

**COMPARATIVE STUDIES OF SEXUAL ASSAULTS IN
CANADA AND IN HONG KONG**

by

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ABSTRACT

Although criminal law involving sexual offence has undergone many legal reforms in both Canada and Hong Kong, there remain numerous socio-cultural factors that maintain the difficulty of achieving successful prosecutions for these offences. This dissertation includes two comparative studies that explore several complainant-specific factors that may affect the perception of adult female complainants in real (Study 1) and simulated (Study 2) sexual assault cases and, ultimately, judicial decisions in two distinct jurisdictions.

Study 1 reviewed 220 archival rape cases in Canada ($n = 119$) and Hong Kong ($n = 101$) to explore how the complainant's relationship with the accused, her sexual history, her substance use before the alleged incident, and her sexual initiation may be associated with the proposal of the "mistaken belief" defence and judicial outcomes. Because accused in Canada have to take "reasonable steps" to ascertain consent, it was expected that the defence would be proposed and accepted less often in Canada than in Hong Kong, and more acquittals would be rendered in Hong Kong than in Canada based on this defence. Univariate analyses revealed that cases that involved acquaintances or intoxicated parties, or a complainant who was sexually provocative or experienced, were associated with increased acceptance of this defence tactic by the court, and increased acquittal of the accused, particularly in Hong Kong.

Because sexual assaults were found to be less successfully prosecuted when the complainant engaged in acts that may be perceived as violating gender norms, Study 2 explored how (mock) jurors' gender and cultural beliefs, and the complainant's drunken and/or sexually provocative behaviours, may affect legal outcomes. Using an online survey program, 467 participants (236 from Canada and 231 from Hong Kong) evaluated one of four simulated sexual assault cases and completed the Illinois Rape Myth Acceptance Scale and Ambivalent Sexism Inventory. Results suggest that Hong Kong and male participants were more likely to endorse rape myths and patriarchal beliefs than Canadian and female participants.

The former groups were also more likely to perceive the complainant as having violated gender norms and to hold her more accountable for the assault.

By comparing the results from Canada and Hong Kong within each study, this research aims to determine whether, and to what extent, western and eastern cultural influences shape the judicial outcomes of sexual assault cases, and to help inform legislators in policy-making.

Keywords: Rape / Sexual Assaults; Cross-Cultural Comparisons; Legal Issues; (Mock) Jury; Rape Myth Acceptance; Gender Roles

DEDICATION

To my parents, who (despite their repeated inquiries of “Are you done yet?”) have never made me question their faith in me, and their love and support.

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TABLE OF CONTENTS

Approval	ii
Abstract.....	iii
Dedication	v
Acknowledgements	vi
Table of Contents	ix
List of Tables	xii
List of Figures.....	xiii
Introduction.....	1
Sexual Assault – Legal Definitions and Issues	5
Sexual Assault – Socio-Cultural Considerations	9
Study 1: “It was Consensual!” - Seeking Guidance from Judicial Opinions in Sexual Assault Cases in Canada and Hong Kong	15
Chinese / Hong Kong Rape Law History	15
Canadian Rape Law History	18
Current Legal Framework for Sexual Assaults in Hong Kong and Canada	21
Variables of Interest.....	28
Stranger vs. Acquaintance	28
Sexual history.....	33
Alcohol Use	35
Complainant’s initiation.....	41
Legally Relevant Variables.....	45
Evidence / Corroboration.....	46
Violence, Threats, and Use of Weapons	47
Summary and Hypotheses.....	48
Methods.....	50
Research Design.....	50
Case Selection.....	51
Case Coding	52
Variables of Interest.....	53
Legally Relevant Variables.....	54
Inter-rater reliability	54
Statistical Approach	56
Results and Discussion.....	58
Court-Related Characteristics	58
Court Level and Trier of Fact	58
Case Characteristics	58
Ages of complainants and accused	58
Location of incident	60
Decisions.....	61

Defence Tactic	64
Reasonable Steps Provision	66
Relationships between Key Variables and Legal Outcomes	68
Accused-complainant relationship.....	68
Complainant’s Sexual History	69
Alcohol Use	70
Complainant’s initiation.....	74
Corroborating evidence.....	78
Use of Violence, Threats, and/or Weapons.	79
Regression Model	81
Step 1: Effects of Legal Variables on Verdict	81
Step 2 and 3: Effects of Key Variables on Verdict.....	81
Study 2: The Effects of Gender and Attitudinal Factors on Judicial Judgments of Sexual Assault Trials in Canada and Hong Kong	87
Rape Myth Acceptance	87
Sex Roles	91
Sex Roles or Sexist?.....	92
Violation of Gender Norms	96
Alcohol use	97
Complainant’s Initiation	98
Gender differences	100
The Present Experiment.....	101
Case Type.....	101
Potential Confound	102
Hypotheses	102
Method	103
Participants.....	103
Measures	104
Vignettes	104
Case Evaluations	105
Attitudinal Questionnaires	106
Ambivalent Sexism Inventory (ASI)	107
Illinois Rape Myth Acceptance Scale (IRMAS).....	107
Procedure	108
Design	109
Analytic Approach	110
Attitudinal measures	110
Case Evaluations	110
Verdict.....	111
Results and Discussion.....	112
Demographic Variables	112
Attitudinal Measures	112
ASI	112
IRMAS	113
Correlation between measures	114

Moderating factors	114
Case Evaluations	115
Vignette Quality	115
Manipulation Checks	116
Perceived Violation of Gender Norms by the Complainant	116
Accused’s Belief in Consent	119
Levels of Perceived Accountability of the Complainant and the Accused....	123
Verdict.....	128
Effects of Jury Instructions on First Verdict.....	129
Second Verdict.....	132
General Discussions	140
Summary / Interpretation of Findings.....	140
Recommendations.....	143
1) Law Reform in Hong Kong -- Mens Rea (Subjective vs. Objective).....	143
2) Balancing the need to establish non-consent and women’s right to sexual autonomy.....	146
Limitations and Future Research	151
Sampling	151
Benevolent Sexism.....	152
Rape Prevention	153
Redefine “Rape” in Hong Kong	155
References	159
Appendix A	191
Vignette.....	191
Appendix B	193
Jury’s Direction [Canada].....	193
Appendix C	194
Jury’s Direction [Hong Kong]	194
Appendix D	195
Ambivalent Sexism Inventory (ASI)	195
Appendix E	196
Illinois Rape Myth Acceptance Scale (IRMAS).....	196
Appendix F	197
Study Procedure	197
Appendix G.....	198
Study’s URLs.....	198

LIST OF TABLES

Table 1. Percentage agreement for the coding of various factors in the Hong Kong and Canadian samples.....	56
Table 2. Frequencies (and percentages) of various factors in the Hong Kong and Canadian samples.....	60
Table 3. Mean ratings of attitudinal questionnaires and F-values as a function of participants' culture (Standard Deviation).....	115
Table 4. Ratings of attitudinal questionnaires as a function of participants' gender (Standard Deviation).....	115
Table 5. Level of perceived credibility and reasonableness of the accused's claim of mistaken belief in consent as a function of participants' gender (Standard Deviation)	121

LIST OF FIGURES

Figure 1. Percentage convicted as a function of the proposal of defence tactic and jurisdictions.....	66
Figure 2. Percentage of mistaken-belief defence proposed or accepted as a function of jurisdiction and the complainant’s alcohol use prior to the incident	71
Figure 3. Percentage convicted as a function of jurisdictions and alcohol use (by the complainant or the accused) prior to the incident	72
Figure 4. Percentage of mistaken-belief defence proposed or accepted as a function of the complainant’s alleged initiation (by the defence) and jurisdictions	75
Figure 5. Percentage of mistaken belief defence proposed or accepted as a function of the complainant’s self-acknowledged initiation and jurisdictions.....	76
Figure 6. Percentage convicted as a function of complainant’s alleged initiation (by either the accused’s allegation or the complainant’s own admission) and jurisdictions.....	77
Figure 7. Percentage convicted as a function of evidence types and jurisdictions	79
Figure 8. Percentage convicted as a function of the violence, threat, and weapon use and jurisdictions	80
Figure 9. Percentage of mistaken belief defence proposed or accepted as a function of the complainant-accused relationships and jurisdictions	83
Figure 10. Percentage convicted as a function of complainant’s alleged initiation, defence tactic, and jurisdictions	84
Figure 11. Level of perceived gender norm violation by the complainant as a function of participants’ gender and whether the case scenario involved alcohol.....	118
Figure 12. Level of perceived credibility and reasonableness of the accused’s claim of mistaken belief as a function of participants’ gender and whether alcohol was present in the case scenario.....	122
Figure 13. Level of perceived accountability of the complainant and the accused as a function of vignette types [role].....	124
Figure 14. Level of perceived accountability of the complainant and the accused as a function of position of questionnaires and vignette types	125
Figure 15. Level of perceived accountability of the complainant and the accused as a function of participants’ culture and gender	126
Figure 16. Conviction rate of first verdict as a function of participants’ culture and order of the jury instructions.....	130
Figure 17. Conviction rates of first verdict as a function of participants’ gender and order of the jury instruction	132

Figure 18. Conviction rates of second verdict as a function of vignette types (whether the complainant or the accused initiated the sexual encounter) and participants' gender..... 134

Figure 19. Conviction rates of second verdicts as a function of Position of Questionnaires, Vignette Types (whether the complainant or the accused initiated the sexual encounter), and participants' Culture 136

INTRODUCTION

Few would dispute that there is a clear communication gap between how most women experience consent, and how many men perceive consent. Some of this gap is attributable to genuine, often gender-based, miscommunication between the parties. Another portion of this gap, however, can be attributed to the myths and stereotypes that many men hold about consent. (*R. v. Park* [CAN], 1995, pp. 864-865)

Over the past few decades, research into societal attitudes toward rape (or sexual assault¹) has revealed a chasm between rape-related stereotypes and reality. In the stereotyped narrative of “real rape” (Ullman, 2010; originally defined by Estrich, 1988) that has infiltrated the public minds, rape is a crime perpetrated by a depraved, sex-craved, weapon-wielding stranger who jumps out from the shadows to attack a blameless, nubile young woman. In this conjured scenario, the woman reports to the police immediately after the rape and is then sent to the hospital for treatment of the savage physical injuries that she sustained during her struggle and vehement resistance. In reality, however, the vast majority of rapes are far from this stereotype. Most rapes are committed by a man who is known to the complainant (also known as acquaintance rape). He uses no weapon, and she offers little, if any, physical resistance due to factors such as fear or, frequently, confusion inspired by alcohol or drug use. The woman may never report the rape to the police (Wolitzky-Taylor, Resnick, McCauley, Amstadter, Kilpatrick, & Ruggiero, 2011), and she may never receive treatment because she sustains no, or only minor, physical injuries (Minister of Industry, 2004), even though her psychological injuries are likely profound (Shakespeare-Finch & Armstrong, 2010).

According to the 7th United Nations Survey of Crime Trends and Operations of Criminal Justice Systems (United Nations Office on Drugs and Crime, 2004), the

¹ Rape and sexual assault can be distinguished but are often treated synonymously. Sexual assault is the term often used to describe offences of sexual contact not involving penetration, whereas rape is generally viewed as crime involving, historically speaking, penetration of a vagina by a penis. Both terms have been used in rape reforms criminalizing oral and anal penetration and penetration with objects. Currently, Hong Kong continues to adopt the term, rape, in its penal code, whereas Canada has redefined rape and its related offences as “sexual assault.” Unless otherwise indicated, these two terms will be used synonymously in this paper

annual rates of *reported* rape (based on police statistics) between 1998 and 2000 were 78.08 to 84.61 per 100,000 inhabitants in Canada and 1.35 to 1.53 per 100,000 inhabitants in Hong Kong. However, both of these figures are likely underestimates of the true rates as sexual assaults are among the least reported and least prosecuted of all violent crimes in both Canada (Gannon & Mihorean, 2004; see also Du Mont & Myhr, 2000) and Hong Kong (Chan, Au, Lam, & Chung, 2006; Cheung & Law, 1990). For example, in a study of 2,147 Hong Kong Chinese college students, only 39% of victims had disclosed their sexual victimization to others (including informal sources; Tang, 2002). In another survey on sexual victimization among 178 Chinese female college students, only 18% disclosed the episodes to their parents and only 3.73% reported the incident to the police (Xu, Xie, & Chen, 1998). Similarly, according to the 2004 General Social Survey on Victimization, an estimated 1,977 incidents of any sexual assault (i.e., including unwanted sexual touching) occurred per 100,000 Canadians aged 15 and older; however, fewer than one in ten of such incidents were reported to the police (as cited in Brennan & Taylor-Butts, 2008). Although it is unclear how much this underreporting is responsible for the discrepancy in rates of reported sexual assault between the two countries, a recent study suggested that Asian-Americans, when compared to Caucasian-Americans, were less likely to disclose a sexual assault incident in general, and when they did, they were more likely to share with informal sources (e.g., friends and family) than with formal sources (e.g., police; Shenoy, Neranartkomol, Ashok, Chiang, Lam, & Trieu, 2010).

In general, research findings have consistently revealed that many victims of sexual assault either do not disclose these experiences (e.g., Kogan, 2004) or wait a long time to do so (e.g., Beh, 1998). Reporting of sexual assaults perpetrated by non-strangers is even more rare (Felson & Paré, 2005; Ullman, Filipa, Henrietta, Townsend, & Starzynski, 2006). The low level of reporting may speak to the perceived repercussions of reporting, and the apprehension that many victims may have about being perceived as not credible (Campbell, 2008; Xu et al., 1998). In particular, sexual assault is a very difficult issue for the criminal law to grapple with. This is largely by virtue of its nature – it is an intimate act, usually committed in

private without witnesses, and charges and convictions are laid and entered based upon the uncorroborated evidence of complainants. Although sexual offence law has undergone many legal reforms over recent decades to encourage reporting and minimize prejudice in both Canada (Gotell, 2007, 2008) and Hong Kong (Emerton, 2002), there remain numerous factors that contribute to a reluctance to pursue prosecution (Kerstetter, 1990; Kerstetter & Van Winkle, 1990; Spohn, Beichner, & Davis-Frenzel, 2001). Reasons cited for this reluctance include: the lack of resistance, physical evidence and/or injury (Littleton, Grills-Taquechel, & Axsom, 2009; MacCaul, Veltum, Boyechko, & Crawford, 1990); the relationship status between the alleged perpetrator and the complainant (particularly for those who are intimate partners; Kahan, in press); and the complainant's credibility (Jordan, 2004; Mulder & Winkel, 1996; Sheehy, 2002). In addition, although significant efforts were made to examine people's stereotypical beliefs about rape (called *rape myths*) and how these myths may affect people's interpretation of the validity of an allegation of rape (e.g., *R. v. Seaboyer*; *R. v. Gayme*, 1991), little is known about how these attitudes may affect the perceived credibility of the complainants in Canada and, in particular, Asia.

The legal standard must reflect the cultural influences that have shaped the perceived reasonableness of the accused's perception of consent. Despite the proliferation of psychology-and-law activities in Anglophone countries during the past few decades, most of this research has lacked a consideration of various Eastern perspectives. While both Canada and Hong Kong are currently common law jurisdictions and share similar colonial histories, different cultures may emphasize different values and enforce different legislation, all of which may lead to different judicial decision-making (e.g., Dussich, Friday, Okada, Yamagami, & Knudten, 2001). For instance, it appears that the rule of law in Hong Kong tends to follow "Confucian" underpinnings rather than the "Lockean" ones adopted by most Western countries (Moran, 2003). Confucian political thought emphasizes *guanxi* (connection), *mianzi* (face), and cooperation (Yang, 2000), whereas Lockean liberalism stresses individual rights, freedom of speech, and legal adjudication (Wong, 2004). This difference in cultural mores has great implications in legal practice. For example, Asian females in Canada are significantly more tolerant of

actions deemed to be sexual harassment (by Western legal paradigms) than non-Asian female respondents (Kennedy & Gonzalka, 2002), and the reported rates of sexual harassment in Hong Kong are significantly lower than comparable U.S. figures (Chan, Tang, & Chan, 1999). More importantly, countries that endorse Confucian interdependence have been shown to emphasize a hierarchical society in which male dominance is assumed and practiced (Sugihara & Katsurada, 2000). In turn, patriarchal values and rigid gender role endorsement have been shown to contribute to rape myth acceptance (Law, 2004; Uji, Shono, Shikai, Kitamura, 2006, 2007). Law (2004) has recently found that rape myth acceptance continues to be widespread in Hong Kong, particularly amongst males, and it is conceivable that rape myth acceptance may contribute to lower perceived credibility judgments of complainants (Jimenez & Abreu, 2003) and higher rates of prejudicial judgments in judicial outcomes.

Based on these cultural differences, this dissertation will include two comparative studies that explore factors that may be related to the public's perception of sexual assault complainants and, ultimately, judicial decisions in Canada and in Hong Kong. The first study will examine the relationships between various extralegal variables and legally relevant outcomes in archival rape cases. The second study will investigate how individual differences (e.g., endorsement of "myths" about rape) and cultural mores (particularly sex-role ideologies and patriarchal beliefs and values) may be associated with the judgment of the credibility of sexual assault complainants in constructed rape scenarios. Specifically, Study 2 will examine the effects of the complainant's violation of gender norms (e.g., complainants' intoxication and initiation of sexual contact) on her credibility and the ultimate verdict. Although the complainants and accused can be of either gender, the vast majority of sexual victimization is experienced by women and is perpetrated by men (Ho & Lieh-Mak, 1992; Tjaden & Thoennes, 2000). Thus, this study will focus on how the court and the public perceive the credibility of an adult² female complainant and an adult male

² Most jurisdictions specify a minimum age under which intercourse automatically becomes rape, or statutory rape. The reasoning behind criminal designations on the basis of age is that youth and teenagers cannot form meaningful consent. It was reckoned that statutory rape and sexual assaults against an adult involve different issues; for one, laws of statutory rape relieve the prosecution of the

accused. By comparing the results from Canada and Hong Kong within each study, this research aims to determine whether, and to what extent, western and eastern cultural influences shape the judicial outcomes of sexual assault cases in Canada and Hong Kong, and to help inform legislators in policy-making. To provide a foundation for both studies, a brief discussion of the legal framework and socio-scientific context related to sexual assault is warranted.

Sexual Assault – Legal Definitions and Issues

From a historical perspective, the original meaning of the word rape was “to steal” (Kinnon, 1981, p. 36), and rape laws were created to ensure the protection of a woman as property of one rightful owner – the husband. This dissertation focuses on two sets of penal codes: *Criminal Code of Canada* (1985) and *Hong Kong Crimes Ordinance* (1971); by the current legal definition (from both jurisdictions), *rape* (or *sexual assault* in Canada) is sex without consent. Sexual violence, apart from rape and sexual assaults, include non-assault conduct such as lewdness, verbal harassment, peeping, and genital exposure. For the purpose of this research, the focus is on the most serious offence, rape (although many of the issues discussed herein have relevance to other sexual assaults in general). The forms of rape addressed in this dissertation include rape within marriages or dating relationships and rape by strangers. However, statutory rapes will not be explored in this study because it is considered a strict liability offence in which the mere act of sexual contact with a minor constitutes an offence (regardless of whether or not the female consented). Therefore it involves social and legal issues that are different from those involved with the forcible rape of an adult. Finally, although there is currently no statute of limitations on the reporting of sexual assault in either Canada (see *Limitation Act*, 1996) or Hong Kong (A. T. da Rosa, Jr., personal communication, July 22, 2010), only incidents of sexual assault that were reported to the police less than one year after the alleged incident were explored because historical sexual assault cases often provide much less information regarding the relationship dynamics of the parties involved and other variables of interest.

burden of prove lack of consent. Therefore, this study will focus on issues related to sexual assaults by an adult against another adult.

A conviction for sexual assault requires proof beyond a reasonable doubt of two basic elements, that the accused committed the *actus reus* (a “guilty act”) and that he had the necessary *mens rea* (a “guilty mind”). The *actus reus* of sexual assault is the nonconsensual sexual act (from the subjective perspective of the complainant), and the *mens rea* is the intention to engage in sexual acts by the accused, knowing of (or being reckless of, or wilfully blind to) a lack of consent (Stewart, Murphy, Penney, Pilkington, & Stribopoulos, 2006). A common issue in sexual assault cases is, therefore, whether or not the sexual activity was consensual. The need for complainants to explicitly express non-consent makes sexual assault drastically different from all other crimes and prosecutions. Indeed, the prosecution must prove beyond a reasonable doubt that the complainant did not consent; however, the prosecutor does not have to prove that she *demonstrated* her lack of consent or affirmatively communicated this to the accused (*R. v. Malone* [UK], 1998). As a result, consent often gives rise to difficult evidentiary issues: was there consent at all? If there was, was it obtained by force, fear, or fraud? As observed by Justice Dunn in *R. v. Olugboja* [UK; 1982],

although ‘consent’ is ... [a] common word it covers a wide range of states of mind in the context of intercourse ... ranging from actual desire on the one hand to reluctant acquiescence on the other ... [T]he dividing line ... between real consent ... and mere submission ... may not be easy to draw. Where it is to be drawn in a given case it is for the jury to decide, applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of the case. (pp. 331-332)

As illustrated in *R. v. Olugboja* [1982], the distinction between “real consent” and “mere submission” is not always an easy one to draw. Where sex is the result of force, it may seem clear that any apparent consent provided by the complainant is moot, and therefore satisfies the legal criteria for sexual assault or rape. However, what if moral, economic, or social pressure is used to induce or procure agreement to sexual intercourse? Suppose, for example, that agreement is procured by a threat to end a long-term, hitherto celibate relationship. Is this “real consent” or “mere submission?” What about the Deputy Clerk who complied with the judge’s sexual

touching for four years for fear of losing her job (see Task Force on Judicial Impeachment, 2009, at the hearing “*To consider possible impeachment of United States District Judge Samuel B. Kent of the Southern District of Texas*”)? Did she “consent” or merely submit? The legal, moral, philosophical, and practical implications of determining whether sex was voluntary or criminal are daunting.

What circumstances will nullify a purported consent, then? Violence or the threat of violence, whether to the complainant herself or to her relatives, will generally be regarded as vitiating consent (e.g., *Chan Sau-Man v. Hong Kong Special Administrative Region [HKSAR]*, 2004; *R. v. Last* [CAN], 2009). It is also considered rape to have sexual intercourse with a woman whose reason and sense (and thus her ability to give valid consent) have been removed by alcohol or drugs (e.g., *HKSAR v. Lee Sze-Lung and Ng Ka-Ming*, 2009; *R. v. Esau* [CAN], 1997), or who is asleep or comatose (e.g., *HKSAR v. Chan Chun Yin*, 2008; *HKSAR v. Leung Sun Keung*, 1998; *R. v. Clark* [CAN], 2010; *R. v. J.B.* [CAN], 2003; *R. v. M.V.D.* [CAN], 2010; *R. v. Sidney* [CAN], 2007). Similarly, sexual intercourse with a child who is too young to understand coitus or to consent is generally verboten (Graupner, 2004). Mental deficiency on the part of the complainant may also vitiate consent (*HKSAR v. Chan Kam Po*, 2009; *R. v. Martineau* [CAN], 1993; *R. v. Hundle* [CAN], 2002), although this may also pose considerable evidential difficulties and instead lead to a charge under section 153.1 of the *Criminal Code of Canada* (“Sexual exploitation of person with a disability”) and section 125 of *Hong Kong Crimes Ordinance* (“Intercourse with mentally incapacitated person”; e.g., *HKSAR v. Gurung Krishna*, 2010). Fraud or deception, on the other hand, will have this effect only if the deception or fraud relates to the nature of the act itself. For example, in *R. v. Chen* [CAN; 2003] and *R. v. Lau Chun Hon* [HK; 1995], consent of being touched was vitiated if it was obtained by fraud under the guise of a medical examination. Fraud as to identity is primarily concerned with cases in which the accused impersonates another person in order to gain the woman’s consent. One specific instance of this is dealt with in section 118(2) of the *Hong Kong Crimes Ordinance*:

(2) A man who induces a married woman to have sexual intercourse with him by impersonating her husband commits rape.

If the accused obtains consent to sexual intercourse by impersonating someone else, such as a complainant's boyfriend, it may also vitiate her consent and amount to rape (e.g., *R. v. Cooney* [CAN], 1996). That said, even when consent is in fact vitiated by impersonation, the accused's *mens rea* must still be proven. The accused will not be found guilty unless he either knew the complainant did not consent or was at least reckless as to this (Jackson, 2003).

To satisfy the *mens rea* of rape, the prosecution must prove that the accused either was reckless or wilfully blind to whether the woman consented to the intercourse. However, if the accused lacks the culpable awareness of such lack of consent, then he ought to be found not guilty. *Director of Public Prosecution (DPP) v. Morgan* [AUS; 1976] is commonly thought of as being a turning point in the development of the law related to sexual assaults and is frequently cited as authority in both Canada (e.g., *R. v. Esau* [CAN], 1997; *R. v. Pappajohn* [CAN], 1980; *R. v. Niedermier* [CAN], 2005) and Hong Kong (e.g., *HKSAR and Soong Roong Sheng*, 2001; 香港特別行政區 訴 吳德榮 [*HKSAR v Ng Tak Wing*], 2007). The relevant principle stated in this case was that when an accused had had sexual intercourse with a woman without her consent, so long as he *genuinely* believed that she did consent, he was not to be convicted of rape, even though the jury were satisfied that he had no reasonable grounds for so believing. Currently, both countries include statutory provisions to consider such mistake of fact on the part of the accused (s. 265(4) of the *Criminal Code* and s. 118(4) of the *Crimes Ordinance*). However, as we shall see in Study 1, the defence of mistaken belief is now limited in Canada by a requirement that the accused must have taken "reasonable steps" to ensure consent (i.e., an "affirmative consent standard"; Gotell, 2007), thereby introducing objectivity to the examination of the accused's subjective perception of the situation. This legislative step has yet to be taken in Hong Kong, and this study will explore how (and how well) the Canadian justice system has been upholding this standard, and whether Hong Kong legislation ought to follow their Canadian counterparts in adopting an objective standard for consent-seeking.

In summary, the particular nature of the sexual offence itself, requiring the absence of consent on the part of the complainant and the corresponding knowledge

of its absence on the part of the accused, provides a well-defined structure to determine criminal culpability. However, despite this seemingly unambiguous framework for the adjudication of sexual assault, trials of sexual offences are still imbued with subjective obscurity and influenced by various prejudicial biases, and both jurisdictions, in the past three decades, have found themselves assailed by conflicting and evolving social mores with respect to sexual relations. It can be argued that legal scholars and activists have significantly improved the response of the legal system to sexual violence in our recent past, and this dissertation will examine the current state of affairs in the adjudication of sexual assaults in both Canada and Hong Kong.

Sexual Assault – Socio-Cultural Considerations

Statutory provisions and legislation cannot be properly understood without examining the particular socio-cultural contexts in which the laws are executed. In addition to providing a comparative analysis of sexual offence laws through my proposed legal and social-scientific research, this dissertation also seeks to investigate how history and socio-cultural norms and expectations help us understand and shape human, specifically gender, relations. For example, in *R. v. Kwong Kin-hung* [HK; 1995], the court pointed out, “cultural differences between different races of people produce very different reactions and modes of behaviour” (p. 333). As shall be seen in the later section on the differences in the legal definitions of rape between Canada and Hong Kong, rape in Chinese society has specific social and cultural meanings. In contrast to the Anglo feminists’ emphasis on the violent aspect of rape (Brownmiller, 1975; Winkler, 1991), the sexual implication of rape has been more salient in the context of Hong Kong culture. What political issues are at stake in conceptualizing rape as sex or violence? Why is this important?

Certainly, viewing rape as an act of violence, not sex, addresses many concerns that are raised by the restorative justice and feminist movements (Anderson & Doherty, 2008; Estrich, 1986; MacKinnon, 1987). It highlights the fact that, for the victim, rape is not a sexually arousing experience, but is, instead, a terrifying, humiliating experience. The “rape as violence, not sex” position also makes it more difficult for the public to trivialize rape, especially when it is perpetrated by a

boyfriend or husband, with whom the woman has already engaged in a consensual, sexual relationship. The view that rape is not motivated by sex has further minimized the blaming of victim for precipitating rape by wearing provocative clothing or flirting with the offender, thereby making it more difficult to invoke rape myths (e.g., blaming the woman for being “promiscuous”; Los, 1994). Finally, this view highlights the relationship between rape, male dominance, and the perceived subordinate role of women, and emphasizes that rape has the same effect as other forms of violence: controlling potential victims (McIntyre, Boyle, Lakeman, & Sheehy, 2000).

The continued consideration of rape as sex in Hong Kong may, however, be rooted in this kind of patriarchal gender relations where women are assigned roles based not on their capacity but on norms and values that perpetuate male dominance and superiority (Wong, 2006). Stemming from the patriarchal concern for legitimate male heirs, traditional Chinese culture has morally mandated female premarital virginity (Wong, 1994; Zhou, 1989). For example, one of the many aphorisms, “it is a small matter to starve to death, but a serious matter to lose one’s virtue” (Ng, 1987, p. 60), was indoctrinated since the Qing dynasty and continues to resonate in contemporary Chinese culture. The high value given to female chastity has contributed to specific cultural understandings and implications of rape in Hong Kong (Tang, Wong, & Cheung, 2002). For example, in contemporary Chinese societies, a woman who survives acquaintance rape is encouraged to marry the assailant to preserve her chastity (Chou, 1995; Yang, 1994). In addition, the patriarchal family structure of the Chinese family seems to elevate rape-induced sexual shame from the individual level of the raped women onto the collective level of family honour (Cheung, Andry, & Tam, 1990) and the violation of *mianzi* (moral and social face; Ho, 1974). Women who have been raped are viewed as “damaged goods” (Tang et al., 2002, p. 977) and a disgrace to their family because their chastity has been blemished. As a result, Chinese rape survivors, who already experience personal shame from being sexually violated, are often further traumatized by the feelings of guilt in imposing social disgrace on their family and, in particular, on their future sexual partners. According to Luo (2002), many rape victims would choose to

withhold disclosure of the incident to avoid “losing face” and to maintain her good name and that of her family. Finally, Chinese gender stereotypes see males as possessing a sexual drive that the desire-free women must resist, and, therefore, in this view, if a woman is raped, she must have brought it upon herself through her lack of resistance (Qi, 2007). In combination, the cultural fetish for female virginity or chastity, and the institutional emphasis on the sexual component of rape and traditional gender norms, contributes to a distinct cultural understanding of rape and perception of rape victims in Chinese society. In turn, these views may affect the types of sexual assault that are (un)reported and/or treated seriously.

Although patriarchal beliefs are common in Asian countries, these cultural beliefs may have particularly permeating effects on personal perceptions and behaviours in Chinese population. For example, Lee and Law (2001) found significant variation in perceptions of rape amongst four Asian immigrant groups (i.e., Chinese, Japanese, Korean, and south-east Asian) in the United States. Whereas the majority of the Chinese respondents did not identify sexual violence against women as a problem, more than 40% of Japanese and south-east Asian respondents perceived it to be a severe problem. The authors noted that although it is possible that sexual violence against women was not as common in the Chinese population, this perception may represent a “communal blind spot” in denying that such issues exist. Further, despite the increased exposure to educational intervention efforts to reduce sexual violence in the United States, the differences in perception found in Lee and Law’s study may serve as an indication of the powerful and long-lasting effects of cultural beliefs on perceptions held by segments of the Asian population.

In places where rape is now widely recognized as a violent crime against the person (e.g., in Canada; Nowlin, 1993), thus reflecting women’s changed legal status and a commitment to protecting women’s personal autonomy (Leader-Elliott & Naffine, 2000), societal beliefs about the situational elements that constitute rape still vary. Analogous to other cultural philosophies, societies construct a set of beliefs about sexual violence that are founded on multiple assumptions of circumstances under which rape occurs. These assumptions make up what are called “rape myths” (Burt, 1980) and “practical ideologies” (involving sometimes contradictory norms

that guide conduct and justify rationalisation; Lea & Auburn, 2001). Although Canadian legislation has come a long way in combating these beliefs, the Canadian legal community has acknowledged that these biased beliefs and stereotypes concerning female sexual behaviours have continued to influence the law and the legal practices associated with sexual offences against women (Grant, 1989; Kobly, 1992; *R. v. Seaboyer*; *R. v. Gayme* [CAN], 1991; Sheehy, 1989). Some typical stereotypical statements included “a man has ‘rights’ to have sex with a woman in certain situations,” “rape victims were ‘asking for it,’ [and] “women who ‘led’ a man on, or dressed provocatively, deserved what they got” (Ministry of Attorney General, 1997, p. 3). More recently, in *R. v. Rhodes* [CAN] (2011), Justice Dewar’s comments and decision inspired public outrage (Turner, 2011) when he used the complainant’s appearance and behaviour to mitigate the sentence. Stating that there was “sex in the air” (para. 319) led on by the intoxicated complainant, Judge Dewar characterized Rhodes as a “clumsy Don Juan” (para. 516) who may have misunderstood the “signals.” Because rape myths continue to influence police screening practices, court processes, and rates of conviction (Du Mont & Myhr, 2000), some legal scholars have argued that the reform has only “eliminated the formal expression of rape myths ... not their informal operation” (McIntyre et al., 2000, p. 74). While the effect of rape myth endorsement on judicial outcomes has received little attention in Hong Kong, it has been found that these stereotypical and prejudicial beliefs are commonly endorsed by people from Hong Kong (Law, 2004). That being said, the criminal justice system has demonstrated that it does take some of the complainants’ allegations seriously. For example, 50% of all sexual assault cases led to a conviction (Statistics Canada, 2003), and rape had one of the highest conviction rates amongst all crimes in Hong Kong during the 10 years after the transfer of sovereignty (Young, 2010). In Study 2, I explore the factors that may be correlated with acquittals in these two jurisdictions and examine whether rape myths may be insidiously affecting mock jurors’ perceptions of culpability in a sexual assault trial.

Finally, Hong Kong, long a British possession but now part of the People’s Republic of China, presents an intricate case study of Asian society because of its cultural diversity and its openness to Western influences. With the “one country, two

systems” policy implemented by China to manage the return of Hong Kong’s sovereignty to China, Hong Kong continues to maintain a high degree of autonomy with respect to political and legal systems (Ash, Ferdinand, Hook, Porter, & Ash, 2002). This research is particularly timely because, under the Basic Law’s Article 5 and 8, the common law system will continue in the postcolonial era of Hong Kong for 50 years after the return of sovereignty (until 2047). It is important to emphasize that, historically, both Canada and Hong Kong were heavily influenced by English law, and the criminal law of England shaped the criminal codes of both countries (Ng, 2009; Parker, 1981). Therefore, the statutes of both countries share similar conventions and traditions. Today, English precedents are no longer binding, but they are still used as persuasive authorities, and counsel in both countries are accustomed to canvassing judgments from other common law jurisdictions (Finn, 2002), although Hong Kong does so to a much greater extent. A cursory look at legal judgments by the Court of Appeal and Court of Final Appeal in Hong Kong confirms the continued influence of non-local authorities, particularly English authorities. As Martin (2002) commented, “The large number of English cases which still have authority in Hong Kong indicates that the Hong Kong courts have not yet taken up the challenge of developing a uniquely Hong Kong vision of legal obligations. There is much in English ... law which could do with rethinking and revising, and other common law jurisdictions (Australia and Canada for example) have, over time, become sufficiently confident in the integrity of their own societal values to reject the wisdom of the English House of Lords in favour of law which is more appropriate to home ground” (p. 728). During the last decade of the English colonial period, with the change of political sovereignty quickly approaching, the Hong Kong government began to “localize” the legal system (Ghai, 1999; Wesley-Smith, 1999). In particular, scholars have suggested that only law that is contextualized within the Chinese Confucian cultural values can function effectively in Hong Kong (Sin & Chu, 1998). This merging of new ideals and old colonial systems of the common law creates an interesting opportunity for research. More importantly, “partly due to its piecemeal development over the last 30 years, the legislation relating to sexual offences [in Hong Kong] has become cumbersome and confusing and in some cases either

inconsistent or archaic” (Emerton, 2002, p. 434). I echo Emerton’s call for a comprehensive review and reform of the sexual offences legislation in Hong Kong. Study 1 explores how these legal definitions and cultural contexts are played out in the legal arena, grounded by historical references, in Hong Kong and Canada.

Study 1: “It was Consensual!” - Seeking Guidance from Judicial Opinions in Sexual Assault Cases in Canada and Hong Kong

Legislation is popularly considered to be a potent weapon in the war against sexual aggression and in battles for justice for women (Berger, Searles, & Neuman, 1995); however, significant amendments to the legislation regarding sexual assault were enacted only in the recent past in both Canada and Hong Kong. It is beyond the scope of the present dissertation to provide a comprehensive review of the historical judicial decisions and legislation; however, a perusal of historical documents will highlight some of the shared history between Canada and Hong Kong in the perceptions of women, the judicial hurdles for prosecution of sexual crimes, and the general presence of rape myths in the milieu of the rape laws in the past. As will be shown below, both Canadian and Chinese/Hong Kong law defined rape similarly up until the 1980s; however, differences in the social and legal contexts of rape, and disparities in the perceived causes of rape, led two similar legal definitions of the offence to rather different ends.

To begin, I will examine a brief account of historical case law and statutes related to sexual assault, law reviews, and other scholarly publications pertaining to gender relations in Canada and Hong Kong. Then, I will lay out the contemporary legal framework of sexual assaults in both countries to compare and contrast the two common law jurisprudences. Finally, I will provide the rationale for exploring some of the extralegal variables' effects on judicial decision making and outline the goals of the study and the predictions from the case analyses.

Chinese / Hong Kong Rape Law History

In 1646, the Qing dynasty issued its first Qing Code. In the section on “Sexual Violations,” the Qing retained all eight of the Ming dynasty statutes on sex crimes; however, it added modifiers to the statute on forcible rape that increased the burden of proof of rape (Ng, 1987). For example, for this crime to be irrefutably established, the complainant must provide evidence that she had struggled against her assailant *throughout* the entire ordeal. Such evidence must include: witnesses (either eyewitnesses or people who had heard the complainant's cry for help), physical injuries, and torn clothing. Moreover, if violence had been used only initially, and the

woman eventually submitted “voluntarily” to the act, the case was not considered rape, but one of “illicit intercourse by mutual consent” (see below), in which case the woman would be subject to punishment. The cynical attitude of Qing officials is evident in the seventeenth-century manual for local magistrates (as cited in Huang & Zhang, 1984, pp. 69-70):

There are instances when a fierce desperado commits flagrant rape by sheer brute force; the victim cannot resist his overwhelming strength or is tied up and gagged by the intruder. *But if the woman is chaste and decisive and prefers to die rather than be ravished, she will yell in spite of gagging* [emphasis added] ... Despite the physical abuse, her intention of keeping her chastity prevails. On the other hand, if a woman who is forced to perform a sexual act by an intruder protests with a loud noise, but [then] ... changes her mind and acquiesces to the violence, it means that the woman has given her tacit consent to the rapist, and the case must be considered illicit intercourse by mutual consent rather than rape. The sitting magistrate should pronounce it a case of adultery by consent or a doubtful case in which the culprits are punished with reduced penalties. (pp. 441-443)

Additionally, one of the modifiers stipulated that, “when a man, having witnessed an illicit affair [with a woman who had lost her virginity], proceeded to force himself on the woman, the incident could not be regarded as rape, because the woman was already a fornicator” (van Gulik, 1961, p. 58). In such cases, the episode would be considered one of “illicit sexual intercourse in which both parties intrigued to meet away from the woman’s house” (Xue, 1970, p. 1080), and the punishment for both parties could be 100 blows with a heavy bamboo stick. With the stringent evidentiary requirement of these past rape laws, and with the notion that a woman could give her consent during the course of a sexual attack, nothing short of her death or, at the very least, very serious physical injury could convince judicial officials of the veracity of her rape allegation.

When the complainant’s chastity was put on trial, the disposition of the case depended heavily on the interpretation of her reported behaviours by the presiding officials. Such “forcible beginning, amicable ending” (Ng, 1987, p. 58) formulaic

situations suggest that Qing lawmakers believed that sexual assault could be pleasurable for the woman. Thus, when she stopped struggling, it was seen as a sign that she actually enjoyed the sexual encounter, and the whole incident would then acquire a completely different complexion. Instead of being treated as a victim of sexual assault, the woman was branded a fornicator and punished accordingly (Elvin, 1984). In other words, a woman's failure to defend her chastity vigorously was in effect made a punishable offence (Tanner, 1994).

Even when Hong Kong was colonized by Britain in 1842, one then-non-controversial legal issue involved marital rape. For example, according to current subsection 118(3) of the *Crimes Ordinance*, sexual intercourse must be "unlawful" to be considered rape. Until recently, however, the expression "unlawful" in rape and other related offences were generally taken to mean sexual intercourse outside of marriage (i.e., other than between husband and wife), and a husband was thought to be immune or exempt from liability for having intercourse with his wife without her consent. This immunity was formed on the basis that a wife irrefutably consented to sexual intercourse by marriage (*R. v. Clarence* [UK], 1888). This common-law marital rape immunity was recognized in Hong Kong and was also applied to concubines (e.g., *R. v. Wong Lin Fai* [HK], 1962; *R. v. Chan Hing-Cheung* [HK], 1974). That said, the English Court of Appeal in *R. v. Miller* [1954] confirmed that a husband's "entitlement" to sexual intercourse did not also entitle him to use force or violence on his wife to achieve sexual intercourse. If he did, he could be convicted of assault or an aggravated assault; however, he remained immune to rape convictions. Similarly, in Hong Kong, in the case of *Cheung Chi-Hung and The Queen* [1976], where the 19-year-old girl alleged that her ex-boyfriend had intercourse with her by force and without her consent, Judge Pickering stated, "having regard to the previous relationship of the couple, a charge of rape was unlikely to have got off the ground. I am thus unconcerned with any question of rape but with assault occasioning actual bodily harm" (para. 3).

As illustrated above, Chinese rape laws were, above all, concerned with the protection of women's chastity. As shall be seen, however, traditional Chinese concepts of rape shared many features with the Canadian common law's

understanding of rape with regards to the especial concern with the protection of chastity, to the lack of protection for women with “bad” reputations, and to the requirement for strong physical resistance on the part of the victim.

Canadian Rape Law History

The high value set upon female purity, and the heavy penalty incurred by its loss ... have led most civilized countries to inflict the severest punishments on the individual guilty of a forcible violation of the *weaker sex* [italics added]. (Beatty, 1834, p. 582)

Canada enacted its first major criminal law legislature in 1840 (Derbishire & Desbarats, 1841), and under Cap. 27 of *The Provincial Statutes of Canada* (1841), “every person convicted of the crime of rape, shall suffer death as a felon” (s. XVI). However, a study of historical Canadian and Chinese rape laws revealed striking similarities between the two cultures in the roles assumed by men and women, the attitudes toward sexuality, and the views about a woman’s right to sexual self-determination. For example, like the traditional oriental values, the historical occidental legal system viewed rape as a crime against male property rights in women: “[Rape] was punished with death, in case the damsel was betrothed to another man; and in case she was not betrothed, then a heavy fine of fifty shekels was to be paid to the damsel’s father, and she was to be the wife of the ravisher all the days of his life” (Blackstone, 1765-1769, p. 210). Similarly, by adopting the criminal law of England (Parker, 1981), the colonial Canadian courts considered a number of factors in determining the truth of the woman’s claim that echoed those adopted by the ancient Chinese legal system:

If the witness be of good fame; if she presently discovered the offence, and made pursuit after the offender; if she shewed circumstances and signs of the injury, whereof many are of that nature that only women are proper examiners; if the place where the fact was done were remote from inhabitants or passengers ... these are the concurring circumstances which give greater probability of her evidence. On the other hand, if she be of evil fame and stand unsupported by other evidence; if she concealed the injury for any considerable time after she had opportunity to complain ... if the place where

the fact was supposed to be committed were near to persons by whom it was probable she might have been heard, and yet she made no outcry ... these are the like circumstances afford a strong, though not conclusive presumption that her testimony is feigned. (East, 1803, p. 445)

Throughout the nineteenth century, members of the bench expressed their concern that malicious women might make false complaints of rape. For example, in the case of *R. v. Francis* [CAN] (1855), Justice Draper noted that situations might arise, “however extreme, when a detected adultress, might, to save herself, accuse a paramour of a capital felony” (pp. 116-117). One such case, at least according to the verdict of the jury, occurred in 1882 in Toronto. Caroline Mercer, a married woman, charged William Stead, a married man who lived near her, with rape. According to her evidence, Stead raped her while her husband was out putting a horse to pasture. Justice Armour cautioned the jury that such charges sometimes arose from motives of malice. In his directions to the jury, he stated that it would not be safe to convict on such evidence, “for it was apparent that had the husband not returned at the critical moment, nothing would have been heard of the charge” (*R. v. William Stead* [CAN], 1882, as cited in *The Globe and Mail*, Oct 12, 1882). Stead was acquitted.

