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## Credibility in context: jury education and intimate partner rape

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**Abstract:** This article reflects critically on the scope of educational jury directions currently utilised in sexual offence cases in England and Wales and argues for their extension to circumstances specifically arising in cases of so-called 'domestic' or intimate partner rape. This position is defended as a necessary step to promote more accurate credibility assessment of claims of sexual violence and the prospects of just trial outcomes for survivors in this subcategory of rape cases.

**Key words:** Rape, domestic abuse, jury directions, misconceptions, credibility

### **Introduction**

In England and Wales - as in other common law jurisdictions – jurors are generally expected to make credibility assessments relying on their 'common sense' knowledge and understanding of the world and of human behaviour. As Friedland, observes, "when jurors exercise their common sense in evaluating a witness's testimony a full and fair credibility determination is presumed to follow".<sup>1</sup> While this broad stance is maintained, the extent to which common sense knowledge provides an adequate foundation for credibility assessment in sexual offence cases has, nonetheless, been notably and

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<sup>1</sup> Friedland, S. I. (1989) 'On common sense and the evaluation of witness credibility' Case Western Reserve Law Review, 40, 165.

exceptionally called into question. In the landmark case of *R v D*<sup>2</sup>, the Court of Appeal significantly accepted that it may be necessary for trial judges presiding in sexual offence cases to give appropriate directions to counter a risk of jurors applying stereotypes and misleading generalisations about behaviour and responses to non-consensual sexual conduct when considering a complainant's testimony. Subsequent case law has supported this position and a range of illustrative 'educative' jury directions that might be utilised by trial judges are currently set out in the latest edition of the *Crown Court Compendium*.<sup>3</sup> These guiding statements importantly address a range of false beliefs and attitudinal biases jurors may hold when they enter into deliberations in rape cases. Notably, however, they offer minimal assistance currently on how jurors may appropriately approach evidence in trials concerned with allegations made against a current or former intimate partner.<sup>4</sup> Existing guidance is specifically confined to a single statement that a jury might be usefully warned against inferring – in relation to the substantive components of the offence – either the presence of consent or reasonable belief in consent from the mere fact that a complainant and defendant had a previous consensual sexual relationship.<sup>5</sup>

This article sets out to problematize this limited approach and accordingly takes issue with the current scope of educational guidance utilised in sexual offence cases in England and Wales. It does so on the broad premise that the distinctive dynamics and circumstances of intimate partner rape are not widely understood phenomena.

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<sup>2</sup> [2008] EWCA Crim 2557.

<sup>3</sup> Sir David Maddison, His Honour Simon Tonking, His Honour John Wait, David Ormerod QC, *Crown Court Compendium Part 1 Jury and Trial Management and Summing Up* 2017 (Judicial College).

<sup>4</sup> 'Intimate partner' is used throughout to refer to all partner and ex-partner relationships, not just where a couple are married or in a civil partnership, but also including co-habiting partners and those considered in a romantic / sexual relationship.

<sup>5</sup> In England and Wales, the offence of rape is contained in the Sexual Offences Act 2003. Section 1 provides (1) A person (A) commits an offence if—

(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,  
(b) B does not consent to the penetration, and  
(c) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

Accordingly, jurors' common sense credibility assessments run the risk of being (mis)informed by false assumptions regarding common complainant responses in this subcategory of rape cases. Tailored educational efforts that provide proper context for complainant behaviours commonly exhibited in cases of intimate partner rape are thus necessitated, this article argues, to assist jurors in their deliberative task and ultimately to promote just trial outcomes. Judicial directions are additionally defended as the appropriate vehicle to serve this educative purpose.

At the outset, and by way of context, it is relevant to note that Crime Survey data for England and Wales indicate that most rapes are committed by known assailants and within this category a significant proportion of rapes – and possibly a majority - are perpetrated by male intimates.<sup>6</sup> For example, aggregated data for the period March 2015-March 2017 looking at female victims of rape (or assault by penetration), found that the offender was a partner or ex-partner in 45% of cases; someone known to the victim other than a partner or family member in 38% of cases and a stranger in 13%.<sup>7</sup> The equivalent information is not available for male victims for comparison as the survey yielded insufficient data to provide robust results. Survey findings from other jurisdictions notably paint a similar picture.<sup>8</sup> It is against this backdrop, then, that the introduction of

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<sup>6</sup> It is widely accepted that surveys are likely to under estimate the extent of partner rape due to the unwillingness of survivors to disclose their experiences and because women may not label their experiences of sexual coercion 'rape' even where relevant legal criteria are met. See Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence. *Trauma, Violence, & Abuse, 16*(2), 111-135.

<sup>7</sup> The remainder reported that the offender was a family member. One significant limitation of CSEW data is that relationship status is only recorded for the *most recent* experience of sexual assault since the age of 16. Office for National Statistics, *Sexual Offences in England and Wales: Year ending March 2017*. These findings are broadly consistent with previous studies conducted in England and Wales. For example, the 2000 British Crime Survey found that women were more likely to be sexually attacked by men they know in some way, most often partners (32%) or acquaintances (22%). Current partners (at the time of the attack) were responsible for 45 per cent of rapes according to the survey, Myhill, A., & Allen, J. (2002). *Rape and sexual assault of women: the extent and nature of the problem*. London, England: Home Office. In a study that tracked 500 cases, Harris and Grace found that rapes committed by acquaintances or intimates accounted 45 and 43 per cent respectively. Harris, J., & Grace, S. (1999). *A question of evidence? Investigating and prosecuting rape in the 1990s*. London: Home Office.

<sup>8</sup> Cox, P. *Sexual assault and domestic violence in the context of co-occurrence and re-victimisation: State of knowledge paper* Sydney: ANROWS, 2015. Black, M. C., Basile, K. C., Breiding, M. J., Smith, S. G., Walters, M. L., Merrick, M. T., & Stevens, M. R. (2011). The national intimate partner and sexual violence survey: 2010 summary report. *Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, 19*, 39-40. See

educational jury directions in sexual offence cases in England and Wales and the stereotypical reasoning they are designed to refute fall to be considered and critiqued.

### **Contesting common sense: jury education in sexual offence cases**

To return to the case of *R v D*<sup>9</sup>, in brief, the appellant was convicted on six counts of raping a woman referred to only as D with whom he had co-habited for several years. The last assault was a particularly brutal affair in which D was reportedly dragged to an upstairs room and raped vaginally and anally. D had had an opportunity to report this incident and previous rapes to the police when they called at the couple's home that same evening but had instead chosen to disclose the assaults when speaking to a single officer two days later. When quizzed about the timing of her complaint during cross-examination, the complainant explained that she had felt too ashamed and embarrassed to report the offences initially as there were several officers present and "the atmosphere had not been right". One ground of appeal was an objection on the part of the defence that the presiding judge had exceeded legitimate comment in describing, in his summing up to the jury, how the complainant may have felt when confronted by several police officers in whom she could not confide. The Court of Appeal, in turn, upheld the trial judge's entitlement to make comments upon the way evidence in the case was to be approached where there was a danger that the jury might reach an unjustified conclusion without an appropriate warning.<sup>10</sup> In the instant case, this legitimately entailed informing the jury that a delayed complaint did not necessarily mean that the allegation was false and extended to making specific reference to the feelings of shame and embarrassment

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also Tjaden, P., & Thoennes, N. (2000). Full report of the prevalence, incidence, and consequences of violence against women series: Research report. Washington DC: U.S. Department of Justice.

<sup>9</sup> [2008] EWCA Crim 2557.

<sup>10</sup> The Court of Appeal noted that the situation was analogous to those in which the trial judge warns the jury about the apparently persuasive but possibly mistaken evidence of identification or jumping to a conclusion of guilt from a defendant's lie. The difference was only that the on this occasion the comment was made in fairness to the complainant rather than in the interests of the defendant.

that might inhibit disclosure. Providing additional appellate guidance, Latham LJ clarified that any observation by the judge must be “uncontroversial” in the sense of furnishing jurors with accepted facts and form part of a balanced exposition of the cases for the prosecution and the defence to ensure fairness to both sides. In other words, the Court of Appeal confirmed that a trial judge could appropriately warn a jury against approaching the evidence with any preconceived assumptions but must not give the impression of endorsing argument for one side at the expense of the other.<sup>11</sup>

Subsequent to this decision, the *Crown Court Benchbook*, which superseded former specimen directions in providing guidance to trial judges when summing up cases in the Crown Court in England and Wales, dedicated a specific chapter to “alerting the jury to the danger of mistaken assumptions” in sexual offence cases.<sup>12</sup> Its pages, penned by Pitchford LJ, identified several subjects for stereotyping in addition to delayed reporting which could potentially lead a jury to approach a complainant’s evidence with “unwarranted scepticism”.<sup>13</sup> These were set out in the form of ‘illustrative directions’ that judges might adapt when dealing with evidence in individual cases, accompanied by a proviso that the precise terms of any advice issued to jurors – as well as the decision to issue advice at all – were entirely for the judgment of the trial judge.<sup>14</sup> In *Miller*, the Court of Appeal approved this broad approach and specifically endorsed the following passage from the *Benchbook*:

“The experience of judges who try sexual offences is that an image of stereotypical behaviour and demeanour by a victim or the perpetrator of a non-consensual offence such as rape held by some members of the public can be misleading and capable of leading to injustice. That experience has been gained by judges, experts in the field, presiding over many such trials during which guilt has been established

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<sup>11</sup> See also *MM* (2007) EWCA (Crim) 1558; *Breeze* [2009] EWCA (Crim) 225.

