumatisation of those reporting and testifying about sexual assault.⁴⁸ A study is currently being undertaken by Scottish researchers to ask victim/survivors themselves about whether or not they chose to engage with the criminal justice system, and their experiences of doing so.⁴⁹ This follows a highly controversial policy introduced by COPFS in March 2018, to compel rape complainers to testify against their alleged attackers, where prosecution is in the public interest.⁵⁰ The policy has been roundly criticised by Rape Crisis Scotland and others, including some MSPs, for its impact on already traumatised victims, and the possibility of its impact on best evidence if a complainer is forced to testify (most especially so following a warrant and a period in custody).⁵¹

In other words, prosecuting and convicting sexual assault is only part of the project of taking sexual assault seriously; the impact of the criminal justice process itself on those who allege rape is an incredibly significant and pressing issue. However, it is useful to highlight these low reporting, prosecution and conviction rates as a way of reminding law and policy makers that law reform, in itself, does not equate with better outcomes, if by better outcomes we mean more convictions.

Having set out the Scottish criminal justice context in which sexual offences are dealt with, the next section surveys the social science research findings that offer a richer picture of the implementation of sexual assault law in practice, and the consequences of this for victims and complainants.

⁴⁷ Larcombe (n 3). Larcombe argues that it is more important to focus on qualitative and victim-centred criminal justice processes and outcomes. See also C McGlynn, (2011), n7.

⁴⁸ E Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (2018)

⁴⁹ <https://news.gov.scot/news/understanding-victims-experiences>. See also <https://www.theguardian.com/society/2017/nov/16/call-for-radical-reform-of-scottish-system-for-prosecutions>.

⁵⁰ <https://www.theguardian.com/society/2018/mar/26/anger-scottish-policy-force-rape-victims-testify>

⁵¹ <https://www.scotsman.com/news/insight-forcing-rape-victims-to-testify-tips-the-scales-1-4735470>

C. SEXUAL ASSAULT: RESEARCH FINDINGS

Behind these stark figures on the recording, prosecution and conviction of sexual assault lies a vast body of literature documenting the many problematic aspects of our social and legal responses to it. With respect to criminal justice professionals, researchers have demonstrated that prosecutors, defence lawyers and judges hold problematically stereotypical views about what constitutes a real victim of sexual assault, and what sorts of information is relevant in deciding whether or not the assault has taken place.⁵² For example, in a recent study in England, Temkin et al found that section 41 of the YJCE Act 1999 was not operating as intended in successfully excluding irrelevant sexual history evidence. In the eight trials they observed, they found 5 or more ‘rape myths’ raised by the defence that were often either not challenged by the Crown, or by the judges, or were not challenged in ways that could have influenced the juries.⁵³

The latest research on sexual history evidence in Scotland was published in 2007, but Temkin’s new findings on section 41 resonate with recent figures released by Scotland’s Cabinet Secretary for Justice on 26th June 2016,⁵⁴ shown below in Table 1. In a three month period from 11 January – 11 April 2016, 57 applications for exceptions to the ‘rape shield’ laws were made under section 275 of the Criminal Procedure (Scotland) Act 1995 (52 in the High Court and 5 in the Sheriff Courts). Of the 52 High Court applications, 42 were granted in full, 5 were granted in part, and 5 refused. Of the 5 that were rejected, 4 of them were not challenged by the Crown (ie the judge rejected the application without Crown intervention). In fact, of the 57 total applications, only 6 were opposed by the Crown (4 in the High Court and 2 in the

⁵² B Krahé and J Temkin, *Sexual Assault and the Justice Gap: A Question of Attitude* (2008); C Gunby, A Carline and C Beynon, "Alcohol-Related Rape Cases: Barristers' Perspectives on the Sexual Offences Act 2003 and Its Impact on Practice" (2010) 74 *The Journal of Criminal Law* 579; J Temkin, J M Gray and J Barrett, "Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study" (2018) 13 *Feminist Criminology* 205. For a tour de force interrogation of the conduct of legal professionals in sexual assault proceedings in Canada, see E Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (2018).

⁵³ J Temkin et al (n 52).

⁵⁴ Letter from Michael Matheson to Margaret Mitchell, MSP, available at <http://www.parliament.scot/General%20Documents/20160624CSfjtoConvenerILR.pdf>

Sheriff Courts) while 51 were unopposed by the Crown (48 in the High Court and 3 in the Sheriff Courts).

Table 1: Applications under s275 of 1995 Act between 11 Jan – 11 April 2016

	Number of s.275 applications made	Number accepted (in full or in part)	Number rejected	Number unopposed by the Crown	Number challenged by the Crown
High Court	52	47	5	48	4
Sheriff court	5	1	4	3	2
Total	57 (100%)	48 (84%)	9 (16%)	51 (90%)	6 (10%)

Although only a three-month snapshot, these figures clearly show that Crown prosecutors are not challenging applications to introduce sexual history evidence. The reasons for this obviously cannot be gleaned from the statistics alone, but in England and Wales, studies by both Krahe and Temkin⁵⁵ and Carline and Gunby⁵⁶ have demonstrated that legal professionals on both sides can hold problematic assumptions about the relevance of ‘appropriate’ gender behaviour to findings of guilt. Burman and Jamieson’s study in the Scottish courts, published in 2007, found an increase in sexual history applications *after* the introduction of the restrictive provisions. The study found that 72% of all High Court sexual offence trials from 2004-05 included a s. 275 application,⁵⁷ with 76% of rape trials involving such applications.⁵⁸ Given that it is more than a decade since this study was undertaken, more detailed, rigorous, and properly funded research is now needed. This is especially so in light of the fact that research in other jurisdictions has demonstrated that legislative efforts to curtail sexual history evidence remain susceptible to being largely sidestepped either through defence trial strategies⁵⁹ or through what Ellison has called ‘judicial override’,⁶⁰ making the law

⁵⁵ J Temkin et al (n 52)

⁵⁶ J Temkin et al (n 52)

⁵⁷ M Burman, L Jamieson, J Nicholson and O Brooks, Scottish Government, Official Publication, Crime and Justice Social Research, “Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study” (2007) 41 ff, available at: <https://www.gov.scot/Resource/Doc/197710/0052889.pdf>

⁵⁸ M Burnman et al (n 57) 2-115.