As illustrated, in the adjudication of rape cases, Canadian courts in the past often turned their attention to the reputation and character of the complainant. Similarly, juries did not convict in a case where there was evidence that the complainant had been drinking at the time of the incident. In the case of *R. v. Cudmore* [CAN] (1865), the accused was charged with raping a woman in Toronto, where she testified that she had been at a tavern on the night of the incident, dancing and engaging in other amusements with the accused and others. Shortly after 10 p.m., she left to return home in the company of two young men. On her way home, the accused overtook her on horseback. He dismounted, seized her, carried her into the bushes, and sexually assaulted her. The two young men who had accompanied her testified that she resisted and screamed. However, the accused’s lawyer told the jury that she was a dipsomaniac of easy virtue and would barter her chastity. Cudmore was also found not guilty.

One of the most interesting series of Upper Canada cases concerned the interrelated issues of force, resistance, and lack of consent. Clark (1872) defined rape as “having unlawful and carnal knowledge of a woman by force against her will” (p. 264). The phrases “by force” and “against her will” would seem to indicate that the facts to be proved were that the act had occurred with a certain degree of force and violence, and that the woman had not consented to the penetration. However, the judiciary appeared to be reluctant to convict unless the complainant had also put up a strong show of resistance. For example, in *R. v. Fisk* [CAN] (1866), the Chief Justice Richards directed the jury that they “had a right to expect some resistance on the part of the woman, to shew that she really was not a consenting party” (p. 380). More remarkably, in an earlier case of husband impersonation (*R. v. Francis* [CAN], 1855) where the jury convicted the accused at trial, Justice Draper, the former Attorney General, later quashed the conviction at an appeal. Citing a number of English decisions which he felt he ought to follow, Justice Draper concluded that “there was danger in implying force from fraud, and an absence of consent, when consent was in fact given, though obtained by deception” (p. 117). Therefore, the requirement for evidence of resistance was illustrated quite starkly by these judicial rulings.

During the late 1800s, women’s groups and church groups imposed greater pressure on the Canadian parliament to protect women from these crimes. For example, a vociferous public lobby grew in Montreal and submitted a “moral legislation” to the Canadian Parliament (Watt, 1890). In addition, during the Senate debate in 1886, Senator Vidal, in arguing for Bill 20 (“*An act to punish seduction and like offences, and to make further provision for the protection of women and girls,*” or the Seduction Bill), reminded his colleagues that “in nearly all civilized countries women and girls have a measure of protection thrown over them by the law of the land [whereas] Canada [has stood] almost alone in having no sufficient provision for their protection” (p.365). As a result, parliament passed a rash of statutes from 1885 to 1890. For example, under *An Act to Further Amend the Criminal Law* (1890), “everyone who, by [im]personating her husband, induces a married woman to permit him to have connection with her, is guilty of rape.” Furthermore, the criminalization of *seduction* moved the definition of sexual assault far beyond earlier requirements

that the attack must occur with violence and that women needed to resist to the utmost. Women were to be protected from non-marital sexual intercourse regardless of the methods by which the seducer sought to accomplish his goal.

Why did the legislators perceive the need to create a blanket prohibition against the seduction of these women? The emerging sexual ideology in the late 1800s understood women as lacking in all sexual desires (Acton, 1888). For example, representatives of the clergy had begun moving away from sermons on the immorality and carnal desires of women as descendants of Eve (Cott, 1979); in deference to the new predominance of women in their congregations, ministers portrayed women as highly moral, intellectual beings, and passionlessness and demureness became the quintessential female virtues. As women became increasingly perceived to be modest, the responsibility for the act of seduction was laid at the foot of the male. However, it appears that only young women, who were considered as inherently pure and uncorrupted, were to be protected. Women who were no longer considered chaste continued to be denied the protection of the criminal law; for example, women who experienced non-marital intercourse were no longer considered passionless (Acton, 1857). This kind of Magdalene-Madonna dichotomous view of women, and its implications on the perceived complainant's and accused's culpability, will be further explored in Study 2 of the present dissertation.

In short, it appears that sexism in society and law permeated both Chinese and Canadian rape law history. Other rape reforms have since been enacted in our recent past, and they will be explored in subsequent sections. However, as we shall see, modern-day rape laws and cultural interpretations appear to perpetuate some of these old, sexist traditions, and these vestiges of early prejudices will be examined in the next section.

Current Legal Framework for Sexual Assaults in Hong Kong and Canada

As rape became an important social and political issue in industrialized countries, criminal justice professionals (Berger et al., 1995; Emerton, 2002; Martin, 2002; Roberts & Mohr, 1994) and women's associations (DeKeseredy & Hinch, 1991) alike demanded new legislation to manage this problem. In Hong Kong, rape law reforms began as early as 1978, when Part XII of the *Crimes Ordinance* (Cap

200) consolidated the statutory law with regard to sexual offences. Similarly, a concerted overhaul in rape law legislation was conducted by the Canadian federal government in the early 1980s (Schissel, 1996). These cross-national efforts attest to the prior deficiencies in sexual offence laws and the need for improvements.

Prior to 1978, the definition of rape in Hong Kong was largely a matter of common law developed by judges through decisions of court and similar tribunals (Jackson, 2003). Currently, the crime of rape has been statutorily defined in Hong Kong to consist of two components: (a) “*a woman*” does not consent to the *intercourse*; and (b) “he knows that she does not consent ... or is reckless as to whether she consents to it” (*Crimes Ordinance*, s. 118(3)(b)). As observed in the legal definition, Hong Kong retains the traditional legal definition of rape as a gender-specific act where a male’s penis penetrates a non-consenting female’s vagina (Emerton, 2002). A man who is found guilty of rape “shall be ... imprison[ed] for life” (*Crimes Ordinance*, s. 118(1)). However, if the accused has attempted penetration but failed, this will not amount to rape, but it may amount to attempted rape contrary to section 159G(1) of the *Crimes Ordinance*, provided that the necessary *mens rea* of rape is present. Interestingly, it is specifically provisioned that “a man who induces a married woman to have sexual intercourse with him by impersonating her husband commits rape” (*Crimes Ordinance*, s. 118(2)). This statutory code underscores the sanctity of women’s chastity in this culture and the importance of protecting women against non-consensual adultery above all other kinds of rape by fraud.

In Canada, “rape” has been subsumed under the general offence of (sexual) assault, an offence that has now been extensively codified (Stuart, 1993). The basic premise of the offence of rape in Canadian law is that it is an act of violence, or an *assault* of a sexual nature. Consequently, the offence of assault is defined in the *Criminal Code of Canada* (s. 265) as intentionally applying *force* on another person without that person’s consent. In addition, in 1983 the parliament replaced the rape provision with the current three-tier structure of gender-neutral sexual assault offences, criminalizing all forms of non-consensual sexual touching and no longer specifically designating an offence defined by penetration (Los, 1994). Specifically,

the *actus reus* of sexual assault is established by the proof of three elements: touching, the sexual nature of the contact, and the absence of consent (*R. v. Ewanchuk* [CAN], 1999). The existing sexual assault provisions further distinguish between varying degrees of violence used in the commission of the crime. Thus, in addition to a general sexual assault provision, there are provisions relating to sexual assault with a weapon, threats to a third party and causing bodily harm, and aggravated sexual assault (*Criminal Code*, ss. 271, 272, and 273, respectively). The maximum penalties of these offences are imprisonment for 10 years, 14 years, and life, respectively.

Faced with evidence of intercourse, the critical questions in a sexual assault trial are usually in regards to whether the complainant did consent and whether the accused was sufficiently aware of her non-consent. The key fault issue here is the requisite mental state of the accused regarding non-consent. Both Hong Kong's Court of Final Appeal and Supreme Court of Canada have entertained this question on a mostly subjective basis (e.g., Brett, 1998; *HKSAR v. Li Kim Ching* [李劍青], 2006; *HKSAR v. Siu Tat Yuen*, 2005; *R. v. Pappajohn* [CAN], 1980; *Sin Kam Wah and Another v. HKSAR*, 2005). On the basis of this subjective mental state of an accused, he may either: (1) know the fact that the complainant does *not* consent; or (2) know that he is *not sure* whether the complainant is consenting; or (3) know or *believe* that the complainant consents (i.e., he holds a genuine but mistaken belief; Bryant, 1989). Outright knowledge of non-consent is of little social-policy concern; for example, the intentional rapist who waits in the dark alley for the unsuspecting victim to come his way is clearly the quintessential culpable accused. Similarly, when the accused had been indifferent to the feelings and wishes of the victim, aptly described colloquially as "could not care less" (*DPP v. Morgan* [AUS], 1976), then by law he was considered reckless and, therefore, culpable. The last category (i.e., the mistake of fact), however, deserves greater attention.

The question of an accused's knowledge of the complainant's consent is fundamental to sexual assault for it critically dictates whether his conduct, as a whole, was illegal or not. Unlike many offences where the non-culpable nature of one element still leaves the other conduct culpable to some degree (e.g., manslaughter), consensual sexual intercourse is not only legal but a commonplace human activity.

Mistake of fact regarding consent in the context of sexual assault, therefore, protects a foundational element (i.e., *mens rea*) of the crime itself (*DPP v. Morgan* [AUS], 1976; *R. v. Pappajohn* [CAN], 1980). Therefore, the “honest belief” that the complainant consented to the sexual conduct has been used as a successful defence and has resulted in the exoneration of the accused, even when that belief was not based on reasonable grounds (Barnhorst & Barnhorst, 1996; *R. v. Pappajohn* [CAN], 1980). However, the *Morgan* and *Pappajohn* rulings have spawned much debate in the field of rape / sexual assault (e.g., Pickard, 1980a), and justifiable criticism has come from those who saw the ruling as abandoning women to the “unreasonable mental calculations of men” (Pineau, 1989, p. 225). Kenny (1978), for example, has argued that, due to “referential opacity” (i.e., the awareness of and respect for the non-transparency of others’ thoughts and intentions), it is not unreasonable in the context of sexual intercourse to demand that a duty be placed upon a man to ascertain consent (see also Eisen, 1988). In addition, the relative ease of inquiry for an accused to determine the true status of a woman’s consent (i.e., the mere asking of a question) can be cited as further reason to insist that the man be assessed against an objective reasonableness standard (Pickard, 1980).

Given these views, judicial reforms, to a varying degree, have been made in both jurisdictions. One of these reforms stipulates that if the accused raises the mistaken belief defence, it simply must provide evidence that carries “an air of reality” (*R. v. Ewanchuk* [CAN], 1999) beyond the mere assertion that “I believed she consented” (Sinclair-Prowse & Bennett, 2009; *HKSAR v. Siu Tat Yuen*, 2005; *R. v. Bulmer* [CAN], 1987). “For there to be ‘an air of reality’ to the defence of honest but mistaken belief in consent, the totality of the evidence for the accused must be reasonably and realistically capable of supporting that defence” (*R. v. Park* [CAN], 1995)³. Therefore, this test was designed to restrict the mistaken belief defence, and it

³ *R. v. Cinous* [2002] also described how the air of reality test may be applied:

“A defence should be put to a jury if, and only if, there is an evidential foundation for it. A trial judge must thus put to the jury all defences that arise on the facts, whether or not they have been specifically raised by an accused, but he has a positive duty to keep from the jury defences lacking an evidential foundation – or air of reality ... The air of reality test imposes a burden on the accused that is merely evidential, rather than persuasive. In applying the air of reality test, a trial judge considers the totality of the evidence, and assumes the evidence relied upon by the accused to be true ... The pre- and post-

has been adopted in both jurisdictions. Furthermore, the Canadian Parliament passed Bill C-49 (*An Act to Amend the Criminal Code [sexual assault]*) to move in the direction of a more communicative model of consent in 1992 (Stuart, 1993), whereas Hong Kong has yet to see any substantive amendments in this area. The critical provision regarding mistaken belief is found at s. 273.2(b) of the *Canadian Criminal Code*, which stipulates that this particular line of defence is not available if the accused did not take responsibility (Schissel, 1996) and engage in *reasonable steps* to ascertain the wishes of the other person. In particular, when the *mistaken-belief* defence is raised, the “air of reality” test is first applied to evaluate the evidence; once the defence has been successfully raised, then the presence or absence of reasonable steps taken to ascertain consent is considered (Tang, 1998).

Since 1992, Canadian courts have instated this consent-seeking process, requiring the accused to take positive steps to secure agreement. In the landmark *R. v. Ewanchuk* (1999) decision, for example, the Canadian Supreme Court explicitly encouraged *affirmative communication* between the parties involved in sexual encounters. In this case, the 17-year-old complainant met the accused in a mall’s parking lot. He told her that he was looking for staff for his woodworking business, and the complainant showed interest and gave him her phone number. The next day the accused interviewed the complainant for the job in his van. He later suggested moving the meeting to his trailer, and upon entering he closed the door in a way that made the complainant believe he had locked it, which frightened her. The complainant initially resisted his sexual advances verbally (by saying “no”) when the accused fondled her breast and engaged in non-sexual massaging. However, when the sexual touching escalated she did not say anything out of fear, even when she did not want the accused to touch her in this manner. Eventually, the accused took out his penis, and the complainant asked him to stop. Soon after, she left the trailer. The trial

Pappajohn authorities support a two-pronged question for determining whether there is an evidential foundation warranting that a defence be put to a jury. The question is whether there is (1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true. The terms “no evidence”, “some evidence” or “any evidence” can be used to describe the applicable evidential standard, provided these terms are understood as elliptical references to the full question. The second part of this question can be rendered by asking whether the evidence put forth is reasonably capable of supporting the inferences required to acquit the accused. This is the current state of the law, uniformly applicable to all defences” (p. 1).

judge acquitted the accused based on the defence of implied consent, holding that, objectively, the complainant's conduct raised a reasonable doubt regarding her lack of consent. The Alberta Court of Appeal upheld the acquittal on the basis that there had been an honest but mistaken belief in consent. However, the Supreme Court reversed the decision and entered a conviction, holding that the trial judge erred in acquitting the accused on the grounds of implied consent since no such defence exists in law. Furthermore, the Supreme Court held that it is not sufficient for the accused to have believed that the complainant was subjectively consenting in her mind. "In order to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant *communicated consent to engage in the sexual activity in question*" (para. 46; emphasis in original), and he must also have taken reasonable steps to ascertain consent to engage in the sexual activity in question to "to give an air of reality to the defence" (para. 56; quoting *R v. Esau* [CAN], 1997, para. 15). In essence, *Ewanchuk* redefined the elements of the defence and how the *air of reality* test may be applied.

In another significant decision that clarified the defence of mistaken belief (*R. v. Malcolm*, 2000), the Manitoba Court of Appeal determined that active steps to obtain consent are required when circumstances exist that would prompt a "reasonable man to inquire further" (para. 21). In *Malcolm*, for example, the accused entered a complainant's bedroom and had sexual intercourse with her while she was sleeping after a night of drinking. He also knew that she was married to a close friend. The Court argued that, in the circumstances of this case, conversation and verbal consent, rather than a mere reliance on physical responses, are required to establish consent (see also *R. v. Cornejo* [CAN], 2003). Moreover, in an important and more recent decision, the Supreme Court found that there is no defence of "prior consent" (*R. v. J.A.*, 2011) because consent must be given when sexual contact takes place. These judicial decisions and legislative reforms have helped Canada to incorporate some objectivity⁴ in the adjudication of sexual crime, which was previously solely

⁴ s. 273.2(b) introduces only a partly objective standard by injecting language such as "in the circumstances known to the accused at the time" of the offence (*Martin's Annual Criminal Code*, 2010); thus, there is still a subjective element to the provision.

dependent on finding and inferring culpability in the accused's subjective state of mind (the *mens rea*).

Together, legislative provisions and doctrine have moved Canadian law in the direction of “only yes means yes” (Gotell, 2008, p. 869), which also calls for the accused to seek positive indications of assent to sex acts at every stage of sexual encounters (e.g., *R. v. Ewanchuk* [CAN], 1999). In comparative terms, Canada appears to have moved much closer to this standard than most other common-law jurisdictions (Munro, 2008), including Hong Kong. At this juncture, however, commentary on the interpretation of the “reasonable steps” requirement in Canada is limited (Verdun-Jones, personal communication, September 17, 2009). In particular, the “positive consent standard” is considered to lack specificity and effectiveness within Canadian law (Ruparelia, 2006; Sheehy, 2000). For example, although Sheehy cited a number of lower court decisions in which judges have found that it is the duty of the accused to “abstain or obtain clarification on the issue of consent” (*R. v. Esau*, 1997, para. 80), in cases where the complainant is asleep, unconscious, or extremely intoxicated, judges have not “raised the bar for what steps are said to be reasonable” (Sheehy, 2002, p. 102). In Study 1, therefore, I sought to explore the factors surrounding the proposal of the mistaken-belief defence and to examine its association with judicial outcomes in Hong Kong and Canada.

To summarize, in Hong Kong a person (A) commits an offence of rape when he intentionally penetrates the vagina of a person (B) with his penis without B's consent, and when A does not reasonably believe that B consents. In Canada, person A commits an offence of sexual assault when he touches person B in a sexual nature and is reckless or wilfully blind to whether B has provided consent. Furthermore, when A advances a defence of mistake of fact, the court must determine whether his belief is reasonable by considering the totality of the circumstances, including any steps A has taken to ascertain whether B consents. Determining or inferring the true mental calculations of a particular accused or the level of consent of a complainant will always be difficult, and triers of fact will often rely upon the objective factual situation to make inferences about the specific, subjective mindset of an accused. Although rape has often been considered a unitary construct, it is a heterogeneous

phenomenon that encompasses such diverse events as verbal coercion or threat from an intimate partner, stranger rape, and non-consensual intercourse when the complainant was too intoxicated to consent or object. The likelihood of conviction may depend upon a whole host of complainant- and accused-related factors, and, in turn, some of these factors may be particularly relevant in certain sociocultural contexts. For instance, a study involving in-depth interviews with 331 jurors who had served in sexual assault trials revealed that jurors were less likely to believe that the accused was guilty if the complainant had reportedly engaged in adultery, been drinking or using drugs, or been acquainted with the accused (LaFree, Reskin, & Visser, 1985).

To expand on these findings, and to explore potential cross-cultural differences, this study examines the relationships between several variables (see below) and judicial outcomes in both Canada and Hong Kong. In addition, to consider the incremental validity of these variables, many of the legally relevant variables that are used to satisfy the standard of proof by triers of facts from both jurisdictions were also considered and coded. All of the variables of interest will be further described in the next section. As a whole, this study represents an initial effort to explore and describe how triers of facts in two distinct jurisdictions interpret law and legislations related to sexual assaults, and to examine the factors that may affect judicial outcomes.

Variables of Interest

The variables considered in this study include: complainant-accused relationship, complainant's sexual history, alcohol use by either party prior to the incident, and complainant's initiation. Each of these variables, as discussed below, are commonly examined in the literature as being related to the perceived credibility of either the complainant or the accused and the ultimate trial outcome.

Stranger vs. Acquaintance

Acquaintance rape, also referred to as "date rape" and "hidden rape," has been increasingly recognized as a real and relatively common problem within Western society (Koss, 1988). Although most of the rape/sexual assaults are perpetrated by someone who was known to the complainant (Beh, 1998; Tjaden & Thoennes, 2000),

studies have shown that rapes/sexual assaults committed by strangers are more frequently reported to police than those perpetrated by non-strangers (Chen & Ullman, 2010; Felson & Paré, 2005; Fisher, Daigle, Cullen, & Turner, 2003; Ruback & Ménard, 2001). In general, law is not automatically invoked whenever a crime occurs; the decision to resort to law, as opposed to using other forms of “social control” (Black, 1984) or doing nothing, depends on a variety of factors. According to Black’s (1976) theory of the behaviour of law, a series of social-structural characteristics determines when, how much, and what style of law is used. One important characteristic is *morphology*, or “the distribution of people in relation to one another” (Black, 1976, p. 37). Morphology consists of people’s networks of interaction, the intimacy of their relationships, and their integration with others. Law is most common where interaction, intimacy, and integration between and amongst the parties involved are scarce (Black, 1979); in particular, strangers frequently use law to solve their disputes, whereas those who know each other tend not to resort to law. According to Black, this is because other less formal and less costly forms of “social controls” are more likely to be available to those who know each other.

Black’s (1976, 1979) framework is intended to be highly applicable to a variety of contexts. On the more specific question of when and in which kinds of situations would the victims of sexual assault contact the police, a number of accounts consistent with Black’s formulation have been constructed (e.g., Gartner & Macmillan, 1995; Williams, 1984). In these accounts, the victim is a rational decision-maker who weighs the costs and the benefits of informing the police. For victims who know their offenders, the costs will often include damage to the relationship, potential reprisal by the offender, and public awareness of their private troubles. Even before these costs are calculated, however, the victim’s decision will be strongly influenced by the seriousness of the crime. A substantial amount of research on perceptions of crime seriousness indicates that crimes perpetrated by strangers are perceived by the general public as more serious than crimes perpetrated by offenders known to the complainant (Estrich, 1988; Gölge, Yavuz, Müderrisoglu, & Yavuz, 2003; Pazzani, 2007). Therefore, the basic prediction derived from these understandings is that the more intimate the relationship between a victim of sexual

assault and the offender, the less likely the criminal justice system will learn about the incident. Although the present study focuses only on cases that were reported and tried in court, it provides a glimpse into the types of cases that overcame the complex social hurdles associated with the prosecution of sexual assaults.

In the judicial arena, Du Mont, McGregor, Myhr, and Miller (2000) reported that, compared to sexual assaults perpetrated by strangers, Canadian sexual assault cases involving acquaintances were 73 percent less likely to result in a conviction. It also appears that judges from both Canadian and Hong Kong jurisdictions may be more likely to consider the mistake of belief in consent in cases where the complainant had an existing or a prior relationship with the accused. For example, in *R. v. Dickson* [CAN; 1993], it was stated that “[e]vidence of a sexual relationship between an accused and a complainant proximate in time to the offences alleged might well support a defence of honest but mistaken belief in consent in some circumstances” (para. 65). Similarly, in Hong Kong, Justice Cheung remarked: “The present case did not involve the victim having been raped by a stranger. Had this been the case, there would simply have been no room for [the] direction [of mistaken belief]” (*HKSAR v. Ma Kin Yiu*, 2008, para. 18). However, the Court of Appeal did go on

to stress that ... [w]e do not consider it necessary for the court to give a direction on “genuine belief” in each and every sexual assault case involving dating pairs or sex partners. The court does not apply the law mechanically. This is because, even where a case involves dating pairs, a married couple or sex partners, if the facts leave no room whatsoever for a direction on “genuine belief”, the giving of such a direction would only serve to confuse the jury. (para. 20)

Similar to their Western counterparts, victims of sexual assaults in Hong Kong often know their assailants (Chan, 2009; Cheung & Law, 1990). For example, in a household survey of 2,708 women residing in Hong Kong, approximately 67% of sexual coercion acts were perpetrated by someone known by the victim (Chan, 2005). Beh (1998) also found that 53% of rape cases were perpetrated by an acquaintance, and amongst these acquaintance rape victims, 21% of the victims had been attacked

on more than one occasion by the same assailant, suggesting a delay (or absence) of reporting as they did not report the first incidents to the authority. In addition, although rapes are more often perpetrated by acquaintances, these assaults are relatively less likely to be reported compared to stranger rapes (Cheung & Law, 1990). It is conceivable that, because of the traditionally-ingrained Confucian influences, victims are less likely to report if they know the accused. Chiu (1991a) advanced the idea that the Chinese Confucian conception of justice is based upon the concept of *yi* (righteousness), which prescribes different obligatory requirements for various social roles and requires one to follow the prescribed rules implied in one's social role. Chiu's (1991b, 1991c) studies also indicated that both roles and imposed obligations are essential parts of the Chinese conception of social justice, and these roles and obligations are where the differences between Western and Chinese conceptions of justice conception lie. While the Western conception of justice may focus on individual rights and autonomy, the Chinese's *yi* suggests the incorporation of obligatory considerations that are context-specific and relationship-focused (*guanxi*; Jacobs, 1979). In particular, although theorists have characterized Chinese culture as a relation-oriented culture, because Chinese are generally concerned about interpersonal harmony and group solidarity (Ho, Chan, & Chiu, 1991; Yang, 2000), *guanxi* (the ties between two parties) is more obligation-bound than the Western concept of social relationships. Particularly among Chinese women, who are more prone to an interdependent construal of the self (Markus & Kitayama, 1991), disclosure of a rape experience often affects their relatedness to others and results in further psychological turmoil (Wood, 1994). Therefore, disclosure in the aftermath of sexual assaults (especially by known assailants) carries greater cultural implications in Hong Kong. That said, although violence against women is often justified and explained in traditional Chinese cultures through recourse to Confucian ideas regarding men as dominant and superior (Qi, 2007), with increased globalization and the influence of discourses on modern ideas, it is now more possible for Chinese women to situate themselves in a better position to resist the status quo (Tang et al., 2002). Such sentiment was supported by Deputy Judge Longley when he stated that "I am obliged to send a clear message to the society that deterrent sentence would be

passed on offenders who abuse their relationship or friendship with the victim in sexual attack” (*HKSAR v. Leung Chi Kei*, 2008, para. 13). In addition, in 2002, the Hong Kong Legislative Council made it clear statutorily that rape is a criminal offence regardless of the marital status of the parties (*Crimes Ordinance*, s. 117(1B)). However, it remains to be seen whether these ideological, judicial, and legislative adjustments would lead to an increase in sexual assault reporting in Hong Kong, particularly the reporting of acquaintance rape.

According to Western psychological research, Monson, Langhinrichsen-Rohling, and Binderup (2000) reported that the perceived seriousness of the sexual assault decreased linearly as the level of familiarity between the victim and the perpetrator increased. In general, observers are less likely to assign blame to the complainant of the rape if the assailant is a stranger to her, and more likely to assign blame if the assailant is a date (L’Armand & Pepitone, 1982; Pollard, 1992). In particular, Bridges (1991) found that American college students of both sexes indicated a belief that “psychological damage” would be greatest for the complainant of the stranger rape and least for the complainant in the steady dating scenario, with the first date complainant falling in between. Furthermore, male students perceived the steady date rape scenario, as compared to a stranger rape scenario, as less likely to be rape and as more enjoyable for the victim, whereas female students characterized all three rape scenarios similarly and attributed similarly low levels of enjoyment to all three victims (Bridges, 1991). More importantly, both male and female students were more likely to believe that the assailant had misunderstood the victim in the dating conditions, when compared to the stranger condition (Bridges & McGrail, 1989). This latter finding has a considerable implication for determining the reasonableness of the accused’s mistaken belief in a rape trial. All in all, these findings suggest that the more intimate the prior relationship between the complainant and the accused, the more lenient people are in judging the accused (e.g., more acquittals or milder sentences) and the more harsh they are in judging the complainant (see also Monson & Byrd, 1996; Viki, Abrams, & Masser, 2004; Willis & Wrightsman, 1995; Yamawaki, 2009).

In this study, it was expected that proportionally fewer cases involving acquaintances (especially intimate partners) would be tried in Hong Kong when compared to Canada because of the strong consideration for *guanxi* (social ties) in Hong Kong. Furthermore, it was hypothesized that the mistaken-belief defence would be proposed more often in cases where the complainant and the accused were acquaintances (as compared to those who were strangers). Finally, it was proposed that sexual assaults perpetrated by strangers would lead to more convictions than those perpetrated by acquaintances in both jurisdictions; however, it remains to be seen whether the mistaken-belief defence would be significantly associated with judicial outcomes in Canada and Hong Kong.

Sexual history

The (mis)use of the complainant's sexual conduct to infer (in)credibility by the defence had been commonplace until the recent past. Currently, both countries have statutorily instated rape shield provisions (Delisle, 1993) to determine the admissibility of evidence of the complainant's sexual experience (s. 154(1) in Hong Kong's *Crimes Ordinance* [introduced in 1978; Stock, 2007] and ss. 276 and 277 of the *Canadian Criminal Code* [implemented in 1983]). The provision holds that evidence related to complainant's sexual experience (with either the accused or others) is "not admissible to support an inference that ... the complainant (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or (b) is less worthy of belief" (s. 276(1)). As illustrated in *HKSAR v Tse Hoi-Pan, Dominic* [2006],

it was then considered that a lack of chastity was relevant to the material issue of consent and also to the collateral issue of credibility. In other words, the purported rationale of the common law approach was that women who had consensual sex outside of marriage were thought, essentially, to have a dual propensity to consent to sexual relations indiscriminately and to also be devoid of veracity. Under the approach, the moral character of the complainant was explored by minutely examining her sexual history in cross-examination. The entrenchment of the stereotype and myth that consensual sexual indulgence outside marriage was *necessarily and logically* probative as

prospectant evidence of whether consent had or had not existed on the occasion of the alleged rape, has by now been completely discredited. (para. 6-7)

Similarly, the rape shield provisions (ss. 276 and 277) were implemented in Canada to protect the victim in court by restricting the admissibility of evidence regarding her sexual past. These reforms attempted to combat the “twin myths” (coined by the Supreme Court of Canada in *R. v. Seaboyer*; *R. v. Gayme* [CAN], 1991, and upheld in *R. v. Darrach* [CAN], 2000) which inferred that a woman who was sexually experienced was less credible as a witness or more likely to consent to intercourse. In particular, the Supreme Court affirmed that “[e]vidence of sexual conduct and reputation in itself cannot be regarded as logically probative of either the complainant’s credibility or consent” (*R. v. Seaboyer*; *R. v. Gayme*, 1991, para. 12).

Importantly, however, this is not an absolute shield (Stuart & Delisle, 1997), and judges in both countries can exercise discretion if they are satisfied that the issue is “relevant” and “probative” (ss. 276(2) and 276(3) of the *Canadian Criminal Code*) and if it would be “unfair to the accused to refuse to allow the evidence to be adduced” (s. 154(2) of the Hong Kong’s *Crimes Ordinance*). Temkin (2002) reviewed the research on shield provisions in Canada, as well as in Australia and England, and concluded that shield reforms that were intended to protect against reliance on sexual history and character evidence are largely ineffective when discretion to determine the admissibility and probative value of past sex conduct is left to judges, as opposed to being specified in statute. Further, Adler (1987) highlighted that even if the admission of the complainant’s sexual history is disallowed, defence counsels frequently bring up sexual history questions and introduce it by “indirect evidence, innuendo and suggestion” (p. viii). For example, Gunn and Linden (1997) found that women perceived to be sexually promiscuous, or otherwise of poor reputation, were less likely to have their cases result in a guilty plea or a verdict in Canada, despite the 1983 rape reform.

In considering the legal relevance of the complainant’s sexual history, her past conduct may be deemed most probative by the defence when the accused proposed that he had a mistaken belief on the matter of her consent. For example, in *R. v. Wald*

[CAN; 1989], although Justice Harradence acknowledged that evidence of reputation was in no way probative with respect to the *actus reus* element of the non-consent, he stated that “[t]he fact that the complainant has a reputation for participating in a specific type of sexual conduct can strengthen the accused’s testimony that he honestly believed she was consenting” (p. 337). When this defence is raised at a sexual assault trial, therefore, the accused may request to introduce sexual history evidence to provide “an air of reality” to this defence (Sinclair-Prowse & Bennett, 2009; *HKSAR v. Siu Tat Yuen*, 2005; *R. v. Bulmer* [CAN], 1987).

In this study, I examined in what context the woman’s sexual history would be mentioned and described in the case, and how it might affect judicial outcomes. It was expected that, despite the shields, some of the case judgments in both countries would make reference to the sexual history of the complainant, especially in cases where a mistake of fact defence was proposed. Finally, I explored how the lack of sexual experience on the part of the complainant (i.e., demonstrating evidence of chastity or the status of being a virgin) might contribute to her credibility. As suggested in the earlier sections, rape laws in traditional China were, above all, concerned with the protection of women’s chastity (Tanner, 1994). Considering the similarly chastity-centric ideology of Hong Kong (Constable, 1996), it was expected that, as compared to cases involving a sexually experienced complainant or cases where the sexual history of the complainant was unknown, the violation of a virgin would lead to more convictions in Hong Kong.

Alcohol Use

Canadian data on the incidence of sexual assault after the use of alcohol are scarce, particularly in cases where the alcohol consumption was voluntary. One large American study estimated that 3 million American women had ever been sexually assaulted by forcible penetration while incapacitated through voluntary consumption of intoxicants to date, with 300,000 of these occurring in the past year (Kilpatrick, Resnick, Ruggiero, Conoscenti, & McCauley, 2007; see also Mohler-Kuo, Dowdall, Koss, & Wechsler, 2004). The researchers also found that these victims were less likely to report their experiences to law enforcement than other victims. In Hong Kong, Beh (1998) reported that approximately 19% of the reported rape cases

involved the use of alcohol and/or drugs; however, there has been no recent substantive research on the prevalence of victim intoxication related to rapes that were not reported in Hong Kong. More recently, Shenoy et al. (2010) also found that Asian American women (30%) are less likely to report sexual assault incidents involving alcohol or drugs than their Caucasian counterparts (62%).

Given that the crimes of rape (in Hong Kong) and sexual assault (in Canada) are general (or basic) intent offences (i.e., the crime committed does not have to be intentional as long as it is a wrongful act; e.g., Archbold, 2007; *R. v. McRae* [CAN], 2010), a defence of self-induced intoxication on the part of the accused would not be recognized, nor will it acquit an accused who was “too drunk to know” that the complainant was not consenting (see s.273.2(a)(i) in the *Canadian Criminal Code*; *R. v. Mohammad Hussain* [HK], 1992; *Secretary for Justice v. Lau Yun Leung* [HK], 1999; Stock, 2007). As observed in *R. v. Sheehand and Moore* [UK] (1975), “[a] drunken intent is nevertheless an intent” (p. 312), and it is considered that “recklessness,” as a consequence of voluntarily-induced intoxication, cannot amount to a defence. However, this generalization is contradicted by the controversial decision of *R. v. Daviault* [CDN; 1995]. The majority of the Supreme Court held that voluntary intoxication, akin to automatism or mental illness, could afford a defence. That said, more recently, a new amendment to the *Canadian Criminal Code* specifically excludes the defence of mistake, and “[i]t is not a defence to an offence ... that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence” (s.33.1).

Another controversial issue, representing another evolving norm in this area, involves whether “drunken consent is still consent” (*R. v. Bree* [UK], 2007). While the *Canadian Criminal Code* does not refer to the relevance of the complainant’s intoxication specifically, s.273.1(1) defines consent as “the voluntary agreement of the complainant” to engage in sexual activity. The *Code* also states that “no consent is obtained where the complainant is incapable of consenting to the activity” (s. 273.1(2)(b)). Taken together, these provisions suggest that the prosecution may use evidence of the effects of alcohol and/or drug consumption to prove non-consent through a lack of capacity or a lack of voluntary agreement. Similarly, according to

the Social Welfare Department of Hong Kong, a person is considered to be subjected to non-consensual sexual acts when she is unable to give consent owing to the influence of alcohol, drugs or other substances (Working Group on Combating Violence, 2007).

In general, a complainant's alcohol consumption can impact consent in a rape trial in two main ways (as described in *R. v. Cedeno* [CAN], 2005). First, if the complainant was virtually comatose during the alleged incident, thereby rendering her physically incapable of consenting, then it is likely that the sexual act was non-consensual and, therefore, a criminal act (e.g., *HKSAR v. Lee Sze-Lung and Ng Ka-Ming*, 2009; *R. v. Esau* [CAN], 1997; *R. v. J.A.* [CAN], 2011). The second scenario involves a complainant who was intoxicated to just short of the point of unconsciousness, and her capacity to consent had been strongly undermined by this intoxication. In situations such as this, the complainant and the accused may disagree about the level of intoxication, or whether she was capable of, and did, consent. For instance, the accused may claim that the complainant gave consent, albeit being drunk, or that he had a reasonable belief that this was the case, whereas the complainant may state that she cannot remember what happened because she was extremely drunk but that she knows that she did not want to have sex with the accused. She may also claim that she was too drunk to resist. This kind of (severe) impairment-but-not-unconscious scenario was tackled in *R. v. L.C.* [CAN; 2002]. In this case, the complainant and the accused attended a house party where they both had consumed alcohol. The complainant was observed by other guests to be intoxicated to the point of being unable to speak, and she testified that she had no memory of the sexual activity. The accused, however, said that while the complainant was drunk, she was neither staggering nor falling, and that she led him to the bedroom and was straddling him at one point in the sexual activity. L.C. was convicted and later appealed the decision. Referencing the Supreme Court of Canada's decision in the aforementioned *R. v. Daviault* [CAN; 1994], Justice Rogers held that:

[B]ecause the evidence showed that Ms. M. was not "passed out" i.e. asleep when the sexual activity took place ... the learned trial judge ... had to have

been satisfied beyond a reasonable doubt that alcohol had rendered Ms. M. an automaton. That is to say: her mind was disengaged from what her body was doing. (para. 6)

The appeal judge found that the prosecution had failed to prove the complainant's incapacity to this standard, and the accused's evidence that the complainant had consented "by her conduct" was not rejected by the trial judge. He therefore allowed the appeal and set aside the conviction (see also *R. v. Jensen*, 1996; *R. v. Mullaney*, 1998).

Similarly, a mistaken-belief argument can be advanced where the accused argues that he honestly believed both that the complainant did have the capacity to consent and that she in fact consented. This point was confirmed by a majority of the Supreme Court of Canada in *R. v. Esau* [CAN; 1997]. The complainant and the accused in this case were drinking at a house party, and the complainant awoke the next morning to find that she had been sexually assaulted. She testified that she had no memory of what had occurred, but that she would not have had voluntary sexual relations with the accused, who was her second cousin. The accused testified that the complainant invited him into the bedroom and was a capable and willing participant. Defence counsel did not request an instruction on *mistaken belief*, asserting that it was a clear-cut case of consent or no consent. Mr. Esau was convicted, but the Yukon Territory Court of Appeal allowed his appeal. On further appeal to the Supreme Court, the majority held that the trial judge had erred in failing to leave the defence of mistaken belief with the jury, as there was evidence that the complainant, though lacking the capacity to consent, may have *appeared* capable and consenting to the accused. However, Justice McLachlin dissented and noted that on the complainant's evidence she either lacked the capacity to consent or did not do so. Although the defence's argument was that the complainant did consent, Justice McLachlin noted that there was simply no *air of reality* to the defence of mistake. Justice McLachlin further remarked that the majority had failed to apply the reasonable steps provision in s. 273.2(b) of the *Criminal Code*, which, as described in the previous section, requires the accused to take reasonable steps to ascertain the presence of consent before a claim of mistake can be made. More recently, Gotell (2008) argued that,

because of the shift to an affirmative consent standard, the Canadian sexual assault law has led to increasing convictions in cases where the complainant was highly intoxicated or passed out. Considering the majority decision in *R. v. Esau* (see also *R. v. Millar*, 2008), however, the present study will explore how often Canadian courts consider and follow s. 273.2(b) in cases involving intoxicated complainants.

Currently, in Hong Kong there is little statutory clarification on the issue of whether complainants have the capacity to consent under intoxication, and we have to consult case law for guidance. Recently, the Hong Kong Court of Appeal (in *香港特別行政區 訴 鄧兆峰 朱君熒 [HKSAR v. Tang Siu Fung and Chu Kwan Wai]*, 2010) adopted the English court decisions in *R. v. Bree* [2007] regarding “drunken consent.” Delivering the decision of the court, Sir Igor Judge P. held that:

[The phrase] ‘drunken consent is still consent’ provides a useful shorthand accurately encapsulating the legal position [according to which a person who is very drunk is still capable of consenting.] [W]hen someone who has had a lot to drink is in fact consenting to intercourse, then that is what she is doing, consenting. (para. 33)

In *香港特別行政區 訴 鄧兆峰 朱君熒 [HKSAR v. Tang Siu Fung and Chu Kwan Wai]* [2010], the complainant was a single woman in her 20’s who went to a nightclub for a birthday party, which was also attended by the three accused (Tang, Chu, and Lai). The complainant knew Tang through school, and he introduced Chu and Lai to the complainant that evening. Throughout the night, she consumed a substantial amount of alcohol and danced and flirted with Chu and Lai. Eventually, she felt intoxicated and sleepy and left with the three accused at 4am for a motel, where intercourse ensued between the complainant and the three accused. The complainant claimed that, due to her drunken condition, she had gaps in her memory of the event and could not remember whether consent was given; however, she testified that she did not want to have sexual intercourse. The trial judge acquitted Lai but convicted Tang and Chu for rape. At appeal, the court, focusing on the voluntary aspect of the complainant’s intoxication, overturned both convictions. In particular, Justice Cheung stated:

In a case which involves a victim who was affected by her own self-induced voluntary intoxication, the question is not whether the intoxication made the victim less inhibited than she would have been if she was sober [n]or is it [a question of] whether she had, while she was intoxicated, done something which she regretted afterwards ... [n]or is it [a question of] whether she, because of the intoxication, could not recollect what had happened. Under these circumstances, the court must remind the jury that the most important question is whether the victim consented to sexual intercourse. If the victim, notwithstanding the effect of the alcohol, did consent to sexual intercourse, the consent cannot be revoked or regarded as ineffective. (para. 45)

Many legal scholars have since debated the validity of such “drunken consent” arguments (Rumney & Fenton, 2008; Wallerstein, 2009). It is difficult to discern whether a woman is so intoxicated that she is incapable of consent because each person will reach this stage of extreme intoxication at a different blood-alcohol level; the individual nature of this threshold makes it legislatively difficult to provide specific guidelines (Cowan, 2008). However, there is strong evidence that putting the issue of (in)capacity solely in the hands of the jury may be problematic, as evidenced by a series of studies conducted by Finch and Munro (2003, 2004, 2005, 2007). For example, they found that, when left to the jury, questions of capacity to consent to sexual intercourse are subject to ongoing prejudicial beliefs about appropriate gender behaviours, where a woman is expected to assume the risk of sexual assault and therefore bears responsibility for any attack perpetrated upon her, particularly when she has been drinking (Finch & Munro, 2005, 2006, 2007). While many jurors in Finch and Munro’s study of mock rape trials recognized that the perpetrator bore some responsibility for the sexual assault, a significant number of them treated the issue of responsibility as a “zero-sum picture” (Archard, 1998, p. 139); that is, if the woman was perceived to bear some responsibility for the rape, this sufficiently diminished the perpetrator’s responsibility, leading to his acquittal in the rape charge.

