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FACTORS AFFECTING THE PROSECUTION OF RAPE: A CASE STUDY OF TRAVIS COUNTY, TEXAS

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SIR Matthew Hale, Lord Chief Justice of the King's Bench from 1671 to 1676, observed that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."¹ Seldom are there eye-witnesses aside from the victim and the defendant,² so conviction almost always rests on evidence that is circumstantial. Legislatures and courts have grappled with this practical problem of proof by prescribing and, at times, discarding such indicators of nonconsent as force, resistance, or corroboration that the prosecution must show before conviction.³ Less apparent perhaps is the possibility that the prosecutors themselves may weigh such factors in deciding whether to bring charges in a particular case, even though the lawmakers in

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¹ 1 M. HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* *634. Hale's language forms the basis of the jury instructions that many states authorize or require in rape cases. See, e.g., Berger, *Man's Trial, Woman's Tribulation: Rape in the Courtroom*, 77 COLUM. L. REV. 1, 10 (1977).

Unlike investigations of most crimes, investigations into charges of rape often focus not on who committed the alleged act but rather on whether the act was committed at all. NATIONAL INST. OF LAW ENFORCEMENT & CRIM. JUST., LAW ENFORCEMENT ASSISTANCE ADM'N, U.S. DEP'T OF JUST., *FORCIBLE RAPE: FINAL PROJECT REPORT* 46 (1978) [hereinafter cited as LEAA REPORT].

² E.g., *Stapleman v. State*, 150 Neb. 460, 464, 34 N.W.2d 907, 910 (1948); LEAA REPORT, *supra* note 1, at 37. Professors Kalven and Zeisel's study of jury trials found that eyewitnesses other than the victim testified in only 4% of rape cases, considerably less frequently than in cases of, e.g., homicide (44%) or burglary (20%). H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 142 (1966).

³ See generally Berger, *supra* note 1, at 7-12; Note, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 VA. L. REV. 1500, 1512-13 (1975).

their jurisdiction have rejected the same considerations in determining what is necessary to prove rape.

This article is the product of a field study of reports, complaints, and prosecutions of forcible rape in Travis County, Texas, during 1970-1976.⁴ After describing the functioning of local rape laws and enforcement mechanisms,⁵ the discussion reports the impact of var-

⁴ Austin is the major city in Travis County. It also is the capital of Texas and the site of the University of Texas at Austin. In 1976, the population of Austin was 308,952 and that of Travis County was 373,275. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS: SPECIAL CENSUS OF AUSTIN, TEXAS, SER. P-28, No. 1551 (1976).

Travis County was chosen as the subject of this study primarily for two reasons. First, both Robert O. Smith, the district attorney for Travis County during the period 1968-1976, and Frank Dyson, chief of police in Austin, allowed the writer to interview their personnel and gave him access to files and reports containing highly confidential information concerning rape complaints and prosecutions that was necessary for the accomplishment of the study. Second, the volume of rape complaints and prosecutions in Travis County during the period of the study was large enough to permit the application of statistical techniques to the data, yet small enough to allow the writer to perform personally all necessary field work. For a description of the volume of rape complaints and prosecutions during the period of the study, see text accompanying note 9 *infra*.

This study is based primarily upon information obtained through personal interviews with the district attorney and the lawyers on his staff and through an examination of the files of the district clerk, the district attorney, and the Austin Police Department. During the period of time covered by this study, Mr. Smith had a staff, on the average, of nine or ten assistant district attorneys. This writer interviewed all attorneys employed in the office in the summer of 1976, when most of the field research was performed. Approximately one half of these attorneys were members of the staff for a majority of the survey period. In several instances attorneys were interviewed who had left public service to enter private practice in Austin. Although these interviews and examination of the prosecutors' files, court files, and police reports constituted the bulk of the research, the writer also obtained useful information through interviews with judges, justices of the peace, and representatives of the Austin Rape Crisis Center.

⁵ The study considers several related crimes of sexual assault, including rape and aggravated rape. In Texas, rape is defined as follows:

- (a) A person commits an offense if he has sexual intercourse with a female not his wife without the female's consent.
- (b) The intercourse is without the female's consent under one or more of the following circumstances:
 - (1) he compels her to submit or participate by force that overcomes such earnest resistance as might reasonably be expected under the circumstances;
 - (2) he compels her to submit or participate by any threat, communicated by actions, words, or deeds, that would prevent resistance by a woman of ordinary resolution, under the same or similar circumstances, because of a reasonable fear of harm;
 - (3) she has not consented and he knows she is unconscious or physically unable to resist;
 - (4) he knows that as a result of mental disease or defect she is at the time of the intercourse incapable either of appraising the nature of the act or resisting it;
 - (5) she has not consented and he knows that she is unaware that sexual intercourse is occurring;
 - (6) he knows that she submits or participates because she erroneously believes that he is her husband; or

ious factual aspects of rape allegations upon their movement through successive stages of prosecution prior to trial. Three-dimensional contingency tables present the results of simultaneously cross-tabulating pairs of these variables against each other.⁶ Analysis of the data in these tables illuminates how these factors affected the probability of an indictment in rape prosecutions.

Prosecutors form their decisions at pretrial stages in part on their expectations of what jurors will do in given situations.⁷ Therefore,

(7) he has intentionally impaired her power to appraise or control her conduct by administering any substance without her knowledge.

(c) An offense under this section is a felony of the second degree.

TEX. PENAL CODE ANN. tit. 5, § 21.02 (Vernon 1974 & Cum. Supp. 1978). This is substantially the same as the law prior to 1974. *Id.* Practice Commentary. A second degree felony is punishable by imprisonment for 2 to 20 years, and the judge also may levy a fine of up to \$10,000. *Id.* tit. 3, § 12.33.

Aggravated rape is defined in Texas as follows:

(a) A person commits an offense if he commits rape as defined in Section 21.02 of this code or rape of a child as defined in Section 21.09 of this code and he:

- (1) causes serious bodily injury or attempts to cause death to the victim or another in the course of the same criminal episode; or
- (2) compels submission to the rape by threat of death, serious bodily injury, or kidnapping to be imminently inflicted on anyone.

(b) An offense under this section is a felony of the first degree.

Id. tit. 5, § 21.03 (Vernon 1974). This statute significantly alters the law prior to 1974, which recognized no degrees of rape. *See id.* Practice Commentary. As a first degree felony, aggravated rape is punished by imprisonment for 5 to 99 years. *See id.* tit. 3, § 12.32.

This study also covers prosecutions for assault with intent to rape, *id.* tit. 15, art. 1162 (Vernon 1961) (repealed 1973), and burglary, *id.* tit. 7, § 30.02(a)(1) (Vernon 1974), if the ultimate felony planned was rape. The former offense does not appear in the 1974 Penal Code because of the new code's enactment of a general criminal attempt statute. *Id.* tit. 4, § 15.01 & Practice Commentary.

The terms "rape prosecutions" and "rape offenses" as used in this article include all of the offenses enumerated above and attempts to commit such offenses. However, the study does not cover the offense of statutory rape, generally defined as sexual intercourse with a female under a certain age, who irrebuttably is considered incapable of consent. In Texas this offense is known as rape of a child. *See id.* tit. 5, § 21.09 (Vernon 1974 & Cum. Supp. 1978).

The study also excludes the offenses of sexual abuse, *id.* tit. 5, § 21.04 (Vernon 1974 & Cum. Supp. 1978), and aggravated sexual abuse, *id.* § 21.05 (Vernon 1974). These sections parallel the rape and aggravated rape provisions but proscribe nonconsensual sexual intercourse of a deviate nature. The legislature enacted these statutes in 1974, late in the period covered, after their predecessor, a general sodomy provision, was declared unconstitutional by a federal district court in 1970. *See Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex. 1970), *vacated*, 408 U.S. 989 (1971); TEX. PENAL CODE ANN. tit. 5, § 21.05 Practice Commentary (Vernon 1974). While this omission arguably renders the study underinclusive, it should have minimal impact on the results because of the relatively small number of prosecutions for sexual abuse. Moreover, there is no reason to believe that the effect of the relevant variables on sexual abuse prosecutions differed systematically from their effect on rape prosecutions.

⁶ For a description of the statistical methodology, see Appendix. TABLE A in the Appendix lists the results of statistical tests.

⁷ H. KALVEN & H. ZEISEL, *supra* note 2, at 31-32 (1966).

to understand the decision to charge one also must examine factors affecting trials. Part I presents an overview of rape trials conducted in Travis County during the period studied and explores the practices concerning the admission of certain evidence in those trials. It also describes certain pretrial proceedings. Part II outlines the variables selected for statistical analysis of the charging decision—assailant force, victim resistance, medical corroboration, the relationship between the parties, and the nature of their encounter before the attack.⁸ The discussion then investigates the varying effects these factors have on prosecution.

I. AN OVERVIEW OF TRIALS AND PRETRIAL PROCEEDINGS IN TRAVIS COUNTY

A. *Prosecutions and Indictments*

The files of the district clerk of Travis County show that the district attorney commenced 268 prosecutions for rape offenses during the period of the study and that grand juries returned indictments in 145 of those cases.⁹

B. *The Trials*

1. *Issues, Defenses, and Verdicts*

Twenty-two defendants were tried in twenty-one trials during the period, twenty defendants in separate trials and two in a joint trial. A jury sat in each case, and in none did the judge intervene with a directed verdict. Thirteen defendants were convicted; eight were acquitted. The jury was unable to reach a verdict in one case, and the defendant was not retried. The following table summarizes these cases according to outcome and the type of defense offered by the accused:

⁸ For a discussion of these factors, see pp. 371-75 *infra*.

⁹ To assure the inclusion of all rape prosecutions during the period 1970-1976, the writer examined the register of criminal complaints for each of these years. The district clerk maintains chronological records of all complaints filed in felony cases in Travis County. The register in each case indicates the name of the accused, the crime charged, and the disposition of the complaint, including a reference to a court file that the district clerk maintains if the grand jury returned an indictment. The writer noted the information concerning each rape prosecution listed in these registers and then examined the court files of all rape prosecutions in which indictments were returned. The files contain copies of all pertinent documents that the district clerk received and provide a source of official information concerning each case.

