Admissibility of Sexual History Evidence and Section 41 Youth Criminal Justice and Evidence Act 1999: Do rape trials perpetuate stereotypical beliefs about victims of rape?

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Abstract

In October 2016, Ched Evans was found to be not guilty of rape.[1] The case sparked academic debate, focusing on section 41 Youth Criminal Justice Evidence Act (YCJEA) 1999 which permits the judiciary to consider a complainant's previous sexual history under specific gateways. This provided scope for attention to be drawn to the Complainant's lifestyle, rather than the unchivalrous acts of Evans. The Complainant's lifestyle did not comply with the societal role that women are perceived to play, portraying women to be passive not active participants in sexual activities. Such misconceptions associated with rape myths are imbedded within society and have consequently influenced legal attitudes, especially about victims of rape.

This article challenges the threshold of section 41(3)(c)(i) YCJEA regarding the admission of sexual history evidence. It highlights the concern that the provision has failed to achieve its intended results, namely to shield complainants from unnecessary stereotyping that seeks to challenge their credibility while also ensuring that the defence can meaningfully participate in the trial process. While it is debatable whether Evans opened the floodgates to the admissibility of sexual history evidence, the case demonstrates that allowing it can lead to victim blaming that might deter future victims of rape from coming forward and reporting sexual assaults. This concern is heightened given that defence counsels, juries, trial judges, and the Crown Prosecution Service perpetuate stereotypical beliefs about rape and its victims within the trial process. Fundamentally, the legal response to sexual offences can only be improved through education that will rectify misconceptions about consent and the role women play in sexual activities, eradicating stereotypical beliefs regarding victims of rape.

[1] [2016] EWCA Crime 452.

Keywords: Rape myths; Admissibility; Similarity; Jury directions; Sexual behaviour; Jury education

1. Introduction

In relation to the offence of rape, myths and stereotypical beliefs feed erroneous views and attitudes about what rape might be and how, where, and with whom it can occur.[2] For example, the twin myths suggests that a 'woman who has sex with one man is more likely to consent to have sex with other men and that evidence of a promiscuous woman is less credible.'[3] The real rape myth dictates that rape always involves a pathological male stranger who unleashes a blitz-style attack on a woman outside, at night, using overwhelming force. Consequently, rape is only considered to be rape when non-consensual sex occurs with the use of threats or violence by an active man to overcome the resistance of a passive woman. Conversely, the real rape myth suggests that a victim is more likely to have consented to sexual activity when no physical violence was used against her.[4] However, the reality is that consent has to be free and full consent and is situation specific, and that more victims are raped by an acquaintance, partner or former partner than by a stranger.[5]

The mismatch between myth and reality is cause for concern. Rape myths are ingrained in patriarchal attitudes that support gender inequalities and shape public and legal perceptions of rape victims. This leads to a higher chance of prosecution and conviction in cases that match the real rape myth.[6] Until patriarchal attitudes are addressed via a meaningful process such as education, rape myths will continue to be prevalent in the way society and the law thinks and will consequently penetrate the legal and justice system.

[2] David Gurnham, 'Ched Evans, Rape Myths and Medusa's Gaze: A Story of Mirrors and Windows' [2018] 14(3) International Journal of the Law in Context 454.
[3] Gudrun Young, 'The Sexual History Provisions in the Youth Justice and Criminal Evidence Act 1999: A Violation of the Right to a Fair Trial' [2001] 41(3) Medicine, Science and the Law 217.
[4] David Gurnham, 'Victim-Blame as a Symptom of Rape Myth Acceptance? Another Look at how Young People in England Understand Sexual Consent' [2016] 36(2) Legal Studies 258.
[5] Tyler J Buller, 'Stave v Smith Perpetuates Rape Myths and Should be Formally Disavowed' [2017] 102(1) Iowa Law Review 285.
[6] Helen Reece, 'Is Elite Opinion Right and Popular Opinion Wrong?' [2013] 33(3) Oxford Journal of Legal Studies 445.

