Prosecuting Intimate Partner Sexual Assault

By Jennifer Gentile Long

Editor's Note: Originally published by the Washington Coalition of Sexual Assault Programs in Connections (2008), www.wcsap.org. For the purposes of this article, the term "intimate partner sexual assault" encompasses marital rape as well as sexual assaults that occur between current or former intimate partners.

The majority of sexual assault victims know their assailants.[1] Despite this fact, the public still expects rapists to be weapon-wielding strangers who attack their victims in dark alleys. This expectation, grounded in cultural bias, victim blaming, rape myth acceptance, and faulty expectations about victim behavior, creates unique challenges to the successful prosecution of non-stranger sexual assault.[2] A current or former relationship between the victim and the defendant can lead to additional complexities that often make the arrest, prosecution, and conviction of an intimate partner rapist even more difficult.

Historically, additional barriers to prosecution were created by many jurisdictions' criminal laws that sanctioned intimate partner rape by exempting spouses from the rape statute.[3] Although the marital exemption is no longer codified, some allied criminal justice professionals have continued to ignore, dismiss, or blame victims of intimate partner sexual assault. A growing number of allied criminal justice professionals recognize the validity of intimate partner sexual violence and conduct aggressive investigations and prosecutions of these rapists. Despite their efforts, however, jurors and judges often fail to hold intimate partner rapists accountable.

The criminal justice system is a critical piece of the coordinated response to sexual violence.[4] If its response is indifferent or ineffective, sexual violence victims are left vulnerable, offenders are not held accountable, communities are less safe, and justice is not accomplished. To increase the effectiveness of the criminal justice system's response to sexual violence, allied criminal justice professionals must recognize the serious impact of intimate partner sexual assault on the victim as well as the community, understand the contexts in which intimate partner sexual assaults occur, and appreciate the individual responses that victims of intimate partner sexual assaults have to their victimization. In addition, prosecutors must develop strategies to overcome jurors' belief in common sexual violence myths that become barriers to the successful prosecution of an intimate partner sexual assault. This article provides a general summary of these issues, barriers, and strategies relating to the prosecution of intimate partner sexual assault. It also includes references to other resources that address these topics more completely.

The Impact of Intimate Partner Sexual Assault

Intimate partner offenders, like all non-stranger rapists, "hide behind the context of their relationships with their victims. They mask themselves as 'nice guys.' They play upon society's biases and stereotypes."[5] "There is a pervasive idea that in-home offenders are somehow not as dangerous or problematic as 'community' offenders i.e., offenders who are strangers. They are, however, more experienced; more invested; cross more boundaries; are safer from exposure; create more betrayal and family conflict; and are more psychologically/emotionally involved in offending."[6] In addition, intimate partner sexual assault victims suffer a higher number of assaults. For example, most victims of marital rape "report being raped more than once, with at least one third of the women reporting being raped more than 20 times over the course of their relationship.[7]

Perpetrators of intimate partner sexual assault violate their victims physically and emotionally. Perpetrators are

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individuals with whom victims share their lives, homes, and possibly children. "In addition to the violation of their bodies, victims are faced with a betrayal of trust and intimacy."[8] Further, because of the relationship between the defendant and the victim, "there may be a tendency for victims to blame themselves, [and] there may also be complex feelings involved since they may love the offender but hate the offense."[9] As a result, although often minimized, intimate partner sexual assault victims often "suffer long-lasting physical and psychological injuries as severe—or more severe—than stranger rape victims, because of the nature of the emotional trauma surrounding their assault. "[10]

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

Understanding the Context of an Intimate Partner Sexual Assault

The term "context" refers to the circumstances surrounding an incident as well as the intent of the perpetrator's use of violence. Prosecutors must determine the context in which a violent incident occurs in order to accurately analyze, charge, try, and dispose of the case.[11] Significantly, not all intimate partner assaults occur in the same context.

Rapists do not rape out of sexual desire or to achieve sexual satisfaction. Rather, sexual assault is about power, and, therefore, sex is a weapon and a means of expressing the rapist's aggression or power.[12] Although some intimate partner assailants limit their violence to sexual assault,[13] the majority of intimate partner sexual assaults occur within a physically abusive relationship.[14] As a result, many intimate partner sexual assaults also involve domestic violence dynamics. All violent relationships include some level of control or attempt on the batterer's part to control his partner. One useful tool to understand this dynamic is the Power and Control Wheel created by the Domestic Abuse Intervention Project in Duluth.[15] Some relationships may include a cycle of violence. The term "cycle of violence" was developed by Lenore Walker to describe three distinct phases in an abusive relationship: tension building, physical abuse, and the honeymoon phase.[16] Prosecutors must understand, however, that although these theories are helpful in understanding domestic violence, not every relationship involves a cycle of violence or the dynamics featured in the Power and Control Wheel. Domestic violence exists on a continuum, and, therefore, most relationships exist at some place—or in many places—along the continuum.[17] It is critical that prosecutors understand the dynamics of each relationship in which an intimate partner assault occurs in order to accurately evaluate and prosecute the case.

