

“Whack” No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases

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Fifteen years ago, defence lawyers in Ottawa were instructed to “whack” the complainant in sexual assault cases. These were their marching orders:

“[W]hack the complainant hard” at the preliminary inquiry... “Generally, if you destroy the complainant in a prosecution...you destroy the head. You cut off the head of the Crown’s case and the case is dead... [A]nd you’ve got to attack the complainant with all you’ve got so that he or she will say [‘]I’m not coming back in front of 12 good citizens to repeat this bullshit story that I’ve just told the judge.[’]”

The “whacking” continues. This defence culture explains, in part, why defence lawyers have no hesitation in leaving their ethics at the courtroom door so as to exploit and perpetuate stereotypes about women and sexual assault in defence of their clients. With the recent focus on civility by the legal profession, and concerns raised about the failure of law reform initiatives to improve reporting and the fair prosecution of sexual assault cases, it is time to address the discriminatory lawyering and denial of access to justice that is taking place in these cases. The article begins by exploring how sexual assault is different from other offences in terms of how it is processed, conceived of, and defended by lawyers. It is argued that this difference requires a rethinking of ethical lawyering in this context. The next part attempts to set out a normative framework that is largely grounded in legal and ethical norms including equality values, the lawyer’s duty to not discriminate, as well as an advocate’s obligation to act in “good faith” and not mislead the court. The article turns to applying this framework by setting out what defence tactics should be ethically barred, particularly when you know your client is guilty. The critical question of

Il y a une quinzaine d’années, on incitait les avocats de la défense exerçant à Ottawa à « assommer » les plaignants dans des causes d’agression sexuelle. Voici le type d’instructions qui étaient alors données sur les étapes à suivre :

[TRADUCTION] « [T]âchez d’assommer le plaignant’ dès l’audience préliminaire ... En général, pour démolir le plaignant dans une poursuite, il faut d’abord couper la tête ... c’est-à-dire que si vous anéantissez la cause de la Couronne dès le départ, alors il n’y a plus de cause du tout... [E]t vous vous arrangez pour attaquer le (ou la) plaignant(e) avec tout ce que vous avez sous la main, ainsi il ou elle finira par se dire ‘Pas question que je retourne en cour devant 12 bons citoyens pour répéter cette histoire pourrie que j’ai racontée au juge’ ».

Et ce type de pression continue de nos jours. Cette culture de la défense explique, en partie, pourquoi les avocats n’hésitent pas à laisser leurs principes déontologiques à la porte du tribunal pour pouvoir exploiter et perpétuer les stéréotypes au sujet des femmes et des agressions sexuelles afin de défendre leurs clients. Toutefois, si l’on considère les préoccupations récemment exprimées par la profession juridique au sujet de la civilité et de l’échec des projets de réforme visant à améliorer les signalements et l’efficacité des poursuites judiciaires dans les affaires de viol et d’abus sexuels, le temps semble venu de remédier à cette pratique discriminatoire commune aux avocats et au déni d’accès à la justice en la matière. L’article commence par explorer la manière dont l’infraction d’agression sexuelle se distingue des autres dans la manière dont elle est traitée, conçue et défendue par les avocats. On soutient que cette différence exige que l’on repense l’exercice du droit de façon

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when you know your client is guilty is also addressed. The final part uses three leading Supreme Court of Canada evidence cases (*R v Khan*; *R v Osolin*; *R v Parrott*) to examine how the proposed ethical limits might have impacted the conduct of the defence.

éthique dans ce contexte. Dans la seconde partie, on tente de circonscrire un cadre normatif largement fondé sur les normes juridiques et déontologiques qui comprennent les valeurs d'égalité, le devoir qu'a l'avocat d'éviter de faire preuve de discrimination, de même que son obligation d'agir de « bonne foi » et de ne pas induire le tribunal en erreur. L'article examine ensuite la manière d'appliquer ce cadre en déterminant quelles tactiques de défense devraient, d'un point de vue déontologique, être exclues, tout particulièrement lorsque l'avocat sait que son client est coupable et en abordant également la question cruciale du moment où l'avocat fait cette découverte. Dans la dernière partie, on se penche sur trois arrêts majeurs rendus par la Cour suprême du Canada en matière de preuve (*R c Khan*; *R c Osolin*; *R c Parrott*) afin d'examiner dans quelle mesure des limites de nature déontologique peuvent avoir influencé la conduite des avocats de la défense.

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I. INTRODUCTION

Over the last few decades, there has been significant law reform to address the criminal law’s discriminatory treatment of complainants in sexual assault cases. For example, there are now limits on the admissibility of a complainant’s prior sexual history including with the accused and the production of her personal records.¹ In addition, Parliament reframed the mistake of fact defence by defining certain mistakes about consent as mistakes of law and by imposing a reasonable steps requirement.²

In many respects, these legislative changes were a response to a “whack the complainant”³ strategy employed by defence lawyers in sexual assault cases, a strategy sanctioned by the common law. Whacking the complainant includes humiliating or prolonged cross-examination that “seek[s] to put the complainant on trial rather than the accused”;⁴ specious applications to obtain the complainant’s records;⁵ and the invoking and exploiting of stereotypical assumptions about women and consent,

1 *Criminal Code*, RSC 1985, c C-46, ss 276, 278.2 [*Criminal Code*]. Canada’s original rape shield provision only applied to prior sexual history with third parties. Our current rape shield provision was enacted in 1992.

2 *Ibid*, ss 273.1 and 273.2.

3 This phrase was coined and used by a leading criminal defence lawyer in Ottawa at a continuing legal education conference. See Cristin Schmitz, “‘Whack’ Sex Assault Complainant at Preliminary Inquiry”, *The Lawyers Weekly* (27 May 1988) 22 [“Whack Sex Assault Complainant”]. See the discussion *infra* at notes 44 to 56.

4 *R v Shearing*, 2002 SCC 58 at para 76, [2002] 3 SCR 33, Binnie J [*Shearing*]. See also *R v Osolin* [1993] 4 SCR 595 at 669, 109 DLR (4th) 478 [*Osolin* SCC], where the Supreme Court raised a warning that a complainant “should not be unduly harassed and pilloried” in recognition of the reality of the experience of women in sexual assault cases.

5 See Melanie Randall, “Sexual Assault Law, Credibility, and ‘Ideal Victims’: Consent, Resistance, and Victim Blaming” (2010) 22 CJWL 397 at 405 [Randall, “Sexual Assault Law”]. See also Lise Gotell, “Tracking Decisions on Access to Sexual Assault Complainants’ Confidential Records: The Continued Permeability of Subsections 278.1–278.9 of the Criminal Code” (2008) 20:1 CJWL 111; Karen Busby, “Discriminatory Uses of Personal Records in Sexual Violence Cases” (1997) 9 CJWL 148 at 148 [Busby, “Discriminatory Use of Personal Records”]; Karen Busby, “Third Party Records Cases Since *R. v. O’Connor*” (2000) 27 Man LJ 355 [Busby, “Third Party Records Cases”].

including assumptions about communication, dress, revenge, marriage, prior sexual history, therapy, lack of resistance and delayed disclosure.⁶

In *R v Mills*,⁷ Justices McLachlin, as she then was, and Iacobucci, writing for the majority, specifically referred to the problem of the whacking of sexual assault complainants by lawyers. They observed that “[t]he accused is not permitted to ‘whack the complainant’ through the use of stereotypes regarding victims of sexual assault.”⁸ The majority also appeared to recognize that this whacking is what likely motivated Parliament’s attempts to address the problem through evidence regulation:

Parliament may also be understood to be recognizing “horizontal” equality concerns, where women’s inequality results from the acts of other individuals and groups rather than the state, but which nonetheless may have consequences for the criminal justice system.⁹

Notwithstanding these legislative responses and the *Mills* prohibition, the “whacking” continues.¹⁰ As Professor Elaine Craig has observed, “[it] seems implausible that members of the legal profession would...today” continue to invoke stereotypes that are “irrelevant, discriminatory and harmful, and outrageously outdated... Yet these are the stories the defence lawyers in Canada continue to tell about the women who have accused their clients of rape.”¹¹ We, therefore, need

6 See Elaine Craig, “The Ethical Obligations of Defence Counsel in Sexual Assault Cases” (2014) 51:2 Osgoode Hall LJ 427 [Craig, “Defence Counsel in Sexual Assault Cases”]. See also Ruthy Lazar, “Negotiating Sex: The Legal Construct of Consent in Cases of Wife Rape in Ontario, Canada” (2010) 22:2 CJWL 329 at 361 [Lazar]; Jennifer Koshan, *The Legal Treatment of Marital Rape and Women’s Equality: An Analysis of the Canadian Experience* (Ottawa: The Equality Effect, 2010) at 30.

7 [1999] 3 SCR 668, 180 DLR (4th) 1 [*Mills*].

8 *Ibid* at para 90.

9 *Ibid* at para 59. *Mills* concerned the constitutionality of sections 278.1 to 278.98 of the *Criminal Code* which were enacted by Parliament to limit the production of private (including therapeutic, counseling, education, employment) records in sexual assault cases to the accused.

10 See the cases cited *infra* at note 11. For more recent cases, see *R v Khaery*, 2014 ABQB 676, [2014] AJ No 1254; *R v Schmalz*, 2015 ABCA 4, [2015] AJ No 33. In *R v Khaery*, the police were called by the accused’s roommate. When the police entered the bedroom, they saw the accused raping the complainant. They ordered him to stop, but he refused and they had to pull him off her. The complainant was in shock. She had two sets of bite marks, bruising, abrasions and lacerations on her body and swelling to her left cheek. At trial, the complainant was in a very fragile state. She testified about a prolonged and vicious series of physical and sexual assaults by the accused. Notwithstanding the overwhelming nature of the Crown’s case and the vulnerability of the complainant, defence counsel cross-examined her for *three* days. He suggested that she was lying about what had happened and had framed the accused because he had not given her money to buy drugs.

11 Professor Craig further observes that there is a “systemic problem” and that “[t]hese are not the practices of a few problematic lawyers. Indeed, an examination of recent case law reveals that in many sexual assault cases in Canada, defence counsel invoke these social assumptions explicitly and seemingly unapologetically” (“Defence Counsel in Sexual Assault Cases”, *supra* note 6 at 435, 437). The stories she tells include the conduct of the defence in *R v AA*, 2004 ONCJ 101, [2004] OJ No 2820; *R v JU*, 2011 ONCJ 457, [2011] OJ no 4143; *R v Tapper*, 2009 NLTD 142, [2009] NJ No 255; *R v Cain*, 2010 ABCA 371, [2010] AJ No 1423. See generally the cases cited in Parts II and III of her article at 435–46. See also Elaine Craig, “Examining the Websites of Canada’s ‘Top Sex Crime Lawyers’: The Ethical Parameters of Online Commercial Expression by the Criminal Defence Bar” UBC L Rev [forthcoming].

to think beyond evidence regulation to curtail “the virulence of the assaults on women’s credibility”¹² in sexual assault cases.