Given the aforementioned precedents, this study explores how Canadian and Hong Kong courts adjudicated cases involving intoxicated parties (particularly the complainant) and examines whether the complainant’s level of intoxication, as

described or inferred by the judge, would be related to judicial outcomes. In particular, it was hypothesized that alcohol use by the complainant would more often be correlated with a not guilty verdict in Hong Kong than in Canada, for two reasons. First, although accused from both jurisdictions could claim that they reasonably believed that the complainant was a consenting party (despite being intoxicated), this belief must be assessed in relation to all the circumstances surrounding the alleged assault in Canada, including any steps taken by the accused to ascertain whether the complainant consented (including his awareness of the complainant's state of intoxication). Therefore, this might shift some of the evidential burden on to the accused, leading to more convictions. Second, it is conceivable that when a complainant violates traditional gender norms through, for example, voluntary and excessive consumption of alcohol, she will be perceived as more accountable for the event (Finch & Munro, 2005, 2006, 2007). Considering that people from Hong Kong generally endorse more rigid sexual norms and rules (Lee, Fiske, Glick, & Chen, 2010), it was expected that alcohol use by the complainant would be perceived as more gender inappropriate in Hong Kong than in Canada, leading to more negative judgments of the complainant and potentially more acquittals. This possibility would be explored further in Study 2.

Complainant's initiation

[P]ossible manifestations of consent before [the complainant] entered the bedroom would not be enough evidence to require that an instruction on reasonable mistake be given. The law of rape is not a part of the law of contracts. If on Friday you manifest consent to have sex on Saturday, and on Saturday you change your mind but the man forces you to have sex with him anyway, he cannot use your Friday expression to interpose, to a charge of rape, a defence of consent or of reasonable mistake as to consent. You are privileged to change your mind at the last moment. (*Tyson v. Trigg* [US], 1995, para. 448)

All of the aforementioned variables are described under the basic premise that “no” means “no” (i.e., the absence of consent). However, when the complainant initiated sexual contact but eventually rescinded her affection, and thereby withdrew

her consent for further intimacy, then the issues surrounding the presence of consent becomes even more complex. In his seminal work on homicide, Wolfgang (1958, 1967) introduced the concept of *victim precipitation* when he argued that, in some instances, the victim may act as a “direct, positive precipitator in the crime” (Wolfgang, 1967, p. 73). Defining victim-precipitated homicide as an incident in which “the role of the victim is characterized by his having been the first in the homicide drama to use physical force directed against his subsequent slayer” (Wolfgang, 1967, p. 73), Wolfgang found that almost 26% of homicides in his study were victim precipitated. Despite Wolfgang’s specific focus on the victim’s primary use of physical force as the determining factor in defining victim-precipitated homicides, subsequent researchers expanded the definition and applied it to other types of violence. For example, Amir (1967) defined rape as being victim precipitated when “the victim, actually, or so it was deemed, agreed to sexual relations but retracted before the actual act or did not react strongly enough when the suggestion was made by the offender(s)” (p. 495). He analyzed 646 forcible rapes recorded by the police in Philadelphia and concluded that 19% were victim-precipitated. However, Amir’s use of *victim precipitation* in this way has been soundly criticized by numerous scholars on both methodological and ideological grounds. For example, feminist scholars argued that Amir uses rape myths to justify sexual assault (Clark & Lewis, 1977) and that this conceptualization of victim precipitation detracts from the analysis of the dynamics of crime and attributes some, if not all, of the responsibility to the victim (Walklate, 2000). In general, concerns about victim-blaming remain a common problem in studies of victim precipitation; however, Fattah (1991) has defended the idea of victim-precipitation, asserting that the criticism of victim precipitation should “not lie in the concept itself, but in the way the concept was operationalized in some studies” (p. 293). Thus, issues of clarifying and operationalizing the concept are critical and are explored in this section.

Victim precipitation is generally defined as behaviour by the victim that initiates the behaviour of the assailant. According to Fattah (1991), the actions of the victim can “encourage a behavioural response or arouse emotions in the offender that increase the chance of victimization” (p. 295). Furthermore, Polk (1997) advocated

for a more narrow and focused definition of the term by referring to situations in which “the victim’s actions were a necessary part of the event” (p. 144). In other words, *but for* the actions of the victim, the incident would not have occurred. Thus, defining precipitation in this way would require operationalizing the concept in terms of the primary sexual initiator. As Fattah argued, “victim precipitation should not be construed as an attempt to blame the victim or to hold him/her responsible for what happened” (p. 293). Rather, the concept allows the researcher to take into consideration situational and contextual factors, providing a richer, more thorough explanation of the criminal event. An inclusion of situational factors into any analysis examining violent incidents should include what active role (if any) the victim played in the evolution of the incident. From the standpoint of sexual assault, victim precipitation may provide new insight into the sexual dynamics between men and women.

What happens in law when complainants behave in ways that can be viewed as precipitating the event? How might, for example, consensual activities (e.g., foreplay) between a man and a woman affect the objective reasonableness of his belief in consent to intercourse – the crux of the mistake-of-fact defence (Attardo, 2002)? Never is the murky nature of consent more evident than when a woman indicates that she was interested in the man and agreed to (or even initiated) some sexual activity on the occasion of an alleged rape. The Ontario Superior Court of Justice’ decision in *R. v. C.R.N.* [1999] is illustrative, where a 16-year-old complainant alleged that she had been raped twice at a party by the 20-year-old accused. The accused claimed that the first act was consensual but admitted that he figured she did not want to have sexual intercourse with him the second time. With the latter admission, it should be an open-and-shut case. However, the judge questioned the complainant’s judgment in putting herself in a potentially dangerous situation by accompanying her friend to a party at the residence of five young men and sleeping over. Although the judge noted that this fact did not reflect upon her credibility directly and had no bearing on whether she consented, he went on to wonder whether a 16-year-old girl might, “in guilt and hindsight place blame on someone to take condemnation away from herself” (para. 14). Furthermore, although

Justice Gordon contended that there was no consent communicated by the complainant in the second incident, which was around 30 seconds after the first, he was not persuaded beyond a reasonable doubt that the complainant had not consented to the first incident. While the accused was convicted for the second incident, the judge appeared to be quite uncomfortable with the precedents set in *R. v. Ewanchuk* [CAN; 1998] when he stated:

[T]hough not specifically at issue here, I must say this application of the law gives me some concern. The practical reality of a sexual incident becoming non-consensual within a short period of time, some 30 seconds, requiring immediate control of a hormonal urge ... seems objectively somewhat idealistic. (para. 45)

This characterization of the sexual assault in biological/hormonal terms echoes the highly controversial comments of Justice McClung of the Alberta Court of Appeal in *R. v. Ewanchuk*, in which Justice McClung stated that the “clumsy passes” (para. 5) of the accused were “far less criminal than hormonal” (para. 21). In *R. v. C.R.N.*, Justice Gordon essentially suggested that once men are “turned on,” it is unrealistic, and perhaps unreasonable, to expect them to “turn it off” instantaneously.

In Hong Kong, it appears that the complainant is also held accountable when she is alleged to have initiated an intimate act. For example, in *香港特別行政區訴戴宜男* [*HKSAR v. Dai Yee Nam*] [2005], quoting *R. v. Billam and others* (1986), Justice Wu stated, “The fact that the victim may be considered to have exposed herself to danger by acting imprudently (as for instance by accepting a lift in a car from a stranger) is not a mitigating factor[,] and the victim’s previous sexual experience is equally irrelevant. But if the victim has behaved in a manner which was calculated to lead the accused to believe that she would consent to sexual intercourse, then there should be some mitigation of the sentence.” (p. 13). Further, in *香港特別行政區訴黃盛中* [*HKSAR v. Wong Shing Chung*] [1999], the court held that a direction on genuine belief was necessary in that case:

[T]he facts of the present case ... leave room for a belief on the part of the applicant that the victim consented [to sexual intercourse] ... He said the victim had flirted with him, that they knew each other very well, and that on

the night in question they had been massaging each other for a very long time. They had also consumed much wine and the applicant, under the influence of alcohol, might have thought that the victim consented to further intimate behaviour. This might well be the genuine belief of the applicant at that time. (para. 19)

To understand the link between complainants' behaviours and their perceived accountability, Stevenson (2000) explored how the stereotypical image of an "unequivocal victim" has shaped legal understanding of sexual assaults and the sexual assault complainants in United Kingdom. Stevenson argued that because of the traditional, mid-Victorian societal view of the female as the quintessential sex that signifies "respectability" (p. 344), women were, and still are, expected to behave in a certain way in order to appear credible in the legal arena. In particular, women who are portrayed as sexually assertive are also perceived as unreliable, particularly in cultures that are "imbibed with patriarchal attitudes" (Barnett, 1998, p. 265).

In this study, therefore, I sought to explore the relationship between complainant's sexual initiation and judicial outcomes in sexual assault trials in Hong Kong and in Canada. It is conceivable that when the accused alleges that the complainant was the first party to introduce sexual intimacy in their encounter, he is also more likely to claim mistaken belief in consent and/or be acquitted. Importantly, it was expected that the association between a complainant's initiation and an acquittal outcome would be even stronger when the complainant herself admitted to initiating some of the sexual intimacy. Finally, it is predicted that because of the greater emphasis of cultural constraints in male-female relationships in Hong Kong (Cheung, 1997), more acquittals would be rendered in Hong Kong, as compared to Canada, when the complainant was perceived to have violated traditional gender norms by initiating sexual intimacy. This possibility would be further explored in Study 2.

Legally Relevant Variables

Sexual assault cases are prosecuted within a legal system defined by a certain structure and by certain processes and principles. For a case of sexual assault to go to trial, for example, the facts of the case have to satisfy a certain evidentiary burden;

otherwise it will be declared “unfounded.” This section will explore the variables of interest in this study that are materially or statutorily considered by the court of law in sexual assault trial: evidence and violence / threat / weapon use.

Evidence / Corroboration

Until recently, women were considered morally underdeveloped; therefore, their testimony under oath could not be trusted, and it alone could not convict the accused (Anderson, 2004; Los, 1994). For example, according to the Hong Kong Department of Justice’s (1999) *Evidence (Amendment) Bill*, corroboration of the complainant’s allegation was required by Hong Kong law prior to the year 2000, and an accused could not be convicted if corroboration did not exist (see also *HKSAR v. Khan Arshed*, 2003). Furthermore, in cases of rape and indecent assault, the judge must remind her/himself, or warn the jury, of the danger of convicting on uncorroborated evidence. Such need for corroboration was historically fuelled by a notorious statement made by Sir Matthew Hale (1971; Chief Justice of the Court of King’s Bench in England), claiming that an allegation of rape is “easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent” (p. 635; as cited in LaFave, 2010). In Canada, similarly, although the need for corroboration in rape cases was abolished in 1975 by the Criminal Law Amendment Act (Hinch, 1985), judges had, under the terms of that act, the discretionary power to caution the jury about the need for corroboration. When the act was used, however, it had the effect of implying that uncorroborated statements made by the complainant were essentially lies intended for the malicious purpose of wrongfully implicating the good character of the accused (McTeer, 1978). Thus, the discretionary powers of the judge to caution for the need for corroboration were subsequently removed entirely in Canada, thereby permitting the statements of the complainants to be considered as true unless proven otherwise (Parker, 1983). More recently, according to section 4B of Hong Kong’s *Evidence Ordinance* (Cap. 8), the old rule of corroboration was abrogated in 2000 (Leung, 2006). Therefore, both Canadian and Hong Kong law currently permits a jury / a judge to find proof beyond a reasonable doubt based solely upon the word of a complainant.

While corroborating evidence is no longer strictly required, it was expected that the presence of any physical evidence that corroborates the complainant's allegation (e.g., bodily injuries, documents [e.g., apology letter from the accused], video recordings, and/or eyewitnesses) would help the prosecution to prove, beyond a reasonable doubt, all of the elements of the crime. On the contrary, if the evidence was insufficient and/or unreliable, then a reasonable jury would find the accused not guilty. Therefore, it was predicted that the presence of corroborating evidence would lead to more guilty verdicts in both countries.

Violence, Threats, and Use of Weapons

When the complainant and the accused had previous sexual relationships, then a proof of rape may require the presence of force beyond that which is typically sufficient to negate the presumption of consent. In Canada, a *simple* sexual assault (as defined by s. 271(1)) is considered to be any attack of a sexual nature in which force (i.e., coercion, threats of harm to victim or victim's loved ones, or physical harm) is used, whereas an aggravated sexual assault (as defined by s. 273(1)) is a sexual assault in which the victim is wounded, maimed, disfigured, brutally beaten, or in danger of losing her/his life. Furthermore, s. 272 describes the specific indictable offence involving weapons during the commission of the offence. In general, according to s.273(3)(a) and (b), "no consent is obtained where the complainant submits or does not resist by reason of the application of force [or] threats or fear of the application of force to the complainant or to a person other than the complainant." Similarly, although the *Hong Kong Crime Ordinance* does not provide guidance when violence / threat / weapon are used to procure consent, the Hong Kong's Bill of Statute Law (Miscellaneous Provisions, 2001) proposed providing a positive meaning for "consent," describing that it must be a "*free* genuine and subsisting agreement to the act." Therefore, it appears that any signs of aggression on the part of the accused during the sexual act may be considered as vitiating consent.

When considering factors that are related to the reporting of sexual assault, physical force by assailants, presence of weapons, and victim injuries (Chen & Ullman, 2010; Du Mont, Miller, & Myhr, 2003; Fisher et al., 2003; Russell & Bolen, 2000) are all related to whether the incident was reported at all. Furthermore, studies

of the situational characteristics of sexual assaults have demonstrated that the complainant's perceived credibility is often associated with the degree of force used by the assailant (Ellison & Munro, 2009a, 2009b). In these studies, typical observers are less likely to assign blame to the complainant if the accused used some significant degree of force against her (Cohn, Dupuis, & Brown, 2009). In this study, therefore, I examined whether the accused's use of threats and violence (including weapon use) were related to the verdict in two jurisdictions. Specifically, it was expected that any signs of aggression displayed by the accused during the alleged assaults would increase the likelihood of successful prosecution in both Hong Kong and Canada.

Summary and Hypotheses

The law is trite in rape. If lack of consent could be readily resolved, one way or the other, on the plain contrasting allegations of the complainant and the accused, there would be no room for an accused person to raise the issue of a mistaken but genuine belief. (*HKSAR v. Tsang Sai Kit*, 1997, para. 40)

A review of rape law reforms in both Canada and Hong Kong demonstrates a very similar history of biases embedded in sexual aggression law at both civil and judicial levels. Although Hong Kong laws have yet to follow the Canadian reforms to redefine the crime of rape in order to underscore the violent nature of the crime, there have been continued efforts in both jurisdictions to eliminate prejudicial evidentiary rules (e.g., regarding the sexual history of the complainant and the corroboration of her testimony). In addition, although both countries continue to consider the defence of mistaken but genuine belief, Canadian courts and legislation have promoted a more communicative model of inquiry related to consent, especially in ambiguous sexual encounters. Therefore, in this study, I sought to provide a brief account as to 1) how consistently Canadian judges consider 273.2(b) (the "reasonable steps" provision) when the defence of mistaken belief is raised, 2) the kinds of steps that were considered as "reasonable," and 3) the effect of this consideration on conviction.

In addition, because Hong Kong continues to consider mistaken belief as a defence and has yet to adopt an affirmative model of consent, other variables related to the complainant, the accused, and the complaint itself were coded to examine their association with this defence, and with judicial outcomes in Canada and in Hong

Kong. Specifically, I explored how the complainant's relationship with the accused, her sexual history (with the accused and/or others), her substance use before the alleged incident, and her sexual initiation may be associated with this defence tactic, and with judicial outcomes. These factors, as demonstrated in the previous sections, are often found to raise an "air of reality" (or provide an "evidential foundation"; *R. v. Cinous*, 2002, p.1) to the mistaken-belief defence in court judgments in both jurisdictions. Although accused from both countries could claim that they reasonably believed that the complainant was a consenting party, this belief must be assessed in relation to all circumstances in Canada, including any steps taken by the accused to ascertain whether the complainant consented. Therefore, this might shift some of the evidential burden on to the accused, leading to more convictions in Canada, as compared to Hong Kong.

Regarding the complainant-accused relationship, it is conceivable that, because of the traditionally-ingrained Confucian influence and the unique sense of righteousness (*yi*; Chiu, 1991a) in Chinese culture, acquaintance rapes would be tried less frequently in Hong Kong than in Canada. Furthermore, it was expected that the mistaken-belief defence would be proposed more often in acquaintance rape cases (especially those involving intimate partners) than stranger rapes, and this defence would be accepted more often in Hong Kong than in Canada (because of the reasonable-steps legislations in Canada). With regards to alcohol consumption, considering that people in Hong Kong generally endorse more rigid gender norms and rules (Lee et al., 2010), it was expected that alcohol use by the complainant would be perceived as more gender inappropriate in Hong Kong than in Canada, leading to more negative judgments of the complainant and, potentially, more acquittals as well. It was also predicted that, because of the greater emphasis on cultural constraints in male-female relationships in Hong Kong (Cheung, 1997), more acquittals would be rendered in Hong Kong than in Canada when the complainant was perceived to have violated traditional gender norms by initiating sexual intimacy. Finally, the accused's use of violence, threats, and weapons, and the presence of corroboration through evidence were all predicted to be more frequently associated with a conviction. By examining how Canadian and Hong Kong courts interpret statutes pertaining to

sexual assaults, and discussing and relating the variables of interests that affect credibility and, ultimately, culpability, this study hopes to illuminate some of the evidential issues and bring some clarity to this “he said, she said” game.

METHODS

Research Design

This study employs a descriptive and quantitative methodology in performing a content analysis on published cases involving sexual assaults in Canada and Hong Kong. According to Babbie (1992), content analysis is a form of descriptive research in which the researcher examines a class of social artefacts typically composed of written documents. A researcher collects a set of related documents, systematically reads them and records the consistent features, and then draws inferences about the use and meaning of the documents (Krippendorff, 2004). Content analysis seeks to characterize or condense content in order to discover the essentials or point out typical characteristics, thus revealing features not immediately apparent to the reader (Findahl & Höijer, 1981) or features not apparent by examining only a small number of samples. According to Hall and Wright (2008), who examined content analyses performed by legal scholars utilizing case law as source material, content analysis can be used as a scientific research tool to generate “objective, falsifiable, and reproducible knowledge” (p. 65) about the deductive methods and the reasoning used by the court and about trends in judicial decision-making. In this manner, a content analysis study enables legal scholars to gain an empirical understanding of the law itself as found in judicial opinions.

According to Hall and Wright (2008), there are three components of content analysis: (1) selecting cases; (2) coding the cases; and (3) analyzing the case coding through statistical methods. In this study, cases involving rape in Hong Kong and sexual assaults in Canada were selected for analyses (see “Case Selection” for further details). Cases were coded based upon a list of *a priori* concepts based on literature review, such as the complainant-accused relationship. Other factors / issues (e.g., complainant’s *level* of intoxication during the alleged incident) emerged during the initial coding process and were hence added to the coding list (see “Case Coding” for

more details). The coding was analyzed through chi-square analyses and logistic regressions (with the verdict and defence tactics as the outcome variables; see the “Statistical Approach” section), which would result in detailed quantitative descriptions of the factors or themes that emerged from this body of case law.

Case Selection

A dataset of sexual assault cases litigated criminally in Hong Kong and Canada from 1992 (the enactment year of the “reasonable steps” legislation) to 2010 was created. The cases were located and accessed through descriptive word searches on QuicklawTM in Canada (“sexual assault”) and the Hong Kong Judiciary website (<http://www.judiciary.gov.hk/en/index/index.htm>; “rape”)⁵. This process ultimately yielded 230 (Chinese and English) decisions in Hong Kong, and over 3000 Canadian cases; this discrepancy was contributed by the inclusion of sexual assaults other than “rape” (e.g., sexual touching) in the Canadian data set. Cases were then selected from these data sets using the following procedure. First, I excluded cases where 1) the charge was not rape / sexual assault, 2) the offence was committed against individuals with no capacity to consent (e.g., those under 16 years of age and those with a mental illness or mental disability), and 3) there was a breach of trust. To minimize age as a factor and to focus on adult relationship dynamics, I also eliminated cases involving offenders who tried under the *Young Offenders Act* or the *Youth Criminal Justice Act* (2002) in Canada, or cases involving young offenders under the age of 16 in Hong Kong (under s.14C of the *Juvenile Offenders Ordinance*) from the study. In addition, cases that involved complainants who proceeded civilly were excluded. Finally, judgments that focused on issues of law rather than the assault itself (e.g., *voir dire*s that dealt with admissibility of evidence and some of the dangerous offender hearings) were excluded because many of the facts about the index offence and/or

⁵ Whether a case is reported and subsequently forwarded to legal search engines is dependent on a number of factors (e.g., the perceived relevance to the interpretation of the law and the uniqueness of the issues raised at trial) and is at the discretion of the presiding and appellate judges. To date, there have not been any systematic studies that have examined and compared the representativeness of the cases that were reported vis-à-vis those that were not reported. There is reason to believe that cases that lead to a conviction are more likely to be reported; therefore, future studies should seek to compare the factors that may influence the reporting of cases and the generalizability of the reported cases. That being said, because it is the reported judicial opinions that form the basis of future law, patterns derived from these data are still informative on their own right.

factors of interest (e.g., complainant's characteristics) were not included in these judgments. All of the rape trial judgments selected contained both (a) a description of the alleged incident and (b) the judge's reasons and decision.

At the end of this procedure, 81 Hong Kong court judgments (64 written in English and 17 in Chinese) met the selection criteria and were evaluated and coded. Because many more Canadian cases than Hong Kong cases were identified, it was initially decided that an equivalent number of Canadian cases would be randomly selected for evaluation and coding. However, an additional 28 Canadian court judgments were coded due to miscommunication between the raters. Consequently, it was decided to include all of the 109 Canadian cases that were coded. All French-language decisions were excluded for linguistic reasons. To match Hong Kong's definition of rape, only cases that involved alleged non-consensual vaginal intercourse in Canada were considered. In addition, although all levels of court hearings were considered during coding, only the initial trial and last appellate court judgments were used to determine judicial outcomes (i.e., verdict and sentence). Finally, for cases that involved more than one accused and/or complainant, each independent accused-complainant pairing would be considered as a separate *incident*.

In Hong Kong, amongst the 81 cases, the majority of cases involved only one accused (87.7%) or one complainant (92.6%). Six (7.4%) cases involved two accused, and four (4.9%) cases involved three accused. In addition, four (4.9%) cases involved two complainants, and two (2.5%) cases involved three complainants. In sum, 95 accused and 89 complainants were involved in the Hong Kong cases, yielding 101 independent incidents.

In Canada, a majority of the 109 cases also involved only one accused (96.4%) or one complainant (97.3%). Four cases involved either two or three accused (both 1.8%) and three cases involved two complainants (2.7%). In total, 116 accused and 113 complainants were involved in the Canadian cases, yielding 119 independent incidents.

Case Coding

Utilizing content analysis methodology and following the recommendations of Krippendorff (2004), the cases chosen for this study were coded based upon a

tentative set of *a priori* categories of interest as well as variables that emerged during the initial stage of coding. The categories of variables used in these analyses included information about the case in general, the incident (e.g., verdict), the complainant (e.g., sexual history), the accused (e.g., use of alcohol), the use of mistaken belief defence, and (for Canada only) the courts' use of "reasonable steps" rules. Notably, only information included in the judge's decision was coded.

General information about the case was recorded to provide descriptive statistics related to jurisdiction (provinces), the court level, and the hearing year. These variables, like other legally-relevant characteristics of the case (e.g., verdict) were included in most or all decisions. The remaining variables are operationally defined in the following sections.

Variables of Interest

Location of the incident

This variable was explored to provide some descriptive statistics on the location of sexual assaults that went to court. The categories included: complainant's residence, accused's residence, shared residence, hotel, and "public," with the latter indicating any locations where others would have access to the area of the incident (including other residences).

Relationship between the accused and the complainant

The relationship between the accused and the complainant was coded dichotomously as either stranger or acquaintance. Of note, the accused and the complainant were considered as "acquaintance" even if they had only met on the day of the incident, as long as a period of interaction had transpired.

Sexual history of the complainant

The complainant's sexual history was coded in two main ways. First, if the complainant was described to have had sexual intercourse with anyone other than the accused in the past, or was described to be "promiscuous" or "open," then the variable *sexual history* was coded as present. Second, the complainant's pre-incident virginity status was coded as *yes* or *no*.

Alcohol Use

Substance use was coded in terms of the intoxicated party (none, complainant, accused, or both).

Complainant's initiation

This variable was coded as present if the complainant initiated the sexual interaction with the accused (e.g., the complainant was the first to touch or kiss the accused). It was coded separately based on the accused's and the complainant's testimony.

Legally Relevant Variables

Corroboration

Several types of evidence which corroborated the complainant's account were considered dichotomously as either present or absent: corroborating bodily evidence (e.g., injuries), text messages / letters (e.g., an apology letter sent by the accused), video recordings of the incident, and eyewitnesses. The general availability of any corroborating evidence in a given case was also considered dichotomously as either *present* or *absent*.

Violence / Threat / Weapon

The presence of violence, threats, and weapon use were all coded dichotomously as either *yes* or *no*. Although sexual crime is violent by its nature, violence was only coded positively in this study if it was "used over and above the force necessary to commit [the crime]" (*R. v. Billam and others*, 1986, p. 48). To increase objectivity, these variables were only coded positively when the judge specifically described their involvement in the incident.

Inter-rater reliability

Twenty-four (approximately 30%) of the incidents from each country were double-coded by two of three independent raters to determine inter-rater reliability for each variable in the dataset. Proportion agreements were calculated by the number of agreements divided by the number of agreements plus disagreements. For all variables, it was considered a disagreement when the raters provided different ratings of the variable, or when only one rater considered the information as missing.

For Hong Kong judgments, I first coded all of the cases post-1997 ($n = 55$). Then, two independent raters (who were both senior undergraduate students) randomly selected and coded 24 independent cases that involved only one accused and one complainant. Table 1 presents the percentage agreements for the coding of each variable of interest. Percentage agreements between myself and the first rater ranged from 0.7 (threats) to 1 ($M = .93$; $SD = .08$), and percentage agreements between myself and the second rater ranged from 0.80 (the complainant's initiation) to 1 ($M = .95$; $SD = .08$). Any discrepancies between coders were subsequently discussed and resolved.

Table 1. Percentage agreement for the coding of various factors in the Hong Kong and Canadian samples

	Hong Kong		Canada
	rater 1	rater 2	
incident location	1	.38	.38
Complainant-accused relationship	0.9	.31	.31
violence	0.85		.06
threats	0.7		.06
weapon	0.95		.34
complainant's sexual history	0.9	.06	.07
complainant's initiation (defence)	0.8	.06	.31
complainant's initiation (complainant)	0.95	.06	.07
complainant's virgin status	1		
physical evidence	1	.31	.34
evidence (any)	1		.3
alcohol (intoxicated party)	0.9	.01	.3
alcohol (dichotomous)	0.95		
mistaken belief (proposed)	0.9		.38
mistaken belief (accepted)	1		.3
guilty plea	1		.06
verdict	1		
sentence	1		.02

For Canada, 24 cases involving 26 accused and 25 complainants were coded by the same two independent raters. As may be seen in Table 1, the percentage agreements of the two raters across factors ranged from 0.6 (the intoxicated party) to 1 ($M = .87$; $SD = .13$). Once discrepancies between coders were examined and resolved, the rest of the Canadian judgments were evenly distributed between the two raters.

Statistical Approach

Data analysis was conducted using SPSS 18.0. The significance level for all statistical tests was $p < .05$. The data were examined in two main ways: 1) descriptive

and chi-square statistics and 2) logistic regression. Prior to the calculation of inferential statistics, each of the factors of interest was described and analyzed with chi-square analyses to assess how these factors, individually, were related to whether the honest-but-mistaken-belief defence was proposed / accepted and to the verdict. These initial steps can detect potential coding problems, homogeneity of responses, and generally provide information about the suitability of the variables for further analyses in the logistic regression model. However, when the expected frequency of any cell is less than five in the cross-tabulation table, the chi-square approximation will be invalid (Snedecor & Cochran, 1989). In these instances, therefore, the Fisher's Exact Test was adopted.

All variables were then entered into a logistic regression model (with backward-stepwise procedures) to examine the extent to which they predicted the verdict. The rationale for using backward elimination in the model was mainly due to the small number of cases available from Hong Kong, which effectively constrained us from including a complex model with multiple factors. More importantly, the stepwise nature of the model allowed us to first examine the factors that were legally relevant (e.g., corroboration), select only those that were strongly related to the outcome, and then proceed to identify the factors that ideally ought to be less legally relevant but may nevertheless still be incrementally predictive of judicial outcome. Because we were also interested in the interactions between *jurisdiction*, *defence tactics*, and the key variables (see below), backward eliminations would not be adopted for the analyses of the main effects of the key variables because the model would be rendered unstable when interaction effects were considered in a model without their associated main effects (C. Schwarz, personal communication, June 8, 2011).

The main outcome variable (i.e., verdict) was a binary variable (with 0 indicating *not guilty* and 1 indicating *guilty*). All independent variables were coded dichotomously. Four legal variables were included in Step 1: *the availability of corroborating evidence*, and the use of *violence*, *threat*, and/or *weapon* during the perpetration of crime. Six key variables were then included in Step 2: *complainant-accused relationship* (stranger vs. acquaintance), *complainant's sexual history*,

alcohol use by the complainant prior to the assault, complainant's alleged initiation, the proposal of the mistaken-belief defence, and jurisdiction (Canada vs. Hong Kong). Finally, the third step included the three-way interactions involving *jurisdiction, defence tactic*, and the other key variables. The reason why the interaction terms were not included in Step 2 was because the standard errors of the coefficients (*B*) would become inflated as the independent variables increase in correlation with each other, as in the case when the interaction terms are included in the regression model (i.e., multicollinearity). Therefore, all variables and their interactions were entered separately to minimize multicollinearity. Similarly, only the interactions of interest were included in the model to minimize the inflation of the standard errors.

RESULTS AND DISCUSSION

Court-Related Characteristics

Court Level and Trier of Fact

Of the 119 Canadian sexual assault incidents reviewed, 66 had a final determination at trials (55.5%), 49 were decided at the appellate level (41.2%), and 4 decisions were rendered by the Supreme Court of Canada (3.4%). A majority of these incidents (77.3%) were judge-alone trials.

Of the 101 Hong Kong rape incidents reviewed, 13 were reported by the Court of First Instance (a lower court; 12.9%), 79 were provided by the appellate courts (78.2%; five of these incidents were appealed by the Secretary for Justice to impose harsher sentences), and 9 decisions were rendered by the Hong Kong Court of Final Appeal (8.9%). A majority of these incidents (83.2%) were originally tried by jury at the Court of First Instance.

Case Characteristics

Ages of complainants and accused

Table 2 presents the frequency (and percentage) of each of the variables of interest in Hong Kong and Canada. In Hong Kong, the age of the complainant ranged from 16 to 74 ($n = 60$; $M = 21.57$; $SD = 8.26$), and the accused's age ranged from 17 to 49 ($n = 32$; $M = 29.88$; $SD = 9.11$). In Canada, the complainant's age ranged from 16 to 56 ($n = 52$; $M = 23.46$; $SD = 9.92$), and the accused's age ranged from 18 to 66

($n = 50$; $M = 32.34$; $SD = 10.85$). Although many cases did not include the age of the parties (which explains the lower ns), the complainant's age (median split) was statistically associated with verdict in Hong Kong and in Canada, both $ps < .05$. Specifically, 78.1% of incidents in Canada and 88.2% of incidents in Hong Kong involving complainants who were younger than 21 led to a guilty verdict, as compared to 50% of incidents in Canada and 65.4% of incidents in Hong Kong involving older complainants (i.e., 21 and over) that led to a conviction. This finding may support the view that cases involving younger women (who are presumably less sexually experienced) are more likely to be taken seriously than those involving more (sexually) mature women.

Table 2. Frequencies (and percentages) of various factors in the Hong Kong and Canadian samples

	Hong Kong (%)	Canada (%)
relationship		
acquaintance	82 (81.2)	108 (90.8)
stranger	19 (18.8)	11 (9.2)
sexual history		
complainant's sexual history	7 (6.9)	6 (5)
Aggression		
violence	33 (32.7)	19 (16)
threat	33 (36.6)	15 (12.6)
weapon	14 (13.9)	5 (4.2)
Physical Evidence		
Corroborating bodily evidence	33 (32.7)	32 (26.9)
text / letter	4 (4)	1 (0.8)
video	4 (4)	1 (0.8)
eyewitness	13 (12.9)	20 (16.8)
Alcohol use		
none	58 (58.6)	33 (27.7)
complainant	16 (16.2)	27 (22.7)
accused	4 (4)	7 (5.9)
both	21 (21.2)	52 (43.7)
Complainant's Initiation		
accused's testimony	25 (24.8)	31 (26.1)
complainant's testimony	7 (6.9)	7 (5.9)

Location of incident

In both jurisdictions, the largest percentage of the alleged incidents took place either at the accused's residence (27.7% in Hong Kong and 35.4% in Canada) or in public (23.8% in Hong Kong and 29.4% in Canada). The third most common location was a hotel/motel (19.8%) in Hong Kong and the complainant's residence (16.8%) in

Canada. The location of the incident was not significantly related to verdict in either country, both $ps > .05$.

Decisions

Canada. The accused pled guilty in 12 cases (10.1%) and was found guilty in the majority of cases (73.1%) at trial. The initial sentences ranged from 12 months to life imprisonment ($n = 48$; $M = 37.06$ months [or approximately 3 years]; $SD = 25.92$ months; life imprisonment was not assigned a value). In general, trials heard by a jury were more likely to lead to a conviction than a judge-alone trial, $\chi^2(1, N = 119) = 4.42, p < .05$; 89% of accused in jury trials were convicted, as compared to 69% of accused in bench trials. Read, Connolly, and Welsh (2006) also found that accused of a historical child sexual abuse trial were significantly more likely to be found guilty with a jury trial than a bench trial and offered a few informed rationales for this discrepancy. For instance, it is conceivable that the accused may be more inclined to be tried by his “peers” when the evidence against him was particularly strong; that is, the higher conviction rate with jury trials may not necessarily reflect an anti-defence sentiment among the jurors, but that election of jury trials may be more likely when the odds of an acquittal were slim to begin with.

Interestingly, when the accused elected not to testify at trial (21.7%), he was significantly more likely to be found guilty than when he testified at trial (78.3%), $\chi^2(1, N = 106) = 4.42, p < .05$; in particular, 91% of the accused who did not testify were convicted at trial, as compared to 65% of those who testified at trial. In Canada, the right to silence is “absolute,” and the silence of an accused cannot lead to any adverse inference against him (*R. v. Noble*, 1997; see also s. 11(c) of the *Canadian Charter of Rights and Freedoms*). However, according to a defence attorney (Mr. M. Tammen, personal communication, May 16, 2011), triers of fact are often inclined to hear the accused’s perspective in trials of sexual assault, because it is generally a “he said, she said” affair. As observed by the dissenting judgment of Justice Lamer, in *R. v. Noble*,

Why, one might ask, has this Court commented so frequently on the effect of the accused’s silence? ... The reason is simple: silence can be very probative. Consider, for example, a case of sexual assault where the victim describes her

attacker as a man with a very unusual tattoo on the upper portion of his arm. Nothing allows the Crown to call the accused as its first witness, as it could do under an inquisitorial system of criminal justice. However, assuming the Crown, by adducing other evidence, establishes a case to meet (i.e. enough evidence to make a guilty verdict reasonable), would not every man wrongly accused who lacks the described tattoo roll up his sleeve in court to exonerate himself? (para.15)

As Judge Lamer also noted, “when the Crown presents a case to meet that implicates the accused in a ‘strong and cogent network of inculpatory facts,’ the trier[s] of fact [are] entitled to consider the accused’s failure to testify in deciding whether [they are] in fact satisfied of his or her guilt beyond a reasonable doubt” (para. 2). Therefore, although the failure to testify cannot be used to shore up a Crown’s case, our results appear to suggest that triers of fact may nevertheless be affected by the accused’s decision not to testify.

Among the guilty verdicts, 51 convictions/sentences (42.9%) were appealed, and decisions rendered by a jury were marginally more likely to be appealed than those rendered by a judge, $\chi^2(1, N = 119) = 4.42, p = .05$. In particular, accused appealed 59% of the jury decisions and 38% of judge’s decisions, possibly because there are more viable routes to appeal with a jury trial (e.g., the appellant may argue that the trial judge had erred in her/his answer to questions from the jury or in her/his instructions to the jury; M. Tammen, personal communication, May 16, 2011). Only 11 appeals (21.6%) were allowed: the appellate court entered an acquittal in four cases (36.4%) and decreased the sentence in seven cases (63.6%).

In total, after considering the appellate decision, 36 accused were found not guilty (30.3%) and 83 were found guilty (69.7%). The appellate decisions were used as the main outcome variable.

Hong Kong. The accused pled guilty in 8 cases (7.9%) and was found guilty in the majority of cases (94.1%) at the Court of First Instance. Verdicts were not statistically associated with whether the accused elected to testify, $p > .05$ (Fisher’s Exact Test) or the types of triers of fact who made the decisions, $p > .05$ (Fisher’s Exact Test). The non-significant findings may be due to the high percentage of

convictions and high number of jury trials in the Hong Kong sample, rendering the data unequally distributed among the cells of the frequency table. The initial sentences ranged from 36 to 156 months ($n = 75$; $M = 83.36$ months [approximately 7 years]; $SD = 25.28$ months). In general, Hong Kong imposed lengthier sentences for sexual assaults than Canada, $t(121) = -9.81$, $p < .01$, because Hong Kong's Courts tend to adopt the *Billam* sentencing guideline for rape (from the English authority of *R. v. Billam*, 1986), which imposes five years of imprisonment for this offence without aggravating circumstances. The *Billam* guideline is commonly cited in the Hong Kong cases that were reviewed in this study.

Eighty-four of these guilty verdicts (88.4%) were appealed, and trials by jury were not statistically more likely to be appealed than judge-alone trial, $p > .05$ (Fisher's Exact Test). Twenty-seven appeals (32.1%) were allowed: specifically, the appellate court entered an acquittal in 18 cases (66.7%), decreased the sentence in seven cases (25.9%), and ordered two retrials (7.4%). Because of the small number of retrials, those two cases were removed from the rest of the analyses.

In total, after considering the appellate decisions, 24 accused were found not guilty (23.8%) and 75 were found guilty (74.3%). The appellate decisions were used as the main outcome variable. Of note, conviction rates were similar before (76.9%; $n = 26$) and after (75.3%; $n = 73$) the transfer of sovereignty from Britain to China in Hong Kong in 1997, $\chi^2(1, N = 99) = 0.03$, $p > .05$.

Summary and Comments. Taken together, it appears that, from 1992 to 2010, perpetrators of sexual assault were often successfully prosecuted at trial in both jurisdictions (from 73% in Canada to 94% in Hong Kong). Similarly, Read and colleagues (2006; Connolly & Read, 2006) also observed a high conviction rate with historical child sexual abuse archival data. Although the high conviction rate may present a ceiling effect that may limit the association between our independent variables and the outcome variable, it was nevertheless predicted that at least some of the key variables of interest would significantly reduce the likelihood of a guilty verdict (as observed in Read et al., 2006).

More importantly, however, the high conviction rates of sexual assault in both jurisdictions seem to run counter to the general observation that accused of this

offence are under-prosecuted (e.g., Beh, 1998; Johnson, in press; Spohn et al., 2001). However, it may be argued that decisions from convicted cases are more likely to be forwarded to legal search engines like QuicklawTM than acquitted cases because jury trials that led to acquittals would not be reported unless the decisions were appealed by the Crown in Canada. Furthermore, jury trials that led to convictions may be more likely to be appealed by the accused, thereby leading to more judicial opinions being forwarded because they were written by the appellate courts. These possible confounding factors may further explain the observation that jury trials tended to produce higher conviction rates than bench trials.

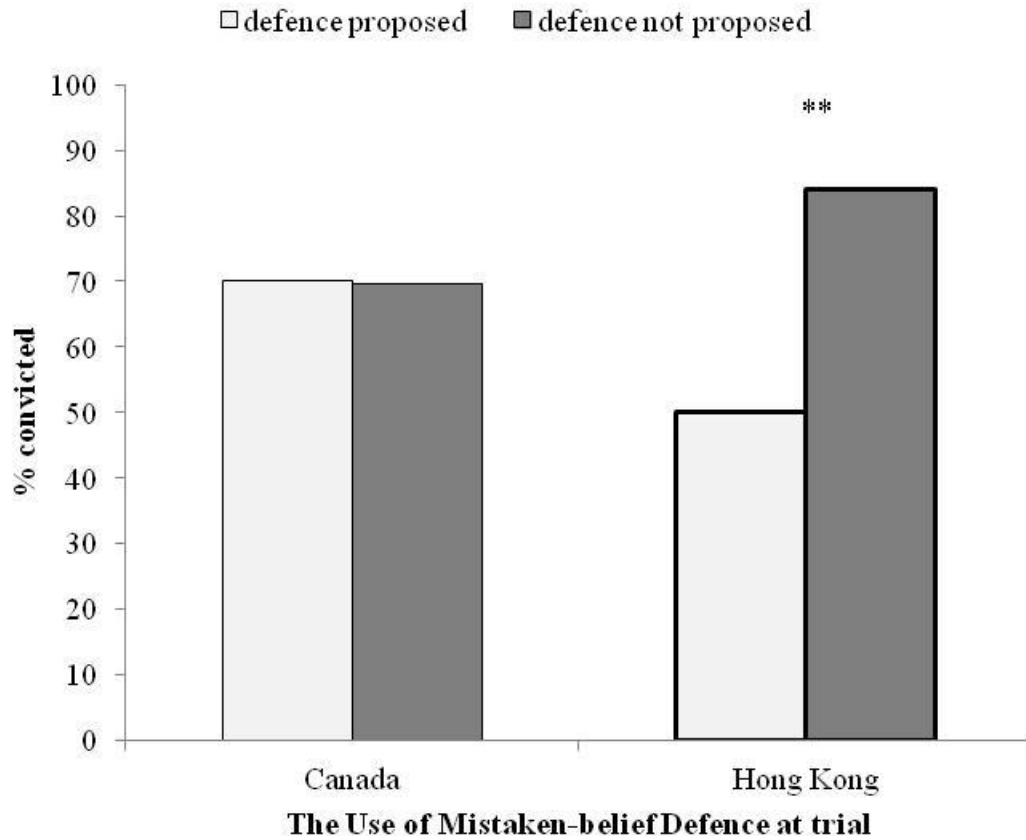
The possibility that there may be more judicial opinions reporting convictions than acquittals was supported by crown prosecutor J. Nascou, who has 18 years of litigation experience with the British Columbia Office of the Crown Counsel. In general, J. Nascou (personal communication, May 13, 2011) observed that although prosecutors' assessments of convictability prior to the trial are based primarily on legal factors, such as the strength of corroborative evidence in the case, legally irrelevant characteristics of the suspect and the complainant can still come into play. Many sexual assault cases may fail to reach the courtroom because they are considered unfounded by police, dropped by prosecutors or the complainant herself, dismissed by judges, or plea bargained (see also Frohmann, 1991, 1998). Although the cases reviewed in this dissertation may not sufficiently capture the characteristics of the cases that were not reported or charged, this study presents an opportunity to examine the qualities of cases that managed to surmount the prosecution hurdles. More importantly, these reported cases are the ones that will be used by legal researchers and policy makers to argue for changes in existing law.