Common Domestic and Sexual Violence Victim Behaviors

Despite the extent of the research on domestic and sexual violence, many jurors still believe stereotypes about sexual and domestic violence victim behavior.[18] For example, jurors expect domestic violence victims to accept responsibility and leave batterers. They also expect victims to be cooperative with prosecutors and to behave in ways consistent with other crimes. As experienced domestic violence prosecutors understand, the opposite is often true: domestic violence victims often stay with their abusers, regularly minimize their abuse, recant, request the dismissal of charges against their batterers, refuse to testify for the prosecution, or testify on behalf of their batterers.[19]

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The behaviors of sexual assault victims—particularly non-stranger sexual assault victims—also frequently conflict with the type of behavior the public expects from a "real" victim. For example, the public expects sexual assault vic-

tims to scream during their rape, to forcefully resist their attackers, to report their rapes immediately, to remain vigilant following their attacks, and to avoid their assailants. Sexual assault victims, however, often do not scream or resist during a rape; they frequently delay reporting their rape;[20] they often do not remain hyper vigilant; and they may continue to have contact with their assailant.[21]

Victims of intimate partner sexual assault may exhibit many of the behaviors described above. Specifically, they may vacillate in their cooperation with the prosecution, recant, or testify on the defendant's behalf. They may also "consent" to sexual activity with their assailant at some point following their assault. These behaviors create significant difficulties in the prosecution of an intimate partner assailant and require explanations by the victim or an expert.[22]

Overcoming Obstacles to the Successful Prosecution of Intimate Partner Sexual Assault

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

First, prosecutors should ensure that they are charging aggressively yet within ethical bounds. Although some offices' policies create a higher burden for charging, the Model Rules of Professional Responsibility as well as the National Prosecution Standards set forth probable cause as the appropriate standard for charging.[23] In addition to this standard, there are many factors a prosecutor may consider when making a charging decision. Section 43.6 of the National Prosecution Standards states: "The prosecutor should exercise his discretion to file only those charges that he considers to be consistent with the interests of justice."[24] Some of the factors that may be considered in this decision include the following: probability of a conviction; nature of the offense; characteristics of the offender; possible deterrent value of prosecution to the offender and society in general; likelihood of prosecution by another criminal justice authority; and willingness of the offender to cooperate with law enforcement. Prosecuting intimate partner sexual assailants holds them accountable for their actions and is an integral part of public safety. It sends a message to the community that the behavior will not be tolerated. It also gives victims a voice, perhaps for the first time.

Since many perpetrators of intimate partner sexual assault use sexual violence in the context of a physically violent relationship, many victims face collateral consequences relevant to domestic assault. Therefore, prosecutors must approach intimate partner sexual assaults in a multidisciplinary manner.[25] Unlike a victim of a random crime, a domestic violence victim's involvement with the criminal justice system may put her[26] at risk of: losing her housing (e.g., if her abuser is the primary household wage-earner); losing her employment (e.g., if she repeatedly misses work in order to attend the numerous court appearances that may accompany the criminal and civil hearings related to her abuse); losing custody of her children (e.g., if the state feels she is unable to protect or provide for her children); losing financial support for herself and her children (e.g., if her abuser loses his job once he is convicted or sent to prison); losing her immigration status (e.g., if she is unable to qualify for a visa under VAWA provisions); and being prosecuted (e.g., if her attempts to protect herself or her children are not recognized as self defense). In addition, as discussed earlier in the article, victims of intimate partner sexual assault feel a deep sense of betrayal over their assaults. They also engage in self-blame.

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

Community advocates can also help safeguard a victim's privacy. Commonly, defense attorneys seek access to victims' medical and psychological history. In addition to the embarrassment victims suffer when this information is exposed, the mere threat of exposure often is enough to dissuade a victim's cooperation. Depending upon the laws

of the jurisdiction where the case is pending, the prosecutor may not have standing to protect the victim against defense attempts to access this history. In these jurisdictions, community legal advocates are critical to protecting the victim's privacy.

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

Third, prosecutors can explain the context of an intimate partner sexual assault by introducing evidence of an assailant's other bad acts.[27] The introduction of other acts can demonstrate the defendant's intent with respect to the intimate partner sexual assault for which he is currently on trial. For example, a defendant's prior violent history with a victim may be relevant to explain her lack of resistance. If the victim has been previously abused by her partner, her perception of her batterer's ability to cause her imminent harm, even where there has been a passage of time between her batterer's threat and the rape is well-grounded. In cases where a victim experiences a cycle of violence, evidence of the dynamics of the victim's relationship and specifically the cycle of violence demonstrates the increasing frequency and severity of the batterer's assaults on the defendant. Domestic violence victims' experience of the repeated violent cycles enable them to predict their partner's impending violence based upon his behavior preceding previous assaults of the victim. Therefore, evidence of the defendant's victimization by the batterer and the cyclical nature of her relationship is relevant and may be admissible to establish that the victim's fear is reasonable and well-grounded.