In addition to a “whacking” style of advocacy, there is also what might be called “under the radar” conduct of defence lawyers that impairs the fair treatment and adjudication of sexual assault cases. Examples of this conduct include shielding accountability through cultural incompetence,¹³ deliberate ignorance of the client’s guilt and relying on objectively “truthful evidence” notwithstanding that it is being introduced for a false purpose.¹⁴ This conduct, in particular, does not lend itself well to judicial or evidence regulation because the trial judge is often unaware of what defence counsel knows or should know about their client’s guilt.

While Parliament has taken the lead in reforming our substantive and procedural law, the necessary cultural change to give justice a chance in sexual assault cases requires leadership from the profession.¹⁵ Our Law Societies need to step in and clearly set out, in Commentaries to the relevant Rules and in Continuing Legal Education (CLE) programs, that advocacy or conduct grounded in stereotypical norms about sexual assault violates the ethical norms of the profession.¹⁶ They also need to push for greater cultural competence training in law school. The focus of

12 Randall, *Sexual Assault Law*, *supra* note 5 at 404.

13 Professor Rose Voyvodic has defined cultural competence in this way:

In order to practise law in a culturally competent manner, I believe that we must (1) value an awareness of humans, and oneself, as cultural beings who are prone to stereotyping; (2) acknowledge the harmful effects of discriminatory thinking and behaviour upon human interaction; and (3) acquire and perform the skills necessary to lessen the effect of these influences in order to serve the pursuit of justice.

She suggests that cultural competence requires lawyers to have the following attributes:

KNOWLEDGE: about how “cultural” differences affect client experiences of the legal process as well as their interactions with lawyers;

SKILLS: through self-monitoring, to identify how assumptions and stereotypes influence his/her own thinking and behaviour, as well as the thinking and behaviour of others, and to work to lessen the effect of these influences;

ATTITUDE: awareness of him/herself as a cultural being and of the harmful effects of power and privilege; and the willingness and desire to practise competently in the pursuit of justice.

See Rose Voyvodic, “Lawyers Meet the Social Context: Understanding Cultural Competence” (2005) 84 *Can Bar Rev* 563 at 564, 571–72 [Voyvodic]. One example of cultural incompetence in this context is failing to understand gender bias and violence against women as well as the harm caused by aggressive lawyering in sexual assault cases.

14 For example, cross-examining a complainant on her criminal record and using that truthful evidence to invite the trier of fact to conclude that she is lying in a case where the client has admitted guilt or where there is an irresistible inference of guilt.

15 Unfortunately, the focus of the profession lately has been on civility rather than on the more serious ethical conduct issues addressed in this article. See *Groia v Law Society of Upper Canada*, 2014 ONSC 6026, 245 ACWS (3d) 805; *Doré v Barreau du Québec*, 2012 SCC 12 at para 66, [2012] 1 SCR 395. That said, if the profession is prepared to address the perceived lack of civility in the profession, it must also be prepared to address how we defend sexual assault cases.

16 This piece will use the Law Society of Upper Canada’s *Rules of Professional Conduct* to situate its discussion of the relevant professional rules in play (Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: LSUC, 2014 [LSUC *RPC* 2014]). In Ontario, the relevant rules include Rule 5.1-1 (Advocacy); Rule 5.6-1 (Encouraging Respect for the Administration of Justice); Rule 6.3.1-1 (Discrimination); Rule 7.2-1 (Courtesy and Good Faith).

this piece, however, is not on discipline and enforcement, but rather on identifying the problematic behaviour of defence lawyers and in identifying the relevant norms and the limits that could be applied to them in sexual assault cases. This piece along with Professor Craig’s article are the first in Canada to focus on using ethics and professional responsibility as a means of counselling defence lawyers to live up to their oath and obligation to uphold the cause of justice in sexual assault cases.¹⁷

Part II will provide the relevant context by exploring how sexual assault is different from other offences because of stereotypes surrounding women and sexual assault. The focus will be on differential treatment in terms of how the offence is processed, conceived of and defended by lawyers.¹⁸ It is argued that this difference manifested in a heightened duty of loyalty, unparalleled in any other context, requires a rethinking of ethical defence lawyering in sexual assault cases.

Part III will set out a normative framework for ethical defence lawyering in an effort to give effect to this context and experience. The analysis is grounded in a lawyer’s ethical duty to not discriminate and to give effect to equality values,¹⁹ and an advocate’s obligation to act in “good faith.”²⁰

Part IV will apply this framework to consider what defence tactics in sexual assault cases should be ethically questioned particularly when you know your client is guilty. This raises the concern of when you know your client charged with sexual assault is guilty. Part IV will also address this fundamental issue by exploring the following three questions. Should knowledge of guilt be limited to explicit admissions by the client (the dominant standard)? Should it be extended to cases where the client maintains innocence, but where there is an “irresistible inference” of guilt?²¹ Additionally, should it be further broadened to include cases where the

17 Professor Craig’s piece is, as she puts it, “intentionally narrow.” Its focus is on using “three social assumptions about sexual violence that have been legally rejected” to limit the conduct of defence lawyers. These rejected social assumptions include using a complainant’s prior sexual history, her delayed disclosure and/or her failure to resist to impeach her credibility (*supra* note 6 at 430).

18 This paper builds on the work of a number of research studies which have examined the conduct of defence lawyers in sexual assault cases. See Elizabeth Comack & Gillian Balfour, *The Power to Criminalize: Violence, Inequality and the Law* (Halifax: Fernwood Publishing, 2004) ch 5 [Comack & Balfour]; Katherine D Kelly, “You Must Be Crazy If You Think You Were Raped: Reflections on the Use of Complainants’ Personal and Therapy Records in Sexual Assault Trials” (1997) 9 CJWL 178 [Kelly]; Lazar, *supra* note 6. All of these authors interviewed defence lawyers as part of their research. For similar work about defence lawyers and rape cases in England, see Jennifer Temkin, “Prosecuting and Defending Rape: Perspectives from the Bar” (2000) 27:2 JL & Soc’y 219 [Temkin].

19 See e.g. LSUC RPC 2014, *supra* note 16, Rule 6.3.1-1, which states that “[a] lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate...in professional dealings with...any...person.” See also Rosemary Cairns Way, “Reconceptualizing Professional Responsibility: Incorporating Equality” (2002) 25 Dal LJ 27 [Cairns Way, “Reconceptualizing Professional Responsibility”]. See generally the discussion of cultural competence, the anti-discrimination ethical norm and professionalism in Voyvodic, *supra* note 13; Christine Boyle & Marilyn MacCrimmon, “To Serve the Cause of Justice: Disciplining Fact Determination” (2001) 20 Windsor YB Access Just 55.

20 See *R v Lytle*, 2004 SCC 5, [2004] 1 SCR 193 [Lytle].

21 This is the approach of Michel Proulx and David Layton in *Ethics and Criminal Law*, 2nd ed (Toronto: Irwin Law, 2015) at 31–38 [Proulx & Layton].

accused's protestations of innocence rely on assertions that have no foundation in law or which are grounded in stereotypical assumptions or implausible speculative theories? This article will suggest that these three questions should be answered no, yes and yes.

In Part V, three leading Supreme Court of Canada (the "Supreme Court") evidence cases—*R v Khan*;²² *R v Osolin*;²³ and *R v Parrott*²⁴—will be used to explore many of the issues raised in this article. They reveal the extreme "whacking" that occurs in sexual assault cases, why judicial regulation will often not be sufficient to reign in the conduct of defence lawyers and how the ethical limits set out in Part IV could have had an impact on the conduct of the lawyers in the case. In addition, these Supreme Court evidence cases are taught every year in our law schools and they provide a rich and unexplored source of ethical issues. Any cultural change in how lawyers defend sexual assault cases requires not only leadership from the profession but also from the academy. Teaching these cases provides students and teachers with an opportunity to critically assess how these kinds of cases should be ethically defended.

II. WHY SEXUAL ASSAULT IS DIFFERENT

Sexual assault is the most under-reported and under-prosecuted offence.²⁵ It has the highest rate of acquittals and the highest rate of overturned convictions by appellate courts.²⁶ It involves conduct for which stereotypes about women continue to linger, notwithstanding significant law reform and feminist activism.²⁷ It is the one offence where, more often than not, the complainant is more vulnerable than the accused on account of gender, age, race or Aboriginality, or physical and/or mental disability.²⁸

Sexual assault is different from other offences because the safeguards in the system are not always functioning to control the conduct of defence counsel. For example, while in theory, the "whacking" approach to defence lawyering can be controlled by the trial judge as the regulator of the criminal trial, experience

22 [1990] 2 SCR 531, 59 CCC (3d) 92 [*Khan* SCC].

23 *Supra* note 4.

24 2001 SCC 3, [2001] 1 SCR 178 [*Parrott* SCC].

25 See e.g. Holly Johnson, "Limits of Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault" in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice, and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 613 [Sheehy].

26 *Ibid.*

27 In "Negotiating Sex", Lazar chronicles her interviews with defence counsel in sexual assault cases. On the issue of prior sexual history, for example, she states that "the majority of defence lawyers... asserted that they use, or seek to use, evidence of sexual history in cases of wife/partner rape. 'Context', 'human nature' and 'common sense' were the 'magic words' that they used to rationalize the relevance they attach to sexual history evidence" (*supra* note 6 at 339).

28 This is not to suggest that there are not exceptions. For example, where the accused is Aboriginal and racialized and the complainant is White. See Shannon Sampert, "Let Me Tell You a Story: English-Canadian Newspapers and Sexual Assault Myths" (2010) 22:2 CJWL 301 at 311–13 [Sampert] for a discussion of the myth of the racialized man who is prone to rape white women.

reveals that trial judges (and prosecutors) often view sexual assault cases through a stereotypical lens.²⁹ In addition, heightened zeal has ramifications rarely seen in other cases. These collateral consequences include under-reporting for fear of being “whacked,”³⁰ secondary trauma to complainants and low conviction rates. These consequences fundamentally jeopardize the legitimacy of the system and the rule of law.

Sexual assault is different from other serious violent offences not only because of the gendered nature of the crime, but also because of the way in which it is defended. As Professors Elizabeth Comack and Gillian Balfour have noted:

unlike other violent crime cases, complainants in sexual assault cases are subject to prejudicial myths concerning women (and children) who allege sexual violence. Discrediting the complainant in sexual assault cases is a central strategy in the armoury of defence counsel, and this practice takes the form of maligning her behaviour, her dress and her character—all in a sexualized way.³¹

As another researcher discovered, defence counsel were blunt in acknowledging that they would bring applications for private records “for evidence that the primary witness is not credible or for inconsistencies in her account or for material that

29 See e.g. the cases analyzed in Melanie Randall, “Sexual Assault in Spousal Relationships, ‘Continuous Consent’, and the Law: Honest but Mistaken Judicial Beliefs” (2008) 32:2 *Man LJ* 144. As Professor Randall concludes (at 181):

These judgments, at least in their legal reasoning, therefore, provide a documentation of how law reform sometimes fails to operate in practice, suggesting a disjuncture between these reforms and actual judicial interpretations. This discordance between legislative reform and statutory requirements regarding sexual assault and their misapplication, suggests the persistence of discriminatory and stereotypical assumptions, which fundamentally distort legal reasoning and reinscribe legally prohibited assumptions about what is permissible in heterosexual intimate relationships.

