Despite progressive law reforms, sexual assault complainants continue to experience the criminal justice response to the violations they have suffered as unsatisfactory, if not traumatic. One emerging response to this dilemma involves greater consideration of the ethical boundaries imposed on lawyers that practice sexual assault law. What is the relationship between a criminal lawyer’s ethical duties and the reforms to the law of sexual assault in Canada? How do lawyers themselves understand the ethical limits imposed on their conduct of a sexual assault case? How do lawyers that practice in this area of law comprehend their role in the criminal law’s response to sexual harm? What is their sense of professionalism when acting in this capacity? If reforms to the law of sexual assault will not alone result in significant improvements to the experience of sexual assault complainants, perhaps greater focus on the ethics of sexual assault lawyering could improve the legal response to sexual harm. While the body of legal scholarship examining the issue of sexual violence has grown substantially in the past several decades, there has been very little research on the perspectives of criminal lawyers themselves. This is the first research aimed specifically at ascertaining how sexual assault lawyers understand their ethical obligations. Through analysis of semi-structured, in-depth interviews with experienced criminal defence lawyers and crown attorneys across Canada, this research aims to provide insight into the ethical identity of sexual assault lawyers.
soit sensiblement étoffée, les recherches demeurent toutefois encore rares en ce qui a trait aux perspectives des criminalistes eux-mêmes. Il s'agit là de la première recherche visant spécifiquement à déterminer de quelle manière les avocats exerçant dans ce domaine comprennent la portée de leurs obligations éthiques. Au moyen d'analyses d'entrevues en profondeur semi-dirigées avec des procureurs de la défense et de la Couronne aguerris dans l'ensemble du Canada, cet article dresse un portrait de l'identité éthique des avocats spécialisés en matière d'agressions sexuelles.

Canada, this article presents a portrait of the ethical identity of sexual assault lawyers.
# CONTENTS

The Ethical Identity of Sexual Assault Lawyers

*Elaine Craig*

I. Introducing the Portrait 77

II. Methodology 82

III. Role-Differentiated Morality 85
   A. The Primary Objectives Identified by the Lawyers Differed 89
   B. Primarily Lawyer-Controlled Decision-Making 91
   C. Statements Consistent with the Hired Gun Model 95

IV. Role-Differentiated Thinking 96
   A. Refusal to Know 97
   B. Insistence on Innocence 100
   C. Possible Functions of Role-Differentiated Thinking 102

V. Individual Incongruity and Intra-Professional Diversity 107
   A. Individual Incongruity 107
   B. Intra-Professional Diversity 112

VI. Reluctance to Label Conduct Unethical 115

VII. Conclusions and Recommendations 119
The Ethical Identity of Sexual Assault Lawyers

Elaine Craig*

I. INTRODUCING THE PORTRAIT

Studying sexual assault lawyers is much easier than practicing sexual assault law. Not only is the important work of sexual assault lawyers personally taxing and frequently thankless, these members of the legal profession are sometimes unfairly vilified for the legal services that they provide.¹ At the same time, members of the criminal defence bar have been rightly criticized for perpetuating a “whack the complainant strategy” that discourages victims of sexual violence from coming forward, and traumatizes those that do report sexual offences.²

¹ One of the most well-known examples of this type of vilification involved public statements by then Alberta cabinet minister Stockwell Day. In a public letter to the Red Deer Advocate, Day asserted that defence lawyer Lorne Goddard must himself believe in the right to possess child pornography because he made Charter arguments in defence of an individual accused of possessing child pornography. See Goddard v Day, 2000 ABQB 942, 194 DLR (4th) 559. Day eventually settled a defamation suit brought by Goddard as a result of the letter.

² See Elizabeth Comack & Tracey Peter, “How the Criminal Justice System Responds to Sexual Assault Survivors: The Slippage between ‘Responsibilization’ and ‘Blaming the Victim’” (2005) 17:2 CJWL 283 at 297–98, citing Cristin Schmitz, “‘Whack’ Sexual Assault Complainant at Preliminary Hearing”, The Lawyers Weekly (27 May 1988) 22 (“[W]hack the complainant hard’ at the preliminary inquiry. . . . ‘Generally, if you destroy the complainant in a prosecution . . . you destroy the head. . . . [Y]ou’ve got to attack the complainant with all you’ve got. . . .’” at 22); Lise Gotell, “The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault

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Beginning in the late 1970s, sexual assault law in Canada underwent nearly three decades of significant renovation. Today, the substantive law of sexual assault in Canada is among the most progressive in the world. Unfortunately, law reform efforts have failed to repair what remains a dysfunctional legal response to a prolific social problem. Conviction rates for sexual assault in Canada decreased during this thirty-year period of reform. Although reporting rates increased in the years immediately following the initial changes, they too have begun to decrease. Indeed, reporting rates for sexual assault remain dramatically lower than for other violent offences and attrition rates are dramatically higher. While notoriously difficult to

3 For example, the requirement that juries be warned about the perils of relying on a sexual assault complainant’s uncorroborated testimony was eliminated. See Criminal Law Amendment Act, 1975, SC 1974–75–76, c 93, s 8); the evidentiary rules relating to delayed disclosure were changed. See Criminal Code, RSC 1985, c C-46 [Code] (“[t]he rules relating to evidence of recent complaint are hereby abrogated”, s 275); R v DD, 2000 SCC 43, [2000] 2 SCR 275); a new statutory approach involving a three-tiered sexual assault regime was introduced in 1982. For a discussion of this new regime, see Christine Boyle, Sexual Assault (Toronto: Carswell Company Limited, 1984); the admissibility of evidence of prior sexual history was limited (see Code, s 276; R v Seaboyer (1987), 61 OR (2d) 290, 37 CCC (3d) 53); an affirmative definition of consent was adopted. See R v Ewanchuk, [1999] 1 SCR 330, 169 DLR (4th) 193; Code, ss 273, 273.2.

4 In the United Kingdom, for example, the marital rape exemption was not eliminated until 1991 (R v R (1991), [1992] 1 AC 599 (HL (Eng)); the rule requiring corroboration of a woman’s testimony was not eliminated until 1994; and the evidentiary rules regarding prior sexual history in the United Kingdom continue to presumptively permit evidence of sexual activity between a complainant and an accused (R v A (No 2)), [2001] UKHL 25. For commentary questioning whether reforms in Canada went too far in favour of the complainant, such that an accused’s right to due process could be threatened. See Don Stuart, “Ewanchuk: Asserting “No Means No” at the Expense of Fault and Proportionality Principles” (1999) 22 CR (5th) 39; Don Stuart, “The Pendulum Has Been Pushed Too Far” (1993) 42 UNBLJ 349.

5 Kathleen Daly & Brigitte Bouhouns, “Rape and Attraction in the Legal Process: A Comparative Analysis of Five Countries” in Michael Tonry, ed, Crime and Justice: A Review of Research, vol 39 (Chicago: University of Chicago Press, 2010) 565 at 568 (finding a significant decrease in Canada in the overall rate of conviction for sexual offences when comparing 1970–89 with 1990–2005. The researchers did note that the types of allegations changed between these two periods—for example, there were less stranger rape cases in the latter period—in ways that may have affected these rates).

6 Ibid at 581(finding that reporting rates in Canada increased in the 1980s, peaked in the early 1990s and have decreased significantly since then (by 25% between 1996 and 2010)).

7 National Victims of Crime Awareness Week, Measuring Violence Against Women, online: <www.victimsweek.gc.ca> (indicating that less than 10% of sexual assaults are reported to police).

8 See Holly Johnson, “Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault” in Elizabeth A Sheehy, ed, Sexual Assault in Canada: Law,
measure, rates of sexual victimization do not appear to have diminished as a consequence of these reforms.\(^9\) Perhaps most importantly, sexual assault complainants continue to experience the criminal justice response to the violations that they have suffered as unsatisfactory, if not traumatic.\(^10\)

Legal commentators continue to identify defence counsel conduct that may contribute to these negative experiences.\(^11\) The reasons why these reforms have failed to increase reporting rates, decrease rates of victimization, and better serve the needs of complainants are complicated, multifaceted, and in some respects extend well beyond what can be achieved through law.\(^12\)

Nevertheless, it remains important to ask what can be done to improve the legal response to the problem of sexual harm, without unduly compromising the constitutional interests of those accused of sexual offences. One emerging response to this dilemma involves greater consideration of the ethical boundaries imposed on lawyers that practice sexual assault law.\(^13\) What is the relationship between a criminal lawyer’s ethical duties

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\(^10\) Mary P Ross, “Restoring Rape Survivors: Justice, Advocacy, and a Call to Action” (2006) 1087 Ann NY Aca Sci 206 at 218–22 (summarizing research in several countries including Canada that reveals the re-traumatization experienced by sexual assault victims through participation in the criminal justice process). See “Sexual-Assault Victims Lack Confidence in Justice System, Study Finds”, *CBC News* (15 November 2014) online: <www.cbc.ca> (discussing one of the most recent Canadian studies indicating that victims of sexual assault lack faith in the judicial system and that this is a common reason why they do not report the abuse); See also Bruce Feldhusen, Olena Hankivsky & Lorraine Greaves, “Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse” (2000) 12 CJWL 66.


\(^12\) See Jennifer Temkin & Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Oxford: Hart Publishing, 2008); See Lucinda Vdervort, “Sexual Consent as Voluntary Agreement: Tales of ‘Seduction’ or Questions of Law?” (2013) 16:1 New Crim L Rev (arguing that popular narratives about seduction and stranger rape have impoverished legal analysis leading to problematic outcomes such as failure to report and failure to enforce the law).

and these significant reforms to the law of sexual assault in Canada? How should professionalism and the ethical obligations owed by a lawyer limit their conduct of a sexual assault case?

In previous work, I advanced the claim that, at a minimum, lawyers are ethically obligated to restrict their carriage of a sexual assault case to conduct that supports findings of fact within the bounds of law. In other words, defence counsel should be ethically precluded from using strategies and advancing arguments that rely, for their probative value, on stereotypes or social assumptions about sexual violence that have been legally rejected through law reform.

This article examines how lawyers themselves understand the ethical limits imposed on their conduct of a sexual assault case. How do lawyers that practice in this area of law comprehend their role in the criminal law’s response to sexual harm? What is their sense of professionalism when acting in this capacity? If reforms to the law of sexual assault will not alone result in significant improvements to the experience of sexual assault complainants, perhaps greater focus on the ethics of sexual assault lawyering could improve the legal response to sexual harm. In part, such focus will require an increased understanding of how lawyers themselves understand their ethical obligations in the context of sexual assault cases. The purpose of this study is to contribute to that understanding.

Literature examining the ethical identity of professionals characterizes identity as “a relatively stable and enduring constellation of attributes, beliefs, values and motives and experiences in terms of which people define themselves in a professional role.” Professionals are thought to manifest this ethical identity through the decisions they make when confronted with ethical quandaries. According to some identity theorists, the relative salience of professional identities—that is the likelihood that an identity will be invoked across either a range of situations or a variety of individuals in a particular situation—is a consequence of “how embedded the role or set of roles is in the group that provides context for the meanings and expect-

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14 Craig, supra note 13.
15 Ibid.
The Ethical Identity of Sexual Assault Lawyers

ations associated with the role.\textsuperscript{18} The more entrenched the role is in the group, the greater the individual commitment to that identity.\textsuperscript{19} This notion of identity salience may be of particular significance to a professional group such as the criminal defence bar. Criminal lawyers are thought to have an established, readily identifiable, and extremely embedded set of roles.\textsuperscript{20}

While the body of legal scholarship examining the issue of sexual violence has grown substantially in the past several decades, there has been very little research on the perspectives of criminal lawyers themselves.\textsuperscript{21} This is the first research aimed specifically at ascertaining how sexual assault lawyers understand their ethical obligations. Through an analysis of semi-structured, in-depth interviews with experienced criminal defence lawyers and Crown Attorneys across Canada this article presents a portrait of the ethical identity of sexual assault lawyers. Some of the themes identified are consistent with the conclusions already drawn by legal ethicists or those within feminist discourse, while others offer new insights. In the main, the article is presented in an effort to raise questions and offer suggestions for further research. This study is not intended to make generalizable claims about the ethical identity of all criminal lawyers, nor that of all sexual assault lawyers. As is often the case with qualitative research, its objective is to examine the particular and to generate new areas of inquiry through the identification of common themes.\textsuperscript{22} The qualitative

\textsuperscript{18} H Gunz & S Gunz, supra note 16 at 856, drawing on the work of Stryker & Burke, supra note 17 at 289.

\textsuperscript{19} Ibid.