<i>Issue or Defense</i>	<i>Guilty</i>	<i>Not Guilty</i>	<i>Hung Jury, No Retrial</i>
No defense, no evidence presented	5	1	0
Alibi defense	5	0	0
Consent defense	2	5	1
Other defenses	1	2	0
	<hr/> 13	<hr/> 8	<hr/> 1

a. No Defense, No Evidence Presented

This category consists of six trials in which the sole evidence presented was testimony of prosecution witnesses. Juries convicted five of these defendants.¹⁰ These were rapes in the classic sense—a stranger broke into the victim's house or attacked her on the street, in a park, or at her place of employment. The strength of the state's proof and the accused's failure to present any evidence in his defense made conviction the predictable outcome in each case.¹¹

b. Alibi Defense

Five other defendants claimed that they were elsewhere at the time of the alleged offense. All were convicted. Except for the alibi defense, these cases closely resemble those in the preceding category in that they involved strangers and involuntary initial encounters. Juries apparently followed the direction of the evidence in rejecting the alibi defenses.¹²

¹⁰ The sixth defendant was acquitted primarily because of weakness in the complainant's testimony concerning the identity of her assailant. Although she identified the defendant as the man who broke into her house at night and attempted to have intercourse with her, she also admitted having failed to recognize the defendant in a group of photographs shown to her at the police station after the incident.

¹¹ The testimony of the complainant in each of these five cases was corroborated either by medical testimony or by admissions of the accused.

¹² In one case, for example, expert testimony showed that hair found in the victim's bed belonged to the accused. In another, the complainant bit her attacker in the chest, and the defendant was shown to have bite marks. In a third case, the prosecution introduced evidence of offenses committed by the defendant. Medical testimony corroborated the complainant in each case in which the offense was completed.

In four of the alibi cases, the defendant and members of his immediate family testified to his whereabouts. In the fifth, only defendant's wife testified.

c. *Consent Defense*

Eight defendants admitted having had intercourse but testified that the complainant had consented.¹³ Juries convicted only two. Differences in relationships and the types of encounters probably explain the dramatic drop in the rate of conviction from that observed in the preceding two categories. In almost every case in those categories, the parties were strangers, and the victim did not consent to the encounter preceding the occurrence. In each of the consent cases, the victim voluntarily entered into the encounter that preceded the alleged rape, and in almost every one, the victim knew the defendant prior to the incident.

d. *Other Defenses*

The three remaining cases involved peculiar circumstances not covered by any of the preceding categories. A jury convicted one defendant; the other two were found not guilty.¹⁴

¹³ This category is best described by several examples:

(1) The complainant and defendant, both university students, returned to his apartment after a party. The complainant testified that she resisted his advances until he choked her into submission. A doctor corroborated her story by testifying to marks left on her neck. The defendant's former wife and a dean of his college testified that the accused had admitted the offense. The jury nevertheless acquitted, probably because the complainant was willing to date the defendant, drink with him, and go to his apartment late at night.

(2) The complainant alleged that the defendant, an acquaintance, raped her after gaining entry into her apartment with his passkey. She did not resist, she said, because she believed it would be dangerous or futile. The defendant testified, however, that the complainant had invited him to her apartment to grant a sexual favor in exchange for helping her out of difficulty in paying the rent. There was no medical evidence, but one witness did testify that he had boasted about having forced a girl to have intercourse. The jury acquitted.

(3) After having a fiat tire, the complainant accepted an offer by the defendant, a stranger, of a ride to her destination. He took her instead to a place outside the city and attacked her. Because no notes or photographs had been made of her bruises, the state was unable to rebut the defendant's assertion that the complainant offered no resistance. The verdict was not guilty.

¹⁴ The following are summaries of the three cases:

(1) The complainant alleged that the defendant, her brother-in-law, had assaulted her in an attempt to rape her. He testified that he had mistaken the complainant for his wife because the two sisters resembled each other. A defense witness impeached the complainant by describing her as being hostile to the accused. The jury acquitted.

(2) The defendant, a stranger, broke into the complainant's house and attempted to have intercourse with the complainant. He testified that he was merely asking for consensual sex. The jury convicted.

(3) The complainant, a white woman, was abducted at gunpoint from the parking lot of a dining and drinking establishment frequented mostly by blacks. Her attacker

2. *Evidentiary Practices*

a. *Evidence of the Complainant's Prior Sexual History*

Consent was at issue in only seven of the twenty-one trials, and the parties were friends or acquaintances in only seven cases. To prove the complainant's consent¹⁵ or to impeach her credibility,¹⁶ courts generally admit evidence of her unchaste character and specific instances of her prior sexual activity with the defendant or other men.¹⁷ In the trials studied, however, defendants rarely succeeded in introducing such proof.¹⁸ In no case did the defense present evidence of specific acts of intercourse with persons other than the accused¹⁹ or of a reputation for unchastity,²⁰ and in only one trial was there testimony concerning prior sexual activity with

raped her outside the city. The accused's gun was found at the scene, and medical testimony corroborated the complainant's story. The defendant appeared in court in military uniform and with his wife. The only evidence he presented was character testimony from his commanding officer and four enlisted men. The jury acquitted. The prosecutor speculated that jurors believed the complainant had assumed the risk when she went to a place they thought was off-limits for white women.

¹⁵ 1 J. WIGMORE, EVIDENCE § 62 (3d ed. 1940) (general character for unchastity) [hereinafter cited as J. WIGMORE (1940)]; 3A *id.* § 924 (Chadbourn rev. ed. 1970) (specific acts of unchastity) [hereinafter cited as J. WIGMORE (1970)]. For modern examples of this position, see *Brown v. State*, 50 Ala. App. 471, 474, 280 So. 2d 177, 179 (Crim. App. 1973); *People v. Stephens*, 18 Ill. App. 3d 971, 977-78, 310 N.E.2d 824, 830 (1974).

¹⁶ 3A J. WIGMORE (1970), *supra* note 15, § 924a (general character); *id.* § 979(4) (specific acts). Wigmore opposed in all cases except rape the admission of evidence of bad character for a specific character trait in order to impeach a witness. He believed that a party might abuse the use of such evidence and give the trial "a flavor of filth and rancor." *Id.* § 924, at 736.

¹⁷ For a comprehensive discussion of the admissibility of the complainant's prior sexual conduct, see Berger, *supra* note 1.

¹⁸ A plea of not guilty is insufficient by itself to raise the issue of consent. *Roper v. State*, 375 S.W.2d 454, 456 (Tex. Crim. App. 1964). The defendant must offer some evidence on this question or forego the defense.

¹⁹ The Texas decisions have divided on the question of admitting evidence of specific acts of unchastity between the victim and persons other than the defendant. *Graham v. State*, 125 Tex. Crim. 210, 67 S.W.2d 296 (1933), and *Stafford v. State*, 104 Tex. Crim. 677, 285 S.W. 314 (1926), approved admission, but *Satterwhite v. State*, 113 Tex. Crim. 659, 23 S.W.2d 356 (1929) (dictum), and *Linder v. State*, 94 Tex. Crim. 316, 250 S.W. 703 (1922), two cases not involving consent, stated that such evidence should be excluded. *Young v. State*, 547 S.W.2d 23 (Tex. Crim. App. 1977), held that it was not error for a trial court to prevent defense counsel from showing that the complainant had engaged in intercourse the night before the offense and had had an abortion three years earlier. Her consent was at issue, but the court found that the excluded evidence was not relevant to her acquiescence or to any other fact in the case.

²⁰ Proof of reputation for unchastity is admissible to show that the complainant consented. *Satterwhite v. State*, 113 Tex. Crim. 659, 23 S.W.2d 356 (1929) (dictum); *Ross v. State*, 60 Tex. Crim. 547, 132 S.W. 793 (1910).

the defendant.²¹ Counsel refrained from bombarding jurors with such proof possibly because of the decisional law in Texas²² and probably because of the selectivity of the district attorney in accepting cases for prosecution.

In 1975 Texas enacted a statute providing that evidence of the victim's prior sexual activity may be admitted only if the judge, after a hearing in camera, finds that such evidence is relevant to a fact in issue in the case and that its probative value outweighs its prejudicial character.²³ The statute utilizes a flexible rule for judicial treatment of prior sexual activity and emphasizes the prejudice to the prosecution and the humiliation to a complaining witness that result from admission of such evidence.²⁴ Most jurors were expected to weigh any evidence of the complainant's sex history heavily against the prosecution's case.²⁵ Because the legislation became effective only on September 1, 1975,²⁶ experience with it is limited.

²¹ Where consent was at issue, the accused could show prior sexual activity between the victim and himself. *Roper v. State*, 375 S.W.2d 454 (Tex. Crim. App. 1964); *Campbell v. State*, 147 Tex. Crim. 192, 179 S.W.2d 547 (1944).

²² See notes 19-21 *supra*.

²³ The statute provides in part:

(a) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct may be admitted . . . only if, and only to the extent that, the judge finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(b) If the defendant proposes to ask any question concerning specific instances, opinion evidence, or reputation evidence of the victim's sexual conduct, either by direct examination or cross-examination of any witness, the defendant must inform the court out of the hearing of the jury prior to asking any such question. After this notice, the court shall conduct an in camera hearing, recorded by the court reporter, to determine whether the proposed evidence is admissible under Subsection (a) of this section. The court shall determine what evidence is admissible and shall accordingly limit the questioning. The defendant shall not go outside these limits nor refer to any evidence ruled inadmissible in camera without prior approval of the court without the presence of the jury.

(c) The court shall seal the record of the in camera hearing required in Subsection

(b) of this section for delivery to the appellate court in the event of an appeal.

TEX. PENAL CODE ANN. tit. 5, § 21.13 (Vernon Cum. Supp. 1978).

²⁴ The two judges who regularly preside over criminal trials in the district court in Travis County doubted that any evidence other than prior sexual relations with the defendant or indiscriminate promiscuity would be admissible under the statute to prove consent.