Section 41 of the Youth Criminal Justice Evidence Act (YCJEA) 1999 exists to prohibit the cross-examination of complainants regarding their past sexual behaviour in rape cases, except where it would be in the interests of justice to do so.[7] Cross examination has been described as the fundamental feature of an adversarial justice system and there is no dispute that evidence should be subject to rigorous and robust challenges.[8] However, it is crucial that sexual history evidence is examined respectfully to shield victims from blame and disbelief.

The stark of reality of Section 41 came to the fore after the media furore that greeted the acquittal of the footballer Ched Evans. Evans was convicted of raping a woman. However, the Court of Appeal accepted fresh evidence from the victim's two previous partners who both gave similar descriptions of the 'performance of oral sex, sexual intercourse during which *x* adopted a position on all fours and used the same words "fuck me harder."'[9] The Court of Appeal's decision gave insight into the broader impact of sexual history evidence on rape cases and arguably opened the floodgates to its admissibility by focussing on factors such as casual sex, excessive drinking, and other salacious details of the victim's lifestyle. This challenged the victim's moral credibility, despite the YCJEA's purpose to shield complainants from victim blaming.

The key issue regarding Section 1(3)(c)(i)[10] is that any similarity between past and present sexual conduct 'cannot reasonably be explained as a coincidence.'[11] However, *R v Evans*[12] puts this to the test as no facts of the case amount to a similarity which cannot be explained as a coincidence. The logical post-*Evans* concern is that the more ordinary the sexual activity, the more it might be used in evidence against a claimant, leading to admissibility of sexual history evidence and opening the door to disbelief and victim blaming and closing it to potential claimants in the future.

[7] Nick Dent and Sandra Paul, 'In Defence of Section 41' [2017] 44(8) Criminal Law Review 613.
[8] Amy Kirby, 'Effectively Engaging Victims, Witnesses and Defendants in the Criminal Courts: A Question of "Court Culture"?' [2017] 12(1) Criminal Law Review 949.
[9] *R v Evans* [2016] EWCA Crime 452.
[10] Ibid.
[11] Ibid.
[12] Ibid.

2. Setting the Scene: The Intention of Section 41 YCJEA 1999

Section 41 of the YJCEA 1999 provides protection for complainants in proceedings involving sexual offences by restricting evidence or questions about their sexual history by or on behalf of the accused, subject to exceptions and with leave of the court.[13] It is critical that the protection of the complainant is recognised. However, the statutory regime intends to balance treating complainants with dignity and respect while ensuring a defendant's right to a fair trial. According to the Attorney General's Office, the legislative purpose of the current law was to curtail any past sexual history of the complainant from entering the court room, thus 'preventing the defence drawing up rape myths and stereotypes to discredit the complainant.'[14] In opposition to this, it is vital to question whether enabling Parliament to pass a law prohibiting a defendant from producing cogent evidence is unfair.[15] In this context, the primary purpose of rape shields is not to save the blushes of the victim.[16] Rather, their aim is to prevent the admission of sexual history evidence from perpetuating victim blaming and allowing sexual history evidence acting as a deterrent to future claimants reporting sexual offending. However, there is a 'natural tension' between the adversarial nature of the criminal justice system and ensuring that witnesses and defendants receive 'appropriate treatment.'[17]

Key to understanding this notion is that questioning a complainant regarding their previous sexual behaviour is by definition the exception rather than the rule.[18] On a literal interpretation, Section 41 imposes a virtual blanket prohibition on adducing evidence of the complainant that concerns their sexual behaviour, subject only to narrowly applied exceptions. Subsequently, an application made by, or on behalf of,

[13] Crown Prosecution Service, 'Rape and Sexual Offences: The Sexual History of Complainants, Section 41 YCJEA 1999' (21 May 2021) <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-10-sexual-history-complainants-section-41-yjcea> accessed 19 June 2021.
[14] Ministry of Justice and Attorney General's Office, *Limiting the Use of Complainants' Sexual History in Sex Cases: Section 41 of the Youth Justice and Criminal Evidence Act 1999: The Law on the Admissibility of Sexual History Evidence in Practice* (Cm 9547, 2017).
[15] JR Spencer, '"Rape Shields" and the Right to a Fair Trial' [2001] 60(3) Cambridge Law Journal 452.
[16] Brian Brewis, 'Section 41 of the Youth Justice and Criminal Evidence Act 1999 and the Admissibility of Evidence Concerning Child Sexual Assault Complaints: R v Philo-Steele (Alexander) [2020] EWCA Crim 1016' [2021] 85(2) Journal of Criminal Law 158.
[17] Kirby (n 8).
[18] M T Thomason, 'Previous Sexual History Evidence: A Gloss on Relevance and Relationship Evidence' [2018] 22(4) International Journal of Evidence & Proof 342.

an accused will only succeed if the court grants leave, thus satisfied that the sexual activity falls within one of the four gateways under Section 41.