30 See also, Susan Ehrlich, “Perpetuating—and Resisting—Rape Myths in Trial Discourse” in Sheehy, *supra* note 25, 389 [Ehrlich]; Lucinda Vandervort, “Legal Subversion of the Criminal Justice Process? Judicial, Prosecutorial, and Police Discretion in *Edmondson, Kindrat, and Brown*” in Sheehy, *supra* note 25, 111.

See *Osolin SCC*, *supra* note 4 at 628, L’Heureux-Dubé J. See also Kate B Wolitzky-Taylor et al, “Is Reporting of Rape on the Rise? A Comparison of Women with Reported Versus Unreported Rape Experiences in the National Women’s Study-Replication” (2011) 26:4 *J Interpersonal Violence* 807 at 817.

31 Comack & Balfour, *supra* note 18 at 112–13, 131. Comack and Balfour were responding directly to the argument that rape trials are not different from other violent crimes made in David Brereton, “How Different Are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials” (1997) 37:2 *Brit J Crim* 242. In her study of criminal lawyers in England, Temkin found that they “always asked complainants questions about their clothing. It was part of the same theme that they had brought what had happened upon themselves” (*supra* note 18 at 233). See also, Ehrlich, *supra* note 29; Natasha Bakht, “What’s in a Face? Demeanour Evidence in the Sexual Assault Context” in Sheehy, *supra* note 25, 591. See also, Alinor C Sterling, “Undressing the Victim: The Intersection of Evidentiary and Semiotic Meanings of Women’s Clothing in Rape Trials” (1995) 7:1 *Yale JL & Feminism* 87.

embarrasses or humiliates her enough to convince her not to proceed.”³² In the course of her research, Professor Karen Busby found that lawyers viewed not bringing third party records applications in *all* cases as “professional negligence.”³³ And, Professor Abbe Smith, a leading ethics scholar in the United States, once noted that “I do not exalt or encourage exploiting sexism in the defense of a man accused of rape, but sometimes you have to do what you have to do.”³⁴

Finally, consider the 2013 sexual assault case of *R v Muvunga*,³⁵ where a senior defence counsel in Windsor brought an application to use Sandro Boticelli’s painting “Calumny of Apelles” as a piece of demonstrative evidence in his closing address to the jury. The painting depicts, as described by the trial judge, “women as symbolic representations of slander, ignorance, suspicion, fraud, conspiracy and repentance.”³⁶ Defence counsel wanted to use the painting “to make the point that the theme of false accusation is not the exclusive invention of criminal defence lawyers.”³⁷ Justice Pomerance forcefully ruled that the painting could not be used.

32 See Kelly, *supra* note 18 at 187. See also Elizabeth Sheehy, “Legalizing Justice for All Women: Canadian Women’s Struggle for Democratic Rape Law Reforms” (1996) 6:1 Australian Feminist LJ 87. Other lawyers have suggested bringing applications in relation to the complainant’s prior sexual history to arguably taint the trial process. In a 1998 Law Society of Upper Canada program on sexual assault cases, the audience was told that “sometimes you bring the application, especially in front of a judge-alone trial to introduce all this otherwise inadmissible evidence and if it’s excluded, well, oh well, the judge has heard it” (See Law Society of Upper Canada Archives, “Law Society of Upper Canada – Conducting sexual offence trials – part one” (21 February 2014), online: YouTube <<https://www.youtube.com/watch?v=3AiohQek2zc>>.). See also Alyshah Hasham, “Marie Henein is the Lawyer Jian Ghomeshi Needs, say Justice System Observers”, *Toronto Star* (5 November 2014), online: The Star <<http://www.thestar.com>>.

33 See Busby, “Discriminatory Uses of Personal Records”, *supra* note 5 at 177; Busby, “Third Party Records Cases”, *supra* note 5 at 359.

34 See Abbe Smith, “Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things” (2000) 28 Hofstra L Rev 925 at 933 [Smith]. In a similar vein, Smith has observed that “[n]o matter how personally distasteful or morally unsettling, zealous advocacy demands that criminal defense lawyers use whatever they can, including stereotypes, to defend their clients. Criminal lawyers are ‘not allowed to refrain from lawful advocacy simply because it offends’ them.... Criminal lawyers already have their hands full trying to stave off disaster for an individual client; they cannot be responsible for fixing the intractable problems of racism and sexism.” (Abbe Smith, “Nice Work if You Can Get It’: ‘Ethical’ Jury Selection in Criminal Defense” (1998) 67:2 Fordham L Rev 523 at 565, 568 [footnotes omitted]). See also Monroe Freedman & Abbe Smith, *Understanding Lawyers’ Ethics*, 2nd ed (New Jersey: Lexis Nexis, 2002) at 218; Abbe Smith, “Burdening the Least of Us: ‘Race-Conscious’ Ethics in Criminal Defense” (1999) 77 Tex L Rev 1585; Abbe Smith, “Rosie O’Neill Goes to Law School: The Clinical Education of a Sensitive New Age Public Defender” (1993) 28 Harv CR-CLL Rev 1 at 42–45.

35 2013 ONSC 3076, (2013) 3 CR (7th) 292 [*Muvunga*].

36 *Ibid* at para 8.

37 *Ibid* at para 2. If anything, given the reluctance of women to report sexual assault and the fear of being violated and humiliated in court, it is hard to imagine why someone would bring a false claim. This point is made by Justice L’Heureux-Dubé in *Osolin* SCC, *supra* note 4 at 625, where she notes that, “[t]here is absolutely no evidence to suggest that false allegations are more common in sexual assaults than in other offences; indeed, given the data indicating the strong disincentives to reporting, it seems much more likely that the opposite is true.” See also, Sampert, *supra* note 28 at 307–11 where Professor Sampert notes that one of the myths surrounding sexual assault that is often portrayed in the media is that “innocent men are regularly accused of sexual assault and women regularly lie about it.” This is not to suggest that there are not wrongful sexual assault convictions, but there is little, if any, evidence that this concern extends beyond cases that turn on identification evidence—that is,

As she put it “the painting will resurrect offensive myths and stereotypes.... The inflammatory images in the Boticelli painting do little to advance the objective, impartial and gender neutral approach to fact finding that our law now requires. Myths cloaked in artistic imagery are still myths....”³⁸

While defence counsel claimed that his purpose in using the painting was not to “promote any offensive or stereotypical notions of female complainants,”³⁹ it is highly unlikely that he has (or would) ever try this tactic in any other case involving an assertion that the complainant or primary Crown witness was lying. Moreover, as the trial judge put it, “asking the jury to disregard depictions of gender is like asking Mrs. Lincoln whether, aside from everything else, she enjoyed the play.”⁴⁰

There are other differences in how sexual assault cases are defended as compared to other violent offences. For example, defence counsel often begins with the presumption that a sexual assault complainant must be mentally unstable, incompetent or subject to suggestive or negligent therapy.⁴¹ And so we see a disproportionate number of applications in sexual assault cases to declare the primary Crown witness incompetent to testify,⁴² or for third-party records to intrude into their private affairs.⁴³

Finally, sexual assault is also arguably the only offence where defence lawyers are socialized and taught by their peers and mentors that the client’s best defence is to have a lawyer who is prepared to act like Rambo⁴⁴ and do whatever it takes to secure an acquittal, even if it means violating basic tenants of human decency and dignity and the lawyer’s own commitment to equality.⁴⁵ So what is the etiology of this defence lawyering socialization in Canada?

where the issue is not consent nor whether the act occurred, but whether, in fact, it was the accused who assaulted the complainant. In this category of sexual assault cases, the concerns with “whacking” rarely arise since the focus is not on making the complainant out to be a liar but with whether that identification is mistaken.

38 *Muvunga*, *supra* note 35 at paras 10–11. While it is true that in this case, the trial judge was able to regulate and protect the trial from the conduct of defence counsel, there is little doubt that the stunt had a negative impact on the complainant who had to sit through the motion and see herself compared to the portrayal of women in the painting.

39 *Ibid* at para 7.

40 *Ibid* at para 9.

41 See Busby, “Discriminatory Use of Personal Records”, *supra* note 5 at 161–62, 164–66; Busby, “Third Party Records Cases”, *supra* note 5 at 357, 374–77. See further, Elizabeth Sheehy, “Evidence Law and ‘Credibility Testing’ of Women: A Comment on the *E* Case” (2002) 2:2 *Queensland U Technology L & Justice J* 157 at 158, 163–64.

42 This was one of the defence tactics in the sexual assault case of *R v Osolin* (1991), 10 CR (4th) 159 at 188–91, 7 BCAC 181 [*Osolin* CA]. The issue was not raised at the Supreme Court of Canada.

43 As Busby found in her analysis of third party record cases, “[i]n theory, personal records can be sought in any criminal case. In reality, the records have been sought mainly in sexual violence cases; they are rarely of interest to criminal defence lawyers in other cases” (Busby, “Discriminatory Use of Personal Records”, *supra* note 5 at 151.

44 Rambo refers to John Rambo, the fictional character from the movie *First Blood* (Orion Pictures, 1982) who was prepared to use any means necessary to win a fight. See the discussion in Judith D Fischer, “Incivility in Lawyers’ Writing: Judicial Handling of Rambo Run Amok” (2011) 51 *Washburn LJ* 365.

45 In my own experience, students interested in becoming defence counsel often raise this issue as a reason to either leave practice or to go work for the Crown.

Fifteen years ago, Ottawa defence lawyers were instructed to “whack” the complainant at a continuing legal education seminar. These were their marching orders:

“[W]hack the complainant hard” at the preliminary inquiry....
 “Generally, if you destroy the complainant in a prosecution...you destroy the head. You cut off the head of the Crown’s case and the case is dead.... [A]nd you’ve got to attack the complainant with all you’ve got so that he or she will say [‘I’m not coming back in front of 12 good citizens to repeat this bullshit story that I’ve just told the judge.[]’]”⁴⁶

More recently, a senior member of the Toronto criminal defence bar advised young defence counsel that they must “kill the witness on cross” in sexual assault cases.⁴⁷

Another powerful moment occurred when senior members of the criminal defence bar, including Eddie Greenspan, came to the defence of Justice McClung of the Alberta Court of Appeal, who had taken the unprecedented step of writing a letter to the National Post attacking Justice L’Heureux-Dubé the day after the Supreme Court had reversed its decision in the “no means no” sexual assault case of *R v Ewanchuk*.⁴⁸ In order to understand just how extraordinary the defence of Justice McClung was by Greenspan et al, it is necessary to highlight Justice McClung’s comments for the majority of the Alberta Court of Appeal in *Ewanchuk* and the response of Justice L’Heureux-Dubé in her concurring opinion in the Supreme Court.