<sup>12</sup> Judicial Studies Board, *Crown Court Benchbook* (2010)

<sup>13</sup> The illustrations were adapted from work done by HH Judge Peter Rook and others participating in the Judicial Studies Board’s Serious Sexual Offences Seminars.

<sup>14</sup> Trial judges are advised to discuss any proposed direction with counsel.

but in which the behaviour and demeanour of complainants and defendants, both during the incident giving rise to the charge and in evidence, has been widely variable. Judges have, as a result of their experience, in recent years adopted the course of cautioning juries against applying stereotypical images how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time, or ought to appear while giving evidence, and to judge the evidence on its intrinsic merits. This is not to invite juries to suspend their own judgement but to approach the evidence without prejudice”.<sup>15</sup>

More recently, the Judicial College saw fit to combine the strengths of previous work and guidance for trial judges – which largely reflects Pitchford LJ’s original guidance with some amendments- is currently contained in the *Crown Court Compendium* in a chapter headed “the dangers of assumptions”.<sup>16</sup> Listed are a dozen “supposed indicators” relating to the evidence of the complainant in relation to which guidance may be necessary. These include, for example, a lack of emotion or distress when giving evidence. Research has shown that rape survivors display different emotional styles when communicating their experiences, ranging from being outwardly distraught and/or crying to being composed and/or emotionally numb.<sup>17</sup> Personality and individual coping strategies are commonly said to account for these differing reactions, as well as the complex, often conflicting emotions survivors typically experience in the aftermath of an assault.<sup>18</sup> Reflecting this reality, illustrative guidance states that it is appropriate for judges to warn jurors that the presence or absence of a show of emotion or distress when giving evidence is not a reliable pointer to the truthfulness or untruthfulness of what a

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<sup>15</sup> [2010] EWCA Crim 1578.

<sup>16</sup> Sir David Maddison, His Honour Simon Tonking, His Honour John Wait, David Ormerod QC, *Crown Court Compendium Part 1 Jury and Trial Management and Summing Up* 2017 (Judicial College).

<sup>17</sup> Frazier, P. A., & Burnett, J. W. (1994). Immediate coping strategies among rape victims. *Journal of Counselling & Development*, 72(6), 633-639.

<sup>18</sup> Littleton, H., & Breitkopf, C. R. (2006). Coping with the experience of rape. *Psychology of Women Quarterly*, 30(1), 106-116.

person is saying and to emphasise that some complainants show obvious signs of emotion and distress when asked to speak about their experience, “whereas others show no emotion at all”. Another direction aims to dispel the notion that narrative inconsistencies in the accounts given by a complainant are necessarily indicative of dishonesty or faulty recall but will be attributable, in some cases, to the effects of trauma which can have a significant bearing on an individual’s ability to take in, register and recall information.<sup>19</sup>

Evidence relating to physical resistance and injury receives similar treatment. Defence lawyers will commonly present the absence of physical struggle on the part of a rape complainant as behaviour denoting consent, invoking the unfounded behavioural assumption that the ‘normal’, instinctive reaction of any person in this situation would be to fight back.<sup>20</sup> To counter this false stereotype, the relevant direction stresses that different people may respond to unwanted sexual activity in different ways, acknowledging that some individuals, whilst they do not consent, may be unable to physically resist whether through fear or personality.<sup>21</sup> Other directions are designed to counter possible gender stereotyping based, for example, around a complainant’s clothing or drinking of alcohol by underscoring that wearing ‘revealing’ clothing or going out at night and getting drunk does not mean that a person is inviting or willing to have sex. Another warns against assuming a man in an established sexual relationship would

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<sup>19</sup> See, for example, Brewin C, Memory Processes in Post-Traumatic Stress Disorder International Review of Psychiatry 2001; 13: 159-163, Van der Kolk B, Fislser R, Dissociation and the Fragmentary Nature of Traumatic Memories: Overview and Exploratory Study Journal of Traumatic Stress 1995; 8: 505-525; Conway M, Holmes E, (2010) Guidelines on Memory and the Law Recommendations from the Scientific Study of the Human Mind London: British Psychological Society.

<sup>20</sup> See for example, Lees, S. (2002). *Carnal knowledge: Rape on trial*. Women’s Press Ltd; Smith, O., & Skinner, T. (2017). How rape myths are used and challenged in rape and sexual assault trials. *Social & Legal Studies*, 26(4), 441-466; Smith, O. (2018). *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Palgrave MacMillan).

<sup>21</sup> For discussion see Sugar, N. F., Fine, D. N., & Eckert, L. O. (2004). Physical injury after sexual assault: findings of a large case series. *American journal of obstetrics and gynecology*, 190(1), 71-76; Galliano, G., Noble, L. M., Travis, L. A., & Puechl, C. (1993). Victim reactions during rape/sexual assault: A preliminary study of the immobility response and its correlates. *Journal of Interpersonal Violence*, 8(1), 109-114.



never resort to sexual activity with any other person, presumably to challenge the spurious notion that men rape because they are sexually deprived.

Collectively, these illustrative directions – alongside Court of Appeal endorsement - constitute welcome acknowledgement of the threat that unchallenged ill-informed behavioural assumptions pose to the fair administration of justice in sexual offence cases. Furthermore, they provide evidence of an equally welcome commitment to counter extra-legal biases that may have an untoward influence on jury decision-making. Currently lacking, however, as previously flagged, is explanatory guidance on generalisations or misconceptions that might arise specifically in connection to allegations of rape by a current or former partner. One might consequently conclude that no special considerations apply in these cases that warrant specific guidance to jurors. An alternative reading, however, and one advanced below, is that the distinct features and dynamics of intimate partner rape – while recognisable to some professionals– are insufficiently familiar in the public domain. Divorced from context and left unexplained, common complainant behaviours are consequently at risk of misinterpretation and biased evaluation.

### **Contextualising Intimate Partner Rape**

Compared with other categories of rape, it is true to say that intimate partner rape remains relatively understudied and has, in addition, generated limited popular discussion. Indeed, Heenan has commented that the unspoken response to this area of sexual offending has much in common with a whispering campaign – “known about by many, but with few willing to address it openly”.<sup>22</sup> Such research as exists, has, however, done much in recent years to further understanding of rape perpetrated in marriage and

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<sup>22</sup> Heenan, M. (2004). *Just" keeping the Peace": A Reluctance to Respond to Male Partner Sexual Violence*. Australian Institute of Family Studies.

other intimate relationships. One of the key findings to emerge from this body of research – based typically on the first-hand accounts of survivors – is the often long-term and repeated nature of victimisation that occurs in women’s established intimate relationships with men. Rape by an intimate partner may be an isolated incident for some women. For a significant number of women, however, it is a trauma that they relive multiple times in relationships that may be relatively short-lived or stretch over years. For example, in separate ground breaking studies, American researchers Russell and Finkelhor and Yllö interviewed women who had experienced rape in their marriages and found that as many as half had been raped twenty times or more by their husbands and rape was a repeated occurrence for the majority.<sup>23</sup> Subsequently, Bergen conducted interviews with American women raped by a male partner and found that some women were assaulted “so frequently they lost count”<sup>24</sup> while the rates of multiple assaults (physical and sexual) reported by women in another US survey prompted the researchers to conclude that “much of the violence perpetrated against women by intimates is chronic in nature”.<sup>25</sup> Their findings indicated that just over half of the women raped by an intimate partner spoke of multiple occasions when they were victimised by the same man.<sup>26</sup> Such findings are consistent with those of studies conducted elsewhere although typically on a smaller scale. For example, an Australian study based on in-depth interviews with 21 survivors of intimate partner rape included accounts of women who

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<sup>23</sup> Russell, D. E. (1990). *Rape in marriage, Exp. and rev.* Indiana University Press; Finkelhor, D., & Yllö, K. (1987). *License to rape: Sexual abuse of wives.* Simon and Schuster.

<sup>24</sup> Bergen, R. K. (1996). *Wife rape* (Vol. 2). Sage at 19.

<sup>25</sup> MacFarlane and Malecha surveyed 148 women seeking protection orders and found that seventy-nine per cent of women who had experienced rape (68% of the total) reported repeated episodes of sexual assault, including vaginal, oral and anal rape. MacFarlane, J., Malecha, A., Watson, K., Gist, J., Batten, E., Hall, I., & Smith, S. (2005) *Obstetrics & Gynecology*, 105(1), 99-108. Mahoney found that almost 20% of women reporting sexual assaults by intimate partners reported more than 10 sexual assaults in a six-month period. Mahoney, P. (1999). High rape chronicity and low rates of help-seeking among wife rape survivors in a nonclinical sample: Implications for research and practice. *Violence against Women*, 5(9), 993-101. Intimate partner sexual assault against women: frequency, health consequences, and treatment outcomes. See also Coker, A. L., Smith, P. H., McKeown, R. E., & King, M. J. (2000). Frequency and correlates of intimate partner violence by type: physical, sexual, and psychological battering. *American journal of public health*, 90(4), 553.

