American Bar Association

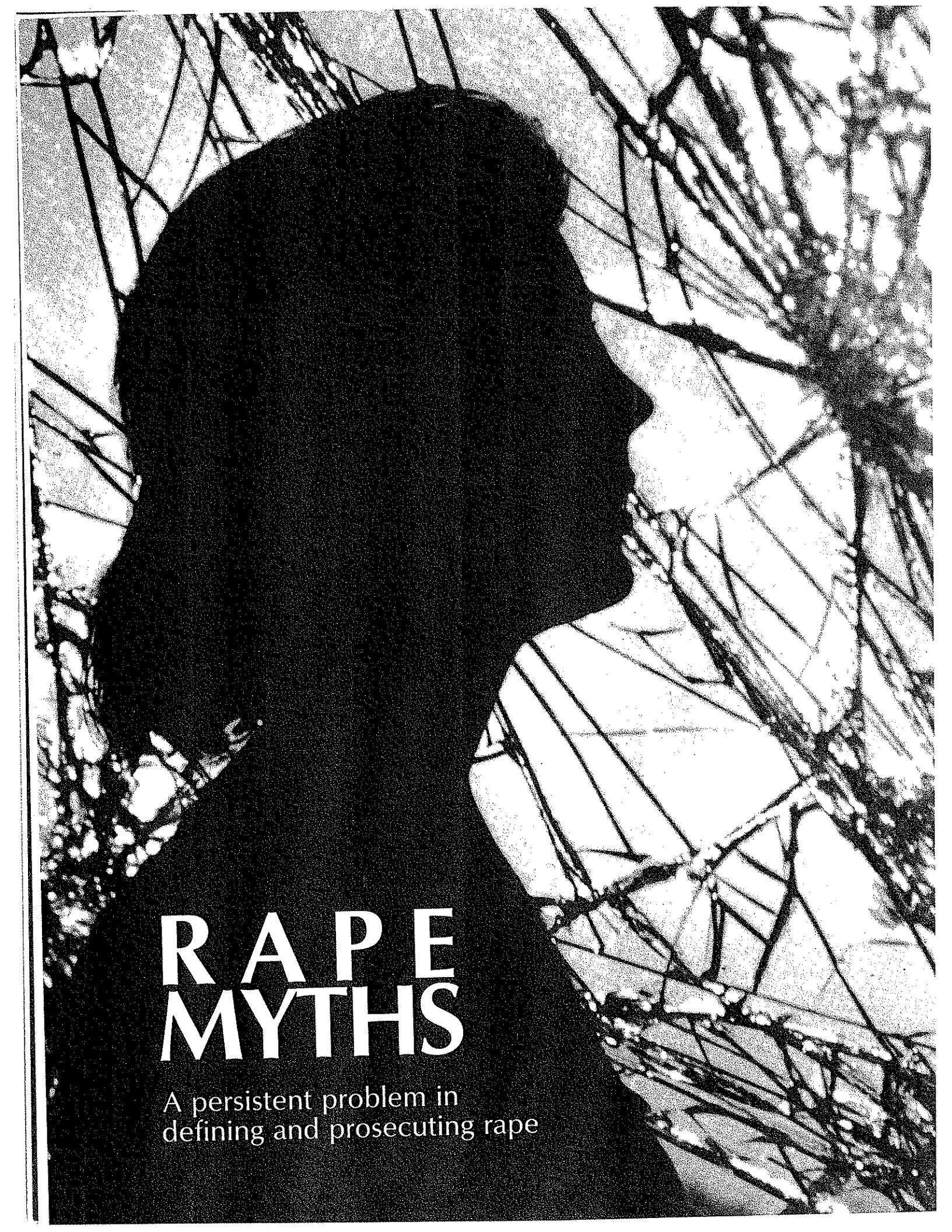
CRIMINAL JUSTICE

Section of Criminal Justice

Summer 1992 Volume 7, Number 2

MYTHS ABOUT RAPE

Persistent problems in prosecuting rapes



RAPE MYTHS

A persistent problem in defining and prosecuting rape

Myths about rape have a corrosive effect on society's ability to prosecute and convict rapists. Their pervasive influence subtly restricts the legal definition of rape and, despite numerous procedural reforms and changes, inhibits conviction of a defendant even where the act alleged is recognized as rape.

On a personal level, the rape victim becomes a victim again and again when she comes in contact with the criminal justice system: at the investigative stage when questioned by medical personnel and the police, at the prosecution stage during the district attorney's trial preparation, and at the trial itself under examination by lawyers and under the scrutiny of the judge and the jury. From the victim's point of view, she becomes the focus of the trial, and it is her actions, not those of the alleged offender, that are dissected and debated.

