

**The New Trial by Ordeal:
Rape Kits and Police Practices**

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Introduction

One of the most highly touted improvements in the criminal justice response to rape has been the wide-scale adoption of sexual assault nurse examiner (SANE) programs. SANE programs, which provide specialized medical care and forensic evidence collection in the wake of a sexual assault, are almost universally described as a significant step forward for the compassionate care of rape victims and the effective investigation and prosecution of sex crimes.

Despite the real benefits that do accompany SANE programs, policy-makers and victim advocates have not sufficiently anticipated problems with the increased use of forensic evidence because they do not anticipate the continuing resistance of law enforcement to taking sexual assault seriously. SANE programs are one of several recent rape-related policy innovations that have unexpected, negative consequences because of significant gaps in the criminal justice response to violence against women. This article uses data gathered from interviews with local rape care advocates to provide a sobering picture of “street-level” strategies used by local law enforcement officials to avoid, downgrade, or dismiss sexual assault cases in their communities. SANE programs expand opportunities and justifications for police to discourage rape reporting, investigation, and prosecution by using the forensic evidence collection process as a way to intimidate victims, diminish the seriousness of the assault, and attack their credibility as witnesses.

Why policing?

The inadequacies of the law enforcement response to rape was a familiar theme in the early days of both the grassroots anti-rape movement (BenDor, 1976; Connell and Wilson, 1974; Horos, 1974; Mehrhof and Kearon, 1971). Beginning in the mid-1970s, feminist reformers in states around the country worked to re-write statutes to eliminate the vestiges of archaic notions about rape. Rape law reform changed the legal definitions of rape, challenged myths about victims and offenders, and introduced standards of procedural fairness in criminal proceedings.

Rape was re-defined, often re-named, to include acts other than penile penetration of the vagina. Reformed statutes encompassed a range of graduated offenses, from sexual touching to penetration of an orifice. New statutes were often gender neutral to encompass acts directed against male victims and perpetrated by female assailants. The campaign against marital rape, which took considerably longer, ended the spousal exemption for sexual assault. Coercion was expanded beyond physical violence, and included non-consent for reasons such as age, physical helplessness, mental defect, or intoxication. Reforms eliminated requirements that victims provide corroboration of the assault and prove she had resisted “to the utmost,” and introduced a “rape shield” provision barring introduction of most types of evidence about the victim’s past sexual history at trial. Most of these provisions focused on rape prosecution, though some—especially the very definition of sex offenses—obviously had a critical impact on the types of acts recognized by law enforcement actors as illegal.

Almost every major study of rape law reform has found consistent evidence that reforms initiated in the 1970s and 1980s were generally ineffective at changing the attitudes and practices of criminal justice personnel (Berger, 1991; LaFree, 1989; Loh, 1980; Marsh, Geist and Caplan, 1982; Spohn and Horney, 1992). Qualitative researchers confirmed these findings in projects that examined the attitudes of police and prosecutors toward sexual assault (Estrich, 1986; Frohmann, 1991; Frohmann, 1997; Martin, 2005; Martin and Powell, 1994; Schwartz, 2010; Spohn, Beichner and Davis-Frenzel, 2001). Scholars, especially those located in the legal academy, point out that legal reforms which eliminated corroboration, prompt complaint, resistance, and physical force requirements in rape law have not resolved deep conflicts over the line between coerced and consensual sexual contact (Anderson, 1998; Anderson, 2004; Estrich, 1987; MacKinnon, 1989; Schulhofer, 1998).

As street-level bureaucrats (Lipsky, 1980), police are invested with high levels of discretion to take reports and decide whether a crime has been committed. Martin and Powell point out in their study rape case processing in Florida jurisdictions that “Women who are raped continue to be embarrassed, doubted, and abused by the legal organizations that process them, a pattern referred to as a ‘second assault.’ From research and the media, ... we know that some legal officials mistreat rape victims and refuse to pursue legal cases against rapists or do so reluctantly and ineffectively” (1994, 856, footnotes omitted). Contemporary police attitudes toward victims of sexual assault deserve special attention since low-visibility decisions made early in the rape reporting process can influence whether and how sexual assaults are formally acknowledged or are dismissed as “not credible” or “unfounded.” Police suspicion of sexual assault reports can divert well-intentioned SANE programs from their initial purpose of improving medical care into a kind of “trial by ordeal” that imposes demands and obligations on rape victims unlike those required of any other witness to a crime.

Research methods

Data for this paper is drawn from a book project examining sexual assault laws and policies in six states (Colorado, Kansas, Michigan, New Jersey, South Carolina, and Washington). The states included were chosen based on a variety of factors—demographic and geographic diversity, political climate, statutory outcomes and language, strength of state coordinating and lobbying presence—to assemble a set of cases which are illuminating but not exceptional in their treatment of sexual violence. Key to state selection was representing different types of communities—urban, suburban, and rural. Many studies of both rape case processing and of prosecutorial responses to sexual assault occur in large, urban jurisdictions; while vitally important, this focus does not necessarily explain the relationships among police, prosecutors, and advocates in smaller communities.

Once states were selected, all rape care programs in the state were identified and contacted to seek their participation in the interview process.¹ Centers were contacted first by letter and then with a follow-up phone call to discuss the project in more detail. Responses ranged from enthusiasm to reluctance, with most advocates willing to participate. Interviews were conducted in New Jersey in Fall 2001; Michigan, Washington, and some parts of Kansas in Fall 2005; Kansas, Colorado, and South Carolina were completed in Fall 2008. In this paper I will focus primarily on New Jersey, Kansas, and Washington, though on a few occasions I will refer to data from other states. Table 1 summarizes the interviews conducted with local advocates in the three states that form the bulk of the analysis here. While I was not able to interview advocates from every rape crisis center in every state, I was able to meet with a majority of centers in each state; all geographic regions across each state were represented.