\textsuperscript{21} The author is aware of only two such empirical studies in the Canadian context: Ruth Lazar, “Negotiating Sex—The Legal Construct of Consent in Cases of Wife Rape in Canada” (2011) 22:2 CJWL 329 (her study included interviews with 32 Ontario lawyers on the issue of marital rape); Department of Justice Canada, Words Are Not Enough: Sexual Assault: Legislation, Education and Information, Bills C-49 and C-46 Key Informant Study, Final Report, by Renate M Mohr (Ottawa: Department of Justice Canada, March 2002) (her study on the impact of legislation regarding the use of prior sexual history (Bill C-49) and third-party record disclosure (Bill C-46) included 32 interviews with lawyers, judges, police officers, and third-party record keepers; on file with author). Neither of these two Canadian studies asked questions about, or focused on, legal ethics or ethical identity. See also Jennifer Temkin, “Prosecuting and Defending Rape: Perspectives From the Bar” (2000) 27:2 JL & Soc’y 219 (involving a UK study which interviewed 10 barristers with extensive experience in sexual assault cases).

\textsuperscript{22} See Jennifer Mason, Qualitative Researching, 2nd ed (London, UK: Sage, 2002) [Mason, Qualitative] (“[qualitative research can reveal] the strategic significance of context, and of the particular, in the development of our understandings and explanations of the social world” at 1). See also Alan Bryman, Quantity and Quality in Social Research (London, UK: Sage, 2008).
knowledge gained from these interviews does raise a number of important issues regarding the practice of sexual assault law. The themes that emerged across participant interviews offer insights into the ways in which these particular lawyers understand their professional roles and sense of self in the context of what is very difficult work. The interviews also reveal disagreement between these sexual assault lawyers about key aspects of their practices, ethical limits, and professional roles.

The article proceeds in six parts. Part II involves a description of the methodology used to conduct the study. Following this, Part III discusses of the role of morality in the legal profession. Several of the lawyers interviewed offered statements that seemed inconsistent with the concept of role-differentiated morality. Building on this exploration of role morality, Part IV examines the notion of role-differentiated thinking revealed in many of the interviews and discusses its possible relationship to the ethical identity of sexual assault lawyers. Part V reviews the many examples of both individual incongruity and intra-professional diversity that emerged from these discussions with participants about the ethical obligations of sexual assault lawyers. Observations regarding these inconsistencies are important because they disrupt the assumption that the professional role of the criminal defence lawyer is settled, fully embedded, or incontrovertible. The final theme, which is discussed in Part VI, involves the tendency on the part of the participant lawyers to discuss legal ethics primarily in broad strokes, as well as a notable reluctance to label specific conduct or strategies as unethical. Following this, the last section of the paper considers the direction for future research and the potential recommendations that flow from this study.

II. METHODOLOGY

The discussion below is based on data collected from 20 semi-structured interviews with experienced criminal lawyers in four Canadian provinces (British Columbia, Ontario, Nova Scotia, and Newfoundland). In qualitative research of this nature, the size of the sample is not intended to be statistically representative of the total population. The aim is to achieve a sample large enough, and with enough diversity, to generate sufficient data upon which comparisons can be made and potential explanations produced. See Mason, *Qualitative, supra*. "[a sample] should be large enough to make meaningful comparisons in relation to your research questions, but not so large as to become so diffuse that a detailed and nuanced focus on something in particular becomes impossible" at 136).
The Ethical Identity of Sexual Assault Lawyers

Sampling was used, based on length of practice and experience with sexual assault files. Lawyers with ten or more years of experience were interviewed, with the majority having practiced for between 25 and 45 years. All of the lawyers interviewed had extensive practice experience in the area of sexual assault law. Length and type of practice were key criterion because of the study’s focus on the relationship between reforms to the law of sexual assault and the ethical identity of sexual assault lawyers. The sample was not intended to be representative of all lawyers or even all criminal lawyers. The objective was to interview lawyers who had at least some pre-reform practice experience. This experience made it possible to ask them to reflect on the impact of major reforms to this area of law, many of which occurred 15 or more years ago. However, it also means that the themes identified in the study are not generalizable to younger generations of lawyers. One area of future inquiry might involve examining potential differences between how newer and more experienced criminal lawyers understand their ethical obligations when conducting a sexual assault trial.

Fifteen of the lawyers interviewed had defence practices at the time of the interview and five were working as Crown Attorneys. Nine of the participants identified as women and the remaining 11 identified as men. Many of the lawyers interviewed had experience with both prosecuting and defending criminal cases. An initial list of potential participants was compiled on the basis of recommendations provided by personal contacts in each province. Lawyers were sent an approach letter, via email, outlining the study and requesting their participation. Initial participants were asked to nominate further contacts in their field.

These contacts were also sent approach letters.

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24 Purposive sampling refers to the notion that research participants are selected based on a known set of criterion. In this case participants were selected by length and type of practice experience. See Jane Ritchie, Jane Lewis & Gillian Elam, “Designing and Selecting Samples” in Jane Ritchie & Jane Lewis, eds, Qualitative Research Practice: A Guide for Social Science Students and Researchers (London, UK: Sage, 2003) 77.

25 For a discussion on the utility of strategic or purposive sampling in qualitative research, see Mason, Qualitative, supra note 22 (“the sample is designed to encapsulate a relevant range in relation to the wider universe, but not to represent it directly” at 124 [emphasis in original]).

26 This sampling method, referred to as snowballing or chain sampling, obviously risks compromising the diversity of the sample frame. To respond to this frailty, participants were given selection criteria (length of practice, willingness to reflect on their practice, and experience with sexual assault cases) and asked to identify individuals who were dissimilar to them in some respect (i.e. different career trajectory; different type of caseload). See Ritchie, Lewis & Elam, supra note 24.
Interviews, which were conducted between March, 2014 and February, 2015, were tape-recorded and lasted approximately 90 to 120 minutes. A transcript of each interview was created. The interviews were semi-structured in order to achieve flexibility without sacrificing the opportunity for comparison between interviews. Participants were asked to provide background information on the nature of their practice and to reflect upon the following areas of inquiry: the relationship between their practice and law reforms over the past several decades; changes to their trial practices and strategies in response to legal reforms; their understanding of the ethical duties owed by criminal defence lawyers; their perspectives regarding the impact that social assumptions about sex, gender, race, and socioeconomic status have on sexual assault proceedings; and, more broadly, their recommendations on ways that the criminal law response to sexual harm could be improved.

Interview transcripts were coded and analyzed manually. An initial open coding was undertaken, in which themes were permitted to emerge freely. Following this initial phase, a list of themes was identified. These themes were ultimately organized into a coding structure involving 32 categories. After the coding structure was developed, thematic coding and detailed analysis were conducted anew on all transcripts. After both phases of manual coding and analysis were completed, a computer-assisted qualitative data analysis program (NVIVO) was used to further identify connections and strands of similarity in the data.

The lawyers who participated in this study were generous with both their time and insights. The most general observation gleaned from the interviews conducted with defence counsel was that the majority of these lawyers are strongly committed to a particular vision of procedural justice and very much guided by a dedication to fulfilling their understanding of their role in the criminal justice process. Moreover, many of them, as is unsurprising, articulated great concern for the harm caused by non-consensual sex. Consider, for example, these comments from Defence Lawyer 3:

Maybe I’m wrong, but I think there’s an epidemic of sexual violence against women and children that the world is largely silent to. For those people who are inherently skeptical about these claims, I’m not sure that they get how pervasive sexual violence is, and how trying and difficult it would be, assuming the allegation was true, to come forward.

27 See generally King & Horrocks, supra note 22 at 25.
Many, if not most of them, considered their role in the criminal justice process to lie in tension with the expected interests of sexual assault complainants.

III. ROLE-DIFFERENTIATED MORALITY

The metaphor of a lawyer as a “hired gun” is purported to be both the paramount public perception of the legal professional as well as the dominant self-understanding of lawyers themselves.\(^{28}\) Despite the dominance of this articulation of lawyering, there is a competing discourse critiquing the traditional framing of the lawyer as zealous advocate with an unqualified duty of loyalty to his clients.\(^{29}\) That said, most Canadian critics ac-

\(^{28}\) Joseph Allegretti, “Have Brief Case Will Travel: An Essay on the Lawyer as Hired Gun” (1990–1991) 24 Creighton L Rev 747 (“[a]mong the metaphors that shape how lawyers view themselves, and are viewed by others, none exercises a more powerful hold than the metaphor of the hired gun” at 749); Jack T Camp, “Thoughts on Professionalism in the Twenty-First Century” (2007) 81:5&6 Tul L Rev 1377 at 1381 (arguing that today lawyers often consider the duty to represent the client zealously as the paramount objective of the profession and that this attitude creates lawyers that are little more than hired guns).

\(^{29}\) See e.g. David Luban, “The Noblesse Oblige Tradition in the Practice of Law (1988) 41:4 Vand L Rev 717 at 738 (arguing that lawyers should judge their clients’ projects and counsel them in a manner consistent with the public good); William H Simon, *The Practice of Justice: A Theory of Lawyers’ Ethics* (Cambridge, Mass: Harvard University Press, 1998) [Simon, *Practice of Justice*] (arguing that lawyers have an ethical duty to exercise a contextualized discretion in favour of promoting justice or legal merit); Deborah L Rhode, *In the Interests of Justice: Reforming the legal Profession* (New York: Oxford University Press, 2000) [Rhode, *Interests of Justice*] (arguing that lawyers should make decisions in the same way that morally-reflective individuals make decisions); Robert W Gordon, “Why Lawyers Can’t Just Be Hired Guns” in Deborah L Rhode, ed, *Ethics in Practice: Lawyers’ Roles, Responsibilities, and Regulation* (New York: Oxford University Press, 2000) 42 [Rhode, *Ethics in Practice*] (arguing that lawyers bear public responsibilities, both as lawyers and as citizens, to respect and maintain the basic ground rules constitutive of our political, cultural, and social order. Defence counsel are both agents to their clients and public agents charged with protecting a framework aimed at preventing systematic abuse and overreach by the state). Canadian legal ethicists have also been critical of the zealous advocate model of legal professionalism. See Trevor CW Farrow, “Sustainable Professionalism” (2009) 10:7 German LJ 1001; Honourable Chief Justice R Roy McMurtry, “Role of the Courts and Counsel in Justice” (delivered at The Advocates’ Society Spring Symposium 2000, Advocacy in the 21st Century, 6 June 2000), online: <www.ontariocourts.on.ca> (arguing that lawyers are not merely hired guns. They are officers of the court with fundamental obligations to protect the administration of justice); Richard F Devlin, “Normative, and Somewhere to Go?: Reflections on Professional Responsibility” (1995) 33:4 Alta L Rev 924 at 924 (arguing that lawyers have an ethical duty to do no harm and that this duty should be understood as an enforceable “public” norm); Allan C Hutchinson, “Legal Ethics for a Fragmented Society: Between Professional and Personal” (1998) 5:2/3 Intl J Leg Profession
knowledge that while a reconceptualization of legal professionalism that incorporates recognition of broader social obligations owed by lawyers and that emphasizes the role of personal morality in making ethical decisions is to be desired, the traditional narrative of the zealous advocate remains common.\textsuperscript{30} Before continuing, it is helpful to articulate the basic precepts of this understanding of legal advocacy.

The lawyer as hired gun or zealous advocate is thought to owe his or her client uncompromising and undivided loyalty. He or she is expected to do everything possible, subject only to the law and professional codes of conduct, to win the case.\textsuperscript{31} Under this model of professionalism, lawyers are to pursue the desired substantive end results of their clients, not justice.\textsuperscript{32} Hired guns advocate zealously for whatever their clients want and they do so from a detached, impersonal, and unaccountable position in which their own moral judgments are displaced by a role-based morality thought to justify conduct that would be otherwise unacceptable.\textsuperscript{33} This role-based morality requires the hired guns or “neutral partisans” to use their skills and professional expertise to pursue whatever course of action is desired by the client.\textsuperscript{34} This detached approach is advanced as necessary

\begin{itemize}
\item[30] See e.g. David M Tanovich, “Law’s Ambition and the Reconstruction of Role Morality in Canada”, (2005) 28:2 Dal L J 267 at 271 [Tanovich, “Law’s Ambition”] (arguing that the perception of the hired gun ethic by Canadian lawyers is widespread but mistaken. Tanovich argues that there is a shift in the moral content of the role (based morality) away from an ethic of absolute loyalty to one’s client and towards an ethic of pursuing substantive justice); Farrow, supra note 29 (noting the continued predominance of the hired gun mode of thinking at 1004); Devlin, supra note 29 (recognizing two schools of thought among lawyers and academics—one of which maintains a commitment to the traditional view of zealous advocacy); Gordon, supra note 29 at 47.
\item[32] Allegretti, supra note 28 (“[t]hey are taught that the job of the lawyer is to represent clients zealously, not to seek justice” at 754).
\item[34] Rhode, \textit{Interests of Justice}, supra note 29.
\end{itemize}
to protect the autonomy and dignity of the individual client and to ensure that the lawyer’s conduct of a case is based on reason and logic.

