‘BUT IF YOU CAN’T RAPE YOUR WIFE, WHO CAN YOU RAPE?’ TOWARD A COURSE-OF-CONDUCT OFFENCE CENTRING PARTNER SEXUAL COERCION IN CANADA

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'But If You Can't Rape Your Wife, Who Can You Rape?'[1]

Toward a Course-Of-Conduct Offence Centring Partner Sexual Coercion in Canada

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ABSTRACT

Despite the removal of the marital exemption to rape 40 years ago in Canada, the law still fails to treat partner sexual assault on par with other sexual assaults. Starting from the norm of stranger rape, it struggles to make sense of partner sexual violence in a culture that normalizes sexually coercive behaviours. Because partner sexual violence presents a serious empirical, social, and legal problem, it deserves to receive primary consideration and should not be treated by legal scholars as a mere exception to the stranger rape model. This process of 'centring' partner sexual violence enables me to identify a gap in the law and propose new avenues to address chronic and non-physically forced sexual violence.

Noting that the stranger rape model presupposes a unique interaction between victim and offender, I work by analogy with coercive control to criticize the 'incident model' of sexual assault. I work 'bottom-up' from the empirical reality of partner sexual violence to propose creating course-of-conduct provisions criminalizing repeatedly engaging in pre-defined acts of sexual coercion. Developing criminal provisions that are behaviourally specific and that do not

[1] Reportedly said by a California State senator to a group of feminist activists: Nicola Gavey, *Just Sex?: The Cultural Scaffolding of Rape* (1st edn, Routledge 2005) 39.

require proving non-consent (among other features) produces a strategy that could pre-empt the implementation problems that plague the legal response to partner sexual violence.

Beyond its exploration of concrete legal reform possibilities, my work contributes to the sexual violence field by focusing on the context of intimate relationships, which is often neglected by legal scholarship. My research confronts the injustices still faced by victims of partner sexual violence and opens up new ways of thinking about legal responses to sexual violations.

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I am also grateful to Pembroke College and the University of Oxford for enabling me to undertake this research by awarding me the Oxford Farthing-Scholarship.

Finally, it is a very short window in history that could have enabled this work. Like me, Annie MacDonald Langstaff studied law at McGill University. But after graduating, in 1914, as the first woman to earn a degree in law in Quebec, she was denied admission to the bar. On the other side of the Atlantic, my college, Pembroke, only started admitting women in 1979. At that time, marital rape was still legal.

The mere fact that I am allowed to read, think, and write is something of a historical miracle, made possible not by supernatural intervention but through sweat, tears, and sacrificed lives. I am forever indebted to all the women who made my existence, as a woman researcher in violence against women at Oxford University, a possibility.

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INTRODUCTION

A woman walks hurriedly across the park, her breathing unsteady. Quick glance over the shoulder. It's dark. Unsure if she is being followed, she picks up the pace. Walks under a broken streetlamp. She knows she shouldn't be in this part of town. Almost there, almost there. A branch cracks; she jumps. Looks over her shoulder one more time. There is a man behind her. But is he following her? She starts running and can hear that he does too. She feels a strong grip on her arm, nails digging in. She screams. The man turns her to face him. He is grinning. He throws her on the floor and pulls out a knife. Scream, scream, scream. Does no one live around this park? Can't they hear her call for help? He tries to pull down her pants but she kicks him in the stomach. He frowns. The knife is on her throat. Silent tears. The camera zooms in on her face as she is raped.

It's been a while since Sophie has seen her friends. After the movie, they'll chat until late. "Text me when you get home." She'll promise to do so. She'll exit her friend's place with her phone in her hand, just in case. Fleeting images of the rape scene will pass through her brain. She'll be over-cautious in choosing her subway wagon. She won't put on her earphones—she's read that creeps sneak in on women who are distracted. She'll feel a sense of relief locking her front door behind her. She'll be as quiet as possible as she prepares to go to bed.

But Bill isn't sleeping. She kisses him hello. "How was your evening?" He puts his hand on her hips and she softly moves it away. "I'm really tired." He kisses her, rolls

closer. “It’s been a while”, he reminds her. She shrugs. “Maybe tomorrow.” Suddenly a weight shift on the mattress, he’s on the other side of the bed. Looking away. “Are you f*cking kidding me?” A thud as the bedside lamp hits the floor. She’s too tired for that. “You’re always tired. You always put your friends first. Whatever, let’s go to bed.” His body is tense. “I’m sorry, I’m sorry”, she murmurs. Silence lingers for a minute that feels like 10. “It’s okay”, he says. “It’s just… I love you so much. I want you to love me the same as I do.” She kisses him reassuringly. “I love you too. It’s just been a long day. Let’s get some sleep.” “Please?”, he asks. Silence. She tries to get up, he holds her arm. “Come on?” Silence. “If you really loved me, you’d want to be with me.” Silence. “Come one, baby, why are you doing this to me? Just say yes.” Sigh. Alright. She’ll make it quick.

Reimagining sexual violence

There are two sexual violence scenes in this short story. The first one is the generic depiction of rape that pollutes movies, books, and nightmares. It is a culturally available sequence, a warning tale of danger that women carry within them from a young age. If you think of rape, talk about rape, read about rape, it’s scene #1 that will most quickly come to mind.

The second scene has another way of being familiar. Minor variations aside, many women have experienced this sequence more times that they can count. The man who doesn’t force you, but who also won’t take ‘no’ for an answer. This story is so

common it is banal, and the coercion and constraint that it contains are almost too normal to be visible. For many, the second scene is ‘bad sex’, not ‘rape’.

We could play ‘Spot the differences’ with these two stories. One involves a stranger, the other a partner. Public place versus home. Weapon versus no weapon. Screams or no screams. Physical force or verbal pressure. Fighting back versus giving in.

But the most notable difference I see is that story #1 is fiction. Not because it is a movie scene, and not because it never happens, but because stranger rape is the rarest form of sexual violence—yet it receives disproportionate attention. Sexual violence is almost always committed against people known to the perpetrator. A woman is more likely to be sexually assaulted in her own bed than in an empty park. As one author puts it, ‘[d]espite generations of repeated storytelling, [physically forced stranger rape] is, in terms of actual incidence, a statistical outlier—so different from the norm as to be exceptional rather than typical’.[2] Sexual violence is not a problem of deviance, caused by monster-predators who lurk in the shadows of some creepy parking lot; rather, as in my favourite quote on the topic, ‘[a]ll the evidence suggests that Mr. Average rapes Ms. Average’.[3]

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[2] Michelle J Anderson, ‘All-American Rape’ (2005) 79 John’s Law Review 625, 626.

[3] Stevi Jackson, ‘The Social Context of Rape: Sexual Scripts and Motivation’ (1978) 1 Women’s Studies International Quarterly 27, 29.

Our collectively distorted perception of rape or sexual assault is far from innocuous. Sexual violence is not well discussed, understood, or even researched. Young women are encouraged to sign-up to self-defence classes. They learn from their peers to walk home with their keys in their hand—to use as a weapon, if needed. At the same time, we are collectively terrible at identifying common forms of domestic violence, we see home as a safe haven, we doubt women's stories of partner or acquaintance rape. Seeing sexual violence as it is—not as moviemakers depict it—is fundamental to adequately address it. A problem that is misunderstood cannot receive an appropriate response. This is why understanding the sexual violence in the second scenario, as well as all the nuances that lie in between the two stories, is so crucial.

Traditionally, rape law was developed to protect men's interest in their property—women—against defilement by strangers. Today, the law seeks to protect women against all kinds of sexual violence, including violence by partners. Yet the law and legal research continue to be guided by the image of stranger rape. I wish this thesis to shift the conversation; to draw the law's and legal scholars' attention to the reality of partner sexual violence.

Overall, my work aims to displace fiction with reality; not by focusing on story #2 specifically, but by acknowledging the various forms that sexual violence can take. By researching partner sexual violence in particular, including what has been termed non-physical sexual coercion, I aim to recentre legal debates on the statistical norm of sexual violence. Not only is partner sexual violence an important empirical problem, it is

also an area that has consistently been neglected by legal research and one where the law continues to fail victims. The law should learn from lived experiences, not movies scenes. Only by focusing on partner sexual violence can the law truly hope to address the most common forms of sexual victimization.

Subject and scope

This thesis examines the problem of partner sexual violence, including non-physically forced partner sexual violence, and critiques the legal response that it receives. Situated in the legal and social context of contemporary Canada, it explores the law's shortcomings and proposes new legal solutions to address partner sexual violence.

The issues I discuss in this thesis are areas of concerns for many jurisdictions. Common-law jurisdictions other than Canada have also been guided by a traditional focus on stranger rape, and still struggle to adequately respond to sexual violence committed by intimate partners. The question of how best to respond to the pervasive reality of sexual violence against women is of global concern. I thus believe the lessons drawn in this thesis have relevance beyond the Canadian context. Canadian law can be seen as a sort of test case. While my thesis explores possible legal changes for Canadian law, it engages with international literature and debates. It is my hope that scholars and lawmakers from other jurisdictions will see the ideas I propose as promising starting points for continued reflections adapted to their specific legal and social contexts.

Canada is a promising jurisdiction to study because it is a positive model for sexual violence legislation. For Catharine MacKinnon, '[t]he law of sexual assault in Canada comes closest [to framing sexual assault laws in sex inequality terms] and could be said to be implicitly guided by sex equality principles to some degree'.[4] Canada has an affirmative consent standard and has moved away from some of the problematic features still found in many Western jurisdictions such as marital exemptions (excluding husbands from criminalization when sexual violence is committed against their wife) and force requirements (finding that non-consensual sexual activity is not rape if there is no physical force). Despite their historical and cultural ties, Canada does not share England and Wales' problematic evidential presumptions.[5] Tellingly enough, the reform that took place in 2003 in England and Wales has much in common with Canada's legal reform 20 years earlier. If—as I conclude—Canadian law nevertheless still does not adequately respond to partner sexual violence, it is more than likely that other jurisdictions also experience this problem and could also benefit from the insights produced in this thesis.

[4] Catharine A MacKinnon, 'Rape Redefined' (2016) 10 Harvard Law & Policy Review 431, 435.

[5] See eg Catarina Sjölin, 'Ten Years On: Consent under the Sexual Offences Act 2003' (2015) 79 The Journal of Criminal Law 20.

Contribution

This thesis seeks to improve the legal response to partner sexual violence, especially non physically forced partner sexual violence. Concretely, I explore avenues for criminalizing repeated instances of sexual coercion.

The contributions of this thesis are found on two levels. On the more concrete or actionable level, my thesis explores new avenues to criminalize sexual coercion, including adopting a new course-of-conduct offence. I reflect on possibilities for Canadian law, which, with some modifications, could serve for the development of criminal law in other jurisdictions. The originality of my proposal lies in taking inspiration from coercive control theory to propose a course-of-conduct approach, that is, an offence that is committed by engaging in repeated behaviour. I also contribute to debates on the criminal law response to sexual violence by proposing behaviourally specific legislation, the idea being that victims and offenders can more easily recognize themselves in a law that lists concrete prohibited behaviours than in vague standards such as definitions of consent or reasonableness threshold. Working from the empirical realities of partner sexual violence, rather than from theoretical musings on the nature of consent, enables legislating in a way that reflects women's lived experience and directly responds to the empirical problem of sexual violence.

On the more theoretical or macro level, my thesis contributes to the field by proposing to 'centre' legal reflections regarding sexual offences on partner sexual

violence. Observing that the law has traditionally focused on stranger rape, and that scholarly work continues to neglect the intimate partner context, I draw inspiration from intersectional theory to propose placing the realities of partner sexual violence at the centre of academic work on sexual offences. Following this method, my work treats partner sexual violence as a paradigmatic or central case rather than as an exception or afterthought. I apply the centring method to the criminalization of sexual coercion by proposing the development of criminal provisions that would reflect the empirical reality of repeated partner sexual coercion. My proposed legal reform is not enough to make our legal system wholly centred on partner sexual violence, but it would be a step in that direction. Specifically, my proposal to look to coercive control to challenge the 'incident model' of sexual assault—a framework that presupposes a unique and bounded interaction between offender and victim— illustrates the insights that can flow from the paradigm shift that centring partner sexual violence represents. Overall, I believe that the centring method is a promising development that can bring major transformations to the way we think about sexual violence through and beyond this thesis.

Intimate partner sexual violence remains a neglected context for sexual violence research. As Melanie Randall explains, '[e]arly research on sexual assault and rape focused almost exclusively on "stranger" or "acquaintance" rape, leaving the issue of sexual assault in the context of intimate relationships virtually unexplored and

unacknowledged'.[6] At the turn of the century, Kersti Yllo observed that at 'the community level, as well as in the culture at large, efforts to challenge the taken-for-granted "right" of husbands to coerce their wives sexually lag at least two decades behind our work on physical violence'. [7] Today, the experience of writing a full doctoral thesis on partner sexual violence reveals that this area remains neglected by scholars. At the empirical level, general studies of the legal response to sexual assault cases abound, while studies on partner sexual assault cases are virtually absent.[8] Similarly at the theoretical level, sexual violence by intimate partners remains under-researched, under-theorized, and under-scrutinized,[9] despite the best efforts of a few dedicated scholars.[10]

Interestingly, while the stranger rape model remains powerful, today increasing attention is being paid to acquaintance or 'date' rape, especially in the context of campus

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[6] Melanie Randall, 'Sexual Assault in Spousal Relationships, Continuous Consent, the Law: Honest but Mistaken Judicial Beliefs' (2008) 32 Manitoba Law Journal 144, 148.

[7] Kersti Yllö, 'The Silence Surrounding Sexual Violence: The Issue of Marital Rape and the Challenge It Poses for the Duluth Model' in Melanie F Shepard and Ellen L Pence (eds), *Coordinating Community Responses to Domestic Violence: Lessons from Duluth and Beyond* (SAGE Publications 1999) 225.

[8] Ruthy Lazar, 'Negotiating Sex: The Legal Construct of Consent in Cases of Wife Rape in Ontario, Canada' (2010) 22 Canadian Journal of Women and the Law 329, 333.

[9] See Randall, 'Sexual Assault in Spousal Relationships, Continuous Consent, the Law' (n 6) 148, 181.

[10] For example, in the Canadian context, Isabel Grant, Ruthy Lazar, Melanie Randall, Elizabeth Sheehy, and Jennifer Koshan.

sexual assault.[11] As Stephen Schulhofer observes, legislators 'picture the typical rape scenario as a case involving two college classmates at a party, flirting, drinking too much, experimenting sexually, and not communicating with each other very well'.[12] The media, too, is 'obsess[ed] with young, inexperienced, middle-class peers in college settings'.[13] It is a testament to student advocacy that campus sexual violence is finally receiving well-deserved attention. Yet if research repeatedly considers acquaintance rape to be 'typical' and marital or partner rape to be a 'specialized' or secondary topic,[14] can we be surprised that the law has made so little headway in confronting and curtailing the empirical problem of partner sexual violence?

Without proposing that other contexts are unimportant, this thesis focuses on the reality of sexual violence by intimate partner, and its proposed 'centring' approach is an invitation for other scholars to also turn their attention to what remains the most empirically significant stage of sexual violence.

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[11] Kathleen C Basile, 'Rape by Acquiescence: The Ways in Which Women "Give in" to Unwanted Sex with Their Husbands' (1999) 5 Violence Against Women 1036, 1036.

[12] Stephen J Schulhofer, 'Reforming the Law of Rape' (2017) 35 Law & Inequality 335, 349.

[13] ibid 350.

[14] See eg David P Bryden, 'Redefining Rape' (1999) 3 Buffalo Criminal Law Review 317, 324.

Terminology

This section explains my terminological choices to enable a better understanding of this thesis.

Rape / sexual assault / sexual violence: Because there is no crime of 'rape' in Canadian law, I use the label 'sexual assault' when writing about the legal response to sexual violence. However, the term 'rape' still appears in this thesis, as it is used in expressions such as 'rape culture', 'rape myths', and 'real rape'. Moreover, some Canadian authors prefer to use the word 'rape' because they consider 'sexual assault' to be either euphemistic or insufficiently gendered.[15] For example, Ruthy Lazar uses the terms 'wife rape'[16] to discuss what I call partner sexual assault. Except in discussions about the 'marital rape exemption', 'rape' is used as synonymous with 'sexual assault', that is, non-consensual sexual contact.[17]

The label 'sexual violence' is also used throughout this thesis, especially in the expression 'partner sexual violence' which is the topic of my thesis. This term is chosen

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[15] See Suzanne Zaccour and Michaël Lessard, 'La Culture Du Viol Dans Le Discours Juridique : Soigner Ses Mots Pour Combattre Les Violences Sexuelles' 33 Canadian Journal of Women and the Law 175.

[16] Lazar, 'Negotiating Sex' (n 8).

[17] For other examples of scholars using 'rape' and 'sexual assault' interchangeably, see MacKinnon, 'Rape Redefined' (n 4) 431; Patricia Easteal and Christine Feerick, 'Sexual Assault by Male Partners: Is the Licence Still Valid?' (2005) 8 Flinders Journal of Law Reform 185, 185.

as a more expansive way to refer to the problem. I use the terms 'sexual violence' or 'partner sexual violence' to refer to any unwanted or coerced sexual activity, even if it is unlikely to be criminalized as sexual assault. Using 'sexual violence' also enables me to avoid the confusion that might arise for non-Canadian readers regarding whether 'sexual assault' includes penetrative sexual activity. I also use the terms 'sexual coercion' and 'partner sexual coercion'; in the literature, these terms are often employed to refer to a broad range of acts of sexual violence, including non-physical tactics for inducing unwanted sexual activity, whether or not such tactics are criminalized.

He (the accused) / she (the victim): Like others in the field,[18] I use masculine pronouns to refer to the accused, and feminine pronouns to refer to the victim. This choice is not merely terminological. Consistent with my proposal to reflect on sexual violence law by considering empirically prevalent problems, the focus of my work is male sexual violence against female intimate partners. This focus should not be interpreted as a denial of the existence of sexual violence against men or by women, or against or by non-binary people. By virtue of the formally gender-neutral nature of Canadian criminal law and in recognition of these other forms of sexual violence, my

[18] See eg MacKinnon, 'Rape Redefined' (n 4) 431; Joshua Sealy-Harrington, 'Tied Hands? A Doctrinal and Policy Argument for the Validity of Advance Consent' (2014) 18 Canadian Criminal Law Review 119, 121; Keith Burgess-Jackson, 'Rape and Persuasive Definition' (1995) 25 Canadian Journal of Philosophy 415, 434.

proposed offence, while based on reflections about male violence against women, will apply to perpetrators and victims of any gender.

Partner / marital / wife / conjugal: my thesis concerns itself with 'partner sexual violence', which I take to include all sexual violence committed by boyfriends, unmarried cohabitants, married spouses, and exes. I prefer the term 'partner sexual violence' to 'marital sexual violence' because it is more expansive. One might make the case that marital sexual violence is qualitatively distinct from partner sexual violence. However, I do not believe that distinguishing partner sexual violence based on the formalized nature of the relationship would be useful for my purposes. In Quebec, the second most populous province in Canada, about two thirds of children are born to unmarried parents,[19] showing the functional equivalence between marriage and cohabitation.[20]

Terms like 'marital rape' or 'spousal rape' still appear in quotes from other texts. I am again mindful of other scholars' choice to use terms like 'marital rape' or 'wife rape' to refer to partner sexual violence committed by married or unmarried partners. As

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[19] Comité consultatif sur le droit de la famille and Alain Roy (prés.), *Pour Un Droit de La Famille Adapté Aux Nouvelles Réalités Conjugales et Familiales* (Québec, Ministère de la Justice du Québec 2015) 36.

[20] There is actually important literature in family law debating whether cohabitation is functionally equivalent to marriage, see eg Anne Barlow, 'Cohabitation Law Reform–Messages from Research' (2006) 14 Feminist Legal Studies 167; Céline Le Bourdais and Évelyne Lapierre-Adamcyk, 'Changes in Conjugal Life in Canada: Is Cohabitation Progressively Replacing Marriage?' (2004) 66 Journal of Marriage and Family 929. This debate lies outside of the scope for my thesis. Suffice it to say that my thesis addresses partner and marital sexual violence as one phenomenon.

noted above, Ruthy Lazar uses 'wife rape'; she refers with this expression to sexual assaults by married, unmarried and ex- partners.[21] Another important player in the field, Jennifer Koshan, also uses 'marital rape' to describe 'rapes and other sexual assaults occurring in spousal (or ex-spousal) relationships, regardless of whether the parties are (or were) legally married'.[22] For my part, I reserve the adjective 'marital' to describing former marital rape exemptions, where the fact of marriage was legally relevant. Other than in describing this historical context, I make no distinction between marital and other partner sexual violence.

Victim / survivor / complainant: I use the term 'victim' when discussing sexual violence to acknowledge that the victim has suffered a wrong. Some players in the field prefer the term 'survivor',[23] which they consider to be more empowering. By choosing the word 'victim', I wish to emphasize that there should be no shame in being subjected to sexual violence, and that women should not feel the need to distance themselves from

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[21] Lazar, 'Negotiating Sex' (n 8) 337.

[22] Jennifer Koshan, 'The Legal Treatment of Marital Rape and Women's Equality: An Analysis of the Canadian Experience' (2010) 3 The Equality Effect 3 <http://theequalityeffect.org/pdfs/maritalrapecanadexperience.pdf>.

[23] Mélanie Lemay and Catherine Descoteaux, 'La parfaite victime: Une occasion d'entamer un dialogue' *La Presse* (7 July 2021) <https://www.lapresse.ca/debats/opinions/2021-07-07/la-parfaite-victime/une-occasion-d-entamer-un-dialogue.php> accessed 20 March 2022.

'victimhood' to feel empowered and worthy of respect. I believe that the insistence of avoiding the label of 'victim' risks fueling victim blaming.[24]

I also use the term 'complainant', which is the label used by Canadian criminal law, to refer to victims of sexual violence in relation to a legal case. I acknowledge that, when discussing legal cases, using the term 'victim' can give the impression that the crime has already been proven, while using the term 'complainant' can signal excessive distrust towards victims of sexual violence and perpetuate the myth of false allegations (especially if this term is primarily used in relation to sexual offences).

Domestic violence / intimate partner violence / coercive control / domestic abuse: I use the terms domestic violence and intimate partner violence as synonymous and in their broad sense. In other words, 'violence' is not used as synonymous with 'physical violence'. When I refer to physical force or physical assaults, the adjective 'physical' is always used.

Some are concerned that, by expanding definitions of domestic violence beyond physical force, we might downplay the significance of physical harm.[25] Helen Reece, for

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[24] As an example, in an unreported family law case involving domestic violence, on file with author, the expert considered 'that the mother needs to get past the status of victim to take on that of "*survivor*" (my translation).

[25] Helen Reece, 'Michael Freeman and Domestic Violence' in Alison Diduck, Noam Peleg and Helen Reece (eds), *Law in Society: Reflections on Children, Family, Culture and Philosophy* (Brill Nijhoff 2015) 317.

example, criticizes the feminist conceptualization of domestic violence as 'a form of domination and control, with physical violence characterised as merely one tactic embedded among many, all integral to a systematic pattern of power and control'.[26]

Despite this critique, I opt for a broad understanding of domestic violence. My choice is consistent with modern feminist understandings of domestic violence as including a broad range of behaviours including physical, sexual, psychological, and economic violence,[27] and including behaviours brought to light by coercive control theory.[28] My decision is also consistent with the broad definition of family violence recently adopted in the Canadian Divorce Act.[29] Thus, when I speak of a 'violent' relationship or a 'violent partner', this includes any form of domestic violence including

[26] ibid 316.

[27] ibid.

[28] See briefs by the Fédération des maisons d'hébergement pour femmes, the Regroupement des maisons pour femmes victimes de violence conjugale, the Fédération des associations de familles monoparentales et recomposées du Québec, and the Alliance des maisons d'hébergement de 2e étape pour femmes et enfants victimes de violence conjugale 'Mémoires déposés lors du mandat « Consultations particulières et auditions publiques sur le projet de loi n° 15 » - Assemblée nationale du Québec' <http://www.assnat.qc.ca/fr/travaux-parlementaires/commissions/CSSS/mandats/Mandat-46921/memoires-deposes.html> accessed 20 March 2022.

[29] Divorce Act, RSC 1985, c 3 (2nd Supp) s 2.

non-physical coercive or controlling behaviour. The terms ‘domestic abuse’ or ‘sexual abuse’ are not used in this thesis.[30]

Thesis structure and summary

This thesis proceeds as follows. I first present contextual information on partner sexual violence: its empirical reality, how society reacts to it, and the legal framework Canada has put in place to address it (chapters 1 to 3). I then expose the problem that lies at the heart of this thesis: the inadequate enforcement of sexual assault legislation in cases of partner sexual assault (chapter 4). Moving to a search for solutions, I propose centring legal reflections about sexual offences on the empirical reality of partner sexual violence, an approach that enables me to see and critique the ‘incident’ framework of sexual assault law (chapters 5 and 6). Finally, I explore concrete solutions to the inadequate legal response to partner sexual violence, especially non-physically forced partner sexual violence, by presenting what a centred, implementation-conscious and non-incident-based response to partner sexual violence could look like in Canadian criminal law (chapter 7).

[30] These terms can be considered euphemistic: see Zaccour and Lessard (n 15); Sandrine Ricci, ‘Abus’ in Suzanne Zaccour and Michaël Lessard (eds), *Dictionnaire critique du sexisme linguistique* (Somme Toute 2017).

More specifically, **chapter 1** exposes the empirical context of partner sexual violence and presents it as a serious empirical problem. I review studies that show partner sexual violence to be particularly frequent and often repeated. Since women are more at risk of sexual violence from a partner than from anyone else, partner sexual violence is an especially pressing concern and far from a niche topic. I explain the gendered dimension of partner sexual violence, its documented consequences including physical and psychological harm, and the special vulnerability of its victims to prolonged and repeated violence. I also explain that partner sexual violence is often accomplished without physical force, through other means of coercion such as verbal or psychological pressure. My review of over 50 empirical articles enables me to present the core of sexually coercive tactics.

Chapter 2 exposes a social context of minimization and cultural acceptability of sexual violence committed by intimate partners. I review important feminist work that has theorized social attitudes towards rape and partner rape, paying particular attention to the concepts of 'real rape', 'sexual scripts', and 'unacknowledged victims'. I find that these concepts, mostly developed in U.S. literature in the 1980s, remain relevant to the context of contemporary Canada.

Chapter 3 then familiarizes the reader with the context of Canadian sexual offences law. It explains important aspects of the crime of sexual assault, and contextualizes the current legislative framework by describing the marital exemption that prevented the prosecution of marital rape until 1983. Like the social context exposed in

chapter 2, this historical background suggests that the law might still struggle to address sexual violence by intimate partners.

Indeed, **chapter 4** demonstrates that, despite Canadian law being ostensibly relationship-neutral, there are serious implementation problems in cases of partner sexual assault. After explaining why criminal law and sexual assault law scholars should pay attention to implementation—rather than solely focusing on the legislative text—I review available Canadian studies regarding the treatment of partner sexual assault at each stage of the criminal justice system. I show that partner sexual assault is less likely than other sexual assaults to be reported, to be considered founded by the police, to be charged at the correct level of seriousness, and to receive a harsh sentence. Regarding the trial stage, I explore to what extent rape myths and problematic outcomes still prevail in partner sexual assault cases. I conclude that the law still presents an inadequate response to partner sexual violence, especially when it is not physically forced.

Having demonstrated a problem with the legal treatment of partner sexual violence cases, I start considering how to improve the law in **chapter 5**. I note that rape law scholarship is often guided by a focus on marginal or exceptional cases, and I propose instead the approach of 'centring' partner sexual violence. I explain what I mean by 'centring' a type of victimization—placing it at the centre of our legal reflections, or giving it primary consideration—and contrast my proposal with other approaches. Findings from previous chapters enable me to justify choosing partner sexual violence as

a central case. I argue that it represents a serious empirical, social, and legal problem that cannot be treated as a mere exception to the 'stranger rape' model.

Having decided to 'centre' my reflections on partner sexual violence enables me to see that, contrary to stranger rape, partner sexual violence involves repeated interactions between the victim and the offender. Drawing inspiration from the coercive control field, I theorize in **chapter 6** that the law of sexual assault functions through an 'incident' model, and that this lens distorts the reality of partner sexual violence and contributes to implementation problems. Consequently, I consider the creation of course-of-conduct provisions as a promising development to move the law in the direction of better responding to partner sexual violence.

In **chapter 7**, I draw on conclusions from previous chapters to explore what an improved legal response to partner sexual violence could look like. Having identified the lack of centring of partner sexual violence, implementation problems in the intimate partner context, and the incident view of sexual violence as major obstacles, I consider how a legal reform of Canada's sexual offences law could respond to these challenges. I propose adopting a new offence (or new provisions within another offence) that would be based on the perpetrator repeatedly engaging in pre-defined acts of sexual coercion.

CHAPTER 1: THE EMPIRICAL PROBLEM OF PARTNER SEXUAL VIOLENCE

This first chapter situates the problem of partner sexual violence with which this thesis is concerned. We will see that partner sexual violence is a serious empirical problem, notably in terms of its frequency. Implicitly, this chapter justifies my choice of topic—partner sexual violence is, despite occupying a narrow theoretical space in sexual violence scholarship, anything but niche. The features discussed in this chapter also lay the groundwork for arguments made in later chapters. In particular, I argue in chapter 5 that the features of partner sexual violence make it deserving of a special consideration in reflections about sexual offences law.

Frequency

Partner sexual violence is a highly prevalent problem. Empirical studies conducted in many parts of the world have revealed that 'women are at a much greater risk of male sexual violence at the hands of their intimate partners than from strangers'.[31] Indeed, '[s]tudies comparing rates of marital rape to stranger rape, acquaintance rape, date rape, and intimate partner violence have shown that marital rape is the most common form of

[31] Diane L Rosenfeld, 'Sexual Coercion, Patriarchal Violence, and Law' in Martin N Muller and Richard W Wrangham (eds), *Sexual Coercion in Primates and Humans* (Harvard University Press 2009) 430.

rape'.[32] It is likely that the relative proportion of marital to non-marital partner sexual violence is on the decline as unmarried cohabitation becomes more accepted, but the important point is that sexual violence is committed in large part by intimate partners.[33] While the prevalence of partner sexual violence is hard to pinpoint with exactitude, a report by the World Health Organization observes that 'in some countries nearly one in four women may experience sexual violence by an intimate partner'.[34]

In the United States, where empirical research is most readily available, '[t]he vast majority of abuse occurs at the hands of a partner rather than a stranger; over 75% of women physically or sexually abused since the age of 15 reported abuse by a partner, and between 20 and 75% of women had experienced emotional abuse'[35] by a partner. Even teenagers are 'at greater risk for sexual victimization in committed relationships as compared to relationships characterized by a few dates'.[36] The U.S. National Justice

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[32] Elaine K Martin, Casey T Taft and Patricia A Resick, 'A Review of Marital Rape' (2007) 12 Aggression and Violent Behavior 329, 336.

[33] As explained in my introduction, my thesis focuses on sexual violence committed by intimate partners, regardless of whether they are legally married.

[34] Etienne G Krug and others (eds), *The World Report on Violence and Health* (World Health Organization 2002) 149.

[35] Rosenfeld (n 31) 425.

[36] F Scott Christopher and Jacqueline C Pflieger, 'Sexual Aggression: The Dark Side of Sexuality in Relationships' (2007) 18 Annual Review of Sex Research 115, 123, references omitted.

Institute has found that '43 percent of all female rape victims and 9 percent of all male victims were raped by some type of current or former intimate partner'.[37]

Studies from other nations present a similarly grim situation. An English study of 1000 married women 'found that marital rape was the commonest form of rape and that one in seven married women had been raped by their husbands'.[38] In another study, one in four teenage girls reported having suffered physical partner violence, and one in three reported sexual partner violence.[39] In a study at the Canberra Rape Crisis Centre, 14% of clients reached out to the centre regarding partner sexual assault, while 'another fifth to a third of clients presenting with other forms of sexual assault ultimately disclose that they too have been sexually assaulted by a partner or former partner'.[40]

In Canada, a 2011 report by Statistics Canada found that, among all sexual assaults against women reported to the police, 17% were committed by intimate

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[37] Patricia Tjaden and Nancy Thoennes, 'Extent, Nature, and Consequences of Rape Victimization: Findings from the National Violence Against Women Survey' (US Department of Justice 2006) NIJ special report 21.

[38] Chris Barton and Kate Painter, 'Rights and Wrongs of Marital Sex' (1991) 141 New Law Journal 349. See also Sylvia Walby and Jonathan Allen, *Domestic Violence, Sexual Assault and Stalking: Findings from the British Crime Survey* (Home Office 2004) ix.

[39] Christine Barter and others, 'Partner Exploitation and Violence in Teenage Intimate Relationships' (University of Bristol, NSPCC 2009). This finding is noteworthy because studies of sexual violence victimization often make the questionable choice to inquire only about sexual violence suffered as an adult or since the age of 16, leading to vast underestimation.

[40] Easteal and Feerick (n 17) 187.

partners.[41] Unfortunately, the proportion of self-reported sexual assaults committed by intimate partners was not indicated. This proportion is likely higher than 17%—while Statistics Canada has not recently provided this data, it was evaluated at 38% of sexual assaults in a 1993 telephone survey.[42]

Prevalence statistics vary by age group, with girls starting their lives vulnerable to familial sexual violence and then, as they start forming intimate relationships, becoming likely to experience partner sexual violence.[43] Unsurprisingly, partner sexual violence is particularly common within violent relationships, although authors have been careful to note that 'not all women who are raped are also battered'.[44] Studies evaluating the proportion of physically violent men who also sexually assault their partner have produced various estimates ranging from 25 to 75%.[45] In a survey of '340 men arrested

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[41] Maire Sinha, 'Measuring Violence against Women: Statistical Trends' (Juristat: Canadian Centre for Justice Statistics 2013) 30.

[42] See Randall, 'Sexual Assault in Spousal Relationships, Continuous Consent, the Law' (n 6) 149.

[43] See Tjaden and Thoennes (n 37) 21; Shireen Jejeebhoy and Sarah Bott, 'Non-Consensual Sexual Experiences of Young People: A Review of the Evidence from Developing Countries' (Population Council 2003) 16 16 <https://knowledgecommons.popcouncil.org/departments_sbsr-rh/526>.

[44] Sarah M Harless, 'From the Bedroom to the Courtroom: The Impact of Domestic Violence Law on Marital Rape Victims' (2003) 35 Rutgers Law Journal 305, 310.

[45] TK Logan, Robert Walker and Jennifer Cole, 'Silenced Suffering: The Need for a Better Understanding of Partner Sexual Violence' (2015) 16 Trauma, Violence, & Abuse 111, 124; Judith Berman, 'Domestic Sexual Assault: A New Opportunity for Court Response' (2004) 55 Juvenile and Family Court Journal 23, 30; Lori Heise, Mary Ellsberg and Megan Gottemoeller, 'Ending Violence against Women' (1999) 27 Population Reports 1; Anna Carline and Patricia Easteal, *Shades of Grey – Domestic and Sexual Violence Against Women: Law Reform and Society* (Routledge 2014); Lynn Hecht Schafran, 'Risk Assessment and Intimate Partner Sexual Abuse: The Hidden Dimension of Domestic Violence' (2009) 93 Judicature 161, 162.

for physical assault of a female spouse or partner and court ordered into batterer intervention programs',[46] 98% reported at least one sexually violent behaviour.[47]

A major point to understand is that studies necessarily underestimate sexual victimization because women do not always recognize or disclose that they have been sexually assaulted.[48] Another issue that often skews results is the participants' young age. In a recent Quebec study, for example, one out of three women and one out of five men identified themselves as victims of sexual coercion by their partner, while one out of five women and one out of four men identified themselves as perpetrators.[49] The participants were on average 24 years old for the women and 26 for the men. Logic dictates that the prevalence of partner sexual violence is higher if we consider women's full lifespan.

Note also that while occasional studies with broad questions about victimization find comparable rates of violence from and against men and women, the gender asymmetry of conjugal violence has been repeatedly demonstrated.[50] In the U.S. National

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[46] Kathleen C Basile and Jeffrey E Hall, 'Intimate Partner Violence Perpetration by Court-Ordered Men: Distinctions and Intersections Among Physical Violence, Sexual Violence, Psychological Abuse, and Stalking' (2011) 26 Journal of Interpersonal Violence 230, 230.

[47] ibid 242.

[48] More on this in chapter 2.

[49] Mélanie M Brousseau and others, 'Victimisation et perpétuation de la coercition sexuelle dans les couples hétérosexuels : une enquête dyadique?' (Centre de recherche interdisciplinaire sur les problèmes conjugaux et les agressions sexuelles 2010) Capsule scientifique #6.

[50] Russell P Dobash and others, 'The Myth of Sexual Symmetry in Marital Violence' (1992) 39 Social Problems 71.

Justice Institute survey, women were '19.3 times more likely than men to be raped by intimates',[51] making it the most gendered type of sexual violence.[52]

Overall, the available evidence paints partner sexual violence as a major issue. In a large review of empirical studies of sexual violence, TK Logan, Robert Walker and Jennifer Cole conclude: '[i]n all but one of those studies, partner offenders account for the largest category of rapists with between 29 % and 53 %.'[53] Overall, 'women are more at risk of experiencing violence in intimate relationships than anywhere else, "challenging the notion that home is a safe haven"'.[54]

Not only is partner sexual violence frequent in the sense that many women are victimized, but partner sexual violence also appears to be often repeated. It is difficult to know precisely how often partner sexual violence is repeated because empirical research on this issue seems to have fallen out of favour. Indeed, recent studies generally underrate partner sexual violence by counting victims instead of instances of sexual

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[51] Tjaden and Thoennes (n 37) 22.

[51] Tjaden and Thoennes (n 37) 22.

[52] ibid.

[53] Logan, Walker and Cole (n 45) 114.

[54] Rosenfeld (n 31) 425; citing World Health Organization, *WHO Multi-Country Study on Women's Health and Domestic Violence against Women: Initial Results on Prevalence, Health Outcomes and Women's Responses* (World Health Organization 2005).

violation.[55] Ignoring the reality of repeated or routine victimization leads to a clear underestimation of the major empirical problem that partner sexual violence represents.

To get a sense of the chronicity of partner sexual violence, we can nonetheless look to surveys conducted in the 1990s.[56] Kathleen Basile's study of 'rape by acquiescence' included women 'experienc[ing] unwanted sex with their husband once or twice a week or more, and for [some], every sex act was an unwanted one, especially near the end of the relationship'.[57] Diana Russel's 1990 study found that 31% of victims of partner sexual assault had been sexually assaulted over 20 times by the same partner, with a further 33% of victims having been sexually assaulted between 2 and 20 times.[58] In another study by Patricia Mahoney, '[m]arital sexual assault survivors were significantly more likely than acquaintance and stranger survivors to experience multiple assaults, with many marital survivors experiencing more than 10 assaults in a 6-month period'.[59] In the absence of solid empirical research on the matter and given the continued prevalence of partner sexual violence, there is no reason to think that it has

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[55] See for example Shana Conroy and Adam Cotter, 'Self-Reported Sexual Assault in Canada, 2014' (Juristat: Canadian Centre for Justice Statistics 2017) 23 <https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14842-eng.htm>.

[56] Berman (n 45) 23; Barton and Painter (n 38).

[57] Basile (n 11) 1052.

[58] Diana EH Russell, *Rape in Marriage* (Indiana University Press 1990).

[59] Patricia Mahoney, 'High Rape Chronicity and Low Rates of Help-Seeking among Wife Rape Survivors in a Nonclinical Sample: Implications for Research and Practice' (1999) 5 Violence Against Women 993, 993.

now become a one-off matter. In fact, a recent study of English women seeking refuge in domestic violence shelters in which '27% of the victims reported they were forced to have sex against their will often or all the time'[60] suggests that partner sexual violence remains frequent in sexually violent relationships.

Non-physically forced sexual violence

Empirical studies of sexual violence vary in their focus: the researchers may set out to study 'rape', 'sexual assault', or 'sexual coercion', for example. Researchers tend to use the term 'sexual coercion' to refer to a broader understanding of sexual violence which includes (or sometimes focuses on) non-physically forced sexual contact.

Studies of non-physically forced sexual coercion uncover high prevalence rates.[61] For instance, in a study of 656 college students in their early twenties, '[n]early 70% of

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[60] Evan Stark, *Coercive Control: The Entrapment of Women in Personal Life* (Oxford University Press 2007) 243; citing data from A Rees, R Agnew-Davies and M Barkham, 'Outcomes for Women Escaping Domestic Violence at Refuge', *Society for Psychotherapy Research Annual Conference, Edinburgh, Scotland* (2006).

[61] See eg Barbara Krahé and others, 'Prevalence and Correlates of Young People's Sexual Aggression Perpetration and Victimisation in 10 European Countries: A Multi-Level Analysis' (2015) 17 Culture, Health & Sexuality 682; Marta Garrido-Macías and Ximena Arriaga, 'Women Are Not Swayed by Sugar-coated Acts of Verbal Sexual Coercion' (2020) 27 Personal Relationships 251, 2; Cindy Struckman-Johnson, David Struckman-Johnson and Peter B Anderson, 'Tactics of Sexual Coercion: When Men and Women Won't Take No for an Answer' (2003) 40 Journal of Sex Research 76. For a Canadian study noting a high rate of sexual coercion victimization among female university students, see Nicole K Jeffrey and Paula C Barata, '"He Didn't Necessarily Force Himself Upon Me, But . . . ": Women's Lived Experiences of Sexual Coercion in Intimate Relationships With Men' (2017) 23 Violence Against Women 911, 923.

the participants had been subjected to at least one tactic of postrefusal sexual persistence since the age of 16' and one third reported using a tactic.[62] Contrary to studies of 'rape' or 'sexual assault', studies of sexual coercion tend to include behaviours that are not criminalized, such as pressuring someone into sexual activity through continual arguments or a threat to break up. This literature thus offers a more complete picture of the problem of sexual violence in intimate relationships and illuminates potential gaps in the law.

Moreover, the concept of sexual coercion, as a broad set of tactics to induce unwanted sexual activity, calls attention to the fact that physical violence is often absent from cases of partner sexual violence. Indeed, physical force and forceful resistance are less common within intimate relationships;[63] instead, '[s]exual violence among intimate partners can and does occur through more subtle coercive means'.[64] Women may also comply with unwanted sex 'in the absence of immediate pressure, . . . after learning [from experience] that they would be pressured if they refused'.[65]

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[62] Struckman-Johnson, Struckman-Johnson and Anderson (n 61) 84.

[63] Logan, Walker and Cole (n 45) 112.

[64] ibid 113.

[65] Jennifer Katz and Vanessa Tirone, 'Going Along With It: Sexually Coercive Partner Behavior Predicts Dating Women's Compliance With Unwanted Sex' (2010) 16 Violence Against Women 730, 738.

Logan, Walker and Cole explain that '[t]here are a variety of tactics that are used to compel sex besides physical force, especially by a partner. . ., the list of specific tactics is unlimited, bound only by the imagination and creativity of the party trying to coerce sex from his or her partner'.[66] Persistent touching and emotional manipulation, in particular, appear to be much more frequent than coercion through intoxication of force.[67]

My own review of over 50 articles[68] including proposed scales and surveys developed to measure sexual coercion or partner sexual coercion,[69] quantitative studies

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[66] Logan, Walker and Cole (n 45) 122.

[67] Katz and Tirone (n 65) 738.

[68] Most of this research stemmed from the United States. While Canadian research would have been preferable if available, I considered research from other countries to be relevant and an adequate substitute since I do not need a precise quantification of sexual coercion tactics, but rather want to provide a general sense of the commonly used and observed sexual coercion tactics to contrast with legal cases as well as use for inspiration for new criminalization avenues towards the end of this thesis.

[69] Todd K Shackelford and Aaron T Goetz, 'Men's Sexual Coercion in Intimate Relationships: Development and Initial Validation of the Sexual Coercion in Intimate Relationships Scale' (2004) 19 Violence and Victims 541; Joseph A Camilleri, Vernon L Quinsey and Jennifer L Tapscott, 'Assessing the Propensity for Sexual Coaxing and Coercion in Relationships: Factor Structure, Reliability, and Validity of the Tactics to Obtain Sex Scale' (2009) 38 Archives of Sexual Behavior 959; Elena Hernández González and Rosaura González Méndez, 'Coerción Sexual, Compromiso y Violencia En Las Relaciones de Pareja de Los Universitarios' (2009) 2 Escritos de Psicología 40; Chitra Raghavan, Shuki Cohen and Tracy Tamborra, 'Development and Preliminary Validation of The Multidimensional Sexual Coercion Questionnaire (MSCQ)' (2015) 21 Journal of Sexual Aggression 271; Poco D Kernsmith and Roger M Kernsmith, 'Gender Differences in Responses to Sexual Coercion' (2009) 19 Journal of Human Behavior in the Social Environment 902; Lisa K Waldner-Haugrud and Brian Magruder, 'Male and Female Sexual Victimization in Dating Relationships: Gender Differences in Coercion Techniques and Outcomes' (1995) 10 Violence and Victims 203; Zoë D Peterson, Erick Janssen and Julia R Heiman, 'The Association between Sexual Aggression and HIV Risk Behavior in Heterosexual Men' (2010) 25 Journal of Interpersonal Violence 538; Mary P Koss and others, 'Revising the SES: A Collaborative Process to Improve Assessment of Sexual Aggression and Victimization' (2007) 31 Psychology of Women Quarterly 357; Mary P Koss and Cheryl J Oros, 'Sexual Experiences Survey: A Research Instrument Investigating

Sexual Aggression and Victimization' (1982) 50 Journal of Consulting and Clinical Psychology 455; Linda L Marshall, 'Development of the Severity of Violence against Women Scales' (1992) 7 Journal of Family Violence 103; Bryana H French, Jasmine D Tilghman and Dominique A Malebranche, 'Sexual Coercion Context and Psychosocial Correlates among Diverse Males.' (2015) 16 Psychology of Men & Masculinity 42; Heather A Sears, E Sandra Byers and E Lisa Price, 'The Co-Occurrence of Adolescent Boys' and Girls' Use of Psychologically, Physically, and Sexually Abusive Behaviours in Their Dating Relationships' (2007) 30 Journal of Adolescence 487; Murray A Straus and others, 'The Revised Conflict Tactics Scales (CTS2): Development and Preliminary Psychometric Data' (1996) 17 Journal of Family Issues 283; Barbara Krahé and Anja Berger, 'Men and Women as Perpetrators and Victims of Sexual Aggression in Heterosexual and Same-Sex Encounters: A Study of First-Year College Students in Germany' (2013) 39 Aggressive Behavior 391; Lisa K Waldner, Linda Vaden-Goad and Anjoo Sikka, 'Sexual Coercion in India: An Exploratory Analysis Using Demographic Variables' (1999) 28 Archives of Sexual Behavior 523; Struckman-Johnson, Struckman-Johnson and Anderson (n 61).

which use, apply, or compare sexual coercion scales,[70] meta-analyses and literature reviews,[71] qualitative studies,[72] and other general literature on sexual coercion[73] enabled

[70] Emily Strang and others, 'Discrepant Responding across Self-Report Measures of Men's Coercive and Aggressive Sexual Strategies' (2013) 50 The Journal of Sex Research 458; Maria Testa and others, 'Measuring Sexual Aggression Perpetration in College Men: A Comparison of Two Measures' (2015) 5 Psychology of Violence 285; Jenny E Mitchell and Chitra Raghavan, 'The Impact of Coercive Control on Use of Specific Sexual Coercion Tactics' (2021) 27 Violence Against Women 187; Luna C Muñoz, Roxanne Khan and Laura Cordwell, 'Sexually Coercive Tactics Used by University Students: A Clear Role for Primary Psychopathy' (2011) 25 Journal of Personality Disorders 28; Jennifer Katz and Laura Myhr, 'Perceived Conflict Patterns and Relationship Quality Associated With Verbal Sexual Coercion by Male Dating Partners' (2008) 23 Journal of Interpersonal Violence 798; Amy Lyndon, Jacquelyn White and Kelly Kadlec, 'Manipulation and Force as Sexual Coercion Tactics: Conceptual and Empirical Differences' (2007) 33 Aggressive behavior 291; Sarah L Cook, 'Self-Reports of Sexual, Physical, and Nonphysical Abuse Perpetration: A Comparison of Three Measures' (2002) 8 Violence Against Women 541; Amy L Brown, Maria Testa and Terri L Messman-Moore, 'Psychological Consequences of Sexual Victimization Resulting from Force, Incapacitation, or Verbal Coercion' (2009) 15 Violence Against Women 898; Katz and Tirone (n 65); Asia A Eaton and Alejandra Matamala, 'The Relationship Between Heteronormative Beliefs and Verbal Sexual Coercion in College Students' (2014) 43 Archives of Sexual Behavior 1443; Elizabeth A Schatzel-Murphy and others, 'Sexual Coercion in Men and Women: Similar Behaviors, Different Predictors' (2009) 38 Archives of Sexual Behavior 974; Debra L Oswald and Brenda L Russell, 'Perceptions of Sexual Coercion in Heterosexual Dating Relationships: The Role of Aggressor Gender and Tactics' (2006) 43 Journal of Sex Research 87.

[71] Logan, Walker and Cole (n 45); Meredith E Bagwell-Gray, Jill Theresa Messing and Adrienne Baldwin-White, 'Intimate Partner Sexual Violence: A Review of Terms, Definitions, and Prevalence' (2015) 16 Trauma, Violence, & Abuse 316; Javier López-Cepero Borrego, Luis Rodríguez Franco and Francisco Javier Rodríguez Díaz, 'Evaluación de La Violencia de Pareja. Una Revisión de Instrumentos de Evaluación Conductual' (2015) 40 Revista Iberoamericana de Diagnóstico y Evaluación 37.

[72] Nicole Jeffrey, 'Men's (Normalized) Sexual Violence Against Intimate Partners' (doctoral thesis, University of Guelph 2019); Jennifer A Livingston and others, 'The Role of Sexual Precedence in Verbal Sexual Coercion' (2004) 28 Psychology of Women Quarterly 287; TK Logan, Jennifer Cole and Lisa Shannon, 'A Mixed-Methods Examination of Sexual Coercion and Degradation Among Women in Violent Relationships Who Do and Do Not Report Forced Sex' (2007) 22 Violence and Victims 29; Basile (n 11); Sarah A Vannier and Lucia F O'Sullivan, 'Sex without Desire: Characteristics of Occasions of Sexual Compliance in Young Adults' Committed Relationships' (2010) 47 The Journal of Sex Research 429.

[73] Melanie Randall and Lori Haskell, 'Sexual Violence in Women's Lives: Findings from the Women's Safety Project, a Community-Based Survey' (1995) 1 Violence Against Women 6; Lucia F O'Sullivan, 'Sexual Coercion in Dating Relationships: Conceptual and Methodological Issues' (2005) 20 Sexual and Relationship Therapy 3; Garrido-Macías and Arriaga (n 61); Jennifer Katz and Monica E Schneider, '(Hetero)Sexual Compliance with Unwanted Casual Sex: Associations with Feelings about First Sex and Sexual Self-Perceptions' (2015) 72 Sex Roles 451; Sarah DeGue and David DiLillo, 'Understanding Perpetrators of Nonphysical Sexual Coercion: Characteristics of Those Who Cross the Line' (2004) 19 Violence and Victims 673; Sarah DeGue and David DiLillo, '"You Would If You Loved Me": Toward an

me to synthesize and categorize what constitutes the main ways in which (typically) men coerce their female partners into unwanted sex:

- Physical violence against victim: threaten physical violence, use physical violence, physically restrain, block retreat, hit or slap, use of physical violence during sex without sex being physically forced, implied threat of physical violence if the victim says no, use of a weapon;
- Other physical violence: threaten violence against someone else, destroy or hit objects, threaten to destroy something;
- Relationship-related threats: threaten to leave, threaten to break up, leave the scene, left the last time the victim said no, threaten to have sex with others, actually having sex with others, threaten to stop loving the victim; threaten to stop access to the children;
- Use of resources: give presents, remind partner of previous gift, threaten to withhold benefits, withhold resources, offer to buy something, threaten to stop buying things;

Improved Conceptual and Etiological Understanding of Nonphysical Male Sexual Coercion' (2005) 10 Aggression and Violent Behavior 513; Joanne K Pitzner and Peter D Drummond, 'The Reliability and Validity of Empirically Scaled Measures of Psychological/Verbal Control and Physical/Sexual Abuse: Relationship between Current Negative Mood and a History of Abuse Independent of Other Negative Life Events' (1997) 43 Journal of Psychosomatic Research 125; Sarah L Cook and others, 'Emerging Issues in the Measurement of Rape Victimization' (2011) 17 Violence Against Women 201.

- Obligation: say sex is the victim's obligation / duty, there is an implied obligation to have sex, say that others would not have said no, justify the perpetrator's need for sex, say sex is part of commitment, express dissatisfaction (e.g. 'we should be having sex more often'), accuse of teasing, demand sex whether victim wants it or not;
- Verbal pressure: ask for sex knowing that the victim doesn't want to, persistent asking, continual arguments, attempts to convince, negotiation, bargaining another sex act e.g. fellatio, offer to compromise / offer trade-off, verbal manipulation, plead, insist, pressure to enact the perpetrator's sexual fantasies, pressure to do things that make the victim feel uncomfortable;
- Verbal violence: swear until partner complies, shout or scream following refusal, victim saying 'no' leads to a fight, say mean things, get angry;
- Emotional manipulation: saying 'if you loved me, you'd have sex with me', make the victim feel bad / guilty for refusing sex, telling lies such as 'I love you', threaten self-harm, become serious or sad when sex is refused, treat partner baldly when sex is refused, sulk, remind of past favors, cry, act ill, act helpless, whine, withhold affection, attention, or sex acts.
- Touching: unwanted or persistent sexual or non-sexual touching, tickling, massage, undressing the victim, ignoring the victim's 'no';
- Insults and accusations: insulting, name-calling, accuse of being a bad lover, accuse of cheating, question the victim's sexual orientation, compare the victim

negatively to past sexual partners, ridicule the victim, accuse the victim of teasing;

- Blackmail: threaten to tell a secret or disclose negative information, threaten to humiliate, threaten to badmouth;
- Authority: use of position of authority or older age, claim greater knowledge;
- Compliments: flatter the victim, become seductive, sweet talk, compliment;
- Promises: make promises, lure with promise of more committed or better relationship, promise of marriage;
- Incapacity: pressure to drink or take drugs, drug or intoxicate the victim, take advantage of partner being unconscious, unaware, asleep, drunk, or drugged;
- Creating opportunity: lying down next to the victim, perpetrator undresses himself, isolate victim, create false pretenses to be alone with the victim.
- Other reasons given by victims: too much to lose by saying no, not worthwhile to resist, afraid how partner will treat her later, saying no never worked, afraid partner will do something bad, afraid how partner will react to no, victim initiates sex to avoid violence;
- Other: not allowing victim to sleep; insist on watching porn; refusing to use contraception.

As we will see, despite the documented existence of all of these tactics of sexual coercion, the minority case of physically forced sexual violence remains the paradigmatic scenario through which sexual violence is understood.

A caveat on the limit of statistics

My use of statistics in the sections above is to show that partner sexual violence is ubiquitous. I cannot, however, made a definite claim about its exact prevalence. This limitation stems from well documented difficulties in counting sexual assaults.[74] This section presents an overview of these difficulties.

The uncertainty regarding the exact proportion of sexual assaults committed by a spouse or partner is due to several limitations in the empirical literature, some of which are highlighted in Logan, Walker and Cole's review:

> Shortcomings of the research on partner sexual violence include (1) overreliance on dichotomous yes/no representations of sexual violence experiences [instead of seeing consent and wantedness as continuums]; (2) lack of, or inadequate documentation of the scope and nature of partner sexual violence; (3) inadequate ways to account for impairment of consent under different circumstances; (4) difficulties in discriminating unwanted from nonconsensual sexual activities; and (5) limited information about the role sexual violence plays in the larger context of coercive control.[75]

Distinguishing 'partner sexual violence' from 'date rape' may also be difficult. Another issue, as mentioned above, is that studies often fail to account for the possibility of women experiencing multiple sexual assaults, both from intimates and from other men.

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[74] See eg Martin, Taft and Resick (n 32) 334.

[75] Logan, Walker and Cole (n 45) 111.

The confusion as to what counts as sexual violence is also a major issue: 'even if studies use the exact same terms, they often define and measure them differently. Conversely, different terms may be used to mean the same thing'.[76] Studies may use narrow or wide definitions of 'rape', 'sexual assault', or coercion, and sometimes the researchers' definitions cannot even be ascertained.[77] Notably, '[m]ost instruments, and thus definitions, include physical force, but not all include verbal threats, and only some inroads have been made to include alcohol and other drugs as tactics.'[78] The 'lack of consistent terms and definitions'[79] contribute to variations in reported prevalence rates.

In addition to these methodological issues, the fact that many women do not recognize or disclose partner sexual violence necessarily leads to an underestimation of its prevalence.[80] Statistics based on police-recorded crimes are particularly distorted due to low reporting rates for sexual offences. In surveys of potential victims, some methodological choices, such as using vaguely worded questions, contribute to producing lower reporting rates.[81] Nonetheless, while perfect statistical accuracy is not a realistic

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[76] ibid 113.

[77] ibid 117.

[78] Cook and others (n 73) 211.

[79] Logan, Walker and Cole (n 45) 113.

[80] This issue will be expanded on in chapter 2.

[81] Cook and others (n 73) 206.

goal in this context, the available data is enough to show that partner sexual violence is highly prevalent.

Vulnerability

To continue our exploration of the empirical problem of partner sexual violence, let us consider women's particular vulnerability to sexual violence from an intimate partner. Intimate relationships 'generate vulnerability to sexual abuse'.[82] The victim is vulnerable to repeated sexual violation and to unparalleled levels of control because 'partner-offenders, compared to stranger and acquaintance offenders, have greater access to their victims'.[83] The chronicity of partner sexual violence thus makes it a particularly serious and pressing issue.

Because victims generally live (and sleep) with their assailant, sexual assault can happen at any time, often without the perpetrator risking being discovered. As a feminist group noted in an intervention to the Supreme Court of Canada on whether the law

[82] Jonathan Herring, 'No More Having and Holding: The Abolition of the Marital Rape Exemption' in Stephen Gilmore, Jonathan Herring and Rebecca Probert (eds), *Landmark Cases in Family Law* (Hart Publishing 2016) 238.

[83] Logan, Walker and Cole (n 45) 119.

should recognize unconscious consent, 'women in relationships are particularly vulnerable to being sexually assaulted while sleeping or otherwise incapacitated'.[84]

Vulnerability to partner sexual assault can be compounded by financial dependence, as well as by the victim having children with her assailant. Many women stay in a violent relationship to protect their children or companion animals.[85] Additionally, the social acceptability of partner sexual coercion, coupled with the widely held belief that people should not intervene in others' intimate relationships, increases women vulnerability to repeated sexual and other violence from their partner.

Harmfulness

To this day, partner sexual violence is still perceived as less serious and less harmful than stranger rape.[86] Yet this perception does not accurately reflect reality. Rather,

> [c]ompared to survivors of non-partner sexual violence, survivors of [intimate partner sexual violence] experience longer lasting trauma, higher levels of physical injury, higher incidences of multiple sexual

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[84] 'Factum in R v JA' (LEAF - Women's Legal Education and Action Fund 2011) para 19 <https://www.leaf.ca/wp-content/uploads/2020/10/J.A-OCA.pdf>.

[85] 'Why Do Victims Stay' (*National Coalition Against Domestic Violence*) <https://ncadv.org/why-do-victims-stay> accessed 6 November 2021; 'How to Protect Your Pet When Escaping Domestic Violence' (*ABC*, 8 January 2020) <https://www.abc.net.au/everyday/keeping-your-pet-safe-when-escaping-domestic-violence/11751300> accessed 6 November 2021.

[86] See eg Jennifer A Bennice and Patricia A Resick, 'Marital Rape: History, Research, and Practice' (2003) 4 Trauma, Violence, & Abuse 228, 232; Christopher and Pflieger (n 36) 232.