Table 1: Interviews with local advocates

State	# of advocates interviewed	# of centers interviewed	# of all centers statewide	% of all centers interviewed
Colorado	31	24	28	86%
Kansas	24	15	21	71%
Michigan	33	22	46	48%
New Jersey	15	14	21	67%
South Carolina	22	13	17	76%
Washington	42	24	44	55%
<i>Totals</i>	167	112	177	63%

The semi-structured interviews with advocates lasted from 60 to 240 minutes, with a mean of 90 minutes, and were conducted face-to-face at the rape crisis center. I generally spoke with the executive director of the agency; in the case of some larger or multi-service agencies I interviewed

¹ For my purposes I defined a rape care program as the non-profit organization designated by the state to provide crisis intervention services to rape victims in a particular county. In some larger communities there may be multiple organizations which provide supportive services to victim-survivors of rape, but typically there is only one organization designated to offer core services such as a 24 hour hotline, emergency room, and law enforcement/court accompaniment. In many states a single agency may serve more than one county. Also, some large metropolitan areas, especially those cities which are geographically very large or which cross county lines, may be served by more than one agency.

the person (usually called a program director) most directly responsible for coordinating sexual assault services. In many centers other staff were invited by the director to join the interview. These additional staff were usually victim advocates providing legal and/or medical accompaniment to victims; occasionally mental health staff (counselors and therapists), social workers/case managers, and sexual assault nurse examiners were involved.²

With the permission of the participants, all interviews were audio recorded. Interviews were not, however, “on the record” because of concerns about confidentiality and potentially negative statements about local community partners (typically legal and medical institutions). In order to maintain confidentiality I have deleted here all references to agency locations and identify agencies only by their state location and general markers when necessary for context or contrast.

Are advocates reliable informers?

Using advocates’ representations of police and prosecutors does raise some important questions about the reliability of these accounts. Advocates clearly define themselves as fighting for victims—a position which may bring them into conflict with law enforcement and thus create an antagonistic relationship that could bias their reflections on the work of police. In the early days of the anti-rape movement, feminist groups often identified law enforcement as part of a patriarchal “establishment” which they were eager to criticize and reform.³ Conversely, rape care advocates might be too closely identified with law enforcement, resulting in a lack of critical perspective on the

² The paper includes many quotations from advocates. When multiple staff members are quoted, I indicate that different speakers are quoted by numbering them as “Advocate 1,” “Advocate 2,” etc. Thus these numbers indicate different participants within each interview, and do not indicate the same advocate is being quoted multiple times.

³ The New Left origins of women’s liberation contributed to an anti-establishment stance among feminist groups (Haag, 1996). As one participant in the New York Radical Feminists conference on rape said, in rejecting overly punitive rape law reforms, “[t]he authoritarian society is our enemy,” (Connell and Wilson 1974, 125). Many advocates were repulsed by the idea of working with a criminal justice system that was deeply implicated in class and race discrimination, and further “question[ed] the efficacy of a social change strategy to be implemented by a male-dominated institution” (Marsh, Geist and Caplan 1982, 14; see also Connell and Wilson 1974; Brownmiller 1975; BenDor 1976; Bevacqua 2000).

legal response to rape.⁴ Also, rape care advocates may have limited contact with police, leading them to unrepresentative conclusions about the practices of these agencies.

And many advocates did identify significant problems with law enforcement officials—both police and prosecutors. Indeed, this was an important theme in many of the interviews I conducted across the country. I nevertheless have a good degree of trust in these reports for several reasons. First, agencies rarely defined themselves as fundamentally opposed to the mission of law enforcement. Second, agencies provided a high level of detail about their interactions, providing me with a sense that they had long-standing relationships with these institutions and personnel. Finally, these accounts of advocates fit in many important ways with scholarly observations about case processing, providing local illustrations of what researchers have identified as continuing issues in police and prosecutorial responses to sexual assault.

The concern that rape crisis workers were ideologically opposed to the work of criminal justice systems was quickly eliminated. A clear majority of advocates specifically rejected a previous generation of feminist anti-rape work which was based in conflict rather than cooperation.⁵ This did not mean that they wanted to adopt the positions they associated with criminal justice officials—indeed, quite the opposite. Rape care staff offered significant criticisms of the way police both think about and respond to rape, challenging assumptions that they are too closely identified with and supportive of excessively punitive responses to rape. Rather, many pointed out that police and advocates have very different roles in dealing with survivors of sexual assault, differences which

⁴ With the resurgence of rape law innovation, especially around sexual predator laws, some scholars have argued that rape care advocates have adopted a conservative, “law and order” approach which endorses hyper-criminalization, including excessively punitive sentences and expanded collateral consequences such as sex offender registration and community notification (Gruber, 2009; Scheingold, Olson and Pershing, 1994).

⁵ In a comment very typical of agencies, one director from New Jersey said that the staff at her agency did not identify themselves or the work of their organization as feminist, in large part because of unproductive clashes with law enforcement. “I’ve changed my whole style, like with law enforcement officers, because we were always known as ‘the feminazis.’ And I joke with them about it now. And I’ve found, since I turned my whole attitude around, that they listen now, they seem to be interested. I have to come across a different way to be effective with especially law enforcement people. ... But it closes more doors than it opens in my experience” (New Jersey, suburban).

mean that rape care advocates and law enforcement can effectively work side-by-side without necessarily intruding on or adopting each others' role.⁶ In many counties agencies indicated that they had better relationships with one of the systems, or with some jurisdictions more than others;⁷ almost none of the advocates defined their relationships with these groups as inherently oppositional. Indeed, groups that described their relationships with law enforcement as poor almost always expressed their desire for a better relationship. Together, these repeatedly articulated perspectives assuaged most of my concerns that advocates might be ineluctably opposed to or sycophantically supportive of the mission of law enforcement.