In upholding the trial judge’s acquittal of Ewanchuk, despite the complainant’s repeated and uncontradicted assertions of “no,” Justice McClung observed that “it must be pointed out that the complainant did not...enter his trailer in a bonnet and crinolines”⁴⁹ and “the sum of the evidence indicates that Ewanchuk’s advances to the complainant were far less criminal than hormonal. In a less litigious age going too far in the boyfriend’s car was better dealt with on site—a well-chosen expletive, a slap in the face or, if necessary, a well-directed knee.”⁵⁰ In what can only be fairly described as a reasonable response, Justice L’Heureux-Dubé went through each of the troubling comments and observed that “[t]his case has not dispelled any of the fears I expressed in *Seaboyer*...about the use of myths and stereotypes in dealing with

46 “Whack Sex Assault Complainant”, *supra* note 3. See also, “Whacking the Complainant Hard: Law and Sexual Assault” in Comack & Balfour, *supra* note 18. See also the discussion in *supra* note 32.

47 Cooper Barristers, *Garage Series* (19 April 2012), online: <<http://www.cooperbarristers.com/>>.

48 [1999] 1 SCR 330, 169 DLR (4th) 193 [*Ewanchuk* SCC].

49 See *R v Ewanchuk*, 1998 ABCA 52 at para 4, 13 CR (5th) 324 [*Ewanchuk* CA]. Justice McClung would later state in a newspaper interview that the complainant “was not lost on her way home to the nunnery” and that she had been “portrayed as a wide-eyed little girl who didn’t know what was happening to her. Well, come on now.” (Canadian Judicial Council, News Release (21 May 1999).)

50 *Ewanchuk* CA, *ibid* at para 21. He also observed that “[w]hat this accused tried to initiate hardly qualifies him for the lasting stigma of a conviction for sexual assault and Alberta’s current bullet-train removal to the penitentiary for prolonged shrift” (*ibid*).

sexual assault complainants....”⁵¹ Justice Gonthier concurred. Justice McLachlin, as she then was, also responded in her concurring opinion and noted that “I also agree with Justice L’Heureux-Dubé that stereotypical assumptions lie at the heart of what went wrong in this case.... On appeal, the idea surfaced that if a woman is not modestly dressed, she is deemed to consent. Such stereotypical assumptions...no longer...find a place in Canadian law.”⁵² Unfortunately, the Justice Major opinion which also overturned Justice McClung’s decision did not comment on his offensive comments leaving it to the two women on the Supreme Court bench (and Justice Gonthier) to do so.

In his extra-judicial letter to the National Post, Justice McClung suggested that Justice L’Heureux-Dubé’s comments “could provide a plausible explanation for the disparate (and growing number of) male suicides” in Quebec.⁵³ Justice McClung would later claim to be unaware of the fact that Justice L’Heureux-Dubé’s husband had committed suicide years earlier. In his National Post editorial, Eddie Greenspan stated that Justice L’Heureux-Dubé’s opinion represented how “[f]eminists have entrenched their ideology in the Supreme Court of Canada and have put all contrary views beyond the pale.”⁵⁴ Greenspan further stated that “Judge L’Heureux-Dubé was hell-bent on re-educating Judge McClung, bullying and coercing him into looking at everything from her point of view. *She raked him over the coals for making remarks that may, in fact, be accurate in the given case.*”⁵⁵ Meanwhile, Ewanchuk has now been declared a long-term offender after having repeatedly sexually assaulted an eight-year-old girl upon his release from prison.⁵⁶ Greenspan’s editorial no doubt sent a powerful message to defence lawyers about the need to keep up the war and to continue their “whacking.”

III. THE RELEVANT NORMATIVE FRAMEWORK

The notion of context has always been a relevant consideration in thinking about the ethical role of the lawyer. Most commentators recognize, for example, that the zealous advocate model is justified in the criminal context to protect the dignity and autonomy interests of the accused, who faces the possibility of imprisonment, significant stigma and a confrontation with the state, which, in most instances,

51 *Ewanchuk* SCC, *supra* note 48 at para 95.

52 *Ibid* at para 103.

53 Justice JW McClung, “Right of Reply”, *The National Post* (26 February 1999) A19.

54 See Edward L Greenspan, “Judges Have no Right to be Bullies”, *The National Post* (2 March 1999) A18 [emphasis added]. Alan D Gold, another prominent defence lawyer, referred to Justice L’Heureux-Dubé’s opinion as a “radical feminist judgment” and as “ridiculous” (“Defence Lawyer Criticizes ‘Radical Feminist’ Ruling”, *Toronto Star* (3 March 1999), A7). For an excellent discussion of the defence reaction, see Constance Backhouse, “The Chilly Climate for Women Judges: Reflections on the Backlash from the *Ewanchuk* case” (2003) 15:1 CJWL 167.

55 Greenspan, *ibid*.

56 This was his sixth sexual assault conviction. See *R v Ewanchuk*, 2010 ABCA 298, 261 CCC (3d) 481. Ewanchuk received a sentence of 16½ years’ imprisonment.

wields greater power and resources.⁵⁷ But what about context within criminal cases? I would argue that it, too, is relevant in assessing ethical advocacy. The relevant context here is the differential treatment of sexual assault discussed in Part II which I argue requires a rethinking of the zealous advocate model.⁵⁸

So what would ethical lawyering look like in this context? Is it even possible? I would argue that it is possible, and that there are existing legal and ethical norms grounded in equality values to guide defence lawyering in sexual assault cases. Both the Supreme Court and Parliament have spoken on the legal and constitutional values that are at stake in sexual assault cases, both from the perspective of the accused and the complainant. In *Osolin*, Justice Cory, for the majority, held that “eliciting evidence from a complainant for the purpose of encouraging inferences pertaining to consent or the credibility of rape victims which are based on groundless myths and fantasized stereotypes is improper.”⁵⁹ Similarly, in *Mills*, the Supreme Court observed that

[e]quality concerns must...inform the contextual circumstances....
[A]n appreciation of myths and stereotypes in the context of sexual violence is essential to delineate properly the boundaries of full answer and defence.... *The accused is not permitted to ‘whack the complainant’ through the use of stereotypes regarding victims of sexual assault.*⁶⁰

These principles were reaffirmed by the Supreme Court in *Shearing* in the context of cross-examination.⁶¹

In enacting section 276(3) of the *Criminal Code*, Parliament set out some of the relevant factors for judges to consider in assessing probative value and prejudicial effect of evidence of a complainant’s prior sexual history. These factors include the accused’s right to make full answer and defence, encouraging the reporting of sexual assault offences, determining whether the evidence will assist in a just determination of the case, removing discriminatory beliefs and biases from the fact-finding process and prejudice to the complainant’s dignity and right of privacy. I would argue that these considerations are also relevant in assessing the ethics of defence lawyering in sexual assault cases.

What the Supreme Court trilogy (i.e., *Osolin*, *Mills* and *Shearing*) and section 276(3) tell us is that equality considerations must be taken into account

57 See David Luban, “Are Criminal Defenders Different?” (1993) 91:7 Mich L Rev 1729.

58 See e.g. David M Tanovich, “Law’s Ambition and the Reconstruction of Role Morality in Canada” (2005) 28 Dal LJ 267 at 302–06 [Tanovich]. See also the approach of Professor Luban who has argued that even within the criminal context, there should be limits on the cross-examination of sexual assault complainants in light of the patriarchal nature of sexual assault and the importance of ensuring access to justice for complainants (David Luban, “Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann” (1990) 90:4 Colum L Rev 1004.

59 *Supra* note 4 at 670.

60 *Supra* note 7 at para 90 [emphasis added].

61 *Supra* note 4 at para 76.

when determining whether evidence or a course of action is necessary to make out full answer and defence. While these provisions address the admissibility of evidence which is a different issue, there is nonetheless a direct link between equality and ethical lawyering: the anti-discrimination norm/rule found in all Canadian codes of conduct.⁶² One such rule is 6.3.1-1 of the LSUC *RPC* 2014, which states that

[a] lawyer has a special responsibility to respect the requirements of human rights laws in Ontario and, specifically, to honour the obligation not to discriminate...with respect to professional employment of other lawyers, articulated students, or any other person or in professional dealings with...any other person.⁶³

Generally speaking, an essential part of any equality argument is evidence pointing to differential treatment based on an enumerated or analogous ground and a link between that treatment and the perpetuation of prejudice (such as discouraging sexually assaulted women from reporting the crime), discrimination, stereotypes or other related harm.⁶⁴ Some have argued that there are conceptual difficulties with equality arguments in this context.⁶⁵ For example, who is the comparator group? Is it male sexual assault complainants? Is it complainants in other violent offences? What largely gives rise to this issue is the gendered nature of the offence, especially in the context of adults. It seems perverse that there would be roadblocks to claims of discrimination because of the gendered nature of the crime.

Perhaps this issue could be resolved by treating sexual assault as an analogous ground.⁶⁶ While no one seems to have yet made this argument, Justice McLachlin, as she then was, in *M(A) v Ryan*⁶⁷ hinted at it in the context of discussing the issue of

62 See generally the discussion in Cairns Way, “Reconceptualizing Professional Responsibility”, *supra* note 19.

63 *Supra* note 16 [emphasis added]. In the Rule’s Commentary, it states that “[t]he Law Society acknowledges the diversity of the community of Ontario in which lawyers serve and expects them to respect the dignity and worth of all persons and to treat all persons equally without discrimination” (*supra* note 16). In the United States, a number of commentators have suggested ethical rules to prohibit discrimination by advocates. See e.g. Andrew E Taslitz & Sharon Styles-Anderson, “Still Officers of the Court: Why the First Amendment is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession” (1996) 9:3 *Geo J Leg Ethics* 781 at 785; Ellen Yaroshefsky, “Balancing Victim’s Rights and Vigorous Advocacy for the Defendant” (1989) *Ann Surv Am L* 135 at 153.

64 *Withler v Canada (AG)*, 2011 SCC 12 at para 30, [2011] 1 SCR 396.

65 See Don Stuart, *Charter Justice in Canadian Criminal Law*, 5th ed (Toronto: Carswell, 2010) at 528–29; Don Stuart, “Zigzags On Rights of Accused: Brittle Majorities Manipulate Weasel Words of Dialogue, Deference, and Charter Values” (2003) 20 *SCLR* (2d) 267 at 278–79.

66 It certainly appears to meet the test for analogous grounds set out in the jurisprudence. Sexual assault complainants/victims are subject to “unequal treatment based on stereotypical attributes ascribed to the group, rather than on the true worth and ability or circumstances of the individual” (*Miron v Trudel*, [1995] 2 SCR 418 at paras 147–50, 124 DLR (4th) 693). They have suffered historical disadvantage, they are a discrete and insular minority and the differential treatment is based on an immutable characteristic (i.e., sexual assault complainants/victims do not choose to be assaulted (*Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 13, 173 DLR (4th) 1).