²⁵ Interviews indicated that prosecutors also believe most jurors would be prejudiced against a complainant if they were to learn that she has been sexually active outside a marriage relationship. In one case, for example, the rape examination showed two types of sperm in the complainant's vagina. Presumably, one type could be attributed to the rape and the other to recent intercourse with her boyfriend. Rather than reveal the complainant's sexual activity to the jury, the prosecutor chose not to present the results of the examination, foregoing the advantage of medical testimony that there had been penetration.

²⁶ See 1975 Tex. Gen. Laws ch. 203, § 3.

One advantage of the new law is that it relieves the state of having to object in the presence of the jury to offers of evidence of sexual conduct.²⁷ In one trial conducted under the old law, the defense attorney asked the complainant on cross-examination whether she had ever had intercourse before the alleged rape. The prosecutor objected to the question because it called for evidence that was not relevant to any issue in the case. Although the court excluded the evidence, the prosecutor said that his objecting alone might have caused the jury to believe that the complainant had a past that the state wanted to conceal. Other prosecutors reported that they sometimes simply did not object to similarly impermissible questions for fear of the jury's drawing such inferences. One prosecutor commented, however, that even under the new procedure jurors might conclude that the victim has an unsavory past. A series of in camera hearings repeatedly interrupted one trial he conducted. The jurors, he surmised, could sense that the court excused them so it could resolve questions concerning the complainant's prior sexual activity. Though the court did not admit the evidence, this attorney believed the procedures aroused jurors' suspicions sufficiently to prejudice the prosecution's case.

The prospect of having her prior sexual conduct examined in court may lie behind many a rape victim's refusal to report the attack. Reform measures like the Texas statute may lead to an increase in reporting because victims might believe courts will not inquire into their sexual histories. This impression is not wholly accurate, however, because such enactments merely require a court to follow certain procedures before it admits this evidence, not that a court exclude it in every case. Evidence of sexual activity still may be admitted if it is relevant to consent or any other disputed fact, and almost every case of rape would permit the defense to raise such an issue. Therefore, a complainant must expect to relate the details of her private life at least to prosecutors, who must prepare her for cross-examination, and possibly to a judge and opposing counsel in camera. To victims who are not aware of these contingencies, the benefits of the new law may prove illusory.

²⁷ The motion in limine has long been available to determine the admissibility of evidence at a hearing outside the presence of the jury, but an examination of the court files for cases tried before the effective date of the statute revealed that prosecutors made use of this procedure on only one occasion.

b. *Evidence of the Defendant's Other Rapes*

The prosecution introduced evidence of other rapes against only one defendant in the twenty-one trials studied.²⁸ The grand jury had returned two indictments against this defendant, each involving a separate victim and occasion. The first rape had occurred after he had broken into the victim's house at night. Because he was a stranger and the room had been dark, the prosecution expected identity to be the major issue at trial. The second complainant had admitted the defendant, whom she had never met, to her apartment when he had inquired about a prior occupant. He attacked her after they had conversed and drunk for two hours. This case almost begged the defense of consent. The prosecution elected to try the first indictment first because Texas case law made admissibility of the evidence of past offenses more likely on the question of identity than on that of consent.²⁹ As expected, the defense vigorously cross-examined the complainant on identity, but the jury convicted nonetheless.³⁰

²⁸ Texas excludes evidence of other crimes unless relevant to disprove a defensive theory or to prove such things as *res gestae*, identity, scienter, method, motive, continuing scheme or plan, or specific intent. *Albrecht v. State*, 486 S.W.2d 97, 100-01 (Tex. Crim. App. 1972). This prohibition is an application of the rule that the prosecution may introduce evidence of bad character only after the defense has put character in issue. The rationale for this prohibition is that the danger of prejudice outweighs the probative value of such evidence. Specifically, the jury might convict the defendant of the crime charged not because he is guilty of that offense but because they believe him to be a man of criminal character who should be convicted regardless of his guilt on this occasion. Further, the jury might infer that because the accused committed one crime, he also committed the crime charged. *Id.* at 100. See MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 190 (2d ed. E. Cleary 1972); 1 J. WIGMORE (1940), *supra* note 15, §§ 193-194.

For a discussion of evidence of other crimes in prosecutions for sex offenses, see Gregg, *Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecution for Sexual Offenses*, 6 ARIZ. L. REV. 212 (1965). For general discussions of such evidence, see Lacy, *Admissibility of Evidence of Crimes Not Charged in the Indictment*, 31 ORE. L. REV. 267 (1952); Slough & Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325 (1956); Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763 (1961).

²⁹ Compare, e.g., *DeVonish v. State*, 500 S.W.2d 800 (Tex. Crim. App. 1973), with *Jackel v. State*, 506 S.W.2d 229, 231 (Tex. Crim. App. 1974), and *Caldwell v. State*, 477 S.W.2d 877, 879 (Tex. Crim. App. 1972).

³⁰ In two other cases the prosecution was prepared to present the testimony of other women who had been raped by the defendant on other occasions close in time and place to the assault upon the complainant. In both of these cases, however, the prosecution elected not to offer such evidence because of the nature of the issues formulated at trial.

C. Pretrial Proceedings

1. Examining Trials

A preliminary hearing, known in Texas as an examining trial,³¹ determines whether probable cause exists to keep the accused in custody. Ordinarily, this limited function calls for a much narrower exploration into the merits than does the trial itself. Preliminary examinations in rape prosecutions, held in only a fraction of the cases,³² did not follow this general rule.

In almost all examining trials, the state presented the testimony of the rape victim, the principal witness against the accused, though in some cases a police officer or a volunteer from the Austin Rape Crisis Center³³ also testified.³⁴ Usually the complainant was on the stand for almost an hour. The defense cross-examined her with as much vigor as might be expected at the full trial. A number of possibilities could explain this approach. The victim's testimony often formed the most critical element of the prosecution's case, and undermining it might lead the presiding magistrate³⁵ to dismiss. This may have been an especially appealing tactic if counsel expected the magistrate to assess credibility in resolving the question of probable cause. In addition, prosecutors in Travis County allowed

³¹ See TEX. CODE CRIM. PROC. ANN. art. 16.01 (Vernon 1977). The procedures and the tactical uses of examining trials in Travis County seem typical of those of preliminary hearings in other communities. See LEAA REPORT, *supra* note 1, at 52.

³² It was not possible to determine the exact number of examining trials conducted in the cases studied because the district court, the only court that maintains complete records, did not have jurisdiction prior to the filing of an indictment or information. The district clerk's register of criminal complaints showed that nine defendants were discharged at examining trials, but the actual number of examining trials could not be determined because the register showed only discharges, not bindovers. In many cases, the files of prosecutors also failed to give complete information concerning examining trials. However, an inspection of records maintained by James Brooks, the official court reporter at such proceedings, revealed that examining trials were conducted in 8 of the 71 prosecutions commenced during 1975.

³³ Upon the report of a rape, police called volunteers from the Austin Rape Crisis Center. One or, ideally, two volunteers would meet the victim at the hospital and explain the medical examinations she would undergo there. They also would describe to her the police and prosecutorial procedures that would follow. Thereafter, the volunteers would visit the victim periodically during the investigation and prosecution to assist and to counsel her. They accompanied her to legal proceedings as well.

³⁴ Because volunteers personally met victims in the emergency room at Brackenridge Hospital, they often were in a position to testify to physical signs of violence, the condition of her clothing, and her hysteria. In some instances a volunteer was the first person to whom the victim disclosed the details of the offense.

³⁵ The presiding magistrate ordinarily was a justice of the peace, although Texas law defines "magistrate" to include trial and appellate judges and mayors and recorders of incorporated cities and towns. See TEX. CODE CRIM. PROC. ANN. art. 2.09 (Vernon 1977).

the examining trial to serve as a discovery device for the accused.³⁶ Finally, with the determinations at these hearings made by the magistrate,³⁷ defense counsel certainly did not feel restrained by a concern that they would alienate a jury if they caused the complainant undue embarrassment on cross-examination.³⁸

While the examining trial necessarily informed the defendant of some of the evidence that would comprise the case against him, it also provided the prosecutor with an opportunity to assess the victim's potential as a witness at trial—how credible she would appear, how well she would hold up under cross-examination, how determined she was to persist in prosecution of the case. Based on this assessment, the prosecutor sometimes moved to dismiss the complaint after the hearing even if probable cause had been shown.

For the complainant, the examining trial was a particularly difficult proceeding. It usually was her first confrontation with her alleged assailant since the commission of the offense. She may have feared further harm by him if he were not bound over for action by the grand jury. Also, this proceeding often was her initial contact with the unfamiliar surroundings of a courtroom. In fact, in most cases it involved her first meeting with a prosecutor, sometimes only minutes before the commencement of the hearing. Although by this time the complainant had related her account of the offense several times to police, medical personnel, and others, she now would submit herself to adverse questioning by a defense attorney. Finally,

³⁶ The examining trial had significant discovery value to the defendant because the district attorney's practice was to disclose more of his case at this proceeding than was necessary to meet the minimal evidentiary standard for a bindover. Defense counsel were not limited to direct rebuttal but could cross-examine the complainant and other prosecution witnesses. The rules of evidence governing examining trials were the same as on final trial, TEX. CODE CRIM. PROC. ANN. art. 16.07 (Vernon 1977), thereby precluding the prosecutor from presenting hearsay or limiting the number of witnesses.

³⁷ Though not required by law, all justices of the peace in Austin were lawyers. Laymen who preside over examining trials perhaps are less able to insure that the rules of evidence are observed and that witnesses are protected from unnecessary harassment at this proceeding.

³⁸ Occasionally, examining trials were scheduled but vacated because the prosecutor obtained indictments before the date set for the hearings. Texas decisions permit this tactic. See, e.g., *Solomon v. State*, 467 S.W.2d 422, 423 (Tex. Crim. App. 1971). Prosecutors may have followed this procedure to deny the defendant the opportunity to learn of the evidence against him or to obtain a discharge from further prosecution. However, it seems equally likely that this practice was the outgrowth of the prosecutor's desire to spare the complainant the difficulty of testifying at another hearing in addition to her appearance before the grand jury. If no examining trial was held, the prosecutor ordinarily allowed the defense attorney to conduct a personal interview of the complainant if the defense agreed to forego the formal pretrial discovery hearing.

the preliminary examination marked the point at which the victim first had to make public³⁹ the facts of the offense.⁴⁰

2. Grand Jury Proceedings

A grand jury returned an indictment in every case that eventually went to trial.⁴¹ Because examining trials were conducted in relatively few prosecutions,⁴² grand jury proceedings often provided prosecutors with their first opportunity to see the complainant or to preview her performance as a witness. Like examining trials, grand jury proceedings served as a device for prosecutors to filter out complaints not suited for trial.

