Forcible Rape

A Manual
for Filing and Trial Prosecutors

Prosecutors' Volume II

National Institute of Law Enforcement and Criminal Justice
Law Enforcement Assistance Administration
United States Department of Justice

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ABSTRACT

Interviews with 40 experienced prosecutors indicated that, even in major cities, an average of only 4.5 rape cases per prosecutor actually proceed to trial, while only 2.5 result in a conviction. Since the handling of rape cases is often an unfamiliar task, this manual has been designed as a reference work.

The report begins with a discussion of the historical prejudices prosecutors, judges, and juries have had toward rape victims. Although the victim is often thought to contribute to the offense, a study of police records in five cities show that substantial threats against the victim's life were made in 60 percent of cases and strong-arm force was used in 75 percent. The manual describes medical tests that should be conducted immediately and at intervals after report of the attack and recommends questions that should be asked at the crime scene. Forensic evidence that should be gathered is also discussed. The process of plea bargaining and the popular concept of the "degree of seriousness" of rape are considered in order to aid the prosecutor who must determine his chances of winning the case. Because of popular prejudices, the rape case must be especially well prepared. Therefore, the presentation and evidence, the treatment of witnesses, methods of discovering possible juror bias, and other trial tactics are also discussed in detail.

Finally, the report concludes with appendixes presenting sample forms for recording information from medical and forensic examinations, a bibliography, and a description of rape victim services in various cities.

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NOTE:

The complete results of this project are included in 11 research products. This volume represents the findings of one part of a comprehensive study of rape and the criminal justice system response. Additional research findings and recommendations are available in the following publications and reports. Copies may be purchased from the Government Printing Office.

Forcible Rape: A National Survey of the Response by Police (Police Volume I)
Forcible Rape: A Manual for Patrol Officers (Police Volume II)
Forcible Rape: A Manual for Sex Crimes Investigators (Police Volume III)
Forcible Rape: Police Administrative and Policy Issues (Police Volume IV)
Forcible Rape: A National Survey of the Response by Prosecutors (Prosecutors' Volume I)
Forcible Rape: Prosecutor Administrative and Policy Issues (Prosecutors' Volume III)
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PREFACE

The criminal justice system must respond aggressively to the crime of rape at many levels. This report is one of a series of documents which explore the range of potential responses. They are the result of a two-year study of rape undertaken by the Battelle Law and Justice Study Center and funded by a grant from the National Institute of Law Enforcement and Criminal Justice (NILECJ) of the Law Enforcement Assistance Administration.

The Battelle Center adopted several research strategies to assure a comprehensive examination of this crime. A total of 208 police departments and 150 prosecutors' offices were surveyed in regard to their procedures and policies toward rape. In addition, 1261 case reports from five metropolitan police departments were analyzed to determine the circumstances under which reported rape offenses occurred, the extent of injury inflicted on victims, and the manner in which cases were handled by police, prosecutors, and courts. Extensive interviews were conducted with 65 prosecutors, 369 police officers, and 146 rape victims in six cities throughout the country. These interviews were designed to explore how policy was implemented at various levels of the criminal justice system and what problems the interviewees perceived in the system's response to rape. Finally, the legal literature concerning rape was reviewed and the status of rape law in every state was determined by a nationwide telephone survey.

This document focuses on the response of the prosecutor to the crime of rape at the filing and trial level. A companion document entitled *Forcible Rape: Prosecutor Administrative and Policy Issues* discusses many of the same topics but from the perspective of the policy maker in the prosecutor's office. Both documents have been based on structured interviews conducted with 40 trial deputies and 25 prosecutors in policy making roles. The professional experience of the 40 trial prosecutors ranged from less than six months to nine years, with a median experience of three years. Only prosecutors who had worked with rape cases were selected to be interviewed. At the time we interviewed them they had had on the average (median number) 15 rape cases presented to them for filing and 10 rape cases assigned for trial. An average of only 4.5 rape cases per prosecutor had actually proceeded to trial; of these, an average of 2.5 had resulted in a conviction. While several very experienced prosecutors were interviewed, the general sample suggested that even those prosecutors who have dealt with rape cases have a relatively limited experience.

The purpose of this document is to discuss the filing and trial responsibilities of prosecutors as they specifically pertain to the crime of rape. It is designed, in part, for use by individual prosecutors who are assigned to rape cases. For these prosecutors, it can be used as a reference text to suggest new ideas and to facilitate comparison of their experiences with those of other prosecutors. In addition, it can be used as a training manual to stimulate discussion among prosecutors who have not had extensive experience with rape cases. It is hoped that this manual may not only provide specific guidance to prosecutors involved with particular rape cases, but also serve as a catalyst for new ideas and attitudes regarding the crime of rape and criminal prosecution.

To facilitate clarity of style, an editorial decision has been made that rape victims and victim advocates will be referred to as "she." All other persons, including prosecutors, will be referred to as "he." This is clearly an arbitrary distinction, though it accurately reflects the prevailing pattern of sexes involved in rape cases and their disposition.

CHAPTER 1. INTRODUCTION

The recent public attention focused upon the crime of rape has often manifested itself in vigorous criticism of the prosecutor. Because he plays an integral part in the criminal justice process, the prosecutor is often identified with the meager record of the entire system. It is estimated, for example, that less than two percent of all reported rapes result in a conviction for rape.[1] As a public official who is an influential member of the criminal justice system, the prosecutor inevitably must share responsibility for this failure.

Direct criticism has been made of the prosecutor's *response* to the crime of rape. The filing and plea bargaining practices of many prosecutors suggest that they are not committed to aggressive rape prosecution; rather, they are cautious and unwilling to file or try difficult cases. The attitudes of many prosecutors toward rape suggest that they still embrace the myths, now discredited, that have historically surrounded this crime. Finally, their often insensitive treatment of victims suggests that prosecutors do not appreciate or understand the impact of rape.[2] While every prosecutor would undoubtedly acknowledge the seriousness of rape, until recently prosecutors have focused little attention upon this crime.

Some of the public criticism of prosecutors may be unfair, raising complex issues that are not susceptible to simple solutions. Nonetheless, several prosecutors have identified significant problems in traditional rape prosecution and have begun to confront them.[3] For example, prosecutors have created specially trained filing units whose personnel are sensitive to victim needs. Rape cases have been assigned to certain rather than all trial lawyers within an office, in order that expertise can be cultivated and consistent decision making insured. Prosecutors have appointed victim advocates within their own offices, formed closer liaison with the police, lobbied for legislative change and promulgated aggressive filing and plea bargaining standards. All of these programs have begun to demonstrate that the criminal justice system can win rape cases and support rape victims.

Rape is not unique in its demands upon a beleagured criminal justice system. However, rape does pose several problems that demand special consideration by prosecutors. Some of these issues are inherent within the nature of the crime itself; others result from the recent public attention focused upon rape and the response of the criminal justice system. Unless these issues are identified and addressed, the record of prosecutors is likely to remain subject to public criticism.

The Victim. The prosecutor's concern with the rape victim is two-fold. First, the rape victim, as a victim of crime, deserves the attention, concern and understanding of the prosecutor. While the violence experienced by the rape victim may be analogous to the trauma known by other victims, it is becoming increasingly clear that the impact of this crime is often special and profound. The prosecutor, as a government official to whom the victim has turned, has an obligation to treat her with dignity and respond appropriately to her needs.

The victim is also the most important witness in the prosecutor's case. He must therefore help create a criminal justice system that will encourage the victim to prosecute. In addition, he must work to facilitate communication with the victim and prepare her to be an effective witness. Given the nature of the crime and its impact upon the victim, special skills may be required, of which the prosecutor may be only dimly aware.

The Crime. Prosecutors generally acknowledge that rape is among the most difficult crimes to prove. Where the issue is identification of the suspect, the crime is similar to the most difficult "one-on-one" robbery. Where the victim and the suspect have been acquainted and identity is not an issue, there is often an inherent defense of consent. The state's case may turn on whether a crime even took place, a posture that is uncommon with other violent crimes.

The crime of rape often occurs in the darkness of night and without witnesses. Physical evidence to prove either identity of the assailant or the victim's lack of consent is infrequently found. As a result particular care must be given to the gathering of every available piece of evidence and the developing of its potential as proof. Such care may require training and expertise that few prosecutors presently possess.

The Law. As recent law review articles and legislative reforms imply, the traditional rape law has been undergoing profound change.[4] Ongoing legislative activity with regard to the admissibility of evidence, the definition of the crime and the penalty structure for rape should alert the prosecutor to the need for active involvement with law reform. The prosecutor must keep abreast of legal change; he must also be in a position to influence the legislative debate as a representative both of the electorate and of the criminal justice system. In addition, much

of the legislative reform has been achieved with promises that there will be increased prosecution; and the responsibility for implementing changes resides with the prosecutor.

The Public. At the same time that part of the public insists on more aggressive rape prosecution, another part, often seated as jurors, seems unwilling to label an individual a rapist without the most compelling of cases.[5] Thus, while there may be pressure to file more rape cases, there is also the practical reality that social attitudes may make these cases particularly difficult to win at trial. This dilemma suggests the need for careful judgment in the filing, plea bargaining and trying of rape cases. Jury attitudes can be overcome, but only if the prosecutor is genuinely committed to his case and can skillfully choose and then convince the jury. Conservative public attitudes toward this crime may ultimately require the prosecutor to become actively involved in a program of public education.

The criminal justice system. The methods by which the criminal justice system responds to the crime of rape are already undergoing significant change. Some police departments have instituted intensive training and created specialized units to investigate rape complaints. Many hospitals have developed protocols for the examination and treatment of rape victims. In most large jurisdictions, a rape crisis line is available to assist victims. The prosecutor must be aware of these and other programs and cooperate with them in the pursuit of common goals. Where such programs do not exist, the prosecutor, as an elected official, may have a special responsibility to work for their development.

While each rape case is unique and therefore no document can outline "how to" prosecute rape cases, this manual discusses those strategies and techniques which seem fundamental to the aggressive prosecution of rape cases. It begins by providing information about rape and its victims. Only if the prosecutor can appreciate the nature of this crime and its likely impact on the rape victim, will he be able to make appropriate legal judgments about the case. The manual then discusses the evolution of the rape case from filing through trial, suggesting ways in which the prosecutor can maximize the possibility of conviction. Finally, it considers the importance of prosecutor interaction with police, medical personnel and victim counselors to facilitate the prosecution of rape.

NOTES

[1] Of the 635 reported rapes from Seattle, Washington (1974) and Kansas City, Missouri (1975) studied as part of this research, 45 cases were charged as rape or attempted rape. Of these 45 cases, 10 resulted in convictions for rape or attempted rape and an additional 10 cases resulted in convictions for other felonies.

[2] See: Carol Bohmer and Audrey Blumberg, "Twice Traumatized: The Rape Victim and the Court", *Judicature*, 58 (1975), 391–99; Ann W. Burgess and Lynda L. Holmstrom, "Rape Victim Counseling: The Legal Process", *Journal of the National Association for Women Deans, Administrators, and Counselors*, (Fall, 1974), pp. 24–31; Lynda L. Holmstrom and Ann W. Burgess, "Rape: The Victim and the Criminal Justice System", *International Journal of Criminology and Penology*, 3 (1975), 101–10; Nancy Gager and Cathleen Schurr, *Sexual Assault: Confronting Rape in America* (New York: Grosset and Dunlap, 1976); Sybil Landau, "Rape: The Victim as Defendant". *Trial*, 10 (July-August, 1974); pp. 19–22; Sally E. Mathiasen, "The Rape Victim: A Victim of Society and the Law", *Williamette Law Journal*, 11 (1974), pp. 36–55; Pamela L. Woods, "The Victim in a Forcible Rape Case: A Feminist View", *American Criminal Law Review*, 2 (Winter, 1973), pp. 335–354.

[3] See Harl Haas, "Rape: New Perspectives and Approaches", *The Prosecutor*, 11 (1976), pp. 257–259.

[4] For a comprehensive review and analysis of legislative change with regard to rape, see *Forcible Rape: An Analysis of Legal Issues* published by National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration as part of this project.

[5] See Harry Kalvin and Hans Zeisel, *The American Jury*, (Chicago: University of Chicago Press, 1966), pp. 249–254.

CHAPTER 2. RAPE AND ITS VICTIMS

It is unlikely that a prosecutor will become involved with many rape cases in his entire career. In addition, he is subject to the same myths and media presentations that influence everyone's perception of what is rape and who are its victims. The purpose of this chapter is to inform prosecutors about rape and to replace stereotypes with a more factual portrayal. By appreciating the nature of the rape victim's trauma, the prosecutor may be better prepared to establish rapport and communicate with her. By understanding both the facts and the myths of rape, the prosecutor may be better equipped to objectively assess the case and later more convincingly argue to the jury. The case that appears to be factually weak may, in fact, be a much stronger case, disguised by a victim who is reacting emotionally to the crime and misperceived by a prosecutor who is unfamiliar with the complexities of rape.

2.1 The Incidence of Rape

Rape is the fastest growing reported violent crime. In 1975, there was an estimated total of 56,090 forcible rapes reported in the United States, representing an increase of 48 percent from 1970.[1] Victimization studies have shown that rape is probably one of the most underreported of all major crimes as well. Estimates of the ratio of reported to unreported rapes range from one in three to one in five.[2] If the actual number of rapes is four times the reported number, almost one quarter million rapes were committed in 1975. If that number is correct, then one in every 500 women in the United States was sexually assaulted in 1975.[3]

The incidence of reported rape is unevenly distributed. The Southern states recqrded 31 percent of the total volume of reported rape in 1975 while the North Central and Western regions each reported 25 percent and the Northeastern states reported 19 percent. Metropolitan areas experienced the highest rate, 61 victims per 100,000 females. Cities outside of metropolitan areas reported a rate of 26 per 100,000 females while the rate in rural areas was 23 victims per 100,000 females. Victimization rates, when analyzed geographically, indicated that females in the Western states were victims of forcible rape at the rate of 73 per 100,000. In the South, this rate was 50 per 100,000; in the North Central states, 47 per 100,000; and in the Northeast 41 per 100,000. There are no data available to suggest how the nonreporting rate corresponds to geographic sectors or demographic factors.[4]

As part of this study, 1,261 police reports from five metropolitan police departments and 146 victim interviews from three cities were analyzed in detail. The following patterns emerged from this research.

a. *Victims*. The victims of rape were usually young and single. Police reports indicate that over half of the victims were 20 years of age or younger. Another quarter to one third of the victims were under 25 years of age, while less than 15 percent of the rapes reported to the police involved women over the age of 30. Although women of all racial groups reported rapes, black women were slightly overrepresented when compared to their numbers in the general population.

b. *Offenders*. Most offenders were estimated to be in their twenties and, on the average, four to five years older than their victims. In general, racial minorities tended to be overrepresented in the offender population. In areas where the minority population is relatively small, the number of minority offenders identified by reporting victims was four or five times greater than their representation in the population as a whole. There was nothing particularly unusual about the physical characteristics of offenders. The majority of victims described their assailants as average in terms of height and weight. In approximately 60 percent of the cases reported to the police, the rapist was a complete stranger to the victim. In another quarter of the reported cases, the victim was acquainted with the offender or had a limited social interaction with him. The remaining 10 to 15 percent considered the offender a close friend or relative.

c. *Initial contact*. The two most common places victims reported encountering their assailant were in their own homes or on the street. In approximately one half of the cases under review the victims reported that force was used against them immediately. In an additional third of these offenses, the victim reported being with the accused for less than 60 minutes when the assault occurred. Hitchhiking was involved in less than 15 percent of the rapes reported to the police.

d. *Weapons, force, and threats*. Weapons were used in approximately 50 percent of the reported rapes. Knives or guns were most widely employed, but such items as bottles, rocks, and lighted cigarettes were also used as weapons. In 75 percent of the rape reports, some type of strong-arm force was used against the victim. Most of these victims reported being overpowered and held down, but choking and beating were not uncommon. Some type of threat was used against 60 percent of

all reporting victims. These threats were usually made against the life of the victim.

e. *Resistance*. Approximately one third of the victims reported that they were unable to employ any type of resistance. Over half of the women reported offering some type of verbal or other form of passive resistance. In addition, roughly half of the victims reported fighting with their assailants. Approximately one third of the victims who fought back reported that their resistance had no apparent effect on their assailants; most of them, in fact, reported that their physical resistance caused the accused to become more violent and aggressive.

f. *Injuries*. About one half of the women who reported being raped sustained physical injuries of some type. When injuries occurred, they usually consisted of minor cuts, scratches, and bruises. Few victims were seriously injured. Of the women who were injured, one half reported that their resistance was the cause of the injury. Fully 80 percent of all victims believed that resistance would result in injuries.

g. *Additional crimes*. About half of the women who reported being raped also reported being the victims of additional offenses, including other sex crimes. About 25 percent were kidnapped or otherwise abducted. Theft was involved in 20 percent of rape reports. About 30 percent of the victims were forced to commit fellatio, and cunnilingus and anal intercourse were each reported by about 10 percent of the victims. Victims reported being forced to commit multiple acts of vaginal intercourse in approximately 25 percent of the cases.

2.2 Social Attitudes About Rape

Discussion of forcible rape is often replete with hearsay information, party humor and fictionalized accounts drawn from novels, television and movies. Thus it is not surprising that many incorrect assumptions and attitudes have been formed about how and why rape occurs. For a prosecutor, knowledge of these myths is helpful not only to assess his own judgment and that of the police, but also to deal with the likely perceptions of the jurors who will ultimately hear the case.

A woman cannot be raped. One myth about rape suggests that rape is virtually impossible unless a woman wills it to happen. This attitude is crudely reflected in jokes about rape: "Have you ever tried to thread a moving needle?" or "A woman can run faster with her dress up than a man can with his pants down." Some believe that "no" to a sexual advance actually means "yes," and it has even been theorized that secretly or unconsciously women long to be raped. A practical corollary to these notions is that unless there are signs of resistance such as visible injuries, the victim must have wanted the "rape" to occur.

The fallacy of this myth can be exposed in a number of ways. First, in approximately one-half of all rapes, the victim is threatened with a weapon. She is thus likely to resist or to exhibit indicia of the rapist's force. Second, most women do resist in *some* manner. Perhaps because most women's experience and expertise with violence tends to be minimal, they are unlikely to engage in physical combat or succeed when they do. Many women employ what is referred to as "passive resistance." This can include crying, being slow to respond, feigning an inability to understand instructions or telling the rapist that they are pregnant, diseased or injured.[5] While these techniques may not always be successful, their use does suggest that the victim is surely not a willing partner. Finally, for a small percentage of victims, the assault occurs so suddenly and the resulting fear is so overwhelming, that they virtually "blank out" or become immobilized. With this type of response, referred to as "traumatic psychological infantilism" or "frozen fright," the victim not only is likely to submit, but also may give the paradoxical impression that she is friendly and cooperative.[6] Thus there is no simple relationship between resistance or injury and a willingness to be "raped." The range of violence and threatened violence employed by the rapist and the variety of victims and victim responses are too diverse to conclude that women can either easily avoid rape or secretly desire it.

Women "Cry Rape." It is often suggested that a high percentage of reported rapes are fabricated. It is alleged, for example, that many women "cry rape" to seek revenge, to explain a pregnancy or to hide an illicit affair. The number of rape reports which are actually falsified is difficult to assess. The estimates of police officers who were surveyed about the number of false accusations ranged from 0 percent to 96 percent of all reports. On a national average, 15 percent of all forcible rapes reported to the police were "determined by investigation" to be unfounded. Given the inherent skepticism of many criminal justice personnel to rape victims and the harassment and invasion of privacy that a reporting victim is likely to confront, it is doubtful that many false accusations proceed past the initial report. Curtis (1974) asserts that "contrary to widespread opinion, there is in fact little hard empirical evidence that victims in rape lie more than, say victims in robbery." [7] Undoubtedly, there are false reports. However, the danger posed by the myth that women "cry rape" is that police officers and prosecutors will believe it and then place the burden on the victims to prove the contrary.

The women precipitated the attack. There is another popular conception that the victim actually provoked the rapist by her suggestive clothing or actions. She is thus "contributorily negligent," and as a result the rapist is somehow less culpable. Rape victims who were interviewed often described their own clothing at the time of

the rape as unattractive and unseductive; many, in fact, wore blue jeans and heavy sweaters. Convicted rapists who were interviewed suggested that the victim's clothing had some influence on their choice of a victim, but it did not precipitate the rape. The rapists stated that the rape was planned in advance, and that the victim's clothing was perhaps one factor considered in the selection of the victim.[8] An analogous argument is made concerning the rape victim who was hitchhiking or had been drinking in a tavern prior to the rape. The myth presents these actions as being either those of a "loose woman" or those of a careless person who may be asking for trouble. The criminal law, of course, does not view the victim's actions in these cases as contributing to the crime. The police and the prosecutor must therefore distinguish between the possibly poor judgment, naievete or simple independence of the victim and the obvious criminal acts of the defendant.

Myths about the rapist. It is a commonly held belief that a rapist is a sex-crazed maniac, who has no normal sexual outlets. Recent research has found, however, that rapists do not differ significantly on psychological tests from the average male though there is a tendency to express more anger. In contrast to the rapist, other sex offenders (molesters, exhibitionists, etc.) differ significantly from the average male. Other studies report that most convicted rapists had a willing partner (a wife or girlfriend) with whom they were sexually active.[9] A related myth suggests that rape is a crime of sexual impulsiveness and that once a male is aroused, there can be no turning back. Research indicates, however, that between 60 and 70 percent of all rapes are planned in advance. The majority of rapists watch for a likely victim and then approach her with rape in mind.[10]

2.3 Rape Trauma Syndrome

Some experiences or situations in life are considered crisis-inducing for any person who experiences them. Rape is one such experience. The psychological reactions of a woman who has been raped are similar to the emotional reactions that people experience in other types of crises such as a severe automobile accident, accidental death of a loved one, or serious physical injury. Normal patterns of living are temporarily disrupted by these events; and mechanisms to deal with stress are severely taxed. Certain reactions to such crises can be expected and should be considered a healthy response.

Researchers and medical personnel have interviewed victims of rape immediately after the attack and for a period of months thereafter. They have observed a common sequential pattern of emotional reactions that have come to be known as the "rape trauma syndrome". Not all rape victims follow the identical pattern of response, nor do they experience the same symptoms or similar symptoms with the same intensity. Virtually all victims, however, experience some of the emotions described; and therefore the rape trauma syndrome provides a useful means to discuss the reaction of victims in general to the crisis of rape. The rape trauma syndrome describes three phases of psychological response: (1) the acute phase, (2) the adjustment phase, and (3) the integration phase.[11]

Acute phase. For the first several days following their rape, many victims experience extreme psychological reactions. Frequently, victims enter a state of emotional shock. They cannot believe the rape occurred and they may be unable to comprehend what has happened or what they should do. As a result, some victims act in what appears to be an illogical or irrational manner. For example, victims may not contact the police for hours or days, or they may repeatedly bathe or wash their clothes.

Every victim experiences some degree of abject fear. The forcible rape itself is most commonly perceived as a life-threatening event rather than a sexual intrusion. Often the victim's life is explicitly threatened. In addition, because weapons are often used, the victim fears injury, mutilation or permanent bodily damage. It is this fear that may determine and explain many of her actions during the hours and days immediately after the rape.

In addition to fear, victims are likely to experience a variety of other emotions, such as anger, shame, guilt, helplessness, anxiety, revenge, powerlessness, humiliation and embarrassment. It is common for victims to exhibit severe and abrupt mood changes immediately after the rape. For example, during an interview, a victim might unexpectedly display a surge of anger followed by a sudden expression of guilt or self-blame. Such mood changes can be as surprising and unexpected to the victim as they are to the interviewer.

Rather than expressing their emotions, some victims respond to a rape with a calm, composed demeanor or "controlled reaction." [12] These victims do not wish to exhibit emotions, especially in front of a stranger or authority figure like the prosecutor. Psychologically it is important for these victims to demonstrate that they can handle stress in a mature and adult manner. The appearance of casualness hides and may avoid true and often intense emotions. This "control" may result in victim responses which are considered inappropriate such as giggling, smiling or even laughing. Unfortunately this type of response can cause others to doubt the victims account of the rape.

Victims experience these feelings at different times and in different ways depending on the manner in which they normally cope with crisis. Strategies will be affected by such factors as the victim's age and maturity, her upbringing (how she was taught to deal with crisis), resources within her environment (how those close to her will respond), and her financial security. The victim's

reaction to the rape is a complex interaction of the imposed situational crisis and the victim's own personal lifestyle.

Adjustment phase. Following their intense emotional reaction to the rape, victims often give every appearance of having learned to cope with their experience. Very often they accomplish this by blocking out all thoughts regarding their rape and rearranging their daily life so that they are not reminded of it. During this period some victims indicate they wish to withdraw their complaints or become uncooperative with investigators and prosecutors. This denial period is usually a temporary stage of outward adjustment, for at this time many victims have not fully come to terms with their experience. For these victims, fundamental problems may remain, only to emerge at a later time.

Integration phase. The final stage of dealing with rape trauma occurs over a long period of time and requires the victim to fully integrate her experience into her life as a whole. Because it so dramatically upsets the normal routines of a victim's life, a rape can produce a period of self-evaluation and new decisions. Many facets of the victim's life may be different after the rape. Some women find it necessary to change residences in an effort to achieve a feeling of safety. Such behavior is particularly common when women have been raped in their own homes. Other women spend a great deal of time, energy, and money to secure their present homes with new locks, bolts, or alarm systems.

Victims may perceive themselves as being changed by the rape either because they feel differently about themselves or because they believe that others see them as changed and stigmatized. Many victims find it difficult to return to their normal responsibilities at work or school. If they do return, they are often unable to concentrate or carry out their normal tasks. For some victims this means either a decision to quit work or school or a decision by an employer to release the woman. In such instances, the woman's life is further disrupted by the lack of employment and financial security.

Family support can be crucial at this time. Unfortunately, family members can respond in ways that are not helpful. Victims describe husbands, boyfriends, or parents who doubt their account of rape. Victims regularly report that relationships with their husband or boyfriend are strained. Most victims severely limit their outside social activities for extended periods following their assault.

The victim and the criminal justice system. The effects of the rape trauma syndrome can clearly influence the victim's interaction with the criminal justice system. There are many specific ways in which the victim's emotional defense mechanisms can interfere with the standard procedures for investigating and prosecuting rape cases. By being aware of potential difficulties, criminal justice personnel at all levels can help victims resolve crises as they arise. Careful attention from the criminal justice system can prevent victim withdrawal and increase the likelihood of successful prosecution.

The victim who gives a statement to the police or the prosecutor shortly after the rape may be unable to relate the incident fully and accurately. While ability varies among victims, all statements should be taken and later read with a consideration of the victim's emotional state at the time. It may be appropriate either to tape the victim's statement to capture the emotional quality of her voice, or to wait a period of time before any formal statement is taken. The emotional factor is not only critical for criminal justice personnel to consider at the time of statement taking, but it can be important later in explaining to juries the particular content of such statements.

Following their assault, some victims revert to a state of dependence or helplessness. Since decision-making may become an ordeal, these victims can become extremely suggestable to pressure. A relative or friend with a strong opinion as to whether the victim should prosecute the rapist may be particularly influential. Victims also become very sensitive to the attitudes and behavior of authority figures such as the police officers and prosecutors involved with their cases. Lack of support from criminal justice personnel is likely to cause victims to become confused and uncooperative.

Victims often respond to the rape with a significant amount of guilt. Some victims exaggerate their own responsibility for not avoiding a potentially dangerous situation. This feeling is often reinforced when the victim is questioned by police and prosecutors about her inability to resist successfully or escape. The victim may need some help to understand that hindsight always enables one to make better judgments. With proper emotional support, the majority of victims come to understand that they probably did the best they could under circumstances of potentially great personal danger.

Victims often report significant disruptions in their daily routines. Some women, for example, are unable to sleep at night and are easily awakened by noises that would not normally bother them. Frequently, women also report loss of appetite. Others find that eating causes nausea, especially if they were forced to perform oral sex. The victim's ability to concentrate may be greatly diminished and her attention span temporarily shortened. In general, the victim's ability to perform normally may be severely strained, particularly as she is exposed to the further stresses of criminal justice procedures.

