

# Connections

A Biannual Publication of  
Washington Coalition of  
Sexual Assault Programs

Volume X, Number 1

SPRING | SUMMER 2008



Considering the Differences:  
Intimate Partner Sexual Violence  
in Sexual Assault and Domestic  
Violence Discourse



Advice for Criminal Justice Staff  
and/or Advocates to Aid  
IPSV Survivors



Making the Connections:  
Advocating for Survivors of  
Intimate Partner Sexual Violence



Making Marital Rape A Crime:  
A Long Road Traveled,  
A Long Way to Go



Prosecuting Intimate Partner  
Sexual Assault

A Guide for Developing Tools  
to Assess for Sexual Assault  
Within the Context of  
Domestic Violence



KATHLEEN ARLEDGE  
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## Letter from the Guest Editor:

Two years ago, the Washington Coalition of Sexual Assault Programs partnered with victim advocates, state organizations, law enforcement, and prosecutors to create a community collaborative approach to address sexual assault in the context of domestic violence. We came to the table with bold ideas about how to serve this unique population of survivors, recognizing the nuanced difficulties within each of our respected fields and the lack of information about adequate service delivery. Pioneering research conducted by Raquel Kennedy Bergen, David Finkelhor & Kersti Yllo, and Diana Russel had coined the phrase Intimate Partner Sexual Violence (IPSV), but their research predated my career as an advocate: We needed to assess the current landscape of service delivery and hear the voice of today's helping professionals.

I began training advocates, conducting focus groups, and reaching out to allied professionals on the issue. The professionals told me they did not have adequate training, their resources were in short supply, and they were unsure as to how to work with other systems on the issue. Then survivors began to come forward. They told me their needs were not being met by the current service structure. They told me that law enforcement did not know how to help them and that prosecutors did not have grounds with which to press charges. It became clear to me that the political and social landscape that existed when Raquel Bergen authored her book "Wife Rape" in 1996 was still prevalent today and without a doubt we still have a long way to go.

A systematic response to intimate partner sexual violence is one that involves all levels of advocacy, legal, and political realms. As the guest editor of this issue of Connections, I sought to portray a comprehensive approach to serving the whole survivor. The articles within this issue illustrate the complexities of IPSV, while painting a picture of that systematic response. By capturing the voices of survivors, advocates and legal leaders in this movement to end violence against women, this Connections will inspire you to look beyond traditional paths of service delivery, dig deeper into the root causes of intimate partner sexual violence, and expand your outreach to survivors. Additionally, it provides a screening resource tool for thought provocation and implementation support.

Today, Washington State is actively working on implementing a state-wide coordinated community response that is equipped to address the needs of survivors of IPSV and convict perpetrators of this heinous crime. Through the team collaborative we've developed local protocols and policies, screening tools. We continue to meet regularly as a team in efforts to enhance service delivery and response to IPSV. The process hasn't been easy, but we're committed. And as our movement to end violence against women continues to grow, our methods of service delivery continues to evolve with the needs of the survivor.

After all, we are in this work to change lives, change culture, and in turn change the world.

*Kathleen Arledge*  
Program Management Specialist, WCSAP



*The Mission of the Washington Coalition of Sexual Assault Programs is to unite agencies engaged in the elimination of sexual violence through education, advocacy, victim services and social change.*



THIS ISSUE:  
**IPSV**  
Intimate Partner  
Sexual Assault

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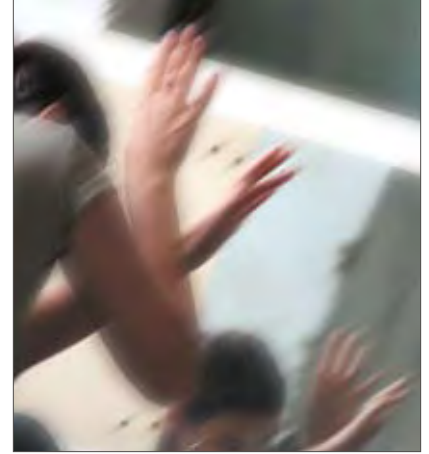


Washington Coalition of  
Sexual Assault Programs

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# Considering the Differences: Intimate Partner Sexual Violence in Sexual Assault and Domestic Violence Discourse



**Louise McOrmond-Plummer**

**T**wenty years ago, I became free of a dangerous man. He beat me regularly, threatened me with weapons and pursued me with threats to my life when I sought to leave. Although I could never have given it a name at the time, he had other ways of subjugating and demeaning me too. He raped me, repeatedly, when his sense of ownership of me was threatened, to punish me, or just because I presumed the right to say 'no.' At the time, avoiding or surviving the battery was a priority; I figured that what happened in the bedroom was best forgotten as soon as possible.

I got away, I tried to bury myself in a new life and forget. Then my ex-partner was charged with murder, and the barricade began to crumble. Most disconcertingly, memories of the *rapes* bothered me. It occurred to me that it was different, *worse*, somehow than the battery. I decided to seek information that could help me begin to process it.

This was immensely frustrating. In rape and domestic violence literature, as well as within agencies, Intimate Partner Sexual Violence (IPSV) and the range of issues it carries as distinct from general sexual assault or domestic violence, was not well-defined. It was as if there was a hole in the knowledge; my experiences had only limited commonality. It left me feeling as if what happened to me was given lip-service as rape, but somehow 'less' rape than any other kind. I believed that my level of trauma must be an overreaction, and was embarrassed about putting it on a par with the rapes of other women.

Upon entering the university setting, I had the opportunity to study IPSV. I discovered that researchers were indeed drawing attention to the issue, pointing out the need to be aware of the specific dynamics of intimate partner sexual violence.<sup>1</sup> Since that time, further positive contributions to understanding have been made. It is thus a privilege to have co-authored the book *Real Rape, Real Pain* with Dr. Patricia Easta.

## **IPSV and General Sexual Assault**

### Problems with equating IPSV and general sexual assault issues

It is true that all types of rape are traumatic, and that in any context, rape should be seen as *rape*. But known wisdoms about sexual assault are often ill-suited to IPSV survivors. Finkelhor and Yllo write about the 'special

In rape and domestic violence literature, as well as within agencies, Intimate Partner Sexual Violence (IPSV) and the range of issues it carries as distinct from general sexual assault or domestic violence, was not well-defined. It was as if there was a hole in the knowledge; my experiences had only limited commonality.

<sup>1</sup> D Finkelhor & K Yllo, 1985 License to Rape: Sexual Abuse of Wives, The Free Press, New York; Diana Russell, 1990 Rape in Marriage, MacMillan Publishing Company, USA.

traumas' of IPSV and tell us, 'It is these special traumas that we need to understand in their full and terrible reality.'<sup>2</sup> Survivor Linda articulates:

And they say marital rape is not as bad as stranger rape. I don't know. I have never been raped by a stranger. But I think being raped by your husband in your own home must be worse in some ways. At least if you're attacked by a perfect stranger it is not so personal. Your husband is the person whom you should be able to turn to for comfort, who should protect you. When it is the person you have entrusted your life to who abuses you, it isn't just physical or sexual assault, it is a betrayal of the very core of your marriage or your person, your trust. If you're not safe in your own home, next to your husband, where are you safe?<sup>3</sup>

It didn't occur to me at the time that 'different' didn't mean 'less than.'

Raquel Bergen writes about the insufficiency of treating IPSV survivors as generic rape survivors with particular regard to counseling and support groups.<sup>4</sup> This is borne out in my own experience of membership in a generic rape survivor group. There simply wasn't the space to explore my specific issues such as ambivalent feelings for the perpetrator and the deep shame of having continued the relationship after being raped by him. This led to a deeper sense of isolation and sense that my experiences didn't matter quite as much as those of the other women. It didn't occur to me at the time that 'different' didn't mean 'less than.'

Below are just some of the issues common to IPSV victims/survivors as opposed to other rape survivors:

- **Longer-lasting trauma:** There's a common notion that IPSV doesn't have as bad an impact as sexual assault by a stranger. In fact, research reveals that the trauma can be longer lasting. Significant reasons for this are lack of recognition and ability to share the pain.<sup>5</sup>
- **Higher levels of physical injury:** If we accept that generally most rapes are not physically violent, those that do involve injury are likely to be partner rapes.<sup>6</sup>
- **The incidence of multiple rape:** Although IPSV can be one off, survivors of IPSV suffer the highest frequency of multiple rape.<sup>7</sup>
- **Higher levels of anal and oral rape:** Partner perpetrators commonly use these forms of assault to humiliate, punish and take 'full' ownership of their partners.<sup>8</sup>
- **Advice to "put up with" rape:** Marital rape victims are a group singularly prone to being advised by church, family or friends that they should be grateful that the rapist is a good father, and that it's their duty to submit.<sup>9</sup> It's hard to imagine any other class of rape victim being given this advice, and is what leads to further endangerment.
- **Financial dependency on the rapist:** Women with children who are permitted no money or employment of their own may feel that there is no escape.
- **Safety issues:** The IPSV survivor may need a place of refuge, court-orders and assistance with legal/custody matters.
- **Difficulty defining the act/s as sexual assault:** Women are socialized to see rape as involving non-consensual sex between two strangers. Additionally, there may be reluctance to define a partner she loves as a "rapist."

<sup>2</sup> Ibid, 138.

<sup>3</sup> P Eastal & L McOrmond-Plummer, 2006 *Real Rape, Real Pain: Help for Women Sexually Assaulted by Male Partners*, Hybrid, Melbourne, 116.

<sup>4</sup> R Bergen 1996 *Wife Rape: Understanding the response of survivors and service providers*, Sage Publications Inc., California, 105.

<sup>5</sup> Finkelhor & Yllo above n 2, 135-7.

<sup>6</sup> A Myhill. and J Allen 2002 *Rape and Sexual Assault of Women: Findings from the British Crime Survey*, at: [homeoffice.gov.uk/rds/pdfs2/r159.pdf](http://homeoffice.gov.uk/rds/pdfs2/r159.pdf).

<sup>7</sup> Ibid

<sup>8</sup> Finkelhor & Yllo above n 1. 36; Peacock, 1995 cited in R Bergen above n 4, 19.

<sup>9</sup> C Adams, 1995 "I just raped my wife! What are you going to do about it, Pastor?" The church and sexual violence, in *Transforming a Rape Culture*, eds E Buchwald, P Fletcher & M Roth, Milkweed Editions, Minneapolis, 76.