The hired gun metaphor is said to be particularly apt regarding criminal lawyers. Indeed, some legal ethicists who encourage modification to the ethical standard for legal advocates in other contexts concede that the orthodox, adversarial ethics of the hired gun is nevertheless warranted in criminal defence work. Far from being derisive, in the criminal law context, the concept of legal advocate as a hired gun is celebrated by some (particularly American) legal ethicists as necessary for the protection of rights and the pursuit of justice.

The American literature debating the ethical parameters of zealous advocacy and loyalty to the criminally accused client is rich and voluminous.

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35 Stephen L Pepper, “The Lawyer’s Amoral Ethical Role: A Defense, a Problem, and Some Possibilities” (1986), 1986:4 American Bar Foundation Research J 613 at 617 (arguing that a lawyer who refuses to act according to the client’s wishes on the basis of his or her own moral judgment, substitutes the lawyers’ beliefs for individual autonomy and diversity).

36 Freedman, supra note 31.

37 Allegretti, supra note 28 at 770 (noting that the metaphor applies to criminal lawyers in particular); Richard O Brooks, “Ethical Legal Identity and Professional Responsibility” (1990–1991) 4 Geo J Leg Ethics 317 at 329 (asserting that the hired gun is a common metaphor for lawyers and in particular criminal lawyers).

38 Wasserstrom, supra note 20 at 112 (arguing that the immoral conduct of criminal defence lawyers is justifiable in a way that is not comparable for lawyers generally); Carrie Menkel-Meadow, “The Limits of Adversarial Ethics” in Rhode, Ethics in Practice, supra note 29 at 123 (identifying criminal defence work as an area where the adversarial model may be justified); Deborah L Rhode, “Ethical Perspectives on Legal Practice” (1985) 37 Stan L Rev 589 at 605 (arguing that the professional norms appropriate in criminal defence work are not necessarily appropriate in other contexts); David Luban, “Are Criminal Defenders Different?” (1993) 91:7 Mich L Rev 1729 [Luban, “Defenders”] (noting that criminal defenders, in particular public defenders, do face challenges not confronted when representing other types of clients). See also William H Simon, “The Ethics of Criminal Defense” (1993) 91:7 Mich L Rev 1703 [Simon, “Ethics”] (critiquing legal ethicists that exclude criminal lawyers from their critique of zealous advocacy).


The issue has been given less consideration by scholars and ethicists in the Canadian criminal law context. It is important to note this discrepancy because, based on the information that is available, there may be differences between the ethical identity of American criminal lawyers and Canadian criminal lawyers. Alice Woolley, for example, has argued that the duty of integrity reflected in Canadian professional codes of conduct, the professional speeches of Canadian lawyers, and judicial.dicta from Canadian judges reveal a more qualified conception of the lawyer’s duty of loyalty. David Tanovich suggests that in Canada, the hired gun model has been borrowed from the American context because of a general lack of Canadian research and reflection on ethics. While the scholarly literature in Canada focusing on criminal law ethics is modest, there is a body of Canadian scholarship that considers the concept of the lawyer as hired gun more broadly. As noted, for the most part this work admits the continued prevalence, if not dominance, of this conception of the ethics of legal advocacy in the Canadian context. As well, some empirical research studying Canadian lawyers reveals a common perception among lawyers that the ethical obligations imposed by the legal profession demand that they act as hired guns.


Woolley, supra 42; Randal N Graham, “Moral Contexts” (2001) 50 UNBLJ 77; Tanovich, “Law’s Ambition”, supra note 30; Farrow, supra note 29.

See Devlin, supra note 29 (for a discussion/critique in the Canadian context of this framing of the ethical advocate); Farrow, supra note 29 (arguing that the hired gun metaphor continues to dominate our conception of legal professionalism but that this is not sustainable).

See Margaret Ann Wilkinson, Christa Walker & Peter Mercer, “Testing Theory and Debunking Stereotypes: Lawyers’ Views on The Practice of Law” (2005) 18:1 Can JL & Jur 165 at 190 (finding that lawyers did not begin their relationship with the client as a hired gun but that, in the end, most lawyers relinquished decision-making to their clients and became hired guns); Margaret Ann Wilkinson, Peter Mercer & Terra Strong “Mentor, Mercenary or Melding: An Empirical Inquiry into The Role of the Lawyer” (1996) 28 Loy U Chicago LJ 373 at 373 (finding that lawyers’ approaches exist along a continuum between the counselor approach and hired gun approach); See also Peter Mercer, Margaret Wilkinson & Terra Strong, “The Practice of Ethical Precepts: Dissecting Decision-Making by Lawyers” (1996) 9 Can JL & Jur 141 (these studies were conducted on Ontario lawyers in the 1990s.)
Interviews with the defence lawyers involved in this study revealed diverse perspectives on the lawyer-client relationship and the role of a criminal defence lawyer. In contrast to the comments of lawyers interviewed in an American study examining the moral decision-making processes engaged in by lawyers in that country, 47 none of the lawyers interviewed for this study explicitly invoked the hired gun metaphor. Certainly, as will be discussed, elements of the hired gun approach were reflected in the statements of many of the defence lawyers interviewed. However, their responses revealed more complicated and, in some ways, incoherent accounts of their professional role, than what is commonly captured by the traditional notion of the zealous advocate. In particular, responses regarding their primary objectives when acting for clients accused of a sexual offence, and comments regarding the decision-making approach to the conduct of a case adopted by many of them, revealed an understanding of their role that is not consistent with the hired gun approach.

A. The Primary Objectives Identified by the Lawyers Differed

Each of the lawyers interviewed was asked what he or she understood to be the primary objective of a defence lawyer when representing a client accused of a sexual offence. Some of them, including one Crown Attorney, offered answers such as “to win,” 48 “to have them found not guilty,” 49 or “to get them acquitted.” 50 Identifying an acquittal as the primary objective of a defence lawyer is consistent with the hired gun ethic. For several of these lawyers, this answer was self-evident.

While the authors do not state the proportion of criminal lawyers, a review of their findings suggests that the majority of lawyers were drawn from the civil bar.

Rand Jack & Dana Crowley Jack, Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers (New York: Cambridge University Press, 1989) (quoting from an interview with trial attorney Brent Stephens, “You’re the hired gun for this guy and you have the duty, obligation to represent him” at 22; and quoting the comments of attorney Larry Smith in response to the question asking what he considers to be his major responsibility in practicing law, “Doing the best job for my client that I can. Somebody has a dispute and they need a hired gun, and I step in” at 57).

Interview with Defence Lawyer 3, “To win. I mean, my job is to win the case for my client, and secure an acquittal, as long as I’m doing it within my ethical confines, that’s my job.”

Interview with Defence Lawyer 4, “[W]ell the primary goal obviously is to have them found not guilty. My other goal . . . I don’t want them to be in the press.” Defence Lawyer 1 said, “Well, it’s to see if I can have a finding of not guilty. You know?”

When asked what she considered to be the primary objective of a defence lawyer in a sexual assault case, Crown Attorney 3 answered, “Just to get them acquitted. Because I think that’s always their objective, has to be their objective, really.”
However, others offered different objectives. Defence Lawyer 6 indicated that her primary objective is “to turn over every rock, explore all possible problems with the complainant’s statements and always keep an open mind when looking at a case.” Defence Lawyer 5 offered the following as his primary objective: “to give the defendant a full and complete defence.” Defence Lawyer 2 said that her primary objective is “to ensure that the person is not convicted unless they should be.” Similarly, Defence Lawyer 7 stated that “[m]y primary objective, in terms of representing the client, is to make sure that ah, if the case is there to be laid out, that it’s proven beyond a reasonable doubt using the rule of law.” Defence Lawyer 8 described his primary objective as “to try and ensure that this person doesn’t get convicted for something they didn’t do or that they shouldn’t be convicted for and to utilize your skills to accomplish that end.” Defence Lawyer 14 stated that “the primary objective is to make sure the Crown does their job . . . to make sure that the procedures are fair, that there’s adequate disclosure. . . . But ah, I don’t think the job is to get the client off.”

There is a distinction between attempting to have one’s client acquitted through every means available and endeavouring to provide a full and complete defence using every means possible. Can lawyers whose primary objective is the latter truly be said to understand themselves as guns for hire—bound to use their skills “solely and unreservedly to obtain what the client wants?”\(^5\) Presumably, in the vast majority of sexual assault cases, what the client wants is an acquittal\(^5\)—not a full and fair defence. Similarly, criminal defence lawyers who identify their primary objective as to prevent wrongful convictions or to ensure that individuals are not convicted unless they should be (thus invoking maintenance of the state’s burden and standard of proof as their preeminent objective) reveal a sense of professionalism that is more nuanced or multidimensional than that captured by the unqualified and unilateral duty of the hired gun. This more broadly conceptualized objective is well reflected in Defence Lawyer 10’s response:

[to] make sure that my client has a fair trial; make sure their defence, whatever it is, gets put forward in the best manner; do my best to ensure that justice happens. And again, my job is not to represent the public interest.

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\(^5\) Allegretti, supra note 28 at 749.

\(^5\) See Randolph Braccialarghe, “Why Were Perry Mason’s Clients Always Innocent? The Criminal Lawyer’s Moral Dilemma—The Criminal Defendant Who Tells His Lawyer He Is Guilty” (2004) 39:1 Valparaiso UL Rev 65 (“[i]t would be an unusual client whose first, if occasionally unrealistic, objective were something other than an acquittal” at 69).
So my version of justice is that my client’s, you know, rights are respected and heard.

It is not that these lawyers frame their ethical identity around a notion of public duty. In fact, while many of the defence lawyers interviewed stated that they owed an ethical duty to the court, none of them articulated an ethical or professional obligation to the public, other participants in the criminal trial process, or the public interest. Indeed, as is evidenced by the comments of Defence Lawyer 10, some of them explicitly rejected owing a duty to the public. But nor did they, when discussing their primary objectives, describe the unilaterally and narrowly driven, client-centered, conception of the zealous advocate.

B. Primarily Lawyer-Controlled Decision-Making

The descriptions provided by defence lawyers regarding the division of decision-making authority between the lawyer and the client also suggested a conception of the lawyer-client relationship that is not fully captured by the metaphor of the hired gun. The defence lawyers interviewed for this study were clear that their clients decide whether to plead guilty or not guilty and whether to testify in their own defence. According to them, where there is disagreement between them and their client on either of these matters, the client’s view prevails. This approach is consistent with case law on this issue. However, most of the defence lawyers interviewed indicated either directly or implicitly that they have, and should have, authority with respect to decisions other than how to plead or whether to testify. Defence

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53 For example, Defence Lawyer 1 stated that his most important ethical obligation was “[t]o provide a full and fair defence, whilst always remembering that I’m an officer of the court.”

54 Defence Lawyer 8 stated, “[T]wo things over the years, you learn is that the accused has the right as to whether to plead guilty or not guilty and to take the stand and give testimony or not. Those things are the rights of the client, of the accused.” Defence Lawyer 9 said, “I say to every client, ‘You have the right to plead guilty or not guilty, regardless of what my opinion is.’”

55 See e.g. R v GDB, 2000 SCC 22, [2000] 1 SCR 520 (“[w]hile it is not the case that defence lawyers must always obtain express approval for each and every decision made by them in relation to the conduct of the defence, there are decisions such as whether or not to plead guilty, or whether or not to testify that defence counsel are ethically bound to discuss with the client and regarding which they must obtain instructions” at para 34).

56 See Ann Southworth, “Lawyer-Client Decision Making in Civil Rights and Poverty Practice: An Empirical Study of Lawyers’ Norms” (1996) 9:4 Geo J Leg Ethics 1101 (this 1996 study of American lawyers found that most legal aid lawyers (unlike their counterparts in business firms or grassroots organizations) took the same approach. They reported playing a sig-
Lawyer 9 offered this explanation in response to a question asking whether there are any types of sexual offence cases that he would not take:

No. I would take them all. . . . And I qualify that by saying only if I’m in control. My clients are not going to tell me how to, as I say, to every client, “You have the right to plead guilty or not guilty, regardless of what my opinion is. But once you decide to plead not guilty, I’m in charge. You’re not in charge. You’re not going to tell me what questions to ask. You’re not going to tell me what witnesses to call. I make that decision.” . . . I have to keep control over the client.57

Similarly, Defence Lawyer 1 indicated that while he would take any type of sexual offence case, he does not represent individuals involved in organized crime because of the risk that he could lose control of the client or the case, “[y]ou simply won’t have the freedom of action.”

