Fordham Urban Law Journal

REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS

VOLUME XV 1986-1987 NUMBER 1

1. The need for consent from a fully informed client before agreeing to mutual orders of protection as a settlement.
2. The availability of community resources and the need for social work and other support services for clients who are victims of domestic violence.

FOR JUDICIAL SCREENING COMMITTEES:

Make available to all members information concerning the nature of domestic violence and the characteristics of domestic-violence victims and offenders and the impact of adult domestic violence on children in the home, including the same particular areas recommended for judges and court personnel.

2. RAPE

Rape is a violent crime that until recently was virtually unprosecutable in New York.[110] Successful prosecutions were rare because the law provided more quarter for the accused than protection to the victim.[111] In several steps, New York reformed its former rape law that had: (1) considered a woman's complaint, standing alone, incredible as a matter of law;[112] (2) required as an element of proof

110. In 1972, Governor Hugh Carey noted that "in a recent, typical year, only 18 rape convictions were obtained in the courts of New York, versus thousands of complaints." Governor's Approval Memorandum No. 16 (May 22, 1972), *reprinted in* N.Y. PENAL LAW § 130.16, practice commentary at 457 (McKinney 1975).

111. Rape law in the United States is rooted in the English common law, which focused attention on the conduct of the complainant rather than the defendant. *See* Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 10 (1977). The 17th century jury charge of Lord Chief Justice Sir Matthew Hale, which became standard throughout the United States, provides that a rape accusation "is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent." *Id.* Therefore, "the law requires that you examine the testimony of the [complainant] with caution." *Id.*

112. Prior to 1972, New York State's law of corroboration in sex offense cases was considered the strictest in the country. Corroboration of the victim's testimony was required to "extend to every material fact essential to constitute the crime." People v. Radunovic, 21 N.Y.2d 186, 190, 234 N.E.2d 212, 214, 287 N.Y.S.2d 33, 35 (1967). The 1972 amendments permitted a conviction if the alleged victim's testimony was supported by evidence that she did not consent but was forcibly compelled to submit. *See* 1972 N.Y. Laws 373. In 1974, New York took a major step to eliminate the corroboration requirement for forcible rape, sodomy and sexual abuse in all but a very limited category of cases. *See* 1974 N.Y. Laws 14 (codified as N.Y. PENAL LAW § 130.16 (McKinney 1975)). Corroboration was still required if the victim was under 17 years of age, mentally defective or incapacitated. *See* N.Y. PENAL LAW § 130.16, practice commentary at 458 (McKinney 1975). The Governor's Approval Memorandum spoke explicitly to the issue of women's credibility:

> [T]he implicit suggestion in the corroboration rule that the testimony of women, who are most often complainants in sex cases, is inherently

a victim's "earnest resistance" of her attacker;[113] (3) permitted a virtually unbridled exposé in open court of the victim's past sexual conduct;[114] and (4) held that a man's act of rape (forcible, nonconsensual intercourse) against his wife was not rape.[115]

Notwithstanding the law's reform, all witnesses testifying on the subject of rape concurred that problems in enforcement and protection of the victim remain. Lorraine Koury, Esq., Coordinator of the Erie County Citizen's Committee on Rape and Sexual Assault, commented:

> suspect and should not be trusted without the support of the independent evidence, is without justification and contrary to our strong belief in the principle of complete equality for women in our society.

Id. (citing Governor's Approval Memorandum No. 2 (Feb. 19, 1974)).

113. Not until 1982 was the requirement that a rape victim prove her "earnest resistance" to her attacker repealed. *See* 1982 N.Y. Laws 560 (amending N.Y. PENAL LAW § 130.00(8) (McKinney Supp. 1984)). This requirement created a particular irony given the advice of law enforcement officials that women submit rather than risk greater injury or death during a struggle. The amended law continued to require that the physical force or threat involved placed the victim "in fear of immediate death or serious physical injury." *Id.* The word "serious" was deleted in 1983. *See* 1983 N.Y. Laws 449 (amending N.Y. PENAL LAW § 130.00(8) (McKinney Supp. 1984)).