- **A general climate of sexual assault/abuse:** Women living with IPSV may face a host of other behaviors than rape that would not be acceptable if committed by strangers, such as their breasts being hurt, being forced to touch the perpetrator sexually, and degrading name calling.<sup>10</sup>

## IPSV and General Domestic Violence

### Problems with equating IPSV and general domestic violence issues

There has been a past trend in domestic violence discourse to view IPSV as simply another abuse. Yet, Bergen's study reveals that women who were battered as well as raped by their partners considered rape to be the most significant issue. She adds that, 'When treated as battered women, the wounds left by the sexual abuse often go unaddressed.'<sup>11</sup>

To be sure, all domestic violence, be it physical, emotional, sexual or otherwise is usually aimed at control and subjugation. But sexual assault attacks a woman's psyche in different ways. In my experience, the battery was aimed at getting me to do what I was told or hurting me for not doing so, but the rape had a far nastier and more contemptuous message about my lack of worth and power. My rapist intended it as an ultimate insult, and that is how I experienced it. While I was ashamed of being battered – certainly in terms of the blame it accrued from others – the shame of being raped was more deeply excoriating; I did not think I would ever tell anybody.

Another serious problem in subsuming IPSV under domestic violence is that it may foster the assumption that rape only happens in battering relationships. While this is statistically more likely,<sup>12</sup> it does also occur in relationships that are not characterized by other violence. Natalie says, 'There was absolutely no indication in the seven years of our relationship that he could be violent, and I know he adored me. I simply couldn't reconcile the Sean who attacked me with the Sean that I had known all those years.'<sup>13</sup> Numerous women have written to me through my website ([www.aphroditewounded.org](http://www.aphroditewounded.org)) with apologetic tones because their partners didn't beat them 'like so many other women.' Yet women shouldn't need to be beaten to feel that their pain around being raped is valid. Women who don't identify as domestic violence victims because they aren't being hit, or whose sexual assaults are more coercive than physically violent (i.e. the perpetrator withdraws affection or verbally badgers to get what he wants) may continue to fall through the cracks when IPSV is not clearly defined and given a prominence of its own. Let's look at some differences:

- **Potential Fatality:** Research establishes that women who are being raped as well as battered are in greater danger of being killed than women who are battered but not raped.<sup>14</sup> Given the dynamics of ultimate power-over and ownership in IPSV, this would seem to be a logical step for some batterers. Screening women for life-threatening issues is an important part of shelter intake; viewing IPSV in this light may save lives.
- **Deliberately inflicted pregnancy or STDs:** Men may rape to impregnate their partners in order to force them to remain in or return to the relationship.<sup>15</sup> They may also force their partners into unprotected sex to infect



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<sup>10</sup> Easteal & McOrmond-Plummer above n 3,19, 25.

<sup>11</sup> R. Bergen above n 4, 89-90.

<sup>12</sup> D. Russell above n 1, 100.

<sup>13</sup> Easteal & McOrmond-Plummer above n 3, 111.

<sup>14</sup> Browne, 1987; Campbell 1989, cited in Bergen above n 4, 104.

<sup>15</sup> Easteal & McOrmond-Plummer above n 3,121.

them with STDs.<sup>16</sup>

- **Psychological Effects:** Women who have been raped as well as battered may suffer greater damage to self-esteem and body issues – and this effect has been measured as separable from battery.<sup>17</sup> This should shock us little since the degradation has come from somebody who was supposed to love and honor the survivor's body. Rape can result in a more "intimate" wound than battery.

#### Different Issues among Subgroups of IPSV Survivors

In thinking about the distinct issues that IPSV survivors face, we should not neglect determinant factors that may have bearing on different IPSV survivors' reactions. Some factors to consider are:

- the age of the survivor (teenage survivors of IPSV experience some different effects to their adult counterparts)
- the levels of violence involved (bearing in mind that 'non-violent' rape is still traumatic and may be more confusing to the victim than rape that involves the more 'stereotypical' element of violence),
- the duration and frequency of the assaults (acknowledging that one rape is one too many and can comprise a profound shock).<sup>18</sup>

#### **To Conclude**

IPSV is sexual assault and domestic violence – "both/and" rather than "either/or" with some distinct features, the recognition of which are crucial if survivors are to be aided effectively. Extremely positive endeavors to this end include Raquel Bergen's extensive writing and training<sup>19</sup> together with initiatives such as the Washington Coalition of Sexual Assault Programs (WCSAP) *Sexual Assault and Stalking in the Context of Domestic Violence* project, a collaborative project which brings together domestic and sexual violence advocates, law enforcement and prosecutors to address the intersections of sexual assault and domestic violence, and trains helping professionals in advocacy for survivors of IPSV.<sup>20</sup> For me, being "part of the solution" in coauthoring *Real Rape Real Pain*, a healing manual that focuses on the issues relevant to IPSV survivors,<sup>21</sup> has been immensely gratifying but also humbling when women write to Patricia and me expressing relief that they finally feel heard and understood, that they know they can end the violence, and that they can take back their lives. It is an honor to be part of this change. We can all hope for its continuance. Women's lives depend on it.

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#### **Bio**

Louise McOrmond-Plummer is co-author of the book *Real Rape Real Pain: Help for women sexually assaulted by male partners*. She maintains the IPSV survivor support website Aphrodite Wounded ([www.aphroditewounded.org](http://www.aphroditewounded.org)) and is a co-moderator of Pandora's Aquarium ([www.pandys.org](http://www.pandys.org)), a thriving message board for survivors of sexual assault including IPSV. Louise has an Associate Diploma in Welfare Studies (La Trobe University, Victoria, Australia). ©

<sup>16</sup> KJ Wilson 1997, *When Violence Begins at Home: A comprehensive guide to understanding and ending domestic violence*, Hunter House Inc., California, 166.

<sup>17</sup> C Shields & N Hanneke cited in Finkelhor & Yllo above n 1, 136.

<sup>18</sup> Easteal & McOrmond-Plummer above n 3.

<sup>19</sup> See [http://www.sju.edu/academics/cas/sociology/faculty\\_staff/rbergen.html](http://www.sju.edu/academics/cas/sociology/faculty_staff/rbergen.html)

<sup>20</sup> See <http://www.wcsap.org/IPSV.htm>

<sup>21</sup> See <http://www.partnerrapebook.org/>

Women who don't identify as domestic violence victims because they aren't being hit, or whose sexual assaults are more coercive than physically violent may continue to fall through the cracks when IPSV is not clearly defined and given a prominence of its own



# Advice for Criminal Justice Staff and/or Advocates to Aid IPSV Survivors

**Patricia Easteal**

*Aside from co-authoring **Real Rape, Real Pain**, Dr Patricia Easteal, an expatriate North American has written books (eg **Voices of the Survivors**, **Killing the Beloved**, **Balancing the Scales: Rape, Law Reform & Australian Culture**, **Less Than Equal: Women and the Australian Legal System**) and numerous articles on sexual assault and domestic violence. She is an activist, advocate and sociolegal academic at University of Canberra.*

Rape culture myths are alive and well throughout society and the criminal justice system can no doubt contribute to the IPSV victim's reluctance to report. Fear of the perpetrator is the most common explanation provided for why a woman chooses not to disclose. In addition though, she may not contact the police because of concern about her credibility as a victim and confusion in defining the act(s) as rape. This self-doubt can be even more powerful if physical force was not a part of the coercion. Of the 30 women whose stories make up *Real Rape Real Pain: Help for Women Sexually Assaulted by Male Partners*, only four told the 'authorities' about the rape. For each of these women, the assault involved physical force.<sup>1</sup>

Delayed reporting can lead to the disappearance of evidence and can then be used against the woman in court to discredit her as a witness. The rape myth operating here is that the 'good' victim reports immediately.

*So, a partner rape survivor often needs emotional support in making a complaint.*

Police might minimize what happened in a number of ways. For example, in an interview with one survivor the officer asked, 'How did he come to rape you?' After she responded that he had forced her legs open, the officer asked, 'How long did he lay on top of you in that position making love to you, fu\*\*\*\*g you, whatever words you want to use...raping you?'<sup>2</sup>

There is a high rate of discontinuances or dropping of charges in all sexual assault cases<sup>3</sup> but it happens even more often in partner rape. Frequently the victim plays an active role in requesting that charges be dropped.<sup>4</sup>

<sup>1</sup> All information in this box unless other wise footnoted comes from Easteal & McOrmond-Plummer above n 3. file:///See <http://www.partnerrapebook.org/index.html> for details.

<sup>2</sup> Court cases and prosecutor comments from research by P Easteal & Feerick 2005, 'Sexual Assault by Male Partners: Is the License Still Valid?' 8 (2) Flinders Journal of Law Reform, 185-207.

<sup>3</sup> In looking at five Australian jurisdictions, Denise Lievore found that 38% of the prosecutions in sexual assault were dropped; Prosecutorial decisions in adult sexual assault cases, Trends and Issues in Crime and Criminal Justice, number 291, January 2005 at <http://www.aic.gov.au/publications/tandi2/tandi291t.html> accessed 19 April 2008.

<sup>4</sup> In Easteal and Feerick, above note 20, 10 of the 21 cases of partner rape were dropped; seven



Some women may be convinced (perhaps subtly and sometimes very directly) by the police or the prosecutors that there is little hope of a guilty verdict. For others, their cross-examination at the committal hearing (indictment) was an ordeal and they simply don't have the energy to continue.

*Police, prosecutors and support workers can be more sensitive to these issues and careful in their communication.*

Also, a woman may have several interviews with police officers. Sadly the courts (and the defense lawyer deliberately) don't often recognize the impact of trauma and search for discrepancies in her accounts to officers. If there are any differences between what a victim said to police between different interviews and/or in her preliminary hearing testimony, the prosecutor may pre-empt the Defense raising these discrepancies at trial by labeling her as 'not reliable' and discontinuing or dropping the case.

*If you're supporting a woman, it may be a good idea to make her aware that what she says seemingly informally to a police officer at the hospital may be compared with later statements.*

The prosecutor knows that the chances of conviction are low.<sup>5</sup> They will be more likely to 'run' with a matter if there is forensic evidence.

*If you are a supporting a victim encourage her to have an examination.*

If the case makes it through the prosecutors' filtering, aside from the very slow wheels of 'justice' the victim needs to be prepared by a support person for certain realities of the courtroom. She may experience frustration since she has no lawyer or advocate in the trial and the defendant may not be cross-examined about matters that she feels are relevant. Further, the judge may not allow certain evidence like history of domestic violence although such evidence may be vital and its inadmissibility contributes to an acquittal.

So often in the case in rape trials, the complainant's word ends up being on trial.<sup>6</sup> The partner/complainants may be cross-examined about previous consensual sex.<sup>7</sup> And, credibility as a witness unfortunately is equated with consistency. For instance, one 'hung' jury seemed to pivot around the complainant's inability to remember all the particular details of the assault.<sup>8</sup> The defense lawyer's cross-examination was exhaustive and managed to get her confused about a number of details and appear unreliable.

**Develop a plan** to assist her in dealing with confusion. **Inform her** that she can ask the judge for time out for a glass of water. **Encourage her** to make eye contact as much as possible with you or with another support person. For prosecutorial staff; **help establish** a 'reality check' by developing some signals eg. Such as advise her that you will touch your forehead as if to say, 'This lawyer is trying to play with your head.' If you clasp your hands it can be a message of strength and union.