In the past, because of a number of technical evidentiary rules (the requirements of corroboration and earnest resistance being the most pivotal) and because of deeply ingrained cultural myths surrounding rape and its prosecution, victims of rape and sexual assault were reluctant to come forward. When victims did come forward, prosecutions were few and convictions were rare. Despite two decades of legal reform, lawyers, judges, and—most importantly—jurors are often unaware of the changing nature of the law of rape and its prosecution. More troubling yet, many recent high-profile rape cases have only served to reinforce biases and misconceptions rather than educate the legal community and the public.

This article explores myths about rape and two decades of statutory and case-law changes in the law of rape. For the most part, these legal developments have been ad hoc responses to particular rape myths or evidentiary problems, rather than a systematic revision of the rape laws. However, the net effect has been to radically alter the landscape of rape prosecutions. The article's focus is primarily on New York, which has been a laboratory of sorts, but similar changes are noted in other state jurisdictions and in the Federal Rules.

Even criminal law specialists will benefit from a review of these developments. Few district attorney offices (or police departments) have the luxury of specialized units. Therefore, even experienced prosecuting attorneys are often unaware of the scope of recent changes. Despite the impression given by the publicity that some high-profile rape cases generate, few defense lawyers have ever tried a rape case to verdict.

Attorneys who are not regularly involved in trying criminal cases will also find these issues of interest. Regrettably, clients who become rape victims often need legal assistance to negotiate the criminal process. Victims also need representation in bringing civil actions. Finally, sexual harassment in the workplace involves many of the same issues and problems as a rape case—"delay" in reporting, corroboration, and a pervasive "blame the victim" climate.

Myths about rape

Rape myths are false and stereotyped views or beliefs about rape, rape victims, and offenders. Among the most common myths are:

- The true victim of a rape will immediately seek out and complain to family, friends, or the police.
- Rape usually occurs at night, out-of-doors, and between strangers; the perpetrator uses a weapon and leaves the victim physically injured.
- Rape is an expression of sexual (albeit misplaced) desire.
- Women falsely accuse men of rape.
- The woman invited the sexual assault by her dress, behavior, or being alone in the wrong place.
- A woman's prior consensual sexual relations with the accused (or with others known to the accused) implies consent.
- A woman impaired by drugs or alcohol deserved to be raped.

There are endless variations on the examples listed above, but they have one factor in common: they shift the focus from the perpetrator to the victim from the very moment the offense takes place.

Immediate outcry. While prompt outcry or, more precisely, the lack of a prompt outcry, has traditionally been considered a significant factor in rape prosecutions, frequently there is no prompt outcry, and often the rape is never reported at all.

The fact is that rape is a vastly underreported crime. A comparison of the FBI's Uniform Crime Reports (UCR), which compile data on crimes reported to police in the United States, with the Justice Department's National Crime Survey (NCS), which is based on victimization surveys, reveals that the rape *victimization* rate is about twice the rate of rapes *reported* to the police. (U.S. Dep't of Justice, Bureau of Justice Statistics, *The Crime of Rape* 1–5 (March 1985).) However, the National Women's Study, a government-funded survey released in April 1992, reports that in 1990, more than *five times* as many women were raped as the number of sexual assaults reported by the Justice Department. (David Johnston, *Survey Shows Number of Rapes Far Higher Than Official Figures,* N.Y. Times, April 24, 1992, at 14, col. 5.) That study estimates that at least 12.1 million women in the United States have been the victims of rape at least once in their lives—61 percent when they were minors.

While victims' reasons for not reporting varied depending on a number of factors, the three predominant reasons were:

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1. They considered rape to be a private or personal matter, or something they wanted to resolve themselves.
2. They feared reprisal by the offender, his family, or his friends.
3. The police would be inefficient, ineffective, or insensitive.

(Caroline Wolf Harlow, *Female Victims of Violent Crimes* 3 (Bureau of Justice Statistics Pub. No. NCJ-126826).)

Definitional and sampling problems may account for discrepancies, but some private researchers believe that the earlier government victimization studies grossly understate the true prevalence of rape in our society. One private study of female students found the victimization rate to be *ten to fifteen times* the UCR rates. (N.Y. Governor's Task Force on Rape and Sexual Assault, *Rape, Sexual Assault, and Child Sexual Abuse: Working Towards a More Responsive Society* 46 (April 1990), citing Mary P. Koss, Christine A. Gidycz, and Nadine Wishiewski, *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students,* 55(2) J. Consulting & Clinical Psych. 162–70 (1987).) This finding comports with the April 1992 report of the National Women's Study, sponsored by the National Victim Center and the Medical University of South Carolina's Crime Victims Research and Treatment Center. (Johnson, *supra.*)

"Real" rape. The traditional view of rape in our society is that the crime occurs late at night, outdoors, and between strangers, where the victim is left physically injured. In fact, recent studies reveal that rape more often than not involves people who know each other, and it occurs in a place familiar to them (the home of the victim or the perpetrator).