Indeed, rather than being overly antagonistic toward law enforcement, I think rape crisis centers may be so eager to appreciate even small improvements that they may be overly positive in their evaluations of the progress made by police forces. Nevertheless, when coding their comments I used their own assessment of police; when they did not provide a clear-cut evaluation I used their longer descriptions and comments to generate what I thought was an accurate reflection of their own experience, not my interpretation of the behaviors described to me.

⁶ "When I train advocates, ... I talk about the role of law enforcement to prove it beyond a reasonable doubt. We have a very different role. We believe always, no matter what. ... So I try to explain the difference in the role." (New Jersey, suburban).

⁷ The words of an advocate from a city in Colorado is a good illustration of the ways that staff often talked about their law enforcement community partners:

Most of the major law enforcement offices [in the service area] have a sex crimes unit, or like detectives that are specifically assigned to, for some of the more rural ones, it might just be crimes against persons, where all the sex crimes would go.... So, since they are the ones who are often working these cases, we have more contact with them, and hear their names all the time, and that's good. So, that's really good. Those departments we feel good about. There are some other ones that, it's not so good. We don't get a lot of referrals from them, don't really talk to them a whole lot, don't really have a lot of interaction, they are not at collaborative meetings.... In those two ranges, the departments that we have a pretty good relationship with, and this would just be my biases, I think the victims in those jurisdictions get their cases seem to be more successful, the victims are happier with how it's going, the way they are informed about the process and their interaction with the officers and detectives is a lot more positive. In those other ones, the calls we get and the interactions we have are people calling and saying, 'I made this report months ago. I haven't even heard about what's going on.' A lot of our interactions are calling and saying, just checking in on behalf of this person, and then sometimes those are negative... So, it kind of, I don't know. We've had some conversations about what's going on and what is the difference there, how can we assist with that? We haven't had a ton of luck. (Colorado, urban)

Finally, almost all advocates reported significant contact with police, readily offering specific examples to illustrate their assessment whether that was positive or negative. Indeed, the insight and nuance that advocates offered—distinguishing between jurisdictions, naming individual officers, commenting on relationships between chiefs and their deputies—indicates that the advocates are involved with and keen observers of law enforcement officials in their communities. When advocates were unfamiliar with the workings of these offices they didn't hesitate to tell me so, and did so often enough that I was not too concerned that their desire to be "helpful" to me was leading them to tell me what they thought I "wanted" to hear.

And, though I would very much like to have had accounts from police to balance against those of advocates, the scope of the research agenda here—like all projects—was limited by time and money. The qualitative data gathered here do provide starting points for additional studies of jurisdictions identified as particularly good or bad, but that is beyond the scope of this particular project. In sum, I found rape care advocates to be thoughtful, respectful, and trenchant observers whose accounts are necessarily partial and incomplete, but not inherently unreliable, deliberately biased, or infused with enmity.

Reporting Rape: The Police Response to Sexual Assault

The complex interpersonal dynamics associated with sexual assault are widely cited as the primary reason for low rates of rape reporting. In its report to Congress on violence against women, the National Institute of Justice cited low reporting and conviction rates as the result of victims' reluctance to come forward: "because domestic and sexual violence victims can face possible reprisals by the offenders, a heavy burden of embarrassment, and other repercussions, obtaining their cooperation can be extremely difficult for law enforcement and other agencies" (National Institute of Justice, 1996, 36). Victims themselves may subscribe to stereotypes about what constitutes rape; a stranger assailant and the use of physical violence are two significant factors that

have been identified as shaping victims' perceptions about whether they were "really" raped and thus report to legal or medical attention (Clay-Warner and Burt, 2005; Du Mont, Miller and Myhr, 2003; Rennison, 2002). But even when experiences are interpreted as legally actionable grievances that should be redressed, victims may find that they do not meet some threshold for police to recognize what happened as a violation of the law.

In some cases police may be simply conveying the meaning of the law as written; obviously, not every incident in which an individual feels aggrieved or violated meets the state definition of a sexual assault. But in many other instances, which advocates had no trouble recounting, advocates reported persistent, clear patterns of police (patrol officers and detectives) who resisted defining even blatant, egregious assaults as sex crimes.

[O]ne example [is] a detective who left the child in the home with ... the offender. The child had disclosed that the offender had performed oral sex on her. I believe the child was under the age of 10. ... And the detective had told her that was not considered rape and felt it was appropriate that since mom ... needed [financial] support, that [the offender] could stay in the home as long as she supervised them.... (Washington, urban)

We had a sexual assault survivor that was drinking, was with two men, and was taken into a wooded area, and it was attempted murder. She was severely beaten. She was repeatedly raped. ... When I first saw her, [she was] still bruised, [with marks from attempted] strangulation. ... And we had a law enforcement officer that questioned were this consensual or not because she was drinking. ... So, I just think we have a lot of work to do, if that still exists among seasoned individuals in law enforcement. (Michigan, small city)

One of the things that was most upsetting to me recently was [a victim brought to a local hospital.]... [W]hen I called the ... police department and talked to ... the detective, and his comment to me was, "Oh, it wasn't a rape, it was just a child." (Washington, small city)

In dealing with some areas of law and with some communities, police may display an attitude of indifference which leads them to dismiss injurious interactions as normal, to find community members are unworthy or undeserving of protection, and sees police intervention as counter-productive or a waste of time. Cultural messages that blame rape victims and minimize the seriousness of rape are reinforced when individuals in authority—whether those are county sheriffs,

city police commissioners, or instructors at a police academy—repeat, condone, or permit such messages to be disseminated by their officers.