⁵⁹ E Craig (n 48)

⁶⁰ L Ellison, “Commentary on *R v A (No 2)* in *R Hunter*” in C McGlynn, E Rackley (eds) *Feminist Judgments: From Theory to Practice* (2010), 205 ff, citing A McColgan, *Women under the Law: The*

in practice less effective than it otherwise might be.⁶¹ ‘Rape shield’ legislation was introduced to protect complainants from intrusive, irrelevant and humiliating questions about their sexual history. However, the frequency with which the issues are raised and not challenged, suggests that it is at least possible that problematic views about the relevance of women’s sexual histories to their reports of sexual assault still hold true.

With respect to juries, much of the research in England and Wales highlights various problematic gendered myths⁶² and stereotypes that have plagued decision making, albeit in a mock jury context.⁶³ For example, mock jury research in sexual offences cases, undertaken by Finch and Munro, and Munro and Ellison, demonstrates that misconceptions, presumptions and stereotypes about women’s personal and sexual responsibility still drive jurors intuitions about a complainant’s credibility, their conclusions about whether sexual violence has taken place, and their verdicts.⁶⁴

These prevailing attitudes make it extremely difficult for a defendant to be brought to, and convicted at, trial, regardless of how well-crafted the substantive law

False Promise of Human Rights (1999). See also, more recently, in Canada, E Craig, (n 48), ch 6 and ch 7; and <https://www.theguardian.com/society/2018/jan/29/uk-rape-complainants-unfair-questions-sexual-history>. Although the article title refers to ‘UK’ rape complainants, the focus is on English criminal law and evidence.

⁶¹ See for example L Kelly et al (n 8); M Burman, L Jamieson (n 57).

⁶² There is a debate, beyond the scope of this article, about whether ‘rape myths’ are themselves myths. See H Reece, “Rape Myths: Is elite opinion right and popular opinion wrong?” (2013) 33 *Oxford Journal of Legal Studies* 445; and J Conaghan and Y Russell “Rape Myths, Law, and Feminist Research: ‘Myths About Myths?’” (2014) 22 *Feminist Legal Studies* 25.

⁶³ It is not possible to conduct research with live juries as to their deliberations or verdicts due to s8 (1) of the Contempt of Court Act 1981 (Scotland and Northern Ireland) and section 20D of the Juries Act 1974 (inserted by s74 of the Criminal Justice and Courts Act 2015). Mock Jury research is the closest we can come to analysing the behaviour of real juries, but for a discussion of the methodological flaws of mock jury studies see: V Munro, and E Finch, “Lifting the veil : the use of focus groups and trial simulations in legal research” (2008) 35 *Journal of Law and Society* 30; and J Chalmers and F Leverick “How should we go about jury research in Scotland?” (2016) 10 *Criminal Law Review* 697, available at: <http://eprints.gla.ac.uk/view/author/5231.html>

⁶⁴ E Finch and V E Munro “The Demon Drink and the Demonized Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants” 16 *Social & Legal Studies* 591; L Ellison and V E Munro, “Of ‘Normal Sex’ and ‘Real Rape’: Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation” (2009) 18 *Social & Legal Studies* 1; L Ellison, V E Munro ‘Reacting to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility’, *The British Journal of Criminology*, 2009, 49(2), pp202–219; Louise Ellison and Vanessa E. Munro, “Better the Devil You Know? “Real Rape Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations” (2013) 17 *The International Journal of Evidence & Proof* 299. Analogous research does not exist in Scotland, although a Scottish Government funded project is now underway to study how (mock) juries reach verdicts, though the research does not focus specifically on how gender roles and stereotypes affect jury decision-making in sexual assault trials, but rather on issues such as majority and ‘not proven’ verdicts, which are peculiar to Scots criminal procedure. See: <http://schooloflaw.academicblogs.co.uk/2017/10/02/major-programme-of-mock-jury-research/>.

is.⁶⁵ As a result, some of those researching jury behaviour in sexual offences trials have suggested we scrap juries in those proceedings,⁶⁶ that we introduce independent legal representation for complainants/complainers,⁶⁷ or that we introduce judicial directions to guide juries away from using myths and stereotypes in their decision-making.⁶⁸ Some of these recommendations have been taken forward. In England and Wales, judicial directions can be given by the judge to the jury in rape trials, on a range of factors such as the irrelevance *in itself* of: any delay in reporting sexual assault; a lack of physical resistance on the part of the complainant; the clothing worn by the complainant; or the complainant's demeanour when reporting or testifying.⁶⁹ These sorts of changes have been celebrated,⁷⁰ but as Isla Callander has pointed out, the effectiveness of such directions depends on a number of other factors, such as the judge's effective wording and delivery of the direction; and the scope of the directions themselves.⁷¹ In Scotland, the directions warning against assumptions about veracity

⁶⁵ There are also now research findings about the way that rape and sexual assault victims are treated in the asylum context. While the role that an allegation of rape plays is very different in the asylum rather than criminal justice context, and the dynamics of the asylum appeal tribunal differ from those in the criminal courtroom, for the female asylum-seeker who claims to have experienced rape, these same barriers to disclosure and credibility will often continue to be significant. See H Baillot, S Cowan and V E. Munro, "Seen But Not Heard?: Parallels and Dissonances in the Treatment of Rape Narratives across the Asylum and Criminal Justice Contexts", (2009), 36 *Journal of Law and Society* 195; H Baillot, S Cowan and V E. Munro, "Hearing the Right Gaps: Enabling and Responding to Disclosures of Sexual Violence within the UK Asylum Process", (2012), 21 *Journal of Social and Legal Studies* 1; H Baillot, S Cowan, V E. Munro, "Reason to Disbelieve: Evaluating the Rape Claims of Women Seeking Asylum in the UK", (2014), 10 *International Journal of Law in Context* 105.

⁶⁶ B Krahe and J Temkin (n 52) 177-180.