Defence Tactic

In the Hong Kong data set, 24 accused (24.8%) raised the mistaken but honest belief defence, and it was accepted in four cases (*HKSAR v. Tsang Sai Kit*, 1997; 香港特別行政區 訴 黃盛中 [*HKSAR v. Wong Shing Chung*], 1999; 香港特別行政區 訴 鄧兆峰 朱君煒 [*HKSAR v. Tang Siu Fung and Chu Kwan Wai*], 2010), involving five accused in total. In the Canadian data set, 20 accused (16.8%) raised the

mistaken but honest belief defence, and it was accepted in six incidents (*R. v. Brooks*, 1999; *R. v. Kuryluk*, 2001; *R. v. M.S.*, 2003; *R. v. Malcolm*, 2000; *R. v. Mannett*, 1998; *R. v. Murphy*, 2004). To examine the extent to which this defence tactic was related to the verdict, a binomial logistic regression (with *jurisdiction* and *defence tactic* as the independent variables) was applied. Because a significant interaction effect between the proposal of the mistaken-belief defence and the verdict was found, $B = -1.67$, $Wald(1) = 5.07$, $p < .05$, tests of simple effects of defence tactic were conducted for each jurisdiction. As illustrated in Figure 1, this defence tactic was statistically associated with a lower conviction rate when it was proposed in Hong Kong, $B = 1.66$, $Wald(1) = 10.34$, $p < .01$, whereas the proposal of this defence tactic was not associated with verdicts in Canada, $B = -0.01$, $Wald(1) = .001$, $p > .05$. Not surprisingly, all of the incidents where the mistaken-belief defence was accepted led to an acquittal in both countries. This pattern of findings supports the prediction that the mistaken-belief defence would be more successful in Hong Kong than in Canada, likely because of the additional “reasonable steps” requirement for the defence in Canada.

Figure 1. Percentage convicted as a function of the proposal of defence tactic and jurisdictions



** $p < .01$

Reasonable Steps Provision

In Canada, the *reasonable steps* provision (s.273.2(b)) was cited in 13 out of 20 incidents (i.e., 65%) where the mistaken belief defence was proposed, and it was not mentioned in any incidents where the accused did not propose this defence. However, as clarified by a British Columbian crown counsel (J. Nascou, personal communication, May 13, 2011) and a Vancouver defence counsel (M. Tammens, personal communication, May 16, 2011), although the provisions may not be explicitly deliberated in the judicial opinions, triers of fact in Canada are legally obligated to consider the provision in all cases where the defence of mistaken belief was proposed and the *air of reality* test had been applied (see also *R. v. Ewanchuk*, 1999).

Nine accused failed to demonstrate that they took “reasonable steps” to ascertain their belief in consent, and, not surprisingly, all of these accused were found guilty as charged. In the other four incidents where the provision was mentioned, the accused was acquitted, only *R. v. Brooks* [1999] specifically illustrated the “reasonable steps” that the accused had taken to ascertain consent. In particular, Justice Bennett of the *Court Martial Appeal Court of Canada* described that

the evidence shows that Brooks wanted J.V. [the complainant] to fellate him. That desire was communicated to J.V. by Brooks, thus fulfilling the requirement in law that he take ‘reasonable steps’ to ascertain whether J.V. was consenting ... There was no evidence that she agreed to or refused other sexual activity although, according to Brooks (not contested by J.V.), she physically responded to his caresses. The learned [judge] should have considered whether this response on the part of J.V. provided Brooks with reasonable grounds to believe that J.V. was consenting to further sexual activity. (*R. v. Brooks*, 1999, para. 64)

The appeal in this case was therefore allowed, and Brook’s conviction was quashed. As described in the annotations of the *Martin’s Annual Criminal Code* (2010), “the accused is not required to have taken *all* reasonable steps [italics added]” (p. 579; see also *R. v. Darrach*, 1998); therefore, it appears that appellate court judge may have considered the accused’s “communication” as a “reasonable [enough] step” to support his belief in consent.

As noted by Justice Helper of the Manitoba Court of Appeal, in *R. v. Malcolm* [2000], “[s]ection 273.2(b) [the reasonable step provision] was an infrequently applied principle of law and not subject to close legal analysis” (p. 1). Determining what is constituted as “reasonable” is an interpretive task (Sheehy, in press), and little guidance has been offered by the appellate courts and the Supreme Court to define the steps that are considered “reasonable ... in the circumstances known to the accused at the time” (s.273.2(b)). However, it appears that at least nine court trials have relied upon the *reasonable steps* limitation to bar a mistaken-belief defence, thus, the provision was at least effective in limiting the scope of the defence in a good number of cases.

Relationships between Key Variables and Legal Outcomes

Accused-complainant relationship

A majority of the incidents involved acquaintances in both jurisdictions (Canada: 90.8%; Hong Kong: 80.8%). However, significantly more stranger-rapes were reported in Hong Kong (19%) than in Canada (9%), $\chi^2(1, n = 218) = 4.51, p < .05$.

Defence Tactic. Not surprisingly, the mistaken-belief defence was not proposed by accused in stranger rape situations in either jurisdiction. With regards to acquaintance rapes, accused from Hong Kong were marginally more likely to propose the defence of mistaken belief at trial, $\chi^2(1, n = 188) = 3.38, p < .10$. Specifically, 30% of accused in Hong Kong, as compared to 19% of accused in Canada, proposed the defence when they knew the complainant. However, this defence was only accepted in 5.6% of the Canadian trials and 7.5% of the Hong Kong trials involving an acquaintance rape.

Verdict. As predicted, there was a significant relationship between the accused-complainant relationship and the verdict in Hong Kong, $p \leq .01$ (Fisher's Exact Test), and in Canada, $p < .05$ (Fisher's Exact Test). Specifically, all stranger rapes (i.e., 100%) led to convictions in both jurisdictions, whereas acquaintance rape conviction rates were 67% in Canada and 70% in Hong Kong.

In general, the hypotheses were supported. First, fewer cases involving acquaintances (especially current marital partners) were tried in Hong Kong when compared to Canada. This finding may be explained by the stronger consideration of social ties (*guanxi*) and obligations (*yi*) in matters related to justice in Hong Kong than in the Western world (Chiu, 1991a, 1991b, 1991c). Second, the mistaken-belief defence was proposed more often by accused who knew the complainants; in fact, this defence was not raised when the involved parties were strangers. Third, this study replicated past research and found that, although most of the complainants of sexual assaults knew their assailants (Beh, 1998; Tjaden & Thoennes, 2000), acquaintance rapes were less likely to be successfully prosecuted than stranger rapes in both jurisdictions (see also Du Mont et al., 2000). In Study 2, I explore whether perceived

accountabilities of the complainant and the accused in acquaintance rapes were based on mock juror's different cultural beliefs.

Complainant's Sexual History

The complainant's sexual history (e.g., described as being "open" or "promiscuous") was alluded to in seven incidents (6.9%) in Hong Kong and six incidents (5%) in Canada. In addition, a sexually-inexperienced complainant (i.e., a virgin) was involved in 10 Hong Kong cases and 4 Canadian cases.

Defence Tactic. Although allusions to the complainant's sexual reputation were not significantly associated with the proposal of the mistaken-belief defence in either jurisdiction, both $ps > .05$ (Fisher's Exact Test), it was significantly related to whether this defence was accepted in both jurisdictions, both $ps < .05$ (Fisher's Exact Test). When the complainant's sexual history was inferred in the judgment, 42.9% of the mistaken-belief defences in Hong Kong and 33.3% of these defences in Canada were accepted, as compared to only 3.3% of the defences in Hong Kong and 3.5% of the defences in Canada being accepted when the complainant's sexual histories were not mentioned.

Verdict. Although few cases considered the complainant's sexual history, such allusion was associated with a not-guilty verdict in Hong Kong, $p < .05$ (Fisher's Exact Test); in particular, when the complainant's prior sexual activities were alluded to in the judicial opinion, 57% of the accused were acquitted, whereas only 22% of accused were acquitted when her sexual reputation was not alluded to. In Canada, however, complainant's sexual history was not significantly associated with the verdict, $p > .05$ (Fisher's Exact Test). Furthermore, all 10 cases that involved an allegedly sexually-inexperienced complainant (i.e., a virgin) led to convictions in Hong Kong, as compared to only two out of four Canadian accused (50%) were convicted when the case involved this type of complainant.

In summary, despite the rape shield provisions (ss. 276 and 277 in Canada and s. 154(1) in Hong Kong), some of the judicial opinions in both countries made reference to the complainant's sexual past. Although it remains unclear as to the context in which the complainant's sexual history would be mentioned in court trials (because allusions to the complainant's sexual history were not statistically associated

with whether the mistaken-belief defence was proposed), allusions to her sexual reputation were significantly associated with the defence being accepted in both jurisdictions. More importantly, as predicted, these allusions increased the likelihood that the accused was acquitted in Hong Kong, but not in Canada. In contrast, the complainant's status of being a virgin appeared to be associated with a successful prosecution; in fact, all of the incidents in Hong Kong involving a virgin complainant led to a conviction. This pattern of results supports the general findings that high value is placed on female premarital virginity in Chinese culture (Stacey, 1983; Wong, 1994; Zhou, 1989), and this preoccupation with female chastity was related to the types of rape charges that were taken seriously by triers of facts in Hong Kong.

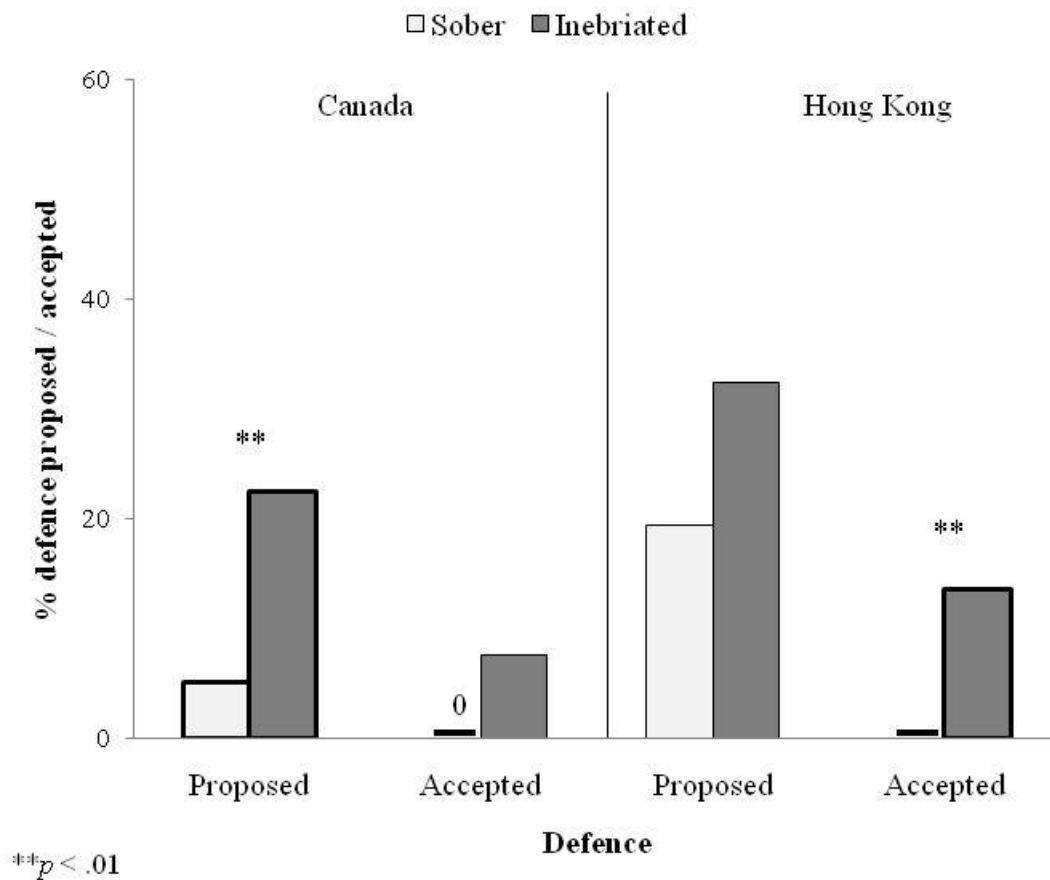
Alcohol Use

The prevalence of alcohol use prior to the alleged incident by either the complainant or the accused is presented in Table 2. In general, alcohol was involved in the incident more frequently in Canada (72%) than in Hong Kong (40%), $\chi^2(1, N = 218) = 19.37, p < .001$, and more complainants and more accused were described as under the influence (e.g., “drunk” or “tipsy”) in Canada than in Hong Kong, both $ps < .05$.

Defence Tactic. In terms of defence tactic, accused in Canada cannot claim a defence of mistaken belief “where the accused's belief arose from the accused's self-induced intoxication” (s. 273.2(a)(i)). Therefore, accused intoxication was found not to be statistically related to whether he proposed the mistaken belief defence, or whether the defence was accepted, both $ps > .05$ (Fisher's Exact Test). In contrast, there are currently no statutory guidelines in Hong Kong to inform whether the accused's intoxication can be made a defence to a rape allegation. As compared to accused who were sober during the incident in Hong Kong, accused who were under the influence during the incident were significantly more likely to propose the mistaken-belief defence, $\chi^2(1, N = 99) = 4.02, p < .05$, and have the defence accepted by the court, $p < .01$ (Fisher's Exact Test); in particular, 40% of the these defences were accepted when it was proposed by an accused who was inebriated during the incident, as compared to only 2.2% of the defences being accepted when the accused was sober at the time of the incident.

As presented in Figure 2, when alcohol was consumed by the complainant prior to the offence, the accused was more likely to propose the mistaken-belief defence in Canada, $\chi^2(1, N = 119) = 6.01, p < .01$, but not in Hong Kong, $\chi^2(1, N = 99) = 2.16, p > .05$. On the other hand, alcohol use by the complainant was significantly associated with the defence being accepted in Hong Kong, $p < .01$, but not in Canada, $p > .05$ (Fisher's Exact Test). Furthermore, when alcohol was not involved, neither jurisdiction accepted this defence.

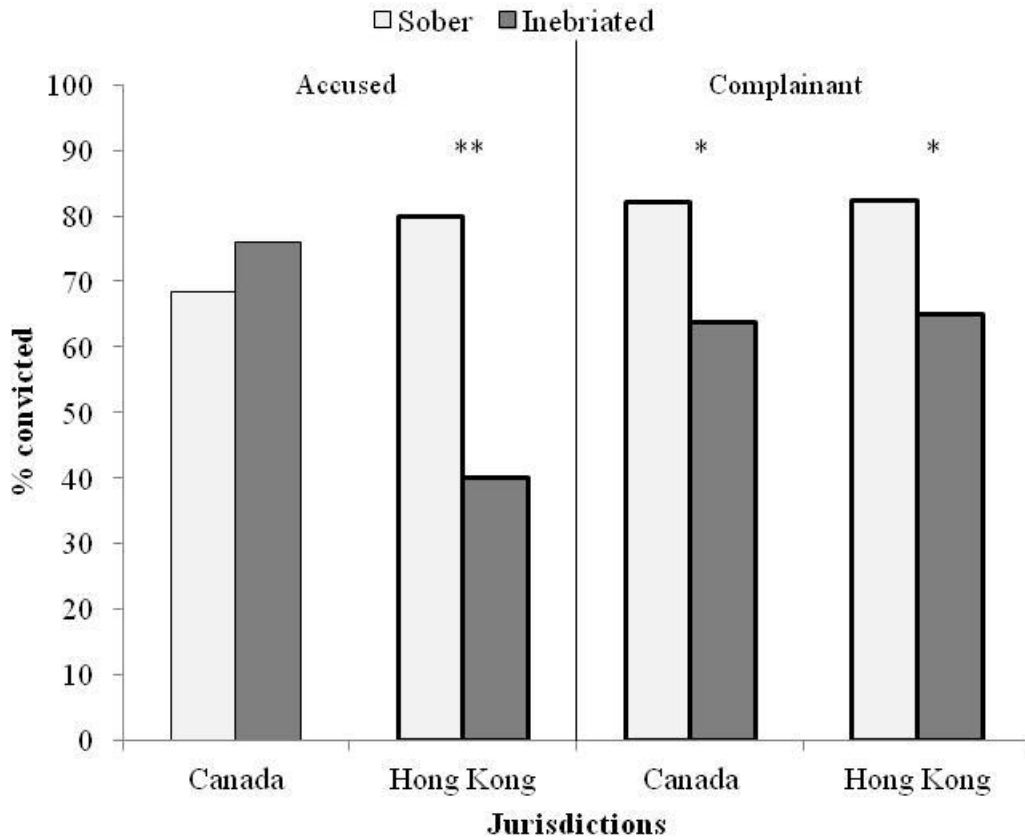
Figure 2. Percentage of mistaken-belief defence proposed or accepted as a function of jurisdiction and the complainant's alcohol use prior to the incident



Verdict. The relationship between alcohol use by each party and the verdict is presented in Figure 3. Alcohol consumption by the accused prior to the incident in question was significantly associated with a not-guilty verdict in Hong Kong, $p < .01$ (Fisher's Exact Test), but not in Canada, $\chi^2(1, N = 118) = 0.56, p > .05$. With regards to the complainant's alcohol consumption, incidents that involved an inebriated

complainant were significantly correlated with acquittals in both jurisdictions, both $ps < .05$.

Figure 3. Percentage convicted as a function of jurisdictions and alcohol use (by the complainant or the accused) prior to the incident



* $p < .05$ ** $p < .01$

In sum, in the context of sexual assaults, alcohol is often involved (especially in Canada). Similar to our findings, Abbey, Zawacki, Buck, Clinton, and McAslan (2001) also observed that approximately half of all sexual-assault complainants, and half of all sexual-assault perpetrators, had consumed alcohol before an offence occurred in North American samples. However, the involvement of alcohol in sexual assaults was significantly more common in Canada than in Hong Kong. This difference may be explained by greater underreporting in Hong Kong when alcohol was involved, because studies have shown that Asian-American victims are less likely to report sexual assault incidents if they were intoxicated during the incident than their Caucasian counterparts (Shenoy et al., 2010).

Although alcohol consumption by the complainant prior to the incident was associated with more acquittals in both jurisdictions, voluntary intoxication by the accused was associated with a not-guilty verdict in Hong Kong only. When the defence tactic was examined, it appears that in Hong Kong the mistaken-belief defence was accepted more frequently in cases where either party was intoxicated, as compared to cases that involved sober parties, whereas the same pattern did not emerge in Canada. As mentioned, in Canada, a defence of “self-induced intoxication” on the part of the accused would not be recognized, nor will it acquit an accused who was “too drunk to know” the complainant was not consenting (s.273.2(a)(i)). However, voluntary intoxication may be made a defence in Hong Kong.

In general, sexual intentions can be misread, especially when the parties are intoxicated. It may be the case that triers of fact in Hong Kong, without statutory guidance, are more inclined to give the accused the benefit of the doubt when he was intoxicated during the incident. Furthermore, when the complainant was under the influence of alcohol, the triers of fact may more readily accept his assertion that she may have *appeared* capable and consenting to the accused, leading to more mistaken-belief defences being accepted. In Canada, however, the belief must be assessed in relation to all the circumstances surrounding the incident, including any steps taken by the accused to ascertain whether she consented. Therefore, this provision may have shifted some of the evidential burden on to the accused, limiting the success of the mistaken-belief defence, and thereby lessening the association between the complainant’s intoxication and an acquittal.

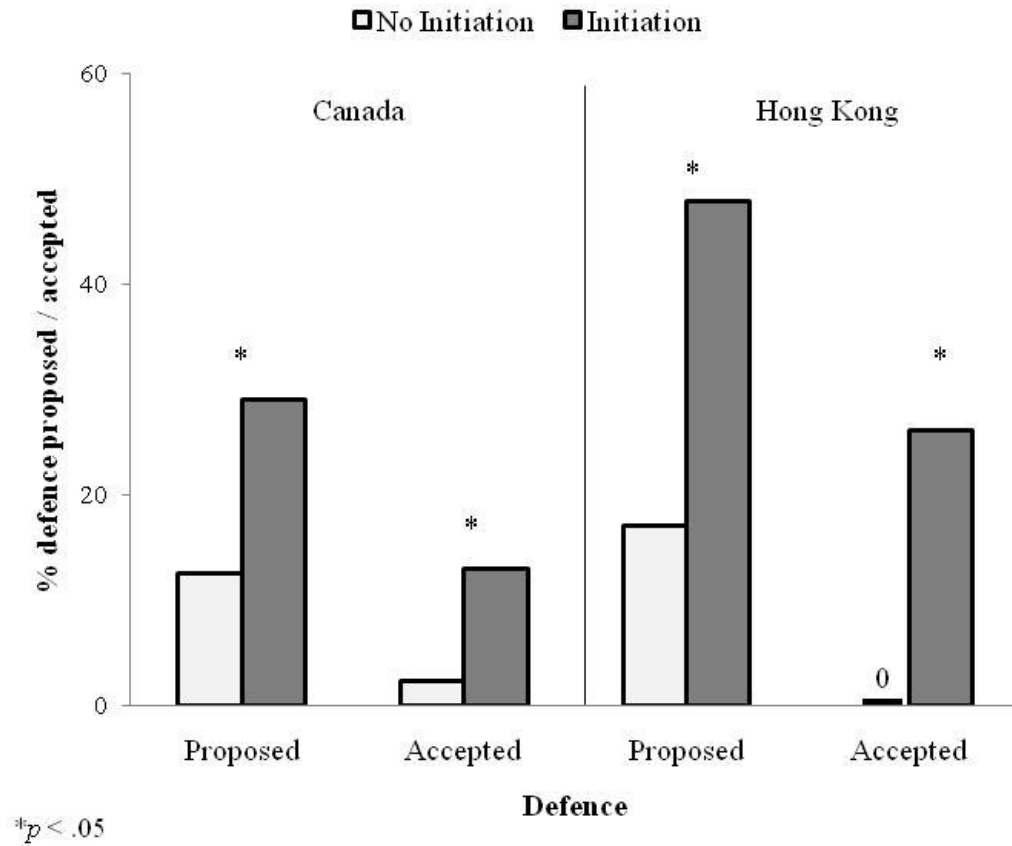
In general, it is conceivable that when a complainant violates traditional gender norms through drinking excessively, she may be perceived as more accountable for the event (Finch & Munro, 2005, 2006, 2007). Considering that people from Hong Kong generally endorse more rigid sexual norms and rules (Lee et al., 2010), the stronger relationship between alcohol use and verdict in Hong Kong than in Canada may be further explained by differences in cultural beliefs. Study 2 will explore this possibility.

Complainant's initiation

Thirty-one accused (26%) in Canada and 24 accused (24%) in Hong Kong alleged that the complainant was the first to initiate intercourse. Seven complainants in each jurisdiction, though testifying that the intercourse was non-consensual, admitted to initiating some level of intimacy. For example, in the aforementioned case of 香港特別行政區 訴 鄧兆峰 朱君熒 [HKSAR v. *Tang Siu Fung and Chu Kwan Wai*] [2010], the complainant voluntarily kissed and danced with three men while she was intoxicated. Another complainant admitted to being “flirtatious” with both accused, and the judge noted that he found “as a fact that the complainant made a statement to both [accused] to the effect they had better watch out ... because she might be tempted to drag them into one of the back rooms and have her way with them” (*R. v. McLaughlin*, 2010, para. 16).

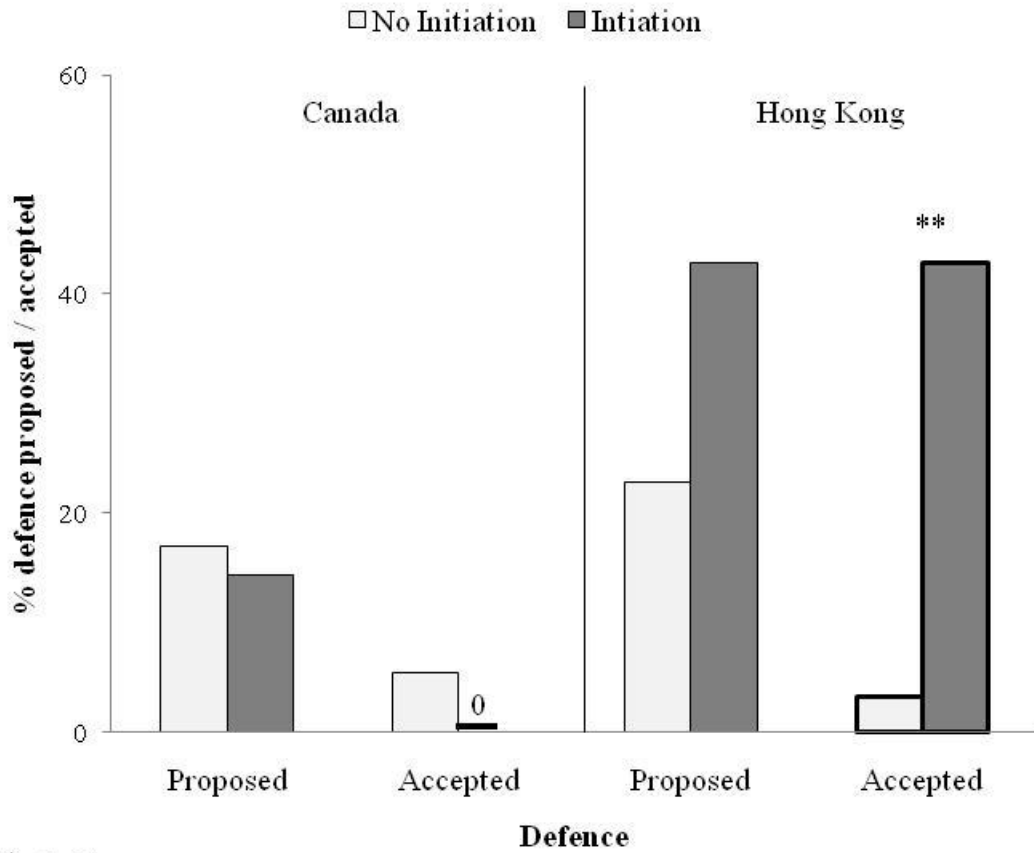
Defence Tactic. As may be seen in Figure 4, when the defence alleged that the complainant initiated the sexual encounter, the mistaken-belief defence was more frequently proposed and accepted (Fisher’s Exact Test), in both jurisdictions, all $ps < .05$.

Figure 4. Percentage of mistaken-belief defence proposed or accepted as a function of the complainant's alleged initiation (by the defence) and jurisdictions



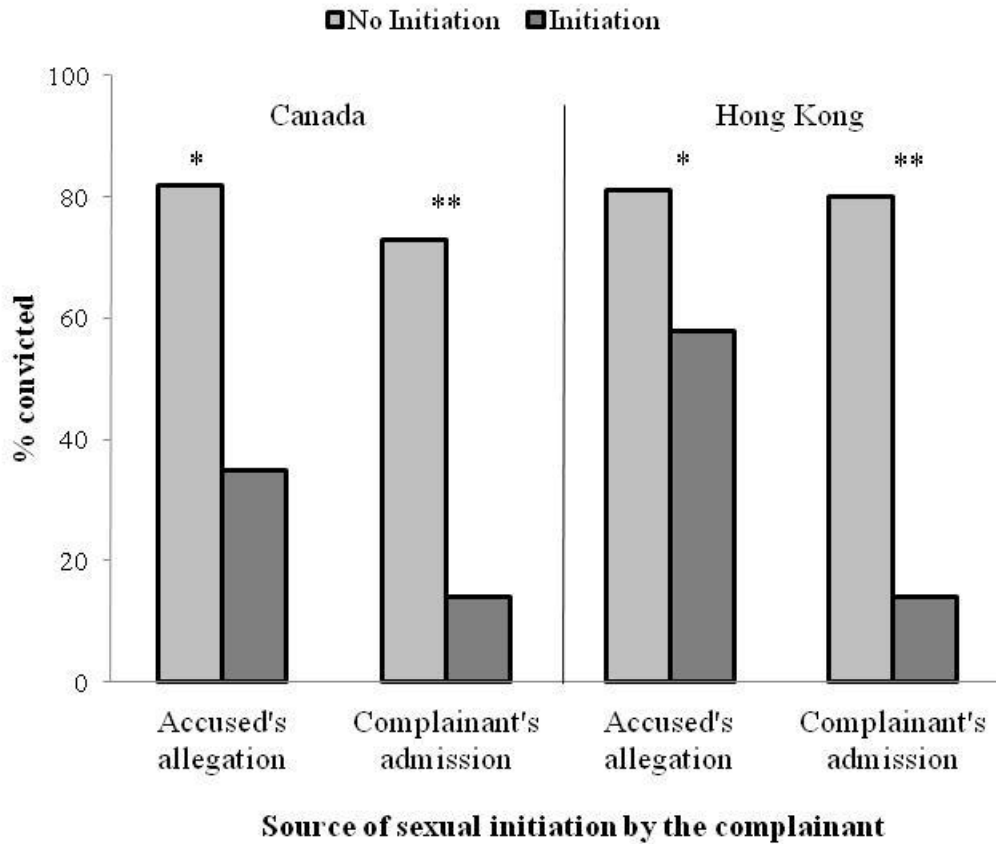
In contrast, the complainant's self-acknowledged initiation was not associated with whether the mistaken-belief defence was proposed in either jurisdiction, $ps > .05$ (Fisher's Exact Test). However, as presented in Figure 5, this defence was significantly more likely to be accepted when the complainant admitted to some degree of initiation in Hong Kong, $p < .01$ (Fisher's Exact Test), but not in Canada, $p > .05$ (Fisher's Exact Test). Of note, only one Canadian accused (in *R. v. Power*, 1999) proposed the defence of mistaken belief when the complainant acknowledged her role in initiating the sexual encounter.

Figure 5. Percentage of mistaken belief defence proposed or accepted as a function of the complainant’s self-acknowledged initiation and jurisdictions



Verdict. In both jurisdictions, as presented in Figure 6, regardless of whether the complainant was alleged to have initiated through the accused’s allegation, both $ps < .05$, or through her own admission, both $ps < .01$, incidents involving a complainant who initiated some level of physical interaction were statistically related to an increased likelihood of an acquittal.

Figure 6. Percentage convicted as a function of complainant’s alleged initiation (by either the accused’s allegation or the complainant’s own admission) and jurisdictions



* $p < .05$; ** $p < .01$

Taken together, as predicted, when the accused alleged that the complainant was the sexual initiator, the mistaken belief defence was more likely to be proposed and accepted, and he was also more likely to be acquitted from his sexual assault charge. Interestingly, when the complainant admitted to having behaved in suggestive ways, the relationship between her admission and whether the defence was proposed or accepted was less consistent, possibly due to its rare occurrence (which reduced the statistical power of such observations). Nevertheless, it appears that the defence was more successfully applied in Hong Kong in general, and the association between the complainant’s initiation and a not-guilty verdict appeared to be more robust in Hong Kong than in Canada. In general, women who express their sexuality more freely and provocatively are also more likely to be perceived by the criminal justice system as

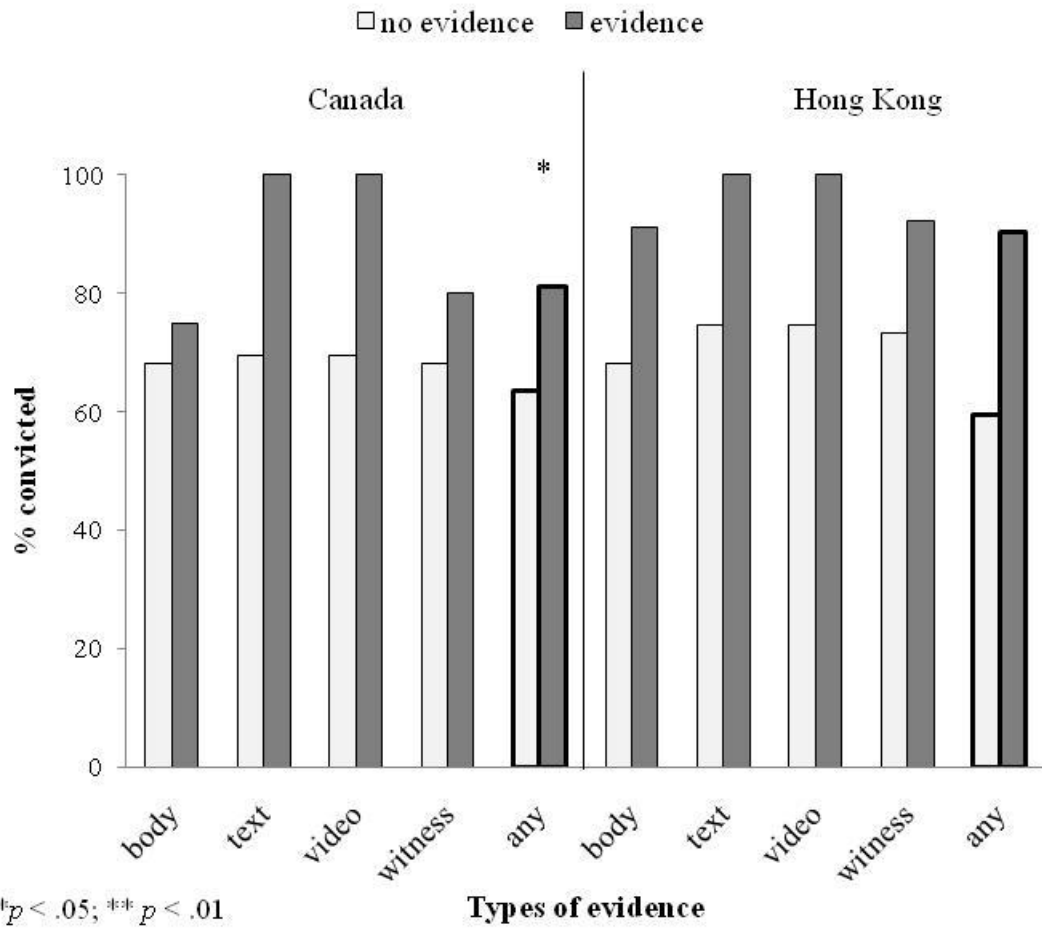
less credible (Denike, 2004), particularly in cultures that are “imbibed with patriarchal attitudes” (Barnett, 1998, p. 265). Therefore, it is conceivable that the reason why more acquittals were rendered in Hong Kong than in Canada when the complainant initiated sexual intimacy is because they were perceived as violating traditional gender norms (Cheung, 1997). This hypothesis will be further explored in Study 2.

Corroborating evidence

Corroborating bodily evidence (e.g., semen, genital injuries, and bruising on other areas of the body) was found in 33 incidents (32.7%) in Hong Kong and 32 incidents (26.9%) in Canada. As presented in Table 2, other evidence documented in the judicial opinions include incriminating text messages / letter, (cell phone) videos, and eyewitnesses. Overall, 52 (51.5%) and 42 (35.3%) incidents involved the presence of at least one piece of evidence in Hong Kong and Canada, respectively.

As illustrated in Figure 7, the availability of evidence of any kind was consistently associated with higher conviction rates. When the different kinds of evidence were combined in one variable and considered dichotomously (i.e., presence or absence), the presence of any kind of corroborating evidence at trial was significantly related to a guilty verdict in in Canada, $\chi^2(1, N = 119) = 3.86, p < .05$, and Hong Kong, $\chi^2(1, N = 99) = 12.76, p < .01$.

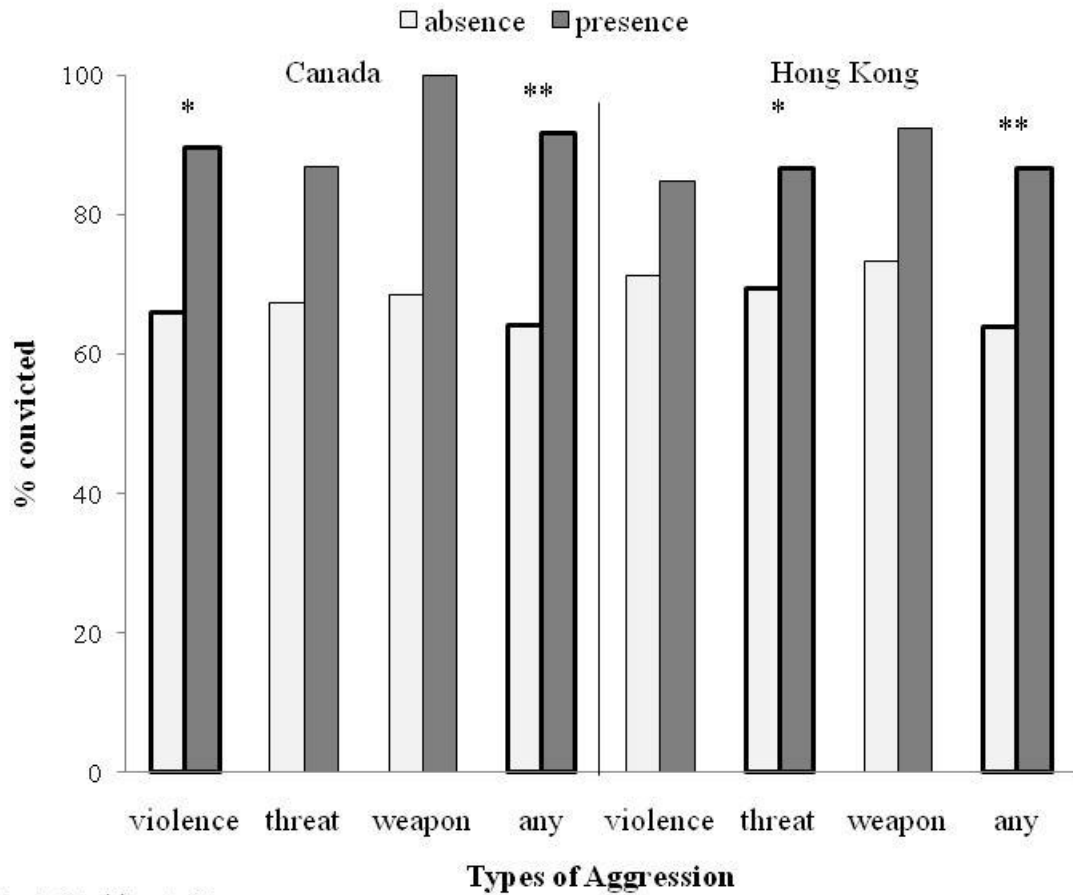
Figure 7. Percentage convicted as a function of evidence types and jurisdictions



Use of Violence, Threats, and/or Weapons.

The use of violence, threats, and weapons during the commission of assaults were somewhat infrequently referred to in both jurisdictions (see Table 2). As presented in Figure 8, the demonstration of aggression of any kind numerically increased the likelihood of a guilty verdict being rendered. However, in Canada, only violence was significantly related to verdicts, $\chi^2(1, N = 119) = 4.17, p < .05$, and in Hong Kong, only threat was marginally associated with legal outcomes, $\chi^2(1, N = 99) = 3.70, p = .05$.

Figure 8. Percentage convicted as a function of the violence, threat, and weapon use and jurisdictions



The inconsistent results may be explained in three main ways. First, cases that involved complainants who were unconscious through intoxication may require little use of violence, threat, or weapon, but would nevertheless increase the likelihood of a conviction; this may have increased the error estimates to the hypothesis that the more aggression that was demonstrated by the perpetrator during the alleged incident, the more likely it is that a guilty verdict would be rendered. Second, as illustrated above, physical evidence (in the form of injury) may be a better indicator as to whether violence was used by the accused. Finally, the non-significant relationships could be attributed to the relatively low prevalence of violent sexual crimes, especially in the case of weapon use. When all the variables were amalgamated into a single variable (*aggression*), approximately half of the incidents (52.5%) in Hong Kong and 20% of the Canadian incidents involved some type of aggression, and the

presence of any aggression during the alleged assault was significantly related to a guilty verdict in both Hong Kong, $\chi^2(1, N = 99) = 6.93, p < .01$, and Canada, $\chi^2(1, N = 119) = 6.85, p < .01$.

Regression Model

Step 1: Effects of Legal Variables on Verdict

Because a relatively small number of cases involved *violence, threats, and/or weapons*, these variables were amalgamated into a single variable, *aggression*. Hence, the two legally relevant variables explored in this step were: *the availability of corroborating evidence* and *aggression*. A test of this step against a constant-only model was statistically reliable, $\chi^2(2, N = 218) = 25.55, p < .001$ (*Nagelkerke R*² = .16), indicating that these legal variables reliably distinguished between those who were convicted and those who were acquitted. In addition, both of these factors survived the first step. Specifically, the accused was 2.97 times more likely to be convicted when there was at least one piece of evidence that corroborated the complainant's testimony, as compared to when no corroborating evidence was available, $B = -1.09, Wald(1) = 8.97, p < .01$. In addition, the accused was 3.19 times more likely to be convicted when the complainant alleged that he had used any form of aggression during or after the commission of the crime, as compared to when she did not make that claim, $B = -1.16, Wald(1) = 8.04, p < .01$.

Step 2 and 3: Effects of Key Variables on Verdict

Along with the two legal factors, six variables of interest were included in the second step: *complainant-accused relationship* (stranger vs. acquaintance), *complainant's sexual history*, *alcohol use by the complainant prior to the assault*, *complainant's alleged initiation*, *the proposal of the mistaken-belief defence*, and *jurisdiction*. The backward elimination procedure was not adopted for this step because we were interested in how *jurisdiction* and *defence tactic* may moderate the effects of these variables (considering the product terms without their associated main effects would render the model unstable). Along with the six aforementioned factors, four triple-order interactions involving *jurisdiction* and *defence tactic* and the key variables were included in Step 3.

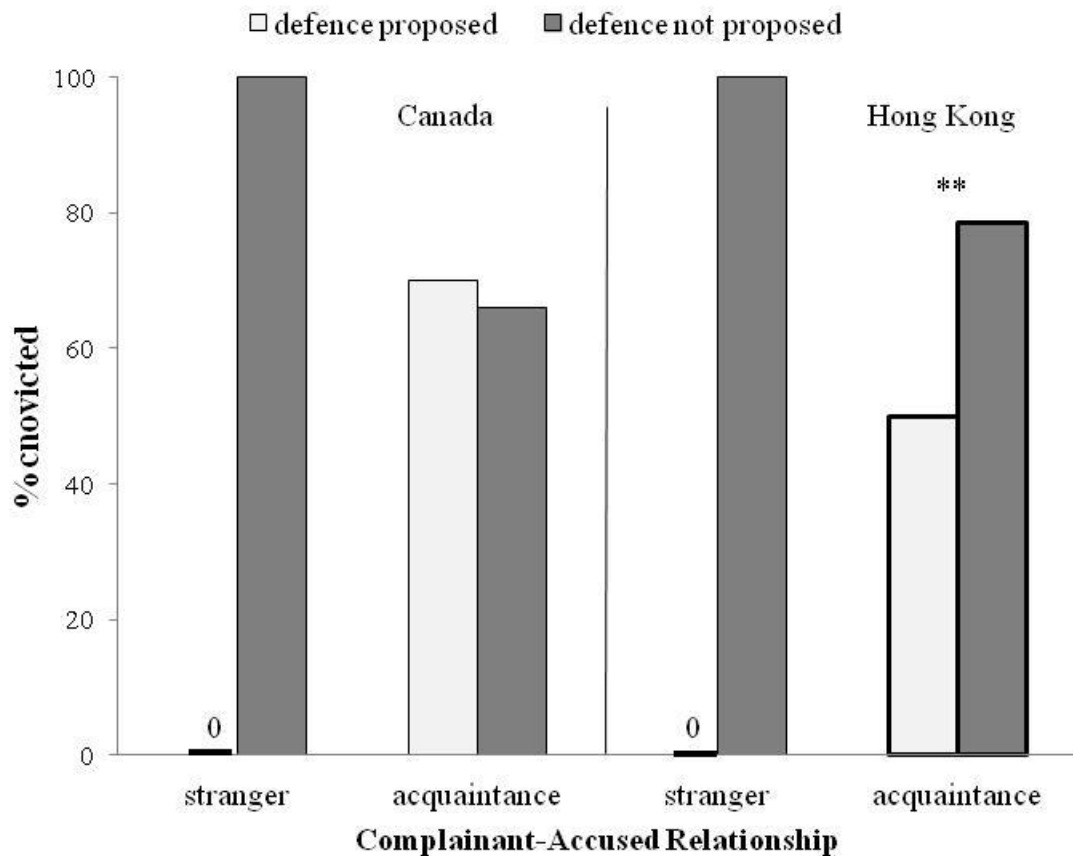
A test of the second step against a constant-only model was statistically reliable, $\chi^2(6, N = 218) = 36.49, p < .001$, indicating that these key variables, as a set, reliably distinguished between those who were convicted and those who were acquitted. More importantly, the *Nagelkerke R²* value, following Step 1, was enhanced by the addition of variables from Step 2 (from .16 to .36), suggesting that these variables contributed incrementally to a predictive model of verdict relative to those contributed by the legally relevant covariates.