Other defence lawyers, although less explicit about adopting a lawyer-controlled approach to the conduct of a case, made comments and used phrasing that suggested a similar attitude. For example, Defence Lawyer 6 referred to “my defence” when discussing trial strategy. Several defence lawyers discussed their decisions as to how to approach the cross-examination of the complainant, whether to elect superior court or provincial court, whether to bring an application for third-party records, or in order to introduce evidence of the complainant’s prior sexual history, whether to have a jury trial, or whether to request a preliminary hearing. None of the defence lawyers interviewed for this study discussed advising their clients on how to make these decisions. None of the lawyers interviewed for this study characterized these decisions as ones that are made by the client on the advice of them as the lawyer, nor did any of them suggest that these are decisions that they and their clients arrive at together. This is true despite the fact that the questions posed to them concerning these types of decisions were framed as inquiries into how they would advise their clients about how to make these decisions.58

57 Defence Lawyer 9 went on to invoke celebrated criminal lawyer Arthur Martin’s analogy to a surgeon and patient, “And I do the comparison, like, in the world of medicine, you can agree to an operation, but once you agree to an operation, you can’t tell the doctor how to do it. Same way with me as a lawyer.” See Martin, supra note 41 at 383.

58 For example, they were asked, “Where a jury trial is an option how do you advise a client on this issue?”
This lawyer-controlled approach to decision-making authority between a client and a lawyer in the conduct of a criminal case appears to be consistent with the view taken by Canadian courts.59 One of the most prominent proponents of the lawyer-controlled model of criminal defending was Arthur Martin.60 Martin asserted that:

[the] alter ego of the client. The function of defence counsel is to provide professional assistance and advice. He must, accordingly, exercise his professional skill and judgment in the conduct of the case and not allow himself to be a mere mouthpiece for the client.61

According to Proulx and Layton, Martin’s view has deeply informed the Canadian approach to criminal defence lawyering.62

How does the lawyer-controlled model of decision-making accord with the metaphor of the legal advocate as hired gun? The lawyer-controlled model is, in part, informed by a paternalism that assumes lawyers know best how to conduct a case, just as surgeons know best how to perform a surgery.63 Martin maintained that sometimes lawyers must even act

59 R v GDB, supra note 55; R v Samra (1998), 41 OR (3d) 434 at 446–47, 129 CCC (3d) 144 at para 31 (CA) (recognizing that defence lawyers may make submissions that are explicitly disapproved of by the client); R v White (1997), 32 OR (3d) 722 at 751, 114 CCC (3d) 225 at 253 (CA) (concluding that once a defendant has decided to plead not guilty, decisions regarding the conduct of the case are to be made by the defence lawyer). But see R v Delisle (1999), 133 CCC (3d) 541 at para 62, 25 CR (5th) 198 (Qc CA) (concluding that a lawyer is not entitled to disregard the client’s instructions); R v Swain, [1991] 1 SCR 933, 63 CCC (3d) 481 [Swain cited to SCR] (the Court emphasized the importance of allowing the accused to control his own defence. But, the issue was whether Swain had control over the decision to plead the insanity defence. This decision seems more akin to the fundamental decision on whether to testify and whether to plead not guilty).
60 Martin, supra note 41.
61 Ibid at 382.
62 Proulx & Layton, supra note 41 at 119. But see Proulx & Layton, ibid at 114–15 (the allocation of decision-making authority in criminal cases in Canada is perhaps shifting towards a more mutual decision-making model in which lawyers and clients work cooperatively to make decisions regarding the conduct of a case. The authors suggest that a less paternalistic relationship between criminal lawyers and clients is desirable). I did not see evidence of this shift in the comments of defence lawyers interviewed for this project. An exploration of whether a shift away from the lawyer-controlled model is desirable will not be considered here. The paternalism inherent in the lawyer-controlled model combined with the general disempowerment of many criminally-accused clients supports Proulx and Layton’s position. However, a shift in the lawyer-client decision-making dynamic would only be a positive development if it did not involve a corresponding reification of the hired gun conception of the legal advocate.
63 Martin, supra note 41 at 383 (invoking this very analogy).
against a client’s wishes in order to achieve the best result for the client. Assuming a solely ends-oriented analysis, the lawyer-controlled model does not seem to be at odds with the client-centered ethic of the hired gun. However, as already discussed, several of the lawyers interviewed for this study identified their primary objective as an interest that cannot aptly be characterized as solely ends-oriented. Moreover, there is a sense in which the lawyer-controlled model may be in tension with the concept of advocate as hired gun.

Some commentators suggest that to act as a hired gun is to step into a client’s shoes—to serve as their alter ego. Recall that for Martin, criminal lawyers act unethically when they act as mere mouthpieces or alter egos for their clients. According to Martin, ethical criminal lawyers control their clients and the conduct of the case. This view of the lawyer-client relationship asserts that lawyers make “virtually all decisions concerning the case, including what witnesses to call, whether a witness should be cross-examined, and if so, how.” This seems inconsistent with the hired gun ethic. First, the role-differentiated morality of the hired gun is said to maintain a “principle of non-accountability” for lawyers. According to this perspective, the zealous advocate is “neither legally, professionally nor morally accountable for the means used or the ends achieved.” Lawyers that assume nearly absolute control over almost every aspect of a case cannot be said to be acting as the detached, unaccountable agent of their clients. Presumably, the more control a lawyer asserts over the conduct of a case, the more accountability she should assume. Second, the traditional hired gun approach is justified, in part, on the grounds

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64 Ibid.
65 R Jack & DC Jack, supra note 47 at 22, 57.
66 Martin, supra note 41 (citing draft standards of the American Bar Association stipulating that “[t]he ‘alter ego’ concept of a defence lawyer, which sees him as a mouthpiece for his client, is fundamentally wrong, unethical and destructive of the lawyer’s image” at 382).
67 Proulx & Layton, supra note 41 at 122.
69 Ibid.
70 See Deborah L Rhode, “Preface” in Rhode, Ethics in Practice, supra note 29, vii (“[t]he assumption that lawyers should simply respect autonomous client choices has persisted less because it is an accurate description of the counselling relationship than because it absolves lawyers of awkward responsibilities” at x). See also William H Simon, “Lawyer Advice and Client Autonomy: Mrs. Jones’s Case” in Rhode, Ethics in Practice, supra note 29, 165 at 175 (arguing that autonomous client decision-making is impossible and that with recognition of responsibility by lawyers over some decisions comes some accountability).
that it preserves individual autonomy and promotes human dignity by not permitting the lawyer to supplant the client’s views and beliefs with her own. Client autonomy is almost certainly undermined by a criminal lawyer-client relationship in which the lawyer “controls the client” and is justified in acting contrary to the client’s instructions.

To recapitulate, comments that identify the defence lawyer’s primary objective as the avoidance of wrongful convictions or the provision of a full and fair defence (rather than the obtainment of an acquittal) and those that reflect a lawyer-controlled approach to decision-making do not reflect an ethical identity that is fully encapsulated by the hired gun metaphor. Other comments made by the defence lawyers interviewed for this study very much demonstrated a commitment to unmitigated zeal. As will be discussed in Part V, often the same individuals that embraced a lawyer-controlled model of decision-making, and/or a multi-dimensional understanding of their primary object as a defence lawyer, also offered comments that reflected an ethical identity more in line with the hired gun conception of lawyering.

C. Statements Consistent with the Hired Gun Model

Some defence lawyers described their role in a sexual assault case in terms that could be characterized as reflecting zealous advocacy. For example, Defence Lawyer 9 offered this explanation for why sexual assault complainants continue to report their experience of the criminal justice system as traumatic:

> It’s the way we as defence council have to approach the problem. You know, you gotta attack the alleged victim. If the issue of credibility is going to be decided by the judge, then of course, you gotta attack the victim. And they feel that they are on trial. And you know, it’s amazing as to what you, the type of questions you can do based on the information you have . . . [such as information taken from the complainant’s Facebook page].

A similar example is given by Defence Lawyer 4:

> In a case where the complainants have, are, you know, either incredibly promiscuous or do have some character issues that I think will weigh against them if a judge sees that, and where I might not have a real absolute legal avenue to ask that question, right, I will do my best to find a legal avenue to ask that question. So, for example, I know that I can’t ask about
other sexual behavior. However, what I can ask, according to case law, is where someone makes a direct contradiction of what they've said earlier. So I will, at the preliminary hearing, delve into and give the person room that if they're going to start saying things that contradict what they said otherwise, that deal with the times when there was other sexual behavior, you know, I'm hopeful that they will. Because once they have, I've got it in. Right? Then I can sidestep the other rule, you know, yeah. You know, is that unethical? I mean, I don't think it's unethical at all. That's advocacy.

Some of the terminology or phrases used in the interviews evoked notions of the hired gun model. Defence Lawyer 6 mentioned smelling “blood in the water” in reference to frail complainants. Several lawyers used words such as “battle” or “weapons” to describe aspects of their trial practice. Defence Lawyer 2 indicated that to be a “true believer,” a criminal lawyer must be prepared to defend an accused against the power of the state “at any cost.” Defence Lawyer 12 commented that “my obligation is to use every tool and every weapon I have available.” Some lawyers referenced the need to “attack” the complainant's credibility or an opposing witness. Defence Lawyer 10, for example, commented, “[m]y job is to attack people’s credibility.” Referring to attempts to obtain third-party records from one of the city’s women’s shelters, Defence Lawyer 1 stated, “[w]e used to have attacks on [them] and places like that. . . . But I never found there was anything in there that was any help.”

Lastly, as discussed in Part IV, many of the defence lawyers interviewed for this study offered comments and explanations that suggested a separation of personal thinking from professional thinking. This type of role-based cognition may also reflect aspects of the hired gun model of advocacy.

IV. ROLE-DIFFERENTIATED THINKING

The hired gun or “amoral technician” conception of the legal advocate turns on the notion of role-differentiated behaviour.71 When representing a client, the neutral partisan or hired gun is to differentiate their personal morality from the role-based morality of the legal advocate. According to

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71 Wasserstrom, supra note 20 (“it is the nature of role-differentiated behavior that it often makes it both appropriate and desirable for the person in a particular role to put to one side considerations of various sorts— and especially various moral considerations—that would otherwise be relevant if not decisive” at 3).
this account of the ethical orientation of lawyers, in the professional life of a legal advocate, personal moral considerations are to be replaced with the role-based morality of the job—its most traditional carnation constructs a role-based morality guided exclusively by the principle that “an advocate . . . knows but one person in all of the world and that person is his client.”

A common theme that emerged from the interviews with defence counsel and Crown Attorneys involved what might be referred to as role-differentiated thinking. Two types of role-based thinking materialized from the interviews: i) refusal to know; and ii) insistence on innocence. The comments of the lawyers discussed in the paragraphs to follow suggest that for some lawyers, performing their professional role may require not only a separation of heart and mind, but also a division of the mind itself.

**A. Refusal to Know**

Several defence lawyers drew clear lines between their personal and professional assessment of the facts as recounted by their clients. Beyond an ethical obligation not to impose their own moral judgments on their client’s alleged behaviour or tailor their representation of a client to comport with their personal values, these lawyers articulated an ethical duty to differentiate personal and professional factual conclusions regarding their clients’ versions of the events. For some, the practice of not drawing factual conclusions of their own, or differentiating their personal thinking about a case from their professional assessment, was explicitly framed as role-dependent. For example, Defence Lawyer 5 commented:

> There’s no real good way to assess, even, I mean, you know, I might have a personal opinion about whether I think it’s a plausible account, or whether I have a feeling, whether I believe it or not. But ah, and I guess maybe that’s another ethical issue, is being able to set that aside, because it’s not my job to judge . . . what the facts of the case are. It’s my job to work with the account that my client has told me.

In response to a question asking what she does when she suspects that her client is lying to her, Defence Lawyer 10 stated:

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I often suspect that my client isn’t telling the truth—that is not my job, that is the job of the judge to work through that. . . . I will be honest with my client that what they’re telling me might be a hard sell but if they say this is what happened, that is what I go with. . . . If I know that my client is lying that is a whole different story but if I don’t know then I’m not the judge. That is why we have a trial.

Other lawyers allowed themselves to make personal assessments, but were clear that their personal thoughts do not inform their conduct of a case. The statements of these lawyers reveal the complexity of the relationship between concepts of truth and the adversarial process. Consider this comment from Defence Lawyer 8 when asked about clients he thought were lying:

They’re entitled to their defence. If it’s that stupid that it is not going to pass the smell test he’s going to get convicted anyway. . . . And I’ll tell him that. I’ll certainly say to him “You really expect a judge or a jury to believe that? And if you do, I’m going to let you go with it. But you gonna get dinged really hard.” . . . “Don’t blame me. But, if you want me to go talk to the Crown and work a deal for you, by all means.” You know? “But if you want to stick with that story boy, you pays your money, you takes your chances.” [laugh] . . . No, I don’t have any problems with that one.