⁶⁷ F Raitt, "Independent legal representation in rape cases: meeting the justice deficit in adversarial proceedings" (2013) 9 *Criminal Law Review* 729; J Chalmers, "Independent legal representation for complainants in sexual offence cases" in J Chalmers, F Leverick and A Shaw, *Post-Corroborator Safeguards Review Report of the Academic Expert Group* (2014) Scottish Government, Official Publication 185

⁶⁸ C McGlynn, "Feminism, Rape and the Search for Justice" (2011) 31 *Oxford Journal of Legal Studies* 825.

⁶⁹ For England and Wales see Section 20 of the "Crown Court Compendium" Last updated November 2017, available at: <https://www.judiciary.gov.uk/wp-content/uploads/2016/06/crown-court-compendium-pt1-jury-and-trial-management-and-summing-up-nov2017-v3.pdf>; for Scotland see Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 6 (inserting s 288DA into the Criminal Procedure (Scotland) Act 1995). Although the phrasing inserted by the 2016 Act is 'the judge must advise' the jury on these issues, this does not apply if the judge thinks that no reasonable jury would consider such evidence, and as such a considerable degree of discretion remains.

⁷⁰ J Temkin, "'And always keep a hold of nurse, for fear of finding something worse: Challenging rape myths in the courtroom'" (2010) 13 *New Crim Law Review* 710; L Ellison and V E Munro, "Turning mirrors into windows? Assessing the impact of (mock) juror education in rape trials" (2009) 49 *British Journal of Criminology* 363.

⁷¹ I Callander "Jury Directions in Rape Trials in Scotland" (2016) 20 *Edinburgh Law Review* 76.

only refer to delayed reporting and a lack of physical resistance or force,⁷² but not to emotional demeanour or clothing. Given what we know from Ellison and Munro's research in England and Wales about the impact of a complainant's appearance and demeanour on (mock) jury decision-making and the outcomes of (mock) trials, i.e. that judicial directions can have a beneficial impact,⁷³ as Callander also notes, this was an opportunity missed.⁷⁴ In any case, the introduction of directions is not sufficient to shift tenacious stereotypes, but in due course, research that monitors the impact of these directions will be vital.

It is not new to say that legal reform alone cannot shift social preconceptions and attitudes. For example Temkin and Krahe's research on attitudes to sexual assault found that the general public, as well as members of the legal profession, tend to rely on their pre-conceived stereotypical intuitions about gender-appropriate behaviour, which lowers their propensity to blame and convict defendants and increases their inclination to blame the complainant.⁷⁵ As the title of their book suggests, it is the attitudes of criminal justice actors just as much as laws that influence the treatment of those who allege sexual assault.⁷⁶ Clearly then, the unevenness and unpredictability of the application of law by criminal justice agents and decision-makers means that legislative gains suffer the constant risk of being undermined or thwarted in practice.

In the next section, I will give some examples of case law, to support the argument that we need to pay more attention to problems with implementation - the law 'in action'. I will examine three recent rape cases in Scotland. The analyses show that in practice, worrying stereotypes and beliefs about what counts as relevant information in a rape trial, and judgements about the appropriate sexual behaviour of complainers, can jeopardise the prospects of justice for individuals who have been sexually assaulted, but also helps to realise the rift between the progressive aims of law reformers, and the day to day routinised practices of courts and law makers in action.

D. SEXUAL ASSAULT: THE CASES

⁷² Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 6 (inserting s 288DA into the Criminal Procedure (Scotland) Act 1995).

⁷³ L Ellison, V E Munro "Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility", (2009) 49 *The British Journal of Criminology* 202.

⁷⁴ I Callander (n 71).

⁷⁵ B Krahe and J Temkin (n 52).

⁷⁶ See also E Craig (n 48).

(1) *Mutebi v HMA* 2014 SCCR 52

The first reported rape case under the new Sexual Offences (Scotland) Act 2009 was an appeal against *conviction*. The complainer was a 25 year-old postgraduate student who got drunk with friends and went to a nightclub. She was later seen on the nightclub's CCTV camera leaving alone in the early hours of the morning, dropping things out of her bag and staggering up the street. Sometime later she entered her flat with a man she had never previously met, and in fact could not identify when later asked to participate in the police identification 'line up'. She testified that she remembered being in her bathroom, and being in bed, and then 'coming to' from unconsciousness to find the accused on top of her, sexually penetrating her. She could not remember whether she had agreed to have sex with him, but stated that when she realised what was happening, she said no, and tried to push him off. Eventually she was able to move and he stopped. He then immediately left the flat, having stolen her phone and £170 in cash. Ultimately, the jury found Mutebi guilty of rape, not because they believed that the sex was initially non-consensual due to intoxication or incapacity, but because they believed that Mutebi had not stopped penetrating the complainer when she had initially asked him to, but had carried on for around another 20 seconds.⁷⁷ The accused was convicted but appealed on the basis that there was insufficient corroboration of the complainer's account that she had withdrawn consent and the appellant had persisted.

On appeal, by way of the judgment of Lord Brailsford, the court accepted the following 'facts': the complainer did not know the accused, and they had only met on the way home;⁷⁸ she was so intoxicated that she could not remember what he looked like when she was later asked to identify him;⁷⁹ she had consumed significant quantities of alcohol;⁸⁰ she was menstruating at the time of the offence;⁸¹ he had stolen her phone and money;⁸² and she was extremely distressed the following day when she reported the offence to her friends, and then to the police.⁸³ These were presented by the Crown

⁷⁷ Under section 15 of the 2009 Act (Scotland), consent to sexual activity can be withdrawn. at any time.

⁷⁸ *HMA v Mutebi* [2014] SCCR 52 at para 5.

⁷⁹ *HMA v Mutebi* [2014] SCCR 52 at para 9.

⁸⁰ *HMA v Mutebi* [2014] SCCR 52 at para 12.

⁸¹ *HMA v Mutebi* [2014] SCCR 52 at para 4.

⁸² *HMA v Mutebi* [2014] SCCR 52 at para 5.

⁸³ *HMA v Mutebi* [2014] SCCR 52 (n 82)

to the court as corroborative of the complainer's account that she did not consent. However, in one short paragraph the appeal court rejected this argument, stating that the factors cited were not sufficiently corroborative of lack of consent, or of the appellant's lack of reasonable belief in consent. Although they did not explicitly say so, the court appears to accept counsel for the appellant's argument that *de recenti* distress cannot corroborate a 'non-forcible' rape allegation.⁸⁴ The issue of corroboration has been explored in some detail, above; it is the court's treatment of consent and capacity that requires analysis here.