Nightmares are a common experience for women who have been raped. The dreams often consist of vivid pictures in which the victim relives the terror of the rape

situation. The paralyzing feeling of doom is recreated with such reality that the victim often awakens to the same frightening powerlessness, loss of autonomy and life-threatening fear of the rape itself. These dreams act to reinforce the victim's general anxiety that she is no longer able to protect herself and may induce her to request that her case be dropped.

Women who have been raped sometimes experience phobic reactions to circumstances or characteristics that they relate to their assault. For example, a victim who was raped on a stairwell may subsequently find it very difficult to use any stairs. Police and prosecutors should be aware of such phobic reactions, particularly if the victim is asked to return to the scene of the crime or to view evidence from the rape.

Phobic reactions and recurring nightmares are natural methods for coping with severe trauma. Rape victims, however, may be very worried that they are "going crazy", that they can no longer cope, or that they will never be normal again. It is important that victims be able to talk to someone about these fears. Police and prosecutors can help by sharing their knowledge about the reactions that victims normally experience. By demonstrating sensitivity and concern, prosecutors can increase a victim's ability to recover quickly from the trauma of being raped and can facilitate the investigation and prosecution of her case.

2.4 Rape Victim Interviews

At some point, either before the filing of charges, the preliminary hearing or the trial, the prosecutor will meet the victim in an interview setting. The prosecutor takes to this interview his legal training and his professional responsibility to gather information, assess the strength of the case, keep the victim involved with prosecution and prepare her for court. He is often busy, inexperienced with counseling and interviewing and less than enthusiastic about exploring the violence of rape with its victim. The victim comes to the interview perhaps in a state of shock or with a strong desire to deny or forget the ordeal she has lived through. She may be anxious to seek retribution or she may find that the interview is still another personal intrusion, this time by the prosecutor. The prosecutor represents an authority figure to whom she must recount the intimate facts of the rape and before whom she must act appropriately, if not formally. It is unlikely that she is of the same sex, age, educational background, and, perhaps, race of the prosecutor. The fact that an interview is even occurring may suggest to her that the statements she has given the police were doubted. The purpose of this section is to briefly discuss techniques to facilitate this interaction. It can only begin to raise the more obvious features of interviewing in the context of rape cases.

In preparation for an interview with a rape victim, the prosecutor should review the case and decide what he hopes to accomplish during the interview. If at all possible, he should carefully read the victim's written statements to establish a sense of her maturity, demeanor, vocabulary, and perhaps some hints on how she reacted emotionally to the rape. If the prosecutor can spend even fifteen or twenty minutes planning for the interview, he can identify aspects of the case he hopes to explore and formulate interview strategies to enhance communication in a sensitive manner.

The setting of the interview can help establish its tone. Privacy and potential interruptions are two factors to consider before the interview actually begins. In most instances, interviews should be as private as possible. Occasionally, one or more other persons may accompany the victim to the interview. If their presence is assessed to be beneficial, they may be allowed to assist in the interview process. The interview should create an atmosphere of open communication. A desk, in particular, may be an obstacle to this process. The prosecutor who sits with an unobstructed view of the victim will put her more at ease. In addition, good eye contact with the victim can communicate a sense of involvement and interest in what the victim says. Breaks in eye contact by the victim may signal her discomfort or embarrassment at having to discuss, for example, threatening or personal aspects of the assault.

The actual interview will vary according to the prosecutor's personal style and the circumstances of the specific case. However, it is important that the prosecutor be as natural and comfortable as possible. Victims report that they feel uneasy when the prosecutor is mechanical, withdrawn or nervous. The beginning moments of the interview are significant for they can set the mood for the entire interaction. The prosecutor should introduce himself and ask the victim her name and how she would like to be addressed. She might be thanked for coming to the office and for reporting the rape to the police. She should be told that the process of reporting the crime of rape is not easy and that it takes great courage. The purpose of the interview should be explained in simple and direct language. The victim should be encouraged to tell everything, even if she feels embarrassed by it or has not yet told anyone else. She should be assured that it is important to have damaging facts revealed, for a failure to disclose them may ultimately be fatal to the prosecution. Before the facts of the case are discussed, the prosecutor might ask if the victim has any questions. This allows her to become an active participant in her case and provides an opportunity for her to voice her real fears. By acknowledging immediately any apprehension the victim might be experiencing, the prosecutor has opened the interview in a manner that tells her that her feelings are important.

During the course of an interview, it is not uncommon

for a rape victim to begin crying. This often poses a difficult and embarrassing problem for both the prosecutor and the victim. In these circumstances the prosecutor might attempt to relieve some of the pressure that the victim must feel. He might break the pace of the interview by offering a timeout or water or coffee. More directly, he can acknowledge the victim's feelings by commenting, "I've never been raped but I do understand the feeling of being very frightened or fearing for my life." or "I have come to understand what you might be feeling by listening carefully to what other victims have told me." In these ways the prosecutor can communicate to the victim that she is in a safe place with a sensitive listener and that crying is an acceptable expression of her emotions.

The types of questions and the manner in which they are asked will greatly affect the atmosphere of the interview. Closed questions such as "Did he use a weapon?" or "What time did he let you go?" can be answered with a short statement and, if continued in a series, will often cause the victim to become passive and unresponsive. Closed questions do not encourage the victim to express herself and do not allow the prosecutor to discover more about the victim's perception of what happened or how well she is able to relate it. Some victims report that this type of questioning resembles an inquisition in which the prosecutor looks for inconsistencies and expects the "right" answer. Open questions such as "And what happened next?" or "Can you tell me more about that?" will allow the victim to talk at her own pace and in her own manner. Listening carefully to what the victim says can give the prosecutor an excellent sense of the case from the victim's point of view.

Often rape victims leave the interview uneasy and uncertain about themselves. They are intuitively aware of the negative attitudes and judgments of the prosecutor. When asked what the prosecutor could do to make the criminal justice procedures less harrowing, victims frequently respond by saying:

> "Don't accuse me unfairly of having somehow asked for it by my negligent behavior."
>
> "Don't imply that I provoked the rape."
>
> "Don't make personal judgments about me that are not relevant to the case."

These responses express a strong feeling that the prosecutor should judge the case on its legal merit rather than on the basis of personal bias.

Since many women themselves wish they had acted more quickly and assertively to stop the rape, they are likely to interpret questions regarding resistance as implied accusations that their efforts were insubstantial. It is important that the prosecutor explain to the victim the reason for the questions and that she be reassured that she did the best she could under the circumstances. If information is needed about why she acted in a certain way, the question should be posed so that it does not sound as if judgment will be passed on her response. For example, the prosecutor might say "You were probably very frightened when you realized that he might rape you—can you describe for me what you were thinking and feeling? What were your thoughts about trying to escape or resist?" The woman may have been so frightened that she was immobilized or she may have assessed the situation and decided her best chance for survival was submission to the rapist's demands. Whatever the reasons, it is the prosecutor's responsibility to create an interview environment that allows the victim to fully describe what happened and what caused her to act in the way she did.

Questions about the details of the sexual acts may be especially embarrassing for the victim. Since sexual behavior is very private behavior, the topic is difficult to discuss in a matter-of-fact manner. In formulating questions, the prosecutor should be aware that the major reason for forcible rape is not sexual activity but violence, and that this violence involves the humiliation and degradation of the victim. If the prosecutor words his questions so that they communicate this understanding to the victim, she may be more comfortable and better able to address this highly charged portion of the interview.

Toward the end of the interview the prosecutor should carefully explain the next steps in the legal process and discuss the victim's responsibilities at each stage. Since most of these procedures will be new to the victim, she is likely to feel somewhat overwhelmed by the process and by the legal terminology used to describe it. It is unlikely that in a single interview the victim can grasp the complexity of the process or even know what questions to ask. Therefore, an individual within the prosecutor's office, perhaps the prosecutor himself, should be designated as a contact person whom the victim can call if questions arise about her case and its status.

If the victim is a child, an adolescent or has unrelated psychological problems, the impact of the rape may be particularly complex and the interview itself may be very difficult. The prosecutor should be sensitive to the special problems of these victims [13] and the potential need for additional counseling. It is his responsibility to identify his own limitations and provide specific information about available community resources. In many large jurisdictions, in addition to local mental health facilities, there are rape crisis centers available to assist the victims of rape. In Chapter 9, the importance of cooperation between prosecutor and victim advocates will be explored.

2.5 Conclusion

It should be clear to prosecutors who become involved with rape cases that each case is unique. Not only are the

factual patterns diverse, but the personalities and emotional reactions of the victims vary greatly. The myths that have reduced rape to cliches have denied the individuality of these victims and have caused the criminal justice system to unfairly prejudge these cases.

The prosecutor must strongly support the rape victim during the ordeal of prosecution. He must reinforce her decision to report the crime and assist her through both the criminal process and the emotional turmoil that follows the rape itself. The prosecutor must be more than simply a legal technician, for he must utilize interviewing and counseling skills that will ensure the victim's commitment and effectiveness as a witness. He is not, however, trained to be a counselor; and he must exercise particular care that his personal judgment not distort legal decision making. The present problem, though, does not seem to stem from overinvolvement in rape cases, as much as from an unwillingness or inability to imagine the rape experience from the victim's perspective.

The pattern of rape suggests that these are difficult cases. There are few victim injuries, witnesses or available physical evidence to assist the prosecution. For rape cases to be filed and tried effectively, prosecutors must be aggressive, skilled and willing to prepare intensively. The remainder of this document suggests techniques and strategies for the successful prosecution of these cases.

NOTES

[1] Federal Bureau of Investigation, *Uniform Crime Reports for the United States*, (Washington, D.C.: United States Government Printing Office, 1975), p. 22.

[2] In 1965, the National Opinion Research Center of the University of Chicago conducted a victimization survey and found that the actual rate of forcible rape in their sample was 3.66 times greater than the reported rate. President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (Washington, D.C.: United States Government Printing Office, 1967), p. 21. In California it has been estimated that the rate of actual forcible rapes to reported rapes was 1:5. State of California, Subcommittee on Sex Crimes of the Assembly Interim Committee on Judicial System and Judicial Process, *Preliminary Report* (1950). Police in Minnesota estimate the rate to be 1:4. Minnesota Department of Corrections, *The Sex Offender in Minnesota*, (1964).

[3] *The Uniform Crime Reports* indicate that the national rate based on the figure of 56,090 rapes was 51 per 100,000 females in 1975. This is a rate of approximately 1:500. See Federal Bureau of Investigation, infra., p. 22.

[4] Ibid., p. 22.

[5] Martin Symonds, "The Rape Victim: Psychological Patterns of Response", *The American Journal of Psychoanalysis*, 36 (Spring, 1976), p. 32.

[6] Ibid., p. 30

[7] Lynn A. Curtis, "Victim Precipitation and Violent Crime", *Social Problems*, 21 (1974), p. 601.

[8] Duncan Chappell and Jennifer James, "Victim Selection and Apprehension from the Rapist's Perspective; A Preliminary Investigation", unpublished paper presented at the 2nd International Symposium on Victomology, Boston, Massachusetts, September 8, 1976.

[9] See Richard T. Rada and Robert Killner, "Plasmic Testosterone Levels in the Rapist", *Psychosomatic Medicine*, 38 (1976), pp. 257–268; Asher R. Pacht and James E. Crowden, "An Explatory Study of Five Hundred Sex Offenders", *Criminal Justice and Behavior*, 1 (1974), pp. 13–20; Murray L. Cohen, et al., "The Psychology of Rapists", *Seminars in Psychiatry*, 3 (August, 1971) pp. 307–327; Walter Bromberg and Elizabeth Coyle, "Rape: A Compulsion to Destroy", *Medical Insight*, 22 (April, 1974), pp. 21–25.

[10] Chappell and James, infra.

[11] For a thorough description of this pathology, see Ann W. Burgess and Lynda L. Holmstrom, "Rape Trauma Syndrome", *American Journal of Psychiatry*, 131 (September, 1974), pp. 981–986; Ann W. Burgess and Lynda L. Holmstrom, "Assessing Trauma in the Rape Victim", *American Journal of Nursing*, 75, (1975), pp. 1288–1291; Ann Wolbert Burgess and Lynda Lyttle Holmstrom, "Coping Behavior of the Rape Victim", *American Journal of Psychiatry*, 133 (1976), pp. 413–18; Sharon L. McCombie, "Characteristics of Rape Victims Seen in Crisis Intervention", *Smith College Studies in Social Work*, 46 (1976), pp. 137–58; Malkah T. Notman and Carol C. Nadelson, "The Rape Victim: Psychodynamic Considerations", *American Journal of Psychiatry*, 133 (1976), pp. 408–13; Sandra Sutherland and Donald Scherl, "Patterns of Response Among Victims of Rape", *American Journal of Orthopsychiatry*, 40 (1970), pp. 503–11; Martin Symonds, "The Rape Victim: Psychological Patterns of Response", *American Journal of Psychoanalysis*, 36, (Spring, 1976), pp. 27–34.

[12] Symonds, infra., p. 30.

[13] For information regarding the special problems of rape victims who are children and adolescents see Ann W. Burgess and Lynda L. Holmstrom, "Sexual Trauma of Children and Adolescents", *Nursing Clinics of North America*, 10 (1975), pp. 551–563; Vincent Capraro, "Sexual Assault of Female Children", *Annals of the New York Academy of Science*, 142 (1967), pp. 817–819; Walter L. Hogan, "The Raped Child", *Medical Aspects of Human Sexuality* (1974), pp. 129–130; Edwin I. Roth, "Emergency Treatment of Raped Children", *Medical Aspects of Human Sexuality*, 6 (1972), pp. 85, 89–91; Joseph J. Peters, "Children Who are Victims of Sexual Assault and the Psychology of the Offender", *American Journal of Psychotherapy*, 30 (1976), pp. 398–421; Ann Burgess and Lynda Holmstrom, "Rape: Its Effect on Task Performance at Varying Stages in the Life Cycle", *Sexual Assault*, eds. Marcia Walker and Stanley Brodsky (Lexington, Mass.: Lexington Books, 1976), pp. 23–34.

CHAPTER 3. FILING

Whether to file charges is perhaps the most important decision the prosecutor makes with regard to rape cases.[1] Analogous to the police decision to investigate the complaint, the decision to file marks the formal entry of the case into the criminal justice system. More importantly, the decision *not* to file essentially terminates the involvement of the criminal justice system with the crime. While decisions to file rape charges are highly visible and systematically reviewed through the adversary process, the decision not to file is virtually invisible and unreviewable. A decision to file is thus critical to the prosecution of rape cases.

Prosecutor decisions have generally been quite conservative at the time of filing and have been dominated by two perceived characteristics of rape cases. Prosecutors have been cautious because, first, it is believed that rape reports are often falsely made. Wigmore, the prominent legal commentator, has written about psychological roots of such false reports:

> Modern psychiatrists have amply studied the behavior of young girls and women coming before the court in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men.[2]

Prosecutors more commonly allege false reporting by unpaid prostitutes or the young complainant who must explain her promiscuity to a father or boyfriend. The legal system has reinforced this skepticism by requiring corroboration of the crime and special cautionary instructions to the jury, or by permitting extensive cross-examination of the victim.[3] To screen false reports that have passed police scrutiny, prosecutors have often insisted on personally interviewing the victim before filing or required that she take a polygraph examination.[4] Neither of these procedures is normally required in the filing of other crimes.

Second, prosecutors, even if they are satisfied with the complainant's veracity, have been cautious in the filing of rape cases because they are perceived to be so difficult to win. Caution has been exercised particularly in those states whose laws have erected procedural barriers to effective prosecution. In addition, the political need in some jurisdictions to maintain a high conviction rate has led prosecutors to file only those cases with a high probability of conviction.

It is impossible to accurately assess the validity of the prosecutors' concerns about rape cases. Not only are no statistics available regarding the number of false complaints reported to the prosecutor, but these concerns are self-fulfilling prophecies. If the prosecutor does not believe the victim, the case is not filed and therefore cannot be won. If the prosecutor is unwilling to risk loss at trial, then the case will not be filed and failure is assured.

An additional factor also can account for conservative attitudes at filing. The crime of rape involves sexual acts that in other situations are perfectly legal. There are many cases in which it is a question whether the sexual contact was done in a criminal or social context; and here the prosecutor's decision may be influenced by his own ideological view regarding the nature of rape. One prosecutor who was interviewed as part of this survey clearly distinguished between rape victims who were employed or who were housewives with families and rape victims who were unmarried and on welfare. It became clear from his statements and those of others that personal attitudes toward women, sexuality and race may all affect the prosecutor's decision-making. While every prosecutor condemns rape as a heinous offense, not every prosecutor would agree on what constitutes a rape. This factor combined with the fear of false reports and the need for probable convictions has made filing judgments a central problem of rape prosecution.

Prosecutors have recently begun to reexamine some of their assumptions regarding rape cases. While everyone would concede that rape reports are occasionally falsified, many prosecutors have rejected Wigmore's philosophy. They no longer assume false reporting and no longer require extensive use of the polygraph and prefiling interviews. They conclude that it is unlikely a woman would subject herself to the insensitivity of the criminal justice system in order to lodge a false complaint. While prosecutors still consider rape cases to be difficult to win, a new recognition of the seriousness of the crime has encouraged prosecutors to take greater risks at the filing stage. Attitudinal changes, coupled with legal changes in many states, have encouraged the filing of rape cases that previously would never have even reached the prosecutor. The appropriate standard for filing now appears to be only whether there is a "reasonable possibility" of conviction.

This chapter explores the process of case filing and suggests filing strategies to maximize the possibility of later success at trial. It largely assumes that the police

and prosecutor believe the victim is truthful and the defendant is guilty of the crime. If the prosecutor believes that the defendant is innocent, the case should never be filed, for the prosecutor has an obligation to the criminal justice system beyond his adversarial role. But once the prosecutor is convinced of the defendant's guilt, he is obliged to utilize his adversary skills to insure conviction.

3.1 Case Analysis

In practice, the filing of a criminal case usually involves a brief presentation by the investigating detective, followed by the prosecutor quickly reading the case file, perhaps interviewing a key witness, glancing at the appropriate statute, and then filling out innumerable forms. The intellectual process of legal evaluation and evidentiary assessment becomes routine to the experienced prosecutor, for criminal cases generally follow well-defined patterns that are easily recognizable. The key component of case evaluation for the prosecutor is imagining and predicting how the case will look weeks or months later at trial. The more experience the filing prosecutor has, the better he will be able to imagine the unfolding of the case and assess its potential strengths and weaknesses. For less experienced prosecutors, who nationally seem responsible for most filings, the process may be an imprecise exercise with vaguely articulated goals and standards.

Proving the elements. One means to assimilate the available evidence and to assess the strength of the case is to analyze the evidence by reference to the elements of the crime. The rape case will generally be presented to the prosecutor as a "rape"; the prosecutor must be familiar with the elements of that crime and then inquire whether the evidence can establish these elements beyond a reasonable doubt. Though rape statutes vary from state to state, rape generally is defined to include three basic elements: sexual penetration, by the defendant, and against the will or without the consent of the victim.

a. *Penetration.* Statutes vary considerably regarding the type of penetration needed to prove a rape; there is even movement in several states to broaden the definition of rape to encompass sexual contact without penetration.[5] Generally, penetration, however slight, must be proved, but whether the penetration is vaginal, oral or anal, and whether it is by a penis or other instrument, the mode of proof is similar. Primary evidence of penetration will be contained in the victim's testimony that the defendant did penetrate the vagina or other orifice with his penis or other instrument. The victim must be expected to testify to this fact in words that are appropriate to her age and experience. However, because of her condition at the time of the rape and the nature of the assault she may be more or less aware of the specific nature of the act. Generally, the victim's testimony can establish all of the elements of the rape case. In those states which do not require corroboration, this testimony will suffice to withstand a motion to dismiss at the end of the state's case. The successful rape prosecution, however, is built upon corroboration of every part of the victim's testimony, even if it is not legally required.

Additional evidence of penetration is most commonly derived from the medical examination of the victim shortly after the assault. At least two kinds of evidence may be immediately available: (1) evidence of trauma to the orifice which was penetrated and (2) evidence of an emission by the assailant.[6] However, penetration can occur without evidence of trauma and without an emission by the rapist.

A skilled gynecologist or trained general practitioner should perform a special examination of the victim shortly after the attack. If there has been penetration, signs of laceration, inflammation and abrasions may be apparent at the point of penetration. The extent of trauma revealed may depend on the age and sexual maturity of the victim, the instrument of penetration and the circumstances of the intercourse. The doctor should specifically describe his observations with reference to location and severity. The prosecutor should inquire how these observations relate to the victim's depiction of the events.

Evidence of sexual emission can establish penetration if it is found within the victim's vagina, mouth or rectum. Material can be taken from these cavities by suction (aspiration) or by use of a cotton swab and then tested for the presence of seminal fluid. Semen contains acid phosphatase, an enzyme, which can be identified by reaction with a particular reagent. If acid phosphatase is found to exist in the aspirate or swabbed sample, then it is likely that penetration and ejaculation took place.

This sample can also be examined microscopically to determine whether sperm is present, whether it is intact, and whether it is motile. By reference to the quantity of acid phosphatase in the sample and the condition and volume of the sperm, an estimate can be made as to the time of ejaculation. There is significant debate as to the life of motile sperm within the vagina, with estimates ranging from 30 minutes to 24 hours. It is also stated that nonmotile sperm can remain in the vagina for up to four days. Sophisticated testing of the acid phosphatase may approximately determine the time of coitus up to a limit of 40 hours. Depending upon the care with which the specimens are retrieved and the sophistication of available analysis, the prosecutor may be able to use the evidence not only to prove penetration, but to corroborate the victim's account of the time of the incident.[7]

It is estimated that up to 20 percent of all samples

taken after sexual assaults with penetration reveal no sperm. It is important to remember that the assailant may have undergone a vasectomy, he may be sterile, or, if no semen is found, he may have used a condom or withdrawn prior to any ejaculation. In addition, the semen may have been washed out of the vagina through the normal cleansing processes of the human body.[8] At certain times of the victim's menstrual cycle, the vaginal environment may be particularly hostile to the semen and thus cause a quicker deterioration than normal.

While the presence of semen in the vagina suggests recent sexual intercourse, it does not necessarily prove that the intercourse was nonconsensual or with the defendant. It is thus important to explore with the victim the possibility of alternative hypotheses for the presence of semen, such as recent consensual intercourse. In states with severe restrictions on the admission of prior sexual history evidence, prosecutors have found it difficult to prove that the semen located in the victim must have emanated from the defendant. In such states, the prosecutor is prohibited from demonstrating that the victim did *not* have consensual intercourse in the period of time immediately prior to the examination without opening the door to extensive cross-examination. Where it is legally possible, the prosecutor must be able to explain away other hypotheses for the presence of semen as well as be able to explain how it is possible that penetration could occur without any evidence of semen.

The presence of seminal fluid *outside* the body may be used to suggest sexual activity, though it cannot prove that penetration occurred. Seminal fluid on the victim's or the defendant's clothing or body, bedsheets, car seats or wherever the intercourse is alleged to have occurred may be helpful to the state's case. The presence of dried seminal fluid on unwashed items may be detected for a considerable period of time. Once again, depending upon when the fluid can be retrieved and examined, it may be possible to suggest the time of ejaculation. The presence of semen on the exterior of the body can be detected by shining an ultraviolet light over the body. A Wood's Lamp, as it is called, causes semen to glow. Once its location is established, semen can be scraped or swabbed and then tested.

There are additional means of establishing penetration that are rarely practical for consideration at filing. Pregnancy, for example, represents definitive evidence of sexual penetration. Since it may take weeks after the intercourse to determine the pregnancy, this evidence is rarely useful for filing. Similarly, the transmittal of disease during intercourse may be useful to prove penetration. Gonorrhea, however, takes approximately six days to develop, while syphilis may take six weeks. A physical examination which occurs immediately after the rape will thus not reveal any venereal disease. The later development of syphilis, however, *may* be used at trial if the defendant is infected and the incubation time approximates the interval between the alleged rape and the onset of the disease.

Rarely does the defense in a rape case hinge on whether or not there was penetration. While this defense is common in statutory rape cases, in most forcible rape cases the defendant will either acknowledge the intercourse but argue that it was consensual, or deny the intercourse was with him. Regardless of the fact that a medical/forensic examination may not be central to the state's case, the prosecutor should insist that it be performed in every case. There are several reasons for the examination:
(1) it is very important to the health of the victim; (2) the defense may not be apparent at the time of filing; (3) the evidence serves to suggest that if the victim's allegation of penetration is accurate then the remainder of her story is true; (4) the tests suggest that the victim has been significantly inconvenienced in the prosecution of the case, and, therefore, it is unlikely that she has fabricated her story; (5) the procedure symbolizes the state's commitment to the victim, her story and the case; (6) the testimony of the doctor or forensic specialist lends authority to the victim's story and the case as a whole; and (7) the absence of this information invites defense attack.

b. *Identity of the defendant.* For the prosecutor, proving the identity of the defendant in a rape case is analogous to proving the identity of a suspect in any other serious felony. If the victim can make an identification, it is usually based on reference to the defendant's facial features or general appearance. She will normally choose him from a photographic montage and/or corporal lineup. The issue in most identification cases is whether the victim had an opportunity to observe the defendant at the time of the crime and thereby make a reliable subsequent identification. Since eyewitness identifications are often suspect, it is important to locate additional evidence that ties the defendant to the crime and thus bolsters the victim's testimony. In this regard, rape cases may provide evidence that is not normally available in other cases.

The intimate nature of the contact between the victim and the suspect may provide the victim with more bases for identification than would be available in a normal burglary or robbery case. These might include the suspect's pattern of speech and language usage, his particular breath or body odors, his clothing styles and materials, the texture of his body or facial hair, his brand and style of underwear, and whether he is circumcized or has appendectomy scars. It is important that police and prosecutors investigate these possible points of identification even if the victim's decision at lineup seems certain.

The victim's identification of the defendant can be corroborated if she can accurately describe the location of the rape and that location is in the sole control of the defendant. For example, if the rape occurred in the suspect's van or apartment, the victim's description of the scene can independently support her identification of the suspect. The victim's memory of a bumper sticker, car stereo or the pattern of furniture in a room can not only lead to the suspect's arrest, but substantiate her lineup identification. The prosecutor who suspects that identification will become an issue at trial, might encourage an artistic victim to draw a sketch of the interior of the suspect's van or apartment; a subsequent search warrant of the premises could produce photographs which can be introduced and compared to the sketches at trial. While at the time of trial the defendant might acknowledge his involvement but allege that the intercourse was consensual, the match of the sketch and photograph will still lend credibility to the victim's account. The elaborate exercise of drawing the sketch and taking photographs suggests that neither the victim nor the prosecutor anticipated that the defendant would interpose a defense of consent.

If the suspect's vehicle or apartment was the scene of the rape, any evidence that places the victim at the scene will substantiate her identification. The victim's fingerprints, clothing, purse or cigarettes found in the suspect's car or home can be extremely valuable evidence and thus it is important that a careful search be made. A failure to search allows the defense to later suggest that the state missed its chance to prove the case conclusively. If the search fails to reveal any evidence, the prosecutor must have an explanation—for instance, that the victim was not carrying a purse, or that exposure to the rain obliterated the fingerprints.

Identification can be corroborated in several other ways. The suspect's record should be checked to determine if identity can be established through a common modus operandi, scheme or plan. If items have been stolen from the victim at the time of the rape, a search of the defendant's home may reveal the stolen items.