114. A 1975 amendment to the Criminal Procedure Law limited the defendant's rights to introduce evidence of the complainant's past sexual conduct subject to certain exceptions, particularly evidence of the victim's past sexual relationship with the defendant. *See* 1975 N.Y. Laws 230 (codified as N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1981)). Other exceptions are evidence of a conviction for prostitution within the prior three years, evidence necessary to rebut certain evidence introduced by the prosecution, and a catchall provision permitting admission of evidence of the victim's sexual conduct if it is "relevant and admissible in the interests of justice." *Id.*

115. Efforts to repeal the marital rape exemption succeeded only to the extent that under a law passed in 1978, the husband could be prosecuted if the couple were living apart pursuant to a court order or were legally separated under an agreement stating that the husband could be prosecuted. *See* N.Y. PENAL LAW § 130.00(4) (McKinney Supp. 1984). An effort to totally repeal the marital rape exemption passed the state assembly but failed in the state senate in 1984. *See Albany Hearings*, *supra* note 57, at 67 (testimony of May Newburger). In that year, the New York Court of Appeals held that the marital rape exemption was unconstitutional. *See* People v. Liberta, 64 N.Y.2d 152, 164, 474 N.E.2d 567, 573, 485 N.Y.S.2d 207, 213 (1984), *cert. denied*, 105 S. Ct. 2029 (1985). Chief Judge Sol Wachtler wrote:

> Rape is not simply a sexual act to which one party does not consent. Rather, it is a degrading, violent act which violates the bodily integrity of the victim and frequently causes severe, long-lasting physical and psychic harm . . . . To ever imply consent to such an act is irrational and absurd. . . . [A] marriage license should not be viewed as a license for a husband to forcibly rape his wife with impunity. A married woman has the same right to control her own body as does an unmarried woman.

64 N.Y.2d at 164, 474 N.E.2d at 573, 485 N.Y.S.2d at 213.

> [I]n the Citizens Committee's interaction with criminal justice personnel, we have heard many attorneys, prosecutors, and even judges state privately to us that if they or a loved one were sexually assaulted, they would not use the criminal justice system. A system which would not be used by the very people who administer it needs to change its response to the problem it attempts to solve.[116]

Cultural stigma and myths about the nature of rape, its perpetrators and victims, still narrow the law's protective reach. The criminal justice system's response to the unique trauma rape victims suffer is incomplete, compounding distress and discouraging complaints of a most underreported crime.

(a) Equal Protection of Victims

The view of rape as a crime of sex rather than one of violence led to untoward scrutiny of elements of a woman's character unrelated to her veracity or powers of observation. Harsh cultural judgment was explicit: a woman—whose dress, demeanor, conduct, associations or lifestyle reasonably or unreasonably could be viewed as at odds with traditional notions of womanly virtue and chastity—implicitly consented to, assumed the risk of or was unworthy of protection against rape.[117]

Making the woman the issue became more difficult when the New York Legislature enacted legislation limiting cross-examination of the complainant about her prior sexual conduct and dispensing with the requirement that the victim resist her attacker.[118] But victims continue to be unfairly judged and unfairly denied the protection of our rape laws. The law, even as reformed, incompletely removes the focus on the woman. The attitudes embodied in former law and

---

116. *Rochester Hearings*, *supra* note 49, at 196-97 (testimony of Lorraine Koury).

117. Examination of some of the most prominent legal and trial practice authorities' writings on rape over the last decades reveals that judges, like all members of the legal profession, have not only been exposed to cultural myths about rape victims, but have been taught that "[p]rosecuting attorneys must continually be on guard for the charge of sex offense brought by the spurned female that has as its underlying basis a desire for revenge, or a blackmail or shakedown scheme." Ploscowe, *Sex Offenses: The American Legal Context*, 25 LAW & CONTEMP. PROBS. 217, 223 (1960); *see* 3A J. WIGMORE, EVIDENCE § 924a, at 737 (1970) (advocating that every complainant of sexual offense be examined by psychiatrist to determine whether she fantasized attack); *see also* F. BAILEY & H. ROTHBLATT, CRIMES OF VIOLENCE: RAPE AND OTHER SEX CRIMES 277 (1973) (stating that "the average woman is equipped to interpose effective obstacles to penetration by means of the hands, limbs, and pelvic muscles").

118. *See supra* notes 113-14 and accompanying text.

which resisted its reform continue to operate in the minds of some judges, jurors, attorneys and prosecutors.