Section 12 of the 2009 Act defines consent as "free agreement", while section 13 says that free agreement to sexual conduct is absent in the circumstances set out in subsection 2, which include subsection (a) - circumstances "**where the conduct occurs at a time when B is incapable because of the effect of alcohol or any other substance of consenting to it**" (note that the provision does not require the complainant to be unconscious, but *incapable*). The prosecution first faces the *actus reus* hurdle of establishing the fact and level of intoxication - showing that the complainer was so intoxicated that she was incapable of free agreement; and second the *mens rea* issue - that the accused did not have a reasonable belief in consent.

Regarding the *actus reus* - was the complainant capable of consenting - at first glance it may look from the facts as though the complainer was so intoxicated that she was unable to consent. However, the difficulties of meeting this threshold have been widely discussed, at least in England, particularly around the time of the English case of *R v Bree*.⁸⁵ In short, decisions such as *Bree* and *Mutebi* suggest that anything short of complete unconsciousness will not meet this threshold of incapacity. Although it was acknowledged in *Bree* that sometimes consent 'evaporates' before complete unconsciousness, the court failed to give detailed directions on the sorts of signs of incapacity (for example, intermittent consciousness, staggering, inability to communicate etc) that could signal lack of ability to consent.⁸⁶ Since *Mutebi* was the first case to be heard in Scotland under the new and much anticipated reforms, the

⁸⁴ *HMA v Mutebi* [2014] SCCR 52 at para 7.

⁸⁵ *R v Bree*, [2007] EWCA Crim 804. For discussion see A Ashworth, Comment, "Rape: Consent - Intoxication" (2007) *Criminal Law Review* 900; P N S Rumney and R A Fenton, "Intoxicated Consent in Rape: *Bree* and Juror Decision-Making" (2008) 71 *Modern Law Review* 279; S Cowan (n13).

⁸⁶ S Cowan (n 13).

courts had an opportunity to discuss these difficult matters in some detail. However the court states simply that:

While in this case it is clear that the complainer had consumed significant quantities of alcohol before she went to the club and thereafter in the club during the hours prior to these events and while the case contended for by the Crown before the jury was that the extent of the complainer's intoxication was such that she was incapable of giving or withholding consent (cf section 13(2)(a) of the 2009 Act), the jury rejected that contention.⁸⁷

The appeal court does not explain why the jury rejected the argument that although very drunk, the complainer was incapable of consenting. But more importantly, given that the level of intoxication goes to the heart of the question of capacity, it is discouraging that the court declines to comment at all on the degree of intoxication that *could* meet this incapacity threshold. Although the issue was not directly before the court, they could have given much-needed direction on how the Scottish provisions on capacity, which have caused so much interpretative trouble in England and Wales, should be understood. And since the complainer was said to have suffered periods of unconsciousness and memory loss, the court might have been able to say whether these were the *kinds* of circumstances where there should at least be significant doubt as to whether *apparent* consent would count as 'free agreement'. Unfortunately, as in *R v Bree*, the High Court neglected to do so.

With respect to the *mens rea* of rape, section 16 of the 2009 Act states:

In determining... whether a person's belief as to consent or knowledge was reasonable, regard is to be had to whether the person took any steps to ascertain whether there was consent or, as the case may be, knowledge; and if so, to what those steps were.

In light of the facts available that were accepted, it seems that the accused would have to have shown that he took some clear and convincing steps to establish that the complainer was consenting before his belief could be said to be reasonable. However,

⁸⁷*HMA v Mutebi* [2014] SCCR 52 at para 12.

it was not demonstrated (at least as far as the appeal court reports in its weighty judgment of fourteen paragraphs in two pages), that the accused did anything at all to ascertain consent.

Rather, the appeal court focused on the question of whether there was corroborative evidence – beyond the complainer’s testimony – that the accused had no reasonable belief in consent, without addressing the question of what, in these circumstances, reasonable belief might look like. This throws up the issue raised above in section 2, with respect to Lord Carloway’s insistence that *mens rea* does not have to be directly corroborated. At the very least the context and circumstances of the case might have provoked a discussion of these more general issues of principle or of interpretation of the Act, such as what steps the accused in such circumstances *might* take to establish consent in order to meet the ‘reasonableness’ requirement.⁸⁸ It certainly raises questions about what kind of gendered socio-sexual scripts would allow for a jury to accept that an accused could reasonably believe that a complainer would ‘freely agree’ to have sexual intercourse, while extremely intoxicated and menstruating, with a stranger in her home. Again, given this was the first appeal to be decided under the new 2009 Act, clarity on the appropriate application of a key section would have been useful.

This case demonstrates both the problem of interpretation of the legislation – as to what might count as incapacity, or a reasonable belief - and what juries and legal professionals are (un)willing to say or believe regarding what it is reasonable for us to expect from each other as sexual agents. While Scotland may be a special case with the extra ‘burden’ of corroboration, there are clearly still many problems with drafting and interpreting the law, and what counts as relevant for jury fact-finding – as well as the problem of a lack of willingness to engage with the problem of how to define intoxication and consent in practice. Although sexual offences cases make up 75% of the High Court workload, as noted in section 2, these opportunities for courts, through reported cases, to give direction on how to interpret new laws, and thereby

⁸⁸ For similar critiques in the Canadian context see also the analysis by E Craig (n 48). *supra*, of the 2013 Canadian case *R v B (IE)* [2013] NSCA 98, in which the judge failed to consider the reasonable steps requirement under the Canadian Criminal Code; and E Sheehy “Judges and the Reasonable Steps Requirement: the Judicial Stance on Perpetration Against Unconscious Women” in E Sheehy (eds) (2012) *Sexual Assault in Canada: Law, Legal Practice, and Women’s Activism*.

communicate more widely on important issues of sexual violence, do not come around often and thus must be taken up.⁸⁹ Thus, the lack of judicial engagement appears to display a neglectful resistance by the courts to provide guidance and leadership in interpreting legislation in a significant area of social and policy concern.⁹⁰ Given what we know about the prevalence of sexual assault, as discussed above, this is fundamentally disappointing.