> assaults, and an increased likelihood of violence resulting in pregnancy and deliberate exposure to sexually transmitted infections.[87]

Partner sexual violence has been associated with physical and psychological consequences including injuries, miscarriages, unwanted pregnancies, vaginal problems, depression, anxiety, sleep disorders, suicidal ideations, self-blame, low self-esteem, and post-traumatic stress disorder.[88] Women who are raped by their partner are more likely to receive a diagnosis of depression or anxiety than women raped by someone else;[89] they are also more likely to report higher levels of stress and dissociation.[90] Victims of partner sexual violence also report self-blame, sadness, and guilt.[91] In one survey of victims of marital rape, 52% stated that the rape had a significant impact, and 34% reported

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[87] Linda Baker, Nicole Etherington and Elsa Baratto, 'Intimate Partner Sexual Violence' (Centre for Research & Education for Violence Against Women & Children, Learning Network 2016) 17 1 <http://www.vawlearningnetwork.ca//our-work/issuebased_newsletters/issue-17/index.html> accessed 5 November 2021.

[88] Martin, Taft and Resick (n 32) 341–342; Raquel Kennedy Bergen, 'Marital Rape: New Research and Directions' (National Online Resource Center on Violence Against Women 2006) <https://vawnet.org/material/marital-rape-new-research-and-directions>; Jeffrey and Barata, '"He Didn't Necessarily Force Himself Upon Me, But . . . "' (n 61); Jeff R Temple and others, 'Differing Effects of Partner and Nonpartner Sexual Assault on Women's Mental Health' (2007) 13 Violence Against Women 285; Amber Norwood and Christopher Murphy, 'What Forms of Abuse Correlate with PTSD Symptoms in Partners of Men Being Treated for Intimate Partner Violence?' (2012) 4 Psychological Trauma: Theory, Research, Practice, and Policy 596; Jessica K Salwen, Ingrid A Solano and K Daniel O'Leary, 'Sexual Coercion and Psychological Aggression Victimization: Unique Constructs and Predictors of Depression' (2015) 6 Partner Abuse 367; Amanda K Gilmore and others, 'Verbal Sexual Coercion Experiences, Sexual Risk, and Substance Use in Women' (2014) 23 Journal of Aggression, Maltreatment & Trauma 725.

[89] Stacey B Plichta and Marilyn Falik, 'Prevalence of Violence and Its Implications for Women's Health' (2001) 11 Women's Health Issues 244.

[90] Temple and others (n 88).

[91] Jeffrey and Barata, '"He Didn't Necessarily Force Himself Upon Me, But . . . "' (n 61).

suffering extreme trauma.[92] Moreover, partner sexual assault harms victims by violating expectations of trust and benevolence in intimate relationships. Kersti Yllo vividly writes: '[w]hen you are raped by a stranger, you live with a frightening memory, but when you are raped by your husband, you live with your rapist'.[93] Even coercive behaviours that do not rise to the level of 'rape' or 'sexual assault' (that is, where there is not enough to conclude that consent was vitiated based on current definitions) are harmful.[94]

Within physically violent relationships, victims of sexual violence report more severe physical violence than women who report physical or emotional, but not sexual, violence.[95] Sexual violence is also associated with heightened risk of femicide, as well as with a higher risk that the victim will kill the perpetrator.[96]

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[92] Russell (n 58).

[93] Kersti Yllö, 'Wife Rape: A Social Problem for the 21st Century' (1999) 5 Violence Against Women 1059, 1060.

[94] See eg Robin West, 'The Harms of Consensual Sex' in Alan Soble (ed), *The Philosophy of Sex: Contemporary Readings* (4th ed, Rowman & Littlefield 2002); Brandie Pugh and Patricia Becker, 'Exploring Definitions and Prevalence of Verbal Sexual Coercion and Its Relationship to Consent to Unwanted Sex: Implications for Affirmative Consent Standards on College Campuses' (2018) 8 Behavioral sciences 69.

[95] Charlene Allen, John Raimer and Emily Rothman, 'Intimate Partner Sexual Abuse: A Curriculum for Batterer Intervention Program Facilitators' (Massachusetts Executive Office of Public Safety Programs Division 2004).

[96] ibid.

In conclusion, while the harm caused by a sexual assault is notably difficult to predict,[97] available evidence shows that partner sexual violence can be, and often is, highly harmful. Together with other evidence cited throughout this chapter, this literature shows that partner sexual violence is a serious problem that deserves consideration from the law and from legal scholars. Hence the objective of this thesis: to improve the legal response to partner sexual violence by giving this form of victimization more consideration.

CHAPTER 2: THE SOCIAL CONTEXT OF PARTNER SEXUAL VIOLENCE

Important feminist work has exposed problematic attitudes toward sexual violence and conceptualized 'rape culture' as a society where sexual violence is under-recognized, easily excused, and even encouraged.[98] Because this thesis is concerned with partner sexual violence specifically, it is important to understand how rape myths and rape culture influence attitudes towards this form of victimization. Partner sexual violence is not only a problem for the legal system; it is also a social problem. The social context of partner sexual violence is an important piece of the puzzle to understand and

[97] Katharine K Baker, 'Why Rape Should Not (Always) Be a Crime' (2015) 100 Minnesota Law Review 221, 252; Rebecca Campbell, Emily Dworkin and Giannina Cabral, 'An Ecological Model of the Impact of Sexual Assault on Women's Mental Health' (2009) 10 Trauma, Violence, & Abuse 225, 238.

[98] See eg Emilie Buchwald, Pamela R Fletcher and Martha Roth, *Transforming a Rape Culture* (Milkweed Editions 2005).

contextualize implementation problems with the law (chapter 4), as well as a relevant factor to consider in designing new legal solutions (chapters 5 to 7).

This chapter proceeds in two steps. First, a review of literature theorizing attitudes toward partner sexual violence, especially partner sexual violence without extrinsic physical violence, is carried out. Then, studies examining the relevance and effects of such attitudes in modern Canada are described.

Since the 1980s, U.S. feminists and other scholars have theorized concepts such as those of 'real rape', 'sexual scripts' and 'unacknowledged victims' to explain the social context of sexual violence. On the one hand, it is important to understand the contribution of this historical literature even though the focus of this thesis is contemporary Canadian law. Both the U.S. and Canada have a shared legal history of marital exemptions imported from English common law, and neither country has entirely broken free from traditional perceptions of partner sexual violence. Arguably, no country has made so much progress that concerns regarding euphemizing and normalizing perceptions of partner sexual violence have become entirely irrelevant, even though an important part of feminist theorizing on the subject happened several decades ago.

On the other hand, it would be unsatisfying to describe U.S. attitudes toward partner sexual violence as if the situation in Canada was entirely equivalent. For one, the United States literature focuses on 'rape', a label that no longer exists in Canadian law. Moreover, the rates of unmarried cohabitation and their significance vary across

geographical, historical, and cultural contexts, with important implications for whether traditional attitudes toward marital rape percolate to the broader context of partner sexual violence. If we take seriously the claim that law can have an impact on social attitudes, the continued existence of numerous marital exemptions in the United States,[99] not to mention requirements of extrinsic physical violence,[100] must also influence social attitudes in the United States in a way unparalleled in Canada.

This dilemma leads me to opt for a two-part chapter. A first section exposes feminist concerns about perceptions of partner sexual violence, focusing on important theoretical and empirical contributions without limiting myself to recent Canadian studies. The purpose is to show that feminists have expressed strong concerns regarding the social context of partner sexual violence, as well as to present the important concepts of 'real rape', 'sexual scripts' and 'unacknowledged victims' which will be used throughout this thesis. Then, a second section explores the question of whether and to what extent these feminist concerns from previous decades apply to an exploration of Canadian sexual assault law today. I will use recent empirical studies of young Canadian's attitudes towards sexual violence and partner sexual violence to show that

[99] Harless (n 44); Michelle J Anderson, 'Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates' (2003) 54 Hastings Law Journal 1465.

[100] Anderson, 'All-American Rape' (n 2) 629.

even in modern Canada, there are persistent concerns regarding the recognition of partner sexual violence.

Theorizing social attitudes toward partner sexual violence

Feminist research on perceptions of sexual violence often centers on 'rape myths' which are defined by Kimberly Lonsway and Louise Fitzgerald as 'attitudes and beliefs that are generally false but are widely and persistently held, and that serve to deny and justify male sexual aggression against women'.[101] These rape myths are numerous, and include the beliefs that rape is only something committed by a stranger in a dark alley (the 'real rape' myth), that women regularly lie about being raped, and that women provoke rape through their dress or behaviour.[102] Importantly, victims are not immune from rape culture; even their interpretations can be affected by rape myths and other social and cultural factors.

The myth that rape is always committed by a stranger is particularly important to understand the neglect, euphemizing, and social acceptability of partner sexual violence. The journey to understanding this myth starts with an important book by Susan Estrich

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[101] Kimberly A Lonsway and Louise F Fitzgerald, 'Rape Myths. In Review' (1994) 18 Psychology of Women Quarterly 133, 134.

[102] Lonsway and Fitzgerald (n 101); Katie M Edwards and others, 'Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change' (2011) 65 Sex Roles 761; Suzanne Zaccour, *La fabrique du viol* (Leméac 2019).

published in 1987, titled *Real Rape*.[103] Other contributions, such as Nils Christie's description of ideal victims and ideal offenders,[104] also help define the problem.

Real rape

In her book 'Real Rape', Susan Estrich explores why acts that fit the legal definition of rape are often not prosecuted. She explains that our society and legal actors adhere to an image of the 'real rape' that has certain characteristics: the perpetrator is a stranger who attacks the victim in a public place, he uses a weapon and physical violence, the victim vehemently resists. By contrast, a 'simple rape' is one by an acquaintance or a date, where no extrinsic violence is used. The latter category is much more common but rarely prosecuted.

More recently, Michelle Anderson has described the 'classic rape narrative' corresponding to the 'real rape' myth as follows:

> A fair young woman is walking home alone at night. Gray street lamps cast shadows from the figure she cuts through an urban landscape. She hurries along, unsure of her safety. Suddenly, perhaps from behind a dumpster, a strange, dark man lunges out at her, knife at her throat, and drags her into a dark alley where he threatens to kill her, and beats her until she bleeds. The young woman puts up a valiant fight to protect

[103] Susan Estrich, *Real Rape* (Harvard University Press 1987).

[104] Nils Christie, 'The Ideal Victim' in Ezzat A Fattah (ed), *From Crime Policy to Victim Policy* (Springer 1986).

> her sexual virtue, but the assailant overcomes her will and rapes her. Afterwards, she immediately calls the police to report the offense.[105]

The main characteristics of the real rape, then, are that: '"real" rape is between strangers . . .; "real" rape is physically violent and a "real" victim fights back'.[106] Physical violence is a crucial point: in a 'real rape', '[t]he aggressor uses force (or the threat of force) to compel the victim's submission. There may be a beating (or threat of one) to effect the rape, and the rapist may engage in other conduct which is degrading or humiliating, additional to the rape'.[107]

The 'real rape' myth is closely related to Nils Christie's concept of the 'ideal victim'. The Norwegian sociologist labels as such 'a person or a category of individuals who – when hit by crime – most readily are given the complete and legitimate status of being a victim'.[108] The ideal victim '*is weak compared to the unrelated offender*, as well as having put a *reasonable energy into protecting herself*'.[109] In rape cases, Christie

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[105] Anderson, 'All-American Rape' (n 2) 625–626.

[106] Logan, Walker and Cole (n 45) 112, references omitted.

[107] JH Bogart, 'Reconsidering Rape: Rethinking the Conceptual Foundations of Rape Law' (1995) 8 Canadian Journal of Law and Jurisprudence 159, 166.

[108] Christie (n 104).

[109] ibid 19, emphasis in original.

explains, the ideal victim 'is the young virgin on her way home from visiting sick relatives, severely beaten or threatened before she gives in'.[110]

Feminists have raised concerns about the impact of the 'real rape', 'ideal victim' and 'ideal offender' categories on legal and societal understanding of sexual violence. 'The more an alleged rape deviates from [the real rape] script', studies suggest, 'the less credible it is thought by police, discussion group members and students'.[111]

In this context, the problem with the recognition—or lack thereof—of partner sexual violence is threefold. The first problem is that if 'real rape' is stranger rape, then by definition partner sexual violence cannot qualify. Christie explains that 'raped wives do not exactly represent the ideal type of victims'[112] because they do not have the power to make their point of view heard. Moreover, '[i]deal victims need – and create – ideal offenders. The two are interdependent'.[113] The partner or husband, however, is not an ideal offender because he is not 'a dangerous man coming from far away'.[114]

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[110] ibid.

[111] Jenny McEwan, 'Proving Consent in Sexual Cases: Legislative Change and Cultural Evolution' (2005) 9 The International Journal of Evidence & Proof 1, 3.

[112] Christie (n 104) 19.

[113] ibid 25.

[114] ibid 26.

While Christie observed in 1986 that wives were approaching the status of ideal victims, because access to divorce gave them more social power,[115] the 'real rape' and 'ideal victim' paradigms continue to obscure the recognition of partner sexual violence. Indeed, U.S. authors have raised the concern that our society often does not perceive non-consensual sexual activity as rape when it occurs within a romantic relationship.[116] Empirical studies have documented the impact of the real rape myth in people's attitudes towards sexual violence that deviates from this script, including partner sexual violence. In Basile's national probability study on attitudes toward marital rape in the U.S., 27% of respondents did not agree that a husband commits rape when he forces sex onto his wife while she is continually saying 'no'. When the respondents were told that the wife led him on, 37% of respondents though there was no rape despite the husband physically forcing the wife.[117] In another study with 200 undergraduate U.S. students published in 2000, researchers found that the closer the victim was to the perpetrator, the less seriously the perpetrator's actions were perceived, even though they were described in

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[115] ibid 20.

[116] See eg Michal Buchhandler-Raphael, 'The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power' (2011) 18 Michigan Journal of Gender & Law 147, 176–177.

[117] Kathleen C Basile, 'Attitudes Toward Wife Rape: Effects of Social Background and Victim Status' (2002) 17 Violence and Victims 341. In the UK, a 2018 study revealed that 24% of people think 'that in most cases it isn't rape if non-consensual sex occurs within a long-term relationship': YouGov, 'Attitudes to Sexual Consent' (End Violence Against Women Coalition 2018) 3 <https://www.endviolenceagainstwomen.org.uk/wp-content/uploads/1-Attitudes-to-sexual-consent-Research-findings-FINAL.pdf> accessed 12 March 2019.

the exact same way.[118] Being told that a dating couple had had previous consensual sexual relationships was also an important factor in making 'rape-supportive and sex role stereotypical attributions about the rape'.[119] Other studies have also found that sexual violence is perceived as more socially acceptable when committed by a partner as opposed to a stranger.[120]

Available studies of attitudes towards partner sexual violence target different subcategories of 'partner sexual violence', sometimes focusing only on rape by a married partner, other times expanding to include unmarried partners and/or a broader range of sexually violent acts. Unmarried cohabitation has a different prevalence and meaning in different cultural contexts, and it would be interesting, although not necessary for my purpose, to parse out potential differences between the categories of 'partners', 'ex-partners', 'unmarried partners', 'sexual partners', 'married partners', etc. Despite variations in focus and methodologies, however, trends can be identified. Reviewing a large number of empirical studies, Christophe and Pflieger summarize that '[a] consistent

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[118] Candice M Monson, Jennifer Langhinrichsen-Rohling and Tisha Binderup, 'Does "No" Really Mean "No" After You Say "Yes"?: Attributions About Date and Marital Rape' (2000) 15 Journal of Interpersonal Violence 1156, 1167–1168.

[119] ibid 1168.

[120] See eg Bennice and Resick (n 86) 232.

finding across studies is that sexual aggression is typically viewed less pejoratively when the victim is a romantic partner rather than a stranger'.[121]

Our second problem is that partner sexual assault may be disregarded or normalized for lacking other features constitutive of the real rape script, such as the use of weapons, physical violence by the assailant, or intense physical and verbal resistance by the victim. As we saw in chapter 1, physical violence is often absent in cases of partner sexual violence; perpetrators might rather use 'covert intimidation'.[122]

Moreover, contrary to real rape mythology that expects complainants to express non-consent forcefully, either physically or verbally, 'such expression is not the norm with the reality of [intimate partner sexual violence].[123] Rather, 'research indicates that the closer the offender is to the victim, the less likely it is the victim will use forceful resistance strategies'.[124] Victims of partner sexual violence 'often employ verbal means of resistance. However, most of marital rape victims are either unable or afraid to resist sexual aggression by their husbands'.[125] In one study, victims of rape or attempted rape

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[121] Christopher and Pflieger (n 36) 136.

[122] Patricia L Easteal, 'The Cultural Context of Rape and Reform' in Patricia L Easteal (ed), *Balancing the Scales: Rape, Law Reform, and Australian Culture* (Federation Press 1998) 7.

[123] Jessica White and Patricia Easteal, 'Feminist Jurisprudence, the Australian Legal System and Intimate Partner Sexual Violence: Fiction over Fact' (2016) 5 Laws 1, 7.

[124] Logan, Walker and Cole (n 45) 112.

[125] Martin, Taft and Resick (n 32) 329.

by a partner were 68% less likely to exhibit resistance than victims of other types of rape or attempted rape; when partner sexual violence victims resisted, they were 66% more likely to employ verbal rather than physical resistance.[126] A context of coercive control[127] can also constrain women's expression of resistance: the victim might know that further violence is to be expected if she refuses to comply with a demand for sexual activity.

Consequently, as Australian authors Jessica White and Patricia Easteal explain, '[partner] rape can be perceived as an "illegitimate" rape because there may be no physical injuries, no resistance or witnesses, and reporting can be delayed. These characteristics directly contradict community attitudes concerning what constitutes "real" rape'.[128]

The third problem with the recognition of partner sexual violence in light of the 'real rape' myth is that, in addition to lacking features constitutive of 'real rape', partner sexual violence shares features with normalized 'sexual scripts'. To understand this point, we now move to the next important theoretical contribution to understand the social context of partner sexual violence: 'sexual scripts' theory.

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[126] Jody Clay-Warner, 'The Context of Sexual Violence: Situational Predictors of Self-Protective Actions' (2003) 18 Violence and Victims 543.

[127] Stark, *Coercive Control* (n 60).

[128] White and Easteal (n 123) 2.

Sexual scripts

Our sexual interactions do not happen in a vacuum: they are influenced by 'sexual scripts'[129] or shared ideas of how a sexual interaction should happen. Cultural scenarios are 'instructional guides'[130] that 'essentially instruct in the narrative requirements of specific roles; they provide for the understandings that make role entry, performance, and/or exit plausible for both self and others'.[131] While sexual scripts are not 'entirely predictive of actual behavior',[132] '[t]he enactment of virtually all roles . . . must reflect either directly or indirectly the contents of appropriate cultural scenarios'.[133] William Simon and John Gagnon observe that '[i]t is [the] complex process of sexual scripting that encourages the very conservative, highly ritualized, or stereotyped character that sexual behavior often takes'.[134]

Sexual scripts provide an important piece of the puzzle in understanding the prevalence and acceptability of partner sexual violence because these scripts include and

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[129] William Simon and John H Gagnon, 'Sexual Scripts: Origins, Influences and Changes' (2003) 26 Qualitative Sociology 491.

[130] William Simon and John H Gagnon, 'Sexual Scripts: Permanence and Change' (1986) 15 Archives of Sexual Behavior 97, 110.

[131] ibid 98.

[132] ibid; citing Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge University Press 1977).

[133] Simon and Gagnon (n 130) 98.

[134] ibid 110.

normalize sexual aggression by male partners. As a result, there are shared features between rape and seduction scripts, such as women's initial refusal. 'Not only do cultural stereotypes perpetuate the idea that male sexual aggression is a natural response to arousal but they also suggest that sexual force is normal within (hetero)sexual relationships',[135] Karen Weiss explains. 'Within this context', she notes, 'a man who pursues sex aggressively and persists even when the woman says "no" may be seen as merely following his masculine scripts, whereas a woman who says "no" is seen as "playing" hard to get and really wants to be convinced'.[136]

These cultural assumptions likely contribute to the prevalence of male sexual aggression.[137] Thus, gender norms 'lay the foundation'[138] for sexual aggression: 'girls and women are primed to say "yes" and boys and men are inclined to assume consent'.[139] Women often 'sexually acquiesce to their male partners because they see it as their responsibility to attend to his sexual needs and, conversely, "feel bad" if they choose not

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[135] Karen G Weiss, '"Boys Will Be Boys" and Other Gendered Accounts: An Exploration of Victims' Excuses and Justifications for Unwanted Sexual Contact and Coercion' (2009) 15 Violence Against Women 810, 812.

[136] ibid.

[137] Ethan Czuy Levine, 'Sexual Scripts and Criminal Statutes: Gender Restrictions, Spousal Allowances, and Victim Accountability After Rape Law Reform' (2018) 24 Violence Against Women 322, 6, references omitted.

[138] Laina Y Bay-Cheng and Rebecca K Eliseo-Arras, 'The Making of Unwanted Sex: Gendered and Neoliberal Norms in College Women's Unwanted Sexual Experiences' (2008) 45 Journal of Sex Research 386, 391.

[139] ibid.

to'.[140] Regular sexual availability is perceived as essential to the maintenance of an intimate relationship,[141] and women feel pressured to satisfy men's fantasies even when they do not desire the sexual activity in question.[142] Thus, 'female sexual compliance is normalised "in the name of love" and being accommodating to unwanted sex is "normal" behaviour for women who love their partners'.[143]

Gender norms of male aggressiveness and female passivity consequently 'blur definitional boundaries between rape and normal heterosexual behavior'.[144] Observing the proximity between 'sex' and 'rape' scripts, feminist authors have challenged the binary categorization of sex/rape and theorized the notion of a 'continuum' of sexual violence. For Nicola Gavey, the problem 'lies in the way that normative heterosex is patterned or scripted in ways that permit far too much ambiguity over distinctions between what is rape and what is *just sex*'.[145] Gavey explains that in the 1980s, rape started to be seen 'not as some aberrant act of a deranged man, but as existing on a

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[140] Melissa Burkett and Karine Hamilton, 'Postfeminist Sexual Agency: Young Women's Negotiations of Sexual Consent' (2012) 15 Sexualities 815, 827.

[141] Gavey (n 1) ch 5; Logan, Walker and Cole (n 45) 115–116; Vannier and O'Sullivan (n 72) 430.

[142] Jonathan Herring, 'Coercive Control and Rough Sex' in Hannah Bows and Jonathan Herring (eds), *'Rough Sex' and the Criminal Law: Global Perspectives* (Emerald 2022).

[143] Burkett and Hamilton (n 140) 825.

[144] Weiss (n 135) 812.

[145] Gavey (n 1) 2.

continuum with other, more normal behaviors'.[146] As a result, we now know that 'rape and sexual intercourse are not always automatically distinguishable from the point of view of women or the law'.[147] Other authors[148] have also highlighted the proximity between sex and rape, leading to the observation that, 'in a male oriented society, rape seems to occupy a position somewhere between accepted practice and unacceptable crime'.[149]

The 'cultural confusion about the distinction between consensual and nonconsensual sex'[150] has also been measured empirically. For example, a study by Heather Littleton and Danny Axsom attempting to uncover a seduction and a rape script from U.S. students found that 'both scripts tended to involve the use of manipulative tactics on the part of the man to obtain sex'.[151] Other studies have suggested that sexual scripts which equate coercion with seduction affect people's perceptions and

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[146] ibid 6.

[147] ibid 33.

[148] See eg Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) 174; Louise du Toit, 'From Consent to Coercive Circumstances: Rape Law Reform on Trial' (2012) 28 South African Journal on Human Rights 380, 397.

[149] Arnie Cann and others, 'Rape' (1981) 37 Journal of Social Issues 1, 1.

[150] Baker (n 97) 302.

[151] Heather L Littleton and Danny Axsom, 'Rape and Seduction Scripts of University Students: Implications for Rape Attributions and Unacknowledged Rape' (2003) 49 Sex Roles 465.

characterizations of incidents of forced sex, especially when such incidents contain ambiguous features deviating from the 'real rape' scenario.[152]

This problem of sexual scripts affecting the recognition of sexual violence is particularly relevant to understand social attitudes toward cases of partner sexual violence that do not involve extrinsic physical violence. In these cases, the concern is that partner sexual violence looks more like 'normal sex' than 'real rape'. This resemblance with sexual scripts makes it hard to see and acknowledge partner sexual violence, as 'incidents of forced sex that contain aspects of individuals' normative sexual scripts are less likely to be characterized as rape than those that do not'.[153] Partner sexual violence is not likely to involve the use of weapons or extreme physical violence, as required in the 'real rape' script. Rather, it may involve post-refusal persistence and various forms of non-physical sexual coercion. Ultimately, '[s]uch behaviours within relationships, rather than viewed as sexually exploitative behaviour, are normalised by gendered norms which convey the idea of men's relentless and thus not readily extinguishable sexual desires'.[154]

This overview of the literature on attitudes toward partner sexual violence expresses the concern that, even though U.S. society presents rape as a very serious

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[152] Heather L Littleton, Danny Axsom and Matthew Yoder, 'Priming of Consensual and Nonconsensual Sexual Scripts: An Experimental Test of the Role of Scripts in Rape Attributions' (2006) 54 Sex Roles 557, 561.

[153] ibid 557.

[154] Burkett and Hamilton (n 140) 827.

crime, it still has unresolved ambivalence toward partner sexual violence, especially when not physically forced. Before moving to check whether this literature has relevance in the contemporary Canadian context, another important concept, crucial to understand following sections of this thesis, must be introduced: that of unacknowledged victims.

Unacknowledged victims

Rape myths and sexual scripts do not only affect society's response to victims' disclosure of partner sexual violence; they also affect victims' perception of their own victimization. Many women who experience sexual violence, especially partner and non-physically forced sexual violence, do not label it as 'rape' or 'sexual assault'. These victims are called 'unacknowledged victims'.[155]

The issue of unacknowledged victims was first raised by Mary Koss in 1985. When Koss set out to measure the prevalence of rape with the Sexual Experiences Survey, she observed that some women responded positively to behaviorally specific questions corresponding to the definition of rape, yet denied having experienced rape. The numbers were striking: 64% of women who reported having been subjected to behaviours that met the legal definitions of rape rejected the label of 'rape'.[156] Koss

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[155] Littleton, Axsom and Yoder (n 152) 557.

[156] Mary P Koss, 'The Hidden Rape Victim: Personality, Attitudinal, and Situational Characteristics' (1985) 9 Psychology of Women Quarterly 193.

called this phenomenon ‘hidden rape’, although the terminology of ‘unacknowledged victims’ has since become more widely used.[157]

The problem of unacknowledged victims is not exclusive to the partner context, but researchers have hypothesized that in a society that muddles the distinction between consent and non-consent, ‘[t]he marital context makes this already ambiguous situation even more confused’.[158] Indeed, numerous studies spanning several decades have observed that women are less likely to characterize coerced sex as rape when the perpetrator is an intimate partner.[159] From a review of available studies, Logan, Walker

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[157] Dusty J Johnstone, ‘A Listening Guide Analysis of Women’s Experiences of Unacknowledged Rape’ (2016) 40 Psychology of Women Quarterly 275, 275.

[158] Basile (n 11) 1054; see also Weiss (n 135) 824.

[159] Logan, Walker and Cole (n 45) 114; Basile (n 11) 1053; Raquel Kennedy Bergen, *Wife Rape: Understanding the Response of Survivors and Service Providers* (Sage 1996); David Finkelhor and Kersti Yllö, *License to Rape: Sexual Abuse of Wives* (Free Press 1985); Mary P Koss, ‘Detecting the Scope of Rape: A Review of Prevalence Research Methods’ (1993) 8 Journal of Interpersonal Violence 198; Robin Warshaw, *I Never Called It Rape: The Ms Report on Recognizing, Fighting, and Surviving Date and Acquaintance Rape* (Harper & Row 1988); Jody Clay-Warner and Callie Harbin Burt, ‘Rape Reporting after Reforms: Have Times Really Changed?’ (2005) 11 Violence Against Women 150; Arnold S Kahn, Virginia Andreoli Mathie and Cyndee Torgler, ‘Rape Scripts and Rape Acknowledgment’ (1994) 18 Psychology of Women Quarterly 53; Mary P Koss and others, ‘Stranger and Acquaintance Rape: Are There Differences in the Victim’s Experience?’ (1988) 12 Psychology of Women Quarterly 1; Mary P Koss, Christine A Gidycz and Nadine Wisniewski, ‘The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students.’ (1987) 55 Journal of Consulting and Clinical Psychology 162; Linda S Williams, ‘The Classic Rape: When Do Victims Report?’ (1984) 31 Social Problems 459; Charity B Hammond and Karen S Calhoun, ‘Labeling of Abuse Experiences and Rates of Victimization’ (2007) 31 Psychology of Women Quarterly 371; Arnold S Kahn, ‘2003 Carolyn Sherif Award Address: What College Women Do and Do Not Experience as Rape’ (2004) 28 Psychology of Women Quarterly 9; Arnold S Kahn and others, ‘Calling It Rape: Differences in Experiences of Women Who Do or Do Not Label Their Sexual Assault as Rape’ (2003) 27 Psychology of Women Quarterly 233; Melissa J Layman, Christine A Gidycz and Steven Jay Lynn, ‘Unacknowledged versus Acknowledged Rape Victims: Situational Factors and Posttraumatic Stress.’ (1996) 105 Journal of Abnormal Psychology 124; Heather Littleton, Amie Grills-Taquechel and Danny Axsom, ‘Impaired and Incapacitated Rape Victims: Assault Characteristics and Post-Assault Experiences’ (2009) 24 Violence and Victims 439; Heather Littleton, Carmen Radecki Breitkopf and Abbey Berenson, ‘Beyond the Campus:

and Cole summarize that 'only between 30 % and 45 % of those who reported being forced by a partner to have sex labeled those experiences as rape, compared to between 55 % and 72 % of those who reported forced sex by nonpartner assailants'.[160] Note that women rejecting the label of rape or sexual assault does not mean that they do not recognize that the sexual activity in question was unwanted, threatening or coerced.[161]

Non-acknowledgement is particularly common when surveys use broad and vaguely worded, as opposed to behaviourally specific, questions.[162] As Emily Strang, Zoë Peterson, Yvette Hill and Julia Heiman summarize, '[d]ecades of research demonstrate that more behaviorally specific items produce higher reports of aggression than items that ask about "rape" or "sexual assault"'.[163] Logan, Walker and Cole report also report that '[b]ehavior-specific questions that probe for experiences of forced sexual activities . . . yield higher and more reliable information [than questions that use the label "rape"]'. A quote from one survivor cited by Patricia Easteal and Christine Feerick illustrates this phenomenon: 'The counsellor asks: "Have you been raped?" I answer:

Unacknowledged Rape among Low-Income Women' (2008) 14 Violence Against Women 269; Anna E Jaffe and others, 'Characterizing Sexual Violence in Intimate Relationships: An Examination of Blame Attributions and Rape Acknowledgment' (2021) 36 Journal of Interpersonal Violence 469.

[160] Logan, Walker and Cole (n 45) 114, references omitted.

[161] ibid 122.

[162] Cook and others (n 73) 206.

[163] Strang and others (n 70) 459.

"No". Questioning needs to be much more subtle and specific: Eg: "How does he initiate sex?" Do you say no to sex? Can you? Have you? What did he say? What did he do?'[164] Research has found that using the legal definition of rape—rather than relying on the word alone—can lead to 11 times more women responding positively to the victimization question![165] Interestingly, women's understanding of whether they have been sexually assaulted can vary with time[166] and as they receive outside help.[167]

Researchers have offered several hypotheses, including social and psychological factors, for why a victim may not label a rape as such. The 'real rape' representation and sexual scrips are part of the problem, as explained above, and so is the fact that women may not recognize that 'they have the right refuse sex with an intimate partner'[168] and that 'marital rape is against the law'.[169] Furthermore, in violent relationships, sexually violent behaviours may be so 'routine or habitual that they . . . become functionally

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[164] Easteal and Feerick (n 17) 189.

[165] Bonnie S Fisher, Francis T Cullen and Michael G Turner, 'The Sexual Victimization of College Women' (US Department of Justice, National Institute of Justice and Bureau of Justice Statistics 2000).

[166] Johnstone (n 157) 277.

[167] Bergen (n 159), cited in Basile (n 11) 1055.

[168] Clare Dalton and Elizabeth M Schneider, *Battered Women and the Law* (Foundation Press 2001) 565.

[169] Schafran (n 45) 161.

invisible'.[170] On the other hand, victims who report that sexual violence 'happened only once [or] occasionally struggle[] with whether or not to respond affirmatively to the exposure question'.[171] Even women who disclose domestic violence may fail to report sexual assault.[172]

The literature offers another interesting explanation for why women reject the label of rape: refusal to see themselves as victims. Women may construct alternative accounts of their experience as a coping mechanism to avoid its classification as 'rape' or 'sexual assault'. Weiss explains that:

> by rationalizing unwanted sexual situations as unintentional or not-so-bad, accounts construct a noncrime reality that requires no formal action to be taken, such as reporting to the police or other authorities. In this manner, . . . victims are able to deny their victimhood and maintain a sense of power and control.[173]

Moreover, 'accounts may work as coping mechanisms that allow victims of unwanted sexual coercion to minimize the deviance of what happened in order to sustain

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[170] Fiona Wilson and Paul Thompson, 'Sexual Harassment as an Exercise of Power' (2001) 8 Gender, Work & Organization 61, 61, discussing sexual harassment at work; see also Logan, Walker and Cole (n 45) 119.

[171] Logan, Walker and Cole (n 45) 119.

[172] See for example Berman (n 45) 27–28.

[173] Weiss (n 135) 829.

relationships with their offenders'.[174] These minimizing accounts 'downplay the seriousness of what happened and enable victims to avoid the cognitive discomfort of having to label situations as crimes, offenders as criminals, or conceptualize themselves as crime victims'.[175] In other words, women's belief in their own sexual agency and unwillingness to consider themselves as rape victims may motivate and enable them to 'construct away the injury of rape'.[176]

A recent meta-analysis of empirical studies, conducted by Catherine Rousseau, Manon Bergeron, and Sandrine Ricci, offers empirical validation to hypothesized reasons for not labelling an experience of sexual violence as such.[177] There we find a mix of cultural and psychological factors influencing women's rejection of the 'sexual violence' (or 'rape', or 'sexual assault') label.

First, victims are influenced by self-blame and hold themselves as at least partially responsible for what happened.[178] Second, victims normalize sexual violence,

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[174] ibid.

[175] ibid 819.

[176] Katharine K Baker and Michelle Oberman, 'Women's Sexual Agency and the Law of Rape in the 21st Century' (2016) 69 Studies in Law, Politics, and Society 63, 66.

[177] Catherine Rousseau, Manon Bergeron and Sandrine Ricci, 'A Metasynthesis of Qualitative Studies on Girls' and Women's Labeling of Sexual Violence' (2020) 52 Aggression and Violent Behavior 101395.

[178] ibid 4.

noting that '[t]he event was not a big deal' or that '[i]t happens all the time.[179] Victims may see sexual violence 'as normal dating behavior within heterosexual relationships'.[180] They may deny the perpetrator's responsibility, for example by referring to the event as accidental or by blaming drugs or alcohol.[181] Third, women reject the term 'sexual violence' because '[r]ecognizing [themselves] as a victim goes against a strong self-image'.[182] Fourth, women evaluate their experience according to the 'real rape' script. Victims may not label an experience as rape or sexual violence in the absence of physical violence, injuries, penetration, or trauma.[183] Conversely, women may label an experience as sexual violence if such features are present.[184] Furthermore, the perpetrator may not fit with their mental image of a stereotypical rapist because he is a partner or friend.[185] Women may also believe that consent cannot be withdrawn, such that no sexual violence is committed once they agreed to fondling.[186] The authors finally note that ambivalence

[179] ibid.

[180] ibid 5.

[181] ibid.

[182] ibid.

[183] ibid 5–6.

[184] ibid 6.

[185] ibid.

[186] ibid.

and uncertainty regarding which terms to use may characterize victims' accounts,[187] and that receiving social support or educational information on sexual violence may lead victims to adopt the label of 'sexual violence'.[188] In other words, victims' non-acknowledgement is not set in stone.

What emerges from the literature are serious concerns that victims do not recognize sexual violence committed against them, especially if the event does not match the 'real rape' script—for instance, if the perpetrator is a partner and if he did not use extrinsic physical force. The reasons for non-acknowledgement are multifaceted. Of note is the influence of the social context (rape myths) as well as the negative implications of seeing oneself as a victim of sexual violence (non-acknowledgement as a coping mechanism). Whatever the reason, the phenomenon of unacknowledged victims reveals a social context where partner sexual violence is difficult to recognize.

Zooming in on attitudes toward partner sexual violence in contemporary Canada

While the literature surveyed above is fundamental to understand the social problem of partner sexual violence, one cannot assume that the feminist critiques of perceptions of

[187] ibid.

[188] ibid 7.

sex and sexual violence remain unchanged across geographical and historical contexts. We must thus now turn our attention to the following question: are these theoretical and empirical contributions on the normalization of partner sexual violence applicable to contemporary Canada? Drawing on recent Canadian studies, I show in this section that the concepts of 'real rape', 'sexual scripts' and 'unacknowledged victims' find application in the context in which my thesis is situated.

Note that this section draws upon available Canadian literature without purporting to precisely quantify attitudes about partner sexual violence—which likely vary by age group, by province, by gender, and by many more factors. Canada is not a uniform country. Nonetheless, keeping our inquiry at a high level of generality is sufficient for the purposes of this chapter—that is, to present concerns about the social context of partner sexual that must be understood before turning our attention to the legal response to this phenomenon.

Note also the rarity of empirical studies related to perceptions of partner sexual violence within the Canadian population. Even recent Canadian work on the topic builds on and refers to U.S. literature and studies from 15 to 30 years ago. It is likely that problematic attitudes toward sexual violence have diminished over the years, at least in their overt form, and it is likely that the Canadian context has at least some measurable differences to the U.S. context. But this, of course, does not mean that concepts of 'real rape' and 'sexual scripts' are no longer relevant, as we will see. It is also pertinent to note that many available studies, whether from Canada or other countries, use university

students as participants due to the convenience of studying this population. There are important critiques in psychological research about the tendency to generalize from 'weird' (Western, Educated, Industrial, Rich, and Democratic) subjects and neglect the study of other groups.[189] Despite this limitation, the information that studies of university populations provide remain relevant, as nearly 30% of Canadian of working age hold a University degree.[190] If anything, one would expect University students to be more critical of rape mythology than other groups, given the increased sexual assault awareness campaigns in schools and universities in recent years.

That being said, the available literature shows the continued relevance of the 'real rape' / 'simple rape' dichotomy identified by Estrich as well as the role of gendered sexual scripts in making partner sexual violence excusable and invisible, even to its victims. A recent series of articles (2017 to 2020) by researchers Nicole Jeffrey and Paula Barata, following the former's doctoral thesis at the University of Guelph in Ontario,[191] provide a rich—and rare—snapshot of current attitudes toward partner sexual violence among both women and men. Their studies will thus be explored in depth. Other

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[189] See eg Michael Muthukrishna and others, 'Beyond Western, Educated, Industrial, Rich, and Democratic (WEIRD) Psychology: Measuring and Mapping Scales of Cultural and Psychological Distance' (2020) 31 Psychological Science 678; Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (1st ed, Pantheon Books 2012) ch 5.

[190] 'Percentage of 25 to 64 Year Olds in Population with a University Degree' (*Canadian Index of Wellbeing*, 1 November 2016) <https://uwaterloo.ca/canadian-index-wellbeing/what-we-do/domains-and-indicators/percentage-25-64-year-olds-population-university-degree> accessed 17 February 2022.

[191] Jeffrey (n 72).

Canadian studies show that a substantive minority of the population adheres to rape mythology, and that the social context of partner sexual violence continues to be one where properly identifying such violence is complex.

Canadian women's interpretations of partner sexual violence and non-acknowledgement

The measure of victims' acknowledgment depends on the definition of 'rape' adopted by the researchers or applicable in the jurisdiction in which the study takes place. For example, if a jurisdiction does not consider that unconscious sex is rape, victims who do not label this experience as 'rape' are not 'unacknowledged'. Problematically, U.S. studies on the labelling of 'rape' often focus on forced penetrative sexual violation, which is inadequate in a Canadian context where sexual assault includes all non-consensual sexual contact. Moreover, we can hypothesize that measures of acknowledgement will depend on the label proposed to victims. Hence the need to measure acknowledgement in Canada, where the relevant label is 'sexual assault', not 'rape'.

Despite the lack of quantitative studies of acknowledgement of partner sexual violence that would allow for numerical comparisons between the U.S. and Canada, the available literature documents the existence of unacknowledged victims in contemporary Canada. Consistent with the predictions that our society does not perceive partner sexual violence as 'real rape' and that partner sexual violence remains difficult to recognize,

studies find that Canadian victims often minimize, excuse and fail to recognize partner sexual violence.

In a rare[192] qualitative study of Canadian unacknowledged victims, Dusty Johnstone used both the terms 'rape' and 'sexual assault'; unacknowledged victims were those who responded negatively to questions using both labels. However, her study participants had all been sexually assaulted in situations of unconsciousness or intoxication and were only asked about unwanted oral, anal or vaginal penetration.[193] Thus, non-acknowledgement of forms of sexual violence typically considered less serious (e.g. submission induced through verbal tactics; non-penetrative sexual contact) was not explored. Moreover, the study was not specific to partner sexual violence.

Nonetheless, Johnstone's study is useful to illustrate that self-blame and the perceived 'normativity of coercive experiences within heterosexual relationships'[194] are barriers to victims' labelling their experience as sexual assault. Downplaying the event 'as both a vehicle for processing what had happened and as a mechanism to facilitate

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[192] In their metasynthesis of qualitative studies of unacknowledged victims, Rousseau, Bergeron, and Ricci (Canadian researchers) only include one Canadian study: Rousseau, Bergeron and Ricci (n 177). This study is: Johnstone (n 157).

[193] Johnstone (n 157) 277.

[194] ibid 280.

coping'[195] was also observed. In two cases of sexual violence by a current or ex-partner, the victims 'acknowledged that what their partners had done to them was wrong, but they preferred to focus on how the specific behaviours were wrong, in a general sense, rather than assign a stigmatizing label that they felt would inevitably hurt their relationships'.[196] One victim explained that she could not acknowledge her ex-husband as her rapist because it would impact her relationship with her children: 'It'll affect my relationship with my kids because every time that I see him I will hate him. I will hate my kids for it, because they're a part of him'.[197]

Johnstone's study is also useful in showing that women's perception of their victimization is not fixed. Three of her 10 participants changed their acknowledgement status in the six weeks between their filling of the first questionnaire and the actual interview.[198] Women also changed their view of the perpetrator's responsibility as the interview progressed. As the victims heard themselves speak, 'they became conscious of how the stories sounded to an outsider. They began to voice more anger and they asked

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[195] ibid.

[196] ibid 281.

[197] ibid.

[198] ibid 277.

more questions—questions about the legitimacy and appropriateness of what had happened to them'.[199]

This observation raises interesting questions about the role of the law and legal actors. If conducted appropriately and sensitively, could contact and discussions with actors in the criminal justice system similarly contribute to raising rates of acknowledgement? The reality of unacknowledged victims should not be seen as a fatality or a reason not to criminalize sexual assault.[200] Rather, it would be interesting to explore the role of the law in helping women label and come to terms with what they have experienced—something to which we will come back in later solution-driven chapters.

Another useful qualitative study is one by Jeffrey and Barata which focuses on women's experiences of sexual coercion by male intimate partners. The authors found that 'women did not interpret their partners' [sexual coercion] as unequivocally negative, but rather minimized, contrasted, and justified it', even painting it in a positive light in a few cases.[201] They add that '[s]ome women minimized [sexual coercion] by seeing it as a normal part of relationships. This was particularly true for less forceful forms of [sexual

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[199] ibid 284.

[200] As argued in Baker (n 97).

[201] Jeffrey and Barata, '"He Didn't Necessarily Force Himself Upon Me, But . . . "' (n 61) 918.

coercion] such as verbal pressure, arguments, and arousal tactics'.[202] Often, 'the women did not know what to call their experiences and made contradictory interpretations',[203] especially when subjected to verbal coercion.

These findings are consistent with previous research on the 'real rape' myth which suggests that both an intimate relationship and the absence of extrinsic physical violence contribute to making sexual violence more socially acceptable. The authors hypothesize that women's failure to articulate their experience as sexual assault 'may have been because [their] experience did not fit either the dominant definition of rape as violent and perpetrated by a stranger or of a typical intimate relationship.[204] On the role of physical violence specifically, the authors explain that '[p]articipants sometimes minimized their experiences by contrasting them with something more severe',[205] such as physical beatings.

Consequently, Jeffrey and Barata conclude that:

> Women's interpretations of [sexual coercion] in the current study support theory and research that suggest that women are less likely to acknowledge an experience as rape when the perpetrator is an intimate

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[202] ibid 919.

[203] ibid 925.

[204] ibid.

[205] ibid 919.

> partner and may have a harder time articulating a sexually coercive experience that does not involve physical force'[206]

Canadian men's interpretations of partner sexual violence

What about men's and perpetrators' interpretations of partner sexual violence? Common sense suggests that they are no less problematic than victims' accounts, and this hypothesis is confirmed by two other studies by Jeffrey and Barata. Particularly interesting are the similarities between one study of recruited perpetrators prompted to discuss their behaviour, and one more general study of heterosexual university men who participated in conversations about sexual behaviors in intimate relationship. The similarities between identified perpetrators and the general male population echoes the feminist critique of sexual violence as scripted, or as 'culturally dictated, not culturally deviant'.[207]

In their study of perpetrators published in 2019, Jeffrey and Barata interviewed men who self-identified as having used sexual violence in their most recent relationship with a woman. Regarding sexual scripts, the researchers found men's sexual coercion and accounts thereof to be 'patterned by dominant discourses about heterosexuality . . .

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[206] ibid 925.

[207] Katharine K Baker, 'Once a Rapist? Motivational Evidence and Relevancy in Rape Law' (1997) 110 Harvard Law Review 563, 578; also see generally Gavey (n 1); Jackson (n 3).

[which] allowed men to position themselves and their behavior as normal'.[208] The researchers explain that '[b]y invoking the male sexual drive discourse, the men were able to frame their [sexual violence] (and, in some cases, their partner's lack of sexual desire) as normal, expected, and reasonable'.[209] The 'have/hold discourse', which 'implies that sex is an assumed or expected part of heterosexual intimate relationships'[210] was less frequent, but also mobilized.[211] The authors conclude that with normalizing accounts 'the men did not need to deny and minimize their behaviors . . . because dominant discourses about heterosexuality worked to justify and normalize their behavior and render the violence and unjustness invisible'.[212]

Regarding the 'real rape' / 'simple rape' dichotomy, the authors explain that:

> Men's accounts of their [sexual violence] were patterned by dominant discourses about [sexual violence] and utilized minimizing strategies. This allowed them to position themselves and their behavior [i.e. 'simple rapes'] as not abnormal or violent; that is, they distanced

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[208] Nicole K Jeffrey and Paula C Barata, '"She Didn't Want To…and I'd Obviously Insist": Canadian University Men's Normalization of Their Sexual Violence Against Intimate Partners' (2019) 28 Journal of Aggression, Maltreatment & Trauma 85, 92.

[209] ibid 93.

[210] ibid.

[211] ibid.

[212] ibid 94.

> themselves and their behavior from more violent and extreme men and behavior [i.e. 'real rapes'].[213]

As discussed in the section above, the 'real rape' myth prevents the recognition of partner sexual violence. In Jeffrey and Barata's study, '[r]ather than denying the extremity of [sexual violence], the men positioned their own acts as distinct from dominant conceptions of [sexual violence]'.[214] As additional justificatory tools, men also 'positioned their [sexual violence] as a one-off and out of character'[215] and minimized the consequences of their sexual violence on their partners.[216]

Interestingly, the men in the study recognized 'at least some of their [sexual violence] (even nonphysical tactics) as bad, wrong, or selfish, or described feeling bad, guilty, disappointed in themselves, or even abusive'.[217] However, these accounts were contradictory and coexisted with the problematic accounts described above.[218] For example, 'many men emphasized the importance of consent and communication but also talked about how sex in their relationship often naturally "evolved" from kissing or

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[213] ibid.

[214] ibid 95.

[215] ibid.

[216] ibid 95–96.

[217] ibid 96.

[218] ibid 97–98.

foreplay without verbal communication, especially in longer-term relationships'.[219] This finding suggests that increased sexual consent education and awareness might affect discourses without necessarily preventing sexual violence or its justification. Affirmative consent messages heard on campus were recited without seemingly being applied by men 'to their relationships in any meaningful way'.[220] Instead, progressive discourses functioned to help 'the men position themselves as modern and good men'.[221] As the authors explain,

> [men's] talk about consent and communication appeared mainly as a way to continue to normalize their [sexual violence] or position it as one-off (that is, they usually seek consent), or to position themselves as good and modern men, without having to make meaningful changes to their behavior.[222]

An important question asked at the beginning of this section was whether past research on the normalization of partner sexual violence remains relevant today. On this point, the authors observe striking similarities between the results from their 'interviews with university men who engaged in mostly verbal [sexual violence]'[223] and a U.S. study with

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[219] ibid 99–100.

[220] ibid 101.

[221] ibid 98.

[222] ibid 101.

[223] ibid 100; citing Koss and Oros (n 69).

convicted rapists published in 1990.[224] Jeffrey and Barata explain that 'these similarities with past research with convicted rapists support feminist conceptualizations of [sexual violence] on a continuum where some acts are common and viewed as socially acceptable'.[225] Their conclusion is that the feminist critique of sexist sexual scripts which normalize partner sexual violence remains relevant today: despite some researchers' suggestion 'that the cultural gender script is beginning to value greater sexual agency for women in mixed-sex relationships', descriptions of sexual violence remain 'constrained by dominant discourses that act to reinforce gendered power relations'.[226]

In that study, though, participants were recruited on the basis of having committed partner sexual violence (and admitting it). Would similar findings apply to a broader population of university men, which presumably includes both perpetrators and non-perpetrators? I now turn to a third and last study by Jeffrey and Barata, published in 2020, where Canadian university men were invited to participate in focus groups to discuss sexual behaviours. In this study, the researchers again found a strong influence of sexist sexual scripts, concluding that

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[224] Jeffrey and Barata, '"She Didn't Want To…and I'd Obviously Insist"' (n 208) 100.

[225] ibid 101; citing Koss and Oros (n 69).

[226] Jeffrey and Barata, '"She Didn't Want To…and I'd Obviously Insist"' (n 208) 100; citing Gavey (n 1); Jeffrey and Barata, '"He Didn't Necessarily Force Himself Upon Me, But . . . "' (n 61); Catharine A MacKinnon, 'A Feminist/Political Approach: "Pleasure under Patriarchy"' in James H Geer and William T O'Donohue (eds), *Theories of human sexuality* (Plenum Press 1987); Weiss (n 135).

> [p]articipants legitimized a dominant, male-centered and sometimes violent version of heterosexuality . . . whereby (a) men have a higher and uncontrollable sex drive compared to women, (b) heterosexual initiation and progression occur naturally and without (men's) verbal communication, and (c) men misinterpret women's ineffective communication and this miscommunication causes sexual violence.[227]

Participants themselves described heterosexual practices 'as pre-given and part of a regular, recognizable pattern; specifically, as (a) natural and biological (i.e., biologically essential) and (b) scripted (i.e., socially essential)'.[228] 'This essentializing language and positioning', the authors explain, 'allowed men to further legitimize a dominant version of heterosexuality by marginalizing heterosexuality practices that do not fit the alleged norm'.[229] For instance, based on the dominant sexual script 'whereby heterosex is natural and starts naturally',[230] verbal consent-seeking was presented as abnormal and strange.[231] While there was some resistance to these dominant discourses by a minority of men, they were generally 'ineffective at shifting the conversations'.[232]

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[227] Nicole K Jeffrey and Paula C Barata, 'The Intersections of Normative Heterosexuality and Sexual Violence: University Men's Talk about Sexual Behavior in Intimate Relationships' (2020) 83 Sex Roles 353, 358.

[228] ibid.

[229] ibid.

[230] ibid 361.

[231] ibid 362.

[232] ibid 365.

Linking their results to previous research, Jeffrey and Barata again draw a story of continuity, not rupture. They note that men's discourses were consistent with 'a number of dominant discourses previously identified in the literature, including those that hold that heterosex is natural and "already mapped out," that men are the agentic subjects of sex, and that women are sexual gatekeepers responsible for controlling men's sexuality'.[233] Notably, participants' 'dominant, male-centered and sometimes violent version of heterosexuality . . . were related to heterosexuality discourses that have been discussed in the literature for over 30 years.[234]

Other research on rape myth endorsement in Canada

The previous qualitative studies were valuable in illustrating persisting problems with the recognition and perception of partner sexual violence. To complete the picture, it is useful to examine other recent studies which have explored the impact of rape myths on perceptions of sexual violence more generally (that is, not in the partner context). The half-full-glass story is that Canada has a relatively low rate of rape myth acceptance, at least among student populations. The half-empty-glass story reminds us that rape myths

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[233] ibid 362.

[234] ibid 366; citing Hannah Frith and Celia Kitzinger, 'Talk about Sexual Miscommunication' (1997) 20 Women's Studies International Forum 517; Nicola Gavey, 'Feminist Poststructuralism and Discourse Analysis: Contributions to Feminist Psychology' (1989) 13 Psychology of Women Quarterly 459; Wendy Hollway, *Subjectivity and Method in Psychology: Gender, Meaning and Science* (Sage Publications, Inc 1989); Cathy Waldby, Susan Kippax and June Crawford, 'Research Note: Heterosexual Men and "Safe Sex" Practice' (1993) 15 Sociology of Health & Illness 246.

continue to influence attitudes toward sexual violence. Given the mixed results found in recent Canadian studies, I conclude that feminists' historical contributions regarding rape mythology remain relevant.

A few surveys have been conducted to measure rape myth acceptance by Canadian students. In Quebec, a survey involving cegep students and employees found that 18% of students and 15% of employees either disagreed or were neutral toward the statement: 'it is as important to obtain sexual consent in ALL relations, regardless of whether the people previously had sexual relations together'.[235] The survey was conducted in November 2019—after the adoption, in 2017, of a law forcing post-secondary institutions to impart yearly sexual assault awareness activities on students and employees.[236] The homologous study at the University level found that 15% of respondents (which included students and employees) agreed or were neutral toward the statement 'if a person does not defend themselves physically or does not say 'no', that cannot be sexual assault'.[237] This statement contradicts Canadian law. The study also

[235] Manon Bergeron and others, 'Rapport de recherche de l'enquête PIECES: Violences sexuelles en milieu collégial au Québec' (Université du Québec à Montréal 2020) 37, my translation, emphasis in original.

[236] Act to prevent and fight sexual violence in higher education institutions, CQLR c P-22.1.

[237] Manon Bergeron and others, 'Violences sexuelles en milieu universitaire au Québec: Rapport de recherche de l'enquête ESSIMU' (Université du Québec à Montréal 2016) 27, my translation.

found that overall, men were more likely than women to endorse myths and stereotypes regarding sexual violence.[238]

Clearly, rape myths still exist today, although it is likely that their acceptance has diminished in recent years. Another study, this time among Ontario university students, noted that 'the overall sample demonstrated relatively low endorsement of rape myths . . . in comparison to previous samples'.[239] Another interesting study compared expectations and acceptance of sexual assault in certain situations for students who scored high or low on a rape myth acceptance scale. The researchers found that

> Coercive behaviour against women is not generally acceptable. [Participants low on rape myth acceptance] indicated that coercion was never acceptable across common dating situations. Participants high in rape myth beliefs though indicated that at times coercion was acceptable.[240]

What is interesting is that '[e]ven participants who indicated that coercive behaviour was never acceptable indicated it was sometimes expected'.[241] The authors conclude that

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[238] ibid 26.

[239] Chelsea D Kilimnik and Terry P Humphreys, 'Understanding Sexual Consent and Nonconsensual Sexual Experiences in Undergraduate Women: The Role of Identification and Rape Myth Acceptance' (2018) 27 The Canadian Journal of Human Sexuality 195, 204.

[240] Marian M Morry and Erica Winkler, 'Student Acceptance and Expectation of Sexual Assault.' (2001) 33 Canadian Journal of Behavioural Science 188, 190.

[241] ibid.

> acceptance and expectation judgements are not the same. For example, if a woman goes to a man's place, participants indicated that sexual assault was expected more than it was accepted. Therefore, different situations can lead to victim blaming (expected) or exonerating the perpetrator (accepted).[242]

Thus, this study distinguishing acceptance and expectation reveals that numerically low acceptance rates for rape myths is not the end of the story. Additional studies of media reporting on sexual violence[243] suggest that rape myths about partner sexual violence can remain operative even as explicit endorsement of these myths diminishes.

Overall, we can observe that rape myths are far from universally accepted in modern Canada. However, a relatively low acceptance rate when students are asked explicitly about rape myths is not the same as rape myths having no impact on interpretations of partner sexual violence, be it in education establishments or in the media. Despite some improvement since feminists first started to theorize rape myths and sexual scripts, it seems like we are still stuck in a social context characterized by acceptance, minimization, and justification of partner sexual violence, especially when it is not accompanied by extrinsic physical force. This context, we will see, is reflected in

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[242] ibid.

[243] Shannon Sampert, 'Let Me Tell You a Story: English-Canadian Newspapers and Sexual Assault Myths' (2010) 22 Canadian Journal of Women and the Law 301; Karen Busby, 'Every Breath You Take: Erotic Asphyxiation, Vengeful Wives, and Other Enduring Myths in Spousal Sexual Assault Prosecutions' (2012) 24 Canadian Journal of Women and the Law 328.

the legal treatment of partner sexual violence, even if Canadian sexual assault law is ostensibly relationship-neutral.

CHAPTER 3: LEGISLATIVE BACKGROUND

Before examining how partner sexual assault cases are treated in the criminal justice system, this chapter presents an overview of the law of sexual offences in Canada. The objective is to familiarize the non-Canadian or non-expert reader with the legislative landscape within which my proposed reform would be implanted. This chapter also provides useful background information to better understand the concerns with the legal treatment of partner sexual assault discussed in the next chapter. I first present Canada's legislative context, and then expose its history with a marital rape exemption.

Legislative context

The main crime relevant to partner sexual violence is sexual assault. Contrary to many other jurisdictions including England and Wales, in Canada there is a single offence targeting all types of non-consensual sexual touching. In other words, there is no offence of 'rape' targeting only penetrative contact with lower offences targeting non-penetrative contact. Moreover, the offence of sexual assault makes no distinction based on the sex/gender of the perpetrator or victim, nor based on the relationship between the offender and the victim.

There are, however, three levels of seriousness for the crime of sexual assault. Sexual assault (level 1) has a maximum prison sentence of 10 years, or 14 if the complainant is under the age of 16.[244] Sexual assault that includes a weapon, threats to a third party, bodily harm, multiple offenders, or choking, suffocation or strangling (level 2) is punishable by up to 14 years of imprisonment, or prison for life if the complainant is younger than 16.[245] Finally, aggravated sexual assault (level 3), which results in the wounding, maiming, disfigurement or life endangerment of the complainant, may be punished by imprisonment for life. These categories are rarely discussed because the overwhelming majority of police-reported sexual assaults are classified as level 1 offence. Between 2009 and 2014, 98% of these sexual assaults were classified as level 1,[246] 'up from 88 percent in 1983'.[247] Therefore, I will continue discussing 'sexual assault' without distinction based on its level, with the understanding that apart from the sentence and level of physical harm inflicted on the victim, there are no differences between the three levels of offences. Note also, with regard to sentencing, that

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[244] Criminal Code, RCS 1985, c. C-46 s 271.

[245] ibid 272.

[246] Cristine Rotenberg, 'Police-Reported Sexual Assaults in Canada, 2009 to 2014: A Statistical Profile' (Juristat: Canadian Centre for Justice Statistics 2017) 3 <https://www.proquest.com/docview/1950013561/abstract/AEFF345801AD47EAPQ/1> accessed 19 February 2022.