67 [1997] 1 SCR 157, 143 DLR (4th) 1.

privilege and counselling records wherein she observed that “[a] rule of privilege which fails to protect confidential doctor/patient communications in the context of an action arising out of sexual assault perpetuates the disadvantage felt by victims of sexual assault, often women.... The victim of a sexual assault is thus placed in a disadvantaged position as compared with the victim of a different wrong.”⁶⁸

At the end of the day, however, I do not believe that we should be concerned with assessing the conduct of lawyers using a strict application of the section 15(1) equality test. The real purpose behind Rule 6.3.1-1 (and similar rules) is to ensure that the conduct of lawyers promotes substantive equality, and that lawyers are guided by equality values in the exercise of their discretion. The fundamental questions all defence counsel should ask in sexual assault cases include whether their conduct (e.g., cross-examination or submissions to the trier of fact) is grounded in stereotypes about sexual assault and gender, sexual orientation, race or disability? Will their tactics in cases of truthful complainants cause irreparable harm? Will it perpetuate disadvantage such as dissuading other complainants from seeking justice in the criminal justice system? Will it bring the administration of justice into disrepute?

In addition to the non-discrimination rule, some jurisdictions impose an ethical duty to protect the dignity of individuals which would include sexual assault complainants. For example, the Commentary to Rule 2.1 (Integrity) of the LSUC Rules provides that “[a] lawyer has special responsibilities by virtue of the privileges afforded the legal profession...including a special responsibility...to protect the dignity of individuals.”⁶⁹

Another relevant ethical standard to guide defence lawyers in sexual assault cases is a lawyer’s duty not to mislead the court. Historically, this standard has not been an impediment to the kind of aggressive lawyering that takes place in sexual assault cases because many of the tactics do not involve using false evidence (e.g. bringing applications for medical records in an effort to intimidate, using truthful evidence to impeach a complainant the lawyer knows is telling the truth or putting forward a defence grounded in stereotypes). In *Lyttle*, however, the Supreme Court infused new life into the duty not to mislead the court obligation by imposing a “good faith” obligation on lawyers before putting a suggestion to a witness in cross-examination and by extension in advancing defences and making submissions to the trier of fact. The Supreme Court held that “[t]he purpose... must be consistent with the lawyer’s role as an officer of the court: to suggest what counsel genuinely thinks possible on known facts or reasonable assumptions is in our view permissible; to assert or imply in a manner that is calculated to mislead is in our view improper and prohibited.”⁷⁰

68 *Ibid* at para 30.

69 LSUC RPC 2014, *supra* note 16, Rule 2.1-1, commentary 4.1.

70 *Supra* note 20 at para 48. A good faith obligation is also incorporated in a number of our *Rules of Professional Conduct*, *supra* note 16, including 5.1-5 and 7.2-1.

In my view, *Lyttle* has changed the ethical landscape particularly where you know that your client is guilty. A re-thinking is now required for traditional tactics to determine whether they “assert or imply in a manner that is calculated to mislead,” to quote Justices Major and Fish. Consider, for example, the classic dilemma of cross-examining a truthful witness. When a lawyer cross-examines a witness whom they know is telling the truth⁷¹ on truthful evidence such as a criminal record, the implicit suggestion he or she seeks to leave with the trier of fact is that the witness is lying. While there is much debate about whether this conduct is ethical and whether *Lyttle* applies,⁷² I would argue that, in the context of sexual assault, a strict reading of *Lyttle* is required and that such conduct is unethical. The harm caused is too great and there is no counter-veiling interest such as a concern that the accused will be wrongfully convicted.

The next Part examines what ethical limits, in addition to the one from *Lyttle* just discussed, should apply taking into account the equality and good faith ethical norms discussed above.

IV. THE ETHICAL LIMITS

1. Reliance on Stereotypes

Any conduct by a defence lawyer that promotes or exploits stereotypes in sexual assault cases violates their ethical duty to not act in a discriminatory fashion. This would include cross-examination on what the complainant was wearing, whether she immediately reported the incident, whether she spoke to a psychiatrist,⁷³ her

71 This would arise, for example, where the client admits that the witness is telling the truth or in a case where the witness is a sexual assault complainant and the client has admitted that there was no consent.

72 See Alice Woolley, *Understanding Lawyers' Ethics in Canada* (Markham: LexisNexis, 2011) at 308 [Woolley] who argues that such cross-examination is ethical. See also Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (Toronto: Carswell, 2011) at 7-9 to 7-15. This is generally the position accepted in the United States. See *United States v Wade*, 388 US 218 at 256-58 (1967). I have taken the opposite approach previously (Tanovich, *supra* note 58 at 294-96). David Layton takes a compromise position in “The Criminal Defence Lawyer’s Role” (2004) 27 Dal LJ 379 at 397-99 in the context of sexual assault. See also the discussion in Jeremy Tatum, “Navigating the Fine Line of Criminal Advocacy: Using Truthful Evidence to Discredit Truthful Testimony” (2012) 2:2 Western J Leg Studies 2; Proulx & Layton, *supra* note 21 at 59-65. For a debate of this issue in the United States, see Harry Subin, “The Criminal Lawyer’s ‘Different Mission’: Reflections on the ‘Right’ to Present a False Case” (1987) 1 Geo J Leg Ethics 125; John Mitchell, “Reasonable Doubts are Where You Find Them: A Response to Professor Subin’s Position on the Criminal Lawyer’s ‘Different Mission’” (1987) 1 Geo J Leg Ethics 339; Harry Subin, “Is This Lie Necessary? Further Reflections on the Right to Present a False Defense” (1988) 1 Geo J Leg Ethics 689.

73 As the Supreme Court observed in *Mills*, *supra* note 7 at para 119:
The myths that a woman’s testimony is unreliable unless she made a complaint shortly after the event (recent complaint), or if she has had previous sexual relations, are but two of the more notorious examples of the speculation that in the past has passed for truth in this difficult area of human behaviour and the law. The notion that consultation with a psychiatrist is, by itself, an indication of untrustworthiness is a more recent, but equally invidious, example of such a myth.

socio-economic status, drug or alcohol use,⁷⁴ lifestyle, or marital status. This is not to suggest that all cross-examination on these factors is improper. The question is whether the implicit purpose of the cross-examination is to suggest that the complainant “is the kind of person to consent” or “the kind of person to lie about consent.” These are some of the classic rape myths. For example, in *R v Rhodes*,⁷⁵ the complainant testified, presumably on cross-examination, that she was, outside a bar, “made up,” dressed in a tube top with no bra on and high heels. This evidence ultimately led the trial judge on sentencing to conclude that there were “‘inviting’ circumstances,” and that “sex was in the air.”⁷⁶ In many respects, this ethical standard that aims to eradicate discriminatory lawyering is co-extensive with the rules of evidence. Returning back to *Osolin*, Justice Cory held that “[c]ross-examination for the purposes of showing consent or impugning credibility which relies upon ‘rape myths’ will always be more prejudicial than probative. Such evidence can fulfill no legitimate purpose and would therefore be inadmissible to go to consent or credibility.”⁷⁷ Another example of discriminatory lawyering would be making submissions about the existence of continuous consent simply on the basis that the parties are married.⁷⁸

2. Determining When You Know Your Client is Guilty and the Ethical Limits That Follow

In Canada, the rules of professional responsibility impose limits on the conduct of defence lawyers where the client admits guilt and the lawyer believes the admission to be true and voluntary.⁷⁹ But what about where the evidence is overwhelming and the client maintains their innocence? In their book, *Ethics and Criminal Law*,⁸⁰ Michel Proulx and David Layton propose that a lawyer knows their client is guilty where “counsel reaches an *irresistible conclusion* that the client is culpable on the criminal standard, by which we mean a conclusion that not even a zealous but

74 Randall refers to an Australian study that found that “the credibility testing of the victims was compounded by cultural and language problems for Aboriginal women, who were subjected to a significantly greater and more intense amount of questioning regarding their drinking, drug use, lying and the levels of casual sexual relations in their communities” (Randall, “Sexual Assault Law”, *supra* note 5 at 410–11).

75 [2011] MJ No 67 (QL) (QB) [*Rhodes* QB]. See the discussion of the case in Craig, “Defence Counsel in Sexual Assault Cases”, *supra* note 6 at 464–66.

76 *Rhodes* QB, *ibid* at paras 509, 511. Rhodes was sentenced to a conditional sentence. The Crown appealed the sentence. Rhodes appealed his conviction. The Manitoba Court of Appeal set aside the conviction on the grounds that the trial judge had erred in applying the reasonable doubt rules from *R v W(D)*, [1991] 1 SCR 742, 122 NR 277. See *R v Rhodes*, 2011 MBCA 98, 281 CCC (3d) 29 [*Rhodes* CA].

77 *Supra* note 4 at 671.

78 See e.g. *R v CMM*, 2002 NSPC 13, 204 NSR (2d) 247.

79 See e.g. LSUC RPC 2014, *supra* note 16, Rule 5.1-1 Commentary. See generally Wooley, *supra* note 72 at 303.

80 *Supra* note 21.

honest partisan could deny.”⁸¹ As they observe, “the justification for prohibiting a lawyer from knowingly misleading the court should apply whether the knowledge of falsity originates from the client’s confession or from other reliable sources of information.”⁸²

Leaving aside the question of whether this extension of when you know your client is guilty should apply to *all* offences, it should apply in sexual assault cases to give effect to equality. The challenge is determining when that high standard is met. I would argue that there is an “irresistible knowledge of guilt” in sexual assault cases in the following circumstances: (i) where the evidence leaves no room for doubt (e.g. where the client’s version is improbable or borders on the absurd and there is corroboration of the complainant’s evidence); (ii) where the accused provides a *voluntary* statement to the police that is strikingly similar to the evidence of the complainant;⁸³ or (iii) where the defence of consent or mistaken belief in consent is grounded in stereotypical assumptions or inconsistent with the statutory regime in the *Criminal Code*. In the first two examples, the threshold is a high one that is consistent with the reasonable doubt standard the Crown has to meet. The third example is less about assessing the sufficiency of the Crown’s case and more about recognizing that the client’s assertion amounts to a mistake of law which affords no defence and which should impose limitations on the conduct of the defence.

Having set out a framework for determining when defence lawyers should be deemed to know when their client is guilty, what ethical limits, in addition to those set out earlier, follow? As with all criminal cases, I would argue that defence counsel can vigorously challenge the collection and admissibility of the evidence. What defence lawyers should not be ethically permitted to do is: (i) call the client or any other witness in support of a defence of innocence; (ii) run a mistaken belief in consent defence; (iii) cross-examine the complainant in a manner to make her look like a liar (e.g. by cross-examining her using truthful evidence);⁸⁴ or (iv) bring an application to introduce evidence of prior sexual history under section 276(2) of the *Criminal Code* or to seek production of therapeutic records under section 278.3(1) of the *Criminal Code*.