Section 41(3)(c)(i) covers the "so similar" gateway. Here, the court will grant leave if the complainant's other sexual behaviour is 'in any respect so similar' to that of the actual alleged offence and cannot be reasonably explained as a coincidence. In 1999, Lord Williams assured that this sub-section was not designed to cover 'evidence of a general approach towards consensual sex such as a predilection for one-night stands or for having consensual sex on a first date.'[19]

3. A Dangerous Precedent? Section 41(3)(c)(i) YCJEA 1999 and *Evans*

The wider interpretation of the "so similar" gateway advanced in *Evans* arguably poses a danger to complainants in future cases. *Evans* might have opened the floodgates to the admissibility of sexual history evidence that might lead to disbelief and victim blaming which might deter victims to report cases of rape in the future.

3.1 Floodgates

Prior to the Court of Appeal's decision in *Evans*, the "so similar" gateway was respected as a very restrictive gateway. However, now there is a new array of issues and ambiguity to the definition of what is considered to be similar conduct. In *R v A*,[20] Lord Clyde commented that the similarity does not have to be 'something which is not too unremarkable as to be reasonably explained as a coincidence.'[21] In *Evans*, the court made it clear that the acts described in the fresh evidence were sufficiently similar to those complained of that it could not be 'explained as a coincidence', allowing sexual history evidence to be heard.[22] However, arguably it is common for young women to go out, get intoxicated, engage in casual sex, and use common tropes which belong to mainstream pornography like "fuck me harder". This raises concerns that the more common or ordinary the sexual activity, the higher the chance that the complainants' previous sexual history may be used in evidence against them.

[19] Young (n 3).
[20] [2002] 2 WLR.
[21] Ibid.
[22] *Evans* (n 1).

It is unjustifiable how straightforward it is to characterise similar and non-coincidental sexual behaviour. The more ordinary the sex, the higher the risk that it will be considered similar and non-coincidental. The more ordinary the sex, the easier it is for the defence to require leave from the court to cross-examine the victim.[23]

However, the recent case of *R v Philo-Steele (Alexander)*[24] suggests the opposite. The case concerned sexual assault against three young children by a care worker. It was heard that one of the children, W, was allegedly molested by the Appellant. However, during an Achieving Best Evidence interview of W's best friend, reference was made to W's sexualised behaviour at the age of six, prior to when the allegations were made. The Appellant argued that W's account had stemmed from his previous experience which provided him with knowledge of the sexual acts under discussion in the case. The Defence claimed that allowing evidence through Section 41 was crucial to highlight the fact that a six-year-old child would not ordinarily have sexual knowledge had it not been for the child's previous sexual experience. However, the Trial Judge prohibited the Defence's applications. The Court of Appeal's agreement on this point affirms the position that judges remain mindful of the dangers of admitting prejudicial sexual behaviour evidence even if, as illustrated by the present case, the 1999 Act does not bite.[25]

Nonetheless, had the facts of *R v Philo-Steele (Alexander)*[26] differed slightly, specifically regarding the age of the Complainant, it is possible that the Defence's application may not have been denied. This becomes apparent when considering that the Trial Judge's position on remaining mindful of the dangers of adducing evidence under Section 41 has not been prominent enough to prevent the admission of previous sexual history evidence in other cases such as *Evans* where the victims are older and sexuality active, adhering to social norms, and following normative sexual scripts or not.