At first glance, the official government studies confirm the common belief that a woman is far more likely to be raped by a stranger than a nonstranger. The NCS reports that two thirds of the rapes are stranger rapes. Even the government researchers concede, however, that their estimates may be understating nonstranger rapes for a variety of reasons unique to this type of rape: a greater sense of embarrassment; a feeling she should have been able to prevent the attack; a desire to protect the identity of the friend or family member; fear of reprisals; and concern that her account won't be believed. (*The Crime of Rape, supra,* at 2.)

The myth of what constitutes "real rape" in our society protects the nonstranger rapist in a variety of ways: the victim is reluctant to come forward, blames herself, and questions whether she was "really" raped. ("Real rape" is a term popularized by Susan Estrich in *Real Rape: How the Legal System Victimizes Women Who Say No* (Harvard Univ. Press, 1987).) If the victim does come forward, she is often met with skepticism and hostility. Nice men don't rape; only psychopaths rape. She must be mistaken. Furthermore, the victim's recovery process is made more difficult by the additional burden of having been betrayed by someone she trusted.

Nongovernmental research studies have found that the percentage may be the reverse of the government's two thirds stranger-rape figure—that in fact two thirds of rapes may involve people who know each other. The National Victim's Center, a Washington, D.C., advocacy center, estimates that "in 80 to 85 percent of all rape cases, the victim knows the defendant." (Tamar Lewin, *Tougher Laws Mean More Cases Are Called Rape,* N.Y. Times, May 27, 1991, at 8, col. 1.) Another 1987 survey of college women (not a sample of the general population) revealed that eight out of ten women knew the men who raped them, and 56 percent of these assaults occurred in a dating context. (Daniel Goleman, *New Studies Map the Mind of the Rapist,* N.Y. Times, Dec. 10, 1991, at C1, col. 6.)

This article does not use the term "date rape." "Date" downplays the nonsexual nature of forcible rape. The juxtaposition of "date" and "rape" implies that a rape is somehow a normal occurrence on a date. Hopefully the term, perpetuated by the media, will go out of fashion.

Rape is a sexual act. The myth is that the act of rape is an expression of a sexual urge or desire; the fact is that rape is a crime involving violent aggression. Sexual arousal may play a part in some rapes, but the crime involves hostile aggression, and force or the threat of force.

While there are studies describing "victim-precipitated rape," most offender research rejects this concept and notes that usually the victim is an easily available target for an aggressive assault. (See the discussion and authorities in Sophia Vinogradov, Norman I. Dishotsky, Ann K. Doty, and Jared R. Tinklenberg, *Patterns of Behavior in Adolescent Rape,* 58 Am. J. Orthopsychiatry 179, 185 (April 1988).) Significantly, the NCS statistics show that while women from 16 to 24 years of age are two to three times more likely to be raped than women in general, women of any age, race, marital status, economic class, and employment status can be victims of rape. (Harlow, *supra,* at 9.)

Police departments and prosecutors' offices are changing the names of their specialized units from "sex crimes" to "special victims" to deemphasize the sexual nature of the crime. While the penal statutes still use the term "sex crimes," modern definitions of rape correctly focus on the violence utilized by the perpetrator.

New York law states that a male is guilty of rape in the first degree when he engages in sexual intercourse with a female by "forcible

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compulsion." (While the New York statute is not gender neutral, as other states' statutes are, it has been rendered so by judicial decision.) Forcible compulsion is defined as the "use of physical force or a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped." (N.Y. Penal Law § 130.05(8) (McKinney 1992).)

California's statute employs similar language. Rape is defined, inter alia, as "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator where it is accomplished against a person's will by means of force, violence, or fear of immediate and unlawful bodily injury on the person or another." (Cal. Penal Code § 261(2) (West 1992).)

Florida defines sexual battery as a felony when "the offender coerces the victim to submit by threatening to use force or violence likely to cause serious personal injury on the victim, and the victim reasonably believes that the offender has the present ability to execute these threats." (Fla. Stat. § 794.011 (1992).)

Indiana defines rape as follows: "when a person who knowingly or intentionally has sexual intercourse with a member of the opposite sex when the other person is compelled by force or imminent threat of force." (Ind. Code Ann. § 35-42-4-1 (West 1991).)