Prosecutors said that whether they would require a victim to testify before the grand jury depended on their evaluation of her as a prospective witness at trial.⁴³ If the case file suggested that she would be a strong witness, the prosecutor usually kept her off the stand to spare her the hardship of relating her account of the offense an additional time. Only a police investigator would testify. On the other hand, if the file suggested that the complainant would be a weak witness or if other circumstances cast doubt on the state's case, the prosecutor ordinarily subpoenaed her to explore these matters before trial.

Following the presentation of evidence in a given case, the prosecutor would advise the grand jury concerning the legal sufficiency of the cases presented for indictment. If the complainant had proved

³⁹ Even though fewer spectators attended these proceedings than full trials, the embarrassment probably was severe.

⁴⁰ The impact of these factors may have been lessened by the Crisis Center, which offered victims a measure of support by volunteers who accompanied them to all proceedings and advised them of what to expect. By the time the preliminary examination occurred a volunteer usually had had an opportunity to establish a supportive relationship with the complainant. The volunteer would remain in the courtroom throughout this proceeding unless he or she also was a witness and subject to the rule of exclusion. Most complainants utilized these services.

⁴¹ Texas law provides that no person shall be held to answer for a felony unless on indictment of a grand jury. TEX. CODE CRIM. PROC. ANN. art. 1.05 (Vernon 1977). As with examining trials, the procedures and the strategies used before grand juries in Travis County are similar to those in other communities. See LEAA REPORT, *supra* note 1, at 52.

⁴² See note 32 *supra*.

⁴³ Interviews were conducted with four assistant district attorneys who had been assigned, successively, to presenting cases to the grand jury. The total length of their service before the grand juries exceeded two years.

Prosecutors estimated that complainants testified in one half of the cases presented to grand juries. One prosecutor said that he called all complainants who were not the victims of brutal rapes. Another called all those who were friends or acquaintances of the accused.

to be a satisfactory witness, the prosecutor would recommend indictment. The return of a true bill usually followed. Conversely, if the victim testified unconvincingly, or if the case was unsatisfactory in some other respect, prosecutors suggested that the state's case, though perhaps legally sufficient, presented problems that made a conviction uncertain. Such statements, they said, generally resulted in the return of a no bill and dismissal of the case.⁴⁴

Prosecutors and Crisis Center representatives agreed that a grand jury proceeding was often an ordeal that would undermine the will of a complainant to persist in prosecution. Unless an examining trial had been conducted, this was the first formal hearing at which the complainant underwent questioning concerning the alleged rape. If a preliminary hearing had been conducted, she again experienced the hardships attendant to testifying about the incident. Questioning by grand jurors may have been less probing than that by defense attorneys, who were not permitted to appear at these proceedings, but prosecutors said that grand jurors were especially inquisitive if a prior relationship existed or if there was any question concerning consent to intercourse. Additionally, though spared a confrontation with the accused, who was not entitled to be present, the complainant was not comforted by the presence of family, friends, or Crisis Center volunteers, who also were excluded from the grand jury room.

Ordinarily, the complainant previously would not have met the prosecutor assigned to the grand jury.⁴⁵ He often would ask her to read the file shortly before she testified, but this was likely to be the extent of their contact. After the hearing, he would have no further connection with her case. Crisis Center representatives reported that victims sometimes were distressed over the lack of greater contact with prosecutors at this stage of the proceedings.

II. AN ANALYSIS OF FACTORS AFFECTING THE CHARGING DECISION

Given this background, this study attempts to measure the impact of five variables upon the prosecution of rape charges in Travis County: (1) the amount of assailant force, (2) the amount of victim resistance, (3) the nature of the encounter preceding the occur-

⁴⁴ In some cases, the prosecutor recommended that the charges be reduced.

⁴⁵ Ordinarily, a different prosecutor appeared at the examining trial, the grand jury proceeding, and the trial of any given case. Thus, a complainant may have had to deal with three different attorneys as her case progressed.

rence—whether it was voluntary or involuntary on the part of the complainant, (4) the type of relationship between the victim and her assailant—whether they were strangers, casual acquaintances, or close acquaintances or friends, and (5) the results of medical examinations of the female after the incident—whether they tended to support the testimony of the complainant.⁴⁶

Three-dimensional contingency tables depict the effect of these variables on cases that terminated at three different stages in the criminal justice process: (1) cases in which police decided not to lodge a formal complaint because no prosecutable offense appeared to have occurred, (2) those in which the police filed a complaint but no indictment followed, and (3) those in which the grand jury returned an indictment. Interpretation of the tables focuses on determining the effect of each pair of variables on the probability of an indictment ultimately being returned.

A. *The Variables*

1. *Force and Resistance*

The Texas Penal Code enumerates circumstances under which sexual intercourse legally is "without the female's consent."⁴⁷ Assailant force and victim resistance are the primary indicators of nonconsent.⁴⁸ The force required to negate consent is force that overcomes "such earnest resistance as might reasonably be expected under the circumstances."⁴⁹ The drafters of the 1974 version of the Texas Penal Code noted that under both the new statute and the prior case law "the amount of force necessary to negate consent is a relative matter to be judged under all the circumstances, the most important of which is the resistance of the female."⁵⁰

⁴⁶ Of course, the presence or absence of force and resistance and the type of encounter were based upon the complainant's story, as yet unproved.

⁴⁷ TEX. PENAL CODE ANN. tit. 5, § 21.02(b) (Vernon Cum. Supp. 1978). For text, see note 5 *supra*.

⁴⁸ *Id.* § 21.02(b)(1). The statute, however, recognizes that threats of harm, as well as actual force, may negate the female's consent. *Id.* § 21.02(b)(2).

⁴⁹ *Id.* § 21.02(b)(1). Texas case law required that resistance be sufficient under the circumstances. *Lewis v. State*, 154 Tex. Crim. 329, 226 S.W.2d 861 (1950); *Perez v. State*, 50 Tex. Crim. 34, 94 S.W. 1036 (1906).

⁵⁰ TEX. PENAL CODE ANN. tit. 5, § 21.02, Practice Commentary at 308 (Vernon 1974). Critics of rape laws regard such insistence on evidence of resistance as unreasonably distrustful of a complainant's credibility. See Landau, *Rape: The Victim as Defendant*, TRIAL, July-Aug. 1974, at 19. However, the suggestion has been made that the law should focus on the behavior of the victim. Note, *The Resistance Standard in Rape Legislation*, 18 STAN. L. REV. 680, 688 (1966). The test proposed in that note would require that a man use force or serious guile,

The study has divided force and resistance into two categories each: high and low force⁵¹ and little and substantial resistance.⁵²

2. Situation

The study has classified each case according to whether the encounter preceding the alleged rape was voluntary or involuntary on the part of the complainant.⁵³ One almost may assume jury sympathy for a complainant if her initial contact with the assailant was involuntary—*e.g.*, if he broke into her house at night. If the situation was voluntary, as where the complainant invited him into the house, the expectation that jurors might regard the complainant as having invited the intercourse, consensual or not, may influence the charging decision. Professors Kalven and Zeisel found that jurors in rape cases seem to apply informally an assumption-of-risk test and acquit when they believe that the victim invited the attack.⁵⁴ The jury goes beyond the issue of consent “to weigh the woman’s conduct in the prior history of the affair . . . and is moved to be lenient

but it then would measure the sufficiency of the force or guile by setting an objective standard of resistance to be overcome.

⁵¹ The low force category includes those cases in which the assailant grabbed or held the victim, struck her, or threatened to harm her if she did not submit. If the assailant either displayed or said he had a weapon, the case was classified as one of high force. Cases that overlapped were placed in the higher classification.

⁵² The little resistance category includes those cases in which the victim simply submitted or resisted orally, either by screaming or urging him to let her alone. Resistance was considered substantial if she struggled, fought, or attempted to flee. Again, cases that overlapped were placed in the higher classification.

⁵³ Involuntary encounters includes such nonconsensual contacts as abductions and forced entries into automobiles or dwellings. Voluntary encounters includes such consensual contacts as hitchhiking, dates, and pickups at bars or parties.

⁵⁴ Professors Kalven and Zeisel studied 72 rape trials and found that in cases in which the alleged victim appeared to have engaged in some form of contributory behavior, the jury found the accused guilty of a lesser offense, if that alternative was available, or acquitted rather than convict him of rape. H. KALVEN & H. ZEISEL, *supra* note 2, at 249-54.

One case involving a charge of aggravated rape provides an example, perhaps an extreme one, of this kind of jury moralizing. The complainant, a nurse, testified that the defendant, a friend, had telephoned and asked her to come over because he had cut himself and needed emergency aid. On arriving, she discovered that he had no injuries. Instead, she said, he attacked her. During the struggle that followed, the complainant fell down a flight of stairs and broke her leg. Then, though she was fully clothed, the defendant completed the act.

A medical examination found sperm in the vagina. Though the defendant did not testify, his attorney intimated that the complainant had consented. With this evidence, the jury, after twelve hours of deliberation, could not agree on a verdict, and a mistrial was declared. A juror later told the prosecutor that she thought the intercourse had been consensual. Remarkably, two prospective jurors had been excused from hearing this case because they believed it was physically impossible for a woman to have intercourse without consenting.

The defendant was retried and convicted. The jury in the second trial assessed punishment at 18 years in prison.

with the defendant whenever there are suggestions of contributory behavior on her part.”⁵⁵

3. *The Relationship Between the Parties*

Each case was examined to determine whether the victim and her assailant were strangers, casual acquaintances, or close acquaintances or friends. Of the cases analyzed, strangers comprised fifty-six percent of the assailants; acquaintances, twenty-nine percent; and friends, sixteen percent.⁵⁶ If nothing else, these figures contradict two conflicting myths: that rape occurs only between total strangers and that rape complainants are women who have been intimate with their assailants.