Nevertheless, Dent and Paul put forward a strong argument concluding that the notion of the dangerous *Evans* precedent is unreasonable because 'it is difficult to comprehend how it can be said that the Court of Appeal ruling set a legal precedent

[23] Clare McGlynn, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' [2017] 81(5) Journal of Criminal Law 81(5) 367.
[24] [2020] EWCA Crim 1016.
[25] Brewis (n 16).
[26] *Philo-Steele* (n 24).

when the judgement was confined to the specific facts, not a legal precedent in the legal sense but rather a "precedent" in common parlance.'[27] Subsequently, Dent and Paul are 'calling for recognition of the progressive and pragmatic nature of section 41.'[28] They argue that claiming that *Evans* has opened the floodgates simply overlooks the actual wording of Section 41 and consequently dismisses the progressive intention of the legislation resulting in a failure to recognise the high thresholds of Section 41(3)(c)(i) whereby admitting sexual history evidence is rarely satisfied.

3.2 Victim Blaming and Deterrence

While *Evans* might not have opened the floodgates for sexual history evidence to be admitted in rape cases, its interpretation of similar sex justifies a complainant being cross-examined simply because of their lifestyle. *Evans* brings awareness of the problems that the high consumption of alcohol and engaging in casual sex cause for women, as the Complainant was unlike the coy woman that society expects her to be. The effects of sexual stereotypes portraying woman as gatekeepers is used to excuse or justify the rape, which implies that a drunk woman is "asking for it" and therefore responsible for any sexual violence she might experience.[29] This indicates that Section 41 enables defendants to rely on the sexual consent narrative that disguise what is essentially cruel and misogynistic conduct. MP Harriet Harman raised issues with Section 41(3)(c)(i) as this 'contributes to shifting the legal and moral blame and responsibility from the defendant to the complainant.'[30] Questions of consent are approached differently in cases where the complainant was intoxicated. It is said that the victim "wanted it", resulting in a veneer of complicity by voluntary intoxication.[31] Consequently, victim blaming is deployed as an attempt to diminish the Accused's role as an active participant in the circumstances of the case. The issues relevant to victim blaming and character assassination are prevalent issues that are embedded within societies' archaic stereotypes regarding gender roles that stereotype women as innocent, chaste, homely, and subordinate, forced to suppress their sexual freedom.

[27] Dent and Paul (n 7).
[28] Brewis (n 16).
[29] Reece (n 6).
[30] Hannah Bows and Nicole Westmarland, 'Rape of Older People in the UK: Challenging the "Real-Rape" Stereotype' [2015] 57(1) British Journal of Criminology 1.
[31] Hannah Bows and Jonathan Herring, 'Getting Away with Murder? A Review of the "Rough Sex Defence"' [2020] 84(6) Journal of Criminal Law 525.

This enabled the Defence to impugn stereotypes to discredit the Complainant. In support of this, the Court of Appeal considered the drunken performance of casual oral sex and sexual intercourse referring to the sexual position adopted by the Complainant, alongside the sexual language used by the Complainant with their previous sexual partners, which was interpreted as 'so similar, that they could not perceive as a coincidence.'[32] Therefore, *Evans* highlights the lack of understanding of the risks which Section 41(3)(c)(i) portrays. It has enabled the Defence to deploy classic rape myths in a trial. In cases where there is a lack of, or weak evidence, sexual history evidence and rape myths enable the defence to rely on broader cultural scripts about women to position the complainant as an enthusiastic and willing participant.[33] This way, *Evans* has created serious concern for victims, a concern that the defence will deploy their previous sexual history as a tool against them, to discredit their version of events, and stereotype them based on their involvement and behaviour during the rape, ultimately deterring victims to disclose their abuse.[34] This echoes Vera Baird QC's argument that *Evans* may lead to more questioning of complainants regarding their sexual history than has previously been the case.[35] Previous sexual history evidence could become the standard by which victims are judged. The Women's Parliamentary Labour Party have also criticised Section 41, suggesting it will 'further deter victims from disclosing their abuse for the fear of having their private lives investigated and scrutinised.'[36]

4. The Role of the Defence Counsel, Jury, Trial Judge, and the Crown Prosecution Service

Having outlined the dangers of the admission of sexual history evidence under Section 41(3)(c)(i) and the resultant risk that this will perpetuate rape myths that stereotype victims, this part of the article will examine the role of the defence counsel, jury, trial

[32] *Evans* (n 1).
[33] Bows and Herring (n 31).
[34] Jennifer Tempkin, 'Sexual History Evidence: Beware of the Backlash' [2003] 88(4) Criminal Law Review 217.
[35] Clare McGlynn, 'Challenging the Law on Sexual History Evidence: A Response to Dent and Paul' [2018] 44(3) Criminal Law Review 216.
[36] Ibid.

judge, and the Crown Prosecution Service in relation to their involvement in adducing gendered stereotypes and myths within rape trials.