(i) Rape Victims' Credibility. "Because of the prior misconceptions about rape, society still does not understand its true nature, and courtroom procedures reflect these misconceptions."[119] Supreme Court Justice Betty Ellerin, Deputy Chief Administrative Judge for the courts within New York City, explained that "[w]hile the overt snickering and insensitivity to victims which characterized the manner in which sex crimes were handled not so long ago have moderated, there are still all too many instances of the woman victim being put on trial with an underlying insensitivity permeating the courtroom."[120] Evaluation of a criminal complainant's credibility—through observation of her demeanor and appearance as well as a consideration of the circumstances surrounding the alleged crime—is central to the fact-finding process. There exists a perception, however, that rape victims' credibility is judged by irrelevant or unduly high standards:

> High standards for witness credibility become gender biased when they presuppose that females, by nature and behavior tempt sex offenders, thereby, inviting sexual assault, and bear further burdens of self-protection from this crime due to sex-role stereotyping that male sexual urges must be guarded against by the female who is expected to protect her "virtue."[121]

Lorraine Koury, Esq., Coordinator of the Erie County Citizen's Committee on Rape and Sexual Assault, asked: "If rape is a violent crime, why should the criminal justice system treat rape differently from other violent crimes?"[122] She responded:

> One answer is that the community perceives both the rapist and the rape victim much differently than other victims and criminals. The community stigmatizes rape victims to a much greater degree than other crime victims, and often blames the victim for the attack. And because society is reluctant to place the proper responsibility for the rape on the rapist, the community is more reluctant to convict rapists of that crime.[123]

---

119. *Rochester Hearings, supra* note 49, at 195 (testimony of Lorraine Koury).

120. *New York City Hearings I, supra* note 27, at 283-84 (testimony of Betty Ellerin).

121. *Albany Hearings, supra* note 57, at 35 (testimony of Judith Condo).

122. *Rochester Hearings, supra* note 49, at 196 (testimony of Lorraine Koury); *accord Albany Hearings, supra* note 57, at 60-61 (testimony of May Newburger).

123. *Rochester Hearings, supra* note 49, at 196 (testimony of Lorraine Koury).

Grand jurors and petit jurors—many of whom "have been raised with incorrect attitudes and beliefs concerning rape victims"[124]—"want to know that the victim is a nice person and a nice girl."[125] The concept "that 'good girls' or women do not get raped . . . and that a woman with an active sexual past cannot be raped"[126] was found by Deborah Sorbini,[127] an Assistant District Attorney in Erie County, to be manifested in "an expectation on the part of judges and juries as to how women sex crime victims will conduct themselves in the court."[128]

> There is that expectation on the part of judges and juries that a woman is going to come into court dressed very nicely, that she is going to be above [reproach] in many respects, and if a woman comes into court in tight jeans or high boots or whatnot, I think there is an automatic prejudice that still arises in the minds of some juries, some judges, [that] perhaps this woman is promiscuous, perhaps the old consent idea. Whether or not [consent] is the actual defense in the case, that may arise.[129]

Mary Ann Hawco, an Assistant District Attorney in Monroe County, noted that a prosecutor cannot "ignore the fact that it is [g]rand [j]urors and jurors that ultimately decide these cases" and that unless the victim "was beaten to death's door, they want to form an opinion about her character."[130]

> Finally, when a victim testifies, her credibility is questioned as she discusses a highly personal and humiliating attack. The community looks at her credibility, her lifestyle, her reputation, her virtue, while the defendant, to a large degree is spared that scrutiny.[131]

Judith Condo, Executive Director of the Albany County Rape Crisis Center, reported:

---

124. *Id.* at 64 (testimony of Beverly O'Connor). Examples cited by Ms. O'Connor were: " 'Rape victims ask for it,' 'Rape is a crime of sex,' 'Rapists are sex-starved psychopaths,' and 'Rape victims are always young and attractive.' " *Id.*

125. *Id.* at 256 (testimony of Mary Ann Hawco).

126. *Id.* at 193 (testimony of Lorraine Koury).

127. Ms. Sorbini was speaking on behalf of Sheila DiTullio, Chief, Comprehensive Assault, Abuse & Rape Bureau (CAAR), Erie County District Attorney's Office. *See Rochester Hearings*, *supra* note 49, at 24-25 (testimony of Deborah Sorbini).

128. *Id.* at 26.

129. *Id.* at 29. Ms. Sorbini also noted that sex crime victims are expected to exhibit some emotion but not too much. Calm, matter-of-fact testimony, due, perhaps, to the passage of time, is deemed to be indifference. Anger or hostility is viewed as irrational. Jurors expect "perhaps some crying, some upsetness." *Id.* at 26-28.

130. *Id.* at 256 (testimony of Mary Ann Hawco).

131. *Id.* at 195-96 (testimony of Lorraine Koury).