Some comfort may be taken from the recent Scottish civil court decision by Lord Armstrong in *DC v DG and DR*,⁹¹ awarding damages to the pursuer for having been raped by two footballers whilst intoxicated. Indeed, it is the only Scottish decision so far that analyses in any depth the meaning and application of s13 (2) of the 2009 Act - circumstances “where the conduct occurs at a time when B is incapable because of the effect of alcohol or any other substance of consenting to it”. Lord Armstrong concludes that there is ample evidence from the pursuer’s testimony and from that of witnesses that she had had an excessive intake of alcohol (back-calculated by the police forensic scientists to be a ‘severe and potentially fatal’ amount),⁹² which caused her memory loss and blackouts, even though she could perform some conscious “well-rehearsed acts” such as walking.⁹³ Importantly Lord Armstrong directly addressed the misconceptions that someone who says nothing is consenting, and that intoxicated people must be unconscious before they can be said to be incapable of consenting:

“I note, in passing, that it was taken from both defenders that... at no time had the pursuer said “No”. That, however, in a case of this sort,

⁸⁹ The High Court did consider section 13 in the more recent case of *Amir Bakhjam v HMA* [2018] HCJAC 11, but the question of the degree of intoxication required for incapacity was not considered in any depth: the judgment was only 35 paragraphs, and the discussion therein related to a number of factors including the advocate depute’s decision to withdraw a charge under section 11 of the 2009 Act (deliberate administration of an intoxicating substance, for sexual purposes).

⁹⁰ A similar point, albeit in a different context, was recently made by Lady Scott in her plenary lecture “Reflections on the Criminal Law: A History of Retreat and Resistance?” (2018) at the Gerald Gordon Annual Seminar in Criminal Law.

⁹¹ *DC v DG and DR* [2017] CSOH 5. Initially a criminal prosecution was initiated but was later dropped due to an insufficiency of evidence. The specific reasons for discontinuation are not clear from the case report, but Lord Armstrong obviously concluded that there were corroborative testimonies from witnesses and forensic analysis that supported the pursuer’s account. See L Farmer “On civil remedies and the law of rape” (2017) available at: <http://obliqueintent.blogspot.com/>

⁹² *DC v DG and DR* [2017] CSOH 5 at para 112.

⁹³ *DC v DG and DR* [2017] CSOH 5 at para 341.

could never be determinative. The current state of the law, having regard to the modern defined meaning of consent in this respect, is such that its value is that it sends a clear signal that anyone dealing with someone who is intoxicated is put on notice that that person may not be able to give consent no matter what she says or does”.⁹⁴

Lord Armstrong found that “because her cognitive functioning and decision-making processes were so impaired, [she] was incapable of giving meaningful consent”.⁹⁵ He also found the defenders did not have a reasonable belief in consent because “the pursuer’s impaired cognitive functioning and general condition of intoxication was so obvious and manifest that the defenders must have been aware that she was not capable of meaningful consent.”⁹⁶ He awarded the pursuer £100,000.

This approach is in direct contrast with that taken by the court in *Mutebi v HMA*, where the complainer also had memory loss and blackouts: she testified that she could not remember whether she had consensually kissed the accused; whether she had voluntarily let him in to her flat; who had undressed her; whether there had been a struggle; or whether she had initially agreed to intercourse. Yet, as demonstrated, there is no discussion on appeal as to how section 13 could or should be applied in such cases. While there may be different degrees of intoxication involved in each case, warranting a different decision as to whether or not there was capacity, the question of what constitutes incapacity under s13 – or indeed reasonable belief in consent in such cases – has not been properly addressed by the criminal courts. Lord Armstrong’s decision runs to 346 paragraphs, as opposed to 14 paragraphs in *Mutebi* appeal decision. Lord Armstrong’s is a first instance decision and as such would require more discussion of facts, but it is Lord Armstrong’s depth of analysis of the law in sexual offences cases that allows the jurisprudence in in this field to be advanced, furthering the development of guidance on the implications of the 2009 Act. It remains to be seen whether judges in the criminal courts will pay it heed.

⁹⁴ *DC v DG and DR* [2017] CSOH 5 at para 343.

⁹⁵ *DC v DG and DR* [2017] CSOH 5 at para 344.

⁹⁶ *DC v DG and DR* [2017] CSOH 5 at para 342.

The next case for review demonstrates another set of problematic assumptions that pervade sexual assault cases; that a previous relationship between the parties can reduce the harm of the assault, and that this ought to be reflected in a reduced sentence.

(2) *HMA v Cooperwhite* [2013] HCJAC 88

The accused here had been convicted of raping two women and sentenced to six years. Both of his victims were his ex-partners. The first case involved a single incident of rape while the complainer was pregnant. The accused knew that sexual intercourse during the pregnancy would pose a dangerous risk of hemorrhage, and since they lived in a remote area of Scotland this could be fatal due to lack of easy access to medical care. The second involved several incidents of rape over a period of time. The second complainer found divorce documents for the first marriage and saw that rape had been claimed as part of the proceedings; she made contact with the ex-partner and the prosecutions were brought together.