Identification can be reinforced, though not determined, by comparing the suspect's blood type with various secretions found at the scene or recovered from the victim. Up to 80 percent of all men secrete blood factors into their urine, saliva and semen. If the suspect is a secretor, then blood stains, semen stains, saliva or seminal fluid on the victim can be analyzed for blood type. If the defendant's blood type matches the type found in the sample, the victim's story will be supported. Since a number of people could have the same blood grouping, such evidence of course cannot independently prove the identity of the suspect. Furthermore, where the victim's secretions are mixed with the defendant's, it is important to eliminate the victim as the secretor of the identified blood group. If the specimen recovered from the scene or the victim has been touched by someone, such as the investigating police officer, perspiration could contaminate the sample by adding additional blood factors. If done properly, however, such blood typing can be an important investigative tool, for a mismatch will positively eliminate a suspect while a positive match will support an independent identification.[9] Once again, failure to have such a test performed will raise the defense argument that had the test been performed, the defendant might have been exculpated. The prosecutor should make contact with local forensic laboratories to determine if they are able and willing to perform these tests. Where identification is the key issue, such forensic investigation can ultimately determine the outcome of the case.

c. *Lack of consent, force, resistance.* The legal standard which characterizes sexual penetration or contact as criminal varies greatly from state to state. Some states require proof of the assailant's forcible compulsion; others necessitate proof that the victim did not consent; others require evidence that the victim resisted. Conceptually these standards establish different burdens with regard to the behavior of the victim and the assailant. Some statutes emphasize the acts of the rapist, while others dwell on the reaction of the victim.[10] While these formulations have significant legal implications for the prosecutor in the way charges are filed and juries are instructed, his evaluation of the evidence at filing remains virtually the same regardless of the statutory scheme. The prosecutor seeks to demonstrate that the intercourse was not consensual whether this was because the assailant used force or deception or because the victim's resistance was overcome. The same types of evidence are used to establish the element regardless of its legal formulation. The trier of fact, having considered the actions of the defendant and the victim, and understanding the nature of the sexual act, must be persuaded beyond a reasonable doubt that the intercourse was not consensual.

Once again, the state's primary witness to establish this element is the victim. Her description of the events prior to, during and after the rape should clearly depict nonconsensual intercourse. Where the defendant argues that the intercourse was consensual, the victim's word will be pitted against his. Evidence that tends to support one testimony rather than the other may ultimately determine the outcome of the case.

The victim's testimony can be dramatically corroborated by evidence of the defendant's use of direct force. This may include bruises or lacerations captured in color photographs shortly after the attack. The victim should be reminded that if bruising develops after her initial

contact with the police, she should recontact them so that pictures can be taken. The filing prosecutor must not only be aware of any physical evidence resulting from the attack, but he must insure that this evidence is appropriately documented for subsequent use at trial. Evidence of cuts and bruises should be reinforced by their reference in medical and police reports. In the course of a routine victim examination, physicians often fail to notice or record bruises on the arms, neck or breasts. Similarly, patrol officers who respond to the scene, intent on understanding the basic facts of the assault, may not record simple observations of injury. It is critical that the record of such injuries, especially if minor, be consistently and carefully noted; the more people who notice these marks, the more significant they will appear later at trial when the bruises and scratches have healed. At the moment of filing, the prosecutor should make sure that the documentation is complete and consistent. Weeks or months later, at the time of trial, it is unlikely that physicians and patrol officers will have independent recollections of minor cuts and bruises.

A careful medical examination may reveal less obvious bruises and tears of the vaginal area. Once again, the doctor should be expected to carefully record the location and extent of these injuries. Many hospitals provide examining physicians with diagrams of the vaginal area to mark the location of injury (See Appendix to Chapter IX.)

Obviously, the use of a weapon is valuable evidence to establish that the intercourse was not consensual. The prosecutor should consider the use of a search warrant to locate a missing weapon if probable cause can be established that it is in a particular location. Whether or not the weapon has been recovered, the victim's statement should contain a detailed description and even a possible sketch. Later at trial, the vividness of the language, even in the absence of the weapon, may have a significant impact on the jury. If the weapon is found, the similarity between the description and the weapon can heighten the victim's credibility. In some jurisdictions, an actual gun that matches the victim's description can be introduced at trial for illustrative purposes.

The victim's emotional condition immediately after the attack, as observed by others, can also reinforce the victim's statement. While medical personnel may be in a position to make the most direct observations of the victim's physical injuries, any number of people who interact with the victim immediately after the attack could testify to her general condition. Such witnesses can include parents, friends, neighbors, nurses and victim advocates. Patrol officers are a potential source of such observations, though they are even less likely to report details of the victim's emotional state than her physical condition. Witnesses can report the victim's tears, incoherence, shock, fright, anxiety, and nervousness as long as these actions appear directly related to the rape and not to the trauma of reporting it.

Clearly the *res gestae* witness, or fresh complaint witness, the person to whom the victim first told the story of the rape, is critical to the state's case. In most jurisdictions, the "hue and cry" of the rape victim is itself admissable to corroborate her story. Such admissibility is an exception to the hearsay rule; the rationale is that if a woman is truly raped, is not fabricating a story, she will immediately report the crime. When that happens, the witness who first hears these words is valuable to the prosecution. The filing prosecutor might inquire if the victim called the police and, if so, whether her report has been tape recorded; if local evidentiary practice allows, its admission could be dramatic evidence. The written statements of *res gestae* witnesses should be precise both in the language used by the reporting victim and the victim's emotional condition at the time.

Since each rape and each rape victim is unique, it is impossible to predict how a victim would normally react to such an assault. Rape victims may not exhibit bruises or cuts and may not react with tears and hysteria. These cases are obviously less dramatic and often more difficult for the prosecutor to prove. At the time of filing, the prosecutor should explore the physical evidence and reaction of the victim in the context of the facts of the case and her personality. The "calm" victim may have been in shock or may have been able to deal with the experience less emotionally than another victim. She may have been fortunate enough to avoid injury, or perhaps she does not bruise easily. The prosecutor must be prepared to exploit for evidentiary purposes victim injuries and emotional reactions when available and yet explain their absence in other cases.

The very facts of the case may be used to suggest that the intercourse was nonconsensual. The prosecutor must clearly understand where and under what circumstances the intercourse took place. The worse the conditions were at the time and place that the rape took place, the less likely it would be that the intercourse was consented to. If the rape occurred in a cold, dark alley and the victim's apartment was nearby, it would be difficult for the defendant to allege consent. If the victim was having her menstrual period, it might be unlikely that she would consent. Types of sexual activity, especially anal or oral sex, if particularly offensive to the victim due, for example, to her religious training, may be noted. Obviously torn or soiled clothing, especially if it is expensive or special to the victim, can suggest unwilling intercourse.

The possibilities for such corroborative evidence to prove force and nonconsent are limited only by the imaginations of the prosecutor and the police working closely with the victim. If the development of this evidence is

postponed until the time of trial, however, it will be more difficult, if not impossible, to assemble. Conditions will have changed, witnesses will have disappeared, and potential testimony will already be limited or jeapordized by inadequately prepared prior statements. It is the responsibility of the filing prosecutor to think through the case, anticipate the defense, and prepare evidence for the trial.

Anticipating defenses. An integral part of evaluating the evidence at the time of filing is the anticipation of defenses. While it is difficult to separate consideration of the state's evidence and the defendant's response, anticipating and responding to defenses even at the filing stage is important enough to justify special attention. While defenses can be combined, and are often not clear even to the defense attorney until just before trial, they do seem to fall into several distinct patterns. These include: defense as to identity, defense as to consent, psychiatric defense, general denial and legal defense, and that there was no intercourse.[11]

The most decisive way to determine the defense is to ask the defendant. The prosecutor should insist that prior to the filing of any rape case, the suspect be contacted and urged, within legal bounds, to give a statement. It is less important what is said than that something is said. Very often the defendant will give clues to what his defense will be; more importantly, he may foreclose defenses that will appear more convenient nearer to trial. Once the case is filed, it may be too late to expect the defendant to say anything regarding the case.

a. *Defense as to identity*. This is a common defense where the facts of the rape suggest extreme force or sexual abuse that would make a consent defense unlikely. If the facts further suggest that the victim's opportunity to observe the defendant was limited or distorted, or the suspect attempted a disguise, then the prosecutor may anticipate an identity defense. As already indicated, except where the sexual nature of the assault may provide extra clues, the prosecutor's technique parallels that in any identification case.

If an identification defense is anticipated, the prosecutor should attempt to learn everything he can about the defendant as quickly as possible. Once the rap sheet is obtained, inquiries into prior arrests and convictions should follow to determine if the defendant has a *modus operandi* that can tie him to the crime. Admission of such evidence of other crimes is difficult. However, unless the prosecutor explores the background of the defendant, he will not even be able to attempt this maneuver.

Coincident with an attack on the state's identification evidence, the defendant will often attempt to establish an alibi. This strategy may not be known to the filing prosecutor, but if it is a possibility, immediate investigation can be very fruitful. Potential alibi witnesses should be contacted and "pinned down" to a story. If the suspect lives at home, his family could be queried about his whereabouts on the evening in question. If they do not have an answer, that, in and of itself, can be important for later cross-examination. Similarly, if the suspect is married, a few brief questions posed to his wife may be critical months later when she may be "reminded" of where he was that night. While the defendant could not be cross-examined about his refusal to speak to the detective, his family's refusal could be used to suggest fabrication or error if they later testify on the defendant's behalf. Given the limitations on resources, it may be impractical to interview all potential alibi witnesses; the prosecutor and the police must carefully decide who should be contacted. Especially with regard to an alibi defense, timing is a key element of case preparation.

b. *Defense as to consent*. If the filing prosecutor and the police could anticipate a consent defense at trial, their investigation at the time of filing would take a very different turn than if identification were the issue. With a consent defense, the case must be built by corroborating every facet of the victim's testimony, for her veracity, rather than her ability to identify, will be at issue. If the victim is believed by the trier of fact, then the defendant will most likely be convicted. The prosecutor must amass enough evidence to prove that the victim's story is more logical, and therefore more believable, than that of the defendant.

The prosecutor may be able to demonstrate lack of consent as well as establish identity by reference to the defendant's prior crimes with similar patterns. If such evidence is available and admissable, it can dramatically portray how the defendant consistently forces victims to submit and then argues that the intercourse was consensual.

If the defendant has given a statement, the prosecutor might isolate obvious points of disagreement between the defendant's and the victim's versions of the incident and then seek evidence that would support one story rather than the other. The smallest piece of corroborating evidence on a disputed point may be critical, for the defendant's story in a consent defense will closely parallel that of the victim. Laborious detail with regard to what happened before the rape may be identical in both stories, with divergence only at the moment of the rape.

After a careful analysis of the available evidence, and aware that more evidence may develop later, the filing prosecutor may determine that the case will depend solely on the testimony of the suspect and the victim. At this point, the filing deputy can do little except clearly signal to the prospective trial attorney that the issue will be credibility and the success of the case may very well depend on preparation of the victim for trial.

c. *Psychiatric defense*. Psychiatric defense can be anticipated where the facts of the rape are heinous and the identification evidence is persuasive. Often the defendant has confessed and has little to argue later except that he was not criminally responsible. Depending on state law, this defense may be signalled early to facilitate psychiatric examination. The psychiatric defense is usually declared after the case is filed and may not be anticipated by the filing prosecutor. In fact, the harder the filing deputy works to foreclose identity and consent defenses, the harder he may be pushing the defendant to an insanity defense.

Unless the defendant is obviously insane, the prosecutor's response to such a defense is that the defendant was responsible for his acts. The prosecutor should locate a psychiatrist to interview the defendant and even the rape victim. Because the victim was actually present at the time of the crime, she may be able to provide the psychiatrist with valuable information regarding the actions of the defendant. It should be noted that defense psychiatrists rarely interview the victim and thus have a less complete factual basis for their conclusions. In addition, the prosecutor should carefully analyze the defendant's actions prior to, during and after the rape in an attempt to suggest that the crime was calculated by the defendant with precision and understanding. Cunning and sophistication exhibited in preparing for the rape, threats and appropriate language used during the rape, and consciousness of guilt and desire to escape punishment evinced following the crime, would all suggest that the rape was not the product of an irresponsible, diseased mind.

d. *Legal defense*. In the strongest cases where the defendant may have little incentive to plead guilty, his attorney will be forced to make a rear-guard attack on every technical ground possible. In fact, the stronger the case, the more likely it will be subject to legal attack. This follows the old maxim: "If the facts are not on your side, argue the law, and if the law is against you, argue the facts."

In rape cases, legal attack will develop as it would in any other criminal case. Searches and seizures of the defendant's person or property will be carefully scrutinized. Similarly, any statements that the defendant has made will be examined for coercion or failure to give complete and comprehensible constitutional warnings. Where the identification is based on a photographic montage or lineup, the suggestibility of these procedures will be attacked. Where physical evidence has been gathered and analyzed, the chain of custody will be examined with great care.

These legal attacks are not unique to rape cases. What is important to the filing deputy is that he anticipate and think ahead to potential problems so that errors can be corrected and weaknesses be minimized. Simply responding to the facts and to the persuasiveness of the detective presenting the case will not guarantee the filing of a strong case. The more questions that the prosecutor can raise early, the fewer that will be available for the defense at trial. The more weaknesses that can be signalled to the trial deputy, the more opportunity there will be to confront them.

3.2 Pre-filing Interviews

The most important witness in every rape case is the victim; she is the essential witness without whom there is unlikely to be a prosecution. In light of this central role, the question is often raised whether the victim should be personally interviewed by the prosecutor prior to the making of a filing decision. Some prosecutors insist on this procedure, while others never require such an interview. A third group interviews occasionally in special cases where talking to the victim might clarify particular aspects of the case.[12]

The decision whether to interview prior to filing is seldom made on the merits of such a procedure, but on the traditions, resources and structures of the criminal justice system in which they occur. In some jurisdictions allocation of time or resources are insufficient for the prosecutor to interview every victim. He relies on police interviews and postpones meeting the victim until she testifies at the preliminary hearing or the grand jury. Since practices vary, a closer look at the perceived advantages and disadvantages of pre-filing interviews is required.

Advantages of pre-filing interviews. Prosecutors cited a number of advantages of pre-filing interviews. Victim interviews provide prosecutors with an opportunity to firmly grasp the details of the case and to follow up limited written statements with direct questions to the victim. In addition, they allow the prosecutor to meet the victim and learn more about her; what she is like, whether she can articulate her story and is convincing; how strong a witness she will be; how much work is required to prepare her for trial. Many prosecutors use the interview to decide whether the victim is telling the truth and really wants to prosecute. For some prosecutors the personal interview provides an opportunity to explain the judicial process to the victim and reinforce her decision to prosecute. Through the interview the prosecutor can portray himself as a personal representative of an otherwise bureaucratic system, allaying the victim's fears and answering her questions. Especially in those jurisdictions where the first post-filing contact of the victim with the criminal justice system is at the preliminary hearing, prosecutors believe that it is important for the victim to be prepared and assured of continued support.

Disadvantages of pre-filing interviews. A number of disadvantages were also cited. Many prosecutors stated that the time required to conduct a pre-filing victim interview is not worth the potential benefits. In addition, they questioned whether the victim should be required to tell her story several times to police, hospital personnel and prosecutors during a short period of time after the rape. It was argued that the value of such an interview would pertain to virtually all felony cases, and that singling out sexual assaults only reinforced stereotypes regarding the unreliability of rape victims. Finally, prosecutors argued that it was better to carefully inform and prepare the victim just before the preliminary hearing or trial, rather than before the case is even filed.

Resolving the debate. The pre-filing interview can serve several valuable purposes, but these purposes may be accomplished in other ways. The screening of criminal cases may not require an interview if the police adequately perform this function. Support and information can be provided to the victim by trained and sensitive police personnel or victim advocates. The interview tends to reinforce the notion that the rape victim is someone whose veracity is inherently suspect. In addition, an interview at this stage may be complicated by the contradictory goals of reinforcing the victim and testing her credibility.

Where the fact situation seems atypical, or the victim may require special attention, a pre-filing interview seems appropriate. The police or victim advocate might suggest the need for an interview in a particular case. However, the requirement of universal pre-filing interviews in rape cases when they are not required for other felonies should be carefully reexamined. If the needs of the victim and the prosecutor can be served in other ways, the prosecutor should seriously question this expenditure.

3.3 Pre-filing Polygraph Examinations

Prosecutors were surveyed regarding their use of polygraphs as a pre-filing screening mechanism. While most respondents acknowledge that it might be a useful tool for the police and that their police departments used the device, there was a range of responses with regard to *their* use of the polygraph.[13] While one prosecutor considered it "the next step up from the Ouija board," others used it in up to 30 to 40 percent of their cases.

Those prosecutors who used the polygraph cited two primary purposes. First, it allows them to decide who is telling the truth in difficult cases. While respondents hoped that the defendant would agree to a polygraph test, in close cases they frequently request that victims submit to polygraph examinations prior to any filing decision. Close cases include those in which the victim is a prostitute, the victim and the defendant had known each other prior to the rape, or the victim had voluntarily accompanied the defendant to the scene of the crime. Second, many prosecutors used the polygraph to "test the will" of the victim. A victim who agrees to take the test is believed to be willing to have her story confirmed and to proceed with prosecution. The unstated corollary, of course, is that the victim who refuses is either not telling the truth or does not want to prosecute with sufficient resolve. This victim might reconsider prosecution when the case is ready for trial.

There is significant debate about the reliability of the polygraph as an indicator of truthfulness. A recent House Committee on Government Operations report concluded that the reliability of the polygraph had not been established and that it should not be used by the federal government.[14] There are additional questions about the reliability of the polygraph in these types of cases. Where consent is a key issue, and the defendant believed the victim consented, the polygraph could suggest that both parties are telling the truth. This dilemma would not resolve the legal issues though it would seriously damage the state's case. The prosecutors who were surveyed displayed their own lack of confidence in the polygraph when they were asked if they supported the admission of test results at trial. The overwhelming majority of the respondents, including those who used polygraphs for pre-trial screening, opposed its admissibility.

Use of the polygraph also has significant indirect impacts on the criminal justice system. Victims who take the polygraph examination and pass it provide prosecutors with an incentive to vigorously prosecute the case and resist extensive plea bargaining. A successful polygraph examination of the victim can be used to persuade the defendant and his attorney that a plea of guilty is appropriate. On the other hand, the act of requesting such a test is still another symbolic suggestion to the victim that she is not believed. Her refusal to take the examination may only reflect her reaction to the consistent doubt expressed by the criminal justice system and not in any way mean that she is fabricating her account or is ambivalent about prosecution. Furthermore, prosecutor reliance on the polygraph may suggest an unwillingness to make difficult decisions. The prosecutor must base his decision whether or not to file a case on his assessment of the sufficiency of the evidence; a polygraph cannot tell the prosecutor how strong his case is. Victim refusal to take a polygraph examination or inconclusive results may merely provide the prosecutor with an excuse to decline the case.

If the victim is to be asked to take a polygraph examination, the manner in which the request is made can be very important. The response of many victims to such a request reflects the approach of the prosecutor rather than the victim's opinion of the test itself. If the prosecutor

can explain the purpose of the test with understanding, then it is likely that the victim will be willing to participate.

There is no logical reason to use the polygraph in the screening of rape cases any more frequently than in the screening of other cases. Given the present uncertainty concerning its reliability and its potentially negative impact on the attitude of the victim, its use should be limited to cases where there are obvious factual discrepancies in the victim's statements or the defendant is willing to submit to a stipulated test.

3.4 The Filing Decision

After accumulating the information and impressions suggested in the preceding pages as necessary prerequisites to filing, the prosecutor is still left with a qualitative judgment whether the information justifies the charging of a crime. The prosecutor must exercise his discretion and decide whether the case, even in its strongest posture, should be filed.

As a preliminary matter, the prosecutor must remain confident that a crime has been committed and that the defendant is the correct person to charge. If the prosecutor has significant doubts about whether a crime has even been committed or the police have identified the right person, then he should not file the charges. This decision, however, begs the difficult question of *how* confident the prosecutor must be in his case before he should proceed. For example, if all evidence points to the defendant, but the prosecutor is unsure, should the case be filed to enable the jury to make the ultimate decision? If the prosecutor finds the defendant's story regarding the consensual nature of the intercourse plausable and believable, though he cannot be sure, should the case be filed? Some jurisdictions have the luxury of sending this type of difficult case to the grand jury. While, to be sure, the grand jury's decision may be influenced by the prosecutor's presentation, a general and even-handed presentation of all the evidence may act to shift the screening burden onto the grand jury. In the past, police skepticism acted as an overefficient screen of difficult cases; rarely would the prosecutor receive a rape case for filing where, for example, consent was a viable defense. As the police become more sensitized to victims, as new personnel assume investigative functions, as the rape law changes and as publicity about rape encourages victims to report, the prosecutor will see a greater volume and variety of cases than ever before.

The prosecutor must also consider the chances of success later at trial. Even if he believes the victim and is confident of the defendant's guilt, he must make the practical judgment regarding the likelihood of success. A majority of the prosecutors indicated that a rape case should be filed if a *prima facie* case can be established and there is a "reasonable possibility" of a conviction. Any higher standard would be difficult to support. Although it might result in a higher conviction percentage, it would lead to few filings and, thus, demonstrate a very conservative attitude toward rape.

Prosecutors generally cited three important variables that must be considered, regardless of the strength or weakness of the case. First, there is the defendant. If the defendant is deemed to be particularly dangerous to the community by virtue of past crimes or the quality of the case under consideration, filing would be justified even with a low probability of success. Where, however, the defendant has no previous record and the case is marginal in seriousness and difficult to prove, there is less incentive to proceed. A second variable is the victim. When the victim is unwilling to proceed or the emotional trauma of the trial would be a danger to her, prosecutors have sometimes not filed cases which were strong and had a high probability of conviction. Furthermore, where the informed victim wanted to proceed even though the possibility of conviction was low, the prosecutor often filed cases which would not have been filed with a less aggressive victim. A third variable often cited is the nature of the crime itself. Rapes of public notoriety, such as gang rapes or rapes that have received significant publicity, are often prosecuted regardless of their chance of success. The trial acts as a public airing; any other response by the prosecutor would be politically unwise.

These considerations ultimately raise important policy questions that can only be resolved at the policy making level. The filing deputy must have a firm understanding of his office's position with regard to rape in order to make basic filing judgments; if this policy is not clear, then he should request its articulation. Rape cases necessitate a special commitment to victims, and prosecution cannot be easily developed or implemented on a case-by-case basis. Thus, any review of the prosecutor's response to this crime requires a basic evaluation of office policy regarding filing.[15]

Declining the case. There undoubtedly will be cases that cannot be filed though the prosecutor believes that the victim has been sexually assaulted. These cases may have evidentiary or witness problems that clearly indicate that there is no reasonable possibility of conviction. In this event, the prosecutor should inform the victim of the decision and explain its rationale. Informing the victim may be a very difficult task; it is often avoided or delegated. The prosecutor should realize that his explanations may reinforce the doubt or guilt already felt by the victim. She may wonder why she even bothered to report the crime and may feel frustration and anger toward the prosecutor and the criminal justice system. A thoughtful and sensitive explanation of why the case will

not be filed may assist the victim in resolving her feelings. The prosecutor might discuss with the victim the availability of counseling services in the community, not to suggest that there is something wrong with her, but to acknowledge that she must be going through a difficult ordeal. If there has been a victim advocate already involved with the case, the advocate's advice and assistance should be solicited.

3.5 Documentation of the Filing Process

In the course of the filing process, the prosecutor will have made a number of decisions and observations about the case. Since it is unlikely in most jurisdictions that the filing prosecutor will be assigned to the case for trial, it is very important that he record and transmit his impressions to the trial attorney. While prosecutors demand clarity and legibility from police and medical reports, there are usually few standardized forms or checklists for prosecutors to pass on information among themselves. Usually the transfer is done informally; but with shifts of personnel, lapses of memory, and the crush of time, it seems likely that information gathered during the filing process will be lost to the trier of fact.

To insure that filing decisions are made consistently, with reference to the same factors, the prosecutor could use a standardized filing format. At the end of this chapter is a checklist for the filing of sexual assault cases that could be adapted to individual jurisdictions. It provides both a vehicle for communication among prosecutors and a standard for the consideration of rape cases.

3.6 Conclusion

The filing of rape cases requires a basic ability to analyze facts and law as well as the imagination to picture the unfolding of a case during an eventual trial. These are skills that the trained and experienced prosecutor should have acquired. In addition, however, filing incorporates policies and attitudes which in rape cases can be particularly important. Filing must reflect an aggressive posture toward rape and a belief that this crime justifies the taking of risks, and a commitment of resources. This philosophy can be articulated by policy makers, but it must be implemented by every deputy who will decide whether a rape case should be filed.

NOTES

[1] For a general discussion regarding prosecutorial discretion in the filing of criminal charges see Frank W. Miller, *Prosection: The Decision to Charge a Suspect with a Crime* (Boston: Little, Brown, 1969).

[2] John H. Wigmore, *Wigmore on Evidence* (Boston: Little, Brown and Co., 1934), Section 924a, p. 379.

[3] See *Forcible Rape: An Analysis of Legal Issues,* published by The National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, as part of this project, Chapter III.

[4] The results of a nationwide survey of 150 prosecutor's offices can be found in *Forcible Rape: A National Survey of the Response by Prosecutors* published by the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration as part of this project.

[5] The legislation which has served as a model for this approach to redefining rape is the Michigan Criminal Sexual Conduct Act, No. 226 Mich. Public Acts (1974), 77th Sess. (effective April 1, 1975), amending No. 328 Mich. Public Acts (1931), Mich. Comp. Laws SS 750.1.568 (1970). See also the general discussion found in *Forcible Rape: An Analysis of Legal Issues,* infra.

[6] See G. Richard Braen, M.D., "Rape Examination Booklet" and "Rape Examination" (16 mm color film 21 minutes) available from Abbott Motion Picture Library, Abbot Park D383, North Chicago, Illinois, 60064 (1976).

[7] A great number of articles have been published in technical journals regarding the life span of spermatozoa within the vagina and the use of swabs and aspirates for forensic purposes. Some of these articles include: F.C. Pinto, "Rape, For the Defense . . . Acid Phosphatase", *Journal of Forensic Medicine,* 6 (October-December, 1959), pp. 147–159; Edgar W. Kivela, "On Finding Spermatozoa in Suspected Seminal Strains", *Journal of Forensic Sciences,* 9 (January, 1964), pp. 138–139; Tadeusz Marcinkowsil and Zygmunt Prsybylske, "Seminal Stains, A Simple Device for Their Determination", *Journal of Forensic Medicine,* 13 (October-December, 1966), pp. 130–133; Joseph C. Rupp, "Sperm Survival and Prostatic Acid Phosphatase Activity in Victims of Sexual Assault", *Journal of Forensic Sciences,* 14 (April, 1969), pp. 177–183; Arthur F. Schiff, "Modification of the Berg Acid Phosphatase Test", *Journal of Forensic Sciences,* 14 (1969), pp. 538–544; Jack H. McCubbin, and Daniel E. Scott, "Management of Alleged Sexual Assault, *Texas Medicine,* 69 (September, 1973), pp. 59–64.

[8] Bruce Woodling, "Expert Testimony", a videotape presentation of Sexual Assault Seminar, held in Ventura, California, November 14, 1975. A four-part videotape series with written supplemental material is available through the California District Attorneys' Association, 923 12th Street, Suite 300, Sacramento, California.

[9] Again, there is a great deal of technical literature regarding the typing of seminal fluid and saliva by use of blood groupings. See: Milton Helpern, and Alexander Wiener, "Grouping of Semen in Cases of Rape", *Fertility and Sterility,* 12 (1961), pp. 551–553; Cecil Heider, "Physical Evidence", a videotape presentation of a Sexual Assault Seminar Held in Ventura, California, November 14, 1975 (Footnote number 7).

[10] See discussion in *Forcible Rape; An Analysis of Legal Issues,* infra, Chapter II.

[11] The 40 prosecutors surveyed as part of this project had difficulty estimating the frequency of various types of defenses. It appeared to be the consensus, however, that over 90 percent of all defenses involved issues of identity or consent and that they were roughly equal in frequency.

[12] See *Forcible Rape: A National Survey of the Response by Prosecutors,* infra, pp. 62–64.

[13] Ibid, pp. 64–66.