> This form of gender bias, coupled with the seeming intransigence at all levels of law enforcement, [l]egislature and [c]ourt [a]dministration to reeducate and replace mythical notions about victims with the volumes of current data on the psychology of the types of sex offenders, encourages sexual assault against women and children and returns adult and juvenile sex offenders to the street to repeat their crimes.[132]

Lorraine Koury voiced a similar conclusion, stating "[t]hese deterrents, as well as the sometimes unsympathetic or insensitive attitude of law enforcement and criminal justice officials, illustrate why the overwhelming majority of victims do not use the criminal justice system."[133]

(ii) Incomplete Legal Protections. New York's rape shield law—which, subject to specific exceptions, renders inadmissable in a rape prosecution "[e]vidence of a victim's sexual conduct"[134]—has been described as an attempt "to strike a reasonable balance between protecting the privacy and reputation of a victim and permitting an accused, when it is found relevant, to present evidence of a victim's sexual conduct."[135] Although the law has eliminated the

---

132. *Albany Hearings*, *supra* note 57, at 34 (testimony of Judith Condo).

133. *Rochester Hearings*, *supra* note 49, at 196 (testimony of Lorraine Koury). Greene County Court Judge John J. Fromer was disciplined by the Judicial Conduct Commission for remarks he made to the press after accepting a rapist's guilty plea to a charge of third degree rape and sentencing him to one year's imprisonment with time off for good behavior. *See In re* Judge John J. Fromer, Determination of New York State Commission on Judicial Conduct (Oct. 25, 1984). The rapist had entered the victim's apartment wearing a stocking mask and raped her several times. *See id.* at 2. Judge Fromer commented:

> As I recall, [the defendant] did go into [the victim's] apartment without permission . . . . He was drunk, jumped into the sack with her, had sex and went to sleep. I think it started without consent, but they ended up enjoying themselves. It's not like a rape on the street . . . . People hear "rape" and they think of the poor girl in the park dragged into the bushes. But it wasn't like that.

The Register-Star, Aug. 19, 1983, at A-16, col. 2.

The Judicial Conduct Commission, in ordering that Judge Fromer be censured, stated:

> Respondent's statements were humiliating and demeaning to the victim of the rape, in no small measure because respondent was, in effect, publicly stating that she had probably consented to the sexual intercourse. . . . Moreover, such comments have the effect of discouraging complaints of rape and sexual harassment. The impact upon those who look to the judiciary for protection from sexual assault may be devastating.

In re Judge John J. Fromer, Determination of New York State Commission on Judicial Conduct 5-6 (Oct. 25, 1984).

134. N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1981).

135. *Id.*, practice commentary at 564.

more flagrant kind of cross-examination abuses, and although, according to survey respondents, a number of judges are invoking the rape shield law *sua sponte* if need be when the improper questioning is specifically related to the complainant's prior sexual conduct,[136] it appears that some defense attorneys successfully play on juror prejudice about rape victims.

Professor Virginia Burns testified about research that describes the way in which jurors are influenced by the way defense attorneys portray rape victims. "A sexist [defense] based on these stereotypes of women [as masochistic and provocative] may result in victims being tried for defying sexual stereotypes and acquittal of a rape defendant because of gender bias and not legal evidence."[137] She reported that in preparation for her testimony she sought to learn from women working in the Monroe County criminal courts whether their experience bore out the findings in the literature.

> I was told by women working in the courts that the way victims of rape . . . are treated is a disgrace . . . . that defense attorneys are very sexist in their questioning, that judges overlook or fail to overrule the line of questioning that is posed by defense attorneys.[138]

Erie County Assistant District Attorney Deborah Sorbini testified that defense lawyers "will never cease to probe as to what [a victim's] lifestyle is like."[139]

> Does she live with a man, does she live with another woman in a homosexual relationship, . . . is she divorced? Any one of a number . . . of clearly improper areas of questions come up in an attempt to subtly impeach the witness, to have her lifestyle negatively reflect on her ability to simply be the victim of a sex crime.[140]

By contrast, Linda Fairstein, Esq., Director of the Sex Crimes

---

136. Female and male survey respondents (F%/M%) reported that when there is improper questioning about complainant's prior sexual conduct, judges invoke the rape shield law *sua sponte* if the prosecutor does not:

ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO ANSWER
5/20	14/22	29/24	21/8	6/2	25/22

R.L. ASSOCIATES, *supra* note 23, app. A, at 68.

137. *Rochester Hearings*, *supra* note 49, at 182 (testimony of Virginia Burns) (citing H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966)).

138. *Id.* at 189.

139. *Id.* at 29-30 (testimony of Deborah Sorbini).