Ironically, the American Law Institute's Model Penal Code, which influenced states to focus on the force used by the offender in the definition of rape, incorporated one of the classic rape myths in its model definition. It made the act a lesser degree of rape where the victim was a "voluntary social companion" on the occasion of the alleged rape and had "previously permitted him sexual liberties." (A.L.I. Model Penal Code, arts. 210–13, § 213.1, at 274 (1980).)

Women "cry rape." The myth is that women falsely accuse men of rape to get back at them or to cover up something. The reality is that there is no empirical evidence to support this claim. (M. T. Notman and C. C. Nadelson, *The Rape Victim: Psychodynamic Consideration,* 133 Am. J. Psychiatry 408–13 (1976).) To the extent that such incidents have occurred, they are but isolated phenomena that have taken on mythic proportions.

After an extensive study of the subject, the New York State Legislature concluded that there was no basis for the general proposition that women falsely accuse men of rape. New York has also banned the use of lie detectors (or the request for a test) as a *precondition* of initiating a rape prosecution:

> [N]o district attorney, police officer or employee of any law enforcement agency shall require, as a prerequisite to initiating a criminal investigation, any victim of a sexual assault crime to submit to any polygraph test or psychological stress evaluator examination for the purpose of subjecting the statements of such victims to analysis to determine the truth or falsity of such statements. (N.Y. Crim. Proc. Law § 160.45(1) (McKinney 1992).)

She asked for it; she deserved it; she consented to it. When a man flashes a roll of bills and is soon thereafter relieved of his property by an assailant, no one absolves the robber because the victim may have used poor judgment. When a woman leaves valuable jewels in her hotel room rather than the hotel safe, no one absolves the burglar because of the owner's lack of precautions. However, where rape or sexual assault is involved, a concept analogous to "contributory negligence" rears its head; the woman's actions are said to have caused the man to assault her, and she "deserved what she got."

This view of rape is demeaning to men and degrading and restricting to women. It is saying that men cannot control themselves when they see a woman alone at night, in an "attractive" outfit, or in a vulnerable situation. In a nonstranger situation, it is saying that men aren't capable of listening, of taking no for an answer, or of accepting limits on intimate sexual activity. It is saying that men believe the woman really means yes when she is saying no.

Brownmiller and others argue that the prevalence of these myths in the society at large and as they appear in the criminal justice system can only be explained from the feminist perspective—that is, they serve to protect men's property interests in the sexual and reproductive functions of women. (See Susan Brownmiller, *Against Our Will: Men, Women and Rape* (1975).) A woman's charge of rape is considered serious only to the degree that she conforms to conventional sexual stereotypes or only in terms of her relationship to a man (that is, a man's wife or his unemancipated daughter).

Whatever their origins, these myths are personally and socially restrictive for women. They tell women how they must dress or where or with whom they may associate or travel. In a nonstranger situation, a woman is deemed to have consented to sexual intercourse if she has had prior relations with her acquaintance (or others), visits certain places with him alone, engages in preliminary sexual activity, or indulges in drugs or alcohol. The consequences for a woman's freedom of choice, movement, and activity are devastating.

From a practitioner's point of view, these myths are brought into the courtroom at every turn and influence every aspect of the case:

- Whether the complaint will be made and/or acted on by the authorities. (Wayne A. Kerstetter, *Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults against Women,* 81(2) J. Crim. L. & Criminology 267 (1990).)
- The way the case will be reported in the media.
- The way the lawyers frame and argue the issues.
- The way the judge rules on the substantive law and other more

Rape Victims on Trial: Competing Rights to Privacy, Press, and Victim Participation

The CJS Victims Committee, in conjunction with the National Judicial College and the ABA Commission on Women, will sponsor a round-table discussion at the 1992 ABA Annual Meeting in San Francisco on Saturday, August 8, from 2:00 pm to 4:00 pm in the Peacock Court of the Mark Hopkins Intercontinental Hotel.

The discussion will focus on issues raised by victims' reforms in the criminal justice system. Moderator **Charles Ogletree**, Professor of Law, Harvard Law School, will lead a panel of nationally recognized defense attorneys, prosecutors, judges, and journalists as they discuss:

- Victims' rights to have their names kept private versus the press's right to publish such public information
- The effects of television and publicity on the defendant and the alleged rape victim, and the propriety of shielding only the victim's background while the defendant is featured daily in the press
- The disparate treatment of cases, depending on the comparative social backgrounds of victims and defendants
- Whether, in order to defend the accused, the victim's character must be destroyed
- The propriety of increasing victim participation through rights of allocution, victim-impact statements, and private counsel for victims at trial

The nationally recognized panel includes:

The Honorable Richard T. Andrias, Justice of the New York Supreme Court

David Austern, General Counsel, Manville Personal Injury Settlement Trust

Angela Jordan Davis, Chief, D.C. Public Defender's Unit

Norman S. Early, Jr., District Attorney, Denver, Colorado

Susan Estrich, Professor, University of Southern California

The Honorable J. David Francis, Chief Judge, Eighth Judicial Circuit, Commonwealth of Kentucky

Deborah P. Kelly, Dickstein Shapiro & Morin, Washington, D.C.; Chair, CJS Victims Committee

The Honorable V. Robert Payant, Dean, The National Judicial College

Lynn Hecht Schafran, NOW Legal Defense Fund

Stuart Taylor, Jr., Senior Journalist, *The American Lawyer*

Randall J. Turk, Miller, Cassidy, Larocca & Lewin, Washington, D.C.

mundane but equally crucial procedural issues.
- Ultimately, how the jury, drawn from a community that is affected by these same myths, will decide.

Rape law reform

During the two decades that the concept of rape myths was being defined, studied, and researched, a parallel reform movement evolved in the realm of substantive and procedural aspects of the law of rape and sexual assault. While these developments substantially altered the landscape of rape prosecution, in most instances the changes were ad hoc responses to particular procedural or substantive problems rather than a coordinated effort to reform the entire law of rape.

Given the rapidity and breadth of change in this area, practitioners would be well served to keep abreast of statutory and case law developments, even if they have tried a rape case in the recent past. As will be noted, changes occur not only in the substantive definitional areas but also in evidence codes and procedural rules. Judges, too, must be on guard to ensure that their jury charges reflect current law and procedure.

Corroboration and scrutiny of the victim's testimony. Understandably, Lord Chief Justice Matthew Hale's oft-quoted seventeenth-century pronouncement on the law of rape has been a lightning rod for modern-day rape law reformers:

> It is true that rape is a most detestable crime and, therefore, ought to be severely and impartially punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by the accused, though never so innocent. (1 Matthew Hale, *Pleas of the Crown* 635 (1680).)

Hale's view that it is not merely the victim's behavior but also her veracity that must be scrutinized was the source of the legal rule that became a virtual impediment to prosecution: the requirement of corroboration of the victim's testimony.

At one time, New York's corroboration rule was the strictest in the nation, requiring not just proof oth-

er than the victim's testimony on the rape itself but corroborative proof of all of the material elements: identity, penetration, and force. Given the private nature of the crime, witnesses were rarely available to corroborate the victim's testimony. Prosecutions were few and convictions rare. Whether apocryphal or not, a report accompanying a 1972 bill designed to modify the corroboration requirement in New York cited the 1969 statistic of 18 convictions for 1,085 rape arrests. A follow-up bill in 1974 eliminated the corroboration requirement entirely in forcible rape situations. (N.Y. Crim. Proc. Law ch. 14 §4 (1974).)

Today almost all American jurisdictions have eliminated the requirement of corroboration except in special situations. Where there is a corroboration requirement, it is usually far less stringent than it was in the past.

Earnest resistance. Historically, one of the biggest roadblocks to successful rape prosecutions was the requirement that the victim demonstrate *earnest resistance*. Under Saxon law, rape was a felony punishable by death. Colonial New York was typical in incorporating the death penalty for rape. The statute itself, however, did not specify a requirement of resistance. This requirement was judicially engrafted, undoubtedly as a reaction to the perceived severity of the penalty. It was not until 1881, more than one hundred years after the American Revolution, that the New York State legislature added the specific requirement of resistance to the rape statute.

Traditionally, the crime of forcible rape had numerous formulations,

> but the central notion has always been unlawful sexual intercourse committed upon a female *by imposition* [emphasis supplied]. The term "unlawful" served the function of excluding cases where the actor and the victim were married to each other. The idea of male "imposition" was expressed by the use of such phrases as "without her consent," "against her will," "by force and against her will," and "forcible ravishment . . . against her will." (A.L.I. Model Penal Code, *supra,* at 275.)

New York defined lack of consent as "forcible compulsion," that is, "physical force that overcomes *earnest resistance;* or a threat, express or implied, that places a person in fear of immediate death or *serious* physical injury to himself, herself, or that another person will immediately be kidnapped" (emphasis supplied). New York's formulation was relatively undemanding compared to other jurisdictions' that required the victim to demonstrate her nonconsent by "utmost resistance," that is, physical opposition to the aggression throughout the encounter. (A.L.I. Model Penal Code, *supra,* at 304.)