In her book *Real Rape*, Susan Estrich wrote that “Sexual assault poses challenges to many police officers’ understandings of appropriate sexual—and general female—behavior” (1986, 1091). Twenty-five years later, Estrich’s observation continues to be true. Advocates who work with sexual assault victims provided many examples to illustrate the ways that the attitudes of police influence their perceptions of the validity and seriousness of sexual assault reports. In response to a standard interview question about how police responded to reports of sexual assault in the community, advocates offered up a depressingly extensive litany of negative attitudes by both patrol officers and detectives assigned to investigate initial reports.

[Police] want this sterile [victim] who doesn’t carouse, or whatever—that somebody, some stranger assaults me and rapes me. They want a victim like that. But that’s not what our victims generally are. I mean, let’s face it, in sexual assault, it’s someone known to you. But they want the almost Sunday school teacher kind of victim that is accosted by someone and raped. I think that’s what they’re looking for, because there was a comment made by one of our law enforcement people ... that weren’t always a lot of real rapes, that there are a lot of reports of false ones because [victims] were messing around on their husband. (Michigan, small city)

There are some officers here that are much more cognizant of the dynamics of abuse and sexual assault. They are much more cognizant of the effects and what it may look like and how many different definitions of what kind of rape. They are just more tuned in psychologically to what they are responding to. I’d say a higher percentage of them are far less tuned in, far less understanding, are far more entrenched in the old ideas of, “Well, she probably asked for it. What was she doing there? What was she wearing? How many other sexual contacts have you had? Didn’t you think you were in the wrong place at the wrong time? How much have you had to drink? She’s probably just trying to”—this is my favorite one—“She’s probably just trying to get back at her boyfriend.” (Washington, rural)

Nor are these statements isolated, outliers, or the result of advocates “misunderstanding” officers. In his study of the police response to rape, Schwartz (2010) makes a strong argument that law enforcement officers have learned what answers they are “expected” to give about rape—what Hodgson (2001) calls “impression management.” But his interviews with detectives revealed the underlying attitudes about how police perceive rape and rape victims:

We learned earlier that police were quick to say all of the right things, including and especially the fact that all cases were investigated dispassionately by the detectives, written up objectively, and passed on without prejudice. Yet, when the microphone was off again and again (or even while the microphone was on) these detectives admitted that there were a large number of cases where they “unfounded” the case rather than continue with it. Evidently if they just plain didn’t believe the victim, then this did not count as a case of “real rape” that would be turned over to the prosecutors. If the victim was treated poorly, and she chose not to continue with her complaint, this was another sign that the case could be ignored (Schwartz, 2010, 44).

Consistent with Schwartz’s findings, advocates report that there are some types of victims or situations that are simply not perceived as credible; these reports may be ignored, downgraded, or dismissed.⁸ Advocates routinely reported that victims who knew their attackers, or who were thought to be involved with culturally questionable or illegal behavior (such as prostitution, using drugs or alcohol, or being homeless or mentally ill) at the time of the assault, were often unable to get police to take them seriously.

Interviewer: How do you feel that [the special sexual assault detectives] do with responding to these reports?

Advocate 1: Okay. I mean, sometimes it depends on the victim. ... You’ve got your good victims and you’ve got your bad victims. ... The good victims are the ones to whom this has probably not happened before, the kind of middle class folks with jobs and seemingly solid family and community relationships. And obviously, the bad ones are the ones who have been, possibly they are sex workers, they’ve got some drug or alcohol involvement, mental health issues, homeless, just kind of your classic... They are not credible. Their information, for whatever reason, is not credible. We’ve seen a variety of cases where clearly there has been assault, sexually and physically, and yes, there’s been drug use involved, possibly, but there has been a rape, if not several, with this particular victim. But, you know, they don’t do much with them. (Kansas, urban)

I would say our teens, especially homeless teens, and our homeless population in general, because we have gone out and actually done training, or tried to do training with the homeless shelters, especially for the women, and just a lot of mistrust there—not only with their clients, but with the staff. They say they try to report things to the police and it’s not believed so why bother. ... [T]he feedback I get from the shelters is that they won’t even go to the police. They won’t even bother reporting anything. (Washington, urban)

I don’t know that I would say I’m still seeing patterns of bias, or maybe I’m just so used to them that now that there are some positive change, that I kind of feel as though, it’s better

⁸ Schwartz reports that “detectives made no effort to hide the fact that they dismissed certain types of cases out of hand. One detective at a major college campus, for example, reported that rape reports at his campus were all or mostly attempts by women to get out of exams, so there was no point in taking them seriously. As another example, one big city detective announced that he would not accept any case where the girl or woman claimed to be forced into a car or van. Others made it clear that there are many stories that they would just not believe” (Schwartz, 2010, 16-7).

now. I think I see it [bias] more with the officers. ... There's a different mindset, a different way of being, a different culture. ... There was this one instance where the comment was, "Oh, she can't be raped, she's a whore." Everyone laughs. I'm sitting there in amazement. The officer stopped laughing and looked at me and said, "Oh, sorry, I forgot you were here." So, I think those things do still happen. (Colorado, urban)

The effects of these attitudes, which have a profound impact on whether police find victims credible witnesses, are difficult to track for quantitative measurement and nearly impossible to stamp out through top-down change (Epp, 2009; Walker, 2003).