[247] Holly Johnson, 'Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault' in Elizabeth A Sheehy (ed), *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (University of Ottawa Press, 2012) 618.

committing a crime against 'the offender's intimate partner or a member of the victim or the offender's family' is an aggravating factor.[248]

As explained by the Supreme Court of Canada, the crime of sexual assault 'is comprised of an assault . . . which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated'.[249] To establish the *actus reus*, the Crown must prove beyond a reasonable doubt the touching, the sexual nature of the contact, and the absence of consent.[250] While the first two elements are objective, lack of consent 'is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred'.[251] No corroboration is required.[252] Consent is dichotomous, and 'implied consent' does not exist, as the Supreme Court has made clear:

> the complainant either consented or not. There is no third option. If the trier of fact accepts the complainant's testimony that she did not consent, no matter how strongly her conduct may contradict that claim, the absence of consent is established and the third component of the *actus reus* of sexual assault is proven. The doctrine of implied consent has been recognized in our common law jurisprudence in a

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[248] Criminal Code, RCS 1985, c. C-46 s 718.2(ii).

[249] *R v Ewanchuk* [1999] 1 SCR 330 [24].

[250] ibid 25.

[251] ibid 26.

[252] Criminal Code, RCS 1985, c. C-46 s 274.

> variety of contexts but sexual assault is not one of them. There is no defence of implied consent to sexual assault in Canadian law.[253]

The Criminal Code defines consent as 'the voluntary agreement of the complainant to engage in the sexual activity in question'[254] and specifies that '[c]onsent must be present at the time the sexual activity in question takes place'.[255] Moreover, a non-exhaustive[256] list of situations where no consent is obtained are spelled out: when

> (a) the agreement is expressed by the words or conduct of a person other than the complainant;
> (a.1) the complainant is unconscious;
> (b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1);
> (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
> (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
> (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.[257]

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[253] *R v Ewanchuk* (n 249) para 31.

[254] Criminal Code, RCS 1985, c. C-46 s 273.1(1).

[255] ibid 273.1(1.1).

[256] ibid 273.1(3).

[257] ibid 273.1(2).

These are not mere rebuttable presumptions; there are situations where consent is not found as a matter of law. Likewise, there is no consent to any assault, including sexual assault,

> where complainant submits or does not resist by reason of
> (a) the application of force to the complainant or to a person other than the complainant;
> (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
> (c) fraud; or
> (d) the exercise of authority.[258]

To establish the *mens rea* of sexual assault, the Crown must 'prove that the accused intended to touch the complainant'[259] and that the accused had a mental state of knowledge, recklessness or wilful blindness regarding the complainant's lack of consent.[260] The *mens rea* is not satisfied if the accused had an honest but mistaken belief that the complainant 'had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused'.[261]

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[258] ibid 265 (3).

[259] *R v Ewanchuk* (n 249) para 41.

[260] ibid 42.

[261] ibid 49.

Note that while mistaken belief in consent is called a 'defence' by the Supreme Court and academics,[262] '[t]he defence of mistake is simply a denial of *mens rea* [and] does not impose any burden of proof upon the accused'.[263] But while the accused does not have a burden of proof, he must pass an air of reality test. The Supreme Court has explained that 'before a court should consider honest but mistaken belief or instruct a jury on it there must be some plausible evidence in support so as to give an air of reality to the defence'.[264] The Court has clarified that '[a]ll that is required is for the accused to adduce some evidence, or refer to evidence already adduced, upon which a properly instructed trier of fact could form a reasonable doubt as to his *mens rea*'.[265]

Furthermore, the Criminal Code spells out situations where the accused's belief in consent is not a defence, that is, when:

> (a) the accused's belief arose from
> (i) the accused's self-induced intoxication,

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[262] See eg these major players in the field who all label mistaken belief in consent as a defence, as does the Supreme Court:: Randall, 'Sexual Assault in Spousal Relationships, Continuous Consent, the Law' (n 6); Elizabeth A Sheehy, 'Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration against Unconscious Women' in Elizabeth A Sheehy (ed), *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (University of Ottawa Press 2012); Elaine Craig, 'Ten Years after Ewanchuk the Art of Seduction Is Alive and Well: An Examination of the Mistaken Belief in Consent Defence' (2009) 13 Canadian Criminal Law Review 247; Koshan, 'The Legal Treatment of Marital Rape and Women's Equality' (n 22); Janine Benedet and Isabel Grant, 'Sexual Assault and the Meaning of Power and Authority for Women with Mental Disabilities' (2014) 22 Feminist Legal Studies 131.

[263] *R v Ewanchuk* (n 249) para 44.

[264] *R v Esau* [1997] 2 SCR 777 [15].

[265] *R v Ewanchuk* (n 249) para 56.

(ii) the accused's recklessness or **wilful blindness**, or
(iii) any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained [the situations cited above];
(b) **the accused did not take reasonable steps**, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or
(c) there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.[266]

Once again, these are not mere presumptions that the accused did not have a belief in consent; they prevent the accused from using the defence. Particularly important is the fact that the accused is blocked from using the defence of mistaken belief in consent if is it proven beyond a reasonable doubt that he did not take reasonable steps to ascertain consent. Wilful blindness—which arises 'where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth'[267]—also prevents the accused from succeeding in a defence of mistaken belief in consent.

Furthermore, as in other jurisdictions, Canada has rules regulating the use of sexual history evidence. Sexual history evidence refers to evidence 'that the complainant has engaged in sexual activity [other than the sexual activity that forms of subject-matter

[266] Criminal Code, RCS 1985, c. C-46 s 273.2.

[267] *Sansregret v The Queen* [1985] 1 SCR 570 [22].

of the charge], whether with the accused or with any other person'.[268] Such evidence cannot be admitted to support the inference that the complainant '(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or (b) is less worthy of belief'.[269] These prohibited inferences are described as 'twin myth reasoning'.[270] Under s. 276 of the Criminal Code, sexual history evidence can only be admitted if it:

> **(a)** is of specific instances of sexual activity;
> **(b)** is relevant to an issue at trial; and
> **(c)** has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.'[271]

A hearing is required to determine the admissibility of the evidence.[272] Importantly, the relevance to an issue at trial cannot be based on twin myth reasoning.[273] Moreover, the Supreme Court has recently emphasized the importance of excluding sexual history

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[268] Criminal Code, RCS 1985, c. C-46 s 276(1).

[269] ibid.

[270] *R v Goldfinch* 2019 SCC 38 [5].

[271] Criminal Code, RCS 1985, c. C-46 s 276(2).

[272] ibid.

[273] *R v Goldfinch* (n 270) para 56.

evidence, notably by stating that '[e]ven "relatively benign" relationship evidence must be scrutinized and handled with care'.[274]

This background information on sexual assault law in Canada will be useful to understand the implementation problems discussed in chapter 4 as well as my proposed new offence. There are other sexual offences such as voyeurism,[275] public nudity,[276] indecent acts,[277] and publishing or distributing intimate images,[278] as well as several offences protecting children and teenagers.[279] However, sexual assault is the most relevant offence for partner sexual violence and the focus of my next chapter.

Historical context: Canada's marital rape exemption and its removal

It would be an understatement to say that rape law was not developed to protect women from their partners. On the contrary: many societies have historically condoned marital rape, offering its victims no legal remedy against it.[280] As a result, 'the law sanctioned

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[274] ibid 46.

[275] Criminal Code, RCS 1985, c. C-46 s 162(1).

[276] ibid 174.

[277] ibid 173(1).

[278] ibid 162(1).

[279] See ibid 171.1, 172.1, 151, 152, 153, 163.1.

[280] Vasanthi Venkatesh and Melanie Randall, 'Normative and International Human Rights Law Imperatives for Criminalising Intimate Partner Sexual Violence: The Marital Rape Impunity in Comparative and

men's routine appropriation of sex from women'[281] and granted husbands 'enforceable "rights" to sexual intercourse with their wives'.[282] Since other authors have detailed the history of marital exemptions,[283] an overview will suffice here. This overview will provide crucial context to understand the current legal treatment of partner sexual assault. Given the importance that marriage took until very recently as the only legitimate context for sex and cohabitation, the history of the marital exemption is relevant even to a broader study of partner sexual violence.

In Canada, the first Criminal Code,[284] enacted in 1892, drew 'heavily on English common law'.[285] While rape carried a maximum sentence of the death penalty, '[a]s in many jurisdictions, the apparent seriousness of sexual offences in the Criminal Code was not matched by any commitment to actually enforcing them'.[286] Sexual offences laws were explicitly gendered and perpetuated myths about sexual violence; for instance,

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Historical Perspective' in Melanie Randall, Jennifer Koshan and Patricia Nyaundi (eds), *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi* (Hart Publishing 2017).

[281] Baker (n 97) 222.

[282] Venkatesh and Randall (n 280) 6.

[283] See eg Ruthy Lazar, 'Constructions of Marital Rape in the Canadian Criminal Justice System' (York University 2009); Venkatesh and Randall (n 280).

[284] Criminal Code, S.C. 1892, c. 29.

[285] Janine Benedet, 'Sexual Assault Cases at the Alberta Court of Appeal: The Roots of Ewanchuk and the Unfinished Revolution' (2014) 52 Alberta Law Review 127, 129.

[286] ibid.

'juries were advised that it was unsafe to convict in the absence of corroboration, that the absence of a recent complaint was indicative of fabrication, and that the past sexual experience of the complaining witness was relevant to undermine her credibility'.[287] Most importantly for our purposes, the Canadian Criminal Code included, following the English tradition, a marital exemption for the crime of rape.

Origins and justifications

Jonathan Herring observes that '[t]he exact origins of the marital rape exemption are unclear'.[288] In English common law, '[a]ll sexual intercourse within marriage was conceived as lawful'.[289] Thus, marital rape was a contradiction in terms. Ruthy Lazar describes three traditional legal theories that justified the marital rape exemption: the implied consent theory, the unity theory, and the property theory.[290]

First and most importantly, following Lord Hale's articulation in the 17th century, the implied consent theory held that, by getting married, women gave their ongoing and

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[287] ibid.

[288] Herring, 'No More Having and Holding: The Abolition of the Marital Rape Exemption' (n 82) 226.

[289] Lazar, 'Negotiating Sex' (n 8) 337.

[290] Lazar, 'Constructions of Marital Rape in the Canadian Criminal Justice System' (n 283) 81; see also Herring, 'No More Having and Holding: The Abolition of the Marital Rape Exemption' (n 82).

irrevocable consent to sexual relations with their husband.[291] In other words, sexual relations were part of the marriage contract, part of a wife's duties. In Hale's words, '[a] husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract'.[292] Hale's theory was widely accepted by common law courts and jurists even though he offered no legal authority in support of his position.[293]

Second, the doctrine of marital unity presented husband and wife as legally one person. Upon marriage, women lost their legal identity and existence, including the rights to own property, to sue or be sued, to control their income, to make a will, and to have custody of their eventual children.[294] Because husband and wife were legally one person—the husband—, marital rape would mean the husband committed a crime against himself, a legal impossibility.[295]

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[291] Lazar, 'Constructions of Marital Rape in the Canadian Criminal Justice System' (n 283) 82.

[292] Sir Matthew Hale, Historia Placitorium Coronae: The History of the Pleas of the Corwn (The Lawbook Exchange, Ltd 2003), cited in Carley R Kranstuber, 'Equality Is Not Enough: The Importance of the Due Process Clause in Redefining Consent to a Sexual Encounter' (2017) 45 Capital University Law Review 765, 773.

[293] Anderson, 'Marital Immunity, Intimate Relationships, and Improper Inferences' (n 99) 1480.

[294] Lazar, 'Constructions of Marital Rape in the Canadian Criminal Justice System' (n 283) 53.

[295] ibid 81.

Third, because women were considered men's property, rape was conceptualized as a property crime against men rather than a crime against women's sexual autonomy.[296] Rape laws served 'to maintain the chastity of the woman in order to protect the property interests of her father or her husband',[297] 'and to protect the "honour" of the family or social group from defilement by other men'.[298] This doctrine once again made marital rape a legal impossibility: '[p]rosecuting a husband for raping his wife made no more sense that indicting him for stealing his own property'.[299]

Canadian author Robyn Maynard adds an important layer to this explanation by describing the deeply racial fabric of sexual offences law. Noting the high penalties associated with rape, she explains:

> The protection of white women, in this context, was mobilized as a protection of white settler society: the (possible) rape of a white woman by a Black man was treated as an affront against the property of white men. The moral outrage surrounding rape was, after all, highly selective: working-class white women who were raped by white men and white women who were raped by family members often received little in the form of legal protection or popular support and were subject to both scrutiny and hostility . . . The politization of rape was

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[296] ibid 81–82.

[297] ibid 82.

[298] Venkatesh and Randall (n 280) 47.

[299] Jaye Sitton, 'Old Wine in New Bottles: The Marital Rape Allowance' (1993) 72 North Carolina Law Review 261, 265.

> far less about protecting white women than it was about justifying the oppression of Black men.[300]

This racial context confirms that sexual offences were not meant to protect women from their (same-race) husband.[301]

In addition to these traditional rationalizations, Lazar exposes modern justifications that explain the survival of marital exemptions in the second half of the 20th century. Most notably, the rhetoric of family privacy was used to shield the marital bedroom from state inspection and intrusion. The home and the family were supposed to escape the state's scrutiny: '[c]onsistent with this approach, marital relationships were conceptualized as too personal and too private to be governed by the state's rules'.[302]

The concept of marital harmony and the fear of false allegations by vindictive wives also served to oppose the criminalization of marital rape. As Melisa Anderson recounts,

> Among the fears of jurists was that if rape was recognized as a crime that men could perpetuate on their wives, then women would fabricate rape charges against their husbands and use these charges for some

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[300] Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Fernwood Publishing 2017) 43–44, references omitted.

[301] Still today, only around 7% of unions are mixed in Canada: Kathya Aathavan, 'Metrics to Meaning: Capturing the Diversity of Couples in Canada' (*The Vanier Institute of the Family*, 25 June 2021) <https://vanierinstitute.ca/metrics-to-meaning-capturing-the-diversity-of-couples-in-canada/> accessed 7 October 2021.

[302] Lazar, 'Constructions of Marital Rape in the Canadian Criminal Justice System' (n 283) 88.

> kind of revenge. Additionally, the fear existed that recognizing crimes within the marriage would permit state intrusion into the privacy of the marriage, thus prohibiting the man and wife from reconciling their problems on their own.[303]

In other words, 'it was believed that a charge of rape would ultimately harm familial relations not because of the act itself, but because reconciliation between spouses would be difficult after a rape accusation'.[304]

Defenders of the marital rape exemption also presented marital rape as less harmful than stranger rape,[305] difficult to prove given the competing versions of the accused and the complainant,[306] and unnecessary to criminalize in light of other legal avenues 'such as assault statutes, which typically provide less severe penalties'.[307]

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[303] Melisa J Anderson, 'Lawful Wife, Unlawful Sex - Examining the Effect of the Criminalization of Marital Rape in England and the Republic of Ireland' (1998) 27 Georgia Journal of International and Comparative Law 139, 148.

[304] Kranstuber (n 292) 776.

[305] Lazar, 'Constructions of Marital Rape in the Canadian Criminal Justice System' (n 283) 91.

[306] ibid.

[307] Anderson, 'Lawful Wife, Unlawful Sex - Examining the Effect of the Criminalization of Marital Rape in England and the Republic of Ireland' (n 303) 148.

Removal of the marital exemption

Between the 1960s (Sweden[308]) and the 2020s (Singapore[309]), several countries removed the marital exemption for rape from their criminal laws, either implicitly or explicitly making marital rape a crime. Although Canada followed England in adopting a marital exemption, it was quicker to remove it, through a major reform of sexual offences law in 1983.

Before the 1983 reform, husbands could not be convicted for raping their wife, but they could be charged with other offences, such as gross indecency. However, this was rarely done.[310] Moreover, even though the marital exemption extended only to husbands, not to unmarried partners, courts treated rape by an acquaintance or a date as significantly less serious than rape by a stranger.[311] Courts created categories of 'violent' and 'non-violent' rape to evaluate the seriousness of rapes, and '[t]hese assessments

[308] R Amy Elman, *Sexual Subordination and State Intervention: Comparing Sweden and the United States* (Berghahn Books 1996) 90.

[309] Neo Rong Wei, 'Criminal Law Reform Bill: A Look at Key Changes in the Penal Code' (*TODAYonline*, 6 May 2019) <https://www.todayonline.com/singapore/criminal-law-reform-bill-look-key-changes-penal-code> accessed 11 October 2021.

[310] Christine Boyle, 'Married Women - Beyond the Pale of the Law of Rape' (1981) 1 Windsor Yearbook of Access to Justice 192.

[311] Benedet (n 285) 131.

typically tracked the stranger/acquaintance dichotomy . . ., even where victims of acquaintance rape were left with injuries'.[312]

Jennifer Koshan reports that '[t]he statutory marital rape immunity in Canada was seen as virtually absolute, and resulted in no cases where the scope of the immunity was interpreted by the courts so as to reduce its impact'.[313] She contrasts the Canadian situation with that of England and Wales, 'where the marital rape immunity was not initially codified, and was eliminated over time by judicial interpretation'[314] until its abolition in 1991. In Canada, '[i]t seemed to be well accepted amongst commentators that the immunity could only be abolished by legislative amendment'.[315]

In the 1970s and the 1980s, feminist organizations and rape crisis centers were instrumental in advocating for legal reform.[316] The adoption, in 1982, of the Canadian Charter of Rights and Freedoms,[317] which prohibits sex-based discrimination, also participated in prompting amendments to the Criminal Code. These changes came into

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[312] ibid 133.

[313] Koshan, 'The Legal Treatment of Marital Rape and Women's Equality' (n 22) 11.

[314] ibid 12.

[315] ibid.

[316] ibid.

[317] The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

force in 1983. The offences of rape and indecent assault were replaced with the crime of sexual assault. This new crime no longer depended on the gender/sex of the offender or victim, nor on the nature of the sexual contact. With these changes came the abolition of the marital rape exemption,[318] as well as the abolition of evidential rules such as the corroboration and recent complaint requirements.[319] Amendments to the Canada Evidence Act also made individuals competent and compellable witnesses for the prosecution of their spouse.[320]

Thus, while over half of the world's countries still retain marital exemptions,[321] in Canada there are no longer any marital rape exemptions or formal distinctions between prosecuting a stranger, a partner, or a husband for sexual assault. Rather than simply removing the exception, Canada chose the avenue of explicit criminalization, with section 278 reading: 'A husband or wife may be charged with an offence under section

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[318] Benedet (n 285) 130.

[319] ibid 131.

[320] Bill C-127, An Act to Amend the Criminal Code in Relation to Sexual Offences and Other Offences Against the Person, s 29.

[321] Shahra Razavi and others, 'Progress of the World's Women 2019-2020: Families in a Changing World' (UN Women 2019) 27; Melanie Randall and Vasanthi Venkatesh, 'The Right to No: State Obligations to Criminalize Marital Rape and International Human Rights Law' (2015) 41 Brooklyn Journal of International Law 153, 154.

271, 272 or 273 in respect of his or her spouse, whether or not the spouses were living together at the time the activity that forms the subject-matter of the charge occurred'.[322]

Conclusion

This chapter has served two main purposes. First, it has provided crucial context to understand the current legal framework for partner sexual violence. Second, acknowledging the tradition of marital impunity is essential to understand and situate the problem with which this thesis is concerned: the inadequate legal response to partner sexual violence. We have seen that marital impunity has been defended on the basis of patriarchal conceptions of sex and marriage. Today, views about sex and marriage have evolved greatly, but we will see in the next chapter that the outdated views that made the recognition of marital rape impossible continue to influence our law and our society, albeit in modernized and less explicit forms.

Edna Erez describes domestic violence as having 'a long past but a short history'.[323] The same can be said of marital rape, a contradiction in terms until just a few decades ago. Even though the marital exemption has been abolished in Canada, it is important to remember our history. The law, in its framing of partner sexual violence,

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[322] Criminal Code, RCS 1985, c. C-46 s 278.

[323] Edna Erez, 'Domestic Violence and the Criminal Justice System: An Overview' (2002) 7 Online Journal of Issues in Nursing 1.

does not start from a position of neutrality regarding the offender-victim relationship, but rather from a long tradition of marital impunity. Might this past, as suggested by some authors, 'continu[e] to affect us deeply'?[324]

CHAPTER 4: LEGAL RESPONSE AND OUTCOMES IN CASES OF PARTNER SEXUAL ASSAULT

The previous chapters have set the stage by exposing the context in which partner sexual violence is prosecuted. Chapter 1 exposed the empirical reality of partner sexual violence. Chapter 2 described a social context where partner sexual violence is difficult to acknowledge and to condemn due to various social and psychological influences. Chapter 3 explained Canadian sexual assault law and placed it in its historical context. We now arrive to the problem which this thesis seeks to address: the inadequate legal response to partner sexual violence.

The purpose of this chapter is to survey documented concerns regarding the legal treatment of partner sexual violence in Canada. The reasons for these concerns are multifaceted and often complex. As such, a mere exposition of existing legal problems does not automatically lead to a clear implementable solution. Rather, the situation

[324] Yllö (n 93) 1061.

presented in this chapter reveals the need to search for solutions, an endeavour which will be undertaken in subsequent chapters.

We saw in chapter 3 that, since 1983, the Criminal Code treats partner sexual assault like any other sexual assault. Marital exemptions no longer exist. In this fourth chapter, we now look beyond the text of the law to uncover its application. In a context of normalization of partner sexual violence, one that affects victims' and other members of society's ability to recognize sexual assaults that do not fit the 'real rape' stereotype, the question is now: how does this social context affect the legal treatment of partner sexual assault cases in the criminal justice system? In other words, this chapter is concerned with implementation: are there implementation problems hindering the application of sexual assault law to partner sexual assault cases?

To answer these questions, chapter 4 is structured as follows. A first section explains the need to look beyond legislation. Scholars have highlighted that the law of the books often diverges from the law in practice, including in sexual violence matters. Thus, the mere fact that the Criminal Code treats partner sexual assault like any other sexual assault cannot satisfy us that partner sexual assault is *actually* treated on par with other sexual assaults. Then, the following sections uncover concerns regarding the legal treatment of partner sexual violence in a chronological order: following a case's trajectory in the criminal justice system, the chapter moves from the reporting, to the charging, to the trying, and finally to the sentencing of partner sexual assaults. At each stage, I review what studies can tell us regarding the treatment of partner sexual violence

in Canada. I also add my own observations to complement existing literature regarding trial decisions.[325] We will see that studies have documented difficulties and differential outcomes in the legal treatment of partner sexual violence at each of these stages, especially when sexual violence is not accompanied by physical violence. Problems include underreporting, undercharging, rarer convictions, shorter sentences, and manifestations of problematic attitudes in lawyers' and judges' discourses.

It must be acknowledged that clear causal explanations are not always available in relation to given outcomes in the criminal justice system. As we saw in chapter 2, the social context of partner sexual violence is complex and at times ambivalent. There might be several reasons why a case does not lead to conviction, ranging from legal actors' beliefs to concrete evidential or procedural issues. For instance, a case might not be brought to trial partly because the decision-maker unconsciously adheres to rape mythology, partly because they anticipate that a jury would be influenced by rape myths, and partly because the evidence is weak on certain aspects. It is also important to acknowledge that many decisions within the criminal justice system do not come with reasons: a victim's decision not to report, the police's choice to label a complaint as unfounded, a jury's acquittal… At times, the best we can do is find correlations and hypothesize on causes.

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[325] See section on injuries and 'rough sex' cases.

Despite these limitations, the available published studies on the legal treatment of partner sexual assault, taken together, show a serious problem and cause for concern. Partner sexual assault is less likely to be reported and prosecuted, especially when it contradicts the 'real rape' imagery by lacking extrinsic physical violence. Moreover, qualitative studies show the persisting influence of the 'real rape' myth on at least some aspects of the criminal justice system. The inadequate legal treatment of partner sexual assault teaches us that, in our search for solutions, implementation concerns must be taken very seriously.

Implementation concerns

Why concern ourselves with the legal treatment of partner sexual assault now that Canada's marital rape exemption has been abolished? If the law is ostensibly relationship-neutral, what problem is there to fix?

This section complexifies the law's apparent neutrality by raising the issue of implementation. Feminists and criminal law theorists have proposed that the law in action is often different from the law in theory. By exploring the theme of implementation, this section sets the stage for a detailed examination of how partner sexual violence cases are actually treated within the legal system.

The criminal law 'is not self-implementing nor is [it] autonomous':[326] it must always be interpreted. Because the law is not applied perfectly or neutrally, scholars have noted that implementation problems are likely to arise when there is a mismatch between the law and public attitudes. Isabel Ventura puts it this way: '[l]egal rules are defined by elites who intend to impose their worldview to others; [but] legal definitions and meanings are not universally fixed. Legal norms are interpreted by individuals with moral frameworks and idiosyncratic evaluations'.[327] As we saw, public attitudes hold partner sexual violence to be less serious and more excusable than other forms of sexual violence; hence, a mismatch between the law and public opinion exists here, opening the door to implementation problems. There is a dialogue between law and society that constrains the application of the law. In the area of sexual offences law, '[l]aw has power in constructing knowledge and ideology, yet it functions in dynamic tension with social structures and systems that affect its operation'.[328]

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[326] Susan B Boyd and Elizabeth A Sheehy, 'Canadian Feminist Perspectives on Law' (1986) 13 Journal of Law and Society 283, 285.

[327] Isabel Ventura, '"They Never Talk about a Victim's Feelings: According to Criminal Law, Feelings Are Not Facts"—Portuguese Judicial Narratives about Sex Crimes' (2016) 2 Palgrave Communications 1, 3.

[328] Lazar, 'Negotiating Sex' (n 8) 331.

An important contribution on the topic of implementation is Dan Kahan's model according to which the bigger the mismatch between the law and public attitudes, the more likely legal actors will refuse to implement the law.[329] He explains that

> as legislators expand liability for [socially acceptable conduct], police become less likely to arrest, prosecutors to charge, jurors to convict, and judges to sentence severely. The conspicuous resistance of these decisionmakers in turn reinforces the norms that lawmakers intended to change.[330]

The more severely the law condemns a conduct compared to the decisionmaker's moral appreciation, the more it reinforces the problematic social norm:

> If the law condemns the conduct substantially more than does the typical decisionmaker, the decisionmaker's personal aversion to condemning too severely will dominate her inclination to enforce the law, and she will balk. Her reluctance to enforce, moreover, will strengthen the resistance of other decisionmakers, whose reluctance will steel the resolve of still others, triggering a self-reinforcing wave of resistance.[331]

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[329] Dan M Kahan, 'Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem' (2000) 67 University of Chicago Law Review 607.

[330] ibid 607.

[331] ibid 608.

This model suggests that legal condemnation of partner sexual violence not only risks facing resistance to implementation; it could also *reinforce* social norms that hold partner sexual violence to be acceptable.

For Kahan, rape law is a prime example of this vicious circle. Public attitudes hold that 'no' sometimes mean 'yes'.[332] To displace this norm, legislators have removed the traditional force requirement and affirmed that non-consent is sufficient to constitute rape. Kahan observes, however, that 'such reforms have proven famously ineffective. In jurisdictions that have adopted them, prosecutors are no more likely to charge men who disregard a woman's verbal protestations, and juries no more likely to convict them, than are prosecutors and juries in other states'.[333] The author explains how such results come to be:

> Jurors either nullify or more likely conclude that the woman who failed to engage in physical resistance actually did consent. Because they know that juries are reluctant to convict, moreover, prosecutors are unlikely to charge men with rape when their victims did not engage in physical resistance. And the conspicuous failure of prosecutors to charge and juries to convict reinforces the public perception that men who follow the "no sometimes means yes" norm *aren't* engaged in

[332] These attitudes are often reflected in publicity, movies, literature, and pornography, as well as in interviews with lay people.

[333] Kahan (n 329) 623.

> rape after all—at which point jurors become even less likely to convict and prosecutors to charge.[334]

Michal Buchhandler-Raphael makes a similar observation when he writes that:

> [p]rosecutors are reluctant to pursue criminal charges in cases that are viewed as highly contested, controversial, and ambiguous. They are viewed as such precisely because of the current understanding of the concept of consent and because of the fundamental gap between legal provisions and prevailing social norms, including those of the prosecutors.[335]

Even when these cases reach the trial stage, '[d]espite the legal instructions juries are given, the decisions they reach are largely influenced by their own personal perceptions and beliefs, which are infused with gendered norms regarding sexuality and sexual conduct'.[336]

A similar analysis can be applied to the criminalization of partner sexual violence. The law may say that it is as serious as other forms of sexual violence, but neither lay people[337] nor legal actors[338] typically endorse that belief. Even if the decision-maker is free from rape myths, they will not bring the case to trial if there is no chance of

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[334] ibid 623–624.

[335] Buchhandler-Raphael (n 116) 181.

[336] ibid 179.

[337] See chapter 2.

[338] See eg Lazar, 'Negotiating Sex' (n 8).

obtaining a conviction. The underenforcement of the law in cases of partner sexual violence reinforces the perception that partner sexual assault is not 'real rape', leading to ever growing implementation problems.

Kahan's model is a simplification. It does not account for other possible triggers for changing societal attitudes. Although partner sexual violence remains highly normalized, empirical evidence does not suggest that it has become *increasingly* normalized since its criminalization. As seen in chapter 2, rape-myth endorsement appears to be on the decline, possibly because popular attitudes are influenced not only by successful or unsuccessful legal implementation, but also by educational initiatives and other cultural cues. Moreover, Kahan's proposed solution to use 'gentle nudges'—norms that only condemn the problematic behaviour slightly more than does the decisionmaker—might itself reinforce the 'real rape' / 'simple rape' dichotomy by validating the different legal treatment of stranger and non-stranger sexual violence.[339] Nevertheless, as Buchhandler-Raphael observes, 'Kahan's insights carry several implications for future rape law reform',[340] notably that 'cultural dispositions and prevailing social norms have a much larger impact on outcome judgments than do legal definitions'.[341] Kahan's model supports the argument that, simply because the law

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[339] See Kahan (n 329) 624–625.

[340] Buchhandler-Raphael (n 116) 177.

[341] ibid.

purports to seriously condemn partner sexual assault and treat it on par with other sexual assaults, that does not mean that the law will be enforced as such. Consequently, in evaluating the law, attention must be paid not just to what it says, but also to how it is applied, as I do in this chapter.

The gap between the law of the books and the law in practice is especially important in the area of sexual offences. Indeed, in a society influenced by rape culture, numerous people (including not only perpetrators but also victims, legal actors, potential jurors…) have not yet assimilated that sex without consent is rape—'even' within marriage or romantic partnerships. Feminist scholars evaluating criminal law reforms have observed that, as the law is filtered through rape myths and interacts with popular beliefs about sexual violence, it is often misapplied. The law is not separate from, but rather a part of, society. We may well have good legislation, but we must still examine how the law is applied by human—and potentially biased—police officers, prosecutors, defence lawyers, judges, and juries.

I do not wish to exaggerate claims as to the law's underenforcement. It is not that written legislation does not matter at all: it of course still informs and constrains legal practices to some extent. But the law is always in dialogue, or perhaps better stated in *negotiation*, with society. As a result, the law, in its application, is neither gender-, nor

relationship-neutral.[342] The law is not self contained; it 'does not adjudicate impartially on the question of rape but rather participates in social constructions of what counts as sex, what counts as rape, who will be recognised as a rapist and whose violation amounts to rape'.[343]

In light of these limitations to the application of the law, we can better understand why previous legal reforms—for which the feminist movement fought long and hard—have achieved only mitigated success. In 1981, Christine Boyle wrote that 'one does not need to be a pessimist to predict that the law, as reformed, will not effect significant change in a practical sense'.[344] Today, we know from empirical research that Canada's important legal reforms of the 1980s and 1990s (removing the marital exemption, the corroboration requirement, and the recent complaint rule; defining consent; imposing a reasonable steps requirement, etc.) have had 'checkered success'.[345] There were positive results, such as more cases of acquaintance and partner sexual assault being taken

[342] As argued by White and Easteal (n 123) 11.

[343] ibid 3. We can observe this phenomenon at play anytime there are legal changes in response to public debates regarding newly recognized forms of sexual violence, such as image-based sexual abuse, 'upskirting', etc.

[344] Boyle (n 310) 199.

[345] Elizabeth A Sheehy, 'From Women's Duty to Resist, to Men's Duty to Ask—How Far Have We Come' (2000) 20 Canadian Woman Studies 98, 227.

through the courts after as compared to before reforms.[346] The 'unfounding' of complaints (when the police concludes that no crime was committed) also dropped markedly after the 1983 reforms.[347] Moreover, a 1990 Government study about the effect of 1983 reforms found higher reporting rates, and refuted the public perception that sexual assault cases were sentenced too leniently.[348] However, post-1983 studies have found that cases that reach the trial stage are generally those that match the 'real rape' myth, that is, cases involving the use of weapons, extrinsic physical violence, and observable injuries to victims.[349] Research has also highlighted the continued importance of corroborative evidence, victim resistance, and prompt complaints even as these requirements were officially abolished.[350]

Even in recent years, feminists have continued to raise concerns about the implementation of sexual assault legislation. They have observed how central tenets of

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[346] Janice Du Mont and Terri L Myhr, 'So Few Convictions: The Role of Client-Related Characteristics in the Legal Processing of Sexual Assaults' (2000) 6 Violence Against Women 1109, 1109.

[347] Ronald Hinch, 'Enforcing the New Sexual Assault Laws: An Exploratory Study' (1988) 14 Atlantis 109, 245.

[348] Julian V Roberts, 'Sentencing Patterns in Cases of Sexual Assault' (Department of Justice Canada, Supply & Services 1990) 3.

[349] Kathleen A Yurchesyn, Ann Keith and Edward K Renner, 'Contrasting Perspectives on the Nature of Sexual Assault Providing Service for Sexual Assault Victims and by the Law Courts' in Jennifer Temkin (ed), *Rape and the Criminal Justice System* (Dartmouth 1995).

[350] Du Mont and Myhr (n 346) 1111; see also Hinch (n 347); Susan Caringella, *Addressing Rape Reform in Law and Practice* (Columbia University Press 2008) 48.

the law, including the affirmative consent standard, are not applied consistently.[351] Janine Benedet and Isabel Grant, for instance, note that for complainants with mental disabilities, 'the doctrine of affirmative consent is not applied rigorously'.[352] Rather, '[s]ome courts continue to equate inadequate resistance, compliance or submission with consent[,] [raising] the concern that some courts are assuming that women with mental disabilities are generally consenting to sexual activity unless they demonstrate otherwise'.[353] Elizabeth Sheehy, for her part, has observed failings of the law when dealing with sleeping or otherwise unconscious victims—in these cases, judges fail to apply the reasonable steps requirement and too easily allow men's defence of mistaken belief in consent.[354] The law also often fails to bring justice to Indigenous victims.[355]

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[351] Benedet and Grant (n 262) 140; Rakhi Ruparelia, 'Does No "No" Mean Reasonable Doubt? Assessing the Impact of Ewanchuk on Determinations of Consent' (2006) 25 Canadian Woman Studies 1, 167; Craig, 'Ten Years after Ewanchuk the Art of Seduction Is Alive and Well' (n 262); Melanie Randall, 'Sexual Assault Law, Credibility, and "Ideal Victims": Consent, Resistance, and Victim Blaming' (2010) 22 Canadian Journal of Women and the Law 397; Lise Gotell, 'The Ideal Victim, the Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law' (2002) 40 Osgoode Hall LJ 251.

[352] Benedet and Grant (n 262) 148.

[353] ibid 140.

[354] Sheehy (n 345); Sheehy (n 262).

[355] See eg Tracey Lindberg, Priscilla Campeau and Maria Campbell, 'Indigenous Women and Sexual Assault in Canada' in Elizabeth A Sheehy (ed), *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (University of Ottawa Press 2012).

The lesson from this section is that the law is more than what appears in the Criminal Code. We need to look further into the law's application to understand how partner sexual assault is criminalized in Canada. Reform is often poorly implemented. The questions to which we now turn our attention, then, are the following: how is partner sexual violence treated in Canadian criminal law? Is it treated on par with other forms of sexual violence—not that these are free from implementation concerns—or does it continue, despite the 1983 reforms, to be marginalized? As mentioned above, we will explore documented concerns at different stages of the criminal justice system, starting with the phenomenon of underreporting.

The underreporting of partner sexual violence

Chronologically, the first obstacle to the prosecution of partner sexual assault is victims' underreporting: if a victim do not report, the law has nothing to work with. This section thus explores underreporting by victims of partner sexual assault.

In chapter 2, I presented the concept of 'unacknowledged victims': victims of sexual assault who do not recognize or label the crime as such. It goes without saying that unacknowledged victims do not report to the police. However, victims may also acknowledge a sexual assault and decide not to report it.

It is worth noting that studies of underreporting are based on comparisons between police reports and acknowledged victims of sexual assault. Thus, any measure of underreporting is an underestimation, as it excludes unacknowledged victims from its

total.[356] Even then, the literature shows underreporting to be an important concern. Available data suggests that between 90 and 95% of sexual assault victims never report the crime,[357] making 'sexual assault the violent crime least likely to be reported to police'.[358] Underreporting rates may be even higher for Indigenous and disabled women.[359] These statistics are not specific to partner sexual assault, but show that, generally, sexual assaults are rarely reported, even when acknowledged.

Reporting decisions appear to be influenced by 'real rape' imagery. In one study of 958 cases at a sexual assault clinic in Vancouver, the presence of physical injury and the assailant being a stranger made police reporting more likely.[360] Another study found that reporting was less likely when the crime lacked physical violence and physical injuries, but that victims of partner sexual assault were not less likely to report the crime than other victims.[361] Some research does suggest that 'the closer the relationship

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[356] See Zaccour, *La fabrique du viol* (n 102) 45.

[357] Theresa C Kelly and Lana Sermac, 'Underreporting in Sexual Assault: A Review of Explanatory Factors' (2008) 9 Baltic Journal of Psychology 30, 31; Rotenberg (n 246) 4.

[358] Rotenberg (n 246) 4.

[359] Koshan, 'The Legal Treatment of Marital Rape and Women's Equality' (n 22) 9.

[360] Margaret J McGregor and others, 'Why Don't More Women Report Sexual Assault to the Police?' (2000) 162 Canadian Medical Association Journal 659.

[361] Janice Du Mont, Karen-Lee Miller and Terri L Myhr, 'The Role of "Real Rape" and "Real Victim" Stereotypes in the Police Reporting Practices of Sexually Assaulted Women' (2003) 9 Violence Against Women 466.

between the sexual aggressor and the victim, the less likely it is that a female victim will elect to report her experience of sexual violation or intrusion, and the less likely she will be to seek legal intervention'.[362] However, it is hard to ascertain whether partner sexual violence is less likely to be reported (once acknowledged) or only less likely to be acknowledged (as discussed in chapter 2). This difficulty is consistent with the finding from a review of international literature that '[w]hile most survey results indicate that women who know their assailants are less likely to report sexual offences, other studies have found that this is not always the case'.[363] In any case, reporting rates for all sexual assaults are remarkably low.

As was the case with non-acknowledgement, many factors play into women's decision not to report a sexual assault. According to recent studies, reasons for not reporting include the views 'that the crime was minor and it was not worth taking the time to report . . ., that the incident was a private or personal matter and it was handled informally . . . , and that no one was harmed during the incident'.[364] These reasons are consistent with euphemizing attitudes towards partner sexual violence discussed in

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[362] Randall, 'Sexual Assault in Spousal Relationships, Continuous Consent, the Law' (n 6) 144; see also Janice Du Mont and others, 'Predicting Legal Outcomes from Medicolegal Findings: An Examination of Sexual Assault in Two Jurisdictions' (2000) 1 Journal of Women's Health Law 219.

[363] Denise Lievore, 'Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review' (Commonwealth of Australia, Office of the Status of Women 2003) 35.

[364] Conroy and Cotter (n 55) 17.

chapter 2. Canadian woman have also reported, as reasons not to go to the police, concerns regarding the criminal justice system, fear of having personal records produced in court, fear of the consequences of reporting for their family, and fear of the perpetrator.[365] A 2021 study highlighted the fear of not being believed, fear for their safety, and a lack of understanding of or trust towards the criminal justice system as reported reasons for not making a complaint.[366] Some women were also discouraged from making a complaint (or from following through) by legal actors who described them as too emotional or as ineffective witnesses.[367] Additionally, for victims of partner sexual assault who have children with their assailant, disclosing sexual and other domestic violence carries the risk of being accused of 'parental alienation' and losing custody of their children to the violent ex-partner.[368] Although the criminal and family

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[365] Tina Hattem, 'Enquête auprès de femmes qui ont survécu à une agression sexuelle' (Ministry of Justice, Government of Canada 2000).

[366] Rachel Chagnon, Carole Boulebsol and Michele Frenette, 'La Judiciarisation Criminelle Des Violences Envers Les Femmes: Vers Un Droit Sensible Aux Victimes?' (2021) 33 Canadian Journal of Women and the Law 131.

[367] ibid 141.

[368] Elizabeth Sheehy and Susan B Boyd, 'Penalizing Women's Fear: Intimate Partner Violence and Parental Alienation in Canadian Child Custody Cases' (2020) 42 Journal of Social Welfare and Family Law 80; Suzanne Zaccour, 'Does Domestic Violence Disappear from Parental Alienation Cases? Five Lessons from Quebec for Judges, Scholars, and Policymakers' (2020) 33 Canadian Journal of Family Law 301. This problem has also been documented outside of Canada: see Jenny Birchall and Shazia Choudhry, '"I Was Punished for Telling the Truth": How Allegations of Parental Alienation Are Used to Silence, Sideline and Disempower Survivors of Domestic Abuse in Family Law Proceedings' (2022) 6 Journal of Gender-Based Violence 115; Suzanne Zaccour, 'Parental Alienation Concepts and the Law: An International Perspective' in Jean Mercer and Margaret Drew (eds), *Challenging Parental Alienation: New Directions for Professionals and Parents* (Routledge 2021); Joan S Meier, 'US Child Custody Outcomes in

justice systems operate separately, this can be an additional reason not to disclose violence by an intimate partner, sexual or otherwise.[369]

These findings are consistent with literature from other Western common law countries where underreporting has also been identified as a major concern, and linked to a variety of factors such as rape mythology, perceptions of the criminal justice system, psychological factors, and rational cost-benefit analyses.[370] Some studies have shown that both 'assault not involving injury and assault perpetrated by a current partner is less likely than other types of assault to be reported [to police] and to result in the use of victim services'.[371] Scholars have also explained that 'victims are less willing to identify persons they know as criminals, and more reluctant to report these persons to authorities and get them into trouble'.[372]

Intersecting oppressions can also play a role in the decision not to report. Indeed,

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Cases Involving Parental Alienation and Abuse Allegations: What Do the Data Show?' (2020) 42 Journal of Social Welfare and Family Law 92.

[369] Simon Lapierre and Isabelle Côté, 'Abused Women and the Threat of Parental Alienation: Shelter Workers' Perspectives' (2016) 65 Children and Youth Services Review 120.

[370] See eg Lievore (n 363).

[371] Christine Coumarelos and Jacqui Allen, *Predicting Women's Responses to Violence: The 1996 Women's Safety Survey* (NSW Bureau of Crime Statistics and Research 1999) 1; see also Bob Pease and Michael Flood, 'Rethinking the Significance of Attitudes in Preventing Men's Violence Against Women' (2016) 43 Australian Journal of Social Issues 547.

[372] Weiss (n 135) 814.

> women whose lives are shaped by conditions of marginalisation and inequality are even less likely to report their experiences of sexual violence to the police. For example, Indigenous women have been found less likely to report to police, and women from other racialised groups, impoverished women, disabled women and those in same-sex relationships are less likely to report sexual assault experiences to police, particularly if perpetrated by intimate partners.[373]

Carolyn West and Kalimah Johnson describe some of the 'multiple barriers to disclosure'[374] faced by African American women:

> These challenges include: rape myth acceptance that fosters self-blame; the internalization or fear of reinforcing the image of Black women as sexually promiscuous Jezebels; and the cultural mandate that survivors should be "Strong Black Women" who are able to handle trauma without assistance.[375]

Because of economic inequalities, a racialized woman is also more likely to depend on her partner or ex-partner's income or child support payments. Or she may be hesitant to report sexual or domestic violence for fear of fueling racism or contributing to the overincarceration of her people.[376] A Black or Indigenous woman may also feel unsafe

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[373] Melanie Randall, 'Marital Rape and Sexual Violence against Women in Intimate Relationships: The Less Recognised Form of Domestic Violence' in Melanie Randall, Patricia Nyaundi and Jennifer Koshan (eds), *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi* (Hart Publishing 2017) 25, references omitted.

[374] Carolyn M West and Kalimah Johnson, 'Sexual Violence in the Lives of African American Women' (National Online Resource Center on Violence Against Women 2013).

[375] ibid.

[376] See eg Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (2022) 43 Stanford Law Review 1241, 1253.

reporting a sexual assault due to the risk of police violence. In Canada, an important investigation released in 2015 revealed repeated violence and abuse from Val-d'Or police officers toward Indigenous women, including pervasive sexual violence inflicted by the police.[377] Certainly, this is not a context in which Indigenous women are likely to seek police involvement.

Victims may also experience shame or be reluctant to disclose intimate details to the police and legal actors.[378] Lynn Schafran writes that '[e]ven a victim who understands that an assault has occurred may hesitate to disclose this most personal form of violence and humiliation, sometimes out of fear that her credibility will be destroyed if she does'.[379]

Finally, there is a lot of discomfort and upheaval associated with reporting a crime. Katharine Baker observes that the criminal law 'requires victims to label their friends, acquaintances and friends of acquaintances as rapists and indict the status quo in which they all live. It appears to be much easier for many victims to just not bother'.[380] After movements like #BeenRapedNeverReported and #MeToo, victims are increasingly

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[377] Radio-Canada, 'Abus de La SQ: Les Femmes Brisent Le Silence', *Enquête* (2015) <https://ici.radio-canada.ca/tele/enquete/2015-2016/episodes/360817/femmes-autochtones-surete-du-quebec-sq>.

[378] Harless (n 44) 308.

[379] Schafran (n 45) 161.

[380] Baker (n 97) 251.

aware of the costs and shortcomings of the criminal justice system.[381] Low conviction rates impact victims' willingness to report a crime; as Sharon Cowan explains,

> one of the worrying things about a low conviction rate—other than the prospects for justice for individual victims of sexual assault—is its impact further back in the criminal justice "chain". In other words, it is not only the number of convictions that might deter a complainant from reporting, but the knowledge of the kinds of cases that are successfully prosecuted, tried and convicted can affect who reports and wants to proceed with a sexual assault allegation.[382]

Moreover, the delays, loss of privacy, emotionally draining process and sometimes humiliating cross-examination practices are not exactly something one would look forward to. In Quebec, a recent documentary titled *La parfaite victime* ('the perfect victim') has exposed and revived important concerns regarding the legal treatment of sexual assault complaints;[383] it is hypothesized that this kind of discourse contributes to underreporting.[384]

In closing this section, I want to acknowledge that reporting the crime to the police is not the only legitimate response to being sexually assaulted. Victims may find

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[381] Chagnon, Boulebsol and Frenette (n 366) 137.

[382] Sharon Cowan, 'Sense and Sensibilities: A Feminist Critique of Legal Interventions against Sexual Violence' (2019) 23 Edinburgh Law Review 22, 30.

[383] *La Parfaite Victime* (Film Progreso inc, Cinémaginaire 2021).

[384] Radio-Canada, 'La diffusion de La parfaite victime a enfreint les normes de Radio-Canada' *Radio-Canada* (7 February 2022) <https://ici.radio-canada.ca/nouvelle/1860403/parfaite-victime-plainte-ombudsman-normes-journalistiques-monic-neron-emilie-perreault> accessed 24 February 2022.

empowerment, healing, or resolution through other means, such as disclosing the assault to their loved ones, suing the perpetrator in civil court, reporting him at school or at work, or sharing their story through an online denunciation. This section is not a judgment of victims who, for a variety of reasons, choose not to report a sexual assault. Rather, it aims to show, together with the following sections, that there are serious and persistent concerns regarding the criminalization of partner sexual violence, and that these concerns start even before the law gets officially involved.

The 'unfounding' and undercharging of partner sexual assault

Once a sexual assault is reported to the police, it is investigated to determine if the complaint is 'founded' or 'unfounded'—i.e. to determine if a crime has been committed. If the complaint is founded, a charge may be laid, but the process varies by province. The decision to lay a charge is made either by the Crown or by the police (after which the Crown decides whether to proceed with the charge).[385] In deciding whether to lay a charge or proceed with it, the Crown must consider whether it is in the public interest to do so. It must also evaluate the likelihood of conviction. Again, the precise standard varies by province; for instance, to lay a charge, there must be a 'reasonable' likelihood of conviction in Ontario, or a 'substantial' likelihood of conviction in British Columbia.

[385] Rotenberg (n 246) 24.

Attrition happens at both of these early stages of the criminal justice system—founding and charging. Let us start with the police determining whether a crime has been committed. In recent years, the practice of 'unfounding'—that is, when the police characterizes a sexual assault complaint as not truthful—has received increased scrutiny in Canada.[386] Unfounding is an important theme in sexual assault law because 'sexual assaults are subjected to "unfounding" to a far greater extent than any other crime'.[387] Unfounding remains a strong filter for sexual assault cases.

After stopping in 2006 due to concerns regarding the reliability of the data, Statistics Canada restarted publishing measures of unfounding in 2017.[388] The data reveals comparatively high rates of unfounding for sexual assault: '14% of sexual assaults (levels 1, 2 and 3) reported to police were classified as unfounded',[389] compared

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[386] Patrick White and Robyn Doolittle, 'Unfounded: Over 10,000 Sexual-Assault Cases to Be Reviewed' *The Globe and Mail* (10 February 2017) <https://www.theglobeandmail.com/news/national/in-unprecedented-response-32-canadian-police-forces-to-review-thousands-of-sexual-assault-complaints/article33991368/> accessed 23 September 2018.

[387] Johnson (n 247) 627.

[388] Statistics Canada Government of Canada, 'Statistics Canada Will Collect and Publish Data on Unfounded Criminal Incidents' (24 April 2017) <https://www.statcan.gc.ca/en/about/smr09/smr09_074> accessed 21 February 2022.

[389] Jacob Greenland and Adam Cotter, 'Unfounded Criminal Incidents in Canada, 2017' (Government of Canada, Statistics Canada 2018) <https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54975-eng.htm> accessed 21 February 2022.

to a rate of 7% for all Criminal Code violations (excluding traffic offences), a 12% rate for violent crimes, a 6% rate for property crimes, and a 7% rate for other crimes.[390]

It is unfortunate that these statistics do not distinguish rates of unfounding based on victim-perpetrator relationship. Available studies conducted in Australia,[391] in the United States,[392] and in England and Wales[393] have found a higher rate of unfounding (called 'no-criming' in the United Kingdom) for partner sexual violence. While conclusive comparisons across categories of victim-offender relationship are lacking for Canada, there are reasons to believe that the 'real rape' myth influences unfounding decisions. In a study by Holly Johnson, '[u]nfounding was more common in cases involving non-strangers who raped women without using force; in cases where women with mental health problems did not clearly say "no"; and in cases where women were not emotionally upset'.[394] The merging of acquaintances, dates and partners in some studies makes it more difficult to particularize the problem of unfounding for these

[390] ibid.

[391] Easteal and Feerick (n 17) 186.

[392] Harless (n 44) 309.

[393] Jeanne Gregory and Sue Lees, *Policing Sexual Assault* (Routledge 2012) 96.

[394] Johnson (n 247) 627–628.

specific categories. However, what is undeniable is that sexual assaults in general face unusually high rates of unfounding compared to other crimes.

In cases of 'founded' complaints, the police or prosecutors may still decline to press charges if the likelihood of conviction is too low or if it is not in the public interest to proceed. Johnson remarks that '[t]he most significant point of attrition after police become involved in sexual assault cases occurs when they record the incident as a crime and fail to lay a charge'.[395] Indeed, '[o]nly 42 percent of all "founded" cases result in a suspect being charged and no more than 11 percent have led to a conviction since Statistics Canada began providing court data in 1994'.[396] Compared to other violent offences, sexual assault cases are thus both less likely to be considered 'founded' and less likely to result in laying charges.[397]

Research published by Statistics Canada also highlights the role of injury in guiding charging decisions: 'The more serious the level of sexual assault, the more likely an incident was to have a charge laid. While a charge was laid in under half (41%) of

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[395] ibid 633.

[396] ibid.

[397] Kelly and Sermac (n 357) 34; Rotenberg (n 246) 2.

level 1 sexual assault incidents, a higher proportion of level 2 (59%) and level 3 (67%) incidents had a charge laid on an accused'.[398]

The problem of under-charging is not specific to partner sexual assault. In a 2006 study among '87 women who presented to a sexual assault treatment center and the police of a large Canadian city in 1994[,] . . . women who were known to the assailant for more than 24 hours (including current or previous partners) were more likely to see their cases forwarded for prosecution'.[399] Another study on the impact of rape myths in charging decisions examined 'a random selection of 300 sexual assault cases reported to and cleared by police'.[400] The authors found that the suspect being a stranger or the victim having had past consensual sex with her assailant did not play a significant role in charging decisions, after controlling for evidence strength.[401] Other factors associated with rape myths did appear significative, such as physical violence, voluntary alcohol consumption by the victim, and evidence of penetration (recall that penetration is legally irrelevant in Canada).[402] Police were also over four times more likely to recommend

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[398] Rotenberg (n 246) 6.

[399] Du Mont and Myhr (n 346) 1109.

[400] Alisha C Salerno-Ferraro and Sandy Jung, 'To Charge or Not to Charge? Police Decisions in Canadian Sexual Assault Cases and the Relevance of Rape Myths' (2021) 23 Police Practice and Research 1, 1.

[401] ibid 7.

[402] ibid 7–8.

charges where the victim was injured, but less likely to do so 'when the victim reported the assault themselves [or] when the assault was reported more than 24 hours after it occurred'.[403] Based on these two studies, the refusal to lay a charge does not seem more likely in cases of partner sexual assault. While this is an encouraging finding, it might be due to stricter filters applied at previous stages (victims' underreporting and police unfounding).

However, if we consider what happens after a charge is laid,

> [t]he likelihood of going to court [is] far lower when the victim knew their assailant: nearly two in three (64%) sexual assaults committed by a stranger procee[d] to court after being charged by police, whereas less than half (47%) of sexual assaults committed by someone known to the victim d[o].[404]

For sexual assaults generally, the proportion of charges dropped before proceeding to court is twice as high as the proportion of physical assaults that are dropped (51% compared to 25%).[405] Comparing sexual assaults to other crimes, Statistics Canada reports that:

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[403] ibid 8.

[404] Cristine Rotenberg, 'From Arrest to Conviction: Court Case Outcomes of Police-Reported Sexual Assaults in Canada, 2009 to 2014' (Juristat: Canadian Centre for Justice Statistics 2017) <https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/54870-eng.htm#a8> accessed 25 February 2022.

[405] ibid.

> The attrition rate, defined broadly as the proportion of criminal incidents that drop out of the criminal justice system, remains higher for sexual assault than for physical assault at all levels of the justice system with the exception of custody sentencing. Most (79%) sexual assaults reported by police (whether or not an accused was identified and whether they were charged or not) did not proceed to court within the six-year reference period. This means that for every five sexual assaults reported by police, one went to court while four did not. By comparison, two in every five physical assaults went to court (attrition rate of 61%).[406]

The institution warns that

> the events that take place between a police charge and court—including the incidence of alternative justice measures, plea bargains and/or charge downgrading—remain a significant information gap in wholly answering the question of why sexual assaults drop out of the justice system.[407]

Apart from deciding whether to lay a charge, the police or prosecutors also have the power to classify a sexual assault as more or less serious. Recall that sexual assault can be level 1, 2 or 3 depending on the use of a weapon and the causing of bodily harm. In an exploratory study 20 years after the abolition of the marital exemption and the creation of this three-level offence, Janice Du Mont observed that 'in almost two-thirds of sexual assault cases, the expected charge did not correspond with the actual charge(s) laid'.[408]

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[406] ibid.

[407] ibid.

[408] Janice Du Mont, 'Charging and Sentencing in Sexual Assault Cases: An Exploratory Examination' (2003) 15 Canadian Journal of Women and the Law 305, 326.

Her data suggests that partner sexual violence is particularly likely to be trivialized. In fact, 'a lesser charge than expected was laid in 76.9 per cent of those cases where the victim was assaulted by a current or previous partner versus 25.0 per cent of those cases where the victim was assaulted by a stranger'.[409]

What can we make of this statistic? We know that virtually all cases are recorded as level 1 sexual assault. Thus, the fact that partner sexual assault was more likely to be undercharged means that partner sexual assault cases were more serious to begin with—they involved more physical violence and injuries. This suggests that partner sexual violence must be very serious to even reach the charging stage of the criminal justice process; in other words, the partner sexual assault cases that victims report, that the police records, and that lead to a prosecution are more likely to involve serious physical injuries compared to other types of sexual assaults. Since partner sexual assault may, in fact, often be committed without physical violence or injuries,[410] we can conclude that the partner sexual assault cases which make it to the charging stage are only the tip of the iceberg.

Note that when the police or prosecutors discontinue or undercharge partner sexual assault cases, they are 'both anticipating what will happen at later stages in the

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[409] ibid 327.

[410] See chapter 1.

process [i.e. evaluating the likelihood of conviction] and giving expression to their own stereotypical views on what constitutes [sexual violence]'.[411] Hence the need to consider the legal response to partner sexual violence in its entirety, knowing that each filtering stage (victims', police, prosecutors', lawyers', judges' and jurors' practices) influence the other stages. Having seen that a partner sexual assault complaint is likely to be considered unfounded, not to result in a charge, or to result in undercharging, we now move to consider what happens to the few cases that do make it to trial.

The trial stage

Several concerns have been raised regarding the treatment reserved to the partner sexual assault cases that do reach the trial stage. My goal with this section is to show that after and despite Canada's legal reform criminalizing marital sexual assault, there are still difficulties in getting a conviction for a sexual assault committed by an intimate partner. Even when an accused is convicted, there is evidence of lawyers and judges holding problematic attitudes towards partner sexual violence.

Remember that as we are now considering the trial stage, most cases of partner sexual violence have already been filtered out through victim's non-reporting, 'unfounding', and the police or the Crown not laying a charge. Recent data by Statistics

[411] Gregory and Lees (n 393) 96.

Canada reveals that '[a]bout half (52%) of sexual assaults that involved an assailant who was a stranger to the victim were convicted, as were half (50%) of cases that involved an intimate partner, and just under half (48%) that involved a casual acquaintance'.[412] However, the information that conviction rates provide is limited. Indeed, at this stage of the criminal justice process, many cases that were unlikely to result in convictions have already been filtered out. As such, conviction rates do not tell us much about whether the legal treatment of partner sexual violence remains problematic. Qualitative examinations of judicial actors' attitudes toward partner sexual assault, as expressed in interviews and written decisions, are more interesting for our purposes.

Melanie Randall, one of the few Canadian legal scholars to have focused on spousal sexual assault cases, observes that

> [o]f those incidents of sexual assault that do get processed criminally, the spousal cases appear to provide jurists with the greatest degree of difficulty. In particular, the difficulty seems to be in not letting popular misconceptions and traditional assumptions about what is "normal," typical and expected in the terrain of intimate sexual relationships, run interference with the rigorous legal analysis and application of the appropriate legal tests to the facts, which the law requires.[413]

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[412] Rotenberg (n 404).

[413] Randall, 'Sexual Assault in Spousal Relationships, Continuous Consent, the Law' (n 6) 145.

We will look at this 'interference' from several angles, focusing on interviews with prosecutors and defence lawyers, application of so-called 'rape shield' laws, as well as judicial attitudes toward consent, mistaken belief in consent, and victim injuries.

A handful of Canadian scholars—Ruthy Lazar,[414] Melanie Randall,[415] Elaine Craig,[416] Jennifer Koshan,[417] and Isabel Grant[418]—have produced valuable scholarship focusing on marital or partner sexual assault and exposing the myths that can come up in such cases.[419] As Karen Busby synthesizes,

> Each of these researchers uses a different lens or methodology to examine spousal sexual assault cases. However, they all come to the same conclusions: the prosecution of these cases remains burdened

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[414] Lazar, 'Negotiating Sex' (n 8); Ruthy Lowenstein Lazar, 'The Vindictive Wife: The Credibility of Complainants in Cases of Wife Rape' (2015) 25 Southern California Review of Law and Social Justice 1; Lazar, 'Constructions of Marital Rape in the Canadian Criminal Justice System' (n 283).