In the early 1960s, the American Law Institute's Model Penal Code sought to refocus the inquiry from the nature of the victim's resistance to the degree of force employed by the assailant, adopting the following definition of rape: "A male who has sexual intercourse with a female not his wife is guilty of rape if he compels her to submit by force or by threat of imminent death, *serious* bodily injury or extreme pain" (emphasis supplied). By eliminating express language of consent and resistance, the ALI drafters clearly went a long way toward reorienting the inquiry from the victim's behavior to aspects of the assailant's use of force.

In 1982, after five years of attempting to redefine "earnest resistance," the New York legislature eliminated the requirement altogether. The Governor's approval memorandum recognized that the earnest-resistance requirement, among other things, "may further endanger the safety of the victim." (Governor's Approval Memorandum, *1982 New York State Legislative Annual,* at 189.) Within a year, the legislature recognized that the retention of the word "serious" in the definition of forcible compulsion was causing continued confusion by implying that resistance was still required, and "serious physical injury" was dropped. Forcible compulsion is now defined as physical force or a threat, express or implied, which places the victim in fear of immediate death or physical injury. As noted previously, many other states, including California and Indiana, have also eliminated the requirement of a resulting *serious* physical injury; others, including Florida, have retained the "serious injury" language but utilize various degrees of seriousness in defining rape.

Rape shield laws. Historically, defense lawyers were given almost free rein to cross-examine a rape victim about her past sexual conduct with the defendant or others. The theory underlying this line of inquiry was, of course, that a defendant has a constitutional right of confrontation in questioning adverse witnesses. Credibility is always at issue, and where the defense is consent, the defendant seeks to demonstrate consent by establishing the victim's prior relations with the defendant or others. The practical effect of this evidentiary rule was to discourage victims from coming forward, for fear of the double humiliation of having to testify about the sexual incident itself and also about their entire sexual histories.

Despite the argument that traditional rules of evidence are sufficiently flexible to protect the victim (that is, the prejudicial effect of the evidence outweighs its probative value; see Comment, *Rape Shield Statutes: Constitutional Dispute, Unconstitutional Exclusions of Evidence,* 1985 Wis. L. Rev. 1219), all states but two have enacted "rape shield" statutes. The Supreme Court recently found that the notice and hearing requirements of Michigan's rape shield statute were not a per se violation of the Sixth Amendment. (*Michigan v. Lucas,* 111 S. Ct. 1743 1991).) Rule 412(b)(1) of the Federal Rules of Evidence offers similar protection. With varying exceptions (usually involving the source of se-

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When the ABA speaks out on criminal justice issues, the public assumes that we speak with authority. Yet the ABA usually takes positions without listening to the ideas and recommendations of non-lawyer experts and without having evaluated their relevant research. We are prisoners of our own environment, confined primarily to the literature of the legal profession.

The ABA can improve the power and the quality of its voice by developing institutional lines of communication with those who have knowledge that we lack. The legal profession is ignorant about some critical questions that research could answer. We lawyers should know that ignorance is no excuse.

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Rape Myths

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men, prostitution, or past sexual conduct between the parties), these statutes restrict the use by the defendant of the victim's past sexual history during cross-examination of the victim.

A number of policy grounds have been put forth in support of these enactments. First, society has an interest in victims coming forward. Second, society has an interest in sound convictions. Where the victim's sexual past is admitted into evidence, it often becomes the main issue of the trial, distracting the jury from the defendant's alleged conduct. Third, due to the sensitive nature of the inquiry, the victim is entitled to have her privacy respected and not be harassed or subjected to public humiliation, unless such an examination is absolutely necessary to resolve the case. Despite continuing controversy over their scope and application (Pamela J. Fisher, *State v. Alvey: Iowa's Victimization of Defendants Through the Overextension of Iowa's Rape Shield Law,* 76 Iowa L. Rev. 835 (1991)), these statutes now play an important strategic role in almost every rape case.

Rape trauma syndrome. One of the most striking developments in the trial of a rape case is the growing acceptance by courts of allowing juries to hear testimony by experts on the subject of rape trauma syndrome. Some women react to the trauma of rape by expressing fear, anger, and anxiety. Researchers have found, however, that other women who are equally traumatized can appear controlled, calm, and subdued. (A. W. Burgess and L. L. Holmstrom, *Rape Trauma Syndrome,* 131 Am. J. Psychiatry 981–82 (1974).)

This syndrome may manifest itself by the victim showing no outward agitation; not reporting the incident to friends, family, or police; or failing to identify an assailant who is known to her. This passive response to a violent assault is often inexplicable to lay jurors, so while prosecutors have always been allowed to utilize "prompt outcry" complaints as exceptions to the hearsay rule (*People v. McDaniel,* 577 N.Y.S.2d 669 (2d Dep't 1991)), they also began searching for ways to assist juries in evaluating seemingly damaging testimony about delayed response.