<sup>26</sup> Tjaden, P., & Thoennes, N. (2000). Full report of the prevalence, incidence, and consequences of violence against women series: Research report. Washington DC: U.S. Department of Justice.

had been raped once by their partner and others who had been raped repeatedly over a space of months or years.<sup>27</sup>

This same body of research has, importantly, also brought to light the interconnections between sexual violence in marital and other intimate relationships and other forms of domestic abuse.<sup>28</sup> There is evidence that partner rape is more likely in battering relationships, for example, although sexual violence is sometimes a feature of a relationship in which there is little or no other physical violence.<sup>29</sup> Many of the women surveyed by Russell, for instance, experienced rape and battering unrelated to the rape(s) while a smaller proportion experienced rape only.<sup>30</sup> Other investigations of the correlates of partner abuse indicate high rates of concurrence of partner rape and non-sexual physical assault.<sup>31</sup> By way of example, Haskell and Randall found in their Canadian study that half of the women in the random sample of respondents who reported physical assault in their intimate relationship with male partners were also forced to have sex by these same men. Some women in the study experienced sexual

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<sup>27</sup> Parkinson, D., & Cowan, S. (2008) *Raped by a Partner: A research report* (Wangaratta: Women's Health Goulburn North East).

<sup>28</sup> Bennice, J. A., & Resick, P. A. (2003). Marital rape: History, research, and practice. *Trauma, Violence, & Abuse*, 4(3), 228-246; Basile, K., & Hall, J. E. (2011). Intimate partner violence perpetration by court-ordered men: Distinctions and intersections among physical violence, sexual violence, psychological abuse, and stalking. *Journal of Interpersonal Violence*, 26(2), 230-253; Campbell, J. C., & Soeken, K. L. (1999). Forced sex and intimate partner violence: Effects on women's risk and women's health. *Violence against women*, 5(9), 1017-1035; Bergen, R. K. (1996). *Wife rape* (Vol. 2). Sage; Russell, D. E. (1990). *Rape in marriage, Exp. and rev.* Indiana University Press; Finkelhor, D., & Yllö, K. (1987). *License to rape: Sexual abuse of wives*. Simon and Schuster; Parkinson, D., & Cowan, S. (2008) *Raped by a Partner: A research report* (Wangaratta: Women's Health Goulburn North East).

<sup>29</sup> Finkelhor, D., & Yllö, K. (1987). *License to rape: Sexual abuse of wives*. Simon and Schuster; L. McOrmond Plummer, J.Y. Levy-Peck, P. Eastal (Eds.), *Intimate partner sexual violence: A multidisciplinary guide to improving services and support for survivors of rape and abuse*. (Jessica Kingsley Publishers).

<sup>30</sup> Russell, D. E. (1990). *Rape in marriage, Exp. and rev.* Indiana University Press.

<sup>31</sup> Campbell, J. C., & Soeken, K. L. (1999) Forced sex and intimate partner violence: Effects on women's risk and women's health. *Violence against women*, 5(9), 1017-1035; Basile, K. C. (2008). Histories of violent victimization among women who reported unwanted sex in marriages and intimate relationships: Findings from a qualitative study. *Violence Against Women*, 14(1), 29-52; Coker, A. L., Smith, P. H., McKeown, R. E., & King, M. J. (2000). Frequency and correlates of intimate partner violence by type: physical, sexual, and psychological battering. *American journal of public health*, 90(4), 553; Randall, M., & Haskell, L. (1995). Sexual violence in women's lives: Findings from the Women's Safety Project, a community-based survey. *Violence against women*, 1(1), 6-31.

assault in isolation.<sup>32</sup> While the relationship is still being studied, it is becoming clear, in addition, that intimate partner rape in many cases forms part a complex pattern of coercive and controlling behaviours aimed at establishing and maintaining women's subordination and dependency in relationships.<sup>33</sup> Studies thus relatedly suggest that women whose partners are controlling psychologically, verbally or economically are more likely to report being raped, physically assaulted and/or stalked by their partners.<sup>34</sup> While each woman's experience is unique, contemporary research has importantly also extended knowledge and understanding of women's responses to the violence and abuse they experience at the hands of intimate partners.<sup>35</sup> There is, for example, a greater appreciation – at least amongst researchers and some professionals- of the complex situational and interpersonal influences that help to explain why women can become entrapped in relationships with the men who rape them and/ or subject them to other forms of abuse. It is thus recognised that women often stay in relationships with abusive partners for fear that an attempt to break free might lead to an escalation in violence. Such fears are well-grounded, moreover, as women are known to be at heightened risk of further violence – including fatal injury - when they seek a separation. Indeed, some study findings significantly indicate that men who engage in sexualised

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<sup>32</sup> The study is reported in Randall, M. 'Marital Rape and Sexual Violence against Women in Intimate Relationships: The Less Recognised Form of Domestic Violence' in (2017) (eds.) Randall, M., Koshan, J. & Nyaundi, P. *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi* (Hart Publishing) at 21.

<sup>33</sup> Most women interviewed by Bergen saw sexual violence as their partner's way to exert control and power over them: Bergen, R. K. (1996). *Wife rape* (Vol. 2). Sage, at 22. See also Stark, E. (2009). *Coercive control: The entrapment of women in personal life*. Oxford University Press;

<sup>34</sup> See, for example, Tjaden, P. G., & Thoennes, N. (2000). Extent, nature, and consequences of intimate partner violence, US Department of Justice); Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence. *Trauma, Violence, & Abuse*, 16(2), 111-135; Basile, K. C. (2008). Histories of violent victimization among women who reported unwanted sex in marriages and intimate relationships: Findings from a qualitative study. *Violence against Women*, 14(1), 29-52.

<sup>35</sup>Theoretical perspectives on responses to intimate partner abuse have shifted from victim-blaming perspectives and theories which saw women as largely passive and helpless to contemporary frameworks which highlight women's resourcefulness, resistance strategies and resilience. See Kelly, U., Gonzalez-Guarda, R. & Taylor, J. Theories of Intimate Partner Abuse in (eds.) Humphreys, J., & Campbell, J. C. (Eds.). (2010). *Family violence and nursing practice*. Springer Publishing Company, 76; Anderson, D. K., & Saunders, D. G. (2003). Leaving an abusive partner: An empirical review of predictors, the process of leaving, and psychological well-being. *Trauma, Violence, & Abuse*, 4(2), 163-191 at 172.

violence are more likely to issue threats kill or severely injure their partners – and to carry out their threats - than men who perpetrate non-sexual physical abuse only.<sup>36</sup> Safety fears will also often extend to children and other family members or friends who can be the target of direct threats.<sup>37</sup> Hence, women may make the rational calculation that the safest option (for them and for those closest to them) at a given moment in time is to remain in a relationship rather than to seek a separation.<sup>38</sup>

Alongside safety fears, economic factors have also been shown to assume major importance as women's choices are inevitably seriously constrained – potentially to vanishing point - where they are dependent on their partner financially or for somewhere to live.<sup>39</sup> A woman may stay in a violent and abusive relationship, facing intolerable conditions, because her financial circumstances at the time dictate no other feasible option.<sup>40</sup> A lack of employment, absence of affordable childcare, and the fact that leaving all too often exposes women to a risk of homelessness,<sup>41</sup> thus constitute some of the many structural barriers that impose severe limitations on women's options in seeking safety.<sup>42</sup> The plight of marginalized women may be further compounded by, *inter alia*,

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<sup>36</sup>The high incidence of abuse that occurs on separation has led to the creation of the term “separation assault” Mahoney, M. R. (1991). Legal images of battered women: Redefining the issue of separation. *Michigan Law Review*, 90(1), 1-94. See also Campbell, J. C., Webster, D., Koziol-McLain, J., Block, C., Campbell, D., Curry, M. A., & Sharps, P. (2003). Risk factors for femicide in abusive relationships: Results from a multisite case control study. *American journal of public health*, 93(7), 1089-1097.

<sup>37</sup> Anderson, D. K., & Saunders, D. G. (2003). Leaving an abusive partner: An empirical review of predictors, the process of leaving, and psychological well-being. *Trauma, Violence, & Abuse*, 4(2), 163-191.

<sup>38</sup>Stark, E. (2009). *Coercive control: The entrapment of women in personal life*. Oxford University Press; Griffing, S., Ragin, D. F., Sage, R. E., Madry, L., Bingham, L. E., & Primm, B. J. (2002). Domestic violence survivors' self-identified reasons for returning to abusive relationships. *Journal of Interpersonal Violence*, 17(3), 306-319.

<sup>39</sup>Coker, D. (2002). Addressing domestic violence through a strategy of economic rights. *Women's Rights Law Reporter*, 24, 187; Barnett, O. W. (2000). Why battered women do not leave, part 1: External inhibiting factors within society. *Trauma, Violence, & Abuse*, 1(4), 343-372.

<sup>40</sup> In some cases women's efforts to find employment or retain jobs may meet with interference or sabotage from their partners. See Stark, E. (2009). *Coercive control: The entrapment of women in personal life*. Oxford University Press; Postmus, J. L., Hoge, G. L., Breckenridge, J., Sharp-Jeffs, N., & Chung, D. (2018). Economic abuse as an invisible form of domestic violence: a multi-country review. *Trauma, Violence, & Abuse*, 1524838018764160.

