SEXUAL ASSAULT REPORT™

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Elizabeth Barnhill First Recipient of the Gail Burns-Smith Award

by Karen L. Baker, LMSW

The Association for the Treatment of Sexual Abusers (ATSA) and the National Sexual Violence Resource Center (NSVRC) presented Elizabeth Barnhill, Executive Director of the Iowa Coalition Against Sexual Assault, with the first annual Gail Burns-Smith Award on September 1. Maia Christopher and Delilah Rumburg presented Ms. Barnhill with the award at the National Sexual Assault Conference in Los Angeles, CA. She was also honored and presented the award again in October at the ATSA conference in Phoenix, AZ. This award provides an opportunity for us to reflect upon the work of two remarkable women, Gail Burns-Smith and Elizabeth Barnhill, and how their work highlights the duty we all share to responsibly address public policy.

Two organizations with different constituencies, yet similar missions and goals, jointly sponsor this award. The partnership between ASTA and NSVRC grew out of Gail Burns-Smith's association with each, and it has continued to flourish. Maia Christopher, ATSA Executive Director, adds, "This is a wonderful opportunity of collaboration as ATSA and NSVRC join together to honor Gail

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Why Rapists Run Free

by M. Claire Harwell, J.D. and David Lisak, Ph.D.

The initial report from the victim may well sound like this: "I think I may have been raped. I'm not sure. I was pretty out of it. I don't remember everything. But I think I was raped. Maybe." Such a halting, equivocal report is unlikely to evoke much confidence in the first responder who hears it. Within a few moments, it may well emerge that the victim was very intoxicated at the time of the sexual assault, she has significant gaps in her memory of what transpired, she delayed reporting for hours or even days, and she does not think anyone observed significant interactions between herself and the suspect either before or after the reported assault. Perhaps not surprisingly, this type of report often has a very short lifespan within the criminal justice system.

Yet there is now a substantial body of compelling research indicating that such a report represents a golden opportunity for the criminal justice system: a chance to identify a person who is very likely to be a serial offender. By investigating the report, criminal justice professionals might uncover other crimes, thereby creating more options for prosecution. In other words, this halting, equivocal report might offer a chance to protect the community from an extremely serious threat.

Seizing this opportunity requires a shift in focus: a shift away from scrutinizing the victim who offers the halting, equivocal report and toward investigating the past and current behavior of the suspect. This type of offender-focused investigation is, of course, not unusual. In fact, most investigations of potentially serious offenses are very much focused on the suspect: What is his background? Who does he know? Who knows him? Where does he hang out? How does he describe his behavior? Only in cases of non-stranger sexual assault does the investigation frequently seem to get diverted away from the suspect and onto the victim.

Research on Re-Perpetration

When that happens we miss a crucial opportunity to nab a serial rapist. This point is often missed because people fail to recognize non-stranger perpetrators as serial rapists. Yet the research clearly demonstrates that most rapes are in fact committed by serial offenders. To illustrate, one study of 1,882

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men that was published in 2002 revealed that of 120 rapists identified in that sample, 63% were serial rapists (Lisak & Miller, 2002). These serial rapists admitted to raping, on average, six victims. They also admitted to another eight victimizations (on average), including childhood abuse and domestic battery. The most critical finding of the study, however, was the following: Of the 483 rapes committed by the men in this sample, 91% were perpetrated by the serial rapists. These numbers were replicated in a study of 1,146 male Navy recruits (McWhorter et al., 2009). In this sample, 71% were serial offenders who also admitted to an average of six rapes. Even more dramatic, 95% of the 865 rapes committed by the men in this sample were perpetrated by the serial rapists.

These statistics are consistent with previously published research on sex offenders, as well as violent offenders more generally. For example, a 1987 study published by Abel and colleagues revealed that 126 rapists averaged seven rapes each (Abel et al., 1987). Similarly, a 1991 study revealed that 37 rapists who had been charged with 66 offenses had actually committed 433 rapes (Weinrott & Saylor, 1991). Many of these rapists committed multiple rapes against the same victim, so the mean number of victims per rapist was, again, six.

The notion that serious, violent crime tends to concentrate in a relatively small percentage of the population is not a revolutionary hypothesis. We have long known it is typically committed by serial, violent offenders who perpetrate over and over again. For example, one large-scale, multi-decade longitudinal study was published in 1990. Of all the crimes committed by individuals involved in the study, as many as 66% of the violent crimes and 75% of the rapes were actually committed by only 7% of the sample (Tracy, Wolfgang & Figlio, 1990).

Thus all of this research points to an inescapable conclusion: Regardless of the nature of the initial report of a rape, whether the victim was sober and drinking tea at a church social, or intoxicated and dancing at a local bar, it is *extremely* likely that the assailant is a serial offender. Certainly, the odds are good enough to warrant a thorough investigation of the suspect.

