

THE “VINDICTIVE WIFE”: THE CREDIBILITY OF COMPLAINANTS IN CASES OF WIFE RAPE

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ABSTRACT

Since Lord Hale’s assertion that rape is “[a]n accusation easily to be made and hard to be proved and harder to be defended by the party accused” the criminal justice system has been obsessively concerned with false rape allegations.

The paper portrays a pioneering qualitative study of women complainants’ credibility in cases of rape within long-term intimate relationships. Although wife rape became a criminal offense, there is a lack of empirical research on the legal treatment of wife rape cases. The article seeks to fill this lacuna and offers an innovative perspective on wife rape, based on the point of view of key legal actors. The uniqueness of this study lies in the in-depth analysis of wife rape cases, obtained from the day-to-day practice of defense and Crown counsel who litigate wife rape cases.

In the article, I assert that myths and sexism continue to inform the legal prosecution of wife rape. Although there is recognition that a woman’s consent in intimate relationships is no longer irrevocable, the way in which women’s credibility in cases of wife rape is perceived, as shown in the research, attests to the fact that stereotypical ways of

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thinking about wife rape continue to inform the attitudes in these cases.

The findings of the research are emblematic of the literature on sexual violence in intimate relationships, and are significant in enhancing our knowledge regarding wife rape cases. Of particular interest is the finding that the myth of false rape allegations shapes the legal discourse of wife rape and serves as a key element in these cases, when issues of property, custody of children, family affairs, and a strong sense of intimacy are involved.

Beyond its analytical contribution, the research may be instrumental to key actors in the criminal justice system when dealing with cases of wife rape. Moreover, due to its unique methodology, the study provides new insights on the legal processing of wife rape cases.

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I. INTRODUCTION

The jails are full of guys because of vengeful wives, and there are a lot of them. . . . [a]nd since society is already burdened with these kinds of women, the *last* thing we need is a law making it illegal for a husband to sexually assault his wife.¹

Dating as far back as the seventeenth century when Lord Hale asserted that rape is “an accusation easily to be made and hard to be proved and harder to be defended by the party accused,”² the criminal justice system has been obsessively concerned with false allegations of rape.³ These concerns are premised on the belief that women fabricate rape accusations for revenge, to cover illegitimate pregnancy or extra-marital affairs, or for various other reasons, which therefore means that women are liars, non-credible, and unreliable.

The fear of false allegations has formed the basis for some modern evidential rules and legal standards that were “designed with one collective purpose in mind: to protect the male against a scheming, lying, vindictive woman.”⁴ Some of these rules included the corroboration requirement,⁵ the recent complaint rule (the “hue and cry”),⁶ and the resistance requirement.⁷

Feminist activism and emerging feminist scholarship on sexual violence have shown the problematic repercussions for rape victims in the criminal justice system through documenting the stereotypical male perceptions that have shaped the definition of rape, including crucial

¹ DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE; SEXUAL ABUSE OF WIVES 169 (1985) (quoting Dick Polman, *Sexual Assault in the Home: Is Marriage a License to Rape?*, HARTFORD ADVOC., Feb. 18, 1981 (reporting comments of Alfred Onorato, a member of the Connecticut General Court in a debate on whether to abolish the maritable rape exemption).

² SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 634 (Vol. 1, 1736).

³ Philip N.S. Rumney, *False Allegations*, 65 CAMBRIDGE L.J. 128 (2006) (reviewing a variety of studies in England, Scotland, U.S. and elsewhere that deal with the prevalence of false rape allegations and the legal treatment of rape complaints, and showing that there is a common theme of a biased and stereotypical approach followed by police when dealing with rape complaints). See SHARON GRACE ET AL., RAPE: FROM RECORDING TO CONVICTION (1992); S.J. Lea, *Attrition in Rape Cases*, 43 BRIT. J. CRIMINOLOGY 583, 593 (2003); Liz Kelly et al., *A Gap or a Chasm? Attrition in Reported Rape Cases*, HOME OFF. RES. STUD. 293, 46–47 (2005).

⁴ Susan Brownmiller, AGAINST OUR WILL: MEN, WOMEN AND RAPE 387 (1975).

⁵ According to this rule, courts cannot convict of rape based on uncorroborated testimony of a complainant.

⁶ This rule demands a victim of rape to complain immediately. Delay in reporting diminished her credibility.

⁷ SUSAN ESTRICH, REAL RAPE 30 (1987) (explaining the assumption that a rape victim should resist to the utmost to indicate her non-consent, as resistance is a sign of non-consent).

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evidentiary rules.⁸ Feminist scholars have also pointed to rape myths that color the societal, cultural, and legal discourse of sexual violence and the influence of these myths on the reporting of rape (indeed, the under-reporting), conviction for rape, sentencing in rape cases, and the treatment of rape victims by the police, judges, prosecutors, and defense lawyers.

Some rape law reforms have taken place in the United States, Canada, and other Western common law countries that seem to address the concerns of the foregoing feminist scholars. These reforms sought to reshape the societal, cultural, and legal narrative of rape, to eradicate rape myths, and to reflect critical feminist values of women's autonomy and sexual safety. Some of these reforms included the redefinition of the rape offense, the abolishment of the marital rape exemption, and the removal of certain evidentiary rules, including the corroboration requirement, the recent complaint rule, and the resistance requirement.⁹

Notwithstanding the changes in rape laws, rape myths still shape the societal and legal discourse of sexual violence in the United States, Canada, and across many, if not all, Western countries.¹⁰ One of the most common myths, the "false rape allegation," still serves as a hurdle for

⁸ See, e.g., Morrison Torrey, *Feminist Legal Scholarship on Rape: A Maturing Look at One Form of Violence Against Women*, 2 WM. & MARY J. WOMEN & L. 35 (1995); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013 (1991) [hereinafter *Fair Trial*]; Christina E. Wells & Erin Elliot Motley, *Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127 (2001); Katie M. Edwards et al., *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change*, 65 SEX ROLES 761 (2011).

⁹ The scholarship on rape law reforms and their effects is vast. See Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 CRIM. L. & CRIMINOLOGY 554 (1993); Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS J. 119 (1999); Kenneth Polk, *Rape Reform and Criminal Justice Processing*, 31 CRIME & DELINQ. 191 (1985); Julian V. Roberts & Robert J. Gebotys, *Reforming Rape Laws: Effects of Legislative Change in Canada*, 16 L. & HUM. BEHAV. 555; Jody Clay-Warner & Callie Harbin Burt, *Rape Reporting after Reforms: Have Times Really Changed?*, 11 VIOLENCE AGAINST WOMEN 150 (2005); SUSAN CARINGELLA, *ADDRESSING RAPE REFORM IN LAW AND PRACTICE* (2009); JOHN M. SCHEB & JOHN M. SCHEB II, *CRIMINAL LAW* 137–41 (5th ed. 2009); Francis X. Shen, *How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform*, 22 COLUM. J. GENDER & L. (2011).

¹⁰ See, e.g., Torrey, *Fair Trial*, *supra* note 8; Clay-Warner & Burt, *supra* note 9, at 150–76; Amy M. Buddies & Arthur G. Miller, *Beyond Rape Myths: A More Complex View of Perceptions of Rape Victims*, 45 SEX ROLES 139 (2001); Renae Franiuk, *Prevalence and Effects of Rape Myths in Print Journalism: The Kobe Bryant Case*, 14 VIOLENCE AGAINST WOMEN 287 (2008); Katie M. Edwards et al., *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change*, 65 SEX ROLES 761 (2011).

victims of sexual violence.¹¹ For example, when the victim is a wife or long-time partner, the myth of false rape allegation constitutes a central concern in the adjudication of rape cases.

This paper portrays a pioneering qualitative study of women complainants' credibility in cases of rape within long-term intimate relationships. Using qualitative methods to analyze interviews conducted with key actors in the Canadian criminal justice system, this paper examines the way by which women, who were raped by their intimate partners, are perceived by the foregoing actors. In particular, it exposes the negative conceptualization of women that these actors hold.

For many years, the legal literature on wife rape has focused primarily on the history of wife rape, particularly on the abolition of the marital rape exemption and on the social and legal resistance to this act.¹² Although wife rape became a criminal offense,¹³ research on the legal treatment of the phenomenon has been scant. The legal scholarship failed to ask whether this crime is being reported and prosecuted, and more importantly, what the characteristics of cases of wife rape are. In the last few years, there has been some change in the legal scholarship, and various studies have discussed the element of consent in cases of wife rape, such as focusing on the way in which the courts have interpreted consent.¹⁴ Other studies have provided a more general description of cases

¹¹ See, e.g., Philip N.S. Rumney, *False Allegations of Rape*, 65 CAMBRIDGE L.J. 125 (2006); Martha R. Burt, *Rape Myths*, in CONFRONTING RAPE AND SEXUAL ASSAULT 129 (Mary E. Odem & Jody Clay-Warner eds., 1998); Kathryn M. Ryan, *The Relationship Between Rape Myths and Sexual Scripts: The Social Construction of Rape*, 65 SEX ROLES 774 (2011).

¹² See Rebecca M. Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 20 LAW & SOC. INQUIRY 941 (1995); RAQUEL KENNEDY BERGEN, MARITAL RAPE: NEW RESEARCH AND DIRECTION (2006) [hereinafter MARITAL RAPE]; FINKELHOR & YLLO, *supra* note 1; Lalenya Weintraub Siegel, Note, *The Marital Rape Exemption: Evolution to Extinction* 43 CLEV. ST. L. REV. 351, 364–69 (1995).

¹³ In 1983, the marital rape exemption was eliminated from the Canadian Criminal Code- Bill C-127 Canada (1983). In the United States, by the 1990s, many aspects of the marital immunity had been repealed in most states. In England, wife rape became a criminal offense in 1990. See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL L. REV. 1375 (2000); Robin West, *Equality Theory, Marital Rape, and Promise of the Fourteenth Amendment*, 42 FLO. L. REV. 11 (1990); Jennifer A. Bennice & Patricia A. Resick, *Marital Rape: History, Research and Practice*, 4 TRAUMA VIOLENCE & ABUSE 228, 228–31 (2003); CARINGELLA, *supra* note 9; Jennifer McMahon-Howard et al., *Criminalizing Spousal Rape: The Diffusion of Legal Reforms*, 52 SOC. PERSP. 505 (2009); Patricia Mahoney & Linda Williams, *Sexual Assault in Marriage: Prevalence, Consequences and Treatment of Wife/Partner Rape*, in PARTNER VIOLENCE: A COMPREHENSIVE REVIEW OF 20 YEARS OF RESEARCH 113 (Jana L. Jasinski & Linda M. Williams eds., 1998).