<sup>41</sup> Women's Aid, (2018) *No Where to Turn: Findings from the second year of the No Woman Turned Away Project* (Women's Aid).

<sup>42</sup> See Randall, M. (2004). Domestic Violence and the Construction of Ideal Victims: Assaulted Women's Image Problems in Law, *Saint Louis University Public Law Review*, 23, 107-154.

material conditions of social deprivation,<sup>43</sup> immigration status,<sup>44</sup> disability,<sup>45</sup> language difficulties and a lack of awareness of available advocacy and support services for survivors of abuse.

Formal systems, including children's protective services, the police, legal process and health professionals, have further been shown to act as both facilitators and barriers for women in this situation.<sup>46</sup> For example, women may remain in relationships and conceal a partner's abusive behaviour for fear of having their children removed from their custody.<sup>47</sup> Meanwhile, as Kelly and colleagues observe, ineffective responses from the police or the courts will prompt women to respond differently than if they received the legal help they were seeking, "perhaps staying in a relationship and 'managing' the abuse as best they can".<sup>48</sup>

Beyond such factors, it is recognised that women may deny or minimise the harms they are subjected to because of intense feelings of stigma and shame<sup>49</sup> or self-blame or because they still have an enduring emotional attachment to their partner.<sup>50</sup> A change in

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<sup>43</sup> Slabbert, I. (2017). Domestic Violence and Poverty: Some Women's Experiences. *Research on social work practice*, 27(2), 223-230.

<sup>44</sup> Women whose immigration status is uncertain are currently ineligible for state support Adams, M. E., & Campbell, J. (2012). Being undocumented & intimate partner violence (IPV): Multiple vulnerabilities through the lens of feminist intersectionality. *Women's Health and Urban Life*, Vol 11 (1), 15-34; Sabri, B., Barcelona de Mendoza, V. & Campbell, J. Immigrant Women and Intimate Partner Sexual Violence in L. McOrmond Plummer, J.Y. Levy-Peck, P. Eastaerl (eds.), *Intimate partner sexual violence: A multidisciplinary guide to improving services and support for survivors of rape and abuse*. (Jessica Kingsley Publishers), 246.

<sup>45</sup> Thiara, R. K., Hague, G., & Mullender, A. (2011). Losing out on both counts: disabled women and domestic violence. *Disability & Society*, 26(6), 757-771.

<sup>46</sup> Evans, M. A., & Feder, G. S. (2016). Help-seeking amongst women survivors of domestic violence: a qualitative study of pathways towards formal and informal support. *Health Expectations*, 19(1), 62-73; Parkinson, D., & Cowan, S. (2008) *Raped by a Partner: A research report* (Wangaratta: Women's Health Goulburn North East).

<sup>47</sup> Wolf, M. E., Ly, U., Hobart, M. A., & Kernic, M. A. (2003). Barriers to seeking police help for intimate partner violence. *Journal of family Violence*, 18(2), 121-129.

<sup>48</sup> Kelly, U., Gonzalez-Guarda, R. & Taylor, J. Theories of Intimate Partner Abuse in (eds.) Humphreys, J., & Campbell, J. C. (Eds.). (2010). *Family violence and nursing practice*. Springer Publishing Company, 76.

<sup>49</sup> Wall, L. (2012). *The many facets of shame in intimate partner sexual violence*. Melbourne: Australian Institute of Family Studies; Barnett, O. W. (2001). Why battered women do not leave, part 2: External inhibiting factors—social support and internal inhibiting factors. *Trauma, Violence, & Abuse*, 2(1), 3-35.

<sup>50</sup> Bergen, R. K. (1996). *Wife rape* (Vol. 2). Sage, 32. See also Parkinson, D., & Cowan, S. (2008) *Raped by a Partner: A research report* (Wangaratta: Women's Health Goulburn North East).

perspective may take place over time when it becomes clear that the abuse is not going to cease or there is an escalation in the severity of abuse experienced.<sup>51</sup> Social support – from friends, family and community - may provide the catalyst for a shift in thinking. Conversely, women who disclose rape or other abuse at the hands of an intimate partner and are disbelieved, are treated unsympathetically, or even counselled to ‘put up with’ the abuse (e.g. to honour the ‘sanctity’ of marriage) may be deterred from taking evasive action.<sup>52</sup> Even with support, there is recognition in the literature that the effects of long-term stress and trauma associated with intimate partner abuse can be debilitating and can hinder women in their efforts to extricate themselves from a relationship and reconstruct their lives.<sup>53</sup> Survivors of intimate partner rape have, for example, spoken of their betrayal, humiliation and shock in the immediate aftermath of an assault, while the documented longer term adverse mental health effects for some women include depression, severe anxiety, post-traumatic stress disorder and suicidal ideation.<sup>54</sup>

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<sup>51</sup> Anderson, D. K., & Saunders, D. G. (2003). Leaving an abusive partner: An empirical review of predictors, the process of leaving, and psychological well-being. *Trauma, Violence, & Abuse, 4*(2), 163-191 at 185.

<sup>52</sup> Similarly, an abusive partner’s own denial of the seriousness of the abuse - “It can’t be rape, you’re my wife” - may exert influence. Parkinson, D., & Cowan, S. (2008) *Raped by a Partner: A research report* (Wangaratta: Women’s Health Goulburn North East).

<sup>53</sup> Herman, J. L. (2015). *Trauma and recovery: The aftermath of violence--from domestic abuse to political terror*. Hachette UK; Kelly, U., Gonzalez-Guarda, R. & Taylor, J. Theories of Intimate Partner Abuse in (eds.) Humphreys, J., & Campbell, J. C. (Eds.). (2010). *Family violence and nursing practice*. Springer Publishing Company, 76; Barnett, O. W. (2001). Why battered women do not leave, part 2: External inhibiting factors—social support and internal inhibiting factors. *Trauma, Violence, & Abuse, 2*(1), 3-35; Riggs, D. S., Kilpatrick, D. G., & Resnick, H. S. (1992) Long-term psychological distress associated with marital rape and aggravated assault: A comparison to other crime victims. *Journal of Family Violence, 7*(4), 283-296.

<sup>54</sup> Research thus upends any notion that intimate partner rape is less injurious than other rapes. McFarlane, J., Malecha, A., Watson, K., Gist, J., Batten, E., Hall, I., & Smith, S. (2005) Intimate partner sexual assault against women: frequency, health consequences, and treatment outcomes. *Obstetrics & Gynecology, 105*(1), 99-108; Kilpatrick, D. G., Best, C. L., Saunders, B. E., & Veronen, L. J. (1988) Rape in marriage and in dating relationships: How bad is it for mental health? *Annals of the New York Academy of Sciences, 528*(1), 335-344; Bennice, J. A., Resnick, P. A., Mechanic, M., & Astin, M. (2003) The relative effects of intimate partner physical and sexual violence on post-traumatic stress disorder symptomatology. *Violence and victims, 18*(1), 87; Campbell, J. C., & Soeken, K. L. (1999) Forced sex and intimate partner violence: Effects on women’s risk and women’s health. *Violence against women, 5*(9), 1017-1035. Being forced to deal with unwanted pregnancy or sexually transmitted infections, including HIV infection, through coerced sex rank amongst multiple adverse physical outcomes. Messing, J. T., Thaller, J., & Bagwell, M. (2014) Factors related to sexual abuse and forced sex in a sample of women experiencing police-involved intimate partner violence. *Health & social work, 39*(3), 181-191; Stermac, L., Bove, G. D., & Addison, M. (2001) Violence, injury, and presentation patterns in spousal sexual assaults. *Violence against Women, 7*(11), 1218-1233.

Notably, the same impacts and dynamics that can keep women trapped in relationships with abusive male partners can also militate against women disclosing offences to the police or to other external agencies. It is understood that the vast majority of sexual assaults are never reported and there is increasing evidence that the same holds true for domestic abuse in various guises. The most recent data from the Office for National Statistics suggest that one-fifth of domestic abuse survivors contact the police.<sup>55</sup> Complainants of intimate partner rape may consequently have endured a history of domestic violence and abuse (physical, sexual, psychological, economic) but not previously reported relevant offences, alerting the police only when their partner's actions extended to rape or when the impulse for protection and/or justice outweighed the perceived risks / costs of engaging with the criminal process. Reasons for non-reporting will obviously reflect individual circumstances but interrelated barriers to disclosure documented in the literature and supported by Crime Survey data<sup>56</sup> include (but are not limited to) fear of retaliation,<sup>57</sup> a desire to protect privacy,<sup>58</sup> stigma and shame,<sup>59</sup> economic dependency,<sup>60</sup> worries relating to the welfare of children,<sup>61</sup> previous negative

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<sup>55</sup> Office of National Statistics, (2017) Domestic Abuse in England and Wales; year ending March 2017.

<sup>56</sup> Office for National Statistics, (2014) Focus on Violent Crime and Sexual Offences 2012-13.

<sup>57</sup> Gover, A. R., Welton-Mitchell, C., Belknap, J., & Deprince, A. P. (2013). When abuse happens again: women's reasons for not reporting new incidents of intimate partner abuse to law enforcement. *Women & Criminal Justice*, 23(2), 99-120; Hoyle, C., & Sanders, A. (2000). Police response to domestic violence. *British journal of criminology*, 40(1), 14-36.