**Find out if your jurisdiction allows her to give her testimony in another room or with a partition.** She will feel more comfortable and safer if she's not in the same room as her perpetrator. You can use the knowledge of the games that are played in the criminal justice system as a suit of armor to protect her to some degree from the wounds. ◉

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<sup>5</sup> In Eastale and Feerick study, of those who went to trial, there were no jury findings of guilt; six defendants pleaded guilty, three were acquitted and in two trials there were hung juries.

<sup>6</sup> In over half (54%) of the trials studied by Pia van deZandt "Heroines of Fortitude" (ed. P Eastale) in Balancing the Scales: Rape, Law Reform and Australian Culture (1998) 124, 130 the complainant was cross-examined about a possible motive for making a false report to the police.

<sup>7</sup> M Heenan 2004 'Just "keeping the peace": A reluctance to respond to male partner sexual violence' 1 Australian Centre for the Study of Sexual Assault 1, citing work from her 2001 unpublished Monash University PhD thesis: 'Trial and Error: Rape, Law Reform and Feminism'.

<sup>8</sup> Eastale and Feerick, above n 20.

# Making the Connections: Advocating for Survivors of Intimate Partner Sexual Violence

Marianne Winters

## Why Make the Connections?

Intimate partner sexual violence (IPSV) is the place where the movements to end and address domestic violence and sexualized violence come together. Simply stated, IPSV exists whenever sexualized violence is present along with any form of violence within an intimate relationship. In early thinking and literature, it was often referred to as marital rape or wife rape. IPSV has been coined as a term so that the understanding of the issue is broad and inclusive of the wide range of intimate relationships, including unmarried partners, people in dating relationships, people of all genders and sexual orientations, and teens. From a survivor's perspective, IPSV is a part of a bigger picture of violence, abuse, and control where sexual assault and abuse get used as an additional form of battering. For some survivors, sexual assault may be the sole form of physical abuse within a relationship. From the perspective of workers in movements to address domestic and sexual violence, however, IPSV is often addressed with the same or similar strategies as either domestic violence or sexualized violence, and oftentimes is unidentified and unaddressed, leaving survivors with gaps in advocacy which narrows the opportunities to develop safety and healing. For the movements to end and address domestic and sexualized violence, a full understanding of the nature, dynamics, impact, and effective approaches to IPSV provides us with the opportunity to address the broad implications for safety, healing, health care, legal issues, prevention, and public policy.

It is my belief that full integration of these issues is essential at all levels of our movements. Counselors and advocates working in domestic violence programs must learn how the experience of sexualized violence impacts efforts to build safety for survivors of domestic violence. Counselors and advocates within rape crisis centers must learn how the risk for ongoing physical violence impacts efforts to seek justice and address healing. Educators and trainers must know how to deepen the analysis of these issues in the context of prevention and professional training. Policy developers must include strategies that address the complexity of these issues. Finally, organizations must implement concrete strategies that promote integrated safety, healing, advocacy, and prevention.

## A Word about Organizational Structure:

My work on IPSV grew out of my work at a rape crisis center in Massachusetts, which eventually led to my work as the first Director of the Mas-



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sachusetts Coalition Against Sexual Assault (MCSASA). In 1998 MCASA was dissolved as it merged with the Massachusetts Coalition of Battered Women Service Groups to form Jane Doe Inc., the Massachusetts Coalition Against Sexual and Domestic Violence. One of the anticipated benefits of the coalition merger was the potential to more fully develop the statewide response to IPSV.

Whenever I begin to talk about these issues, somebody always raised the comment –“sounds like you think we all should merge.” The reality is that I do not promote merger or combining agencies as the only way that these issues can be addressed. And, I don’t believe that just because an agency or coalition works on both domestic violence and sexual assault, that this automatically means that the issues will be integrated. When I promote integration of these issues, I intend for all of us to think through these issues based upon the experiences of survivors and the needs of communities. Integration can happen through creative collaborations, through the development of training, and through policy initiatives that address the complex needs of survivors of IPSV. In this article I propose a model to frame the issues of IPSV based in a social change framework that encompasses initiatives that address these issues at all levels of intervention.

### **Start with Society**

IPSV exists in the context of our society’s mythology and within the context of oppression. As we know from our work to identify the sociological underpinnings of both domestic and sexualized violence, we are bombarded with these messages, both subtle and obvious that lay the foundation for interpersonal violence. I won’t go into the whole spectrum here, but will highlight some particular messages that I believe promote perpetrator behavior and impact the ways in which survivors feel and recover in the aftermath.

First and foremost is the idea that rape can’t exist in a marriage or ongoing relationship. This, of course then becomes extended to include anyone who has ever had consensual sex, which is why one of the earliest battles of our movements was the passage of rape shield laws and other measures that assure that a victim’s past sexual conduct is not open as evidence of consent. These hard won battles were direct confrontations of the notion that once a woman consents to sex, she’s committed to sex forever after. The notions of “wifely duty” and our cultural obsession with coupling further solidify this message. “You’re nobody unless somebody loves you” is not only a lyric in a song, but also a theme in countless movies, television shows, cartoons, and children’s stories.

Another sociological factor is society’s obsession with looks and women’s bodies. Here the message goes “your nobody unless you’re thin, beautiful by popular cultural standards, well-proportioned, manicured, and coiffed and of course, with all unwanted hair removed.” This cultural dynamic is used as a tool by perpetrators who use verbal insults, comparisons with other, and physical put-downs as an effective tool of emotional abuse.

Finally, mainstream US culture attempts to enforce behavior by maintaining strong consequences for anyone who may be or behave outside of a prescribed norm. This is one of the many ways that racism and sexism collide by opening the door to rape of women of color. Women of color, under this paradigm, get perceived as more deserving of rape and in need of being controlled. In fact, anyone who doesn’t fit a narrowly prescribed set of behaviors and identities is at greater risk. Societal messages are abundant that punish people with mental illness, with disabilities, who are poor and working class with increased risk for violence. Also, gay men, lesbians, bisexual women and men, and transgender people all hear these messages, while the wider society learns that all of these populations are fair game for sexual violence.

### **The Impact of IPSV on Survivors**

Survivors of IPSV often experience the full range of impact that is usually associated with both domestic violence and sexualized violence. However, the specific reactions that survivors have to this violence may be exacerbated by the complexity of the violence suffered. Women may have similar rates of fearing death or having severe psychological outcomes when raped by strangers or by intimate partners. Survivors may be experiencing reactions to the actual abuse as well as to society’s mythology regarding sexual assault – it’s the victim’s fault, it’s what she



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While their partner may have raped them repeatedly, it's rare that the perpetrator gets named as a serial rapist, yet this is indeed behavior that fits this definition.

did, how he acts, what she wears, etc. Put in a context with society's messages about sexuality and obsession about looks and bodies, and many survivors experience deep feelings of shame, guilt, fear, and invisibility.

For many, the struggle to reach clarity about the abuse is difficult. Because they were sexually assaulted or abused by an intimate partner, they frequently don't identify as victims of rape or sexual assault, yet they are experiencing emotions as a survivor of sexual assault. While their partner may have raped them repeatedly, it's rare that the perpetrator gets named as a serial rapist, yet this is indeed behavior that fits this definition. Rather, society layers on confusion and denial so that many survivors experience a disconnect between what they feel and what they understand to be happening to them.

IPSV is also a medical issue, with both short term and long term health impacts that are often unaddressed. Short term and urgent medical needs include injuries from the assault, issues with unwanted or forced pregnancy, sexually transmitted infections, risk of birth defects or miscarriage, risk for alcoholism and other substance use and abuse, depression, anxiety, suicidality, and forensic needs. Longer-term issues emerge when immediate issues are ignored or misdiagnosed, as well as the full range of longer-term health impact of ongoing violence.

### **Cultural Factors**

Culture and background play a role in how survivors experience the impact of violence. While a survivor's culture and social system may serve a safety and healing role, it can also be the source of messages that can be misused to further isolate a survivor. Messages about adherence to gender roles or the expectations of a wife and mother all factor in to a survivor's reactions. Belief structures based in religion, political ideology, economic background, sexual orientation, and gender identity may also have an impact. When a survivor is part of a community that is isolated or extremely marginalized (such as certain immigrant communities, transgender survivors, or survivors with disabilities or deafness) there can be little if any place to turn for support in developing safety and healing. In fact, the very community that provides a social and economic support structure may also be a place of support and denial for perpetrators. There are many cultures that adhere strongly to the notion that married women are obligated to have sex whenever their husbands wish. These messages are grounded in cultural, historical or religious values and often have a high degree of adherence within the culture. There are often strong cultural taboos to discussing sex in general, let alone IPSV. These cultural taboos are often widespread and act as barriers to disclosure across many cultures. It should be remembered that not every person from a given culture or background adheres to predominant cultural norms to the same degree. Many cultures have some element or degree of belief in the concept of "wifely duty", which can contribute to the idea that men have a right to demand sex of their partners and that women have an obligation to comply.

## Implications for lesbians and gay men

Society's oppression of people in same-sex relationships puts survivors at more risk for isolation and marginalization. Same-sex oppression or heterosexism establishes messages that all people in same-sex relationships are sexually deviant, dangerous or abnormal. Therefore, it may be even more difficult for survivors to identify their experience as sexual assault. Many survivors lack a strong support system due to heterosexism. Survivors may not have been open to family members or friends about their relationship or their sexuality, making it more difficult to disclose the abuse in the relationship. They may also fear becoming isolated from their community by "airing dirty laundry" about an already oppressed community. The abusive partner often uses heterosexism as a dynamic of the abuse. For example, an abuser may threaten to "out" their partner to family or co-workers as a tool for getting the survivor to comply or keep quiet about the abuse. Not only do survivors face their feelings about the sexual abuse and the stigma attached, but also they have to deal with the fear that whomever they might confide in will be judgmental about their same-sex relationship.

## Implications for Transgender Individuals

Intimate partner sexual assault may take place in relationships where one or both partners identify as transgender. Often workers lack basic understanding of issues, may make assumptions and expect or depend on the transgender person to explain everything about their lives before being able to help. Counselors may assume that transgender is the same as gay or lesbian and may want to identify based on looks or biological gender, rather than self-identity. Programs that have gender requirements for eligibility for shelter and safe homes may be inaccessible to members of the transgender community. A common experience of transgender survivors is to find counselors who believe that their job is to focus on the issues of gender transition and identity, rather than on issues related to the violence they are experiencing. Survivors may not have "come out" to family members or friends, medical providers, making it more difficult to disclose the abuse in the relationship.

## Implications for Domestic Violence and Sexual Assault programs

Anyone who works with survivors of either domestic or sexualized violence should develop a foundation of understanding of IPSV. Cross-training initiatives are a beginning to this process while ongoing development that includes training, think-tank approaches, and case study is an essential next step. Advocates need to understand not only the steps within the system, but at a deeper level, the ways that the decisions, options, concerns, and priorities of survivors of IPSV may be impacted by the complexity of the abuse. Therefore, integration of issues of IPSV must be supported and structured into ongoing management structures at every level of organizations. Policy groups including coalitions, community task forces, and round tables are also key to this process. I would advocate that integration be imagined on every level with a goal toward improving a community's capacity to fully support survivors of IPSV. This would assure that issue development happens at the level of individual advocates,



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prevention educators, managers, boards and advisory groups, and policy makers.