When the Crown appealed the six-year sentence as too lenient, the respondent replied that the sentence was within the range open to the judge, and that previous cases in Scotland “demonstrated that ‘familiarity’ between a rapist and his victim was regarded as something justifying a more lenient sentence than might normally have been thought appropriate (*Ramage v HM Advocate (supra)* and *Petrie v HM Advocate (supra)*).”⁹⁷

In the case of *Ramage v HMA* in 1999, Lord Caplan said:

“... there are factors in this case which could perhaps justify treating the case as being less serious than would normally be the case with a rape offence. The appellant and the complainer were not in any sense strangers. They had been in an intimate relationship before and, indeed, at one point they had been in a sexual relationship. Moreover they had resumed friendship and were seeing each other regularly (although it must be acknowledged that the complainer in no way gave the appellant to understand that she was prepared to resume a sexual relationship with

⁹⁷ *HMA v Cooperwhite* [2013] HCJAC 88 at para 14, citing *Petrie v HMA* [2012] JC 1; *Ramage v HM Advocate* [1999] SCCR 592.

him). Nevertheless, there was perhaps room for the appellant to delude himself as to what the position was on that point. **Beyond the rape itself there had been no serious degree of personal violence and the appellant was not likely to repeat this conduct with other women".**⁹⁸

In *Petrie v HMA* 2012 JC 1, the trial judge had treated the existence of a relationship as an aggravating factor because of the breach of trust involved. However, this sentence was reduced on appeal in the High Court, in another very short judgment of just 8 paragraphs:

While the element of breach of trust involved in any domestic assault is an important factor in determining the appropriate penalty, the significance of an on-going sexual relationship in determining the penalty in a case such as this, where the gravest feature is that there was penile penetration and the conviction is for rape, is a much more complex issue. The fact of the relationship is one of a complex host of facts and circumstances that have to be taken into account in determining the appropriate sentence. **In this case we consider that the judge gave insufficient weight to the fact that the couple had regularly engaged in sexual intercourse over a period of two years up to the night of the offence".**⁹⁹

Both of these judgments are problematic in their unexplored yet presumed assertions that a previous sexual relationship mitigates (rather than aggravates as the trial judge in *Petrie* held) the offence.¹⁰⁰ They were both referenced in *Cooperwhite*, in the leading judgment given by the Lord Justice Clerk Carloway, who acknowledged the continuing debate about the relevance of the relationship between rapist and victim, and that previous cases in Scotland had treated it as a mitigating factor.

Lord Carloway (now the Lord Justice General, the most senior judge in Scotland) thought that the court should reconsider as a matter of importance their

⁹⁸ *Ramage v HM Advocate* [1999] SCCR 592 at para 594, emphasis added.

⁹⁹ *Petrie v HMA* [2012] JC 1, at para 7, emphasis added.

¹⁰⁰ In *HMA v SSK*, discussed below, Lord Carloway, drawing upon the reasoning of a 2010 New Zealand court of Appeal judgment, states explicitly that existence of a previous or ongoing sexual relationship is not necessarily mitigatory, but neither is it an aggravating factor, at para 26.

previous stance on the relevance of a pre-existing or on-going relationship. He referred to sentencing practice in England and Wales as a possible comparator in such cases, and held, dismissing the appeal, that in the present case, while lenient, the sentence did not fall outside the range of sentences that could reasonably have been imposed. The only other judge in the case to give an opinion was Lord Eassie, who served on the Scottish Law Commission when they produced their report on Sexual Offences in 2007. Also dismissing the appeal, Lord Eassie offered only 5 short paragraphs, stating that he did not believe that the sentencing judge's approach or reasoning – or sentence – were open to criticism (para 25). He expressly rejected both the idea that it was appropriate for the court to be even considering giving sentencing guidance on such cases to lower courts, and the notion that the Scottish courts should take any heed of what other jurisdictions were doing with respect to sentencing in this area:

“The cases which occur in this area of sentencing tend to be particularly "fact specific" and relationships between complainers and accused may vary considerably in their nature and quality. I have reservations whether in practice issuing of guidelines in this area would prove to be of real assistance to sentencing judges.”¹⁰¹

As well the worrying tendency of Scottish courts to take a parochial view of the extent to which other jurisdictions have much to teach us,¹⁰² there is also a disquieting discrepancy between the court's approach in this case, and what we know from the work of feminist and other critical scholars, discussed in section 3 above: research demonstrates that stranger rape is far less frequent than rape perpetrated by someone known to the victim, and that stranger rape is not necessarily experienced as more serious than those other incidents that make up the majority of rapes. In the cases prior to *Cooperwhite* the courts seem to suggest that the reason stranger rape could be seen as more serious is at least partly because there is no risk of the non-stranger offender raping another person in the future.¹⁰³ But this is not necessarily the case, as

¹⁰¹ *HMA v Cooperwhite* [2013] HCJAC 88 at para 28. See also *HMA v SSK* [2015] HCJAC 114 on sentencing leniency in sexual assault cases, discussed below.

¹⁰² Arguably, it was this approach that led Scotland's position on legal representation during police interviews to be challenged as incompatible with the ECHR: *Cadder v HM Advocate* [2010] UKSC 43.

¹⁰³ *Ramage v HM Advocate* [1999] SCCR 592, at para 594.

demonstrated by the facts of *Cooperwhite* itself, where two partners were subjected to rape by the same man. As discussed above, social science research indicates that women raped by people they know, or with whom they have previously engaged in sexual activity, are less likely to report the incident because of the perception – and indeed often the reality – that their assault will be taken less seriously than if it had been perpetrated by a stranger. In such circumstances, one might be forgiven for thinking that a rapist who knows that his victims are less likely to report, and that stranger rapes are easier to prove and lead to conviction, could conceivably be more likely to be a repeat offender than a stranger rapist.

These cases also illuminate significant gaps between the intentions behind and during the process of law reform, the conceptualization of key terms within the legislation, and the way that the Scottish judiciary are interpreting and applying the law. As Lord Carloway explicitly acknowledged, it is certainly not beyond the remit of the court to reconsider the approach of older courts that applied more lenient sentences in cases where there has been or is ongoing sexual activity between the parties, particularly in the absence of any formal sentencing guidelines.¹⁰⁴ Although each case will surely be decided on its own merits, perhaps the courts should be more willing to avail themselves of these opportunities to revisit problematic assumptions about sexual assault.

The analyses of these two cases present a sceptical view of the value of concentrating on law reform on the books as the end point, even for feminist legal scholars. The practices of law - that is, the ways in which key principles of rape law, such as consent and harm, are interpreted, reinterpreted and reformulated, as well as the way that these practices influence and are influenced by ‘common sense’ understandings of what constitutes ‘real’ rape, are of deep concern, perhaps particularly

¹⁰⁴ Sentencing in sexual offences is up for review, as the courts have noted - *HMA v Collins* [2016] HCJAC 102 at para 29: “The court is aware that at some point in the next 12 to 18 months the Scottish Sentencing Council (‘SSC’) intends to begin research into the sentencing of sexual offences in order to determine whether a sentencing guideline should be prepared (Scottish Sentencing Council Business Plan 2015 – 2018, 29 – 30). *It is important to note, however, that responsibility for determining the level of sentences remains with the court. The SSC is an advisory body. Once a proposed sentencing guideline on sexual offences is prepared and submitted to this court by the SSC, the court may either approve or reject the proposed guideline in whole or in part, with or without modifications*” (emphasis added).

in the Scottish context. The third and final case for analysis is case is also a sentencing case, and further supports feminist scepticism.