¹⁴ See Christine Boyle, *Sexual Assault as Foreplay: Does Ewanchuk Apply to Spouses?*, 20 CRIM. REP. 359 (2004); Melanie Randall, *Sexual Assault in Spousal Relationships*, 'Continuous

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of wife rape.¹⁵ Despite the significance of these studies for legal and feminist literature on the subject, there is still a lack of *empirical* research on the legal proceedings of wife rape.

This paper seeks to fill this lacuna and offers a unique perspective on wife rape, based on the point of view of the people who litigate these cases. It is one of few studies, and the first study in Canada, that uses the empirical methodology of qualitative interviews to provide an in-depth picture of the legal processing of wife rape.

The findings of the research are emblematic of the literature on sexual violence in intimate relationships, and are significant in enhancing our legal knowledge of wife rape. Beyond its analytical contribution, the research may be instrumental to key actors in the criminal justice law system (judges, jury, and lawyers) when dealing with cases of wife rape. Moreover, due to its unique methodology, the study provides new insights on the legal processing of cases of wife rape. Notwithstanding its focus on Canada, the research is pertinent to other common law, Western jurisdictions as they face similar legal issues in the adjudication of cases of wife rape.

This paper is the second in a series that examines the legal treatment of wife rape¹⁶ by the Canadian criminal justice system, focusing on the

Consent, and the Law: *Honest but Mistaken Judicial Beliefs*, 32 MAN. L.J. 144 (2008); Elaine Craig, *Ten Years after Ewanchuk the Art of Seduction is Alive and Well: An Examination of the Mistaken Belief in Consent Defence*, 13 CAN. CRIM. L. REV. 24 (2009).

¹⁵ For studies conducted in the United States, see Lisa Eskow, *The Ultimate Weapon: Demythologizing Spousal Rape and Reconceptualizing its Prosecution*, 48 STAN. L. REV. 677 (1996). See also Hasday, *supra* note 13. For studies conducted in Australia, see Patricia Easteal & Christine Feerick, *Sexual Assault by a Male Partner: Is the Licence Still Valid?*, 8 FLINDERS J L. REFORM 185 (2005); Patricia Easteal & Miriam Gani, *Sexual Assault by Male Partners: A Study of Sentencing Factors*, 9 S. CROSS UNIV. L. REV. 39 (2005); Patricia Easteal, *Rape in Marriage: Has the Licence Lapsed?*, in BALANCING THE SCALES: RAPE, LAW REFORM AND AUSTRALIAN CULTURE (Patricia Easteal ed., 1998). For a study conducted in Canada, see Jennifer Koshan, *The Legal Treatment of Marital Rape and Women's Equality: An Analysis of the Canadian Experience*, EQUALITY EFFECT (Sept. 2010), <http://theequalityeffect.org/pdfs/maritalrapecanadexperience.pdf> (analyzing the judicial treatment of almost 300 reported cases of marital rape in Canada since 1983–2010. The paper focuses on consent, the defense of mistaken belief in consent, evidentiary rules (such as the corroboration requirement, similar fact evidence) and sentencing).

¹⁶ I purposely use the term rape and not sexual assault (which is the legal term in Canada) to convey the sexualized nature of violence and the gendered nature of this act. In 1983, the offense of rape in Canada was replaced by a gender-neutral offense of “sexual assault,” which was based on the definition of § 265(1) of the *Criminal Code*. The goal was to draw a distinction between sex and violence in order to affirm the non-sexual nature of the crime of rape and thus, to restructure the crime of rape as a societal problem of inequality, dominance, and imbalances of power between men and women. See Catharine A. MacKinnon, *Feminist Approaches to Sexual*

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province of Ontario. The first paper in the series focused on the role of consent in cases of wife rape and the way key actors construct wife rape in the justice system. The argument was that lawyers face difficulties acknowledging concepts of “non-consent” in cases of wife rape, given the nature of marriage and the association of consent with love, sex, intimacy, familiarity, prior sex, and couples’ “personal language.” The analysis reflected the complexities inherent in the concept of consent in cases of wife rape, leading to the focus of the present paper, which deals with the negative image of victims of wife rape.

The research in this paper focuses on the way societal fear of false rape allegations plays out in cases of wife rape. Of particular interest is the finding that the myth of false rape allegations shapes the legal discourse of wife rape especially when issues of property, custody of children, family affairs, and a strong sense of intimacy are involved. The analysis shows that the conceptualization of wife rape is informed by societal and cultural beliefs concerning intimate relationships and marriage, and by rape myths. Rape myths and stereotypes are often connected with societal assumptions about what women’s rational response to domestic violence should be (e.g., leaving the abuser and reporting the violence to legal authorities).¹⁷

Research reveals the theoretical and factual connection between wife rape and domestic violence; battered women are at high risk of being raped by their partners.¹⁸ Studies have found that at least 50 percent, and as many as 70 percent, of all battered women experience sexual violence by their husbands or partners, in addition to physical abuse.¹⁹ Research also reveals the unique dynamic that typifies both forms of violence in that

Assault in Canada and the United States: A Brief Retrospective, in CHALLENGING TIME, THE WOMEN’S MOVEMENT IN CANADA AND THE UNITED STATES 187 (Constance Backhouse & David H. Flaherty eds., 1992). The same feminists, who had earlier advocated for this approach, later criticized the “desexuali[z]ation” of the offense of rape. Their later analysis perceived rape as an act of assault in which violence is part of the sex. MacKinnon stated, “While this approach [conceiving rape as violence] gave needed emphasis to rape’s previously effaced elements of power and dominance, it obscured its elements of sex. This approach made it impossible to see that violence is sex when it is practiced as sex.” See CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 134 (1989).

¹⁷ Discussion of the unique dynamic of abusive relationships is presented in the data analysis, in Part IV.

¹⁸ DENISE A. HINES ET AL., FAMILY VIOLENCE IN THE UNITED STATES: DEFINING, UNDERSTANDING, AND COMBATING ABUSE 151 (Kassie Graves et al. eds., 2d 2013).

¹⁹ Mahoney & Williams, *supra* note 13, at 123. See also FINKELHOR & YLLO, *supra* note 1, at 22 (noting that roughly half of the sample of marital-rape victims repeatedly experienced physical abuse); Raquel Kennedy Bergen, *The Reality of Wife Rape: Women’s Experiences of Sexual Violence in Marriage*, in ISSUES IN INTIMATE VIOLENCE 237 (Raquel Kennedy Bergen ed., 1998).

both forms of violence are characterized by under-reporting of the crimes, by an escalation of the violence when the victim leaves or decides to leave the relationship,²⁰ and by emotional, cultural, and economic barriers to leaving the relationship.²¹ The woman's reactions to the sexual and physical violence are shaped by the control that the man exercises over her, as well as by terror and the power relations between the two. In such a context of violence and power relations, autonomy and free choice are severely compromised, and the woman's consent to sexual relations cannot be freely given. The violent context is relevant to the analysis of wife rape, and therefore societal expectations of women's rational response to domestic violence affect the analysis of wife rape.

The present study shows that rape myths are no longer as explicitly relied on as they have been historically. Instead, many of the interviewees' opinions are presented as professional legal arguments. The qualitative tools used in this study demonstrate an in-depth picture of wife rape, revealing the implicit use of rape myths and the suspicions toward women who have been raped by their husbands. The analysis exposes the extent to which myths and sexism continue to inform the prosecution of wife rape.

Lawyers tend to view the credibility of married women in cases of wife rape as quite low, particularly when sexual violence is not accompanied by physical violence. In these cases, the legal dispute centers on the intimate nature of the relationship between the parties, and this is seen as negatively affecting the woman's credibility. While the man's use of physical violence diminishes the importance of consent and challenges

²⁰ See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 16 (1991) [hereinafter *Legal Images of Battered Women*]; Martha Mahoney, *Exit: Power and the Idea of Leaving in Love, Work and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1304 (1992); Ruth E. Fleury, Cris M. Sullivan & Deborah I. Bybee, *When Ending the Relationship Doesn't End the Violence: Women's Experiences of Violence by Former Partners*, 6 VIOLENCE AGAINST WOMEN 1363, 1364 (2000).

²¹ For a detailed discussion of the barriers in leaving abusive relationships, see LIZ SHEEHY, *DEFENDING BATTERED WOMEN ON TRIAL: LESSONS FROM TRANSCRIPTS*, 59–71 (UBC Press, 2014). Sheehy discusses the “environmental factors” that can be barriers, such as lack of job skills, the presence of children and the fear of losing them, and fear of retaliation by the abuser. *Id.* at 60. She also refers to the emotional complexity in leaving the abuser, particularly to the loss of control by the woman. The following illustrates some of the difficulties: “beyond . . . facing the real risks of deadly violence, women face the complex process of separation, requiring emotional detachment, ability to overcome psychological denial, safety planning, practical preparations, action and maintenance of separation.” *Id.* Later on in the chapter, Sheehy provides a detailed description of the inadequate and negligent treatment of the abused woman by police and the justice system, and the failure of the legal authorities to assist battered women. *See id.* at 71–88.

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the claim of false rape allegations,²² in cases where physical violence does not exist, notions of love, intimacy, secret language, and prior sexual relations are key themes in the construction of married women's enduring and permanent consent. In cases in which there is no visible evidence of physical violence, these notions again have a negative effect on the credibility of wife rape victims.²³

Issues of custody and matrimonial property are used to depict women as revengeful and manipulative. Late complaints and the failure to leave the relationships, which often characterize women's responses to violence in abusive intimate relationships, generate further suspicions about married women's allegations of sexual violence by their husbands.

In the adversarial system, particularly in a criminal trial, the defense routinely attacks the complainant's credibility and reliability in order to raise a reasonable doubt. In cases of rape, the credibility of the victim is often at the center of the legal battle since the evidence mostly centers on the complainant's word against the word of the accused. The present study shows that in cases of wife rape, the tactic of undermining the complainant's credibility is exceptionally dominant, and a complainant's claims are frequently depicted as fabricated and as driven by the woman's feelings of revenge and hatred.

The analysis is organized around three themes that emerged from the interviews conducted through the study: (1) issues of family law, (2) late disclosure of the sexual violence, and (3) the “failure” to leave the problematic relationship. The last two reflect the reluctance of women to expose the sexual violence they endure.

Family law issues (i.e. potential, impending or ongoing legal proceedings related to family law), such as custody of children and division of property, are key elements in the discourse of victims' credibility in cases of wife rape. All the interviewees in the study, except

²² A key theme that emerges in the broader research is the role played by physical violence in cases of wife rape. Bruises, a black eye, and broken ribs strengthen the complainants' credibility and set aside notions of love, intimate emotions, sexual relations, and the importance of marriage. This is consistent with Koshan's finding that in these cases, it is easier for the courts to determine guilt since the defenses of consent and mistaken belief in consent are more difficult to mount. See Koshan, *supra* note 15.