Barriers to Prosecution

Unfortunately, this is not what happens for most reports of non-stranger sexual assault. Research on the attrition of rape cases clearly demonstrates that rape reports are routinely filtered out of the criminal justice system and few make it to trial. Arguably the most comprehensive and recent US-based study

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of attrition in rape cases is that published by Frazier and Haney in 1996. They examined all 861 cases reported to a metropolitan police department in 1991, and found that only 12% of reported rapes resulted in convictions. Cases were more likely to be prosecuted when they involved threats and injuries, were perpetrated by strangers, and when witnesses were available (Frazier & Haney, 1996).

One barrier that is often cited by prosecutors is a concern that these typical sexual assault cases are "unwinnable," and it is therefore seen as unethical to take them to trial. Yet this position is based on an inaccurate interpretation of the ethical canons. It is true that the standards for prosecution require some consideration of whether a conviction can be obtained, but this is only one of 13 factors to be considered under the National District Attorneys Association *Prosecution Standard 4-2.4* (2009). The standards do not prohibit taking difficult cases to trial. What is prohibited is to bring a criminal charge when the evidence does not support the charge. Specifically, the American Bar Association (ABA) *Model Rules of Professional Conduct* (2010) prohibit prosecutors from knowingly bringing a charge in the absence of probable cause [Rule 3.8(a)]. The American Bar Association's Criminal Justice Section's *Standards for the Prosecution Function* states in Part III, Section 3-3.9(e):

> In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in the jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question (ABA, 1993).

The research studies cited above provide ample basis for viewing a sexual assault report as an opportunity to address just such a "serious threat to the community." Prosecutors who take on the difficult work of pursuing these cases are thus protecting their communities from the threat of ongoing violence by serial offenders. This is particularly critical because these offenders often remain undetected due to low reporting rates for sexual assault.

Another concern stems from the bias of jurors, which leads to a disproportionate number of acquittals for sexual assault as compared with other crimes. This can make prosecution of sexual violence appear to represent a poor use of limited resources. While concern about resource allocation is valid, we would argue that the very opposite is true. We believe sexual violence cases merit a heavy investment of prosecution resources because of the potential for a substantial pay-off. Consider this hypothetical: A prosecutor learns from a jailhouse informant that the informant's cellmate has bragged about raping nine women. Only one of these crimes has been reported, but the reported crime is going to be a difficult case. Would anyone seriously suggest that it is not worth the prosecutor's resources to pursue this offender? Of course not. Addressing habitual offending is widely viewed as the best use of limited resources. Again, we seem to understand this in almost every other criminal context except non-stranger sexual assault.

In a related vein, it is often the case that a particular prosecutor's office has highlighted a focus on specific issues (e.g., gangs, drugs), but sexual violence is not among them. It is therefore important to keep in mind that sexual assault is a violent crime that affects us all on some level. No community is immune from sexual violence. Rural communities have higher *per capita* rates of these offenses than do urban areas, and urban areas have numerically sobering rates of both non-stranger and stranger sexual assault (Ruback & Meynard, 2001; de Arellano, Ruggiero & Kilpatrick, 2003, cited in National Sexual Violence Resource Center, 2003). Moreover, based on conservative averages from studies of young offenders, those who commit sexual offenses have an average of 14 violent crime victims each. It is therefore difficult to imagine a more appropriate use of prosecution resources than pursuing sexual assault cases, even if the result is only to deter future crime by investigating a specific individual offender (Lisak & Miller, 2002). With more than 90% of sexual assaults perpetrated by serial offenders, deterring even one from committing future offenses would seem to be a worthwhile goal.

The Path to Prosecution

Once a prosecutor has decided to evaluate a sexual assault case for charging, it is likely to present a myriad of challenges. One of these is the pre-existing beliefs and attitudes of jurors (Mallios & Meisner, 2010). It is absolutely critical that prosecutors recognize that jurors and judges may bring inaccurate schemas to the consideration of the case, and thus take proactive steps to address them. Unfortunately, jurors often apply unreliable or even erroneous methods to evaluate the credibility of witnesses. For example, they may rely on the length of time it took the victim to seek help; the victim's (lack of) sobriety; the emotional presentation of the victim; the victim's inability to give an identical narrative over time (or even a consistent, logical, and chronologically ordered narrative); and the existence of a past relationship with the accused (Schuller & Klippenstine, 2004; Ellison & Munro, 2009). None of these issues definitively determine the credibility of the witness or the validity of the charges. However, the presence or absence of expected behavior can irretrievably alter the decisionmaker's perception of the validity of the complaint, the veracity of the victim's testimony and, ultimately, the adequacy of the proof of the charges.