4.1 The Defence Counsel

Cases where sexual activity is not denied but consent is disputed and where the case depends on the sole evidence of the complainant and defendant result in the issue of credibility as opposed to consent. Distinguishing between challenging credibility and permitting questions about a complainant's sexual history is an important defence issue and a very difficult distinction for the trial judge to make.[37]

In *Le Brocq v Liverpool Crown Court*,[38] an appeal was held against the Defence Barrister regarding remarks he made referring to the Complainant's past sexual history and his closing speech was determined to be prejudicial to the fairness of the trail. Despite the absence of a ruling under Section 41, the Appellant Defence Counsel was determined to bring in the fact that the Complainant was sexually active with her boyfriend. He effectively gave evidence himself by telling the Jury not to ignore what goes on 'these days' in respect of sexually active teenagers.[39] The question for the Judge was to determine whether it was improper or unreasonable for the Defence to comment on the evidence that was before the Jury for some purpose other than for which the Prosecution had sought to adduce it. The Defence Counsel implied to the Jury that, because the Complainant was a sexually active 14-year-old, she was likely to consent to sexual activity. This reflects the twin rape myths that, if a complainant is promiscuous, they are then more likely to agree to sex at any time.[40] It also implies the Complainant's low morals and calls her credibility into doubt. As Justice McLachlin confirmed in the case of *R v Seaboyer*:[41] 'these inferences were based not on facts, but on the myths that unchaste women were more likely to consent to intercourse [and] were less worthy of belief. The fact that a woman has had intercourse on other

[37] Laura Hoyano, 'R. v T: Evidence - Youth Justice and Criminal Evidence Act 1999 s.41 - Rape - Cross-Examination as to Sexual Behaviour of Complainant Court of Appeal (Criminal Division): Moses L.J., Nicol and Lindblom JJ.: November 7, 2012; [2012] EWCA Crim 2358' [2013] 42(7) Criminal Law Review 596.
[38] [2019] EWCA Crim 1938.
[39] D Wurtzel, 'Evidence- Sexual History Evidence- Counsel's Comments in Closing Speech' [2019] 12(7) Archbold Review 2.
[40] Young (n 3).
[41] Ibid.

occasions does not in itself increase the logical probability that she consented to intercourse with the accused.'[42] This highlights the dangers of persistent rape myths and the failure to uphold the rights of women and girls to autonomy over their own bodies.[43]

In *Le Brocq v Liverpool Crown Court*, the Defence introduced stereotypical assumptions about the Complainant without leave, which raises doubts as to whether victims of rape are truly protected. The same cannot be said for *Evans* however, as the victim's previous sexual history was adduced with leave. However, the Defence actively searched through the victim's previous sexual partners to prove the that Complainant had engaged in similar drunken sex, implying the victim was a promiscuous individual. Jess Philips questioned 'what is to stop any defendant crowdsourcing information from a victim's previous partner and using it against her in court.'[44] Consequently, a low threshold to Section 41 allows defendants to collude and introduce previous sexual history which will question the validity of a victim's credibility.

The latter point re-confirms that it is critical that the questioning of a complainant regarding their previous sexual history evidence is, by definition, the exception rather than the rule. The elastic nature of some of the concepts used in Section 41 together with the defence counsel's interpretation of the legislation provides room for a permissive *Evans* style interpretation of the law and the perpetuation of stereotypical beliefs about victims of rape. Therefore, the thresholds of Section 41 must remain high to prevent the 1999 Act from being sidestepped by the defence. This will protect complainant's without it being at the expense of the defendant.