Rape trauma syndrome testimony has been common in New York trial courts for years. Noting that the issue has been discussed and studied for a decade and a half, New York's highest court recently held:

> We realize that rape trauma syndrome encompasses a broad range of symptoms and varied patterns of recovery. Some women are better able to cope with the aftermath of sexual assault than other women. . . . It is also apparent that there is no single typical profile of a rape victim and that different victims express themselves and come to terms with the experience of rape in different ways. We are satisfied, however, that the relevant scientific community has generally accepted that rape is a highly traumatic event that will in many women trigger the onset of certain identifiable symptoms. . . .
>
> (*People v. Taylor,* 75 N.Y.2d 277, 286 (1990).)

The decisive factor in determining whether a particular state permits expert testimony on the subject of rape trauma syndrome or whether a particular court allows the testimony in a specific case has always revolved around the issue of whether the evidence will infringe on the jury's province to make determinations of credibility and fact. The trend is to *not* allow the testimony where it bears directly on whether a rape occurred, and to allow the expert testimony when it is relevant to explain that a complainant's behavior *is consistent with* a claim of rape.

The future: Antidotes to rape myths

In their classic study *The American Jury,* Kalven and Zeisel found that what the law defines as rape and what the jury concludes *is* rape has much to do with the woman's conduct and the prior history of the parties. The female is closely scrutinized, and where there is a hint of contributory behavior on her part, juries are lenient with the defendant. (H. Kalven and H. Zeisel, *The American Jury* 249 (Univ. of Chicago Press, 1971).) More recent detailed research by Burt and Albin has confirmed that the greater the degree of rape-myth acceptance, the narrower the definition of rape, and consequently the less the willingness to convict sexual assailants. Furthermore, the greater the acceptance of interpersonal violence (which they found is the strongest

predictor of rape-myth acceptance), the less the willingness to convict. (Martha R. Burt and Rochelle Semmel Albin, *Rape Myths, Rape Definitions, and Probability of Conviction,* 11(3) J. Applied Social Psych. 212–30 (1981).)

These scientific findings are not surprising. A review of the extensive news reports of several recent high-profile cases reveals the persistent presence of rape-myth acceptance in the press and the public. In New York's St. John's University case, the question of why anyone not looking for sex would visit an off-campus social house where drinking and partying were the order of the day was consistently raised. Similar reactions were apparent in the televised Palm Beach case, questioning why a woman would go to a beach on a moonlit night with a member of the opposite sex if she was not looking for consensual sex. In the most recent national high-profile case, Mr. Tyson's defense was direct and unambiguous: A young woman would only go to a hotel room with him late at night for one purpose—consensual sex.

Rape myths permeate the reporting of these high-profile cases and further infect already biased jury pools. Even the august *New York Times,* which prides itself on its sensitive reporting of these issues, focused on the complainant's past "wild streak" in a full-page analysis of the Palm Beach case. (Fox Butterfield and Mary B. W. Tabor, *Woman in Florida Rape Inquiry Fought Adversity and Sought Acceptance,* N.Y. Times, April 17, 1991, at A17, col. 1; see discussion of this article in William Glaberson, *Times Article Naming Rape Accuser Ignites Debate on Journalistic Values,* N.Y. Times, April 26, 1991, at A14, col. 1.) For reasons that no one but the *Times* can comprehend, the Tyson trial was consistently reported in the sports section of the newspaper.

These myths about rape and sexual violence have taken root and spread over generations, and they will not be eradicated in the courtrooms of the nation alone. The New York Governor's Task Force on Rape and Sexual Assault studied these issues in New York and elsewhere, and proposed as a first step broad public education. Its blueprint suggested public education led by the state's chief executive and other state agencies; education in schools and colleges; efforts to sensitize the media about its role in reporting incidents of sexual violence; neighborhood workshops and programs in religious institutions and community centers; and education for all professionals who have contact with rape victims, including health practitioners, police, prosecutors, and the judiciary. Finally, it proposed that the state itself become a model for business and industry in implementing and requiring training about rape and sexual assault for all its employees. (Task Force, *supra,* at 67–83.)

What can be done immediately to further improve the understanding of how rape myths affect proceedings in our criminal justice system and to build upon the technical evidentiary reforms that already have been achieved? One thoughtful proposal has been put forth by Patricia Tetreault. (Patricia A. Tetreault, *Rape Myth Acceptance: A Case for Providing Educational Expert Testimony in Rape Jury Trials,* 7(2) Behav. Sci. & the Law 243–57 (1989).) She suggests that expert testimony is needed regarding common misconceptions about rape and rape-victim behavior to help juries understand and compensate for societal biases against the complainant in a rape trial.