²³ The existence of physical violence not only affects the perceived credibility of wife rape complainants but also affects the way by which the women perceive the act. Most women acknowledge the rape when there is clear evidence of physical violence: Kathleen C. Basile, *Rape by Acquiescence: The Ways in Which Women “Give in” to Unwanted Sex with Their Husbands*, 5 VIOLENCE AGAINST WOMEN 1036, 1051–53 (1999).

two,²⁴ claimed that family law matters play a significant role in shaping the process of assessing women's credibility in these cases. These issues serve as a central instrument in challenging complainants' credibility. The defense typically uses the family law proceedings to portray complainants as revengeful schemers who allege rape in order to gain custody and property benefits.

Late disclosure of sexual violence is the second theme that plays a dominant role in undermining women's credibility in cases of wife rape. Women who experience abuse by their partners often do not disclose the violence to an outsider,²⁵ making the exposure of sexual violence even more difficult.

The fact that many women stay in relationships characterized by violence and sexual abuse constitutes the third theme in my analysis. Although this behavior is characteristic of abusive relationships, it undermines the credibility of the victims in cases of wife rape.

The article proceeds as follows: Part II presents a historic overview of the institution of marriage and of sexual violence within marriage. Examination of the history of wife rape and of the legal discourse of the marital rape exemption sheds light on the modern construction and perceptions of wife rape. Part III discusses the methodology. Drawing on in-depth interviews with thirty-two Ontario-based defense and prosecutors (known as "Crown counsel" in Canada's criminal justice system) who have litigated cases of wife rape since 1983, I have developed a comprehensive description of the way in which these cases are perceived and constructed by these key actors. Because the use of empirical qualitative research tools in the study of sexual violence in intimate relationship is scarce, the present research sheds light on aspects of wife rape that have not been examined to date. In Part IV, I analyze cases of wife rape based on the results of the interviews. Analysis of the interviews is based on the three themes that emerged from the data, which together

²⁴ The sample of interviewees consisted of thirty-two defense and Crown counsel (the methodology is presented in the Methodology Section).

²⁵ See Michael J. Strube & Linda S. Barbour, *Abusive Relationship: Economic Dependence and Psychological Commitment*, 45 J. MARRIAGE FAM. 785 (1983); Caryl E. Rusbult & John M. Martz, *Remaining in an Abusive Relationship: An Investment Model Analysis of Nonvoluntary Dependence*, 21 PERSONALITY SOC. PSYCHOL. BULL. 558 (1995); Andrea J. Martin et al., *The Process of Leaving an Abusive Relationship: The Role of Risk Assessments and Decision-Certainty*, 15 J. FAM. VIOLENCE 109 (2000); Antonia J. Z. Henderson, et al., *When Love Means Hurting: An Exploring of Attachment and Intimate Abuse in a Community Sample*, 20 J. FAM. VIOLENCE 219 (2005); DONALD G. DUTTON, *ABUSIVE PERSONALITY: VIOLENCE AND CONTROL IN INTIMATE RELATIONSHIPS* (2d ed. 2007).

form the picture of women’s credibility in cases of wife rape.

II. MARRIAGE AND WIFE RAPE THROUGHOUT HISTORY

A. THE HISTORICAL INSTITUTION OF MARRIAGE AND SEXUAL RELATIONS WITHIN MARRIAGE

Most historical writing about women discusses women “in only one type of relationship, their personal relationship with men.”²⁶ Throughout Western history, women did not have a separate identity but rather were wives, mothers, daughters, and lovers.²⁷ “There remain no legal slaves, except the mistress of every house,” said John Stuart Mill.²⁸ In England, during the seventeenth to nineteenth centuries, the perception of women as the property of men shaped the structure of the family and the marriage institution. Upon marriage, the woman and the man became one unit, which was that of the man.²⁹ According to her new marital legal status, referred to as *coverture*, a married woman gave up her legal identity and had no legal existence.³⁰ Because a married woman was the property of her husband, he could “use” his property in any way he desired, without being criminally stigmatized or punished. Furthermore, the marriage

²⁶ R. EMERSON DOBASH & RUSSEL DOBASH, VIOLENCE AGAINST WIVES, A CASE AGAINST THE PATRIARCHY 32 (Open Books, 1979).

²⁷ *Id.*

²⁸ JOHN STUART MILL, THE SUBJECTION OF WOMEN (1869), *reprinted in* ESSAYS ON SEX EQUALITY 217 (A.S. Rossi ed., University of Chicago Press, 1970).

²⁹ This is referred to as the unity theory:

“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 the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called in our law-french a *feme-covert* . . . under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*.”

WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442–45 (Oxford, Vol. 1, 1765) (original emphasis).

³⁰ A woman had no right to own property, she could not sue or be sued, and she could not make a will. A married woman also gave up her right to personal credit and to the care and custody of any children she might have had. The husband controlled all income from property she brought into the marriage, and any salary she earned outside the home belonged to her husband. See Claudia Zaher, *When a Woman’s Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 L. LIBR. J. 459, 460 (2002). See also DOBASH & DOBASH, *supra* note 26 (noting that, historically, women were discouraged from having an identity other than that of wife, mother, and daughter, and departure from that limited identity was punished).

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contract was defined as a codification of natural law.³¹ Perceived as such, the marriage institution was placed above the individuals and was viewed as sacred.

The view of women as the property of men and the inferiority of women within marriage shaped rape laws to protect men's property interests rather than women's interests in sexual autonomy and safety. In ancient times through the sixteenth century, non-spousal rape was defined as a property crime against men (either the father or the husband).³² This conceptualization of rape meant that the sexual autonomy of women and their right to safety and bodily integrity were not part of the social and legal discourse of rape. The sole purpose of rape laws was to maintain the chastity of women in order to protect the property interests of their fathers or their husbands. Thus, "prosecuting a husband for raping his wife made no more sense than indicting him for stealing his own property."³³

These perceptions of marriage and women, and the resulting definition of the crime of rape, formed the initial rationale for the rape of a wife, which essentially held that all sexual intercourse within marriage was lawful. One of the goals of this "marriage contract" (or as termed by Carole Pateman, "the sexual contract")³⁴ was to regulate sexual relations, in particular the man's sexual drive. Thus, marriage served as a framework for unlimited sexual access by men to women.³⁵ The importance attached to conjugal sexual relations affected later societal attitudes toward rape in marriage. By constructing sexual relations between a husband and a wife as a natural process for the continuation of the family, the criminalization of forced sexual relations in marital relationships seemed unjustified and contrary to human nature.

The ongoing consent theory, as articulated by Lord Hale in the seventeenth century, was that a woman's consent to marriage represented an ongoing consent to sexual intercourse with her husband; he declared:

³¹ Rebecca M. Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 20 L. & SOC. INQUIRY 941, 945 (1995).

³² SHARON FREDERICK & THE AWARE COMMITTEE ON RAPE, RAPE: WEAPON OF TERROR 12 (2001).

³³ Jaye Sitton, Comment, *Old Wine in New Bottles: The 'Marital' Rape Allowance*, 72 N.C.L. REV. 261, 265 (1993).

³⁴ See generally, CAROLE PATEMAN, *THE SEXUAL CONTRACT* (U.S.A.: Stanford University Press, 1988).

³⁵ See BLACKSTONE, *supra* note 29, at 422 ("That of husband and wife; which is founded in nature, but modified in civil society; the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated.").

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“The 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 her in this kind unto her husband, which she cannot retract.”³⁶ Hale contended that with marriage the woman relinquished all rights to autonomy and choice, and was obliged to grant her husband sexual services at his convenience. The ongoing consent theory was highly influential in shaping the way sexual relationships in marriage were socially conceptualized. Specifically, this conceptualization set the foundation for the marital rape exception in Canada, England, the United States, as well as in other common law countries, and was highly influential in preserving it. From the seventeenth to nineteenth century, the marital rape exemption went uncontested by the legal system.³⁷ It was only in the mid-1970s, in the United States and Canada, that Hale’s theory was challenged by second-wave feminists, and subsequently abolished from criminal law.³⁸

The implied consent theory, together with the property and the unity theories, structured marriage as a safe place for husbands who raped their wives; any act of sexual act that husbands inflicted on their wives was justified, acceptable, and legal.

B. THE MARITAL RAPE EXEMPTION

It just seems too intimate, and the violation of that intimacy is precisely the core of wife rape.³⁹

To understand current social and judicial views of wife rape, it is helpful to discuss the historical views that justified the persistence of the marital rape exemption. An examination of the sources of resistance to the criminalization of marital rape can explain the reluctance of society to acknowledge sexual violence within marriage. Resistance to the elimination of the marital rape exemption was based on a variety of

³⁶ MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 638 (1736).

³⁷ Various feminists in the 18th and 19th centuries attempted to challenge the free sexual access of husbands to their wives. *See, e.g.*, MARY WOLLSTONECRAFT, *A VINDICATION OF THE RIGHTS OF WOMAN WITH STRICTURES ON POLITICAL AND MORAL SUBJECTS* (London, 1792) (perceiving marriage as “legalized prostitution”). *See also* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373,1428–34 (2000).

³⁸ *See, e.g.*, Katherine Schelong, *Domestic Violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape & Stalking*, 78 MARQ. L. REV. 79 (1994); Ryan, *supra* note 31.

³⁹ Kersti Yllo, *Wife Rape: A Social Problem for the 21st Century*, 5 VIOLENCE AGAINST WOMEN 1059, 1062 (1999).

justifications. One category of these justifications referred to the privacy of marital life and the importance of conjugal relationships. The notions of marital harmony, marital intimacy, and the sanctity of marital relationships rejected any state intervention in what was going on behind the bedroom door.⁴⁰

A different reason for non-intervention in marital life was the perceived level of the severity of wife rape. Rape by the husband was perceived as less harmful than other forms of rape.⁴¹ This assumption was affected by the woman's familiarity with her assailant, and most importantly, by the prior consensual sexual relations between the two. Rape in these situations was perceived as sex rather than violence.⁴² Thus, the view was that wife rape is less traumatic and less destructive to its victims than other forms of rape.⁴³

Another rationale against the criminalization of wife rape was related to the myth of false rape allegations. The historic fear was that women would fabricate allegations of rape against their husbands. This fear reveals the strong societal and legal resistance to criminalizing marital rape, and exposes the powerful role played by rape myths and stereotypical assumptions about women, rape, and sexuality.

The social and legal reliance on notions of matrimonial harmony, the privacy of family life, and marital stability in denying feminist challenges to the marital rape exemption has implications for the current perception of wife rape in society and can explain the reluctance to acknowledge

⁴⁰ "Belief in the sanctity of the family was closely associated with belief in personal privacy and with the rejection of outside intervention in family affairs The family was analogous to a fortress, closed off almost completely from the outside world." DOBASH & DOBASH, *supra* note 26, at 7.