4.2 The Jury

In England and Wales, jurors are expected to make credibility assessments relying on their own common sense, knowledge and understanding of the world and of human

[42] Ibid.
[43] Lisa Gormley, 'Rape Myths and the Rights of Victims: Why the UK Needs to Ratify the Istanbul Convention' (*LSE Research Online*, 21st October 2016) <https://eprints.lse.ac.uk/76785/1/blogs.lse.ac.uk-Rape%20myths%20and%20the%20rights%20of%20victims%20why%20the%20UK%20needs%20to%20ratify%20the%20Istanbul%20Convention.pdf> accessed 10 June 2023.
[44] McGlynn (n 35).

behaviour.[45] Jurors should be trusted to make assertive and fair decisions. However, it is difficult to establish an adequate foundation of credibility. Subsequently, when sexual history evidence does pass through the "so similar" gateway, there is a risk that the juror's own credibility assessment is influenced by rape myths, including those involving intoxication and conceptions of real rape. Because drunken consent is still consent, arguably, a juror may believe that the Complainant in *Evans* is blameworthy because she was intoxicated. And because real rape is perceived to involve a pathological stranger who unleashes a blitz-style attack outside, at night, using overwhelming force,[46] jurors might struggle to visualise a rape that does not involve a violent attack. Juror's misconceptions about rape are illustrated in a study taken as part of the Scottish Jury Research where 431 mock jurors had to deliberate on a scenario where there was lack of physical resistance to sexual violence. One female juror observed: 'I think it's instinct, if you've got a hand free, you'd grab for his eyes. I cannot get my head around that.'[47] This highlights a false parallel between non-consensual sex and evidence of resistance. Subsequently, it is easier for a juror to comprehend rape when a complainant suffers bruising, cuts, and internal injuries. In England and Wales, the crime of rape does not require proof of force or injury.[48] However, when a complainant has offered little resistance, this provides more scope for the jury to impugn their credibility. It is important to keep in mind though that jurors are normal people who have their own opinions and judgements, and it can be challenging to distinguish personal opinions from the facts presented in a case. Further, it is human nature to have an opinion on controversial matters. Therefore, boundaries become blurred and stereotypical beliefs fill a gap in the trial process. Therefore it is crucial to develop ways of taking the jury into light, rather than deliberately keeping them in the dark.[49] However, this notion of light cannot be so transparent that Section 41 permits every aspect of a complainant's sex life to be scrutinised in the courtroom.

[45] Louise Ellison, 'Credibility in Context: Jury Education and Intimate Partner Rape' [2019] 23(3) International Journal of Evidence & Proof 263.
[46] Gurnham (n 4).
[47] Fiona Leverick, 'What do we Know About Rape Myths and Juror Decision Making?' [2020] 24(3) International Journal of Evidence & Proof 255.
[48] Sexual Offences Act 2003, s 1.
[49] Brewis (n 16).

In order to realign the boundaries and eliminate any threat of stereotypical beliefs influencing juror's decisions, one proposal is to exclude the jury from the trial process completely. However, reform proposals for the abolition of juries within rape trials would be dangerous as 'the reliance on judges and barristers affectively challenge stereotypes seems rather like pie in the sky.'[50]

Less radically, Henderson suggests that 'the single most important factor in achieving any sort of change in trial process is the attitude of the judiciary and legal profession'[51] and education is required. Jurors who have been exposed to educational guidance are less likely to refer to the complainant's demeanour when giving evidence and are more inclined to comment that it was normal that a victim of rape could respond in a calm manner.[52]

4.3 The Judiciary

The trial judge is accountable for guiding and controlling the trial process, thus holding one of the most important roles. To perform it, they must be alert to the needs of everyone involved in the case.[53] However, judges are not free from misconceptions about rape, perpetuate negative stereotypes, and engage in victim blaming. Judge Kushner, for example, commented that 'girls are perfectly entitled to drink themselves into the ground but should be aware of potential defendants who gravitate towards girls who have been drinking.'[54] It might be that the true intention of the Judge was not to encapsulate rape myths. However, there is a fine line between providing guidance of the repercussions of intoxication and endorsing victim blaming. As Judge Kushner's comment dangerously conditions the jury to ask questions about the victim's state of intoxication, it welcomes victim blaming into court.