[14] Committee of Government Operations, "The Use of Polygraphs and Similar Devices by Federal Agencies", H.R. Rep. No. 94–795, 94th Congress, 2nd Session (1976).

[15] For a general discussion of rape prosecution from the prosecutor-administrator's perspective see *Forcible Rape: Prosecutor Administrative and Policy Issues* published by the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration as part of this project.

APPENDIX TO CHAPTER 3
FILING CHECKLIST

Case #
Detective
Victim's name
Defendant's name
Date of offense
Date of prosecutor presentation
Name of prosecutor

1. Statements — Comments
   - —a. Victim
   - —b. Patrol Officer
   - —c. Res Gestae witness
   - —d. Defendant
   - —e. Victim advocate
   - —f. Transactional witnesses
   - —g. Other witnesses
2. Reports
   - —a. Initial report form
   - —b. Follow-up reports
   - —c. Medical examination
   - —d. Forensic tests
   - —e. Evidence sheet (Physical evidence)
   - —f. Cover sheet (names and addresses of all witnesses)
   - —g. Copy of any search warrants
   - —h. Defendant identification information
   - —i. Rap sheets
   - —j. Line-up identification forms
   - —k. Advisal of rights forms
   - —l. Other reports
3. Physical evidence
   - —a. Clothing of victim
   - —b. Clothing of defendant
   - —c. Diagram of crime scene
   - —d. Photograph of crime scene
   - —e. Photograph of victim injuries
   - —f. Other physical evidence

Case Analysis

A. Intercourse
   - —1. Medical evidence
   - —2. Forensic tests
   - —3. Defendant statement
   - —4. Victim statement

B. Identity
   - —1. Photo montage
   - —2. Lineup
   - —3. Defendant's statement
   - —4. Physical evidence
   - —5. Other witnesses
   - —6. Other evidence

C. Force, Lack of Consent
   - —1. Victim's statement
   - —2. Defendant's statement
   - —3. Weapons
   - —4. Evidence of injury
   - —5. Evidence of emotional trauma
   - —6. Torn or soiled clothing
   - —7. Circumstances of case
   - —8. Other evidence

Case Evaluation

1. Strength of the case
   - a. Victim's credibility
   - b. Corroborating evidence
   - c. Legal problems
2. Who is the defendant
   - a. Criminal record
   - b. Suspect in other crimes
   - c. Dangerousness
3. Seriousness of the crime
   - a. Injuries
   - b. Threats
   - c. Victim reaction
4. Victim's attitude
   - a. Willing to testify
   - b. Anxious to proceed
5. Probability of winning at trial
   - a. Percentage
   - b.
6. Major weaknesses at trial
   - a.
   - b.
7. Major strengths at trial
   - a.
   - b.

Victim Support
- ☐ 1. Victim advocate
- ☐ 2. Information provided to victim
- ☐ 3. Referrals

Notes to Prelim Deputy

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Notes to Trial Deputy

CHAPTER 4. PRELIMINARY HEARINGS AND GRAND JURIES

The manner in which probable cause is established in felony cases can have a substantial impact on the development and ultimately the outcome of the case. This is especially true in rape cases where the determination of probable cause often cruelly exposes a vulnerable rape victim to the processes of criminal justice. The extent to which the victim understands the pre-trial procedure, whether she is prepared to testify under what may be adverse circumstances, and whether she is debriefed following her experience, may all affect not only the quality of her testimony, but whether she will continue to cooperate with the prosecutor at all. Thus it is important to review the various means to establish probable cause in rape cases and to suggest how they can be utilized to the prosecutor's advantage.

Procedures for establishing probable cause in felony cases vary throughout the country. Most jurisdictions require that an adversary proceeding, often called the "preliminary hearing" or the "probable cause hearing", be held in a court of limited jurisdiction. Here the state presents its case in a skeletal form and calls a minimum number of witnesses who are subject to cross-examination. In rape cases, the victim is usually the state's only witness, and her cross-examination is often extensive and abusive. Other jurisdictions do not require an adversary proceeding. Often hearsay is admissible and the victim is not required to testify. An investigating detective, for example, may testify before a magistrate and report what the victim told him about the crime. Many jurisdictions have available a grand jury where the victim or detective can testify without being subject to cross-examination. Still others file felony cases directly into the trial court without a formalized preliminary hearing; an affidavit sworn to by the filing deputy, for example, when reviewed by a judge will suffice to establish probable cause. Other jurisdictions employ a combination of these practices with significant discretion resting in the prosecutor to decide how to establish probable cause. Though preliminary hearings have come under scrutiny recently,[2] it is unlikely that a due process standard will prescribe a single method to determine probable cause.

4.1 The Preliminary Hearing

In those states which require adversarial preliminary hearings, the hearing is often an inexplicable and traumatic experience for the victim. While the victim may have some media familiarity with the tone of a trial, it would be unlikely that she could anticipate the reality of the preliminary hearing. Especially in urban courtrooms, the preliminary hearings for rape cases appear in a calendar mixed with hearings for other felonies and even misdemeanors. The courtroom and halls are often crowded with witnesses, defendants, relatives or courthouse "regulars" who have come to participate in or observe hearings which involve drugs, robbery, homicide and the like. The courtroom itself reflects the bureaucratic needs of the participants. The judge has a lengthy calendar to complete, as do the prosecutors. The defense attorneys impatiently await their turn; once they have an opportunity to speak, they do not like to relinquish it. The need to process cases often creates a tension in the courtroom that can be heard in the tone of the judge and attorneys. Witnesses are often rudely instructed to step up, sit down, speak up, answer the question. The victim is often called to the witness stand without having met the prosecutor who will be asking her questions, without having been prepared for her cross-examination, and without having seen the defendant since the moment of the rape. The circumstances, while routine to the professionals, must seem chaotic to the parties.

With some exceptions, prosecutors who were interviewed indicated that they did little preparation for the preliminary hearings. Usually a stack of files containing a range of charges was left with the prosecutor a day or two before the hearing. At best, the prosecutor reads through the files and notes the nature of the crimes, the necessary elements, the general factual patterns and the issues which need to be explored at the hearing. Rarely are the witnesses personally contacted or prepared in any way prior to the hearing. At the time the case is called, perhaps hours after the victim has arrived at the courthouse, she is told to take the witness stand. She is administered the oath and then generally tells the story of her rape. She makes an in-court identification of the defendant and then is cross-examined by the defense attorney. The cross-examination is often a protracted and brutal experience; it is unclear how recent evidentiary exclusions with elaborate trial court procedures restrain defense attorneys intent on humiliating the victim. The defense attorney may use the preliminary hearing as a discovery tool and explore many issues in a random fashion. He may also use the hearing to intimidate the victim, giving her a taste, he believes, of what she will experience if she goes through with the trial. Even the least experienced trial attorney may respond to stereotypes of rape cases and attempt, with more or less subtlety, to impugn the character of the complainant.

The hearing is often stopped by the judge when he is satisfied that the legal requirements of probable cause have been met. The case is then either bound over to the trial court or continued for a period of time for plea negotiations. Once the hearing is finished, the defendant and his attorney leave the courtroom while the judge and the prosecutor hurriedly proceed to their next case. Rarely is there an opportunity for the prosecutor to discuss with the victim what has just happened.

Purposes of the preliminary hearing. Prosecutors were asked what they hoped to achieve at the preliminary hearing. The range of responses fell into two distinct categories which suggested fundamentally different perspectives on the process.[3] Many prosecutors considered the preliminary hearing an opportunity for the state to test and evaluate its case. The prosecutor can observe the victim respond to his questions and to cross-examination by the defense attorney. The victim's ability to articulate the events of the rape, recall specific details and control her emotions under realistic conditions are central to the prosecutor's assessment of his case.

Most prosecutors who considered the preliminary hearing as a test of their case did not believe that preparation of the victim was required. If the case was fundamentally sound, it would stand on its own at this point. Pre-trial preparation at a later point would serve to smooth out rough edges. If the case was not strong, the hearing provided an opportunity to screen it out of the system prior to trial and with little investment of resources. One prosecutor commented that he wanted to remain physically and emotionally distant from the victim lest the victim feel dependent upon him. The prosecutor could thus be more objective in his evaluation of the case and the complainant's testimony would be given under more "realistic" conditions.

For these prosecutors the preliminary hearing served a critical screening function. It was anticipated that many cases would reach the preliminary hearing only to be reduced or dismissed shortly thereafter. The job of the experienced prosecutor at the preliminary hearing was to make a judgement as to which cases deserved to go any further.

A much different perspective on the preliminary hearing was voiced by many prosecutors who did not see the hearing as a test of their case. To them the preliminary hearing was a necessary evil whose purpose was to fulfill technical legal requirements. Perhaps, they argued, it was valuable to the prosecutor in those very rare situations where the victim would later be unavailable at trial, for her preliminary hearing testimony could be used in her place. Generally, however, these prosecutors believed that little could be achieved and much could be jeapordized at the preliminary hearing. They argued that if the case had been properly screened at filing, there was little purpose to the hearing; it did no more than reveal details of the case to the defense, while quite possibly upsetting the alienating the victim. At best, some indications of the defense strategy could be gleaned, but this result was not worth the risk.

To minimize the risks of victim alienation, some prosecutors attempted to contact the victim prior to the hearing. A personal relationship might be established while the prosecutor and victim discussed questions that would be asked at the hearing. A victim advocate could be present if the prosecutor and the victim required extensive preparation; the advocate might later sit with the victim while she waited for her case to be called. To these prosecutors, the hearing itself was routine, for probable cause was rarely an issue. The goal of the hearing was to minimize both case and exposure while still fulfilling the legal requirements to establish probable cause.

Advantages and disadvantages of the preliminary hearing. In jurisdictions requiring preliminary hearings the prosecutor should consider strategies to maximize the potential advantages and minimize the potential disadvantages of such hearings. In other jurisdictions where the prosecutor has discretion whether or not to hold preliminary hearings, a consideration of advantages and disadvantages can assist him in exercising this discretion.

The preliminary hearing poses several dangers to the state's case by exposing it at its weakest moment. The result may be to create a record that will endanger the case at trial and to deter the victim from further involvement with the prosecution. These dangers must be recognized and compensated for by the prosecutor.

In most jurisdictions the preliminary hearing is recorded and a transcript of the proceedings is available to counsel for both victim and defendant prior to trial. Some jurisdictions do not record the preliminary hearing and only the notes of the parties are available for later reference. Still other jurisdictions allow recording when, for example, the defense attorney hires a court reporter because a pending civil action is intertwined with the criminal case.

A record may be useful to the defense. The state's position, at least as it is represented by the victim's testimony, is "pinned down" in the record. Later at trial, the victim can be subject to cross-examination by her prior inconsistent statements or "misstatements" recorded at the hearing. Any experienced attorney can attest to the power of a transcript from a previous hearing or deposition for purposes of impeachment. It would be an exceptional case when even the best witness cannot be cross-examined by prior statements, and the rape victim is likely to be a particularly vulnerable witness. To the extent that the victim testifies without preparation, the chances of her creating a record for her own impeachment increase dramatically. Her inability to remember details because she has not read her statements, her reluctance to

be specific because she does not understand the purpose of the hearing, her nervousness because she does not like to talk about rape in a crowded courtroom, all accrue to the advantage of the defense.

The preliminary hearing may also threaten the victim's commitment to prosecution. The cross-examination may be quite brutal and disturbing to the victim. She may lose faith in the prosecutor for failing to warn her or protect her at the hearing. Unfortunately, at the time of the hearing the prosecutor is often overworked and concerned primarily with presenting a series of legally sufficient cases. The prosecutor may be a different attorney from the one who filed the case or who will later try it and, thus, his commitment and stake in its outcome may be quite limited. Without a previously established relationship with the victim and regardless of good intentions, he will inevitably appear unconcerned, bureaucratically oriented, perhaps even nervous and harrassed. The victim can hardly feel reinforced in her decision to prosecute when the attorney to whom she has turned is impersonal and outwardly unconcerned. The general setting of the preliminary hearing can also be disturbing to the victim. It is quite unrealistic to expect a victim to sit comfortably among strangers as she awaits her public depiction of a sexual encounter. All of these factors may not only influence her ability to testify, but affect her resolve to proceed further, as well.

On the other hand, the preliminary hearing may provide several opportunities for the prosecutor to strengthen his case. First, the prosecutor will inevitably learn something about the case simply because he has spent some time with it and has observed its public presentation. The prosecutor can signal to the trial attorney what areas require further investigation and how the victim can be better prepared for trial. For example, the victim may have particular problems describing the details of the sexual act; the preliminary hearing deputy could alert the trial attorney so that he could approach the problem prior to trial.

Second, the prosecutor may discover hints of the defense strategy. Though it is unlikely that the defense attorney will have decided upon a definitive strategy by the time of the preliminary hearing, questions in cross-examination may reveal what the defense attorney perceives to be the weaknesses of the state's case. Particular attention to this aspect of the case may help the trial prosecutor anticipate defense trial strategies. Even where there will be a written transcript for the trial attorney's use, tone, emphasis and even subtle communication between the defendant and his attorney could supplement the text.

Third, the prosecutor can gather information about the defendant that may be valuable for the trial attorney. While it is unlikely that the defendant will testify at the preliminary hearing, the prosecutor may be able to assess the type of impression the defendant will make to a jury at trial. It may be important, for example, that the trial attorney be aware that the defendant has changed his appearance or that his demeanor is abusive, sympathetic or unattractive.

Fourth, not only will the prosecutor see the victim on the witness stand, but the victim will have an opportunity to gain a potentially instructive and valuable experience. If the victim is properly prepared in advance and consulted afterward, the prosecutor may find that the court experience will boost her confidence and allay her fears.

Preliminary hearings and plea bargaining. Probably the most important institutional impact of the preliminary hearing is that it facilitates plea bargaining. As a result of the exposure of the state's case, both the prosecutor and the defense attorney know more precisely where they stand. Various details have been revealed for the first time, the victim has actually testified for the record, and the whole case assumes a tangibility that cannot be imagined from written reports.

The significance of this new information and these impressions varies. The defendant, for example, may be struck by the reality of his predicament, especially if he has been out of jail explaining to his friends and family that there is no legitimacy to the charges. His nonchalance or skepticism about the victim may be shaken when he actually sees her testify and hears the judge pronounce that probable cause has been established. In contrast, a poor presentation of the case may give the defendant the impression that the case against him is weak; he may become more confident and reject plea negotiations. If the case is presented well but is inherently weak, confidence on the part of the defendant may be justified. If, on the other hand, a poor presentation of the case reflects inadequate preparation, the defendant may have an unrealistic sense of his position.

Since the key to plea bargaining is a commonly shared core of information, the public exposure of the case through the preliminary hearing will enhance plea discussion. What all parties must assess is to what extent the presentation reflects the exigencies of the hearing and to what extent it reflects the potential of the case for trial. Arguably, the more prepared the state is, the more the hearing will approximate the trial. Well prepared preliminary hearings should thus lead to more accurate assessments of the relative bargaining positions.

Maximizing gains and minimizing losses. Where preliminary hearings are inevitable, it is logical that the prosecutor plan his strategy in advance to maximize possible gains and minimize losses. On balance, the latter is his primary concern. The possibility of getting significant benefit from the hearing seems to be outweighed by the potential for damaging the case. If filing represents a firm decision to proceed toward a conviction for rape, then

little can be gained at the preliminary hearing. If this decision has not been made in advance of the hearing, the prosecutor risks destroying a potentially good case in the process of evaluating it.

With regard to the victim's performance and attitudes, several techniques can be used to minimize risk. First, the victim must understand the purpose of the preliminary hearing. It should be clear that while this is not a trial, it is an important preliminary step to the trial or the resolution of the case by a negotiated plea. The victim should be informed realistically about the nature of the hearing, the sequence of events, what will be expected of her and the importance of her cooperation. The prosecutor who conducts the preliminary hearing should introduce himself to the victim, especially if he is the first prosecutor she has met or is one different from the filing prosecutor. The victim may not even know what a prosecutor is, what his role is vis-à-vis her interests, and what she can expect from him. The very act of introduction may suggest that someone is concerned and personally involved in the case, even if this introduction is wedded with a disclaimer regarding the role of the prosecutor as a private counsel. Furthermore, after the hearing, the victim's experience should be reviewed with her. She should be thanked for her participation, reinforced about what she did well and alerted to what will have to be worked on before she is ready for the trial. Ideally, the victim should be involved in the process so that the preliminary hearing is not, like the rape, some mysterious event inflicted upon her. She should be encouraged to express her opinions about the experience so that the prosecutor can deal directly with her fears and misconceptions.

Victim advocates (to be discussed in Chapter IX) may be particularly helpful to both victims and prosecutors with regard to preliminary hearings. Advocates who are trained to understand the nature of the criminal process and the special needs of rape victims can work with the prosecutor to prepare the victim for her testimony. In addition, the advocate can insure that the victim is aware of the time and date of the hearing and can even help with the victim's transportation. Finally, the advocate can stay with the victim at the courthouse while she awaits her testimony, and can be with the victim after the hearing to discuss what transpired. This is especially important, for on the day of the hearing the prosecutor may be unable to spend considerable time with any individual victim.

The prosecutor must also prepare himself for the preliminary hearing. He should know enough about the case so that he can quickly and efficiently establish probable cause. Fumbling through the file during the hearing to find basic facts of the case may not only be embarrassing to the attorney, but suggest to both the victim and the defendant that the prosecutor's office either does not take this case seriously or that it is incompetent. Both obviously redound to the disadvantage of the prosecutor during plea negotiations and trial.

The prosecutor should anticipate, and be prepared to act aggressively toward, an abusive defense counsel. The message should be quite clear to both the defendant and the victim that the prosecutor will not tolerate any insinuations, accusations or other attacks upon the state's witness. If possible, the prosecutor should attempt to limit cross-examination and protect the victim. This can be done in several ways. First, a direct examination which is short and to the point discourages extensive cross-examination. Furthermore, the tone of a precise direct will make a far-reaching cross-examination seem longer than it actually is. Second, the prosecutor must be prepared to raise objections and even have available a well-documented motion *in limine* or short memorandum of law stating the limited purpose of the hearing and the irrelevancy of much defense questioning. Third, the prosecutor should be prepared to appeal to the judge in regard to the defendant's waste of valuable time and arguably insulting tone. Since the purpose of the hearing is an inquiry into probable cause and not a trial on the issues or a discovery hearing, much of the defense attorney's inquiry may be beyond the scope of the direct examination and the purpose of the hearing. If the prosecutor can reach the judge's inevitable concern for court efficiency, the prosecutor may help develop a courtroom tone that will not tolerate a fishing expedition attempted by the defense attorney. Any strategy to limit cross-examination will require a sensitive understanding of the judge and how he can be persuaded. At the very least, prosecutor tactics should allow the victim an opportunity to catch her breath with an eye to the record that is being incessantly created.

In a few jurisdictions special consideration is given to victims of sexual assaults in the scheduling and presentation of preliminary hearings. Special calendars have been created on which only sexual assault cases are heard. These calendars are often less crowded than normal felony dockets and victims and witnesses will often voluntarily remain outside the court until their cases are called. The prosecutors who present an entire calendar of such cases are often better prepared to deal with the special problems that they pose.[4] In some jurisdictions, at least where the victims are children, the preliminary hearing is heard on the record but in the judge's chambers. This obviously relieves a certain amount of pressure from the victim, though the hearing itself may not be a realistic rehearsal for the trial.[5] Prosecutors and judges can also control hearings for the benefit of victims by scheduling sexual assault cases at the end of the normal calendar. By this

time there are usually few people remaining in the courtroom, and therefore the victim's testimony may be less stressful.

4.2 Grand Jury

The grand jury hearing allows the prosecutor to realize many of the gains to be achieved at the preliminary hearing without exposing the case to significant risk. He can more easily control the hearing while its nonadversial nature shields and protects the victim.

The grand jury allows the prosecutor to present and assess his case much as does the preliminary hearing. However, the investigative nature of the proceeding allows the prosecutor to explore more widely and to call a variety of witnesses who might be more reluctant to testify fully in an adversial setting. The courtroom is more relaxed, with grand jurors less harshly inquisitive than the defense attorney of the preliminary hearing. The very fact that the hearing is not public and the defendant is absent must lessen the strain on the rape victim. The prosecutor has the additional luxury of asking the jurors what questions or doubts they have, and what further evidence they would like to see developed before they would vote to convict. Thus, the grand jury hearing becomes a dry run, not only for the witnesses, but for the prosecutor as well.

Grand jury hearings are more time-consuming and expensive than preliminary hearings and thus are not easily scheduled. Many jurisdictions have virtually eliminated this procedure except in highly political and sensitive cases. Where grand juries sit regularly, they do not meet every day and rape cases must compete with other cases for a hearing. These factors pose problems for the prosecutor that may make the regular use of the grand jury for rape cases impractical.

If these difficulties can be overcome, the grand jury process poses few additional problems for the prosecutor. Once again he should prepare the victim and his case, but the risks of poor preparation are not as great for they are less easily exploited by the defendant. The more relaxed atmosphere allows the prosecutor and the jury to draw out the victim's story while the tension of the preliminary hearing more likely forces her to withdraw and react impetuously for the record. While a record is kept in the grand jury, it can be corrected as the victim testifies.

The grand jury hearing is a less realistic model vis-à-vis the trial than the preliminary hearing. The true strength of the case may not be accurately assessed because it is not fully tested. However, if the screening of the case is adequate there may be little reason to have cross-examination to enhance the prosecutor's assessment of the case. They jury itself acts as an independent evaluator of the case. The victim's telling her story to a group of strangers in a courtroom may be more than adequate to prepare her for the trial.

In general, the grand jury is a preferred means of establishing probable cause. The prosecutor can use the hearing to test his case without exposing it and the victim to the scrutiny of opposing counsel. This method can simultaneously lend support to the victim and fulfill the needs of the prosecutor.

4.3 Direct Filing

In some jurisdictions the prosecutor has the choice of filing the felony case either directly into the trial court or into a lower court for a preliminary hearing. For those prosecutors who believe that the preliminary hearing is fraught with potential dangers, direct filing is a valuable option.

Assuming that the prosecutor can make this choice, the question becomes which cases should be scheduled for a preliminary hearing and which cases should be filed directly. The potential negative effects of the preliminary hearing on both the victim and the rape case itself strongly suggest that such cases should always be filed directly unless there is a compelling reason to hold a preliminary hearing. These reasons should be carefully articulated within a prosecutor's exceptions from the rule.

Preliminary hearings might be scheduled in a number of situations. Where there is a significant likelihood that the case will be reduced to a misdemeanor, its placement in a court of limited jurisdiction may be appropriate. Obvious and articulable problems with the case might be effectively tested at a preliminary hearing. For example, if the victim has difficulty articulating her story, the preliminary hearing may be a good test to see if the prosecutor has a case at all. Even a preliminary interview may not have revealed her ability to express herself in court. If the filing prosecutor is uncertain about the strength of the case, the preliminary hearing will force further evaluation by the preliminary hearing prosecutor and the judge. Here, it is assumed that there is enough to file charges, but not enough to be certain of a strong case at trial. If the victim is ambivalent about prosecuting due, for example, to a prior relationship with the defendant, the preliminary hearing will test the victim's willingness to proceed. If the victim is elderly and may not survive until trial, the preliminary hearing will preserve her testimony. These are all exceptional cases where screening and case development may be enhanced by a preliminary hearing. It is important in the prosecutor's decision, however, that he consider the potential risks to his case and the victim by such a procedure.

4.4 Documentation of Preliminary Hearings

If a preliminary hearing is held, it is critical that any information gathered be properly recorded. For the hearing to have value, such information must be transmitted to the prosecutors engaged in plea negotiation and trial

preparation. It is thus important that the preliminary hearing prosecutor not only take extensive notes of the proceeding, but later record his observations and opinions regarding the strengths and weaknesses of the case. This might be done as a continuation of the filing prosecutor's notes (see Appendix to Chapter III) or in a separate form designed for preliminary hearings.

4.5 Conclusion

The impact of the preliminary hearing on the victim and on the state's case has not been given sufficient attention in many jurisdictions. To the extent that the process intimidates victims and weakens potential cases, the preliminary hearing acts as a device to remove cases from the system. While this may not be a conscious policy decision of prosecutors, the result is the same. The "test" of the case at the preliminary hearing is virtually predetermined by the resources expended in preparation and victim support; rape cases are predisposed to failure. If rape is to be effectively prosecuted, the critical impact of the preliminary hearing must be carefully analyzed. Aggressive prosecution through case preparation, victim support, and attempts to limit and even bypass the preliminary hearing are necessary to counter the inevitable processes that will weaken rape cases. "Business as usual" at the preliminary hearing will mean that rape cases will be dismissed or reduced. More time and care must be invested if rapes are to be given an even chance at successful prosecution.

NOTES

[1] For the results of prosecutor surveys regarding the reasons that victims dropped out of the criminal process see *Forcible Rape: A National Survey of the Response by Prosecutors*, published by the National Institute of Law Enforcement and Criminal Justice, the Law Enforcement Assistance Administration as part of this project, pp. 67–70.

[2] See *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975).

[3] Those prosecutors who have been characterized as viewing the preliminary hearing as a "test" of the case saw the value of the preliminary hearing in some of the following ways: "test witness credibility", "see how strong or weak the case is", "see how victim performs under cross-examination", "see if victim will testify", and "test victim if there is question about her ability to relate". Those who saw the preliminary hearing as having "no benefit at all" were more concerned about the impact of the hearing on the victim and the exposure of the case to the defense.

[4] One jurisdiction which has created a special calendar to hear preliminary hearings in sexual assault cases is King County (Seattle), Washington.

[5] One jurisdiction in which preliminary hearings with child victims were observed to be held in chambers is Wayne County (Detroit), Michigan.

CHAPTER 5. PLEA BARGAINING

"Plea negotiation is the central technique for settling cases in American courthouses." [1] For all crimes, including rape, the vast majority of cases are resolved short of trial through plea negotiations. This process is justified by prosecutors because it is efficient, because it avoids the risks and trauma of trial, and because it allows the exercise of discretion in the interests of justice. Regardless of its rationale, plea bargaining is an institutional reality of the criminal justice system that is unlikely to be quickly changed.[2]

Plea bargaining has been subject to significant criticism, however, especially in the context of rape. It is often suggested that rape cases are reduced too routinely. Such bargaining is allegedly symptomatic of a timid stance toward rape, parochial attitudes toward women, or exaggerated fears of losing at trial. Victims, and even the police, complain that they are not consulted about plea negotiations and are only occasionally informed of an agreement after the fact. For the prosecutor then, plea bargaining in rape cases is at least a public relations problem and, at worst, represents a failure to perceive the difficult problems associated with this crime.

This chapter briefly explores the crime of rape in the context of plea bargaining. It identifies the factors which are normally considered in the negotiation of rape cases and then suggests that standards for plea bargaining be promulgated. Finally, this chapter discusses ways in which plea negotiations can be more effectively and sensitively conducted.

5.1 Case Evaluation

While the filing decision will generally *label* fact situations, plea negotiations tend to look beyond labels to the individual characteristics of the case. Various factors are explored to determine what crime and sentence may be appropriate to the competing interests of the various parties. Some of the variables which individualize the case include: the seriousness of the crime, the strength of the case, the background of the defendant, the attitude of the victim, and the resources of the prosecutor's office. All of these factors have some importance in the plea negotiation. How judgments are made with regard to these factors and how they are ranked in importance ultimately determine not only whether the case will be resolved short of trial, but what will be the terms of the negotiated plea.

Seriousness of the crime. Rapes do not follow a standard pattern and all rapes do not share the same degree of seriousness. While it might be difficult to imagine a rape that was not serious, some rapes do present greater threats to personal liberty and social order than others. For example, a rape by an armed stranger in the course of a burglary seems more serious than a rape between longtime acquaintances in a dating situation. The degree of violence, injury and harm may also differentiate rape cases.

Several states have recently changed their rape statutes to reflect the diversity of criminal acts often characterized as "rape." These states establish degrees of rape based upon the violence used, and thus, the seriousness of the crime.[3] Coincident with a formulation of degrees has been a differentiation in punishment. It is argued that the more serious the rape, the more severe should be the punishment.