Tetreault makes a persuasive case, and her article should be read and debated. However, the objection to expert testimony on the rape trauma syndrome that was raised in many quarters—that the testimony invades the province of the jury on the ultimate factual issues—is even more applicable to expert testimony on rape myths, because the latter is more general and is not related to a specific issue in the case. However, there are universally accepted methods available for educating juries on the issue of rape myths: the judge's introductory remarks, and expanded voir dire questions.

In their introductory remarks, judges can stress that rape is a crime of violence, that it is not a "sex crime," that there is no typical profile for a rapist, that it is not necessary for the woman to resist where force or the threat of force is used, that it isn't necessary that the woman be injured or seriously

injured for a rape to have occurred, and that jurors will have to feel comfortable hearing and discussing with strangers the subjects of anatomy and bodily fluids. This can be accomplished in the context of a preliminary charge on the law or in a general introduction to the particular issues in the case. Of course, in addition to a discussion of the presumption of innocence and the burden of proof, when requested the court should include a balanced introduction to the defendant's arguments or contentions.

Allowing the lawyers to explore juror attitudes and biases in an expanded voir dire would achieve similar ends. Even "efficient" jurisdictions that now severely restrict lawyer participation in the voir dire examination of the jury could relax the rules, given the serious nature of these cases and the demonstrated effect that these myths have on jurors' perceived notions about rape and rape victims. The court could ask the questions or allow the lawyers additional time to explore juror attitudes. Furthermore, initial screening of jurors could be done individually, with the parties in the judge's robing room, so that jurors would not feel inhibited by having to speak in front of fellow jurors. As always, to ensure that the lawyers learn the true feelings of jurors, open-ended questions capable of being answered in a narrative fashion should be employed.

Clearly, only ambitious educational programs such as those described above will go a long way toward both eliminating sexual assault in our communities and ensuring that victims are treated responsibly and with understanding when an incident does occur and is prosecuted in our courts. However, these programs will take years to implement, even if public monies become available. In the meantime, expanded voir dire and sensitive judicial instructions on the irrelevance of rape myths to the issue before the court will help achieve these goals. **CJ**

Negotiating Immunity

(*Continued from page 12*)

serves its right to use those statements for purposes of cross-examination or rebuttal as well as to use information derived from the interview in obtaining leads to other evidence.

The role of cooperation

Typically, witnesses with substantial criminal involvement do not receive immunity unless they also agree to plead guilty to some lesser or related criminal offense. In white-collar cases, especially since the enactment of the Federal Sentencing Guidelines, many white-collar first offenders—even those who cooperate—will serve prison terms.

Although under the Sentencing Guidelines cooperation with government authorities is a significant factor weighing in the defendant's favor, it is by no means dispositive. Accordingly, it is largely illusory for an exposed corporate executive to think immediately of negotiating for "immunity" as a solution to his or her problems. Even though the executive is willing to testify, it will be difficult to avoid a conviction in exchange for testimony if his or her culpability level is substantial.

Prosecution of an immunized witness

In *Kastigar v. United States,* the Supreme Court upheld the constitutionality of 18 U.S.C. § 6002, finding its prohibition of use and derivative use of the witness's testimony to be "coextensive with the scope of the privilege against self-incrimination." The Court held that the immunity statute bars the use of compelled testimony as an investigatory lead as well as "use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." (*Kastigar,* 406 U.S. at 453, 460 (1972).) In *United States v. McDaniel,* 482 F.2d 305, 311 (8th Cir. 1973), the Eighth Circuit enumerated some of the prohibited uses when it held that the immunity statute forbids "all prosecutorial use of the testimony," including "assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy."

The *Kastigar* court reaffirmed that prosecutors who seek to bring criminal charges against a witness who has testified under a grant of immunity "have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." (406 U.S. at 460, quoting *Murphy v. Waterfront Comm.,* 378 U.S. at 79 n.18.) A defendant "need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." (*Id.* at 461–62.)

The "heavy burden" imposed on the government by the Supreme Court's decision in *Kastigar* has been made somewhat lighter by subsequent decisions of the courts of appeals. A number of courts have held that "the government is only required 'to demonstrate by a preponderance of the evidence an independent source for all evidence introduced.' " (*United States v. Hampton,* 775 F.2d 1479, 1485 (11th Cir. 1985), quoting *United States v. Seiffert,* 501 F.2d 974, 982 (5th Cir. 1974); see also *United States v. Crowson,* 828 F.2d 1427, 1429 (9th Cir. 1987). See *White Collar Crime: Fifth Survey of Law—Immunity,* 26 Am. Crim. L. Rev.