⁴¹ Rene I. Augustine, *Marriage: The Safe Haven for Rapists*, 29 J. FAM. L. 559 (1990); Sarah M. Harless, *From the Bedroom to the Courtroom: The Impact of Domestic Violence Law on Marital Rape Victims*, 35 RUTGERS L.J. 305 (2003).

⁴² See Glanville Williams, *The Problem of Domestic Rape*, 141 NEW L.J. 205, 206 (1991) ("It is a biological activity, strongly baited by nature, which is regularly and pleasurably performed on a consensual basis by mankind").

⁴³ It is now recognized that wife rape has devastating effects on women. Lisa A. Goodman, Mary Koss & Nancy Felipe Russo, *Violence Against Women: Physical and Mental Health Effects. Part 1: Research Findings*, 2 APPLIED PREVENTIVE PSYCHOL. 79 (1993); Jacquelyn C. Campbell & Karen L. Soeken, *Forced Sex and Intimate Partner Violence Effects on Women's Risk and Women's Health*, 5 VIOLENCE AGAINST WOMEN 1017 (1999); Jennifer A. Bennice, Patricia A. Resick, Mindy Mechanic & Millie Astin, *The Relative Effects of Intimate Partner Physical and Sexual Violence on Post-Traumatic Stress Disorder Symptomatology*, 18 VIOLENCE & VICTIMS 87 (2003); Jeff R. Temple, Rebecca Weston, Benjamin F. Rodriguez & Linda L. Marshall, *Differing Effects of Partner and Nonpartner Sexual Assault on Women's Mental Health*, 13 VIOLENCE AGAINST WOMEN 285 (2007).

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sexual violence by a husband against his wife. This archaic and prejudicial belief appear to have been dismissed with the abolition of the marital rape exemption, but as the present study reveals, a married woman’s claim of rape still meets with suspicion and disbelief even among lawyers, and the myth of false rape allegation is still central in the discourse of wife rape.

III. METHODOLOGY

To understand the legal reality of cases of sexual violence in intimate relationships, and to examine how lawyers construct those cases, I used the experiences and views of Crown attorneys and defense counsel who have litigated cases of wife rape. The uniqueness of this study lies in the in-depth description of cases of wife rape, obtained from the day-to-day practice of these key legal actors.

Following the abolition of the marital rape exemption in the Canadian Criminal Code in 1983,⁴⁴ cases of sexual violence in marriage or common law relationships have come up in the legal system. A review of reported cases, although helpful in observing the approach of the legal system to the matter, does not say a great deal about the legal reality of wife rape as a crime, nor about how that reality has changed since 1983, if at all. Case law often does not reflect the thoughts, perceptions and practices of the legal players involved.

In the recent research, I sought to go behind the scenes of the cases in order to discover the views, attitudes, thoughts, and perceptions of key actors in the criminal justice system regarding cases of wife rape. Qualitative interviews with lawyers who handle these cases provide a detailed account of the legal nature of cases of wife rape, and assist in finding out what lawyers think about wife rape.⁴⁵

A. THE SAMPLE

“Whom you choose to interview should match how you have defined the subject of your research.”⁴⁶ Since my research sought to examine the way cases of wife rape are constructed by legal actors and to look at how

⁴⁴ Bill C-127 Canada (1983).

⁴⁵ This is a paraphrase of the following quotation, explaining the goal of qualitative interviewing: “Qualitative interviewing is a way of finding out what others feel and think about their world.” HERBERT J. RUBIN & IRENE S. RUBIN, *QUALITATIVE INTERVIEWING: THE ART OF HEARING DATA 1* (1995).

⁴⁶ *Id.* at 65.

these cases are viewed, understood, and practiced by key actors in the system, the sample included lawyers—Crown attorneys and defense counsel—who had experience in litigating and deciding on cases of wife rape.⁴⁷

I used reported cases of sexual assault within marriage and common law relationships in Ontario since 1983 as a basis for selecting the interviewees.⁴⁸ Thirty-two lawyers, fifteen defense counsel, and seventeen prosecutors were interviewed.⁴⁹ Interviewing both defense and prosecutors provided an inclusive picture of the cases, from both legal sides. All the interviewees except one were experienced lawyers who had practiced criminal law for many years and had litigated a variety of cases of rape. Thirteen defense lawyers were male and two were female. Twelve prosecutors were female and five were male.⁵⁰ They were of different ages (from around thirty to sixty), from different geographic locations in Ontario, and from various ethnic backgrounds.⁵¹

While the sample cannot be viewed as representative of the entire criminal lawyers' population involved in cases of wife rape in Canada, it

⁴⁷ I did not include judges in the sample since I assumed that they would be more hesitant and less comfortable discussing openly their personal thoughts, perceptions and feelings regarding wife rape.

⁴⁸ I searched all Canadian case law databases (Lexis-Nexis, Quicklaw, and Westlaw) since 1983 until 2006 (the beginning of the research) for cases in which sexual assault was alleged to have been committed by a husband/common law partner or ex-husband. The decision to include ex-husbands was based on the fact that sexual and other forms of violence escalate following a separation and divorce. See, e.g., Mahoney, *Legal Images of Battered Women*, *supra* note 20. For the list of cases, see Appendix I.

In order to decide what constitutes a common law partnership and accordingly, what types of cohabiting relationships would form part of my sample, I examined the legal definitions of "spouse" and "common law partner" in Canada and in Ontario. Following a review of the various legal definitions of common law partnership and spousal relationships in Canada and Ontario I decided to include, in my definition of long-term intimate relationships, only couples who cohabitated for more than a year. As it turned out, I had only two cases of cohabiting relationships of five and six years.

⁴⁹ A list of sixty lawyers was derived from the case law. Seventeen lawyers did not respond to various means of contacting them, three lawyers could not be located, three were not willing to be interviewed, two were judges at the time of the research and three lawyers had played only a minor role in the cases and did not believe that they could contribute to the research. The final sample consisted of thirty-two lawyers.

⁵⁰ The role of the interviewee's gender and the impact it might have had on his or her views, thoughts, and ideas were not part of the analysis. This is partly because there were no differences between the women and men's views; rather the differences laid between the views of defense lawyers and Crown prosecutors. However, it will be interesting exploring this aspect in a future research, particularly focusing on the role of female defense lawyers in rape cases.

⁵¹ In order to keep the identity of the lawyers confidential, I do not describe the ethnic backgrounds or the geographic locations.

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does draw together a broad range of experience and perceptions, generating significant insights in relation to cases of wife rape.

The interviews were designed as semi-structured qualitative interviews. Seeking to study the attitudes, thoughts, and perceptions held by the people who are litigating cases of wife rape, and to further study their legal approach and “legal behavior” in these cases, the interview guide referred to various central aspects in the literature on wife rape and also provided the interviewees a broad spectrum of possibilities to answer the questions and to raise new issues. Therefore, although the interviews were “structured” in the sense that they consisted of prepared questions about specific concepts, most of the questions were designed as open-ended questions so that they would not limit the answers to a specific direction. The interviews took between one and two hours. They were recorded and transcribed verbatim.

B. THE PROCESS OF ANALYSIS

The analytical stage of the research was informed by the principles of grounded theory, a method of generating and building a theory from the data. Through systematic collection and analysis of data pertaining to the phenomenon under investigation, a researcher develops a theory based on the data.⁵² The researcher’s themes come from the data, are shaped by the data, and “systematically work out in relation to the data in the course of the research.”⁵³ In grounded theory, the data has two facets, two roles—it first generates ideas and concepts that jointly comprise a theory and then is used to illustrate the ideas and concepts that were generated by it.⁵⁴

In grounded theory, the first step of the analysis is referred to as “open coding” and is defined as “[t]he process of breaking down,

⁵² Grounded theorists often warn qualitative researchers “[n]ever to impose anything on the data,” and to set aside, as much as possible, the researcher’s biases, ideas, and thoughts in order to inductively develop a theory which is based upon, grounded in, and informed by the data, and therefore reflects and represents the reality of the area of study. ANSELM STRAUSS & JULIET CORBIN, *BASICS OF QUALITATIVE RESEARCH: GROUNDED THEORY PROCEDURES AND TECHNIQUES* 94 (1990). At the same time, one cannot ignore the existence of one’s scholarly knowledge biases, ideas, assumptions, and experience. In this research there were few concepts I wanted to explore in the process of the interviews, such as consent and the link to physical violence.

⁵³ *See id.* at 23; JOHN W. CRESWELL, *QUALITATIVE INQUIRY AND RESEARCH DESIGN: CHOOSING AMONG FIVE TRADITIONS* 56 (1998); BARNEY G. GLASER & ANSELM STRAUSS, *THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH* (1967).

⁵⁴ *See* GLASER & STRAUSS, *supra* note 53, at 23.

examining, comparing, conceptualizing and categorizing data.”⁵⁵ In this first step, I went through the transcripts of the thirty-two interviews, coding concepts and notions.⁵⁶ I used these concepts and notions and compared them to one another. The comparison allowed me to see the frequency of the concepts in the interviews. It further allowed me to make connections and relationships between the various concepts. This analysis generated broader concepts/categories with which to work.⁵⁷

In the second phase of the analysis, referred to by Straus and Corbin as “axial coding,”⁵⁸ the researcher goes back to the categories and the concepts that were coded in the first stage and further analyzes them by asking new questions about these concepts. This process creates new concepts and achieves a deeper understanding of the existing concepts. In this stage of the analysis, I re-analyzed concepts and categories in a new way by making connections between a category and its subcategories. Following this stage, several main themes emerged.

In the final step of the analysis, a theoretical account is developed. The various themes (consisting of the concepts and notions that were coded, compared and organized in the first two analytical stages) were integrated into a narrative of wife rape in the Ontario legal realm. The concepts, categories, and key themes were all derived from the interviews. The combination of final themes created a picture about the way in which cases of wife rape are conceptualized and handled by the Ontario criminal justice system. The credibility of the complainants, which is the focus of this paper, is one of these key themes.⁵⁹

Following the process of analyzing the interviews, I examined the themes and conclusions in the context of the literature. Situating the analysis of the data in the context of the theoretical literature revealed that the interviewee’s views and arguments are emblematic of societal perceptions of sexual violence in intimate context. Although the interviewees do not represent society or even the smaller group of criminal lawyers in Canada, the above fact strengthened the credibility of the

⁵⁵ See STRAUSS & CORBIN, *supra* note 52, at 61.

⁵⁶ The following are examples of several concepts: staying in abusive relationships, human nature, context, custody battles, fabrication, unwanted sex, presumed consent, shame, children.

⁵⁷ For example the following concepts: reluctance to complain, shame, denial of the sexual assault, abusive relationships, abused women, and physical violence generated the broader category of “staying in abusive relationships.”