140. *Id.*

Unit in the New York County District Attorney's Office, stated that she could not think of one example in ten years of sex crimes litigation "in which a judge has allowed any improper questioning of a victim."[141] Ms. Fairstein pointed out that the fact "[t]hat some women have been [made] uncomfortable in the process [of cross-examination] is inevitable, but I distinguish that from the propriety of the proceedings," and stated that her unit has witnessed "a far more humane and dignified treatment of the rape survivor as witness with no erosion of defendant's legal rights."[142]

The rape shield law permits introduction of evidence of a complainant's prior relationship with the accused. It appears that this entire class of prosecutions—sometimes known as "acquaintance rape" and "date rape"—is one in which the victim is inadequately protected.

There are conflicting claims about whether more rapes are committed by strangers or known assailants. Although the Federal Bureau of Justice Statistics asserts that "[a] woman is twice as likely to be attacked by a stranger as by someone she knows,"[143] this claim is disputed by experts in the field who believe the majority of rapes are committed by someone known to the victim.[144]

Judith Condo of the Albany County Rape Crisis Center testified that prosecutorial discretion and reluctance to accept or take to trial cases dissimilar to those previously taken before juries "compounds the problems of reeducating jurors and judges" and "den[ies] the majority of the victims, those who know the offender, equal protection under the law."[145] Ms. Condo reported that her agency's annual review of local victim reports revealed complaints from a large number of victims who indicated that after reporting a crime to the police and submitting to the hospital evidence-gathering procedure, either nothing happened, there was an initial investigation but no arrest even when the offender was known, or the offender received a very light sentence and was already back on the street or would be shortly. This led the Center to compare data from victim reports, police reports, signed complaints, warrants issued, conviction figures and plea bargains. The data revealed that at many

---

141. *Albany Hearings*, *supra* note 57, at 199 (testimony of Linda Fairstein).

142. *Id.* at 199-200.

143. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, THE CRIME OF RAPE, BULLETIN 2 (Mar. 1985).

144. *E.g.*, Ozer & Tovo, *Why Rape Statistics Lie*, N.Y. Times, Apr. 12, 1985, at A26, col. 1 (Letter to Editor) (Washington, D.C. Rape Crisis Center asserting that more than half of victims know their assailants).

145. *Albany Hearings*, *supra* note 57, at 35, 37 (testimony of Judith Condo).

stages of the process the police and prosecutors were interposing their judgments about victim credibility and either declining to go forward with a substantial number of cases or accepting plea bargains "that left the victim unsatisfied with the sentence and removed her completely from the process of stating her case against the accused, the major rational[e] for her initial police report."[146]

A majority of respondents to the Attorneys' Survey reported a clear distinction between the way courts deal with stranger rape and acquaintance rape. The majority of both women and men respondents reported that there is less concern on the part of the judges, prosecutors and attorneys about rape cases in which there is a current or past relationship between the complainant and defendant.[147] Fifty-nine percent reported judges to be less concerned; sixty percent reported the same about prosecutors and about attorneys.

Seventy-three percent of men and eighty-two percent of women also said that bail is "sometimes," "often" or "always" set lower in rape cases when the parties knew each other than when they were strangers.[148] Sixty-two percent of men and seventy-three percent of women reported that sentences in rape cases are "sometimes," "often" or "always" shorter when parties knew one another than when they were strangers.[149]

---

146. *Id.* at 39.

147. Female and male (F%/M%) survey respondents, asked whether judges, prosecutors, and attorneys demonstrate less concern about rape cases when the parties have a current or past relationship/acquaintance, responded:

	YES	NO	NO ANSWER
Judges	74/53	10/22	16/25
Prosecutors	66/58	22/24	12/18
Attorneys	68/58	19/25	13/18

R.L. ASSOCIATES, *supra* note 23, app. A, at 69.

148. Female and male (F%/M%) survey respondents, reported that bail in rape cases when parties knew each other is set lower than in cases when parties were strangers:

ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO ANSWER
21/2	31/30	30/41	6/12	3/6	9/8

Id., app. A, at 67.

149. Female and male (F%/M%) survey respondents reported that sentences in rape cases are shorter when parties knew one another than in cases when parties were strangers:

ALWAYS	OFTEN	SOMETIMES	RARELY	NEVER	NO ANSWER
17/1	31/20	25/41	12/14	3/12	13/12

Id., app. A, at 68.