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[50] Reece (n 6).
[51] E Henderson, 'Bigger Fish to Fry: Should the Reform of Cross-Examination be Expanded Beyond Vulnerable Witnesses?' [2015] 19(2) International Journal of Evidence & Proof 83.
[52] Kirby (n 8).
[53] Penny Cooper and others, 'One Step Forward and Two Steps Back? The 20 Principles for Questioning Vulnerable Witnesses and the Lack of an Evidence-Based Approach' [2018] 22(4) International Journal of Evidence & Proof 392.
[54] — — 'Judge's Warning to Drunk Women "Will Stop Reporting of Rape' (*The Guardian*, 11 March 2017) <https://www.theguardian.com/society/2017/mar/11/judge-criticised-over-warning-to-drunk-women> accessed 18 March 2020.

Conversely, eradicating the opportunity for the judiciary to direct the jury, thus permitting the jury to dissect evidence based on their own understanding, would diminish the integrity of the trial process. Therefore, we expect juries to be properly directed about matters that might give rise to misconceived assumptions.[55] However, as judicial direction is permitted, this is also problematic. Research on jurors' reactions to instructions generally suggest that they do not necessarily obey them or fail to understand them even though they think they do.[56] Subsequently, jury directions should be seen as a complementary measure, rather than as an alternative to other strategies to counter the potential influence of prejudicial attitudes.[57]

4.4 The Crown Prosecution Service (CPS)

In addition to focussing on the issues of the defence, jury, and judiciary, it is important to highlight the failings within the CPS procedure. Kate Allen commented that 'our government has an international duty to tackle the triple problem of the high incident of rape, low conviction rate and a sexist blame culture.'[58] Indeed, only 5.6% of rapes reported to the police currently result in conviction.[59] Indicating the prevalence of the real rape myth, the police and the CPS appear to favour cases involving violence as the issues seem clear cut.[60] Without evidence of some form of assault or resistance, the prospect of conviction diminishes.

Indeed, the Home Office said it has made 'numerous changes to how the police and Crown Prosecution Service work to put the victim's needs first and to make it easier to secure convictions.'[61] Interestingly, in June 2021, the CPS introduced guidance on the new minimum standards for rape and sexual assault victim support. This included to create 'single points of contact across the police, CPS and Independent Sexual

[55] Candida Leigh Saunders, 'Rape as "One Person's Word Against Another's": Challenging the Conventional Wisdom' [2018] 22(2) International Journal of Evidence & Proof 161.
[56] Michael E Lamb and Hayden Henderson, 'The Discussion of Ground Rules Issues in Pre-Trial Preparation for Vulnerable Witnesses in English Crown Courts' [2019] 19(7) Criminal Law Review 599.
[57] Isla Callander, 'Jury Directions in Rape Trial in Scotland' [2016] 20(1) Edinburgh Law Review 76.
[58] Crown Prosecution Service (n 13).
[59] Gurnham (n 4).
[60] Clare Gunby, Anna Carline and Caryl Beynon, 'Alcohol-Related Rape Cases: Barristers' Perspectives on the Sexual Offences Act 2003 and its Impact on Practice' [2010] 74(6) Journal of Criminal Law 579.
[61] Ibid.

Violence Advisor (ISVA) agencies to forge even stronger working relationships and seamless communication between partners.'[62] However, unless the CPS addresses the persistence of prosecutors' beliefs in rape myths and their impact on the CPS procedure, the action plan fails.

5. Education

As indicated above, misconceptions about rape and rape victims held by the legal professionals, judges, and jurors can be dispelled through education. However, education cannot stop there and has to expand to society more broadly, particularly amongst the younger generation.[63] Rape culture and its myths create a society in which rape is normalised, justified, and trivialised.[64] Arguably from a young age, girls are taught how to avoid being raped. This includes not to get too intoxicated, not to wear certain items of clothing, and not to walk home alone. However, such guidance provided to young girls is informed by rape myths. Contrastingly, sex education for boys, specifically the education about consent, is treated as a trivial matter. In society, rape myths are deployed to portray rapists to be monstrous, deranged animals, different from the average man. Realistically however, rapists are normal individuals who often are acquaintances of the victim and deploy strategies to get the kind of sex they want without recognising their partner's lack of informed consent.[65] Education can eradicate these misconceptions and lead to a progressive change in men's attitudes towards women, normalising the reality that women are active participants in sexual activities rather than a passive tool.