Prosecutors must take care not to decline a case based on irrelevant issues such as the ones on this list, as they actually represent typical dynamics of a sexual assault case (e.g., delayed reporting; victim intoxication; flattened affect by the victim in the courtroom; problems in the victim's statement, such as inconsistencies or omissions; and some sort of relationship with the accused). Declining or dismissing a case based on these factors ensures that the serial offender's method of targeting vulnerable victims is successful. Instead, prosecutors should make use of expert testimony to explain paradoxical victim behavior, file pretrial motions to exclude irrelevant but prejudicial information, and use *voir dire* examples to normalize and explain victim-related issues. The prosecutor's role is to constantly refocus the trial onto the trial's central legal issue: the behavior of the accused.

To focus on the suspect in a sexual assault case instead of the victim is to treat the suspect in the same way as a purported drug dealer, by evaluating his (or her) contacts, social circle, former romantic partners, etc., all with an eye toward developing information that pertains not just to a single crime, but potentially to a larger pattern of offenses. This is how such cases can be successfully prosecuted. To illustrate: In a case prosecuted by the first author, a broad investigation of a single flawed sexual assault report revealed numerous additional victims. Victims were identified at the offender's fitness club, tanning club, favorite bar, and among the children of his friends. Where a narrowly focused investigation would have resulted in no prosecution, a more comprehensive approach resulted in the identification of nine sexual assault victims and additional victims of other types of offenses. Ultimately, the offender was convicted on charges stemming not from the original reported case, but from one of the cases that emerged later in the investigation.

In contrast, by allowing the focus to remain on the victim, we permit recurring

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violations of the victim's constitutional rights to privacy, we risk negative trial outcomes and, ultimately, we chill future victim reporting. No trauma victim can entirely avoid the negative attention and harsh judgment they will inevitably face in the adversarial process of our criminal justice system. Trauma, by its nature, often inspires attempts to avoid symptoms. Yet these avoidance strategies may produce victim behaviors that will be viewed unfavorably by jurors. For example, many victims drink alcohol to block out nightmares that they experience as a result of their sexual assault. While this may be understandable from a human perspective, it is likely to undermine their credibility in court. In this way, behavior that is caused by the crime is often used against victims, to thwart jurors' empathy for the experience of being victimized.

Similarly, victims are potentially damaged by "fishing expeditions" conducted as part of the discovery process, which seek defense access to the entirety of a victim's medical and counseling records. Such efforts are designed to seek out extraneous, unfavorable personal information that can be used to bias the jury against the victim. These discovery demands are often justified by the need for adequate cross-examination, but most are simply violations of constitutional privacy rights. They must therefore be quashed aggressively, both to protect the victim in the instant case, but also to convey the appearance of fairness to the next victim who may well be hearing about the case in the media.

Conclusion

Prosecution of sexual assault is critical to the prevention of future violence in our communities. Without the reality of significant sanctions for offending, serial offenders will continue to prey on our most vulnerable community members. For additional resources and assistance in terminating the free reign of serial offenders in your jurisdiction, please consult the following organizations:

- AEquitas: Prosecutors Resource on Violence Against Women (http://www.aequitasresource.org/);
- End Violence Against Women International (http://www.evawintl.org/);
- American Prosecutors Research Institute (http://www.ndaa.org/apri/index.html).

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of hearsay information comes in, it is difficult to see how it could help significantly (Licata, 1992).

Indeed, because such a limited amount of hearsay is admitted, a jury may well conclude that a victim is *less* credible because the complaint seems inconsistent in its brevity. Defense attorneys can also easily nullify any possible benefit of the testimony by arguing that just because a victim said something twice does not make it true—or worse, that the victim "went out of her way" to tell someone about the sexual assault because she is "so vindictive" that she "wanted to make it look good." More attention to the offensive myth that women are inherently vindictive would thus better serve victims than application of the fresh complaint rule.

Rule May Benefit a Few, at the Expense of Most, Victims

Given its limited scope, any small benefit gained by the rule for a particular victim must be weighed against the fact that the rule never did and never will directly redress the most serious gender myths (e.g., victims are vindictive, promiscuous, mentally ill and cry rape for sport). Rather, it serves as a prophylactic thumb on the scale; a kind of "affirmative action" for certain victims. In this sense, the rule may seem appropriate given the gender-biased nature of the criminal justice system and the state's failure to deter violence against women.

As stated in the court's decision in **Brzonkala v. Virginia Polytechnic Institute and State University**, 132 F.3d 949, 971 (4th Cir. 1997): "Study after study has concluded that crimes disproportionately affecting women are often treated less

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