Finally, prosecutors must understand the impacts of a victim's lack of cooperation, the doctrine of forfeiture by wrongdoing,[28] and the impact of *Crawford v. Washington*[29] and *Davis v. Washington*[30] on their ability to prosecute an intimate partner sexual assault. A prosecutor will rarely be able to successfully prosecute an intimate partner sexual assault of competent adult victim[31] without the victim's cooperation because of the difficulty in overcoming the consent defense. Therefore, if a victim is unavailable at the time of trial, the prosecutor must determine whether her unavailability was caused by the abuser. If this is the case, prosecutors must prepare for a forfeiture hearing.[32] During this hearing, the prosecutor can introduce the history of abuse between the defendant and the victim; prior charges filed, even if they were withdrawn; testimony from bond hearings; testimony from prior cases; evidence from police, a prior prosecutor, family, or friends about the victim's fear of the defendant; evidence about the victim's fear of testifying in prior cases; and anything else that shows the defendant did something to prevent the victim from testifying. Significantly, hearsay is permissible at a forfeiture hearing.[33] If the prosecution successfully establishes forfeiture by wrongdoing, the defendant is precluded from objecting to the introduction of a victim's testimonial statements.

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

Conclusion

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

Endnotes

1 *See* National Crime Victimization Survey 2005 stating ("In seven out of every ten assaults, the defendant is either the victim's intimate partner, other relative, friend or acquaintance.") available at http:www.ojp.usdoj.gov/bjs/cvic.htm.

2 *See e.g.*, Jennifer A. Bennice, Patricia A. Resick, Marital Rape: History, Research, and Practice, 4 Trauma, Violence & Abuse 3 at 231 (July 2003) ("One of the driving forces behind the widespread cultural invalidation has been the commonly held belief that marital rape is not "real rape."); *see also* Susan Estrich, Real Rape (1988) ("Acquaintance rape is one of the most misunderstood forms of

criminal violence. Many people believe that it is not "real rape.").

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

4 *See e.g.,* The United States Department of Defense Sexual Assault Prevention and Response, *Restricted Reporting* at http://www.sapr.mil/HomePage.aspx?Topic=Sexual%20Assault&PageName=Restricted.htm.

5 Veronique N. Valliere, Psy.D., *Understanding the Non-Stranger Rapist*, The Voice, Vol.1, Issue 11 (2007).

6 *See Id.*

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

8 *Id.*

9 *Id.*

10 *Id.*

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

12 Understanding the Rape Victim, NCPVAW APRI (2005).

13 Bennice, *supra* note 3, at 234.

14 Bennice, *supra* note 3, at 234 (stating "Marital rape is more prevalent among women who also experience physical abuse within their intimate relationships.).

15 *See e.g.*,Minnesota Program Development, Inc., Domestic Abuse Intervention Project, the Power and Control Wheel at http://www.duluth-model.org/documents/PhyVio.pdf.

16 See Lenore E. A. Walker, *The Battered Woman Syndrome* (1984); *see also* Lenore E. A. Walker, *Battered Woman Syndrome and Self-Defense*, 6 Notre Dame J.L. Ethics & Pub. Pol'y 321, 326 (1992).

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

18 *See* Sarah Ben-David & Ofra Schneider, *Rape Perceptions, Gender Role Attitudes, and Victim-Perpetrator Acquaintance,* 53 (5/6) Sex Roles 385 (Sept. 2005) (stating "Despite considerable research and publications in professional and popular journals concerning rape, such myths continue to persist in common law reasoning.")

19 *See e.g.*, Sarah M. Buel, 50 *Obstacles to Leaving, a.k.a. Why Abuse Victims Stay, Family Violence* 28/10 The Colorado Lawyer (October 1999).

20 *See generally* Callie Marie Rennison, U.S. Department of Justice, Bureau of Justice Statistics, Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000 (2002) (discussing rationales behind reporting behavior).

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

22 *See* Jennifer Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions* (American Prosecutors Research Institute, 2007). To request a copy, please contact the National Center for the Prosecution of Violence Against Women at ncpvaw@ndaa.org or 703.549.9222. Electronic copies may also be downloaded at http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf.

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

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

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

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

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

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

29 Crawford v. Washington, 541 U.S. 36 (2004).

30 Davis v. Washington, 126 S.Ct. 2266 (2006).

31 The term "competent adult" is used to represent those adults who are viewed by the legal system as competent. Please refer to state law for definitions or interpretations of what constitutes a competent adult in a given state.

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

34 Fed. R. Evid. 803.