⁵⁸ STRAUSS & CORBIN, *supra* note 52, at 96–97.

⁵⁹ The other key themes are consent, the link between physical violence and sexual violence in cases of wife rape, and the role of criminal law.

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research and supported its arguments and conclusions.

The choice of a qualitative research in the form of in-depth interviews, the nature of the sample and the interviews, and the nature of the analysis contributed to an inclusive and rich account of the topic of wife rape in the legal system. Using a qualitative method of research fit the goal of the study to deeply delve into the thoughts, ideas, and practices of key actors in the Ontario criminal justice system regarding cases of wife rape.

IV. ANALYSIS

As noted above, the feminist literature on sexual violence identifies the central role that the false rape allegations myth plays in cases of rape in general, and in rape in intimate relations in particular.⁶⁰ Based on the literature and the interviews conducted, a woman complaining of rape by her partner seems to have little social or legal chance of being believed. Family law issues and societal assumptions about women’s response to violence are combined to produce the portrayal of married women’s credibility as dubious. The interviews reveal the extent to which the myth of fabricated rape allegations shapes the nature and construction of cases of wife rape, and expose the deep suspicion toward married women’s claims of rape.

A. FAMILY LAW MATTERS

The common narrative of defense lawyers is that married women fabricate rape and assault allegations in order prevail in their family law-based lawsuits or other legal proceedings. They argue that late complaints are strongly related to women’s efforts to gain benefits in family courts. The logic of the defense lawyers’ arguments is that women use criminal law as a tactical tool when they are involved in a struggle over children or money. The struggle may be about gaining an advantage (the wife wants custody of children) or about vengeance (the wife wants to harm the husband by making sure he cannot have custody).

Prosecutors perceive the argument of fabricated charges as a cynical misrepresentation of the complainant’s situation that serves as a strong

⁶⁰ See, e.g., Sheila McIntyre, *Tracking and Resisting Backlash Against Equality Gains in Sexual Assault Offence Law*, 20 CAN. WOMEN STUD. 72 (2000); Linda Jackson, *Marital Rape: A Higher Standard Is in Order*, 1 WM. & MARY J. WOMEN & L. 183 (1994); COLLEEN A. WARD, *ATTITUDES TOWARD RAPE: FEMINISTS AND SOCIAL PSYCHOLOGICAL PERSPECTIVES* (1995).

weapon of the defense since it constructs the woman as a vengeful liar. Most prosecutors reject the argument of fabrication (while admitting that it can be highly persuasive argument), stressing the difficulties of going through a rape trial that would dissuade a woman from putting herself through such an ordeal for an ulterior motive.

The following excerpt, by prosecutor T (all interviewees mentioned in this article will be designated by their title and a letter), demonstrates the link drawn between fabricated allegations of wife rape and family law proceedings:

What I see the most, and bothers me the most, is the allegation of fabrication because of a custody battle. I think it will be raised through a fabrication argument, this probably will be the best way to get it in – she fabricates it since she didn't complain for a year and now she does in order to get custody . . . I think if I was a defen[s]e counsel I would use the argument of fabrication and relate it to the delay as an indicator of fabrication to succeed in the family proceeding.

Question: How would you respond to this argument, as a Crown?

Answer: It is so hard since on one hand so many horrible things are happening in the family court, there are also fabrications, but as a Crown, I would look at the context of the facts to see if there is something in this argument.

The reference to the dynamic in family courts and the statement that “many horrible things are happening in family court” seem to indicate that this interviewee has difficulty rejecting the defense argument of fabricated allegations. This “self-debate” does not necessarily indicate that the prosecutor agrees with this contention, but it does highlight the challenges a complainant faces. The fact that the prosecutor recognizes these challenges shows just how much these issues affect the complainant's credibility.

The assumption that family law matters are strongly associated with fabricated allegations of domestic violence, physical or sexual, was evident in all interviews but two. It was astonishing to discover the low credibility and constant suspicion that women have to deal with in wife rape cases. During the interviews, defense lawyers explicitly stated their suspicion of women and argued that children and property issues generate fabricated allegations of wife rape. For example, defense lawyer O argued that women use the criminal system to improve their results in the family law arena. O focused on physical assault allegations, but also stated allegations of wife rape:

You often find that the parties in the family court process use the

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criminal process to achieve things in family court. Women separate and argue that “he assaulted me” and then he cannot get in the house. Many of the abuses in the system relate to spousal abuse and with the connection to family court, they bring through the back door what they cannot get in the front door.

The deep mistrust of married women who allege sexual or physical violence is also manifest in the following statement by defense lawyer W: “There are so often family law elements to these things. Family lawyers tell the women to lay some kind of charge because it will give you some leverage in the family court.”⁶¹

The connection between a woman’s motive to fabricate rape charges against her husband and family law issues is also discussed by defense lawyer S:

I would like to find motive . . . talking about common sense—the juries will think, why a woman will complain of rape if it didn’t happen. Thus, motive is important. In marital relationships, the motive depends on the context but *I don’t need to know more than the marriage falls apart and there is a custody battle.* (Emphasis added.)

Defense lawyers also emphasize the connection between the timing of the woman’s complaint and fabricated allegations, a theme that is addressed at length in the next part of the paper. For example, defense lawyer A discusses the case about which he was interviewed:

They [family law matters] play out seriously. There was really a sense of a motivation of the complainant to fabricate in this case. Money and children did motivate—when she decided to end the relationship she wanted as much money and the best custody arrangements. She wanted to cut him off the children. Generally, a lot is relating to custody battles. In the middle of a custody case, you all of a sudden hear a complaint about sexual violence or other offen[s]es. Custody issues bring out the allegations and in significant numbers of cases, they are false.

Mistrust of married women’s allegations of rape by their husbands, as shown in the interviews, constructs wife rape as a tool in the battle between married couples rather than a discussion of real rape. In other words, the discussion is not about sexual violence and the dreadful outcomes of wife rape for the victims, but rather about their possible motives for lying. The focus on motives for fabrication affects the

⁶¹ The defense lawyer’s assumption that family lawyers encourage fabricated allegations of wife rape is especially problematic because it is known that women are often “punished” (that is, treated in a problematic way) in family court when they raise such issues, even when they are substantiated.

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response of the judiciary to wife rape claims. Prosecutor P illustrates this point: “Some judges say: you were all this time in a relationship and all of a sudden, you leave at the same time as family law litigation takes place—you lose, as a Crown, before you even start. It is not even about how the woman testifies.” Another example is the statement by prosecutor A:

I think it’s a difficult issue in the sense that the court . . . they better be right when [they] convict in that context because there are lawyers who will advise their clients that if they need to get out of the marriage they have to

Getting a criminal charge against their husbands is helpful. The courts have to be sure before they convict that there are [no] other reasons for the allegation.

These excerpts raise the question whether the interviewee would have mentioned similar issues when discussing other forms of rape or other criminal offenses. Analyzing these views and other views in the context of the literature on wife rape shows that these views are illustrative of wife rape as a social conceptualization that includes few, extreme, and rare cases⁶² in which, as prosecutor A stated, “courts have to be sure before they convict.” Must the courts not be sure when convicting in any cases of rape or in any criminal matter? Must they not be sure that “there are no other reasons for allegations” in any criminal case?

Clearly, efforts by the defense to challenge the complainants’ credibility and to point out a motive to fabricate charges are not unique to cases of wife rape. In the adversarial system, where each side wants to present the most convincing story to the court, it is the duty of the defense to challenge the complainants’ credibility and reliability. However, the focus of the interviewees on false allegations, the link they made between false allegations and family law matters, and the blame placed on married women as being vengeful liars were consistent in almost all the interviews, with both prosecutors and defense lawyers. The focus on false allegations by both defense lawyers and prosecutors exposed stereotypical conceptions of wife rape that, in turn, triggered several thoughts about the perception of wife rape by the interviewees.

The interview results also indicate that the presence of children in the marriage shapes the understanding of rape allegations. Having children complicates cases of wife rape because it often delays the disclosure of the rape and prevents many women from leaving abusive relationships; children add many other complications for women who flee, such as a

⁶² See, e.g., Bennice & Resick, *supra* note 13, at 231–34.

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need of economic support, shelter and daycare arrangements, and legal obligation to ensure access for the children’s father.⁶³ Despite these difficulties, children are perceived as a common incentive for the fabrication of false charges. On one hand, having children makes an exit from a violent relationship problematic and therefore undermines women’s credibility. On the other hand, the decision to leave and to seek custody of the children is perceived as a motive for the fabrication of charges.

The discussion of children and matters of family law by the prosecutors partly reflects the above point. For example, prosecutor K stated that the complainant in the case that formed the basis of the interview did not disclose the rape and the emotional violence because of the children. When the complainant went to the police, her fears that her relationship with the children might be affected were proven well founded when one of her two children stopped speaking to her.

K identified the children as the main factor for the delay in reporting the violence and for remaining in an abusive relationship. Concerning the defense argument about the connection between fabricated allegations and family law issues, K answered:

I sometimes have seen what looks like “suspicious” allegations but isn’t that when the tempers are flaring anyway, and isn’t that when these type of things take place, it’s just surrounding issues like that.

Question: Is it a hard argument to deal with?

Answer: Yes, but again, isn’t it when the tempers flare around these issues? Again, the issue of children explains why people stay in abusive relationships, it explains why they don’t report it, it explains all sorts of things.

According to K, when a woman complains about rape by her husband, all sorts of emotions and feelings of anger surface. It is not surprising, therefore, that the woman also decides to begin a battle in family court. K stated, “Victims are not shaken by this suggestion [that they fabricate rape to win in family court (R.LL.)]. They tell me: ‘Are you crazy? Do you think I’ll go through all of this to get \$100 more a month?’”

After identifying the central role played by the notion of fabrication in these cases, I sought to reveal the rationale behind these views and how they underlined the views of defense counsel. Is portraying the

⁶³ See SHEEHY, *supra* note 21 (discussing the many barriers women face in leaving abusive relationships).

complainants as liars and revengeful a common defense strategy, which is not unique to cases of wife rape? Do defense lawyers rely on societal beliefs about marriage, while knowing how difficult it is for society to acknowledge rape in marriage? Or do defense lawyers genuinely regard most rape allegations in intimate contexts as efforts by women to gain benefits in the realm of family law? The fact that prosecutors acknowledge the strength of the fabrication claim and admit that allegations of sexual violence in an intimate context can appear suspicious further complicates the analysis.