### Call for Collaboration and Innovation

Various factors contribute to underreporting, shame, lack of help seeking of survivors of IPSV and to the difficulty in documentation of IPSV. As a movement, we can continue to lead the way toward integration of these issues so that the responses on all levels will come closer to meeting the needs of survivors. Collaboration is key, and begins with local conversations within organizations, across organizations, and within community round tables and task forces. Assessment tools and skills are extremely important as a starting point. Questions that ask about sexual assault by intimate partners need to be asked with sensitivity and in a number of ways to be sure that survivors do not have to identify with a narrow definition or question. Also, survivors need to be asked in a way that validates their experiences and emphasizes that they are not alone. With an already established network of partnering organizations and coalitions, we have the foundation that can support this work and deepen our capacity to more fully support survivors of IPSV.



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- individual advocates,
- prevention educators,
- managers,
- boards and advisory groups,
- and policy makers.

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# Making Marital Rape A Crime: A Long Road Traveled, A Long Way to Go

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†The National Judicial Education Program is a unique, award-winning project which pioneered judicial education about gender bias and was the catalyst for nearly 50 high-level state and federal task forces on gender bias in the courts nationwide. Over the past twenty years, NJEP has utilized a three-fold approach to promote access to the justice system and equality for women and men in the courts: education, publications and supporting the task forces on gender bias in the courts. More information about NJEP and its sexual assault resources is available at: [www.legalmomentum.org/njep](http://www.legalmomentum.org/njep)

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As late as 1976<sup>1</sup>, prosecuting charges of marital rape<sup>2</sup> was legally impossible in any state. While there is no longer a total exemption for marital rape in any state's law, in many states the extant statutes are hardly proactive in promoting a vigorous prosecution of marital rape or overtly condemning marital rape as a crime. Some states simply removed the language that provided the exemption from their rape laws – typically eliminating the phrase “not his wife” from the statutory definition of the crime. These are called “silent” statutes. Other states went further to explicitly state that a marital relationship is not a “defense” to rape. But in many states, marital rape was made illegal in special statutes which impose restrictions on reporting and lesser penalties for the crime. Today twenty-six states still cling to these regressive statutes.

Myriad factors affect the prosecution of marital rape, not the least of which are statutory constraints that make it more difficult for a victim to report and the State to prove the crime. Eleven states impose extra requirements on victims reporting these offenses including unusually short time limits to report (in some states as short as 30 days), requirements that the couple be separated

<sup>1</sup> In 1976 Nebraska became the first state to criminalize marital rape. See, Legislative Bills: L.B. 38, 85th Leg., 1st Session, NB (1977).

<sup>2</sup> For purposes of this article, **marital rape** is defined as unwanted sexual contact perpetrated by one spouse against the other.



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or divorced at the time of the rape, or requirements that the victim show that force or the threat of force was used to coerce sexual contact.<sup>3</sup> Thirty states limit the types of crimes that may be prosecuted as spousal rape, often excluding crimes committed when the spouse is rendered incapacitated by mental illness or intoxication, even if the spouse purposely incapacitated the victim.<sup>4</sup> Four states maintain separate statutes for marital rape which call for lesser sentences or allow judicial discretion in lowering the charge or sentence.<sup>5</sup> Finally, four states – Connecticut, D.C., Iowa and Minnesota – have moved backwards and expanded the definition of “spouse” in their marital rape statutes to include unmarried persons in intimate relationships or cohabiting, which means that the restrictive reporting requirements apply to them as well, or that defendants cannot be charged with certain crimes.<sup>6</sup>

The extra requirements and lesser penalties enshrined in these laws are vestiges of the marital rape exemption and are based on the cultural assumptions that propped it up for so long. These assumptions are challenged by current research demonstrating that marital rape is devastating to victims and therefore merits harsher treatment. Professor Evan Stark, a leading researcher on violence against women writes:

“[M]arital rape...should be treated differently and more severely than similar crimes committed by strangers. As a result of its unique relation to personal life, sexual assault is far more likely to be repeated when it is committed by partners and almost always occurs amid other forms of violence, intimidation, and control. The level of unfreedom, subordination, dependence, and betrayal associated with marital rape has no counterpart in public life.”<sup>7</sup>

Most victims of marital rape never report the violence for numerous reasons including difficulty recognizing the conduct as rape, economic dependence on their abuser, fear that no one will believe them and ignorance of the law making marital rape a crime. These fears are grounded in persistent and pervasive cultural myths about rape in marital relationships. The myths, and the laws that enshrine them, effectively silence victims and sanction rape in marriage.

### Marital Rape Law: The Historical Exemption Theories and Current Myths

- Historical Assumption: A woman is a man’s property. Upon marriage, rights to such property are transferred from a woman’s father to her husband. Rape is a violation of the man’s property. A man cannot violate his own property; therefore, a husband cannot rape his own wife.

<sup>3</sup> AMERICAN PROSECUTORS RESEARCH INSTITUTE (APRI), SUMMARY OF SPOUSAL RAPE LAWS (2006). To obtain a copy email [ncpvaw@ndaa.org](mailto:ncpvaw@ndaa.org).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE (2007) at 388. (emphasis supplied)



The historical notion that a woman is a man's property, and that rights to this property are transferred from father to husband, dates to the biblical era. Quoting Florence Rush, one of the first feminist theorists to discuss sexual abuse in families, Lisa Eskow writes in her Stanford Law Review Note:

"Judaism ordained that a bride could be legally acquired by contract, money or sexual intercourse, but since the [Christian] church eschewed materialism, sexual intercourse emerged as the validating factor. As early as the sixth century, Pope Gregory decreed that "any female taken by a man in copulation belonged to him and his kindred." "And since copulation with or without consent established male possession of the female, vaginal penetration superseded all impediments."<sup>8</sup>

Ironically, this understanding of sex between men and women is precisely how rape is primarily defined today – an act of power and violence against a person to subjugate and own them. While today this theory is not as germane to the law and stereotypes about marital rape, it is a refrain many women hear from their batterer/rapist. Perpetrators of marital rape are often described as jealous, domineering individuals who feel a sense of entitlement to have sex with their "property." In her book, *Wife Rape*, Raquel Kennedy Bergen describes the following victim experiences:

"Wanda remembered that her husband told her repeatedly, 'That's my body – my ass, my tits, my body. You gave that to me when you married me and that belongs to me.'"

"Emily recalled that on the night her husband raped her he was saying something like 'I'm his wife and I'm supposed to have sex with him and by law I was his or something like that – his possession.'"

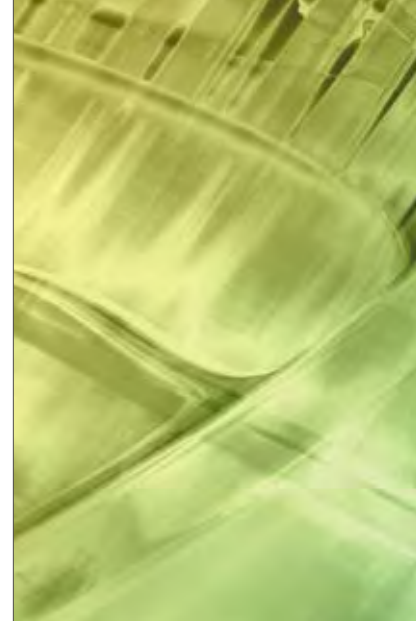
"Pam told me, 'I remember one time he [her husband] told the judge, 'That's my wife, you can't tell me what to do with her.'"<sup>9</sup>

Similarly, in a case where a man forced his wife to have sex with him at gunpoint, he claimed upon arrest "You mean I can go to jail for having sex with my wife?"<sup>10</sup> While this will not stand up in court, such misconceptions about a man's "rights" with respect to his wife fuel a marital rapist's sense of entitlement to complete access to his partner and may give a sense of impunity. In 1979, in the midst of a conversation with a lobbyist from the National Council of Jewish Women who was seeking support for an end to California's marital rape exemption, California State Senator Bob

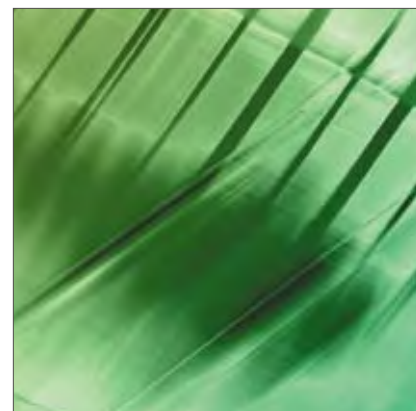
<sup>8</sup> Lisa Eskow, NOTE: *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing its Prosecution*, 48 STAN. L. REV. 677, 679 (1996), quoting FLORENCE RUSH, THE BEST KEPT SECRET: SEXUAL ABUSE OF CHILDREN (1980) at 32.

<sup>9</sup> RAQUEL KENNEDY BERGEN, WIFE RAPE: UNDERSTANDING THE RESPONSE OF SURVIVORS AND SERVICE PROVIDERS (1996) at 20.

<sup>10</sup> *People v. Johnson*, No. C047560, 2005 Cal. App. Unpub LEXIS 11725 (Cal. Ct. App. Dec. 20, 2005), \*6.



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Eskow asserts that such misconceptions create a "false consciousness of consent" in marital rape victims, making it even more difficult for them to recognize sexual assault.

Wilson is quoted saying “If you can’t rape your wife, who can you rape?”<sup>11</sup>

These attitudes and victims’ own misconception about what is consent and what is rape in an intimate relationship make it extremely difficult for victims to report these crimes. Eskow asserts that such misconceptions create a “false consciousness of consent”<sup>12</sup> in marital rape victims, making it even more difficult for them to recognize sexual assault. In study after study, women do not label the actions perpetrated against them as rape, or even sexual assault. Only behaviorally-based questions, such as “Has your spouse forced you to have sex when you did not want to?,” elicit information about the abuse.<sup>13</sup> This, along with victims’ fear that they will not be believed, pose as much of a barrier as any statutory marital rape exemption.

- Historical Assumption: The marriage contract is a guarantee of ongoing consent to sexual relations.