For others, drawing conclusions about “the truth of what happened” is both futile and ill-advised. Defence Lawyer 2 described her perception of the relationship between truth and the conduct of a case as follows, “[I]f there’s one thing I’ve learned, in twenty years, it is that I have no ability to assess when people are telling me the truth. . . . I can’t assess. And I don’t think, I don’t believe anybody else can either.” Defence Lawyer 7 indicated that he encourages his clients to be forthcoming with him, that most of the time they do not tell the truth, but that it is not possible to know whether a client is truthful or lying:

I work with my clients and I challenge them when they’re not telling the truth. You know, if my clients don’t tell me the truth, the problem is theirs, not mine. I don’t internalize that. I will point out the obvious contradictions to them, what appear to be obvious contradictions to me. And interestingly enough, I have challenged clients on what appeared to be absolute logical inconsistencies with respect to what they’re saying and the evidence. And they’ll come back with a logical explanation. . . . You never know.
Defence Lawyer 11 offered this comment on the relationship between truth and the criminal justice process: “[T]his whole business of ‘Who’s telling the truth?’ is extremely uncertain and produces very bad results often.”

Some defence counsel suggested that the truth is more elusive in sexual assault cases than in other types of cases. For example, Defence Lawyer 5 suggested that making factual assessments is particularly challenging in sexual assault cases because “so often what happened is just something that entirely comes from the accounts of the two people that were there.”

A more extreme form of this “refusal to know” involves a refusal to hear or discuss the client’s version of events. Defence Lawyer 9 described the way in which he sometimes intentionally limits his factual knowledge of a sexual assault case:

On the first interview I will not take a statement. I usually don’t take a statement from them because I really want to find out exactly what the allegations are [by contacting the Crown or police], and then of course, I can take the position that I’m going to confront my client with the allegations, get his side of the story. Or, I may very well explain to the client that I’m, you know, “I may not ask you whether or not you did it, but you have a right to go through a trial to see whether or not the Crown can prove its case beyond a reasonable doubt.”

Crown Attorney 3 offered a similar explanation of this approach. She also highlighted the role-based differentiation she makes between her professional and personal opinions about this tactic:

So, some defence lawyers, they’ll meet their client, and I’ve talked to defence lawyers about this. And they’ll say “I don’t want to hear anything from you . . . This is the Crown’s case. This is where I think there is weaknesses. This is the strategy I think that we should take. And that’s what we’ll do. And you won’t take the stand and we’ll just try to poke holes and they won’t reach, like, their burden.” [I: Do you think that kind of wilful blindness is problematic or is it okay?] “Yeah, from people that, from defence lawyers that I respect, yeah, I think it’s fine. I don’t like it on a, like, outside the office level.”

The rules of professional conduct regulating criminal lawyers in Canada support, if not require, a type of role-differentiated thinking. Proponents

74 The Federation of Law Societies Of Canada, Model Code of Professional Conduct, Ottawa: FLSC, 2012, ch 5.1, commentary 9 [FLSC] (“notwithstanding the lawyer’s private opinion
of the hired gun conception of legal advocacy identify a “refusal to know” as an indispensable part of representing the criminally accused. Abbe Smith, for example, suggests that this suspension of belief is “one of the most important things a defense lawyer can offer a client accused of a terrible crime.”

There is, however, a distinction between a lawyer that refrains from drawing inferences of guilt based on either the client’s information or external evidence and one who remains wilfully blind by refusing to discuss the facts with his or her client. While some version of the former is widely accepted by courts, practitioners, and commentators in the Canadian context, the latter is (at least by some) considered unethical.

B. Insistence on Innocence

For other lawyers interviewed, role-based thinking seems to operate in a more general sense. These lawyers connected their views regarding the ubiquity of false allegations to their manner of practice—in other words, how they conduct a sexual assault trial.

In the context of a discussion regarding whether to elect superior court (and a preliminary hearing) over provincial court, Defence Lawyer 7 was asked if there are any other factors that go into that election. She answered as follows:

The frailty of the complainant. (I: Okay. Can you say more about that?) . . . I may want to go at her in a prelim because it’ll shake her, or him. And you know, all of this is premised on the fact that I actually always, I really always believe my client, believe in my client’s cause. I actually really feel like I’m on their side. . . . So I really believe that this girl is lying.... I think that is a defence mechanism I think for me. . . . I think I have to feel that way or else I can’t do my job. . . . It makes my job easier. . . . And so, at a prelim, I might, I might feel like if I take a good enough crack at her and shake her enough, then the Crown will say [sigh] You know? And then I’ve

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76 See Proulx & Layton, supra note 41 at 38, 48.

77 The notion that false allegations of sexual assault are common appears to be prevalent within at least some subset of the criminal defence bar. See Craig, supra note 13 (noting that many of the sexual assault lawyer web sites studied made assertions about the frequency of false allegations).
done my job. Because no one likes trials . . . and she may not want to go through that again.

In order to do her job—which she identifies as requiring her to take “a good enough crack” at a shaky complainant—Defence Lawyer 7 concludes that she must believe the complainant is lying. For her, this *ex ante* factual assessment is a general conclusion about the false allegations her clients (will) face, that she then applies to each individual case, “I actually always, I really always believe my client.”

While not as explicit (or perhaps conscious), Defence Lawyer 4 also drew a connection between her manner of practice and factual assumptions that she holds about the veracity of sexual assault allegations:

But on a sex assault case, I mean, when I’m cross-examining the complainant, it’s not like cross-examining some police officer, on a search. Right? . . . Particularly because I do, my view is that many of the complainants who have testified are lying. Right? There’s a subset of ones who I think just, you know, yeah, but there are a number who I think are not telling the truth. And it’s a very, I see it almost as a psychological battle between me and the witness, to be able to bring out and be able to show a judge what the realities are.

The psychological manoeuvres revealed in these two interviews raise a number of additional questions. Does a lawyer who operates on an assumption of innocence problematically play the role of a judge just as much as would a lawyer that assumes guilt? Are these assessments about sexual assault complainants confined exclusively to the professional corners of these lawyers’ lives? To what extent, if any, are they a reflection of broader social attitudes about women who allege sexual assault? Many of the defence lawyers interviewed for this study have worked as Crown prosecutors. Some continue to do so on an *ad hoc* basis. Do the generalized assumptions about sexual assault that are operationalized in some lawyers’ defence practices inform their prosecutorial performances?\(^7\)

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\(^7\) Some research suggests that prosecutors and defence lawyers alike continue to express outdated social assumptions about sexual violence that tend to bias them towards disbelieving the complainant. This research may suggest that the insistence on innocence embraced by some sexual assault lawyers is reinforced by, if not founded upon, broader social attitudes about the prevalence with which women lie about rape. See e.g. Lazar, *supra* note 21; Temkin, *supra* note 21.
C. Possible Functions of Role-Differentiated Thinking

For sexual assault lawyers, role-differentiated thinking is likely to perform three functions that may inform their ethical identities. First, it provides an opportunity for lawyers to distance themselves from responsibility for the outcome of a sexual assault proceeding. In conjunction with a strong narrative about the adversarial system, a “refusal to know” advances a strictly role-based notion of criminal justice in which the defence lawyer performs his or her part—presents his or her client’s case—before a neutral arbiter who is solely responsible for the decision to convict or acquit. In this sense, role-differentiated thinking supports the hired gun’s “principle of non-accountability.”

Defence Lawyer 10’s statement is telling in this regard, “If I don’t know, then I am not the judge.” Defence Lawyer 11’s comments in response to a question about the personal toll of practicing sexual assault law demonstrate the way in which defence lawyers might rely on a notion of the adversarial system to insulate themselves from the emotional impact of a particular outcome in a case:

You approach criminal law on the footing that you're not responsible for the outcome, that your job is to defend that person and make the Crown prove their case. If they can't do it, that’s the way the world's supposed to work. But at the extremes of that proposition, there’s always cases that you say “Gee, that’s not the right result. I know that’s not the right result.” And you may be the only one who knows it’s not the right result, for that matter.

Defence Lawyer 9’s assertion that he does not, and does not need to, draw conclusions about the veracity of allegations also reveals the way in which this position distances lawyers from responsibility for trial outcomes:

So, when I approach a case, I don’t approach it from the position that I’m going to show that the complainant, the allegations are false. Okay? I’d leave that up to the judge, okay? You can’t become personally involved in your cases. I mean, you just can’t, because I mean, you'll have a heart attack from stress. Okay? Basically, we leave it up to the judge. And as I say, we rely on the basic principles. And then the judge has to make a decision.

Defence Lawyer 8’s description of a case, in which he intentionally led the jury to wrongly assume that his client wanted to testify, but was prevented from doing so by him, similarly reveals the way in which responsibility for
the outcome is placed on the adversarial process rather than on those who perform its roles:

So, there’s a situation where you might say, “What is your ethical responsibility?” . . . If the jury wanted to presume that the client wanted to testify and it was his lawyer who prevented him from doing so, then that’s an inference that they could make. But, I thought I did my job, which was to defend my client. And the issue of his guilt or innocence was supposed to be determined by the court, based on the clash of the adversaries.

The second possible connection between role-differentiated thinking and ethical framings for, and by, the profession is strategic. While a clear delineation of the ethical parameters of criminal advocacy work did not surface from the interviews with either defence or Crown lawyers, two particular ethical obligations were identified by several lawyers interviewed for this study: a duty not to rely on evidence that they know to be false (meaning, either in part or primarily, that a confession by a client will limit what a lawyer can do in representing them) and to a lesser extent, an obligation as an advocate to act in good faith when cross-examining a witness. Given these ethical obligations, the strategic advantages of not drawing conclusions about the facts, not learning the clients’ version of the facts, and problematizing the possibility of objective truth (particularly about experiences of non-consensual sex) are evident.

The starkest example of this involves lawyers that do not ask clients for their version of events. Crown Attorney 1 summarized the strategic advantage in this circumstance as follows:

But this ethical obligation where you have to have a good faith basis to ask a question in cross-examination comes up a lot. And I think it is particularly true of sexual assault because I get questions that are just really out there. . . . There are two ways to approach this right? You can, some

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79 For example, Defence Lawyer 1 described his response to a client’s confession as follows, “I say ‘Look. You’re fully entitled to plead not guilty. I can’t put you on the stand, obviously. But I can cross examine.’” In response to a question about a defence lawyer’s most important ethical obligations, Defence Lawyer 7 answered, “I tell, it’s important for my client to understand that I cannot and will not lie for him or her.” Defence Lawyer 4 stated, “I think that’s an important place to start. I think that because many people believe that as defence lawyers we are their liar. And we’re, our job is to go in and spew what they want to say and stuff like that. And so, I think it’s important to set the barriers.”

80 Both of these ethical obligations are recognized by law societies (see e.g. FLSC, supra note 74, ch 5.1, 5.1-2) and courts (see e.g. R v Lyttle, 2004 SCC 5, [2004] 1 SCR 193).
people just don’t ask their client what happened, which opens up all sorts of possibilities about what they can theorize. . . . They can’t ask questions they know to be wrong. So, but they don’t ask them initially what really happened. Third party, all those things come into play then. . . .

There are obvious ethical concerns when lawyers refuse to receive their client’s version of the facts so that they might be liberated from their ethical obligation not to mislead the court, present false evidence, or assist in dishonest action.⁸¹ It is more difficult to ascertain the line between resisting what is “irresistible knowledge of guilt”⁸² and unduly limiting an accused’s defence because of a lawyer’s subjective judgment about the client’s factual guilt. When does a lawyer “know” her client is guilty and what types of information can or should she rely upon in arriving at this conclusion? A certain, informed, and reliable confession from a client establishes knowledge of guilt. What about other evidence of guilt? What about knowledge regarding the truthfulness of the complainant? How does knowledge of the guilt of one’s client inform the ethical parameters of cross-examining a sexual assault complainant? These are admittedly hard questions.⁸³ When asked questions such as whether it is ethical for a defence lawyer whose client has confessed to them to challenge the credibility (rather than, for example, the reliability) of a truthful sexual assault complainant, several of the lawyers interviewed struggled to provide an answer. For example, in response to this question, Defence Lawyer 120u are asking really hard questions. I would really agonize over this issue. I would really agonize.” The less a lawyer knows, the less complicated it is for the lawyer to identify ethical limits in the conduct of a case.⁸⁴

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⁸¹ See FLSC, supra note 74, ch 3.2-7, 5.1-2; Proulx & Layton, supra note 41. But see Freedman, “Questions”, supra note 40.