<sup>58</sup> Felson, R. B., Messner, S. F., Hoskin, A. W., & Deane, G. (2002). Reasons for reporting and not reporting domestic violence to the police. *Criminology*, 40(3), 617-648.

<sup>59</sup> Wall, L. (2012). *The many facets of shame in intimate partner sexual violence*. Melbourne: Australian Institute of Family Studies; Parkinson, D., & Cowan, S. (2008) *Raped by a Partner: A research report* (Wangaratta: Women's Health Goulburn North East).

<sup>60</sup> Novisky, M. A., & Peralta, R. L. (2015). When women tell: Intimate partner violence and the factors related to police notification. *Violence against women*, 21(1), 65-86; Hoyle, C., & Sanders, A. (2000). Police response to domestic violence. *British journal of criminology*, 40(1), 14-36.

<sup>61</sup> Wolf, M. E., Ly, U., Hobart, M. A., & Kernic, M. A. (2003). Barriers to seeking police help for intimate partner violence. *Journal of family Violence*, 18(2), 121-129. Conversely, in some cases, concern to protect children may act as a motivating factor to report offences – see Meyer, S. (2010). Seeking help to protect the children? The influence of children on women's decisions to seek help when experiencing intimate partner violence. *Journal of Family Violence*, 25(8), 713-725; Evans and Feder Rhodes; K. V., Cerulli, C., Dichter, M. E., Kothari, C. L., & Barg, F. K. (2010). "I didn't want to put them through that": The influence of children on victim decision-making in intimate partner violence cases. *Journal of Family Violence*, 25(5), 485-493;



experiences with the police and/or wider legal process,<sup>62</sup> a commitment to reconciliation with an abusive partner and a desire to protect a husband or partner from criminal sanction.<sup>63</sup>

Added to this, and for many of the same reasons, women who have experienced partner abuse who do report offences can remain deeply ambivalent about the benefits of supporting or pursuing criminal intervention and/or come under extreme emotional pressure to 'drop' allegations.<sup>64</sup> Lengthy delays in cases reaching court and inadequate provision of specialist support and advocacy add to this picture.<sup>65</sup> Consequently, it is common for women who come into contact with the police to subsequently withdraw complaints or otherwise disengage from a prosecution down the line.<sup>66</sup> Indeed, high rates of complainant retraction (coupled with trial non-attendance) are cited as one of the most pressing – and seemingly intractable - challenges facing the criminal justice process in responding to intimate partner abuse.<sup>67</sup> In the context of intimate partner rape prosecutions, then, complainants may have made a complaint - or multiple complaints -

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<sup>62</sup> Gover, A. R., Welton-Mitchell, C., Belknap, J., & Deprince, A. P. (2013). When abuse happens again: women's reasons for not reporting new incidents of intimate partner abuse to law enforcement. *Women & Criminal Justice*, 23(2), 99-120.

<sup>63</sup> Hoyle, C., & Sanders, A. (2000). Police response to domestic violence. *British journal of criminology*, 40(1), 14-36; Felson, R. B., Messner, S. F., Hoskin, A. W., & Deane, G. (2002). Reasons for reporting and not reporting domestic violence to the police. *Criminology*, 40(3), 617-648. Logan, T. K., Walker, R., & Cole, J. (2015). Silenced suffering: The need for a better understanding of partner sexual violence. *Trauma, Violence, & Abuse*, 16(2), 111-135.

<sup>64</sup> Bonomi, A. E., Gangamma, R., Locke, C. R., Katafiasz, H., & Martin, D. (2011) "Meet me at the hill where we used to park": Interpersonal processes associated with victim recantation. *Social Science & Medicine*, 73(7), 1054-1061; Hoyle, C., & Sanders, A. (2000). Police response to domestic violence. *British journal of criminology*, 40(1), 14-36, Bennett, L., Goodman, L., & Dutton, M. A. (1999). Systemic obstacles to the criminal prosecution of a battering partner: A victim perspective. *Journal of Interpersonal Violence*, 14(7), 761-772; Ellison, L. (2002). Prosecuting domestic violence without victim participation. *The Modern Law Review*, 65(6), 834-858.

<sup>65</sup> SafeLives, (2018) *SafeLives' 2017 Survey of Domestic Abuse Practitioners in England and Wales* (SafeLives).

<sup>66</sup> Her Majesty's Inspectorate of Constabulary. (2014). Everyone's business: Improving the police response to domestic abuse. *Report, HMIC, UK*.

<sup>67</sup> According to the CPS *Violence against Women and Crime Report* (2016-17), unsuccessful outcomes that were due to 'victim issues' (including victim retractions, victim non-attendance and where the 'evidence of the victim does not support the case) rose from 52.5% in 2015-16 to 54.0%. This was mainly due to a slight rise in victim non-attendance (from 25.5% in 2015-16 to 28.3%). See also Lievore, D. (2002). Intimate partner sexual assault: the impact of competing demands on victims' decisions to seek criminal justice solutions. *Australian Institute of Criminology*.

against their partners or former partners in the past detailing violent assaults or psychological abuse, for example, which were subsequently reneged.

### ***Outside the realm of 'common knowledge'***

At present, trial judges in England and Wales presiding in cases of alleged intimate partner rape are not encouraged to give jurors guidance to help them to understand why a complainant might not have reported prior instances of abuse of a *non-sexual* nature, or why, having made previous complaints of abuse to the police, a complainant might have then gone on to retract the complaints, possibly going as far as to refute the allegations. Nor are jurors given assistance to help them fathom why a woman might stay in a relationship with the man who has allegedly subjected her to a catalogue of abuse, including rape, perhaps multiple times. Without access to this contextual information jurors are left instead to draw inferences in individual cases based on their life experience and understanding of the world and of human behaviour; they are expected, in other words, to resort to their common sense knowledge.

There is, nonetheless, a strong case to be made that the complex dynamics and effects of partner rape and material conditions that help shape survivors' equally complex responses (by necessity outlined only briefly above) are not self-evident to either the public or jurors chosen from its ranks despite increased social attention to domestic abuse in recent years. Relevant insights gleaned from research have, as highlighted, been gained only relatively recently, have attracted limited press, and are not yet necessarily familiar even to those who regularly encounter this complainant population. It worth noting, for example, that prosecutors in England and Wales are provided with guidance on matters such as why a woman might stay in an abusive relationship or might withdraw cooperation for a prosecution after reporting abuse to inform their decision-

making,<sup>68</sup> while there have been calls for the police to receive dedicated training covering the same ground.<sup>69</sup> It seems improbable, then, that the average lay juror will enter the deliberation process possessing greater knowledge and understanding, especially when intimate partner sexual violence remains something of a taboo, generating little public acknowledgment or discourse.

Added to this, within the “relatively sealed world of the courtroom”<sup>70</sup>, as Duncanson and Henderson observe,

“... specific moral values, and expectations of behaviour can be hot-housed to flourish and overwhelm, even as they contradict the values and expectations that are more progressively and extensively accepted beyond the confines of the legal space.”<sup>71</sup>

In rape cases, it is well-documented that defence lawyers routinely portray common post-assault reactions exhibited by complainants as anomalous and/or ‘irrational’ in an effort to discredit complainant testimony.<sup>72</sup> Drawing upon recent extensive rape trial observations, Smith and Skinner, for example, provide instructive examples of defence lawyers’ deployment of recognised rape ‘myths’ or stereotypes to purposefully create a sense of ‘appropriate’ behaviour – or a “rational ideal” – which, according to the researchers, involved framing complainants’ actions as abnormal if they did not comply with this norm.<sup>73</sup> Complainants who delayed reporting were, for instance, typically

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<sup>68</sup> Guidance for Crown Prosecutors is contained in Crown Prosecution Service, *Domestic Abuse Guidelines for Prosecutors* [www.cps.gov.uk/legal-guidance/domestic-abuse-guidelines-prosecutors](http://www.cps.gov.uk/legal-guidance/domestic-abuse-guidelines-prosecutors) (accessed 29 June 2018).

<sup>69</sup> Her Majesty’s Inspectorate of Constabulary. (2014). Everyone’s business: Improving the police response to domestic abuse. *Report, HMIC, UK*.

<sup>70</sup> Rock, P. (1993) *The Social World of an English Crown Court: Witness and professionals in the crown court centre at wood green*. Clarendon Press, 34.

<sup>71</sup> Duncanson, K., & Henderson, E. (2014). Narrative, theatre, and the disruptive potential of jury directions in rape trials. *Feminist Legal Studies*, 22(2), 155-174 at 169.

<sup>72</sup> Lees, S. (2002). *Carnal knowledge: Rape on trial*. Women’s Press Limited; Smith, O. (2018). Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths (Palgrave MacMillan); Temkin, J., Gray, J. M., & Barrett, J. (2018). Different functions of rape myth use in court: Findings from a trial observation study. *Feminist criminology*, 13(2), 205-226.