[415] Randall, 'Sexual Assault in Spousal Relationships, Continuous Consent, the Law' (n 6).

[416] Craig, 'Ten Years after Ewanchuk the Art of Seduction Is Alive and Well' (n 262). Note however that this research has not focused on, but rather has discussed, partner sexual assault.

[417] Koshan, 'The Legal Treatment of Marital Rape and Women's Equality' (n 22); Jennifer Koshan, 'The Judicial Treatment of Marital Rape in Canada: A Post-Criminalisation Case Study' in Melanie Randall, Jennifer Koshan and Patricia Nyaundi (eds), *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi* (Hart Publishing 2017).

[418] Isabel Grant, *Sentencing for Intimate Partner Violence in Canada: Has S. 718.2 (a)(Ii) Made a Difference?* (Department of Justice Canada 2017).

[419] The use of the terms 'wife rape' or 'spousal sexual assault' do not mean that these researchers have limited their search to married partners, see eg: Koshan, 'The Judicial Treatment of Marital Rape in Canada' (n 417). This author discusses 'marital rape cases' but explains that cases were included regardless of whether the parties were legally married; see also Lazar, 'The Vindictive Wife' (n 414) 16.

> with discriminatory assumptions about spousal relationships, and convictions are still difficult to obtain.[420]

I note that these researchers' studies are not quantitative, and no claim is made that rape myths affect all cases of spousal sexual assault. On the contrary, each of these studies highlights at least a few positive examples. Not all criminal justice actors endorse sexual assault myths. Nonetheless, in any given case there is always the risk that, consciously or unconsciously, decision-makers will be influenced by rape myths. In a 2000 article tracking backlash against equality gains in sexual offences law, Sheila McIntyre, Christine Lesley Boyle, Lee Lakeman and Elizabeth Sheehy make the following observation, which still holds today:

> It is a testimony to the political effectiveness of the last 30 years of feminist activism that most women and many men—including criminal law professors, defence and Crown counsel, Justice Department lawyers, and judges—consciously acknowledge [statements such as 'a (good) wife cannot be raped' or 'reports of sexual abuse by women and children are inherently suspect'] to be based on discriminatory stereotypes that are unfounded in fact, yet mythic in their tenacious hold upon the Anglo-American legal imagination.[421]

To understand what concerns have been raised regarding the legal treatment of partner sexual violence after the 1980s and 1990s legal reforms, this chapter must rely on the

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[420] Busby (n 243) 331.

[421] Sheila McIntyre and others, 'Tracking and Resisting Backlash against Equality Gains in Sexual Offence Law' (2000) 20 Canadian Woman Studies 72, 20.

available literature from the few scholars, cited above, who have researched partner sexual assault specifically. This research often cites cases from the 1990s and the early 2000s, raising the question of whether these concerns still apply in the 2020s decade. We might think—and hope—that problematic attitudes towards partner sexual assault have continued to diminish throughout the 2010s and the current decade.

The problem is that such large-scale research[422] on the legal treatment of partner sexual assault is not repeatedly reproduced as years pass. The sparsity of research is likely explained by how few Canadian researchers focus on partner sexual violence. It would have been possible to conduct, as a doctoral project, a large-scale study of partner sexual assault cases decided in recent years. However, such a tall order would have left no space or time for the theoretical contributions which I aim to make in subsequent chapters. Moreover, because reported tried cases represent a very small part of all sexual assault cases that come into contact with the criminal justice system, it would not have been ideal to focus an entire thesis on this non-representative phenomenon.

To address these difficulties and ensure the presence of recent cases in this section, I have decided to complement the available literature with my own observations. I have chosen to pay particular attention to the theme of injury in partner sexual assault cases given its importance in the 'real rape' myth and in charging decisions, as seen

[422] Koshan, for example, produced a sample of 6000 decisions, among which 400 cases were retained as relevant. Koshan, 'The Judicial Treatment of Marital Rape in Canada' (n 417).

above. Thus, this section will refer to findings from earlier studies, while also contributing to the field with new observations regarding the legal treatment of partner sexual violence in recent years. While I cannot verify that every single problem identified by other scholars continues to take place today, my own research illustrates persistent causes for concern regarding the treatment of partner sexual assault cases which are consistent with previous studies.

Lawyers' attitudes

Trial outcomes are often opaque: in jury trials, there are no written reasons; in judge-alone trials, cases are rarely reported; and even in reported cases, written reasons might not be an exact representation of the judge's thinking process.[423] For these reasons, the influence of rape myths on the trial process cannot merely be ascertained from reading written decisions; other sources of information must be considered. In this section, we explore how lawyers discuss partner sexual violence. Studies of lawyers' attitudes towards partner sexual violence provide useful information as to whether this form of victimization might be treated differently and unfairly compared to other sexual assaults.

[423] The influence of extraneous and legally irrelevant factors on judicial decisions (and the fact that these factors are not represented in official written reasons) is widely acknowledged. See for example Shai Danziger, Jonathan Levav and Liora Avnaim-Pesso, 'Extraneous Factors in Judicial Decisions' (2011) 108 Proceedings of the National Academy of Sciences 6889; Holger Spamann and Lars Klöhn, 'Justice Is Less Blind, and Less Legalistic, than We Thought: Evidence from an Experiment with Real Judges' (2016) 45 The Journal of Legal Studies 255. See also generally Daniel Kahneman, Olivier Sibony and Cass R Sunstein, *Noise: A Flaw in Human Judgment* (Little, Brown Spark 2021).

Ruthy Lazar notes that 'research on the legal treatment of [wife rape in Canada] has been scant'.[424] By interviewing prosecutors and defence lawyers who had litigated cases of partner sexual assault, she conducted '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'.[425] (Note that despite her using the terminology of 'wife rape', she interviewed lawyers who litigated 'cases in which sexual assault was alleged to have been committed by a husband/common law partner or ex-husband'.[426]) Lazar published two articles from her study—one on the theme of consent and one on the that of false allegations—that show 'the extent to which myths and sexism continue to inform the legal prosecution of wife/partner rape as well as the failure to prosecute it in many cases'.[427] I explore her findings in depth as they reveal an important and persistent concern even decades after legal reforms: that rape myths continue to be prevalent and impact legal cases, particularly in cases of partner sexual assault. Lazar's findings will reappear in later subsections when they help better understand and contextualize findings that others have made from reported cases.

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[424] Lazar, 'The Vindictive Wife' (n 414) 5.

[425] ibid 7.

[426] ibid 16.

[427] Lazar, 'Negotiating Sex' (n 8) 333.

Through her interviews, Lazar identifies persistent rape myths held by legal actors that influence the prosecution of partner sexual assault cases. These rape myths are not 'as explicit as they have been historically'.[428] Yet 'a little digging under the surface and some unpacking of the views and arguments presented'[429] reveal the influence of rape myths on lawyers' discourses.

Lazar's interviewees appeared to adhere to the 'real rape' / 'simple rape' dichotomy described in chapter 2. The researcher writes that 'both Crown and defence counsel generally translated wife/partner rape as "bad sex" or "unwanted sex" but not really as rape'.[430] Lawyers' 'narratives revealed difficulties with acknowledging concepts of "non-consent," given the nature of marriage and the association of consent with love, sex, intimacy, familiarity, sexual history, and couples' personal language'.[431] Lazar develops on the theme of the special 'language of relationships', the idea that couples communicate agreement to have sex through codes and non-verbal signals, a construction that 'almost inevitably produce a reasonable and honest belief in consent'.[432] Instead of discussing partner sexual violence, lawyers preferred to speak of 'grey areas',

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[428] ibid.

[429] ibid.

[430] ibid.

[431] ibid 330.

[432] ibid 348.

miscommunication, and the normality of having sex with one's husband.[433] Some lawyers went as far as to suggest that 'in intimate relationships it is impossible to recognize non-consent'[434] because 'personal codes of behaviours and distinct rules of intimacy are too complicated and private for legal adjudication'.[435] In this context, Lazar observes, 'the nature of intimate relationships leaves no room for an external enquiry as to consent'.[436] Only when rape was 'accompanied by physical violence or occur[ed] within physically abusive relationships'[437] were lawyers willing to negate the normalcy or marital sex and to acknowledge the possibility of non-consent.

Lazar also found that 'the myth of false rape allegations shape[d] the legal discourse of wife rape'.[438] Lawyers tended 'to view the credibility of married women in cases of wife rape as quite low, particularly when sexual violence [was] not accompanied

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[433] ibid 355–356.

[434] ibid 353.

[435] ibid.

[436] ibid.

[437] ibid 340.

[438] Lazar, 'The Vindictive Wife' (n 414) 2.

by physical violence'.[439] When they were involved in family litigation, women were depicted as 'revengeful and manipulative'.[440] Lazar explains that:

> The common narrative of defense lawyers is that married women fabricate rape and assault allegations in order [to] 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).[441]

While most prosecutors 'reject[ed] the argument of fabrication',[442] they saw it as highly persuasive to judges.[443] It is notable that all but two of Lazar's interviewees 'claimed that family law matters play a significant role in shaping the process of assessing women's credibility in [wife rape] cases'.[444]

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[439] ibid 8.

[440] ibid 9.

[441] ibid 19.

[442] ibid 20.

[443] ibid 22.

[444] ibid 10.

Seeing denunciations made upon separation as particularly suspicious is flawed thinking.[445] First, separation is the most natural moment to report intimate partner violence, including sexual violence: going through with a sexual assault complaint while the couple is still together would be a more puzzling scenario.[446] Second, research shows that reporting domestic or sexual violence is not an advantage in custody litigation. In fact, many victims chose not to report domestic violence to avoid being labeled 'alienators' and being subjected to negative inferences regarding their parental capacity.[447] The myth of the false allegation by a vengeful ex-partner nonetheless remains culturally powerful.

For Lazar, this myth can be linked to antiquated beliefs about partner sexual violence: 'the traditional societal belief was that women falsely claimed rape to conceal sex outside marriage, whereas the modem view of married women's credibility is no less stereotypical'.[448] There is continuity in legal actors' historical and present-day disbelief of victims of partner sexual violence. This disbelief still pervades our society and

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[445] Zaccour, *La fabrique du viol* (n 102) 34–40.

[446] Women often stay with their abuser even after complaints to the police have been made; this often leads them to recant their original statement. In a classic lose-lose situation, women are also considered highly suspect in this scenario. On the complexities of dealing with recanting complainants, see Michelle Madden Dempsey, *Prosecuting Domestic Violence* (Oxford University Press 2009).

[447] Zaccour, *La fabrique du viol* (n 102) 34–40; for more context on the risks women face in family court when they report intimate partner violence, see Sheehy and Boyd (n 368); Zaccour, 'Does Domestic Violence Disappear from Parental Alienation Cases?' (n 368); Lapierre and Côté (n 369).

[448] Lazar, 'The Vindictive Wife' (n 414) 24.

comforts a vision of the world where partner sexual violence does not exist or is highly marginal. Indeed, for Lazar,

> 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.[449]

Lazar's work reveals ways in which partner sexual assault can be unfairly treated in the legal system without this bias necessarily appearing in reported cases. She observes that to justify or deny their reliance on rape myths, defence lawyers hid them behind apparent 'professional legal arguments'.[450] This observation echoes a controversy in the literature regarding whether or to what extent defence lawyers might utilize rape myths to discredit the victim in sexual assault cases[451] (the so-called 'whacking' of the complainant[452]). As

[449] ibid.

[450] ibid 8.

[451] See Jonathan Herring, *Legal Ethics* (2nd edn, Oxford University Press 2017) 278–280.

[452] David M Tanovich, 'Whack No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases' (2013) 45 Ottawa Law Review 495.

David Luban explains, relying on rape myths and aggressive cross-examination is an effective, if dubious, defence strategy:

> To make it seem plausible that the victim consented and then turned around and charged rape, the lawyer must play to the jurors' deeply rooted cultural fantasies about feminine sexual voracity and vengefulness. All the while, without seeming like a bully, the advocate must humiliate and browbeat the prosecutrix, knowing that if she blows up she will seem less sympathetic, while if she pulls inside herself emotionally she loses credibility as a victim.[453]

This quote illustrates one of the ways in which rape myths held (or even just utilized) by criminal lawyers might affect partner sexual assault cases.

It is also noteworthy that Lazar found an almost universal reliance on rape myths by her interviewees (both Crown and defence counsel for some myths, or only defence counsel for others). Lawyers also perceived judges as adhering to these myths, which is plausible given that judges are chosen among lawyers. In sexual assault trials, the Crown has the burden of proving each element of the offence beyond a reasonable doubt. This means that rape myths or other extraneous factors do not need to convince the judge or jury to be effective; it is enough for it to raise a reasonable doubt as to an element of the crime, such as consent. Lazar observes that myths were rarely stated explicitly and were

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[453] David Luban, 'Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann' (1990) 90 Columbia Law Review 1004, 1041. For recent Canadian commentary on this topic, see David M Tanovich, 'Whack No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases' (2013) 45 Ottawa L. Rev. 495; Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen's Press 2018).

often coated in professional legal arguments. It is likely that judges who, consciously or unconsciously, are influenced by these same myths will not say so explicitly in their reasons. As the author explains in justifying her qualitative methodology, the '[c]ase law often does not reflect the thoughts, perceptions and practices of the legal players involved'.[454] Therefore, the work cited in this section suggests that, even if reported cases do not universally show the impact of myths about partner sexual violence, such myths can still significantly affect the legal treatment of partner sexual assault cases.

Sexual history evidence

An important problem with partner sexual assault cases is the use, by the defence, of impermissible sexual history evidence. This theme recurs in studies of partner sexual assault cases and sexual assault cases more generally.

As we saw in chapter 3, sexual history evidence cannot be admitted without a previous hearing on a s. 276 application. Moreover, such evidence cannot be admitted to support an inference that the victim '(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge [the consent inference]; or (b) is less worthy of belief [the credibility inference]'.[455] So-called 'rape shield' provisions are particularly important in cases of partner sexual assault, because there is almost always a

[454] Lazar, 'The Vindictive Wife' (n 414) 15.

[455] Criminal Code, RCS 1985, c. C-46 s 276(1).

sexual history between the victim and the accused. The rape shields exist to prevent the decisionmaker from assuming that, by virtue of this sexual history, the complainant is likely to have consented to the sexual activity in question. Yet the available evidence suggests that rape shield provisions are routinely misapplied in cases of partner sexual violence.

It is not rare for lawyers and judges to entirely ignore rape shield provisions. In a study of reported partner sexual assault cases, Melanie Randall observes that past sexual history tends to 'slip in automatically'.[456] Indeed, 'some judges are allowing the defence to introduce past sexual history evidence in spousal sexual assault trials without any adherence to the proper procedures to determine admissibility',[457] that is, without the required s. 276 application. In her review of 400 cases of partner sexual assault decided between the removal of the marital exemption and 2003, Jennifer Koshan also concludes that sexual history evidence is often introduced without the required application.[458] Likewise, Ruthy Lazar found that in the majority of partner sexual assault cases studied, 'defence lawyers did not even submit an application to present sexual history evidence',[459] an observation that was confirmed in her interviews. I make the same

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[456] Randall, 'Sexual Assault in Spousal Relationships, Continuous Consent, the Law' (n 6) 146.

[457] ibid 152.

[458] Koshan, 'The Judicial Treatment of Marital Rape in Canada' (n 417) 270.

[459] Lazar, 'Negotiating Sex' (n 8) 347.

observation in my study of recent cases with a 'rough sex defence', described later in this chapter.

Partner sexual assault cases also showcase a problematic application of rape shield provisions even when the proper procedure is followed. Koshan observes that, 'in the vast majority of marital rape cases, applications to adduce evidence of sexual activity were allowed, at least in part'.[460] The author also notes that sexual history evidence 'was typically found to be relevant to issues regarding consent, mistaken belief in consent, and fabrication'.[461] While not all partner sexual assault cases involve misapplications of the law, the ones that do 'suggest that the courts are failing to apply the rape shield provisions with rigour where spouses are involved'.[462]

A further study of section 276 applications published by Elaine Craig in 2016 shows one the main problems with judges' evaluation of sexual history evidence: they admit this evidence when it shows a 'pattern of consenting' on the part of the victim.[463] Such 'pattern of consenting' is admitted to demonstrate consent: that is, to support the inference that the victim is more likely to have consented to the sexual activity in

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[460] Koshan, 'The Judicial Treatment of Marital Rape in Canada' (n 417) 271.

[461] ibid.

[462] ibid.

[463] Elaine Craig, 'Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions' (2016) 94 Canadian Bar Review 45, 62.

question, which is the exact inference that the law prohibits. For example, in a case where the victim said that the accused sexually assaulted her after she broke up with him, the judge admitted sexual history evidence to establish a 'pattern of repeatedly consenting to sex with the accused in similar circumstances'.[464] As Craig explains, '[t]he "similar circumstances" involved attending at the accused's home before her work shift, bringing tea with her, going up to his bedroom, and having sexual intercourse'.[465] Such cases, which are not uncommon, show the persistent influence of the rape myths that consent is continuous within a relationship, and that consent on some occasions means consent on all occasions. As Craig argues, these legally flawed cases risk 'reify[ing] the stereotypical assumption that real sexual assaults are perpetuated by strangers, and that ongoing sexual partners do not sexually assault one another'.[466]

It is not hard to find examples of legally wrong decisions on sexual history evidence, as those abound in cases that involve sexual partners.[467] A recent example that shows the differential treatment of partner sexual violence is the case *R v XX*, where the judge rejected evidence of sexual history with a third party, but accepted 'as potentially relevant and admissible the relationship evidence that during their marriage, the

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[464] ibid 65; citing *R v Latreille* 2005 CanLII 41547 (ON SC).

[465] Craig, 'Section 276 Misconstrued' (n 463) 65.

[466] ibid 67.

[467] Some recent examples are described in the section on 'rough sex' cases.

[complainant] and accused had a regular consensual sexual relationship'.[468] The common misapplication of rape shield provisions has lead the Supreme Court of Canada to reiterate, in a 2019 case, that sexual history evidence must be handled with care. In that case, evidence that the victim and the accused were 'friends with benefits' was found to have been wrongfully admitted as it 'served no purpose other than to support the inference that because the complainant had consented in the past, she was more likely to have consented on the night in question'.[469]

Why do judges, defence lawyers, and even Crown prosecutors continue to participate in the misapplication of the law? They might, consciously or unconsciously, adhere to the prohibited rape myth that sexual history evidence is indicative of consent. In Lazar's interviews, defence lawyers

> did not explicitly raise the "twin myths" that women who engaged in previous sex with the accused are less worthy of belief and/or are more likely to consent, which have been specifically prohibited by the Supreme Court of Canada as tools of reasoning. Instead, they criticized the "artificiality" of discussing sexual assault within intimate relationships in isolation from the broader context of the relationship as counter to "common sense."[470]

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[468] *R v XX* 2018 BCPC 393 [76].

[469] *R v Goldfinch* (n 270) para 4.

[470] Lazar, 'Negotiating Sex' (n 8) 340.

Even prosecutors were ambivalent toward sexual history evidence, and many of them 'admitted that they too often perceive sexual history as being relevant to consent'[471] in partner sexual assault cases. The prosecutors 'opposed the presumed relevance of sexual history to consent, but they also voiced the difficulties of separating wife/partner rape from previous sexual relations and acknowledged that they understood defence efforts to admit sexual history evidence'.[472]

Overall, Lazar's interviewees viewed 'sexual history as a significant element in the analysis of wife/partner rape[, as playing] an important role in the way consent within intimate relations is legally structured'.[473] For them, 'prior sexual history leads to a covert presumption of consent based on the fact that the parties know each other and are familiar with the other's sexual wishes and behaviours'.[474] The lawyers' beliefs about the role of sexual history evidence runs counter to the law. If even prosecutors share these problematic views, it is not surprising that the reported cases show frequent misapplications of the law.

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[471] ibid 345.

[472] ibid 346.

[473] ibid 339.

[474] ibid 358.

Overall, studies of sexual history evidence in partner sexual assault cases show a differential, unequal, and legally incorrect treatment of these cases. As suspected, there is more to the story than simply the text of the law, which prohibits the consent inference. Misapplying the law with regard to sexual history evidence might not automatically grant the accused an acquittal, but is far from harmless. The problem is not only with humiliating cross-examination practices that discourage the reporting of sexual assaults. Mock juror research conducted in the United Kingdom has shown that the use of previous sexual history affects the evaluation of a victim's credibility and the conclusion as to whether the complainant consented to the sexual activity in question.[475] Likewise in reported cases, judges primarily use sexual history evidence 'to support their inference that the very existence of a spousal or intimate relationship suggests a generalized and ongoing consent to sexual contact'.[476] Randall expands that some 'judges automatically read in the existence of an ongoing interpersonal relationship as creating a presumption of continuous consent',[477] which leads us to our next theme: implied consent in intimate relationships.

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[475] Louise Ellison and Vanessa E Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2008) 49 British Journal of Criminology 202.

[476] Randall, 'Sexual Assault in Spousal Relationships, Continuous Consent, the Law' (n 6) 152.

[477] ibid 146.

Consent

Misapplications of the law on consent have been identified as an important obstacle to the successful prosecution of partner sexual assault. Presumptions that consent is ongoing within relationship may complicate the legal response to partner sexual violence.

In our society, consent is often presumed to be continuous or implied within intimate relationships.[478] This assumption is reflected in interviews with criminal lawyers, suggesting that it may affect the legal treatment of partner sexual assault cases. According to Lazar's research, 'key justice system players themselves presume consent to sex in intimate relationships, which, in turn, shapes the way these players construct and litigate wife rape'.[479] The presumption of consent in intimate relationships is not stated explicitly, as it manifestly runs counter to the state of the law.[480] Lazar observes that '[o]n the surface, all interviewees argue[d] against the notion of presumed consent in marital or other intimate relationships between couples'.[481] However, 'probing into their views and arguments and analyzing them carefully produced a different account of

[478] Logan, Walker and Cole (n 45) 112; Lazar, 'Negotiating Sex' (n 8) 361.

[479] Lazar, 'Negotiating Sex' (n 8) 333.

[480] *R v Ewanchuk* (n 249).

[481] Lazar, 'Negotiating Sex' (n 8) 358.

consent: a consent that is assumed, presumed, and almost invariably apparent in intimate sexual relationships'.[482] Specifically, although defence and prosecuting lawyers

> disavowed adherence to the notion of continual consent for married women, their extensive discussions of sexual history as relevant to the issues at trial, the focus on [couples'] "secret language," and the characterization of [wife rape] as simply "unwanted sex," construct consent in intimate relationships as almost invariably present.[483]

Are these attitudes reflected in judicial decisions on partner sexual violence? The three following studies have attempted to answer this question. Analysing the aftereffects of the Supreme Court of Canada's decision in *R v Ewanchuk*[484]—which stated that 'implied consent' to sexual activity does not exist in Canadian law—, Elaine Craig observes that 'in circumstances involving intimate partners or spouses, trial judges may be more likely to wrongly rely on the assumption that as between spouses the doctrine of implied consent still exists'.[485] Her analysis of hundred of cases decided between 1999 and 2009 leads her to conclude that while the repudiation of implied consent 'has done much to achieve better respect from the law for the sexual integrity of the intoxicated party-

[482] ibid.

[483] ibid 361.

[484] *R v Ewanchuk* (n 249).

[485] Craig, 'Ten Years after Ewanchuk the Art of Seduction Is Alive and Well' (n 262) 259.

goer',[486] 'Ewanchuk has been less able to achieve this with respect to the sexual integrity of wives and girlfriends'.[487]

Melanie Randall's study of cases of spousal sexual assault reaches similar conclusions.[488] She observes that some judges 'appear to be preoccupied with the idea that marital and other spousal-like relationships imply ongoing rights of sexual access, or "continuous consent" to sexual activity'.[489] Judges may use the assumption 'that marriage confers upon men presumed rights of sexual access to their wives . . . as part of the framework for analyzing a criminal sexual assault charge'.[490] Some judges go as far as to assert 'a new legal test or burden for the Crown to meet in cases where the relational context of a sexual assault charge is a marital one'.[491] Within this made-up test, the complainant who says 'no', even explicitly and repeatedly, may still be found to be consenting or to give the impression of consent. Even worse, judges recast the accused's

[486] ibid 1.

[487] ibid.

[488] Unfortunately, Randall does not describe her methodology.

[489] Randall, 'Sexual Assault in Spousal Relationships, Continuous Consent, the Law' (n 6) 167.

[490] ibid 145.

[491] ibid.

sexual assault in the face of repeated refusals as 'seduction' or 'romantic gestures' that are normal and expected in spousal (and even separating) relationships.[492]

Jennifer Koshan's study of cases of partner sexual assault similarly found that many cases

> demonstrate that a relaxed standard continues to be applied to the issue of consent in many marital rape cases – consent may be implied, credibility determinations may turn on marital rape myths, and courts may seek proof of resistance or lack of capacity to consent rather than the absence of affirmative agreement.[493]

What can we conclude from these three reviews of cases, which overlap both in their findings and in some of the cases cited? Randall's, Koshan's, and Craig's studies all include problematic cases decided not only after the removal of marital exemptions (1983), but also after the *Ewanchuk* case rejecting the doctrine of implied consent (1999).[494] This confirms that courts can fail to apply the law in cases of partner sexual assault. Nonetheless, many of the examples that the researchers cite are over 20 years old, and one can hope that minimizing attitudes toward partner sexual violence are less prevalent today. We will see in my analysis of recent 'rough sex' cases that implied consent continues to be argued by defendants, although, at least in cases involving

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[492] ibid 179.

[493] Koshan, 'The Judicial Treatment of Marital Rape in Canada' (n 417).

[494] *R v Ewanchuk* (n 249).

physical injuries, judges often reject this argument at trial. We can thus be cautiously optimistic that, in most cases, judges are not presuming consent on the part of wives and partners. However, the fact that lawyers continue to rely on implied consent in discussing cases of partner sexual assault[495] suggests that such assumption remains a cause for concern: recall that to be effective, a rape myth does not have to be believed or explicitly endorsed, but simply to raise a reasonable doubt. Even the occasional doubt that consent was implied by the fact of a relationship is problematic given how few partner sexual assault cases even make it to the trial stage.

Apart from the influence of the implied consent myth, another concern regarding the legal evaluation of consent arises from Koshan's observation that 'courts in marital rape cases seem to ignore section 273.1(2)(c) of the Criminal Code, which provides that no consent to sexual assault is obtained where "the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority"'.[496] The disregard for this section is unfortunate as it could be useful in cases where the relationship between the victim and the accused is one characterized by domestic

[495] As found in Lazar, 'Negotiating Sex' (n 8).

[496] Koshan, 'The Legal Treatment of Marital Rape and Women's Equality' (n 22) 35.

violence. Other research[497] confirms that, to this day, section 273.1(2)(c) is rarely used in cases of adult sexual assault.[498]

Mistaken belief in consent and reasonable steps

The concept of implied consent within intimate relationships may also affect the evaluation of the accused's *mens rea* and give rise to a reasonable doubt that the accused had a mistaken belief in consent. 'So entrenched is the idea of "continuous consent" in spousal relationships', Randall remarks, 'that some judges have even managed to find support for an "honest but mistaken belief in consent" defence in cases where husbands have used or threatened extreme violence against their wives in the course of sexually assaulting them',[499] as well as in cases where the victim explicitly and repeatedly said 'no'. Randall's examples include both first-instance and appellate decisions that problematically lower the threshold for mistaken belief in consent in cases of partner sexual assault. But as Lazar observes, if we adhere to the view that couples have special codes (as the lawyers she interviewed did), then a mistaken belief in consent should be harder, not easier, to plead in cases of partner sexual assault:

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[497] Benedet and Grant (n 262) 143–144.

[498] This can be confirmed by a quick search on CanLII, which reveals that only 89 cases even cite the provision as of 2022, with only a handful of them applying the provision to a case of adult sexual assault.

[499] Randall, 'Sexual Assault in Spousal Relationships, Continuous Consent, the Law' (n 6) 176.

> it could be argued that the familiarity that characterizes intimate relationships should generate a clearer consent compared to that of other relationships. The closeness and the ease that distinguish intimate relationships from others should arguably minimize misunderstandings of behaviours between people who know each other well.[500]

In Canada, the 'defence'[501] of honest but mistaken belief in consent cannot succeed if the accused did not take reasonable steps to ascertain consent.[502] The Supreme Court has explained[503] that

> to raise this defence, the accused bears an initial evidentiary burden of pointing to some evidence capable of showing that he or she took reasonable steps. . . The Crown then bears the persuasive burden of proving beyond a reasonable doubt that the accused failed to take such steps.[504]

Instead of applying this two-step reasoning, courts often ignore the provision entirely, state that the accused did not need to take any reasonable steps, or interpret the mere existence of a relationship as a 'reasonable step'. In Randall's study, there was often

> a judicial failure to acknowledge, let alone correctly apply, the reasonable steps provision of the "honest but mistaken belief in

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[500] Lazar, 'Negotiating Sex' (n 8) 350.

[501] As explained in chapter 3, this 'defence' is actually a denial of *mens rea*. While the accused has no burden of proof, the defence can only be considered if it has an air of reality.

[502] Criminal Code, RCS 1985, c. C-46 s 273.2(b).

[503] In the analogous context of child sexual offences and the mistake of age defence.

[504] *R v Morrison* 2019 SCC 15 [48]. See for a critique: Isabel Grant, 'The Slow Death of Reasonable Steps Requirement for the Mistake of Age Defence' (2021) 44 Manitoba Law Journal 1.

> consent" defence. In fact, this provision is glossed over in some of the judgments, as if it simply does not exist in the Criminal Code.[505]

This finding is consistent with Koshan's study, in which many of the cases 'suggest that the presence of a spousal relationship between the parties is seen as clearly relevant to, and sometimes seems to lead to a finding of, mistaken belief in consent'.[506] Elaine Craig has also inquired into the mistaken belief in consent defence in the decade following the *Ewanchuk* decision (1999-2009).[507] Focusing on the use of the defence in cases of ongoing sexual relationships, she observes

> a failure on the part of lower courts to consistently ascribe to the communicative notion of consent in cases involving sexual assault allegations between long term intimate partners – more specifically, in cases where an accused's actions appear to be motivated by a desperate attempt to 'win back' or 're-claim' his partner.[508]

From the recent 'rough sex' cases I examine in a subsequent section, it is also clear that judges are prepared to consider a defence of mistaken belief in consent—and to accept sexual history evidence as relevant to this defence—even in cases where the accused admits to not asking for consent before penetrating the victim.

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[505] Randall, 'Sexual Assault in Spousal Relationships, Continuous Consent, the Law' (n 6) 145–146.

[506] Koshan, 'The Legal Treatment of Marital Rape and Women's Equality' (n 22) 41.

[507] *R v Ewanchuk* (n 249).

[508] Craig, 'Ten Years after Ewanchuk the Art of Seduction Is Alive and Well' (n 262).

While the reasonable steps requirement in Canadian law is quite progressive, it is of little use if judges do not actually enforce it. Once again, available studies suggest that partner sexual assault cases are not always judged in a manner consistent with the state of the law.

Injuries in prosecuted cases of partner sexual violence

Previous sections were based on available research on reported partner sexual assault cases. But as commented above, the articles cited often refer to old cases, so it is hard to know if similar problems are still taking place today. Moreover, these studies do not always make explicit their methodology or quantify their findings. To get a clearer picture of persisting issues with the legal response to partner sexual violence, this and the following section relies on my own case law analysis.

Because we saw that injury is a defining feature of the 'real rape' myth, and that partner sexual assault cases without physical violence or injuries are often filtered out of the criminal justice system, this is the theme on which I focus. In this section, I question to what extent partner sexual assault cases not involving physical violence can be taken to trial. In the following section, I use the context of so-called 'rough sex' cases to revisit the issues of sexual history evidence, consent, and mistaken belief in consent from a new angle.

Feminists have expressed concerns that, because it departs from 'real rape' imagery, non-physically forced sexual violence is harder to recognize and prosecute. The

defining role of injuries in policing the frontier between 'real' and 'simple' rape is revealed in Lazar's interviews with both defence and Crown criminal lawyers. She explains that:

> This division between "violent rape" and "non-violent rape" constituted a major theme in the interviews . . . The participants dichotomized between wife rape that is accompanied by physical violence or occurs within physically abusive relationships and wife rape that is "solely" about sexual violence and thus is "non-violent." . . . The physical abuse displaces societal assumptions about matrimonial harmony and stability and negates the "normalcy" of these relationships, which in turn makes it is easier to acknowledge non-consent in marital relationships.[509]

Similar attitudes seem to filter out partner sexual assault cases even before they reach lawyers. As Lazar observes, the 'invalidation of "non-physical violence related" domestic sexual assault cases is also evidenced by the fact that these cases are not common in the criminal justice system'.[510] Indeed, we saw that, absent physical injury, women are less likely to report a sexual assault.[511] The absence of physical injury was also found to be a significant factor in 'unfounding' decisions by the police.[512] Recall also that Janice Du Mont's study showed undercharging in 77% of partner sexual assault

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[509] Lazar, 'Negotiating Sex' (n 8) 340.

[510] Lazar, 'Constructions of Marital Rape in the Canadian Criminal Justice System' (n 283) 16.

[511] McGregor and others (n 360); Du Mont, Miller and Myhr (n 361).

[512] Johnson (n 247) 627–628.

cases.[513] This suggests that at least 77% of partner sexual assault cases reaching the charging stage involved a weapon, threats to a third party or causing bodily harm (level 2), or wounding, maiming, disfigurement or life endangerment of the complainant (level 3). Where are the cases of partner sexual assault where there is no extrinsic physical violence? Another study on sentencing outcomes observed factual similarities between stranger and intimate partner sexual assaults,[514] suggesting that partner sexual assaults 'not characterized by force, injury and penetration may have been screened out at earlier stages of the criminal justice system'.[515]

These findings are concerning because, as we saw in chapter 1, physical force, resistance, and injuries are often absent in cases of partner sexual violence. Rather, sexual coercion can be exerted through non-physical means such as verbal pressure, emotional manipulation, and non-physical threats. If non-physically forced partner sexual violence is common, yet does not often make it to the trial or conviction stage, we can conclude that a large proportion of partner sexual violence cases are not represented in the case law. The disparity between features of partner sexual assault occurrences and

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[513] Du Mont (n 408) 327.

[514] Janice Du Mont, Deborah Parnis and Tonia Forte, 'Judicial Sentencing in Canadian Intimate Partner Sexual Assault Cases' (2006) 25 Medicine and Law 139, 139; this result contrasts with Jennifer S McCormick and others, 'Relationship to Victim Predicts Sentence Length in Sexual Assault Cases' (1998) 13 Journal of Interpersonal Violence 413.

[515] Du Mont, Parnis and Forte (n 514) 148.

features of partner sexual assault cases is concerning: it suggests that the law is only targeting the tip of the iceberg. The move from a force to a consent model—that is, the dropping of physical force requirement—was an important step in the improvement of sexual offences law, but this legal change is of little significance if it does not translate in practice.

To confirm whether non-physically forced partner sexual violence is present in tried cases of partner sexual assault, I employed the following methodology. I first conducted a search on the CanLII database for cases that had 'R.' in their case name and '(spouse OR married) AND sexual assault' in the text of the decision. Cases had to have been decided since the year 2000. I read the first 50 results, ordered by relevance. This search revealed 28 cases involving partner sexual assault (because I was mostly interested in the facts of the case, I included not only trial cases, but also other decisions such as appeals and sentencing). To ensure the inclusion of acquittals,[516] I conducted a further search of cases decided since 2000 with 'R.' in the case name and the following keywords: '(spouse OR married) AND sexual assault AND find /s "not guilty"'. I examined the first 70 decisions which revealed 23 cases of partner sexual assault where the accused was acquitted of at least one of the charges. After accounting for overlapping results between the two searches and joining multiple decisions on the same set of facts, I

[516] We can hypothesize, based on the evidence reviewed above, that acquittals are more likely than conviction cases to involve non-physically forced sexual violence.

was left with 40 relevant cases of partner sexual assault, which I analysed to identify the kind of coercion used.[517]

The sample reveals that most cases involve physically forced intercourse. In 29 cases, the sexual assault was completed through physical force. Three further cases involve a combination of physical force with something else (threats of physical violence,[518] the complainant's unconsciousness,[519] or the enforcement of social norms that the woman must have sex with her husband),[520] for a total of 32 cases. I consider that a case where the complainant did not resist because she was afraid after her ex broke into her apartment[521] involves an implicit threat of physical violence and can thus also be counted within the physical violence category. There are three cases[522] involving

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[517] I base my factual analysis on the testimony of the complainant. I acknowledge that, in so doing, I am drawing conclusions based on facts that were not always proven beyond a reasonable doubt. However, this seems to be the only way to get a sense of how often cases of partner sexual assault involve physical violence. I obviously cannot base my analysis on the testimony of the accused (if there is one), as the accused typically denies any physical violence in claiming his innocence. I could have limited my search to cases where the evidence of the complainant satisfied the burden of proof beyond a reasonable doubt, but then the search would have been skewed by excluding acquittals. I thus take the testimony of the complainant as an appropriate representation of the facts, while acknowledging that this might not be true in all cases.

[518] *R v MAM* 2021 ONCJ 475.

[519] *R v JD* 2019 ONSC 2685.

[520] *R v SSA* 2015 ABPC 97.

[521] *R v V(RW)* 2003 BCSC 1806.

[522] Including the one that involved both unconsciousness and physical force after the complainant woke up.

unconsciousness.[523] Further, there is only one case of non-physical threat, where the accused obtained sexual compliance through threats that he would have the victim deported and was also convicted of extortion.[524] One case, counted as 'coercive control and deception', involved a complainant who was made to believe that she would be killed by the accused's family for not being a sufficiently passive wife if the accused did not beat and sexually assault her.[525] Three cases had insufficient information to ascertain the type of coercion.[526] The distribution of the cases in which the information was found is thus as follows, with over 85% of the cases involving physical violence:[527]

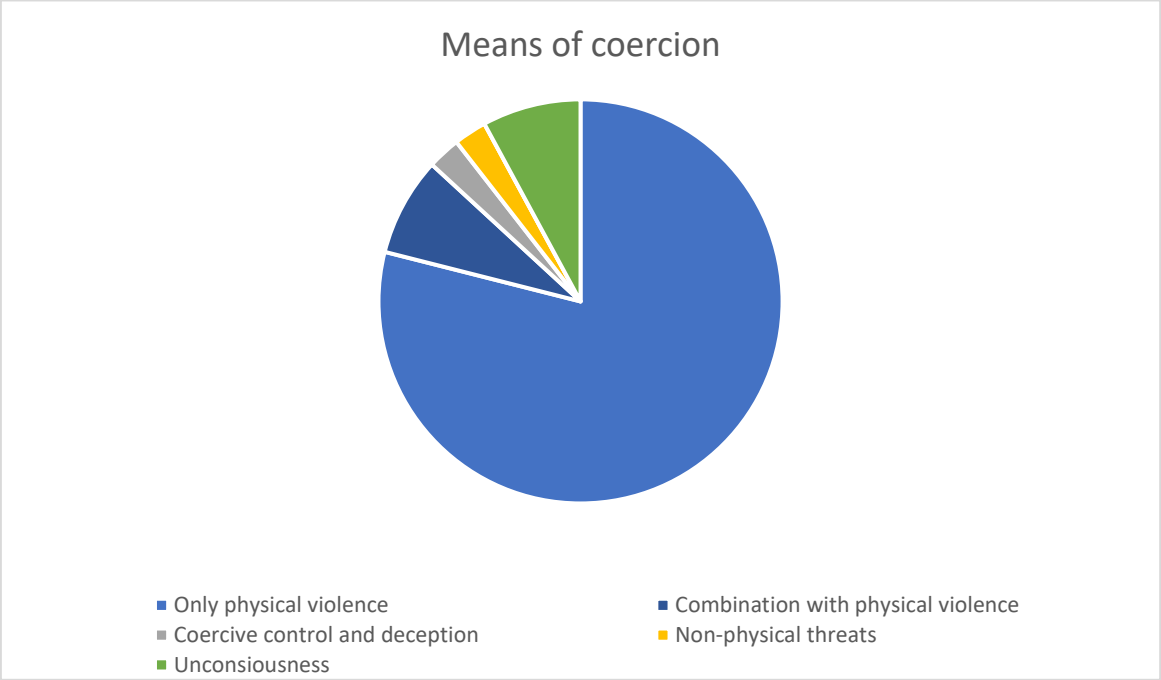
[523] *R v LH* 2019 BCPC 89; *R v ES* 2019 NLSC 199; *R v JD* 2019 ONSC 2685.

[524] *R v TD* 2019 ONSC 3761.

[525] *R v Mastronardi* 2006 BCSC 1681.

[526] *R v XXS* 2006 CanLII 20 (ON SC); *R v LoE* 2019 ONSC 6402; *R v EA* 2020 ABQB 536.

[527] Arguably, sexual assaults committed while the victim is unconscious *are* physically forced. However, in literature on sexual coercion (explored in later chapters), unconsciousness is distinguished from physical violence or threats of physical violence as a separate coercive tactic.



As this chart makes clear, the non-physically forced sexual assaults that are reported in the empirical literature are mostly absent once we reach the trial stage. Moreover, all cases included penetration and/or attempts at penetration. This suggests that, despite the abolition of the force requirement, the penetration requirement, and the marital exemption, 'simple rapes' by partners using non-physical means of coercion remain under-criminalized, due to a combination of reporting, 'unfounding', and charging practices.

In addition to being skewed towards physically-forced intercourse, many of the reported tried cases involve injuries, be it slight bruising and soreness not requiring

medical attention,[528] or serious injuries. Some cases also involve weapons.[529] Cases involving choking, beatings, and penetration with objects show the extreme levels of sexual violence represented in prosecuted cases.[530] For example, the facts in one case are described as follows:

> He choked her, and as he pulled her by the hair down the stairs to the basement
> Once the offender arrived at the bottom of the stairway he put his wife on a bed while still pushing his penis into her mouth telling her what a whore she was and that he would treat her like a whore from now on. He then took a screwdriver and began shoving the handle of the screwdriver repeatedly into her vagina for what seemed to her like a very long time and he also shoved a child's plastic bowling pin into her vagina. Following this he had intercourse with her while continuing to bang her head against the wall. She begged him to stop and she was crying.[531]

Reading reported cases reveals, together with the statistics cited above, how the criminal justice system targets incidents of extreme sexual violence, apparently leaving aside cases of 'simple rapes' or 'ordinary' partner sexual assault not involving physical violence, penetration, or injuries. This situation is very concerning given how important it was for the evolution of sexual offences law to put an end to the force requirement.

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[528] See eg *R v AH* 2018 ONSC 625.

[529] See eg *R v Evans* 2012 ONSC 5801.

[530] See eg *R v DLE* 2009 MBQB 218 [9]; *R v Basil Smith* 2015 ONSC 3330 [5].

[531] *R v BU* 2006 SKQB 476 [13-14].

This feature might no longer be a requirement in law, but it continues to be a strong filter in fact.

In conclusion, the reported cases studied do not showcase the variety in forms of coercion exposed in empirical literature. Rather, physical violence dominates the legal narrative on partner sexual assault. Cases of verbal pressure, non-physical threats, and other non-physical forms of coercion are virtually absent from the sample, suggesting that these cases, which we know to exist, have been filtered out at previous stages. This observation foreshadows the challenge that lies ahead for the creation of a new offence that will primarily target non-physically violent partner sexual coercion.

The 'rough sex defence'

We now know, from the sample I examined as well as from other studies cited throughout this chapter, that physical force and injuries are often present in prosecuted cases of partner sexual assault. In recent years, feminists have also voiced concerns that cases involving injuries are being framed as 'BDSM' or 'rough sex' cases, making a conviction more difficult to obtain and fueling myths and stereotypes about sexual violence.[532] As such, there are two sets of concerns regarding the role of physical force or

[532] See eg Elizabeth Sheehy and Isabel Grant, 'The Misogyny of the So-Called "Rough Sex" Defence' (*Policy Options*, 21 January 2020) <https://policyoptions.irpp.org/magazines/january-2020/the-misogyny-of-the-so-called-rough-sex-defence/> accessed 31 August 2020; Craig, 'Ten Years after Ewanchuk the Art of Seduction Is Alive and Well' (n 262); Craig, 'Section 276 Misconstrued' (n 463); Busby (n 243);

injuries in sexual assault cases: the concern that cases that do not involve physical violence are not prosecuted as they do not look like 'real rape' (explored in the previous section), and the concern that violent sexual assaults are wrongly perceived as BDSM or rough sex (explored in this section).

The defence narrative that the accused's physical violence was consensual is described as the 'rough sex defence' (of the 'BDSM defence'), even though it is a theory of the case rather than a defence in the legal sense. Cases with a 'rough sex defence' are a rich topic to continue exploring the legal response to partner sexual assault as they straddle all the legal issues we have considered so far: credibility, sexual history evidence, consent, and mistaken belief in consent. As a matter of common sense, consent is more dubious when physical violence is involved, and injuries should make convictions more likely by reflecting 'real rape' imagery and providing corroboration. Consequently, exploring problems that might arise in these cases is a fruitful endeavour: if sexual assault remains difficult to prove or if myths and stereotypes are visible even in these extreme cases, what hope is there for the few prosecuted cases of partner sexual assault not involving physical violence?

Koshan, 'The Legal Treatment of Marital Rape and Women's Equality' (n 22); Koshan, 'The Judicial Treatment of Marital Rape in Canada' (n 417).

In 2011, Karen Busby conducted a study of Canadian 'rough sex' cases, and found that the focus was displaced from contemporaneous, affirmative consent to assumptions of continued consent to similar sexual activity within relationships:

> In the absence of contemporaneous negotiation, all defendants rely on prior sexual encounters with the complainant to raise a reasonable doubt about consent or to support a mistaken belief in consent. Frequently, the cases have involved defence assertions that a "no" is really a "yes," and seemingly coercive conduct such as strangulation, slapping, bondage, threats, and name calling have been seen as part of a game. The absence of safewords and other aspects of the safe, sane, and consensual credo in almost all of these cases underscores the fact that these cases are not about carefully employed BDSM practices. It also raises the very practical question of just what a complainant needs to do to indicate non-consent. If the BDSM conduct was similar to what the parties had previously engaged in, acquittals are more likely, whereas if the conduct involved more apparently violent conduct, convictions were more likely.[533]

To see if partner sexual assault cases continue to be argued and judged based on myths and stereotypes even in recent years, this section explores 'rough sex' cases in the ten years following Busby's study (2011 to 2021). I conducted the following search on CanLII for decisions in English[534] released between May 2011 and May 2021: '"sexual assault" AND "rough sex" OR "bdsm" OR "bondage" OR "masochism" OR "sadomasochism" OR "erotic asphyxiation" OR "spank"'. I read the 60 first results (ranked by relevance) and, after excluding irrelevant cases (non-criminal cases, child

[533] Busby (n 243) 349–350.

[534] I had difficulty finding cases in French involving a 'rough sex defence'.

victims, consent not at issue), I was left with 40 results.[535] I included both partner and non-partner sexual assault cases to allow for comparisons.

Some people might be concerned that 'rough sex' prosecutions are used to unfairly target sexual minorities. But the first thing to note is that all the cases examined involved a male perpetrator and a female victim who reported the crime to the police and testified to clearly, and often repeatedly, expressing non-consent. This finding is consistent with Busby's study, in which she contrasts the prosecution of 'rough sex' cases in Canada with the leading English case on consent to harm, *R v Brown*:[536]

> Most of the complainants . . . went to the police to make a complaint. No complainant [except one] had recanted her original statement. . . All of the cases involve heterosexual relationships except two of the homicide cases. These characteristics should be contrasted with *R. v Brown* in the United Kingdom, which involved gross indecency convictions against gay men engaging in clearly consensual BDSM activities who were arrested following a long covert police investigation.[537]

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[535] Something to notice is that I found 40 relevant cases among the first 60 results showed on CanLII, with the search engine having returned a total of 435 cases. This abundance of results is striking, if we consider that Busby only found 22 cases for the 2005 to 2011 period. My search seems to confirm feminists' concern that the 'rough sex defence' is being increasingly used, complicating a narrative of progress in the prosecution of sexual assault.

[536] *R v Brown* [1993] UKHL 19.

[537] Busby (n 243) 346–347.

That being said, I now move to considering admissibility rulings for sexual history evidence, before describing trial decisions.

Admissibility rulings

The sample includes 16 admissibility rulings. Some evidence is admitted in ten cases,[538] while in six cases, the proposed evidence is excluded. There are also trial cases in which evidence of previous sexual history is discussed, with or without reference to a s. 276 application. Most of the cases suggest a misapplication of the law, especially in cases of partner sexual violence, as will be detailed through the exploration of four identified themes.

Theme 1: Essential context

The sample shows the difficulty of excluding sexual history evidence in cases of partner sexual assault. Eleven out of the 16 admissibility rulings involve a romantic relationship, and sexual history evidence is admitted in eight of them. While excluding sexual history evidence is particularly important in cases of partner sexual violence, judges struggle to fully deploy the rape shields in these cases. Even when judges exclude the particulars of

[538] Although what is admitted in *R v MacMillan* 2019 ONSC 6018 is marginal (arguably not even sexual history evidence).

the complainant's sexual life, evidence that she had a sexual relationship with the accused seems almost unavoidable.

For example, in *R v Freer*, evidence that 'the parties were involved in a consensual sexual relationship was [admitted because, as the trial judge wrote:] "it is necessary for the jury to understand that these parties were in a romantic relationship prior to the events in question and that their relationship included consensual sex"'.[539]

In *R v BTH*, the accused did not establish the relevance of sexual history evidence '[g]iven his denial that the prior sexual activity formed a part of his perception that the complainant was consenting, and his attribution of his belief in her consent entirely to her conduct on the date of the alleged offence'.[540] The judge observes that '[a] brief if intense sexual interval within a much longer platonic relationship would not ordinarily be considered as sufficient grounding for an honest but mistaken belief in consent to sexual activity some 11 months later.'[541] Yet the judge cannot resist admitting at least evidence that the accused and the complainant had a four-day sexual relationship 11 months before the alleged sexual assault.[542] Not only is there no relevance to the admitted evidence (on

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[539] *R v Freer* 2020 ABCA 177 [33].

[540] *R v BTH* 2018 SKQB 85 [40].

[541] ibid 70.

[542] ibid 73.

the accused's own admission), but the judge's reasoning also suggests that previous sexual activity would have been even easier to admit in the context of a longer ongoing relationship: 'the temporal connection is extremely fragile. It is not as if a relationship, including a sexual aspect of the relationship, continued for a time'.[543]

Theme 2: Unusual sexual activity

This difficulty in excluding sexual history evidence is not exclusive to cases with a 'rough sex defence', as we saw above, but the fact that the accused claims that the couple had an 'atypical' sexual life helps bolster his argument that sexual history evidence is crucial context. Indeed, in 'rough sex' cases, defendants emphasize the need to include sexual history evidence for 'context' due to the 'unusual' nature of the sexual activity in question.

For example, in *R v JSS*, evidence of previous anal sex is wrongfully admitted for the prohibited purpose of showing that consent was more likely. This decision is justified, in the judge's view, because 'anal intercourse between heterosexual couples, while not necessarily outside of the mainstream, is sufficiently close to its boundaries that some jurors might see it as an act that a woman would not necessarily willingly engage in'.[544] Without sexual history evidence, the incidents in question would lack

[543] ibid 70.

[544] *R v JSS* 2014 BCSC 804 [39].

context and ‘emerge as if from nowhere’.[545] The judge contrasts this case ‘to the situation in which a spouse is alleged to have engaged in forced vaginal intercourse without the partner's consent, in which a jury would be unlikely to presume anything particular about the likelihood of consent in that specific situation’.[546] The judge uses a discourse of ‘normality’, ‘context’, and ‘credibility’ to avoid the obvious conclusion that sexual history evidence is admitted for a prohibited purpose: showing that the complainant is more likely to have consented to anal intercourse because she is the ‘kind of woman’ who consents to that type of sexual activity. Stating that the evidence goes to ‘credibility’ is just smoke and mirrors when the credibility contest is on the issue of consent, and as the Supreme Court has highlighted, vigilance is essential so that ‘twin-myth reasoning masquerading as ‘context’ or ‘narrative’ does not ambush the proceedings’.[547]

A similar mistake is at play in *R v Marsden*, where ‘[t]he accused deposed that he and the complainant routinely engaged in consensual sexual activity that included playing dominant and submissive roles and engaging in “rape play” scenarios’.[548] The reviewing judge criticizes the previous judge’s decision to admit sexual history evidence but stops short of overturning it: ‘I do not see how the fact of previous anal intercourse

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[545] ibid 40.

[546] ibid 41.

[547] *R v Goldfinch* (n 270) para 51.

[548] *R v Marsden* 2020 ONSC 3091 [11].

helps on the issue of consent or communication of consent to later anal intercourse. [But the] fact that the judge weighed the factors differently from the way I might have does not necessarily amount to an error of law.'[549]

In *R v G*, the victim bit the accused's penis, and the accused wants to include evidence that she has done so in the past in the context of consensual sexual activity as well as evidence of rape fantasies. The proposed relevance is manifestly founded on the prohibited inference on consent, but the defence exploits the usual excuses of 'context', 'credibility', and the 'nature of the relationship':

> the Applicant says this evidence is relevant to [credibility] and is necessary to understand the nature of their relationship. . . The Applicant takes the position that the evidence is relevant to credibility because it will provide the necessary context for evaluating the accounts of each of the complainant and the Applicant . . . The Applicant's submission is based on the premise that without this evidence, the trier of fact may be less inclined to accept the evidence or argument by the Applicant that the complainant willingly engaged in what he calls "rough sex".[550]

The judge sees through the argument, and even though some case law suggests that evidence of prior unusual sexual activity could be admitted, she closes the gate:

> I find it difficult to distinguish [the Applicant's] position from the prohibited line of reasoning set out in s. 276(1)(a) of the Code that the complainant is more likely to have consented to the sexual activity on

[549] ibid 16–17.

[550] *R v G* 2015 ONSC 5321 [12, 27].

> this occasion because she consented to similar sexual activity on another occasion.[551]

However, the judge does not challenge the underlying argument that 'unusual' sexual activity is 'crucial context' in 'rough sex' cases:

> The Applicant relies on the unique features of the sexual activity alleged . . . It appears that in some cases where the alleged offences involved bondage or other forms of rough sex, this argument has been persuasive [but here the facts are not] so unusual as to make information about their previous sexual encounters necessary in order to understand the nature of the relationship between them, or to assess credibility.[552]

Moreover, once again the existence of a sexual relationship is assumed to be crucial context. No sexual history evidence is admitted only because the existence of previous sexual relationships is already implied by the marital relationship.[553] Echoing our first theme, one is left to wonder if the 'context' argument will always permit at least some of the parties' previous sexual history to permeate in cases of partner sexual violence.

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[551] ibid 30, 34.

[552] ibid.

[553] ibid 32.

Theme 3: Distinction without a difference

We saw that judges are open to admitting sexual history evidence for 'context', especially if the sexual activity in question is judged 'unusual'. In many cases, the evidence is clearly admitted to support the prohibited consent inference, although judges state the relevance slightly differently. This suggests that judges may not have internalized the legal direction that sexual history evidence does not support an inference of consent.

For instance, in *R v CC*, the unusual nature of the sexual activity enables the admission of sexual history evidence 'to rebut the common sense inference that a person would be unlikely to consent to being struck or choked during sexual activity'.[554] Yet rebutting the 'inference that a person would be unlikely to consent' is equivalent to showing that the complainant is more likely to consent, as is recognized in other cases.[555] The evidence is thus admitted to support the prohibited consent inference. Otherwise, it would have been sufficient to tell the jury that sometimes people consent to being struck or chocked during sexual activity. What the judge does instead is admitting evidence that *this complainant* has the propensity to consent to this type of sexual activity.

[554] *R v CC* 2018 ONSC 1262 [16].

[555] *R v MacMillan* (n 538) para 23; *R v Goldfinch* (n 270) paras 58–59.

A poorly disguised prohibited inference is also present in the murder case *R v Garnier*. Feminists have noted that the 'rough sex defence' is particularly unfair when the victim is no longer there to tell her side of the story.[556] Here the accused seeks to admit evidence of rough sexual activity between the victim (Ms. Campbell) and another man (V.H.), arguing that 'the testimony of V.H. will enhance his credibility regarding his allegation that Ms. Campbell had an interest in sexual masochism or rough sex'.[557] While the preliminary inquiry judge concluded that the proposed inference was 'stereotypical reasoning about women, sex and consent',[558] the evidence is admitted at trial—once again, its relevance only vaguely stated:

> V.H.'s potential evidence is of specific instances of sexual activity that meet the requirements for similar act evidence or are evidence of a pattern of sexual conduct (rough sex, also known as sexual masochism) that resemble Mr. Garnier's version of the alleged encounter with Ms. Campbell ; it is relevant to an issue at trial ; and, based on the defence evidence, it has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.[559]

The evidence engages the prohibited inference on consent: the accused's claim of consent is more credible because the victim had a 'pattern' of consenting to rough sex.

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[556] Sheehy and Grant (n 532).

[557] *R v Garnier* 2017 NSSC 341 [49].

[558] *R v Garnier* 2016 NSPC 86 [39].

[559] *R v Garnier* (n 557) para 56.

The prohibited reasoning lies thinly veiled by the proposition that the evidence goes to 'credibility'—a distinction without a difference.

Theme 4: Mistaken belief and displacing rape myths

The sample also reveals that sexual history evidence is more easily admitted when the accused claims a belief in consent rather than consent. This is because previous consent is not supposed to inform the trier of fact on subsequent consent, but the accused can claim that his belief was based on 'sexual acts performed by the complainant at some other time or place'.[560] In my view, this double standard simply displaces the rape myth onto the accused. While the trier of fact is not allowed to conclude that a complainant is more likely to consent because she has consented in the past, the accused can claim this exact reasoning to facilitate the admission of prejudicial evidence. At trial, the accused may not succeed if his only argument is that he believed the complainant consented because she consented in the past, but judges seem less vigilant at the admissibility stage.

A shocking example is *R v Ross*. The accused admits that he did not ask for consent before penetrating the victim's anus with his penis,[561] yet the judge rejects the Crown's argument that the defence of mistaken belief in consent has no air of reality.[562]

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[560] *R v Seaboyer; R v Gayme* (1991) 2 SCR 577 613.

[561] *R v Ross* 2014 SKQB 50 [10].

[562] ibid 37.

The accused relies on the narrative of the 'habitual' sexual encounter: he believed in the victim's consent because he had, in the past, done similar things to the complainant with her consent. The judge buys this argument and characterizes anal sex as 'the next logical step' in the couple's sexuality:

> At issue is also the nature and extent of the prior sexual activity as compared with the sexual activity forming the subject matter of the charge. As indicated, the accused has sworn to various acts of domination/submission. The complainant swore to a similar set of acts at the preliminary inquiry. The acts forming the subject matter of the charge could be argued to be a part of the overall sexual activity of this couple, or to be the next logical step in a progression of expression of their sexuality. Those issues are pertinent to the accused's state of mind as to consent.[563]

What remains unstated is that this evidence is only relevant to the accused's state of mind if he is allowed to presume consent based on past similar sexual activity. Yet the law does not allow a belief in implied consent—the accused must have a belief in contemporaneously communicated consent. Still the judge allows for extensive sexual history evidence to be admitted, including

> the nature and type of prior consensual sexual activity between the complainant and the accused; the dates that the parties' sexual relationship commenced and discontinued, and the specific reasons for engaging in and discontinuing such conduct; any previous representations (by words or conduct) given by the complainant to the

[563] ibid 39.

> accused regarding her willingness to engage in role playing, rough sexual intercourse, and acts of domination/submission.[564]

The reasoning at play here and in other cases is highly problematic. A general willingness to engage in sexual activity (rough or otherwise) is not consent to a specific sexual activity. Nor is it an acceptable basis for a mistaken belief in consent, especially when the accused himself admits that he did not ask for consent. As the Supreme Court has stated, 'an honest but mistaken belief cannot simply rest upon evidence that a person consented at "some point" in the past'.[565] In this case, the evidence is clearly admitted to support the prohibited inference of consent: the complainant's previous willingness to engage in rough sex will be used to presume her consent, but this inference is made by the accused rather than the judge.