4. *Medical Corroboration*

Texas follows the trend⁵⁷ against requiring that the testimony of a rape victim be supported by additional evidence to sustain a conviction.⁵⁸ In 1975, Texas enacted a statute providing that a rape conviction is supportable on the uncorroborated testimony of the victim if she informs any person of the offense within six months after its occurrence.⁵⁹ Previously, the case law had required corroboration if the complainant failed to make a “prompt outcry” when there was a reasonable opportunity to do so.⁶⁰ This earlier standard, however, would have required corroboration in only a handful of the cases in this study in which prosecution was commenced.

The principal source of corroborating medical evidence was the pelvic examination,⁶¹ which Brackenridge Hospital in Austin per-

⁵⁵ H. KALVEN & H. ZEISEL, *supra* note 2, at 249.

⁵⁶ See TABLE II *infra*. These figures are remarkably close to those found in a five-city survey conducted under the auspices of the Law Enforcement Assistance Administration. See LEAA REPORT, *supra* note 1, at 16-18, 70.

⁵⁷ See Note, *supra* note 3, at 1532 & n.168.

⁵⁸ The desirability of a corroboration requirement is beyond the scope of this article. For general discussions of this requirement, see Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137 (1967); Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365 (1972).

⁵⁹ 1975 Tex. Gen. Laws, ch. 203, § 6 (codified in TEX. CODE CRIM. PROC. ANN. art. 38.07 (Vernon Cum. Supp. 1978)).

⁶⁰ See *Carter v. State*, 506 S.W.2d 876, 880 (Tex. Crim. App. 1974). The rule requiring corroboration was applied only if consent was at issue. *Id.*

⁶¹ On the average, the victim waited four hours in the emergency room before the examination could be conducted. Crisis Center representatives reported that the medical examination was often an ordeal for the victims, many of whom were in a state of shock at this time. The cost of the medical examination was sustained by law enforcement agencies, not victims. TEX. REV. CIV. STAT. ANN. tit. 71, art. 4447m (Vernon 1976).

formed routinely when victims of reported rapes arrived.⁶² Each case with a record of such an examination has been classified on the basis of whether the findings were positive or inconclusive on the question of intercourse, whether there were signs of forcible penetration, and whether the results tended to support the testimony of the complainant.⁶³ These examinations produced corroborating evidence in a majority of cases in this part of the study.⁶⁴

Prosecutors prized the opportunity to present medical evidence in support of the testimony of rape complainants, whose credibility almost always was the principal issue at trial. They believed that experts would impress the jury, especially where, as in these cases, the medical testimony would be disinterested, based on standard clinical examinations, and uncontradicted by opposing experts.

Prosecutors nevertheless registered substantial dissatisfaction with the quality of medical testimony, particularly in trials at which the accused asserted consent. If the defendant admitted the intercourse but denied that it was forcible, the focus shifted to medical testimony concerning cuts, bruises, vaginal tears, and other indicia of trauma, not the presence of sperm or semen in the vagina. Medical testimony in most consent cases revealed that doctors had examined victims only to determine whether intercourse had occurred, neglecting to look also for signs of force or to make notes of such findings. In one case, a complainant visited three doctors before she was satisfied that a thorough medical examination had been performed. In other cases, examinations simply left prosecutors without the additional evidence necessary to meet the defense that the female had consented. Just as they credited doctors with helping to

⁶² For a description of the procedure used in the medical examination, see Bornstein, *Investigation of Rape; Medicolegal Problems*, [1963 Annual] MED. TRIAL TECH. Q. 229.

⁶³ This part of the study included only cases of ordinary or aggravated rape, completed offenses that require the elements of both force and penetration. Medical examinations generally were not conducted in cases of incompleting offenses, such as attempted rape. In part this explains why TABLES IV, VII, IX, and X report only 134 cases while all other tables report 201 or 202. Information on this variable was considered to be complete only if the files indicated whether the rape examination was performed and what the results were. These results are classified as either positive or inconclusive. Results were positive if the examination showed that intercourse had occurred, such as by the presence of sperm in the vagina or if, though not showing intercourse, it tended to corroborate the victim's account of the occurrence, such as by showing seminal stains on clothing or contusions of the neck in cases of choking. The inconclusive category consists of cases in which the results of the examination were indeterminate. However, for ease in presenting the data, this classification also includes those few cases in which a medical examination was not performed on the victim of a completed offense.

⁶⁴ See TABLE IV *infra*. Compare *id.* with LEAA REPORT, *supra* note 1, at 20.

obtain convictions where rape examinations had been adequate, prosecutors said inadequacies in medical testimony partially explain most of the acquittals.⁶⁵

The district attorney reported that although hospital authorities established satisfactory procedures for the rape examination, some doctors failed to observe them. Many doctors disliked becoming involved in rape cases as prosecution witnesses and, therefore, felt little desire to do more in the examination than to treat the victim. They also may not have understood the vital importance of preserving evidence of facts other than the occurrence of intercourse. Moreover, many doctors may have seen other patients brought to the emergency room as requiring more attention than the rape victim, whose need for physical care was not so immediate. One solution may be to have only those doctors perform rape examinations who would do so willingly and regularly and to have physicians with forensic skills instruct these doctors on the proper procedure.

B. Three Stages of the Pretrial Process

1. Report, No Complaint

In fifty-one cases,⁶⁶ the police investigated a reported rape⁶⁷ but

⁶⁵ Apparently some doctors were willing to perform the rape examination but resented the prospect of later having to testify concerning the matter. One doctor, for example, displayed outright hostility to a victim while performing the examination and told her that he would hate to testify in her case if he would miss his vacation in doing so. Although the results of the examination in this case were positive, the prosecutor chose not to present this doctor's testimony because of his negative attitude. The jury acquitted. The prosecutor, with hindsight, remarked that the lack of medical corroboration undoubtedly contributed to the verdict.

The project conducted by the Law Enforcement Assistance Administration found this physician insensitivity in other communities as well. See LEAA REPORT, *supra* note 1, at 20; NATIONAL INST. OF LAW ENFORCEMENT & CRIM. JUST., LAW ENFORCEMENT ASSISTANCE ADM'N, U.S. DEP'T OF JUST., FORCIBLE RAPE: POLICE ADMINISTRATIVE AND POLICY ISSUES 27 (1978).

⁶⁶ The ideals of random sampling gave way to practicality in the interest of obtaining enough cases of this kind about which there was sufficient information on the relevant variables to permit the application of statistical techniques. Therefore, this part of the study consists only of cases fitting the category for which there were offense reports in the files of the Austin Police Department. This may skew somewhat the percentages discussed later because only a sample was used. Nevertheless, the study assumes that the 51 cases used approximate a random sample that could have been drawn if full information had been available. This is as accurate as practicality has allowed.

⁶⁷ A federal survey has estimated that only one fourth of all rapes committed in the United States are reported. LEAA REPORT, *supra* note 1, at 15. The bulk of the rape cases prosecuted in Travis County began with a telephone call from the victim to the Austin Police Department, usually within an hour or two of the assault. Ordinarily a patrolman was dispatched to the scene to initiate an investigation and to transport the victim to the emergency room

determined that an offense had not occurred. Therefore, they filed no complaint before a magistrate.⁶⁸ In this initial screening,⁶⁹ police were guided by their expectations of the kinds of cases that the district attorney would decide to prosecute.⁷⁰

2. *Complaint, No Indictment*

In fifty-four cases, the police commenced criminal proceedings by filing complaints but the defendants were not indicted.⁷¹ In some,

of Brackenridge Hospital for a medical examination.

The patrolman would not perform detailed investigative work because the ultimate responsibility for the investigation of sex offenses lay with the Homicide Division. Rather than collect fingerprints, for example, the patrolman would secure the premises so that investigators from Homicide later might perform this task. For the same reasons, the patrolman, in talking with the victim, would tend not to inquire into the details of the sexual encounter, but instead would elicit information that might possibly be used to make an immediate arrest of a suspect—the name or a description of her assailant, whether he had a weapon, the time and place of the attack, etc. This initial phase of an investigation usually was very brief. Often the victim was on her way to the hospital within 20 minutes.

When a victim would arrive at the emergency room, a social worker from Brackenridge trained in client counseling would explain the procedures about to take place, including the purpose of the medical examination, the particular laboratory tests to be made, the necessity for certain hospital and consent forms, and the availability of follow-up counseling from the Crisis Center. *See* note 33 *supra*.

⁶⁸ Under Texas law, a prosecution is commenced by the filing of a complaint with a justice of the peace, who usually issues a warrant for the accused's arrest, unless he is already in custody. *See* TEX. CODE CRIM. PROC. ANN. arts. 15.03-.05 (Vernon 1977).

⁶⁹ A prosecutor, usually from the complaint section of the district attorney's office, would make the decision to prosecute. Of the two attorneys who would staff this section, one regularly was stationed at police headquarters where he was available for consultation with police investigators. One attorney who held this position reported that in deciding whether to file a complaint, he personally interviewed the victim in only 10% of the cases, usually in order to clarify a fact mentioned in the offense report. In the bulk of the cases, he relied upon the interviews conducted by police.

Victims sometimes accompanied an investigator or prosecutor when he filed a complaint, but they would not be called upon to relate an account of the offense to the magistrate.

The vast majority of complaints were filed after police had conducted an investigation and presented the case to the prosecutor. Occasionally, however, a victim would visit the district attorney's office without first having reported the offense to the police, seeking to file what the office called a "walk-in" complaint. If the prosecutor decided to file a complaint in such a case, he referred the victim to the police. Prosecutors reported that the rate of dismissal of "walk-in" complaints was higher than that of other complaints. The absence of prior police investigation may explain the difference.

⁷⁰ For a discussion of factors affecting cases in which police found no rape to have occurred, *see* Comment, *Police Discretion and the Judgment That a Crime Has Been Committed—Rape in Philadelphia*, 117 U. PA. L. REV. 277 (1968).