⁸² Proulx & Layton, supra note 41 (advancing this “irresistible knowledge of guilt” as the standard necessary to “activate ethical restrictions pertaining to the conduct of the defence” at 40–41; by this, they mean an “unequivocal and reasonable subjective belief” that the client is guilty at 41). Allan Hutchinson argues that these types of ethical obligations should only be triggered where the lawyer has no doubt that the client plans to mislead the court. See Hutchinson, supra note 29 at 175.

⁸³ See Freedman, “Questions”, supra note 40 (identifying these types of issues as the most difficult ethical dilemmas faced by criminal lawyers).

⁸⁴ Unless, that is, one accepts David Luban’s suggestion that “the distinction between forceful-but-honest advocacy and deception is so artificial that it can never form the basis for drawing the magic moral line.” One of the examples he uses to support this assertion is lawyers that “hear no evil”—in other words, lawyers that ensure their clients do not tell them inconvenient facts. Another example he uses is lawyers that treat as true facts those
Abbe Smith contends that “[t]he truth is a complicated thing in criminal defence.” She and other like-minded academics argue that criminal defence lawyers must concern themselves with proof, not truth. Several lawyers interviewed for this study reflected a similar sentiment about the role of truth in the criminal trial process. While it may be the case that criminal lawyers should be more concerned with proof than truth, it remains important to consider whether, and how, role-differentiated cognition informs a lawyer’s self-understanding of the ethical limits to which he or she is subject.

A third possible function of role-differentiated thinking by sexual assault lawyers involves coping strategies. While insisting that criminal defenders must remain intellectually indifferent to the guilt or innocence of their clients if they are to do their job, proponents of the hired gun approach do concede that this “refusal to know” does not insulate criminal defence lawyers from the personal toll experienced when confronted with the pain and emotion caused by a client that has done something terrible. Lawyers that presume a sexual assault complainant is lying or that a client is innocent may avoid, or at least defer, this pain. Recall Defence Lawyer 7’s characterization of her belief that the complainant is always lying as a defence mechanism that enables her to do her job, or Defence Lawyer 4’s belief that many sexual assault complainants are lying and that she sees her cross-examination as a psychological battle to reveal the truth. Consider also Defence Lawyer 10’s suggestion that the line between suspecting that her client is lying and knowing that he is lying is harder in sexual assault cases. Her explanation was that “it’s harder because, it’s a horrible, horrible offence. It’s a horrible thing for somebody to have gone

they do not know to be false but suspect may be false. See Luban, “Defenders”, supra note 38 at 1761–62.


86 See e.g. Freedman, “Questions”, supra note 40 (arguing that, in the adversarial process, constitutional rights reflect independent values that may well outweigh the truth-seeking value of a trial. Accordingly, in some cases defence lawyers may have a professional duty to, for example, advise her client to withhold the truth, or to have accurate and truthful evidence excluded).

87 Smith, “Defending the Innocent”, supra note 85 at 509, n 100.

88 The one clear exception to this was circumstances in which their client confessed to them. Nearly every lawyer interviewed noted their ethical obligation not to put their client on the stand knowing that they intended to lie. This duty is explicitly articulated in professional codes of conduct in Canada. See e.g. FLSC, supra note 74, ch 5.1, commentary 10.

89 Babcock, supra note 75.
through once, never mind go through the trial process . . . but in deciding that this is my job, I have to be able to do that.” She was referring to the need to suspend belief in her client’s guilt when he has been accused of “a horrible, horrible offence.”

For these lawyers, a presumption of innocence may serve as a coping strategy adopted in an effort to avoid the emotional conflict that results from defending someone accused of doing harmful and damaging things. It may insulate them from unwanted encroachments of personal morality into professional spheres. A refusal to acknowledge the veracity of the complainant’s allegations may help lawyers to distance themselves from the vicarious trauma or second-hand emotion that professionals experience90 when repeatedly confronted with stories of cruel and inhumane suffering. Interviews with legal professionals in the United Kingdom working with asylum and refugee claimants that have experienced sexual violence in their countries of origin revealed precisely these types of psychological strategies on the part of lawyers, “[I]n your head, you have to go in thinking I don’t believe this story, because if you went in there believing that story, you couldn’t really do your job.”91 Criminal lawyers, given the nature of the work they do, may be particularly susceptible to the type of stress and second-hand trauma that arises from repeated exposure to the suffering of others.92

Unfortunately, one potential difficulty with an insistence on innocence is the likelihood that this particular type of role-differentiated thinking will reinforce the social assumptions or stereotypes about women and sexual assault that have historically inhibited broad social recognition of the


92 See Lila Petar Vrklevski & John Franklin, “Vicarious Trauma: The Impact on Solicitors of Exposure to Traumatic Material” (2008) 14:1 Traumatology 106 (finding that criminal lawyers reported significantly-higher levels of subjective distress, vicarious trauma, depression, and stress).
prevalence and impact of non-consensual sex. In other words, a belief in the ubiquity of false allegations must be rationalized or supported somehow. One way to do so is to accept certain assumptions: women often lie about rape; women who were drinking are more likely to have consented; allegations of sexual assault are often a function of post-sex regret; women who are sexually experienced are more likely to have consented.

V. INDIVIDUAL INCONGRUITY AND INTRA-PROFESSIONAL DIVERSITY

There is a sense within the legal community that the professional ethos of the criminal defence bar is sufficiently engrained, and so widely accepted, as to be both self-evident and incontrovertible. Several colleagues responded to a description of this study, before the interviews were conducted, by suggesting that it would be obvious how the lawyers interviewed would answer questions, describe ethical obligations, and characterize their sense of professionalism. The assumption was that the interviews would reflect the criminal defence bar as singularly committed to one steadfast, deeply entrenched, univocal vision of their mission: a uniformly client-centered mandate, punctiliously observant of a duty of loyalty that would inform nearly every aspect of their ethical identity. In fact, the interviews yielded a diversity of perspectives on several important issues, as well as notable contradictions on an individual basis.

A. Individual Incongruity

Many, if not most, of the interviews revealed inconsistencies in the individual lawyer’s perspective on the ethics of sexual assault lawyering. The interview with Defence Lawyer 1 provides an example. He offered the following

93 See Susan Bandes, “Repression and Denial in Criminal Lawyering” (2005–2006) 9 Buff Crim L Rev 339 (“[d]efense attorneys, as a rule, are comfortable with their ethical obligation to offer a zealous defense and do not find the question, as posed, very interesting” at 340). See also Fred C Zacharias, “Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics” (1993) 69:2 Notre Dame L Rev 223 at 236, n 40 (arguing that code requirements become so engrained lawyers take them as given); Cristina C Arguedas, “Duties of a Criminal Defense Lawyer” (1996) 30:1 Loy LA L Rev 7 (claiming that the duties and responsibilities of the criminal defence lawyer are utterly unambiguous, “to defend his or her client vigorously, aggressively, and completely, within the bounds of the law” at 7). It is important to note that these sources are American and that in the Canadian context this perspective may be less prevalent.
response to a question about whether defence lawyers should ever embarrass or shame a complainant through cross-examination or the use of prior sexual history or third-party records:

It’s going to come out in public that you’re bipolar or that you’ve had previous psychiatric—or that you had a baby out of wedlock, or, you know, heaven forbid. Look, that’s all crap. And I don’t think any decent lawyer would or should do it. (I: Would you do that?) No, absolutely not. . . . Look, there’s good lawyers, bad lawyers and indifferent lawyers and it’s pretty hard to categorize them. . . . There is his story/her story and somewhere in between is the true story. But you never do it for purposes of embarrassing somebody.

Later in the interview, in recommending another lawyer for participation in the study, he stated:

He’s a guy who was a strong believer in whacking the complainant with the first question. He’ll spend days thinking about what his first question is. And he’s a very, very good lawyer in my view. And very ethical. You know?

One of the most common inconsistencies involved the relationship between a lawyer’s self-identified commitment to protecting the truth-seeking function of the criminal trial process and his or her articulation of the ethical parameters of sexual assault lawyering. Whether the criminal trial’s objective is to pursue truth is debatable. 94 Regardless, the concept of truth and its relationship to legal ethics featured in many of the interviews. Several of the lawyers labelled themselves as officers of the court, and acknowledged a duty not to knowingly mislead the court. 95 Indeed, as previously noted, for most of the defence lawyers interviewed, this was the only specific ethical obligation that they identified, other than a duty of loyalty to their client. At a general level, this ethical obligation to preserve the truth-seeking function of the trial may be in tension with a refusal to know, insistence on innocence, or liberation from truth. For example, wilful blindness on the part of a defence lawyer with respect to some of the facts, when adopted in an effort to avoid “knowingly” misleading the

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95 For example, Defence lawyer 1 stated, “I truly believe that I am an officer of the court. . . . I still have my duty to my client. I’m carrying out that duty. But I’m not jerking around with the court.”
court, is not in any real sense consistent with an ethical obligation not to distort the court’s truth-seeking function.

In addition, several of the interviews provided specific examples of this incoherence between acknowledging an ethical commitment to preserving the court’s truth-seeking function and the scope of one’s duty of loyalty to the client. The following example from Defence Lawyer 12 reflects a disjunction that was evident in many of the interviews. She described her most important ethical obligations as follows:

I would say . . . number one would be to, and they’re very closely intertwined, number one would be to zealously advance any defence that I can on behalf of the client that is legal and ethical, within the bounds of the law and the canons of ethics. . . . But, very closely linked to that, I would say my ethical obligations as an officer of the court, and to justice more broadly, so you know, hand in hand with that is to make sure that there’s no fraud on the court, to make sure that there’s no, that I’m not advancing a defence that is known to me to be untrue; to suggest something is that is not; to call evidence that I know is false.

In identifying what she considered to be the most significant legal reforms to the area of sexual assault law in the last thirty years, she explained:

I want to say Seaboyer. . . . Because I think, you know, in Seaboyer, you have a moment where the court is saying, we’re talking about stereotypes of women as victims or as complainants and we’re not, we’re going to consciously, maybe for the first time, acknowledge that those stereotypes are there and that they’re not helpful, that they don’t actually lead us to a better, you know, they don’t lead to a better truth-seeking function in the justice system. . . . In fact, the opposite is true. And so we’re not going to let you ask the kinds of questions that reinforce stereotypes or that rely on stereotypes to get to a result in the justice system.

She was also asked whether she would, in a case in which her client had given her a reliable confession, introduce a photograph of the complainant wearing provocative clothing on the evening that she was sexually assaulted. Ostensibly, the photograph would be offered in order to establish timing (because it had a time stamp). In reality, it was so that the jury would see how the complainant was dressed—one on the assumption that many of them would believe a young woman should not go out dressed like that for an evening of drinking and that exposure to the photograph may subconsciously impact the jury’s conclusions. She responded as follows:
I would agonize. . . . I personally do not believe that the way she’s dressed is relevant to whether she’s consented or not consented. And I would have a lot of trouble giving the jury that tool. On the other hand, my obligation is to use every tool and every weapon I have available. So I would, I don’t, I probably would put the picture before the jury at the end of the day. . . .

It is difficult to reconcile Defence Lawyer 12’s ethical commitment to preserving the court’s truth-seeking function with her (reluctant) willingness to invoke stereotypes that she believes to be baseless, yet likely to influence the jury. Notably, Defence Lawyer 12 did very much appear to agonize in offering this answer. She was clearly conflicted, but ultimately felt bound by her understanding of what her duty of loyalty to the client required.

Another type of incongruence evident in the interviews with some lawyers involved a contradiction between the justifications they suggested for defending someone they believe to have committed harmful offences and some of the trial practices that they endorsed. The interview with Defence Lawyer 9 provides an example:

I believe in the basic principles: the presumption of innocence, the burden of proof, proof beyond a reasonable doubt, and a fair and public hearing. I believe in those things. And as long as I believe in them, I can then defend anybody.

Throughout the interview, he emphasized protection of these basic principles as the fundamental role he performs (referencing them five times). In response to a question asking whether it is ethical for a lawyer to bring applications to introduce evidence of prior sexual history, or to obtain therapeutic or medical records held by a third party in order to threaten or scare off the complainant, Defence Lawyer 9 commented as follows:

I see absolutely nothing wrong. . . . I see nothing wrong, from a defence point of view, as to going after prior medical records, or making an application to go after prior sexual acts, as long as the lawyer feels there’s some relevancy to it. Medical records, I can never see anything wrong, for whatever reasons, okay? If it’s to scare off the alleged victim, so she won’t testify, that’s fine. Okay? There’s nothing wrong with that. But, so, I approve of that tactic, because you have to remember, as a defence counsel, we owe our duty to the client, not to the alleged victim.96

96 Beyond the scope of this article but nevertheless important, is the question of what defence lawyers mean when they say that a strategy or line of questioning is ethical if it has “some relevancy.” Do they mean relevant to the outcome because a particular tactic will
In discussing the use of the complainant’s prior sexual history, he stated:

Whether I’m right or wrong, prior sexual behaviour is usually, or can be completely irrelevant to the issue before the court. And the last thing that I want to do of course, is to embarrass the alleged victim to the point where the judge is going to have sympathy for that victim. Now, if it’s somebody over the age of eighteen and consent is an issue, then of course, my position is different. (*I: And then what’s your position?*) Then I, if I can, I will go after her.