81 *Ibid* at 33 [emphasis in original]. The “irresistible conclusion” standard was referred to by the Supreme Court in *R v Youvarajah*, 2013 SCC 41 at para 61, [2013] 2 SCR 720. Woolley has endorsed the approach observing that “[t]his interpretation of when the rule is triggered is reasonable so long as counsel emphasize the high standard before determining that the client is guilty, and so long as counsel recognize that it is not the obligation of counsel to enter into such judgments unnecessarily” (Woolley, *supra* note 72 at 304).

82 Proulx & Layton, *supra* note 21 at 34.

83 An example of this can be found in *R v FJU*, [1995] 3 SCR 764, 128 DLR (4th) 121, where the complainant and accused were both interviewed on the same night and gave “strikingly similar” accounts of the sexual abuse including that they had had sex the previous night. At trial, both the complainant and accused testified and recanted their police statements. The trial judge upheld the voluntariness and constitutionality of the accused’s statement.

84 See notes 70 to 71.

Does limiting the ability of defence lawyers to perpetuate stereotypes, run specious defences and harm truthful sexual assault complainants through aggressive cross-examination and other tactics undermine their role? Does it compromise the “undivided loyalty,” to quote from Justice Binnie in *R v Neil*,⁸⁵ that accused are constitutionally entitled to? These questions are answered by the well-established constitutional and ethical limits on criminal advocacy. As previously discussed, with respect to the constitutional limits, the Supreme Court has held that equality interests can limit the right to make full answer and defence. As Justice Binnie put it in *Shearing*, “[t]his does not turn persons accused of sexual abuse into second-class litigants. It simply means that the defence has to work with facts rather than rely on innuendoes and wishful assumptions.”⁸⁶

With respect to ethical limits, lawyers must have a good faith foundation before putting suggestions to a witness and by extension to the trier of fact.⁸⁷ They cannot mislead the court or fail to refer to binding precedent. They cannot put a client on the stand when they know he or she will lie. No one suggests that these well-accepted limits on defence advocacy are unfair or threaten the integrity of the system or that they will result in wrongful convictions. Arguably, the harm caused to complainants and society by discriminatory advocacy in sexual assault cases is as great, if not more, than the harm caused by these prohibitions. Even the most sacred of all duties—the duty of confidentiality—is not absolute and in many jurisdictions, a lawyer has the discretion to breach a confidence to prevent serious harm including psychological harm.

V. THREE CASE STUDIES

This Part of the article examines the ethical standards proposed earlier in the context of three leading Supreme Court evidence cases. The issues raised include: (i) Should counsel have been deemed to know that their client was guilty?; (ii) Was the raising of speculative and fanciful defences unethical and discriminatory?; and (iii) Was it ethical to call their clients?

1. *R v Khan*

Khan is one of the most famous Supreme Court evidence decisions. It signalled a new era of admissibility for hearsay evidence. But there is so much more to the case for anyone interested in legal ethics. In light of the uncontested facts, the case raises a number of important ethical questions. For example, should his lawyer have been deemed to know that Dr. Khan was guilty in light of the overwhelming evidence? Was it ethical for Dr. Khan’s lawyer to put a speculative and implausible

85 2002 SCC 70 at para 12, [2002] 3 SCR 631.

86 *Supra* note 4 at para 122.

87 See *Lyttle*, *supra* note 20.

theory to the trial judge at his first trial as to the origins of the semen stain on the complainant’s blouse? In order to answer these questions, it is necessary to consider in detail the facts of the case.

The case involved T, the complainant, her mother (P.O.) and the accused, Dr. Abdullah Khan. On March 26, 1985, T’s mother made an appointment with Dr. Khan who had a family practice on the Danforth in Toronto. They had not seen him in over two years as they were no longer living in the city. P.O. was scheduled to have a general examination, and her four-and-a-half-year-old daughter T was going to receive her final immunization booster before starting school in the fall. Before the appointment, T changed into a freshly laundered grey jogging suit.⁸⁸ Following her booster shot, T was alone with Dr. Khan for approximately ten minutes while her mother changed for her examination.⁸⁹ During this time, P.O. heard a tissue being pulled from a box. While P.O. was being examined by Dr. Khan, she heard a “gagging” sound from his office where T was alone.⁹⁰ She became concerned but Dr. Khan assured her everything was fine.⁹¹ The examination took approximately 15 minutes.

At the end of their visit, P.O. noticed T picking at a “wet spot” on the left sleeve of her jogging outfit.⁹² Approximately 10 to 15 minutes after leaving the office, the following conversation took place:

[P.]O.: So you were talking to Dr. Khan, were you? What did he say?

T: He asked me if I wanted a candy. I said yes. And do you know what?

[P.]O.: What?

T: He said “open your mouth”. And do you know what? He put his birdie in my mouth, shook it and peed in my mouth.

[P.]O.: Are you sure?

T: Yes.

[P.]O.: You are not lying to me, are you?

T: No. He put his birdie in my mouth. And he never did give me my candy.⁹³

88 These facts come from *R v Khan* (1988), 42 CCC (3d) 197 at 200–01, 64 CR (3d) 281 (Ont CA) [*Khan CA*].

89 The time frame was described as “five to seven” in the Supreme Court decision and “about ten minutes” in the Court of Appeal decision in the disciplinary proceedings, (*Khan SCC, supra* note 22 at 533; *Khan v College of Physicians and Surgeons of Ontario* (1992), 9 OR (3d) 641 at 646, 94 DLR (4th) 193 [*Khan v College of Physicians*]).

90 *Khan v College of Physicians, ibid* at 646.

91 *Ibid.*

92 *Khan SCC, supra* note 22 at 534.

93 *Ibid.*

P.O. testified that the word “birdie” meant “penis” to T.⁹⁴ T repeated this statement to various individuals. The next day the police interviewed Dr. Khan. He denied committing any sexual assault. He agreed to provide saliva and blood samples. A forensic biologist testified that the spot on the sleeve had been produced by a semen and saliva deposit that probably mixed together before being deposited. The tests to determine which blood group they came from were inconclusive.⁹⁵

At Khan’s first trial, the trial judge held that T was incompetent to give unsworn evidence and therefore could not testify.⁹⁶ He further held that her hearsay statement to her mother did not fall under the spontaneous declaration exception. Dr. Khan did not testify or call any evidence. In his closing submissions, his defence lawyer argued that Dr. Khan sometimes kept sperm samples in his office and that T. could have come into contact with the sperm and then tried to wipe it off with saliva from her mouth.⁹⁷ The trial judge concluded that this theory was not “fanciful” or “unreasonable.”⁹⁸ Dr. Khan was acquitted.

The Supreme Court ordered a new trial, concluding that T’s statement to her mother was reliable enough to be admissible under a principled approach to the hearsay rule.⁹⁹ Dr. Khan was convicted at his second trial. He fled the jurisdiction before sentencing.¹⁰⁰ He was eventually sentenced to four years imprisonment.¹⁰¹ During the criminal appellate process, Dr. Khan was found guilty of professional misconduct by the College of Physicians and Surgeons. Dr. Khan testified at his disciplinary hearing and denied sexually assaulting T.¹⁰²

In my view, there was an irresistible inference of guilt from this evidence. The original defence theory of accidental contact was incredible and without any good faith or factual foundation, especially with the explanation given by T and the

94 *Ibid.*

95 Gary Oakes, “Doctor Said He’d Flee Country Officer Tells Sex Assault Trial”, *Toronto Star* (24 May 1986) A13.

96 Section 16 of the *Canada Evidence Act*, RSC 1985, c C-5 [CEA] has since been amended in large part because of the precedent in this case that a child had to demonstrate an understanding of the nature of the obligation to tell the truth. Under section 16.1, witnesses under the age of 14 are no longer presumed incompetent and can testify on promising to tell the truth. The only threshold issue today is whether the witness can communicate the evidence. No questions can be asked the witness about promises to tell the truth. See the discussion of the provision in *R v DAI*, 2012 SCC 5 at paras 38–39, [2012] 1 SCR 149 [DAI]. T would have been able to testify under this provision. As noted by the Court of Appeal, T “answered these questions intelligently and responsively” (*Khan CA*, *supra* note 88 at 202).

97 See Wendy Darroch, “MD Acquitted of Sex Assault on 3-year-old”, *Toronto Star* (7 June 1986) A3 [Darroch]. See also Alfred Holden, “Sex Trial Judge Ignored Evidence in MD’s Acquittal, Court Told”, *Toronto Star* (4 June 1987) A13.

98 Darroch, *supra* note 97.

99 *Khan SCC supra* note 22.

100 Gary Oakes, “Sex-assault Doctor Flees to US”, *Toronto Star* (2 May 1991) A6.

101 Gary Oakes, “Runaway Doctor Gets 4 Years for Sex Assault”, *Toronto Star* (6 June 1991) A6.

102 At the disciplinary hearing, he did not advance the accidental contact theory, but rather a “phantom fellatio theory” as described by the Divisional Court (*Khan v College of Physicians and Surgeons of Ontario* (1990), 76 DLR (4th) 179, [1990] OJ No 2310).

absence of any defence evidence.¹⁰³ As the Ontario Court of Appeal observed in relation to Dr. Khan’s disciplinary hearing appeal, “[t]he uncontested circumstantial and forensic evidence all but established that [T]’s shirt was stained with semen during the short period she was in Dr. Khan’s office without her mother. No innocent explanation for the stain was evident from the evidence.”¹⁰⁴

Given that Khan’s lawyer should be deemed to have known that his client was guilty (if he did not, in fact, know), did his conduct raise ethical red flags? It was certainly ethical to challenge the competency of T and the admissibility of her hearsay statement to her mother. Indeed, as a result of that challenge, the Supreme Court was given the opportunity to set out a principled approach to hearsay evidence which has facilitated the prosecution of child sexual assault cases. Given the overwhelming evidence of guilt and lack of any credible innocent explanation, however, I would argue that, using the framework developed in this paper, there were serious ethical questions raised by his leaving the accidental contact theory with the trier of fact (even if the theory had come from the client). Similarly, it would have been problematic if the complainant had been permitted to testify and the accidental contact theory put to her in cross-examination. I also think that imputed knowledge should have barred Dr. Khan from testifying at his disciplinary hearing especially where the standard of proof is balance of probabilities and not proof beyond a reasonable doubt. Indeed, the liberty interest at stake in a criminal case was absent as it was a professional disciplinary hearing.