Police who suspect that victims are not being truthful about the assault are not shy about challenging individuals. Clearly the investigation of sexual assault allegations should be taken seriously, and it is well within the rights and responsibilities of police to question victims about inconsistencies or omissions in their description of events. But advocates indicate that police investigation can too often seem like an adversarial interrogation of victims, who have none of the criminal due process rights of accused individuals yet may be treated as such for reporting a sexual assault.

Advocate 1: There are some [police officers] that absolutely do not want to believe a victim. Every victim must be lying.

Advocate 2: "We need to polygraph all our victims."

Advocate 1: "If they are victims then they must be lying, because in my [many] years of experience..." That's what they will say. ... Threatening to file charges for false reporting if their story seems at all different from what a "true" rape victim would be. "You didn't fight, therefore, it must be that you've made this up. Therefore, I'll have to file charges against you for false reporting, or even leaving children in the home with the offender." (Washington, urban)

We are seeing the victim is guilty until proven innocent. You know how we have to be very careful with someone who is considered a perpetrator and we have to afford them their rights, and we can't assume that they are guilty. It seems like it's flip-flopped on our victims that they're lying until they can prove otherwise, and [police are] really getting in their faces, saying, "You know, you can go to jail for twenty years if you are perjuring yourself, if you are making a false report to law enforcement." (South Carolina, small city)

Advocate 1: [T]here have been times when [police] people are not doing their jobs, or doing them in a manner that is just so awful, that, well... We had a situation with [an advocate] at the hospital, and it's a miracle she wasn't arrested. It was bad, it was really bad. ...

Advocate 2: Yeah, they went toe to toe, and this was a [victim] that supposedly was a prostitute. So this [police officer] didn't have any respect for her, wanted to check her pockets for money, this and that. The advocate said, "Absolutely not." Come to find out,

after this girl was checked and they did the forensic, they ran the DNA, and the guy that did it to her did it to other people. ...

Advocate 1: Well, and not only that, but within two weeks, ... [the perpetrator] had somebody he had [kidnapped and raped over a period of days]. Same guy that this cop was saying to this girl, “You are just a prostitute, and this is a good family man’s life you are trying to ruin.” (Washington, small city)

The sheer number, variety, and similarities of these stories indicates that negative, dismissive, or even abusive practices by police are not unique or unusual, but rather persist in many areas and affect thousands of victims each year who do choose to report a sexual assault to the police. These interactions provide some leverage in explaining gaps between experiences that meet legal definitions of rape and the number of rapes reported to the police, and they set the context against which SANE programs play out in many communities.

The SANE exam as “trial by ordeal”

The difficulties rape victims and rape care advocates experience in getting police—both first responders and detectives—to take sexual assault seriously certainly have an effect on how many sexual assaults are recorded as such, and why victims of rape begin to “leak” out of the reporting pipeline immediately after an assault occurs. However, this very real impact of police attitudes is rarely taken into account when legislators attempt to improve the medical and legal responses to rape. The emergence of SANE programs as the highest quality of post-rape forensic care is one example of how police attitudes toward sexual violence can transform an otherwise generally well-intentioned policy innovation into a barrier to rape reporting and investigation.

Over the last fifteen years, SANE programs have emerged as a new “best practice” in providing efficient, comprehensive, effective services for rape victims (Campbell, 2006; Campbell, Patterson and Lichty, 2005; Ledray, 1999). SANEs are typically registered nurses who receive special training in collecting forensic evidence and managing the psychological trauma of rape. As medical professionals, SANEs provide specialized post-rape care for victims which, ideally, brings together a high-quality forensic examination with greater emotional sensitivity to sexual trauma, thus improving

exam times, competence completing the evidence collection, maintaining the chain of custody for forensic evidence, and ability and preparation to testify about medical findings from the exam.

SANE programs have produced significantly improved outcomes for victims in many communities where they have been implemented. These benefits are borne out both in anecdotal evidence from local RCC advocates and in empirical studies. In areas such as victim satisfaction with medical care (Campbell, 1998; Ericksen, Dudley, McIntosh et al., 2002), completeness of medical attention (Littel, 2001), proper collection and maintenance of forensic medical evidence (Sievers, Murphy and Miller, 2003), and improved criminal justice outcomes (Nugent-Borakove, Fanflik, Troutman et al., 2006), SANE programs far exceed the performance of their emergency room peers who lack special training on sexual assault.

While these benefits are important and should not be underestimated, SANE programs also raise potentially troubling issues for feminists and victim advocates concerned about how victim services are shaped by this intersection of medical and criminal justice priorities. Though developed as a model to aid victims and improve medical and prosecutorial outcomes, SANE programs are flexible tools that can be adopted and adapted to serve a variety of ends. And evidence from this study indicates that police may see the SANE exam in a much different light than the nurses who actually provide medical care.

Police who suspect that many alleged rape victims are lying have long sought ways to confirm a story that may have no witnesses or corroborating evidence. One method, gradually falling into legal (but not law enforcement) disfavor, is the polygraph machine. Polygraphs, justified as an “investigatory tool,” have long been used by law enforcement as a way to measure the sincerity, compliance, and cooperation of victims with law enforcement. Most states have banned the practice of *requiring* victims to submit to a polygraph (sometimes only in order to receive federal law

enforcement funds), but *asking* victims to be polygraphed is still routine practice in many police departments.