Legal scholars agree that this contract theory has had the most enduring impact on the marital rape exemption. However, it is important to note that this theory flows naturally from the assumption that women are men’s property. If a woman is her husband’s property, it flows logically that she cannot retract her consent to sexual relations after signing the marriage contract, at which point she is officially “deeded” to him. A famed fifteenth-century British jurist, Sir Matthew Hale (1609-1676), articulated the now-called “ongoing consent” theory in his *History of the Pleas of the Crown* published after his death in 1736. Without any legal basis, he unilaterally declared:

“[T]he husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”<sup>14</sup>

At one time in history, sex within marriage was the only kind of *legal sex*. Extramarital sexual relations were considered either adultery or fornication and therefore illegal. The contract theory arose in this context. Sex with her husband was the only sex a woman could consent to – otherwise she transgressed against the law. Once married, she was part and parcel of her husband so her consent was a given.<sup>15</sup>

Matthew Hale’s theory, along with his other infamous assertion that “rape is an accusation easily to be made, hard to be proved, and harder yet to be defended by the party accused, tho’ never so innocent” has left an indelible mark on all rape laws and trials. Hale’s assertion gets at the crucial issues of victim credibility and the paranoia men and the courts feel about false rape allegations. In the case of marital rape laws, these notions underlie restrictions on the amount of time a victim has to report and the need for corroborating evidence demonstrating force or threat of force.

The ongoing consent theory also feeds into the notion that marital rape is “not that bad” since wives are “used to” having sex with their husbands anyway. This stereotype blinds jurors and the courts to the fact that time and again studies have shown that marital rape is far more injurious psychologically, physically, and emotionally than stranger rape. Studies with populations of college students demonstrate that traditional notions about gender and victim dress influence beliefs about whether or not a woman has a right to refuse sex from her husband. In these studies, men are less likely than women to think that marital rape should be a crime.<sup>16</sup>

<sup>11</sup> Cited in Eskow, *supra* note 8, at 689.

<sup>12</sup> *Id.* at 689.

<sup>13</sup> JUDITH MCFARLANE & ANN MALECHA, NATIONAL INSTITUTE OF JUSTICE, SEXUAL ASSAULT AMONG INTIMATES: FREQUENCY, CONSEQUENCES AND TREATMENTS (2005), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/211678.pdf>. (citing 69% of battered women in their sample experienced sexual abuse and only 6% of these reported to the authorities.)

<sup>14</sup> MATTHEW HALE, *HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN* (1736) at 628.

<sup>15</sup> For a more in-depth discussion of the proscription against extramarital relations see, Michelle Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L. J. 1465, 1516-1521 (2003).

<sup>16</sup> Candace Monson, Jennifer Langhinrichsen-Rohling, & Tisha Binderup, *Does ‘No’ Really Mean ‘No’ After you say ‘Yes’?*, 15 J. INTERPERSONAL VIOLENCE 1156 (2000); Mark A. Whatley, *The Effect of Participant Sex, Victim Dress, and Traditional*, 20 J. FAM. (continued)

Women who are victims of marital rape are more likely to suffer from severe post-traumatic stress disorder, have suicidal thoughts, and report an inability to trust or get involved in emotional relationships than women who are physically but not sexually abused.<sup>17</sup> In the famous words of pioneer researchers in this field David Finkelhor and Kersti Yllo:

“When you are raped by a stranger you live with a frightening memory. When you are raped by your husband you have to live with your rapist.”<sup>18</sup>

Marital rape can happen with or without other types of violence in the relationship. In fact, marital rape is often part of a larger cycle of physical and emotional violence. In *Wife Rape*, Raquel Bergen reports that 70% of the women in her sample experienced brutal “battering rapes” (i.e., where rape follows a physically violent attack.) Victims often acquiesce to sex with their partners, not by choice, but to avoid physical violence. When physical violence accompanies rape, the injuries are particularly brutal.

Moreover, unlike rape by a date or stranger, rape marital rape is often not an isolated incident. Because the victim lives with the assailant, marital rape is more likely to be completed and multiple assaults are common. In a study published in 2000 by the National Institute of Justice, just over half of women raped by an intimate partner said they were victimized repeatedly by that partner. Overall the average was 4.5 rapes by the same partner.<sup>19</sup> In their book *License to Rape*, Finkelhor and Yllo report,

“For most marital rape victims, rape is a chronic and constant threat, not an isolated problem. The battered women, of course, were the most vulnerable of all to such repeated sexual abuse. Twice as many battered women suffered from chronic rapes (twenty times or more) as the other raped women.”<sup>20</sup>

In the study of forty women reported in Raquel Kennedy Bergen, *Wife Rape*, twenty-two women, 55% of the sample, were raped twenty times or more during marriage.<sup>21</sup>

- Historical Assumption: When a man and woman marry they are united as one under the law, and the one is the husband. As one entity, it is a logical impossibility for one half of the entity to rape the other.

In the sixteenth century, Sir William Blackstone (1723-1780), a British jurist who wrote the first defining treatise on common law, included in his *Commentaries* the following analysis of the marital contract:

“By marriage the husband and wife are one person in law: that is the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband: under whose protection and cover, she performs everything...and her condition during her marriage is called her coverture.”<sup>22</sup>

In other words, upon marriage the wife’s existence as a separate being under the law ceased. As such, her inter-

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VIOLENCE 191 (2005); Carol J. Auster & Jane M. Leone, *Late Adolescents Perspectives on Marital Rape: The Impact of Gender and Fraternity/Sorority Membership*, 36 ADOLESCENCE 141 (2001) (showing less than half of the men studied believed that marital rape should be a crime, while over 60% of the women studied thought it should).

<sup>17</sup> MacFarlane & Malecha *supra* note 13.; Jennifer A. Bennice, *The Relative Effects of Intimate Partner Physical and Sexual Violence on Post-Traumatic Stress Disorder Symptomatology*, 18 VIOLENCE AND VICTIMS 87 (2003).

<sup>18</sup> DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE: SEXUAL ABUSE OF WIVES (1985) at 138.

<sup>19</sup> PATRICIA TJADEN & NANCY THOENNES, U.S. DEPARTMENT OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, NATIONAL INSTITUTE OF JUSTICE (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf>.

<sup>20</sup> Finkelhor & Yllo *supra* note 18, at 23.

<sup>21</sup> Bergen *supra* note 9.

<sup>22</sup> SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765) AT 430.

ests and her husband's were merged. The caveat, of course, is that really only the husband's interests were preserved, since upon marriage women relinquished to their husbands all rights to their person, their wages, and their property.

The "unity theory" of the marital rape exemption, as it is often called, was central to nineteenth century feminists' theory that a woman's place in society would never be equal to man's so long as she could not even have control over her own person. Jill Hasday, in her article *Contest and Consent*, details the fervor with which nineteenth century feminists railed against the marital rape exemption. In an 1855 letter to Antoinette Brown Blackwell, prominent feminist Lucy Stone wrote:

"[I]t is clear to me that [the marriage] question underlies this whole movement and all our little skirmishing for better laws, and the right to vote, will yet be swallowed up, in the real question, viz, has woman, as wife, a right to herself? It is very little to me to have the right to vote, to own property &c. if I may not keep my body, and its uses, in my absolute right. Not one wife in a thousand can do that now, & so long as she suffers this bondage, all other rights will not help her true position."<sup>23</sup>

These early feminists understood that shifting the power imbalance at the core of the marital relationship was key to redefining women's role in society. While they would not live to see the marital rape exemption repealed, they did successfully change the laws so that married women could own property. They also forced courts to recognize some cases of marital rape as "extreme cruelty" and therefore grounds for divorce.

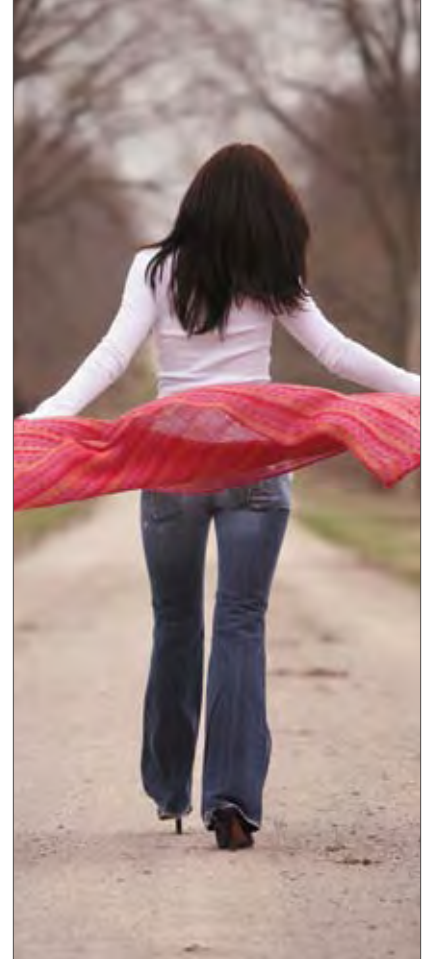
While the notion of coverture is no longer officially enshrined in law, the idea that marriage is a sacred entity holding the best interest of both parties is alive and well. Jill Hasday explains,

"One of the most remarkable characteristics of the modern defense of the marital rape exemption...is that it presupposes the aligned interests of husband and wife. ... [The] assumption of conjoined interests in marriage is so absolute that proponents do not concede that a marital rape exemption might inflict harm on wives. Their argument assumes that a wife's interests, like her husband's, are always and wholly served in a marital relationship where her husband cannot be prosecuted for raping her."<sup>24</sup>

Indeed, this assumption underlies the impulse of many jurors today to acquit marital rapists so as to maintain the integrity of the marriage. Current state statutes that separate "spousal rape" from "regular rape" only perpetuate the notion that spousal rape is less harmful to women, and that lesser penalties are in the interest of husband, wife, and the institution of

<sup>23</sup> Quote in, Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1425 (2000).

<sup>24</sup> *Id.* at 1485.



"Skirmishing for better laws, and the right to vote, will yet be swallowed up, in the real question, viz, has woman, as wife, a right to herself? It is very little to me to have the right to vote, to own property &c. if I may not keep my body, and its uses, in my absolute right. Not one wife in a thousand can do that now, & so long as she suffers this bondage, all other rights will not help her true position."

-Lucy Stone, 1855

Current state statutes that separate “spousal rape” from “regular rape” only perpetuate the notion that spousal rape is less harmful to women, and that lesser penalties are in the interest of husband, wife, and the institution of marriage.

marriage. The institution of marriage casts a mitigating light on the crime of rape. A prosecutor quoted in Eskow’s article mentioned above even suggests giving jurors specific instructions that “All spouses have a right to control their bodies. Spousal status in [sic] no defense to rape.”<sup>25</sup>

## Conclusion


In 1976, an Oregon jury acquitted John Rideout of raping his wife Greta. News articles reported on the expert testimony offered at trial about the marital rape exemption, including Sir Matthew Hale’s theory of “implied consent.” The case sparked the feminist movement to lobby for the abolition of the marital rape exemption. The last state to fall was North Carolina in 1993. The first four states to eliminate the exemption did so by case law. In striking down this exemption, the New York Court of Appeals wrote:

“We find that there is no rational basis for distinguishing between marital rape and nonmarital rape. The various rationales which have been asserted in defense of the exemption are either based upon archaic notions about the consent and property rights incident to marriage or are simply unable to withstand even the slightest scrutiny. We therefore declare the marital exemption for rape in the New York statute to be unconstitutional.