2. *R v Osolin*

As has been referred to throughout, *Osolin* is an important evidence case because it was the first of the Supreme Court trilogy to recognize the need to *factor in* the equality and privacy rights of sexual assault complainants when assessing an accused’s right to make full answer and defence through cross-examination or evidence admissibility/production. The Supreme Court cautioned against aggressive defence tactics “for the purpose of encouraging inferences pertaining to consent or the credibility of rape victims which are based on groundless myths and fantasized stereotypes.”¹⁰⁵ There were two legal issues before the Supreme Court. The first concerned *Osolin*’s right to cross-examine the complainant on a single July 9th entry in her psychiatric records, which indicated that, one day during therapy, the complainant expressed

103 It is reminiscent of the submissions of Officer Justin Volpe’s lawyer in the Abner Louima case. Louima, who was Haitian, alleged that Volpe shoved a broom handle up his rectum causing a torn colon, lacerated bladder and ruptured intestine. Volpe’s lawyer argued in his opening address that the injuries were from a consensual act and that “a trace of Mr. Louima’s feces found in the police station bathroom ‘contains DNA of another male’” (Joseph P Fried, “Graphic Details as Trial Opens in Louima Case”, *The New York Times* (5 May 1999) A1). Volpe was convicted and sentenced to 30 years. For an extreme defence of the conduct of Volpe’s lawyer, see Smith, *supra* note 34.

104 *Khan v College of Physicians*, *supra* note 89 at 676.

105 *Osolin* SCC, *supra* note 4 at 670.

concern “that her attitude and behaviour may have influenced the man to some extent,” and that she was “having second thoughts about the entire case.”¹⁰⁶ The second issue was the nature of the “air of reality” test and the constitutionality of the mistaken belief in consent defence in section 265(4) of the *Criminal Code*.

While the Court was unanimous on the constitutionality of section 265(4),¹⁰⁷ there was a five-four split on the records issue, with the majority ordering a new trial because of the trial judge’s refusal to permit cross-examination on the July 9th notation. Unfortunately, the majority did not appear to heed their own warnings about allowing stereotypes to influence decision-making. As Justice L’Heureux-Dubé put it in her dissenting opinion:

The complainant’s reflections on how the situation might have been avoided, even assuming they are correct, can have no probative value as to whether or not there was consent to the assault or mistaken belief in consent.... It is well-known that victims of sexual assault in particular often feel responsible for not having done enough to prevent the attack.¹⁰⁸

Turning to the issue of the conduct of the defence, it is once again necessary to set out the facts in some detail. Surprisingly, this part of the case seems to have received little attention.¹⁰⁹ It is hard to understand how a case involving such gratuitous violence and humiliation, much of it admitted by the accused and a “whack the complainant” style of defence advocacy could have led to a debate in the Supreme Court about the impact of the inability to cross-examine the complainant on a brief notation in her medical records made many months after the ordeal and about the availability of the defence of mistaken belief.

106 *Ibid* at 661.

107 The Supreme Court was split on the issue of whether there could ever be an “air of reality” to mistaken belief in cases of diametrically opposed versions of what happened with the majority concluding that there could be.

108 *Supra* note 4 at 635. Indeed as Stephen Coughlan notes in “Sexual Assault Complainants and Psychiatric Records: Keeping Exceptions to Confidentiality Truly Exceptional” (1994) 2 Health LJ 135 at 136, the majority set the bar extremely low in ordering a new trial on this ground. As he puts it, “if the facts of this case met the test for admission, then psychiatric records will virtually always be admitted.” He further observes that:

It is only in the context of sexual assault that the complainant’s self-doubt is seen as relevant to the issue of the accused person’s guilt. To that end, seeing the evidence as potentially relevant is motivated by the very myths about sexual assault that rape-shield legislation was specifically enacted to combat. That is, a fair trial will not normally be threatened if evidence of this sort, which in other cases would not be seen as relevant, is excluded (at 140).

109 But see Elizabeth Sheehy, “Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Women” in Sheehy, *supra* note 25, 483 (noting that “*R v Osolin* also showed Canadian women just how much male violence is immunized by the ‘honest mistake’ doctrine” at 492). See also Annalise Acorn, *The Defence of Mistake of Fact and the Proposed Recodification of the General Part of the Criminal Code: A Feminist Critique and Proposals for Reform* (Edmonton: The Alberta Women’s and Senior’s Secretariat, 1994) at 21–22.

As noted, much of the case’s narrative was not in dispute at trial.¹¹⁰ Stephen Osolin and Russell McCallum were charged with sexual assault and kidnapping of L.B., who was 17 years old. Osolin and McCallum did not know the complainant. They had been told at a pub that she was “easy.” They drove to a trailer and barged into a bedroom where the complainant and another man were sleeping. Their intention was to have sex with her. The man was taken and driven some distance from the trailer. According to the complainant, McCallum tried to rape her, but was unable as she struggled with him. Osolin entered the room and carried her out of the trailer to their car. She was repeatedly hit in the head and face. The complainant only had her underwear on. Osolin admitted that he “overrode” her complaint about being forced to leave the trailer without any clothes. The complainant was then forced into a car where Osolin ripped off her underwear. A ripped pair of underwear was found by the police near where the car had been parked.

McCallum drove 40 miles to a remote cabin. During the drive, Osolin touched the complainant’s breasts and tried to pry her legs apart. The complainant testified that she did not consent and that when she resisted, Osolin hit her on the side of her face. The car stopped and Osolin pulled her out of the car and then through a fence. McCallum left. Once in the cabin, Osolin tied her spread eagle to the bed frame with electrical cords. She testified that he told her that he could kill her “so easily.” Osolin went to the bathroom and returned with some soap and a razor. He started shaving her pubic hair. She told him to stop. After she was able to hit him with her knee, he tightened the cords. He then raped her. The police found the complainant at 3:30 in the morning at the side of the road. She was screaming and crying. She vomited at the police station. The medical evidence confirmed that she had bruises on her wrists and on her head. There was also bruising and discolouration to her pubic area. Osolin acknowledged in his evidence that the complainant protested over the course of the night. His general indifference to what was happening was expressed in the following exchange about his tying up of the complainant:

- Q. And the reason you didn’t ask, sir, was because you weren’t interested in whether or not she was willing to consent to that activity, were you?
- A. No.¹¹¹

The defence theory was that the complainant had consented to the sexual abduction and acts and had laid a false complaint to avoid confrontation with her parents. The defence lawyer ignored the facts and instead engaged in aggressive tactics in an effort to humiliate and embarrass the complainant and to exploit stereotypes about sexual assault complainants and mental disability. First, counsel applied

110 All of the facts summarized below come from *Osolin SCC*, *supra* note 4; *Osolin CA*, *supra* note 42.

111 *Osolin CA*, *supra* note 42 at 173.

to cross-examine her on the 100 pages of psychiatric records in their possession to show “what kind of person the complainant is.”¹¹² As Justice L’Heureux-Dubé correctly pointed out, “it is clear that the appellant intended to use these records to establish the very sort of prejudice to the complainant which informs rape myths.”¹¹³ Second, they relied on evidence of L.B.’s prior sexual encounters that day with two other men.¹¹⁴ That evidence should never have been admitted. It had no probative value on the issue of consent and would have simply invited the jurors to use the twin myths (that is, that a sexually active woman is more likely to have consented and is not believable when she says that she did not consent) in assessing the complainant’s evidence. And finally, the defence attempted to introduce expert evidence that the complainant’s evidence might not be reliable because of her psychiatric history of depression and anxiety.¹¹⁵

Applying the framework from this article, I would argue that defence counsel should have been ethically prohibited from using the complainant’s medical records in the manner proposed, to rely on the evidence of her prior sexual history regardless of who introduced it and to attempt to call expert evidence to challenge the reliability of her evidence. This was advocacy grounded in stereotypes. It violated an advocate’s ethical obligation to act in good faith and to avoid discriminatory lawyering.

In addition, given the shocking nature of the evidence, Osolin’s own admissions and the significant corroborative evidence, I think that there were serious ethical issues raised by calling him in these circumstances and in advancing a mistaken belief in consent defence. Defence counsel should be deemed in a case like this to know that their client is guilty thereby triggering the traditional restrictions on putting forward a false defence including not calling your client to testify. Osolin may not have liked it but, arguably, the only ethical conduct for his lawyer was to persuade him to plead guilty or withdraw from the case. The fact that a majority of the Supreme Court ordered a new trial because of the inability of Osolin to cross-examine the complainant on the July 9th notation does not alter this analysis. With respect, that decision was simply wrong and was grounded in stereotypical assumptions, as was the conduct of defence counsel in the case. It provides cogent evidence of the problems with relying on judicial regulation to control the ethical conduct of counsel in sexual assault cases.

112 *Osolin* SCC, *supra* note 4 at 673. During the cross-examination of the complainant’s psychiatrist on the records *voir dire*, the defence asked questions about the complainant’s history of drug and alcohol use, difficulties in social relations and her prior sexual history (*ibid* at 634).

113 *Ibid* at 634.

114 It is unclear from the reasons whether that evidence was elicited by the Crown or the defence. Osolin was asked, however, during his testimony about whether he was familiar with the complainant’s prior sexual history that day (*Osolin* CA, *supra* note 42 at 163).

115 The defence wanted to call Dr. James Tyhurst. They also wanted him to testify about Osolin’s sexual predilections. The trial judge excluded Tyhurst’s evidence and that decision was upheld by the Court of Appeal (*ibid* at 188–91). Dr. Tyhurst was later himself convicted of sexual assault (*JRIG v Tyhurst*, 2003 BCCA 224, 226 DLR (4th) 447).

3. *R v Parrott*

Parrott is another significant Supreme Court evidence case that addressed the admissibility of expert evidence on a section 16 of the *CEA* competency hearing and the meaning of necessity under the principled approach to hearsay. It is one of the few Supreme Court decisions that has considered the issue of intellectual disabilities and evidence law.¹¹⁶ Again in order to assess the ethical issues raised in the case, it is necessary to consider in detail the facts of the case.¹¹⁷

Walter Parrott was charged with kidnapping and sexual assault causing bodily harm in relation to a complainant with a significant intellectual disability. She resided in a hospital for the mentally ill. According to the evidence, Parrott paid another female resident (P.C.) \$20 to bring the complainant to his car parked at the hospital. The police were called by a nursing assistant who witnessed the female resident “grip” the complainant and put her in Parrott’s car. The complainant was found seven hours later in a remote coastal area around 2:35 in the morning. Her shorts were on backwards; her underpants were hanging over the top of her shorts. Her clothes were soiled and wet. She had bruises on her left cheek and hand. There were scratches on her arms and legs. The complainant told the police that the “bad man” in the car caused her injuries and that he had “smacked” and scratched her in his car. The complainant was held to be incompetent under section 16 of the *CEA* and her hearsay statement to the police was admitted.

Parrott testified at trial. He gave the following evidence as to what he was doing in the area of the hospital:

“Why I was there—I was—I was up on Cookstown Road painting a car. That’s all I was doing and while I was painting the car, they were—Four guys came down from up on the hill and they were there and they had some dope. They wanted me to do some dope with them so I wouldn’t do it. I never done any dope in my life. So they wanted me, kept after me to do it and I said, no, I wouldn’t. So three or four of them caught ahold to me and they put a needle there in my arm and what they had in the needle—I don’t know what they had in the needle. I’m not familiar with drugs and so I feel funny and everything after that and then I went in to the hospital after that and I went down to the canteen. So I asked [P.C.] if she would ask the other girl to come with me for a drive, that was all, because [P.C.] used to come with me all the time, numbers of times...”¹¹⁸

116 See *DAI*, *supra* note 96.

117 See *Parrott SCC*, *supra* note 24; *R v Parrott*, 175 Nfld & PEIR 89, 573 APR 89 (NLCA) [*Parrott CA*].

118 *Parrott CA*, *ibid* at para 180 [brackets in original].