After three backward eliminations at Step 3, *evidence* continued to contribute significant variance to the final model, $B = -1.11, Wald(1) = 6.97, p < .01$, but the effect of *aggression* was no longer statistically significant, $B = -0.78, Wald(1) = 2.70, p > .05$. In addition, a significant effect of *complainant's sexual history* was found, $B = 1.61, Wald(1) = 4.36, p < .05$; in particular, when the complainant's sexual reputation was referenced in the judicial opinion, the accused was five times more likely to be acquitted in general. Therefore, although both countries have statutorily limited the admissibility of evidence related to the complainant's sexual experience (ss. 276 and 277 of the *Canadian Criminal Code* and s. 154(1) in Hong Kong's *Crimes Ordinance*), even after controlling for legally relevant factors such as corroboration, allusions to the complainant's sexual past at trial increased the likelihood of accused acquittal.

Furthermore, there was a significant three-way interaction between *jurisdiction*, *defence tactic*, and *complainant-accused relationship*, $B = -2.39, Wald(1) = 5.49, p < .05$. When only acquaintance rapes were considered, there was a significant interaction between *jurisdiction* and *defence tactic*, $B = -1.49, Wald(1) = 3.94, p < .05$. As may be seen in Figure 9, tests of simple effects further revealed that an accused in Hong Kong was significantly less likely to be convicted when he knew the complainant *and* proposed the mistaken-belief defence at trial, $B = 1.30, Wald(1) = 6.19, p \leq .01$, whereas an accused in Canada was marginally more likely to be convicted when he knew the complainant *and* proposed the defence at trial, $B = -0.19, Wald(1) = 0.12, p < .10$. Furthermore, as indicated in the previous section, none of the accused in stranger-rape cases proposed the mistaken-belief defence. This finding further supported the hypothesis that, even after we have accounted for the variances

of legally relevant factors (i.e., corroboration and aggression), the mistaken-belief defence was much more successful in Hong Kong than in Canada in acquaintance rapes, potentially because of the reasonable-steps legislations in Canada that may effectively limit the scope of the mistaken belief defence.

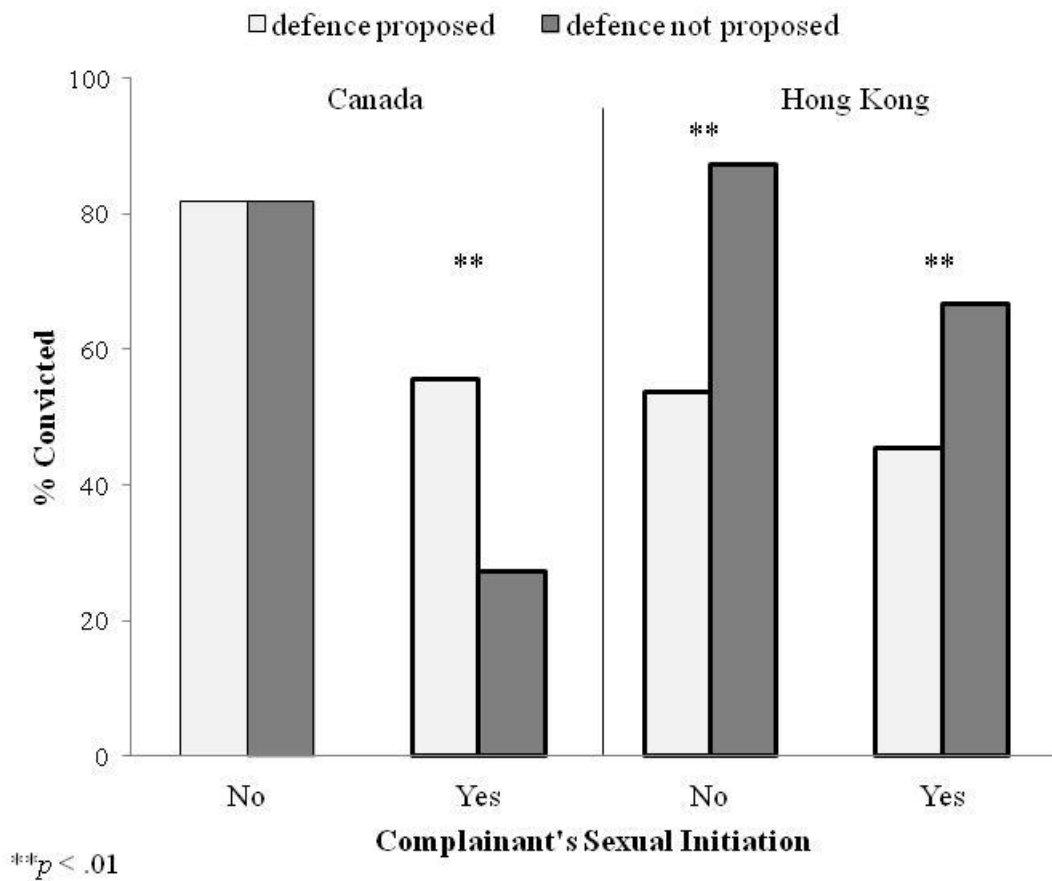
Figure 9. Percentage of mistaken belief defence proposed or accepted as a function of the complainant-accused relationships and jurisdictions



Finally, although a significant effect of *complainant's initiation* was found in Step 2, $B = 1.44$, $Wald(1) = 13.24$, $p < .01$, Step 3 revealed that this main effect was qualified by a significant three-way interaction between *jurisdiction*, *defence tactic*, and *complainant's sexual initiation*, $B = 1.84$, $Wald(1) = 5.14$, $p < .05$. As may be seen in Figure 10, the significant interaction was contributed by the increased propensity for the accused to be acquitted in Hong Kong when he proposed the mistaken-belief defence across both levels of initiation, $B = 1.44$, $Wald(1) = 7.18$, $p < .01$, whereas no significant main effect of defence tactic was found in Canada, $B = -0.67$, $Wald(1) = 1.12$, $p > .05$. As mentioned, when the accused asserted that he

thought the complainant consented in Canada, he must be able to show, pursuant to s. 273.2(b) of the *Criminal Code*, that he took “reasonable steps” to substantiate the belief in order to be exculpated for his “mistake.” Therefore, it seems likely that, even though the burden of proof is not imposed on the accused when he proposed the mistaken-belief defence, the Canadian provision related to “reasonable steps” may have shifted some of the evidential burden to the accused when he seeks to rely upon the mistaken-belief defence. On the contrary, Hong Kong has not adopted such requirement, which makes an acquittal more likely to be rendered when this defence is raised.

Figure 10. Percentage convicted as a function of complainant’s alleged initiation, defence tactic, and jurisdictions



However, contrary to our expectations, tests of simple effects also revealed that when the complainant was alleged to have initiated the sexual encounter, *and* when the defence of mistaken belief was *not* proposed, the accused was significantly

more likely to be acquitted in Canada, $B = 2.49$, $Wald(1) = 19.51$, $p < .01$, and a not-guilty verdict was also marginally more likely to be rendered in Hong Kong, $B = 1.24$, $Wald(1) = 2.94$, $p < .10$. In light of these unexpected findings, cases that involved complainant's initiation were further reviewed. It appears that, in Canada, when the complainant initiated the sexual encounter, the court generally concentrated on "whether the Crown has proven beyond a reasonable doubt that the sexual activity occurred without the complainant's consent [i.e., the *actus reus*]. If there is a reasonable doubt on that point, the accused is entitled to be acquitted, and the issue of belief in consent ... [would] not arise" (*R. v. McLaughlin*, 2010, para. 2). In general, "the defence of honest but mistaken belief arises only with the *mens rea* element of the offence" (*R. v. Annett*, 2007, para. 31), and *mens rea* would not be considered until the *actus reus* (or the guilty act) has been proven (M. Tammen, personal communication, May 16, 2011). Therefore, a majority of the Canadian accused (73%) were acquitted when he alleged that the complainant initiated because the Crown did not prove beyond a reasonable doubt on the issue of absence of consent by the complainant.

As described in the annotation section of *Martin's Annual Criminal Code* (2011), "[t]he complainant's statement that she did not consent is a matter of credibility to be weighed in light of all of the evidence including any ambiguous conduct. If the trier of fact accepts the complainant's testimony that she did not consent, no matter how strongly [her] conduct may contradict her claim, the absence of consent is established" (p. 576). However, it appears that the complainant's equivocal behaviours may nevertheless raise doubt in the mind of the trier of fact regarding her lack of consent. This finding is particularly alarming because even when the complainant initially provides consent, she is legally entitled to express a change of heart in any sexual acts (see s. 273.1(2)(e)). Despite s.273.1(2)(e), this pattern of results suggest that if there are inconsistencies in the complainant's behaviours that may obscure her (lack of) agreement to engage in sexual acts, her assertion of non-consent may be perceived with increased doubt, even though the law recognizes "the right of the complainant to change her mind at any point in the sexual encounter" (*R. v. J.A.*, 2011, para. 53).

Taken together, it appears that the mistaken-belief defence was not as successfully applied in Canada than in Hong Kong in general, potentially because the declaration of a “mistake” can only be advanced in Canada when the accused took “reasonable steps, in the circumstances known to [him] at the time, to ascertain that the complainant was consenting.” (s.273.2(b)). Nevertheless, in both jurisdictions, the offence of sexual assault tends not to be as successfully prosecuted when the complainant ignored what are considered traditional and moral standards by engaging in acts such as being sexually provocative or, to a lesser extent, being intoxicated. In these incidents, the more substantive issue seems to relate to whether there was enough evidence to support the complainant’s non-consent (i.e., the *actus reus*), instead of the accused’s belief or his subjective *mens rea*, and the complainant appears to be held much more accountable for the sexual assault. In Study 2, we explored whether cultural beliefs (e.g., rape myth acceptance and patriarchal ideologies) would contribute to lower perceived credibility judgments of sexual assault complainants, especially those who have violated traditional gender norms, resulting in prejudicial judgments in judicial outcomes.

Study 2: The Effects of Gender and Attitudinal Factors on Judicial Judgments of Sexual Assault Trials in Canada and Hong Kong

The current sexual assault laws raise some fundamental questions that can be empirically assessed: Will a complainant's inebriation and/or her sexually provocative behaviours prior to or during the sexual encounter in question influence jurors' perceptions of the complainant (especially her perceived accountability and the perceived likelihood that she consented to sexual intercourse)? Will this information have a prejudicial impact on jurors' decisions regarding guilt or culpability in a rape trial, particularly when these behaviours are more frowned upon in the jurors' culture? How may the jurors' gender and predispositions (e.g., rape myth endorsement and rigid gender-norm beliefs) affect their judicial decision-making in a sexual assault trial? An examination of some of the socio-psychological constructs behind these issues in both Hong Kong and Canada may help shed light on these questions.

Study 2, therefore, explores how hegemonic understanding of gender (including gender norms) and rape myth may shape the cultural perception of sexual violence in Canada and in Hong Kong. In particular, the present research examined the impact of the complainant's gender-role violations on mock jurors' verdicts and perceptions of the complainant in a simulated sexual assault trial. To begin, the following sections will review the psychological studies examining the influence of rape myth acceptance and sex role stereotypes on individuals' perceptions in a rape situation.

Rape Myth Acceptance

Myths of rape include the view that women fantasise about being rape victims; that women mean 'yes' even when they say 'no'; that any woman could successfully resist a rapist if she really wished to; that the sexually experienced do not suffer harms when raped (or at least suffer lesser harms than the sexually 'innocent'); that women often deserved to be raped on account of their conduct, dress, and demeanour; that rape by a stranger is worse than one by an acquaintance. Stereotypes of sexuality include the view of women as passive, disposed submissively to surrender to the sexual

advances of active men, the view that sexual love consists in the ‘possession’ by a man of a woman, and that heterosexual sexual activity is paradigmatically penetrative coitus. (*R. v. Ewanchuk*, 1999, p. 370)

Attitudes toward sexual offences differ from one society to another; however, there are common myths and shared biases in considering what constitutes as “real” rape and “real” victims that universally affect complainants’ perceived credibility and enhance victims’ fear of being disbelieved (Ullman, 2010; originally defined by Estrich, 1988). For example, as illustrated in legal cases mentioned in Study 1, factors that may undermine the perceived veracity of a “real” rape include a complainant’s relationship with the assailant, her own sexual past, her provocative behaviours prior to the incidents, and her level of intoxication. These factors are often also taken into account by both the police and the prosecutors in deciding whether to pursue a case or not (J. Nascou, personal communication, May 13, 2011). For example, Madam Justice Jean McFarland, in *Jane Doe v. The Metropolitan Toronto Police Force* (1998) ruled that the police investigation in that case was motivated by “serial rape mythology and discriminatory sexual stereotypes” (as cited in “The Auditor General’s Second Follow-up Review on the Police Investigation of Sexual Assaults”; www.toronto.ca/legdocs/mmis/2010/cc/bgrd/AU19.18a.pdf). More recently, on January 24, 2011, a Toronto police officer spoke at a campus information session at Osgoode Hall Law School and stated that women should not “dress like sluts” to avoid sexual assault (reported in *The Star*, February 18, 2011). The remarks garnered immediate outrage and concerns among University officials and in the media. Although the officer was reportedly disciplined for the statement, the “what did she expect?” mentality appears to linger among the gatekeepers of law, and this sentiment may continue to make women fearful of reporting sexual assaults and pursuing prosecution.

These victim-blaming views have often been examined through assessing the attitudes that support rape stereotypes and myths (Burt, 1980; Ellis et al., 1992; for a full review, see Lonsway & Fitzgerald, 1994). Burt (1980) coined the term “rape myth” to describe “prejudicial, stereotyped, or false beliefs” (p. 217) or social perceptions about rape that deny or reduce perceived injury, or blame the

complainants for their own victimization. Using her version of the *Rape Myth Acceptance Scale*, Burt (1980) found a cluster of attitudinal variables (e.g., traditional gender role attitudes, adversarial sexual beliefs, and acceptance of interpersonal violence) that strongly predicted rape myth acceptance, and the correlations between these constructs were also supported in other research studies (Check & Malamuth, 1985; Quackenbush, 1989). Further, rape myth acceptance has been shown to lead to greater victim blame, lower conviction rates, and shorter sentences imposed by juries in mock crime studies (Finch & Munro, 2005; Lonsway & Fitzgerald, 1994). However, it has been suggested that Burt's (1980) scale lacks content validity and criterion-related validity (e.g., many of the items were confounded with hostility towards women; Lonsway & Fitzgerald, 1994). Therefore, despite the popularity of Burt's (1980) scale, Payne, Lonsway, and Fitzgerald's (1999) *Illinois Rape Myth Acceptance Scale* (IRMAS) was used in the present study (see Methods section for further details).

Most of the aforementioned research was conducted in western countries. However, Wasti, Bergman, Glomb, and Drasgow (2000) observed the need to expand research related to sexual violence beyond the "individualistic, industrialized, Western context" (p. 766). Particularly, in light of the observation that rape myth is "culturally driven" (Burt, 1980), it seems conceivable that there would be cross-cultural variability in the prevalence of rape myth endorsement. Previous research indicates that Chinese-Canadians (Kennedy & Gonzalka, 2002) and Asian-Americans (Mori, Bernat, Glenn, Selle, & Zarate, 1995) are more tolerant of rape myths than non-Asian respondents. Similarly, according to the Hong Kong Rape Crisis Centre (2001, 2002), the majority of the Chinese respondents adhered to the myth that rape occurs only between strangers, at night, and in dark and secluded areas. Nearly half of the respondents also agreed that "women who go out alone at night put themselves into a situation that is prone to be raped." The victim-blaming attitude is further reflected in the high endorsement (60%) of the myth that "men rape because of uncontrollable passion." This myth may implicitly be holding some women more accountable for their own sexual assaults when they are triggering those (uncontrollable) passions by holding certain occupations, or dressing and/or behaving

in a way, that fails to conform to the ideal female stereotype (Tang et al., 2002). In general, the belief of victim accountability is directly related to the nature of sex-role stereotyping in Chinese societies, which places certain prescribed expectations on the behaviours of the two sexes.

Like most other patriarchal societies, Chinese individuals hold (and uphold) a two-sided archetype of women: the chaste virgin / widow versus the temptress (also known as the *fox-spirit* in Chinese cultures). The *fox-spirit*, in its female manifestation, is a common supernatural figure in Chinese folktales (Songling, 2001). The *fox woman* is typically extremely beautiful and seductive and loves to prey on unsuspecting young men who are novices in the matters of love and sex. However, the consequences are predictable, as his vital *yang* (or masculine energy) is gradually sapped by the *fox woman*, and the young man grows progressively thinner and weaker until he is, quite literally, reduced to a ghost of his former self. The depiction of Eve as a temptress, who seduced Adam into sharing the forbidden fruit, provides another similar metaphor. As a result, the more Eve and consequently all women are associated with serpent and sin, “the greater [the] need [grew] to control, subdue, and dominate ... [them]” (Fletcher, 1995, p. 76).

Fox-possession tales are so universally known in Hong Kong and China that, in the vernacular speech, seductresses are often referred to as “*fox-spirits*.” In fact, as far as sexual enjoyment is concerned, Chinese men probably regard themselves as disadvantaged vis-à-vis their women. Indeed, as the fox-possession tale suggests, Chinese generally believe that women, when given the opportunity, would prey on men (Songling, 2001). Small wonder, then, that the Qing officials (as referenced in Study 1’s *Chinese / Hong Kong Rape Law History* section) would demand stringent proof of rape (to ensure that the woman was not actually a jilted temptress), and would accept the idea that a complainant could actually enjoy the sexual attack through a “forcible beginning [but] amicable ending” (Ng, 1987, p. 58) scenario. Even when a sexual assault was ruled as rape, judges would tend to first make an issue of the complainant’s sexual history (and determine her moral makeup) before considering the grievousness of the crime (Xue, 1970).

More recently, rape myths also manifested themselves in Hong Kong law in the assumptions made about sexual offences (Chiu, 2004). For example, buggery is not considered as adultery; only vaginal penetration would be considered as a lawful marital consummation and unlawful rape (*Crimes Ordinance*, s. 118). By legitimising the heterosexual, reproduction-focused perspective, rape laws in Hong Kong further strengthens the patriarchal ideology (Chiu, 2004): men, who are supposed to be rational, are assumed to be sexually aggressive, and it is therefore women's responsibility not to arouse the male sexual desire. As seen in Study 1, law courts (especially in Hong Kong) would often decide that the complainant may have consented to sexual intercourse with the accused if the complainant had a promiscuous sexual history and initiated some form of sexual intimacy with the accused. Because of the pervasiveness of rape myth endorsement in Chinese culture, it is predicted that mock jurors from Hong Kong would perceive the rape complainant as more accountable than their Canadian counterparts.

Sex Roles

An important research and clinical aspect of rape myth is its determinants, and past research has consistently demonstrated that strong endorsement of rape myths is highly associated with traditional attitudes with regards to gender-role conformity (Burt, 1980; Check & Malamuth, 1983; Costin & Schwartz, 1987; Giacobassi & Dull, 1986; Mayerson & Taylor, 1987; Ward, 1988). For example, Jimenez and Abreu (2003) found that Caucasian women endorse more positive attitudes towards the complainant and fewer rape myths compared with their Latino counterparts, and the researchers speculated that a more traditional set of sex-role values in Latinos may have accounted for the findings. Similarly, Simonson and Subich (1999) found that respondents holding less traditional gender-role stereotypes perceived rape scenarios as more serious and were less likely to blame the complainant. In general, sex-role stereotyping appears to be highly associated with rape myth acceptance and negative attitudes towards the rape victim.

The gender-based role assignments are further exaggerated in Eastern cultures. For example, the general favouritism towards males in traditional Chinese society leads to the socialization of individuals based on gender and results in

different assigned values and respective treatments for men and women. For instance, as argued by Tang et al. (2002), the submissiveness of Chinese women within the family and the patriarchal attitudes of Chinese husbands toward their wives tend to legitimize wife battering, which is often defended within the rules of family life. Confucius' teachings also condone the evaluations of women based on the "three obediences" (i.e., a woman is to subject herself to the authority of her father when she is young, her husband when she marries, and her son when she is widowed), and the "four virtues" (i.e., fidelity, tidiness, propriety in speech, and commitment to needlework; Tang, Chua, & O, 2010). These traditional values may provide fertile ground for blaming women who are assaulted by their partners, and violence may be regarded as one of the legitimate means to discipline a Chinese woman if she fails to meet these standards (Tang, Lee, & Cheung, 1999). Despite social and political changes, remnants of these traditional values and conceptions persist in Chinese societies, including Hong Kong (Cheung, 1997).

Sex Roles or Sexist?

According to Ellis (1989), feminists have maintained that violence against women is an integral part of a patriarchal society, and rape is a social tradition arising from male domination and female exploitation (see also Brownmiller, 1975). A few earlier studies on this topic found that the acceptance of interpersonal violence, sex role stereotyping, and adversarial sexual beliefs were the best predictors of rape myth acceptance (Burt, 1980; Christopher, Owens, & Steckers, 1993). To update Burt's (1980) construct of sex-role stereotyping, and in contrast to the typical definition that sexism is just antipathy toward women, Glick and Fiske (1996, 2001) proposed that sexism consists of two components: one that reflects hostile attitudes toward women, and another that reflects benevolent attitudes toward women. Hostile sexism manifests as denigrating attitudes that punish women who defy traditional gender roles, whereas benevolent sexism signifies reverent attitudes that reward women who are traditionally feminine (e.g., "women complete men," and "women should be cherished and protected by men"; Glick & Fiske, 1996, p. 491; Glick, Diebold, Bailey-Werner, & Zhu, 1997). Their theory posits that the relationship between the genders is characterized by the concurring male dominance in society and intimate

interdependence between the two genders, which creates ambivalence. For example, on one hand, male predominance in economic, political, and social institutions supports hostile sexism, which characterizes women as inferior and incompetent. On the other hand, sexual reproduction makes men and women intimate and highly interdependent with each other, hence creating benevolent sexism, which characterizes women as needing to be protected.

Glick and Fiske (1996, 1999) developed a scale to measure hostile and benevolent sexism toward women (the Ambivalent Sexism Inventory; ASI). Whereas hostile sexism is a single factor (though originally viewed as having three components), benevolent sexism includes three factors: protective paternalism (chivalry toward women), complementary gender differentiation (stereotypic roles of women), and heterosexual intimacy (believing men and women are incomplete without each other). Despite the two subscales having opposing connotations, responses to the Hostile Sexism and Benevolent Sexism subscales have been reported to be positively correlated because both sexism justify traditional gender roles and power relations (Glick & Fiske, 1996, 2001; Glick et al., 2000).

How do these subjectively hostile and benevolent attitudes co-exist without causing cognitive dissonance? Glick and Fiske (1996) proposed that ambivalent sexists reconcile their hostile and benevolent feelings by classifying women into *good* and *bad* subcategories (i.e., as either “good girls” or “bad girls”). “Good girls” are venerated and thus worthy of chivalry; “bad girls,” on the other hand, are denigrated and denied patriarchal protection. Thus, benevolence is directed at those women who conform to traditional roles, and hostility is reserved for nonconforming feminists and career women (Glick et al., 1997; Masser & Abrams, 2004). In a series of studies, Glick et al. (1997) observed that benevolent sexism predicted favourable feelings toward women in traditional gender roles, whereas hostile sexism predicted negative feelings toward women in non-traditional roles. Further, Glick and Fiske (1997) found that, for both male and female participants, hostile sexism (but not benevolent sexism) significantly correlated with Burt’s (1980) Rape Myth Acceptance Scale. Moreover, Abrams, Viki, Masser, and Bohner (2003) found that individuals who scored highly on hostile sexism were more likely to perceive the sexual assault

complainant as wanting to engage in sexual intercourse and only offering token resistance so as to appear chaste (i.e., adversarial sexual belief). In terms of gender differences, men generally score higher on the ASI (on both hostile and benevolent sexism) than women (Glick & Fiske, 1996, 2001; Glick et al., 2000), which is not surprising given men's stake in the traditionally dominant role. However, women may accept benevolent sexism more than hostile sexism because of the benefits (e.g., protection) such sexism promises (Glick et al., 2000). Despite the positive tone of benevolent sexism, Glick et al. (2000) found that national averages on benevolent sexism (as well as hostile sexism) were negatively correlated with national indicators of gender equality, suggesting that benevolent sexism may also serve to justify the system of inequality.

According to Viki and Abrams (2002), some of the observed differences in the blame attributed to acquaintance and stranger rape victims can be explained in terms of benevolent sexism. This proposal is based, in part, on Bateman's (1991) observation that women are stereotyped as guardians of sexuality (see also Glick & Fiske, 1996). Although this could be viewed as a positive stereotype (e.g., considering women as more virtuous than men), such perceptions also place most of the responsibility of sexual morality on women. For this reason, when accusations of sexual assault are made, more attention may be paid to the behaviours of the complainant and her relationship with the perpetrator, rather than to the perpetrator's intentions and the nature of the act (Batemen, 1991; Weller, 1992). In addition, Weller (1992) and Bechhofer and Parrot (1991) noted that the exclusive focus on the behaviours of the complainants often makes it difficult to prosecute acquaintance rape cases (an observation that was further supported in Study 1). This is because acquaintance rapes often take place in situations in which there is some potential for consensual sex, whereas in stranger rapes, such potential is generally absent (Bechhofer & Parrot, 1991). Finally, Viki and Abrams (2002) suggested that individuals who score higher in benevolent sexism may be more likely to blame complainants of acquaintance rape for falling short of the "ladylike" standard. Consistent with their hypotheses, Viki and colleagues found that benevolent sexism, but not hostile sexism, was associated with increased blaming of victims of

acquaintance rape, as compared to stranger rape (see also Abrams et al., 2003). They concluded that individuals who are high in benevolent sexism may blame acquaintance rape victims to protect their belief in a just world (Bohner & Schwarz, 1996); that is, a world where people tend to get what they deserve. Taken together, such findings suggest that responses to rape complainants may be influenced by both hostile and benevolent sexist norms that prescribe appropriate behaviours and roles for women within (intimate) relationships. Therefore, it seems reasonable to hypothesize that individuals who endorse both sexist beliefs (as measured by the ASI) are more likely to attribute responsibility to complainants who may be viewed as violating traditional gender role expectations (e.g., when she drank to the point of being highly inebriated or initiated sexual contact by inviting the man into her apartment) than those who do not hold such beliefs.

Although some studies outside of the United States and Canada have examined sex-role stereotyping and hostility towards women (e.g., Aromaki, Haebich, & Lindman, 2002), there has only been a small number of studies that have investigated these constructs across different cultures. In a comparative analysis of 19 nations (including Asian countries), Glick et al. (2000) found that both hostile and benevolent sexism are pervasive across cultures. More recently, Lee et al. (2010) found that Chinese (in mainland China) scored higher on both kinds of sexism (using the ASI) than their American counterparts, and the benevolent and hostile ideologies remained strongly correlated for both cultural groups. Because Hong Kong also has a long history of male-female hierarchy that arises from traditional Confucian philosophy (Bond & Smith, 1996), its residents may also endorse a higher level of ambivalent sexism than their western counterparts. The present research, therefore, explored the prevalence of ambivalent sexism in Hong Kong and examined whether benevolent sexism would influence judgments of acquaintance rape complainants who may be perceived as having violated traditional gender role norms in Hong Kong and Canada. In the next section, the specific types of gender norms violations will be explored.

Violation of Gender Norms

Gender socialization begins very early in life as girls and boys learn to behave in different ways that are perceived as appropriate for their gender. For example, by age three, children are easily able to categorize people as female or male (Katz, 1996; Levy, 1999) and have a simple understanding of how many common activities and objects are stereotyped as feminine or masculine (Poulin-Dubois, Serbin, Eichstedt, Sen, & Beissel, 2002). Furthermore, by the time children are five years of age, they have a fairly sophisticated understanding of how to use gender labels appropriately, and have an elementary understanding of the gender stereotyping of personality traits (Powlishta, Sen, Servin, Poulin-Dubois, & Eichstedt, 2001).

Because individuals are exposed to different socialization processes throughout their formative years, male and female gender roles become normative expectations (Eagly & Wood, 1991) that are believed to be socially sanctioned and representative of consensually-shared beliefs (Eagly, Wood, & Diekmann, 2000). More importantly, research suggests that these normative expectations tend to guide people's behaviour when they are in ambiguous situations (Festinger, 1954), potentially because behaving consistently with normative expectations is less risky than behaving in a non-normative manner. Hence, people who violate these expectations are often disapproved (e.g., Hibbard & Buhrmester, 1998; Prentice & Carranza, 2004). For example, Heilman and Kimoto (2007) found that women who are successful in traditionally male domains tend to be disliked; however, negative feelings towards these kinds of women may be attenuated if they clearly express communal attributes, which are traditionally perceived as feminine traits. Disapproval for gender role violations is also experienced by men, as evidenced by the censure of men who do not work outside of home, but instead work within the home as househusbands (Wentworth & Chell, 2005). More importantly, despite the presence of rapid social, economic, and political changes in Chinese societies in recent decades, social roles, gender stereotypes, and gender socialization processes continue to be important psychosocial mechanisms in regulating social behaviours (Tang et al., 2010). This study, therefore, adds to the literature by examining how perceived behavioural violations of gender roles influence judgments of women who have been

sexually assaulted in Hong Kong and in Canada. To operationalize behaviours that violate feminine gender role norms, I investigated how alcohol intoxication and the complainant's sexual initiation may influence perceptions of an acquaintance rape.

Alcohol use

As suggested in Study 1, sexual assault often involves intoxicated complainants; for example, approximately 66% of Canadian complainants and 37% of the complainants from Hong Kong had consumed alcohol before the alleged assaults (see also Kilpatrick et al., 2007). Other research has also found that most sexual assault victims who consumed alcohol before the assault believed their alcohol consumption had an influence on the perpetrator's behaviour and 23% of them believed their intoxication was a direct cause of their sexual assault (Testa & Livingston, 1999).

A number of scenario studies with lay populations document that people evaluate and judge men and women differently with regards to their alcohol consumption (e.g., Abbey, 1991; Abbey et al., 2002; Finch & Munro, 2003, 2005, 2007; Zawacki et al., 2005). For example, when a woman was portrayed as inebriated in a vignette that depicted a heterosexual dating couple, she was viewed as more sexually responsive, easier to seduce, and more likely to engage in foreplay and intercourse compared to the nondrinking character (George, Cue, Lopez, Crowe, & Norris, 1995; George, Gournic, & McAfee, 1988, Study 2). In addition, in the context of a mock sexual assault trial scenario, when the complainant had consumed alcohol instead of cola, she was viewed as less credible and more blameworthy, and the accused was viewed as less likely to be guilty (Klippenstine, Schuller, & Wall, 2007; Schuller & Wall, 1998; Sims, Noel, & Maisto, 2007; Wall & Schuller, 2000). Moreover, Finch and Munro conducted a series of studies (2003, 2004, 2005, 2006, 2007; Ellison & Munro, 2009) and found that several rape myths related to alcohol are still commonly endorsed in Britain; for example, it is considered socially significant if a woman offers alcohol to a male companion, because it implies that sex might also be offered. Further, the researchers also found that despite a range of poster and radio campaigns aimed at altering attitudes towards women, alcohol, and rape, more people held that an intoxicated complainant was (at least partially)

responsible for the assault in 2009 than in 2004. A similar pattern also emerged with regards to complainants who flirted with the accused (see the *complainant's initiation* section below for further details).

More significantly, traditional gender role norms often lead to disapproval of women who drink alcohol but not of men who drink. For example, research investigating alcohol use among adolescents found that those with higher endorsement of traditional gender roles were more likely to approve of drinking by males and more likely to disapprove of drinking by females (Huselid & Cooper, 1992). In addition, drinking by women is often perceived as a violation of feminine gender role norms (Blume, 1997), and women are more likely than men to believe others may disapprove of their drinking (Agostinelli, Grube, & Morgan, 2003). Although North Americans are more likely to drink, to drink more frequently, and to drink higher qualities than their Hong Kong counterparts, people in Hong Kong are introduced to alcohol in the home at an earlier age (Lo & Globetti, 2000). During these early introductions, young people are inculcated with the rules of drinking, and they become aware of cultural expectations and sanctions relating to drinking (Barnett, 1955). Taken together, because individuals in Hong Kong have more stereotypical views on gender appropriate behaviours than their western peers (e.g., Lee et al., 2010), it is conceivable that the relationship between a complainant's alcohol consumption (which violates traditional gender norms) and the public's perception of her accountability in sexual assaults would be stronger in Hong Kong than in Canada. Therefore, it was expected that, as compared to Canadians, participants from Hong Kong would be more likely to acquit the accused who was charged for rape when alcohol was involved in a sexual encounter.

Complainant's Initiation

Traditional gender role norms also lead to assumptions about who should initiate sexual intimacy. Since the middle and later parts of the 19th century, gender role norms concerning sexuality have reflected a double standard in which women are expected to be virtuous, whereas men are allowed more leniency in their sexual behaviour (Acton, 1857; Cott, 1979; Denmark, Rabinowitz, & Sechzer, 2005). For example, men are expected to be the initiators of dates and/or sexual interactions

(Basow & Minieri, 2011; Hills, Laner, & Ventrone, 1998). These double standards for sexuality are further reflected in the Magdalene-Madonna dichotomy, in which chaste women are generally categorized as good women, and sexually-provocative women are generally categorized as bad women (Garcia, 1986). Moreover, rape myths that characterize victims' seductiveness as provoking their own victimization may have helped perpetuate the belief that certain appearances and behaviours displayed by the complainant make them more vulnerable, or even responsible, for their own assaults (Timmer & Norman, 1984). For example, although most doctors hold a favourable attitude towards rape victims, male, as compared to female, physicians are more likely to perceive rape as precipitated and triggered by the personality traits and behaviours of the victims (Calhoun, Selbv, Rotters, & King, 1987), and a sizeable group (36%) of doctors from Hong Kong emergency rooms believe that "a woman should be responsible for preventing her own rape" (Wong, Wong, Lau, & Lau, 2002). In general, as explored in Study 1, these victim-blaming beliefs may legitimize a man's "belief" that it is reasonable to expect that sex is forthcoming if and when the woman has broken these rules (e.g., by initiating).

In their study of Chinese cultures (including Hong Kong, Mainland China, and Taiwan), Tang et al. (2002) found that the victim's accountability in her own assault is a belief widely held by Chinese individuals. In particular, perpetrators were often described as having certain irresistible impulses, and women, like the traditional *fox-spirit*, were triggers of those impulses. In addition, cultural myths about violence against women are strongly linked to other deeply-held and pervasive attitudes, such as sexual conservatism, adversarial sexual beliefs, acceptance of interpersonal violence, and sex role stereotyping (e.g., Burt, 1980). Similarly, Tang et al. found that the belief in victim accountability is related to sex-role stereotyping in Chinese societies. As an ideology, sex-role stereotyping prescribes behaviours for members of each sex and places men in a superior and dominant role and women in an inferior and submissive role. According to many Chinese participants in Tang et al.'s study, there were certain boundaries of sex-role behaviours that people, especially women, should not cross. In cases of rape, it is conceivable that those who are perceived as crossing the line of sexual norms may be held responsible for their fates. Therefore, it

is expected that Chinese individuals, when compared to their Western counterparts, would be more likely to judge a complainant who initiated sexual interaction as worthy of blame and render more acquittals.

Gender differences

Studies have consistently shown that a person's gender is correlated with her or his perceptions of rape, and men, as compared to women, generally adopt narrower definitions of sexual assaults and are more tolerant of rape (e.g., Anderson & Swainson, 2001; Gerber, Cronin, & Steigman, 2004; Newcombe, van den Eynde, Hafner, & Jolly, 2008). As mentioned in previous sections, research has typically found that men endorse higher levels of rape myths (e.g., (Hammond, Berry, & Rodriguez, in press; Giacomassi & Dull, 1986; Iconis, 2008) and ambivalent sexism (Glick & Fiske, 1996, 1997, 2001; Glick et al., 2000) than women. Furthermore, a recent American study found that men blamed the complainant more and the perpetrator less, in acquaintance rape cases, than did the females (Brown & Testa, 2008). Similar research conducted with Australian adolescents and young adults (Xenos & Smith, 2001), English college students (Anderson & Lyons, 2005), and Latino Americans (Jimenez & Abreu, 2003) also found that women are generally more sympathetic toward women who were sexually assaulted than are men. Further, in Tang et al.'s (2002) focus group with Chinese participants, although male and female participants were largely similar in their perceptions and attitudes toward various explanations and myths regarding rape, male, as compared to female, participants were more likely to endorse the idea that the complainant shared responsibility and to view women as active agents in the sexual encounter. Finally, in a study involving 14 countries (including Canada and Hong Kong), men consistently held more unfavourable attitudes toward rape victims than women (Ward, 1995). According to Crittenden and Bae (1994), people (from both western and eastern cultures) are socialized to enhance and defend the reputations of the groups to which they belong. Thus, Tang et al. argue that Asian men are more likely than Asian women to attribute men's violence against women to a good cause (i.e., the need for family structure and rigid gender-based hierarchy) to protect the reputation of men in general. Study 2 adds to this line of research by examining whether the complainant's

gender norm violations would have differential impacts on men and women in their judgment of an acquaintance rape.

THE PRESENT EXPERIMENT

The general purpose of this study was to examine whether men and women from Canada and Hong Kong, because of their varying levels of endorsement of rape myths and patriarchal sex-role beliefs, would make different culpability judgments of the parties involved in an acquaintance rape scenario. In addition, we explored whether alcohol consumption by the parties prior to the index offence and/or the complainant's sexual initiation would affect the complainant's perceived adherence to traditional gender norms and the guilt judgment of the accused.

Case Type

Read et al. (2006) recently found a higher conviction rate for delayed or historical allegations of child sexual abuse with jury trials as compared to judge-alone trials in Canada. In Study 1, although the difference in verdicts between the two triers of fact was only statistically significant in Canada, 95.2% of accused in Hong Kong and 88.9% of accused in Canada were initially convicted by a jury at trial. To minimize the possibility of the accused being judged guilty by the vast majority of mock jurors (which would reduce statistical power), every effort is made to increase the "air of reality" of the accused's claim of mistaken belief in consent in the simulated sexual assault scenario. Highlighting the "air of reality" of the scenario may also make the vignette more sensitive to cultural norm biases, as pre-existing attitudes are much more likely to influence processing and judgment if the situation is ambiguous (e.g., Ross, McFarland, Conway, & Zanna, 1983). In addition, it has been demonstrated that people who hold sexist attitudes are more likely to apply them when the situation is more ambiguous (i.e., in an acquaintance rape situation) than when it is unambiguous (i.e., in a stranger rape scenario; Abrams et al., 2003). Therefore, the case scenario presented in this study involved an accused who knew the complainant and employed no violence or force during the commission of the alleged crime. The complainant was also portrayed as affording little resistance (please see the Method section for further descriptive details of the case scenario).

Potential Confound

It is conceivable that measuring the constructs in question (i.e., rape myth acceptance, sexism, and attitudes towards rape victims) after participants have responded to the scenario may lead to a reverse causal chain from our hypotheses; that is, the nature of the scenario (where the woman could potentially have led the man on) may prime participants to endorse more rape myths or a higher level of sexism. Conversely, exposing mock jurors to statements on patriarchal beliefs and rape myths might encourage participants to reflect on and challenge these stereotypical and prejudicial beliefs and lead them to increase guilt ratings of the accused. In general, sexism appears to be a robust and stable individual difference (Masser & Abrams, 1999). For example, Domalewski (1998) has shown that no significant differences were found in a person's rape myth acceptance before and after watching a movie scene that either depicts a rape scene, a consensual sex scene or a non-sex scene. However, it is unclear whether reading and evaluating statements on these attitudes would affect or prime particular responses to the rape scenarios. Therefore, to measure these potential effects, half of the participants received the questionnaires before responding to the vignette, and half of the participants responded to the vignette before completing the questionnaires.

Hypotheses

Jurors' pre-existing attitudes and beliefs often colour their interpretation of the facts and the deliberation process (Hammond et al., in press). In the present study, we sought to build upon previous findings regarding acquaintance rape by investigating the influence of ambivalent sexism (hostile / benevolent) and rape myth acceptance in different cultures on participants' evaluations of evidence in different date rape scenarios.

Our four predictions were as follows: First, it was hypothesized that people from Hong Kong were more likely to endorse rape myths and ambivalent sexism than their Canadian counterparts, so it was expected that they would be more likely to acquit and hold the complainant accountable in the sexual assault incident, especially when the complainant had violated traditional gender norms through initiating sexual contact or being intoxicated. Second, it was expected that male participants would

endorse higher levels of ambivalent sexism and rape myths than female participants. Therefore, it was predicted that the males would perceive the complainant as more accountable than females. Third, to expand on the findings of Study 1 and to explore factors that may moderate the perceived credibility of the accused's assertion of mistaken belief, we sought to examine whether men and women from different cultures would differentially rate the degree to which they believed the accused's assertion that his mistaken belief was honest, and how reasonable was his belief in consent. Based on the robust gender effect in this line of research, it was expected that men would be more likely to perceive the accused's claim as credible and reasonable as compared to their female counterparts. It remained to be seen whether culture was related to the perceived credibility and reasonableness of the accused's claim of honest belief in consent. The extent to which the perceived credibility of the claim was dependent on the types of date rape scenarios would also be explored. Finally, it was expected that Hong Kong participants, and male participants in general, would be more likely to render a not-guilty verdict *because* of their higher endorsement of rape myths and patriarchal beliefs, as compared to Canadian participants, and female participants; that is, significant cultural and gender differences may not be found after the effects of ambivalent sexism and rape myths are accounted for.

METHOD

Participants

Participants were recruited through introductory psychology / criminology classes, word of mouth, and advertisements on social media. All participants from each country who submitted their email addresses were included in a lottery to win a CAN\$50 (~HK\$350) movie voucher for their participation. Seven hundred and eight participants participated in this study (461 from Canada and 247 from Hong Kong), which was conducted through Simon Fraser University's (SFU) Web Survey program (a Java-based application built by staff of the Academic Computing Services of SFU). To minimize the discrepancies in sample sizes between the two locations, and to create more homogenous cultural groups, participants from Canada who were born in

countries other than Canada and those who reported their identification with a culture other than that of Canada were removed from the study. Similarly, participants from Hong Kong who neither were born in Hong Kong nor identified with that cultural identity were excluded. Following these exclusion criteria, 467 participants (236 from Canada and 231 from Hong Kong) were included in the study.