New York County Assistant District Attorney Linda Fairstein noted the impropriety of distinguishing sex offenses involving assaults by strangers from those committed by acquaintances: "once the legal elements of the crime are satisfied by the assailant, once he has subjected his victim to sexual intercourse by forcible compulsion, we cannot afford the victim of any kind of incident any less respect as a witness than we would to another victim."[150] Assistant District Attorney Mary Ann Hawco suggested that a way to increase indictments in acquaintance rape cases would be to have more felony categories for forcible rape than just the current B felony. It is her belief that if grand juries were offered a charge with a sentence less than that of a B felony, they would be more likely to indict in many instances, including those in which the grand jury believes the facts as presented by the prosecutor but sympathizes with the defendant, as often happens in cases of acquaintance rape.[151]

(b) Responses to Victims' Special Needs

Sexual assault is uniquely traumatic in terms of the immediate and long-term psychic injury to the victim and frequently, the censorious response of the community. Linda Fairstein, Esq., explained:

> We have learned that the damage inflicted by the sex offender is not measured by the physical injury a woman sustains. In fact, such injury occurs, if at all, in less than one-third of all sexual assaults, since victims are often most wise to submit to threats of violence when the assailant has the means to take her life. Rather, the survivor's injury is incapable of assessment in physical terms like a visible scar might be.[152]

Public hearing witnesses stated that specialized prosecutorial divisions

---

150. *Albany Hearings*, *supra* note 57, at 198 (testimony of Linda Fairstein).

151. *See Rochester Hearings*, *supra* note 49, at 250 (testimony of Mary Ann Hawco); *see, e.g.*, MICH. COMP. LAWS § 750.520(b)-(e) (West Supp. 1985) (containing four degrees of criminal sexual conduct, all having similar elements).

152. *Albany Hearings*, *supra* note 57, at 198-99 (testimony of Linda Fairstein). A recent, long-term research study conducted by the Medical University of South Carolina and People Against Rape under a grant from the National Center for the Prevention and Control of Rape found that for three years post-rape, victims still suffered in varying degrees from many symptoms of post-traumatic stress disorder including fear, anxiety and phobic anxiety. *See* Kilpatrick, *The Sexual Assault Research Project: Assessing the Aftermath of Rape*, 8 RESPONSE TO THE VICTIMIZATION OF WOMEN AND CHILDREN 20 (Fall 1985); *see also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 617-19 (1982) (Burger, C.J., dissenting) (arguing that statute providing for exclusion of general public from trials of sex crimes involving victims under age of eighteen constitutionally "prevent[s] the risk of severe psychological damage" to the child).

and legislation assuring confidentiality of victim-rape counselor communications are necessary to ensure that the criminal justice system does not aggravate this trauma.

(i) Specialized Prosecutorial Divisions. The Task Force received detailed testimony about the effectiveness of specialized prosecutorial divisions that handle only sexual offense cases in making the victims feel more comfortable and better able to negotiate and survive the prosecution process.

Linda Fairstein, Esq., explained that the Manhattan District Attorney's Sex Crimes Unit, established in 1974, was the first unit in a prosecutor's office in the country to be exclusively dedicated to investigating and prosecuting rape, sodomy and sexual abuse cases.

> The special bureau grew out of a belief that sex offenses pose unique problems for prosecutors, of course, but, more importantly, for the crime victims and survivors and that if specialized legal knowledge and understanding of the psychological factors involved were applied to the handling of the cases not only would there be an increase in the low conviction rate, but again, more importantly, the women's experience in the courtroom as witnesses would be made more comfortable and they would not again be made victims in the process.[153]

In the Manhattan District Attorney's office, every sex offense case is diverted from the regular intake system to the office Sex Crimes Prosecution Unit, which is staffed with experienced men and women attorneys trained to recognize the problems unique to these cases and to anticipate the defenses frequently interposed. Each victim works with one unit member from the first interview through the disposition of her case, so that she need not repeat her story to many different individuals at different stages of the proceedings. An effort is made to present the case to the grand jury on the same day the witness first appears in order to spare her repeated trips to the courthouse. The victim is never made to testify at a preliminary hearing and face the defendant at that stage of the proceedings.

The unit also refers the victim for appropriate medical or counseling services and encourages her to communicate with the assigned attorney about any questions she may have and with the assigned detective if she, or a member of her family, is subjected to harassment by the defendant or members of his family. Witnesses are prepared to understand the defendant's rights and to anticipate defense tactics including vigorous cross-examination. Ms. Fairstein testified:

---

153. *Albany Hearings*, *supra* note 57, at 193 (testimony of Linda Fairstein).