Conclusion on admissibility rulings

Not all studied cases revealed stereotypical reasoning. A few judges are aware that 'not more unlikely to consent' means the same as 'more likely to consent',[566] that attacking a complainant's 'credibility' does not make prohibited evidence admissible,[567] and that the

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[564] ibid 46.

[565] *R v Goldfinch* (n 270) para 62.

[566] *R v MacMillan* (n 538) para 23.

[567] *R v PO* 2020 ABQB 647 [43–44].

benefit of the law should extend to all women, including those who do not fit the stereotypical ideal of the 'good victim'. The judges in B.T.H. and MacMillan caution that '[p]eople of all types get sexually assaulted'[568] and that 'the fact that the sex a complainant ultimately engaged in is unconventional does not alter the playing field'.[569] The appellate judges in *D.K.* confirm that evidence of sexual activity that happened after the charge cannot be admitted to show consent, observing that:

> Allowing J.D. to be cross-examined on any subsequent consensual sexual activity she may have had with the appellant would have opened the trial up to consideration of stereotypical assumptions about how sexual assault victims "should behave" after the fact. As Professor Dufraimont recently observed, "victims do not follow a standard script, and courts cannot reason as if they do".[570]

Despite these positive results in a minority of the cases, the global picture remains one of difficulties with rejecting sexual history evidence. This observation holds especially true for cases of partner sexual violence, consistent with Ruthy Lazar's finding that most defence lawyers seek to use sexual history evidence in these cases and that they use 'common sense' as a justification.[571] Judges appear more likely to admit sexual history

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[568] *R v B.T.H.* (n 540) para 59.

[569] *R v MacMillan* (n 538) para 23.

[570] *R v DK* 2020 ONCA 79 [58]; citing Lisa Dufraimont, 'Myth, Inference and Evidence in Sexual Assault Trials Contesting Criminal Law: Honouring the Work of Professor Don Stuart' (2019) 44 Queen's Law Journal 316, 352.

[571] Lazar, 'Negotiating Sex' (n 8) 339.

evidence when the disputed sexual activity is seen as 'atypical'. Yet the fact that a woman consented to rough sex on another occasion does not make it more likely that she consented to the violent sexual activity in question. This inference is flawed and has been rejected by the law. Moreover, it is dangerous to assume that sexual history evidence necessarily discloses previous *consensual* sexual activity, given that partner sexual violence is often repeated,[572] and given the assertion made by the accused themselves in some cases that they never asked for consent[573] or that the complainant often said 'no', resisted, or expressed pain during previous sexual activity.[574]

While recognizing that sexual history evidence cannot be admitted for the purpose of twin myth reasoning, judges seem to accept dubious reformulations of the same basis for relevance. The Supreme Court of Canada has cautioned that '[b]are assertions that [sexual history] evidence will be relevant to context, narrative or credibility cannot satisfy s. 276'.[575] Yet defendants and judges use these 'magic words'[576] without explaining what inference the proposed evidence would support. 'Dispelling the unlikelihood of consent', 'providing essential context to the allegations', 'assessing the

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[572] As discussed in chapter 1.

[573] See eg *R v XX* (n 468) para 12.

[574] See eg *R v Sweet* 2018 BCSC 1696 [78–79, 84].

[575] *R v Goldfinch* (n 270) para 5.

[576] Lazar, 'Negotiating Sex' (n 8) 339.

accused's credibility'... these are but vague purposes that in no way guarantee that the evidence is not being admitted to show an increased likelihood of consent. Judges are even less strict when the accused pleads a mistaken belief in consent, despite the fact that an accused's belief in consent cannot be based on the stereotypical notion that consent is continuous within a relationship—a mistake in law.

A final but major cause of concern regarding sexual history evidence is that, consistent with previous research,[577] evidence of previous sexual history often slips in without a s. 276 application. When the proper procedure is not followed, the complainant's rights are not vindicated, and no pressure is put on the defence or the judge to explain how the evidence could be relevant. The numerous cases where sexual history evidence appears to have been put on the record without a previous application suggest that the problems found in admissibility rulings are only the tip of the iceberg.

Trial decisions

In admissibility rulings, problematic cases were the norm. By contrast, in trial decisions, problematic and stereotypical judicial reasoning appears only in a minority of cases. Most judges refuse to harbour a reasonable doubt based on the accused's argument that the complainant had consented in the past to similar activity. But conviction cases often

[577] ibid 348.

involve exceptional circumstances including highly credible victims, objective evidence of injuries, video recordings of the sexual assault, and even sometimes an accused who himself testifies that he did not ask for consent. Seeing that, despite these odds, so many accused made the choice to go to trial and testify, presumably following advice from defence counsel, is a cause for concern in a legal system that ostensibly requires affirmative consent. Defence arguments that are based on myths and stereotypes about partner sexual violence are also problematic—even if they fail to convince judges—as they participate in a legal system where partner sexual assault victims continue to be subjected to discriminatory attitudes. These defence arguments explicitly rely on a narrative of normality: the accused argues that consent was implied by the relationship, that there could be no sexual assault because what happened was similar to past sexual activity, and even that the victim saying 'no' or resisting was also habitual and thus actually meant 'yes'.

Four examples will be used to showcase the 'rough is normal' argument in action. In *R v TS*, a case resulting in an acquittal, the accused relies on the untold logic that if something is routine, then it is not rape: 'The accused admitted that, during this lengthy sexual encounter, he held her down, called her degrading names and spat on her. He explained, however, that this was simply part of their routine consensual sexual

activity'.[578] There is no sign of anyone intervening to contest the admissibility of this evidence.

The three other examples result in a conviction. In *R v Sweet*, the accused insists on the normality of the sexual activity in question despite the complainant's resistance and despite his admission that he did not ask for consent before spanking the complainant with a belt:

> Mr. Sweet says he then took the complainant by the hair into the bedroom, possibly for sex – **just as he had always done in their relationship**.
>
> Mr. Sweet says he took the complainant's clothes off without objection. He says the two **often** had their hands all over each other and "ripped each other's clothes off". According to Mr. Sweet this was **no different** and he believed the complainant was consenting. . .
>
> Mr. Sweet acknowledged that the complainant said things such as "No", "Ouch" and "Stop". According to Mr. Sweet, that **often went on in their relationship** and he did not understand that the complainant actually wanted him to stop. . .
>
> Sweet acknowledges that he probably bit the complainant too hard and hard enough to leave marks. He insists that this was **just as they had done before** and that he believed the complainant was okay with it.[579]

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[578] *R v TS* 2012 ONSC 6070 [3].

[579] *R v Sweet* (n 574) paras 77–79, 84, emphasis added.

The judge rejects Mr. Sweet's testimony, but the accused's normality narrative still prejudiced the complainant, as it led to the admission of sexual history evidence. Having heard the totality of the evidence, the judge even seems to regret admitting that evidence:

> When I allowed Mr. Sweet's s. 276 application, I thought this might be a case about possible grey areas in the law concerning the autonomy of adults to set ground rules for themselves to engage in consensual and pleasurable sexual activities, albeit with some level of pain.
>
> After hearing all of the evidence, however, it simply turns out to be a case involving a controlling, possessive, jealous man who perpetrated sexual violence on an intimate partner he professed to love.[580]

Further, in *R v Freer*, the accused testifies on previous sexual activity despite a ruling that this evidence is inadmissible. His testimony centres on the normality of his aggressive behaviour:

> So then I started – start begging a little bit more. . . So then I grabbed her hair, pulled her hair back a little bit, started kissing her neck. It's a turn on. **It's worked before** . . .
>
> I'm still thinking. I'm like, you know, **every night we've slept together, we've had sex**. You know, come on. . .
>
> At one point, I put my hand on her neck, applied a little bit of pressure. **It's nothing I hadn't done before**. . .

[580] ibid 157–158.

> I did apply pressure to her throat that once, but **I'[ve] done that before. That was a common occurrence**.[581]

The accused even argues that there is not 'a single guy out in the world that hasn't begged his girlfriend for sex before'.[582] While resulting in a conviction, this case is troubling in illustrating how normalized sexual coercion is, and how permissive judges can be even after ruling that sexual history evidence is inadmissible.

Finally, in *R v BDN*, the accused admits that he did not ask for consent and that the complainant said 'no',[583] yet he also attempts to paint the events in question as a typical sexual encounter with his wife:

> [The accused's] subsequent actions of tying her hands and feet with rope, shaving her pubic hair and striking her three times with a leather belt were **typical of sex play they engaged in from time to time**, he said. . .
>
> [T]he accused testified that they moved over to the bed and spontaneously had sex **in a way that was quite often done by this couple** i.e. with some role playing and bondage and some spanking.[584]

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[581] *R v Freer* (n 539) para 11, emphasis added.

[582] ibid 16.

[583] *R v BDN* 2015 ONSC 6613 [22].

[584] ibid 14, 17, emphasis added.

The judge once again makes no comment on the inadmissibility of such sexual history evidence, although the accused's 'habit of saying what he "would do" to the complainant in apparent reference to the parties past sexual encounters' detracts from his credibility.[585] Interestingly, the judge insists that the couple 'maintained separate bedrooms and had not had sex for several months',[586] perhaps to displace the presumption that sexual relations are normal between married people. Because sex was not normal or expected in that relationship, the accused's assertion of belief in consent does not raise a reasonable doubt. The judge reasons that 'the fact that bondage and role playing was sometimes part of their prior sex life does not make it reasonable for him to believe she was open to being tied up and whipped on this occasion'.[587] Regardless of the outcome (a conviction), the complainant was still put through having to explain irrelevant previous sexual activity,[588] without any mention of an admissibility ruling.

In conclusion, what transpires from these trial decisions and admissibility rulings is a narrative of normality. The defence focuses on the resemblance between the events in question and previous sexual activity, a fact argued to be essential context informing the accused's belief in consent. The place that this normality discourse takes suggests a

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[585] ibid 18.

[586] ibid 3.

[587] ibid 26.

[588] ibid 21.

differential treatment of cases of partner sexual assault, where this stereotypical rhetoric is more readily available to the accused. While judges are more vigilant at the trial stage, victims of partner sexual assault are subjected to legally flawed admissibility rulings (when these ruling even take place), an injustice that risks contributing to the underreporting of partner sexual violence.

The sentencing stage

We have arrived at the last stage of the criminal justice process. Discussing the sentencing of partner sexual assault completes the picture and enables us to understand the legal response to partner sexual violence from start to finish. It is important to remember, however, that sentencing data excludes all cases that resulted in attrition or acquittals.

Statistics Canada observes that sentencing is 'the one stage of the criminal justice system where sexual assault cases [are] dealt with more harshly than physical assault cases'.[589] Sexual assaults between 2009 and 2014 received a custody sentence in 56% of the cases, probation in 29% of the cases, a conditional sentence in 9% of the cases, and fines in 3% of the cases.[590] Regarding victim-offender relationship, statistics Canada

[589] Rotenberg (n 404).

[590] ibid.

observes that intimate partners are 'the least likely relationship group to be sentenced to custody':[591]

> Once convicted, parents saw the harshest sentencing outcomes with four in five (79%) cases sentenced to custody, while two in three (67%) cases involving family members other than parents were sentenced to the same. This is compared with half (52%) of sexual assault cases perpetrated by a stranger, and less than half (46%) of sexual assaults perpetrated by an intimate partner.[592]

The finding that intimate partners are less likely than non-intimates to be sentenced to jail and more likely to receive a conditional sentence is consistent with previous research examining sentencing outcomes between 1997 and 2002,[593] although the rates of custodial sentences for sexual assault have increased significatively since then.

We might ask if differences in sentencing outcomes reflect biases or rather distinct levels of seriousness. Noting that '[m]any of the [available] studies have examined the relationship variable in a dichotomous fashion, with [intimate partner sexual assault] collapsed into the same group as those committed by other known offenders',[594] Janice Du Mont, Deborah Parnis and Tonia Forte set out to 'investigat[e]

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[591] ibid.

[592] ibid.

[593] Marie Gannon and Karen Mihorean, 'Sentencing Outcomes: A Comparison of Family Violence and Non-Family Violence Cases' (2005) 12 JustResearch 42, 44–45.

[594] Du Mont, Parnis and Forte (n 514) 141.

186 cases across four categories of perpetrator-victim relationship'[595]: strangers, acquaintances, authority figures, and intimate partners.[596]

In their study, there were 'notable similarities between intimate partner and stranger sexual assaults in terms of the occurrence of penetration, force, and injury'.[597] Yet even though sentenced cases of partner sexual assault were as violent as stranger rapes, and despite partner sexual assault cases involving 'a greater number of convictions for secondary offences',[598] '(ex)partner perpetrators received significantly shorter sentences than their stranger counterparts'.[599]

This unequal treatment may be due to the assumption that stranger offenders are more dangerous and more likely to reoffend. Yet sentence leniency 'may have particular negative implications'[600] for victims of partner sexual assault: '[b]ecause their abusers

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[595] ibid 139.

[596] ibid.

[597] ibid; this result contrasts with McCormick and others (n 514).

[598] Du Mont, Parnis and Forte (n 514) 149.

[599] ibid.

[600] ibid.

may be released from prison earlier, and are more likely to have subsequent frequent contact with them, the threat of possible future harm is heightened'.[601]

Another study by Isabel Grant presents equally worrisome conclusions. Recall from chapter 3 that s. 718.2(a)(ii) of the Criminal Code sets out violence towards an intimate partner to be an aggravating factor at sentencing.[602] In a 2017 report for the Department of Justice Canada, Grant sought to evaluate if partner violence was truly treated as an aggravating factor in physical violence and sexual assault cases. The author concludes from her review of relevant cases that '[w]hile in general courts take [male intimate partner violence against women] seriously, sentencing for intimate partner sexual violence . . . appears to be the context that is most resistant to change'.[603]

Appellate decisions in particular reveal an unequal treatment of partner sexual violence. Indeed, '[w]hile courts often say the right thing about the intimate relationship not being a mitigating factor, sentences significantly below the range are sometimes imposed without any real explanation of why the case falls below the lower end of the range'.[604] The trivialization of partner sexual assault is often implicit: 'appellate courts

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[601] ibid.

[602] Criminal Code, RCS 1985, c. C-46 s 718.2(a)(ii).

[603] Grant (n 418) iv–v.

[604] ibid 55.

consistently take the position that nonconsensual intercourse is a particularly serious form of sexual assault, yet in the spousal context some of these cases are not treated with the seriousness that courts say they deserve'.[605] Moreover, many appellate cases do not mention s. 718-2(a)(ii) when it would be warranted to do so.[606] Some appellate courts have gone as far as to propose a lower sentencing range for sexual assaults committed by intimates as compared to sexual assaults by non intimates.[607]

The most serious offences, however, are less likely to be trivialized, probably because of their proximity to the 'real rape' script. When cases fall 'on the higher end of the spectrum',[608] courts 'have less difficulty in understanding [their] seriousness [and] analogizing these cases to stranger sexual assaults'.[609] The author also observes that the trial decisions from her sample involved 'particularly serious cases often involving multiple charges',[610] and that in these cases 'courts see less difference between sexual assault in intimate relationships and other sexual assaults'.[611] Grant's findings suggest

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[605] ibid 56.

[606] ibid 66.

[607] ibid 57.

[608] ibid 60.

[609] ibid.

[610] ibid 61.

[611] ibid.

that ‘it is only where significant violence, beyond that inherent in the sexual assault, is inflicted on an intimate partner that courts will fully recognize the serious harm of [intimate partner sexual violence]’.[612]

Grant’s findings are not surprising given the social context of minimization of partner sexual violence described in chapter 2. As one prosecutor interviewed by Lazar explained, ‘[t]he judge looks at her and thinks: how bad can it be to have sex with your husband. You had sex with him for years. How bad can it be? The rape seems like an act of sex and not violence’.[613] This observation echoes a 1994 study where Linda Coates, Janet Beavin Bavelas, and James Gibson observed that Canadian judges employed a different vocabulary depending on the offender-victim relationship. When committed by a stranger, sexual assault was described with violence-related words. By contrast, partner sexual assaults were described using romanticizing and erotizing vocabulary that suggests affection (‘fondling’, ‘hugging’, ‘kiss’…), consent (‘offering his penis to her mouth’) and mutuality (‘relationship’, ‘intercourse with’).[614]

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[612] ibid 62.

[613] Lazar, ‘Negotiating Sex’ (n 8) 356.

[614] Linda Coates, Janet Bavelas and James Gibson, ‘Anomalous Language in Sexual Assault Trial Judgments’ (1994) 5 Discourse & Society 189; see also Janet Bavelas and Linda Coates, ‘Is It Sex or Assault? Erotic versus Violent Language in Sexual Assault Trial Judgments’ (2001) 10 Journal of Social Distress and the Homeless 29.

The minimization of partner sexual assaults is compounded by judges' problematic use of concurrent sentences in cases of repeated sexual violence. Grant explains that there are cases 'where distinct incidents of abuse over a period of time are sentenced with a number of concurrent sentences'.[615] This means that judges give a 'discount' to the man who rapes his partner repeatedly:

> the use of concurrent sentences often masks the impact of a long course of violent behaviour against an intimate partner. If the same starting point, or bottom of the range, is used for multiple sexual assaults against an intimate partner as is used for one sexual assault against a stranger, this effectively discounts [intimate partner sexual violence] where concurrent sentences are imposed.[616]

Beyond numerical outcomes, Grant's study also shows the persistence of myths about partner sexual violence : '[r]ape myths surrounding why a woman stayed in a relationship or why she apparently consented to sexual relations with the offender after the sexual assault at issue still arise in these cases particularly when dealing with level I sexual assaults'.[617] Yet saying that a victim continuing to cohabit with her rapist is a mitigating factor shows a profound misunderstanding of intimate partner violence.[618] Grant observes that courts seem to be moving away from problematic assumptions about

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[615] Grant (n 418) 62.

[616] ibid.

[617] ibid iv–v.

[618] ibid 57.

intimate partner violence in assault cases, but not in sexual assault cases.[619] Her conclusion is alarming:

> Not all the sexual assault appeal cases in this sample are problematic, but there are enough troubling cases to raise concern. These cases suggest that, perhaps not surprisingly, we have not made the progress with [intimate partner sexual violence] that we have with other forms of [male intimate partner violence against women]. Remnants of rape myths such as "why didn't she leave the relationship" or "would she have consented to have sex with him later if she had really been sexually assaulted" can still be found in these cases in a way that was not seen in this sample with nonsexual offences.[620]

In conclusion, sentencing decisions suggest that '[s]exual assault is simply not seen as being as serious within an intimate relationship as it is otherwise'.[621] This finding adds a final concern to those that have been piling up throughout this chapter. The law may well affirm that partner sexual assault is equal to non-partner sexual assault, it may even state that violence within an intimate relationship is an aggravating factor, but as with previous stages of the criminal justice system, there is a gap between written legislation and actual practices.

The point is not that longer prison sentences are intrinsically better than shorter sentences—abundant literature has shows than harsh prison sentences are ineffective at

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[619] ibid 65.

[620] ibid 61.

[621] ibid.

preventing crime, do not rehabilitate offenders, and unfairly target Black and other racialized offenders.[622] The point is that, as Isabel Grant explains, short sentences are no victory when they stem from the continued minimization of partner sexual assault:

> There is a tendency when examining sentencing for [male intimate partner violence against women] to assume that longer sentences are better than shorter sentences. . . Non-custodial sentences have historically been a result of the trivialization of [male intimate partner violence against women] and therefore harsher sentences are seen as a reflection of the courts finally taking this violence seriously. However, it would be mistaken to think the sentencing process is an effective means through which to reduce [male intimate partner violence against women] in a meaningful way. . . . Having said this, neither can [male intimate partner violence against women] be discounted in the sentencing process as compared to other forms of violence.[623]

Grant concludes that 'when they do seek out the criminal justice system, [women] need to be confident that courts, and other processes within the criminal justice system, will acknowledge and denounce' the devastation of partner sexual violence. This and previous sections in this chapter have shown that, at the moment, victims of partner sexual assault cannot turn to the criminal justice system with such confidence.

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[622] See eg Mimi E Kim, 'From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration' (2018) 27 Journal of Ethnic & Cultural Diversity in Social Work 219; Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (Revised edition, New Press 2012).

[623] Grant (n 418) 67.

Conclusion

We have reached the end of chapter 4, regarding the legal treatment of partner sexual assault cases. This chapter has showcased persistent documented concerns regarding the unequal treatment of partner sexual violence in the criminal justice system. Despite ostensibly relationship-neutral laws, the legal treatment of partner sexual assault continues to be influenced, at various stages, by the 'real rape' myth and other stereotypes about sexual violence. My contribution to studies of reported partner sexual assault cases shows that concerns regarding the legal response to partner sexual violence persist to this day, even in cases where the victim sustained injuries. This finding is consistent with research from other jurisdictions that has also highlighted the difficulties in reaching a conviction in cases of partner sexual violence.[624]

But just how impactful are rape myths in the prosecution of partner sexual assault? Researchers in the West have started to raise concerns that the feminist critique of sexual violence prosecutions is creating 'myths about myths'; that is, overstating the

[624] See eg Melanie Heenan, 'Just "Keeping the Peace": A Reluctance to Respond to Male Partner Sexual Violence' (Australian Institute of Family Studies 2004); Easteal and Feerick (n 17); Gregory and Lees (n 393) 109; Sue Lees, *Carnal Knowledge: Rape on Trial* (Women's Press Ltd 2002); Gary LaFree, *Rape and Criminal Justice: The Social Construction of Sexual Assault* (Wadsworth Publishing Company 1989); Jessica Harris and Sharon Grace, *A Question of Evidence?: Investigating and Prosecuting Rape in the 1990s* (Home Office London 1999); James V Check and Neil M Malamuth, 'Sex Role Stereotyping and Reactions to Depictions of Stranger versus Acquaintance Rape.' (1983) 45 Journal of Personality and Social Psychology 344.

role, extent, and fallaciousness of rape myths.[625] Others have warned that rape myths continue 'to play a critical role in explaining the low conviction rates for sexual assault',[626] and that the critique of rape myths remains relevant today. What is certain is that measuring the impact of rape myths on sexual assault prosecutions—or in my case, on partner sexual assault prosecutions—is a complex matter.

It is clear that the lawyers' attitudes and judicial mistakes described in above examples are not omnipresent, but how significant are they? Not all cases of 'simple rape' are disbelieved by the police or lead to a decision not to prosecute. Not all cases that are tried involve misapplications of the law. Not all sentencing decisions are lenient. While many of the studies cited regarding underreporting, 'unfounding', charging, and sentencing are quantitative, studies of trial judgments are often qualitative, which makes it difficult to assess the scope of the problem. But even if we had precise statistics on judicial errors, we would have to keep in mind that reviews of case law only reveal the tip of the iceberg: unconscious bias and reasoning that is clearly contrary to the state of

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[625] Helen Reece, 'Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?1' (2013) 33 Oxford Journal of Legal Studies 445.

[626] Barbara Krahé, 'Myths about Rape Myths? Let the Evidence Speak. A Comment on Reece (2013)' 9 <https://www.uni-potsdam.de/fileadmin/projects/sozialpsychologie/images/pdf/Comment_Reece_Paper.pdf>; see also Joanne Conaghan and Yvette Russell, 'Rape Myths, Law, and Feminist Research: "Myths about Myths"?' (2014) 22 Feminist Legal Studies 25.

the law do not often make their way into written decisions. All of this is to say that the full impact of rape myths is difficult, if not impossible, to quantify.

Nonetheless, it is sufficient for my purposes to conclude, from existing literature as well as my own examination of partner sexual assault cases, that there are persistent concerns regarding the legal treatment of partner sexual assault. These concerns are especially present when partner sexual violence does not look like 'real rape'—for instance, because it does not involve physical injuries. An unequal treatment of partner sexual assault cases, even if bias does not play a role in *all* cases, puts the success of progressive legal reforms into question.

The conclusion is supported by the Supreme Court's own recognition that myths and stereotypes continue to play a role in sexual assault cases.[627] As recently as 2019, Canada's highest court rejected an accused's suggestion that rape myths are no longer operative.[628] The Court also suggested that trial judges might have to explicitly direct juries that '[n]o means no, and only yes means yes: even in the context of an established relationship, even part way through a sexual encounter, and even if the act is one the

[627] See eg *R v Ewanchuk* (n 249) para 95; *R v Goldfinch* (n 270) para 95; *R v Friesen* 2020 SCC 9 [50]. As Jennifer Koshan observes, '[t]he Court has not yet discussed marital rape myths specifically': Koshan, 'The Judicial Treatment of Marital Rape in Canada' (n 417) 6.

[628] *R v Goldfinch* (n 270) para 45, references omitted.

complainant has routinely consented to in the past'.[629] The myth that the 'real rape' is stranger rape, the Court suggests, still need to be dispelled:

> Nearly 30 years [after the enactment of the rape shield provision], the investigation and prosecution of sexual assault continues to be plagued by myths. One such myth is that sexual assault is a crime committed by persons who are strangers to their targets.[630]

This recognition, unfortunately, does not mean that the Supreme Court is itself exempt from perpetuating rape myths, including myths about partner sexual violence.[631] But these statements, as well as the research cited through the chapter, confirm the actuality of implementation problems with the law of sexual assault, especially in cases of partner sexual violence and in cases where there is no physical violence or injury. Decades after the Canadian legal reforms, some legal actors continue to read cases of partner sexual violence through a veil of myths and stereotypes, resulting in an imperfect and unequal treatment of these cases.

This conclusion suggests that something needs to be done to improve the legal treatment of partner sexual violence. Consequently, proposing solutions to better respond to partner sexual violence, including and particularly in cases where sexual activity is not

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[629] ibid 74.

[630] ibid 2.

[631] See on *R v JA* 2011 SCC 28; Jennifer Koshan, 'Marriage and Advance Consent to Sex: A Feminist Judgment in R v. JA' (2016) 6 Oñati Socio-legal Series 1377; Zaccour and Lessard (n 15) 188–190.

physically forced, is a relevant endeavour. In other words, this chapter justifies the search for solution that takes place in subsequent chapters.

In addition to this simple justificatory function, this chapter also provides several implicit lessons for the rest of this thesis. It sends a word of caution: experience suggests that it is unlikely that a single legislated solution will put an end to the pernicious and persisting influence of rape myths. I also take as a lesson from this chapter that implementation issues are key. In proposing a new offence, it might be useful, for instance, to think about reducing the scope for interpretation and discretion. An additional lesson, given how often the theme of physical force and injury appeared throughout this chapter, is the need to focus legal attention on non-physically forced partner sexual violence—such cases are currently almost absent from the criminal justice system.

It is also clear, given the link between implementation problems described in this chapter and attitudes towards partner sexual violence exposed in chapter 2, that legal solutions must be adopted concurrently with attempts to target problematic attitudes within and outside the criminal justice system. Improved consent education at the population level, anti-bias training for decisionmakers, and the use of specialized courts

for sexual and/or domestic violence cases[632] are just a few possibilities for reducing bias towards partner sexual violence.[633]

In conclusion, by exploring the implementation problems that appear at different stages of the criminal justice system, I have both justified the need for reform and established a solid basis on which to ground my search for solutions. The proposed legal reform will take implementation problems into account and aim to reduce their extent. It will also seek to challenge attitudes that hold partner sexual violence and non-physically forced sexual violence to be of minor concern.

CHAPTER 5: CENTRING PARTNER SEXUAL VIOLENCE

For too long, wife rape was completely legal. Today, partner sexual assault is illegal, but often remains socially and legally tolerated. Indeed, social attitudes toward partner sexual violence continue to reflect the traditional assumption that partner rape is not 'real rape'.

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[632] Ontario already has an integrated domestic violence court that hears family and criminal cases 'Integrated Domestic Violence Court (IDV Court)' (*Ontario Court of Justice*) <https://www.ontariocourts.ca/ocj/integrated-domestic-violence-court/> accessed 25 February 2022; in Quebec, a specialized tribunal for criminal matters of sexual and domestic violence is being established: 'Projet de loi n° 92, Loi visant la création d'un tribunal spécialisé en matière de violence sexuelle et de violence conjugale' (*Assemblée nationale du Québec*) <http://m.assnat.qc.ca/fr/travaux-parlementaires/projets-loi/projet-loi-92-42-1.html> accessed 25 February 2022.

[633] Exploring all possible solutions that would contribute to an improved legal response to partner sexual violence is beyond the scope of this thesis, although I am myself involved, in parallel to my research work, in sexual consent education. The need to mix legal and non-legal approaches should be kept in mind by any lawyer working on sexual violence issues.

In the legal sphere, the unequal implementation of sexual offences legislation in the intimate context paints a picture of continued marginalization of partner sexual assault.

This legal treatment of partner sexual violence is far from innocuous. In addition to denying justice to individual victims and letting individual offenders off the hook, it plays an important role in the structuring of men-women relations and the continuance of patriarchy. Intimate partner violence, including partner sexual assault, creates a society in which 'women are the least equal at home, in private; [and have] the most equality in public, far from home'.[634] The legal marginalization of partner sexual violence and the correspondingly disproportionate focus on stranger rape continue to promote the myth of the home as a safe haven while neglecting a large proportion of sexual assaults. This context calls for a better legal response to partner sexual violence.

There are different approaches we could think of to make the law more responsive to partner sexual violence. One generic solution would be to continue to improve sexual assault law incrementally, hoping that the 'rising tide' will also lead to improvements in the context of partner sexual assault. Certainly, this is a valid approach, in that the legal treatment of partner sexual assault has, to some extent at least, benefited from general reforms such as defining consent, developing rape shields, and requiring reasonable steps to ascertain consent. On the other hand, this strategy has its limits: the

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[634] Catharine A MacKinnon, 'Disputing Male Sovereignty: On United States v. Morrison' (2000) 114 Harvard Law Review 135, 175.

previous chapter has shown that a law that appears relationship-neutral can still lead to differential treatment of partner sexual violence.

This chapter proposes a different approach to guide sexual assault law reform, which I call 'centring partner sexual violence'. While the law has so far been guided by a focus on stranger rape,[635] I propose that partner sexual violence must now be given primary consideration in thinking about and developing the law of sexual offences. In other words, partner sexual violence should not simply be 'included' in the law's ambit—as we have seen in previous chapters, the attempt to do just that with the removal of marital exemptions has left a legacy of implementation problems. Rather, partner sexual violence must be placed at the centre of legal reflexions. This strategy will lead me to propose a sexual coercion offence which, while not limited in its application to the intimate context, will be primarily informed by it.

In the first part of this chapter, I develop what I mean by 'centring', referring to intersectional literature on the process of 'centring the margins'. Noting that academic reflections on sexual offences law are often based on examples or scenarios, I examine how other authors have worked with the idea of 'paradigm' or 'central case' for sexual violence law. I distinguish such endeavours from my proposal, which seeks to attune the law to the realities of partner sexual violence. Finally, drawing on findings from previous

[635] See chapter 3 on the marital rape exemption.

chapters, I justify my choice of partner sexual violence as deserving the special consideration I propose for it. I observe that partner sexual assault represents a serious empirical and social problem as well as a special challenge for the law, making it all the more urgent to have the law focus on this form of sexual victimization.

I see broad implications for the call to centre partner sexual violence. A major review of sexual offences law from this angle would certainly produce powerful insights, and it would be an interesting project to pursue after this thesis.[636] For this research project, though, I will specifically use the concept of centring partner sexual violence to ground a critique of the incident model of sexual assault (chapter 6) and to propose a new course-of-conduct offence of sexual coercion (chapters 7 and 8). The result will not be a legal system that is fully centred on partner sexual violence, since I suggest the addition of a new crime as opposed to the complete restructuring of current sexual assault legislation. However, my proposal in subsequent chapters will constitute a good example of the centring method, that is, the process of placing partner sexual violence at the centre of reflexions regarding legal reform.

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[636] It is beyond the scope of this thesis to flesh out all possible changes to sexual offences law that could be made by following the method of centring partner sexual violence. Examples could include reforms to rules on similar fact evidence and rape shields such that sexual assault allegations are evaluated within the full context of a relationship. Making the crime of sexual assault less incident-based (what this means will be explained in the next chapter) could also be a fruitful endeavour to centre partner sexual violence.

What is 'centring'?

What does it mean to choose a 'central' case for thinking about sexual offences? Saying that a case should be centred means it deserves special attention, that it cannot be treated as a mere exception or afterthought. Traditionally, rape law has been centred on the case of stranger rape; the rules that it developed (marital exemptions as well as corroboration, immediate disclosure, force, and resistance requirements) were informed by thinking about this type of sexual violence. By imagining stranger rape as the primary or only form of sexual victimization, the law painted a misleading picture of the nature of sexual violence.

Centring partner sexual violence would mean ensuring that this reality attracts primary consideration, rather than being treated as a secondary problem or one that should only be addressed once all issues with 'simpler' cases have been resolved. In that sense, my approach is analogous to and inspired by the intersectional call to 'centre the margins'.[637] Such proposal can notably be found in critical race theory and disability

[637] See eg Az Causevic and others, 'Centering Knowledge from the Margins: Our Embodied Practices of Epistemic Resistance and Revolution' (2020) 22 International Feminist Journal of Politics 6; Karen A Gallagher, 'Centering the Margins: What Can Be Learned from Listening to the Voices of Lesbians over 55?' (doctoral thesis, University of British Columbia 1996); Loren Yukio Kajikawa, *Centering the Margins: Black Music and American Culture, 1980–2000* (Umi Dissertation Publishing 2011); Derek M Griffith, '"Centering the Margins": Moving Equity to the Center of Men's Health Research' (2018) 12 American Journal of Men's Health 1317; Jessica C Harris and Chris Linder, *Intersections of Identity and Sexual Violence on Campus: Centering Minoritized Students' Experiences* (Stylus Publishing, LLC 2017); Fabienne Doucet, *Centering the Margins: (Re)Defining Useful Research Evidence through Critical Perspectives* (William T Grant Foundation 2019); Raihan Jamil and Uttaran Dutta, 'Centering the Margins:

rights literature. For instance, Janine Benedet and Isabel Grant argue that the sexual assault of women with mental disabilities cannot be treated as a side issue, but instead must be included in the evaluation of general sexual assault law. They observe that '[r]eference is often made to the fact that women with disabilities are particularly targeted for sexual violence but they are not always seen as paradigmatic sexual subjects'.[638] Rather than having special offences that apply only to victims with disabilities, they argue, 'it is much better to focus on how the general provisions on sexual assault and the criminal trial process can be applied equally to women with mental disabilities'.[639] They treat the case of the sexual assault of a mentally disabled victim as a test case: 'If our general sexual assault law does not adequately protect this group of highly targeted women, it needs to be rethought'.[640] The argument is not that women without mental disabilities should be less protected; rather, the point is that having a legal system that adequately protects women with mental disabilities will likely produce better outcomes for all.

Critical race theorists and Black feminists have also argued that considering the needs of the most marginalized is the most effective strategy to achieve social or legal

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The Precarity of Bangladeshi Low-Income Migrant Workers During the Time of COVID-19' (2021) 65 American Behavioral Scientist 1384.

[638] Benedet and Grant (n 262) 137.

[639] ibid 141.

[640] ibid.

change that will benefit the marginalized *and* other groups. In *Black Feminist Thought*, Patricia Hill Collins explains that centring Black women does not mean ignoring other groups or engaging in a merely comparative exercise. It means going to the root of the oppression of women and Black people and understanding the interconnectedness of different oppressive structures.[641] Authors have warned that attempting to *incorporate*—rather than *centre*—diverse experiences within feminist narratives is not enough as it fails to challenge and destabilize racist mythologies.[642] For example, on preventing and responding to campus sexual assault, Ciera Scott, Anneliese Singh and Jessica Harris propose to 'not only include but also centralize the experiences of women of color survivors',[643] in order to 'destabilize, not work around, [racist and sexist] stereotypes'.[644]

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[641] Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (Routledge 2002) vii–viii, 124–125; see also Chris Weedon, *Feminist Practice and Poststructuralist Theory* (Blackwell 1987); Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989 University of Chicago Legal Forum 139.

[642] Chandra Talpade Mohanty, 'Feminist Encounters: Locating the Politics of Experience' in Michèle Barrett and Anne Phillips (eds), *Destabilizing Theory: Contemporary Feminist Debates* (Stanford University Press 1992); Tanya Serisier, 'Speaking Out Against Rape: Feminist (Her)Stories and Anti-Rape Politics' (2007) 16 Lilith 84, 91–92.

[643] Ciera V Scott, Anneliese A Singh and Jessica C Harris, 'The Intersections of Lived Oppression and Resilience' in Jessica C Harris and Chris Linder (eds), *Intersections of Identity and Sexual Violence on Campus: Centering Minoritized Students' Experiences* (Stylus Publishing, LLC 2017) 131.

[644] ibid.

In the criminal law context, Donna Coker cleverly describes the plea to centre poor women of colour in the law of self-defence as 'the reverse of the "rising tide carries all boats"'.[645] She explains:

> Law and policy that is based on the experiences of poor women, and especially of poor women of color, is likely to result in reforms that benefit all battered women. But law and policy that is developed from the experiences of a generic category "battered women," is likely to reflect the needs and experiences of more economically advantaged women and white women, and is unlikely to meet the needs of poor women and women of color.[646]

These examples of projects to 'centre' marginalized identities help understand my proposal to centre not a type of victim (facing additional vulnerabilities, oppressions, and stereotypes), but a type of victimization (involving additional complexities, societal denial, and stereotypes). The underlying argument is analogous. If the law does not work with partner sexual violence, it must be rethought. Partner sexual violence cannot be seen as a special case or an exception to the stranger rape model; it must instead be seen as a central or primary case which deserves an adequate and myth-free legal response.

This does not mean that other forms of sexual victimization must be disregarded. It does not mean that stranger rape is unimportant or must be decriminalized. Rather, partner sexual violence, which is more frequent and more complex, must be given

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[645] Donna Coker, 'Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review' (2001) 4 Buffalo Criminal Law Review 801, 811.

[646] ibid.

primary consideration and must stand as the test (or one of the tests) of good sexual offences law. The hope is that a law that works for partner sexual violence, with its complexities and high prevalence, is more likely to work for the simpler and rarer issue of stranger rape than the other way around.

Understanding rape through scenarios and examples

Why do we even need to pick a central case to think about sexual offences law? Rape and sexual assault are often understood by reference to examples, scenarios, or central cases. This is not to say that the law or legal scholars do not use explicit definitions, but a conception of the 'paradigm' of rape can be implicit in such definitions. For instance, in the 1892 Canadian Criminal Code, rape was defined as:

> the act of a man having carnal knowledge of a woman who is not his wife without her consent, or with consent which has been extorted by threats or fear of bodily harm, or obtained by personating the woman's husband, or by false and fraudulent representations as to the nature and quality of the act.[647]

While the Criminal Code proposed a definition, the underlying scenarios are apparent, notably stranger rape, impersonating the victim's husband, and faking a medical procedure. These scenarios may not be 'typical' of how sexual violence is committed or experienced, but they are readily available when we think of sexual violence and often

[647] Criminal Code, S.C. 1892, c. 29 s 266.

inform, explicitly or implicitly, legal theories about rape. With these scenarios in mind, the doctrines of corroboration or immediate complaint, for instance, make a lot more sense than if the law was thought of from the perspective of centring partner sexual violence (which often happens in private and within an emotionally charged relationship).

Rape or sexual assault scenarios are particularly significant given the lack of consensus regarding a proper definition of the crime. Joanne Conaghan wirtes that rape is 'a maelstrom of conceptual and normative contestation, a "category in crisis"'.[648] Rape has also been described as an 'essentially contested' concept.[649] Scholars engage in discussions about what rape is and ought to be—legally, morally, or politically—without a shared understanding of its definition, and sometimes without explicitly stating their own definition.

A common type of scholarly conversation on rape can serve to illustrate this point. Authors will describe a scenario that is proposed as either 'obviously' rape or 'obviously' non-rape, and suggest a theory that is considered superior to the alternative for accommodating that scenario. Scholarly debates in this field may take the form of: 'X's theory cannot be right, because if what X says is true, then scenario Y would be

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[648] Joanne Conaghan, 'The Essence of Rape' (2019) 39 Oxford Journal of Legal Studies 151, 6; citing Peter D Rush, 'Jurisdictions of Sexual Assault: Reforming the Texts and Testimony of Rape in Australia' (2011) 19 Feminist Legal Studies 47.

[649] Eric Reitan, 'Rape as an Essentially Contested Concept' (2001) 16 Hypatia 43.

rape, and clearly it cannot be that Y is rape'. For example, Jonathan Herring proposes that there is no consent where a person '(i) is mistaken as to the fact; and (ii) had s/he known the truth about that fact would not have consented to [the sexual activity]'.[650] To which Alex Sharpe replies that 'according to the logic of Herring's argument, where a woman is anti-semitic and communicates her anti-semitism to her Jewish sexual partner, rape occurs if he has intercourse with her without disclosing his Jewishness'.[651] The example stands as an argument that the proposed definition is overbroad.

My point here is not to take a position on the debate regarding rape by deception. Rather, I aim to illustrate that examples or factual scenarios—real or imagined—take an important place in rape law scholarship. The reaction that ought to follow a proposed set of facts is often taken for granted. For instance, Jeb Rubenfeld's controversial article 'The Riddle of Rape-by-Deception' is replete with all kinds of examples, including the following: 'imagine a young woman who threatens to break up with her boyfriend unless he violates his religious ban on sex until marriage. Breaking up would devastate him, so he sleeps with her. Nearly everyone will say the boy wasn't raped, but he was coerced,

[650] Jonathan Herring, 'Mistaken Sex' (2005) 2015 Criminal Law Review 511, 517.

[651] Alex Sharpe, 'Transgender Marriage and the Legal Obligation to Disclose Gender History' (2012) 75 Modern Law Review 33, 38. For other examples of this use of scenarios, see Scott A Anderson, 'Conceptualizing Rape as Coerced Sex' (2016) 127 Ethics 50, 65; Robert Sparrow and Lauren Karas, 'Teledildonics and Rape by Deception' (2020) 12 Law, Innovation and Technology 175, 186 ff; Sealy-Harrington (n 18) 121–122.

wasn't he?'[652] The example is supposed to speak for itself, assuming a shared understanding that 1) there is coercion and 2) there is no rape.

What is even more interesting than the conclusion of these arguments by example is the fact that authors rarely provide a justification for their choice of scenarios. These examples may be proposed as typical, or admitted to be far-fetched. They might be considered particularly meaningful or representative, but empirical studies are not typically used to show that they are representative of some empirical phenomenon. Often, scenarios are used because of their marginality, as a way of testing the frontiers of rape. Either way, frequency of occurrence is neither verified, nor presented as an important consideration. As a result, theories about rape are often built on marginal cases. By contrast, I propose to build theories around empirically significant legal problems.

Different conceptions of central cases—what should inform our theories?

In this section, I take a closer look at the use of examples that are described as 'typical', 'central', or 'paradigmatic' in scholarly debates. I will examine three ways to think about centrally important cases of sexual violence. The first describes the 'paradigm' as a case

[652] Jed Rubenfeld, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy' (2012) 122 Yale Law Journal 1372, 1436.

on which everyone agrees. The second approach, proposed as the 'pure rape case' by John Gardner and Stephen Shute, focuses on instances of rape without superfluous harm. These two avenues are exposed to distinguish my proposal, and to show that centring the law on empirically significant problems, as I propose, shifts the conversation. The third way to think about central cases is to look at the 'ordinary rape', and try to match the legal conception of rape to the empirical reality of how rape is experienced. I argue that this approach, which has been used to highlight the reality of 'date rape', is the most promising way to refocus rape law around a central case—although in my case, that central case will be partner sexual violence.

Note that no attempt is made to catalogue all scholarly texts which engage in thinking about sexual offences law by centring a factual scenario; rather, I refer to examples to illustrate the implications that the choice of a central case can have for the development of theories about sexual violence. Moreover, because I am here thinking about sexual violence law at a theoretical level, I am not limiting myself to exploring scholarly debates in Canada. Nonetheless, the conclusion that sexual offences law should be centred around partner sexual violence will be used to develop Canadian solutions in subsequent chapters.

The paradigm: everyone agrees

Rape law has historically been focused on the 'paradigm' of stranger rape. Here, a paradigm means a case which everybody agrees belongs to the relevant category. Reitan

and Hänel use Gallie's description of essentially contested concepts[653]—concepts that cannot be captured 'by one general definition, but rather [that] are adequately captured by a number of competing characterizations [that] are unified by a common appraisive meaning and a shared set of complex paradigms'[654]—to explore the notion of paradigms in rape law. Hänel explains that:

> A paradigm is an exemplar of the case in question such that everyone agrees that it falls within the concept. For example, football is a paradigm case of the concept of sport simply because everyone agrees that it is a kind of sport. Nobody would contest that football is a sport, in comparison to ping-pong; some people might think that ping-pong is a leisure activity but not a sport.[655]

Under that definition, physically aggravated stranger rape—or 'real rape'—is a paradigm of rape. In contrast to 'date rape', everyone agrees that physically aggravated stranger rape is an instance of rape, albeit for differing reasons:

> while traditionalists stress the importance of physical violence, force, and penetration as essential features of acts of rape, feminists stress the importance of lack of consent and control as essential features. Thus, while both feminists and traditionalists agree that the paradigm case of physically aggravated stranger rape is an instance of rape, they disagree why this is the case. [As a result,] feminists—by stressing consent as

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[653] See WB Gallie, 'IX.—Essentially Contested Concepts' (1956) 56 Proceedings of the Aristotelian Society 167.

[654] Hilkje Charlotte Hänel, *What Is Rape? Social Theory and Conceptual Analysis* (Transcipt 2018) 57.

[655] ibid.

> an essential feature—take it that non-coercive forms of date rape are also rape, while traditionalists disagree on this.[656]

Partner rape is not paradigmatic because not everybody agrees that it represents an instance of rape, especially when it is not physically forced. This form of victimization is, depending on the person making the evaluation,[657] sometimes included in, and other times excluded from, the domain of sexual violence.

But what is the practical use of paradigms in developing rape law scholarship—and why do I propose a different angle? I take no issue with the description of stranger rape as paradigmatic and partner rape as non-paradigmatic; the problem comes from using the paradigm to inform the development of rape law. If the law is developed by reference to the paradigm of rape, then partner sexual assault is likely to be ignored.

Reitan sees the paradigm as a useful starting point from which to extend the agreement on rape, with the goal of including new instances of sexual violence. Thus, '[w]hat the paradigms provide is a starting point for the normative debate—and their

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[656] ibid 58; see also Burgess-Jackson (n 18) 442–443.

[657] Interestingly, Fitzpatrick's study suggests that using scenarios that are more complex (further away from the paradigm of real rape) generates responses that are more influenced by the race and gender of the student evaluating the scenario: Colleen Fitzpatrick, 'Hypothetical Rape Scenarios as a Pedagogical Device to Facilitate Students' Learning about Prosecutorial Decision-Making and Discretion' (2001) 12 Journal of Criminal Justice Education 169.

value as a starting point rests not in their being the best examples . . ., but in the existence of general agreement about them'.[658]

His explanation comes with the recognition that 'real rape' might not be the 'best' and certainly not the most 'typical' example of sexual violence:

> feminists have not only broadened the extension of the concept to create new gray areas, but have argued that some of the new gray area cases are more central, more important for our understanding of rape, than the traditional paradigms. For example, date rape seems to be far more common, and far less idiosyncratic, that the classic example of resisted, coercive stranger-rape. Shouldn't we therefore treat date rape cases as the "real" paradigms of rape, in place of the traditional patriarchy-infected paradigms?[659]

While 'date rape' is not yet a paradigm of rape, he explains, extending the area of agreement from the starting point of 'real rape' might lead to such development:

> there is nothing about viewing rape as essentially contested that rules out the emergence of new paradigms-that is, new points of agreement. Indeed, one would hope that the discourse about rape would lead to new points of agreement. But one cannot hope to reach new agreement from points of disagreement. Instead, one needs to start from points of agreement. This is what the paradigms help to do.[660]

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[658] Reitan (n 649) 57.

[659] ibid 56.

[660] ibid 57.

But how useful is the paradigm of stranger rape for the purpose of debating extensions of the definition of rape? Reitan defends feminists' attempt to describe 'date rape' as 'rape' because extending the definition of rape to borderline or even non-borderline cases based on their resemblance with the paradigm is legitimate.[661] However, others put the centrality of 'real rape' into question—could starting from the point of agreement, from the paradigmatic 'real rape', feed rape myths?

The answer is yes, according to Hilkje Charlotte Hänel. Hänel agrees with Reitan that '[u]nderstanding the concept of rape as essentially contested allows us to include instances that were previously disregarded'.[662] However, she criticizes the continued focus on the paradigm: '[e]ven though it is empirically true that physically aggravated stranger rape is the instance of rape accepted by nearly everyone, continuing to focus on physically aggravated stranger rape as the paradigm of rape masks much more common and subtle forms of rape'.[663] Focusing discourses on the paradigmatic case reproduces rape myths by 'misrepresenting the social reality of rape'[664]: 'most of the time, rape is

[661] See also, for a similar argument, Burgess-Jackson (n 18).

[662] Hänel (n 654) 59.

[663] ibid.

[664] ibid 82.

not stranger rape, but acquaintance rape, which does not involve physical violence from a stranger, but psychological pressure from an acquaintance'.[665]

Thus,

> Endorsing physically aggravated stranger rape as the paradigm example of rape—even if this is the most uncontested example—strengthens the dominant operative concept of rape. Thus, the problem is not that it is false to take physically aggravated stranger rape as the paradigm in dominant meaning . . . **The problem is that by constructing a theory around this paradigm, we fall prey to reproducing the paradigm**, even if this is not in our interest. It again becomes the focus point of analyses of rape, although it is far from actually capturing most cases of rape.[666]

Two of Hänel's points are worth emphasizing: the willingness to take into account the social (or empirical) reality of rape, and the warning that what we choose to treat as central matters. Hänel also casts doubt on Reitan's proposition that new paradigms may emerge as areas of agreement are extended: 'The fact that everyone agrees on the paradigm of stranger rape shows that there is hesitation to understand rape differently. Why then should anyone who is convinced of the dominant understanding suddenly extend this understanding in the way Reitan hopes for?'[667]

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[665] ibid.

[666] ibid 59–60, emphasis added.

[667] ibid 61.

The problem is exacerbated when different instances of rape are tested based on factual similarities with the paradigm:[668] 'having our concept built around a misguided paradigm means that we fail to account for most cases of rape'.[669] Joanne Conaghan also offers the warning that '[t]he identification of a "typical" rape scenario means that the conceptual parameters of rape become constrained by a paradigmatic norm against which other instantiations are weighted'.[670]

Since most instances of sexual violence do not resemble the stranger rape paradigm, we are left with most cases of rape being accepted practices:

> the more a case of rape diverges from the dominant (and false) paradigmatic case of physically aggravated stranger rape, the more it is accepted and legitimized in the social world. This acceptance is caused by an epistemic distortion about the act in question; by masking the act as an act of non-rape, it becomes accepted.[671]

Focusing legal theory on the real rape paradigm reinforces the same myths that cause acquaintance and partner sexual violence ('simple rapes') to face implementation difficulties and to be treated differently throughout the legal system, as found in chapter 4.

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[668] ibid 82.

[669] ibid.

[670] Conaghan (n 648) 14.

[671] Hänel (n 654) 130–131.

The 'pure rape case': rape without harm

Another influential approach that can be contrasted with mine is the idea of the 'pure rape case', developed by John Gardner and Stephen Shute.[672] To support their argument that the wrongness of rape does not depend on the harm it causes, the authors imagine a 'harmless rape' which they present as 'pure rape'. In their scenario, a man rapes an unconscious woman. No one ever finds out (not even the victim) and the rapist dies shortly thereafter. This, they suggest, is a case of 'the wrong and nothing but the wrong'.[673] Gardner and Shute centre this example to develop a theory on why rape is wrong.

Gardner and Shute recognize that the scenario they use is 'atypical',[674] and that it would be 'unusual[] for a rapist to do no harm'.[675] Yet they insist on viewing harmless rape as the 'central' case of rape: 'Isn't this just another borderline case? We don't think so. On the contrary, the case is, in the sense which matters here, the central case of rape. For it is the pure case, entirely stripped of distracting epiphenomena'.[676] They assert,

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[672] John Gardner and Stephen Shute, 'The Wrongness of Rape', *Oxford essays in jurisprudence: Fourth Series* (Oxford University Press 2000).

[673] ibid 202.

[674] ibid 197.

[675] ibid 196.

[676] ibid 197.

then, ‘the need to rehabilitate [the pure rape case] into the centre of the moral terrain of rape even as it languishes at the statistical periphery’.[677] Their scenario that is ‘bound to be legally marginal . . . remains morally central’.[678]

We might be skeptical of Gardner and Shute’s claim that the ‘pure rape case’ is truly harmless. But my critique lies elsewhere. Gardner and Shute’s proposal is the clearest example of the phenomenon I denounce: building theories about rape around marginal scenarios. Why should a situation that virtually never happens inform the criminalization of a crime that happens constantly? If we want to get at some ‘truth’ about rape, should we not direct our attention to common, typical, normal instances of sexual violence? This question rings especially true if one is engaged in the project of not only understanding but also eradicating rape.

In other words, I am critical of the use of conceptual, logical, or philosophical criteria to determine what kind of scenario should be centred in thinking about sexual violence law. My proposal, as will be developed below, is to prefer practical and empirical standards.

For Gardner and Shute, focusing on the wrongness of harmless rape is necessary because ‘[t]he alternative is to dismiss the outraged victims of more typical rapes as

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[677] ibid 198.

[678] ibid 199.

suffering pathological reactions'.[679] For them, unless we can find an objective reason making 'pure rape' a wrong, women who experience strong negative emotions after having been raped (in non-'pure' cases) would be irrational.[680]

This justification does not convince, for two main reasons. First, the authors seem to believe that a reaction is either objectively justified or pathological—but our thoughts, feelings, and reactions can also be socially conditioned. It might be that in a society that held different views on sex, gender and violence, unwanted sex would be no worse than unwanted movie-watching. That does not make a reaction informed by the social meaning of rape pathological. Michelle Madden Dempsey and Jonathan Herring have argued that the sexual penetration is a prima facie wrong, among other reasons because of the 'current social meanings of penile sexual penetration under current social conditions [which] can only credibly be explained as devaluing women qua women and disrespecting women's humanity'.[681] While women need not be conscious of this social meaning for the prima facie wrong to be present,[682] they may very well register this meaning—even more so when sexual penetration is non-consensual—, and this

[679] ibid.

[680] ibid 197.

[681] Michelle Madden Dempsey and Jonathan Herring, 'Why Sexual Penetration Requires Justification' (2007) 27 Oxford Journal of Legal Studies 467, 485.

[682] ibid 483.

understanding of their experience as devaluating cannot reasonably be characterized a pathological.

Second and more importantly for our purposes, rape—especially stranger rape—is widely accepted as harmful and traumatic.[683] An argument that confirms that stranger rape is wrong does little to advance the fight against sexual violence; few people would say that its victims are overreacting. The problem feminists struggle with is that the bulk of sexual violence—non-stranger rape—is not always recognized as such.

The paradigm (in the sense of a universally accepted instance of rape) and the pure rape case (in the sense of 'harmless' rape) do not help us understand, address or criminalize the most statistically significant forms of sexual violence. Even if we can find agreement on the paradigm or the pure rape case, extending areas of agreement to include so-called 'borderline' (but common) cases is not made any easier, since there is much factual difference between, to borrow Susan Estrich's typology, 'real rapes' and 'simple rapes'.[684] As such, while there might be a theoretical interest in thinking about uncommon and uncontroversial examples, this choice does not fit with my approach of centring empirical problems that need to be solved.

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[683] See Nicola Gavey and Johanna Schmidt, '"Trauma of Rape" Discourse: A Double-Edged Template for Everyday Understandings of the Impact of Rape?' (2011) 17 Violence Against Women 433.

[684] Estrich (n 103).

The non-physically violent rapes that Gardner and Shute evoke as the 'borderline'[685] are, in my view, what should be at the 'moral centre'. And, I would add, women's experience of being raped is not 'distracting',[686] it is a starting point for the feminist inquiry into sexual violence.

The 'ordinary' rape: matching social reality

Instead of focusing our reflections on the paradigm of real rape or on the unlikeliest of scenarios, a better way to find the legitimate 'centre' of theories about rape is to try to match social reality. Hänel, for instance, proposes that we 'systematically map[] the phenomenon of rape as it exists in the world'.[687] This approach can challenge the paradigm of physically violent stranger rape and lead to a more accurate and useful understanding of sexual violence.

An interesting contribution to this idea of centring typical instances of sexual violence can be found in Michelle Anderson's article 'All-American Rape'.[688] Like Hänel and others, Anderson criticizes the importance taken by the 'real rape' myth. She observes that '[d]espite generations of repeated storytelling, this type of rape is, in terms

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[685] Gardner and Shute (n 672) 193.

[686] ibid 197.

[687] Hänel (n 654) 131.

[688] Anderson, 'All-American Rape' (n 2).

of actual incidence, a statistical outlier—so different from the norm as to be exceptional rather than typical'.[689] She notes that '[c]ulturally, as well as legally, the classic rape narrative remains the public face of rape in [the United States]. It is statistically rare but spoken of frequently. It leads the nightly news; it has centered academic discussion of the crime'.[690]

Anderson contrasts the classic rape narrative with the 'statistical norm of sexual assault in this country',[691] a case of date rape which she calls the all-American rape:

> Contrast that classic narrative with a description of a typical rape, one in which both the offender and the victim are of your own race: A male and a female student meet at a party and begin to talk, drink, and flirt. Later, she wanders to a quiet place with him. Once there, he pushes her down, pins her, and begins kissing her aggressively. She does not want to be rude. He must have misunderstood, she thinks. The alcohol is getting to her, she feels dizzy, and she wonders if she is going to throw up. She says, "Ummm... wait... please... I'm not sure that this is what we should do." He ignores her and begins taking off their clothes. She cannot seem to get away, and her panic rises. She cries as he penetrates her. Shamed by the experience, she does not tell anyone until three years later when she confides in a trusted friend. She never calls the police.[692]

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[689] ibid 626.

[690] ibid 633.

[691] ibid 627.

[692] ibid 626.

Contrary to the classic rape narrative, the all-American rape 'is painfully common but almost never discussed'.[693]

Anderson criticizes the law's distorted focus on violent stranger rape: '[s]tuck as it is on the classic rape narrative, the law has fundamentally misconceived the crime. Instead of criminalizing rape, it has criminalized the extrinsic, violent assault'.[694] Writing from an evolutionary perspective, Diana Rosenfeld also criticizes the law's neglect of the most common forms of sexual violence:

> an evolutionary perspective reveals the vast prevalence of all male sexual coercion in almost all human societies—informing us that this behavior is commonplace rather than aberrational. Yet, the laws of these societies fail to provide recourse for most forms of sexual coercion, recognizing only the most extreme (and uncommon) behaviors.[695]

I similarly hold that excluding partner sexual violence from the law's focus misconceives the crime of rape or sexual assault. Repeated storytelling about stranger rape through theories centred on unusual forms of sexual victimization obscures the realities of sexual violence, generating practical and theoretical problems. The law and scholarly debate must, instead, be focused on typical instances of sexual violence.

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[693] ibid 633.

[694] ibid 627–628.

[695] Rosenfeld (n 31) 424.

While Anderson's proposal focuses on acquaintance (or date) rape, I propose a focus on partner sexual violence. Therefore, the next section will argue for paying more attention to partner sexual violence based on its frequency (it is an 'ordinary' sexual violation) and other relevant factors. The idea of getting the law to better match social reality will also be carried to later parts of my project, when I will propose a new sexual offence that will better reflect commonly experienced forms of sexual coercion.

Why partner sexual violence is a central case

Under my proposed 'centring' approach, reflections about sexual offences law should be based on partner sexual violence not because it is conceptually interesting or generates agreement, but because it represents a real empirical problem. Partner sexual assault is a significant and prevalent social issue, it attracts problematic cultural assumptions, and it presents particular legal challenges. Centring partner sexual assault is necessary to tackle the problem: as with the intersectional critique of white- or able-centred laws, mere attempts to 'include' without 'centring' the more complex issue will produce unequal outcomes.

Drawing on findings from previous chapters, I emphasize here the several features of partner sexual violence—its frequency, its targeting of vulnerable victims, its harmfulness, its social acceptability, and its complexity—that make it deserving of special consideration. The case for centring partner sexual assault can be summarized as

follows: partner sexual violence needs to be centred because it represents a serious empirical, social, and legal problem.