It is not easy to find definite answers to the above questions. By listening to defense lawyers and analyzing their interviews, I realized that many defense lawyers truly believe that women allege rape in intimate relationships in order to gain benefits in family law proceedings. They refer to the “zero tolerance” policy as a tool that women use to abuse the system and take revenge upon their husbands. For many defense lawyers, the combination of a late complaint, pending family law disputes, and allegations of wife rape is too suspicious to ignore. Even if they believe that the allegations of wife rape have merit, they regard the presence of family law issues as a valuable defense tool in attacking the complainants’ version of the events and raising a reasonable doubt.

Still, the uniformity that characterizes these views and the fact that all the defense lawyers described the allegations as fabricated deserves attention, particularly because it was not evident in the discussion of the other themes unrelated to the conceptualization of a woman’s consent. I argue that the portrayal of complainants as vengeful liars goes hand-in-hand with societal difficulties in acknowledging sexual violence by a husband against his wife, a notion that was reflected in the interviews. By focusing on motives for fabricating charges of rape, and by depicting women as vindictive, the interviewees (and likely society as well) find it easier to interpret the situation: it does not require us to challenge our beliefs about marriage and intimate relationships, it does not make us confront the issue of sexual violence by a husband against his wife, and it does not contradict age-old narratives about the duplicity of women.

In light of the historical context of marital rape, as presented earlier, it can be argued that the traditional societal belief was that women falsely claimed rape to conceal sex outside marriage, whereas the modern view of married women’s credibility is no less stereotypical. According to the modern view, women intend to seek vengeance, and wish to gain custody of children and benefits in the shared property.

I suggest that the women’s reluctance to complain should enhance

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their credibility. Women’s unwillingness to disclose the sexual violence and their efforts to keep the violence secret should enhance the trust in women who allege rape by a partner. The following excerpt from an interview with prosecutor P captures this idea. P stated that the complainant disclosed only the physical violence and did not want to report the sexual violence because she did not want to break up the marriage. This partial disclosure contradicts any suggestion of fabrication and revenge:

It shows that these women, unlike what the defen[s]e is often trying to present, are not running around with the aim of revenge in their heads. Even with the breakdown, they often still have emotions for their partners, they have kids. It’s complicated. They are regular people trying to respond to their regular problems. They don’t think about the criminal trial. They end up in the system without even an intention to be there. It’s easy for the defen[s]e to say that women just try to screw the men, present them as revenge driven but it’s not like that. Many of them just try to figure out what to do in their lives. They do not even want to get out of the marriages.

This quote vividly reflects the suffering situation that abused women find themselves in, and the conflicting emotions that often characterize the situation. Despite the violence, women still care for their husbands and still love them; for the women, the abusers are often also the fathers of their common children and the person who used to love them.⁶⁴ These psychological characteristics prevent women from perceiving the criminal law as a remedy.⁶⁵ In the words of the interviewee: “they end up in the system without even an intention to be there.”

Family law matters are not the only element used by the defense to support the argument of fabricated rape allegations. As noted above, late disclosure is also linked to family law proceedings and to the accusation that women untruthfully allege rape.

⁶⁴ See, e.g., *Compelling Reasons Women Stay*, DOMESTIC ABUSE PROJECT, <http://www.domesticabuseproject.com/get-educated/compelling-reasons-women-stay/> (last visited Nov. 10, 2015).

⁶⁵ Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801 (2001); Sally F. Goldfarb, *Reconceiving Civil Protection Order for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1488 (2008); Hadar Dancig-Rosenberg & Dana Pugach, *Pain, Love and Voice: The Role of Domestic Violence Victims in Sentencing*, 18 MICH. J. GENDER & L. 423 (2012).

B. DELAY IN REPORTING

There is widespread acknowledgment that many women do not disclose an experience of rape immediately following it, or at all, because of various reasons.⁶⁶ When the sexual violence occurs within an intimate context, these reasons intensify.⁶⁷

Cultural beliefs about the importance of conjugal relations and the societal idealization of heterosexual marriage affect women's perception of coerced sex in marriage. Many women do not perceive coerced sex as rape, and some feel that they are obliged to submit to their husband's sexual wishes.⁶⁸ Others do not want to break up the marriage. Because of the intimate nature of the relationship and the sexual nature of the act, women often do not acknowledge the rape.⁶⁹

When the sexual violence occurs in a physically abusive relationship, the reluctance to reveal the sexual violence is strengthened. As stated, the psychological world of women who live in abusive relationships is complex in that abused women experience a variety of mixed emotions: love and hate for the abuser, dependence as well as a desire to leave, fear of staying with the abuser and fear of leaving, shame and desire. "Many battered women do not want to go. They want the violence to stop, and they want to feel safe, but they do not want to leave."⁷⁰

⁶⁶ SARAH E. ULLMAN, TALKING ABOUT SEXUAL ASSAULT: SOCIETY'S RESPONSE TO SURVIVORS (2010); Courtney E. Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 AM. J. COMMUNITY PSYCHOL. 263 (2006); Rebecca Campbell et al., *Preventing the "Second Rape": Rape Survivors' Experience with Community Service Providers*, 16(12) J. INTERPERS. VIOLENCE 1239 (2001); Tracy Bennett Herbert & Christine Dunkel-Schetter, *Negative Social Reactions to Victims: An Overview of Responses and Their Determinants*, in LIFE CRISES & EXPERIENCES OF LOSS IN ADULTHOOD 497 (Leo Montada, Filipp Sigrun-Heide & Melvin J. Lerner eds., 1992).

⁶⁷ For a discussion of the low reporting of wife and partner rape, see PATRICIA EASTEAL & LOUISE MCORMOND-PLUMMER, REAL RAPE REAL PAIN: HELP FOR WOMEN SEXUALLY ASSAULTED BY MALE PARTNERS (2006); Mahoney & Williams, *supra* note 13, at 123–29; Morgan Lee Woolley, *Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues*, 18 HASTINGS WOMEN'S L.J. 269 (2007).

⁶⁸ The following response, given by a woman who was raped by her husband, exemplifies this idea: "I was married and thought I had to have intercourse whether I wanted it or not. I wanted him to get it over with so he would not be angry with me or the children." Patricia Peacock, *Marital Rape*, in FORCED SEXUAL INTERCOURSE IN INTIMATE RELATIONSHIPS 225, 230 (Ida M. Johnson & Robert J. Sigler eds., 1997).

⁶⁹ See *id.*; FINKELHOR & YLLO, *supra* note 1; EASTEAL & MCORMOND-PLUMMER, *supra* note 67; Mahoney & Williams, *supra* note 13; BERGEN, MARITAL RAPE, *supra* note 12; see also Basile, *supra* note 23, at 1036–58.

⁷⁰ Katharine K. Baker, *Gender and Emotion in Criminal Law*, 28 HARV. J.L. & GENDER. 447, 457–58 (2005).

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Many women conceal the violence from outsiders because of the inadequate response from state authorities (police and the prosecution), economic barriers, cultural pressures, the need to provide for the children, lack of available support systems, and a variety of other reasons. Furthermore, battered women tend to set aside the sexual violence and focus on the physical violence,⁷¹ an aspect that was prominently raised in the interviews.

The interviewees pointed out that the sexual violence is often only revealed in the course of a broader process of disclosure of physical abuse. Therefore, in many cases, sexual violence by the husband is hidden behind events of battering and veiled by a broader framework of physical, emotional, and economic abuse. The following illustrates this claim:

Does it [sexual violence] always appear in the case? No. The absence of it does not mean it doesn't exist. Either we didn't do enough of a good job eliciting it or she doesn't feel that she can trust us with that. More often than not, sexual violence is not reported, that is the more common. (Prosecutor G.)

In these cases, often, the sexual assault is not even what she is trying to complain of. Usually she has been beaten so badly, and someone is calling the police and while speaking with the police, almost incidentally she mentions that he raped her. (Prosecutor J.)

Prosecutor N also mentioned the reluctance of women to complain about rape and the hardships that the prosecution and the police face in eliciting and exposing sexual violence. She focuses on the difficulties complainants of wife rape experience in separating the rape from physical violence:

Usually the men who are beating their wives are not tender and “kind” in bed. These things merge

By the time they get to a courtroom, some of the sexual violence is being ingrained already, it's part of the cycle, and she is not distinguishing between the sexual violence and the beating because they are all together. So the police may or may not charge on the sexual violence, it

⁷¹ An example of the focus on the physical nature of the abuse can be found in an American study, where 62 percent of 150 women applying for a restraining order reported in a later interview that they had been sexually assaulted by their partners in addition to the physical violence. Not even one of these women mentioned the sexual assault in her petition for the restraining order. See Judith Berman, *Domestic Sexual Assault: A New Opportunity for Courts Response*, 55 JUV. & FAM. CT. J. 23, 27–28 (2004). This did not include less extreme violence or sexual assaults unrelated to intercourse, which are common in intimate relationships characterized by violence. Angela Browne, *Violence against Women by Male Partners: Prevalence, Outcomes and Policy Implications*, 48 AM. PSYCHOL. 1077 (1993).

might be primarily on the bruising and the beating and then it merges during trial—during the testimony. It merges, and I don't know if it is in the mind of the victim, who . . . how do you separate out the horror, he is punching you in the face and he is raping you, it is all horrible, which one is more horrible and which one you tell the police about? How do you tell the police about the rape when you have the beating. So [there are] many issues around disclosure of the offen[s]es. It merges in that way.

Prosecutor L, who works in a special domestic violence court, explained that women were more reluctant to report the rape than the physical violence, and described how this unwillingness shapes the nature of the trial:

In long-term relationships they will disclose periodically some type of inappropriate sexual touching that can be defined as a sexual assault, and most times they don't want conviction on that, they want us to drop that and just proceed with assault. They don't want their husbands to be convicted of sexual assault, and if they think we are going to proceed [with] that they become more and more reluctant generally to wanting to proceed with that at all, even with the assault. So I frequently have to turn my mind to that and it's a difficult thing. I may have to compel the woman to be there if I want to proceed with the sexual assault. It's a difficult territory. . . . I prefer not to have someone to be forced into something that she is not ascribing to at that point and doesn't think it's beneficial for her family at that point.

Prosecutor L also perceives the disclosure of the sexual violence as an additional component in a broader process of engagement with the criminal justice system. These excerpts illustrate the link between wife rape and domestic violence, and how this link shapes women's responses to wife rape. The interviews demonstrate the unwillingness and difficulties of complainants of wife rape to disclose the sexual violence and proceed with such an allegation, even as the complainants expose the physical violence they endure.⁷²

These views are consistent with the literature illustrating that wife rape (and psychological abuse) cause the deepest of shame—and are often the hardest for women to disclose—harder than physical abuse. The following excerpt, by prosecutor L, summarizes this notion:

I had at least two cases of assault that come to my mind that at the

⁷² FINKELHOR & YLLO, *supra* note 1; EASTEAL & MCORMOND-PLUMMER, *supra* note 67; Mahoney & Williams, *supra* note 13; Peacock, *supra* note 68; BERGEN, *MARITAL RAPE*, *supra* note 12.