(3) *HMA v SSK* [2015] HCJAC 114

The Crown appealed against what they considered an unduly lenient sentence. The accused was convicted of sexual offences against 2 of his former partners and two of their children, resulting in an extended sentence of 7 years, with a custodial element of 5 years.¹⁰⁵ The charges against one male child aged 9-10 years in 2007-8, included many instances of ‘lewd practices’, including handling the boy’s penis, attempting digital penetration of his anus, compelling the boy to masturbate him and oral penetration of the boy with his penis (why these were not charged as indecent assault is not clear); and indecent assault, in the form of ‘attempted sodomy’. Against the female child aged 12-14 in 2008-10, the accused was charged with lewd practices, including digital vaginal penetration (section 6 of the Criminal Law Consolidation (Scotland) Act 1995). Charges against the first adult female related to indecent assaults in 2010-13 involving penile penetration of the anus, and anal rape in 2010-2013 under the 2009 Act. For the second adult female, the charge was anal rape under the 2009 Act.

In the appeal judgment – delivered again by Lord Carloway (at the time, the Lord Justice Clerk) - the High Court considered the trial judge’s reasoning for the accused’s sentencing, saying that some of the judge’s observations may be regarded as “controversial”.¹⁰⁶ Amongst other things, the trial judge had said that he would have regard to the effect that a more serious punishment for the accused would have on the children, taking into consideration the guilt that survivors of sexual abuse suffer - a consideration which Lord Carloway described as “speculation” without basis.¹⁰⁷ The judge also said that the complainant’s choice to ‘freely live’ with the accused after the rapes demonstrated “powerful mitigation”.¹⁰⁸

¹⁰⁵ These incidents occurred prior to the Sexual Offences (Scotland) Act 2009.

¹⁰⁶ *HMA v SSK* [2015] HCJAC 114 at para 22.

¹⁰⁷ *HMA v SSK* [2015] HCJAC 114 at para 10.

¹⁰⁸ *HMA v SSK* [2015] HCJAC 114 at para 7.

According to Lord Carloway, the trial judge described the adult offences as “essentially non-violent relationship rapes”, and that the rapes were “at the lower end of the seriousness scale”.¹⁰⁹ The trial judge referred to one of the adult complainers as having “few if any sexual boundaries”,¹¹⁰ and as “condoning” or “acquiescing in” her own anal rapes, because she was sexually confident and part of the swinging scene.¹¹¹ He also downplayed the assaults on the children. Taking no account of the breach of trust and the seriousness of the cumulative behavior against them, he regarded the child complainers as relatively untraumatised, and therefore not vulnerable:¹¹² “but for the existence of 2 adult complainers and the libel of anal (as distinct from vaginal) penetration, no convictions would have followed”.¹¹³ Perhaps most worryingly, Lord Carloway reports that the trial judge did not regard the accused as representing a risk to the general public, as distinct from a class of vulnerable women, such as the complainers, and their children.¹¹⁴ This is especially troubling since the author of the Criminal Justice Social Work Report risk assessment presented at the sentencing hearing, stated the assessment of “medium risk” of reoffending was an underestimate. He pointed out that the accused had continually denied the charges involving the children; that his own childhood had included sexual abuse; and that he presented serious risk of sexually violent harm towards women he formed a relationship with, and their children.¹¹⁵

The trial judge’s statements are clearly problematic on a number of fronts, not least because he engages in blatant victim-blaming, and downplays both the impact of sexual assault upon victims, and the culpability of the accused; if the women and children were indeed part of a class of vulnerable victims, this would surely increase rather than decrease the blameworthiness of the accused’s conduct. In short, the trial judge’s views are indeed, controversial.

¹⁰⁹ *HMA v SSK* [2015] HCJAC 114 at para 11.

¹¹⁰ *HMA v SSK* [2015] HCJAC 114 at para 5.

¹¹¹ *HMA v SSK* [2015] HCJAC 114 at para 7.

¹¹² *HMA v SSK* [2015] HCJAC 114 at para 10.

¹¹³ *HMA v SSK* [2015] HCJAC 114 at para 11.

¹¹⁴ *HMA v SSK* [2015] HCJAC 114 at para 12.

¹¹⁵ *HMA v SSK* [2015] HCJAC 114 at para 17. All references to paragraph numbers are from the SSK 2015 appeal judgment.

During the appeal, the Crown looked to sentencing regimes in England and Wales, as well as Commonwealth jurisdictions.¹¹⁶ The representative for the respondent however, argued that the Scottish approach was more flexible because of our lack of rigid rules and sentencing guidelines such as those adopted by other countries, an approach that seems underpinned by a commitment to the application of ‘common sense’ as much as common law. As mentioned above, it might often be beneficial to take into account these other guidelines and practices, since the discretion afforded judges even within these schemes is substantial, and sentencing discretion that is only fettered by common law is surely more open to the possibility of significant arbitrariness. Lord Carloway himself in his judgment notes that a judge is certainly entitled to have regard to sentencing guidelines in other jurisdictions.¹¹⁷

Although the Crown’s appeal was successful, and an extended sentence of 12 years (8 of which were to be custodial), was imposed, this kind of reasoning by the trial judge is of course extremely troubling, even if corrected at appeal. In his approach, we see elements of the problematic reasoning described in the cases previously analysed above: the reluctance to take sexual offending seriously; the assumption that a sexually active or previously consenting complainant suffers less harm from sexual assault; and unwillingness to take into account the practices of other jurisdictions. As discussed earlier, most rapes are not reported or recorded as such. Of those that are, only a small proportion result in conviction. A smaller number again are appealed. This means, worryingly, that many rape trials are not open to public scrutiny, and the extent to which trial judges – and legal professionals, police officers and juries – are expressing these sorts of views in sexual assault proceedings is unknown.¹¹⁸ Statements of a similarly problematic nature made by judges in Canada about the promiscuity and sexual history of complainants, and the minimisation of harm caused to them, have recently led to judicial investigations and in one case, *R v Wagar*,¹¹⁹ a finding of misconduct leading to a recommendation for the judge’s removal from the bench.¹²⁰ As Craig deftly points out, even if not representative, the language and attitudes displayed by such judges not

¹¹⁶ *HMA v SSK* [2015] HCJAC 114 at para 26.