In terms of plea bargaining, seriousness of the crime should be considered to determine the appropriate label to attach to the criminal act and the potential punishment to the defendant. In those states with a single statutory definition of rape, all acts which technically constitute rape may not deserve the possible punishment given to offenders. In those states which have degrees of rape, what may technically fall under the highest degree of seriousness may be appropriately labeled and punished under a lesser degree. Statutes inevitably proscribe conduct in very general terms; particular cases may not fit into the general scheme.

Beyond these obvious considerations of seriousness, however, lie more difficult issues regarding the nature of rape and society's view of women. How serious is a rape? To what extent does its seriousness depend on the chastity and virtue of its victim? The issue of seriousness was raised indirectly in the Inez Garcia murder case where the defendant was accused of murdering the man who had assisted in her rape. The jury convicted Garcia, presumably finding that the homicide was not justified by the rape. In explaining the jury's verdict, one juror expressed his attitude regarding the seriousness of rape:

> . . . the guy's not trying to kill her. He's just trying to screw her and give her a good time. To get off the guy will have to do her bodily harm and giving a girl a screw isn't giving her bodily harm.[4]

On the other hand, rape is often viewed as very close to murder; it is not perceived as a sexual intrusion so much as a condition of ultimate domination and powerlessness where death may be imminent. Elizabeth Gould Davis, author of *The First Sex*, was nearly sixty years old when

she was raped. She described why she might have preferred to be murdered:

> . . . simple murder would not have involved the horror, the insulting violation of personhood, the degradation, the devastating affront to the dignity, and the sensation of bodily filth that time has not washed off.[5]

Traditionally rape has been considered an extremely serious crime which has called for penalties of up to life imprisonment and even capital punishment. The most severe punishments, however, have obviously been aimed at the most brutal types of rape committed by a stranger. As rapes depart from this paradigm, prosecutors have exercised significant discretion in plea negotiations in ascribing seriousness to the crime. How the level of seriousness is determined may depend on an individual prosecutor's attitude toward a number of issues, including premarital sexual activity, interracial dating and even hitchhiking. The process of plea bargaining requires a judgment of the seriousness of particular rapes; there is little in most statutes to guide a prosecutor when he makes these judgments.

Strength of the case. Regardless of how serious the prosecutor considers a particular case, in formulating a plea bargaining position he must realistically assess the probability of winning at trial. His evaluation of what evidence will be admissible, how effective the victim will be as a witness, whether the facts of the case will be compelling to the jury, the completeness of the police investigation, and the skills and reputations of the respective attorneys all contribute to an assessment of the probability of the case's success. The plea bargain involves the bartering of a sure conviction through a plea with a problematic conviction through a trial. The prosecutor's bargaining strength thus relates directly to the strength of the state's case. The usual result is that the strongest cases, from the state's perspective, result in a plea while the weaker cases proceed to trial.

The background of the defendant. While it may be prejudicial for a jury to consider the background of a defendant in the determination of his guilt, it is very appropriate for the prosecutor to consider this information in the formulation of a plea bargaining position. The prosecutor has a duty to the community to seek punishment for offenders and to protect society from future criminality. If the defendant is a very dangerous person with a prior conviction for rape, the prosecutor must be concerned with public protection. Does he risk loss at trial to make sure that the offender is imprisoned for a maximum term, or does he assure that the offender will be taken off the street temporarily by agreeing to a plea on a lesser charge? If the defendant has no criminal record and does not appear to be a serious threat to the community, it may be inappropriate to seek a conviction for the serious crime of rape. This again, of course, depends on the particular strength of the case and the seriousness of the crime.

The attitude of the victim. An additional factor in formulating the prosecutor's position at plea bargaining is the attitude of the victim toward prosecution. Does she want to proceed with a possibly traumatic trial and risk an acquittal, or would she prefer that the defendant plead guilty in return for a reduced charge or lesser sentence? Since the victim is so central to the case and the crime can be so personal to her, her opinion should be carefully considered by the prosecutor.

Rarely would the victim's judgment alone determine the prosecutor's plea bargaining position. While a witness who refused to testify would surely tie the hands of a prosecutor, a revengeful victim who sought trial regardless of the risks to the case might be overruled by other considerations.

In addition the prosecutor should be concerned for the victim's emotional and physical well being. It may be an important question in a relatively few cases whether the victim can even get through the trial; but even if she could, the prosecutor must consider whether the risk of harm could be justified. This can be a very difficult decision and should only be made in consultation with the victim, her family, a victim advocate or a physician.

Prosecutors may have a tendency to explain and justify plea bargaining decisions by reference to the attitude of the victim or their sense of what is best for her. While these are legitimate concerns, they can be used to mask other reasons for plea bargaining such as the trial attorney's fear of an acquittal, his hesitation to become entangled in an unpleasant trial or even the political pressure on an office to maintain a high conviction rate. Even where the victim tells the prosecutor that she believes that a plea is best, the prosecutor should consider whether he has unfairly influenced that decision. The way in which he has posed the alternatives may insure a particular response. While the prosecutor should carefully consider the attitudes and interests of the victim, he should be careful not to rationalize a plea bargaining decision solely by his concern for her.

Prosecutor resources. To be tried effectively, rape cases require extensive preparation. The time spent with the victim before trial may alone be longer than the entire preparation of other felony cases. During trial preparation the prosecutor will have less time to spend on his cases, and other prosecutors may be forced to shoulder a larger case load. If prosecutors decide to file more cases and plea bargain less frequently, then they will have to consider the impact on office resources of increased trials.[6] The question becomes, whether a particular case, given its strength and seriousness, justifies the allocation of resources necessary for trial. Depending upon the resources of an

office, this can become a major concern.

Evaluating the case. It is clear that the factors briefly outlined cannot be independently evaluated. Somehow the prosecutor must consider and weigh them all simultaneously. He might take a tough bargaining position on a weak case where the defendant is dangerous and the victim is willing to testify. With a different fact situation, he might not want to spend office resources and risk an acquittal when a plea could be negotiated.

Even when the trade-offs are apparent and the probabilities are calculated, the prosecutor must still impose a policy judgment in formulating a plea bargaining position. What risks and costs can be justified in the pursuit of rape convictions? Should greater chances be taken at trial with rape cases than with other felonies because the crime is so important, or should there be more plea bargaining in these cases because they are so difficult to win? Should the prosecutor distinguish rape cases by their seriousness in considering plea bargaining, or should the jury be allowed to decide whether a particular fact situation justifies a conviction for rape?

While these are very difficult questions to answer, they are rarely even raised in the context of plea bargaining. Traditionally cases are evaluated on an *ad hoc* basis, with decisions emanating from virtually private discussions between a prosecutor and a defense attorney. It is unclear what factors are considered, how they are weighed or how any individual decision fits into a more general pattern of plea negotiations. There are virtually no written standards for plea bargaining in prosecutor offices and no structured means to ensure that plea bargaining is conducted consistently. Especially in rape cases where there are so many personal attitudes that can influence professional judgment, a more systematic approach should be considered.

5.2 Standards for Plea Bargaining

It is virtually impossible to construct strict plea bargaining standards that would apply to the multiplicity of circumstances that arise in criminal cases. Nonetheless, certain guidelines can be formulated which could be considered in decision-making. The promulgation of such standards would at least force the consideration of an office's goals and assumptions regarding rape, although it might not allow one to predict the outcome of any particular plea bargain.[7]

The most important variables that the prosecutor should consider in reaching a plea bargain could be defined and ranked in order of importance. If the ones chosen were the ones outlined above, the seriousness of the crime could be ranked at the top while the issue of limited resources ranked near the bottom. Thus, a serious case would seldom be plea bargained simply because resources were limited. Those factors which made a case more or less serious could be carefully articulated. For example, while the use of a weapon might be considered an aggravating circumstance, the chastity of the victim might be specifically excluded from consideration. If the prosecutor's office recommended sentences as part of a plea bargain, then particular aggravating and mitigating circumstances that could enhance or reduce an average sentence might be delineated for the decision-maker. In addition, the policy regarding the dismissal or reduction of charges in return for a plea could be specified.

The process of decision-making itself could be standardized. For example, a checklist could be devised to insure that the decision-maker at least considered factors that the office as a whole considered important. Exceptions to the standards could be required to be justified in writing so that a "common law" of exceptions developed. This would alert prosecutors to what is and what is not an exceptional case. Furthermore, if the decision-making were centralized or reviewed by a single senior prosecutor, the pattern of consideration and exception could be made significantly more consistent.

There are many advantages to such a decision-making process. First, it tends to force decision on legitimate, articulated lines rather than personal biases toward the crime, the victim or the defendant. While personal biases can be masked by such a procedure, this approach minimizes the risk that such factors will form the bases of decision.

Second, the use of standards allows an office to carefully consider and articulate its policy toward rape. The promulgation of such guidelines with its attendant discussion and debate may be valuable itself. Basic policy questions are often considered only on a case by case basis; the importance of these decisions demand a more systematic approach.

Third, standards and guidelines allow prosecutors to consider the unique problems of rape, or any other crime, apart from the general flow of individual cases. Prosecutors may conclude that rape need not be singled out for special treatment, but that decision itself, if carefully considered, might be significant. On the other hand, after reviewing their present practices, prosecutors may decide that rape cases should be assigned special priority reflected in tougher plea negotiations. Regardless of the policy, the act of singling out the crime and examining its special features can be beneficial.

Consistent and deliberate plea negotiation necessitates a process of formulating and applying standards. Without standards, policy will remain vague and randomly applied. With specific regard to the plea bargaining of rape cases, the absence of guidelines may mean that individual value judgments and irrelevant concerns dictate policy.

5.3 The Polygraph and Plea Negotiation

The polygraph is often considered during plea negotiations as a means to avoid trial and resolve obvious factual disputes. If it is clear that the state and defense versions of the facts differ on points not subject to misinterpretation—for instance, was the door open or was it closed, did the defendant strike the victim with his fist or did he not—some prosecutors will consider the use of a polygraph with one or both of the parties. This situation is distinguishable from that at the pre-filing stage, when the unchallenged victim must unilaterally submit to a polygraph examination for the case to be filed, and it is not applicable to those cases in which the facts in dispute are subject to differing interpretation, i.e., did the victim consent to intercourse.

Even under these circumstances the reliability of the polygraph is still at issue.[8] Prosecutors who justify the use of the test argue that they would go forward if they had confidence in the polygrapher for it is the operator who determines the reliability of the test. It is argued that at the point of plea negotiations the facts have usually narrowed sufficiently to present the polygrapher with a testable factual dispute. These prosecutors argue that in close cases the polygraph can eliminate the need for trial and, thus, minimize the risks to both the state and the defendant.

Under these circumstances most prosecutors insist that the results of the polygraph be stipulated and, therefore, that the results be admissible at trial. While most courts will not admit into evidence polygraph results presented by one party to a dispute, courts will honor a prior agreement between parties, that the test results, if not "inconclusive," will be admissible at trial. It is important for the prosecutor to prepare a carefully worded written stipulation signed by the defendant and his counsel so that there is no way that the results, favorable or unfavorable to either party, can be shielded from the jury. Prosecutors should further insist that the defendant be the party that takes the examination. The burden at this point of the plea negotiations is usually on the defendant to prove his innocence; the state is presumably ready and willing to take the case to the trier of fact. As a result, the defendant should be the one to take the stipulated polygraph examination and run the accompanying risks. Occasionally, an agreement can be reached that if the defendant "passes" the test then the victim must take it. Usually, however, the cases in which polygraphs are used are so close that the defendant's success will determine the outcome of the trial regardless of the victim's results.

The use of polygraph examinations at the time of plea negotiations is subject to less criticism than are pre-filing examinations. Now it is not a test of the victim's willingness or credibility, but a challenge to the defendant to have his denial tested. In close cases, where there is little evidence to corroborate the victim's story, a stipulated polygraph examination may provide the state an opportunity to develop valuable evidence for trial.

In deciding whether or not to agree to such an examination, the prosecutor should consider several key factors. Most competent defense counsel will pre-test their clients with a private polygrapher before agreeing to a stipulated polygraph. The defense attorney usually will not reveal this fact to the prosecutor. As a result the prosecutor should be wary and only agree to a stipulated polygraph if he has confidence in the expertise of his polygrapher. In assessing the strength of his case without this examination, the prosecutor might conclude that he will lose despite the defendant's guilt. Agreeing to the test represents a calculated risk to gather additional evidence for trial. The weaker the state's case, therefore, the more reasonable the polygraph becomes. The factors for and against having the defendant take the test should be explained to the victim and her opinion elicited. She may be willing to risk trial without the polygraph or may be willing to risk a test if its success will assure conviction. In either case, she should be involved in the decision, for a polygraph that will indicate the defendant's lack of deception may essentially terminate the case. (4) The prosecutor and the defense counsel should work closely with the polygrapher to make certain that questions asked will clearly detect deception if it exists. Some cases where, for example, consent is an issue cannot be reduced to obvious factual disputes, and the parties can both "pass" polygraph examinations without resolving the legal issue.

5.4 Participants in the Plea Bargaining Process

While the power to plea bargain resides ultimately with the prosecutor, the question has arisen as to the appropriate roles for the victim, the police and others in the negotiation process. It is important to remember that the rape case is not "the prosecutor's case", but a crime against the state and its citizens; the prosecutor merely represents these interests. As an advocate for the victim and the police, for example, he must consult with them and consider their opinions. Too often the prosecutor assumes some possessive interest in the case; the opinions of even those most directly involved with the crime are considered tangential. As a practical matter, consultation with the victim and the police can provide the prosecutor with valuable information about the crime that has been lost in the process of having many police and prosecutors involved. Most importantly, such consultation may inform the prosecutor about the attitudes of the community toward the crime charged and the possibility of a negotiated plea.

Undoubtedly, consultation with police and victims may be time consuming and impractical. Furthermore, such contact may create expectations regarding influence in the decision and further contact; these expectations could lead to later problems.

Nevertheless, consultation should be part of a continuing relationship between the prosecutor, the victim and the police. Many prosecutors begin educating the victim about the possibility of plea bargaining at their first contact. The victim should know that her opinions will be solicited and considered, but that the prosecutor has many other considerations to weigh as well. With regard to the police, continuing relations require that the police trust the prosecutor to represent their interests in the plea bargaining process. While the police assume that plea bargaining will resolve most cases, the time spent in consultation may be an investment in long-term cooperation.

Much of the public distrust for plea bargaining may emanate from its secretive nature. If standards are published, bargaining is conducted with consultation, and decisions are explained and justified, then it may be possible to portray plea bargaining more realistically. This process is not an illicit exception to the rule of law, but a legitimate and integral part of the criminal justice system.

NOTES

[1] Arthur Rosett and Donald R. Cressey, *Justice by Consent: Plea Bargains in the American Courthouse* (Philadelphia: J. B. Lippincott Co., 1976), p. 7.

[2] For a general discussion of plea bargaining see Donald J. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial* (Boston: Little, Brown, and Co., 1966). See also Marvin Marcus and Robert J. Wheaton, *Plea Bargaining: A Selected Bibliography,* National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, 1976.

[3] See *Forcible Rape: An Analysis of Legal Issues*, published by the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration as part of this project, Chapter II.

[4] Quoted in appellant's supplemental opening brief, *People v. Garcia*, No. 1 Crim. 14104, in the Court of Appeals of the State of California, First Appellate Division (1976), p. 55.

[5] Elizabeth Gould Davis, quoted in *The Village Voice*, November 21, 1974, p. 43.

[6] In jurisdictions which have attempted to limit plea bargaining, such as Multnomah County (Portland), Oregon and King County (Seattle), Washington, the impact on trials has been perceived by the prosecutors to be slight. While at first trials seemed to increase dramatically, they later leveled off and then returned to their former rates. Ultimately the defendants began pleading to the charges as originally filed. See also Thomas Church, Jr., "Plea Bargains and Courts: Analysis of a Quasi-Experiment", *Law and Society* (Spring, 1976), pp. 377–401.

[7] For a general discussion of the purposes and use of standards see Kenneth Culp Davis, *Discretionary Justice* (Baton Rouge, Louisiana: Louisiana State University Press, 1969).

[8] See discussion in Chapter III regarding pre-filing victim polygraphs.

CHAPTER 6. TRIAL PREPARATION

The trial preparation of rape cases parallels the pre-trial work in other major felonies. The prosecutor must respond to defense motions, contact witnesses, organize the physical evidence and, inevitably, become involved with additional investigation. There are, however, special considerations with regard to pre-trial preparation in rape cases that should be identified and discussed. The same considerations that influence filing and plea bargaining attorneys in rape cases—victim vulnerability and the inherent evidentiary weaknesses of such cases—should concern the prosecutor as he anticipates the rape trial.

6.1 Pre-trial Legal Issues

Pre-trial defense motions in rape cases are often motivated by two distinct goals. First, these motions have traditional rationale—to gain information, to suppress evidence—which relate directly to the substantive issues which the parties hope to resolve at trial. These are common motions that require traditional responses. Second, many of these motions are motivated by defense attempts to pressure the victim, weaken her testimony and discourage her involvement with prosecution. Just as the preliminary hearing can be viewed as a tactic to apply pressure, various defense motions should be considered in terms of their impact upon the victim. Even in the pre-trial period, the victim may perceive that she is being subjected to attack and that her integrity, rather than the defendant's criminality, is at issue. Thus, pre-trial motions represent more than technical legal process; they must be pursued in a way most protective and supportive of the victim.

Discovery. The exchange of discovery material is handled by a variety of procedures in different jurisdictions. These procedures range from friendly exchanges of documents and open access to case files to formalized discovery motion hearings for the record. Clearly, due process requires that the state provide discovery, though many prosecutors lament the practical one-way flow of information. While the prosecutor cannot withhold valuable information from the defense, the particular nature of the rape victim's vulnerability suggests that the prosecutor exercise special care in the dissemination of personal information.

The victim's address is an example of a seemingly innocuous, yet sensitive piece of information that is often provided to the defense. If possible it ought to be withheld out of a concern about victim intimidation from the defendant, his family or friends, as well as the subtle harassment that can accompany character investigations of the victim. Phone calls and visits to neighbors, friends and relatives of the victim can be extremely embarrassing. The prosecutor should also realize the victim's emotional adjustment to the rape, as discussed in Chapter II, may be jeopardized if she is contacted personally by the defense attorney or his investigators at her home. This is especially true if the victim has moved as a means of dealing with the trauma of the rape.

It may be impossible for the prosecutor to withhold certain information regarding the victim. However, he may employ several strategies in its delivery. First, he can express very clearly to the defense counsel that he is concerned about how this information will be used. While the defense attorney can be expected to share this information with his client, it is important to inform the attorney that any intimidation of the victim will be dealt with severely. It may even affect the future flow of information from the prosecutor's office to the defense attorney. The prosecutor has no direct control over the defense counsel/defendant relationship; however, he can stress to both attorney and client that it is in their best interests to use discretion.

Second, the prosecutor may be able to limit the use of the information he must give up. For example, the prosecutor might withhold the address of the victim from the defense counsel and thereby force a formal discovery motion to the court. At this time the state can clearly express for the record its concerns regarding the dissemination of information. The prosecutor can even suggest that access to the victim be available only through his office; this would allow defense preparation without significant risk to the victim. If the defense has some other reason to know the location of the victim, this reason should be clearly articulated so that the judge, the defense attorney and the prosecutor can negotiate terms for the use of the information. Even if the information is given, such a hearing underscores the state's message to all parties; it is concerned about the victim and will not tolerate undue interference. Since this interest is not subject to question, the judge may condition the exchange of information on explicit promises of good faith by the defense counsel and the defendant.

Third, in exchange for giving up this information, the state may be able to exact a price in return. The state may seek a *quid pro quo*, such as a complete list of defense witnesses with names, addresses and testimonial summaries by a certain date. The defense attorney, who no doubt argued his need to prepare, is not in a strong

position to argue against the state's similar needs.

The prosecutor should inform the victim regarding information that has been given to defense counsel. She should also be prepared, from the moment of filing, to anticipate contact by the defendant's attorney and be schooled on an appropriate range of responses. It must be clearly understood by her that the prosecutor is *not* instructing her *not* to speak to the defense attorney. Whether to meet with the defense attorney is ultimately her choice. Many prosecutors suggest that if such a contact is made, she refer the attorney or investigator to the prosecutor who may set up an interview in his presence. (If such an interview is held, the prosecutor should have an additional witness present in case the substance of the interview becomes an issue at trial.) Regardless of the strategy chosen, the prosecutor should clearly understand the anxiety that the victim is likely to experience from such a contact.

A question may arise during the exchange of discovery information regarding defense access to information concerning the victim's prior sexual history. The prosecutor may be aware of information or have access to information that would, if admissible, be useful to the defendant. For example, the prosecutor may know that the victim has been accused or has been convicted of prostitution. Clearly at a later point the prosecution might argue that such evidence, if competent, would be nonetheless irrelevant and inadmissible. At the time of discovery, however, before the issue of admissibility can even be framed, what are his obligations with regard to disclosing or searching for such information upon request?

Two recent developments make the prosecutor's response difficult. First, the prosecutor, in seeking increased protection of the victim, has placed himself in the best position to question the victim if he is requested to do so by the defense or the court.

Second, recent statutory changes governing the admissibility of prior sexual history evidence in many states has placed a premium on the specificity of such information. The defense attorney in a pre-trial motion is often required to specify the evidence that he seeks admitted at trial. A pre-trial hearing outside the presence of the jury and often *in camera* will then be used to determine the admissibility of the evidence. While the prosecutor prefers this method to a fishing expedition during the victim's cross-examination at trial, does this procedure create a discovery problem for the prosecutor?

The prosecutor does not have a problem if the defendant is aware of the victim's prior sexual history. If the defendant did not know at the time of the attack, then the evidence may be irrelevant. But if the defendant suspects that there is such evidence and wants its admissibility tested, should he ask the victim or request the prosecutor to inquire? Once again, the tactic may be to harass as well as to seek exculpatory evidence.

A specific prosecutorial strategy to deal with this potential problem will ultimately depend upon local statute and practice. The prosecutor should not assist the defendant in investigating the background of the victim if the prosecutor believes the evidence to be irrelevant. But he should also discourage the defense from independently harassing the victim. An appropriate compromise may be for the prosecutor to be present when sensitive questions are asked of the victim. He can then object to specific questions and caution the victim that she need not respond. Any impass will then have to be resolved by the court. The prosecutor should have two fundamental concerns regarding such a procedure. First, he should not underestimate the damage to the rape case posed by the admission of such information. Second, he should carefully consider the impact upon the victim of questions which address her sexual history. She should expect the prosecutor to respect and protect her privacy; if he does not, she may lose confidence in him and seek to withdraw her complaint.

Motion for psychiatric examination. Defense attorneys will sometimes request that the court order the victim to undergo psychiatric examination. While these requests are made with some frequency, they are rarely granted. The rationale for the request emanates from Wigmore's classic assertion that rape "victims" are often morally deformed or mentally unbalanced. It is argued that the psychiatric examination will serve to separate fabricated, fantasized reports from legitimate complaints.[1] The impact of such an examination on the victim should be obvious. Not only may the criminal justice system in this way suggest to the victim that the rape is her fault, but she is essentially accused of mental instability. The prosecutor should resist these motions strenuously.

Generally, motions for psychiatric examination of the victim appear to be granted only when there is little evidence to corroborate the victim's story. Courts have entertained several arguments against such examinations: (1) the state of the art is inadequate for psychiatry to discern between actual and fantasized accounts of rape; (2) this use of psychiatry invades the province of the trier of the facts; (3) this is an invasion of the victim's privacy; (4) this opens the door to victim harassment; and (5) this is an expensive and time-consuming process that will turn the trial into a battle of experts.[2] Prosecutors should consider all of these arguments.

Beyond these policy arguments, however, the prosecutor should also demand from the defendant a specific, written motion, affidavit and offer of proof that establishes a compelling need for such an examination. The request should be based on a particular record of related

mental instability rather than a general suspicion of rape victims. It is unlikely, given the screening of rape cases by the police and the prosecutor, that a fantasized complaint would reach the pre-trial stage of case development. Thus, it is unlikely that the defendant will be able to successfully document a history that would warrant this examination.

It is unlikely that polygraph examinations would be suggested in lieu of psychiatric examinations, given the traditional antipathy of the courts toward such tests. All of the arguments used to resist the psychiatric motion can be used to resist a motion for a polygraph examination. In addition, if the alleged basis for the test is mental illness, then there is no reason to believe that the polygraph will detect deception on the part of the victim. If the defense allegation is simply victim fabrication, then there is no reason to supplant the judgment of the trier of fact with that of a machine.

6.2 Witnesses and Exhibits

It is clear that each case requires a unique preparation. Some serious cases are quite simple to prepare, while other, less significant crimes may be quite complex. The seriousness of the charge of rape does not necessarily suggest a particular mode of preparation. The exigencies of time, the dictates of style, and the facts of the case ultimately determine the preparation.

A prerequisite to effective trial preparation, however, is a firm understanding of the facts and law of the case. There can be no substitute for a careful, detailed and uninterrupted reading of all the file materials. Often this will include a preliminary hearing or grand jury transcript, as well as the various police, medical and witness reports. Furthermore, it is highly recommended that the prosecutor visit the crime scene if it is available. To make the jury comprehend the reality of the crime, the prosecutor must be familiar with its details.

Each witness must also be interviewed. Written statements of witnesses are inevitably supplemented by informal discussion. In addition, the prosecutor must examine all the physical evidence that has been gathered or prepared. The process of reading the materials, visiting the scene, interviewing the witnesses and checking the physical evidence is a cumulative one. The interviews of witnesses become more meaningful after the scene has been visited and the materials read. The materials make more sense after seeing the physical evidence and speaking with witnesses. At some point before the trial, the reality of the crime and its parts should begin to coalesce. The sooner the preparation is begun and the more thorough it is, the greater is the possibility that the prosecutor can make connections between pieces of evidence, discover nuances in his case and present a vivid, detailed account of the crime to the jury.

Victim Preparation. The rape victim is the prosecutor's chief witness at trial. If the jury believes her, then there will usually be a conviction; if her word is doubted, it is unlikely that the jury will convict. The victim's credibility depends on numerous factors, such as her personality, her ability to articulate her story, and the logic of the story itself. While the prosecutor cannot recreate the rape situation for the trial, he can attempt to present the victim in the most convincing and sympathetic light possible. To do so requires a working relationship between the prosecutor and the victim that will both reinforce her decision to prosecute and prepare her to be an effective witness.

Pre-trial interviews are clearly distinguishable from pre-filing interviews. By the time of pre-trial preparation, the prosecutor and his office should have a commitment to prosecution. The goal of an interview is to bring the victim and prosecutor together to work on the case as a team. In most jurisdictions, the attorney who will try the case is not the same attorney who filed or presented the case at the preliminary hearing. Thus, the prosecutor must independently establish rapport between himself and the victim. The victim may already have had favorable or unfavorable experiences with other prosecutors and courtroom procedures. In addition, she may be uninterested in prosecuting at that moment because she is attempting to place the rape experience behind her.

The role of the prosecutor should be reexplained to the victim. He is an attorney and a public official who will try the rape case. Emphasis on the fact that he "has been assigned" to this case may suggest, perhaps accurately, that it was not his idea and he does not really care about her. He should demonstrate his personal commitment to the victim, perhaps by handing her his card; and she should be encouraged to be an active partner in the process, to ask questions and to volunteer ideas. The prosecutor's efforts may not only boost her morale and self-confidence, but may also uncover new evidence and trial strategies. The prosecutor should outline the schedule of the case and realistically describe the possibilities of success. The weaknesses and strengths of the case should be explored so that the victim will be alerted to those aspects which will require special attention.

Prosecutors generally acknowledge the importance of working closely with rape victims. Some prosecutors meet with the victim as many as six times prior to trial; most believe that at least two meetings are required. Too much preparation of the victim may produce negative consequences. She may become more nervous in anticipation or her testimony may appear rehearsed and automatic. On the other hand, repeated rehearsals of the victim's account may decrease her tension and her reluctance to articulate the worst details of the case. Further, the inherent tension of the trial will prevent an emotionless, routinized presentation of the evidence. The dangers

of each method will obviously have to be assessed in terms of the needs and demeanor of each victim.