⁷¹ The facts concerning cases in this category were extracted from the files of the district attorney. Because indictments had not been obtained in these cases, they usually had not progressed far enough through the criminal justice system for the file on any one to contain much more than offense reports, the results of the medical examination, and occasional notes

the prosecutor moved to dismiss the complaint without presenting it to the grand jury. Prosecutors sought such dismissals for a variety of reasons: (1) the magistrate did not find probable cause at the examining trial, (2) the accused was the subject of another conviction or of an order revoking his probation or parole, (3) upon further investigation the evidence was deemed insufficient, or, most commonly, (4) the complainant did not want to continue with the prosecution. In the other cases in this category, a grand jury considered the case but returned a no bill.

3. *Indictment*

Grand juries returned indictments in ninety-six cases. These represent positive decisions on the question of prosecution made in the final stage of the screening process.⁷²

C. *The Findings*

The following ten tables show the effect of each pair of variables upon the probability of an indictment. The text accompanying each table discusses the relationship that the data supports according to the statistical technique explained in the Appendix. Either no relationship exists between the pair and the probability of an indictment or one of three types of influences explains the relationship observed: (1) the independent effect of one of the variables, (2) the independent effects of both variables acting simultaneously ("combined effects"), or (3) the interaction of the two variables.⁷³

1. *Force, Resistance, and Prosecution*

Table I shows how assailant force and victim resistance influenced decisions to prosecute. Neither the independent effect of either variable acting alone nor their combined effects explains the

and memoranda by prosecutors concerning the prosecutability of the complaint—the last being information that was not available at the police level. Again, to obtain a sufficiently large sample, all cases were included in this part of the study for which there was complete information on each of the variables. Almost all the complaints in these cases had been filed in 1972-1976.

⁷² The files of the district attorney provided the information necessary for this part of the study. Because prosecutors had readied many of these cases for trial or plea negotiations, these files contained more pertinent data than files in cases terminated earlier in the pretrial process.

⁷³ "Interaction" means that the effect of one factor varied with the presence of the other.

TABLE I. FORCE, RESISTANCE, AND PROSECUTION

Prosecution	Force	Resistance		Total
		Little	Substantial	
Report, No Complaint	Low	30	4	34
	High	9	8	17
	Total	39	12	51
Complaint, No Indictment	Low	16	21	37
	High	11	6	17
	Total	27	27	54
Indictment	Low	13	33	46
	High	24	26	50
	Total	37	59	96
Total		103	98	201

data. Rather, the interaction of force and resistance appears to have affected the probability of indictment.⁷⁴

In cases of high force and little resistance, prosecution was far more likely than in cases of low force and little resistance.⁷⁵ Apparently, a low level of resistance undermined the victim's allegations of nonconsent unless the force was so high that a jury would be expected to conclude that it "prevent[ed] resistance by a woman of ordinary resolution."⁷⁶ Prosecutors, anticipating juries' reactions, seem to have recognized that high force may have made resistance dangerous or futile. Likewise, substantial resistance increased the likelihood of indictment if force was low.⁷⁷ A high level of resistance

⁷⁴ TABLE A *infra* shows that the probability for the G^2 statistic is only .002 for the independent effects of both force and resistance and even less for the simpler models. Thus, interaction between the two variables most likely produced the effect observed.

⁷⁵ If there was little resistance, prosecutors obtained indictments in 22% (13 of 59 (30 + 16 + 13)) of cases of low force but 55% (24 of 44 (9 + 11 + 24)) of cases of high force.

⁷⁶ TEX. PENAL CODE ANN. tit. 5, § 21.02(b)(2) (Vernon Cum. Supp. 1978). For text, see note 5 *supra*. See also LEAA REPORT, *supra* note 1, at 18-19 (most victims resist in some manner, but resistance usually is futile).

⁷⁷ If force was low, grand juries indicted in 57% (33 of 58 (4 + 21 + 33)) of cases of substantial resistance but only 22% of cases of little resistance. See note 75 *supra*.

in the absence of high force arguably bolstered the victim's testimony that she had not consented.

The effects of greater force and resistance were not cumulative, however. Once either high force or substantial resistance was present, the addition of the other had no significant incremental effect.⁷⁸ The interaction of the two, rather than their independent effects, explains prosecutors' decisions.

TABLE II. FORCE, RELATIONSHIP, AND PROSECUTION

Prosecution	Force	Relationship			Total
		Stranger	Acquaintance	Friend	
Report, No Complaint	Low	19	11	4	34
	High	9	7	1	17
	Total	28	18	5	51
Complaint, No Indictment	Low	14	15	8	37
	High	6	7	4	17
	Total	20	22	12	54
Indictment	Low	26	10	10	46
	High	39	6	5	50
	Total	65	16	15	96
Total		113	56	32	201

2. Force, Relationship, and Prosecution

The data from Table II indicates that the combined effects of the assailant's force and his prior relationship with the victim influenced the decision to indict.⁷⁹ As one might expect, the probability of an indictment was greater where the amount of force was high

⁷⁸ If force was high and resistance low, indictments occurred in 55% of the cases. See note 75 *supra*. If force was low but resistance substantial, indictments were obtained in 57%. See note 77 *supra*. The presence of both high force and substantial resistance led to indictments in 65% (26 of 40 (8 + 6 + 26)), a percentage not significantly greater than if either factor had been lower.

⁷⁹ TABLE A *infra* shows the G^2 probability to be .494 for the combined independent effects of force and relationship upon prosecution. This indicates that interaction is highly unlikely

than where it was low.⁸⁰ More surprising is the effect of the relationship factor: the probability of an indictment was highest in cases of strangers and lowest, not in cases of friends, but in those of acquaintances.⁸¹

Why were strangers subject to prosecution more often, relatively as well as absolutely, than acquaintances? If only problems of eyewitness identification were considered, perhaps acquaintances would be subject to greater prosecution. Rape often occurs under conditions of darkness, and the identity of the assailant is often a crucial issue at trial. The victim's identification of an acquaintance, because of her prior knowledge of his appearance, may be less vulnerable to attack than her identification of a stranger. However, countervailing considerations control the charging decision. Prosecutors consciously or unconsciously may react to the societal belief that rape by a stranger is the most horrifying form of rape. Perhaps they also suspect that strangers are more forceful with their victims than are other assailants.⁸² Surely they expect that jurors know the incidence of consensual sex is higher among acquaintances as a class than among strangers—that is, that life and experience teach that the probability of *forcible* intercourse is greater if the parties do not know one another than if they do.

Nevertheless, one would expect that the incidence of consensual sex is greater among friends as a class than among acquaintances. One factor that may explain this apparent anomaly is that trials of friends almost certainly would be free of issues concerning the identity of the assailant. However, it is doubtful that this alone can explain the difference in the rate of prosecution, because the same consideration applies, to a lesser extent perhaps, where the parties were acquaintances. A more likely explanation of the more frequent prosecution of friends is that, because of complications arising from

and that the independent action of either factor alone is insufficient to explain the effect upon prosecution.

As between the two factors, the effect of relationship appears to have been stronger, with the effect of force adding little predictive value. The G^2 probability is .149 for the independent effect of relationship and only .016 for the independent effect of force.

⁸⁰ The accused was indicted in 60% (50 of 84 (17 + 17 + 50)) of cases of high force but in only 39% (46 of 117 (34 + 37 + 46)) of cases of low force.

⁸¹ Grand juries returned indictments in 58% (65 of 113) of cases of strangers, 47% (15 of 32) of cases of friends, and 29% (16 of 56) of cases of acquaintances.

⁸² The forcible behavior of the assailant varied with the type of relationship he had with his victim. High force was used by 31% (10 (1 + 4 + 5) of 32) of friends, 36% (20 (7 + 7 + 6) of 56) of acquaintances, and 48% (54 (9 + 6 + 39) of 113) of strangers—the more distant the relationship, the greater the force. The force that attended all types of relationships shows that rape is indeed a crime of violence. See also LEAA REPORT, *supra* note 1, at 10-11.

close personal relationships, more rapes by friends went unreported than those by strangers or acquaintances. Of those that were reported, prosecutors believed that a greater proportion were genuine, probably because most females would have been unwilling to suffer the consequences of reporting an attack by a close friend unless an attack actually had occurred. Many of these victims may have foregone reporting because, in addition to the difficulties endured by complainants in rape cases generally, they also would have faced a variety of considerations peculiar to cases in which the parties were friends—e.g., worry that the complaint would not be believed because of the relationship, concern over what mutual friends might think, a desire to spare the attacker the sanctions of the criminal law, feelings of self-doubt over what she might have done to precipitate his behavior. The table cannot prove the theory, of course, but the data does demonstrate that the absolute frequency of reporting by friends was significantly less than by acquaintances or strangers.

TABLE III. FORCE, SITUATION, AND PROSECUTION

<i>Prosecution</i>	<i>Force</i>	<i>Situation</i>		<i>Total</i>
		Voluntary	Involuntary	
Report, No Complaint	Low	24	10	34
	High	12	5	17
	Total	36	15	51
Complaint, No Indictment	Low	20	17	37
	High	9	8	17
	Total	29	25	54
Indictment	Low	22	24	46
	High	10	40	50
	Total	32	64	96
<i>Total</i>		97	104	201

3. Force, Situation, and Prosecution

When considered together with force, situation alone seems to

have affected the probability of an indictment.⁸³ Cases in which the initial encounters were involuntary were subject to prosecution more often than cases in which the parties met voluntarily.⁸⁴ One explanation is obvious: where the encounter was voluntary, prosecutors probably expected jurors to suspect the victim in fact had consented to the intercourse or to decide that she had assumed the risk of forced sex.⁸⁵

TABLE IV. FORCE, CORROBORATION, AND PROSECUTION

Prosecution	Force	Corroboration		Total
		Yes	No	
Report, No Complaint	Low	3	23	26
	High	1	9	10
	Total	4	32	36
Complaint, No Indictment	Low	16	8	24
	High	6	4	10
	Total	22	12	34
Indictment	Low	26	3	29
	High	32	3	35
	Total	58	6	64
Total		84	50	134

4. Force, Corroboration, and Prosecution

Force and medical corroboration combined to influence decisions

⁸³ TABLE A *infra* shows that probability for the G^2 likelihood statistic to be .067 for the independent effect of situation.