Partner sexual violence as a prevalent empirical problem

The primary argument for centring partner sexual violence is simply its ubiquity. I am not advocating granting primary consideration to an exceptional form of sexual violence. Rather, I wish to draw attention to a problem that is more the norm than the exception.

We saw in chapter 1 that women are much more likely to be sexually assaulted by an intimate partner than by a stranger or acquaintance. In almost all empirical studies of sexual violence, intimate partners are the largest category of perpetrators.[696] So important is partner sexual violence as an empirical problem that estimates rise to as high as one in four or one in three women as victims—and we know that studies produce underestimations due to the phenomenon of unacknowledged victims discussed in chapter 2. As partner sexual assault violence represents a prevalent social issue, my proposal avoids the problem I identified with other approaches, that is, the problem of centring discussions about sexual violence on marginal cases.

[696] Logan, Walker and Cole (n 45) 114.

Centring partner sexual assault is also justified by the special vulnerability of its victims[697] and the harm that it causes. We saw that victims of partner sexual assault are vulnerable to repeated victimization and to high levels of control. They might receive less help and support than other victims due cultural assumptions that partner sexual violence is a private matter or that it is not very serious. Yet contrary to popular belief, partner sexual violence can be as harmful and even more harmful than stranger sexual violence. Recall that studies have associated partner sexual assault with negative consequences including physical injuries, mental illness, suicidal ideations, and post-traumatic stress disorder.[698]

One of the cases found in the previous chapter's exploration of physical force in partner sexual assault cases provides a vivid illustration of the level of seriousness that can be attained in cases of partner sexual violence. In *R v Mastronardi*, the accused told the victim that she had to follow strict family rules, or else she would be killed by his family. She was brought to get a large tattoo on her stomach with the accused's name, made to agree to anal intercourse, prevented from contacting friends, and told what to wear and when to clean herself.[699] The accused made her believe that his family would

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[697] Although beyond the scope of this thesis, this justification could also apply to other forms of sexual violence, such as sexual violence toward children. To reiterate, my claim about the importance of considering partner sexual violence is not a claim that other forms of sexual violence are not important.

[698] Martin, Taft and Resick (n 32) 341–342; Bergen (n 88); Plichta and Falik (n 89).

[699] *R v Mastronardi* (n 525) paras 51, 55, 60.

kill her if they separated or if he did not beat her for not being submissive enough. As a result, the complainant demanded physical and sexual violence. He beat her repeatedly, broke her nose, cut her face and private parts, and penetrated her with his penis and with the handle of a knife.[700] The victim attempted to commit suicide[701] before she was finally able to escape.

Of course, not all cases are that extreme, and the goal of this thesis is in part to highlight more 'ordinary' forms of partner sexual violence that should also be legally sanctioned. But this case serves as an illustration that, in the context of an intimate relationship, the control, gaslighting, surveillance, and isolation that perpetrators are able to exert can rise to extreme levels, making victims particularly vulnerable to not only serious but also repeated sexual violence.

The likelihood of repeated victimization makes partner sexual assault a particularly good candidate to receive the law's central attention: the law should attempt to intervene promptly and successfully to prevent additional harm. Similar to the claim in intersectional literature that, for instance, Black women need to be centred in sexual violence prevention efforts because of specific vulnerabilities, partner sexual violence also calls for special consideration.

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[700] ibid 72, 76, 79, 80.

[701] ibid 93.

Moreover, we might say that partner sexual violence is particularly egregious because of the breach of trust involved.[702] For Bogart, for example, '[a]s more stringent duties are violated, the rape rises in seriousness'.[703] The implication, some argue, is that partner sexual violence deserves a more severe legal response. For instance, Lynn Hecht Schafran writes that:

> because marital rape takes its special cast from the access, personal knowledge, and privileges associated with its commission by a partner, it should be treated differently and more severely than similar crimes committed by strangers. . . As a result of its unique relation to personal life, sexual assault is far more likely to be repeated when it is committed by partners and almost always occurs amid other forms of violence, intimidation, and control. The level of unfreedom, subordination, dependence, and betrayal associated with marital rape has no counterpart in public life.[704]

Yet rather than making the point that the seriousness of partner sexual assault demands harsh sentences, I argue that this feature calls for partner sexual assault to be 'centred' in legal responses. The fact that partner sexual assault involves vulnerability and harm makes it all the more problematic to have a legal system that is centred on 'real rape' and exhibits serious implementation problems in cases of partner sexual assault.[705]

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[702] See eg Herring, 'No More Having and Holding: The Abolition of the Marital Rape Exemption' (n 82) 233.

[703] Bogart (n 107) 173.

[704] Schafran (n 45) 162.

[705] As demonstrated in chapter 4.

Partner sexual violence as a serious social problem

We saw in chapter 2 that partner sexual violence is perceived as less serious than stranger sexual violence.[706] Surveys have found high rates of acceptability of partner sexual violence,[707] even in recent years.[708] This social acceptability makes partner sexual violence qualitatively different from stranger rape.[709]

We also saw in previous chapters that partner sexual violence is particularly difficult to recognize due to a number of myths, including 'the widespread notion[s] that sexual relations between partners is a "private" matter; [that] "real" rape is between strangers . . .; [that] "real" rape is physically violent and [that] a "real" victim fights back . . . ; and that sex is a "wifely" duty.'[710] In this context, '[w]omen who are raped by their husbands . . . may fail to realize that they have the right to refuse sex with an

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[706] See eg Bennice and Resick (n 86) 232; Christopher and Pflieger (n 36) 136.

[707] Terry C Davis, Gary Q Peck and John M Storment, 'Acquaintance Rape and the High School Student' (1993) 14 Journal of Adolescent Health 220; Todd G Morrison and others, 'Gender Stereotyping, Homonegativity, and Misconceptions about Sexually Coercive Behavior among Adolescents' (1997) 28 Youth & Society 351.

[708] Elena Sirvent Garcia del Valle, 'Acceptability of Sexual Violence Against Women In Spain: Demographic, Behavioral, and Attitudinal Correlates' (2020) 26 Violence Against Women 1080; Heather R Hlavka, 'Normalizing Sexual Violence: Young Women Account for Harassment and Abuse' (2014) 28 Gender & Society 337; Jeffrey and Barata, '"She Didn't Want To…and I'd Obviously Insist"' (n 208); Jeffrey and Barata, '"He Didn't Necessarily Force Himself Upon Me, But . . . "' (n 61).

[709] This is not to say that problematic attitudes towards other forms of sexual victimization no longer exist.

[710] Logan, Walker and Cole (n 45) 112, references omitted.

intimate partner'.[711] The presence of coercion in sexual scripts also complicates the identification of partner sexual violence.[712]

Against this backdrop of cultural acceptability, the law needs to tackle partner sexual violence head on and present it as a core aspect of the sexual violence problem. The cultural confusion regarding partner sexual violence provides two corresponding reasons for giving primary consideration to partner sexual violence: centring is necessary 1) because the societal disregard for partner sexual violence is a source of additional complexity for the law—it makes convictions and proper applications of the law less likely—, and 2) because the law must perform its educative function. In other words, the social context of partner sexual violence makes it both more difficult to adequately apply the law to cases of partner sexual assault, and more important that the law be adequately applied to those cases.

As such, an important reason for centring the law around the realities of partner sexual violence is that, in the intimate context, the law still needs to do the job of displacing problematic social norms and communicating a woman's right to say 'no' to sex. Granted, the law's role in influencing social norms is complex, controversial, and

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[711] Jessica Klarfeld, 'A Striking Disconnect: Marital Rape Law's Failure to Keep up with Domestic Violence Law' (2011) 48 American Criminal Law Review 1819, 1835.

[712] Weiss (n 135) 824.

often difficult to predict.[713] Yet many scholars have hypothesized that sexual offences law communicates something important about sex and sexual violence.[714] A legal system that fails to condemn partner sexual violence can legitimize sexual inequalities.[715]

Sexual violence is too prevalent for one to hope that all offenders could ever be convicted. There are not enough prisons in the world. More important is that the law fulfill its educative function in the hope of preventing of sexual violence, or, at least, triggering social sanctions. Centring the law on physically violent stranger rape does little to communicate that women have the right to refuse to have sex with a partner or that partner sexual coercion is inappropriate, especially given all the implementation problems discussed in chapter 4.

Partner sexual violence as a legal challenge

The intersectional call for centring the margins is based on the observation that refusing to adapt our thinking to more complex situations (for example, intersecting oppressions) leads to an inadequate legal response. I make an analogous argument in relation to

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[713] See eg Kahan (n 329); Leslie Green, 'Should Law Improve Morality?' (2013) 7 Criminal Law and Philosophy 473, 492.

[714] See eg Lise Gotell, 'Governing Heterosexuality through Specific Consent: Interrogating the Governmental Effects of R. v J.A.' (2012) 24 Canadian Journal of Women and the Law 359, 362.

[715] See eg Venkatesh and Randall (n 280) 45; Rosenfeld (n 31); Catharine A MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 8 Signs 635, 182.

partner sexual violence. We need to centre it because, when we fail to do so, the law does not work well.

In chapter 4, we saw abundant evidence that the law in its current form (centred on stranger rape) leads to serious implementation problems in cases of partner sexual violence. Partner sexual assault involves complexities and intricacies unparalleled in other forms of sexual violence. These complexities are compounded by the effects cultural acceptability and form a context of legal challenge and under-enforcement. If partner sexual violence is both different from and more complex than stranger rape—the model on which sexual violence law is based—then treating partner sexual violence as an afterthought is insufficient to equip the law to address this harm. In other words, we need to centre partner sexual violence because it is a legally complex problem.

While chapter 4 focused primarily on outcomes, showing a differential legal treatment for partner sexual assault cases, here I want to emphasize some challenging features of this form of victimization that contribute to implementation problems and call for a tailored search for solutions. The main challenges for the law are subtler types of coercion and resistance, as well as the existence of sexual precedence.

Coercion and resistance

As we saw in chapter 2, the traditional 'real rape' model requires physical violence by the rapist and forceful resistance by the victim. We have also seen that these features are often absent from partner sexual violence cases. This distinction might not make partner

sexual violence intrinsically more complex than stranger rape, but it is complex *for the law* because sexual victimization is evaluated by reference to the stranger rape model. Given the different features that characterize both types of victimization, the law needs a different outlook on consent and coercion if it is to be effective at identifying partner sexual violence.

Indeed, in partner sexual violence, the form of sexual coercion chosen by the perpetrator can appear mild to outside eyes, yet still be successful in forcing unwanted sexual activity. Consequently, '[t]he difficulties in understanding and measuring sexual violence experiences are greater when the acts occur within the context of intimate partner relationships'.[716] Moreover, in partner sexual violence, the categories of 'sex' and 'sexual assault' are harder for the law to delimitate given the 'failure in our society to define the boundaries of bodily integrity within the context of intimate relationships',[717] as explained above. Hence the need to 'centre' partner sexual violence to target non-physical coercion.

The concept of social coercion provides an example of a thorny legal issue that is mostly absent from discussions about sexual violence centred on stranger rape. Social coercion refers to pressure to comply with unwanted sexual activity that does not come

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[716] Logan, Walker and Cole (n 45) 111.

[717] ibid.

from the sexual partner, but rather from society, for example the social norm that a girlfriend should agree to a request for sex from her boyfriend. As Melissa Burkett and Karine Hamilton explain in a study of young women's negotiation of sexual consent that:

> women's negotiations of consent in intimate relationships [are] clearly shaped by norms which encourage sexual compliance. It was common for the young women [interviewed] to explain that they relinquished their own sense of personal lust and passion in order to fulfil their expected role of sexually fulfilling a partner's sexual desires and needs in a relationship.[718]

Thus, gendered norms and discourses 'generate implicit pressures that disrupt [women's] negotiations of consent'.[719] For women, complying with unwanted sexual activity is expected as part of relationship maintenance[720]: the 'understanding that infrequent sex threatens an intimate relationship gives rise to feelings of guilt and fear in women if they fail to embody the ideals of a "good feminine woman" who is always sexually available to her partner'.[721] It has been suggested that with the rise of online pornography, social

[718] Burkett and Hamilton (n 140) 825.

[719] ibid 817.

[720] Gavey (n 1).

[721] Burkett and Hamilton (n 140) 826.

pressures to comply with a partner's request cover an increasingly wide ranger of sexual activities.[722]

Elaine Martin, Casey Taft, and Patricia Resick observe that '[s]ocial coercion is the most common form of sexual coercion'.[723] The pressure to comply with the expected role of a good female partner has no equivalent in stranger rape (although it may be present in date rape). It raises complicated questions for the law that cannot be brushed aside to accommodate intimate partner sexual violence within a stranger rape model. Yet social coercion is rarely discussed in literature about sex and sexual violence. For instance, Nicole Conroy, Ambika Krishnakumar and Janel Leone note in a 2015 article that 'the influence of social coercion, or covert societal or relationship pressures, has been consistently overlooked in past research'[724] on sexual compliance.

The complexity of understanding consent and coercion in cases of partner sexual violence is complicated by the fact that '[s]urvivors may experience multiple types of coercion both concurrently and over time, in the context of changing abuse patterns'.[725]

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[722] See eg Louise Perry, 'What Sort of Sex Do Women Really Want?' (*UnHerd*, 31 March 2020) <https://unherd.com/2020/04/what-sort-of-sex-do-women-really-want/> accessed 19 September 2021; Herring, 'Coercive Control and Rough Sex' (n 142).

[723] Martin, Taft and Resick (n 32) 333.

[724] Nicole E Conroy, Ambika Krishnakumar and Janel M Leone, 'Reexamining Issues of Conceptualization and Willing Consent: The Hidden Role of Coercion in Experiences of Sexual Acquiescence' (2015) 30 Journal of Interpersonal Violence 1828, 4.

[725] Carline and Easteal (n 45) 213.

For instance, social and interpersonal coercion (i.e. coercion by the partner) may be interlocked if it is the partner who enforces norms of sexual compliance. Nicola Gavey explains that:

> A woman's compliance with unwanted sex can also, of course, be the outcome of an engagement not only with these norms, but also with the direct policing of them by the man she is with. [I]t is essential to recognize how noncompliance can be directly punished by men in ways that either make it aversive or intensify its aversiveness and make it potentially untenable.[726]

In cases where partners utilize patriarchal social norms to coerce women into participating in unwanted sex (e.g.: 'if you were a good girlfriend, you'd have sex with me'), distinguishing the contributing role of social and interpersonal coercion is complex.

The point is not that socially coerced sex must necessarily be criminalized; the point is that we need to think about social coercion and its meaning in the context of sexual offences. Eric Reitan observes that '[c]learly, prior to feminist inquiry into the patterns of human sexuality, no one would have called a sexual encounter rape just because the prevailing social norms made refusal nearly impossible'.[727] Today, in situations where social norms and sexual scripts pressure women into unwanted sex, reasonable people will disagree on how much responsibility the partner should bear, and

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[726] Gavey (n 1) 155.

[727] Reitan (n 649) 59.

on whether social coercion vitiates consent.[728] Yet, the mere need to ask the question takes us outside of the traditional stranger rape model.

Thus, partner sexual violence presents particular challenges for the law that further justify giving it particular consideration and, indeed, centering the law around this type of victimization. Only a legal model centred on partner sexual violence can adequately parse out the multiple sources of coercion that its victims endure. And it would be much easier to disregard the factor of social coercion in a case where it did not apply—say, a case of stranger rape—, than it is to deal with this typically disregarded and undertheorized factor when analysing a case of partner sexual violence under a stranger rape model.

Sexual precedence

We just saw that, in cases of partner sexual violence, the issue of coercion is complicated because there can be multiple types and even sources of coercion. The difficulty in identifying sexual coercion in the partner context is exacerbated by a backdrop of sexual activity within the relationship, as we saw in exploring the misapplication of 'rape shield' provisions. Logan, Walker and Cole explain that sex and violence 'may be more difficult to distinguish [when committed by an intimate partner] because sex acts in one context

[728] See eg MacKinnon, *Toward a Feminist Theory of the State* (n 148), who questions women's ability to consent in a society where men have power over women, and West (n 94), for whom women having sex as a result of compulsory sexuality is consensual, but not harmless, sex.

may be wanted and/or consensual while in another are neither wanted nor consensual'.[729] The authors also comment, in the context of empirical research, that 'there are unique challenges associated with partner sexual violence around consent, especially because consensual sexual relations likely precede and follow incidents of sexual violence'.[730]

Sexual precedence, that is, the existence of a sexual history between the accused and the victim, is also a source of complexity in the eyes of the law. As Anna Carline and Patricia Easteal note, 'in a partner context, proving that the woman did not consent (a physical element) or an absence of consent that the defendant knew of, but chose to ignore (the fault element) is difficult, because of the history of consensual intercourse'.[731] The stranger rape model of sexual victimization does not leave space for these difficulties. When we centre sexual offences law on stranger rape, we assume a unique interaction between offender and victim and fail to acknowledge these important issues.

It is not only the backdrop of consensual sex that is absent in the stranger rape model: a history of sexual violence is also out of the question. The stranger rape model presupposes a unique incident. With partner sexual violence, however, previous acts of violence may influence subsequent interactions. For example, a woman might say 'yes' to a sexual request from her partner without any apparent coercion, but digging into the

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[729] Logan, Walker and Cole (n 45) 115.

[730] ibid 126.

[731] Carline and Easteal (n 45) 212.

couple's history might reveal that, the last time she said 'no', he threatened physical violence.

The opportunity for repeated sexual violation within intimate relationships has been noted by others.[732] But what I specifically want to draw attention to is the possibility of manufacturing sexual compliance within established relationships, and the source of legal complexity that this feature of partner sexual violence represents.

Within intimate relationships, perpetrators can build up coercion over time to manufacture the victim's compliance, making future interactions appear consensual. Janine Benedet and Isabel Grant touch on this possibility in the context of victims with mental disabilities. They observe that:

> the common assertion that people with mental disabilities are compliant may overlook the fact that this compliance is reinforced and rewarded by support systems that provide few opportunities for dissent . . . Legally, it may cause us to miss the multifaceted ways in which people with mental disabilities resist or object to sexual assault and also to assume that compliance represents consent rather than acquiescence in the face of coercion or exploitative inducements.[733]

This point also applies to the ways in which sexually coercive partners reward compliance and silence dissent. Within established relationships, sexual acts have a

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[732] Berman (n 45) 23; Tjaden and Thoennes (n 37); 'Intimate Partner Sexual Violence (IPSV): Information Sheet' (Fredericton Sexual Assault Crisis Centre) <https://www.gnb.ca/0012/Womens-Issues/PDF/Fact%20Sheet-E2.pdf> accessed 30 January 2021; Mahoney (n 59) 993.

[733] Benedet and Grant (n 262) 135, references omitted.

history. Romantic and sexual relationships present a unique opportunity to manufacture compliance through a system of rewards and punishment. This is especially true in relationships characterized by coercive control or physical violence. If battered women have been described as exhibiting 'learned helplessness',[734] perhaps an idea of 'learned sexual compliance' is at play here. That is, previous unsuccessful attempts to resist sexual activity may teach a woman that compliance is the only option.

The empirical literature on sexual compliance supports this hypothesis. Research has shown that 'partners' sexually coercive behavior predict[] victims' subsequent compliance with unwanted sex . . ., suggesting that immediate partner physical or nonphysical pressure is not necessary for sexual compliance'.[735] For instance, in a study of seemingly uncoerced unwanted sex among 63 young adults in committed, heterosexual relationships, Sarah Vannier and Lucia O'Sullivan note that:

> A significant portion of the sample described in their interviews at least one previous occasion in which their partner used guilt or pressure to persuade them to engage in sexual activity. Past attempts to refuse sexual activity may have been met with a negative response from their partners. Thus, a desire to maintain harmony in the relationship, and to avoid a partner's negative reaction, may motivate some to engage in

[734] See Lenore EA Walker, *The Battered Woman Syndrome* (3rd edn, Springer Publishing Co 2009).

[735] Mitchell and Raghavan (n 70) 191; citing Katz and Tirone (n 65).

> undesired sexual activity, even when their partner is not currently overtly using pressure.[736]

As Nicole Conroy, Ambika Krishnakumar, and Janel Leone explain in reviewing available literature:

> Sexual compliance has also been linked to experiences of past threatened, physical, and/or interpersonal coercion from one's current or past partner, which problematizes the notion of "free" or "willing" consent. . . This suggests the possibility that one may participate in unwanted sexual activity without resistance to avoid or bypass overt coercion that they experienced in the past when they refused to acquiesce to their partners' requests.[737]

Jenny Mitchell and Chitra Raghavan likewise explain that

> repeated negative relationship experiences that occur after declining requests for sex can affect a victim's capacity for refusing sex or hopelessness for resisting over time . . . In addition, immediate partner pressure is unnecessary for sexual coercion to occur due to the strength of contextual pressure of societal norms condoning of gendered sexual obligation.[738]

Consequently, before determining that sexual activity in the partner context is uncoerced, 'one must consider that sexual compliance may be a learned response to previous

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[736] Vannier and O'Sullivan (n 72) 438, emphasis added.

[737] Conroy, Krishnakumar and Leone (n 724) 4–5. Conroy et al note that, in their study, '[a]lthough sexual relationship power predicted women's acquiescence to unwanted sexual activity, past experiences of PTIC [physical, threatened physical, or interpersonal coercion] did not' (ibid 141). However, the authors note that the finding is nonsignificant, contrasts with past research, and 'may be the result of using a dichotomous measure of past coercion' (ibid 15) .

[738] Mitchell and Raghavan (n 70) 189, references omitted.

experiences of coercion from one's past or current partners, or it may be done to avoid potential negative consequences of refusal to engage sexual activity'.[739]

Repeated interactions and coercion buildup are sources of legal complexity. They demand that the law look beyond the absence of immediate coercion and consider the broader context. Women subjected to stranger, familial, or date rape may also comply in reaction to past violence, but in intimate relationships (as in familial sexual violence) the ongoing relationship provides an important context to understand sexual acts.

This source of complexity justifies paying more attention to partner sexual violence and its context, as coercion buildup is not accommodated by a stranger rape model of sexual victimization. In other words, sexual precedence suggests a potential failure of the stranger rape model to translate to the context of partner sexual violence, and thus represents a reason to think about the partner context specifically. In partner sexual violence, the parties' repeated interactions and the context of a relationship complexify the consent question and require a different analysis than what we might put in place based on the stranger rape model. This specificity adds to our list of reasons to centre partner sexual violence.

In the next chapter, I will take up the challenge of centring partner sexual violence to think about sexual precedence and coercion buildup by mounting a critique of

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[739] Conroy, Krishnakumar and Leone (n 724) 3.

the ‘incident model’ of sexual assault. This analysis will lead me to propose the adoption of a course-of-conduct offence, which by definition does not presume a single interaction between the offender and the victim. But the lesson to take from this chapter is not that centring partner sexual violence leads to specific and predetermined legal reform proposals such as a course-of-conduct offence; rather, I hope to have shown that centring partner sexual violence allows us to uncover issues that must be considered on our path to a better legal response to partner sexual violence. Centring stranger rape or marginal cases is less likely to enable us to spot empirically significant problems in the prosecution of sexual violence.

Conclusion

So far, this thesis has shown that partner sexual violence is an empirically important problem (chapter 1), but one that is not easily recognized in the current social context (chapter 2). We have seen that the law, which traditionally condoned marital rape (chapter 3), does a poor job at challenging this social context: not only does partner sexual violence rarely lead to convictions, but the law itself is at times influenced by the same myths that it should dispel (chapter 4). The fact that the law does not adequately respond to the immense empirical problem that is partner sexual violence is a serious cause for concern and justifies a major rethinking of sexual offences law.

I have proposed in this chapter that such rethinking should be made by ‘centring’ partner sexual violence. This means that, in developing theories and legal rules about

sexual violence, the focus should be on partner sexual violence. In other words, partner sexual violence must lie at the centre of legal reflections on sexual offences law. We need to acknowledge the inadequacy of the stranger rape model to accommodate the realities of partner sexual violence, and we should resist the temptation to focus legal debates on marginal cases.

Giving primary consideration to partner sexual violence in thinking about sexual offences law is justified by the fact that this form of victimization represents a particularly serious empirical, social, and legal problem. Partner sexual assault is far from an exceptional case and should not be treated as so. I have described the role of social coercion and the possibility of sexual violence playing out over an extended period as two examples of potentially challenging features of partner sexual violence.[740] These features justify a search for bespoke legal solutions because they show the difficulty of accommodating partner sexual violence within what is (wrongly) considered 'typical' sexual victimization, that is, stranger rape.

My proposal that partner sexual violence be taken as a central case is not an attempt to reduce rape to partner rape. On the contrary, focusing on partner sexual violence (which requires us to part with some of the most problematic requirements of

[740] The fact that partner sexual assault cases involving non-physical forms of coercion are indeed challenging has been shown in chapter 4.

the ‘stranger rape’ model such as physical violence and vehement resistance) expands our understanding of what sexual violence is.

Centring partner sexual violence can allow legal scholars and policymakers to uncover specific legal problems that would otherwise remain invisible or marginalized under a stranger rape model. This is why I expect my proposed approach of ‘centring’ partner sexual violence to continue to produce insights beyond my concrete proposal for a new course-of-conduct offence. Thinking of partner sexual violence in developing rules about consent, *mens rea*, credibility and rape shields, for instance, would likely also lead to improvements in these areas and contribute to centring the crime of sexual assault on partner sexual violence. I thus hope that this chapter can be an invitation for legal scholars to by dedicate more brainpower to studying sexual offences law through the lens of partner sexual violence.

For my part, I have highlighted social coercion and sexual precedence as issues that can be brought to light and receive more attention by centring partner sexual violence. Both issues will be reflected in my proposed legal reform. My proposal covers the use of social norms to attempt to induce sex, and it adopts a course-of-conduct form to account for repeated interactions between the perpetrator and the victim. To reiterate, a decision to centre partner sexual violence does not necessarily lead to my conclusions regarding social coercion and a course-of-conduct offence. But the centring approach is necessary to raise these kinds of issues—specific to or particularly prevalent in situations of partner sexual violence—whatever answer we then decide to adopt.

By developing a legal reform proposal from the consideration of partner sexual violence specifically—even if the proposal could apply to a wider range of circumstances—I hope to generate legal rules that, for avoiding the pitfall of painting law around marginal cases, are less likely to be undermined by implementation problems.

CHAPTER 6: AGAINST AN INCIDENT MODEL OF SEXUAL VIOLENCE

My choice to 'centre' partner sexual violence, that is, give primary consideration to its features to move away from a stranger rape model of victimization, has enabled me to see sexual precedence and repeated victimization as important issues. While a stranger rape model presupposes a single interaction between the perpetrator and the victim, partner sexual violence likely involves sexual activity—consensual or otherwise—before and after the event under consideration. As my study of rough sex cases and the examination of rape shield provisions have revealed, sexual precedence often works to the advantage of the accused and troubles the evaluation of the victim's credibility. A legal reform proposal 'centred' on partner sexual violence must pay particular attention to this issue. To this end, this chapter draws inspiration from coercive control theory to develop a critique of the 'incident model of sexual assault', and proposes conceptualizing sexual violence on a larger time frame.

Coercive control and the challenge to the 'incident model' of domestic violence

Coercive control theory is a reframing of intimate partner violence popularized mostly by Evan Stark since the 2000s.[741] Its main contribution is to shed a new light on intimate partner violence by shifting the focus away from physical assaults and onto other forms of coercion and control omnipresent in victims' lives. Critiquing the 'incident' model of domestic violence, Stark argues that 'the primary harm abusive men inflict is political, not physical, and reflects the deprivation of rights and resources that are critical to personhood and citizenship'.[742] Stark's new perspective has led to the creation of course-of-conduct offences in some jurisdictions (not in Canada), and will serve as inspiration for my proposed course-of-conduct offence of sexual coercion.

Evan Stark presents coercive control as multifaceted and not primarily about injury-provoking physical violence. Stark observes that intimate partner violence 'often involve[s] frequent, but predominantly minor assault extending over a considerable

[741] Stark, *Coercive Control* (n 60).

[742] ibid 5.

period'.[743] In addition to physical violence, men deploy tactics of intimidation,[744] isolation,[745] and control.[746] As a result of these tactics, coercive control is omnipresent and routine, such that 'many victims experience tension as chronic rather than episodic'.[747]

Stark's theory attacks the core assumption in research, policy, and intervention that 'partner abuse can be equated with [physical] violence'.[748] He observes that

> [d]espite attempts to broaden the definition of domestic violence to include "psychological abuse" or "control" . . ., criminal and family law, medical identification protocols, and other major intervention strategies or policies continue to focus on violence almost exclusively.[749]

By focusing on physical violence, the incident model trivializes men's intimate partner violence. Stark explains that 'when they are approached with a model that considers each assault separately, the pattern of routine, low-level assault is replaced by a view of minor

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[743] Evan Stark, 'Do Violent Acts Equal Abuse? Resolving the Gender Parity/Asymmetry Dilemma' (2010) 62 Sex Roles 201, 203.

[744] Stark, *Coercive Control* (n 60) 249.

[745] ibid 262.

[746] ibid 271.

[747] Evan Stark, 'Rethinking Coercive Control' (2009) 15 Violence Against Women 1509, 246.

[748] Stark, *Coercive Control* (n 60) 190.

[749] ibid, references omitted.

assault or a series of trivial assaults, none of which appears to merit serious intervention'.[750] At the court level, '[r]egardless of its chronic nature, courts treat each abuse incident they see as a first offense. Because well over 95% of these incidents are minor, no one goes to jail'.[751] Thus, intimate partner violence is reduced 'to a second-class misdemeanor for which no one is punished'.[752]

For Stark, we must '[turn] the prevailing definition [of domestic violence] on its head, replacing its emphasis on discrete, gender-neutral acts of injurious violence with a picture of an ongoing and gender-specific pattern of coercive and controlling behaviors that causes a range of harms in addition to injury'.[753] This shift of focus '[s]tarts with women's experience'.[754] Stark writes that the incident model 'bears little resemblance to the forms of oppression that drive most abused women to require outside assistance'[755] such as perpetrators 'appropriating their resources; undermining their social support; subverting their rights to privacy, self-respect, and autonomy; and depriving them of

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[750] Evan Stark, 'Looking Beyond Domestic Violence: Policing Coercive Control' (2012) 12 Journal of Police Crisis Negotiations 199, 204.

[751] Stark, *Coercive Control* (n 60) 10.

[752] ibid 99.

[753] ibid 99–100.

[754] ibid.

[755] Stark, 'Looking Beyond Domestic Violence' (n 750) 201.

substantive equality'.[756] Indeed, '[v]iewing woman abuse through the prism of the incident-specific and injury-based definition of violence has concealed its major components, dynamics, and effects'.[757] As a result, the gender-specific harms of coercive control have remained largely invisible to the law.[758] Stark sees the law as complicit in women's entrapment; he writes that '[i]ts very invisibility on the public stage suggests that coercive control depends on at least tacit support from law, discriminatory structures, and normative consent'.[759]

Other scholars have echoed Stark's critique of the criminal law as obsessing over isolated and visible physical injuries and consequently failing to capture the real, pattern-based wrong of domestic violence.[760] They have noted that assault laws used to prosecute domestic violence have 'a narrow temporal lens',[761] and that they 'rende[r] context

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[756] Stark, *Coercive Control* (n 60) 13.

[757] ibid 10.

[758] ibid 15.

[759] ibid 194–195.

[760] Vanessa Bettinson, 'Criminalising Coercive Control in Domestic Violence Cases: Should Scotland Follow the Path of England and Wales?' (2016) 3 Criminal Law Review 165, 169; Jennifer Youngs, 'Domestic Violence and the Criminal Law: Reconceptualising Reform' (2015) 79 Journal of Criminal Law 55.

[761] Deborah Tuerkheimer, 'Recognizing and Remedying the Harm to Battering: A Call to Criminalize Domestic Violence Criminal Law' (2003) 94 Journal of Criminal Law & Criminology 959, 971.

meaningless'[762] by 'isolating and atomizing violence in intimate relationships.'[763] Trials for domestic violence typically focus on evidence of injuries, such as photographs from doctors' reports, and on the accused's state of mind (for example, intent) at a precise moment in time—what Jonathan Herring calls 'the photograph approach'.[764] Consequently, the effects of ongoing controlling behaviour are not properly considered.[765]

The critique of the incident model of domestic violence has impacted the legal approach to violence against women, most notably in England and Wales, a jurisdiction famous for being the first to criminalize coercive control. The offence of 'controlling or coercive behaviour in an intimate or family relationship', which came into force in December 2015, criminalizes repeated or continuous controlling or coercive behaviour that has a serious effect on the victim.[766] Targeting repeated or continuous behaviour is what makes the offence a course-of-conduct one.

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[762] ibid 973.

[763] ibid.

[764] Jonathan Herring, *Domestic Abuse and Human Rights* (Intersentia 2020) 115.

[765] Tuerkheimer (n 761) 972; Vanessa Bettinson and Charlotte Bishop, 'Is the Creation of a Discrete Offence of Coercive Control Necessary to Combat Domestic Violence' (2015) 66 Northern Ireland Legal Quarterly 179. See chapter 4 for more details.

[766] Serious Crime Act 2015, 2015 c. 9 s 76.

The new offence implicitly recognizes the inadequacy of pre-existing crimes to deal with intimate partner violence. The novelty and promise of the coercive control offence hinge on its focus on a course of conduct 'which may involve unremarkable acts when viewed in isolation, that are not criminal except in the context of the pattern of abuse, and which may not involve any acts of physical violence'.[767] This change finally recognizes 'what most researchers in the domestic violence field have argued for many years – that the core nature of much domestic abuse is constituted by the cumulative effect of coercive and controlling behaviour rather than by physical abuse'.[768] Consistent with the creation of coercive control crime, the British Parliament also enacted the Domestic Abuse Act 2021, which defines 'domestic abuse' inclusive of 'controlling or coercive behaviour',[769] and states that for behaviour to be considered 'abusive', 'it does not matter whether the behaviour consists of a single incident or a course of conduct'.[770]

Such legislative changes do not guarantee, of course, that the implementation of the law raises no challenge. A post-criminalization study found that the police recorded a

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[767] Sandra Walklate, Kate Fitz-Gibbon and Jude McCulloch, 'Is More Law the Answer? Seeking Justice for Victims of Intimate Partner Violence through the Reform of Legal Categories' (2018) 18 Criminology & Criminal Justice 115, 122.

[768] Marilyn McMahon and Paul McGorrery, 'Criminalising Controlling and Coercive Behaviour: The Next Step in the Prosecution of Family Violence' (2016) 41 Alternative Law Journal 98, 99.

[769] Domestic Abuse Act 2021, 2021 c. 17 s 1(3).

[770] ibid.

'considerably low'[771] number of coercive control crimes, and that these cases often involved physical violence, suggesting that police offices might more easily identify physical violence as opposed to 'a web of abusive behaviour as constituted in the new legislation'.[772] While 37% of the cases did not include physical violence,[773] these cases were less significantly less likely 'to be graded as high risk, result in arrest and be "solved"'.[774] The study's authors also explain that some police officers focused 'on investigating isolated 'incidents' (such as physical assault or criminal damage) rather than identifying, responding to and attempting to demonstrate the presence of a pattern behaviour'.[775] A lack of understanding of coercive control also led to '[d]ifficulties associated with evidencing the offence'.[776]

Consequently, simply shifting to a course-of-conduct offence is not the magic solution to every problem regarding the legal treatment of intimate partner violence. Nonetheless, the development of coercive control offences has often been seen as a

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[771] Charlotte Barlow and others, 'Putting Coercive Control into Practice: Problems and Possibilities' (2020) 60 The British Journal of Criminology 160, 165.

[772] ibid 169.

[773] ibid 173.

[774] ibid 171.

[775] ibid 170.

[776] ibid 171.

positive development, and there are even calls to reproduce one such offence in Canada.[777] Could a similar move from an incident to a course-of-conduct model also prove useful as a paradigm shift in sexual offences law?

Challenging the 'incident model' of sexual assault

The coercive control critique of the 'incident model' of domestic violence and the corresponding move to produce a course-of-conduct offence has marked an important mindset shift in the law. I argue that a similar move could help with sexual offences legislation as it also adopts an 'incident' view of the crime.

Indeed, the law often apprehends sexual assault as a bounded incident divorced from context and political meaning, and this contributes to the marginalization of partner sexual violence. The purpose of this section is to use case-law and legislative examples as well as scholarly work on the concept of consent to argue that sexual offences law has a dominant 'incident' framing. We will see that this framing is part of the story of marginalization of partner sexual violence. Thus, to de-marginalize partner sexual

[777] 'Projet de loi C-247: Loi modifiant le Code criminel (conduite contrôlante ou coercitive)' (*Parlement du Canada*) <https://parl.ca/DocumentViewer/fr/43-2/projet-loi/C-247/premiere-lecture> accessed 4 March 2022; Suzanne Zaccour, 'La loi doit voir plus loin que la violence physique' *Le Devoir* (19 October 2020) <https://www.ledevoir.com/opinion/idees/588038/violence-conjugale-la-loi-doit-voir-plus-loin-que-la-violence-physique> accessed 23 May 2022.

violence, the turn to a course-of-conduct offence like that of coercive control appears promising.

Consent in the moment

The centrality of consent in defining sexual offences often favours an analysis of rape or sexual assault as a bounded incident. This is due to consent being conventionally framed as permission given at the moment of the sexual act. Sexual assault law thus tends to focus attention on a single moment—the moment of consent—rather than examining the meaning of the sexual activity within a relationship or a broader time frame. As other scholars have noted, there is a then risk of the law neglecting the parties' relationship history and the context of the utterance.[778] Cheryl Hanna writes that:

> similar to the way the law looks at domestic violence as a series of discrete acts instead of an ongoing pattern of behavior, we tend to think about consent within intimate relationships as a moment in time—the few seconds before the act in question took place. Thus, we often miss the broader context.[779]

While consent can be made permeable to context, more often

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[778] Jonathan Herring, 'Relational Autonomy and Rape' in Shelley Day Sclater and others (eds), *Regulating Autonomy: Sex, Reproduction and Family* (Bloomsbury Publishing 2009); Lees (n 624); Rebecca Whisnant, 'Feminist Perspectives on Rape' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University 2017) <https://plato.stanford.edu/archives/fall2017/entries/feminism-rape/> accessed 29 September 2018.

[779] Cheryl Hanna, 'Rethinking Consent in a Big Love Way' (2010) 17 Michigan Journal of Gender & Law 111, 136.

> [t]he contemporary legal discourse of sexual assault effects a form of radical decontextualization in which the moment of consent, understood as signifying sexual autonomy, becomes isolated from the moments before and after, from lived realities and from the power relationships that shape and often constrain choices.[780]

I do not believe that sexual offences law *necessarily* closes the door to a contextual analysis. Case law from England and Wales reveals an emerging jurisprudence where a contextual analysis is adopted in grooming cases.[781] In my analysis of 'rough sex' jurisprudence in Canada, I found a case where an accused is convicted of sexually assaulting his partner's biological daughter, a 19-year-old with intellectual limitations.[782] The Court finds that the Crown has not proven beyond a reasonable doubt that the victim did not consent, but then goes on to conclude that her participation to the sexual activity (which included role-playing, fetishist activities, 'BDSM'-type activity, and a 'threesome' involving her birth mother) was coerced. Engaging in a contextual analysis going beyond the incident model, the Court observes that the victim was 'submerged in a micro-society managed and controlled' by the accused[783] and concludes that the victim's 'sexual activity was coerced by a combination of fear, physical intimidation, and an

[780] Gotell, 'Governing Heterosexuality through Specific Consent' (n 714) 380.

[781] See eg *R v Ali & Anor* [2015] EWCA Crim 1279.

[782] *R v KDH* 2012 ABQB 318 [170].

[783] ibid.

environment with a powerful authority, [the accused], who arranged and directed activities for his pleasure'.[784]

As this and other cases show, a contextual analysis is not banned by the legislative framework on sexual assault. On the contrary, the notion that consent can be vitiated in situations of power imbalance invites a contextual analysis. However, the incident, decontextualized model still dominates in cases not involving familial sexual violence. Recall from chapter 4 that section 273.1(c) of the Criminal Code,[785] which provides that no consent is obtained where the accused induces the complainant's participation by abusing a position of trust, power, or authority, is virtually never used in cases involving adult victims or partner sexual violence. Recall also that the cases that are prosecuted tend to be cases with a clear use of force and a clear absence of consent, a factual context conducive to an incident view of the crime. Thus, while the affirmation that consent involves a decontextualized and incident-bound analysis must be nuanced, this concern remains relevant.

Interestingly, research by Terry Humphreys suggests that men have a narrower view of consent than women; they are more likely to see consent as an event rather than a process. Men are more likely to agree that 'asking for consent at the beginning of a

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[784] ibid 173.

[785] Criminal Code, RCS 1985, c. C-46.

sexual encounter is enough' or that 'their own behaviour typically involves asking for consent only once during a sexual encounter'.[786] These results allow us to characterize the law's limited, incident view of consent as male bias, similarly to Stark's point that '[t]he abstraction of discrete violent acts from the larger context of abuse reflects a male-oriented perspective on events'.[787] But even broad and feminist views of consent often remain within the incident framework; as Melanie Beres explains, rather than viewing consent as a single event, '[m]ost feminist theorizing and work with sexual violence prevention views consent as a process **that begins with sexual initiation** and is ongoing throughout the sexual activity'.[788] A more contextual view would also consider what happened before sexual initiation. For example, some feminists have denounced repeated request for sexual activity or 'postrefusal sexual persistence'[789] as a potentially coercive

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[786] Terry P Humphreys, 'Understanding Sexual Consent: An Empirical Investigation of the Normative Script for Young Heterosexual Adults' in Mark Cowling and Paul Reynolds (eds), *Making Sense of Sexual Consent* (Ashgate 2004); see however, distinguishing consent and willingness, Melanie Ann Beres, 'Rethinking the Concept of Consent for Anti-Sexual Violence Activism and Education' (2014) 24 Feminism & Psychology 373, 386.

[787] Stark, *Coercive Control* (n 60) 246.

[788] Beres (n 786) 382, emphasis added. Michelle J Anderson, 'Negotiating Sex' (2004) 78 Southern California Law Review 1401, is an interesting example where a process of negotiation is proposed (to replace the consent model). The agreement resulting from the negotiation should be ongoing; Anderson writes at 1425 that agreement 'is dynamic and active', may 'change over time, and must be sensitive to context and changes circumstances'. However, she proposes that negotiation should be required only to for sexual penetration.

[789] Struckman-Johnson, Struckman-Johnson and Anderson (n 61) 76.

practice even if the last request results in a communicated 'yes' before the sexual activity in question.[790]

A rich examination of the view of consent as a single event is presented by Susan Ehrlich in her linguistic analysis of a disciplinary trial. Ehrlich examines how the framing of consent as a single moment is exploited by a defendant who argues that the victim did not object 'to each of his sexual advances'.[791] The author observes that

> temporality becomes crucial to the defendant's notion of consent. [T]here is explicit acknowledgement on the part of the defendant that the complainant has expressed lack of consent at some previous point in the interaction; however, because she did not communicate her protests in the wake of each of his acts of sexual aggression, he understood her to be "consenting".[792]

The issue of timing allows the defendant to make each act of resistance irrelevant to subsequent sexual aggression. In other words: he persists until she yields.[793]

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[790] See eg Hlavka (n 708) 349; Jeffrey and Barata, '"She Didn't Want To…and I'd Obviously Insist"' (n 208).

[791] Susan Ehrlich, 'The Discursive Reconstruction of Sexual Consent' (1998) 9 Discourse & Society 149, 153.

[792] ibid.

[793] Though her example is now dated, Ehrlich's detailed analysis of the linguistic practices that support the incident model remains illustrative of its usefulness to the defence.

As shown in this example, the law's 'light switch'[794] framing may import patriarchal biases by allowing defendants to treat consent-seeking as a meaningless route to 'working a "yes" out'.[795] Along those lines, Jonathan Herring explains that the notion of consent 'is too narrow in its time frame'[796] and that it 'objectifies the woman in paying no attention to her understanding or experience of the event'.[797] Evidence of violence, insistence, or incapacity can then be marginalized to lend credibility to a defendant's assertion of consent or belief in consent in the *separate instant* of consent.

Rape shield laws: divorcing context

Rape shield laws provide further evidence of the narrow temporal frame of consent, as these laws isolate the sexual encounter in question from the victim and the defendant's sexual history.

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[794] Jaclyn Friedman, "Consent Is Not a Lightswitch", Yes Means Yes! (9 November 2010), no longer available online, cited in Gotell, 'Governing Heterosexuality through Specific Consent' (n 714) 180.

[795] Peggy Reeves Sanday, *Fraternity Gang Rape: Sex Brotherhood, and Privilege on Campus* (New York University Press 1990).

[796] Herring, 'Relational Autonomy and Rape' (n 778) 65.

[797] ibid.

It is important to acknowledge at the outset that rape shields are meant to protect victims as well as the truth-seeking process from the twin myths that, by reason of the prior sexual history,

> the complainant
>
> > (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
> >
> > (b) is less worthy of belief.[798]

As we saw in chapter 4, rape shield laws are often circumvented in cases of partner sexual violence. But even when rape shields successfully protect victims, they may be a double-edged sword because they leave underlying biases—that prior sexual history makes consent more likely—unchallenged. Rape shields embrace the decontextualized incident model by making victims look like virgins and partner rape look like stranger rape. In so doing, they may reinforce the primacy of stranger rape as the 'real' or 'legitimate' type of rape.

In *R v Goldfinch*, an important 2019 Canadian Supreme Court decision on sexual history evidence, the majority judges rejected the admissibility of sexual history evidence and ordered a new trial in a case where the accused had presented as 'context' the fact

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[798] Criminal Code, RCS 1985, c. C-46 s 276(1).

that he and the victim were 'friends with benefits'.[799] Dissenting Justice Brown would have restored the acquittal. He argued that:

> it was *the Crown's* cross-examination of the appellant which directly put the *sexual* nature of his relationship with the complainant at issue. And it was *the Crown* who suggested that he had sexually assaulted her because they hadn't had sex recently. And it was *the Crown* who suggested that they had a "tumultuous relationship" marked with many arguments and her being upset with him but returning to him eventually. *The difference*, however, is that the Crown leaned into the existence of the relationship in order to advance a theory that, *because* they were in a sexual relationship, the jury should find that he expected sex and was angry when she refused. At the same time, however, the Crown insisted that the appellant be prohibited from rebutting that theory, if his evidence would in any way indirectly reveal to the jury that the complainant had engaged in *the same sexual activity that the Crown pointed to in support of its own theory*. This is . . . fundamentally unfair.[800]

Leaving aside the unfairness argument, what is interesting is the suggestion that sexual history evidence might be advantageous to the Crown. In our rape-myth infused society, a robust application of rape shields is essential because contextualization is always, or almost always, to the detriment of the victim. But we could imagine a different approach to context, where we would see sexual history evidence as essential not because it suggests that the victim is more likely to have consented, but because sexual violence is often committed by someone who is not a sexual stranger (for instance, a 'friend with

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[799] *R v Goldfinch* (n 270).

[800] ibid 196.

benefits', a date, a partner, or an ex-partner). From this perspective, sexual history evidence would not make an acquittal more likely; rather, it might cause suspicion or paint a motive, as in the *Goldfinch* case where the Crown used context to suggest that the accused felt entitled to sexual access to the victim. In the current context, rape shields remain a necessary protection. But they do show that the law has placed its bets on the incident model, accepting the risk of losing important context.

I want to be clear that I am not suggesting abolishing rape shield provisions, as this would likely reduce convictions for partner sexual assault even more. That rape shield provisions are not robustly applied in cases of partner sexual violence, as observed in chapter 4, is not a positive result, because this implementation problem often points to an assumption of continuous consent within relationships. Rape shields are a pragmatic response to the predictable effect of rape myths on juries and even judges. My point at this stage is simply to show that the current legislation favors an incident view of sexual violence, where the sexual activity in question is meant to be examined in isolation from previous events.

Coercion and resistance in the moment

The incident view of sexual violence may also confine coercion and resistance to a limited time frame. This means that the moment of consent or non-consent can be analyzed in isolation from acts of coercion by the defendant and affirmations of non-consent by the victim having occurred merely minutes earlier. How broadly or narrowly

to examine the situation can be the subject of framing disputes between the Crown and the accused.

For example, in *R v AE*,[801] several men sexually assaulted the complainant and recorded the event. Their acquittal at trial was overturned on appeal. Regarding the judge's finding that the complainant consented to some but not all acts occurring simultaneously, the Crown argued that 'treating these matters in isolation from one another led to an artificial finding that the complainant was consenting to the sexual acts involving her upper body, while not consenting to the sexual acts occurring to her lower body at the same time'.[802] The Court of Appeal rejected the proposition that 'the complainant could not simultaneously consent to one act of sexual touching, while refusing another',[803] exemplifying a clear form of decontextualization. Even worse, despite the context of a sexual assault by multiple assailants, the Court of Appeal wrote that:

> The complainant clearly withdrew her consent when she cried out in pain as identified in para 36 above, and her consent was **not re-established until she agreed to perform fellatio on TF** as shown near

[801] *R v AE* 2021 ABCA 172.

[802] ibid 44.

[803] ibid.

> the end of the video. What transpired **in the interim** was a sexual assault.[804]

While the Court of Appeal is, with these sentences, justifying a conviction, it is worth emphasizing that its reasoning makes consent *immediately after a gang rape* possible—and even so plausible as to not require any explanation for this incongruity. If the extreme and entirely transparent coercive context of a recorded gang rape is not sufficient to prevent a finding of consent, what hope is there for the recognition of subtler forms of control and coercion within relationships? Or forms of violence that happen earlier than a few minutes before the sexual activity in question?

A similar obliviousness to the impact of violence on the issue of consent immediately after this violence is present in the trial judgment in *R v Adepoju*. The facts are as follows:

> The complainant testified that she had invited the respondent to her home to stay while he found other permanent accommodation, but indicated to him that it was to remain a platonic relationship. The respondent came to her home and immediately starting kissing her. She allowed him to give her one kiss but told him no more. She told him she did not want to engage in any sexual activity. She told him so on numerous occasions. He persisted and despite her protestations, grabbed her and pulled her pants and panties off. After struggling and resisting his advances for about 15 or 20 minutes, she realized the respondent was not going to take no for an answer. She stopped fighting back and stopped saying no but she did not say yes. . . On this

[804] ibid 101, emphasis added. Note that the dissenting judge proposes to '[focus] on what the accused did to the complainant' rather than on the complainant's consent [109]. For him, consent was simply not possible in the circumstances of this case.

> basis, the trial judge found that the Crown had failed to prove the absence of consent.[805]

The Alberta Court of Appeal allowed the appeal and convicted the defendant, reminding us that 'acquiescence or submission is not consent'[806] and that 'consent must be freely given'.[807] The continued existence of such flagrant errors of law in trial decisions is, once again, a cause for pessimism: is the absence of reported cases with subtle coercion over time surprising when even clear cases of immediate physical force prove challenging for judges?

A final useful example to see the incident framing on coercion is the 2001 case *R v MacFie*.[808] As the Court of Appeal of Alberta recounts, 'the trial judge found that although MacFie had violently abducted his estranged wife and had sexual intercourse with her without her consent, he nevertheless had an honest belief in consent'.[809] This case led the Court to ponder the somewhat surreal question of 'whether, and under what circumstances, a person who has violently abducted a victim can claim that he honestly

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[805] *R v Adepoju* 2014 ABCA 100 [2]; this case is discussed by Benedet (n 285) 143.

[806] *R v Adepoju* (n 805) para 11.

[807] ibid.

[808] This case is discussed in Koshan, 'The Legal Treatment of Marital Rape and Women's Equality' (n 22) 38.

[809] *R v MacFie* 2001 ABCA 34 [1].

but mistakenly believed that the victim consented to sexual activity while the abduction continued'.[810]

The trial judgment exemplifies an extreme form of decontextualization by finding an air of reality to the accused's claim of mistaken belief in consent due to the victim's 'statement to the police that she did what she could to persuade MacFie that she was consenting so that he would not hurt her'.[811] By contrast, for the Court of Appeal, 'other circumstances should have been considered',[812] especially the history of domestic violence and the accused's threats to kill the victim. In the context of a violent abduction, there was no air of reality to the accused's defence.

The Court of Appeal concludes that, 'as a general principle, . . . while the abduction continues, the perpetrator of the abduction cannot assert an honest belief in consent'.[813] The Crown's position was that 'a person who violently abducts another can never have an honest belief in consent, at least until the abduction has clearly terminated and the victim is free to once again exercise her own will'.[814] But even the Court of

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[810] ibid 2.

[811] ibid 22.

[812] ibid 26.

[813] ibid 2.

[814] ibid 28.

Appeal's and the Crown's positions are narrow in scope, suggesting that a defence of mistaken belief in consent would be possible immediately *after* a violent kidnapping, despite the clear power imbalance.

In criticizing the incident view of domestic violence, Stark notes that '[u]nderlying the question of why battered women stay [with a violent partner] are the beliefs that they have the opportunity to exit and that there is sufficient volitional space between abusive incidents to exercise decisional autonomy'.[815] The incident model of sexual assault similarly holds that victims can exercise decisional autonomy (i.e., give consent) immediately after or between violent episodes. While appellate courts are still able to convict in the extreme cases cited above, the incident framework through which sexual assault is understood appears to focus attention on a narrow time frame and enable the extraction of the moment of consent from its coercive context.

Previous violence by the accused

In addition to coercion immediately preceding the sexual encounter, more distant violence by the accused is also excluded by an incident view of sexual assault. Indeed, when a sexual assault occurs within the context of a relationship, it is quite likely that there have been other forms of violence within that relationship—other sexual assaults,

[815] Stark, *Coercive Control* (n 60) 115.

physical force, coercive control… Yet the law adopts a position of distrust toward evidence of previous violence by the accused, because of the risk that 'bad character evidence' will be used to convict the accused, not for having committed the crime, but for being *the type of person* who could commit the crime. Arguably, in cases of sexual violence, and especially partner sexual violence, the accused's violence remains highly relevant despite this risk, since previous violence bears on consent and communication of consent. Indeed, as Patricia Easteal and Christine Feerick explain, '[i]f evidence of prior violence is not admitted and the incident is looked at in isolation from the dynamics of the relationship, then the threat of force that vitiates the victim's consent may not be comprehended'.[816]

There are debates even within feminist circles regarding whether evidence of the accused raping other women should be admitted.[817] But when evaluating an allegation of sexual violation within a relationship, courts should at the very least have access to information about the violent or coercive nature of that relationship. A background of violence can silence women's non-consent and prompt them to acquiesce to unwanted sex—and in these contexts, additional physical force by the perpetrator may not be

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[816] Easteal and Feerick (n 17) 204.

[817] See eg the debate between David Tanovich, 'An Equality-Oriented Approach to the Admissibility of Similar Fact Evidence in Sexual Assault Prosecutions' in Elizabeth A Sheehy (ed), *Sexual Assault in Canada: Law, Legal Practice, and Women's Activism* (University of Ottawa Press 2012); and Aviva Orenstein, 'No Bad Men: A Feminist Analysis of Character Evidence in Rape Trials' (1997) 49 Hastings Law Journal 663.

required to coerce sexual activity. Therefore, it is important that the law see rape or sexual assault not as an isolated incident, but as part of an ongoing violent dynamic. Yet the law rarely adopts this contextual view.

Even when judges have all the relevant information regarding the accused's violence towards the victim, they might not use it appropriately. A powerful example is *R v JA*, the case establishing the impossibility of consenting to sexual activity while unconscious.[818] As other commentators have noted, the judges involved ignored the fact that, based on the presentence report, the accused was a 'serial abuser of women and this woman in particular'.[819] Judges described the victim as a '"willing and enthusiastic participant throughout all stages of the sexual activity," exemplif[ying] a highly decontextualized analysis of consent as well as a reconstruction of the facts'.[820] This decontextualization led to problematic assumptions and conclusions on the victim's factual consent.[821] If a case so clear is decontextualized to such an extend by higher courts, what hope is there for a generalized understanding of consent and domestic violence throughout the criminal justice system?

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[818] *R v JA* (n 631).

[819] Busby (n 243) 336–338.

[820] Gotell, 'Governing Heterosexuality through Specific Consent' (n 714) 378.

[821] Koshan, 'Marriage and Advance Consent to Sex' (n 631).

Decontextualizing power relations

We have seen how force and coercion applied by the defendant before the sexual assault can be ignored under an incident framework. A more general context of power imbalance is also more easily discounted in incident-framed legal analyses. An incident model enables the unequal nature of the relationship to be put 'on hold' for the purpose of the consent inquiry.

As explained above, the incident view of sexual assault promotes a focus on the 'act', divorced from its context. With consent as a singular moment and sexual violence as an isolated act, the law neglects the quality of the offender-victim relationship and the meaning of the sexual encounter within that relationship, as well as the positioning of the victim and offender along various axes of power. In so doing, the incident model contrasts with a more contextual approach. Vanessa Munro writes regarding the English and Welsh legislative framework and definition of consent that they do 'little to recognize, let alone problematize, the complex ways in which entrenched power disparities, material inequalities, relational dynamics, and socio-sexual norms operate to construct and constrain . . . women's ability to say "no" to male sexual initiative'.[822] The

[822] Vanessa E Munro, 'Constructing Consent: Legislating Freedom and Legitimating Constraint in the Expression of Sexual Autonomy' (2008) 41 Akron Law Review 923, 925.

same can be said of Canadian law. Sexual assault law demands momentary consent, not equal relationships.[823]

A manifestation of this framework is courts' reticence to find that unequal relationships can vitiate consent.[824] Janine Benedet and Isabel Grant observe that Canadian courts 'are very reluctant to find relationships of trust or authority with adult women except in extreme cases such as psychologist/patient or prison guard/prisoner',[825] even when the adult woman has a mental disability. Only age difference seems to be readily recognized, yet age-based hierarchies are already covered by specific child sexual assault offences.[826]

An example of the discounting of power relationships for adult women is the trial judgment in *R v Alsadi*.[827] The judge held that the complainant, an involuntary patient in a psychiatric ward, consented to sexual activity with a security guard. In finding that the accused was not in a position of authority over the complainant, the judge commented that the accused did not 'have the authority to restrain the activities of the complainant *at*

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[823] For a full critique, see MacKinnon, 'Rape Redefined' (n 4).

[824] The counterexample of *R v TD* (n 524) will be discussed below.

[825] Benedet and Grant (n 262) 150.

[826] ibid 152.

[827] Discussed in ibid 145–147.

that time'.[828] The judge also found that the accused and the complainant were not together long enough for a relationship of trust or authority to develop. The Court of Appeal for British Columbia ordered a new trial, noting that '[t]he judge did not analyze whether security guards are in a position of trust or power [or] whether the respondent incited or induced the complainant to participate in the sexual activity by abusing this position'.[829]

The trial judgment adopts an incident framework. The judge focused too narrowly on the single moment of the interaction between the complainant and the accused, neglecting the broader context—that security guards are routinely involved in restraining patients, and that the complainant, having been hospitalized 20 times, would likely have witnessed such interactions.[830]

This case exemplifies the broader point that the dominant model of consent may decontextualize and individualize sexual encounters instead of reading them in a broader context of gender, racial, ability, age, and class inequality. This problem persists despite modernisations of rape law. In fact, Lise Gotell associates decontextualization with the modern affirmative consent standard because '[e]mphasis is placed on discrete sexual

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[828] *R v Alsadi* 2012 BCCA 183 [22] citing the trial judgment [52].

[829] ibid 34.

[830] Benedet and Grant (n 262) 146.

transactions, consent-seeking actions, and the moment of agreement'.[831] Gotell explains that

> while [affirmative consent is] valuable in focusing attention on agreement from the complainant's perspective and on the demonstration of positive consent, sexual violence is atomized—its manifestations and consequences are never collected and are never considered in a context where sexual assault is a mechanism for sustaining gendered power relations.[832]

The author is thus particularly critical of how '[a]ffirmative consent individualizes by focusing attention on the moment of a sexual transaction, thus abstracting sexual interactions from their contexts'.[833] 'Placing emphasis on the moment of "agreement/acquiescence" in a sexual transaction', she adds, 'allows for the excision of context, including constraints on this complainant's agency'.[834]

The risk is that decontextualized analyses fail to offer equal protection to women most marginalized due to race, indigeneity, homelessness, or disability.[835] They depoliticize sexual violence by making the incident of sexual assault an exception rather

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[831] Gotell, 'Governing Heterosexuality through Specific Consent' (n 714) 365.