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preliminary hearing, which was on assault, the complainant was cross-examined in such an aggressive fashion that finally she said: “Well, if you really want to know he raped me at the same time.” When I watched it unfolding two times now I thought to myself: I don’t think those are unique situations, I guess. I think because the circumstances that were there, the reasons why they tried to conceal: the shame, the idea to themselves that that was still something intimate where the idea of being punched and kicked is more public. In this case, she was pushed to tell. I was thinking that they are probably two people of hundreds and hundreds that I deal with.

The views regarding late reporting were divided between those interviewees who support the validity of this argument because “common sense” dictates an immediate complaint about the rape, and those who assume that delay in reporting is not relevant to a woman’s credibility and should not play a significant role in the construction of such cases. Those who interpret the delay in the complaint as reasonable behavior on the part of rape victims, and argue against using it to challenge the woman’s version of the events, are nevertheless aware of the fact that a late disclosure constitutes a strong defense argument, particularly when it is associated with family law issues. Therefore, they seek to address it in court and to explain the reasons for the delay in order to bolster the credibility of the complainants.

1. LATE DISCLOSURE OF THE RAPE AS A CHALLENGE TO WOMEN’S CREDIBILITY

Defense lawyers were consistent in discussing the element of late disclosure, and the majority supported the use of late reporting to challenge the complainants’ credibility. A late complaint is viewed as a strong defense argument because it can be tied to other factors, such as family law proceedings, and can portray the woman as a liar and manipulator. Furthermore, a late complaint is presented as contradicting “common sense” and “human nature,” and therefore it is readily used by the defense. For example, defense lawyer L stated on this issue:

It’s a matter of common sense: if somebody punches you, you will complain. If someone steals [sic] your car, you will complain, it’s a matter of common sense.

Question: Will you use it in court?

Answer: Absolutely. You present it in a way that the conduct will look inexplicable if it is true.

The element of “common sense” was also raised by defense lawyer O

to justify a delay in reporting the rape to attack the woman's credibility. According to O, despite the instructions of the judge to the jury, which advise that the delay does not necessarily indicate that the rape did not occur, juries often use their common sense and consider the late status of a complaint when assessing the credibility of complainants:

Question: Is it a common defen[s]e strategy in these cases?

Answer: Yes, especially in front of a jury—I still try to bring it out—it doesn't make sense to me [not to complain].

Defense lawyer S also resorts to the common sense argument: “Judges in general really believe that delay in reporting is irrelevant and there is a real risk that the jury will misinterpret it. Judges are cautious. As a defen[s]e counsel, it is a common sense issue and I will try to present it.”

By raising the issues of common sense and human nature, defense lawyers do not explicitly promote the stereotypes and rape myths, but rather consider the use of the late complaint as a professional legal decision that reflects simple “common sense.” Many defense lawyers do not find their use of a late complaint as problematic and do not look for excuses to justify their views. They perceive this argument as a reasonable practice that should not be overlooked by the defense; it is part of the role of the defense in the adversarial system, a professional tool that helps secure an acquittal.

Common sense is socially perceived to be about sound judgment, perceptions and conventions shared by most people, rooted in experience and amounting to simple fact. By using common sense professional obligations, defense lawyers' reliance on delay of complaints becomes almost impossible to refute. When an argument is based on notions of logic and rationality, it is perceived to be true, objective, and, more importantly, unbiased. Therefore, in analyzing the relevance of delayed complaints, deconstruction of the notions of common sense and logic and a critical examination of these notions, which point to their non-neutral nature, is particularly important. In cases of wife rape, it is further important since cultural and societal beliefs about women, sex, sexuality, and sexual violence still shape the interpretation of relevance.

2. Arguing Against the Use of Late Disclosure to Challenge Complainants' Credibility

The opposite view regarding late disclosure of the rape is illustrated mainly in interviews with prosecutors. According to this position, a late complaint is an inherent element of abusive relationships and represents

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entirely reasonable behavior in abused women. These interviewees consider the delay to be irrelevant. At the same time, they acknowledge the effect of the argument on the judiciary, and to counter it they attempt to explain to the court and the jury the unique dynamic of abusive relationships. The following statement by prosecutor G illustrates this position:

If there is delay in reporting, you can be sure it will be raised by the defen[s]e. While recent complaint is gone and there is no requirement to complain immediately *de jure, de facto*—always. They try to bundle it to consent: because you delayed, it was consensual or you made it up.

Question: How would you respond?

Answer: Usually the delay in disclosure makes more sense in the context of a defen[s]e of fabrication: it didn't happen. Usually we try to explain it away by the victim. In the case I mentioned, I asked her, and one of her reasons was that she was scared that she wouldn't be believed. That allowed me to say to the jury, “That is exactly what she was afraid of, if you don't believe her because she delayed this is a proof that this stereotype is working. The fact that she was criticized is the proof.” In these cases, I urge prosecutors to explain it and then bring experts.

Prosecutors noted that the defense uses this argument more frequently in cases of wife rape than in other rape cases. For example, prosecutor H argued:

It is more common in these types of cases compared to other sexual assault cases since these relationships (marital/common law) are long. Women have stayed in the relationships for a long time. They are often more shameful to admit that they are sexually assaulted or abused by partners. Additionally they still have love for their partners. Given this dynamic and these factors, women are more reluctant to complain.

This excerpt reflects the unique interaction between sexual violence and intimate relationships. Although courts and juries are aware of the dynamic of sexual violence and its effect on rape victims, it is much more difficult to convey to them the unique characteristics of sexual violence by an intimate partner: the love that the woman still feels for the abuser, the importance of family, the emotional dependence of the woman, the control and power that characterize the relationship, and other factors that make the exit from such a relationship problematic.

C. REMAINING IN ABUSIVE RELATIONSHIPS

The fact that the woman remained in the abusive relationship “colors almost every legal and social inquiry about battering.”⁷³ A societal expectation that abused women will act against the abusers by leaving violent relationships still exists, and as does a great deal of ignorance about the difficulties inherent in leaving abusive relationships, as discussed above.

The societal assumption that abused women will leave abusive relationships is grounded in liberal conceptions of free choice and autonomy. The liberal model assumes that a person is autonomous, rational, and has a variety of alternatives from which to choose the best option. However, the social, cultural, religious, ethnic, and gender context is not central to the liberal discussion of autonomy. The liberal viewpoint ignores the complex reality of women who live in abusive relationships and the unique dynamic of domestic violence.

Feminist scholarship has criticized the liberal notion of autonomy that shaped the discourse of violence against women. Feminists have challenged the rigid definition of autonomy, and stress the need to go beyond the traditional liberal elements of autonomy and to include social context, which is one of oppression, racism, and marginalization for many women.⁷⁴

The interviews contain two prevalent views regarding the issue of exit. One view acknowledges the unique characteristics of abusive relationships and reflects the perception that the fact of remaining in an abusive relationship should not diminish the credibility of complainants in cases of wife rape. This approach recognizes the societal, cultural, and personal difficulties in leaving abusive relationships, and it places the

⁷³ Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF DOMESTIC ABUSE* 59, 74 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994). *See also* Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work and the Confirmation Hearings*. 65 S. CAL. L. REV. 1283, 1299–313 (1992).

⁷⁴ The concept of autonomy is structured differentially by different branches of feminism. The common understanding among feminist scholars writing about autonomy is the need to go beyond traditional liberal assumptions, towards a broader definition of this notion that reflects societal factors and takes into account the oppression and marginalization of women. Notably, feminist scholars differ in their definition and conceptualization of autonomy. *See, e.g.*, Natalie Stoljar, *Autonomy and the Feminist Intuition*, in *RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF* 94 (Catriona Mackenzie and Natalie Stoljar eds., 2000); NANCY J. HIRSCHMANN, *THE SUBJECT OF LIBERTY: TOWARD A FEMINIST THEORY OF FREEDOM* (2003).

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analysis within a broader social context. Some of the interviewees argued that legal actors (judges, juries, defense lawyers, and prosecutors) are aware of the unique dynamic of domestic violence, and therefore the argument of failing to leave the relationship is not as common as it had been in the past.

The other view on this matter, shared mostly by defense lawyers, considers the lack of an exit as an important tool for the defense to challenge the credibility and reliability of the complainant in cases of wife rape.

1. Arguing Against the Use of Remaining in Abusive Relationships to Challenge Complainants' Credibility

Prosecutors argue that using the fact that a woman's lack of exit to attack her credibility is not as prevalent as one might think. According to the prosecutors' position, there is societal awareness of the distinct context of domestic violence and of the difficulties women face in leaving abusive relationships. The following argument, raised by prosecutor A, illustrates this position:

In today's world, judges in particular have come to accept that women end up, either for economic reasons or for other psychological reasons, that they can easily stay in abusive relationships because there are other factors that are locking them in. Defen[s]e lawyers may occasionally get down that road but I don't think they do anymore.

In another interview, prosecutor K discussed the unique aspects of abusive relationships and how such aspects allowed her to rationalize to a court why a complainant had stayed with her husband. Similarly to prosecutor A, K believed that judges understood the unique dynamic of domestic violence:

We responded in the context: we are not dealing with two strangers; we are talking about a whole web, with so many things involved: children, sometimes parents, economic issues that are not prevalent in other types of a criminal conduct. I think that many judges are finally getting it.

Some defense lawyers also hold the view that remaining in an abusive relationship is a reasonable response from women who suffer domestic violence of any form. Defense lawyer D illustrated this view by noting, "The days we challenge women who stay are not there anymore. We know that now." Defense lawyer I similarly stated, "The public is not that unsophisticated as to not perceive that people's behavior will be affected by violence."

A different version of the above approach was mentioned in interviews with other defense lawyers. Their reasoning is not grounded in the unique features of domestic violence but rather in their problematic implications for acquittal. As in the case of late disclosure, their approach is strictly about professional tactics: using the fact of continued life together with the abuser in order to attack the credibility of the complainant works against the defense because it exposes the prior violence and shows the defendant in a negative light.

The following quotes illustrate this view:

Putting the issue of staying in the abusive relationship is dangerous for the defen[s]e since it opens the door for her to talk about the abuse. You can't control the content of what she is saying. You might get information that otherwise would not have been exposed. Very, very dangerous place to go. (Defense lawyer I.)

The use of it depends on how pathetic the complainant is, how miserable and powerless the complainant is, how abused she is appeared to be. If she is like that I won't use it, you treat her with respect since your client is going to look bad. (Defense lawyer O.)

Prosecutors also mentioned the view: "If the explanation is long abuse, the defense needs to be careful. They want to avoid all of that."