There is a disjunction between how Defence Lawyer 9 understands his fundamental role as a defender of the guilty and the validation of these types of tactics. Using therapeutic records to dissuade a sexual assault complainant from testifying, or attempting to introduce irrelevant evidence of a woman’s sexual past in order to embarrass her, does not preserve the presumption of innocence or the state’s burden or standard of proof. To the contrary, it interferes with the provision of a fair and public hearing.

One can imagine a defence lawyer, whose justification for representing the factually guilty is a commitment to subverting or resisting the carceral state and the prison complex, endorsing such tactics in the name of their role. This position is articulated by some American criminal lawyers. 

None of the lawyers interviewed in this study mentioned a principled objection to the carceral state. Some explicitly sanctioned the use of incarceration or harsher penalties. For example, in offering suggestions to improve the criminal law’s response to sexual harm, Defence Lawyer 7 commented:

> [m]y responses go all the way from mediation and apologies and the negotiations and round circle to throwing the book at people, and stronger sentences. . . . I would likely be one of the worst people that you would want to have as a judge if a person was found guilty, in a, you know, sexual assault case. (*I: Why is that? That you would, upon conviction, throw the book at them?*) I see what hurt it does. I see what it’s done to people.

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deter a complainant or cause a trial of fact to disbelieve the complainant because of her sexual history? Conversely, do they mean relevant to an inference that is legally permissible? The latter definition of relevancy imposes ethical limits on defence counsel not present with the former. See Craig, *supra* note 13. Crown Attorney 3 also indicated that it is ethical for defence lawyers to use the prospect of a section 273 or a section 276 application to discourage a sexual assault complainant from continuing.

Defence Lawyer 9 offered a further example, “[I]f in fact, the uncle, the father, whoever, the grandfather, did it, they have to be punished. He’s the person that did something wrong; now let’s put him behind bars.”

It seems incoherent for a lawyer that identifies a process-based primary objective (such as the provision of a full and fair defence or the protection of a fair and public hearing), and that does not object on principle to the coercive authority of the carceral state, to also adopt a defend “at any cost” approach to the representation of a client they know to be factually guilty.

These observations regarding individual inconsistencies are not intended to be in any way critical of the defence lawyers who participated in this study, nor are they intended to suggest that this kind of individual incoherence would not occur with any professional or social actor that engages in complex, multi-dimensional work. Rather, they are offered as part of the portrait of the ethical identity that this article attempts to create.

**B. Intra-Professional Diversity**

Given the nature and effects of an adversarial system, it is unsurprising to find differences between the defence bar’s conception of their ethical obligations in sexual assault cases and the perceptions of Crown Attorneys regarding the ethical limits on defence lawyers when representing individuals accused of sexual offences. Such differences were apparent from the interviews conducted for this study.

One hypothesis for this distinction is that prosecutors are better positioned to empathize with the complainant. Crown Attorney 5, who practiced for seven years as a defence lawyer before becoming a prosecutor, offered the following comments:

I never really understood what a victim was until I was a Crown. Then you meet with them and you hear them and you listen to them and then you go, holy shit this is really tough stuff these people are going through and its only then that you begin to understand the rape myths that pervade not just society but the investigators . . . jurors . . . judges and then in your own, in your own, thought patterns. But you don’t really start to explore that side of the issue except from the Crown point of view.

Perhaps more remarkable than divergences between Crown and defence lawyers are the contradictions between defence lawyers themselves. One notable difference involved what defence lawyers identified as their main objectives. As previously discussed, lawyers interviewed for this
study offered different responses when asked about the primary objective of a lawyer representing a client accused of a sexual offence. Most noteworthy, in the face of this discrepancy, is that the lawyers interviewed generally responded to this question as if the answer was self-evident. Lawyers that identified their primary objective as to provide a full and fair defense, or to put the state to its test, implied that such a goal was incontrovertible. Consider this exchange with Defence Lawyer 11:

Read the question again. It is deceptively simple. [I: In your opinion, when acting for an individual accused of a sexual offence, what’s the primary objective of the lawyer?] To see that the Crown proves its case or the client gets acquitted. That’s true of every case. [I: It may seem like a really obvious question, but it actually elicits different types of answers.] The lawyer’s professional role, it really is not to win. It may make you feel good to win. Like, I feel better than when I lose. Almost always. But no . . . that’s not, you can’t think of your role that way. If you do, then the limits which professionalism imposes on you are literally tacked on to your conception of yourself and what you’re doing in court. . . . Everybody gets taught that.

Those that identified winning, or securing an acquittal, as their primary objective were equally certain as to the plainness of their perspective. Defence Lawyer 4 offered this response, “[W]ell the primary goal obviously is to have them found not guilty.” The content and tone of Defence Lawyer 3’s response conveyed a similar viewpoint, “To win. I mean, my job is to win the case for my client, and secure an acquittal, as long as I’m doing it within my ethical confines, that’s my job.” 

A second example of intra-professional discrepancy evidenced by the interviews involved questions about the cross-examination of a truthful complainant. Some defence lawyers readily drew a line between attacking the reliability of a truthful witness (so as to test the state’s evidence) and attacking the credibility of a witness they believed to be truthful. Defence Lawyer 11 offered this explanation:

98 A similar perspective is taken by some American lawyers. See e.g. Craig M Bradley & Joseph L Hoffman, “Public Perception, Justice, and the ‘Search for Truth’ in Criminal Cases” (1996) 69:4 S Cal L Rev 1267 (Alan Dershowitz commented, “[b]asically, I have one job when I take on a criminal case—to help my client get the lowest possible sentence or get acquitted” at 1297). In fact, it is not axiomatic that an acquittal should be a defence lawyer’s paramount goal. According to the Federation’s Model Code of Conduct, a criminal defence lawyer’s “duty is to protect the client as far as possible from being convicted, except . . . upon legal evidence sufficient to support a conviction for the offence with which the client is charged.” See FLSC, supra note 74, ch 5.1-1, commentary 9.
We’ve always drawn the ruler at that. It’s probably salutary. I’m not sure it’s a hugely meaningful rule. But it, I think it makes sense that that’s where you, one of the places you draw the line. Because you, you have integrity as an officer of the court not to abuse a witness. And it’s abusive to try and use a witness to say something or to achieve a result which you know is not true.

A similar ethical limit was identified in the following statement by Defence Lawyer 10, “I wouldn’t do it. I would frame it differently than that. Would it be unethical? I would frame it around certainty rather than honesty.”

Contrast these statements with the response given by Defence Lawyer 12. While she noted that she would very much agonize over whether to undermine the credibility of a truthful sexual assault complainant in a case in which her client had confessed to her, she concluded that “yeah I think I would challenge her credibility...on the belief that when the system does what it is supposed to do the right outcome prevails.”

Discussions about the ethics of using a preliminary inquiry to discourage a sexual assault complainant from proceeding also revealed discrepancies. Crown Lawyer 3 indicated that she does not think it is problematic for defence counsel to use the preliminary inquiry in this way:

[W]hat bothers me is if there’s a lot of delays. So, it gives the defence, you know, the statement, then the transcript from the preliminary and then the evidence at the trial, which of course is going to be different, especially if there’s a long delay. And then they just hammer them on cross-examination...Little differences don’t matter, but big differences do matter. So, I don’t know, I don’t really have a problem with it, other than the delay.

Defence Lawyer 9 also indicated that this was an acceptable use of the preliminary inquiry. In contrast, Defence Lawyer 3 offered the following description of tactics that he would not use:

But there are certain lawyers who love Superior Court for sex assault, for all cases, but for sex assault cases, cause they love having a crack at the complainant in a prelim. They love it. They love it; they think that they’re going to get all sorts of stuff and be able to challenge the complainant and hopefully maybe show the Crown some of the weaknesses in their case and see if they can get the Crown to either withdraw or make them a good offer. And to be frank, there are some defence lawyers who would say “I want the complainant to go through it twice. Like, let’s make this process, I’ve got a client to defend, let’s make this process as difficult as possible.”
The discrepancies between these sexual assault lawyers regarding their ethical limits suggest that in certain respects, the role of the criminal defence lawyer may not be as deeply embedded and incontestable as is perhaps assumed.

VI. RELUCTANCE TO LABEL CONDUCT UNETHICAL

One final theme is discussed in this section of the paper. Similarities involving the ways in which lawyers discussed legal ethics appeared with considerable frequency in the interviews with both Crown and defence lawyers. The lawyers interviewed for this study had a tendency to speak in broad strokes, and to avoid labelling particular conduct as unethical. The following comment by Defence Lawyer 12 demonstrates this tendency to describe ethical duties in general terms: “It’s for me to provide the best defence I can, within the limits of the law and the canons of ethics.” Defence Lawyer 1 commented, “I think lawyers have duties, I don’t know what they call them, ethical or whatever, you know, you have a social responsibility to act properly.”

When pressed to provide details about what limits the canon of ethics impose, many of the defence lawyers interviewed identified only one: some version of the duty not to mislead the court. Most commonly, these lawyers articulated this as the duty not to place their client on the stand, knowing that the client would lie in circumstances where the client has confessed to them. Some lawyers did offer other types of limits. Four of them, for example, described an ethical obligation to ensure a good faith basis for pursuing a particular line of cross-examination. However, for many, the descriptions of ethical limits placed on defence counsel were vague. For example, Defence Lawyer 1 commented in reference to the concerns of senior defence counsel about the practices of young lawyers, “[W]e’re very concerned about advocacy and ethics. Very concerned.” However, he was unable to provide any illustrations of this unease or examples of specific concerns.

Each of the lawyers interviewed was asked to identify and describe an ethical dilemma that he or she had faced when acting as a lawyer in a sexual assault case. None of them could recall a sexual assault case in which they were confronted with an ethical dilemma. It is likely difficult for a lawyer to immediately recollect something like this when giving an interview. However, it may be noteworthy that these lawyers that have practiced for twenty, thirty or forty years could not recall encountering
an ethical dilemma in a sexual assault case. Ann Tenbrunsel and David Messick describe a notion of “ethical fading” in which common psychological processes fade the ethics from an ethical dilemma.99 In some circumstances, this ethical fading causes decision makers to characterize as a business decision or a strategic decision something they might otherwise frame as an ethical judgment.. According to some research, this explanation is reflected in the way that lawyers react to discussions of ethics, “[L]awyers’ responses suggest that they simply did not think very much about legal ethics or that they did not consider the issues they confronted in moral or ethical terms.”100

One example of what could be ethical fading, evidenced in the interviews conducted for this study, relates to explanations or descriptions about a lawyer’s approach to the cross-examination of the complainant. Interview participants were asked how they determined this approach. Almost every defence lawyer interviewed reported that they do not use an aggressive approach when cross-examining a sexual assault complainant.101 They all attributed this decision to strategic considerations. Defence Lawyer 1’s response reflects a perspective expressed by others: “speaking generally, it’s a strategic thing . . . ah, it’s more the common sense approach. I mean, there’s no percentage in making a ten or twelve year old girl cry.” This explanation from Defence lawyer 8 offers another example:

[I]n all the cases I’ve done, I’ve never had the need to beat up on a victim, okay, on a complainant. I certainly believe you can get a lot more by making them feel comfortable, giving them an opportunity to speak, encouraging them to tell their story, and, if you think they’re being outrageous or coming close to creating fiction, you simply encourage them to do so. . . yells, screaming, abusing the person coves them to some extent, if they’ve already been abused and they climb back into their shell. So you’re certainly not doing your client any good in that regard.

Research suggests that ethical fading contributes to unethical behaviour.102 In the examples provided from the interviews conducted for this

101 It is true that at other points in the interviews some lawyers, despite having indicated that for strategic reasons they do not use aggressive tactics when cross-examining sexual assault complainants, did describe attacking the complainant, or going after her.
102 Tenbrunsel & Messick, supra note 99.
study, the suggestion is not that this possible fading contributed to unethical behaviour. Indeed, these lawyers consistently reported that they do not use aggression when cross-examining a sexual assault complainant. What is interesting is that with significant consistency, they attributed this decision entirely to strategy rather than ethical obligation.