The location of pre-trial victim interviews may influence their success. The power relationship between the prosecutor and the victim is undoubtedly enhanced in the prosecutor's office but may intimidate the victim and frustrate communication. Despite the convenience of such a meeting place to the prosecutor, the victim with a job, family or other responsibilities may find it burdensome. Thus, some thought should be given to finding mutually convenient times and places. If a victim advocate (see Chapter IX) is available, her presence at these interviews may reassure and assist both the victim and the prosecutor.

The victim should be prepared for the substance and tone of her testimony. While such preparation should be appropriate to the abilities of the particular victim, several techniques can be suggested. (1) The victim should be thoroughly familiar with all of the written statements and recorded testimony that she has made. (2) All discrepancies or misstatements should be carefully noted and explored. (3) The victim should be familiar with all physical evidence, such as clothing and weapons, which she will be asked to identify at trial. (4) The victim should examine all photographs and diagrams that may be used at trial so that she can orient herself to them. (5) She should be familiar with the sequence of events before and after the rape, including the report to the police, the arrest and the lineup, so that she can place the events in the proper context. (6) She should have the opportunity to observe a courtroom, sit in the witness chair and, even observe an actual trial. (7) She should be informed who will likely be in the courtroom at the time of her testimony and where they will be seated. (If the case is expected to raise identification issues, the prosecutor should be careful not to jeopardize the in-court identification by suggesting where the defendant will be seated.) (8) She should be informed that she may be excluded from the courtroom during parts of the trial; the rationale for such exclusion should be carefully explained. (9) She should be informed that her appearance at trial may be important and that she should attempt to avoid any inappropriate makeup or clothing which might alienate the jury.

Beyond these procedural and extrinsic considerations, the interviews with the victim should focus on the facts of the incident and their presentation in court. Prosecutors use different styles to prepare the victim for her actual testimony. Some prosecutors write out each question that they will ask on their direct examination and essentially rehearse the testimony with the victim. If the answers are not what the prosecutor sought, he can change the question to elicit the information desired. The purpose of this intense preparation is to make certain that the victim clearly understands the questions and the prosecutor can anticipate the response with reasonable certainty. Other prosecutors simply go over the story with the victim a number of times to make sure that the victim is comfortable and confident in its presentation.

The exact description of the sexual act is often the most difficult aspect of the direct testimony for the victim. At some point prior to trial, the prosecutor must be certain that the specific element of penetration, if required by law, can be articulated convincingly by the victim. It is important that the language used be appropriate to the victim and inoffensive to the jury. There are obvious limits to the control that the prosecutor can and should exert; it may require considerable skill to help the victim express herself in terms that will be comfortable to her and to the jury.

Preparing the victim for cross-examination is an equally important component of pre-trial preparation. The victim should understand the role of the defense attorney and the purpose, scope and anticipated tone of his questions. Some specific directions might be given her. (1) Listen very carefully to each question so that it is clearly understood. (2) Pause before answering each question to give the prosecutor an opportunity to object. (3) Tell the truth, do not say anything about which you are unsure, and do not volunteer information. (4) While appropriate emotions should not be stifled, do not get angry or fight back at the questioner, for that may be his purpose in asking provocative questions.

Some prosecutors prepare the victim for cross-examination by rehearsing anticipated difficult questions. Other prosecutors will merely highlight general issues that will be likely to arise. Depending upon the sophistication of the witness, the overall strategies of the state and the defense can be explained so that she may attempt to respond appropriately on the witness stand. There may be a danger, however, that if the victim attempts to outguess the questioner she may lose credibility and damage the case.

The victim should be aware that on cross-examination she may be asked if she has spoken with the prosecutor about the case. Because her first reaction might be to deny any discussion she should be informed that such preparation is perfectly legitimate. She may also be prepared to respond to subsequent related questions on either cross-examination or redirect; she should be able to explain that the prosecutor did not tell her what to say except that she should only tell the truth.

It should be emphasized that there is nothing unethical about thorough preparation of the witnesses. While the prosecutor cannot tell the witness what she should say or that she should distort the truth, failure to adequately prepare the victim will jeopardize the case. At the trial, a prior event must be transformed into testimony so convincing that a jury will convict even though it knows that the defendant may be sent to the penitentiary. Convictions

do not happen by accident, and preparation is a key to successful prosecution.

Preparation of the examining physician. Doctors often pose special pre-trial problems. First, they are very difficult to locate and interview. The emergency room doctor who examined the rape victim may have been a resident who, months later, has moved and has little time for trial preparation. Second, a useful interview may require that the prosecutor have a rudimentary knowledge of examination technique. These difficulties reflect trial problems as well; doctors are often uninterested or unavailable for testimony and their technical language may baffle the jury. The prosecutor should anticipate and compensate for both potential problems.

The importance of a pre-trial interview with the examining physician cannot be underestimated. Doctors tend to be very tentative in their conclusions, especially when subject to the scrutiny of cross-examination. Unless they are well-briefed on the facts of the case and the relevance of their testimony, they can be as harmful to a case as they are helpful. The prosecutor might ask the doctor what he can offer to help establish that the victim was subjected to a forcible sexual assault. The prosecutor should then carefully discuss the strengths and weaknesses of the doctor's observations. If the prosecutor can explain the relevance of the medical testimony, exhibit some knowledge suggestive of his interest, and demonstrate a need for the doctor's assistance, the traditional lawyer-doctor antipathy may be turned into a mutual concern for the victim and the crime.

Just as lawyers have a problem simplifying their legal language for the jury, so, too, must the doctor be reminded to teach and explain without lecturing. Finally, the doctor may have little familiarity with testifying and be as concerned about his exposure to cross-examination as the victim. Possible lines of cross-examination could be reviewed with him. If the doctor is experienced, the prosecutor should make sure that his tone will not be perceived as overconfident and condescending.

Preparation of other witnesses. Every witness should be interviewed prior to trial. Inevitably, they contribute to the prosecutor's understanding of the case and therefore influence its presentation. These interviews also provide the prosecutor with an opportunity to assess the willingness and credibility of the witnesses, so that he can anticipate the impact of their testimony and plan accordingly for the trial. If it is appropriate, the witnesses should be alerted to what they can contribute and how their testimony fits into the whole. They may be able to volunteer information that was not previously elicited or recorded in their written statements. Patrol officers, particularly, inevitably know a great deal more about the crime and the crime scene than is found in their often cryptic incident reports.

Preparation of exhibits. At some point the prosecutor should make sure that the appropriate exhibits have been prepared for use at trial. These may include maps, diagrams, photographs, charts and other kinds of illustrative devices that will clarify and enhance the presentation of the case. It is a general axiom of trial practice that jurors will remember oral testimony considerably longer and with greater comprehension if it is supplemented by demonstrative evidence. The preparation of such exhibits, however, should not be done too early, for until the prosecutor has a firm understanding of his case, he will not know what particular angles or perspectives should be captured for illustrative purposes. This problem only underscores the obvious need to prepare early and intensely.

In addition, the prosecutor should be certain that all physical evidence is properly marked and stored and that the chain of custody can be clearly established. The prosecutor should know in advance of trial which witness will introduce which exhibit and what additional testimony will be required for the evidence to be admitted.

Pre-trial checklist. Some prosecutors find it helpful to prepare a checklist of pre-trial steps to assist them in allocating time and to assure them that nothing is overlooked. A sample checklist which can be modified to the needs of individual prosecutors and local practice has been included as an appendix to this chapter.

NOTES

[1] See "Psychiatric Aid in Evaluating the Credibility of a Prosecuting Witness Charging Rape", *Indiana Law Journal*, 26 (Fall, 1950), pp. 98–103; "Complainant Credibility in Sexual Offense Cases: A Survey of Character Testimony and Psychiatric Experts", *Journal of Criminal Law and Criminology*, 64 (March, 1973), pp. 67–75.

[2] See *Ballard v. Superior Court* 64 Cal. 2d 159, 49 Cal. Rptr. 302, 410 P. 2d 838 (1966): *People v. Pierce*, 11 Cal. App. 3d 320, 89 Cal. Rptr. 751 (1970): *State v. Forsyth*, 533 P. 2d 176, (Or. App. 1975): *Hopkins v. State*, 480 SW Rptr. 212 (Tex. Cr. App. 1972): *U. S. v. Benn*, 476, F. 2d 1127 (D. C. C. A., 1973).

APPENDIX TO CHAPTER 6

Trial Preparation Checklist

State v. _____ # _____
Trial Date _____

I. Background Reading
   A. Pleadings
   B. Police Reports
   C. Witness Statements
   D. Medical Reports
   E. Laboratory Reports
   F. Preliminary Hearing Transcripts
   G. (Other)

II. Evidence

A. Physical Evidence	Police #	Introduced By	Chain of Custody	Comments
1.				
2.				
3.				
4.				
5.				

B. Props (Maps, Charts, Etc.)	Stipulation	Introduced By	Comments
1.			
2.			

3.

4.

III. Witnesses	Interview #1 Date	Interview #2 Date	Comments
A. Detective			
B. Victim			
C. Patrol			
D. Doctor			
E. Lab Tech.			
F.			
G.			

IV. Discovery
A. Given to D/Date
B. Requested—Date Promised

V. Pre-Trial Motions	D's Brief Due	Hearing Date	Comments
A.			
B.			

VI. Jury Instructions
VII. Voire Dire

IX. Miscellaneous—To Do

1. _____

2. _____

3. _____

4. _____

CHAPTER 7. TRIAL

Over 98 percent of all reported rapes are resolved short of trial. Most reports never leave the police department, many are not filed by the prosecutor and most of the remainder are bargained in return for a plea, usually to a crime less serious than the one originally charged.[1] Nonetheless, the public perceives the trial as the culmination of the criminal justice system's response to the crime of rape. Therefore, the public perception of the symbolic importance of the trial should not be ignored. Brutal treatment of the victim at trial and low rates of conviction, which have been publicized repeatedly in the media, adversely affect public attitudes.

Aggressively fought and successful rape trials may change the public's attitude and may also affect the attitudes of victims and criminal justice personnel. If victims believe that rape trials can be won, that they will be supported within the criminal justice system and that the experience of trial is not as crippling as portrayed on television, then, perhaps, there will be more reporting. If the police realize that the prosecutor's office will take difficult cases to trial and win, then they may be more encouraged to thoroughly investigate and file cases that were previously considered marginal. If prosecutors themselves see rape cases as challenging trials that can be won, then perhaps more cases will be taken to trial and more convictions will be earned.

Most experienced trial attorneys do not perceive the trial of a rape case to be significantly different from the trial of any other major felony. They argue that the experienced trial attorney can try any case; it is simply a matter of presenting the evidence. To a large extent, this is true; but certain characteristics of rape do pose special problems at trial that require special prosecutor consideration.

7.1 Prior Sexual History

Prosecutors generally agree that, if evidence of the victim's prior sexual history is admitted at trial, it can seriously damage the state's case. This evidence can be used to support the defendant's consent defense and suggest that the victim's behavior contributed to her own victimization. Several state legislatures have specifically limited the use of this evidence and have provided special procedures to test its admissibility. Other states still rely on common law traditions which also limit the admissibility of this evidence. To some extent, however, all states allow the admission of the victim's prior sexual history in certain circumstances. The prosecutor must be aware of the law regarding this evidence as well as strategies to prohibit its use or minimize its impact if admitted.

Recent statutory schemes. There is great variety in the statutory schemes that have been enacted to limit the admission of the victim's prior sexual history. Some statutes allow its use only when it is relevant to the issue of consent. Other statutes allow its use only if it is relevant to the victim's credibility. Other states allow its use if it is "relevant," a term undefined. Still other states limit its use to explain the presence of semen, pregnancy or disease. It will take a number of years for the constitutionality and scope of these restrictive provisions to be adjudicated. What is clear, however, is that legislatures have instituted statutory changes to limit the harrassment of victims at trial and to increase the possibility of rape convictions.[2]

There have been several problems with newly enacted statutes. An Oregon statute, for example, has been interpreted to limit the prosecutor in establishing that the victim did *not* have sexual intercourse during the twenty-four hour period before the rape; such evidence could tie the semen found in the post-rape medical examination directly to the defendant's act of intercourse. If the prosecutor does inquire about intercourse shortly before the rape, he may open the door to extensive cross-examination regarding prior sexual history in general. Most statutes do not mention sexual acts subsequent to the rape but their specificity on other issues suggests that such evidence is admissible. Some of the evidentiary statutes are vague and fail to suggest specific admission criteria for the judge; the statutes may only be as helpful or as harmful as the common law.

Many of the new statutory schemes provide for elaborate pre-trial proceedings at which the defense must establish the relevance of proposed evidence. These hearings are usually triggered by written motions which outline the scope and importance of the evidence. If the documents successfully raise the issue, a full (usually *in camera*) evidentiary hearing is held to rule on the admissibility of the evidence. There has been relatively little practical experience with these evidentiary laws. Most prosecutors in those states where such legal changes have occurred report that there are very few requests for hearings. Either defense attorneys have had a difficult time specifying and documenting prior sexual acts that are relevant or, in certain cases, prosecutors have conceded relevance and the hearings have been waived.[3] It is difficult to determine whether these statutes will have any

impact on cross-examination during preliminary hearings or on defense attempts to question the victim through depositions or interrogatories.

Some prosecutors have expressed concern that the elaborate procedures designed to screen out prior sexual history information may have the opposite effect. Under the common law in many states, specific acts of prior sexuality were excluded if such acts were committed with anyone but the defendant. The language of the case law was quite strong and often sufficed to limit admissibility of the evidence. The new procedures work to legitimize the use of such evidence if the defendant follows the specified procedural requirements. It may become more difficult to reverse the trial judge's ruling if the evidence has been carefully considered pursuant to the statute.[4]

Since the evidence is so critical to the jury's judgment of the case, the prosecutor must be prepared to respond to any attempts to have the evidence declared admissible. Several steps are possible. (1) The prosecutor should force the defendant to be specific with regard to the evidence he seeks to be ruled upon and its relevance to the charge. Vague innuendoes or evidence that merely suggests a possibility of relevance should not be enough to even warrant the hearing to determine admissibility. (2) The prosecutor should gather indications of the legislative intent of statutes—through records of legislative debate, committee hearings, and public statements by lobbyists and the governor—which he can use in oral arguments and briefs to establish the clear need and purpose of the new legislation. (3) The prosecutor should have prepared a standard brief which summarizes the traditional common law exclusions of such evidence and demonstrates how the new statutes limit admissibility even further. The common law can be supplemented by the numerous law review commentaries which have recently documented national trends in this area.[5] (4) In significant cases, the prosecutor might inform interested women's groups about the possibility of amicus briefs.

If the defendant's motion to admit the evidence is denied, then it is important that the prosecutor carefully prepare a written order which summarizes the court's findings of fact and conclusions of law. The order should state the exact evidence excluded as well as prohibit any innuendo or reference to such evidence. Careful drafting may deter a skillful defense counsel from attempting to circumvent the court's holding. A crude example of such techniques might involve a defense attorney who asks the victim if she is married, and then asks if she has any children. While these questions may be innocuous on their face, if the answer to the former question is "no" and the latter is "yes," the defense may have raised suggestions of promiscuity without confronting the issue directly.

The written order prepared by the state should put the defense attorney on notice that neither the court nor the prosecutor will allow *any* reference to the sexual history of the victim. All parties should know which questions will and will not be allowed in advance of their being asked. Even if the objection to an improper question is sustained, the very asking of the question may do significant damage. A hint that promiscuity is being covered up by the objection may be more harmful than the exposure of the facts themselves. The limits of admissible evidence must therefore be established outside the presence of the jury, before the issue can be raised in trial.

Practice under the common law. In those states in which case law provides the basis for limiting the admission of prior sexual history, prosecutors often file motions *in limine*. These motions, usually heard at the beginning of the trial, request orders from the court to limit the use of such evidence during the trial. The purpose of such a motion is to force a ruling on the issue before it can be raised in front of the jury. The motion should be written and accompanied by an affidavit outlining the specific evidence sought to be excluded. The motion should state that such evidence is irrelevant and its use would be prejudicial to the state's case. In addition, the motion should stress that the ruling should be made in advance of trial so that the jury will not even be aware of the issue. An example of such a motion is included in the Appendix to this chapter.

The danger of such a motion is that is forces the state to specify what evidence it seeks to exclude. Specific evidence may be revealed that the defense is not aware of at the same time that the motion signals the state's vulnerability on the issue. The prosecutor should assume that if the evidence is damaging it must be disclosed and that the defendant should already be aware of it. The purpose of the motion is to control its use by aggressively demonstrating its inadmissibility.

Some trial courts will not rule on motions *in limine* until the issue arises during the trial. Even if the court reserves its ruling on the motion, however, the court may require that at the appropriate time the defense counsel make an offer of proof rather than ask the question in front of the jury. In general the prosecutor's motion will alert everyone to the problem and will thereby ensure scrutiny of the issue when it does arise.

Even in those states which have hearings prescribed by statute to consider such evidence, motions *in limine* can be used. These motions usually seek orders which go beyond the evidence proposed for admission by the defendant. They further insure that all related evidentiary issues are resolved before the trial begins.

Admissible evidence of prior sexual history. There are cases where evidence of the victim's prior sexual history will be admitted. Either the prosecutor has conceded its relevance or the judge has ruled over state objection that the evidence is admissible. In either case the prosecutor

must face the strategic question of whether to introduce the evidence himself or await its admission by the defendant.

If the prosecutor introduces the evidence himself, he can control its presentation. He can begin in the *voir dire* of the jury by asking if the victim's prior sexual history, for example, a conviction for prostitution, will influence the jury's deliberation. He can ask the jury to promise that they will not consider the prostitution conviction except as specified by the court. In opening argument or in direct examination of the victim he might then refer to the conviction as a "misdemeanor" thus attempting to minimize its importance. The general strategy of the prosecutor is to take the issue away from the defense, to show the jury that he is not hiding anything, and to control the use of the evidence in a way that minimizes its impact.

If prior sexual history evidence is offered or exploited by the defense, it can often be effectively neutralized by the prosecutor in argument; in fact, some prosecutors assert that such evidence can be used to the state's advantage. By reference to defense use of such evidence, the prosecutor can suggest an attempt to malign the rape victim. Especially if the jury has been influenced by recent public concern for rape, such argument can demonstrate the weakness of the defense case by suggesting the great lengths to which the defense must go in order to avoid a conviction.

7.2 Jury Selection

Most prosecutors agree that the process of jury selection is critical to the success of the state's case. This process includes not only selecting the individuals who will hear the case but preparing them for their deliberations. It is especially important in rape cases where personal attitudes toward rape, sexuality and women are so important to the jury's perception of the facts.

The impact of jury attitudes in the deliberation of rape cases has been documented in Kalvin and Zeisel's *The American Jury*.[5] The authors studied 106 forcible rape cases which involved adult victims. The data suggest that juror attitudes toward the behavior of the victim were critical factors in the jury's determination of guilt. The authors conclude:

> The law recognizes only one issue in rape cases other than the fact of intercourse: Whether there was consent at the moment of intercourse. The jury, as we came to see it, does not limit itself to this one issue; it goes on to weigh the woman's conduct in the prior history of the affair. It closely, and often harshly scrutinizes the female complainant and is moved to be lenient with the defendant whenever there are suggestions of contributory behavior on her part.
> . . . the jury chooses to redefine the crime of rape in terms of its notions of (the victim's) assumption of risk. Where it perceives an assumption of risk the jury, if given the option of finding the defendant guilty of a lesser crime, will frequently do so. It is thus saying not that the defendant has done nothing, but rather that what he has done does not deserve the distinctive opprobrium of rape. If forced to choose in these cases between total acquittal and finding the defendant guilty of rape, the jury will usually choose acquittal as the lesser evil.[7]

The job of the trial attorney is to test jury attitudes toward rape and then, to choose those jurors who are most likely to vote for conviction.

Voir Dire. During the questioning of the jury panel, the prosecutor has an opportunity to introduce himself, explore jury prejudice and educate the jury about the facts of his case and the nature of the crime charged. Since jurors appear to have strong opinions regarding rape, it is important that the prosecutor identify unacceptable jurors, whom he will ask to have excused, and neutralize the prejudice among the remaining jurors. The prosecutors surveyed as part of this study generally believed that jury bias was inevitable in rape cases, but that the *voir dire* can provide the prosecutor with a means to control its impact.

Prosecutors from various jurisdictions were asked to recount those questions they generally asked in rape cases. Though the responses varied greatly, the questions can be grouped into three categories: (1) questions which explore general attitudes toward rape, (2) questions which explore the background of the juror, and (3) questions which relate to the specific issues of the state's case.

Questions which explore general attitudes toward rape. These questions were used to identify jurors who had conservative, judgmental attitudes toward sexuality and might be unsympathetic to a rape victim of less than chaste character. Such jurors might impose their values and life styles upon the victim and blame her for the assault. Prosecutors used these types of questions most frequently in cases where consent was the anticipated defense. Even in cases where consent was not an issue, however, prosecutors wished to identify those jurors who could believe that a rape victim had "asked for it," simply by being in the wrong place at the wrong time. The technique suggested by several prosecutors involved a sequence of questions. The initial inquiry would attempt to explore potential prejudice while the remaining questions were intended to force the juries to be fair despite their biases.

The initial questions were often open-ended, encouraging the jurors to talk and reveal their attitudes. Examples include:

- Have you watched any television shows or read any magazines about rape? What were they about? Do you agree or disagree with those ideas?

- Do you have any opinions about the crime of rape?
- Have you ever been is a serious discussion about the crime of rape? What was discussed? What position do you take on those issues?
- Do you associate the crime of rape with a particular type of rapist? Victim? Sequence of events?
- Do you agree with the notion that "a woman cannot be raped"?

Prosecutors then followed with leading questions that encouraged the jurors to put aside their biases and be objective in their deliberation. Examples of these questions include:

- You understand, do you not, that you are only to consider the evidence presented to you at trial, and not what you may remember about a television program or magazine article?
- You understand, do you not, that even if you disagree with the life styles of either the defendant or the victim, you are not to judge the case because of your biases, but upon the facts of the case?
- Do you understand that even if you disagree with the law as outlined by the court, you must follow that law?

Finally the prosecutors would exact a promise from the jurors to obey the law as given by the judge and to deliberate only with reference to the evidence. These questions might include the following:

- Will you promise me and the defense counsel that you will put your attitudes toward life style and sexuality aside and take a fair, unbiased look at the evidence?
- It is easy to be a Monday morning quarterback and say here is what I would have done in that situation. Can you promise that you will put aside your personal opinions and consider the evidence as presented?
- You may find that you do not like the defendant or even the victim in this case; nonetheless, can you promise both the defendant and the state that you will put aside your personal judgment and consider the case on its facts?

The prosecutors suggested that the value of these "promise" questions could be realized in rebuttal argument. For example, in arguing a case which involved a consent defense, the prosecutor might assert:

> . . . Now you may not have liked the people that testified in this trial, and you may have had difficulty understanding why the victim did what she did, because you would never have done that. But what you might have done or not done is unimportant, and you cannot consider it. Each of you promised me before this trial began that you would not judge these people's life styles. You promised that you would put aside your personal biases. It is not enough to say that the victim was naive or foolish. The question is was she raped and to answer that you must look at the facts . . .

The sequence of questions allows the prosecutor to identify a few candid jurors whose attitudes make them unacceptable for the case. For the remainder of the panel, these questions should suggest the existence of prejudice in everyone and the need to place such biases aside. The ultimate goal of the prosecutor is to have the jurors bend over backwards to be fair to the victim.

b. *Questions which explore the background of the juror*. These are questions which prosecutors ask in virtually every felony case. They include inquiries into educational background, occupation, hobbies, community groups, subscriptions and family ties. One particular subject mentioned often by prosecutors concerns the juror's experience with crime and the criminal justice system. Some of these questions include the following:

- Have you or a member of your family ever been the victim of a crime?
- Do you know anyone who has been the victim of a serious felony?
- Have you ever known anyone who has been the victim of a rape?
- Have you ever known anyone who has been accused of rape?
- Do you have any friends or relatives in law enforcement?
- Have you ever had any bad experiences with a law enforcement officer?

These questions may reveal that the juror has had a negative experience with law enforcement or has had a friend or relative accused of rape. In addition, they may reveal a predisposition to identify with the victim of a crime. The goal of these questions is obviously to learn as much as possible about the jurors in order to predict how they will perceive and weigh the evidence.

c. *Questions which relate to specific issues in the state's case*. Perhaps the most important questions that can be asked in *voir dire* relate to problem areas in the prosecutor's case. The prosecutor may be able to expose weaknesses in a manner that steals the issue from the defense and minimizes its impact. Under the guise of exploring possible prejudice the prosecutor hopes to present his case in a sympathetic light.

Several prosecutors who were interviewed sought to alert the jury to the lack of evidence in their rape cases in a manner that made this weakness understandable. Rather than have the jury speculate on the absence of additional evidence, these prosecutors believed that jurors who were alerted to the problem would pay more attention to evidence that was presented. Examples of these questions include:

- Do you understand that rape is a crime that occurs in the darkness of night, usually without witness and never in front of a crowd?

- If the law instructs you that you can convict the defendant even on the testimony of one witness, will you be able to follow that law if you believe that witness beyond a reasonable doubt?

The latter question forces the juror to consider a case that is weaker than the prosecutor may present. If the state introduces three or four witnesses the jury should be reminded in rebuttal that they agreed to convict on the testimony of only one.

Many prosecutors believe that juries have particular difficulty with cases in which the victim offers little resistance. These prosecutors approach the issue through *voir dire* in a number of different ways:

- Would you expect the victim of a rape to risk death or hospitalization in order to resist a sexual attack?
- If the law instructs you that resistance is not required under all circumstances, can you promise me that you will follow that law? Even if you personally disagree with that law?
- Under what circumstances can you foresee that resistance would be foolhardy and dangerous?
- Have you ever been in a situation where a person of greater physical size and strength has threatened to kill you unless you did what he said? Are you able to imagine what that would be like?

Once again the prosecutor can ask the question in an exaggerated fashion so that the jury will agree with him in a situation more troublesome than the one he hopes to present at trial. He can later remind them that they were willing to convict if there was no resistance; in the case he presented the victim did indeed offer significant resistance.

If the victim in the case acted in an unusual way, the prosecutor might raise this issue in *voir dire* by suggesting that what the victim did was perfectly understandable given the circumstances. Prosecutors suggested the following questions in these circumstances:

- Have you ever heard about incidents where people run back into their burning home to retrieve a piece of costume jewelry or a favorite dress? Can you understand what fear and shock can do to one's common sense?
- If the parties to this case did things that you, in the quiet calm of the courtroom, find strange or foolish, could you try to place yourself in their predicament to understand why they may have done what they did?

Some prosecutors fear juror reaction to the particular life style of certain victims. They suggest exploring the issue in the following ways:

- You will learn that the victim in this case works as a cocktail waitress. Is there something about the nature of that job that even now makes you biased against this woman? Do you think a cocktail waitress can be raped? Is there anything about being a cocktail waitress that makes one less worthy of the protection of the law?
- Can you promise the state and this court that your personal opinions, no matter what they are regarding the parties in this case, will not interfere with your deliberation on the facts?

Occasionally, the prosecutor will isolate one important characteristic of the case, such as hitchhiking:

- Do you know of anyone in your family who hitchhikes?
- Have you ever hitchhiked?
- If you were hitchhiking and were robbed, would you say that you were "asking for it"? Do you think that the robber would not be guilty of robbery just because you were hitchhiking?

Where the jury composition includes several minority members, prosecutors have attempted to utilize this fact to their advantage in the following manner:

> Do you believe that all citizens have basic civil rights that must be protected by law? Would you agree that this is true regardless of age, religion, race or wealth? Would you also agree that a woman has a civil right to be free from having sexual intercourse unless she is a willing partner?