We have a lot of polygraphing, or asking victims, do they want to be polygraphed. ... [I]f there were questions about, “Is this a teenage, he said/she said?” or “Do we think this could be Sally Sue thinks she’s going to get in trouble because she had sex with her boyfriend?” If there was anything along that sort of line that they were hearing from the detectives, “Well then, maybe you should polygraph them just so—even though it can’t be used in court—we feel better about what we are doing.... This is an investigation tool.” That’s what so many of them see it as, and if [victims] are not willing to do that then [the detective thinks], “Hmm, I wonder why.” (South Carolina, urban)

Since use of polygraphs is discouraged by some state and federal regulations, I believe that police are looking for new ways to test the compliance, cooperation, and credibility of rape victims. One such method is, I think, the forensic exam process. In listening to advocates talk about police practices related to SANE exams, I was struck that police seemed to be seeking some of the same goals as have been used to justify polygraphs: the desire for certainty, and the belief that a victim with nothing to hide should willingly submit to any and all law enforcement requests.

Testing victims

Though SANE programs are increasing, they are not available in all communities. In states that are geographically smaller and have many health care providers, accessing a SANE program is usually not terribly difficult. But in states with large rural populations, poorer or demographically segregated urban centers, and a limited number of hospitals, barriers to access can be significant. Though a post-rape pelvic exam and tests for exposure to sexually transmitted infections takes only a few minutes, the more extensive forensic evidence collection process takes from one to five hours and involves procedures victims may find intrusive and upsetting, such as plucking numerous pubic and head hairs, cutting fingernails, obtaining oral, vaginal, and anal swabs, and taking clothing.

Advocates almost universally agreed that SANE programs were an enormous improvement over exams performed by emergency room physicians. However, they also pointed out that law enforcement insistence on using an official SANE program and requiring victims to submit to the

full forensic exam can mean that victims are forced to face long transport and hospital wait times, as well as the forensic exam itself, which may take two to four hours. This means that the entire SANE-related process could easily take eight hours or more. But police rarely discuss the SANE exam as one of several possible medical options for victims; instead, as with the “request” for a polygraph, it may be presented as the only way to proceed, even if that imposes real hardships on victims seeking to report.

[M]ost of the clients don’t want to take that other trip [to the SANE program]. They will come here [to the local hospital for triage screening]. Then they go in and talk to the detective, who is not the nicest guy in the world to talk to about rape. Then, he says, “Well, I’m taking you 90 miles [for the SANE exam].” Most of them say, “No, I’ve had it. I’m not going any further.” (Kansas, rural)

One of the difficulties, though, is, let’s say there’s a woman who is raped in [a town] which is 45 miles away from here. Well, she has the option of coming to [our] hospital here, but if she wants a SANE exam, she needs to go to [another town], which is another half an hour away. Is she going to want to do that? If she does want to do that, who is going to transport her? (Colorado, small city)

[I]t has become really apparent ... in the last year that hospitals are ... sending people to where there is a SANE nurse, even if that is fifty, eighty, a hundred miles away. And even if once they get there they have to wait for a long time. Essentially [police are] now saying, “Well you can’t do a kit unless you’re a SANE.” (Kansas, urban)

Access to a SANE can require long distances and difficult travel arrangements, especially in rural and/or geographically isolated communities. Yet if victims do not access that SANE program and instead have the rape kit done at a local, non-SANE hospital, or if they refuse to have a rape kit completed altogether, police may view and treat a victim as resistant, non-cooperative, or trying to hide something. The SANE exam itself thus can become a sort of grueling trial by ordeal for victims—those “serious” enough to go through the process may be more readily acknowledged by law enforcement officials as “real” victims, while those who make the decision not to participate in the forensic exam may experience even greater skepticism and resistance to investigation and prosecution of their cases. There is a real parallel here to the persistent use of polygraphs in sexual assault cases.

Screening victims out of the criminal justice process: Who “deserves” a SANE exam?

When police view rape victims’ reports through a lens of pre-determined skepticism, stories that fail to resonate with rape stereotypes (a stranger assailant, use of force or injury, a sympathetic and completely blameless victim) means that police may be reluctant to bring victims in for the SANE exam.

Well, I’m not too thrilled [with law enforcement]. I think a lot of it has to do with the comfort level. ... [W]hen it is a brutal stranger rape, oh, yeah—they get right into that. But, if it’s the acquaintance, fuzzy stuff, they’ll take their time. Then, if he’s saying “Oh, yeah, we had sex but it was consensual,” then they don’t even get too excited about doing the forensic exam. (Colorado, small city)

This suspicion about victims means that everything about the SANE program—such as the time and cost of police personnel to transport victims to a SANE site and wait for the evidence collection—may be perceived as an unwarranted, unjustified burden for law enforcement.

Interviewer: How do you feel about law enforcement’s buy-in to SANE?

Advocate: I would say I think it is okay. I don’t think it is great, especially with the smaller law enforcement agencies, like the smaller communities. They are like, “Oh crap.” That comes out of their budget.

Interviewer: What does?

Advocate: The exam. ... [T]here are [several] law enforcement agencies because of county versus community cops. There are [a few] small communities that are going “\$300”—whatever it is now, \$450, whatever—is a lot of money to pay [for a SANE exam],” especially if [police] are going, “She’s just saying this.” So they are a little bit somewhat reluctant. ... [T]he communities that are closer to [the SANE program], it’s easy, because that’s where they would be going to the hospital anyway. But those that have to travel further, it’s a little bit more difficult. ... [I]s [the low number of SANE exams] because law enforcement agencies haven’t totally bought into it? Now you are looking at the western side of the county. Are they going to be bringing them to [the SANE program] when they can go to [a closer hospital]? Are they will to go that extra 30 or 40 miles to bring them to [the SANE program]? It’s very territorial and becomes a pissing match in the different parts of the county. So, “I don’t want to go to your side, you don’t want to come to my side.” (Colorado, small city)

Police departments may be influenced by the financial and resources cost of the forensic exam when deciding when a victim’s story is credible enough to warrant activating (and paying for) the SANE. These concerns, which intersect with pre-existing skepticism about victims, may result in police denying victims SANE exams unless their report fits whatever stereotype about “real rape” is held by officers in that jurisdiction.