<sup>73</sup> Smith, O., & Skinner, T. (2017). How rape myths are used and challenged in rape and sexual assault trials. *Social & Legal Studies*, 26(4), 441-466, at 458.

presented as displaying ‘unusual’ behaviour despite it being widely accepted, as highlighted, that delayed disclosure of rape is commonplace. Freckelton has similarly described the propensity of defence lawyers to invoke the idealised attribution of the ‘real victim’ by appealing to community expectations of the responses of survivors to sexual violations. Defence lawyers can be relied upon, he observes, to invite jurors to view a complainant’s actions as “inconsistent with the behaviour characteristic of a victim of sexual assault”.<sup>74</sup> The problem, as Freckelton identifies, is that the archetypal victim is “mythical”.<sup>75</sup>

In the same way and to gain the same adversarial advantage, complainants of intimate partner rape who do not immediately seek to cut ties with the men they claim have raped and otherwise abused them can specifically expect to see the authenticity of their claims of victimisation challenged in court, *inter alia*, on the basis that the ‘normal’ or ‘rational’ response of any woman subject to violence (sexual or otherwise) at the hands of an intimate partner would be to directly, and irrevocably, terminate the relationship (‘are members of the jury expected to believe that you simply put up with this alleged abuse?’). Temkin and colleagues provide the illustrative example of an observed cross-examination of a complainant of multiple marital rapes who was asked repeatedly why she continued to live with the defendant at the time of the rapes she was alleging and – more pointedly - why she shared the same bed with a “rapist”. Defence counsel’s invocation to the jury was reportedly that the complainant “would hardly have behaved like this if she really was being abused”.<sup>76</sup> In the same vein, evidence of prior non-reporting of alleged abuse (sexual or otherwise) and/or severed commitment to a criminal prosecution in the past is likely to be seized upon by the defence as ‘suspicious’ behaviour that inevitably invites the conclusion that a complainant is ‘manipulating the

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<sup>74</sup> Freckelton, I. ‘Sexual Offence Prosecutions: A Barrister’s Perspective’ in (ed.) Easteal, P. W. (1998). *Balancing the scales: rape, law reform, and Australian culture*. Federation Press, at 147.

<sup>75</sup> Ibid.

<sup>76</sup> Temkin, J., Gray, J. M., & Barrett, J. (2018). Different functions of rape myth use in court: Findings from a trial observation study. *Feminist criminology*, 13(2), 205-226 at 215.

system' and fabricating the present rape charge to her own ends (e.g. to gain leverage in divorce or custody proceedings or to exact revenge for a relationship break-up).<sup>77</sup> While such portrayals are – as hopefully made plain – oversimplified and seriously misleading potentially, prosecutors are constrained in their ability to proffer counter-narratives for juror consumption. There is a limit to what prosecutors may say to challenge false assumptions by way of general comment in opening and closing speeches and while prosecuting counsel may attempt to elicit explanations from complainants that account for 'defects' in their evidence or post-assault behaviours, only some complainants will be able to articulate such matters.<sup>78</sup> Even if explanations are forthcoming, information that would allow jurors to situate behaviours in a broader context is not currently being placed before them for consideration. One-sided representations liable to produce biased assessments of a complainant's credibility (and a defendant's guilt) are thus presently left uncorrected.

Elsewhere, in contrast, criminal courts have notably accepted the need for 'stereotype-countering' efforts in cases of intimate partner rape and partner abuse more generally. As Garvin and colleagues report, courts in the United States have, for example, long recognised that the dynamics of abusive relationships are not necessarily readily understood by members of the public who make up juries.<sup>79</sup> Accordingly, judges presiding in courts across most states have been willing to sanction the prosecutorial use of expert testimony to explain behaviours exhibited by complainants that might otherwise be perceived as counterintuitive or incomprehensible. They cite, for example, the case of *State v Ciske*<sup>80</sup> in which a defendant was charged with raping his girlfriend four times over a period of nine months. In this instance, the Supreme Court of

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<sup>77</sup> See Long, J. Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases, *The Voice* 1(4) (American Prosecutors Research Institute).

<sup>78</sup> Freckelton, I. 'Sexual Offence Prosecutions: A Barrister's Perspective' in (ed.) Easteal, P. W. (1998). *Balancing the scales: rape, law reform, and Australian culture*. Federation Press, at 148.

<sup>79</sup> Garvin, M., Wilkinson, A., & LeClair, S. Victims' Rights Compel Action to Counteract Judges' and Juries Common Misperceptions About Domestic Violence Victims' Behaviours, *Violence Against Women Bulletin* September 2014 (United States: National Crime Victim Law Institute).

<sup>80</sup> *State v Ciskie* 751 P2d 1165 (Wash. 1988).

Washington ruled that expert testimony had been rightly admitted as a counter to a defence suggestion that the complainant's behaviour in not reporting the rapes immediately after they occurred and in remaining in a relationship with the defendant was inconsistent with the behaviour of a rape victim. Explanatory evidence was necessary in this context, the Court concluded, to disabuse jurors of commonly held misconceptions about common reactions to intimate partner abuse, including the notion that it is simple to leave an abusive relationship. Similarly, in *People v Brown*<sup>81</sup> the California Superior Court concluded that explanatory testimony concerning the tendency of survivors of partner abuse to recant or minimise their description of abuse experienced was admissible to assist the jury in evaluating the credibility of the complainant's trial testimony and earlier statements to the police. Without such testimony the Court observed that jurors may rush prematurely to judgment that a complainant is either untruthful or someone who had not been abused. Further, in *People v Ellis* the Supreme Court of New York County recognised that a complainant's recantation was not self-explanatory and that without a possible explanation for it jurors' application of their common sense would be likely to lead them to apply their own myths to the behaviour.<sup>82</sup> More generally, the New Jersey Supreme Court echoed his approach, stating in *State v Townsend* "we have no doubt that the ramifications of a battering relationship is still a subject that is beyond the ken of the average juror".<sup>83</sup> Different states have applied differently couched tests or thresholds in deciding whether to permit expert testimony but the general proposition that the complexities of partner abuse lie outside common knowledge and are, as a result, open to misinterpretation and judgment grounded in flawed expectations is the common – and rarely disputed - starting point.<sup>84</sup>

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<sup>81</sup> *People v Brown* 94 P3d 574 (Cal. 2004).

<sup>82</sup> *People v Ellis* 170 Misc. 2d 945 (N.Y. Misc. 1996).

<sup>83</sup> *State v Townsend* 897 A.2d 316 (N.J. 2006).

<sup>84</sup> For further cases and discussion see Long, J. (2007) *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions* (American Prosecutors Research Institute); Dempsey, M. (2004) *The Use of Expert Witness Testimony in the Prosecution of Domestic Violence* (Crown Prosecution Service).

### **Extended jury Instructions – a proposed step in the right direction**

It is against this broad backdrop, that a persuasive case for dedicated guidance in cases involving allegations of rape against a current or former intimate partner emerges, I propose. As outlined, the current set of illustrative directions were introduced as a mechanism to assist jurors to better understand the evidence presented to them in sexual offence cases. This move entailed explicit recognition that juror common knowledge about rape and the varied, often complex, behaviour of survivors was limited and, moreover, likely to consist of erroneous stereotypes or unjustified beliefs about 'typical' complainant responses. Misplaced or misleading behavioural assumptions were identified as a threat to accurate fact-determination, in other words, and educational directions embraced as a necessary antidote.

The same underpinning rationale can be applied to an extension of educative efforts to behaviours likely to arise in cases of intimate partner rape. The complexities, dynamics and impact of abuse perpetrated in intimate relationships are not so widely understood that jurors can be safely assumed to have the necessary knowledge to assess complainants' testimony fairly, free from biased assumptions. The proclivity of defence lawyers to invoke stereotyped generalisations incongruent with many women's lived experiences as a way of impugning complainant credibility adds to the picture. Unless complainant behaviours are placed in context a danger arises that jurors will make assessments clouded by misperceptions and faulty logic, leading to unjust conclusions. Specifically, as outlined, misconceptions are liable to arise and exert a potentially distorting influence where a complainant alleges rape but has

- remained in a relationship with her alleged abuser for a period; and/or
- failed to previously report non-sexual offences that now form the backdrop to an allegation(s) of rape; and /or
- recanted allegations of abuse (sexual or otherwise) on prior occasions.

Rather than keep jurors 'in the dark', potentially labouring under false apprehensions (e.g. 'it couldn't have been rape because she wouldn't have stayed'), suitably drafted directions would provide jurors with the information they need to properly evaluate the factual credibility of evidence given by complainants. Jurors would be alerted that staying in an abusive relationship or failing to report (non-sexual) abuse are not reliable indicators of whether abuse was taking place as both reactions may be explained by a range of factors, including fears for safety, economic dependency, lack of a feasible escape route, depending upon the facts of the case in hand. Similarly, jurors would be made aware that a retraction does not necessarily mean that the originating allegation was false as retractions can be the product of fear, shame and stigma and other pressures. Behaviours that are likely to be perceived as perplexing or 'suspect' would be rendered more comprehensible as a result, providing a counter to defence interpretations and aiding jurors in their deliberative task.