Lord Hale’s notion of an irrevocable implied consent by a married woman to sexual intercourse has been cited most frequently in support of the marital [rape exemption]. Any argument based on a supposed consent, however, is untenable. Rape is not simply a sexual act to which one party does not consent. Rather, it is a degrading, violent act which violates the bodily integrity of the victim and frequently causes severe, long-lasting physical and psychic harm. To ever imply consent to such an act is irrational and absurd. Other than in the context of rape statutes, marriage has never been viewed as giving a husband the right to coerced intercourse on demand. Certainly, then, a marriage license should not be viewed as a license for a husband to forcibly rape his wife with impunity. A married woman has the same right to control her own body as does an unmarried woman. If a husband feels ‘aggrieved’ by his wife’s refusal to engage in sexual intercourse, he should seek relief in the courts governing domestic relations, not in ‘violent or forceful self-help.’<sup>26</sup>

The twenty-six states that maintain exceptions and restrictions in their marital rape law have yet to acknowledge what the New York Court of Appeals recognized with such forceful clarity. We must be active in our individual states to change these laws and create a climate in which victims can disclose and be treated with respect by the justice system and the community.

For information about the marital rape laws in your state see the AMERICAN PROSECUTORS RESEARCH INSTITUTE (APRI), SUMMARY OF SPOUSAL RAPE LAWS (2006). For a copy, email [ncpvaw@ndaa.org](mailto:ncpvaw@ndaa.org).

The National Judicial Education Program has posted a web course and resource for judges and others addressing all aspects of rape in intimate relationships, which includes a discussion of the marital rape exemption. You can register for and view the course for free at [www.njep-ipsacourse.org](http://www.njep-ipsacourse.org). 

<sup>25</sup> Eskow *supra* note 8, at 702.

<sup>26</sup> *People v. Liberta*, 474 N.E. 2nd 567 (N.Y. 1984) at 163-164. (citations omitted)



# Prosecuting Intimate Partner Sexual Assault

Jennifer Gentile Long<sup>1</sup>

To increase the effectiveness of the criminal justice system's response to sexual violence, allied criminal justice professionals must recognize the serious impact of intimate partner sexual assault on the victim as well as the community, understand the contexts in which intimate partner sexual assaults occur, and appreciate the individual responses that victims of intimate partner sexual assaults have to their victimization.

The majority of sexual assault victims know their assailants.<sup>2</sup> Despite this fact, the public still expects rapists to be weapon-wielding strangers who attack their victims in dark alleys. This expectation, grounded in cultural bias, victim blaming, rape myth acceptance, and faulty expectations about victim behavior, creates unique challenges to the successful prosecution of non-stranger sexual assault.<sup>3</sup> A current or former relationship between the victim and the defendant can lead to additional complexities that often make the arrest, prosecution, and conviction of an intimate partner rapist even more difficult.

Historically, additional barriers to prosecution were created by many jurisdictions' criminal laws that sanctioned intimate partner rape by exempting spouses from the rape statutes.<sup>4</sup> Although the marital exemption is no longer codified, some allied criminal justice professionals have continued to ignore, dismiss, or blame victims of intimate partner sexual assault. A growing number of allied criminal justice professionals recognize the validity of intimate partner sexual violence and conduct aggressive investigations and prosecutions of these rapists. Despite their efforts, however, jurors and judges often fail to hold intimate partner rapists accountable.

The criminal justice system is a critical piece of the coordinated response to sexual violence.<sup>5</sup> If its response is indifferent or ineffective, sexual violence victims are left vulnerable, offenders are not held accountable, com-

<sup>1</sup> Ms. Long is the Director of the National Center for the Prosecution of Violence (NCPVAW). The author relied heavily on the Outline "The Prosecution of Rape by Intimate Partner" prepared by Teresa Scalzo, J.D., NCPVAW's former Director. For the purposes of this article, the term "intimate partner sexual assault" encompasses marital rape as well as sexual assaults, which occur between current or former intimate partners.

<sup>2</sup> See National Crime Victimization Survey 2005 stating ("In seven out of every ten assaults, the defendant is either the victim's intimate partner, other relative, friend or acquaintance.")

<sup>3</sup> See e.g., Jennifer A. Bennice, Patricia A. Resick, Marital Rape: History, Research, and Practice, 4 TRAUMA, VIOLENCE & ABUSE 3 at 231 (July 2003) ("One of the driving forces behind the widespread cultural invalidation has been the commonly held belief that marital rape is not "real rape."); see also "Acquaintance rape is one of the most misunderstood forms of criminal violence. Many people believe that it is not "real rape" (citing SUSAN ESTRICH, REAL RAPE 1988)

<sup>4</sup> See e.g. (18 Pa.C.S.A. § 3121 (1994) ("a person commits a felony of the first degree when he engages in sexual intercourse with another person not his spouse: (1) by forcible compulsion . . .") removed by silent statute 1995; see also *Intimate Partner Sexual Abuse: Adjudicating this Hidden Dimension of Domestic Violence* at <http://www.njep-ipsacourse.org> (stating "[b]y July 1993, marital rape was a crime, to some degree, in all 50 states. The Uniform Code of Military Justice eliminated the marital rape exemption in 1995.") Nevertheless, there remained a disparity in the treatment of spousal sexual assaults.

<sup>5</sup> See e.g., Restricted Reporting at <http://www.sapr.mil/HomePage.aspx?Topic=Sexual%20Assault&PageName=Restricted.htm>.

munities are less safe, and justice is not accomplished. To increase the effectiveness of the criminal justice system's response to sexual violence, allied criminal justice professionals must recognize the serious impact of intimate partner sexual assault on the victim as well as the community, understand the contexts in which intimate partner sexual assaults occur, and appreciate the individual responses that victims of intimate partner sexual assaults have to their victimization. In addition, prosecutors must develop strategies to overcome jurors' belief in common sexual violence myths which become barriers to the successful prosecution of an intimate partner sexual assault. This article provides a general summary of these issues, barriers, and strategies relating to the prosecution of intimate partner sexual assault. It also includes references to other resources that address these topics more completely.

### The Impact of Intimate Partner Sexual Assault

Intimate partner offenders, like all non-stranger rapists, "hide behind the context of their relationships with their victims. They mask themselves as 'nice guys.' They play upon society's biases and stereotypes."<sup>6</sup> "There is a pervasive idea that in-home offenders are somehow not as dangerous or problematic as 'community' offenders. They are, however, more experienced; more invested; cross more boundaries; are safer from exposure; create more betrayal and family conflict; and are more psychologically/emotionally involved in offending."<sup>7</sup> In addition, intimate partner sexual assault victims suffer a higher number of assaults. For example, most victims of marital rape "report being raped more than once, with at least one third of the women reporting being raped more than twenty times over the course of their relationship."<sup>8</sup>

Perpetrators of intimate partner sexual assault violate their victims physically and emotionally. Perpetrators are individuals with whom victims share their lives, homes, and possibly children. "In addition to the violation of their bodies, victims are faced with a betrayal of trust and intimacy."<sup>9</sup> Further, because of the relationship between the defendant and the victim, "there may be a tendency for victims to blame themselves, [and] there may also be complex feelings involved since they may love the offender but hate the offense."<sup>10</sup> As a result, intimate partner sexual assault victims often "suffer long-lasting physical and psychological injuries as severe—



It is critical that prosecutors understand the dynamics of each relationship in which an intimate partner assault occurs in order to accurately evaluate and prosecute the case.

<sup>6</sup> Veronique N. Valliere, Psy.D., *Understanding the Non-Stranger Rapist*, 1 (8) THE VOICE 5 (2007).

<sup>7</sup> See Veronique Valliere, Psy. D., *Understanding the Non-Stranger Rapist*, National Institute on the Prosecution of Sexual Violence. This presentation can be requested from the National Center for the Prosecution of Violence Against Women (NCPVAW) at [www.ncpvaw.org](http://www.ncpvaw.org) or 703.549.9222.

<sup>8</sup> The Wife Rape Fact Sheet, Patricia Mahoney, M.A. National Violence Against Women Prevention Research Center Wellesley Centers for Women, Wellesley College Stone Center at <http://www.musc.edu/vawprevention/research/wiferape.shtml> (citing (Finkelhor & Yllo, 1985; Russell, 1990).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

or more severe—than stranger rape victims.”<sup>11</sup>

Many victims do not recognize their rape as an assault. Some believe that the law protects their rapist. Some believe that a spouse has the right to rape his wife. Others rely on their partners’ insistence that spouses or other intimate partners who have previously given consent to a partner are not able to withdraw it. Unfortunately, society often also shares these views and refuses to hold offenders accountable.

## Understanding the Context of an Intimate Partner Sexual Assault

The term “context” refers to the circumstances surrounding an incident as well as the intent of the perpetrator’s use of violence. Prosecutors must determine the context in which a violent incident occurs in order to accurately analyze, charge, try, and dispose of the case.<sup>12</sup> Significantly, not all intimate partner assaults occur in the same context.

Rapists do not rape out of sexual desire or to achieve sexual satisfaction. Rather, sexual assault is about power, and, therefore, sex is a weapon and a means of expressing the rapist’s aggression or power.<sup>13</sup> Although some intimate partner assailants limit their violence to sexual assault,<sup>14</sup> the majority of intimate partner sexual assaults occur within a physically abusive relationship.<sup>15</sup> As a result, many intimate partner sexual assaults also involve domestic violence dynamics. All violent relationships include some level of control or attempt on the batterer’s part to control his partner. One useful tool to understand this dynamic is the Power and Control Wheel created by the Domestic Abuse Intervention Project in Duluth.<sup>16</sup> Some relationships may include a cycle of violence. The term “cycle of violence” was developed by Lenore Walker to describe three distinct phases in an abusive relationship: tension building, physical abuse, and the honeymoon phase.<sup>17</sup> Prosecutors must understand, however, that although these theories are helpful in understanding domestic violence, not every relationship involves a cycle of violence or the dynamics featured in the Power and Control Wheel. Domestic violence exists on a continuum, and, therefore, most relationships exist at some place—or in many places—along the continuum.<sup>18</sup> It is critical that prosecutors understand the dynamics of each relationship in which an intimate partner assault occurs in order to accurately evaluate and prosecute the case.

## Common Domestic and Sexual Violence Victim Behaviors

Despite the extent of the research on domestic and sexual violence, many jurors still believe stereotypes about sexual and domestic violence victim behavior.<sup>19</sup> For example, jurors expect domestic violence victims to accept

<sup>11</sup> *Id.*

<sup>12</sup> Special thanks to Loretta Frederick, Legal Counsel, Battered Women’s Justice Project (BWJP); Michael Paymar, Resource Specialist, BWJP; and James Henderson, Jr., Domestic Violence Probation Officer, 15th District Court, Ann Arbor, MI, for their discussions on the importance of understanding the context in which a violent incident occurs in order to appropriately evaluate a domestic violence case.

<sup>13</sup> Understanding the Rape Victim, NCPVAW APRI (2005). This document can be requested from the National Center for the Prosecution of Violence Against Women (NCPVAW) at [www.ncpvaw.org](http://www.ncpvaw.org) or 703.549.9222.