Nor have these financial concerns been allayed by new federal regulations. Beginning July 1, 2008, the federal Violence Against Women Act (VAWA) required states to pay for the cost of rape kits. The VAWA regulations permit states to adopt a variety of methods to fund rape kits: sometimes these come out of local agency budgets, sometimes from a state-wide law enforcement agency, and occasionally from a victim's compensation fund. But local jurisdictions are still solely responsible for the costs including transportation and staff time. When local police face losing a deputy for hours at a time to transport and accompany a rape victim, they may find it easier, as the advocate above suggests, to simply bring the victim to a closer hospital or to find other ways to ignore the report.

Funneling victims into the criminal justice system: Defining post-rape care as evidence collection

Post-rape care for victims is increasingly defined as the forensic exam and evidence collection. This has several unwelcome outcomes for victims. First, it creates a strong association of the medical response to rape with the criminal justice system, and may discourage reporting among victims who fear police attention. Second, it funnels all victims into a criminal justice response, even if they are not interested in moving ahead with police reporting or prosecution.

SANE programs are premised on the idea that the logical, appropriate, and desirable response to sexual assault is victim reporting and participation in prosecution. For example, one study of SANE outcomes funded by the National Institute of Justice emphasized higher rates of victim participation with criminal justice systems as the basis for advocating SANE responses that are closely linked to law enforcement (Nugent-Borakove, et al., 2006). Yet for victims who were engaged in illegal behavior (such as drugs, prostitution, underage drinking or sexual contact), the connection between post-rape medical care and law enforcement discourages some of them from seeking medical care at all.

[SANE is] too closely tied with law enforcement... I felt very, very strongly ... that I didn't like the way it was going to play out. ... I just don't like that tie with law enforcement because

the victims that we are seeing—and more importantly, the ones that we’re not seeing—as soon as they hear the prosecutor’s office has anything to do with it [medical care], they’re out of there. And I can understand that because a lot of them were engaged in illegal activities to begin with, when the assault happened. (New Jersey, urban)

While some victims may know about the connection between the post-rape exam and police involvement and therefore avoid reporting altogether, other victims are swept up in the forensic exam process and are not fully informed of their rights to request or decline certain kinds of care or interactions with the police.

[O]ne of the other things that I’ve heard ... is that survivors may want to seek medical treatment but have no intention of ever filing a report, so they don’t need or want a rape kit of any kind. ... And so she may want to just go in for basic medical care because she is concerned about STDs, she is concerned about any number of these things but she is going to be really funneled and forced into this criminal, sort of criminal justice response that she may have no intention of. ... I’ve heard some survivors ... talk about that being a really huge problem. (Kansas, urban)

The recent re-authorization of VAWA included provisions that permitted anonymous reporting, and eliminated requirements that predicated access to a SANE exam on cooperation with police. These important improvements, however, are again understood and implemented differently in local jurisdictions. SANEs may see their own role as aligned with and focused on reporting and prosecution, and may not inform victims that they can choose not to speak with police.

I’ve had cases where I’m at the hospital and the nurses, the head nurse is aware of [the new anonymous reporting process] but not supporting the law.... I’ve had police officers where I know they are aware because we attend these same meetings where we discuss the new law.... So they’ve got this negative concept of this new law, that they are not supporting and pushing forward for the sake of the victim, or the sake of their cases. ... And, hospitals have a protocol to call the police anytime someone says that they’ve been sexually assaulted. So, the police officer shows up there, and no matter what is going to try to push for the victim to talk to them and they try to make it seem like that, even the nurses sometimes make it seem like that’s the only action. (Colorado, urban)

There’s a SANE nurse at the [local] hospital, and she’s very sympathetic. ... I think she thinks she does a good enough job that she doesn’t need us. But I have some problems with her approach. Her focus is on prosecution, and whether or not a victim wants to report she pressures them to prosecute. (Michigan, rural)

And, as with any good trial by ordeal, surviving the test doesn’t mean a favorable outcome for the victim. A victim’s willingness to go through the forensic exam process doesn’t guarantee that

the report will be taken seriously. In some jurisdictions, police who don't believe a victim's story may simply refuse to send rape kits along to the state crime lab.

I go into the hospital and these girls—they're like, "The DNA, the DNA!" I'm like, "Honey, this is never even going to get to the crime lab" is what I'm thinking in my head. And I can't tell them that, but if this detective walks out of here and closes this case this [rape kit] is not even being sent to the crime lab. (New Jersey, suburban)

One director in Michigan reported that a staff member from the state crime lab told her that most rape kits were never passed along from local police. Comparing the RCC records with those of the state crime lab indicated that about 75% of adult kits and about half of rape kits completed on child victims were not being turned over for processing. She expressed her anger: "You put someone through that horrific exam and then you don't use it? And you just throw it on a shelf and act like it's nothing?" (Michigan, urban). Advocates' concerns about the low priority given to rape kits by police and crime labs are reinforced by reports such as those out of Los Angeles, where one of the only systematic studies of rape kit processing found that backlog of over 12,000 unprocessed kits in the possession of the Los Angeles Police Department, hundreds of which were more than ten years old (Human Rights Watch, 2009). A similar backlog in Illinois prompted legislators to required police to turn over and test all completed rape kits (Human Rights Watch, 2010). Anecdotal evidence from these interviews suggest that the problem may not be confined to large urban jurisdictions, but instead reflect a wide-spread pattern of disregard for sexual assault reporting. And the failure to turn over kits indicate that police beliefs about rape as a crime and about the credibility of victims are not trumped, or even challenged, by the current vogue for forensic evidence.