Measures

Vignettes

All participants read one of four story vignettes describing a sexual assault. The vignettes are fictional, but they reflect the real situations depicted in both Canada and Hong Kong's legal judgments, and simulate the characteristics of typical sexual assault cases as described in Study 1. The scenario (as presented in Appendix A) describes the case of Ms. Smith / Li, a fictitious complainant who alleged that she was sexually assaulted by an acquaintance (Mr. William Edward Chase / Chung Wai-Hong, William). In all four forms of the vignette, the basic elements and structure were the same, and each vignette varied only in terms of whether alcohol was consumed by the targets prior to the incident and who initiated the sexual contact. Specifically, the vignette described that the complainant and accused consumed either coffee or wine on the night of the alleged incident, and either the complainant or the accused suggested that they should continue the evening at the complainant's home and initiated sexual intimacy through kissing. We did not systematically vary the target who was inebriated because the consumption of alcohol tends to be a shared activity within a social context (Abbey et al., 2001). In all four vignettes, the accused claimed that the sexual intercourse that followed was consensual, whereas the complainant always claimed that it was forced.

After reading the scenario, participants received a series of jury instructions. To increase ecological validity, the name of the charge (e.g., sexual assault or rape) and the instructions for the jury were tailored by using local legal terms and jury's directions (see Appendices B and C). The scripts of the jury instructions from each respective jurisdiction are available on the Canadian Judicial Council website (http://www.cjc-ccm.gc.ca/english/lawyers_en.asp?selMenu=lawyers_so_offence271_en.asp) and the Hong

Kong Judiciary website (http://legalref.judiciary.gov.hk/doc/sp_dir/pdf/eng/SDJT.pdf). Although the author concedes that the internal validity of this study was undermined by the use of different jury instructions for the different cultural samples, we erred on the side of augmenting the external validity to reflect local criminal codes and reality. The order of when the first verdict was rendered and the presentation of the jury instructions was also counterbalanced so that cultural differences (without the influence of jury instructions) may be examined.

Case Evaluations

Vignette Quality. Participants were first asked to rate (on a 7-point scale) the degrees to which they agreed or disagreed to three statements that assessed the quality of the vignette: “The case was easy to understand”; “The incident described could happen in your country”; and “The case was believable.”

Manipulation check. Participants were also asked to retrospectively indicate the degrees to which the complainant and the accused initiated the sexual interaction, and the degrees of intoxication of the complainant and the accused, on a scale of 0 (*not at all*) to 100 (*to a large degree*).

Violation of Gender Norms. Participants who endorse high benevolent sexism may blame complainants in acquaintance rape because they perceive them as violating traditional gender role expectations and behaving in a manner that is inappropriate for women (Glick & Fiske, 1996). These participants may therefore view the complainant as undeserving of their benevolent protection (Glick et al., 1997; Viki & Abrams, 2002). To assess this potential mediator, participants provided ratings for a 10-item (10-point) semantic differential scale assessing their perceptions of the appropriateness of the complainant’s behaviours. Example items include “Appropriate vs. Inappropriate” and “Proper vs. Improper.” A higher score indicates that the participant perceived the complainant’s behaviour as less appropriate.

Accused’s belief in consent. In all case scenarios, the accused described the event as consensual. To expand on the findings of Study 1, participants also rated the degree to which they believed the accused’s assertion that his mistaken belief was honest, and how reasonable they found his belief in consent, on a scale of 0 (*not at all*) to 100 (*to a large degree*) .

Accountability. Participants then rated the degrees to which the accused and the complainant were responsible for the sexual interaction in the scenario, on a scale of 0 (*not at all*) to 100 (*to a large degree*).

Verdict. All participants were asked to provide two guilt judgments. The first judgment of guilt occurred immediately after the presentation of the case scenario. For this judgement, participants were asked either to render a verdict first before reading the jury instructions, or to read the jury instructions before rendering a verdict. This manipulation was adopted to examine whether the order of jury instructions from the two jurisdictions affected the verdict differently, and to compare these possible effects with the participants' demographic characteristics and the study's other experimental manipulations.

The participants were then asked to complete the aforementioned ratings before a second judgment of guilt was conducted. This second judgment was created so that all participants would have an opportunity to render a verdict after reviewing the juror's instructions. It is also conceivable that participants may change verdicts between their first and second judgements, having considered the parameters provided in the evaluation and deliberating on their responses. Therefore, by comparing the participants' two verdicts, we may be able to compare participants' gut-level response and their deliberated response; it may be the case that the former would be more affected by cultural assumptions.

For both judgments of guilt, participants provided a verdict of *guilty* or *not guilty*. If a guilty verdict was rendered, participants were asked to propose a sentence. If participants changed their verdict, they were provided with an opportunity to discuss their reasons for this change.

Attitudinal Questionnaires

For both questionnaires described below, participants were asked to indicate the degree to which they agreed or disagreed with each statement on a 7-point Likert scale, from 1 (*strongly disagree*) to 7 (*strongly agree*; with the option of 4 [*neutral*]). This provided a consistent scale for all of the questionnaire results, with higher values indicating stronger endorsement of the statements.

Ambivalent Sexism Inventory (ASI)

The *Ambivalent Sexism Inventory* (ASI; Glick & Fiske, 1996; see Appendix D) was used to measure two co-occurring patriarchal attitudes: Hostile Sexism (11 items) and Benevolent Sexism (11 items). Benevolent sexism denotes subjective affectionate attitudes toward women in traditional roles (e.g., “Women should be cherished and protected by men.”), whereas hostile sexism denotes antagonistic attitudes toward women perceived as violating traditional gender norms (e.g., “Women exaggerate problems at work.” and “Women seek to gain power by getting control over men.”). Although this instrument has not previously been employed in Hong Kong, it has recently been adopted in two studies conducted in mainland China that explored the relationships between ambivalent sexism and relationship ideals (Chen et al., 2009; Lee et al., 2010). More importantly, Glick et al. (2000) found that the constructs examined with this instrument are psychometrically sound across 19 nations (including Asian countries), demonstrating its cross-cultural applicability.

Illinois Rape Myth Acceptance Scale (IRMAS)

Many scales that measure rape myth acceptance have been created in recent years (for a review, see Lonsway & Fitzgerald, 1994). However, a few of the rape myth acceptance instruments (e.g., Burt’s [1980] Rape Myth Acceptance Scale) have been perceived as antiquated (Payne et al., 1999) and ambiguous/awkward in its language and meaning (Ward, 1988). Moreover, the use of various colloquial phrases in the rape myth items of the recently developed *Acceptance of Modern Myths about Sexual Aggression* (Gerger, Kley, Bohner, & Siebler, 2007) may restrict the cross-cultural applicability of this instrument. Therefore, Payne et al.’s (1999) *Illinois Rape Myth Acceptance Scale* (IRMAS; short-form) was adopted for this study because of its brevity and its well-established psychometric properties (including more robust operational definitions). The reliability and validity of this instrument were also established in a study in Hong Kong (Law, 2004), demonstrating its suitability to be used in this culture.

Payne et al.’s (1999) scale was developed from an analysis of an item pool containing 95 statements reflecting attitudes and generally false beliefs about rape that are widely and persistently held. The items are composed of seven aspects of the

rape myth construct identified by Payne (1993): victim precipitation, definition of rape, male intention, victim desire-enjoyment, false charges, trivialization of the crime, and deviance of the act. The final 20 items (see Appendix E) were chosen by Payne et al. on the basis of three criteria: clarity of wording and reference to sexual assault; least overlap of content with items in other domains; and psychometric considerations, such as mean level of endorsement and item variance. All items are positively worded, so that higher scores indicate greater acceptance of rape myths.

Procedure

All of the materials adopted in this study were presented in English⁶. After attaining informed consent of participants through the online survey engine, they completed the case evaluation and the questionnaires in counterbalanced order. Thus, half of the participants first read and evaluated the vignette and then completed the ASI and the IRMAS, and the remaining participants first completed the questionnaires, and then read and evaluated the vignette. This manipulation was adopted to examine whether reviewing the attitudinal items on sexism, rape myths, and rape victims would affect participant's guilt judgment, and whether exposing participants to different types of acquaintance rape cases would influence their responses on the attitudinal questionnaires.

When reviewing the vignette, participants were asked to imagine themselves as jurors in a trial as they read a fictitious account of a date rape (please see the Appendix A). After the facts of the case were presented in the vignette, participants were instructed to evaluate the scenario and to assign a verdict twice. The first verdict and the jury instruction were presented in counterbalanced order: half of the participants rendered their first verdict before reading the jury instructions, and the remaining participants rendered their first verdict after reviewing the jury instructions. After further reviewing the case in the parameters described under the *Case Evaluations* section (e.g., accountability), all participants were then provided a second

⁶ Of note, many of the participants in Hong Kong were recruited via the University of Hong Kong, which is an international, English-speaking university. As such, participants' English proficiency was expected to be at a high level. In addition, the High Court trials in Hong Kong are conducted in English, and non-English speaking members of the community are not eligible for jury service. Therefore, the adoption of English-only presentation in this study reflected the local exclusion criteria of the jury system.

opportunity to render a verdict, and were allowed to change verdicts. Finally, all participants completed a demographic questionnaire. The procedure of the study is pictorially illustrated in Appendix F.

In total, 32 different versions of the online questionnaires were created to represent the varying jurisdiction-specific information (e.g., different jury instructions), the different case scenarios, and the different presentation orders. Based on the participants' locations (Canada vs. Hong Kong) and their dates of birth, participants were asked to access the online study using one of the 32 URLs (see Appendix G). For example, if the participant's birthday was on the 1st or the 17th (regardless of the month), then s/he would pick the first URL; if they were born on the 2nd or the 18th, then the second URL would be selected.

Design

A between-subjects design was adopted in the present study, with Culture (Canada vs. Hong Kong) and the four vignette types (2 [Alcohol: *whether or not alcohol was involved in the case scenario*] X 2 [Initiation: *complainant vs. accused*]) as the main independent variables. In addition, the presentation order of the case evaluation and the structured questionnaires (e.g., ASI) were counterbalanced. Finally, participants rendered their first verdicts either before or after reviewing the jury direction. Therefore, this study adopted a 2 (Culture) X 2 (Alcohol) X 2 (Initiation) X 2 (Jury Instruction: the jury instructions were presented either *before vs. after* the first verdict) X 2 (Position of Questionnaires: Attitudes questionnaires were presented either *before vs. after* the case evaluation) between-subjects design. Participants' gender and age were also considered as between-subjects variables.

There are three main dependent variables: perceived violation of gender norms by the complainant, perceived accountability judgments of the accused and the complainant, and the verdict. Mediators considered for the verdict include: the level of benevolent / hostile sexism (as measured by the ASI; Glick & Fiske, 1996) and the level of rape myth acceptance (as measured by the IRMAS; Lonsway & Fitzgerald, 1994). Finally, to connect this study to the findings of Study 1, we examined whether the perceived credibility and reasonableness of the mistaken belief defence was affected by the participant's culture and gender and/or by the situations portrayed in

the vignette (i.e., whether alcohol was involved and whether the complainant initiated the sexual encounter).

Analytic Approach

Data analysis was conducted using SPSS 18.0. The significance level for all statistical tests was $p < .05$.

Attitudinal measures

Before examining the effects of demographic variables (i.e., culture, gender, and age) on ambivalent sexism, rape myth endorsements, and attitudes towards rape victims, principal component analyses (PCAs) were conducted to ascertain that the measures (i.e., ASI and IRMAS) operated in comparable ways amongst the two cultures. Items that loaded poorly on their dominant components would be eliminated. Cronbach's alphas (α) were then calculated to estimate the internal consistencies of the abridged measures for our sample. Cronbach's alpha coefficient is the proportion of a scale's total variance that is attributable to a latent variable underlying the items; coefficients above .70 and less than .90 are recommended (Nunnally & Bernstein, 1994). After establishing that the measures were internally reliable, a multivariate analysis of variance (MANOVA) was conducted to examine whether the participants' demographic characteristics were significantly related to the ratings on the IRMAS and the hostile and benevolent sexism scales of the ASI. In addition, the MANOVA also explored whether the presentation of the case scenario (involving an acquaintance rape) affected or primed the ratings on these measures. A MANOVA was conducted because these attitudinal constructs were highly correlated, rendering findings from separate ANOVAs redundant and difficult to interpret. Furthermore, the family-wise error rate would become higher if separate ANOVAs were conducted for each of these constructs.

Case Evaluations

(Mixed) analyses of variance (ANOVAs) were used to determine whether different demographic variables and experimental manipulations (i.e., different vignette types and different presentation orders of the case evaluation and the attitudinal questionnaires) affected the perceived violation of traditional gender norms by the complainant, the perceived credibility and reasonableness of the accused's

claim of mistaken belief in consent, and the perceived accountability of the complainant and the accused.

Verdict

As mentioned, participants were asked to render the verdict twice: once to determine the effect of jury instructions and once at the end of the case evaluations. Therefore, I first considered the main effect of jury instruction (from each jurisdiction) on participants' verdict and explored how participants' demographic characteristics and the different vignette types may moderate the effect of jury instruction in a binomial logistic regression. Then, both demographic and experimental variables (vignette type and presentation order) were entered into a logistic regression model (with backward-stepwise procedures for the product terms) to examine the extent to which they influenced the verdict. The stepwise nature of the model allowed us to first examine the demographic variables that were commonly found to affect verdict, and then proceed to identify the covariates (ambivalent sexism, rape myth endorsement, and attitudes towards rape victims) that might mediate the effects of demographic variables. As described in the Statistical Analysis section in Study 1, a backward-stepwise procedure was adopted in the analyses of the product terms to minimize the problem of multicollinearity. Furthermore, backward eliminations were not adopted for the analyses of the main effects because the model would be made unstable when interaction effects were considered in a model without their associated main effects (C. Schwarz, personal communication, June 8, 2011).

The outcome variables were binary variables (with 0 indicating *not guilty* and 1 indicating *guilty*). All demographic and experimental variables were treated dichotomously. The six independent variables included in Step 1 were the following: *culture* (Canada vs. Hong Kong), *gender*, *age*, *initiation* (complainant vs. accused), *alcohol* (whether alcohol was involved in the case scenario or not), and *position of questionnaires* (the case scenario was presented either before or after the questionnaires). Then, Step 2 included the double- and triple-order interactions involving all independent variables. Finally, the ratings of the hostile and benevolent sexism (ASI) and rape myth endorsement (IRMAS) were included in Step 3.

RESULTS AND DISCUSSION

Demographic Variables

In general, there were significantly more females who participated in this study in Hong Kong than in Canada, $\chi^2(1, N = 467) = 5.18, p < .05$; 66% of participants in Hong Kong, as compared to 56% of participants in Canada, were females. In terms of age, participants from Hong Kong (mean age = 29.22; $SD = 13.25$) were significantly older than participants from Canada (mean age = 22.33; $SD = 5.42$), $t(465) = 7.38, p < .01$. This discrepancy was likely influenced by the higher number of participants recruited from introductory classes in Canada. In addition, students from a variety of disciplines (including those from law school or graduate school) represented the majority of the Canadian participants (86.9%), whereas only 56.3% of Hong Kong participants were students at the time of data collection. Gender and age were controlled for in the main analyses. To examine the effect of age on outcome variables, a median-split procedure was used to divide participants into two groups: ≤ 20 years old (130 in Canada and 86 in Hong Kong) and > 20 years old (106 in Canada and 145 in Hong Kong).

Attitudinal Measures

Across participants, the number of missing items on both ASI and IRMAS ranged from 0 to 2. Seventeen participants (3.6%) missed one item, and one participant (0.4%) missed two items on the ASI and the IRMAS. No participants were excluded due to missing items. For inferential statistics, the average item score with a range of 1 to 7 was used to represent the endorsement of different constructs represented in the three scales.

ASI

Items from the ASI are presented in Appendix D. In developing the ASI, Glick and Fiske (1996, 1999) found that whereas hostile sexism is a single factor, benevolent sexism includes three factors: protective paternalism (chivalry toward women), complementary gender differentiation (stereotypic roles of women), and heterosexual intimacy (believing men and women are incomplete without each other). To ensure these factors operated comparably in our samples from different cultures, principal component analyses (PCAs) were conducted for each cultural sample. At

the end, three items were removed from the benevolent sexism scale (items 1, 3, and 12), and another three items were removed from the hostile sexism scale (items 2, 4, and 18), because they loaded poorly on its dominant components (i.e., coefficient < .50) for the Hong Kong sample. The Cronbach's alphas for the abridged hostile sexism scale were .90 (for Canada) and .73 (for Hong Kong). To increase the internal consistency of the benevolent sexism scale in the Hong Kong sample, items 6 and 13 were also removed from the scale. The Cronbach's alphas for the abridged benevolent sexism scale were .77 (for Canada) and .60 (for Hong Kong).

The relatively poorer internal consistency of the measure for benevolent sexism was understandable considering that it was found to be a multi-factorial construct (Glick & Fiske, 1996, 1999). However, the coefficient alpha yielded for Hong Kong was lower than the conventionally acceptable standard (i.e., > .70; Nunnally & Bernstein, 1994). Similarly, Moradi, Yoder, and Berendsen (2004) also found that the benevolent sexism scale had low internal consistency in African-American populations. Helms (1996) stressed that observed psychometric properties of psychological instruments can be substantially influenced by sample composition (due to issues related to comprehension and interpretation of items). As demonstrated by the lower alpha generated from the Hong Kong sample, the meaning of benevolent sexism may be different for that population, and the lower internal consistency of this scale may result in unstable or under-predictions of links between benevolent sexism and other variables.

IRMAS

Items from the short form of the IRMAS are presented in Appendix E. According to Payne et al. (1999), the short form is different from the full 45-item version of the scale in that it was created to measure only general rape myth acceptance and none of the specific rape myth components. To ensure that the scale operated similarly for the two cultural groups, PCAs were conducted for each cultural sample. Items 5, 9, and 15 were not included in the analysis because they were intended to be "filler" items (Payne et al., 1999). At the end, four items (3, 10, 13, and 20) were removed from the scale because they loaded inadequately on its dominant

components for one of the cultural samples. The Cronbach's alphas for the abridged IRMAS-SF were .88 (for Canada) and .81 (for Hong Kong).

Correlation between measures

All of the scales were significantly correlated with each other, with correlation coefficients ranging from 0.41 (between benevolent sexism and hostile sexism) to 0.58 (between rape myth endorsement and hostile sexism), all $ps < .01$. This finding replicated past research; for example, sampling from 72 studies, Anderson, Cooper, and Okamura's meta-analysis (1997) revealed that the maintenance of traditional gender-role beliefs is highly associated with rape myth acceptance for both men and women (see also Glick & Fiske, 1996, 1997).

Moderating factors

A 2 (Culture) X 2 (Gender) X 2 (Age) X 2 (Alcohol) X 2 (Initiation) X 2 (Position of Questionnaires: Attitudes questionnaires were presented either *before* vs. *after* the case evaluation) MANOVA was conducted to examine the effect of these variables on the ratings of hostile sexism, benevolent sexism, and rape myth endorsement. Two global main effects emerged: Culture, $F(4, 448) = 52.740, p < .01, \eta_p^2 = .35$, and Gender, $F(4, 448) = 13.65, p < .01, \eta_p^2 = .12$. As suggested by previous findings (Domalewski, 1998; Masser & Abrams, 1999), individual differences based on these constructs appeared to be stable and robust. Therefore, no significant priming effect was found, and reviewing different case scenarios did not significantly affect scores on these attitudinal measures. The univariate analyses were used to interpret these global effects.

Culture was significantly and strongly related to all attitudinal ratings, with all $ps < .01$ (η_p^2 ranged from .08 [Hostile Sexism] to .31 [IRMAS]). As illustrated in Table 3, participants from Canada endorsed these attitudinal measures to a significantly lesser degree than participants from Hong Kong. This pattern of results replicates previous findings (Kennedy & Gonzalka, 2002; T. L. Lee et al., 2010; Mori et al., 1995) and suggests that Canadians are less likely to hold both kinds of sexism and to endorse rape myths than individuals from Hong Kong.

Table 3. Mean ratings of attitudinal questionnaires and F-values as a function of participants' culture (Standard Deviation)

	Canada	Hong Kong	<i>F</i>
ASI (Hostile sexism)	3.60 (1.14)	4.12 (0.80)**	32.79
ASI (Benevolent sexism)	3.42 (1.01)	4.21 (0.74)**	68.91
IRMAS (Rape Myth Endorsement)	2.21 (0.89)	3.47(0.90)**	184.33

** $p < .01$

Significant associations were also found between Gender and all attitudinal ratings, with all $ps < .01$ (η_p^2 ranged from .04 [Benevolent Sexism] to .08 [IRMAS]). As illustrated in Table 4, female participants endorsed these beliefs and attitudes to a significantly lesser degree than male participants. As supported by previous findings, women tend to hold lower levels of both hostile and benevolent sexism (e.g., Giacopassi & Dull, 1986; Glick & Fiske, 1996, 1997, 2001; Glick et al., 2000) and endorse a lower number of rape myths (Iconis, 2008; Newcombe et al., 2008) than men.

Table 4. Ratings of attitudinal questionnaires as a function of participants' gender (Standard Deviation)

	Female	Male	<i>F</i>
ASI (Hostile sexism)	3.68 (1.06)	4.14 (0.90)**	33.83
ASI (Benevolent sexism)	3.74 (1.01)	3.92 (0.89)**	17.48
IRMAS (Rape Myth Endorsement)	2.69 (1.08)	3.04 (1.07)**	35.56

** $p < .01$

Case Evaluations

Vignette Quality

On a Likert-scale ranging from 1 (*strongly disagree*) to 7 (*strongly agree*), participants found the vignettes generally easy to understand (Canada: $M = 5.38$; $SD = 1.53$; Hong Kong: $M = 5.21$; $SD = 1.36$), and no significant cultural differences were found, $t(465) = -1.29$, $p > .05$. Furthermore, they generally agreed that the scenario portrayed in the vignette was believable (Canada: $M = 6.44$; $SD = 0.85$; Hong Kong: $M = 5.88$; $SD = 1.13$) and that it could happen in their own country

(Canada: $M = 6.61$; $SD = 0.84$; Hong Kong: $M = 6.09$; $SD = 0.96$). As compared to participants in Hong Kong, Canadian participants rated the scenario captured in the vignette to be more likely to happen in their country, $t(465) = -6.30$, $p < .01$, and more believable, $t(465) = -6.03$, $p < .01$; however, these ratings did not moderate the effects of culture on the dependent variables.

Manipulation Checks

Initiation. Participants were asked to rate the degree to which they perceived the complainant and the accused as having initiated the sexual interaction to verify whether the different versions of the vignette were successful in differentiating the level of initiation between the complainant and the accused. When participants' ratings were compared, those who read the complainant-initiated scenario ($M = 56.27$; $SD = 25.06$) considered the complainant to have initiated significantly more than those who read an accused-initiated scenario ($M = 47.45$; $SD = 24.14$), $t(460) = 3.85$, $p < .01$. Similarly, when participants were asked to rate the degree to which the accused initiated the sexual interaction, those who read the accused-initiated scenario ($M = 69.41$; $SD = 17.56$) considered the accused to have initiated significantly more than those who read the complainant-initiated scenario ($M = 61.52$; $SD = 22.44$), $t(460) = -4.19$, $p < .01$.

Intoxication. Participants who read the scenario involving alcohol rated both the complainant (alcohol: $M = 62.35$; $SD = 20.97$; no alcohol: $M = 34.72$; $SD = 26.34$) and the accused (alcohol: $M = 55.24$; $SD = 21.15$; no alcohol: $M = 39.08$; $SD = 29.10$) as more inebriated than those who read the alcohol-free version of the vignette, with both $ps < .01$.

All in all, it appears that the vignettes were successful in illustrating the intended scenarios.

Perceived Violation of Gender Norms by the Complainant

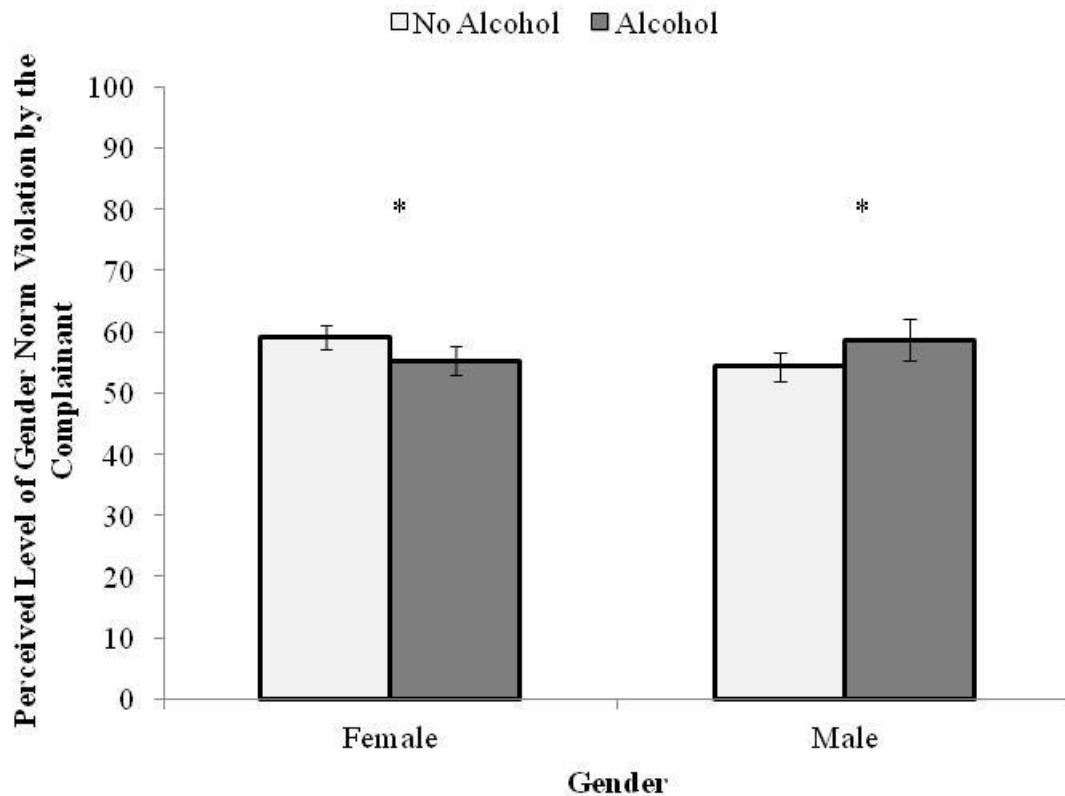
The Cronbach's α of the 10-item semantic differential scale is .89, which indicates a high level of internal consistency for the scale with this sample. A 2 (Culture: *Canada* vs. *Hong Kong*) X 2 (Gender) X 2 (Age: ≤ 20 years old vs. > 20 years old) X 2 (Initiation: *complainant-* vs. *accused-*initiated sexual encounter in the case scenario) X 2 (Alcohol: whether or not alcohol was involved in the case

scenario) X 2 (Position of Questionnaires: Attitudes questionnaires were presented either *before* vs. *after* the case evaluation) ANOVA was conducted to examine whether the different vignette types, the different presentation orders, and the participants' demographic characteristics affected the perceived violation of gender norms by the complainant.

There was a significant Culture effect, $F(1, 403) = 28.40, p < .01, \eta_p^2 = .07$; Hong Kong participants ($M = 60.66; SD = 13.50$) were significantly more likely to consider the complainant's behaviours as having violated normative gender expectations in any of the four case scenarios than Canadian participants ($M = 53.16; SD = 12.61$). In the story (regardless of whether the complainant was inebriated or the one who initiated), she always claimed that she became fatigued and retreated to her bedroom while the accused was still in her apartment. It is conceivable that participants in Hong Kong may have perceived such behaviour to be more sexually provocative than their Canadian counterparts, and her behaviours may more likely be regarded as having crossed the more conservative cultural line for gender appropriate behaviours in Hong Kong than in Canada.

Furthermore, there was a significant interaction between Gender and Alcohol, $F(1, 403) = 4.47, p < .05, \eta_p^2 = .01$. As illustrated in Figure 11, analyses of simple-main effects revealed that, women were less likely to consider the complainant's behaviour as violating gender norms when alcohol was involved in the case scenario than when the scenario was alcohol-free, $t(281) = -2.41, p < .05$, whereas men were more likely to consider the complainant as behaving gender inappropriately when alcohol was involved in the case scenario than when the scenario did not involve alcohol, $t(182) = 2.16, p < .05$. Although the absolute differences in ratings between genders were small, contrary to our expectations that an intoxicated complainant would be more likely to be perceived as having violated gender norms, it appears that females may have a tendency to perceive the complainant's behaviour in a slightly *less* lenient light when alcohol was *not* involved than when it was involved.

Figure 11. Level of perceived gender norm violation by the complainant as a function of participants' gender and whether the case scenario involved alcohol



* $p < .05$; error bars = 95% confidence intervals (C.I.) around the means (i.e., $M \pm 1.96 \times$ standard error of the mean)

Schuller and colleagues (Klippenstine et al., 2007; Schuller & Wall, 1998, 2000) found that, in general, women were more supportive of the complainant who reported a sexual offence than men, and intoxicated complainants were perceived more negatively than sober complainants. However, the researchers also found that the relationship between gender and judgments of a sexual assault case was moderated by the level of intoxication of the complainant and the accused. In particular, when the complainant was sober and the accused was inebriated, female participants were less sympathetic towards the complainant and more pro-accused. The researchers speculated that women may consider the sober complainant to have endangered herself by being around an intoxicated man, which made her more blameworthy. In the current study, alcohol consumption by the parties was not systematically manipulated so that only one party imbibed alcohol before the incident; however, our finding seems to support the earlier findings that females may

consider the complainant's behaviours as less gender appropriate and place more blame on the complainant when she put herself at risk while she was sober (i.e., more in control), as compared to when she was inebriated.

Accused's Belief in Consent

In all vignettes, the accused testified that he honestly believed that the complainant had consented during the incident. A 2 (Culture) X 2 (Gender) X 2 (Age) X 2 (Initiation) X 2 (Alcohol) X 2 (Position of Questionnaires) MANOVA was conducted to examine whether the different vignette types and the participants' demographic characteristics affected the perceived credibility of the accused's assertion of mistaken belief and the perceived reasonableness of his belief (of note, MANOVA was conducted for these two ratings because they were highly correlated, $r = .75, p < .01$). Three global main effects were found: Culture, $F(2, 393) = 4.85, p < .01, \eta_p^2 = .02$; Gender, $F(2, 393) = 4.08, p < .05, \eta_p^2 = .02$; and Position of Questionnaires, $F(2, 393) = 4.88, p < .01, \eta_p^2 = .02$. In addition, there was a numerical difference that favoured an interaction effect between Gender and Alcohol, $F(2, 393) = 2.46, p < .10, \eta_p^2 = .01$. The univariate analyses were then reviewed to interpret these global effects.

Culture. Interestingly, although participants in Canada ($M = 58.40; SD = 21.96$) and Hong Kong ($M = 57.47; SD = 24.88$) considered the *credibility* of the accused's claim at a similar level, $F(1, 394) = 0.01, p > .05$, Canadian participants ($M = 51.11; SD = 27.08$) considered the accused's claim of mistaken belief as significantly less reasonable than participants in Hong Kong ($M = 58.95; SD = 23.22$), $F(1, 394) = 4.18, p < .05, \eta_p^2 = .01$. As suggested above, participants in Hong Kong were more likely to consider the complainant's behaviour as having violated normative gender expectations than Canadian participants. As such, participants in Hong Kong may have perceived the complainant's behaviours as more sexually provocative and considered the accused's claim of mistaken belief more reasonable and understandable than their Canadian counterparts.

In general, once the *actus reus* has been established (i.e., that there was no consent from the complainant during the sexual encounter), there needs to be proof of *subjective mens rea* on the part of the accused to meet minimum constitutional

standards (*Martin's Annual Criminal Code*, 2010). Although the perceived credibility of the claim is evaluated from the accused's *subjective* perspective (i.e., what the accused might have honestly believed at the time, *given the circumstances known to him at the time*), a consideration of the reasonableness of his claim would have held the belief against an *objective* standard (i.e., what a reasonable person in the accused's situation would have or ought to have believed or known; M. Tammen, personal communication, May 16, 2011). Both jurisdictions have previously proposed that the accused's mistaken belief in consent does not have to be reasonable, so long as it is honestly held (*HKSAR v. Soong Roong Sheng*, 2001; *R. v. Pappajohn* [CAN], 1980; see also *DPP v. Morgan* [AUS], 1976, which was often cited in Canadian and Hong Kong case laws). As may also be seen in the jury instructions for both jurisdictions (Appendices B and C), (mock) jurors were asked to consider whether there were reasonable grounds for the accused to hold the belief in consent (from his perspective). However, in the Canadian's jury instruction, it was explicitly described that the belief "[did] not have to be reasonable to ... the juror." Therefore, the jury instruction may have prompted Canadian participants to consider the accused's claim as more unreasonable (from their perspective) than the Hong Kong participants, even though they considered the accused's belief as equally credible as their Asian counterparts. After all, participants may be able to give the accused the benefit of a reasonable doubt with regards to his belief in consent (given the complainant's conduct may be perceived as equivocal); however, they may not agree that his belief was "reasonable" according to the normative standard.

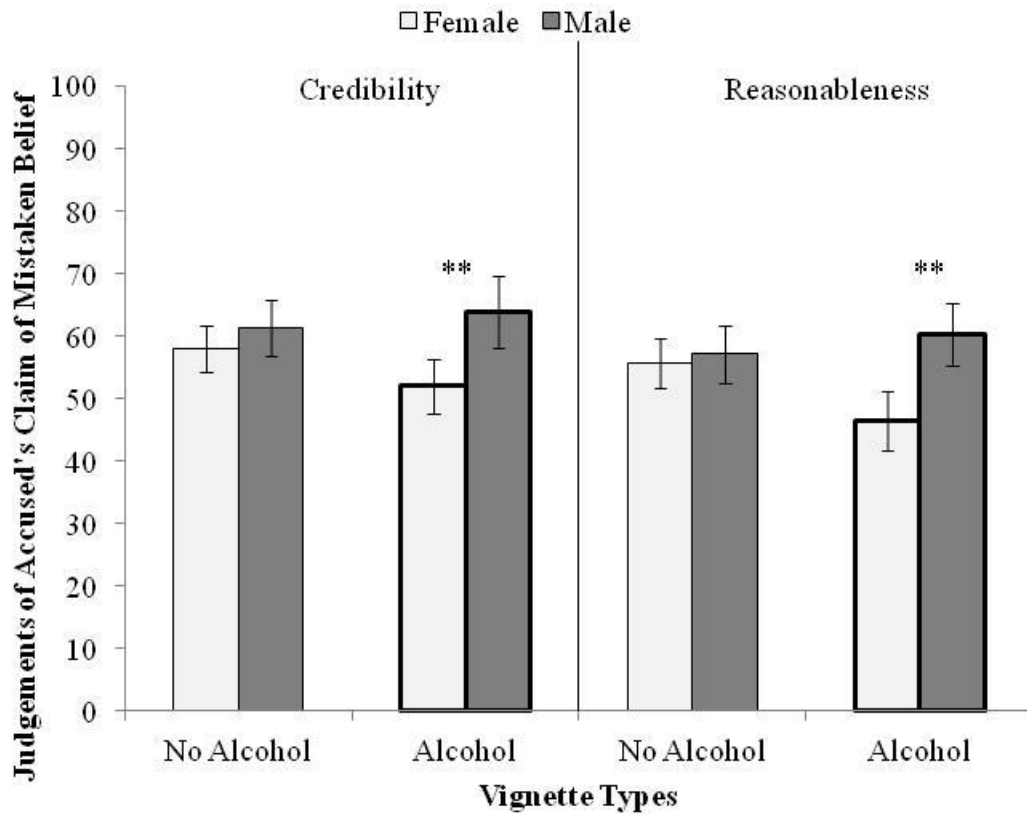
Gender (X Alcohol). As presented in Table 5, male participants rated the accused's claim of belief in consent as significantly more credible, $F(1, 394) = 7.57, p < .01, \eta_p^2 = .02$, and more reasonable, $F(1, 426) = 6.56, p < .01, \eta_p^2 = .02$, than did female participants.

Table 5. Level of perceived credibility and reasonableness of the accused’s claim of mistaken belief in consent as a function of participants’ gender (Standard Deviation)

	Female	Male
Accused's belief		
<i>Credible</i>	54.94 (24.47)	62.58 (20.92)**
<i>Reasonable</i>	52.64 (26.57)	58.71 (23.36)**
** $p < .01$		

However, alcohol-involvement significantly moderated the effect of Gender when the reasonableness of the accused’s claim of mistaken belief was considered, $F(1, 394) = 4.89, p < .05, \eta_p^2 = .01$, and marginally moderated the effect of Gender when the credibility of the accused’s claim of mistaken belief was considered, $F(1, 394) = 3.15, p < .10, \eta_p^2 = .01$. As illustrated in Figure 12, analyses of simple-main effects revealed that although no significant Gender effect was found when alcohol was not involved in the scenario (with both $ps > .05$), females considered the accused’s claim significantly less credible, $t(225) = 3.64, p < .01$, and less reasonable, $t(225) = 2.96, p < .01$, than males when alcohol was involved. As indicated earlier, female participants were more sympathetic towards an inebriated complainant than a sober complainant, whereas the opposite was found for male participants. It is conceivable that, as compared to men, women were especially less likely to accept the claim of mistaken belief in consent than males when alcohol was involved because they may be more likely to perceive the accused as “taking advantage” of the drunken situation.

Figure 12. Level of perceived credibility and reasonableness of the accused's claim of mistaken belief as a function of participants' gender and whether alcohol was present in the case scenario



* $p < .01$; error bars = 95% C.I.

Position of Questionnaires. Finally, participants who responded to the attitudinal questionnaires prior to evaluating the case ($M = 50.85$; $SD = 26.03$) perceived the claim as significantly less reasonable than participants who completed the questionnaires after evaluating the case ($M = 58.73$; $SD = 24.50$), $F(1, 394) = 8.71$, $p < .01$, $\eta_p^2 = .02$. No significant effect of Position of Questionnaires was found when the credibility of the claim was considered, $F(1, 394) = 2.22$, $p > .05$. Therefore, although cultural and gender expectations affect the perceived reasonableness of the claim, the results reveal that individuals may deliberate upon judicial decisions through concurring cognitive and social mechanisms; when participants were asked to evaluate statements related to patriarchal beliefs and rape myths prior to evaluating a sexual assault case, they may be encouraged to question these stereotypical and prejudicial beliefs and to recalibrate their standard for what

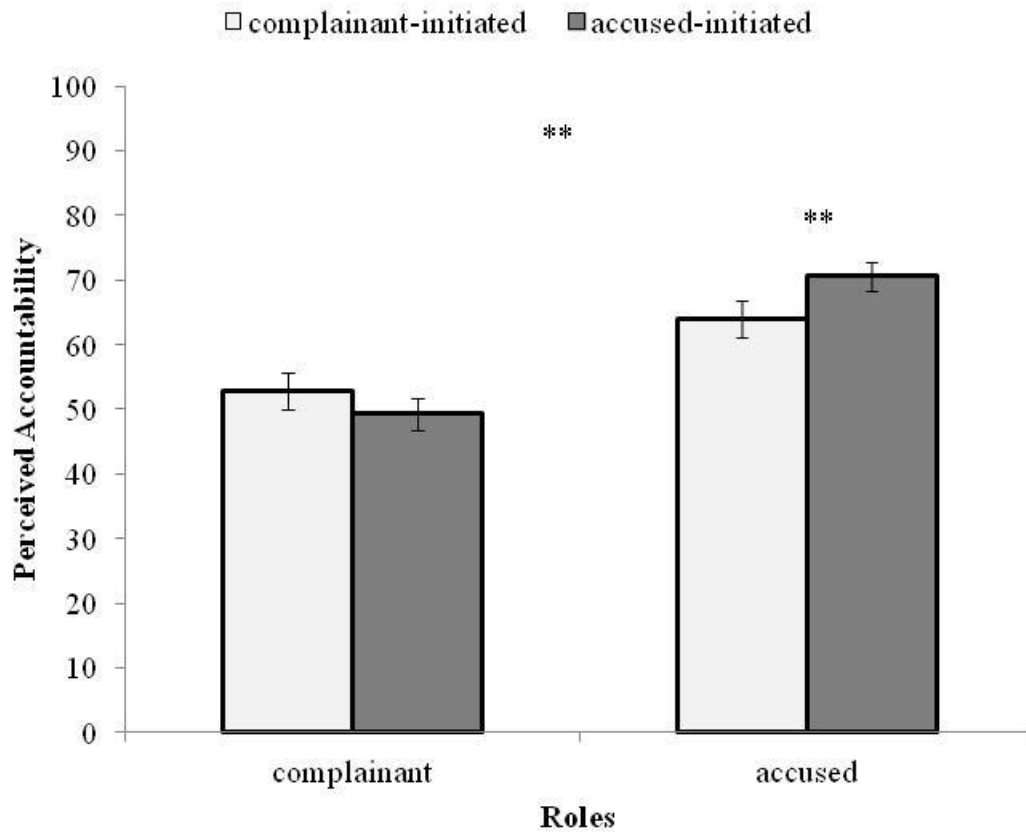
beliefs would be considered as reasonable to be held by the accused at the time of the offence.

Levels of Perceived Accountability of the Complainant and the Accused

Participants provided separate ratings of perceived accountability of the complainant and of the accused for the sexual interaction. A 2 (Culture) X 2 (Gender) X 2 (Age) X 2 (Initiation) X 2 (Alcohol) X 2 (Position of Questionnaires) mixed factorial analysis of variance (ANOVA) was conducted to compare these two accountability ratings based on different experimental manipulations and the participants' demographic characteristics (i.e., the accountability ratings were treated as the within-subjects variable). This analysis yielded three significant within-subjects effects (Accountability, Accountability X Initiation, and Accountability X Culture) and three between-subjects effects (Culture, Culture X Gender, and Initiation X Position of Questionnaires).

In terms of Accountability, as illustrated in Figure 13, participants generally rated the accused ($M = 67.11$; $SD = 20.15$) as more accountable than the complainant ($M = 51.11$; $SD = 23.97$), $F(1, 397) = 83.59$, $p < .01$, $\eta_p^2 = .17$. As intended by the manipulation, and in line with the results pertaining to the manipulation check, there was a significant interaction between Accountability and Initiation, $F(1, 397) = 11.09$, $p < .01$, $\eta_p^2 = .03$ (see Figure 13); tests of simple effects revealed that participants who read the accused-initiated scenario held the accused more accountable, $t(460) = -3.48$, $p < .01$, whereas participants who read the complainant-initiated scenario considered the complainant numerically (but not significantly) more accountable, $t(459) = 1.62$, $p > .05$.