2. Challenging Complainants Who Remain in Their Relationship

Only three of fifteen defense lawyers argued explicitly that the "failure" of the complainant to leave the relationship should be used to challenge her version of the events. Although using this fact to challenge the woman's credibility does not appear to be a significant defense tool, six prosecutors noted that the defense commonly uses this tactic.

This aspect of the analysis is also related to the delay in reporting rape. Both the continuation of an abusive relationship and late disclosure of the rape reflect the power dynamic in violent intimate relationships, both sexual and physical, and the difficulties that women face in leaving intimate relationships. Both behaviors are produced by the women's reluctance to disclose physical or sexual violence perpetrated against them by their intimate partners.

V. CONCLUSION

The distinction between "real" and "simple" rape was coined by

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Susan Estrich, a professor at the University of Southern California Gould School of Law, to convey the societal perception of rape.⁷⁵ Estrich exposed the stereotypical portrayal of rape as an act perpetrated by a stranger against a young (virgin) woman, in a dark alley, using physical violence. Other forms of rape were socially conceived as bad sex, unwanted sex, or “sex gone wrong”—but not as rape.⁷⁶

An incident of rape reported by a married woman or by one in an intimate relationship is treated with social and legal suspicion. As this paper illustrates, various factors contribute to the low credibility of the women. Family law issues are leading factors in the apprehensive attitude because they suggest that the motive behind a woman’s allegation is not the sexual violence, but rather a desire to win in realm of family law. For some defense lawyers, litigation in family court symbolizes a woman’s dishonesty and her desire for revenge to harm her husband or partner.

Other factors, such as a delay in making the complaint and continued living with an abusive partner, also shape the way women’s credibility is perceived by the lawyers. Analysis has shown that a delayed complaint about the rape raises obstacles for women because the delay is perceived to be indicative that the allegation is false. The interviews reveal that the combination of late disclosure and family law matters together become an effective weapon for the defense.

Delay in reporting the rape forms a significant element in challenging the women’s credibility. By contrast, remaining in an abusive relationship is not a central factor in challenging their credibility. However, the reason for this is not the defense lawyers’ understanding of the obstacles the women face in leaving their partners, but rather their wish not to portray the accused as a violent person, and their attempt to leave the violent context out of the legal proceedings.

The study has revealed deep and indisputable mistrust and suspicion on the part of defense lawyers toward married women who allege rape by their husbands. This suspicion is further problematic in these cases where the evidence is often based on “word against word” testimonies.⁷⁷ It would

⁷⁵ ESTRICH, *supra* note 7.

⁷⁶ Zoe D. Peterson & Charlene L. Muehlenhard, *Was It Rape? The Function of Women’s Rape Myth Acceptance and Definitions of Sex in Labeling Their Own Experiences*, 51 *SEX ROLES* 129 (2004); Dorothy E. Roberts, *Rape, Violence and Women’s Autonomy*, 69 *CHI. KENT L. REV.* 359 (1993).

⁷⁷ The disbelief of complainants is also evident in cases of date rape, which are also based on “a word against word” evidence. Similar to cases of wife rape, date rape cases reflect cultural and social assumptions about women and men’s sexuality and about women’s consent to sex in

be simplistic to dismiss the suspicions raised by the defense as standard tactics used in court to challenge the testimony of complainants. As the study has shown, analyzing the disbelief of women should be done within a broader societal and cultural context.

Women who suffer domestic violence of any form are often reluctant to cooperate with the criminal justice system. In an intimate context, where a variety of social and cultural beliefs and views about marriage, love, intimate relationships, and sex are involved, women who allege rape by an intimate partner face especially great obstacles in persuading society that their allegations are true.

My contention is that the negative portrayal of the complainants' credibility in cases of wife rape is largely the result of the difficulties that the interviewees have in recognizing and acknowledging the rape of women in marital or long-term relationships. This reluctance is reflected in devaluation of women's words and worth and is affected by the social perception of wife rape as not real rape. It is easier to blame the woman for revenge and fabrication by using certain behaviors as indicators of the falsity of the allegation, than to accept that a husband forces sex upon his wife.

The complainants' low credibility, as constructed by defense lawyers and as described by the prosecutors, is consistent with rape myths, as well as societal and cultural beliefs about women's sexuality, sexual relations, and gender roles. The depiction of women's credibility fits with the way in which society views wife rape and with its resistance to recognize and accept this act, particularly when it is not associated with physical violence.

The 1983 Canadian reforms brought about a new regime in the treatment of sexual violence in marital relations. It marked the formal recognition that the sexual anatomy of a woman was no longer defined by her marital status. Although a woman's consent is no longer viewed as irrevocable, the way in which these cases are realistically treated by key legal actors shows that stereotypical ways of thinking about wife rape continue to influence the attitudes surrounding these cases.⁷⁸

intimate relationships. See Katharine K. Baker, *Sex, Rape, and Shame*, 8 DEPAUL J. HEALTH CARE L. 179, 196–210 (2004).

⁷⁸ This is consistent with data regarding sentencing in cases of wife rape. See Koshan, *supra* note 15; Kate Warner, *Sentencing in Cases of Marital Rape: Towards Changing the Male Imagination*, 20 LEG STUD. 592 (discussing sentencing in cases of wife rape in England); Michelle J. Anderson, *Marital Immunity, Intimate Relationships and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1463, 1527 (2003) (examining the various American state laws on wife rape, and showing how these laws are discriminatory

Considering similarities in the historical narrative of wife rape and in the nature of rape myths across common law jurisdictions, the research, although focusing on Ontario, Canada, can shed light on the legal discourse of wife rape in other common law jurisdictions as well.

The gap between the black-letter law and legal reality, which the research reveals, shows that the effect of significant reforms in criminal law may be slight and that the law (and courts) have limited power to change social reality and to create social change.⁷⁹ Thus, it is not sufficient to amend the criminal law; change in societal and cultural beliefs regarding marriage, family, women and men’s sexuality and eradication of rape myths are no less significant.

APPENDIX 1: LIST OF CASES

- R. v. Noel, [1989] O.J. No. 518 (Can. Ont. Dist. Ct.)
- R. v. B.W., [1992] O.J. No. 4011 (Can. Ont. Ct. J.)
- R. v. A.E.S., [1992] O.J. No. 1697 (Can. Ont. Ct. J.)
- R. v. N.B., [1992] O.J. No. 1801 (Can. Ont. Ct. J.)
- R. v. C.M.T., [1993] O.J. No. 1938 (Can. Ont. Ct. J.)
- R. v. M.N., [1993] O.J. No. 3077 (Can. Ont. Ct. J.)
- R. v. M.C., [1994] O.J. No. 4029 (Can. Ont. Ct. J.)
- R. v. C.A.S., [1994] O.J. No. 2387 (Can. Ont. Ct. J.)
- R. v. A.R., [1996] O.J. No. 367 (Can. Ont. Ct. J.)

towards married women who complain of rape. Twenty states grant marital immunity for sex with a wife who is incapacitated or unconscious and cannot consent. Fifteen states grant marital immunity for sexual offenses unless requirements such as prompt complaint, extra force, separation, or divorce are met. Anderson also states that there is a lack of written appellate cases involving conviction of wife rape).

⁷⁹ The relationship between law and social change and the generated questions of whether and how law enhances social change, have been key questions of jurisprudential and social analysis for the past half century. On the significance of law in enhancing social change, *see, e.g.*, AUSTIN SARAT & STEWART SCHEINGOLD, *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* (1998); Alizabeth Newman, *Bridging the Justice Gap – Building Community by Responding to Individual Need*, 17 *CLINICAL L. REV.* 615 (2011); SHARYN L. ROACH ANLEU, *LAW AND SOCIAL CHANGE* (2d ed. 2000); Marcy L. Karin & Robin R. Runge, *Toward Integrated Law Clinics that Train Social Change Advocates*, 17 *CLINICAL L. REV.* 563 (2011); Thomas M. Hilbink, *You Know the Type...: Categories of Cause Lawyering*, *L. & SOC. INQUIRY* 657 (2004). For literature that criticizes the role of courts in bringing social change, *see* GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2008) (asserting that Supreme Court decisions generally do not produce social change, Rosenberg’s research generated an overarching scholarship that criticized his analysis). *See also* Michael W. McCann, *Reform Litigation on Trial*, 18 *LAW & SOC. INQUIRY* 715 (1993).

R. v. T.S., [1996] O.J. No. 3761 (Can. Ont. Ct. J.)
R. v. R.W.H., [1996] O.J. No. 4692 (Can. Ont. Ct. J.)
R. v. D.S.F., [1997] O.J. No. 5628 (Can. Ont. Ct. J.)
R. v. D.T., [1997] O.J. No. 688 (Can. Ont. Ct. J.)
R. v. M.R., [1997] O.J. No. 5048 (Can. Ont. Ct. J.)
R. v. H.V., [1998] O.J. No. 4694 (Can. Ont. Ct. J.)
R. v. T.(J.C.), [1998] O.J. No. 1688 (Can. Ont. C.A.)
R. v. W.R., [1998] O.J. No. 6483 (Can. Ont. Ct. J.)
R. v. S.R., [1998] O.J. No. 1439 (Can. Ont. Ct. J.)
R. v. C.W.R., [1999] O.J. No. 1583 (Can. Ont. Ct. J.)
R. v. D.S.F., [1999] O.J. No. 688 (Can. Ont. C.A.)
R. v. M.J.B., [1999] O.J. No. 2235 (Can. Ont. Sup. Ct.)
R. v. K.F.L., [1999] O.J. No. 2623 (Can. Ont. Sup. Ct.)
R. v. J.A., [1999] O.J. No. 92 (Can. Ont. Ct. J.)
R. v. E.M., [1999] O.J. No. 3417 (Can. Ont. Ct. J.)
R. v. D.G.K., [1999] O.J. No. 5239 (Can. Ont. Sup. Ct.)
R. v. R.V., [2001] O.J. No. 5143 (Can. Ont. Ct. J.)
R. v. S.B.G., [2001] O.J. No. 3785 (Can. Ont. Sup. Ct.)
R. v. R.M., [2003] O.J. No. 5155 (Can. Ont. C.A.)
R. v. D.M., [2003] O.J. No. 2807 (Can. Ont. Ct. J.)
R. v. Q.M.J., [2003] O.J. No. 6012 (Can. Ont. Ct. J.)
R. v. R.V., [2004] O.J. No. 849 (Can. Ont. Sup. Ct.)
R. v. R.V., [2004] O.J. No. 5136 (Can. Ont. C.A.)
R. v. W. R.G., [2004] O.J. No. 399 (Can. Ont. Sup. Ct.)
R. v. B.R., [2004] O.J. No. 5969 (Can. Ont. Sup. Ct.)
R. v. A.A.M., [2004] O.J. No. 5306 (Can. Ont. Sup. Ct.)
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