Highlighting that education is necessary from a young age, 22-year-old student Soma Sara launched a website to highlight the sexual abuse that continues to occur within UK schools. One girl stated: 'I was regularly sexually harassed by boys at school in front of teachers that "turned a blind eye". One of these boys went on to sexually assault me and another raped me.'[66] In response, the Chair of the Commons

[62] Ibid.
[63] Youth Justice and Criminal Evidence Act 1999, s 41.
[64] Kimberly Peterson, 'Victim or Villain: The Effects of Rape Culture and Rape Myths on Justice for Rape Victims' [2018] 53(2) Valparaiso University Law Review 467.
[65] Joyce Plotnikoff and Richard Woolfson, 'Dispensing with the "Safety Net": Is the Intermediary Really Needed During Cross-Examination?' [2017] 1(6) Criminal Evidence 6.
[66] Ibid.

Education Select Committee, Robert Halfon, has called for an inquiry into safeguarding in schools, calling the allegations 'horrific' and 'a national scandal.'[67] While Sara's actions might spurred the Government into action, the website highlights the failings of the Government to implement a structured programme addressing sex education, specially consent and the myths in relation to women's role in sex.

6. Conclusion

This article has examined the admissibility of previous sexual history evidence via Section 41(3)(c)(i) of the YCJEA. It has established that rape trials perpetuate stereotypical beliefs about rape victims. The language and interpretation of Section 41 has created ambiguity and unnecessary complexities for the judiciary to interpret. This has provided scope for stereotypical attitudes to enter the court room. While Section 41 had the right intentions, to create a rape shield to protect victims, it is difficult to find that it provides adequate protection for a complainant.

While the rights of complainants and defendants have to be balanced, Section 41 creates an obligation to ensure that a complainant is not humiliated.[68] Nonetheless, this cannot be said for the treatment which the Complainant in *Evans* faced. The case exemplifies the low thresholds of Section 41(3)(c)(i) and the consequence it can have, not fulfilling its purpose. Rather than being shielded from rape myths, victims might believe that they have 'put themselves at risk, thus the victim may believe in this "real rape" scenario.'[69] Evans was a high-profile defendant and this could explain why the Complainant suffered such deplorable treatment.[70] Nevertheless, the decision in *R v Evans* illustrates the failings of the statutory regime. It created a fear that the Court of Appeal's decision has set a dangerous precedent that opened the floodgates and would serve to act as a deterrent for future victims.

When focussing on the broader impact of rape myths and stereotypes about rape victims, the CPS is more likely to take forward cases of violent rape. Defence counsel

[67] Ibid.
[68] L.E.E, 'Evidence- Whether Trial Judge Having Discretion to Limit Extent of Admissibility of Evidence of Sexual Behaviour of Complainants Where Criteria for Admissibility Established' [2005] 44(12) Criminal Law Review 564.
[69] Gurnham (n 4).
[70] Brewis (n 16).

use the elastic nature of Section 41 to introduce sexual history evidence that is intended to discredit the complainant. Jurors settle on a story that reflects their understandings of real rape and normal behaviour of rape victims. However, excluding the jury and leaving cases to judges to decide alone would not necessarily lead to better decisions as trial judges hold their own misconceptions about sexual offences.

Fundamentally, to prevent rape trials from perpetuating rape myths, effort, time, and money needs to be spend on the education system to rectify the misconceptions about consent and the role that women play in sex. Education is the only way to change people's behaviours and attitudes. Education shapes the younger generation that will become the next generation of adults and legal professionals. Only better education of the next generation about rape myths and stereotypes will lead to progressive change in the future. Only then will complainants whose previous sexual history has been granted leave in accordance with Section 41 be treated with dignity and the respect they deserve, without fear of their credibility being damaged by rape myths.

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