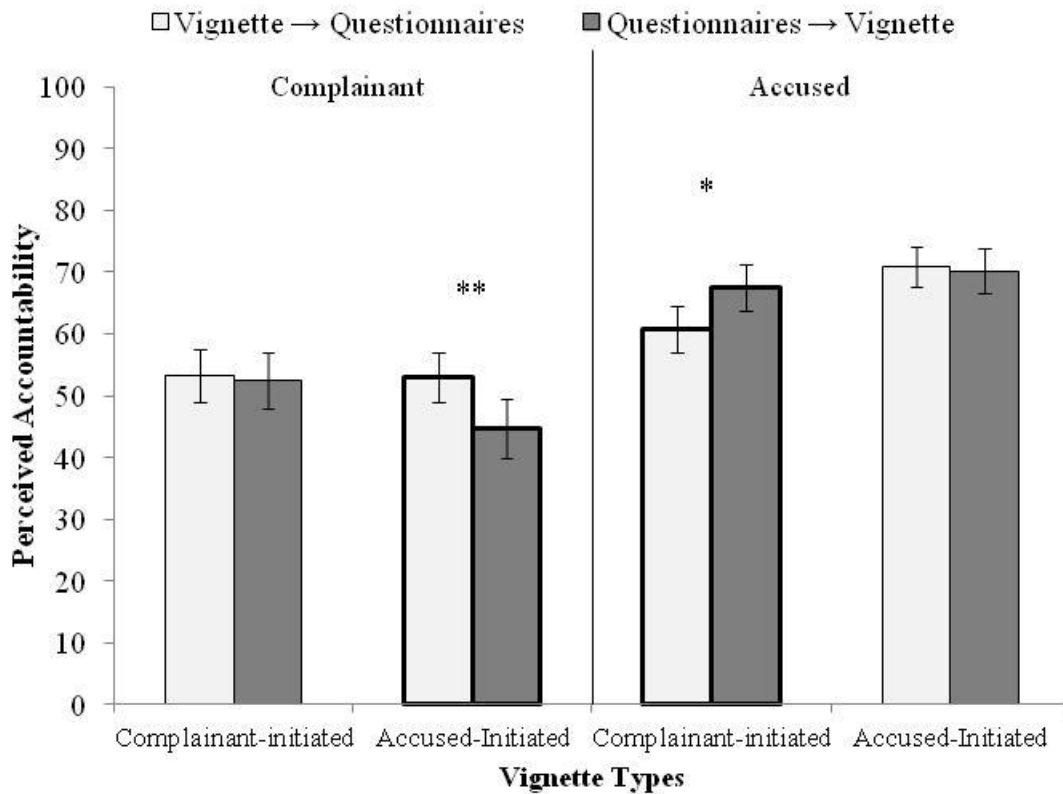
Figure 13. Level of perceived accountability of the complainant and the accused as a function of vignette types [role]



** $p < .01$; error bars = 95% C.I.

In addition, a significant between-subjects interaction effect was found between Initiation and Position of Questionnaires, $F(1, 397) = 4.48, p < .05, \eta_p^2 = .01$. As illustrated in Figure 14, tests of simple effects revealed that, as compared to participants who evaluated the vignette before responding to the attitudinal questionnaires, participants who first contemplated the items on the questionnaires held the complainant less accountable when the *accused* initiated the sexual encounter, $t(220) = 2.65, p < .01$, and held the accused more accountable even when the *complainant* initiated the sexual encounter, $t(238) = -2.45, p < .05$. No significant effect of Position of Questionnaires were found when participants were asked to rate the level of accountability for the individual who initiated the event.

Figure 14. Level of perceived accountability of the complainant and the accused as a function of position of questionnaires and vignette types



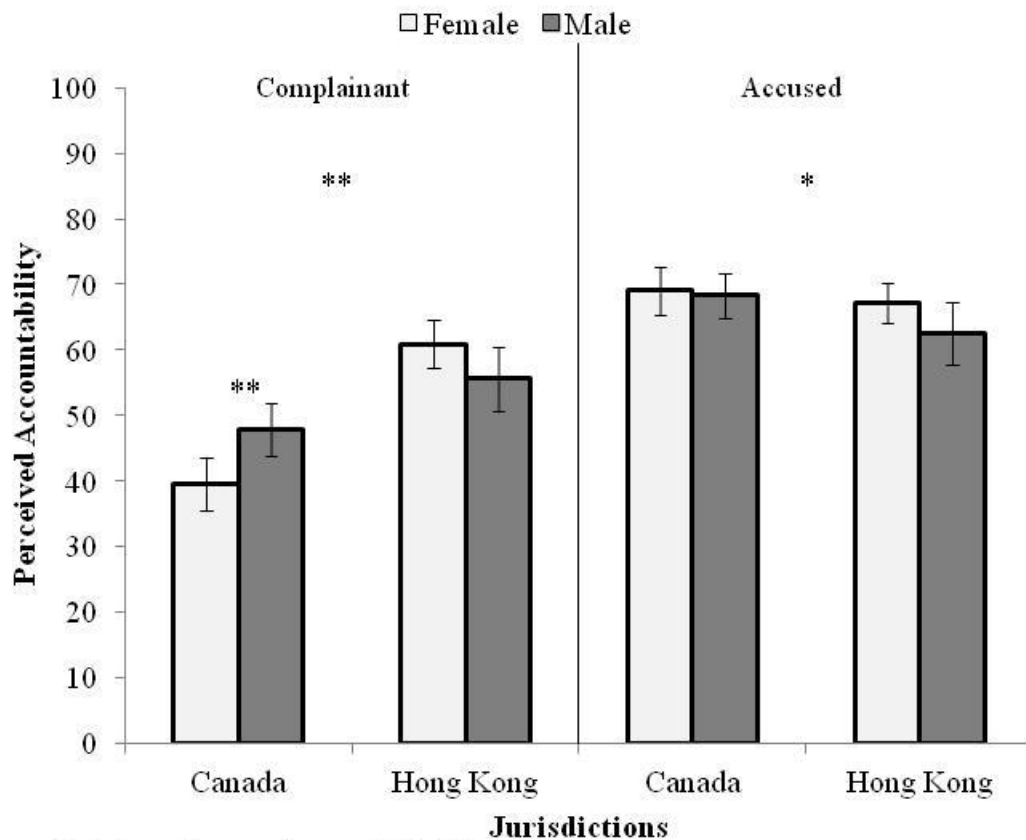
* $p < .05$; ** $p < .01$; error bars = 95% C.I.

When participants were asked to evaluate their own level of rape myth acceptance and endorsement of patriarchal beliefs before deliberating on a case involving a sexual assault, the effect of this evaluation may have been for them to challenge any prejudicial beliefs which they held. Therefore, participants may become more pro-prosecution and hold the complainant less accountable, especially when the accused initiated the event. However, it is unclear as to why no significant effect of presentation order was found when participants rated the level of responsibility for the person who initiated the sexual encounter. It is conceivable that the results could be explained by the phenomenon of culpable causation (Alicke, 1992, 2000), which is the tendency to attribute the moral blameworthiness and responsibility to those who perform the behaviours. By having an apparent initiator, it may have made the question of accountability less ambiguous for the participants and

less influenced by situational factors (i.e., exposure to items related to rape myths and patriarchal beliefs).

Culture (X Accountability and X Gender). As demonstrated in Figure 15, the tests of within-subjects effects revealed a significant Accountability X Culture interaction, $F(1, 397) = 27.43, p < .01, \eta_p^2 = .07$, and the tests of between-subjects effects revealed a significant Culture X Gender interaction, $F(1, 397) = 6.36, p < .01, \eta_p^2 = .02$. Separate ANOVAs were therefore conducted to examine the effects of Culture on the perceived accountability of the complainant and the accused, respectively, and to explore the significant between-subjects effects (Culture and Culture X Gender).

Figure 15. Level of perceived accountability of the complainant and the accused as a function of participants' culture and gender



* $p < .05$; ** $p < .01$; error bars = 95% C.I.

With regards to the perceived accountability of the complainant, a significant main effect of Culture was found, $F(1, 457) = 45.73, p < .01, \eta_p^2 = .09$ (see Figure 15); participants from Hong Kong ($M = 59.07$; $SD = 22.79$) held the complainant

much more accountable than participants from Canada ($M = 43.19$; $SD = 22.49$). However, this main effect was qualified by a significant interaction between Culture and Gender, $F(1, 457) = 10.10$, $p < .01$, $\eta_p^2 = .02$. Analyses of simple-main effects revealed that whereas female Canadians held the complainant significantly less responsible for the sexual interaction than male Canadians, $t(229) = 2.84$, $p < .01$ (see Figure 15), females from Hong Kong held the complainant marginally *more* responsible than males from Hong Kong, $t(228) = -1.70$, $p < .10$.

On the other hand, with regards to the perceived accountability of the accused, an ANOVA revealed a significant Culture effect, $F(1, 458) = 4.32$, $p < .05$, $\eta_p^2 = .01$ (see Figure 15). In particular, participants from Canada ($M = 68.83$; $SD = 20.21$) held the accused significantly more accountable than participants from Hong Kong ($M = 65.52$; $SD = 20.07$). No significant Gender effect or Culture X Gender interaction was found, both $ps > .05$.

Taken together, this pattern of results is in support of the hypotheses that participants from Hong Kong would consider complainants to be more responsible, and the accused to be less responsible, than participants from Canada. However, although female participants in Canada responded in the predicted fashion and considered the complainant as less responsible than male participants from Canada, the ratings of Hong Kong females were a little surprising. That being said, Coller and Resick (1987) found that females who endorse more traditional sex-norms are less likely to perceive forced intercourse on a date as rape and attribute more responsibility to the complainant than would females who endorse more egalitarian views on gender-role. As mentioned, participants in Hong Kong were found to endorse higher levels of both hostile and benevolent sexism; therefore, it is conceivable that they were also more likely to blame the complainant.

Attribution theory (Heider, 1944), which seeks to explain the motivation and cognitive processes involved in ascribing responsibility to any particular individual(s) for some event or behaviours, may help account for the discrepancies between genders in Hong Kong and Canada. As observed by Shaver (1975),

[There is a] desire on the part of perceivers to make whatever attributions that will best reduce the threat posed by the situation. If you are faced with a

threatening attributional situation, in which the threat can be reduced by attributing responsibility and denying personal similarity, you will do that. If you cannot deny personal similarity, then you are more likely to attribute the negative outcome to chance. (p. 110)

In reviewing the qualitative remarks of the case made by participants, a number of female participants in Hong Kong focused on the complainant's behaviours. For example, one participant wrote, "I wouldn't have invited a man to my house. She should have expected what will happen after inviting a man to her home." Similarly, a study by the Family Planning Association of Hong Kong (1991a, 1991b) found that, as compared to males, female respondents were more traditional in their expectations towards sex, and they tended to show greater disapproval of premarital sex, extramarital sex, and cohabitation. It is conceivable that female participants in Hong Kong may find the complainant's actions less relatable than those in Canada, and therefore holding the complainant more accountable for the situation. As for men, Newcombe et al. (2008) asserted that men may perceive themselves as so dissimilar to the female complainants that there is no trigger for the self-defensiveness that would lead to such attributions. Therefore, the discrepancies in accountability ratings for the complainant between Canadian and Hong Kong male participants were smaller than those found in female participants from the two countries.

Verdict

Participants were provided two opportunities to render their verdicts. The first opportunity was presented either before or after a review of the local jury instructions (i.e., half of the participants rendered their first verdict without first reviewing their local legal standards for adjudicating sexual assaults). The second opportunity was presented after all the case evaluations were completed. In general, participants rarely changed their verdicts ($n = 30$; 6.4%); four (1.7%) participants from Canada and eight (3.5%) participants from Hong Kong changed their verdict from *not guilty* to *guilty*, and 15 (6.4%) Canadian and 3 (1.3%) Hong Kong participants changed their verdict from *guilty* to *not guilty*. All in all, the conviction rates, based on the first verdict, were 35% for the Canadian sample and 27% for the Hong Kong sample, and the

conviction rates, based on the second verdict, were 31% and 29% for Canada and Hong Kong, respectively.

Because the majority of participants (93.6%) held the same verdict for both the first and second guilt judgment, and because the participants' first and second verdicts were highly correlated, $\chi^2(1, N = 467) = 336.79, p < .01$, the second judgment was adopted as the main outcome variable. However, the effect of jury instruction on participants' first verdict was examined in the next section.

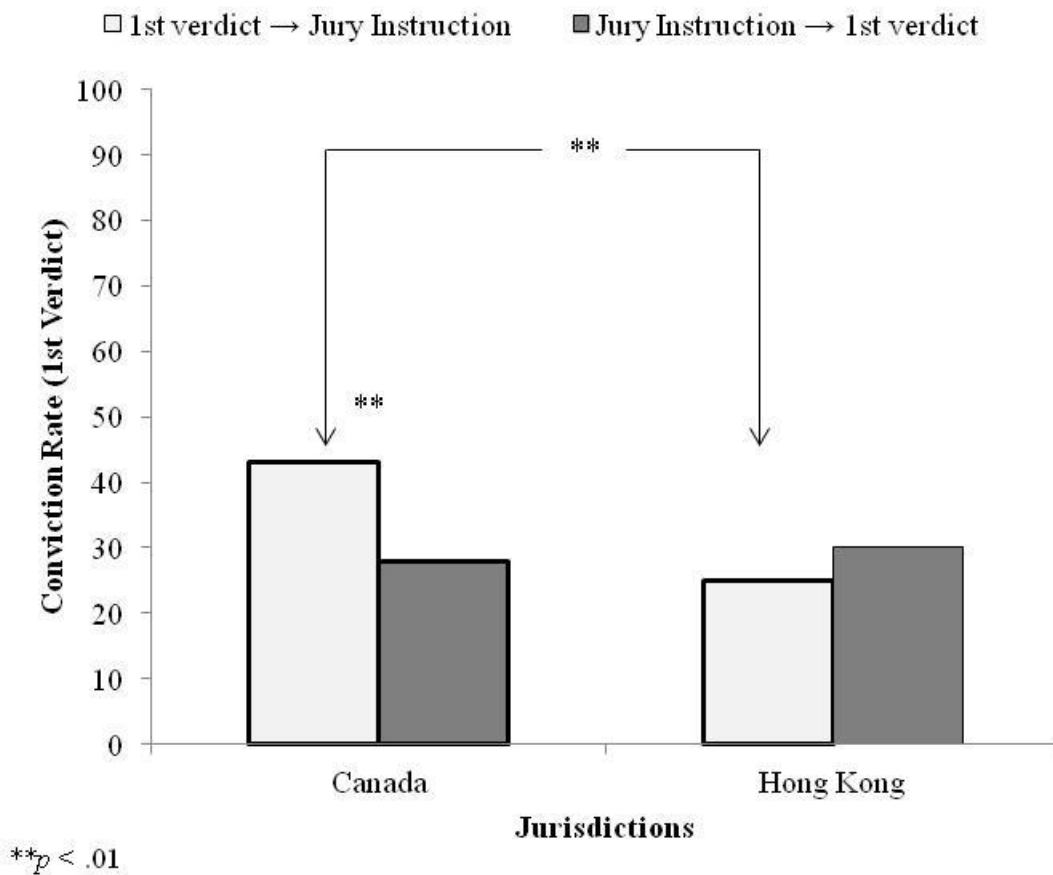
Effects of Jury Instructions on First Verdict

Appendices B and C presented the jury directions that were adapted for use in this study in Canada and in Hong Kong, respectively. To examine the effect of jury instructions on participants' first verdict, a logistic regression model (with backward-stepwise procedures on the product terms) was conducted by entering the experimental variable (Jury Instruction: *before* vs. *after the first verdict being rendered*) into Step 1 and its product terms with Culture, Gender, Alcohol, and Initiation into Step 2. As described in the Analytical Approach section, the product terms were included separately because of issues related to multicollinearity.

Results showed no significant main effect of jury instructions, $B = 0.21, Wald(1) = 1.11, p > .05$. However, as observed in Figure 16, there was a significant two-way interaction between Jury Instruction and Culture, $B = -0.95, Wald(1) = 10.57, p < .01$. In particular, tests of simple main effects revealed that Canadian participants were significantly more likely to find the accused not guilty if they had first reviewed the jury instructions than if they had *not* reviewed the jury direction, $B = -0.67, Wald(1) = 5.76, p < .05$, whereas no significant effect of jury instruction was found in Hong Kong, $B = 0.29, Wald(1) = 0.94, p > .05$. In addition, Canadian participants were significantly more likely to render a guilty verdict than Chinese participants before they reviewed the jury's instructions, $B = -0.83, Wald(1) = 8.66, p < .01$, whereas no significant difference between the two cultures was found when the jury's instructions had been reviewed, $B = 0.12, Wald(1) = 0.18, p > .05$. Therefore, Canadian participants were more likely to acquit only after they were informed about the local legal principles pertaining to sexual assaults. As suggested, participants from Canada were more likely to find the accused's claim of honest belief in consent

unreasonable than were participants from Hong Kong. However, in the jury instruction, it was explicitly described that the claim “[did] not have to be reasonable to ... the juror.” Therefore, uninformed Canadian participants (i.e., those who provided the first verdict before reviewing the jury instruction) may be more inclined to find the accused culpable simply because they found his claim unreasonable, whereas informed Canadian participants, after being cautioned by the relevant Canadian law, may be more likely to acquit because they were instructed to ignore the reasonableness of his claim from the jurors’ perspectives.

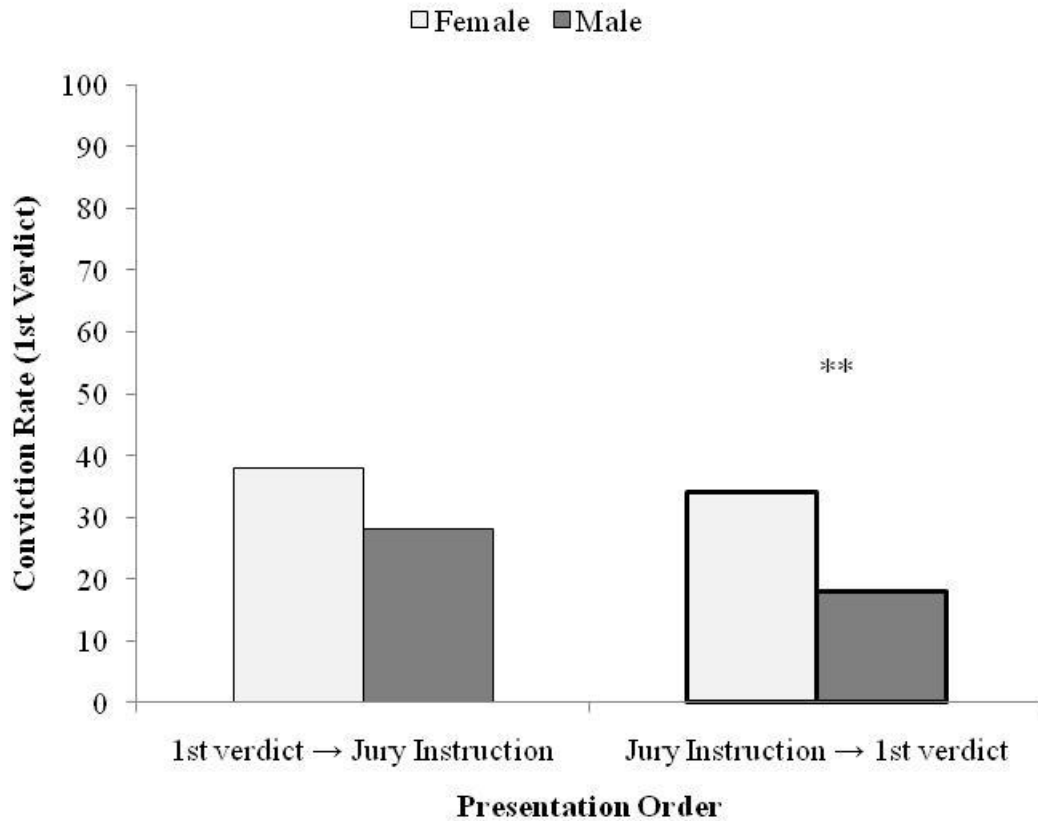
Figure 16. Conviction rate of first verdict as a function of participants’ culture and order of the jury instructions



Furthermore, there was a significant two-way interaction between Jury Instruction and Gender, $B = -1.17$, $Wald(1) = 8.23$, $p < .01$. As presented in Figure 17, tests of simple-main effects revealed that males (from either culture) were significantly more likely to acquit after reviewing the jury instructions than females, $B = -0.90$, $Wald(1) = 6.65$, $p < .01$; however, no significant Gender effect was found

when the first verdict was rendered before the jury instructions were reviewed, $B = -.45$, $Wald(1) = 2.55$, $p > .05$. Mullin, Imrich, and Linz (1996) found that American men who were exposed to general pre-trial publicity rendered more pro-accused decisions than men who were not exposed to news articles on rape, whereas women were not affected by the publicity. It is conceivable that a greater proportion of male than female participants may be inclined to acquit an accused charged with a sexual assault because males generally endorse a higher level of rape myths (see also Brekke & Borgida, 1988). While males may feel ambivalent in forming a not-guilty verdict freely because they have to reconcile contradictory evidence presented at trial (English & Sales, 1997), reviewing the legal cautions in their jurisdiction's jury instructions may give such participants sufficient grounds to find the accused not guilty.

Figure 17. Conviction rates of first verdict as a function of participants' gender and order of the jury instruction



** $p < .01$

Second Verdict

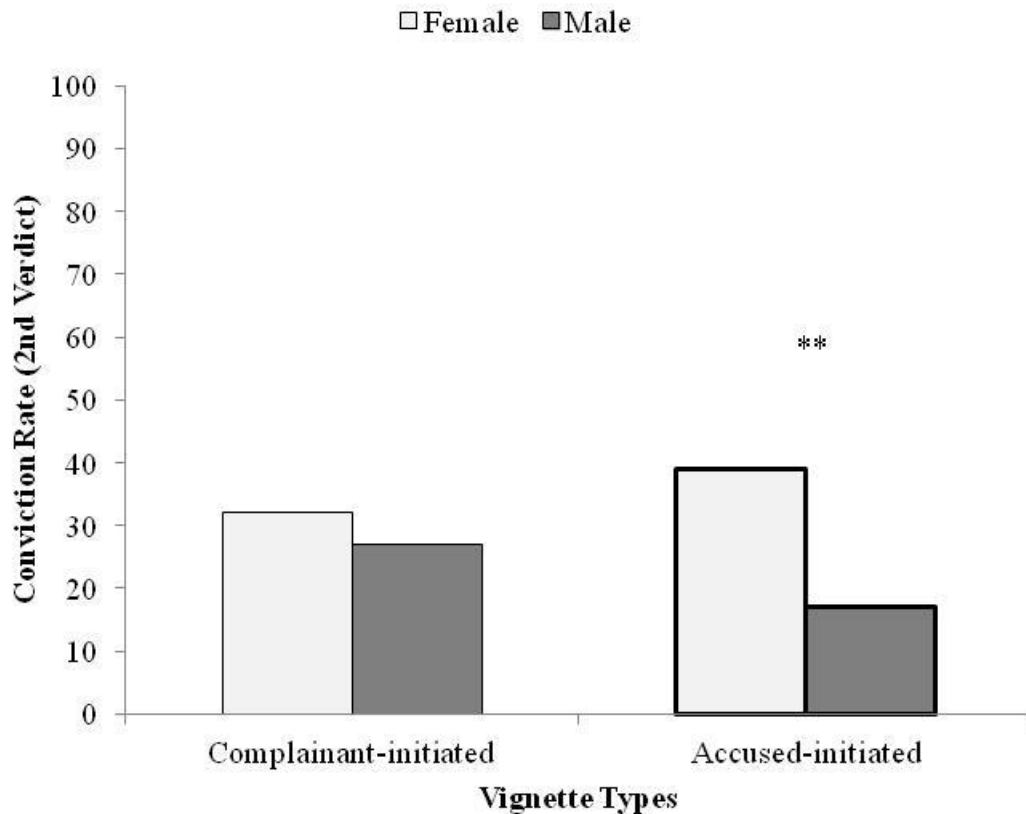
Overall, the conviction rate was 30%. To examine the effects of demographic characteristics (i.e., Culture, Gender, and Age), experimental manipulations (i.e., Vignette Types and Position of Questionnaires), and ratings on the ASI (hostile and benevolent sexism) and the IRMAS on the final verdict, a logistic regression model (with backward-stepwise procedures on the product terms) was conducted. First, all of the demographic and experimental variables (which were all dichotomous) were entered in to Step 1. Then, all of the product terms of those variables were entered into Step 2. Finally, ratings on hostile sexism, benevolent sexism, and IRMAS, and all of the surviving terms were entered into Step 3.

Step 1 and Step 2: Effects of Demographic Characteristics and Experimental Manipulations on Verdict

The six variables explored in Step 1 were: Culture, Gender, Age, Alcohol, Initiation, and Position of Questionnaires, and their product terms were explored in Step 2. A test of the second step against a constant-only model was statistically reliable, $\chi^2(41, N = 467) = 65.37, p < .01$ (Nagelkerke $R^2 = .19$), indicating that these independent variables and their product terms, as a set, reliably distinguished between those who convicted and those who acquitted.

Gender (X Initiation). A significant Gender effect was found, $B = -1.30, Wald(1) = 14.18, p < .01$, with female participants convicting significantly more often than male participants (35% and 22%, respectively). However, the main Gender effect was qualified by a significant interaction between Gender and Initiation, $B = 1.04, Wald(1) = 5.24, p < .05$. As illustrated in Figure 18, a significant Gender effect was found only when participants had read an accused-initiated sexual encounter, $B = -1.14, Wald(1) = 11.72, p < .01$, and not when they had read a complainant-initiated scenario, $B = -0.28, Wald(1) = 0.93, p > .05$. Specifically, as compared to female participants, male participants were twice as likely to acquit when the accused initiated the sexual encounter.

Figure 18. Conviction rates of second verdict as a function of vignette types (whether the complainant or the accused initiated the sexual encounter) and participants' gender



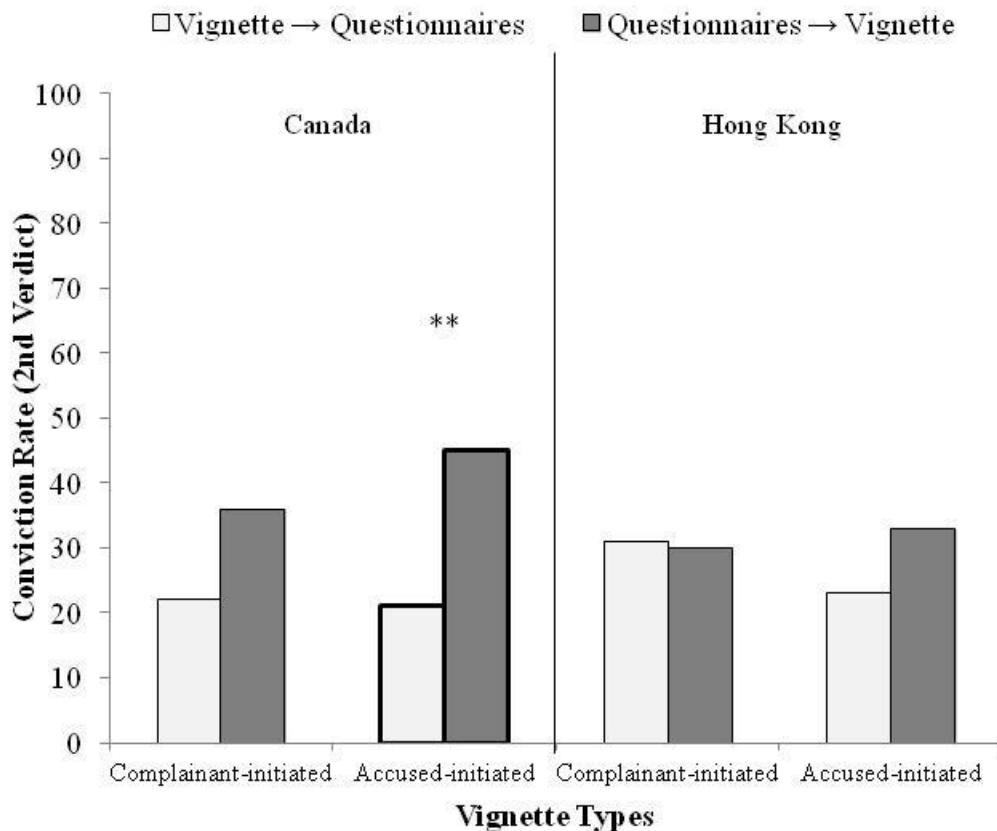
** $p < .01$

In general, previous research has shown that women are more likely to render pro-prosecution decisions in sexual assault trials (Brekke & Borgida, 1988), and men have been found to attribute more blame to rape victims than women. According to Shaver's (1970) defensive attribution theory, individuals are more likely to blame those whose personal characteristics are dissimilar to their own. This serves as a self-protective function because individuals can reassure themselves that they are not responsible for negative events. According to this theory, men may see themselves as being more similar to the male offender's position than to the female complainant's. As a result, when the accused initiated the sexual encounter, men attributed less blame to the offender and more blame to the complainant, leading to a more pro-accused verdict. In contrast, women, who identify with the female complainant, are hesitant to stigmatize themselves by holding the complainant responsible.

Consequently, in this study, we found that they were less likely to blame the complainant compared with men, and they also attributed more responsibility to the accused.

Position of Questionnaire (X Culture X Initiation). In addition, a significant main effect of Position of Questionnaires was found, $B = -0.88$, $Wald(1) = 12.67$, $p < .01$; participants who completed the questionnaires before evaluating the case (36%) were significantly more likely to convict than participants who completed the questionnaires after evaluating the case (24%). However, the main effect of Position of Questionnaires was qualified by a significant three-way Culture X Initiation X Position of Questionnaires interaction, $B = 0.89$, $Wald(1) = 4.58$, $p < .05$. As illustrated in Figure 19, tests of simple effects indicated that significant main effects of Position of Questionnaires were found only in Canada, $B = -1.15$, $Wald(1) = 7.51$, $p < .01$. In particular, when Canadian participants evaluated the attitudinal questionnaires before reviewing the case, they were significantly more likely to convict when the accused initiated the sexual encounter, $B = -1.15$, $Wald(1) = 7.51$, $p < .01$, and marginally (but not significantly) more likely to convict when the complainant initiated the sexual encounter, $B = -0.69$, $Wald(1) = 2.80$, $p < .10$, as compared to when they did not examine the attitudinal questionnaires before reviewing the case. When the Hong Kong sample was examined, no significant main effects of Vignette Types or Position of Questionnaires or Vignette X Position of Questionnaires interaction were found, all $ps > .24$.

Figure 19. Conviction rates of second verdicts as a function of Position of Questionnaires, Vignette Types (whether the complainant or the accused initiated the sexual encounter), and participants' Culture



** $p < .01$

In general, this result is surprising because previous studies in North America have found that rape myths portrayed in the news may prime rape myths already held by the audience and make people more likely to use them in the future (Franiuk, Seefeldt, Cepress, & Vandello, 2008; Malamuth & Check, 1985). However, in this study, when Canadian participants were exposed to statements regarding patriarchal beliefs and rape myths, they were more likely to hold the accused accountable (especially when he was the initiator) and render a guilty verdict than when they were not exposed to these beliefs. As compared to being a passive recipient of the negative portrayal of rape (and its victims) in news media, participants in this study were asked to *evaluate* these statements and demonstrate their levels of endorsement. It may be the case that Canadian participants in this study were more critical of these beliefs once these stereotypical views were brought to their consciousness. Therefore, they were more inclined to render a verdict that was more pro-prosecution when they

evaluated the case after the completion of the questionnaires than when they evaluated the case unchallenged, especially when the sexual encounter was initiated by the accused.

In contrast, participants in Hong Kong were found to be less susceptible to the effects of the presentation order of the attitudinal questionnaires. It is conceivable that language barriers may be preventing full comprehension of some of the statements. Alternatively, Hong Kong participants may be interpreting the survey items in more idiosyncratic ways (as indicated by the lower Cronbach's alpha for these instruments in Hong Kong), thereby lowering the relationship between the exposure to these statements and the verdict. However, as compared to their North American brethren, Chinese individuals are less likely to confront dominant ideas because they tend to believe in a fixed social-moral reality to which individuals should subordinate their personal interests and values (Hong, Ip, Chiu, Morris, & Mennon, 2001). Therefore, because they may be less likely to challenge societal patriarchal beliefs and stereotypical views on sexual offences, they may be less reactive to the task of evaluating the statements in the attitudinal questionnaires.

Step 3: Effects of Attitudinal Questionnaires on Verdict

Along with the previous independent variable (i.e., *Culture, Gender, Age, Alcohol, Initiation, and Position of Questionnaires*) and the surviving product terms (*Gender X Initiation, Culture X Initiation X Position of Questionnaires*), the ratings on ASI (hostile sexism and benevolent sexism) and IRMAS (rape myth endorsement) were included in Step 3. A test of Step 3 against a constant-only model was statistically reliable, $\chi^2(11, N = 467) = 64.01, p < .001$ (*Nagelkerke R*² = .18), indicating that these attitudinal factors and the surviving variables, as a set, reliably distinguished between those who were convicted and those who were acquitted.

All of the previously survived main and interactional effects remained significant, with all *ps* < .05. In addition, as predicted, those who endorsed high levels of *hostile sexism*, *B* = -0.40, *Wald*(1) = 8.10, *p* < .01, and *rape myth*, *B* = -0.51, *Wald*(1) = 10.41, *p* < .01, were significantly more likely to acquit, in general. However, contrary to expectation, no significant effect of benevolent sexism was found, *B* = 0.18, *Wald*(1) = 1.79, *p* > .05. As mentioned, benevolent sexism had

relatively low internal consistency (α s = .60 and .77 for the Hong Kong and Canadian samples, respectively), and the lower reliability of this scale may have contributed to unstable or under-predictions of links between benevolent sexism and other variables.

Summary. In general, it was hypothesized that Hong Kong participants, and male participants, would be more likely to render a not-guilty verdict because of their higher endorsement of rape myths and patriarchal beliefs, as compared to Canadian participants, and female participants. Although participants' levels of rape myth acceptance and hostile sexism did significantly correlate with their verdict, the main effect (i.e., gender) and the interactional effect (i.e., *Gender X Initiation*) that survived the first two steps remained significant even after the effects of ambivalent sexism and rape myths were accounted for. Therefore, it is noteworthy that the effects of gender may not simply be due to participants' varying level of rape myth endorsement or their hostile sexism. Instead, it is conceivable that the gender effects may be more related to how men and women perceive and interpret the facts of the case in a legal setting.

As characterized by Shaver (1985), people are rational information processors; however, the perceiver's motives in making attributions cannot be dismissed, and individuals are motivated to ascribe responsibility in ways that are least threatening to their own sensibilities. For example, as compared to female participants, males were more likely to consider the accused's claim of mistaken belief credible and reasonable (especially when alcohol was involved), to acquit the accused after reviewing a case scenario that was initiated by the accused, and to acquit after reviewing the jury's instructions. That is, it appears that men may render ratings and decisions in a fashion similar to women under certain circumstances (e.g., when the complainant initiated or when alcohol was not involved) because they too have to reconcile contradictory evidence presented in court. Nevertheless, men may be more inclined to be pro-accused when they find the accused's position (of being falsely accused) more threatening (Estrich, 1987), and, presumably, they may be more motivated to ensure that if they found themselves in a similar situation, they would also seek to avoid being blamed. In addition, possibly because of their increased level of rape myth endorsement and patriarchal beliefs, men may be more

predisposed than women to consider the charge unfounded when they are given more information (e.g., legal cautions via jury's instructions) to support their rationale for an acquittal.

Surprisingly, however, culture was not found to be significantly associated with the final verdict. As mentioned, the conviction rate was relatively low (at approximately 30%); this truncated range of ratings may have limited the ability to find the predicted main effect. However, it appears that the verdicts of Canadian participants were more affected by jury instructions than those submitted by the Hong Kong participants. In particular, Canadian participants, as compared to participants from Hong Kong, *were* more likely to render a guilty verdict until they had an opportunity to review the jury instructions; however, it is conceivable that the legal caution to ignore the reasonableness of the accused's claim may have contributed to the increased acquittals in Canada to a level that was more on par with the Hong Kong sample. Interestingly, despite the attenuated conviction rate after reviewing the jury instructions in the Canadian sample, those who responded to the attitudinal questionnaires before reviewing the vignette were significantly more likely to convict than those who reviewed the vignette as their first task. Therefore, it appears that Canadian participants may be more susceptible to both types of experimental manipulations than Hong Kong participants in general, but that these opposing effects may have cancelled out the overall effect of culture on verdict.

GENERAL DISCUSSIONS

In this dissertation, I examined the effects of legal and other complainant-focused variables on the legal decision-making of real triers of fact in Canada and Hong Kong (Study 1) and sought to explain the differences in judicial outcomes based on varied influences of gender-related issues and rape myth acceptance in mock jurors from these different cultures (Study 2). Read et al. (2006) described the respective strengths and weaknesses of pursuing research with simulated and real jury verdicts, and this dissertation sought to harness the merits of both procedures to capture both mock and real triers of fact's responses to allegations of sexual assaults. In this section, after reviewing the dissertation findings, a set of recommendations for the two jurisdictions will be tendered for considerations, and the limitations of the dissertation and suggestions for future studies will be explored.

Summary / Interpretation of Findings

Study 1 focused on identifying published judicial judgments involving sexual assault (i.e., rape) in Canada and Hong Kong to synthesize factors or themes in those cases, to highlight inconsistencies in the application of law, and to develop recommendations to policy makers. As observed by Randall (2010), "with regard to sexual assault in Canada, the law on the books and the law in action are two very different things" (p. 399). For example, although statutory provisions and case laws (e.g., *R. v. Ewanchuk*, 1999) have taken steps to limit inferences that can be made from the complainant's sexual history or ambiguous behaviours, the complainant's past and present sexual provocativeness remain inextricably connected to (dis)proving a charge of sexual assault. Formally, the law recognizes the fallacy that inheres in such inferences, which were presumed to have been remedied by the abrogation of certain rules (e.g., recent complaint, corroboration, and the inclusion of the complainant's sexual history) and by the shift to a more communicative model of consent-seeking through the "reasonable steps" legislature. However, despite the many Canadian legal reforms in sexual assault law with regard to consent, the justice-seeking process often plays out in prejudicial and complainant-blaming ways. In particular, myths and stereotypes regarding sexual assaults continue to appear in

judicial opinions (regardless of the ultimate verdict rendered) and seem to influence decision-making most directly when the complainant's conduct is viewed as ambiguous. In many of these cases, because the onus of proof and credibility of consent in practice always remain with the prosecution, Canadian judges continue to focus on determining whether she *explicitly* communicated non-consent, rather than considering whether the accused had any basis to believe that she had positively communicated her voluntary agreement (see also Gotell, 2007). Despite progress, ingrained stereotypes about complainants would thus appear to be slow in disappearing altogether.

With regard to practices in Hong Kong, similar patterns were also observed. In addition, an examination of its sexual offences provisions illustrates that, despite sporadic examples of good practice (e.g., abrogating certain outdated provisions such as the need for corroboration), Hong Kong still retains antiquated sexual offences frameworks that were adopted from the United Kingdom in the Victorian period and were based on now-outdated notions of decency and morality (with an especial focus on chastity), rather than the protection of women. More importantly, possibly because of the "piecemeal development" (Emerton, 2001, p. 434) of the Hong Kong rape law, few steps have been taken to address the application of the mistaken belief defence, and no statutory guidance has been proffered to assist the court in cases that involved an accused who was intoxicated at the time of the incident in question.

It is therefore argued that extensive changes in the legal institution are needed, particularly in Hong Kong (see the Recommendation section for further details). As noted, although conviction rates in both jurisdictions were observed to be considerable (at approximately 70% in Canada and 75% in Hong Kong after considering the appellate decisions), it was consistently observed that men accused of sexual offences are under-prosecuted because of what transpired behind the scenes (Beh, 1998; Johnson, in press; Spohn et al., 2001); that is, many sexual assault cases may fail to reach the courtroom because they are considered unfounded by police, dropped by crown counsels or the complainant herself, dismissed by judges, or plea bargained (see also Fohmann, 1991, 1998). In the absence of a good-faith belief in securing a conviction because of the complainant's equivocal behaviours, it is

understandable from a legal standpoint for the prosecution to decide against pursuing a case. However, changing from an emphasis on the prosecution having to show that the *complainant did not consent* to a standard where the accused has to show that he *actively obtained consent* may help adjudicate acquaintance rape trials where the alleged victim violated traditional standards of feminine prudence and morality. For example, if a complainant had consumed alcohol, worn provocative clothing, or accompanied a man to his apartment, these actions undermine assumptions about her “sexual purity” (Anderson, 2002), making successful prosecution of the accused virtually impossible, particularly in acquaintance rape cases. By modifying what had been a purely subjective *mens rea* standard to introduce a quasi-objective component (such that the belief in consent need not be reasonable, but the accused must take steps in the circumstances to ascertain consent), such a shift may help reduce ambiguity of the situation. It is also hopeful that the publicity accompanying such a legal change will alter individuals’ sexual expectations and behaviours, whereby more open communications about consent issues will be encouraged and enforced behind closed doors. By navigating sexual relationships this way, the legal change will conceivably help minimize female exploitation (especially when the encounter involves acquaintances) and reassure men who follow the protocol that they will less likely be confronted with baseless accusations.

Study 2 investigated how the increased ambiguity of the complainant’s behaviour (i.e., consuming alcohol or initiating the sexual encounter) prior to an alleged sexual assault may differentially influence Canadian and Hong Kong mock jurors’ perceptions of her level of gender-norm violations and accountability, and how these perceptions may be correlated with individual differences (e.g., endorsement of rape myths) and cultural mores (particularly sex-role ideologies and patriarchal beliefs and values). Results revealed that, as compared to the Canadian sample, participants in Hong Kong 1) endorsed higher levels of rape myth acceptance and both types of sexism, 2) considered the complainant’s behaviours as having violated normative gender expectations to a greater degree (regardless of the vignette types), 3) perceived the accused’s claim of mistaken belief as more reasonable, 4) ascribed *more* accountability to the complainant and *less* accountability to the

accused, and 5) rendered more acquittals before the jury's instructions were reviewed. In addition, male participants, as compared to their female peers, 1) provided higher ratings on the IRMAS and both scales of the ASI, 2) considered the complainant's behaviours as having violated gender norms to a greater degree and the accused's claim of mistaken belief as being more credible and reasonable *when the complainant had consumed alcohol prior to the alleged assault*, 3) rendered more acquittals after the jury's instructions had been reviewed, and 4) rendered more acquittals when the accused initiated the sexual encounter.

Interestingly, although the evaluation of a sexual assault scenario did not prime participants to endorse more rape myths or a higher level of sexism (see also Domalewski, 1998), exposing mock jurors (especially those in Canada) to statements on patriarchal beliefs and rape myths appears to have encouraged them to reflect on and challenge these stereotypical and prejudicial beliefs, which corresponded with 1) an increased level of perceived unreasonableness of the accused's claim of mistaken belief, 2) an increased level of perceived accountability of the accused, and 3) a higher conviction rate of the accused when the attitudinal questionnaires were considered before the evaluation of the case. As commented, ingrained cultural mores (including the hegemonic understanding of gender) and the different gender-based attributional and motivational factors may have contributed to the differences in the two cultural groups. As rational decision-makers (Shaver, 1985), however, individuals do deliberate judicial decisions through concurring cognitive and social mechanisms, and may therefore be amenable to attitudinal and behavioural changes when asked to reflect on and challenge deep-seated beliefs.

Recommendations

1) Law Reform in Hong Kong -- Mens Rea (Subjective vs. Objective)

In the absence of any explicit statutory definition of the *mens rea* element related to the awareness of non-consent, common-law jurisdictions have generated two distinct judicial interpretations: i.e., the guilty mind may be evaluated from a *subjective* or an *objective* perspective. The subjective approach (adopted by Hong Kong; e.g., *Sin Kam Wan & Another v. HKSAR*, 2005) requires the prosecution to establish that the accused had actual knowledge that the complainant did not consent

or was reckless or careless to the issue of consent (e.g., *HKSAR v. Li Kim Ching*, 2006). In both jurisdictions, it is also sufficient for the accused to establish that he held an honest belief that the complainant was consenting even if that belief was not reasonable (based on the landmark case *Director of Public Prosecutions v. Morgan*, 1976). As such, this *mens rea* standard often creates an unobtainable benchmark (especially in Hong Kong) whereby, even in instances where it is established that there was no consent, no conviction ensued (e.g., 香港特別行政區 訴 鄧兆峰 朱君 煒 [*HKSAR v. Tang Siu Fung and Chu Kwan Wai*], 2010).