<sup>14</sup> Bennice, *supra* note 3, at 234.

<sup>15</sup> *Id.* (stating “Marital rape is more prevalent among women who also experience physical abuse within their intimate relationships.”)

<sup>16</sup> See *e.g.*, Domestic Abuse Intervention Project, the Power and Control Wheel at <http://www.duluth-model.org/documents/PhyVio.pdf>

<sup>17</sup> See LENORE E. A. WALKER, THE BATTERED WOMAN SYNDROME (1984); see also Lenore E. A. Walker, *Battered Woman Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL’Y 321, 326 (1992).

<sup>18</sup> See *e.g.*, Domestic Abuse Intervention Project, the Power and Control Wheel at <http://www.duluth-model.org/documents/PhyVio.pdf>; See also, *e.g.* Department of Sexual Assault Services and Crime Victim Assistance, Rutgers, The State University of New Jersey, *Dating Violence, Domestic Abuse, Stalking*, at <http://sexualassault.rutgers.edu/datingviolence.htm> (discussing the continuum of violence); see also National Center on Domestic and Sexual Violence, *the Continuum of Domestic Violence* at <http://www.ncdsv.org/images/ContinuumDomesticViolence.pdf>.

<sup>19</sup> See Sarah Ben-David & Ofra Schneider, *Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance*, 53 (5/6) SEX ROLES 385 (Sept. 2005) (stating “Despite considerable research and publications in professional and popular journals (*continued*)



responsibility and leave batterers. They also expect victims to be cooperative with prosecutors and to behave in ways consistent with other crimes. As experienced domestic violence prosecutors understand, the opposite is often true: domestic violence victims often stay with their abusers, regularly minimize their abuse, recant, request the dismissal of charges against their batterers, refuse to testify for the prosecution, or testify on behalf of their batterers.<sup>20</sup>

The behaviors of sexual assault victims—particularly non-stranger sexual assault victims—also frequently conflict with the type of behavior the public expects from a “real” victim. For example, the public expects sexual assault victims to scream during their rape, to forcefully resist their attackers, to report their rapes immediately, to remain vigilant following their attacks, and to avoid their assailants. Sexual assault victims, however, often do not scream or resist during a rape; they frequently delay reporting their rape;<sup>21</sup> they often do not remain hypervigilant; and they may continue to have contact with their assailant.<sup>22</sup>

Victims of intimate partner sexual assault may exhibit many of the behaviors described above. Specifically, they may vacillate in their cooperation with the prosecution, recant, or testify on the defendant’s behalf. They may also “consent” to sexual activity with their assailant at some point following their assault. These behaviors create significant difficulties in the prosecution of an intimate partner assailant and require explanations by the victim or an expert.<sup>23</sup>



## Overcoming Obstacles to the Successful Prosecution of Intimate Partner Sexual Assault

The prevalence of myths surrounding sexual and domestic violence create significant barriers to the successful prosecution of intimate partner sexual assault, but prosecutors can take steps to overcome them.

First, prosecutors should ensure that they are charging aggressively yet within ethical bounds. Although some offices’ policies create a higher burden for charging, the Model Rules of Professional Responsibility as well as the National Prosecution Standards set forth probable cause as the appropriate standard for charging.<sup>24</sup> In addition to this standard, there are many factors a prosecutor may consider when making a charging decision. Section

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concerning rape, such myths continue to persist in common law reasoning”).

<sup>20</sup> See e.g., Sarah M. Buel, 50 *Obstacles to Leaving, a.k.a. Why Abuse Victims Stay*, *Family Violence* 28/10 THE COLORADO LAWYER (October 1999). The reasons haven’t changed.

<sup>21</sup> See generally CALLIE MARIE RENNISON, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992-2000 (2002) (discussing rationales behind reporting behavior).

<sup>22</sup> E-mail from Mr. Russell W. Strand, Chief, Family Law Enforcement Training Division, U.S. Army Military Police School, Fort Leonard Wood, MO (May 4, 2007 09:41:00 EST) (on file with author); see also, JOYCE HERMAN, *TRAUMA AND RECOVERY* (1992) at 38-42 (stating “[s]ometimes people reenact the traumatic moment with a fantasy of changing the outcome of the dangerous encounter. In their attempts to undo the traumatic moment, survivors may even put themselves at risk of further harm. . . . Reliving a trauma may offer an opportunity for mastery, but most survivors do not consciously seek or welcome the opportunity”).

<sup>23</sup> See JENNIFER LONG, *INTRODUCING EXPERT TESTIMONY TO EXPLAIN VICTIM BEHAVIOR IN SEXUAL AND DOMESTIC VIOLENCE PROSECUTIONS* (American Prosecutors Research Institute, 2007). To request a copy, please contact the National Center for the Prosecution of Violence Against Women at [ncpvaw@ndaa.org](mailto:ncpvaw@ndaa.org) or 703-549-9222. Electronic copies may also be downloaded at [http://www.ndaa.org/pdf/pub\\_introducing\\_expert\\_testimony.pdf](http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf).

<sup>24</sup> NATIONAL DISTRICT ATTORNEYS ASSOCIATION NATIONAL PROSECUTION STANDARDS § 1.1, (2nd Ed. 1991) (stating, “The primary responsibility of prosecution is to see that justice is accomplished”); see also *Berger v. United States*, 295 U.S. 78, 88 (1935) (stating, a prosecutor’s interest “in a criminal prosecution is not that [he or she] shall win a case but that justice shall be done”).

43.6 of the National Prosecution Standards states: “The prosecutor should exercise his discretion to file only those charges that he considers to be consistent with the interests of justice.”<sup>25</sup> Some of the factors that may be considered in this decision include the following: probability of a conviction; nature of the offense; characteristics of the offender; possible deterrent value of prosecution to the offender and society in general; likelihood of prosecution by another criminal justice authority; and willingness of the offender to cooperate with law enforcement. Prosecuting intimate partner sexual assailants holds them accountable for their actions and is an integral part of public safety. It sends a message to the community that the behavior will not be tolerated. It also gives victims a voice, perhaps for the first time.

Next, prosecutors must approach intimate partner sexual assaults in a multidisciplinary manner.<sup>26</sup> Unlike a victim of a random crime, a domestic violence victim’s involvement with the criminal justice system may put her<sup>27</sup> at risk of: losing her housing (e.g., if her abuser is the primary household wage-earner); losing her employment (e.g., if she repeatedly misses work in order to attend the numerous court appearances that may accompany the criminal and civil hearings related to her abuse); losing custody of her children (e.g., if the state feels she is unable to protect or provide for her children); losing financial support for herself and her children (e.g., if her abuser loses his job once he is convicted or sent to prison); losing her immigration status (e.g., if she is unable to qualify for a visa under VAWA provisions); and being prosecuted (e.g., if her attempts to protect herself or her children are not recognized as self defense). In addition, as discussed earlier in the article, victims of intimate partner sexual assault feel a deep sense of betrayal over their assaults. They also engage in self-blame.

Prosecutors must identify and form relationships with community advocates and agencies to address and attempt to resolve the collateral problems domestic violence victims face as a result of their abuse and to address the emotional distress caused by the assault. Prosecutors alone are not able to provide victims with the attention, advocacy, and resources required to address and resolve the victim’s needs. By working with community advocates, prosecutors can help victims procure counseling, create a safety plan, obtain assistance with child-care, secure or maintain housing, and receive vocational training or assistance with a current employer.

Community advocates can also help safeguard a victim’s privacy. Commonly, defense attorneys seek access to victims’ medical and psychological history. In addition to the embarrassment victims suffer when this information is exposed, the mere threat of exposure often is enough to dissuade a victim’s cooperation. Depending upon the laws of the jurisdiction where the case is pending, the prosecutor may not have standing to protect the victim against defense attempts to access this history. In these jurisdictions, community legal advocates are critical to protecting the victim’s privacy.

<sup>25</sup> NATIONAL DISTRICT ATTORNEYS ASSOCIATION NATIONAL PROSECUTION STANDARDS § 43.6, *supra* note 32 (additional factors include: aid to other criminal justice goals through non-prosecution; interests of the victim; possible improper motives of a victim or witness; age of the offense; undue hardship caused to the accused; a history of non-enforcement of a statute; excessive cost of prosecution in relation to the seriousness of the offense; recommendations of the involved law enforcement agency; the expressed desire of an offender to release potential civil claims against victims, witnesses, law enforcement agencies and their personnel, and the prosecutor and his personnel, where such desire is expressed after the opportunity to obtain advice from counsel and is knowing and voluntary; and any mitigating circumstances.)

<sup>26</sup> The discussion of a multidisciplinary approach is taken in large part from the following publication: Jennifer Gentile Long and Viktoria Kristiansson, *Taking a Process-Oriented Approach to Domestic Violence Prosecutions*, 1(9) THE VOICE (2007).

<sup>27</sup> See U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE IN THE U.S. (1993-2004), *available at* <http://www.ojp.usdoj.gov/bjs/intimate/offender.htm> (indicating that in 2004, 96.9% of victims of intimate partner violence were female where the offender was male); *see also* U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE IN THE U.S. (1993-2004), *available at* <http://www.ojp.usdoj.gov/bjs/intimate/table/women.htm> (indicating that in 75.3% of cases in 2004, offenders of intimate partner violence were male, regardless of the victim’s gender); *see* U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, VICTIMIZATION RATES FOR PERSONS AGE 12 AND OVER, BY GENDER AND AGE OF VICTIM AND TYPE OF CRIME (2005), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/cvus05.pdf> (indicating that between 1994 and 2005, the average annual percentage of rape and sexual assault offenders who were male was 96.4%, and that a male’s risk of suffering rape or sexual assault is statistically 0.0%). For this reason, the pronoun “she” is used when referring to a victim and the pronoun “he” is used to refer to the perpetrator; however, the principles discussed apply regardless of the sex of the victim or the perpetrator.

Supported victims—ones whose concerns are being addressed—are more likely to cooperate in the prosecution of their abusers, since many of the risks and fears that normally would act as obstacles to their participation will be erased upon the prosecutor’s collaboration with other support agencies. Providing victims with the counsel and support they need helps to ensure offender accountability by increasing the number of victims who are able and willing to cooperate in their abuser’s prosecution.

Third, prosecutors can explain the context of an intimate partner sexual assault by introducing evidence of an assailant’s other bad acts.<sup>28</sup> The introduction of other acts can demonstrate the defendant’s intent with respect to the intimate partner sexual assault for which he is currently on trial. For example, a defendant’s prior violent history with a victim may be relevant to explain her lack of resistance. If the victim has been previously abused by her partner, her perception of her batterer’s ability to cause her imminent harm, even where there has been a passage of time between her batterer’s threat and the rape is well-grounded. In cases where a victim experiences a cycle of violence, evidence of the dynamics of the victim’s relationship and specifically the cycle of violence demonstrates the increasing frequency and severity of the batterer’s assaults on the defendant. Domestic violence victims’ experience of the repeated violent cycles enable them to predict their partner’s impending violence based upon his behavior preceding previous assaults of the victim. Therefore, evidence of the defendant’s victimization by the batterer and the cyclical nature of her relationship is relevant and may be admissible establish that the victim’s fear is reasonable and well-grounded.