Parrott further testified that he gave P.C. the money out of friendship to help her buy some dye for her hair. He went to the remote area with the complainant because he was not feeling well as a result of “that needle.” They spent the time eating chips and listening to the radio. Parrott testified that the complainant’s injuries were caused when she went to the bathroom and fell. The expert evidence called by the Crown disputed that the complainant received her injuries in this fashion. There was also evidence relied on by the defence that the complainant had “a habit of inflicting scratch marks on herself.”¹¹⁹ Parrott also testified to a criminal record including break and entry, breach of recognizance and *rape*.¹²⁰

The trial judge convicted Parrott of kidnapping and of the lesser-included offence of assault causing bodily harm. Unfortunately, no meaningful reasons were provided as to why the trial judge had a reasonable doubt that what occurred was a sexual assault. On appeal, a majority of the Newfoundland and Labrador Court of Appeal held that the trial judge had erred in admitting the complainant’s hearsay statement to the police without first assessing whether she was, in fact, incompetent to testify under section 16 of the *CEA*. A new trial was ordered only on the assault causing bodily harm charge as the Court of Appeal was satisfied that the evidence of kidnapping was overwhelming even without the complainant’s statement. A majority of the Supreme Court dismissed the Crown appeal.

In my opinion, the circumstantial evidence in this case was overwhelming. Parrott’s evidence bordered on the absurd and was pure fantasy, in particular the part of having been injected with drugs by a group of men just before he took the complainant away from her residence. As in *Khan*, it was certainly appropriate to challenge the competence of the complainant and the admissibility of the hearsay evidence. There was, however, clearly an irresistible inference of guilt; and again, using the framework developed, I would argue that there is a serious question raised about the ethics of calling the client in these circumstances.¹²¹

Before concluding, I want to address a likely criticism of my observations about imputed knowledge based, in part, on the implausibility of the defence theory and the ethics of allowing a client like *Khan*, *Osolin* and *Parrott* to testify, or of challenging the complainant or engaging in other defence tactics in an effort to secure an acquittal in these cases. That criticism is that the approach set out requires a defence lawyer to become their client’s judge rather than their defender.

119 *Ibid* at para 95.

120 *Ibid* at para 182.

121 Equally troubling was the submission on appeal that the verdict was unreasonable. According to the submission of appellate counsel, “the appellant gave evidence in his own behalf denying any intention to remove I.R. from the hospital against her will, denying any assault and offering innocent explanations for I.R.’s scratches and injuries, which he says are reasonable and consistent with the facts of the case” (*Parrott CA, ibid* at para 179).

There is no question that it is not the role of defence counsel to judge their client’s case.¹²² This was made clear by the Québec Court of Appeal in *R v Delisle*.¹²³ Justice Proulx, for the Québec Court of Appeal, held “[t]he lawyer’s explanation that he did not believe his client’s story is...totally unacceptable. *The lawyer cannot set himself up as the judge of the client.*”¹²⁴ In *Delisle*, the accused was charged with assault causing bodily harm. The victim had been attacked by a group of individuals and Delisle was identified as an assailant. Delisle was represented by a lawyer who had only been practicing for a year. Delisle maintained his innocence and identified Kevin Carl as the person who had committed the acts attributed to him. The lawyer did not believe his client and failed to interview Carl and refused to permit his client to testify. As Justice Proulx put it, “because of his lack of experience, [he] relied on his impressions rather than undertaking the steps required for effective representation.”¹²⁵ After Delisle was convicted, Carl approached the lawyer and confessed. The Québec Court of Appeal set aside the conviction on the basis of the “flagrant incompetence” of trial counsel.

On its facts, *Delisle* is much different from the cases chronicled in this Part. Nor does its context give rise to the same concerns identified. First, it was an identification evidence case, a true “who did it?” It was not about consent or mistaken belief in consent (*Osolin*) or accident (*Khan* and *Parrott*). There is no question that, given our concerns about the unreliability of identification evidence and the dangers that arise when interpreting circumstantial evidence in support of identification, it should be a rare case where defence counsel are deemed to know that their client is guilty or to be restrained in their advocacy because the accused’s version appears implausible or unbelievable. Second, unlike in *Delisle*, the objective evidence in *Khan*, *Osolin* and *Parrott* was overwhelming.

Third, there was nothing implausible about Delisle’s position that someone else was the culprit and there was no concern that a “someone else did it” defence would humiliate or exploit the vulnerabilities of the complainant. Moreover, in other contexts (i.e. those not involving violence against women), it is likely that we can trust the trier of fact to see through an implausible defence theory where the evidence is overwhelming and convict. The same is not true in sexual assault cases where the trier often interprets the evidence through a stereotypical lens and with an overly suspicious mind.

And finally, in other contexts, defence counsel’s concern about their reputation or integrity often deters them from bringing forward spurious

122 On this point, it is important to recall the words of the late great G Arthur Martin who once observed that “I have heard many unlikely stories in my time from defendants; some surprisingly, turned out to be true. Some cases look impossible; intensive preparation indicates that they are not really so” (G Arthur Martin, “The Role and Responsibility of the Defence Advocate” (1970) 12 Crim LQ 376 at 387, cited in Proulx & Layton, *supra* note 21 at 29).

123 [1999] RJQ 129, 133 CCC (3d) 541 (CA) [*Delisle* cited to CCC].

124 *Ibid* at 555 [emphasis in original].

125 *Ibid* at 554.

theories.¹²⁶ Indeed, it is well-established that part of the role of defence counsel is to exercise independent judgment and not simply serve as the mouthpiece of the client. In *R v Samra*,¹²⁷ Justice Rosenberg observed the following:

There is an erroneous premise underlying the appellant's submissions in this case—that defence counsel is but a mouthpiece for his client. His argument must be that counsel is bound to make submissions no matter how foolish or ill-advised or contrary to established legal principle and doctrine, provided that is what the client desires.¹²⁸

In sexual assault cases, however, it would seem that defence counsel appear all too willing to do their client's bidding knowing that they will likely get an ethical pass from trial judges, their colleagues and the system because of an inherent suspicion of sexual assault. And so, the safeguards in the system that might ensure a “no harm no foul” consequence of unbridled defence advocacy in other cases are not present in sexual assault cases.

VI. CONCLUSION

Although the legal profession has recently committed itself to enhancing professionalism and ethical lawyering, much of the focus has been on civility. It is time for the profession and the criminal defence bar to shift its gaze from civility to the discriminatory lawyering that is taking place in sexual assault cases. Defence lawyers have largely escaped scrutiny despite the fact that they have significantly contributed to the systemic problems with our treatment of sexual assault and those victimized by it. In no other context would the profession countenance lawyers publicly stating that their job is to “whack” the complainant. This article has attempted to lay out a framework for ethical defence lawyering in sexual assault cases that is grounded in context, equality and “good faith.”

126 See Proulx & Layton, *supra* note 21 at 134.

127 (1998), 41 OR (3d) 434, 129 CCC (3d) 144 (CA).

128 *Ibid* at para 30. See also *R v Felderhof*, 68 OR (3d) 481, 235 DLR (4th) 131 (CA) where Justice Rosenberg qualified the “fearless” obligation of defence counsel, discussed *supra* note 19, as defence counsel’s “obligation to his or her client to fearlessly raise every *legitimate* issue...” [emphasis added]. He further held that:

As I have said, defence counsel’s obligation to his or her client to fearlessly raise every legitimate issue is not incompatible with these duties to the court, to fellow counsel and to the profession. See Arthur Maloney, Q.C., “The Role of the Independent Bar”, 1979 Law Society of Upper Canada Special Lectures 49 at p. 63, and G. Arthur Martin, Q.C., “The Role and Responsibility of the Defence Advocate” (1970), 12 C.L.Q. 376 at p. 385.

Mr. Maloney and Mr. Martin both referred to the well-known passage from *Rondel v Worsley*, [1967] 3 All E.R. 993, [1969] 1 A.C. 191 (H.L.), at pp. 227-28 where Lord Reid said, in part that, “[c]ounsel must not mislead the court, [and] he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession.”

In thinking about their ethical obligations in defending accused charged with sexual assault, this article has argued that the fundamental question all defence counsel should ask is whether their conduct (e.g. cross-examination or submissions to the trier of fact) is grounded in stereotypes about sexual assault. If it is, it violates their ethical obligation to not discriminate. The duty to not discriminate, to not mislead the court, to act in good faith and to protect complainants from irreparable harm also requires a re-thinking of the issue of when you know your client is guilty. Leaving aside the question of whether any extension of the traditional admission approach should apply to all offences, this article has argued that an equality-oriented approach favours a broader approach—in sexual assault cases. It has further argued that there is an “irresistible knowledge of guilt” in sexual assault cases where, for example, the complainant’s evidence is corroborated and the defence theory improbable, bordering on the absurd or grounded in stereotypes about consent.

Finally, having set out a framework for determining when defence lawyers should be deemed to know when their client is guilty, I have argued that the following ethical limits are triggered and that defence counsel cannot (i) call the client or any other witness in support of a defence of innocence; (ii) run a mistaken belief in consent defence; (iii) cross-examine the complainant in a manner to make her look like a liar; or (iv) bring an application to introduce evidence of prior sexual history or the complainant’s private records.

Some will no doubt challenge this approach as a thinly-veiled attempt to do away with the presumption of innocence in sexual assault cases. Nothing could be further from the truth. The presumption of innocence does not give the accused a licence to engage in distortion in an effort to escape liability, nor does it remove the public interest in ensuring a fair trial for both the accused and the community. The fact that a “whack the complainant” strategy—defined broadly as an attempt to rely on and exploit discriminatory assumptions about women and sexual assault—may be all that an accused has to secure an acquittal is not a sufficient justification for the harm caused.

It is trite law now after cases like *Darrach*, *Mills* and *R v NS*,¹²⁹ that the need to ensure respect for the autonomy and dignity of criminal accused by ensuring a fair trial while of fundamental importance is not absolute. It is about achieving a constitutional *balance*. The ethical limits suggested in this article are an attempt to balance the competing interests in sexual assault cases of ensuring full answer and defence and protecting the trial and complainant from discrimination. None of these limits threaten an accused’s constitutional right to reliable verdict achieved in a fair process. Rather, they ensure access to justice for both an accused and sexual assault complainants and they protect the repute of the administration of justice by reducing the likelihood that discriminatory and stereotypical assumptions will taint the process and ultimate verdict.

129 2012 SCC 72, [2012] 3 SCR 726. *R v NS* involved whether a sexual assault complainant could be compelled to remove her niqab. The majority created an approach that balanced the complainant’s right to free expression of religion and an accused’s right to make full answer and defence.