And the (literal) openness of the victim's body to high-tech medical scrutiny can provide a way for police to seek information about victims that is not always relevant to the allegations at hand. Police can request, and medical personnel have conducted, drug and alcohol testing on victims without their knowledge or consent (Reedy V. Evanson, 2010). The forensic exam may also introduce non-relevant medical evidence—such as testing positive for a sexually transmitted

infection, number and outcome of previous pregnancies, the presence of tattoos or piercings—that police may use to assess and undermine victim credibility, or that may be used against victims during prosecution (Rees, 2010).⁹ SANE exams may add another avenue for police to discredit and dismiss allegations of serious behavior based on non-legal, non-relevant, personal characteristics of victims.

Discussion

Advocates agree with existing research that SANEs are almost universally a significant improvement in the medical response to rape victims. Advocates also agree that when they do testify, SANEs are compelling expert witnesses. The question this research raises is thus not about the quality of care provided by SANEs, nor about whether SANEs are effective witnesses for prosecutors. Rather, the experiences of advocates raises larger questions about how SANE programs—universally hailed as a breakthrough for victims—can actually reinforce some of the more negative aspects of the criminal justice response to rape.

Law enforcement perceptions about the importance and purpose of the SANE exam are still heavily influenced by pervasive negative attitudes toward sexual assault. This data indicate that policy innovations such as SANE programs, while well-intentioned, may provide new avenues for police to continue to dissuade, frighten, and intimidate rape victims out of reporting sex crimes. Demands that all victims undergo the SANE exam (and its associated burdens) assess whether victims are “serious.” Conversely, a victim request for a SANE exam may be interpreted as a burden and waste of law enforcement time and money. The close ties between medical and legal interventions

⁹ An advocate from South Carolina described how medical information collected during the forensic exam ended up harming, rather than helping, the victim:

At one point, recently, [the medical staff] were considering not doing any STD testing because one of the more pro-active ... physicians ... had that come back on a victim one time. [S]he came up positive, which meant she had something prior [to the assault] and the defense tried to use that against her and he was very upset by that. So, there was a while that they discussed not doing any STD testing right there at the hospital because he didn't want that used against the victim, like they [had] loose morals, whatever the defense would try to say. (South Carolina, urban)

discourage victims from reporting if they fear that police involvement could lead to charges against them for engaging in illegal behavior. And by defining post-rape care for victims as the forensic exam, victims who may not want contact with police may be caught up in systems that push them to report and/or prosecute.

Two advocates from Kansas who participated in legislative education and lobbying efforts to around implementation of the VAWA anonymous reporting provision recounted the surprise of many stakeholders who were confused about why victims might be reluctant to report a sexual assault to the police, and why rape care advocates would be cautious about encouraging them to report.

Advocate 1: I think that when this was taken to the legislature, there was really a lot of puzzlement about “Why wouldn’t you want someone to report? Why do you want to allow this to happen without report to the law enforcement?” ... [T]here were some people who felt like this was just wrong. We were generating immunity for serial rapists. ...

Advocate 2: But I think that there were people who were generally trying to figure it out. Like, you know, “If this happened to my daughter, or my sister, I would want her to report to the police. Why would we encourage people not to report to the police at any level?” So I think there was real puzzlement and there’s a real need for some education around that whole piece.

Advocate 1: There was. And I still don’t think they really necessarily got it. I mean, you really just want to say, “Well, trust me, if you encourage [a victim to report rape to law enforcement] that you’d only do it once. You would never encourage anyone to do it again.” ... It only takes once to make you completely clear that that is not the way to go. (Kansas, urban)

These kinds of concerns about the law enforcement response to rape are generally not reflected in scholarly literature on SANE and sexual assault response team (SART) programs. SART programs, which formalize the cooperation between legal, medical, and RCC aspects of rape response, link the goals and protocols of medical and law enforcement personnel even more seamlessly. One recent study of SANE/SART programs explored the likelihood that “the victim will cooperate and participate in the justice process,” which was defined as “making formal statements to law enforcement, testifying and/or appearing at court hearings, providing a victim impact statement, and cooperating with the prosecution.” The authors found that “participation in the process is

highest among cases in which there was a SANE/SART intervention” (Nugent-Borakove, et al., 2006, 32); they then argued for closer, tighter connections between medical and legal responses to rape, since “coordinated approaches, involving first responders from different disciplines, help to keep victims informed and engaged in the process” (Nugent-Borakove, et al., 2006, x).

The assumption that victim cooperation with law enforcement is an unalloyed benefit is not consistently supported by data from advocates, who indicate that victims could make an informed and rational decision not to report when faced with a hostile law enforcement response. Using SANE programs to push or “funnel” victims into cooperating with law enforcement prioritizes the interests of the criminal justice system over those of the victim, diminishing the choices and autonomy of victims and subjecting them to sometimes abusive practices by legal personnel.

These findings indicate that scholars, advocates, and policy-makers interested in promoting SANE programs for their victim care component should not assume that these programs will be implemented or used predictably in all areas. Until the systemic and unique hostility and suspicion of law enforcement personnel to rape allegations is confronted, even well-intentioned innovations like SANE programs may simply provide skeptical officials with more avenues to avoid, disbelieve, discredit, and dismiss reports of sexual assault.

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