Obviously there is a great variety in the potential styles and content of *voir dire* questions. Depending upon local law, the indulgence of the trial judge, the facts of the case and the personality of the prosecutor, the *voir dire* examination can be an important opportunity to identify problem jurors and introduce important aspects of the case.

Choosing particular jurors. Prosecutors were asked what types of jurors they wanted to have sit on rape trials. While one would expect that criteria for selection would vary as a function of the facts of the rape case, there was a remarkable lack of unanimity even when a constant set of facts was assumed.

Many prosecutors did not distinguish between jurors selected for rape cases and jurors selected for other felonies. These prosecutors sought jurors who were pillars of the community—who had a long job tenure, a home, a mortgage, a family or any other characteristics suggesting they were interested in protecting their own achievement from those who would not abide by the law.

Other prosecutors were concerned that these types of jurors would be unable to identify with many rape victims, and as a result, these prosecutors distinguished most rape cases from other felonies. Middle-class and middle-aged jurors, who would be acceptable in most other felony cases, might judge the victim harshly for hitchhiking, going unescorted to a tavern or inviting a man to her apartment. Of particular concern were middle-aged

women, who might be extremely critical of other women. The possibility that these women might judge victims by their own standards of conduct and caution was thought to pose a considerable risk if the evidence of resistance was minimal and the victim's actions were interpreted as suggestive. These prosecutors preferred younger, more liberated women as jurors on rape cases even though these same women would be unacceptable on other cases, such as those which involved certain drugs.

Generally, prosecutors sought jurors who would identify more readily with the victim than the defendant. Young men, if the facts of the case were not brutal, might identify with the defendant. In contrast, older men might be more interested in the proper behavior of young men and display a paternal concern for the victim. Men and women with female children of the victim's age were expected to be good jurors if the victim's activities were consistent with what one might expect from a daughter. On the other hand, jurors with male children were less acceptable since they might be more inclined to excuse the behavior of the defendant.

The preferred racial composition of the jury was dependent upon the race of the victim and the defendant. Where the parties were of different races, prosecutors believed it was unwise to have many jurors of the defendant's race unless the defendant's racial connection to the jurors could be overcome. If the defendant's actions or background was significantly foreign to the juror, then the racial similarity was believed to be less important.

Prosecutors generally sought jurors with whom they felt comfortable. Such jurors may more easily identify with the prosecutor and the victim than with the defendant and, possibly, the defense attorney.

Many prosecutors agreed that it was difficult, if not impossible, to accurately predict jury sentiment based on *voir dire*. They suggested that the prosecutor should attempt to select stable, respectable citizens with whom the prosecutor could easily communicate. If the case was convincing to the prosecutor, then the prosecutor should be able to convince the jury.

Unfortunately, there are very little data available on what kinds of jurors are best for rape cases. While there has been some research on jury selection in "political" trials, it is questionable whether this has general applicability to all criminal cases or to rape cases in particular. While prosecutors were quite willing to theorize on their notions of jury selection, most were quick to disclaim any scientific basis to their beliefs.

7.3 Trial Strategy

The actual presentation of the state's evidence and the tone and content of the prosecutor's arguments follow from the development of a theory of the case. This theory is the "story line" of the case, into which every piece of evidence should fit. It is the conceptual framework that unites the evidence into a consistent and convincing portrayal of events. The theory of the case is often formulated in anticipation of defense argument, for the state's case, especially in rape cases, can be tailored to what the defense will allege. This chapter explores trial strategy by reference to possible defenses and their related theories of the case.

Consent defense. The case in which consent is raised as a defense focuses on whether the victim voluntarily and willingly engaged in sexual intercourse. (See discussion of the consent defense in Chapter III.) The identity of the parties and the fact that penetration occurred are usually conceded. The victim contends that she was forced to engage in intercourse while the defendant asserts that the victim was a willing partner. The prosecutor's strategy should be to demonstrate, through evidence and argument, that the victim's story is more believable than that of the defendant. To achieve this goal, he can employ several strategies.

Since the victim must suffer humiliation and invasion of privacy to pursue prosecution, the prosecutor should point out how unlikely it is that the victim fabricated her story. The prosecutor should take advantage of the media portrayal of victim harassment and demonstrate the ordeal that the victim has gone through. Not only should the victim testify to the terrible details of the rape, but the jury should be aware that she has been forced to tell this same story to strangers in the police department, the local hospital, the prosecutor's office and various public courtrooms. The prosecutor may go so far as to suggest that if the victim wanted to "get" the defendant, there are surely easier ways. The prosecutor should not spare the details of either the rape or the reporting process; the jury should consider itself obligated to the victim for the suffering this crime has caused her.

Since credibility is central to the case, the prosecutor should portray the victim as honest, candid and forthright while the defendant is cast as evasive, inconsistent and untruthful. The consistency of the victim's story should be emphasized. Even though she has been forced to repeat the story of the rape numerous times, it has remained basically the same. In contrast, any changes in the defendant's story should be exploited. The smallest fabrication on the most peripheral point can stand for the proposition that if he would lie about something insignificant, surely he cannot be trusted on the central issues of the case. The prosecutor can argue that while the victim has little to gain and much to suffer by the defendant's conviction, the defendant, on trial for a serious crime, has every reason to shade the details of the rape. If the defendant has an admissible criminal record, this should obviously be emphasized.

The defendant should be cast as the aggressor and the

victim as his prey. If the victim used poor judgment or displayed naiveté, this can be turned to the state's advantage. The prosecutor can suggest the victim's vulnerability in contrast to the defendant's willingness to take advantage of her.

The ultimate success of the case may depend upon the prosecutor's ability to corroborate the victim's story. Any evidence suggesting the defendant's use of force either directly, through injury or torn clothing, or indirectly, by indications of the victim's emotional state immediately after the rape, can be critical. Photographs and illustrations can suggest how unpleasant the scene of intercourse was, while a map might demonstrate the availability of a more congenial setting for consensual intercourse.

The prosecutor should plan the entire case presentation with goals and strategies such as these in mind. *Voir dire* could explore issues of consent and resistance while the opening argument might stress the internal logic of the victim's story and how it is corroborated in every important detail by numerous witnesses. The witnesses themselves might then be presented in a parade, each contributing a little more to the details surrounding the rape. This should increase jury expectations regarding the victim and mark her testimony at the end of the state's case as the climax of the trial. It is often beneficial to have the victim on the witness stand at the end of direct testimony, just before the court recesses for the day. This may leave a favorable, lasting impression with the jury. If the victim is expected to be quite weak, she might be introduced as the first witness with the remainder of the case devised to show how her story is corroborated.

All of these steps should lead to closing argument and rebuttal. Many trial attorneys suggest that final arguments should be the first part of the trial that are prepared; the rest of the trial acts to provide the foundation for these arguments. In the consent case, this is particularly true because jury prejudice and the usual plausibility of the defense are difficult factors to overcome. The prosecutor must try to shape jury attitudes through the presentation of evidence and persuasive argument from the beginning to the end of trial.

Identification defense. The primary strategy in an identification case is to bolster and corroborate the victim's in-court identification of the defendant. (See discussion of identification defense in Chapter III.) This can be done through direct examination of the victim, testimony of corroborating witnesses and effective argument.

Direct examination of the victim in an identification case is obviously critical. Great attention should be paid not only to the victim's description of the defendant at the time of the rape but to the conditions under which the victim observed the defendant. The lighting, distance, perspective and time involved should all be presented in such a way as to suggest the possibility for accurate observation. This can be done by breaking down the incident into its component parts. The victim should not only describe the appearance of the defendant, but also carefully describe his actions and movements, so that the length of the observation appears extended. Short time spans can be exaggerated by the standard device of the prosecutor looking at his watch for the ten or fifteen seconds mentioned. In the quiet courtroom with the brutality of a rape in everyone's mind, time can appear to move very slowly. If the scene of the observation changed, each new distance, lighting, and perspective should be reviewed. It should appear that the victim has made a series of independent observations, each reinforcing the last and clarifying the next.

In addition to describing the rape itself, the victim should spend a considerable amount of time in direct examination describing the subsequent process of identification conducted by the police. The nature of the photographic montage and the range of choice available to the victim should be explored. She should carefully articulate which features in the photograph convinced her that this was the rapist. Of course, these should be the same features that she previously described when depicting the events of the rape itself. This process should be repeated with reference to the corporal lineup. The photographic montage and lineup photographs can be submitted into evidence; normally they demonstrate that the identification was not influenced by the police. The purpose of this repetition and concern for detail is to emphasize the victim's certainty concerning the defendant's identification. This should obviously be climaxed with the victim decisively pointing to the defendant as the man who raped her.

Police witnesses can be used to corroborate the victim's description of the identification techniques. By outlining the procedures regarding photographic and corporal lineups the police can demonstrate the professionalism and neutrality of the process. Furthermore, they can report the reaction of the victim when she identified the suspect. Since this does not go to the "truth" of the identification, it may be admissible to show that an identification was made. Police witnesses can also be used to show other methods of identification were employed. Juries may have come to expect identification to be proved by the matching of fingerprints. If the police have not considered this, an astute defense attorney may suggest it to them. The police should be able to explain how they attempted to find fingerprints and other evidence of identification or why that approach was impossible. The absence of such evidence should not provide a basis for jury speculation.

Any evidence which corroborates the victim's identification is critical. This could include testimony that the defendant was in the area at the time of the incident. It could include facts related by the victim that only a person

who saw the defendant unclothed would know. The extraordinary proximity of the victim and her assailant in a rape case should be exploited.

Diagrams, maps and photographs can be usefully employed to demonstrate the victim's opportunity to observe the defendant. This not only will clarify her presentation of the events, but special features such as exact distances, lines of sight and light sources can be marked for emphasis.

A common defense tactic in identification is to dwell on the initial description of the suspect, and point out how the description does not match the defendant. Either details were omitted which appear significant, or details were added that do not correspond to the defendant. The prosecutor can effectively counter these points in argument by distinguishing between "description" and "identification." Description is inevitably vague and inexact, for it requires the transformation of a visual image into words. Inaccuracy of description does not mean an inaccurate identification. The latter is the recognition that the visual impression matches the person identified.

One prosecutor described a particularly successful technique to distinguish description from identification in the juror's minds. In argument, he asks the jurors to look directly at him but to describe to themselves what the person sitting next to them looked like the day before. The prosecutor might ask what the color of the juror's blouse or shirt had been, if that juror had worn any jewelry, and to estimate the juror's height and weight. Obviously the exercise would be quite difficult. The prosecutor then asks the jurors whether if they saw that person again, they would be able to recognize him or her. The point is made that descriptions are fraught with error, especially under the unrealistic scrutiny of cross-examination.

If the defendant does not look like a "rapist," the prosecutor should be sensitive to possible jury reaction. This could be explored in *voir dire* where jurors could be instructed that rapists exhibit few common characteristics and may have normal sexual outlets. Such handling can undermine a defendant who is attractive and who may even have a wife, children or a girlfriend in the courtroom. In a consent case, the defendant's impressive demeanor may be exploited to suggest how he could have influenced the victim to associate with him prior to the rape.

If there is an alibi in conjunction with the normal identification issues, it is important that the prosecutor be well prepared. Each defense witness should be interviewed prior to trial and with a state's witness present so that inconsistent statements made at trial can be impeached. At trial, the alibi witnesses should be excluded from the courtroom when not testifying and prohibited, as much as possible, from discussing their testimony until all have testified. The cross-examination of these witnesses should emphasize bias and inconsistencies. Their relationship to the defendant should be carefully explored. While their memory of such obvious details as the time when they were with the defendant may be perfect, they may not be able to remember more peripheral details such as where everyone sat in the room, what words were spoken or what clothing was being worn. If the prosecutor asks each witness to diagram the seating arrangement or quote the words of the defendant, dramatic contradictions may appear. In addition, each witness could be asked when he first learned that the defendant had been charged with rape, when he first came forward with his story and to whom it was told. It can then be emphasized that he never informed the police or the prosecutor that the man charged with rape was with him at the time of the crime and so could not have committed it.

Though identification is the key element in the case and penetration may be conceded, the prosecutor should still explore the rape in all of its terrible details. Inevitably the defense will attempt to brush this aspect aside by conceding the horrible nature of the assault. The prosecutor should not succumb to the temptation of glossing over these facts lightly, for he must provide a reason for the jury to convict. He must try to create a situation in which the jury desperately wants to convict, and then demonstrate that all the evidence points directly to the defendant.

Psychiatric defense. The psychiatric defense often arises in cases where consent and identification defenses are unlikely, given the strength of the state's case. (See discussion of psychiatric defense in Chapter III.) Depending on state law, the psychiatric defense can represent a favorable option for the defendant. The defendant might prefer a verdict of "not guilty by reason of insanity" to a conviction for rape, for this may allow him to serve a shorter sentence in a hospital setting. The prosecutor's response to this defense is virtually the same in any felony.

The prosecutor should order his case from the beginning to suggest that the defendant has some advantage in pleading an insanity defense and that he actually calculated the entire crime. The jury can be questioned during *voir dire* about the legal requirements of insanity and about their bias for and against psychiatric testimony. The presentation of the state's evidence and the prosecutor's arguments should emphasize the detailed planning of the crime, the defendant's consciousness of guilt and the appropriateness generally of the defendant's language and actions.

The cross-examination of the state psychiatrist is usually the key to the success of the state's case. The following is a summary of the general advice given by Peter Kossaris, Deputy District Attorney for Ventura County, California, regarding the cross-examination of the defense psychiatrists:

- Ascertain what information the psychiatrist was provided with and obtain copies of all written information he was given. There may be information favorable to the state's position which the psychiatrist did not mention.
- Determine the assumptions of the psychiatrist so the state may establish that these assumptions are incorrect. There may, for example, be contradicted by evidence the state has already introduced or even by the material the psychiatrist has in his possession.
- Determine what the psychiatrist charges for his services and his rate per hour; the hourly and total fee may demonstrate that he has spent little time preparing outside of the courtroom.
- Attempt to demonstrate that the psychiatrist did not investigate the case and prepare thoroughly. Reference in the written material to documents or to tapes might lead to questions which reveal that the doctor did not investigate any primary sources.
- The prosecutor may be able to suggest that the psychiatrist is biased toward the defense. If the psychiatrist can acknowledge a long list of cases in which he testified on behalf of the defense, he might be asked in how many cases he has testified for the state.
- If the doctor testifies that he determined no tendencies toward sexual deviation on the part of the defendant after interviewing the defendant, the psychiatrist can be asked how he can draw this conclusion after only one hour under normal interview conditions.[8]

In argument, the prosecutor's strategy should be to consider the inherent persuasive power of the defendant's expert witness and within ethical bounds suggest the possible motives for the defendant to seek an acquittal by reason of insanity.[9] It can be emphasized to the jury that there are only two people who can accurately report the defendant's condition at the time of the rape. The defendant may have an interest in alleging his insanity. The victim, however, has no interest in the outcome with regard to this issue.

Once again, despite defense concessions, the full horror of the rape should not be minimized. The trial should not be allowed to focus entirely on the defendant. The jury must be forced to consider the ordeal of the victim as they reach a verdict.

Character witnesses for the defense. The defendant may present character testimony, where admissible, to demonstrate his good reputation in the community. The prosecutor's response is to undermine the impact and relevance of the testimony through cross-examination. The prosecutor can explore with the witnesses the community in which this reputation developed. Clearly a good reputation in the church community may not be relevant to the defendant's sexual habits. The prosecutor can subtly inquire into the training that the witnesses have had which would enable them to conclude that the defendant is not a rapist. Clearly the witness's relationship to the defendant and their conversations regarding the case can be scrutinized. Finally, the witnesses can be confronted with some of the facts of the case. Often the witnesses are unfamiliar with the details of the assault and can be asked if knowledge of certain facts would have influenced their opinions regarding the defendant's character. If the questions are carefully phrased the witness will either say "yes" and almost become a state's witness, or "no" and thereby suggest a strong bias.

The defendant. The key defense witness in many criminal trials is the defendant himself. In rape cases, especially where consent is an issue, he will often seek to pit his word against that of the victim. The defendant's testimony can be the strongest part of the state's case, if on cross-examination the prosecutor can demonstrate the defendant's fabrication of his story.

In trials that involve consent, the defendant's testimony may suggest the same condescension and disdain for the victim that he exhibited at the time of the crime. His testimony may be an attempt to establish his superiority over the victim in a contest before the jury. One tactic that a skilled prosecutor might employ in cross-examination is to force the defendant to amplify on his distorted sense of superiority. The prosecutor could explore in excruciating detail, the various techniques that the defendant employed to "seduce" the victim. Such a recital will often alienate the average juror, for the defendant can be portrayed as a calculating egotist with a callous disregard for his prey. As a general matter, the prosecutor should be aware of the various types of rapists that have been classified as a result of clinical studies. This may help the prosecutor to understand the nature of the crime and the defendant he will have to interrogate.[10]

Generally, the examination of the defendant in rape cases will be similar to cross-examination in other cross-cases. This is especially true if the defense involves identification or psychiatric issues. The prosecutor must emphasize the improbability of the defendant's story and his attempts to evade the truth. The prosecutor should exploit inconsistencies in the defendant's stories, admissions or actions which suggest a consciousness of guilt, attempts to deceive the victim or the police, and prior convictions. In the context of cross-examination this usually requires that each basic fact be clearly and forcefully exposed; the conclusions to be drawn should await argument.

The prosecutor should be sensitive to the limits of cross-examination as well. If the defendant is a strong, well-prepared witness, he may be able to reiterate or expand upon his direct testimony. In the extreme case, the weak defendant may arouse jury sympathy. In preparing for cross-examination the prosecutor should be aware that

the jury expects a vigorous attack upon the defendant. The success of the cross-examination may very well determine the outcome of the case.

Closing argument. The prosecutor's closing argument and rebuttal will undoubtedly reflect his personal style. Prosecutors who were interviewed suggested a number of points that are traditionally emphasized at the end of the trial. The jury should have no doubt about the prosecutor's opinion of the defendant's guilt or the strength of the state's case. While the prosecutor cannot render his opinion, his tone should clearly suggest confidence in the case. If the jury believes that the prosecutor has any doubts, then there is no incentive to convict. The prosecutor should recognize and deal directly with the myths about rape that may influence jury perceptions. By acknowledging these jury concerns, identifying them as myths and suggesting their inapplicability to his case, the prosecutor will provide the jury with a means to overcome its prejudice. Several prosecutors urged that the jury be reminded of its responsibilities during argument. The jury, as the conscience of the community, has an obligation to reach a verdict. It is the jury, and not the police, who ultimately must enforce the criminal law. These prosecutors also emphasized that the rebuttal argument should stress the seriousness of the crime. In this way, the prosecutor can suggest that a guilty verdict will demonstrate the jury's concern for rape and its victims.

NOTES

[1] Of the 635 reported rapes in Seattle, Washington (1974) and Kansas City, Missouri (1975) studied as part of this research, the police were able to identify a suspect in 167 cases. Of these 167 cases, 121 were presented to the prosecutor for filing. The prosecutor filed 86 cases; 45 for rape or attempted rape. Of these 45 cases, 10 resulted in convictions for rape or attempted rape. Only five of these convictions resulted from a trial.

[2] See *Forcible Rape: An Analysis of Legislative Issues*, published by the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration published as part of this project, Chapter III.

[3] This was the opinion of prosecutors in Alameda County, (Oakland), California, King County (Seattle), Washington and Wayne County, (Detroit), Michigan.

[4] This was the opinion among prosecutors in King County (Seattle), Washington, though there were no cases cited in which this result occurred.

[5] See *Forcible Rape: An Analysis of Legislative Issues*, infra, for a selected bibliography of the relevant legal literature.

[6] Harry Kalvin, and Hans Zeisel, *The American Jury* (Chicago: University of Chicago Press, 1966).

[7] Ibid., p. 249, 254.

[8] Peter Kossaris, "Trial Considerations", *Sexual Assault: A Training Program of the California District Attorney's Association*, California District Attorney Association, 1975. See Harlan M. Goulett, *The Insanity Defense in Criminal Trials* (St. Paul, Minn: West Publishing Co., 1965).

[9] See ABA Standards, *The Prosecution Function*, 6.1 (1971), *Administration of Criminal Justice*, (American Bar Association, 1974), Standard 5.8.

[10] See Murray L. Cohen, Ralph Garofalo, Richard Boucher and Theoharris Seghorn, "The Psychology of Rapists". *Seminars in Psychiatry*, 3 (August, 1971) pp. 307–327; Walter Bromberg and Elizabeth Coyle, "Rape: A Compulsion to Destroy", *Medical Insight*, 22 (April, 1974), pp. 21–25: Fritz Henn, Marijan Hersanic and Robert H. Vanderpeall, "Forensic Psychiatry: Profiles of Two Types of Sex Offenders", *American Journal of Psychiatry* 133 (1976), pp. 694–696; Gary Fisher and Ephraim Rivlin, "Psychological Needs of Rapists", *British Journal of Criminology* II (1971), pp. 182–185; Asher Pacht and James E. Cowden, "An Explatory Study of Five Hundred Sex Offenders", *Criminal Justice and Behavior* I (1974), pp. 13–20.

APPENDIX TO CHAPTER 7

IN THE SUPERIOR COURT OF THE STATE OF _____ FOR _____ COUNTY STATE OF _____,

Plaintiff,
v.
JOHN DOE,
Defendant.

NO. _____
PLAINTIFF'S MOTION *IN LIMINE* AND SUPPORTING AFFIDAVIT

COMES NOW _____, Prosecuting Attorney for _____ County by and through his deputy, _____, and moves the court for an order *in limine* prohibiting the defendant's attorney, the defendant, and any witness in the above-entitled cause from inquiring of, referring to or making accusations in connection with any prior acts of misconduct by the prosecutrix and/or general reputation for chastity. This motion is based on the records and files herein, the attached supporting affidavit, and the trial memorandum.

_____
Prosecuting Attorney

By _____
Deputy Prosecuting Attorney

STATE OF _____ }
COUNTY OF _____ } ss.

_____, being first duly sworn on oath, deposes and says:

That he is a deputy prosecuting attorney for _____ County and the trial deputy in the above-entitled cause; that he is familiar with the records and files herein; that the above-named defendant is charged with the crimes of rape and sodomy allegedly committed upon one _____; that said victim will be a witness for the State of _____; that said victim is unmarried, and has _____ child; that your affiant has discussed this case with Mr. _____, the defendant's counsel; that during this conversation Mr. _____ suggested that the victim has a poor reputation for chastity; that information regarding the victim's prior acts or general reputation for chastity is not relevant to the present charge; that such information is so prejudicial that its suggestion would preclude the plaintiff from receiving a fair trial; and that the use of such information is contrary to the established law of the state of _____.

_____
Deputy Prosecuting Attorney

SUBSCRIBED AND SWORN to before me
this _____ day of _____, 197 ____ :

_____

NOTARY PUBLIC in and for the state
of _____, residing at _____.

IN THE SUPERIOR COURT OF THE STATE OF _____ FOR
_____ COUNTY

STATE OF _____,
Plaintiff,

v.

JOHN DOE,
Defendant.

NO. _____

ORDER *IN LIMINE*

THIS MATTER coming on regularly to be heard before the undersigned judge of the above-entitled court upon the motion of the state of _____, plaintiff, for an order *in limine* precluding testimony concerning the prior acts of misconduct by the prosecutrix and/or general reputation for chastity on behalf of the prosecutrix, and the court being fully advised in the premises; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there shall be no reference made to any unrelated prior acts of misconduct by the prosecutrix and/or to the general reputation of the prosecutrix for chastity.

DONE IN OPEN COURT this _____ day of _____, 197 _____.

_____
JUDGE

Presented by:

_____
Deputy Prosecuting Attorney

Copy received:

_____
Attorney for Defendant

CHAPTER 8. SENTENCING

The sentencing of the guilty defendant represents the final stage of a criminal case and perhaps its culmination. The underlying assumptions of prosecution come to light and the offender should be addressed. With the exception of the infrequent trial, this is the most public part of the criminal proceedings; the decisions to arrest, file charges and negotiate a plea are all done without public scrutiny. At sentencing, the public can observe, at least in part, how the criminal justice system responds to the crime of rape.

The prosecutor's role at sentencing varies greatly among jurisdictions. There are, as well, a variety of sentencing procedures. In some jurisdictions, the jury actually fixes the defendant's sentence and the prosecutor addresses the jury as he would give closing argument. In jurisdictions in which the judge determines the sentence, the prosecutor may act as the representative of the state in an adversary proceeding, offering specific sentence recommendations to the judge and articulating their rationale.[1]

The sentences that rapists receive vary greatly as well. Rapists are subject to the death penalty in some states and routinely receive sentences of hundreds of years imprisonment in others. In still other states, rapists are sent to sexual psychopathy treatment programs or mental institutions, placed immediately on probation, or sentenced to limited jail terms.

The variety of laws, styles and roles is so great that there are few conclusions to be drawn or recommendations to be made. However, three general topics should be briefly addressed. These include the role of the prosecutor with regard to the rape case, the need for providing information to the sentencing judge and the involvement of the victim and the police at sentencing.

8.1 The Role of the Prosecutor

Though the role of the prosecutor at sentencing varies among jurisdictions, his role vis-à-vis the rape case does not end until the defendant is sentenced. Since most rape cases are resolved by a plea prior to trial, the personal involvement of the sentencing prosecutor may be quite limited. Often he will only have received the case file just before the sentencing; rarely will he have tried the case to its conclusion and be intimately familiar with the facts. In either case, the prosecutor represents the state at the hearing and must act to protect the people's interests.

Inevitably the prosecutor is cast in an adversial relationship with the defense attorney, who seeks a disposition less severe than the state. While occasionally the attorneys will agree to a common sentencing recommendation, more often the understanding reached in negotiations reflects only the prosecutor's recommendation. It will act as a recommendation for the upper limit of punishment, and the defense attorney will advocate a sentence that is less punitive. Where the parties do agree on an appropriate sentence there is no special role for the prosecutor. Where they disagree, the prosecutor should be prepared to state with reference to the facts of the case and the policy of his office, why the particular recommendation is being made. If the prosecutor does not know the facts of the case or the basis for the recommendation, then he is not prepared to advocate that sentence.

Often the judge does not expect a presentation or even a recommendation by the prosecutor; he will rely on pre-sentence reports to arrive at his decision. Especially in these situations, a prosecutor's recommendation or statement of philosophy may be quite persuasive. Perhaps it is in rape cases that such statements should be made. Because the crime of rape has been so misunderstood, the judge perhaps should be reminded that this is not simply another felony.

8.2 The Transfer of Information

Regardless of the prosecutor's role at sentencing, the judge will base his sentence on what he has learned about the defendant and the crime. The information that he receives may come from many sources. Most recently, pre-sentence reports have been written by social service agencies distinct from both the prosecuting and defense attorney offices. It is critical that the judge receive all of the relevant information that the prosecutor possesses.[2]

This transfer of information may take the form of a memorandum or telephone call to the pre-sentence report writers. It may take the form of a report written directly to the judge with a copy to the defense attorney. This report should outline all of the factors that the prosecutor believes the judge should consider in making his sentencing decision.

The contents of this report may go beyond the simple written statements of the case file. If the prosecutor has met with the victim and various witnesses, he may have supplemental information regarding the defendant and the seriousness of the crime. In addition, he may be aware of information that would not be admissible at trial, but should be considered by the court. Hearsay information, such as police intelligence reports, is admissible for the purpose of sentencing.

As the state provides more information to the judge, the defense will attempt to either respond in kind or challenge the validity of the information. This may turn the sentencing into an elaborate hearing and force the expenditure of prosecutorial resources not normally alloted to this function. Policy makers within the prosecutor's office will ultimately determine whether this type of expenditure is worthwhile and, if so, in which cases. If rape has been traditionally perceived in narrow terms within a jurisdiction, such an expenditure may be justified to change judicial attitudes.

8.3 The Victim and the Police

As discussed in the context of plea bargaining (Chapter V), the victim and the police are two parties that may have a special interest in the outcome of the rape case. The victim may seek retribution or at least a conclusion to her victimization. The police desire a fair result that will justify their efforts in the case. In addition both groups may have information to contribute to the sentencing decision. They obviously have a legitimate interest in participating in the sentencing and being informed of the result.