Precise wording would be for others to formulate, however, in keeping with Court of Appeal guidance, any novel direction intended to serve a context-giving function would need to be balanced in fairness to the defence and be uncontroversial (i.e. confined to accepted facts). While a check on the information that may be contained in educative instructions, it may be assumed that trial judges – by virtue of their trial experience - are familiar with the (undisputable) fact that survivors of intimate partner rape sometimes remain in relationships with the men who abuse them, elect not to report violent incidents or patterns of controlling behaviour and/or withdraw their support from a criminal prosecution after reporting offences and do so for some of reasons discussed above. Accordingly, it would be open to the Judicial College to draw upon this experience to produce illustrative jury directions that are reflective of the empirical realities of partner rape in a suitably balanced way. The onus would be on those responsible for delivering compulsory training to judges who sit in sexual offence cases to raise awareness of the new directions and to promote their usage. As is current practice, trial judges would then



be free to adapt available guidance to reflect the factual context, evidence and arguments raised by the prosecution and defence in individual cases.

Ultimately, the beneficial effect of a move in this direction would, I propose, be to promote more accurate, less prejudicial fact determination in this subcategory of rape cases by potentially increasing the reliability of judgments of complainant credibility. Where complainant testimony is unduly discounted or rejected due to ill-informed stereotypical generalisations complainants are unfairly discredited and the fact-finding function of the trial process necessarily subverted. As Ward observes, complainants experience an ‘epistemic’ injustice:

“A jury who disbelieves or doubts a witness on the basis of some unwarranted stereotype does her a serious injustice – not on a par with a wrongful conviction followed by a long prison sentence, but a grave wrong nonetheless”.<sup>85</sup>

By assisting jurors to better distinguish between fact and fiction, jury directions addressing the circumstances and dynamics of partner rape would advance complainants’ legitimate interest in having trial evidence fairly evaluated by an informed fact-finder and, by extension, shore up the prospects of just trial outcomes.

Further considerations that warrant comment are of a more general nature.

#### *Judicial directions versus general expert testimony*

It is, for example, appropriate in this context to acknowledge ongoing debate regarding the relative merits and drawbacks of judicial direction *vis a vis* expert testimony as a mechanism for educating jurors. The possibility of prosecutors in England and Wales

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<sup>85</sup> Ward, T. (2009). Usurping the role of the jury? Expert evidence and witness credibility in English criminal trials. *The International Journal of Evidence & Proof*, 13(2), 83-101, at 94.

following the lead of their US counterparts in proffering expert evidence for educative purposes was raised in the 2006 Government consultation paper, *Convicting Rapists and Protecting Victims*.<sup>86</sup> The proposal advanced - and subsequently shelved - was specifically to amend the law to allow the prosecutorial use of 'general' expert testimony in rape cases to "dispel myths and stereotypes concerning how a victim should behave, and help a judge and jury understand the normal and varied reactions of such victims".<sup>87</sup> Such evidence, the Government was keen to stress, would not be case-specific to avoid any risk of accusations of improper 'oath-helping'. Rather, it would be limited to general observations based on empirically validated behaviours or reactions with – importantly - *no direct comment on the behaviour or evidence of individual complainants*.<sup>88</sup> The modest function envisaged for general expert testimony was thus simply be to alert jurors to certain information that they might not have been previously aware with the laudable aim of promoting more accurate, less prejudiced, assessments of complainant credibility. Calls for the introduction of legislation that would permit the use of general expert evidence in sexual offence cases in England and Wales persist.<sup>89</sup> Supporting the use of educational judicial directions, however, is precisely the licence trial judges enjoy in linking explanatory comments to the behaviour of individual complainants. Research utilising mock juries suggests that guidance delivered with the aim of sensitizing jurors to popular misconceptions regarding 'normal' (and thereby credible) witness reactions is most likely to be understood as relevant to the deliberative task and integrated into the decision-making process when the connection to a witness's behaviour is made concrete

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<sup>86</sup> Home Office, (2006) *Convicting Rapists and Protecting Victims—Justice for Victims of Rape* (London: Home Office).

<sup>87</sup> *ibid* at 16.

<sup>88</sup> *Ibid* at 19.

<sup>89</sup> Opinion is divided on whether general expert evidence could be admitted under existing evidentiary principles. For discussion that supports the admissibility of general expert evidence serving a narrow educative function, see Ellison, L. (2005). Closing the credibility gap: The prosecutorial use of expert witness testimony in sexual assault cases. *The International Journal of Evidence & Proof*, 9(4), 239-268. On calls for legislative intervention see, for example, Cossins, A. (2013). Expert witness evidence in sexual assault trials: questions, answers and law reform in Australia and England. *The International Journal of Evidence & Proof*, 17(1), 74-113.

or explicit.<sup>90</sup> This is not to assert that educational guidance limited to generic abstract data about common complainant behaviours of the kind envisaged in the Government consultation (and delivered by experts in the United States and elsewhere) is unlikely to be utilised by jurors. Indeed, available evidence generally supports its utility.<sup>91</sup> Rather, it is to suggest, in line with research, that educational directions tailored by trial judges to the specific factual circumstances of a given case and the reactions of a given complainant have – owing to their case specificity - a greater likelihood of being perceived as pertinent by jurors and are, therefore, arguably more likely to be taken on board and to have influence.

In addition, and more practically, relying on trial judges to deliver explanatory guidance to juries obviates the need to identify and recruit suitably qualified experts (and meet associated financial costs) and spares trial judges the potentially difficult task of ‘policing’ the evidence of experts to ensure that it does not stray beyond the general.<sup>92</sup> Of course, also to be weighed in the balance, as Temkin and colleagues and Smith and Skinner independently highlight, is the possibility that some trial judges will give perfunctory jury directions or abstain from giving any direction to juries at all even where the facts of the case suggest that explanatory guidance is called for.<sup>93</sup> Whilst a distinct and inevitable

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<sup>90</sup> Brekke, N., & Borgida, E. (1988). Expert psychological testimony in rape trials: A social-cognitive analysis. *Journal of personality and social psychology*, 55(3), 372. For further discussion of relevant studies see Vidmar, N. J., & Schuller, R. A. (1989). Juries and expert evidence: Social framework testimony. *Law and contemporary problems*, 52(4), 133-176

<sup>91</sup> See, for example, Ellison, L., & Munro, V. E. (2009). Turning mirrors into windows? Assessing the impact of (mock) juror education in rape trials. *The British Journal of Criminology*, 49(3), 363-383., Goodman-Delahunty, J., Cossins, A., & O'Brien, K. (2011). A comparison of expert evidence and judicial directions to counter misconceptions in child sexual abuse trials. *Australian & New Zealand Journal of Criminology*, 44(2), 196-217. Gabora, N. J., Spanos, N. P., & Joab, A. (1993). The effects of complainant age and expert psychological testimony in a simulated child sexual abuse trial. *Law and Human Behavior*, 17(1), 103; Crowley, M. J., O'Callaghan, M. G., & Ball, P. J. (1994). The juridical impact of psychological expert testimony in a simulated child sexual abuse trial. *Law and Human Behavior*, 18(1), 89.

<sup>92</sup> Home Office, (2007) *Convicting Rapists and Protecting Victims—Justice for Victims of Rape: Response to Consultation* (London: Home Office); Ward, T. (2009). Usurping the role of the jury? Expert evidence and witness credibility in English criminal trials. *The International Journal of Evidence & Proof*, 13(2), 83-101, at 97.

<sup>93</sup> Temkin, J., Gray, J. M., & Barrett, J. (2018). Different functions of rape myth use in court: Findings from a trial observation study. *Feminist criminology*, 13(2), 205-226; Smith, O., & Skinner, T. (2017). How rape myths are used and challenged in rape and sexual assault trials. *Social & Legal Studies*, 26(4), 441-466.

drawback of the current discretionary stance on educational directions, this risk can at least be mediated by aforementioned mandatory training for 'sex-ticketed' judges - *if* suitably designed.<sup>94</sup> This is, nevertheless, a situation that warrants being kept under review, ideally through systematic monitoring and evaluation of relevant training. In the event that judicial practice on the ground was found wanting, arguments favouring the prosecutorial use of general expert evidence would be reignited and given greater impetus.

### *A matter of timing*

It is also relevant to note observations related to the temporal location of educative directions in trial proceedings. Duncanson and Henderson, for instance, raise a concern that the import of directions may be at risk of being completely lost to the jury if "hidden in the depth of a lengthy judicial monologue, at the end of a days or weeks-long trial".<sup>95</sup> They also cite studies which appear to indicate a preference amongst jurors for story-based decision-making techniques over more mathematical or logic-based reasoning.<sup>96</sup> Rather than listen passively to all evidence as it unfolds, this research suggests that jurors "actively process evidence as it emerges, evaluating it and attempting to fit it into an evolving story which makes sense to them".<sup>97</sup> To the extent that jurors may have committed to a particular interpretation of a complainant's testimony well before the trial judge's summing up, Duncanson and Henderson suggest that jury directions delivered

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<sup>94</sup> It is worth noting that other jurisdictions have introduced *mandatory* jury directions in sexual offence cases, including, most recently, Scotland: Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

<sup>95</sup> Duncanson, K., & Henderson, E. (2014). Narrative, theatre, and the disruptive potential of jury directions in rape trials. *Feminist Legal Studies*, 22(2), 155-174 at 172. See also Temkin, J. (2010). "And always keep a-hold of nurse, for fear of finding something worse": challenging rape myths in the courtroom. *New Criminal Law Review*, 13(4), 710-734.