> One of our greatest pleasures often comes at the conclusion of a trial, when a rape survivor, perhaps reluctant to have reported the crime originally and whose only prior exposure to the criminal justice system was a made for TV movie about rape trials and their horrors—when such a woman calls to say, "I am glad I did this. It was much easier than I expected it to have been. I never thought he would be convicted and he has been. Your assistant was wonderful to us. The judge was fair." Those calls are quite common.[154]

Deborah Sorbini, an Assistant District Attorney in Erie County (Buffalo), testified that a Comprehensive Assault, Abuse & Rape Bureau was recently established there. As in New York County, a victim need deal with only one district attorney and will not have to retell her story to others at each stage of the proceeding. Ms. Sorbini testified that the unit came about through a realization in the District Attorney's office that "shuffling sex crime victims from D.A. to D.A." was "counterproductive," "insensitive" and "was only adding to the trauma that these people have already endured."[155]

Judith Condo testified that Albany County has a specialized vertical prosecution unit and that this is one of the elements of a victim/criminal justice interface recommended at the 1984 National Symposium on Sexual Assault sponsored by the Department of Justice and the FBI.[156]

(ii) Victim-Counselor Confidentiality. Rape crisis centers staffed with counselors trained to provide information and support to rape victims are of critical importance in easing the trauma of this crime and increasing prosecutions.[157] Beverly O'Connor of the Syracuse Rape Crisis Center testified about the need for legislation to protect the confidentiality of communications between crisis counselors and

---

154. *Id.* at 200.

155. *Rochester Hearings*, *supra* note 49, at 31-32 (testimony of Deborah Sorbini).

156. *See Albany Hearings*, *supra* note 57, at 37-38 (testimony of Judith Condo). Another witness urging specialized prosecution units, Lorraine Koury, also urged specialized court parts so that "both prosecutors and judges [would have] the special expertise and experience needed to prosecute and preside over these trials." *Rochester Hearings, supra* note 49, at 197 (testimony of Lorraine Koury).

157. Lois Davis, past president of the Rochester Judicial Process Committee, commented on the fact that the impetus for improved treatment of rape victims has come from outside the criminal justice system:

> [W]ith the advent of rape crisis centers, women have been encouraged to file charges and are given support through the court process. But it is not the court that has given them help, but the non-profit agencies. There are still judges and attorneys who consider the women partly responsible for these crimes.

Id. at 221 (testimony of Lois Davis).

victims. Failure to extend confidentiality to crisis counseling incurs the risk of undermining the effectiveness of the counseling. Some victims who need this kind of help now fear to seek it. Without the protection of confidentiality, victims have found their files subpoenaed by the defense and feel betrayed when thoughts and feelings that they considered private are open to public scrutiny in a courtroom.[158] Ms. O'Connor pointed out that statutes extending confidentiality to counseling by psychologists and psychiatrists were passed before the importance of victim counseling was recognized.[159] Under these statutes,[160] only those who can afford private treatment are protected.

SUMMARY OF FINDINGS

1. Until recently, New York's rape law codified the view that women's claims of rape are to be skeptically received. Through a slow process of reform, the most detrimental provisions have been repealed or struck down as unconstitutional.
2. The attitudes embodied in the former law and which resisted its reform continue to operate in the minds of some judges, jurors, defense attorneys and prosecutors.
3. As a result, cultural stigma and myths about rape's perpetrators and victims still narrow the law's protective reach.
   a. Elements of a woman's character unrelated to her powers

158. *See id.* at 63 (testimony of Beverly O'Connor). One court, as a matter of common law, has barred a rape defendant from obtaining the records of the complainant's conversation with a rape crisis center counselor. *See* People v. Pena, 127 Misc. 2d 1057, 487 N.Y.S.2d 935 (Sup. Ct. Kings County 1985). At least one state already has such a statute. *See* 42 PA. CONS. STAT. ANN. § 5945.1(b) (Purdon 1981).

159. *See Rochester Hearings*, *supra* note 49, at 63 (testimony of Beverly O'Connor). The courts' use of pre-sentence victim impact statements in assessing the injury to rape victims was discussed by two witnesses. Beverly O'Connor of the Syracuse Rape Crisis Center testified: "Judges should allow for, and give appropriate weight to, input at sentencing from victims of rape. . . . [t]he impact of the crime on the victim's physical, financial and psychological well-being must be explained." *Id.* at 65.

Judith Condo of the Albany County Rape Crisis Center urged that "prosecutors and judges should use victim impact statement to assess plea bargain implications for the victim and the society at large prior to drastically reducing charges and sentences to avoid court time." *Albany Hearings*, *supra* note 57, at 40-41 (testimony of Judith Condo).