⁸⁴ Indictments were obtained in 62% (64 of 104) of cases in which the initial encounter was involuntary, and only 33% (32 of 97) of cases in which the initial encounter was voluntary.

⁸⁵ If we set aside the .050 G^2 probability requirement, see Appendix, the data could support the conclusion that the effects of force and situation acting independently explain the probability of an indictment. TABLE A *infra* shows the G^2 probability for this model to be .135. The added effect of force was that indictments were more probable in cases of high force than low force. See note 80 *supra*. This indicates, although without statistical significance, that force and situation may have interacted to affect prosecution. The data in TABLE III bears out this possibility. If force and situation did not interact, force should have had an impact

to prosecute.⁸⁶ As shown before, the probability of an indictment was substantially greater when force was high than when it was low.⁸⁷ Table IV also reveals that an indictment was much more likely in cases with medical corroboration of the offense than in those lacking such corroboration.⁸⁸

Although the strongest of all the relationships supported by the data is the combined effect of the two factors, corroboration appears to have been the more important of the two.⁸⁹ Prosecutors seem to have expected that, despite assailant violence, jurors would not have believed the victim whose testimony at trial would not be corroborated by medical evidence. The conclusion that test results are more important than the amount of assailant force, which the statute expressly posits as a primary indicator of nonconsent, demonstrates the suspicion with which many regard the testimony of rape victims.

5. *Resistance, Relationship, and Prosecution*

As earlier tables have shown,⁹⁰ the presence of substantial resistance as a general rule increased the probability of indictment,⁹¹ and indictment was most likely if the defendant was a stranger to the victim, less likely if her friend, and least likely if an acquaintance.⁹²

in both voluntary and involuntary situations. The actual data departs from that hypothesis. The effect of force appears to have been restricted to involuntary cases. In involuntary cases, the proportion of indictments increased from 47% (24 of 51 (10 + 17 + 24)) where force was low to 75% (40 of 53 (5 + 8 + 40)) where force was high. In voluntary cases, the probability of an indictment was 33% (22 of 66 (24 + 20 + 22)) where force was low and 32% (10 of 31 (12 + 9 + 10)) where force was high. Apparently, in situations in which the initial encounter was voluntary, attention focused on the behavior of the victim, who probably was viewed with suspicion because she had consented to the encounter. Her resistance became the primary indicator of her nonconsent. See text at Table VI *infra*.

⁸⁶ The G^2 probability exceeds .500 for the combined independent effects to force and corroboration upon prosecution. See TABLE A *infra*. This indicates that interaction was highly unlikely.

⁸⁷ See note 80 *supra*.

⁸⁸ Grand juries returned indictments in 69% (58 of 84) of cases in which medical corroboration was present, but only 12% (6 of 50) of cases in which it was absent.

⁸⁹ TABLE A *infra* shows the probability for the G^2 likelihood statistic to be .155 for the independent effect of corroboration upon prosecution and .000 for the independent effect of force.

⁹⁰ See TABLES I & II *supra*.

⁹¹ Indictments were obtained in 60% (59 of 98 (12 + 27 + 59)) of cases in which victim resistance was substantial but only 37% (38 of 104 (39 + 27 + 38)) of cases in which there was little victim resistance.

⁹² Prosecutors returned indictments in 47% (15 of 32) of cases of friends, 30% (17 of 57) of cases of acquaintances, and 58% (65 of 113) of cases of strangers. For a discussion of this rather surprising result, see text accompanying notes 81-82 *supra*.

TABLE V. RESISTANCE, RELATIONSHIP, AND PROSECUTION

Prosecution	Resistance	Relationship			Total
		Stranger	Acquaintance	Friend	
Report, No Complaint	Little	24	12	3	39
	Substantial	4	6	2	12
	Total	28	18	5	51
Complaint, No Indictment	Little	11	10	6	27
	Substantial	9	12	6	27
	Total	20	22	12	54
Indictment	Little	30	7	1	38
	Substantial	35	10	14	59
	Total	65	17	15	97
Total		113	57	32	202

The data from Table V indicates that the combined effects of these two variables, rather than their interaction or the effect of either acting alone, influenced prosecutors' decisions.⁹³

Although the possibility of interaction between relationship and resistance is not statistically significant,⁹⁴ one departure from the general effect just outlined deserves comment. In cases of little resistance, friends were subject to a smaller chance of indictment than were acquaintances.⁹⁵ Nevertheless, the extreme likelihood that a friend would be indicted if resistance was substantial⁹⁶ may have produced the overall result that friends were bound over more often.

⁹³ The G^2 probability is .328 for the combined independent effects of both resistance and relationship upon prosecution. See TABLE A *infra*. The values for the independent effects of either variable alone are very low. The .328 value for the combination model indicates that interaction between the variables was not a strong possibility but does not place it beyond reasonable speculation.

⁹⁴ See note 93 *supra*.

⁹⁵ In cases of little resistance, the defendant was indicted in 10% (1 of 10 (3 + 6 + 1)) of cases of friends, 24% (7 of 29 (12 + 10 + 7)) of cases of acquaintances, and 46% (30 of 65 (24 + 11 + 30)) of cases of strangers.

⁹⁶ Indictments were obtained in 64% (14 of 22 (2 + 6 + 14)) of cases of substantial resistance and friends.

These observations suggest that resistance had an effect upon the probability of indictment much greater in cases of friends than in cases of acquaintances or strangers.⁹⁷ In the former cases, the principal issue at trial often would be the victim's behavior. The relationship as friends, the usually voluntary nature of the encounter preceding attack, and the generally lower amount of force all might lead a juror to suspect consent⁹⁸ and demand evidence of substantial resistance to convict.⁹⁹ These expectations of jury reaction seem likely to have influenced prosecutors' perceptions of their chances for success at trial and, therefore, their decisions to indict.

TABLE VI. RESISTANCE, SITUATION, AND PROSECUTION

Prosecution	Resistance	Situation		Total
		Voluntary	Involuntary	
Report, No Complaint	Little	28	11	39
	Substantial	8	4	12
	Total	36	15	51
Complaint, No Indictment	Little	14	13	27
	Substantial	15	12	27
	Total	29	25	54
Indictment	Little	6	32	38
	Substantial	26	33	59
	Total	32	65	97
Total		97	105	202

6. Resistance, Situation, and Prosecution

The data in Table VI show that resistance and situation inter-

⁹⁷ In cases of friends, the shift from little to substantial resistance accounted for a sixfold increase in the probability of an indictment, from 10% to 64%. In cases of acquaintances or strangers, the increase was less than twofold: from 24% to 36% (10 of 28 (6 + 12 + 10)) in cases of acquaintances and from 46% to 73% (35 of 48 (4 + 9 + 35)) in cases of strangers.

⁹⁸ See note 82 *supra*.

⁹⁹ The closer the relationship, the greater was the amount of resistance the victim offered. Substantial resistance appeared in 69% (22 (2 + 6 + 14) of 32) of friends, 49% (28 (6 + 12 + 10) of 57) of acquaintances, and 42% (48 (4 + 9 + 35) of 113) of strangers.

acted to affect the probability of an indictment.¹⁰⁰ Again, cases of substantial resistance were subject to prosecution more often than cases of little resistance,¹⁰¹ and involuntary cases more often than voluntary ones,¹⁰² but the importance of each factor varied with change in the other. Resistance was substantially more important in voluntary than in involuntary cases.¹⁰³ Situation had a far greater impact in cases of little rather than substantial resistance.¹⁰⁴

The greater importance of resistance in voluntary cases seems to be readily explainable. If the victim voluntarily entered into the initial contact preceding the attack, the credibility of her claim of nonconsent would become the primary issue at trial. The extent of her resistance was perhaps the best indicator of her truthfulness.¹⁰⁵ On the other hand, if the initial contact between the parties was involuntary on the victim's part, the victim's credibility would not be the primary issue, and a trial would focus instead on the coerciveness of the attacker as the main indicator of nonconsent.¹⁰⁶

7. Resistance, Corroboration, and Prosecution

Table VII, showing the impact of victim resistance and medical corroboration, supports the conclusion that prosecutors reacted to the independent effect of corroboration.¹⁰⁷ The presence of medical evidence substantially boosted the likelihood of an indictment.¹⁰⁸ The importance of corroboration, greater than that of victim resistance, demonstrates the serious doubts that prosecutors and jurors must have held about the credibility of rape complainants.

¹⁰⁰ TABLE A *infra* shows that the G^2 probability is only .088 for the combined effects of force and resistance. This suggests that only the interaction of resistance and situation can explain the effect upon prosecution.

¹⁰¹ See note 91 *supra*.

¹⁰² See note 85 *supra*.

¹⁰³ In voluntary cases, the probability of an indictment jumped from 13% (6 of 48 (14 + 28 + 6)) where there was little resistance, to 53% (26 of 49 (8 + 15 + 26)) where resistance was substantial. In involuntary cases, the jump was from 57% (32 of 56 (11 + 13 + 32)) to 67%.

¹⁰⁴ With little resistance present, indictments occurred in 57% of involuntary cases but only 13% of voluntary cases. With substantial resistance, indictments occurred in 67% of involuntary cases and 53% of voluntary cases. See note 103 *supra*.

¹⁰⁵ Indeed, assailant force appears to have been of no significance in voluntary cases. See note 85 *supra*.

¹⁰⁶ See TABLE III *supra*.

¹⁰⁷ The G^2 probability was .284 for the independent effect of corroboration and only .062 for the independent effect of resistance. See TABLE A *infra*. The probability for the effect of both variables is greater than .500. Interaction, therefore, is highly unlikely.

¹⁰⁸ Medical corroboration increased the probability of indictment from 20% (10 of 50) of cases in which it was absent to 55% (46 of 84) in cases with it present.