If the police and the victim write to the sentencing judge or even appear at the sentencing, the effect may be to reinforce the state's position. The judge may be persuaded by their information and interest; at the least he will have to justify his decision to them. This is especially important in those cases which have been resolved by a negotiated plea, for the judge may have never seen the victim or fully understood her ordeal. Based only on written reports, the judge's impression of the crime may be limited, if not unrealistic.

It is sometimes argued that inviting the victim and the police to the sentencing applies unfair pressure to the judge, forcing him to be harsh with the defendant. It is further argued that this approach or tactic may backfire as the judge responds to the pressure rather than the merits of the case. The judge, however, is a public official, elected or appointed to perform the difficult task of making sentencing decisions. There is nothing underhanded about confronting the judge with the public and controversial nature of this crime.

Inviting the victim and the police to the sentencing inevitably requires the expenditure of still more time and resources. The parties must not only be kept informed about the changing times and locations of the hearing, but they should be prepared for the hearing itself if they want to participate. Ultimately, however, the amount of resources that should be expended begs the question of the appropriate role of the prosecutor. If the prosecutor assigns a high priority to the crime of rape, then these functions may very well become routine.

NOTES

[1] See ABA Standards; *The Prosecution Function*, 6.1 (1971).

[2] Ibid., 6.2.

CHAPTER 9. POLICE, MEDICAL PERSONNEL, AND VICTIM COUNSELORS

The prosecutor is only one member of a criminal justice team that responds to the crime of forcible rape. Police, medical personnel and victim counselors all have central roles in the development of rape cases and their cooperative interaction with the prosecutor is essential. It is very important to the prosecutor that he have good professional relationships with these groups, for he must depend upon them to investigate the case, gather evidence, testify at trial and assist him in helping the rape victim. The purpose of this chapter is to discuss these interactions and suggest strategies that will maximize their effectiveness.

9.1 Police

Police departments are organized in several different ways to respond to the crime of rape; their organizational structure may dictate the style of police/prosecutor interaction. Traditional police departments dispatch patrol officers to rape calls, and then provide follow-up investigative support by detectives a day or even several days later. The detectives may have little special training in rape cases, and in most smaller jurisdictions they investigate many other crimes in addition to rapes. Several larger police departments have created specialized sexual assault units at the detective level. The detectives are often trained to respond to the needs of rape victims and the difficulties of rape prosecution. They either report directly to the scene of the crime or begin their investigation within 24 hours of the time it is reported. Thus, depending upon the size of the department and its degree of specialization, prosecutors will interact with a variety of police personnel. These police officers will respond to the crime of rape with varying degrees of expertise, training and sensitivity.

Prosecutors and police were asked about their perceptions of each other.[1] Many complaints were voiced which may be endemic to prosecutor/police relations and not specifically related to rape. Nonetheless, they seem to emanate from a general lack of communication that can influence the outcome of these cases. Prosecutors complain that the police are sloppy in their investigation of crimes. They either miss important evidence or improperly seize, mark or store the evidence that is gathered. They fail to contact corroborating witnesses or to interview them adequately. Detectives are criticized specifically because they cannot be relied upon once their case has been filed. The police argue that prosecutors view their cases superficially and make filing and plea bargaining decisions without consultation and without regard to the quality of the investigation. They complain that prosecutors give inadequate guidance at the same time that they expect the police to file perfect cases. These general problems of communication have been attacked by a number of strategies throughout the country.

Many prosecutors have sought early involvement in complex cases such as rape. Some prosecutor offices have 24 hour-a-day liaison with the sexual assault units of police departments so that police and prosecutors can work together from the time of the rape report. This not only facilitates rapport between agencies, but enables the police to better perceive the rape investigation from the prosecutor's perspective of possible trial. It also enables the police to respond more quickly and confidently to potentially complex legal problems such as when and how to arrest or conduct a search.

Prosecutors have participated in the training of police for complex cases such as rape. The trading of information in the context of training allows each side to understand the needs of the other. The prosecutor, for example, can push the consideration of defense tactics back into the police investigation so that the police can act more expeditiously to close off possible defenses. The paperwork requirements of the prosecutor can be better understood by the police if the utilization of such data can be fully explained. The police can be instructed regarding recent statutory changes, important case law and local court trends in a manner that will facilitate their daily work.

Prosecutors have increased their efforts to keep the police informed about the progress of their cases. There is growing sensitivity to the inconvenience suffered by the police when court hearings are continued or prosecutors are unable to make appointments or return phone calls. Prosecutors and police have also met on a regular basis to discuss current cases, to review general problems of personnel and to consider how past errors can be avoided. Formalizing general lines of communication can facilitate the spread of intelligence information between agencies.

Police and prosecutors have worked together to create standardized recording forms so that key issues to the prosecutor will be consistently addressed by the police. The diversity of reporting formats can be a severe problem to prosecutors who work with several police departments. Prosecutors have also encouraged the use of standard

evidence-gathering materials such as the "rape-kit." [2]

The individual trial prosecutor may have inadequate means to develop these programs. His responsibility may be to alert senior prosecutors in policy making roles to particular problems. In addition, however, the prosecutor can set the tone for improved police/prosecutor relations within the context of his own cases. Prosecutors who were interviewed suggested several approaches to communication problems at this level.

The prosecutor should make early contact with the detective who is responsible for his case. An appointment can be made to discuss the details of the crime, the timetable for its prosecution, what remains to be done, as well as to generally explore the strengths and weaknesses of the case. Not only is such a conference vital to the prosecutor's understanding of the case, but it suggests to the detective that the prosecutor respects his opinions. If the prosecutor later needs assistance from the detective, a foundation of mutual respect may facilitate cooperation. Often the detective will sit with the prosecutor at the counsel table during trial; not only does he assist the prosecutor, but he recognizes his central role in the prosecution.

Prosecutors should not be reticent about criticizing the police with regard to their work. It follows that prosecutors should seek the advice and criticism of the police. Very often both patrol and detective personnel have significantly more experience in criminal justice than the prosecutor has; yet there may be a hint of prosecutor condescension. The goal is to forge a continuing professional relationship so that the police and prosecutor can depend upon one another. Without this cooperation, the possibility of efficient and successful prosecution of all cases is significantly diminished.

9.2 Medical Personnel

It should be standard procedure in every sexual assault case that the victim is examined by a specially trained physician. This may not only be important to the victim's health, it may also be critical to the success of subsequent criminal prosecution. It is therefore important that the prosecutor investigate whether medical examinations for rape victims are routinely given in his jurisdiction and if such examinations are conducted with the possibility of criminal prosecution in mind. The purpose of this section is not to instruct medical personnel about their responsibilities, but to suggest to prosecutors what they might expect from medical examinations, hospital procedures and medical personnel.[3]

The physical examination. The examination of the rape victim can be divided into three phases: (1) general observations of the victim; (2) the taking of a limited medical history; and (3) the physical examination and recovery of physical evidence. The doctor's observations of the victim should include reference to her emotional condition. This can range from bewilderment and disorientation to shock, incoherency, fright, remorse, or indifference. The doctor should also observe the victim's general appearance with special reference to disarray, clothing tears, stains, dirt deposits, foreign hairs or fibers. Obviously, these observations should be recorded with sufficient specificity that the doctor can recreate his observations at a later time.

The doctor should also gather data regarding the incident and the medical history of the victim. The inquiry should assist the doctor in determining what to examine and how to interpret his observations. Some data items that the physician might record are: [4]

Name and exact time of examination.
Name of victim.
Address of victim.
Age of victim.
Marital status of victim.
Last menstrual period.
Is victim pregnant?
Last time victim engaged in consensual coitus, which may account for the presence of semen in vaginal specimen.
Date, time and exact location where attack occurred.
Was victim wearing present garments at the time of the assault?
Did victim know the assailant?
Did the assailant have a weapon? If so, what type?
Did assailant bind the victim?
Did the assailant inflict bodily harm?
Did the assailant compel victim to perform acts of fellatio?
Did assailant perform acts of buggery?
Did assailant perform act of cunnilingus?
Did assailant engage only in the act of sexual intercourse?
Did the assailant insert a foreign object into the vagina or rectum?
Did assailant wear a condom?
Did assailant have an emission?
What did victim do following attack regarding hygiene?
Did the victim injure her assailant? Scratching? Biting? Other?

In addition to a general physical examination of the victim, detailed gynecological observations should be made. Skilled physicians can detect subtle scratching, bruising and inflammation within the vagina which can suggest the use of excessive force though not necessarily unlawful conduct. In addition, the doctor should examine the exterior of the body for the presence of semen (especially on pubic hairs) and other foreign materials such as hairs or fibers.

Swabs and smears are routinely taken and examined for the presence of semen. A "swab" is defined as a material

removed from the interior of the body orifice by "swabbing" the interior of the orifice with a cotton applicator (cotton swab); the cotton swab is submitted to the crime laboratory for examination. A smear is defined as material removed from the interior of the body orifice by swabbing the interior of the orifice with a cotton swab and then gently rubbing the material from the swab onto a microscope slide; the slide is then submitted for examination. Two swabs and smears should be taken from each relevant orifice. All slides and swabs must be appropriately packaged and labelled with the name of the victim, the date, the type of specimen, and the initials of the medical personnel obtaining the specimen. In addition, it may be necessary to draw blood from the victim, obtain head or pubic hair samples, or fingernail scrapings. Once again, all specimens must be separately packaged and marked.

When medical or laboratory personnel remove foreign materials from the clothing of the victim, the specimens must also be carefully packaged and marked. The specimens should be marked with the name of the victim, the date, the type of material removed, the location on the body or garment where the material was recovered and the initials of the medical personnel who removed the material. It is often suggested that labels on all test tubes or vials be attached with tape in addition to normal adhesives found on the backs of labels.

This list of possible medical and evidentiary techniques is obviously not exhaustive. Its length, however, suggests the need for the prosecutor to understand the evidentiary possibilities of the medical examination and the need to coordinate with local medical personnel. Some jurisdictions have developed a standard reporting form for doctors. This ensures that evidence of potential forensic value will not be overlooked, especially by physicians who have had little experience or training with the examination of rape victims. A sample of this type of form has been included in the appendix to this chapter. As this form suggests, it is important not only that the appropriate tests and observations be made, but also that the results be properly recorded and an adequate chain of custody established to assure the admissibility of evidence at trial.

Hospital procedures. The prosecutor should be aware of how rape victims are treated by local hospitals. Insensitive medical treatment can deter victims from reporting as much as can the more publicized police and prosecutor insensitivity. The prosecutor might include if local hospitals have considered the following issues:

- the length of time a victim must await her medical examination;
- where she must wait;
- how her emotional needs are met during this time;
- whether parental permission is required for the examination of minors;
- who will pay for the cost of the medical examination; and
- what information is made available to the victim regarding future medical needs, counseling services and the reporting of the crime.

The hospital, in partnership with the police and prosecutor, is obligated to assist the victim and encourage her to report the crime.[5]

Doctors and nurses. Ultimately the prosecutor will interact with one or more medical personnel who examined the victim—most commonly with the one examiner who is subpenaed for trial. Prosecutors have noted several problems in this doctor/prosecutor relationship, some stemming from traditional doctor/lawyer antipathy and some resulting from the unique features of rape. Prosecutors report that doctors are rarely anxious to testify, are difficult to locate for pre-trial conferences, do not enjoy criminal cases in general and rape cases specifically, and are often ineffective witnesses.

Many of these problems arise because rape victims are taken to large, public hospitals by the police and examined in emergency rooms staffed by interns and residents who are often foreign doctors who do not speak English well. The doctors are often in another rotation, hospital, city or even country by the time the case comes to trial. Some of the problems are thus systemic and have little to do with personal relations between the prosecutor and the doctor. It may be useful for the prosecutor, in conjunction with the police, to contact hospital administrators and alert them to the needs of the criminal justice system. Some hospitals have worked closely with criminal justice agencies and have assigned specially trained physicians to emergency rooms for purposes of rape victim examination.

It is difficult to generalize about individual physician/prosecutor relations. Most prosecutors seek early and continuing contact with the doctor. Prosecutors try to explain the entire case to the doctor so that his contribution to the trial can be clear. At the time of trial they customarily call the doctor as a witness out of order when it is necessary to facilitate his schedule. Prosecutors should be aware of local funding arrangements with private and public physicians so that payment, if necessary, can be expedited.

Nurses are a potential group of witnesses that are often overlooked. While they cannot supplant the doctor's medical testimony, they can reinforce it. Nurses often have a greater opportunity to observe the emotional condition of the victim than does the doctor who may simply perform the routine physical examination and leave the remainder of the work to the nurse.

9.3 Victim Counselors

In most major jurisdictions victim services are available through local rape crisis centers, outpatient hospital

clinics or community health facilities. In these programs professional counselors are available, often twenty-four hours a day, to assist the victims of sexual assault.[5] In addition, several prosecutor offices have initiated either general service programs for crime victims or specialized rape programs where advocates perform similar functions to those provided in private rape crisis centers.[6] Close cooperation between the prosecutor and these victim counselors will not only assist the victim, but will help the prosecutor in the development of his case.

Prosecutors who were surveyed as part of this study indicated that the active involvement of a victim advocate in a rape case can be very valuable to the prosecutor. Prosecutors generally believed that rape victims need a degree of attention, assistance and reinforcement that the prosecutor is unable to provide, given the constraints of his schedule, training and role. The victim advocate who has expertise in the emotional needs of rape victims can relieve the prosecutor of certain victim responsibilities and thus allow him to concentrate on the more technical and familiar aspects of prosecution. In addition, the advocate can directly assist the prosecutor with his case. Victim advocates can maintain contact with the victim, remind her of appointments and assist her in arranging transportation, child care and release from work or school. By helping the prosecutor understand the victim's problems, the advocate can assist him in his communication with the victim, and in his preparation of the victim for trial. The very fact that a single individual will stay by the victim through the entire criminal process can have a significant stabilizing influence on the victim. Finally, the advocate can help the prosecutor explain to the victim the results of plea bargaining, trial and sentencing.

Some prosecutors expressed skepticism about victim advocacy, believing advocates to be still another complicating variable in the rape case. Decisions had to be explained and justified to someone who, if politically motivated or emotionally involved, might respond with hostility. There was some criticism that victim advocates were improperly trained. They were insensitive to trial strategy or even provided incorrect information to the victim. Some prosecutors resented the intrusion of "non-professionals" into their cases.

Where a victim advocate is involved with a case, or the prosecutor needs assistance, he should make early contact with the advocate and establish a working relationship. Their primary concerns may be different, for the advocate will focus upon the victim and the prosecutor upon his case; but the obvious overlap should provide a basis for cooperation. The prosecutor should acknowledge the expertise of the advocate by discussing the case with her and asking her advice. By recognizing the importance of her role he can work to insure her understanding of procedure and her positive involvement with the case.

For most prosecuting agencies, local rape crisis centers provide the only practical means of extending services to rape victims. General cooperation with such agencies can be enhanced by the exchange of speakers, joint training programs, or the appointment of a permanent liaison. If the prosecutor can become actively involved with the service agency, then advocates may be better informed and better able to assist the prosecutor. A mutual concern for victim care and aggressive prosecution can provide a foundation for such interaction.

9.4 Conclusion

Only if all parts of the criminal justice system share common goals and assumptions about rape can they cooperate to assist rape victims and to increase the possibility of convictions. Without the support of thorough police investigation, comprehensive forensic examination of victims and professional victim counseling, the prosecutor will be unlikely to significantly affect the pattern of low reporting and conviction rates. The prosecutor must work to insure such cooperation and support. Not only can he address these issues directly by working with other agencies, but by aggressively filing and trying rape cases, he can himself set the tone of the criminal justice system's response to rape. The recent public attention focused upon this crime has raised public expectations that victims can be treated with compassion and that the crime of rape can be controlled. These are legitimate expectations to which the prosecutor has an obligation to respond.

NOTES

[1] In addition to the 40 prosecutors who were surveyed, 214 patrol officers and 86 detectives were questioned about procedures and attitudes regarding rape.

[2] Generally, "rape kits" contain various vials, envelopes, and a comb to gather and store physical evidence obtained from the rape victim. Information regarding the contents, use, and availability of such "kits" can be obtained from the Southwestern Institute of Forensic Sciences, 5230 Medical Center Drive, Dallas, Texas, 75235.

[3] There are various publications designed for medical personnel which suggest how victims of sexual assault should be treated. See: Jack H. McCubbin, and Daniel E. Scott, "Management of Alleged Sexual Assault", *Texas Medicine*, 69 (September, 1973), pp. 59–64; "Suspected Rape", *American College of Obstetricians and Gynecologists Technical Bulletin*, Number 14, (1970, revised April, 1972).

[4] This list was adapted from Louis R. Vitullo, "Physical Evidence in Rape Cases", *Journal of Police and Administration*, 2 (1974), pp. 160–163.

[5] For a general discussion of the response to rape by medical facilities

see Lisa Brodyaga, et al., *Rape and Its Victims: A Report for Citizens, Health Facilities and Criminal Justice Agencies*, National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, United States Department of Justice, 1975, pp. 55–86.

[6] For a general discussion of community based victim services see: Lisa Brodyaga, et al., infra., pp. 119–153; for a general discussion of prosecutor based victim services see: Harl Haas, "Rape: New Perspectives and New Approaches", *The Prosecutor*, II (1976), pp. 357–359; *Forcible Rape: Prosecutor, Administrative and Policy Issues* published by the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration as part of this project, Chapter 3.

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ASSAULT VICTIM MEDICAL REPORT

Form A
Patient Interview Form

Please type or print all information clearly.
For explanation of each item, see corresponding number in associated protocol.

This report may be completed by any licensed or certified health professional.

---

1. **Date of Interview** _____ 2. **Time of Interview** _____

3. **Patient name** _____ (Last / First) 4. **Medical file no.** _____

5. **Patient birth date** _____ 6. **Patient Sex** _____ 7. **Phone** _____

8. **Patient address** _____ **Zip** _____

Permission for Interview, Examination and Release of Information

Permission is hereby granted to the medical staff of:

9. **Hospital/Clinic/Private Doctor Name** _____

10. **Address** _____

☐ **To perform a medical interview and a physical examination as may be necessary on the person of** _____

☐ **To release the results of this examination and laboratory specimens and clothing to the proper legal authorities.**

11. **Patient signature** _____ 12. **Date** _____

13. **Or Parent/Guardian signature** _____ 14. **Relation** _____

15. **Witness signature** _____ 16. **Date** _____

---

16. **Patient's description of assault (Record in patient's words. Include all spontaneous utterances).**

17. **Date of assault** _____ 18. **Time of assault** _____

19. Note indication of pain in patient's own words:

20. Check pain and symptoms mentioned:

_____ skeletal muscular pain	_____ headache	_____ tenesmus
_____ abdominal pain	_____ bleeding	_____ dysuria
_____ pelvic pain	_____ discharge	_____ other

21. Has there been recent treatment of any disorder?

_____ No _____ Yes Describe _____

22. Has there been any cleansing since the assault?

_____ No _____ Yes Describe _____

23. (Vaginal assault only) LNMP _____

24. (Vaginal assault only) Date of last previous coitus before assault _____

25. Additional remarks:

I understand that the law considers the examining licensed or certified health professional as an eye witness in the body of events surrounding a potential crime. What a patient/victim says to medical staff may be admissable as an exception to the hearsay rule, and these statements may be important in determining the truth before a judge or jury. I agree to preserve these statements as part of this patient's history.

26. Interviewer signature _____

27. Interviewer name _____ 28. Title _____

29. (If known) Termination date of this employment _____

30. Interviewer fluent in English _____ Yes _____ No

ASSAULT VICTIM MEDICAL REPORT

Form B
Patient Examination Form

Please type or print all information clearly.
For explanation of each item, *see corresponding number in associated protocol.*
This examination and report may be completed by any licensed or certified health professional.

31. Date of examination _____ 32. Time of Examination _____

33. Patient Name _____ 34. Medical File No. _____
Last First

35. Appearance of patient's clothing: (Check if yes)

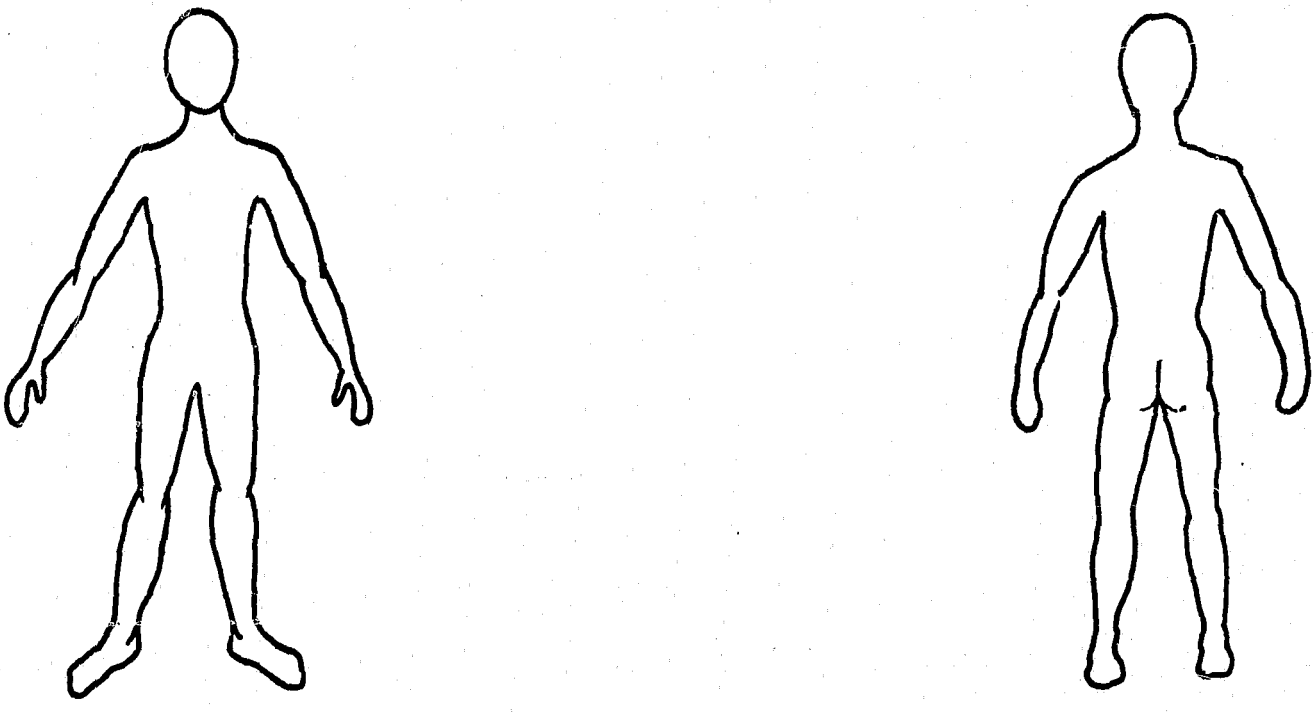
_____ Missing	_____ Soiled or muddy	_____ Leaves, grass embedded
_____ Torn	_____ Damp or wet	_____ Other as described
_____ Soiled	_____ Blood Stains	_____

36. Patient changed clothing between assault and arrival at examination?

_____ Yes _____ No

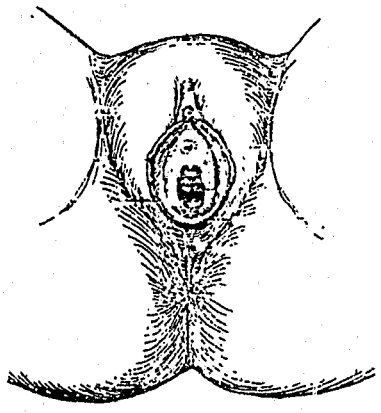
37. Itemize clothing placed in containers separately and tagged for evidence:

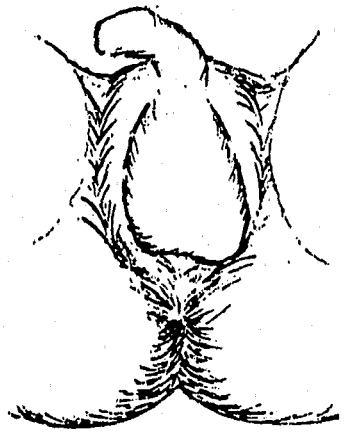
38. Describe presence of trauma to skin of entire body. Indicate location using chart. Describe exact appearance and size. Indicate possible source such as teeth, cigarette.



39. Itemize photos or X-rays of patient:

40. Describe external perineal or genito pelvic trauma:





41. Describe internal trauma (Speculum and bimanual examination):

_____ Lacerations present, Describe:

42. Is there discharge? ____ No ____ Yes Describe:

43. Checklist of symptoms of extreme mental trauma:

- ☐ Patient seems extremely quiet, passive, withdrawn, unresponsive - shows little emotion at all.
- ☐ Patient says little or nothing; seems unable to talk.
- ☐ Patient cries loudly and continually in a hysterical fashion.
- ☐ Patient laughs, jokes with those around - incongruously lighthearted.
- ☐ Patient expresses fear that his/her body was broken, permanently damaged or changed in some way.
- ☐ Patient exhibits serious breaks with reality, e.g. sensory, auditory or visual hallucinations.
- ☐ Patient expresses fears of falling apart, going crazy, disappearing.
- ☐ Patient refuses to leave the facility.
- ☐ Patient expresses suicidal ideation.
- ☐ Other_____

44. Immediate Laboratory Examination of wet mount slide: (List source affected area and check result).

List Source Areas	Sperm Present	Sperm Absent	Sperm Motile	Sperm Nonmotile

45. Signature of Legal Authority receiving this information, clothing and the following specimens:_____

46. ☐ Air-dried cotton swabs - 2 sets from affected area (list body sources)

47. ☐ Dry unstained slides (list body sources)

48. ☐ Fibers from patient's body

49. ☐ Combing from patient's head

50. ☐ Combing from pubic area

51. ☐ 6-8 hair samples pulled from pubis

52. ☐ 12 strands patient's head hair pulled from different regions of head

53. ☐ Saliva sample: cotton cloth in patient's mouth and air dried

54. ☐ 4 drops of patient's blood dried on cotton cloth

I understand that the law considers the examining licensed or certified health professional as an eye witness in the body of events surrounding a potential crime, and that I may be called to testify and be cross-examined about my findings in this examination.

55. Examining health professional signature _____

56. Examining health professional printed name _____

Title _____

57. Supervising physician name, if any _____

58. (If known) Termination date of this employment _____

59. Examiner fluent in English

_____ Yes _____ No

ASSAULT VICTIM MEDICAL REPORT

Form C
Patient Treatment Record

Please type or print all information clearly.
For explanation of each item, see corresponding number in associated protocol.

---

60. Date of treatment _____ 61. Time of treatment _____

62. Patient Name _____ 63. Medical File No. _____
Last First

---

64. Statement of Patient's Rights.

1. You have the right to considerate and respectful care by doctors and nurses.
2. You have the right to privacy and confidentiality for yourself and your medical records.
3. You have the right to full information about treatment.
4. You have the right to refuse or choose treatment offered, and to leave the location of medical service when you wish.
5. You have the right to continued care and timely treatment of your future health problems related to this incident.

Tests given to patient:

65. GC culture ____ Yes ____ No 66. VDRL ____ Yes ____ No

67. Pap smear ____ Yes ____ No 68. Pregnancy test ____ Yes ____ No

69. Other information ____ No ____ Yes Describe:

Treatment given to patient:

70. VD prophylaxis ____ No ____ Yes Describe:

71. Medication given:

72. Medication prescribed:

73. Other treatment given:

Future treatment planned

74. Transfer to another medical facility Name _____

75. Appointment in 6 weeks for repeat GC culture, VDRL, and pregnancy test:

Date _____ Time _____ Place _____

76. Referred for counselling, or introduced for follow-up to:

1st Copy - Medical Records 2nd Copy - Patient

END