Interviews with some lawyers seemed to reveal a hesitancy to categorize specific conduct as either ethical or unethical. Lawyers were particularly reluctant to label the conduct of others as unethical. The following comments by Defence Lawyer 6 illustrate this phenomenon. She suggested that she is “ethically obligated not to go there”—in reference to using either the complainant’s sexual history or therapeutic records in order to make the process difficult for her. When asked whether she thinks other defence counsel do that, she answered as follows:

Oh yeah. I do. [I: And do you think that is unethical?] I don’t. I don’t think it’s in the best traditions of the bar. . . . And that, you know, that’s, I’m not being critical. . . . [I: You described yourself as having an ethical obligation? But then, but you don’t think it’s unethical for other lawyers to do that?] Um, I think it could be unethical. But I can’t get inside their head. So, it’d be very hard to suss out.

Defence Lawyer 8 was asked whether he thinks some defence lawyers use the prospect of a section 276 application to introduce evidence of sexual history as a means to intimidate the complainant. He summarized his thoughts in this way:

I’m sure they do. I mean, we do, many people do whatever they feel they deem appropriate. And they don’t always act appropriately. [I: Do you think it is unethical to do that?] I have great issue with the use of the word ‘ethical’ to be honest. (laugh) My concept of ethics is that you, it’s the golden rule. You wouldn’t want to do to somebody what you wouldn’t want done to yourself. To me, that’s the definition of ethics. It’s good manners and, simply don’t do to someone what you wouldn’t want done to yourself. Ethics is much too much of a complex concept for me to grasp. I cannot imagine myself actually simply going after that information for the purpose of intimidating the witness, okay? As to how high my threshold is, if my client gives me information that leads me to believe that a sexual history would in some way impact the outcome, well then, certainly I will do it. I don’t think I would hesitate. But if the only purpose was to let them know that you’re going to be asking about who they slept with over the last five, six, seven, eight, nine, ten years, no thanks.
Defence Lawyer 7 was asked, “Do you think some criminal lawyers who practice sexual assault law push the boundaries of what you would consider to be honourable, ethical representation?” His response also suggested a hesitancy to label conduct as unethical:

Ah, yeah, I do. And my boundary might be different from someone else’s. You know? And so, I’m, and there are, yeah, but I’m not, I’m not, I don’t see that in a negative way. . . . I think the boundaries are there, and we have an obligation, a professional obligation to push them. You know? And the law develops out of the adversarial nature of our criminal justice system.103

The following explanation from Crown Lawyer 2 also demonstrates this tendency:

I don’t know that defence lawyers, in my mind, have changed when it comes to some stuff—there’s always, maybe I’m being unfair, the idea of ‘I’m going to make this very difficult on you’—the complainant. And I don’t know if that’s ethical or unethical, but. . . . I don’t know. I can’t say.

Later in the interview Crown Attorney 2 commented:

I think it’s unethical to attempt to question a complainant with a view to hopefully getting that one or two members on the jury who are thinking along those rape lines, er, rape myths, sorry. But, I don’t know, that’s just the way, maybe I’m just twisted now as a Crown Attorney, for all that long that ah. . . . But, ah I don’t know. You’d have to ask a defence lawyer.

Some lawyers seemed to avoid answering direct questions about whether a specific tactic or strategy is ethical. This response from Defence Lawyer 12 to a question about whether it is ethical for defence counsel to invoke stereotypes about how a woman is dressed, or the implications of a woman’s failure to raise a hue and cry, provides an example:

I think, I mean, delayed disclosure for example, a lot of times, I’m trying to get around answering your question (laugh) basically. I don’t want to answer these questions. You know, a lot of times, like, the Crown is going to call the evidence about why delayed disclosure. They always do. So, it doesn’t really get me anywhere to try to hang my hat on that issue. So, I’m trying to evade your question. (laugh)

103 See Marc C Suchman, “Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation” (1998) 67:2 Fordham L Rev 837 at 854 (demonstrating that, for some American lawyers, pushing the ethical envelope is a point of pride).
All of the lawyers interviewed for this study made statements and offered comments, suggesting that they had reflected frequently upon what it means to them to “do their job.” They had well-developed narratives to articulate this notion. In contrast, significant consideration of codes of conduct or ethical obligations was not evident from the interviews. While all of the defence lawyers interviewed clearly identified their duty of loyalty to their client, and their duty not to knowingly permit a client to lie when testifying, for the most part, other aspects of their practice were not framed in the language of legal ethics or ethical obligations. With notable consistency, the lawyers interviewed for this study did not appear to assess practice issues using an ethics framework.104

VII. CONCLUSIONS AND RECOMMENDATIONS

Interviews with the sexual assault lawyers who participated in this study revealed a group of professionals that experience this type of work as extremely taxing because of its emotional nature. The interviews revealed a group that is not unanimous on some of the key features of the role and obligations of lawyers working in this capacity—including a criminal lawyer’s primary objective. The dominant conception of the lawyer as hired gun was embraced in some respects by some of these lawyers, but in other ways, it was not reflected in many of the interviews. Several of the lawyers demonstrated a type of role-differentiated thinking that appeared to inform their sense of professionalism. Most of the interview participants offered comments that seemed to be at odds with other responses they had provided. Most of the lawyers interviewed were reluctant to label specific types of conduct as unethical.

These insights about how some sexual assault lawyers understand their ethical obligations give rise to three general observations. The observations and reference to potential strategies offered are intentionally broad. The objective of this work is to initiate conversation and to encourage

104 Martin, supra note 41 (offering this explanation for the dearth of literature examining criminal law ethics: “Traditionally, discussions with respect to ethical problems in the defence of criminal cases have centered around questions, the answers to which were reasonably clear, at least to experienced counsel. The grey areas were not debated. Perhaps this was so because, when the defence of criminal cases tended to be in the hands of a small group of experienced practitioners, defence counsel relied on intuition born of experience and tradition. Another explanation for the meagre nature of the literature on the subject may be that in other times only the grossest departure from propriety attracted public notice or judicial or professional sanctions” at 380–81).
further research on the relationship between the ethical identities and obligations of criminal defence lawyers and the deficiencies in, and difficulties with, the legal response to non-consensual sex.

First, if the reluctance to identify specific practices as unethical reflects a broader trend among lawyers, then strategies should be devised to encourage a professional culture in which there is more willingness to both reflect on one’s own practice using the lens of legal ethics, and to identify and name unethical conduct in others. Such strategies may include mandatory reporting obligations imposed by law societies on both defence counsel and Crown Attorneys. It may involve closer consideration of the role that law schools play in cultivating the ethical identity of sexual assault lawyers. Does the legal academy push law students to think critically about the ways in which their ethical obligations coexist and the relationship between their professional objectives and ethical duties? Should law schools commit more resources to developing the skills necessary for professional self-reflection and management of complex and challenging emotional contexts? The legal profession is granted more autonomy—more independence from state regulation—than any other profession in Canada. As part of this autonomy, lawyers are able to corner the market for legal services in Canada. In exchange, the legal profession is required to regulate itself in the public interest. In a sense, “ethical obligations are, in broad terms, the quid pro quo society requires for what is frequently a monopoly over a wide range of lucrative activities.”

Second, and perhaps related to the first observation, the level of abstraction at which these lawyers discussed their ethical duties and sense of ethical obligations may be uniquely problematic in the context of sexual assault cases. For example, one of the core issues in delineating the ethical parameters of criminal defence work involves the tension between the duty to provide resolute representation for one’s client and the ethical obligation not to knowingly subvert the truth-seeking function of the adversarial process. Many of the lawyers interviewed relied on the concepts of relevancy and good faith to resolve this tension. Factors such as assessments of a sexual assault complainant’s credibility, conclusions as to whether an accused had an honest but mistaken belief in consent, and the relevancy of a complainant’s prior sexual experience are deeply imbued

with social assumptions about sexuality, women, and gender. Reliance
on the relevancy of an argument, a third-party record, or a particular line
of cross-examination to delineate the ethical boundaries of criminal litiga-
tion is problematic in a legal context in which outdated stereotypes
persist. (For example, in any case in which the defence is consent, prior
sexual history will seem relevant to a lawyer who accepts that women who
have had multiple sexual partners in the past are more likely to consent
to sex.) Given the persistence of these stereotypes, it may be necessary in
this area of law to implement ethical standards that do not rely on con-
ceptual criterion like “good faith” and “relevancy.” Professional codes of
conduct should be revisited to ensure an appropriate balance between ar-
ticulating the profession’s aspirational values and sufficiently delineating,
with a greater degree of specificity, the limits on those that practice in this
difficult and socially-complex area of law. For example, is it necessary to
elaborate on or clarify the duty not to discriminate?

Third, the diverse perspectives among lawyers about the objectives
of, and limits on, those that practice sexual assault law challenges the
narrative that criminal lawyers who whack the complainant, invoke out-
dated stereotypes, or defend at all costs, are obligated to do so in order to
properly serve their client. This study demonstrates that not all criminal
lawyers consider this a necessary aspect of their duty of loyalty to the
client. Beyond not being required, for some of the lawyers interviewed,
these kinds of tactics are in fact unethical. This diversity of perspectives
within the profession suggests an opportunity to critically explore or re-
visit the role of defence counsel in sexual assault cases.

Indeed, addressing the problematic role of stereotypical thinking about women and sex
was the impetus for many of the major reforms to sexual assault law in Canada. According
to Jennifer Temkin and Barbara Krahé, “no other criminal offence...is as intimately relat-
ed to broader social attitudes and evaluations of the victim’s conduct as sexual assault.”
See Temkin & Krahé, supra note 12 at 33.

I have argued elsewhere that the categorical rejection of a particular stereotype through
law reform imposes specific ethical obligations on lawyers. See Craig, supra note 13.

There is literature exploring the balance between the aspirational and operational con-
tent of professional codes of conduct. See e.g. Manfred F Meine & Thomas P Dunn, “The
Search for Ethical Competency: Do Ethics Codes Matter?” (2013) 15:2 Public Integrity 149.

See Tanovich, “Equality”, supra note 13 (discussing the role of the ethical duty not to dis-
criminate in the context of conducting a sexual assault trial).

For a similar observation, see Susan Daicoff, “(Oxymoron?) Ethical Decision Making
by Attorneys: An Empirical Study” (1996) 48:2 Fla L Rev 197 at 201 (discussing a study
demonstrating that “lawyers’ professional ethical decision making may not be as homoge-
neous, conventional, or rule-based as some previous studies suggest” at 201).
constitutional right of the accused to due process is not a conversation stopper if we understand there to be more than one accepted professional vision of how to practice sexual assault law. Some scholars and legal ethicists most committed to the notion that criminal defence lawyers must serve as truly zealous advocates, the hired guns, or amoral agents of their clients, either (1) make an exception with respect to sexual assault cases,\textsuperscript{111} or (2) acknowledge an inability to reconcile their hired gun ethic implicitly, with their perspective on the ethical treatment by defence lawyers of women who have been sexually violated.\textsuperscript{112} Recognition that there is no unanimity among criminal lawyers about the ethics of sexual assault lawyering, and concessions by legal ethicists that the hired gun model is not appropriate in this area of law, could have significant implications for a reconsideration of the sexual assault lawyer’s ethical obligations.

Social context expectedly informs the framing of ethical identity. This is no less true for sexual assault lawyers than for other professionals. While not above reproach, criminal lawyers should not be castigated for the disappointments, limits, and dysfunctions of the criminal justice response to sexual assault. Ameliorating the criminal law’s approach to the social problem of sexual harm requires changing our social context. While reforms to the law of sexual assault were and continue to be critical, the justice gap between the aim of these reforms and the substantive results that they have failed to deliver cannot be remediated through law alone. However, invigorating the profession’s attention and commitment to the ethics of sexual assault lawyering may offer one spoke in what will necessarily be a multifaceted renovation to the law’s response to sexual harm.

\textsuperscript{111} See David Luban, “Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann” (1990) 90:4 Colum L Rev 1004 at 1026 (arguing that, in a sexual assault case involving a female victim, the institutional power of the state is pitted against the institution of patriarchy and its power. The need to hold the state to its burden of proof will not justify the aggressive cross-examination of a truthful witness in a sexual assault trial because of the competing need to protect women from the institution of patriarchy).

\textsuperscript{112} Freedman & Smith, supra note 33 at 164–65 (noting that he does not accept rape cases because of the manner in which the criminal justice system treats sexual assault victims). But see Abbe Smith, “Rosie O’Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender” (1993) 28:1 Harv CR-CLL Rev 1 at 42 (arguing that it is ethical to aggressively cross-examine a truthful sexual assault complainant even if it causes harm and perpetuates sexism).