Finally, prosecutors must understand the impacts of a victim’s lack of cooperation, the doctrine of forfeiture by wrongdoing,<sup>29</sup> and the impact of *Crawford v. Washington*<sup>30</sup> and *Davis v. Washington*<sup>31</sup> on their ability to prosecute an intimate partner sexual assault. A prosecutor will rarely be able to successfully prosecute an intimate partner sexual assault of competent adult victim<sup>32</sup> without the victim’s cooperation because of the difficulty in overcoming the consent defense. Therefore, if a victim is unavailable at the time of trial, the prosecutor must determine whether her unavailability was caused by the abuser. If this is the case, prosecutors must prepare for a forfeiture hearing. During this hearing, the prosecutor can introduce the history of abuse between the defendant and the victim; prior charges filed, even if they were withdrawn; testimony from bond hearings; testimony from prior cases; evidence from police, a prior prosecutor, family, or

<sup>28</sup> See, e.g., Fed. R. Evid. 404(b). Before preparing and filing motions to 404(b), prosecutors should consult the rules and case law governing the admission of other acts evidence in their jurisdictions.

<sup>29</sup> Fed. R. Evid. 804(b)(6). The discussion of forfeiture by wrongdoing is taken in large part from the following publication: Jennifer Gentile Long and Viktoria Kristiansson, *Taking a Process-Oriented Approach to Domestic Violence Prosecutions*, 1(9) THE VOICE (2007).

<sup>30</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>31</sup> *Davis v. Washington*, 126 S.Ct. 2266 (2006).

<sup>32</sup> The term “competent adult” is used to represent those adults who are viewed by the legal system as competent. Please refer to state law for definitions or interpretations of what constitutes a *competent adult* in a given state.



By working with community advocates, prosecutors can help victims procure counseling, create a safety plan, obtain assistance with childcare, secure or maintain housing, and receive vocational training or assistance with a current employer.

In cases where a victim experiences a cycle of violence, evidence of the dynamics of the victim’s relationship and specifically the cycle of violence demonstrates the increasing frequency and severity of the batterer’s assaults on the defendant.



friends about the victim's fear of the defendant; evidence about the victim's fear of testifying in prior cases; and anything else that shows the defendant did something to prevent the victim from testifying. Significantly, hearsay is permissible at a forfeiture hearing.<sup>33</sup> If the prosecution successfully establishes forfeiture by wrongdoing, the defendant is precluded from objecting to the introduction of a victim's testimonial statements.

In the rare instance where an intimate partner sexual assault of a competent adult without the victim's cooperation is prosecuted, prosecutors must anticipate defense objections to the introduction of hearsay<sup>34</sup> as well as any "testimonial" statements under *Crawford* and *Davis*. *Crawford* held that testimonial statements of an unavailable witness can be admitted at trial only when the defendant has had a prior opportunity to cross-examine that witness. This holding was clarified in *Davis*, in which the Court explained that statements made to government agents for the primary purpose of receiving assistance in an ongoing emergency are non-testimonial. Statements are testimonial when circumstances objectively indicate there is no ongoing emergency and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

## Conclusion

Intimate partner sexual assaults pose significant challenges for prosecutors. In order to successfully prosecute these cases, prosecutors must overcome cultural bias, victim blaming, and domestic and sexual violence myth acceptance. Further, they must persuade judges and juries that intimate partner sexual assaults are serious cases that significantly impact the safety and well-being of the community. Prosecutors can debunk prevailing myths by understanding and explaining sexual and domestic violence dynamics and victim behaviors. They can overcome barriers by demonstrating the context in which an intimate partner sexual assault occurs. They can also persuade judges and juries to hold intimate partner sexual assailants accountable by ethically and aggressively charging and litigating intimate partner sexual assaults in a manner that exposes them as critical weapons in an offender's abuse of his partner. ◉

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<sup>33</sup> Currently, *Giles v California*, is pending before the Supreme Court in which the question presented was: Does a criminal defendant "forfeit" his or her Sixth Amendment Confrontation Clause claims upon a mere showing that the defendant has caused the unavailability of a witness, as some courts have held, or must there also be an additional showing that the defendant's actions were undertaken for the purpose of preventing the witness from testifying, as other courts have held.

<sup>34</sup> Fed. R. Evid. 803.



# A Guide for Developing Tools to Assess for Sexual Assault Within the Context of Domestic Violence<sup>1</sup>

Compiled by Kathleen Arledge, MSW

Survivors of Intimate Partner Sexual Violence often hesitate to define their experience as rape. In addition, there are many reasons why a survivor may never tell a practitioner about the sexual assault, despite the practitioner's efforts to screen victims.

This guide will assist the practitioner in developing screening questions that validate the victim's experiences and empowers them to initiate help-seeking behavior.

1. Rapport should be built with the victim before screening questions are asked.
2. Questions should use specific language when referring to the crime. Words such as hurt, threatened, or forced should be clarified by the interviewer (i.e. did she/he hurt you vs. did she/he hit or push you).
3. Due to rape myths, some victims of intimate partner sexual violence may not consider the crime a "rape." Screening questions should use words such as sexual activity, intimate experience, etc.
4. Questions should be open-ended and designed to facilitate disclosure.
5. Persons asking questions about sexual activities should first receive training in how to discuss sexual histories and experiences in a non-threatening, non-judgmental manner.
6. Before asking the questions, the interviewer should decide what they will do if the victim provides information that indicates a sexual assault.

Before asking the victim such questions, the interviewer must know the answers to the following questions:

- What kind of answers would lead you to believe that an intervention is warranted?
- What kind of intervention are you prepared to make?
- What further questions would you need to ask?
- What resources and/or information do you have to offer?

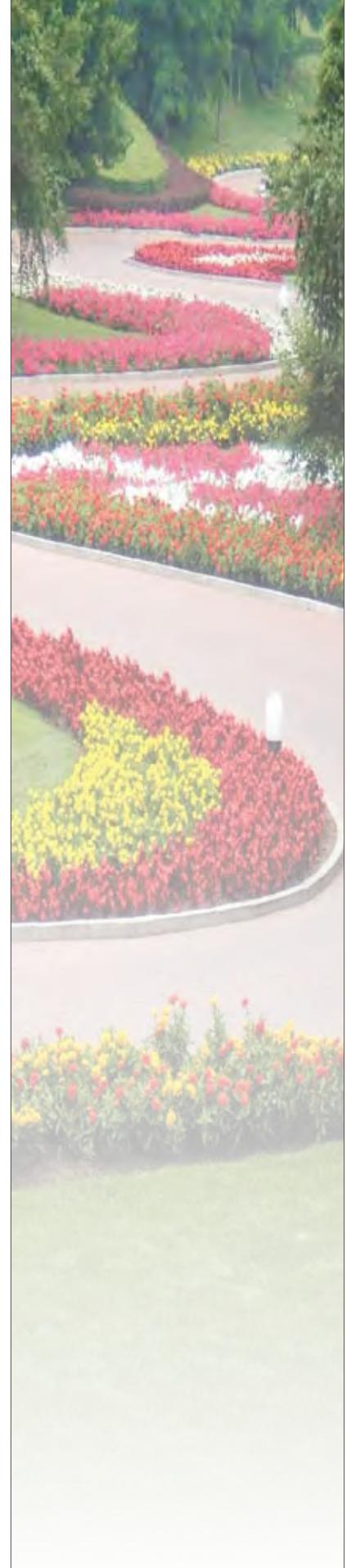
<sup>1</sup> Mahoney, P. & Williams L. Sexual assault in marriage: Prevalence, consequences, and treatment of wife rape. *Family Research Laboratory*, University of New Hampshire. Obtained from [http://www.agnr.umd.edu/nfr/research/pv/pv\\_ch5.html](http://www.agnr.umd.edu/nfr/research/pv/pv_ch5.html).

## Possible Screening Questions:

The following list of screening questions has been synthesized from various scholarly resources. This is not an exhaustive list of questions, and they have not been systematically evaluated. These questions are designed to facilitate disclosure from the victim. They are not intended for verbatim use; the interviewer should make necessary revisions to fit specific assessment situations.

- Have you ever been intimate with your partner when you didn't want to?
- Does your partner ever force you to be intimate? How often does this happen and when did it happen last?
- Have you ever been intimate with your partner because you were afraid of him / her?
- Are there times when sex between you or your partner is unpleasant for either one of you? What happens to make it unpleasant?
- Do you and your partner ever have disagreements about sex: for example, when and how often to have sex? How do you resolve those disagreements?
- Do you think you and your partner enjoy your sexual relationship equally?
- Has your partner ever made you have a sexual experience when you had too much alcohol to drink or when you've taken something (drugs, exc.) that made you unable to consent?
- Has your partner ever forced or pressured you into doing things that you weren't comfortable with? What were they?
- Has your partner ever forced you to have a sexual experience by using a weapon, or by physically hurting you?
- Has your partner ever forced you to have a sexual experience by kidnapping you, or by breaking into your home/office/car, etc?
- Have you ever had sex with your partner because he has threatened, pressured, forced, or hurt you? What happened?<sup>2</sup>
- Has your partner ever had sex with you when you were physically or mentally unable to say yes or agree to the activity?
- Have you ever "given in" to a sexual encounter with your partner to avoid fighting or being hurt?
- Have you ever had a sexual encounter because you felt overwhelmed by your partner's continual arguing and / or pressure?
- Has your partner ever touched you in a sexual way that has made you feel uncomfortable?
- Has your partner ever said or done sexually degrading things to you?

<sup>2</sup> Note to interviewer – based upon your assessment of the situation, clarify for the victim what you mean by threat, pressure, force, etc.





### Follow-up Questions:<sup>3</sup>

These follow-up questions have been designed to solicit more information from the victim after the preceding screening questions have been asked. These questions solicit additional information from the victim when the initial screening question is closed-ended and the victim has given a positive response to that question.

- How long has this sexual abuse / behavior been occurring in your relationship?
- How often does the sexual abuse occur?
- Are there any patterns between the physical and sexual abuse in your relationship?
- Have you noticed any change in the frequency or severity of abuse in your relationship?
- Was there ever any force or pressure involved?
- Have you ever told anyone or received help?
- Who did you tell or what type of help did you receive?
- How has the sexual abuse in your relationship impacted you?
- Have you noticed any physical or medical changes with your body?
- What has been the emotional or psychological affects you've experienced as a result of the sexual abuse?
- How can I help you? ⊙

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<sup>3</sup> Fribley, C. & Trujillo, O. Sexual Violence Within the Context of DV. Praxis International Audio Conference Call, September 2006.

*For information about becoming a supporting member of WCSAP,  
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