[832] ibid.

[833] ibid 361.

[834] ibid 369.

[835] ibid 367.

than a normative expression of rape culture, 'treating it as if it were an isolated and abnormal event in otherwise equal relations between men and women'.[836]

In short, the incident construction of consent puts sexual assault in a box, failing to place a woman's decision to have sex in the relevant context. The incident model misses the mark by neglecting to consider the extent to which women's choices are constrained within patriarchy in ways that are not always apparent from a gender-neutral, decontextualized perspective. Men's responsibility in exploiting those constraints also becomes less apparent when power relations are not fully examined.

Convicting for an act rather than a course of conduct

Finally, the definition of the crime of sexual assault as a single event means that the accused is generally convicted for a single act rather than a course of conduct, even when this default framing does not match his criminality. Consider the case of *R v Sweet*,[837] discussed in the section on 'rough sex' cases. M. Sweet was convicted for charges relating to a single event, on September 9 to 10, 2017. Yet his testimony suggests that sexual violence was a common occurrence in the relationship, even if the dated events might have been more serious:

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[836] ibid 387.

[837] *R v Sweet* (n 574).

> Mr. Sweet acknowledged that the complainant said things such as "No", "Ouch" and "Stop". According to Mr. Sweet, that **often went on in their relationship** and he did not understand that the complainant actually wanted him to stop. . .
>
> Sweet acknowledges that he probably bit the complainant too hard and hard enough to leave marks. He insists that this was **just as they had done before** and that he believed the complainant was okay with it.[838]

Moreover, while the victim testified to agreeing to BDSM activities, the language used suggests that this past sexual activity might not have been entirely consensual, or at least not desired:

> She agrees that prior to their marital problems they engaged in bondage and role playing on occasion but this was **his preference** and occurred **at his option** only after they had engaged in more conventional sex and only after she had been satisfied. On those occasions she **agreed to his request** to tie her up and if the ties were too tight she would feel free to speak up. She acknowledged that she had **allowed him** to shave her pubic hair during previous encounters.[839]

Sexual activity 'allowed' by the woman might not satisfy the threshold for sexual assault, but now that we know what happened when the victim did *not* allow BDSM—she was violently sexually assaulted and the accused was convicted for it—, we might be

[838] ibid 79, 84, emphasis added.

[839] ibid 21, emphasis added.

skeptical of the law's translation of this couple's history into a single event of sexual assault.

Of course, the incident model enables sexual assault to be repeated: more charges could have been laid, pointing to other dates and other events. However, under an incident model, the law would start from scratch in evaluating these additional charges. For each instance, the victim's non consent and the accused's *mens rea* would need to be proven beyond a reasonable doubt; as put by a judge considering extensive evidence of domestic violence, '[e]ach count is entirely separate from the others and must be . . . considered separately'.[840] We thus find cases where the victim reports a series of sexual assaults, some of which are proven and some not.[841] Proven counts add no credence to yet-to-be-proven events.

There are exceptions to the rule that one count represents one incident of sexual assault. In cases of historic or child sexual assault, for instance, it is common for a single count to capture multiple distinct incidents, a practice toward which the Supreme Court has expressed some caution.[842] In the extortion case *R v TD*, the judge finds that multiple sexual assaults were included within one count:

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[840] *R v SMH* 2010 ONSC 1635 [11].

[841] *R v MG* 2012 ONSC 5722; *R v RG et al* 2018 ONSC 6368.

[842] *R v MRH* 2019 SCC 46 [6].

> Having regard for the fact that count 1 in the indictment covers the period from May 28, to July 30, 2015, essentially spanning the entire period of the couple's marriage, I found that these events did not happen on only one isolated occasion. Rather, I found that Mr. T.D. committed sexual assault on the complainant on more than one occasion during the period specified in the indictment, but I was unable to determine precisely how many times it occurred.[843]

The danger in these cases, as the Supreme Court has denounced in the context of child sexual assault, is to 'discount a sentence simply because numerous incidents of sexual violence are covered by a single charge instead of multiple charges'.[844] The Court has explained that '[i]f the conviction for a single charge includes multiple instances of sexual violence, the sentencing judge is to give weight to this factor and should not analogize the case to single instance cases simply because those cases also involved only a single charge'.[845] In the *R v TD* extortion case, the defence tries to do exactly that: it analogizes the case to situations with a single sexual assault in an attempt to paint the case as exceptional and deserving of a low sentence. The judge, however, rejects the defence's proposition and retains a custodial sentence of 40 months.

Another source of potential unfairness is that, when defendants are sentenced for a single count representing multiple sexual assaults, their record will divulge a single

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[843] *R v TD* (n 524) para 23.

[844] *R v Friesen* (n 627) para 132.

[845] ibid.

conviction, evidencing a form of 'discount' for the person who sexual assaults his partner repeatedly. As seen in chapter 4, partner sexual assailants may received a 'discount' even when they are convicted for multiple counts of sexual assault due to the improper use of concurrent sentences for distinct incidents of sexual assault.[846] Courts also sometimes use the same starting points or range of sentences regardless of whether sexual violence happened once or repeatedly.[847] These practices suggest a mismatch between the law and reality when judges are tasked with sentencing people convicted of 'incidents' that do not reflect their criminality.

While the Supreme Court has acknowledged that sexual violence against children is often repeated, centring partner sexual violence should lead to the same conclusion regarding adult sexual assault. Courts should not frame repeated victimization as exceptional, as the Court of Appeal for Saskatchewan does in this case:

> because of their vulnerability, child victims of sexual assault are frequently subjected to ongoing acts of abuse. . . This makes a starting point sentence less useful than it is in the circumstances of **adult victims who typically are violated once** and then extricate themselves from the situation that led to the crime.[848]

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[846] See Grant (n 418), discussed in chapter 4.

[847] See ibid, discussed in chapter 4.

[848] *R v LV* 2016 SKCA 74 [65], emphasis added.

Saying that adult victims are typically violated only once shows not only an incident view of criminality but also a profound disregard for the reality of partner sexual violence. The ‘stranger rape’ model is transparent.

These cases illustrate that while repeated victimization is acknowledged as a possibility, especially when the victim is a child, this view of sexual violence is an exception to the norm of the incident model.

The incident model and partner sexual violence

Having exposed the features of an incident model of sexual assault, I now want to emphasize how this paradigm participates to the marginalization of partner sexual violence and contributes to a ‘stranger rape’ model of sexual victimization. The assumptions of the incident model do not match the reality of partner sexual violence, evidencing the lack of ‘centring’ of this phenomenon.

Consider the momentariness of consent and the correspondingly short lifespan of coercion and resistance: when a sexual encounter happens only once between strangers or acquaintances, zooming in on the moment of consent or non-consent does not leave out much.[849] However, a romantic relationship creates the opportunity for coercion at different moments. The perpetrator may regularly inflict violence, sexual or otherwise,

[849] Although the lack of consideration for power imbalance can pose problems even in such cases.

which would be relevant to an analysis of the victim's consent. The perpetrator can also more credibly threaten future violence and act on that threat. These threats can be expressed through subtle clues of 'signals' which are difficult to detect without a close contextual analysis.[850] An implicit threat to break up if the victim does not agree to have sex can also complicate the analysis of sexual violence as episodic in the context of coercive relationships.[851] To account for these realities, a broader time frame might be required to analyze cases of partner sexual assault.

The recognition of partner sexual violence is also hindered by a disregard for power imbalances. Gender norms constrain women's sexual negotiations—within and outside of committed relationships.[852] Women in physically violent relationships are particularly vulnerable to sexual violence as they may 'agree' to unwanted sex to avoid an escalation of violence. Kathleen Basile describes these women as 'constantly monitoring their own behavior, teaching themselves to behave in ways that would not result in a negative reaction from their husbands'.[853] An incident framework risks

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[850] See Charlotte Poppy Bishop, 'The Limitations of the Legal Response to Domestic Violence in England and Wales: A Critical Analysis' (doctoral thesis, University of Exeter 2013) 175–176 <https://ore.exeter.ac.uk/repository/bitstream/handle/10871/15820/BishopC.pdf?sequence=3> accessed 1 March 2022.

[851] See Logan, Walker and Cole (n 45) 126.

[852] See for example Gavey (n 1) ch 5; Burkett and Hamilton (n 140).

[853] Basile (n 11) 1050.

confusing their acquiescence with real consent. Imbalances of power affect women's behaviour and reactions to their partner's requests for sex. Examining their 'consent' out of context is, then, inadequate.

Partner sexual violence is also longer in duration than suggested by an incident model. The sexual violence '"incident" … can last from a half hour to days',[854] and victims may experience continuous badgering until they comply.[855] Examining resistance as short-lived silences these experiences because each act of sexual aggression is evaluated in isolation. Against assumptions that sexual consent is owed by the 'good wife' or 'good partner',[856] repeated sexual aggression in the form of post-refusal persistence is hard to resist continually.[857] The progressive wearing down of the victim is hidden by an incident model that focuses on a single moment of consent, coercion, and resistance. Indeed, 'context is critical in fully understanding partner sexual violence

[854] Logan, Walker and Cole (n 45) 120.

[855] Basile (n 11) 1048.

[856] Gavey (n 1) ch 5; Basile (n 11) 1046–1047.

[857] On the difficulty of saying 'no' to sex, see Burkett and Hamilton (n 140); Celia Kitzinger and Hannah Frith, 'Just Say No? The Use of Conversation Analysis in Developing a Feminist Perspective on Sexual Refusal' (1999) 10 Discourse & Society 293.

victimization and only looking at an overt "objective" act may have little to do with the degree of harm from the act.'[858]

As highlighted in chapter 1, partner sexual violence is often repeated. The incident model cannot account for the chronic nature of this form of victimization.[859] Recall that in Kathleen Basile's study, some women constantly experienced unwanted sex with their husband.[860] As Irene Casique summarizes, 'sexual violence inflicted in marriage [or in other intimate relationships] rarely consists in an isolated event; rather, it is a continuous process in the relationship'.[861] This reality sits awkwardly with the law's view of repeated offending as an exception to one-off perpetration, which places stranger and acquaintance rape as the norm, and partner and family sexual violence as special circumstances.

Satisfying the burden of proof when each act is considered in isolation is also a challenge when victims' comprehension of what happened clashes with the law's, as Isabel Ventura explains:

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[858] Logan, Walker and Cole (n 45) 115.

[859] For example Mahoney (n 59) 1009; Basile (n 11) 1052.

[860] Basile (n 11) 1052.

[861] Irene Casique, '¿Cuándo Puedo Decir No? Empoderamiento Femenino y Sexo No Deseado En México' (2006) 21 Estudios demográficos y urbanos 49, 51, my translation.

> Victims may recall what they felt rather than the details of what happened. Moreover, not all the particulars interest to judges and prosecutors. They insist on the quantitative dimension of the enquiry: "How old were you when it all started? And on another occasion, in the car, how old were you?". It is persistently asked how often or how frequently the facts occurred ["could have been once a week? Once a month? How many times?"], as well as the number of people involved, dates and exact locations, a clear chronology and a straightforward narrative, without any accessory elements. But few witnesses are able to testify with that judicial competence, especially if they have no legal advice.[862]

Due to the repeated nature of partner sexual violence, victims risk losing credibility through misremembering dates, failing to denounce all sexual assaults at the first opportunity, or being perceived as exaggerating the frequency of sexual assaults.[863] The problem is that charges of sexual assault relate to a particular incident and are not used to describe a sexually violent *relationship*. Thus, in a coercive relationship, convicting and sentencing individual acts of sexual violence does not capture the nature of the wrong: abuse of trust and cumulative violence within an environment of control.[864] The law as it stands is not well equipped to denounce the course of conduct of criminality of someone who regularly sexually exploits his partner.

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[862] Ventura (n 327) 6.

[863] See eg *R v BH* 2006 CanLII 42381 (ON SC); *R v BF* 2018 ONSC 2240; *R v TA* 2018 ONSC 1423.

[864] Herring, 'No More Having and Holding: The Abolition of the Marital Rape Exemption' (n 82) 233; Victor Tadros, 'The Distinctiveness of Domestic Abuse: A Freedom Based Account' (2004) 65 Louisiana Law Review 989, 1001.

Because partner sexual violence demands contextualization, an incident framework participates in making this violence less intelligible to the legal system. These problems add to a general predisposition to presume consent within intimate relationships[865] and other issues explored in chapter 4. It is telling that many of the reported cases of partner sexual assault involve clear physical violence and injuries rather than the more subtle and gradual erosion of victims' sexual autonomy. The reported cases are those that better fit an incident view of sexual assault.

Conclusion

We have seen that the law's dominant sexual assault model can be characterized as incident-based, and that this framing can contribute to marginalizing partner sexual violence. The consideration of repeated sexual violation and the analogy with coercive control, which have enabled me to identify and critique the incident model of sexual assault, are examples of the process of centring partner sexual violence. Paying attention to conjugality (and thus domestic violence) and to the chronic nature of partner sexual violence was a crucial step to enable this theoretical development. Yet the examples described throughout this section have not been only of partner sexual violence. Indeed, centring partner sexual violence makes space for sources of complexity that are absent in a stranger rape model but that are empirically present in diverse contexts. Starting from

[865] Logan, Walker and Cole (n 45) 112.

the realization that partner sexual violence involves repeated interaction and coercion buildup has thus opened the way to reflections on sexual offences law that can be beneficial even beyond this context, as anticipated in the description of my proposed 'centring' method.

As a next step in these reflections, I will draw inspiration from the legal response to coercive control to propose a course-of-conduct offence that would centre the reality of repeated partner sexual violence. But would such an offence be a sufficient challenge to the incident model of sexual assault? In jurisdictions that have recognized it, coercive control has been added on the side of other offences. This choice has enabled a new tailored response to coercive control, but it can be criticized as failing to fully challenge the incident approach to domestic violence reflected in more commonly prosecuted crimes. Likewise, the addition of a course-of-conduct sexual offence would enable the law to see repeated partner sexual violence, but it would only be a partial challenge to the incident model if the sexual assault offence is not reformed. Despite this limitation, I choose an additional course-of-conduct offence over a reform of sexual assault law because working on a more specific offence allows me to tailor my proposal to the reality of partner sexual violence and to the enforcement issues identified in this thesis. My proposed offence can exist alongside the existing 'incident' offences – notably sexual assault – in a way that attenuates many of the concerns discussed in this chapter by making space for the criminalization of repeated forms of partner sexual violence. But my hope is also that my proposal can plant the seed of a more general move away from

the incident model of sexual violence. Importantly, my proposal is not dependent on the continued existence of the incident-based sexual assault offence; it could work equally well alongside different offences as the limitations of the existing law continue to be challenged.

CHAPTER 7: A CENTRED, IMPLEMENTATION-CONSCIOUS, AND NON-INCIDENT-BASED AVENUE FOR CRIMINALIZING SEXUAL COERCION

The purpose of this chapter is to illustrate how the centring method can be applied to try to improve sexual offences legislation. This thesis so far has highlighted three major and related problems.

The first problem is that the law is currently not centred on partner sexual violence, neither in its design nor in its application. As a result, the most common forms of sexually coercive behaviours are not criminalized. The solution is to centre partner sexual violence in designing sexual offences.

The second problem is that implementation problems seem to survive legal reforms, such that any attempt to change, for instance, the definition of consent appears unlikely to significantly increase the criminalization of partner sexual violence. The solution is to design legal rules that are implementation-conscious, that is, rules that are easy to apply, that reduce the space for interpretation, and that can contribute to the recognition of some behaviours as sexual violence—including by their victims.

The third problem that I have identified is the 'incident model' of sexual assault. The law's understanding of sexual violence as a single, bounded incident can obscure the recognition of partner sexual violence. The solution, inspired by coercive control crimes and literature, is to consider creating a course-of-conduct offence or course-of-conduct criminal provisions.

These three elements constitute the core of this thesis' contribution. They suggest a potential new approach to academic work and law reform in the area of sexual offences. These are also lessons that, with the required adjustments, could be translated into other legal contexts.

The ingredients that this thesis has brought to light could be used in different recipes. In other words, my work does not lead to a single appropriate legal response to partner sexual coercion. On the contrary, I see my work as providing building blocks that must continue to be explored and manipulated as we attempt to improve sexual offences law. Similar to how developing a 'feminist approach' to sexual violence would not lead to a single and contained implication, but rather to a paradigm shift, it is my hope that the centring approach can be seen as a fertile evaluative tool rather than as a single legislative proposal. That being said, this final chapter illustrates how a legal proposal to criminalize partner sexual violence could be developed by adopting a centring, implementation-conscious and non-incident-based approach.

Centred: working from empirical studies

Explanation

My analysis of Canadian sexual assault law has revealed that the most common forms of sexual violence are often excluded from the law's ambit. Not only is partner sexual violence rarely criminalized, but non-physical tactics, often termed 'sexual coercion', are even more absent from the criminal justice system. The importance of centring the law on these common tactics has already been explained throughout this thesis; the question is now how to apply this insight. Where should we start an attempt to better criminalize partner sexual coercion, and how should we identify the types of behaviours that should be covered?

A possible way to engage in this exercise would be to start from philosophical work on consent and attempt to identify the kind of constraints that prevent meaningful consent. It is also common to use legal criteria to try to determine which kinds of coercion could or should be criminalized. My approach is different. To truly centre common behaviours, I suggest starting from empirical literature on partner sexual coercion, especially work including or focused on non-physical partner sexual coercion. Because my reflection starts with empirical literature, my approach is biased towards recognizing the kinds of sexual coercion that women commonly experience. This approach stands in sharp contrast with the traditional approach of criminalizing 'real rape' or forms of sexual coercion that are uncommon. Consistent with the method I

described in chapter 5 as 'centring partner sexual violence', I propose to place at the point of focus not a scenario attracting universal agreement or a 'pure' harmless rape, but rather ordinary partner sexual coercion as found in empirical studies.

The move to find legal truth in women's experiences rather than abstract reasoning echoes feminist methods. Indeed, feminists have often contended that '[t]he starting point of feminist work must be found in women's lives and not in legal definitions'.[866] This observation also applies to feminist legal theory, which Michelle Madden Dempsey defines as 'a group of related theses that offer explanatory and/or normative accounts of law, legal practice, or legal systems from a stance which is self-consciously critical of existing patriarchal structural inequality'[867] and which aims at 'the avoidance, repudiation, curtailment, denunciation, and cessation of patriarchy'.[868]

Feminist legal theory often involves a call to consider the social reality and the lived experiences of women to correct male biases found in the law:

> Feminist legal theorists examine the consequences—both for women and for jurisprudence—of the exclusion of women's input into our shared understanding of the law's philosophical foundations. Toward that end feminists have examined competing philosophical understandings of the nature of law, have attempted to show how they fail to reflect women's perspectives, and have attempted in each case to

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[866] Editors, 'Introduction' (1986) 14 International Journal of Sociology of Law 233.

[867] Madden Dempsey (n 446) 8.

[868] ibid 7.

> reinvigorate them by **centralizing rather than marginalizing women's experiences**.[869]

While feminist legal theory is far from uniform and should not be reduced to generalizations, it does often involve the call to take 'women's experience as central'.[870] Feminist methods that centralize women's experiences[871] are often at odds with the law's traditional approach. Audrey Macklin writes humorously: 'One would think one had to seek permission under the Constitution to use a real group of people and their real life experience as the organizing principle for inquiry as opposed to an ostensibly genderless, raceless, faceless doctrine'.[872]

In feminist methods, and in my proposed 'centring' approach in particular, empirical reality is an important test of legal theory. Sandra Harding writes that feminist theory 'generates its problematics from the perspective of women's experiences. It also uses these experiences as a significant indicator of the "reality" against which hypotheses

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[869] Robin L West, 'Feminist Legal Theory' (*Encyclopedia.com*, 2005) <https://www.encyclopedia.com/humanities/encyclopedias-almanacs-transcripts-and-maps/feminist-legal-theory> accessed 10 September 2021, emphasis added.

[870] Christine A Littleton, 'Feminist Jurisprudence: The Difference Method Makes (Book Review)' 41 Stanford Law Review 751, 766, n. 73.

[871] See eg 'asking the woman question' and 'consciousness-raising', two feminist methods described in Katharine T Bartlett, 'Feminist Legal Methods' (1990) 103 Harvard Law Review 829, 836–837.

[872] Audrey Macklin, 'Law Reform Error: Retry or Abort?' (1993) 16 Dalhousie Law Journal 395.

are tested'.[873] Feminist methods 'enabl[e] feminists to draw insights and perceptions from their own experiences and those of other women and to use these insights to challenge dominant versions of social reality'.[874] Within feminist research and consciousness-raising groups, '[t]heory expresses and grows out of experience but it also related back to that experience for further refinement, validation, or modification'.[875] Experience helps make sense of theory, and theory reshapes experience. As Bartlett recounts, '[s]everal feminists have translated the insights of feminist consciousness-raising into their normative accounts of legal process and legal decisionmaking'.[876]

Feminist scholarship on rape and sexual violence is no exception—some influential scholars have even used their own experience of being raped in developing their theories.[877] Reliance on women's experience and social reality is thought important to counteract the male biases that have shaped the development of the law,[878] given that

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[873] Sandra G Harding, 'Introduction: Is There a Feminist Method?' in Sandra G Harding (ed), *Feminism and Methodology: Social Science Issues* (Indiana University Press 1987) 7.

[874] Bartlett (n 871) 866.

[875] Elizabeth M Schneider, 'The Dialectic of Rights and Politics: Perspectives from the Women's Movement' (1986) 61 New York University Law Review 589, 602.

[876] Bartlett (n 871) 865.

[877] See eg Estrich (n 103); Lynne N Henderson, 'What Makes Rape a Crime Review Essay' (1987) 3 Berkeley Women's Law Journal 193.

[878] Caringella (n 350) 133–134; Lynne Henderson, 'Getting to Know: Honoring Women in Law and in Fact 1992 Symposium on New Perspectives on Women and Violence--Part I' (1993) 2 Texas Journal of Women and the Law 41, 42.

rape has traditionally been 'understood from a primarily male perspective'.[879] For example, Catharine MacKinnon hypothesizes that 'one reason rape law is so ineffective is its failure to define the legal reality in terms of the social reality'.[880] For Christine Boyle, a feminist judge 'would try to utilize the collective experience of women'[881] and her own experience to understand and apply sexual assault law.

Women's perspective on rape is a legitimate addition to the rape law debate because, as Lois Pineau argues, 'the patriarchal point of view is unfair to women [but the] feminist point of view . . . is not unfair to men'.[882] Eric Reitan observes that 'women have a unique and intimate perspective on the nature of rape'[883] and adds that:

> Feminism can, at least in one sense, be understood as that enterprise which takes women's experiences seriously, and gives women's experiences and voices a place in public discourse: A feminist definition of rape can then be understood as one that introduces women's experiences of rape into the definitional debate that shapes the concept's extension and grey area.[884]

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[879] Reitan (n 649) 51.

[880] MacKinnon, 'Rape Redefined' (n 4) 439.

[881] Christine Boyle, 'Sexual Assault and the Feminist Judge' (1985) 1 Canadian Journal of Women and the Law 93, 102.

[882] Lois Pineau, 'A Response to My Critics' in Leslie Francis (ed), *Date Rape: Feminism, Philosophy, and the Law* (Pennsylvania State University Press 1996) 85.

[883] Reitan (n 649) 53.

[884] ibid 51.

This attentiveness to women's norms and reality is important given that 'what is "normal" according to male social norms and "reasonable" according to male communication patterns and expectations does not accord with what women believe to be reasonable'.[885] Hence the need to 'explor[e] common experiences and patterns that emerge from shared tellings of life events [so that what] were experienced as personal hurts individually suffered reveal themselves as a collective experience of oppression'.[886]

My project to recentre the law on an ordinary form of sexual violence is consistent with such a commitment to centralize women's experiences. Taking women's perspectives and experiences seriously means that common experiences of sexual violence must form part of theories on rape—not be brushed aside as mere 'borderline' cases or treated as an afterthought. In other words, I am interested in the forms of sexual coercion that are central parts of women's lives.

Two points of nuance are warranted. First, although I take women's experiences of partner sexual violence to be central to my project, I do not reduce sexual violence to what women acknowledge and label as such. As we saw, women do not always recognize that they have experienced sexual violence due to rape myths and the cultural confusion between sex and sexual violence. Second, my proposal to centralize women's

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[885] Kit Kinports, 'Rape and Force: The Forgotten Mens Rea' (2000) 4 Buffalo Criminal Law Review 755, 766.

[886] Leslie Bender, 'A Lawyer's Primer on Feminist Theory and Tort' (1988) 38 Journal of Legal Education 3, 9.

experiences should not be taken as an invitation to reduce sexual violence to a 'woman problem'. As Martha McCaughey writes, '[i]t is a common misperception that rape is a large part of women's experience but not men's. Men do have an experience of rape—far too often as rapists—but they rarely think of it as rape, or as violence'.[887] Many scholars and activists have called for rape law to focus less on the victim and more on the rapist.[888] In criminalizing partner sexual coercion, it would thus be useful to focus on the perpetrator's sexually coercive behaviours. And to identify sexually coercive practices in chapter 1, I also considered research into men's sexual coercion. Women's experience of sexual coercion is intrinsically linked to men's, and my work would be incomplete if I only considered surveys of women's victimization.

Application

To realize and exemplify my proposed approach to centre common forms of sexual violence, I propose to use empirical studies of sexual coercion as a starting point to identify the behaviours targeted by the new legislation.

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[887] Martha McCaughey, *Real Knockouts: The Physical Feminism of Women's Self-Defense* (NYU Press 1997) 28.

[888] See eg Sue Lees, *Carnal Knowledge: Rape on Trial* (Hamish Hamilton 1996); MacKinnon, 'Rape Redefined' (n 4) 441, 469; Benedet and Grant (n 262) 137; Victor Tadros, 'Rape Without Consent' (2006) 26 Oxford Journal of Legal Studies 515, 539; Buchhandler-Raphael (n 116) 195; Wendy Larcombe and others, '"I Think It's Rape and I Think He Would Be Found Not Guilty": Focus Group Perceptions of (Un)Reasonable Belief in Consent in Rape Law' (2016) 25 Social & Legal Studies 611, 623; Peter M Tiersma, 'The Language of Consent in Rape Law' in Janet Cotterill (ed), *The Language of Sexual Crime* (Springer 2007) 96.

In chapter 1, I presented a list of documented sexual coercion tactics based on my review of 50 empirical studies. These studies have done crucial work in bringing to light common yet non-paradigmatic forms of sexual violence. For example, Todd Shackelford and Aaron Goetz explain that the items they propose for their Sexual Coercion in Intimate Relationships Scale 'were chosen based on men's and women's experience with sexual coercion as well as previous research indicating that such acts are common tactics of sexual coercion'.[889] Their method, which fits will with my centring approach, enables them to highlight behaviours such as the following:

- My partner hinted that I was cheating on him, in an effort to get me to have sex with him.
- My partner gave me gifts or other benefits so that I would feel obligated to have sex with him.
- My partner told me that if I loved him I would have sex with him.
- My partner hinted that it was my obligation or duty to have sex with him.
- My partner threatened to have sex with another woman if I did not have sex with him.[890]

Another example of a study proposing a measuring instrument for sexual coercion is one by Cindy Struckman-Johnson, David Struckman-Johnson, and Peter Anderson,[891] in which the authors focus on 'postrefusal sexual persistence', 'defined as the act of

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[889] Shackelford and Goetz (n 69) 552.

[890] ibid 546–547.

[891] Struckman-Johnson, Struckman-Johnson and Anderson (n 61).

pursuing sexual contact with a person after he or she has refused an initial advance'.[892] This focus allows the authors to identify acts that are sexually coercive in this post-refusal context but that would be noncoercive in other contexts.[893] The authors include, among others, the following examples: persistent kissing and touching, repeatedly asking, telling lies, questioning the target's sexuality, threatening to break up, threatening self-harm, and threatening blackmail.[894] Post-refusal sexual persistence presents a thorny issue for criminal lawyers committed to centring partner sexual violence: on the one hand, this tactic is both extremely common and extremely successful[895]; it is thus responsible for an important proportion of coerced or unwanted sex and causes a lot of its harm. On the other hand, the behaviour is so common and normalized that criminalizing it raises the problem of overcriminalization, especially given that what would be criminalized is essentially non-threatening speech (for example, saying 'please, are you sure we can't have sex tonight?' repeatedly). Nonetheless, in a process of centring partner sexual violence, coercive tactics that are commonly used should constitute a good starting point, even if further research is required to decide where precisely to draw the line between criminal and non-criminal conduct.

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[892] ibid 78.

[893] ibid.

[894] ibid 80.

[895] ibid 84.

As was explained in chapter 1, my review of the empirical literature enabled me to draw a long list of sexual coercion tactics.[896] We know by now that these tactics of sexual coercion (including partner sexual coercion) that are identified as common in the empirical literature are absent or virtually absent from cases and scholarship on sexual violence. Indeed, typical experiences of sexual coercion diverge from 'paradigmatic' cases of physically forced sexual violence, as Jennifer Katz and Vanessa Tirone observe:

> the tactics of sexual coercion that participants typically reported experiencing involved partner attempts to arouse them with continued sexual touching or to emotionally manipulate/deceive them. In contrast, partners rarely attempted sexual coercion involving intoxication or force. These findings converge with past research showing that psychological rather than physical forms of coercive sexual pressure are most commonly exerted by intimate partners.[897]

Yet note that not all the reported tactics are necessarily good candidates for criminalization as sexual coercion. My method is to start from empirical studies of partner sexual violence, but of course one cannot simply translate scales of sexual coercion into a criminal offence, as there are other factors to consider apart from the existence of a tactic. Some of the reported tactics might be too vaguely worded, such as

[896] See pages 44-46.

[897] Katz and Tirone (n 65) 738.

the perpetrator's tactics of 'dropping hints'[898] or using 'verbal manipulation'[899]. Moreover, some tactics are already covered by other offences or should be addressed separately, such as, perhaps, use of older age.

Additionally, while it is true that men in coercive relationships will deny affection, cheat, and withhold sex as a means of control, we should be careful with criminalization as there is a risk of backfiring. The right to sexual autonomy comprises the right to say 'no' to sexual activity with a partner—hence this thesis—; thus, I do not suggest criminalizing withholding sex even though this is sometimes part of a strategy of coercive and sexual control. Even tactics such as threatening to break up with someone if they do not agree to sex might be difficult to criminalize in a way that properly draws the line between sexual coercion and legitimate conversations about needs and expectations in a relationship.

Moreover, some tactics are simply too mild to be criminalized, because they can be used completely innocently, and I want to avoid the risk of criminalizing innocent actors. For this reason, the tactic of a perpetrator undressing himself or complimenting the victim cannot find a place in a sexual coercion offence. Likewise, a tactic such as

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[898] Eaton and Matamala (n 70).

[899] French, Tilghman and Malebranche (n 69).

lying down next to one's partner[900] cannot reasonably be criminalized as it is not generally harmful. While the purpose of centring partner sexual violence is to identify common behaviours, using the criminal law to target such common practices raises important questions about the proper role of criminal law and generates the risk of backlash and non-enforcement (as will be further explored in the next section).

Another complication is that some behaviours identified in this list are already covered by the sexual assault offence, although they might rarely be criminalized as such. For example, persistent touching following a sexual refusal is sexual assault. Characterizing sexual touching as 'sexual coercion' rather than sexual assault risks reinforcing the 'real rape' / 'simple rape' dichotomy by reproducing the idea that non-penetrative sexual touching is not serious sexual violence. At the same time, abandoning this tactic because it is already covered in theory is not an implementation-conscious approach and does not solve the problem of non-physically violent sexual assaults being overlooked by the criminal justice system.

Some other tactics identified in the reported studies are more readily recognized as sexual assaults and do not need to be re-criminalized as sexual coercion. In particular, the use of a weapon or sexual contact with an unconscious or unaware victim are clearly criminalized through the offence of sexual assault. In such cases, the risk of overlap

[900] Camilleri, Quinsey and Tapscott (n 69).

between criminal offences as contributing to a legal context of over-use of the criminal law must also be considered. There might also be a risk of trivialization if clear sexual assaults are criminalized as sexual coercion (in particular, if sexual coercion attracts lower sentences).

Taking all these nuances into account, it is possible to draw, based on reported studies of sexual coercion, a list of behaviours that could be used in the context of legislation criminalizing sexual coercion:

- Using or threatening to use violence against someone else, including committed or threatening self-harm;
- Damaging or threatening to damage an object belonging to the complainant or to which the complainant is attached;
- Limiting or threatening to limit the complainant's access to resources or benefits;
- Insulting, blackmailing or humiliating the complainant, including through the disclosure of private information or material, or threatening to insult, blackmail or humiliate;
- Persisting in demanding sexual activity after a refusal;[901]

[901] This behaviour is, perhaps, the most controversial from the list. Post-refusal sexual persistence should already be recognized within the context of sexual assault, but it generally is not. As explained, it is also a highly effective yet common and normalized tactic of sexual coercion. As for all the behaviours on the list, care will need to be given to precisely how to define this tactic in the context of criminal legislation.

- Promising something, including promises to make a gift, to marry, or to increase the level of commitment of the relationship.

It is important to remember that these behaviours will need to be accompanied by the proper *mens rea* to be criminalized; hence, even if some behaviours appear somewhat mild or too normalized to be criminalized, the *mens rea* will participate in drawing the line between innocent and wrongful conduct.

Two other categories of behaviours might warrant inclusion within this list even though they were not reported in studies of sexual coercion, because these behaviours are well documented in studies of intimate partner violence: violence or threat of violence toward a companion animal, and threat of legal action (for example, suing the victim for full custody or reporting her to immigration services).

It is well documented that intimate partner violence intersects with violence towards non-human animals, and that perpetrators often use violence toward companion animals to control and harm women co-victims.[902] In Canada, killing or harming an animal is, since 2021, recognized as a form of domestic violence under the Divorce

[902] See eg Carol J Adams, 'Woman-Battering and Harm to Animals' in Carol J Adams and Josephine Donovan (eds), *Animals and Women: Feminist Theoretical Explorations* (Duke University Press 1995); Nik Taylor and Heather Fraser, *Companion Animals and Domestic Violence: Rescuing Me, Rescuing You* (Palgrave Macmillan 2019).

Act.[903] Even though I propose to draw inspiration from empirical studies of sexual coercion, legislative drafters might consider also including threats to a companion animal because such a threat is highly coercive, unlikely to be recognized under existing legislation, and reflected in domestic violence literature more generally.

Likewise, legal and custody-related threats, which are well documented in studies of domestic violence,[904] might also be included. As for violence and threats of violence against non-human animals, custody- and litigation- related threats are an important theme in domestic violence literature, likely to be very coercive, and unlikely to be recognized under existing legislation. I also note that immigration-related threats, while not reflected in empirical studies of sexual coercion, appear in case law[905] and in other proposals for criminalizing sexual coercion.[906] Consequently, while I propose to draw inspiration from empirical studies of sexual coercion, it is not impossible to extrapolate to include other elements.

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[903] Divorce Act, RSC 1985, c 3 (2nd Supp) s 2.

[904] Colleen Varcoe and Lori G Irwin, '"If I Killed You, I'd Get the Kids": Women's Survival and Protection Work with Child Custody and Access in the Context of Woman Abuse' (2004) 27 Qualitative Sociology 77, 81, 86.

[905] See eg *R v TD* (n 524), discussed in previous chapters.

[906] See eg 'An Overview of Tentative Draft No. 5 of the Model Penal Code: Sexual Assault and Related Offenses' (*The ALI Adviser*, 22 June 2021) <https://www.thealiadviser.org/sexual-assault/an-overview-of-tentative-draft-no-5-of-the-model-penal-code-sexual-assault-and-related-offenses/> accessed 7 March 2022, discussed below.

I want to emphasize that I am proposing an example of reasoning that could be used to develop sexual violence legislation 'centred' on partner sexual violence. But before actually criminalizing the behaviours that I have identified, each one of them would ideally receive its own detailed discussion and analysis. For each sexually coercive tactic, there are pros and cons regarding its inclusion, and important normative debates to be had, as well as a need for a deeper dive into the empirical literature. My choice of tactics is based on behaviours that are reported in the empirical literature, but such literature could tell us much more: who uses this tactic? What harm does it cause? Is it often repeated? What circumstances make it more or less coercive? While the need to criminalize some forms of sexual coercion is often recognized, scholars often diverge as to which specific tactics are sufficiently coercive to be targeted by the law.[907]

However, a detailed discussion of every documented sexual coercion tactic lies beyond the scope of this thesis. My contribution is rather to open an avenue for research based on the method of centring empirically significant problems to improve sexual offences law. In other words, I am concerned with the solution—new legislation criminalizing sexual coercion—but I am also proposing a *strategy* for targeting partner

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[907] See on this point Elizabeth Hanus, 'Rape by Nonphysical Coercion: State v. Brooks' (2015) 64 University of Kansas Law Review 1141, 1168–1169; Patricia J Falk, 'Rape by Fraud and Rape by Coercion' (1998) 64 Brooklyn Law Review 39, 47; Donald A Dripps, 'Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent' (1992) 92 Columbia Law Review 1780, 1799; John F Decker and Peter G Baroni, 'No Still Means Yes: The Failure of the Non-Consent Reform Movement in American Rape and Sexual Assault Law Criminal Law' (2011) 101 Journal of Criminal Law and Criminology 1081, 1168.

sexual violence. In particular, I hope to have highlighted the difference that the 'centring' method can make at each stage of the legal reform reflection: from choosing a paradigmatic case of concern to determining the behaviours that should be targeted by new legislation.

It is particularly interesting to observe that the behaviours that caught my attention from an empirically informed approach are very different from the ones in found proposals informed by abstract reasoning. Proposed new Model Penal Code provisions for the U.S., for instance, retain behaviours that, while certainly coercive, for the most part did not appear in empirical studies of sexual coercion or partner sexual coercion—that is, implicit or explicit threats 'to accuse [a person] of a criminal offence or a failure to comply with immigration regulation' or 'to take or withhold action as an official, or cause an official to take or withhold action'.[908] While an approach founded on empirical studies might need to be complemented to cover hypothetical behaviours,[909] I have sought to illustrate the value of centralizing women's experiences—and centring partner sexual violence in particular—as a starting point for legal reform. My hope is that

[908] 'An Overview of Tentative Draft No. 5 of the Model Penal Code: Sexual Assault and Related Offenses' (n 906), presenting proposed section 213.4.

[909] I have already discussed, for instance, the idea of including threats to non-human animals as well as legal threats even though they are not reflected in empirical literature on sexual coercion.

other scholars will enter the debate regarding the criminalization of sexual coercion so that we collectively emerge with the best solution possible.

Implementation-conscious: behaviourally specific legislation

Explanation

This thesis has revealed an important number of implementation problems and concerns regarding the criminalization of partner sexual violence. These problems mean that even when a behaviour is already criminalized, it does not necessarily lead to a conviction because of underreporting, undercharging, or misapplication of the law. This state of affairs immediately raises a crucial question for any law reform problem: can new legislation solve the problem, or will implementation difficulties continue to frustrate any attempt at criminalization? In other words, is a law reform project doomed to failure?

I have two answers to this problem. First, while implementation problems are central in the under-criminalization of partner sexual violence, it is far from certain that they represent the whole of the issue. Second, while it is not possible to design legislation that will entirely avoid implementation problems, it is possible to mitigate the risks with implementation-conscious legal reform work.

Regarding the first point, consider some of the sexually coercive behaviours that I have identified in my review of empirical studies: humiliating the victim, limiting her access to resources, promising things, threatening harm to a companion animal,

persisting in demanding sexual activity after a refusal… It is not entirely clear whether these behaviours can already be criminalized under the current sexual assault legislation. If these scenarios did make it through to the court system, would they be recognized as sufficient to constitute sexual assault by the courts? Even the Supreme Court appears to have difficulty in recognizing scenarios of non-consent in certain circumstances.

Consider a 2017 Supreme Court case about a male teenager who 'instigated the sexual encounter, despite Ms. George's genuine protestations'.[910] Ms. George was the accused, since the teenager was below the legal age of consent. Still, it was the teenager who forced the sexual contact despite the woman saying 'no' and backing away: the judgment recounts that Ms. George 'asked him to stop several times. But he ignored these requests and persisted. In the end, Ms. George "simply let him finish"'.[911] The Court notes that there was 'no dispute' that Ms. George was a 'willing participant', and that 'neither party contested' her consent.[912] Yet the scenario clearly includes post-refusal persistence and lacks affirmative consent.

We can see this case as an example of an implementation problem: the judges failed to see a clear case of non-consent on the part of the woman (and if she did not

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[910] *R v George* 2017 SCC 38 [3].

[911] ibid 5.

[912] ibid.

consent, she cannot be accused of sexual assault). But when it is the Supreme Court that is interpreting the law, can we really speak of an implementation problem, or is it rather a problem with the law as authoritatively stated by the Supreme Court?

I believe a case like this one could have been better managed even under the current sexual assault framework. That this woman was prosecuted and had to defend herself up to the Supreme Court level (where she was acquitted based on a mistake of age defense) is a clear injustice. Nonetheless, a different legislative framework, under which the decisionmaker is barred from making a finding of consent in circumstances of sexual coercion (such as post-refusal persistence) could also have led to a different result.

This case is only discussed to illustrate the fact that, even if implementation problems are the heart of the matter, new legislation is not doomed to uselessness. Sexual coercion can already be recognized under current sexual assault legislation,[913] but decisionmakers can also find consent or a mistaken belief in consent despite sexually coercive acts. New legislation could bar such conclusions as a matter of law, preventing findings of consent when they are not warranted.[914]

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[913] It is of course difficult to know with precision whether sexual coercion can vitiate consent as a matter of law since sexual coercion cases rarely make it to the courts. Indeed, in the example presented, the victim of sexual coercion was the accused.

[914] New legislation separately criminalizing sexual coercion could also be effective by drawing attention to sexually coercive behaviours.

Regarding the second point—the possibility of limiting implementation problems—, the ability of new criminal legislation to properly punish and even prevent partner sexual violence depends on its ability to influence social attitudes that hold partner sexual violence to be normal and acceptable. We can thus turn to an abundant literature on the proper role of the criminal law as leading or following social attitudes to consider whether and how new legislation could be effective.

The criminal law's deterrent effect can be linked to its ability to build on and strengthen social rules. If the criminal law is sufficiently credible as an indicator

> of what the community perceives as condemnable and not condemnable, people are more likely to defer to its commands as morally authoritative, at least in borderline cases where the propriety of certain conduct, or the degree of its impropriety, is unsettled or ambiguous.[915]

By contrast, when criminal law deviates too much from community standards, juries do not convict, and 'this deters prosecutors even from prosecuting'.[916]

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[915] Paul H Robinson, 'The Criminal-Civil Distinction and the Utility of Desert Symposium' (1996) 76 Boston University Law Review 201, 212.

[916] Rebecca Williams, 'Criminal Law in England and Wales: Just Another Form of Regulatory Tool?' in Matthew Dyson and Benjamin Vogel (eds), *The Limits of Criminal Law* (Intersentia 2020) 223.

To function properly, the criminal law must thus retain its credibility. How? By doing 'what ordinary people expect it will do'.[917] Paul Robinson explains that '[a] distribution of liability that the community perceives as doing justice enhances the criminal law's moral credibility; a distribution of liability that deviates from community perceptions of justice undermines it'.[918] Thus,

> [being] in accord with the community's shared intuitions of justice builds the moral credibility of the criminal justice system and thereby promotes cooperation and acquiescence, harnesses the powerful social influences of stigmatization and condemnation, and increases criminal law's ability to shape societal and internalized norms.[919]

Consequently, the criminal law should avoid punishing behaviours that are not seen as reprehensible by the community.[920] Otherwise, 'there is obviously a potential for illegitimacy'.[921] The possibility for criminal laws that 'seriously conflict with the community's shared intuitions of justice [to] indeed undermine the criminal law's moral

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[917] Richard A Epstein, 'The Tort/Crime Distinction: A Generation Later Symposium' (1996) 76 Boston University Law Review 1, 21.

[918] Robinson (n 915) 213.

[919] Paul H Robinson, 'Criminalization Tensions: Empirical Desert, Changing Norms & Rape Reform' in RA Duff and others (eds), *The Structures of Criminal Law* (Oxford University Press 2011) 188.

[920] Williams, 'Criminal Law in England and Wales' (n 916) 223.

[921] ibid 225.

credibility [and] the criminal justice system's crime-fighting effectiveness'[922] has even been verified empirically.[923]

The problem of the criminal law's legitimacy is linked to the criminalized conduct's wrongfulness or harmfulness. To remain credible, the criminal law must primarily concern itself with serious wrongs, that is with 'forms of harm or wrong which are deserving of and which attract social stigma'.[924]

Does this mean that the criminal law must always follow social attitudes? Rebecca Williams explains the irony and difficulty with this conclusion:

> it means that where the criminal law has its greatest condemnatory effect it may in this respect not be necessary, since those activities would in any event attract grave moral stigma, and conversely, where criminal law has the greatest capacity to make a contribution in enhancing moral stigma that it may be least likely to do so.[925]

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[922] Robinson (n 919) 190; see also Paul H Robinson, Geoffrey P Goodwin and Michael D Reisig, 'The Disutility of Injustice' (2010) 85 New York University Law Review 1940.

[923] Robinson (n 919) 190; see also Robinson, Goodwin and Reisig (n 922).

[924] Williams, 'Criminal Law in England and Wales' (n 916) 224.

[925] ibid.

The challenge we are faced with is thus to craft criminal legislation that can be effectively enforced even as it targets normalized conduct—legislation that can raise the social stigma associated with partner sexual violence.

Application

It is possible to have successful criminal legislation despite a context of normalization; indeed, the criminalization of drunk driving and domestic violence[926] are held as examples of where the law was successful in influencing social norms.[927] Nonetheless, criminalizing common and accepted behaviours, including in the area of sexual violence, is challenging in a legal system that is replete with implementation failures. To address this challenge, some precautions can be taken at the stage of legislation drafting to make the criminal law easier to implement.

According to Paul Robinson, the law does not lose all its credibility merely because one provision is out of sync with community standards. While '[e]very deviation from desert perceived by the community incrementally undermines the law's moral credibility'[928], some deviations 'will be quickly and easily excused by the community'.[929]

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[926] Or more precisely, assault within the intimate partner context.

[927] Robinson (n 919) 198.

[928] ibid 199.

[929] ibid.

Thus, Robinson's proposal is for legal reformers to 'build up' the system's credibility, to then spend carefully their 'store of "credibility chips"'[930] when it is worth doing so. If the legal reform 'is successful at shifting the norm, then the conflict with community views will fade away as community views change'.[931] Robinson uses the specific example of rape law reform to illustrate how a reformer might compromise, adopting a position that is ahead of societal norms without being perceived as too extreme, such that 'every case litigated in public [becomes] an opportunity to promote the public discussion about what should be considered "reasonable"'.[932] Similarly, according to Rebecca Williams, 'gradual enforcement over time might also help to lead public opinion',[933] as it may ensure 'that [a new] offence [does] not reach too far ahead of existing public opinion'.[934]

Furthermore, campaigns and messaging can be used to support the criminalization effort. Robinson gives the example of campaigns analogizing unlicensed music downloads to physically stealing money.[935] Likewise, campaigns built on analogies between psychological and physical coercion could be used to support the

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[930] ibid 199–200.

[931] ibid.

[932] ibid 201.

[933] Williams, 'Criminal Law in England and Wales' (n 916) 228.

[934] ibid 229.

[935] Robinson (n 919) 202.

criminalization of non-physical sexual coercion.[936] By analogizing new offences with 'offences from the core of criminal law about which we do have more developed intuitions',[937] the chances of successful criminalization increase.

These approaches—building up the credibility of the criminal justice system and pairing criminalization with public education campaigns—lie somewhat outside of the scope of this thesis. It is more interesting, in terms of legal reform proposals, to consider how legislation drafting can also contribute to better enforcement. In that regard, I propose to make the law easier to implement by defining sexual coercion through a list of specific prohibited coercive tactics rather than using vague or value-laden standards.

The problem with value-laden standards is illustrated by Rebecca Williams' discussion of the criminalization of cartel behaviour in England and Wales in 2002. The offence failed to lead to convictions and prison sentences because 'at the time the offence was adopted cartels were not perceived to be morally wrong. Rather, criminalisation was the result of a top-down, forward-looking process'.[938] 'The government did attempt to attach a sense of moral opprobrium to the offence by incorporating a dishonesty

[936] ibid.

[937] Williams, 'Criminal Law in England and Wales' (n 916) 225.

[938] ibid 222.

requirement within the original offence',[939] Williams explains, but this circular approach did not work because 'dishonesty relies upon, and presupposes, a pre-existing sense of moral stigma'.[940] To function, the law would have needed to 'pull itself up by its own bootstraps',[941] since it used a dishonesty standard to try to influence what the community perceived as dishonest.

The criminalization of partner sexual coercion would face a similar problem if the law defined the impermissible conduct using a standard of 'reasonableness'. The problem lies in the normalization—and perceived 'reasonableness'—of partner sexual violence and non-physical coercion.

Yet proposals to criminalize sexual coercion (threats in particular) often include objective components, such as requiring that the complainant have no reasonable alternative but to engage in the sex act or that a threat would prevent resistance by a person of ordinary resolution.[942] For example, the proposed modifications to the Model Penal Code in the United States include a threat 'to take any action or cause any

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[939] ibid.

[940] ibid 223.

[941] Rebecca Williams, 'Cartels in the Criminal Landscape' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising cartels: Critical studies of an international regulatory movement* (Hart Publishing 2011).

[942] See eg Hanus (n 907) 1142; Ann T Spence, 'A Contract Reading of Rape Law: Redefining Force to Include Coercion' (2003) 37 Columbia Journal of Law and Social Problems 57, 82; Caringella (n 350) 135; Alan Wertheimer, *Consent to Sexual Relations* (Cambridge University Press 2003) 165. For a legislated example, see the Penal Code of California s 266c.

consequence that would cause submission to or performance of the act of sexual penetration or oral sex **by someone of ordinary resolution** in that person's situation under all the circumstances'.[943]

Such objective standards are sure to generate implementation problems. They rely on malleable concepts that would risk introducing more stereotypes into the law[944] and fail to produce a law of clear, predictable, and uniform application. A reasonableness standard or the comparison with 'someone of ordinary resolution' might also strengthen the rape myth that 'real' or 'ideal' victims actively and strongly resist sexual violence. Blaming the victim for failing to protect herself imposes on victims of sexual violence 'a measure of "self-help" which . . . is usually frowned upon by the law'.[945] For Victor Tadros, 'even if one took the bizarre view that the complainant . . . deserves criticism for failing to resist, nothing would follow concerning the wrong perpetrated by the defendant'.[946]

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[943] 'An Overview of Tentative Draft No. 5 of the Model Penal Code: Sexual Assault and Related Offenses' (n 906), presenting proposed section 213.4.

[944] Jane E Larson, '"Women Understand So Little, They Call My Good Nature Deceit": A Feminist Rethinking of Seduction' (1993) 93 Columbia Law Review 374, 470.

[945] Jocelynne A Scutt, 'Consent versus Submission: Threats and the Element of Fear in Rape' (1977) 13 University of Western Australia Law Review 52, 76.

[946] Tadros (n 888) 527; discussing the immediacy requirement in English law: Sexual Offences Act 2003, 2003 c. 42 s 75.

Moreover, intimate partner violence can be highly personalized. In committing partner sexual coercion, the perpetrator is not attempting to coerce a reasonable woman; he is attempting to coerce a specific woman whom he knows very well. The law should protect both 'reasonable' and 'unreasonable' women from sexual coercion by their partners. As an analogy, when we criminalize physically forced sexual activity, we do not require the perpetrator to exert physical violence that would overcome a reasonably strong woman. It would be absurd to say that a physically weak woman was not sexually assaulted because a reasonably strong woman could have defeated her assailant.[947]

That sexual violence typically occurs between non-strangers is a crucial point. Relying on an objective measure condones perpetrators taking advantage of their knowledge of the particularities, weaknesses, phobias, or different values of 'unreasonable' women to inflict precisely the type of harm that will make them comply.[948] It is this use of sexually coercive tactics that I want to criminalize, regardless of whether it would succeed when perpetrated against a reasonable woman. When a perpetrator prevents a victim from refusing unwanted sex, he harms her regardless of

[947] Of course, a woman who does not show sufficient resistance may face negative inferences and rape myths in the evaluation of whether she truly expressed non-consent, but this is not a desirable line of reasoning that the law should encourage.

[948] See the examples given by Scutt (n 945) 71.

whether another woman, real or imagined, would have endured the coercion without complying.

Importantly, a reasonableness standard is useful when we want the law to follow, not displace, societal norms. Objective standards require decisionmakers to make value judgments based on their own lived experience. This is inappropriate in a context where sexual coercion is so common and normalized that many enforcers and decision-makers, having themselves committed similar acts of sexual coercion, might more easily identify with the perpetrator than with the victim.[949]

By contrast, a list of prohibited behaviours can be an effective way to criminalize normalized behaviours. This design choice is reflected in the offence of criminal harassment, which includes:

> **(a)** repeatedly following from place to place the other person or anyone known to them;
> **(b)** repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
> **(c)** besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
> **(d)** engaging in threatening conduct directed at the other person or any member of their family.[950]

[949] See Lazar, 'Negotiating Sex' (n 8) 356–357.

[950] Criminal Code, RCS 1985, c. C-46 s 264(1).

The drafting of the offence makes the prohibited behaviours easily identifiable. The legislation paints a clear mental image: we can read the offence and know what criminal harassment looks like. Likewise, a list of prohibited behaviours would paint a clear image of what sexual coercion looks like.

A disadvantage of precise descriptions is the risk of under-inclusion: '[b]ecause rules have clear edges, people can evade them by engaging in conduct that is technically exempted but that creates the same or analogous harms'.[951] By contrast, discretionary standards can prevent specific behaviours from falling through the cracks; they can 'avoid the sort of "evasion" that rules may attract if so drafted that they fail to capture some undesirable behaviours or outcomes that manifest the mischief at which the rule is directed'.[952]

There is thus a trade-off between specificity and flexibility that is reflected in legal literature on the choice between rules and discretion. While an offence described in vaguer terms is necessarily more flexible and open to interpretation, strict rules are easier to enforce, more consistent, and more predictable.[953] Trusting judges (or other decision-makers) to apply standards to determine if a certain behaviour qualify as, in this case,

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[951] Kahneman, Sibony and Sunstein (n 423) ch 27.

[952] Joanna Miles, 'Should the Regime Be Discretionary or Rules-Based?' in Jessica Palmer and others (eds), *Law and Policy in Modern Family Finance* (Intersentia 2017) 267.

[953] ibid 266.

sexual coercion, involves 'law-making at the point of application',[954] or, in Joanna Miles' words, 'economically, intellectually and emotionally demanding improvisation'.[955]

In the context of sexual offences law, I believe the balance tilts towards rules rather than discretion.[956] Stephen Schulhofer observes that 'in rape law, flexibility almost inevitably means *under*enforcement and *non* compliance'.[957] Based on what I have highlighted in chapter 4, I share this concern. Sexual offences legislation can be interpreted through rape myths, gender bias, and stereotypes about intimate partner violence. As a result, it is safer to make the legislation as specific and even rigid as possible to reduce enforcement problems.

There is another important reason to prioritize specificity. It is imperative to create a precise depiction of sexual coercion to displace the mental image that sexual violence is physically forced sexual penetration. The 'real rape' script is so culturally prevalent that a mere definition of sexual coercion is unlikely to displace the stereotype. An implementation-conscious approach should create precise images of non-physical

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[954] Cass R Sunstein, 'Problems with Rules' (1995) 83 California Law Review 953, 956.

[955] Miles (n 952) 272.

[956] Tanya Palmer, 'Failing to See the Wood for the Trees: Chronic Sexual Violation and Criminal Law' (2020) 84 The Journal of Criminal Law 573, 594 comes to a similar conclusion.

[957] Stephen J Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard University Press 1998) 90, italics in original.

forms of sexual coercion to help their recognition by victims, perpetrators, and legal actors.

I make this recommendation even as I recognize that a list of behaviours creates the risk that some problematic behaviours fall through the cracks. I am however reassured by my survey of sexual coercion studies described in chapter 1. This literature shows an abundance of scales and surveys that manage to identify high rates of sexual coercion through a list of pre-defined tactics. The proposed surveys have many elements in common, suggesting that, although there might be variation, there is also a core of frequently used sexually coercive tactics. Even if the law fails to identify all instances of sexual coercion in a relationship, the fact that empirical studies find high rates of sexual coercion using pre-defined lists suggests that targeting these behaviours will still be effective at identifying an important number of sexually coercive acts and relationships.

My next reason for choosing specificity over flexible standards is the knowledge that while victims of sexual violence often fail to identify as victims of 'rape' or 'sexual assault', they respond affirmatively to behaviourally specific questions.[958] Thus, behaviourally specific legislation might help victims better recognize the criminal nature of normalized sexually coercive behaviours, which is important since underreporting is a major obstacle in criminalizing partner sexual violence.

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[958] See Cook and others (n 73) 206 and discussion in chapter 5.

Furthermore, a specific list is also fairer to defendants because it sends a clear message on precisely what behaviour is criminalized—something that is important in a context of normalization. Precise provisions are likely to be more efficient at achieving deterrence, as they allow perpetrators to see themselves in the newly criminalized behaviour—rather than rationalizing that they are not the kind of person who, say, acts 'unreasonably' or 'coerces sexual activity'. Specific legislation thus has better chances of fulfilling its educative function than a law that adopts vague standards.

Indeed, because underspecified laws demand of citizens 'that they exercise their own judgement in precisifying a vague standard in a given situation and taking responsibility for their choice',[959] bright line rules are often useful in situations where we do not want the perpetrator to make the determination. Using standards, Jeremy Waldron explains, means that 'users have to develop and apply a conception, and that conception may be informed not only by their particular take on how best to elaborate the standard but also by their particular view about the desirability of the norms that the standard appears to embody'.[960] This process is not always desirable. For example, we have a strict cut-off for drunk driving—regardless of an individual's alcohol tolerance—, as well as clear lines regarding the age of consent. It is obvious that not every person becomes

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[959] Geert Keil and Ralf Poscher, 'Vagueness and Law' in Geert Keil and Ralf Poscher (eds), *Vagueness and Law: Philosophical and Legal Perspectives* (Oxford University Press) 10.

[960] Jeremy Waldron, 'Clarity, Thoughtfulness, and the Rule of Law' in Geert Keil and Ralf Poscher (eds), *Vagueness and Law: Philosophical and Legal Perspectives* (Oxford University Press) 322.

factually capable of consenting precisely on the day of their 16th birthday (the age of consent in Canada), but having a legally defined age of consent helps with implementation and puts potential defendants on notice. They cannot rationalize that a particular child is mature for their age and that sexual activity is thus appropriate. A clearly defined age of consent thus better protects children *and* sends a clearer message to potential perpetrators, since they are put on notice as to the criminality of their action and do not face the uncertainty of not knowing whether a particular child will, a posteriori, be judged to be mature enough to give sexual consent.

It is important to acknowledge that we can never rid sexual offences law of *all* discretion and interpretation.[961] However, precisely identified sexually coercive behaviours call for less interpretation than a broad standard and are thus more appropriate in a context of normalization and implementation concerns. Indeed, pre-determining what constitutes sexual coercion is specifically meant to circumvent rape myths. While I harbour no hope that a single legislative solution will fully rid our society of sexual violence or be applied in a perfect, myth-free fashion, I do believe that implementation-conscious legislation centred on partner sexual violence has a much better chance of success than previous legal reforms. The hope is that if the new legislation leads to successful prosecutions, a virtuous cycle of enforcement will be

[961] See Timothy Endicott, 'Law Is Necessarily Vague' (2001) 7 Legal Theory 379, on the necessary vagueness even in apparently precise legislation.

created,[962] positively influencing social norms and challenging the myths that partner sexual coercion is normal and acceptable.