The objective approach, in contrast, requires the prosecution to establish that a “reasonable” person in the position of the accused would believe the complainant was not consenting; in this approach, the subjective belief of the accused is irrelevant (M. Tammens, personal communication, May 16, 2011). Braman (2010) has recently argued that “the law’s reliance on the concept of reasonableness allows for a cultural hedge” (p. 1455); that is, instead of instating a rigid prescription of what is right and what is wrong, injecting language like “reasonableness” will allow legal actors to make decisions that reflect current local norms and values. However, the application of a “reasonable” standard in the context of sexual assault has been critiqued by proponents of the subjective approach on the basis that an objective approach is incongruent with the general subjective approach adopted in relation to the *mens rea* element in other criminal law offences (Klein, 2008). In turn, the objective approach is also critiqued by some feminist commentators (e.g., Martin, 1994) who argue that the reasonableness standard may be problematic because it is construed according to the male standard, and it does not go far enough to protect victims of rape. For example, Vandervort (2004) argued that “adoption of an ‘objective’ standard to assess culpability would invite dispositions that reflect community prejudices and practices. To use the very social norms of sexual conduct that result in the commission of sexual offences to determine whether an exculpatory defense is available, would, in the vast majority of cases, only serve to approve those norms and the conduct based on them” (p. 659).

More importantly, it has been argued that the application of the objective “reasonable” standard is not only sex-biased but also culture-biased (Sin & Chu,

1998). In particular, Sin and Chu argued that the standard of reasonableness (as applied in Hong Kong courts) has adopted an English reasonable man rather than that of a Hong Kong reasonable person standpoint, because judges in Hong Kong have mainly referred to English cases in following the rule of *stare decisis* (where the lower courts are bound to follow the ruling of higher courts, and within the same level of courts, judgments made earlier should be followed by later cases; see Wesley-Smith, 1994, for an account of *stare decisis* in Hong Kong). In one rare example of an indecent assault case, Judge Downey, in *R. v. Lau Wai Tung* [HK] [1985], stated that in deciding whether an act is indecent, “little, if any, assistance is to be derived from decided cases in other jurisdictions, because there may be different levels of tolerable behaviour and legitimate differences as to what ordinary observers would regard as an affront to customary standards of modesty” (p. 4). In another incident, in *R. v. Fong Chi Wai* [HK] [1995; as cited in Mughal, 1996], where a complainant was on her way home when the accused suddenly grabbed her and kissed her on her left face, the judge concluded that the admitted facts, as a matter of law, constituted an indecent assault within the context of the Chinese culture. Despite these exceptions, continued influence of non-local authorities, particularly English authorities, was observed in cases reviewed in Study 1. Moreover, because the Hong Kong judiciary (Government Printer, 1996) and jury pool are heavily represented by expatriates (as only those “who [have] a knowledge of the English language” may qualify to act as a juror [s. 4 of the Jury Ordinance]), it is difficult to calibrate a *reasonable Hong Kong person’s* standard amongst the triers of fact because they do not have the same cultural yardstick. Therefore, the search for a “reasonable” Hong Kong standard could only be possible if it is set free from the dominant legal discourse permeated with English standards through the operation of *stare decisis* and the domination of expatriate judges in the ethnic composition of the triers of fact.

Although it is important to continue to consider the accused’s belief (i.e., the presence of *mens rea*) from his subjective standpoint and disregard the reasonableness of his claim, it may be important for the triers of fact in Hong Kong to *objectively* examine the totality of the circumstances and determine how he may have been “mistaken” with regards to the complainant’s sexual consent. After all,

regardless of how strongly an accused may subjectively believe a person has consented to the sexual activity, that belief must be formed “with an air of reality” in order for the accused to have adduced substantial evidence (e.g., *HKSAR v. Siu Tat Yuen*, 2005). However, Study 1 showed that the mistaken belief defence, when proposed, significantly increased the likelihood of an acquittal in Hong Kong, as compared to Canada. Although the reasonable steps provision was not explicitly described in all of the cases involving this defence, all triers of facts needed to consider the provision when the defence was raised in Canada (J. Nascou, personal communication, May 13, 2011). Furthermore, in cases where the accused cannot establish that he took reasonable steps to ascertain consent, no argument of honest but mistaken belief in consent is available (Gotell, 2008; Seidman & Vickers, 2005). It is conceivable that the explicit statutory limits on the defence of mistaken belief may have effectively limited the scope of the defence, and it may behoove policy makers in Hong Kong to consider adopting a reasonable steps provision when the accused asserted a belief in consent. As of 2010, there are motions in place to change the test for the standard of care from a subjective standard to a two-fold objective/subjective standard in Hong Kong's Companies Ordinance (see “Rewrite of the Companies Ordinance”; www.cr.gov.hk/en/publications/docs/20100830_conclusion-e.pdf). A legislative reasonable steps provision will help ensure that this quasi-objective approach will be taken more consistently throughout the region.

2) Balancing the need to establish non-consent and women’s right to sexual autonomy

The foregoing section focused on recommendations pertaining to the application of the quasi-objective consent model in Hong Kong, in which the accused is asked to demonstrate that he has taken reasonable steps to establish consent *in the event where he claims a belief in consent*. However, this section argues that it may not be sufficient to simply target reforms regarding the mistaken-belief defence to increase prosecution successes.

In Study 1, it was revealed that the mistaken-belief defence was only raised in 16.8% of cases in Canada and 24.8% of cases in Hong Kong. As discussed in Study 1 and as observed by British Columbian legal counsel (J. Nascou and M. Tammens) who were consulted, the court generally concentrates on whether the Crown has

proven beyond a reasonable doubt that the sexual activity occurred *without* the complainant's consent (i.e., the *actus reus*), and the *mens rea* element does not arise until her non-consent has been proven. Importantly, despite judicial reforms in both jurisdictions, it was shown that if there were inconsistencies in the complainant's behaviours that could obscure her (lack of) agreement to engage in sexual acts, her assertion of non-consent might be questioned and the accused may be more likely to be acquitted. In a way, this is consistent with the notion of guilt *beyond a reasonable doubt*, a notion upon which the common-law justice system is based. The ambiguity introduced by variables such as complainant's initiation or complainant's drunkenness (which lowers her perceived reliability to recall the event) might establish a "reasonable doubt."

In addition, in Study 2, I sought to directly evaluate whether the complainant's perceived equivocal behaviours (e.g., being "tipsy" or sexually provocative) would affect participants' rating of her perceived violation of gender norms and their perception of the alleged sexual assault (as related to perceived accountability and verdict). Although the vignettes were successful in illustrating the intended scenario (according to the manipulation checks), experimental manipulations of her intoxication level or her sexual initiation did not significantly influence her perceived violation of traditional gender norms and did not produce significant main effects related to the conviction rate. That being said, the vignettes were constructed to increase the "air of reality" to the accused's mistaken belief defence (based on Study 1's finding that 89% of Canadian accused and 95% of Hong Kong accused were convicted when they were tried by a jury), and all types of case scenario included elements that may have raised the complainant's perceived violation of gender norms; for example, the vignette always described that the complainant retreated to her bedroom while the accused was still in her apartment. The ambiguity created in the case scenario may also have been enhanced by the fact that the complainant self-admitted that she thought the accused was "good looking" and that she had conducted herself in a "flirtatious" manner. Therefore, in Study 2, although participants generally considered the accused to be significantly more accountable for instigating the sexual encounter than the complainant, we found that they still ascribed a

substantial level of responsibility to the complainant in general (at approximately 40% [Canada] to 60% [Hong Kong]; of note, participants rated the levels of accountability of the complainant and the defendant separately, which would make it possible for participants to attribute 100% of responsibilities to both parties). Moreover, although no significant main effects of *alcohol* or *initiation* were found in the analyses for verdict, the relatively low conviction rate (at approximately 30%) suggests that it is often difficult to prove a sexual assault has occurred beyond a reasonable doubt when the complainant's behaviours may be perceived as equivocal. From a prosecution's standpoint, therefore, it remains that the more clearly the complainant expressed her non-consent from the outset, the greater the likelihood of a conviction (J. Nascou, personal communication, May 13, 2011).

In general, research shows that incidents of alleged sexual assaults containing elements of normal sexual exchanges (e.g., flirting) are less likely to be characterized as rape than those that do not (Bondurant, 2001; Bridges, 1991; Frese, Moya, Megias, 2004). In addition, in cases where the complainant decided to remain in the same room with the accused, her failure to simply leave the premises may serve to indicate consent to sexual contact (e.g., *R. v. T.V.*, 2006). Similarly, in the context of sexual harassment, the plaintiff's claim of sexual harassment may be undermined by her "willingness" to enter into or stay in an environment permeated by sexual banter, and sexual innuendos (O'Connor, Gutek, Stockdate, Geer, & Melançon, 2004). Hence, it has been suggested that it may be prudent to redefine rape from a public problem to an individual problem, such that risks of harm may be best managed through self-responsibility and self-regulation (J. Nascou, personal communication, May 13, 2011). This is because the criminal legal system is simply not well-equipped to cope with balancing two social agendas: the rights of the accused (to proffer evidence and apply techniques that are logically probative for his defence so as to minimize the chance of convicting a "morally innocent" person) and the rights of the complainant (who may want to assert her rights to act as ambiguously as she desires without her actions being perceived with prejudice in court).

Before we discuss issues pertaining to the management of risk, a question remains: why, despite successful reforms in sexual assault law, is legal change not

demonstrably effective? It is well recognized that jurors bring a “commonsense” justice into the courtroom (Finkel, 1995) and often prefer their own construal of the law to that pronounced by the trial judge (Smith, 1991). Therefore, despite reforms, jurors may modify, alter, or reject legal requisites if these standards do not coincide with their sense of justice (Finkel, 1995; Horowitz & Willging, 1991). Given that sexual assault cases are primarily “oath against oath” (M. Tammens, personal communication, May 16, 2011), “commonsense” (Finkel & Sales, 1997) may dictate whether the two parties comport themselves in accord with normal human (sexual) behaviours and may also dictate the line of culpability. For example, the commonsense approach is applied when we consider the right of the accused to give no evidence. As described in Study 1, although the *Canadian Charter of Rights and Freedoms* (s.11(d)) has helped maintain that the silence of an accused cannot lead to any adverse inference against him, Study 1 found that defendants who elected not to testify were more likely to be found guilty than those who chose to testify. This tension between the right of the accused to give no evidence, and the potentially adverse consequences that may result from it, was captured by the late Justice Ritchie’s opinion in *McConnell and Beer v. R.* [1968]: “It would be ‘most naïve’ to ignore the fact that when an accused fails to testify, there must be at least some jurors who say to themselves ‘If he didn’t do it, why didn’t he say so.’” Certainly, placing independent weight on the silence of the accused violates the right to silence and the presumption of innocence. However, far from clarifying the matter, setting out a general prohibition in the rules of law (in supporting the accused’s right to silence) may fail to prevent its consideration at trial. The inadequacy of legal rules to overrule commonsense is also highlighted when we consider the limitations of substantive law reform (e.g., abrogating the need for corroboration and reinforcing the idea that complainant’s “ambiguous behaviours” could not be seen as implied consent) to increase conviction (e.g., Campbell et al., 2009; Randall, 2010). For instance, despite the rape shield provision, Study 1 showed that allusions to the complainant’s sexual past at trial increased the likelihood of acquittals even after controlling for legally relevant factors such as corroboration. Because the ultimate burden of proving guilt beyond a reasonable doubt remains with the Crown throughout the trial, the Crown

needs to successfully put forth a case by tendering evidence capable of supporting a finding of guilt, and commonsense often rules in considering the types of evidence that will satisfy the high burden of proof.

As such, how do we balance the right of any women to express their sexual autonomy and minimize their risks of sexual exploitation? In particular, research has shown that certain populations may be particularly vulnerable to sexual victimization. For example, there is evidence that previously victimized women, when presented with vignettes depicting risky social situations, perceive less risk in these situations (e.g., Soler-Baillo, Marx, & Sloan, 2005; Yeater, McFall, & Viken, 2011). When confronted with a situation that might culminate in sexual assault, women must first recognize risk prior to making a decision about how to respond. Therefore, women who report victimization experiences may need interventions that teach them to respond more effectively to situations that involve sexual activity and alcohol use (e.g., Marx, Calhoun, Wilson, & Meyerson, 2001). Research also indicates that the use of active resistance strategies (e.g., fighting, fleeing, and screaming) significantly decreases the odds of a completed rape (see Ullman, 2007, for a review). Programs that provide such information may be used to teach women effective responses to situations that they are likely to encounter when dating or interacting socially with men.

That being said, Gotell (2007, 2008, 2009) and Randall (2010) have criticized that the “privatization” of sexual assault is inextricably tied with the pervasiveness of victim-blaming, whereby putting all the onus on women to take responsibility for navigating their own safety, for managing men’s sexual attention and aggression, and for accurately assessing and avoiding risks. Therefore, additional efforts will need to be directed at eradicating specific misconceptions and rape myths in the public about situations where the complainant’s behaviours may be perceived as “ambiguous” in sexual aggressions. For example, Justice Ducharme, in *R. v. J.R.* [2006], recently refuted the connection between a complainant’s drunkenness and her increased likelihood to engage in intercourse, stating that “while such a belief in the aphrodisiacal powers of alcohol might find a home in some works of pornographic fiction, it does not accord with common sense, common experience or the evidence in

this case” (para. 39). Dispelling these urban myths related to sexual assaults will help establish the credibility of a complainant’s rape claims when they have engaged in behaviours that may be perceived as ambiguous.

Despite the previous discursive discussion, it begs the question of why the legal proceeding continues to impose an especial focus on the complainants to the exclusion of a focus on the perpetrators (Randall, 2010). The bigger questions that legislators and policy makers have to grapple with, therefore, are why there are men who commit acts of sexual (and physical) violence against women, what individual and social circumstances instigate or contribute to this problem, and what can be done to stop this universal problem. Therefore, rather than focusing on the individual victim (or complainant), attention must also be paid to the offender himself, along with the social, political, and cultural contexts that produce the men who perpetrate these acts of sexual aggression.

Limitations and Future Research

Sampling

Study 1 reviewed and analyzed reported judicial opinions from 1992 to 2010 in Canada and Hong Kong. Because a small proportion of all sexual assaults are actually prosecuted at trial (J. Nascou, personal communication, May 13, 2011; see also Frazier & Haney, 1996), it will be important to examine the effects of the variables examined in this study (including complainant-accused relationship, complainant’s sexual history, and complainant’s behaviours prior to the alleged assault) at the earlier phases of the criminal prosecution system. For example, future studies should examine police reports and unreported court documents to examine the characteristics of the cases that were dropped or plea bargained.

One of the factors that limits the generalization of results from Study 2 is the nature of the participants surveyed. In particular, a majority (87%) of the Canadian participants were recruited through the Research Participation System at Simon Fraser University, whereas a majority of the Hong Kong sample was recruited through word-of-mouth (through contacts at the University of Hong Kong), and only 56% of the Hong Kong sample were students. Because participants were not selected by probability sampling, the sample cannot be said to represent the Canadian and

Hong Kong populations at large. Therefore, it will be important to replicate the study findings with a broader range of socio-demographic populations.

In addition, although using an online survey presents many advantages (e.g., convenience and potentially greater candor when responding on a sensitive topic), it may increase sampling bias (Pealer, Weiler, Pigg, Morgan, Miller, & Dorman, 2001) and lower response rates when there is no dedicated sample pool to draw from (as observed in Hong Kong). Therefore, future research should consider recruiting samples in a more systematic manner, and when online samples are used, a comparable sample of in-person participants should be obtained to ensure generalizability of results.

Finally, the rape scenarios themselves were written vignettes and contained only minimal information that was, perhaps, a little abstract (as commented by participants). This is a common criticism of rape attribution research and hinders the generalizability of the results (Monson et al., 2000). Although the use of case vignettes appears to be the methodology of choice in this research area, it is important to consider the degree to which the findings may be dependent on situational variations. In an earlier review, Whatley (1996) noted that there is wide variability in case vignettes, with scenarios ranging from the rape occurring late at night in a park (Bolt & Caswell, 1981) to that occurring in a house in which the victim was babysitting for the attacker (Howells, Shaw, Greasley, Robertson, Gloster, & Metcalfe, 1984). It is difficult to draw unequivocal conclusions from research that does not utilize a consistent methodology. In this dissertation, although the vignettes were fictional, they reflect the real situations depicted in both Canada and Hong Kong's legal judgments and simulate the characteristics of typical sexual assault cases as described in Study 1. However, further research with greater ecological validity in the stories, as well as stories presented in different modalities (e.g., video) and in different settings (e.g., with multiple mock jurors present to simulate a jury trial) is warranted.

Benevolent Sexism

As mentioned, the scale used to measure benevolent sexism had low internal reliability ($\alpha = .60$) for the Hong Kong sample. Past research has indicated that

individuals who score higher on benevolent sexism are more likely to blame complainants of acquaintance rape for falling short of the “ladylike” standard (Abrams et al., 2003; Viki & Abrams, 2002) in order to protect their own belief in a just world (i.e., a world where people tend to get what they deserve; Viki et al., 2004). Because individuals in Hong Kong tend to endorse a higher level of these attitudes and beliefs (Lee et al., 2010), and because this tendency was further supported in Study 2, it was hypothesized that Hong Kong participants would be more likely to acquit on account of their higher level of benevolent sexism than their Canadian counterparts. However, this is not the case. Taken together, such findings suggest that the Western prescription of benevolent sexism may take on a different meaning in Eastern cultures. In particular, although benevolent gender ideologies may promote and maintain gender inequality (Glisk & Fiske, 1996), they may function in accord with the ingrained cultural perception of the paternalistically chivalrous male and the virtuous caretaking female (Lee et al., 2010), and endorsement of benevolent sexism may not affect what kind of women deserve the benevolent protection in Hong Kong. In general, the findings of lower internal consistency of benevolent sexism in Hong Kong (and in African-American populations; Moradi et al., 2004) underlines the importance of examining the psychometric properties and construct validity of any instruments when they are used in different populations. Future research should further examine the relationship between the endorsement of patriarchal beliefs and perception of rape complainants in other cultural samples, or explore other antecedent beliefs that may maintain rape myth endorsement and/or contribute to prejudicial views of sexual assault complainants.

Rape Prevention

As has been noted previously (e.g., Carmody & Washington, 2001), cross-sectional research in this area prevents interpretations in relation to whether attitudes about rape shape the way people attribute accountability and blame or whether reflecting on one’s reasoning about rape leads to an acceptance of certain beliefs and/or challenging those beliefs. In Study 1, participants were more likely to convict when they had first contemplated the items related to rape myths and beliefs associated with stereotypical sex roles. It is conceivable that raising these prejudicial

and stereotypical beliefs to awareness prevented them from negatively influencing participants' perceptions of the complainant. Future study can examine which measure(s), and/or which items, are particularly effective in raising such awareness and what the long-term impacts are. An understanding of these issues, therefore, can help frame how programs of prevention may be implemented.

Considering the significant effects of exposure to attitudinal questionnaires on attitudes towards the complainant and perception of the sexual assaults, it may be important to explicitly raise the consciousness of attributions about rape via rape prevention programs. Rape prevention can take many forms, from changing the environment (e.g., implementing community safety initiatives) to altering responsive behaviours (e.g., self-defense classes or assertiveness training) to programs that target men's attitudes and behaviours. While these initiatives might help prevent stranger rapes, further strategies must be considered for the more prevalent acquaintance rapes. The Departments of Justice in both jurisdictions, the Canadian Resource Centre for Victims for Crime, and Hong Kong's first rape crisis center (RainLily) have promoted and provided rape prevention education programs aimed to develop understanding regarding violence across the varying types of relationships. However, equivocal outcome data were found with regard to changing the attitudes of North American male participants (e.g., Holcombe, Savage, Seehafer, Waalkes, 2002; Jackson & Davis, 2000), and no outcome data are currently available in Hong Kong. In addition, there is little evidence of long-term attitude and behaviour change in male participants after participating in the programs (with the exception of Foubert, 2000, who found continued decline in participants' rape myth acceptance seven months after an initial program, as well as continued decreases in likelihood to rape over the same time period). Foubert's work recommends the need for program inoculation (or booster sessions) to avoid the loss of the program effect and to increase the chance of longer attitude change. However, the absence of consistent results does highlight the need for better development of program content, better forethought with regard to the composition of the group (e.g., including a mix of gender; Holcombe et al., 2002), continued program fidelity check, and sounder program evaluations.

Redefine “Rape” in Hong Kong

Lastly, future policy research could explore whether the legal characterization of rape should be redefined in Hong Kong. In particular, Hong Kong continues to adopt (penile) rape, attempted rape, and indecent assault as the terms used to designate the range of sexual violations against adult women, and s.118(3)(a) of the *Crimes Ordinance* states that a man commits rape if “he has *unlawful sexual intercourse* with a *woman* who at the time of the intercourse does not consent to it [italics added].” This provision, as described in the *Ordinance*, is based on the English legislation that has subsequently been modified in England but remains in its original form in Hong Kong. As critiqued by Warburton, (2004), centralising rape as the primary offence in sexual offences provisions and framing it to exclude other, equally harmful, sexual violations does not represent good practice. Indeed, the focus on (forced) penile-vaginal penetration in sexual offences provisions reflects a historic conceptualization of rape whereby rape provisions were constructed and intended to protect the virginity status of a woman and her (future) husband (Chiu, 2004). Even in contemporary Hong Kong, results from Study 1 suggest that complainants who were virgins were treated differently from complainants who had a sexual reputation. The high value placed on female chastity has therefore contributed to specific cultural understandings and implications of rape in Hong Kong (Tang et al., 2002).

Whilst criminal law reform cannot itself prevent sexual assault, a revised legal framework in Hong Kong could play an important and valuable role in designating culturally acceptable and contemporary standards in relation to the sexual autonomy and physical integrity of women, as well as contribute to countering stereotypes about sexual assault which hinder and frustrate the criminal process. Given the strong cultural reticence towards the topic of sex in general (Chin & Kroesen, 1999), future research should explore whether the change in emphasizing “rape” as an act of violence, not sex, may make it more difficult to invoke rape myths, may help minimize the rape-induced sexual shame experienced by many rape victims and their families in Hong Kong, and may encourage the reporting of sexual violence (especially for incidents where the complainant and her assailant are acquaintances or romantically involved). De-sexualizing rape and reducing it to the crime of assault

may also sensitize law towards the different gender identities of both victim and assailant (as currently Hong Kong law does not recognize same-sex rape or male rape) and also protect the victims from different kinds of sexual assault.

That being said, Sandland (1995) has rightly pointed out that the de-sexualization of sexual assault may neglect the inequality of power existing between the two sexes. In particular,

de-sexualisation as a general strategy is of problematic and uncertain application because sex is not a 'thing' but a relation and so the implementation of a particular approach will impact differently upon the various actors involved ... It can be (and has been) argued forcibly that the de-sexualisation of rape as a strategy fails to consider the very real power differences between men and women. (pp. 35-36)

Therefore, it is always prudent to embed arguments related to sexual assault law within the gender violence / power dynamics. For example, legal reforms proposed by feminists have paid special attention to the definitions of "sexual act" (e.g., Schissel, 1996). In Canada, the sexual assault law implemented in 1983 replaced the crime of rape with a three-tier structure: (sexual) assault; (sexual) assault with a weapon, threats to a third party, or causing bodily harm; and aggravated (sexual) assault. Because it does not provide any specific definition of "sexual act," non-consented vaginal penetration is still not solely considered a serious sexual offence.

Nevertheless, the limitations of criminal law to engender the successful prosecution and conviction of offenders are well documented in the literature (e.g., Campbell, 2008; Gotell, 2007; Sin & Chu, 1998). For example, although sexual assault laws in Canada have been extensively codified for approximately three decades, there still have not been appreciable decreases in the incidence of sexual assault or even significant increases in prosecution and conviction rates (Campbell, Patterson, Bybee, & Dworkin, 2009). In addition, in Hong Kong, despite abolishing the exemption of marital rape in as late as 2002 (see ss. 117(1B) and 118(3A) of the *Crimes Ordinance*), not a single case of marital rape was found in Study 1 even after an exhaustive case search was conducted on the Hong Kong Judiciary website. Legal experts have argued that prevalent stereotypes about rape dominate each stage of the

criminal justice process, hindering prosecution and conviction even when a sound legal framework for sexual offences is in place (e.g., Temkin & Krahé, 2008). As demonstrated in this dissertation, the endorsement of such stereotypes is still evident in the criminal processes on both sides of the Pacific and in the public's psyche.

Notwithstanding the aforementioned critique, however, many commentators argue that law reform still matters (Randall, 2010). For example, the introduction of a more communicative model of consent plays an important role in dismantling persistent stereotypes by establishing appropriate normative standards for the community and legal actors. The introduction and consideration of an affirmative model by other common-law jurisdictions such as Canada provides an ideal platform for law reform initiations in Hong Kong (see the next *Law Reform* section for further details). Such reforms will come at an especially opportune juncture because, under the Basic Law's Articles 5 and 8, the common law system will continue in the postcolonial era of Hong Kong for another 50 years (until 2047), and the current government is in a state of flux endeavouring to localize its legal system (Ghai, 1999; Wesley-Smith, 1999). The introduction of such provisions in Hong Kong would mark the "seriousness" of sexual assault and at the same time articulate a more contemporary value system that could govern sexual relations and the autonomy of women in the region.

Finally, although the foregoing recommendations (related to the consideration and incorporation of Western legal reforms in Hong Kong) may be criticized by politicians as failing to consider the cultural relevance of the current statutes in Hong Kong (Chiu, 2004), reforms of sexual assaults could create the opportunity to remove and replace the colonial origins of the previous law, which was not, in and of itself, reflective of local and contemporary culture. Furthermore, the reforms could acknowledge and reinforce the important role of the government in shaping the changing values of Hong Kong and re-defining the limits of acceptable behaviours. For example, with the enactment of the *Bill of Rights Ordinance* (Cap. 383) in 1991, Hong Kong started to move towards an era of promoting sexual justice, including the decriminalization of same-sex sodomy (e.g., *Leung William Roy v. Secretary for Justice*, 2005). Coupled with a renewed emphasis in the region on the impact of, and

the need to prevent, gender-based violence and public commitment to reform sexual offences provisions (Chiu, 2011; *HKSAR v. Leung Chi Kei*, 2008; Tang et al., 2002), future studies and policy research in Hong Kong could harness the timeliness of the transition and explore the utility of adopting the aforementioned changes in Hong Kong.

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APPENDIX A

Vignette

Members of the jury panel, welcome. The accused, [William Edward Chase / Chung Wai-Hong, William], is charged with [sexual assault / rape] of [Ms. A. Smith / Ms. A. Li] on June 26, 2010 in or near [the City of Vancouver, British Columbia / Mongkok, Hong Kong], contrary to [Section 271 of the Criminal Code / Section 118 of the Crime Ordinance]. The accused has pleaded not guilty. Your duty will be to consider the evidence and, in the end, decide whether the accused is guilty or not guilty.

Summary of the Evidence

The alleged event occurred on the evening of June 26, 2010, at a residence near [Oscar's Café / Oscar's Pub]. Although the complainant and the accused each testified that sexual intercourse occurred on the night in question, Mr. Chase claimed that the sex was consensual, whereas Ms. Smith claimed that it was not.

The basic trial testimony indicates that the two had met through friends and met subsequently on several occasions to study together, where they went on “study dates.” On the night of June 26, 2010, they attended a mutual friend’s party, and they each testified that they spent much of their time at the party together, talking about mutual interests. Ms. Smith further testified that there were a number of things done and said by herself at the party that she admitted could be described as “flirtatious.” For example, about 10 minutes after Mr. Chase’s arrival at around 9 p.m., they began to engage in intense conversation. Ms. Smith admitted that she thought Mr. Chase was “a good looking guy” and that she was highly interested in him. An unknown photographer took various candid photographs of the guests at the party which were tendered as evidence. Several photos showed that Ms. Smith and Mr. Chase engaged in conversation in close proximity and made non-sexual physical contact, providing some objective corroborative evidence of flirtation by both the complainant and the accused.

After the party, [Mr. Chase asked Ms. Smith / Ms. Smith asked Mr. Chase] to go for [coffee / a drink]. At the [café / pub], they reportedly enjoyed each other’s company, and they both continued to “flirt.” When the [café / pub] closed, Mr. Chase offered to walk Ms. Smith to her residence. When they arrived, [Mr. Chase / Ms. Smith] suggested that [s/he] did not want the night to end, and they decided to continue the evening at Ms. Smith’s residence. At the apartment, they [consumed a bottle of wine and] discussed future plans and the possibility of dating. [Mr. Chase / Ms. Smith] then leaned over to kiss [Ms. Smith / Mr. Chase]. Although both testified that they started to kiss, their stories began to diverge with respect to the events that followed. Ms. Smith testified that she felt tired [and really tipsy] and went to lie down in her bedroom. Mr. Chase then reportedly got undressed and followed her into the bedroom. Ms. Smith testified that she told Mr. Chase that she was “not interested in going all the way” and asked him to stop fondling her. However, Mr. Chase tore off her blouse and pulled down her pants. Ms. Smith stated that it was only after resisting

to the point of extreme fatigue that she stopped resisting, at which point Mr. Chase penetrated her. She further maintained that she did not provide consent.

On the other hand, Mr. Chase testified that Ms. Smith asked him to enter the bedroom with her where they had consensual sexual intercourse. He maintained that Ms. Smith was a willing participant, and that he could provide specific examples (e.g., she pulled him on top of her, and she lifted her hips when he was removing her pants) that support his belief that she was consenting. He also described specific words and actions on the part of the complainant that led him to believe that she was consenting.

In the closing statements, the prosecution suggested that the reason why Ms. Smith delayed reporting the incident to police for a week was because she was feeling ashamed and embarrassed about the incident and did not want to face the accused again. The defence counsel suggested that Ms. Smith alleged that it was [sexual assault / rape] due to feelings of guilt and regret about having a one-night stand. Although corroboration is no longer required in this kind of crime, it is always helpful for the Court to look at all surrounding facts to determine whether they fit the theory of the crime. In this case, we have a missing button that could be corroborative of the version whereby the accused "ripped off" the complainant's blouse. A bruise was also found on Ms. Smith's right inner thigh. On the other hand, the defence's theory was that these evidence could be explained by actions that had occurred in the heat of passion.

APPENDIX B

Jury's Direction [Canada]

You must find the accused not guilty of sexual assault unless the Crown has proved beyond a reasonable doubt that the accused is the person who committed the offence on the date and in the place described in the indictment. Specifically, the Crown must prove each of the following essential elements of the offence beyond a reasonable doubt:

1. that the accused had sex with Ms. Smith;
2. that Ms. Smith did not consent to the sexual act
3. that the accused knew that Ms. Smith did not consent to the sexual act

Unless you are satisfied beyond a reasonable doubt that the Crown has proved all these essential elements, you must find the accused not guilty of sexual assault. If you are satisfied beyond a reasonable doubt of all these essential elements, and you have no reasonable doubt after considering the defence about which I will instruct you, you must find the accused guilty of sexual assault.

The accused's position is that he was unaware that Ms. Smith did not consent. In fact, it is his position that he honestly believed that Ms. Smith consented to the sexual intercourse in question. A belief is a state of mind, in this case, the accused's state of mind. To determine whether the accused honestly believed that Ms. Smith consented, you should consider all the circumstances surrounding that activity. Further, the accused's belief that Ms. Smith consented to the sexual activity must be an honest belief. An honest belief cannot be based on the accused's intoxication. There is no honest belief if the accused saw a risk that Ms. Smith would not consent to the physical contact, but went ahead anyway despite that risk. Similarly, there can be no honest belief if the accused was aware of indications that Ms. Smith did not consent, but deliberately chose to ignore them because the accused did not want to know the truth. Nor can there be an honest belief in Ms. Smith's consent to the physical contact unless the accused took reasonable steps in the circumstances known to the accused at the time to find out whether Ms. Smith consented.

The accused's belief must be honest and reasonable to him, but it *does not* have to be reasonable to you, the juror. That is, you should consider whether there were reasonable grounds for the accused's belief that she had consented. The presence or absence of reasonable grounds may help you decide whether the accused's belief was honest.

Look at all the circumstances in deciding this issue. Do not focus on only one and ignore the rest. Again, unless you are satisfied beyond a reasonable doubt that the accused knew that Ms. Smith did not consent or that he did not honestly believe that she consented to the physical contact in question, you must find the accused not guilty.

APPENDIX C

Jury's Direction [Hong Kong]

A man commits rape if he has sexual intercourse with a woman who at the time does not consent to it and, if at the time he has sexual intercourse with her, either he knows that she does not consent to it, or is reckless as to whether she consents to it.

Sexual intercourse is penetration by a man's penis into a woman's vagina. The slightest degree of penetration is enough, and it is not necessary to prove that ejaculation took place.

Before you may convict the accused, you have to be sure of each of the following matters:

1. that the accused had sexual intercourse with Ms. Smith;
2. that at the time of that act of sexual intercourse, Ms. Smith did not consent to it; and
3. that at the time of sexual intercourse, either the accused knew that Ms. Smith did not consent or was reckless as to whether she consented to sexual intercourse.

The accused was reckless as to whether Ms. Smith consented to sexual intercourse if you are sure that he knew that there was a risk that she was not consenting and carried on anyway or when in the circumstances known to him it was unreasonable to do so.

However, if it is or may be the case that the accused believed that she was consenting, then he cannot be guilty of rape. It is not for the accused to prove that he believed that she was consenting; rather, it is for the prosecution to prove, so that you are sure, that he did not believe that she was consenting to sexual intercourse. And what if he held that belief but was mistaken? Well, if it is or may be the case that he held a genuine but mistaken belief that she was consenting, then you must acquit him. In deciding whether or not he believed or may have believed that she was consenting, you should have regard to the existence or absence of reasonable grounds for such a belief, and to all the surrounding circumstances. But the question must always be whether you are sure that he himself did not hold such a belief.

APPENDIX D

Ambivalent Sexism Inventory (ASI)

- | 1 | 2 | 3 | 4 | 5 | 6 | 7 |
|----------------------|----------|--------------------|---------|-----------------|-------|-------------------|
| Strongly
Disagree | Disagree | Mildly
Disagree | Neutral | Mildly
Agree | Agree | Strongly
agree |
1. No matter how accomplished he is, a man is not truly complete as a person unless he has the love of a woman. (B(I))
 2. Many women are actually seeking special favours, such as hiring policies that favour them over men, under the guise of asking for “equality.” (H)
 3. *In a disaster, women ought not necessarily to be rescued before men.* (B(P))
 4. Most women interpret innocent remarks or acts as being sexist. (H)
 5. Women are too easily offended. (H)
 6. *People are often truly happy in life without being romantically involved with a member of the other sex.* (B(I)).
 7. *Feminists are not seeking for women to have more power than men.* (H)
 8. Many women have a quality of purity that few men possess. (B(G))
 9. Women should be cherished and protected by men. (B(P))
 10. Most women fail to appreciate fully all that men do for them. (H)
 11. Women seek to gain power by getting control over men. (H)
 12. Every man ought to have a woman whom he adores. (B(I))
 13. *Men are complete without women.* (B(I))
 14. Women exaggerate problems they have at work. (H)
 15. Once a woman gets a man to commit to her, she usually tries to put him on a tight leash. (H)
 16. When women lose to men in a fair competition, they typically complain about being discriminated against. (H)
 17. A good woman should be set on a pedestal by her man. (B(P)).
 18. *There are actually very few women who get a kick out of teasing men by seeming sexually available and then refusing male advances.* (H)
 19. Women, compared to men, tend to have a superior moral sensibility. (B(G))
 20. Men should be willing to sacrifice their own well being in order to provide financially for the women in their lives. (B(P))
 21. *Feminists are making entirely reasonable demands of men.* (H)
 22. Women, as compared to men, tend to have a more refined sense of culture and good taste. (B(G))

H = Hostile Sexism

B = Benevolent Sexism

P = Protective Paternalism

G = Complementary gender differentiation

I = Heterosexual Intimacy

Italicized = reversed items

APPENDIX E

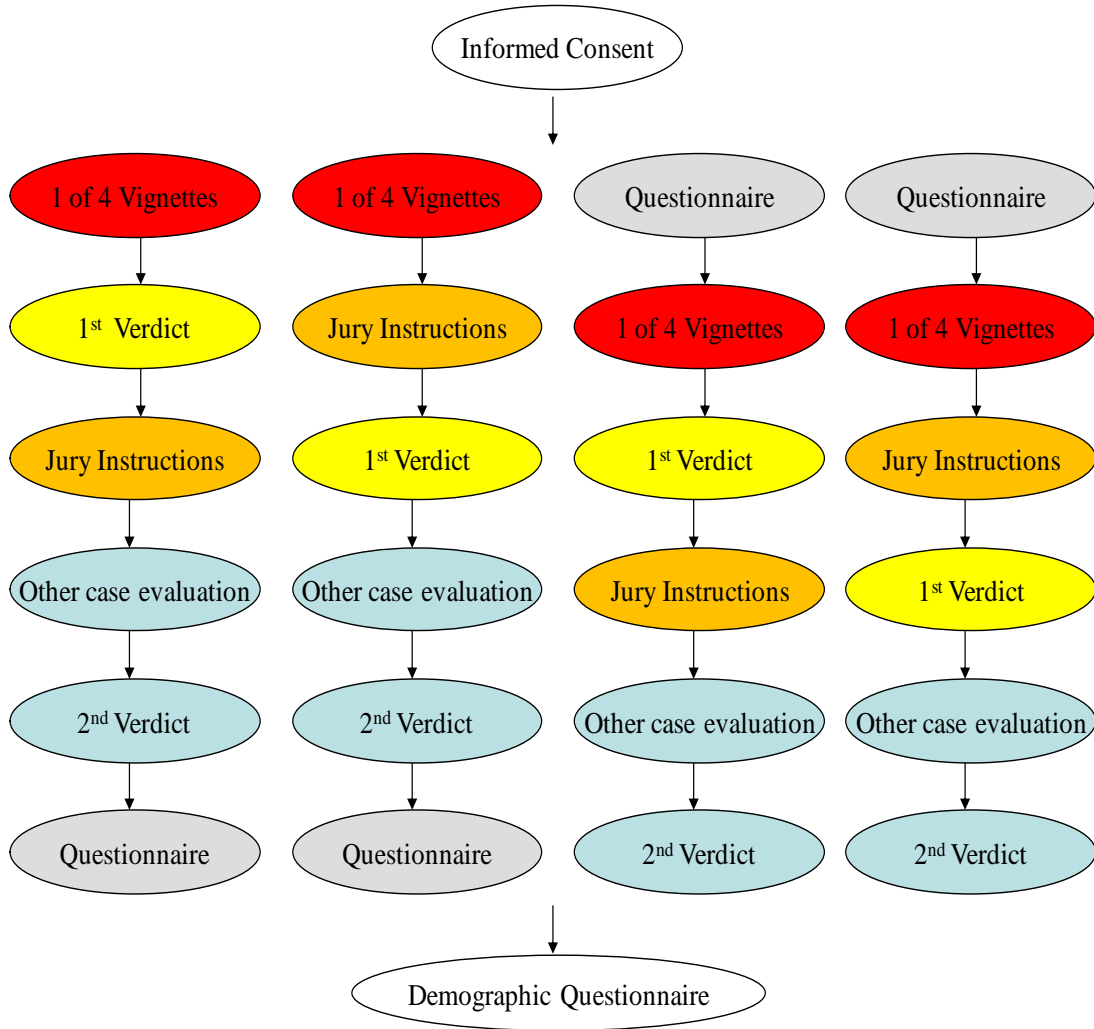
Illinois Rape Myth Acceptance Scale (IRMAS)

1	2	3	4	5	6	7
Strongly Disagree	Disagree	Mildly Disagree	Neutral	Mildly Agree	Agree	Strongly agree

1. If a woman is raped while she is drunk, she is at least somewhat responsible for letting things get out of control
2. Although most women wouldn't admit it, they generally find being physically forced into sex a real "turn-on".
3. If a woman is willing to "make out" with a guy, then it's no big deal if he goes a little further and has sex.
4. Many women secretly desire to be raped.
5. Most rapists are not caught by the police.
6. If a woman doesn't physically fight back, you can't really say that it was rape.
7. Men from nice middle-class homes almost never rape.
8. Rape accusations are often used as a way of getting back at men.
9. All women should have access to self-defense class.
10. It is usually only women who dress suggestively that are raped.
11. If the rapist doesn't have a weapon, you really can't call it a rape.
12. Rape is unlikely to happen in the woman's own familiar neighbourhood.
13. Women tend to exaggerate how much rape affects them.
14. A lot of women lead a man on and then they cry rape.
15. It is preferable that a female police officer conduct the questioning when a woman reports a rape.
16. A woman who "teases" men deserves anything that might happen.
17. When women are raped, it's often because the way they said "no" was ambiguous.
18. Men don't usually intend to force sex on a woman, but sometimes they get too sexually carried away.
19. A woman who dresses in skimpy clothes should not be surprised if a man tries to force her to have sex.
20. Rape happens when a man's sex drive gets out of control.

APPENDIX F

Study Procedure



APPENDIX G

Study's URLs

For each location, participants were assigned to each of the 16 conditions based on their date of birth date as follows:

- 1, 17 – vignette → questionnaire / alcohol / complainant / jury instruction → 1st verdict (<http://websurvey.sfu.ca/survey/64950096>)
- 2, 18 – vignette → questionnaire / no alcohol / complainant / jury instruction → 1st verdict (<http://websurvey.sfu.ca/survey/71167659>)
- 3, 19 – vignette → questionnaire / alcohol / accused / jury instruction → 1st verdict (<http://websurvey.sfu.ca/survey/71174871>)
- 4, 20 – vignette → questionnaire / no alcohol / accused / jury instruction → 1st verdict (<http://websurvey.sfu.ca/survey/71180187>)
- 5, 21 – vignette → questionnaire / alcohol / complainant / 1st verdict → jury instruction (<http://websurvey.sfu.ca/survey/71191867>)
- 6, 22 – vignette → questionnaire / no alcohol / complainant / 1st verdict → jury instruction (<http://websurvey.sfu.ca/survey/71205200>)
- 7, 23 – vignette → questionnaire / alcohol / accused / 1st verdict → jury instruction (<http://websurvey.sfu.ca/survey/71212926>)
- 8, 24 – vignette → questionnaire / no alcohol / accused / 1st verdict → jury instruction (<http://websurvey.sfu.ca/survey/71221083>)
- 9, 25 – questionnaire → vignette / alcohol / complainant / jury instruction → 1st verdict (<http://websurvey.sfu.ca/survey/71238595>)
- 10, 26 – questionnaire → vignette / no alcohol / complainant / jury instruction → 1st verdict (<http://websurvey.sfu.ca/survey/71240896>)
- 11, 27 – questionnaire → vignette / alcohol / accused / jury instruction → 1st verdict (<http://websurvey.sfu.ca/survey/71254342>)
- 12, 28 – questionnaire → vignette / no alcohol / accused / jury instruction → 1st verdict (<http://websurvey.sfu.ca/survey/71267338>)
- 13, 29 – questionnaire → vignette / alcohol / complainant / 1st verdict → jury instruction (<http://websurvey.sfu.ca/survey/71273459>)
- 14, 30 – questionnaire → vignette / no alcohol / complainant / 1st verdict → jury instruction (<http://websurvey.sfu.ca/survey/71281397>)
- 15, 31 – questionnaire → vignette / alcohol / accused / 1st verdict → jury instruction (<http://websurvey.sfu.ca/survey/71298402>)
- 16 – questionnaire → vignette / no alcohol / accused / 1st verdict → jury instruction (<http://websurvey.sfu.ca/survey/71304789>)

For example, if the participant was born on October 1, she first reviewed the vignette involving an inebriated complainant who initiated the sexual interaction between herself and the accused. The participant also read the jury instructions before submitting the first verdict. Finally, she completed the questionnaires (e.g., Illinois Rape Myth Acceptance Scale).

Alternatively, if the participant was born on October 16, he first completed the questionnaires. Then, he reviewed the vignette that involved a sexual encounter that was initiated by the accused and involved no alcohol. The participant also provided the first verdict before reading the jury instructions.