160. *See* N.Y. CIV. PRAC. L. & R. § 4504 (physician-patient) (McKinney 1983 & Supp. 1985); *id.* § 4507 (psychologist-client) (McKinney Supp. 1985); *id.* § 4508 (social worker-client) (McKinney Supp. 1985). *See generally Rochester Hearings*, *supra* note 49, at 64 (testimony of Beverly O'Connor).

of observation and veracity—such as her manner of dress, perceived reaction to the crime and lifestyle—continue to be unfairly deemed relevant to a determination of the defendant's guilt or innocence.

b. Victims of rape who had any level of past relationship or acquaintance with the perpetrator are less likely to see his conviction and appropriate punishment.

4. Certain legislative and prosecutorial measures can offer a more appropriate response to the unique trauma rape victims suffer.
   a. Specialized prosecution units trained to recognize rape victims' psychological trauma and designed to minimize the need for the victim to repeat her story to many individuals and to appear in court have been successfully implemented in a number of counties.
   b. A statute creating victim-rape counselor confidentiality, similar to that applied to communications between psychiatrists and patients, would permit victims to utilize important crisis services without fear that privately-related statements would be admitted in court.

RECOMMENDATIONS

FOR COURT ADMINISTRATION:

Take necessary steps to assure that judges are familiar with:

1. The substantial current data about the nature of the crime of rape, the psychology of offenders, the prevalence and seriousness of acquaintance rape and the long-term psychic injury to rape victims.
2. The difference between vigorous cross-examination that protects the defendant's rights and questioning that includes improper sex stereotyping and harassment of the victim.
3. The appropriate utilization of victim impact statements.

FOR THE LEGISLATURE:

1. Enact legislation providing for the confidentiality of communications between rape victims and rape counselors.
2. Consider legislation adding one or more felony grades to the crime of rape that are not dependent on the complainant's age.

FOR DISTRICT ATTORNEYS:

1. Establish specialized prosecution units that permit rape victims to deal with only one assistant district attorney through all stages of the proceeding.
2. Ensure that assistant district attorneys receive training as to the same particular areas recommended for judges.

3. Ensure that acquaintance rape cases are treated with the same seriousness as stranger rape cases.

FOR POLICE DEPARTMENTS:

1. Establish specialized units to deal with sex offenses.
2. Ensure that police officers receive training as to the same particular areas recommended for judges.
3. Ensure that acquaintance rape complaints are treated with the same seriousness as complaints of stranger rape.

FOR BAR ASSOCIATIONS:

Coordinate efforts with rape crisis centers, prosecutors and police to provide community education similar to that recommended for judges.

FOR LAW SCHOOLS:

Ensure that criminal justice courses provide accurate information about rape similar to that recommended for judges.

FOR JUDICIAL SCREENING COMMITTEES:

Make available to all members information about rape similar to that recommended for judges.

B. The Courts' Enforcement of Women's Economic Rights

The "feminization of poverty"—the disproportionate representation of women among New York's poorest citizens—has impelled the legislative[161] and executive[162] branches of government to identify causes and seek solutions. For most women, unlike men, divorce causes extreme economic dislocation and thus has contributed significantly to the swelling ranks of female single-parent heads of households living in poverty.[163]

The courts directly influence the economic welfare of a substantial

---

161. *See generally* NEW YORK CITY COUNCIL, THE FEMINIZATION OF POVERTY, AN ANALYSIS OF POOR WOMEN IN NEW YORK CITY (1984); THE STATUS OF OLDER WOMEN: A REPORT ON STATEWIDE PUBLIC HEARINGS CONDUCTED BY THE ASSEMBLY TASK FORCE ON WOMEN'S ISSUES AND THE ASSEMBLY STANDING COMMITTEE ON AGING (1983).

162. *See generally Minutes, Hearings on the Feminization of Poverty before New York Department of State*, New York City (June 14, 1984); *id.* Hauppauge (June 13, 1984); *id.* White Plains (June 12, 1984); *id.* Syracuse (June 6, 1984); *id.* Buffalo (June 5, 1984) [hereinafter *Feminization of Poverty Hearings*].

163. *See* D. CHAMBERS, MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT (1979); G. STERIN & S. DAVIS, DIVORCE AWARDS AND OUTCOMES (1981); J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP (1980); L. WEITZMANN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985); *cf.* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1983 CURRENT POPULATION REPORTS, Series P-23, No. 141, CHILD SUPPORT & ALIMONY (1985) [hereinafter CHILD SUPPORT].