To conclude, while discretion is not the only evil of sexual offences law, it is a major problem that 'has not [often] been seriously contemplated'[963] in legal reform work. Rather, '[t]he work on reform for rape and sexual assault offenses continually reconceptualizes the phenomena and readjusts the line in the sand with different definitions, formulas, and perspectives'.[964] By defining sexual coercion by reference to precisely described behaviours, I choose to take implementation concerns seriously and can thus recommend an approach that is both reflective of the reality of sexual coercion and realistic regarding the conditions required for its adequate enforcement.

Non-incident based: criminalizing a course-of-conduct

Explanation

Centring partner sexual violence has shed light on the feature of repeated interactions between perpetrator and victim, and working from an analogy with coercive control has enabled us to observe that the incident lens through which the sexual assault model sees

[962] Kahan (n 329).

[963] Caringella (n 350) 97.

[964] ibid.

sexual violence participates in the marginalization of partner sexual violence. To develop legislation that would not be entirely incident-based, legislators should consider adopting a course-of-conduct offence or definition of sexual coercion. A course-of-conduct offence or definition is one that, like existing coercive control offences, requires proof of more than a single act or behaviour.

To understand the kind of conduct which may be targeted with a course-of-conduct offence or definition, it is useful to consider Tanya Palmer's distinction between 'acute' and 'chronic' sexual violation. She explains that acute sexual violation 'refers to a discrete incident in which one person's sexual autonomy is overridden by another',[965] while '"[c]hronic sexual violation"' refers to a situation in which the victim's sexual autonomy is gradually chipped away over a longer period of time[,] often using a more insidious web of tactics'.[966] Women in violent relationships often experience both acute and chronic sexual violence.[967]

While acute sexual violation is already targeted by incident offences—such as, in Canada, sexual assault—there is a need for a course-of-conduct element to target the more low-level but repeated acts of chronic sexual violation. Tanya Palmer notes—as I

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[965] Palmer (n 956) 577.

[966] ibid.

[967] ibid 588.

also did in examining the legal response to partner sexual violence—that even acts that legally constitute sexual assault are unlikely to be criminalized in their chronic form. Thus, her definition of chronic sexual violation overlaps with existing incident-based crimes:

> The assemblage of behaviours which I refer to as chronic sexual violation includes frequent sexual assaults, denials of privacy, compelling the victim to watch and/or imitate pornography, diffuse and cumulative forms of pressure, sex that is ostensibly consensual but the manner of sex is not, sexual humiliation, reproductive coercion, and victims initiating sex in order to protect themselves, not all of which need be present to qualify. Despite its entanglements and overlaps with the concepts of rape and coercive control, there is a value to articulating chronic sexual violation as a distinct construct. This is designed to give expression to the specific lived experience of chronic sexual violation, as distinct from acute sexual violation, without trivialising either.[968]

I propose to consider the development of legislation covering 'chronic' sexual violation—repeated acts of sexual coercion—, with a particular focus on non-physically forced sexual violence. The behaviours that can be defined as sexual coercion may partially overlap with the broad (in theory at least) offence of sexual assault. Yet there will be important differences in the approach to sexual violation: while current sexual assault legislation adopts an incident frame, questioning whether the victim lacked consent in the moment of sexual touching, a course-of-conduct approach would draw

[968] ibid 585.

attention to the perpetrator's repeated engagement with sexually coercive tactics, regardless of their immediate effect.

As such, conduct that could be seen as both 'acute' or 'chronic' sexual violence could be prosecuted under existing sexual assault provisions if non-consent can be proven under the incident model, or as sexual coercion if the causal link between coercion and compliance is unlikely to be established. The offence or definition of sexual coercion could cover acts that are typically considered too trivial to warrant criminalization as sexual assault, such as post-refusal sexual persistence: sexual coercion legislation would specifically and explicitly cover such situations, if repeated.[969] Thus, while there can be some overlap between the current sexual assault offence and new legislation regarding sexual coercion, what distinguishes them is a different focus and approach to the case. Sexual assault currently typically targets extreme or 'acute' constraints on the victim's autonomy, while sexual coercion provisions would focus on repeated forms of sexual coercion, specifically covering types of sexual coercion that rarely or never appear in sexual assault prosecutions.

So far, I have been drawn to the conclusion that a course-of-conduct definition is the right choice given the existence of chronic sexual violation in the intimate partner

[969] The main obstacle to criminalization in such a scenario might be victim non-acknowledgement and underreporting rather than decisions by legal actors. Still, as will be described below, the proposed offence aims to influence victims as well as legal actors.

context and the need to challenge (or at least provide an alternative to) the incident model of sexual assault. There are additional reasons why course-of-conduct legislation is particularly suitable to target sexually coercive tactics.

Recall that sexual coercion is both frequent (chapter 1) and normalized (chapter 2). We saw for example that nearly 70% of college students report having been subjected to post-refusal sexual persistence since the age of 16, and that a third report having used this tactic.[970] Such a context of ubiquity and normalization are concerning for any attempt at criminalization, as discussed above.

Within this context of normalization, it could be preferable to exclude situations where a sexually coercive tactic is used in a one-off fashion in an otherwise relatively equal relationship (or even in an unequal relationship, when the victim exceptionally uses one such tactic). A course-of-conduct definition allows the law to better identify relationships that are sexually coercive and where acts of sexual coercion, even if individually benign, may add up to erode the victim's possibilities of dissent.

An important lesson from coercive control theory is that it is not just the behaviour that matters, but also its context. It is the context of repeated controlling or coercive behaviour that calls for criminalization even if the conduct appears

[970] Struckman-Johnson, Struckman-Johnson and Anderson (n 61) 84.

unproblematic from an outside standpoint. This lesson is especially important as perpetrators of coercive control often enforce normalized gender norms, establishing control through 'the microregulation of everyday behaviors associated with stereotypic female roles, such as how women dress, cook, clean, socialize, care for their children, or perform sexually'.[971] This 'hyper-regulation of everyday routines . . . works because the normative constraints already embedded in women's performance of everyday chores merge with their fear of not doing what is demanded'.[972] A difficulty with coercive control that contributes to its invisibility is that coercion stands in continuity with 'normal' behaviors. As a result of expectations of female submission within relationships, 'there is enormous ambiguity about where appropriate expectations end and risk begins'.[973]

Sexual coercion likewise builds on tropes about what a 'good' girlfriend / wife / partner should do, reinforcing cultural norms of sexual compliance and submission. Assumptions that it is normal for a female partner to be sexually available complicate the recognition of sexual coercion, for victims themselves as well as for legal actors. Thus, as with coercive control, a course-of-conduct offence or definition can help make sense of the situation by highlighting the repeated nature of sexual coercion as building a web

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[971] Stark, *Coercive Control* (n 60) 5.

[972] ibid 230.

[973] ibid 211.

of control. A single instance of post-refusal persistence, for example, might not cause sufficient harm to warrant criminalization. But in a relationship where sexually coercive tactics become repeated or even the norm, the risk is that the victim's capacity for dissent is eroded over time such that her sexual autonomy is infringed by a coercive context.

I also fear that, currently, a proposal to target single instances of non-physical sexual coercion within relationships could encounter insurmountable opposition. The behaviour might simply not be considered sufficiently harmful, or there might be a risk of trivialization of sexual assault and sexually coercive relationships. I thus prefer the criminalization of a course of conduct of sexual coercion. It is nonetheless possible that, as attitudes toward sexual coercion evolve—due to legal changes but also to increased sexual consent education and cultural evolution—, we will see the need to criminalize single acts of sexual coercion. In that sense, my proposal is a first step, one that leads not to a perfect legal solution, but to a manageable improvement over the current legal context.

Application

What does it mean to have a non-incident based, course-of-conduct definition of sexual coercion? It means two things: first, sexual coercion should have a certain threshold of frequency or repetition, and second, concomitance of sexual coercion and resulting coerced activity should not be required.

Regarding the frequency threshold, we can look for inspiration in existing course-of-conduct offences. The English and Welsh coercive control offence speaks of 'repeatedly or continuously' engaging in controlling or coercive behaviour.[974] In Canadian criminal law, the offence of criminal harassment is also a useful model; it targets both acts that must be repeated to be considered serious enough, and acts that are included even if they happen only once. We could say that the law targets both 'acute' and 'chronic' harassment. The prohibited conduct of criminal harassment consists of:

> **(a)** repeatedly following from place to place the other person or anyone known to them;
>
> **(b)** repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
>
> **(c)** besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
>
> **(d)** engaging in threatening conduct directed at the other person or any member of their family.[975]

The related crime of 'harassing communications'[976] also engages a threshold of 'repeatedly' posing an action.

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[974] Serious Crime Act 2015, 2015 c. 9 s 76.

[975] Criminal Code, RCS 1985, c. C-46 s 264(2).

[976] ibid 272(3).

Therefore, new legislation criminalizing sexual coercion could also retain the threshold of 'repeatedly' engaging in sexually coercive practices, that is, engaging in such conduct more than once.[977] Other possible thresholds are those of 'continuously' engaging in sexual coercion, or engaging in a 'pattern' of sexual coercion. It is not clear what threshold number of events the courts would find necessary to clear these thresholds—a clearer threshold might thus be preferable—but the existing order of forfeiture, which the Criminal Code says can take place when 'the offender engaged in a pattern of criminal activity for the purpose of directly or indirectly receiving a material benefit',[978] requires 'at least two serious offences or one criminal organization offence'.[979]

Regarding the question of concomitance of required elements, something to consider is whether sexual coercion should be required to have happened immediately before the sexual activity in question. Requiring such immediacy does not work well with a course-of-conduct definition and would be more appropriate to target single instances of acute sexual violence. Alternatively, causation could be required, such that past sexual coercion could be recognized as having caused sexual compliance at a future date. Again, this would constitute an incident-based approach, albeit with a wider time

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[977] See *R v Ohenhen* 2005 CanLII 34564 (ON CA) [31].

[978] Criminal Code, RCS 1985, c. C-46 s 462.37(2.01).

[979] ibid 462.37(2.05).

frame. The prosecution would need to target specific instances of sexual coercion associated with specific instances of sexual activity. It might then be difficult to target constraints on the victim's sexual autonomy that may be more diffused and not easily recognized under an incident model. For example, the causal link between coercion and compliance might not be proven due to coercion appearing too mild. Difficulties in targeting sexual coercion under an incident framework might also arise because coercion is built up over the course of a relationship, or because the victim feels forced to engage in sexual activity at a particular frequency, rather than having a situation where an explicit threat is associated with compliance at a specific time. In such cases, targeting a specific moment of compliance to obtain a sexual assault conviction might not be possible, or it might not adequately represent the accused's criminality.

If immediacy or causation are not required, the law could then potentially work to recognize subtler and more diffuse forms of sexual coercion, such that even if it does not cause or immediately precede compliance, the repeated sexual coercion is sanctioned. Therefore, this avenue is more interesting given my critique of the incident model of sexual assault. However, it might raise practical and conceptual difficulties if, once repeated sexual coercion is identified, any future sexual activity is deemed non-consensual, regardless of the victim's willingness. Assuming that, in the context of a sexually coercive relationship, no sexual autonomy whatsoever can be exercised—or that the woman never freely desires or initiates sexual activity—can be problematic. On this topic, it is important to acknowledge that the proper role and meaning of sexual

autonomy in sexual offences law is full of debates and complexities.[980] One of the concerns is that finding certain subjects incapable of consenting is paternalistic,[981] or that raising the threshold on consent may threaten women's right to 'have a meaningful voice in determining the norms that govern their intimate relationships and sexual lives'.[982] On the other hand, such arguments are sometimes used to fight hard-won gains in the area of sexual offences law—for instance, to argue for the possibility of implied consent within intimate relationships.[983]

An interesting option to be considered, which might solve the abovementioned problems, is to have the law specifically target sexual coercion rather than the resulting coerced sexual activity. That is, the offence would be completed once sexual coercion is committed repeatedly, without regard to whether sex happens or to whether the coercion actually coerces the victim into compliance. In this way, the law can properly identify sexual coercion as a wrong without having to comment on whether or to what extent a

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[980] See for example Joseph J Fischel and Hilary R O'Connell, 'Disabling Consent, or Reconstructing Sexual Autonomy' (2015) 30 Columbia Journal of Gender and Law 428; Stephen J Schulhofer, 'Taking Sexual Autonomy Seriously: Rape Law and Beyond' [1992] Law and Philosophy 35.

[981] See for example Fischel and O'Connell (n 980) 430.

[982] Michael Plaxton, *Implied Consent and Sexual Assault: Intimate Relationships, Autonomy, and Voice* (McGill-Queen's University Press 2015) 3.

[983] For example, Plaxton (n 982).

woman's apparent consent is authentic. The focus is properly placed on the perpetrator's actions rather than the victim's resistance or state of mind.

This choice to find that sexual coercion does not require subsequent sexual activity would raise the question of whether the offence could be qualified as inchoate, or as a preventive offence criminalizing harmless conduct. Or, framed differently, what would be the harm—warranting criminalization—involved in sexual coercion that does not (necessarily) result in coerced sexual activity? While the answer depends to some extent on one's stance towards criminal law as outcome- or behaviour-based,[984] I argue that criminalizing sexually coercive acts would not be inchoate and would not criminalize victimless or harmless conduct.

Inchoate offences criminalize conduct before harm occurs (in the case of incomplete attempts) or despite no harm occurring (in the case of completed but failed attempts).[985] They are 'usually associated with a preventive rationale'.[986] However, in the case of completed attempts, prevention is not necessarily the main rationale; on retributive grounds, completed attempts are criminalized because the defendant has

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[984] See Andrew Ashworth, 'Belief, Intent, and Criminal Liability' in John Eekelaar and John Bell (eds), *Oxford Essays in Jurisprudence. Third Series* (Clarendon Press; Oxford University Press 1987) 16.

[985] See RA Duff, 'Subjectivism, Objectivism and Criminal Attempts' in AP Simester and ATH Smith (eds), *Harm and Culpability* (Oxford University Press 1996) 22–23.

[986] Ashworth (n 984) 21.

exhibited the full behaviour of the substantive offence, and only failed to realize the intended consequences because of luck.[987]

A sexual coercion offence that did not require subsequent sex or compliance might be seen as inchoate: it would intervene preventively before the full sequence of actions is engaged in, that is, before the sexual coercion leads to non-consensual sexual activity. Such interpretation would not be fatal: inchoate offences are widely accepted and used throughout criminal law, although they are not without controversy.[988] Even though attempt offences criminalize conduct that 'may be committed without causing harm and in circumstances where no harm could possibly result',[989] inchoate and victimless offences are problematic only (or especially) to those who believe crimes should be outcome-dependant, that is, defined based on the consequence they bring about. Those who see crimes as properly conduct-based—defined in terms of *potentially* harmful conduct—have no problem separating the crime from its outcome, as that outcome often depends on luck. This position can be traced to a subjectivist view of criminal law: subjectivists note that consequences 'are matters of chance, and moral blame should rather concern itself with what the person was trying to do'.[990] Note

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[987] ibid 22–26.

[988] See for example, regarding 'impossible' attempts and attempts without intent, Duff (n 985) 26, 31.

[989] Ashworth (n 984) 6.

[990] ibid 16.

however that, in the case of criminalizing sexual coercion regardless of resulting sexual activity, resorting to criminal law is acceptable even on an outcome-based view of crimes.

Indeed, not requiring resulting sex or compliance would not mean that sexual coercion is criminalized as an inchoate or victimless offence, nor would it mean that the criminal law intervenes preventively before the victim experiences the intended result of non-consensual sexual activity. This proposal could instead be seen as intervening *after* harm has occurred—the harm being the sexually coercive conduct *per se*. In other words, sexual coercion with no resulting sexual activity does not lack a harmful outcome; the victim has experienced the harm of sexual coercion. She has had to hold firm or brace herself in the face of increased difficulties in refusing sexual activity, which is a very different situation from a failed attempt where the victim does not experience any harm or is even unaware of the attempt.

It is also possible to describe attempted sexual coercion as harmful because it is conduct that endangers the victim's sexual autonomy—it creates the *risk* of induced compliance. This conduct could properly be criminalized because, according to some authors:

> the harm principle does not say that only harmful wrongs may be criminalised. Rather, it states that even harmless wrongs may be criminalised if criminalisation diminishes their occurrence and if their

> wider occurrence would detract from other people's prospects—for example, by diminishing some public good.[991]

But I rather propose to focus on the fact that experiencing threats or other forms of sexual coercion already constitutes harm, even if no sexual activity follows. The harm is not the potential non-consensual sexual activity, but rather that of being subjected to sexual coercion. Hence my position that an offence along those lines would not be inchoate.

The focus on sexually coercive acts as the targeted harm is important to avoid under-inclusion. Consider the case of a boss who repeatedly engages in sexual coercion toward his employee to have sex with her. Even if the sexual coercion is unsuccessful—if the victim resists it—, acts of sexual coercion have been committed, are likely to have caused distress, and deserve sanction. Likewise, even a girlfriend who was already intending to have sex with her boyfriend should be protected from 'superfluous' (non-compliance causing) acts of sexual coercion.

To further explain this point of view, let us look to the existing crime of extortion.[992] Extortion is committed by a person who, 'without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence

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[991] Stephen Shute, 'Appropriation and the Law of Theft' (2002) 6 Criminal Law Review 445, 454.

[992] Looking at extortion is particularly interesting given the critique, made by several authors, that the law is better at protecting property interests than sexual integrity: see for example Stephen J Schulhofer, 'Rape in the Twilight Zone: When Sex Is Unwanted but Not Illegal' (2005) 38 Suffolk University Law Review 415, 421–422; Herring, 'Mistaken Sex' (n 650) 511; Estrich (n 103); Caringella (n 350) 200; Rebecca Williams, 'A Further Case on Obtaining Sex by Deception' 137 Law Quarterly Review 183, 187–188.

induces or attempts to induce any person . . . to do anything or cause anything to be done'.[993] The wording of the offence merges the completed and inchoate forms of the crime, in that the inducement must not be successful for the crime to be engaged in. However, the law requires the accused to actually use threats, accusations, menaces or violence, excluding from its ambit the accused who merely attempts to utter a threat (for example, though a letter that is never received). We can say that the crime covers failed attempts but not incomplete attempts. It is not hard to imagine oneself at the receiving end of threats and menaces—as the victim of a failed attempt at extortion—and see that the conduct that is criminalized is not harmless. The crime of extortion has similarities with a sexual coercion offence that would require coercive acts to be completed, but not successful in causing compliance.

Overall, excluding a requirement to prove that sexual coercion caused sexual compliance does not depart from the harm principle in criminalizing victimless conduct or failed attempts at sexually coercive acts. It would still be possible to criminalize only completed acts, such as communicated threats, which is very different from the criminalization of—to give examples of harmless conduct—an attempt to steal what is mine or an attempt to assault someone who is not even there to notice it.

[993] Criminal Code, RCS 1985, c. C-46 s 346(1), emphasis added.

To conclude, a less ‘incident-based’ approach to sexual coercion might:

- Adopt a course-of-conduct definition of sexual coercion, where sexually coercive acts must be committed repeatedly (or at a frequency determined by some other threshold); and
- Not require a relationship of immediacy or causation between sexual coercion and sexual activity, and even possibly not require resulting sexual activity at all.

Other considerations

While the sections above described the major features that a centred, implementation-conscious, and non-incident-based criminalization of partner sexual violence could adopt, the following sections conclude with additional considerations relevant to such legislation.

The role of consent

The goal of new legislation would be to target sexual coercion, especially non-physical sexual coercion, in a way that avoids the incident model of sexual assault by reacting to the gradual erosion of the victim’s ability to say no. The idea is to target behaviours that are often not considered serious or coercive enough to be prosecuted as acute violations through the crime of sexual assault, but that are still blameworthy and can still impact the victim’s sexual autonomy, especially if repeated. This context raises the question of what

the role of consent should be: should non-consent still have to be proved in addition to sexual coercion? Should non-consent be presumed? Should it be irrelevant?

The option of requiring proof of both coercion and non-consent can easily be put aside. There is an important feminist debate as to whether sexual offences should be defined based on coercion or consent. But one or the other should suffice, as consent and coercion are incompatible. The view that sexual offences should require proof of *both* force and non-consent is still present in many jurisdictions, but it is becoming the minority view.[994] Because 'consent can only have meaning within a context where dissent and refusal are real possibilities',[995] defining sexual violence based on a force or coercion model should make consent superfluous.[996] It would likewise be problematic to adopt something like the English and Welsh evidential presumptions of non-consent, because they enable and even encourage the defense to argue that consent was present despite sexual coercion, a conversation that invites myths and stereotypes about women and consent.[997] While the implementation of presumptions *could* be different in Canada, it is not reassuring that the English and Welsh presumptions have been described as

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[994] Schulhofer, 'Reforming the Law of Rape' (n 12) 343.

[995] Karin Van Marle, 'The Politics of Consent, Friendship and Sovereignty' in Rosemary Hunter and Sharon Cowan (eds), *Choice and Consent: Feminist Engagements with Law and Subjectivity* (Routledge 2007) 75.

[996] See Tadros (n 888) 537; Buchhandler-Raphael (n 116) 195.

[997] Sexual Offences Act 2003, 2003 c. 42 (n 946) ss 75–76.

being ‘as forceful as a feather’.[998] Thus, I consider that having to prove both coercion and non-consent, even with the help of a rebuttable presumption, is not a promising avenue.

Based on my previous choices and the advantages of the coercion model, I propose to define sexual coercion based on the presence of coercive acts rather than the absence of consent. Indeed, many scholars and activists have called for rape law to focus less on the victim and more on the rapist.[999] Rather than scrutinizing the victim’s state of mind and the authenticity of her apparent consent in circumstances of sexual coercion, it would be preferable to focus on the perpetrator’s practices of sexual coercion. The reason is that evaluating the authenticity of ostensible consent in coercive circumstances is complex—therefore not implementation-conscious. Moreover, as discussed, it raises the issue of paternalism or respect for the victim’s autonomy by suggesting that women are not able to make the right choices for themselves. I argue that even if the victim happens to consent to sexual activity following sexual coercion, the use of sexual coercion still deserves sanction. And if the victim does not comply with the request for sexual activity, the attempt at coercing sexual activity is still blameworthy. In focusing on the perpetrator’s behaviour, the law can avoid the minefield of deciding whether all sex within a violent or coercive relationship is non-consensual, without however committing

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[998] Sjölin (n 5) 29.

[999] See eg Lees (n 888); MacKinnon, ‘Rape Redefined’ (n 4) 441, 469; Benedet and Grant (n 262) 137; Tadros (n 888) 539; Buchhandler-Raphael (n 116) 195; Larcombe and others (n 888) 623; Tiersma (n 888) 96.

the ‘incident-view’ mistake of seeing a coercive context as irrelevant when coercion is built subtly over time rather than exerted through overt physical violence. The coercion model thus restricts men’s ability to ‘work a yes out’,[1000] that is, to induce submission or surrendering that could be mistaken for consent.[1001]

The coercion model brings to light the conditions in which the perpetrator placed the victim. For Louise du Toit, ‘by asking about the possibilities for dissent from and refusal of sexual advances, and by focusing on a range of coercive circumstances which would undermine such possibilities, rape law has a better chance of protecting those most vulnerable to sexual violence’.[1002] She contrasts this perspective with current consent-based approaches to rape, in which the law ‘presume[s] both the capacity for meaningful consent as well as the likelihood of actual consent, loading the dice against the complainant’.[1003] Thus, the focus should be on the perpetrator’s actions (for example, uttering a threat) rather than the complainant’s state of mind (for example, non-consent). In this way, consent would not be presumed, and women would not be asked to perform the correct reaction to coercive circumstances; rather, the initiator would have the responsibility not to use sexually coercive tactics. This position rejects victim-blaming

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[1000] Sanday (n 795).

[1001] Buchhandler-Raphael (n 116) 182.

[1002] du Toit (n 148) 380.

[1003] ibid 399.

attitudes and recognizes that the person who can avoid the offence being committed is the perpetrator, not the victim.

In addition to literature promoting the coercion model, there is extensive feminist work on the limits of consent as a frontier between sex and sexual assault. Some rape law researchers have suggested abandoning non-consent altogether because of its theoretical and practical problems.[1004] 'Consent' is vague and polysemic.[1005] It allows the defendant who uses force to argue that the victim nevertheless consented.[1006] It diverts attention from the defendant's conduct to the victim's,[1007] legitimizing victim-blaming and stereotypical assumptions about how women communicate sexual availability.[1008]

[1004] See, among others, MacKinnon, 'Rape Redefined' (n 4); Anderson, 'Negotiating Sex' (n 788); Carole Pateman, 'Women and Consent' (1980) 8 Political Theory 149; du Toit (n 148).

[1005] Melanie Beres, '"Spontaneous" Sexual Consent: An Analysis of Sexual Consent Literature' (2007) 17 Feminism & Psychology 93; see also Buchhandler-Raphael (n 116) 159; Donald Dripps, 'After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault' (2008) 41 Akron Law Review 957, 958.

[1006] Tadros (n 888) 527.

[1007] Anderson, 'Negotiating Sex' (n 788) 1406; du Toit (n 148) 384; Tadros (n 888) 539; Buchhandler-Raphael (n 116) 159; Lise Gotell, 'Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women' (2008) 41 Akron Law Review 865, 898.

[1008] Jennifer Temkin and Andrew Ashworth, 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent' (2004) May Criminal Law Review 328, 342; for Anderson, 'Negotiating Sex' (n 788) 1417–1417, 'A well-developed body of social psychology literature documents that men interpret women's body language as indicative of sexual intent when women have no such intent'; see cites among others: Martie G Haselton and David M Buss, 'Error Management Theory: A New Perspective on Biases in Cross-Sex Mind Reading.' (2000) 78 Journal of Personality and Social Psychology 81; Antonia Abbey and Richard J Harnish, 'Perception of Sexual Intent: The Role of Gender, Alcohol Consumption, and Rape Supportive Attitudes' (1995) 32 Sex Roles 297; David Dryden Henningsen, 'Flirting with Meaning: An Examination of Miscommunication in Flirting Interactions' (2004) 50 Sex Roles 481.

Feminist scholars have also noted that consent implies 'a weak form of agency',[1009] where female sexuality is essentially passive.[1010] The law's concern for women's consent, rather than active desire, erases women's sexual agency, reducing their role to assenting to men's desires.[1011] For Carole Pateman, 'an egalitarian sexual relationship . . . cannot be grounded in "consent"'.[1012]

A coercion standard, then, appears more promising. I am especially interested in the hypothesis that, by moving away from consent, we might reduce the risks of the victim being put on trial. By legally focusing attention on the perpetrator's actions, rather than on how the victim felt or reacted, the hope is to avoid or reduce legal practices that implicitly or explicitly blame the victim for her reaction to sexual violence. Thus, the choice not to focus the new legislation on consent or non-consent is also part of an implementation-conscious approach to criminalization.

The next question is whether non-consent should be conclusively presumed or irrelevant if a coercion model is chosen. My proposal to target sexual coercion regardless of whether sexual activity follows suggests that non-consent should not be required.

[1009] du Toit (n 148) 382.

[1010] MacKinnon, *Toward a Feminist Theory of the State* (n 148) 174.

[1011] du Toit (n 148) 398; Ann J Cahill, *Rethinking Rape* (Cornell University Press 2001) 173; Pateman (n 1004) 164; Anderson, 'Negotiating Sex' (n 788) 1408.

[1012] Pateman (n 1004) 164.

Alternatively, in cases where there is subsequent sexual activity, non-consent could be either conclusively presumed or irrelevant. These two options can be designed to be functionally equivalent, although there might be a practical interest in making consent simply irrelevant.

Consider the first option, where non-consent is conclusively presumed once sexual coercion is proven. This would be akin to Canadian law establishing that, as a matter of law, no consent is obtained in certain situations, including the victim being unconscious or the perpetrator inducing the victim's participation by abusing a position of trust.[1013] Similarly, the law could presume that, in situations where repeated acts of sexual coercion have been committed, there is no consent (and there is knowledge of non-consent). The issue is that the law would need to establish some temporal link between coercion and sexual activity. Alternatively, the law could state that when acts of sexual coercion induce the victim to engage in sexual activity, non-consent and knowledge of non-consent are considered proven.

These approaches are plausible solutions. However, they would represent an incident approach to sexual coercion, where specific instances of sexual coercion are associated with specific instances of sexual activity. As discussed, there are limits to the

[1013] Criminal Code, RCS 1985, c. C-46 s 273.1(2).

incident-based approach's ability to properly identify and punish chronic sexual violations.

Alternatively, if causation or temporality are not required, it would mean that once sexual coercion has been committed, no future sexual activity can ever be consensual, such that someone who commits sexual coercion against his long-term partner might potentially leave the relationship with hundreds of convictions, one for each instance of sexual contact. Even though sexually coercive relationships deserve sanction, this approach seems excessive. Capping the number of convictions, on the other hand, would be arbitrary. Hence the interest in criminalizing sexual coercion separately from the consent-based crime of sexual assault.

For the foregoing reasons, the avenue of criminalizing sexual coercion in a new offence where consent and even subsequent sexual activity are irrelevant might be preferable. As such, there would be no need to presume non-consent: non-consent would not be a necessary element of the offence. In other words, if a man starts repeatedly using sexually coercive tactics against his partner (with the required *mens rea*), the offence would be completed, even if they do not engage in subsequent sexual activity. As already discussed, this approach would have the additional benefit of avoiding the potentially paternalistic practice of telling women in a sexually coercive relationship that they can never consent to any sexual activity.

The mens rea

What *mens rea* should be adopted? At least two elements are required. First, because the actus reus consists of predefined acts of sexual coercion, it is necessary that these acts be done voluntarily. Therefore, the first element of the mens rea should be intent to engage in the relevant act of sexual coercion.

Some level of *mens rea* will also be required with regard to the consequence of the sexual coercion. Intent, knowledge, recklessness or even criminal negligence (marked departure from the standard of a reasonable person) could be adopted depending on how high we want to set the threshold. The mens rea could be based on causal intent, that is, intent to cause compliance. This is a high bar for the Crown to prove, although it might be inferred from the actus reus depending on the relevant act(s) of sexual coercion. For example, if the accused threatened the victim saying that he would harm her pet if she did not agree to have sex with him, the intent to cause compliance should not be too difficult to infer. I do have the concern, however, that if an accused has already established an environment of sexual control, he might argue that any new act of sexual coercion is not intended to cause compliance with sexual activity, but is merely done out of habit, to humiliate the victim, or for other reasons.[1014]

[1014] In the context of the English fraud offence, Ormerod describes the problems that might arise when causal intent must be established; we can see a parallel with situations of sexual coercion where the intent

A lower threshold could be formulated as intent to constrain the victim's choice or reduce her ability to say 'no'. Knowledge or recklessness with regard to this result could be substituted. I believe this strikes a good compromise between ensuring that the criminalized conduct is sufficiently wrongful and ensuring that the *mens rea* remains provable for the Crown. A purely objective mens rea, such as marked departure from the behaviour of a reasonable person, would also be possible,[1015] although less usual in the criminal context.

We might also consider, given the lack of requirement that sexual activity ensues, an additional mens rea of intent to have sex or foresight that sexual activity with the victim might happen. The purpose is to avoid the offence being committed out of the context of sexual coercion by a sexual partner. Consider the following example: A tells her best friend B that she is reticent to have sex with her partner. B then engages in sexually coercive behaviours such as making A feel obliged to say yes ('good girlfriends don't say no to sex', 'you are being mean to him', etc.) and threatening to terminate their relationship ('I could never be friends with such a prude'). She might even intend to limit A's ability to refuse to have sex with her partner. Yet these behaviours, while highly problematic on a social level, should probably be excluded from a sexual coercion

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might be to gain access or an opportunity to have sex but not to induce sex strictly speaking: David Ormerod, 'The Fraud Act 2006 - Criminalising Lying?' (2007) March Criminal Law Review 193, 203.

[1015] This threshold has been identified as the minimum constitutionally valid *mens rea* for a criminal offence: *R v Brown* 2022 SCC 18 [90].

offence as there is no intent to have sex, nor foresight on B's part that she might engage in sexual activity with her friend. The decision to require intent or foresight regarding sexual activity with the victim would also mean that any sexual coercion engaged in by a pimp to force his victim to engage in sexual activity with someone else would also be excluded. While such behaviour would certainly be highly coercive and deserving of criminalization, it calls for specific legislation centred on this reality.

The interaction with current sexual assault legislation

We have already seen that sexual coercion could become a new sexual offence, or could be integrated within the offence of sexual assault. In my view, while both options are possible[1016] and could be made to become functional equivalents, there is a certain difficulty in integrating a course-of-conduct approach within an incident-based offence, as I have explained in discussing the role of consent. To recap, if repeated acts of sexual coercion trigger a presumption of no consent, two unsatisfactory options arise. One is to apply the presumption of non-consent to a specific instance of sexual activity, perhaps the one where compliance was induced by the sexual coercion—this is a purely incident-based approach which would raise important difficulties regarding proof of causality. On the other hand, if the presumption of non-consent applies generally to any subsequent sexual activity, issues of overcriminalization and autonomy arise. The accused could

[1016] Note that integrating sexual coercion within the sexual assault offence would more easily solve a situation like that of *R v George* 2017 SCC 38 (n 910), described earlier in this chapter.

receive a separate conviction for every single instance of sexual contact, which seems excessive. And, as discussed, the law would also imply that, once acts of sexual coercion have been committed, the victim can never exercise her autonomy to engage in wanted sexual activity. For these reasons, a separate offence which does not rely on the existence of sexual activity or absence of consent, but is rather engaged if repeated acts of sexual coercion have been committed with the relevant *mens rea*, seems more promising. As sexual touching is part of the *actus reus* of sexual assault, a separate offence would also enable the criminalization of acts of sexual coercion that do not lead to sexual activity.

I note a third potential avenue of criminalization, which would be to include sexual coercion within a coercive control offence. There is currently no such offence in Canadian law, but adopting a coercive control crime has been proposed.[1017] A coercive control offence could be a better fit for sexual coercion because it would be a course-of-conduct offence. While both avenues—a separate offence and part of a coercive control offence—are appropriate, separating sexual coercion from coercive control would enable the crime to be applied beyond the intimate partner or familial context. Moreover, a separate offence would enable a specific and tailored response to sexual coercion, with more flexibility to determine the *mens rea* and *actus reus*. For instance, in the English offence, coercive control needs to cause a certain level of harm—a 'serious effect'—,[1018]

[1017] 'Projet de loi C-247: Loi modifiant le Code criminel (conduite contrôlante ou coercitive)' (n 777).

[1018] Serious Crime Act 2015, 2015 c. 9 s 76(4).

but sexual offences have moved away from required experienced harm to better protect sexual autonomy. Because sexual coercion is normalized, even by its victims, many situations would be excluded from the law's ambit if it required the victims to experience fear, distress, or other negative emotions. With sexual offences, harm is difficult to predict and may manifest in a delayed fashion. Thus, focusing on the perpetrator's wrongdoing appears preferable.

Apart from these difficulties, creating a separate offence has specific advantages; notably, it capitalizes on the law's power of naming. Specifically labelling a sexual violation identifies it as a distinct and serious wrong. Dale Spencer writes in *Man-Made Language* that '[n]ames are essential for the construction of reality for without a name it is difficult to accept the existence of an object, an event, a feeling'.[1019] Liz Kelly adds that '[n]aming involves making visible what was invisible, defining as unacceptable what was acceptable and insisting that what was naturalized is problematic'.[1020] As such, '[a] vital part of feminist work around sexual violence has . . . been to provide names that describe women's experiences [such as] "battered woman", "domestic violence", "sexual harassment", "sexual violence" and "incest survivor"'[1021] (another example is the label

[1019] Spender Dale, *Man Made Language* (Routledge & Kegan Paul 1980) 163.

[1020] Liz Kelly, *Surviving Sexual Violence* (Polity 1988).

[1021] ibid. Note that the expressions 'battered woman' and 'battered wife' are now considered restrictive and are rarely used in contemporary work about domestic violence.

'coercive control'[1022]). Similarly, legally naming currently invisible forms of sexual violence—such as non-physical sexual coercion—could enable victims (and perpetrators) to recognize themselves and discuss their experiences, as in a process of consciousness-raising.

Moreover, a 'sexual coercion' label might be easier to identify with than the existing term of 'sexual assault'. We saw in chapter 2 that the labels of 'rape' and 'sexual assault' are often insufficient to enable women to recognize and name sexual violence by their intimate partners, especially when it is not physically forced, because women's experience conflicts with the dominant rape script.[1023] The fact that victims of non-physically forced partner sexual violence often reject the labels of 'rape' or 'sexual assault' is a clue that a new label with fewer connotations of 'stranger rape'—such as 'sexual coercion'—might be a promising avenue, as Tanya Palmer also argues:

> A separate offence would identify chronic sexual violation as a distinct wrong . . . Naming an offence of chronic sexual violation would help to create a shared language for this mode of sexual violation and give expression to an experience which is often marginalised both within discussions of sexual violence and domestic abuse.[1024]

[1022] Stark, *Coercive Control* (n 60) 369.

[1023] See for example Kelly (n 1020) 138.

[1024] Palmer (n 956) 594.

Additionally, ‘sexual coercion’ might also be an easier label to accept for judges and juries, as it may carry less stigma than ‘sexual assault’.

Creating a new, separate offence *centered* on partner sexual violence also aims to break free from the ‘real rape’ undertones of existing sexual offences. As we have seen, the sexual assault offence has struggled to accommodate the reality of partner sexual violence. Instead of ‘statutory tinkering’[1025] and attempting to fine-tune the definition of sexual assault, a separate offence could present a new way of thinking about the core of sexual violence, that is, as the repeated erosion of the victim’s ability to say ‘no’ through often non-physical means.

In short, while several avenues are possible, a separate offence is a promising option to clearly, explicitly, and specifically target sexual coercion in a way that would be specially designed to facilitate the prosecution of non-physically forced and chronic sexual violation. It would make it clearer to victims and decision-makers that sexual coercion is criminalized, which is also fairer to defendants as they are put on notice as to the criminal nature of sexual coercion and, if convicted, receive a label that closely matches their wrongdoing.

[1025] Corey Rayburn Yung, ‘Rape Law Fundamentals’ (2015) 27 Yale Journal of Law and Feminism 1, 46.

The scope of the offence

A final consideration is whether the criminalization of sexual coercion should be limited to the intimate partner context. In my view, the net should be cast more broadly. Limiting the criminalization of sexual coercion to intimate partners would target partner sexual violence specifically rather than following the method of centring partner sexual violence to improve sexual offences law more generally (i.e., treating partner sexual violence as a paradigmatic case, as proposed in chapter 5).

Additionally, I am concerned that provisions applying only to intimate partners would reinforce the 'real rape' / 'simple rape' dichotomy, especially if sexual coercion attracts lower sentences than currently criminalized sexual assaults. Recall from chapter 2 that partner sexual violence continues to be perceived as less serious than sexual violence by strangers. By creating more space for partner sexual violence in a separate and specific sexual offence, there is a risk of creating an apparent hierarchy between partner and non-partner sexual violence. This concern is heightened by the implementation problems highlighted in chapter 4. I see risks in having one offence that is specifically for intimate partner sexual violence, and one that ostensibly applies to all sexual assaults but from which partner sexual assaults are often filtered out.[1026]

[1026] For a similar argument, see Palmer (n 956) 594.

Indeed, by having a separate offence that only applies to the intimate context, there is a risk of perceiving the main difference between sexual assault and sexual coercion as the status of the perpetrator (intimate partner or non-intimate partner), instead of considering whether the violation is acute or chronic. The risk is both to trivialize acute instances of partner sexual violence by failing to charge sexual assault, *and* to miss the opportunity to criminalize chronic sexual violation in other contexts.

Reflecting on these concerns, Tanya Palmer concludes that 'the operation of chronic sexual violation across a range of contexts is crucial to understanding chronic and acute sexual violation as distinct but equally serious wrongs',[1027] that is, to avoid the 'real rape' / 'simple rape' dichotomy. Her work exemplifies the 'centring' method: her inquiry starts from and focuses on the intimate partner context, yet she sees her conclusions as also being useful for other situations. She writes:

> [Abuse within intimate relationships] is a key context for chronic sexual violation which I have used as a case study to develop and articulate this construct. I argue, however, that the concept of chronic sexual violation is applicable beyond coercive controlling relationships. Indeed, my intention is to draw connections between patterns of sexual abuse and exploitation in a range of scenarios and thereby resist hierarchical demarcations between 'relationship rape' and 'real rape', offering instead a framework of distinct but equally serious modes of chronic and acute sexual violation.[1028]

[1027] ibid.

[1028] ibid 590.

I share Palmer's concerns regarding unduly limiting the legal response to partner sexual coercion. I have argued that intimate relationships induce vulnerability to sexual violence and that the law should prioritize responding to this vulnerability. Research suggests that intimate partner violence might increase with commitment, for example by escalating with cohabitation and pregnancy.[1029] As such, I do expect my proposed offence to mostly be used in the context of committed intimate partnerships. And limiting the offence to this context would make the offence more specific, which can be seen as a positive feature of legislation.[1030]

Yet I believe it is not worth the risk of excluding instances of sexual coercion in other contexts, such as casual relationships or 'friends with benefits'. Professional or professor-student relationships are also contexts where sexual coercion might occur. Consider the phenomenon of sexual harassment at work or at school: there can be repeated requests, pressure, and coercion to get the victim to submit to unwanted sexual behaviour. If the resulting sexual activity is non-consensual, the correct offence to charge would be that of sexual assault. But what if there is no resulting sexual activity, just (unsuccessful) sexually coercive tactics? Or what if non-consent cannot be proven because the levels of coercion and power imbalance do not reach the necessary threshold

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[1029] See eg Jana L Jasinski, 'Pregnancy and Domestic Violence: A Review of the Literature' (2004) 5 Trauma, Violence, & Abuse 47.

[1030] Suzanne Zaccour, 'Public Policy and Laws Addressing Men's Violence against Female Intimate Partners' in Todd K Shackelford (ed), *The SAGE Handbook of Domestic Violence* (SAGE 2020).

to be recognized by the courts in cases of sexual assault? Then a course-of-conduct offence of sexual coercion might be appropriate.

I thus conclude that the new provisions covering sexual coercion should not be explicitly limited to intimate partners, although, since they were developed by studying and centring partner sexual violence, they would likely primarily apply to this context. The use of the intimate partner context to reflect on improvements for sexual offences law generally follows the centring strategy that this thesis has proposed.

Conclusion

In this chapter, I have explored potential features for developing legislation criminalizing partner sexual coercion in a way that responds to the concerns raised throughout this thesis. In particular, we have seen that the current sexual offences law faces important implementation problems as it is applied within a context that normalizes partner sexual violence (chapters 2 and 4). As such, we might be concerned that any new legal reform will face the same fate as the previous ones—it might lead to modest improvements, but still be often misapplied. This is a concern that I have addressed by keeping implementation issues at the forefront of my reflections throughout this chapter. In particular, I have proposed behaviourally specific legislation and the avoidance of vague standards such as ‘reasonableness’ as a way to circumvent many implementation difficulties. Although it would be naïve to think that a single legislative solution could put an end to *all* implementation concerns, I believe that good design choices can make

the enforcement of new sexual coercion provisions much simpler than that of sexual assault.

I have additionally proposed to develop provisions that are centred on the reality of partner sexual violence and that are not incident-based, thus addressing the major concerns regarding sexual assault provisions raised throughout this thesis. Rather than proposing a single wording for new sexual coercion provisions and attempting to close a debate on the proper way to criminalize this phenomenon, I have explored several possibilities and hope to have exemplified a new legal reform strategy that centres partner sexual violence.

CONCLUSIONS

In 1979, addressing a group of feminists lobbying for the removal of the marital exemption, one California State senator reportedly said: 'but if you can't rape your wife, who can you rape?'[1031] Sometimes there is truth in the wrongest of statements. Wives and girlfriends are the most 'rapeable' of women. For centuries, men could rape them in complete impunity. After decades of feminist work, fight, and engagement with legal reform, they can now do so in quasi-complete impunity, as only a fraction of partner sexual assaults will ever lead to a conviction.

[1031] Gavey (n 1) 39.

The idea behind my project is that, in a way, if you can't rape your wife, you can't rape anyone. I have proposed to place partner sexual violence at the centre of our legal reflections regarding sexual offences, working with the assumption that once the prevalent, tricky, socially accepted issue of partner sexual violence is solved, 'simpler' problems such as that of stranger rape will pose no difficulty. I believe that addressing partner sexual violence can cut through the Gordian knot of sexual violence against women. This intuition echoes how Black feminists have proposed that addressing the oppression of Black women will solve white women's plight of sexism better than white feminism could ever help Black women. Since centuries of centring stranger rape have done little to reduce or even factually criminalize men's sexual violence against their intimate partners, it is time to try a different approach.

To address the issue of sexual coercion, I have thus proposed developing legislation that is 'centred' on partner sexual violence: that is, legislation which is guided by the empirical reality of partner sexual coercion, implementation conscious, non-incident-based, and not limited to the intimate context. Granted, my proposal is not enough to make sexual offences law fully centred on partner sexual violence, because I have not proposed to rewrite the whole sexual assault offence. While partner sexual violence is often repeated, there are cases of one-off perpetration that should continue to be covered by existing sexual assault provisions. Given the breadth of problems exposed in chapter 4, it is likely that many waves of legal reforms will be necessary before partner sexual violence is truly treated fairly in a legal system that has historically focused on

stranger rape. Yet my hope is that with new legislation that has better chances of being successfully enforced, we will see the development of a positive enforcement cycle where problematic myths and social norms are progressively chipped at. More generally, my hope is also that by evaluating potential solutions in terms of how they fare when confronted with the reality of partner sexual violence—the approach I have proposed as a radical change in strategy—, we will create more effective legal reform proposals beyond the one I have explored here.

The main contribution I see for this thesis is thus the paradigm shift of seeing partner sexual violence as a central rather than a special case. Violence by intimate partners is not an exception to the so-called 'typical' stranger rape case. On the contrary, we might say that sexual violence against acquaintances and strangers is the extension of partner sexual violence, with men appropriating other women as if they were theirs. Proposing to start from partner sexual violence in developing legal rules and doctrines is the mirror opposite of the law's traditional approach, which has started from a focus on stranger rape and has subsequently attempted to integrate partner sexual violence within the stranger rape paradigm through the removal marital exemptions. My thesis has shown that such a strategy has failed to deliver, and that a major shift is required for women to truly be protected against sexual violence by their partners.

Limitations

While I believe my proposed 'centring' approach is a fruitful development for legal scholarship on sexual violence, there is always danger in speaking of a 'central case' because it raises the question: can there be more than one centre? I have defended the idea of seeing partner sexual violence as more central than stranger or acquaintance rape. Yet I have not provided a complete analysis of child or familial sexual violence. Many parallels can be made between conjugal and familial sexual violence. Children are not well protected from sexual violence in our society; familial sexual violence has been obscured by the 'stranger danger' paradigm, and this type of sexual violence is also often repeated and does not neatly fit the incident model.

Consequently, while centring partner sexual violence reveals important insights for sexual offences law, an analogous project examining how law and society respond to familial sexual violence and centring this type of victimization might also yield valuable new ideas and solutions. I see no reason to think that insights generated from centring familial sexual violence would be incompatible with those generated by centring partner sexual violence. It is however the nature of a doctoral thesis that many fruitful paths must be closed; I thus recognize the neglect of familial or child sexual violence as a limitation of my work. I do hope that my proposal to challenge the incident model of sexual assault and my critique of the centring of stranger rape will open up possibilities for seeing various forms of sexual violence that can be hidden by the stranger rape model: not only

partner and child sexual violence, but also sexual violence in institutional settings, elder sexual violence, sexual violence within religious organizations, etc.

Another limitation is unsurprising as it is a recurring theme in feminist scholarship on violence against women. Feminists have long debated whether engaging with criminal law is beneficial. On the one hand, critics of 'carceral feminism' reject criminalization and imprisonment as the appropriate response to violence against women. They see criminal law as a 'blunt instrument'[1032] which is not guided by feminist values and often unfairly targets the most marginalized populations.[1033] Not only does the criminal (in)justice system often fail victims of sexual violence, but even in 'what is often taken by mainstream feminists to be the "best case" scenario, perpetrators are locked up in institutions that are tools of racist, colonial, classist, ableist, homophobic, and transphobic violence, in which misogyny is endemic and rape is ubiquitous'.[1034] Anti-carceral feminists critique 'decades of feminist anti-violence collaboration with the carceral state'.[1035] They argue that instead of pro-criminalization strategies, feminists

[1032] See eg Donna Coker, 'Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking' (1999) 47 UCLA Law Review 1, 57.

[1033] Kim (n 622) 220.

[1034] Chloë Taylor, 'Anti-Carceral Feminism and Sexual Assault—A Defense' (2018) 34 Social Philosophy Today 29, 32.

[1035] Kim (n 622) 220.

should pursue community-based initiatives such as restorative or transformative justice.[1036]

On the other hand, some authors, while recognizing that criminal law cannot be the only solution to violence against women, see value in using it as part of our arsenal. For them:

> The law plays a crucial role in setting the boundaries of socially and culturally acceptable conduct. Unfair or exploitative forms of behaviour that disproportionately affect particular segments of the community have the potential, if not afforded legal recognition, to reinforce existing patterns of social discrimination.[1037]

Scholars also see engagement in criminal law as a strategy to challenge rape myths and patriarchal gender norms, including problematic sexual scripts,[1038] since 'sexual assault law plays a powerful role in discursively constructing and reconstructing normative heterosexuality'.[1039] Research suggests that formal sources of help such as the police or social service agencies are effective in stopping a situation of partner sexual violence.[1040]

[1036] ibid 225.

[1037] Jonathan Crowe, 'Consent, Power and Mistake of Fact in Queensland Rape Law' (2011) 23 Bond Law Review 21, 40.

[1038] Lise Gotell, 'Reassessing the Place of Criminal Law Reform in the Struggle Against Sexual Violence' in Anastasia Powell, Nicola Henry and Asher Flynn (eds), *Rape Justice: Beyond the Criminal Law* (Palgrave Macmillan 2015) 59–61.

[1039] ibid 61.

[1040] Martin, Taft and Resick (n 32) 329, 344.

The concern is also to engage with the law where it is and try to redirect its coercive power in support of women: '[a]lthough this is not a straightforward task, to do otherwise is to potentially 'cede ground to antifeminist institutions and practices"'.[1041]

Both camps agree that the ultimate feminist goal is to reduce sexual violence, not to put more men in jail. For Catharine MacKinnon, '[t]he real point of law is not incarceration or damage awards anyway but voluntary compliance, otherwise known as legal socialization or education'.[1042] My hope is that new legislation 'can be a persuasive influence on attitudes'[1043] because law is often taken for granted and 'viewed by most as the ultimate account of what is right, good, and proper'.[1044] As someone who works in sexual consent education, I have no doubt that the workshops I do in schools will prevent more sexual assaults than any work I do as a jurist. Still, I often use the authority of the law to promote responsible consent-seeking, telling young people not to engage in certain behaviours because they are illegal. Ultimately, while I do not believe that the road to dismantling the criminal justice system and the prison industrial complex should *start* with violence against women, I remain conscious of the need to exercise caution

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[1041] Carline and Easteal (n 45) 12; citing Vanessa Munro, *Law and Politics at the Perimeter: Re-Evaluating Key Debates in Feminist Theory* (Hart 2007) 69.

[1042] MacKinnon, 'Rape Redefined' (n 4) 477.

[1043] Caringella (n 350) 8.

[1044] ibid.

and be self-critical when proposing increased criminalization as a solution to a socio-political problem. Jails are and will likely remain a site of institutionalized and generalized sexual violence, and the use of criminal law as a tool should be regularly rethought and put the test.

Key findings and contributions

Significant work in sexual offences law has focused on finely adjusting rules and definitions on, for instance, consent, coercion, or threats. Given the existing problems with the legal treatment of partner sexual assault and the social context of normalization within which sexual offences are interpreted and applied, I have suggested a more radical approach, namely, reimagining the type of sexual violence that occupies the centre of our legal reflections. My exposition of the problems with the legal response to partner sexual assault and my proposed 'centring' method contribute to the field by refocusing its attention. Seeing sexual offences law through the lens of partner sexual violence enables the identification of hidden problems and original solutions, such as, in this case, addressing the 'incident model' of sexual assault through course-of-conduct legislation.

For an audience of sexual violence scholars, the most significant takeaway might be to pay more attention to the type of sexual violence which they imagine as paradigmatic. As they propose new rules and avenues for legal reforms, I invite them to consider how their suggestions would fair in relation to partner sexual violence. More

generally, do they centre common forms of sexual victimization, or are they building theories around marginal cases?

For an audience of policymakers, I have proposed potential avenues for new sexual coercion legislation which could be adopted into Canadian law or, with the required adjustments, into other legal systems. The originality of my proposal lies in challenging the taken-for-granted view of sexual violence as a one-off, bounded incident, and in proposing to target sexual violence through course-of-conduct legislation, similar to what is being done in relation to coercive control. I additionally contribute to legal reform work by proposing to build legislation in a bottom-up fashion, starting from empirical studies that reveal the most common forms of sexual coercion rather than legislating based on top-down theoretical reflections on the nature of consent or based on stereotypical cases that are culturally available and overrepresented in the media.

In addition to these key points, other contributions are made throughout the substantive chapters of this thesis and are worth summarizing.

In **chapter 1**, I have synthetized existing empirical literature on sexual coercion to highlight the core of sexually coercive tactics that men use to have women participate in unwanted sexual activities.

In **chapter 2**, I have revisited foundational feminist literature on rape myths, sexual scripts, and unacknowledged victims and have shown that the concerns that it expresses remain relevant to the contemporary Canadian context. The lesson to keep

from this chapter is that apparent progress in our society's appreciation of sexual violence has struggled to percolate to the intimate context.

In **chapter 4**, I have surveyed and synthetized available research on the legal treatment of partner sexual violence in Canada. Since partner sexual violence remains under-researched, this chapter makes an important contribution to the field. Research shows that partner sexual violence is less likely to be reported than other forms of sexual violence. When partner sexual violence victims do report, they are less likely to be believed and less likely to see their case brought to trial. At the trial stage, existing research complemented by my own contributions show that rape myths and under-enforcement remain important concerns; and even if a conviction ensues, partner sexual violence cases are sentenced more leniently than other cases. Particularly concerning is the virtual absence of cases of non-physically forced partner sexual violence throughout the criminal justice chain, despite their empirical prevalence. Scholars concerned with the increasing use of the so-called 'rough sex defence' by men accused of sexual violence will also be interested in my contribution to the study of this phenomenon, which shows a special difficulty in applying 'rape shield' provisions and highlights our society's appetite for the 'normal, therefore not rape' narrative. That a particular behaviour can be both normalized *and* violent is a recurring theme of this thesis.

Chapter 5 houses my main theoretical proposal to 'centre' legal reflections on partner sexual violence. Sexual violence and criminal law scholars might also generally be interested in my observation that legal reflections are often based on paradigmatic

cases which are rarely justified in terms of frequency or significance. The scenario that lies at the back of our mind as we think about a problem might have pervasive implications for our legal theories. For instance, my focus on partner sexual violence has enabled me to highlight some potentially neglected dimensions of the sexual violence problem: the use of subtle or non-physical forms of coercion and resistance, and the relevance of sexual precedence as creating learned sexual compliance. By justifying paying attention to the problem of partner sexual violence in terms of its empirical, social, and legal importance, I hope to have inspired scholars—or at least, engaged scholars—to reflect self-critically on the focus of their work and on whether it serves an ameliorative goal, such as that of ultimately eliminating violence against women.

In **chapter 6**, I have offered an original appraisal of sexual violence law as adopting an 'incident framework'. While other scholars have criticized consent as too narrow, I have contributed to this conversation by drawing a parallel between the 'incident model of sexual assault' and the 'incident model of domestic violence'. Like my proposed 'centring' method, the concept of the 'incident model' is one that could lead to a variety of developments and new insights regarding how best to respond to 'chronic sexual violation'.[1045] I have used this chapter to springboard my proposal for course-of-conduct legislation to address partner sexual violence, but my critique of the

[1045] Palmer (n 956).

‘incident model’ could similarly serve reflections on familial sexual violence, workplace sexual harassment, or relationships between ‘pimps’ and prostituted women, to name a few examples.

Finally, **chapter 7** has proposed features for sexual coercion legislation that responds to the main issues explored through this thesis: the lack of centring of partner sexual violence, implementation problems, and the incident model of sexual assault. I have proposed to design legislation in a way that captures common forms of sexual coercion as exposed in empirical studies, to make such legislation behaviourally specific to facilitate implementation, and to adopt a course-of-conduct definition of sexual coercion by criminalizing repeated behaviours.

If we are committed not only to studying but also to ending sexual violence, it makes sense to focus our attention on common and normalized sexually coercive behaviours. Empirical studies cannot uncritically and automatically be translated into legislation; theory is also necessary. Nonetheless, lived experiences constitute a powerful starting point to improve the legal response to violence against women. With coercive control legislation still in its infancy, it is hard to predict the impact that it will have in coming decades. If the current model proves too difficult to implement, specifically targeting common controlling and coercive behaviours, as I have done for sexual coercion, might be an avenue to explore despite the risks associated with a fragmented approach.

In my last substantive chapter, I have also explored other important features, such as the role of consent, the *mens rea*, the interaction with current sexual assault legislation, and the scope of the offence. Moreover, I have contributed to reflections on sexual coercion by framing its harm in terms of the sexual coercion experienced rather than the resulting non-consensual sexual activity, opening the way to criminalizing a broader range of harmful behaviours.

Finally, both sexual and domestic violence scholars might be interested in the way in which my work brings the two sister fields closer together. Coercive control might hold many more hidden insights for sexual violence scholars, and vice-versa. It has been suggested that one of the reasons for partner sexual violence failing to receive the attention it deserves is that it has fallen through the cracks between sexual and domestic violence. As Melanie Randall observes in the Canadian context,

> Much of the research and policy on domestic violence has not adequately addressed the fact that many women are also forced into sex by their physically abusive partners. Similarly, public education and programmes addressing domestic violence typically focus on physical assaults, threats and even emotional abuse, while not drawing sufficient attention to the fact that in too many cases sexual violence is also a component of this violence.[1046]

[1046] Randall, 'The Right to Say No' (n 373) 18.

The risk in compartmentalizing domestic violence and sexual violence is that neither field focuses on or fully understands the unique features of partner sexual violence.[1047] In recent years, there have thus been calls to pay more attention to relationship between sexual violence and coercive control specifically[1048] as '[m]ost studies of sexual coercion have been conducted somewhat separately from the [intimate partner violence] literature—using college samples, sexual partners who were not in intimate partnerships, or community samples where partner nonsexual violence history was not assessed'.[1049] In the future, '[u]nderstanding sexual violence as a unique class of coercive control with a specific role might radically alter society's view of how seemingly "consensual" sexual acts are actually conducted in a context that negates women's sexual agency and causes serious harms'.[1050] By centring partner sexual violence and drawing inspiration from coercive control theory, I hope to have contributed to a better flow of thoughts and knowledge between the sexual violence and domestic violence fields.

I conclude this thesis with a thought for all the victims of partner sexual violence who continue to wait—and often to fight—for justice in a world that seeks to silence them. Since I started to be vocal against sexual violence roughly nine years ago,

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[1047] Berman (n 45) 27.

[1048] Logan, Walker and Cole (n 45) 113.

[1049] Mitchell and Raghavan (n 70) 191.

[1050] Logan, Walker and Cole (n 45) 125.

countless women—friends and strangers—have trusted me with their personal stories and experiences. I am always reminded of a famous speech in which Andrea Dworkin, begging for a single day without rape, said the following:

> As a feminist, I carry the rape of all the women I've talked to over the last ten years personally with me. As a woman, I carry my own rape with me. Do you remember pictures that you've seen of European cities during the plague, when there were wheelbarrows that would go along and people would just pick up corpses and throw them in? Well, that is what it is like knowing about rape. Piles and piles and piles of bodies that have whole lives and human names and human faces.[1051]

As a woman, as a feminist, as an educator, I carry my fair share of corpses. Every woman who has shown me hers has nourished a fire inside me that will burn until the day my work finally becomes obsolete. Dworkin said 'we do not have time. We women. We don't have forever.'[1052]

May that day of obsoleteness come soon.

[1051] Speech given at the Midwest Regional Conference of the National Organization for Changing Men in the fall of 1983 in St Paul, Minnesota. Published in Andrea Dworkin, *Letters from a War Zone* (1st ed, Lawrence Hill Books 1993).

[1052] ibid.

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