<sup>96</sup> See generally, for example, Pennington, N., & Hastie, R. (1993). *The story model for juror decision-making* Cambridge University Press; Bennett, W. L., & Feldman, M. S. (2014). *Reconstructing reality in the courtroom: Justice and judgment in American culture*. Quid Pro Books.

<sup>97</sup> Young, W., Cameron, N., & Tinsley, Y. (2001). *Juries in criminal trials* (No. 69). New Zealand Law Commission Report, 16; Ellison, L., & Munro, V. E. (2010). Getting to (not) guilty: examining jurors' deliberative processes in, and beyond, the context of a mock rape trial. *Legal Studies*, 30(1), 74-97.

at this stage may simply come too late to have educational efficacy.<sup>98</sup> Temkin and Krahe make a similar point when they assert that the reasoning process jurors employ in constructing a plausible story or narrative can be conceptualised as a “hypothesis-testing exercise”.<sup>99</sup> Jurors weigh the probability of competing hypotheses leading to conclusions about the acceptability of the complainant’s account versus that of the defendant and early commitment to one hypothesis is likely to bias the interpretation of subsequent evidence in the same direction, they maintain. While the experimental studies cited in support of this conception of jury decision-making arguably underestimate the dynamics of juror interaction and the shifts that can occur in individual opinions in the context of group deliberation, taken together, they suggest, then, that trial judges might be usefully encouraged to deliver educational directions at an early point in criminal trials before jurors have had an opportunity to settle on a narrative construction of case facts. At the same time though, it has been suggested that, compared to earlier evidence presentation, information delivered at the end of the trial may be more salient to jurors when they consider their verdict “and may, therefore, be more likely to be spontaneously recalled and utilized during the course of deliberations, especially in lengthy complex cases”.<sup>100</sup> The optimal approach (while yet to be tested) may, therefore, be for trial judges to issue educational directions early on in a trial and to then remind jurors of the same key messages in summing up. Current guidance notably leaves the timing of directions to the discretion of individual trial judges.<sup>101</sup>

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<sup>98</sup> See also Temkin, J. (2010). "And always keep a-hold of nurse, for fear of finding something worse": challenging rape myths in the courtroom. *New Criminal Law Review*, 13(4), 710-734.

<sup>99</sup> Temkin, J., & Krahe, B. (2008). *Sexual assault and the justice gap: A question of attitude* (No. 5). Bloomsbury Publishing at 55.

<sup>100</sup> Ellison, L., & Munro, V. E. (2009). Turning mirrors into windows? Assessing the impact of (mock) juror education in rape trials. *The British Journal of Criminology*, 49(3), 363-383, at p 377 discussing findings reported by Leippe, M. R., Eisenstadt, D., Rauch, S. M., & Seib, H. M. (2004). Timing of eyewitness expert testimony, jurors' need for cognition, and case strength as determinants of trial verdicts. *Journal of Applied Psychology*, 89(3), 524.

<sup>101</sup> Sir David Maddison, His Honour Simon Tonking, His Honour John Wait, David Ormerod QC, *Crown Court Compendium Part 1 Jury and Trial Management and Summing Up* 2017 (Judicial College).

## A reflection on current directions

Beyond the issues discussed above, there is an additional observation to be made regarding the application of current directions in cases of intimate partner rape. Study findings generally provide support for the ability of educational directions to inform jurors about disparate reactions to rape, however, guidance issued to mock jurors on the absence of physical resistance was found to have limited educational efficacy in a study by Ellison and Munro.<sup>102</sup> Despite being informed that there can be good reasons why victims of rape do not fight back physically, including shock and fear, the researchers found that mock jurors overall maintained a commitment to the (false) notion that the instinctive reaction of someone facing sexual assault would always be to offer physical resistance.<sup>103</sup> Close analysis of recorded deliberations revealed that study participants appeared to fail to make the connection between the guidance given (whether by a judge or an expert) and the case they were presented with which involved a defendant and complainant who knew each other. More specifically, they associated the type of 'freezing' response described in the guidance with a 'blitz'-type rape scenario, characterized by a sudden surprise attack by an unknown, armed assailant which jurors accepted would provoke extreme fear. In contrast, mock jurors questioned how fearful a complainant would be if she knew the man she claimed assaulted her and were thus generally unwilling to countenance that a woman in this situation might have 'frozen in fright'.

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<sup>102</sup> The standard caveat on the need for caution when extrapolating from experimental to 'real life' contexts applies. See, for example, Ellison, L., & Munro, V. E. (2009). Turning mirrors into windows? Assessing the impact of (mock) juror education in rape trials. *The British Journal of Criminology*, 49(3), 363-383., Goodman-Delahunty, J., Cossins, A., & O'Brien, K. (2011). A comparison of expert evidence and judicial directions to counter misconceptions in child sexual abuse trials. *Australian & New Zealand Journal of Criminology*, 44(2), 196-217.

<sup>103</sup> Ellison, L., & Munro, V. E. (2009). Turning mirrors into windows? Assessing the impact of (mock) juror education in rape trials. *The British Journal of Criminology*, 49(3), 363-383, 372. See also see Ellison, L., & Munro, V. E. (2013). Better the devil you know? 'Real rape' stereotypes and the relevance of a previous relationship in (mock) juror deliberations. *The International Journal of Evidence & Proof*, 17(4), 299-322.

These findings further underscore the importance, noted above, of linking information in directions to the factual circumstances of the case in hand. It is amply demonstrated by relevant research that complainants of intimate partner rape will often offer no physical resistance during assaults, in many instances, due to fear instilled by their partners.<sup>104</sup> It is therefore appropriate that trial judges include this information when directing jurors on the reasons why a woman raped by her partner or former partner may not have physically struggled and/or sustained defensive injuries. The current ‘example’ direction simply states that some people do not resist physically “through fear or personality”, as previously mentioned, but unsatisfactorily fails to confirm that this holds true for complainants intimately acquainted with their alleged attackers. Again, context is key.

### **Concluding comments**

Educational jury directions were adopted in England and Wales with the aim of promoting fairer, more accurate fact-determination in sexual offence cases. In this article I have argued that a lack of understanding of common complainant behaviours in cases of intimate partner rape represents an ongoing threat to the fair evaluation of rape testimony and set out how dedicated jury directions might be beneficially utilised as a counter measure. It is, nonetheless, important in closing to acknowledge the limitations of this strategy. As highlighted in foregoing discussion, sexual violence in intimate relationships remains, even now, relatively ‘hidden’, rarely openly discussed or debated and is the focus of limited targeted research. Noting advances in separate spheres of domestic violence and sexual assault, Randall observes, for example, that the specific problem of marital rape and sexual violence in intimate relationships remains under the radar:

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<sup>104</sup> Russell, D. E. (1990). *Rape in marriage, Exp. and rev.* Indiana University Press; Finkelhor, D., & Yllö, K. (1987). *License to rape: Sexual abuse of wives.* Simon and Schuster; Bergen, R. K. (1996). *Wife rape* (Vol. 2). Sage.

“Much of the research and policy on domestic violence has not adequately addressed the fact that many women are also forced into sex by their physically abusive partners. Similarly, public education and programmes addressing domestic violence typically focus on physical assaults, threats and even emotional abuse, while not drawing sufficient attention to the fact that in too many cases sexual violence is also a component of this violence.”<sup>105</sup>

As previously flagged, this failure to confront the reality of sexual violence experienced in marriage and other intimate relationships persists in the face of overwhelming evidence that most rapes are committed by known assailants and a significant proportion - and possibly most - are perpetrated by male intimates. It is therefore clear that efforts to counter misapprehensions or biases potentially harboured by jurors, while worthwhile, do not diminish the need for wider concerted efforts aimed at raising awareness and understanding within institutions and the public at large. Overcoming a broader lack of sensitivity to the contexts in which sexual violence takes place is a pivotal first step to finding ways to better support survivors and to improving legal and social responses.<sup>106</sup> Crucially, it is a necessary precursor to devising meaningful policies and strategies to prevent the sexual violence (and wider abuse) that so many women endure within their intimate relationships which must ultimately be the prioritized goal.

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<sup>105</sup> Randall, M. ‘Marital Rape and Sexual Violence against Women in Intimate Relationships: The Less Recognised Form of Domestic Violence’ in (2017) (eds.) Randall, M., Koshan, J. & Nyaundi, P. *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi* (Hart Publishing) at 12.

<sup>106</sup> For discussion see Parkinson, D. & Reid, S. “Invisible Partner Sexual Violence, Prevention and Intervention Challenges in L. McOrmond Plummer, J.Y. Levy-Peck, P. Easteal (eds.), *Intimate partner sexual violence: A multidisciplinary guide to improving services and support for survivors of rape and abuse* (Jessica Kingsley Publishers) 136; Carline, A., & Easteal, P. (2014). *Shades of Grey-Domestic and Sexual Violence against Women: Law Reform and Society*. Routledge, chapter 10; Heenan, M. (2004). *Just" keeping the Peace": A Reluctance to Respond to Male Partner Sexual Violence*. Australian Institute of Family Studies; Randall, M., Koshan, J. & Nyaundi, P. *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi* (Hart Publishing).