¹¹⁷ *HMA v SSK* [2015] HCJAC 114 at para 23.

¹¹⁸ Clearly the media also plays a role in the way that perceptions and misperceptions of sexual assault, socio-sexual scripts and appropriate gender behaviour are produced and permeate our consciousness but that is beyond the scope of this article.

¹¹⁹ *R v Wagar* [2015] ABCA 327.

¹²⁰ E Craig (n 48) 192-204.

only demonstrates a lack of knowledge or respect for the law, but also produces a harmful shaming effect on the particular sexual assault complainants as well as victim/survivors of sexual assault more generally.¹²¹ Legal reasoning, then, is just as much an appropriate focus of attention as the law ‘on the books’.

E. CONCLUSION

Sexual violence is systemic, and recent crime statistics tell us that despite an ongoing drop in crime rates overall, sexual offences are on the rise. Much sexual violence goes unreported and unrecorded, and even when proceeded against, the conviction rate, particularly for rape and attempted rape, is comparatively low. Where cases go to court, socio-sexual scripts about appropriate active/passive sex and gender roles still apply. This is demonstrated by social science research, such as that on mock juries’ attribution of blame and responsibility in rape trials,¹²² and by the case analyses offered in this article. As discussed, these problems are not confined to Scotland; however, the analysis of recent Scottish research, cases and statistics demonstrates how acute the problem is; how, despite legal interventions, things are not improving; and what sorts of factors (such as jury or judicial gender-stereotyping) may well influence the direction of travel.

Notwithstanding the drive to define and refine in order to draft precisely the wrong of sexual violence, great difficulty persists in achieving clarity in the application of substantive or evidential legal rules. Issues include what counts as intoxication that invalidates consent, or what constitutes ‘reasonable belief’ in consent, or what needs to be corroborated – and how – in a sexual assault prosecution. As such, a victim’s experiences of the harm of sexual violence may never be legally recognised.¹²³ Legal techniques are also ill equipped to combat social and legal perceptions about what constitutes sexual violence, or to impact upon the rate of sexual violence occurring in the ‘real world’. Prospects for real engagement with the harm of sexual violence are

¹²¹ E Craig (n 48) 204-209. She suggests a more interventionist form of judicial training for judges deciding these cases.

¹²² L Ellison and V E Munro, "Of ‘Normal Sex’ and ‘Real Rape’: Exploring The Use of Socio-Sexual Scripts in (Mock) Jury Deliberation" (2009) 18 *Social & Legal Studies* 291.

¹²³ L Du Toit "The Conditions of Consent" (2007) in R Hunter and S Cowan (eds) *Choice and Consent: Feminist Engagements with Law and Subjectivity*.

impeded if we over-focus on an endless cycle of law reforms that fine tune the rules, but neglect the issue of who implements them. However, retreating from law completely risks a reprivatisation and silencing of violence.¹²⁴ Engaging with sexual assault therefore means not just getting the law ‘right’ – or even getting the implementation ‘right’¹²⁵ - but provoking public debate about the gender roles and sexual scripts that underpin both the rules and the application of those rules, and the representations of sexuality and sexual behaviour they spawn. In that sense, the #MeToo movement is a timely intervention that has sparked wide-scale public engagement and has the potential to challenge many taken-for granted assumptions about ‘normal’ sexual behaviour and sex/gender sensibilities.¹²⁶

Alongside these broad community-based conversations, endeavours such as Feminist Judgments Projects,¹²⁷ which rewrite key cases from a feminist perspective, can help to challenge the notion that a truly impartial account is possible; and demonstrate (even to judges) that given the same legal tools available to the judges in the original case, an alternative judgment that takes the gendered impact of law into account, is feasible. In other words, feminists must focus not only on law but on whose voices are heard in public and legal debates on sexual violence. In the meantime, it is safe to say that the failure to record, prosecute, or convict a significant number of sexual assaults, or to treat complainers with respect, particularly those alleging sexual assault within an existing relationship, or those involving intoxicated or incapacitated victims, signals a failure of the criminal justice system to take routinised, every day violence

¹²⁴ L Gotell (n 14).

¹²⁵ See Y Russell “Woman’s Voice/Law’s Logos: The Rape Trial and the Limits of Liberal Reform” (2017) 42 Australian Feminist Law Journal 237 who argues that even if correctly implanted, the structure of law and legal logic entails a failure to recognise women’s unique sexual subjectivity or the harm of rape.

¹²⁶ In its most recent incarnation, the #MeToo movement began as a twitter campaign response to the sexual harassment allegations made against Harvey Weinstein, but the movement is said to have been started ten years earlier by the African American feminist Tarana Burke. See <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html>. See C E Cooper “Speaking the unspeakable? Nicola Lacey’s *Unspeakable Subjects* and the issue of autonomous consent in the age of #MeToo” forthcoming in (2019) *Feminists@Law Journal*, on file with author.

¹²⁷ See for example <http://www.feministjudging.ie/> and www.sfpj.law.ed.ac.uk; S Cowan, C Kennedy, V Munro, “Scottish Feminist Judgments Project” (2017) 482 *SCOLAG Legal Journal*; S Cowan “The Scottish Feminist Judgments Project: A New Frontier”, (2018), *Oñati Socio-legal Series* (forthcoming, available at: https://papers.ssrn.com/sol3/Jeljour_results.cfm?form_name=journalbrowse&journal_id=1605943&Network=no&lim=false).

seriously. It is difficult, therefore, to resist the conclusion that we cannot rely on legal interventions to solve the seemingly intransigent problem of sexual violence.