TABLE VII. RESISTANCE, CORROBORATION, AND PROSECUTION

<i>Prosecution</i>	<i>Resistance</i>	<i>Corroboration</i>		<i>Total</i>
		Yes	No	
Report, No Complaint	Little	6	23	29
	Substantial	14	2	16
	Total	<u>20</u>	<u>25</u>	<u>45</u>
Complaint, No Indictment	Little	9	13	22
	Substantial	9	2	11
	Total	<u>18</u>	<u>15</u>	<u>33</u>
Indictment	Little	11	8	19
	Substantial	35	2	37
	Total	<u>46</u>	<u>10</u>	<u>56</u>
<i>Total</i>		84	50	134

TABLE VIII. SITUATION, RELATIONSHIP, AND PROSECUTION

<i>Prosecution</i>	<i>Situation</i>	<i>Relationship</i>			<i>Total</i>
		Stranger	Acquaintance	Friend	
Report, No Complaint	Voluntary	16	15	5	36
	Involuntary	12	3	0	15
	Total	<u>28</u>	<u>18</u>	<u>5</u>	<u>51</u>
Complaint, No Indictment	Voluntary	5	13	11	29
	Involuntary	15	9	1	25
	Total	<u>20</u>	<u>22</u>	<u>12</u>	<u>54</u>
Indictment	Voluntary	14	9	9	32
	Involuntary	51	8	6	65
	Total	<u>65</u>	<u>17</u>	<u>15</u>	<u>97</u>
<i>Total</i>		113	57	32	202

Although victim resistance did not add statistically significant explanatory value, Table VII does support the effect of resistance seen in Table V.¹⁰⁹ An indictment was more likely in cases of substantial resistance than in those in which there was little resistance.¹¹⁰

8. Situation, Relationship, and Prosecution

When the situation prior to the offense and the type of relationship between the victim and her attacker are examined together, the probability of an indictment appears to have depended upon the combined effects of both of these factors.¹¹¹ Cases involving involuntary contact preceding the attack were subject to greater prosecution.

TABLE IX. CORROBORATION, SITUATION, AND PROSECUTION

Prosecution	Corroboration	Situation		Total
		Voluntary	Involuntary	
Report, No Complaint	Yes	4	0	4
	No	24	8	32
	Total	28	8	36
Complaint, No Indictment	Yes	13	9	22
	No	9	3	12
	Total	22	12	34
Indictment	Yes	22	36	58
	No	4	2	6
	Total	26	38	64
Total		76	58	134

¹⁰⁹ See note 107 *supra*.

¹¹⁰ Prosecutors secured indictments in 58% (37 of 64 (16 + 11 + 37)) of cases of substantial resistance and only 27% (19 of 70 (29 + 22 + 19)) of cases of little resistance. See also note 91 *supra*.

¹¹¹ The probability for the G^2 likelihood statistic exceeds .500 for the independent effects of situation and relationship. See TABLE A *infra*. Thus, interaction is highly unlikely. In addition, the probabilities of .039 for the independent effect of situation and .003 for the independent effect of relationship show that neither factor alone accounts for the effect on prosecution.

tion than voluntary cases.¹¹² Again, the probability of an indictment was highest in cases of strangers and lowest in cases of acquaintances.¹¹³

9. Corroboration, Situation, and Prosecution

Analysis of the data in Table IX indicates that the independent effect of corroboration explains the probability of an indictment when corroboration is combined with situation.¹¹⁴ The presence of medical corroboration substantially increases the probability of an indictment.¹¹⁵

TABLE X. CORROBORATION, RELATIONSHIP, AND PROSECUTION

Prosecution	Corroboration	Relationship			Total
		Stranger	Acquaintance	Friend	
Report, No Complaint	Yes	2	1	1	4
	No	16	12	4	32
	Total	18	13	5	36
Complaint, No Indictment	Yes	10	7	5	22
	No	2	7	3	12
	Total	12	14	8	34
Indictment	Yes	38	10	10	58
	No	4	1	1	6
	Total	42	11	11	64
Total		72	38	24	134

¹¹² Indictments were obtained in 62% (65 of 105 (15 + 25 + 65)) of involuntary cases and 33% (32 of 97 (36 + 29 + 32)) of voluntary cases. See note 85 *supra*.

¹¹³ See note 81 *supra*. An explanation for this effect is given in the text following that note.

¹¹⁴ TABLE A *infra* shows the G^2 probability to be .107 for the independent effect of corroboration upon prosecution and .000 for the independent effect of resistance. The value for the effect of corroboration and resistance together is .347, which does not support a conclusion of interaction between the variables but does not place it beyond reasonable speculation either.

¹¹⁵ Grand juries indicted in 69% (58 of 84 (4 + 22 + 58)) of cases in which medical corroboration was present but in only 12% (6 of 50 (32 + 12 + 6)) of cases in which it was absent. See also note 108 *supra*.

10. Corroboration, Relationship, and Prosecution

Table X shows the effect of medical corroboration and the relationship between the assailant and the victim. Again, the independent effect of corroboration explains the probability of an indictment.¹¹⁶ As we have seen previously,¹¹⁷ medical corroboration increases this probability.¹¹⁸

D. Summary of Findings

The Texas Penal Code posits assailant force and victim resistance as the primary indicators of nonconsent. The study shows that in practice these were not the most important factors in prosecutorial decisionmaking. Instead, medical corroboration and, to a lesser extent, the situation preceding the offense seem to have had greater effect on the probability of an indictment. This departure in actual practice from the terms of the statute appears to reflect the influence upon the charging decision of how prosecutors expected jurors to evaluate the complainant's credibility.

Medical corroboration clearly was the most important factor. It alone explains the probability of an indictment when combined with situation,¹¹⁹ resistance,¹²⁰ and relationship.¹²¹ Moreover, when combined with force, medical corroboration was the more important factor, although not of exclusive explanatory value.¹²² The vital nature of medical corroboration to decisions to prosecute underscores the centrality of the rape complainant's credibility. With objective evidence supporting her accusation, jurors understandably would be much more comfortable about convicting.

Although certainly not so important as medical corroboration, the situation preceding the offense appears to have been more important than any of the other remaining factors. It alone explained decisions when examined with force.¹²³ It had some explanatory

¹¹⁶ The G^2 probability was .339 for the independent effect of corroboration upon prosecution and .000 for the independent effect of relationship. See TABLE A *infra*. The value for the effect of corroboration and relationship together exceeds .500, which negates the possibility of interaction between these variables.

¹¹⁷ See TABLES VII & IX.

¹¹⁸ See note 115 *supra*.

¹¹⁹ TABLE IX.

¹²⁰ TABLE VII.

¹²¹ TABLE X.

¹²² TABLE IV.

¹²³ TABLE III.

value in conjunction with each of the other variables, except corroboration.¹²⁴ Again, impact on the complainant's credibility probably caused these results. Prosecutors very likely expected jurors to infer that there was a better chance the complainant had consented to the intercourse where she voluntarily had agreed to the initial encounter with her assailant than where the initial encounter had been involuntary. Some jurors even might have held her to have assumed the risk of forcible intercourse because of what they would have perceived to have been her contributory behavior. Either or both expectations probably weighed against proceeding to trial.

The other three factors studied—force, resistance, and relationship—all affected the probability of an indictment to a smaller degree. Force had independent partial effects when combined with relationship¹²⁵ and corroboration,¹²⁶ and an interactive effect with resistance.¹²⁷ Only in conjunction with situation did force lack any explanatory value.¹²⁸ Resistance had an independent partial effect when combined with relationship,¹²⁹ and interactive effects when combined with force¹³⁰ and situation.¹³¹ Resistance had no effect only when combined with corroboration.¹³² Relationship had independent partial effects when combined with force,¹³³ resistance,¹³⁴ and situation,¹³⁵ and lacked explanatory value only when combined with corroboration.¹³⁶ In no instance was any of these three factors of exclusive explanatory value.

III. CONCLUSION

It is difficult to overstate the importance of these findings. They indicate that prosecutorial decisions in rape cases have been made, consciously or unconsciously, on the basis of criteria only partly acceptable in light of legislative policy. Of primary concern is the apparent insistence upon medical evidence to corroborate the com-

¹²⁴ TABLE IX.

¹²⁵ TABLE II.

¹²⁶ TABLE IV.

¹²⁷ TABLE I.

¹²⁸ TABLE III.

¹²⁹ TABLE V.

¹³⁰ TABLE I.

¹³¹ TABLE VI.

¹³² TABLE VII.

¹³³ TABLE II.

¹³⁴ TABLE V.

¹³⁵ TABLE VIII.

¹³⁶ TABLE X.

plainant's testimony. The law dictates no formal corroboration requirement. Indeed, the absence of medical corroboration does not carry the negative implication that no rape occurred, if only because examining physicians varied in their diligence and cooperativeness. Therefore, the great reliance by prosecutors on the presence or absence of medical corroboration was misguided. While this certainly can be strong evidence, there is a danger that an almost mechanical requirement of medical corroboration would prevent many valid cases from being prosecuted.

Also of major concern is the heightened importance of the situation immediately preceding the offense. Table III has shown that situation predominated over assailant force in determining the probability of an indictment. Whether or not the complainant voluntarily encountered the assailant may have been one fact relevant to the issue of her consent, but certainly it was not any more important than the amount of force used by the assailant. Situation seems to have drawn increased importance from an assumption-of-risk notion, a consideration inappropriate in the rape context.

These shortcomings, however, should not be allowed to obscure the positive side of prosecutorial activity in Travis County. The mix of the cases in which indictments were obtained, as well as those in which jury trials were held, demonstrates that prosecution was not limited to the case of the stereotypical rapist, who leaps from the bushes with gun in hand—and whose conviction is easy to obtain. Prosecutions were commenced in cases in which the parties were acquaintances or friends and those in which the victim voluntarily had encountered her assailant. Where criminal proceedings were initiated, prosecution was vigorous and persevering. Where complaints were not prosecuted, Crisis Center representatives reported that rape victims were treated with respect and sensitivity.¹³⁷

Because this study has examined the functioning of rape laws in but a single community, one might be tempted to dismiss these findings as having little relevance outside of the location concerned. It probably is true that patterns of prosecution vary from locality to locality. In administering rape laws, prosecutors may give different weight to the factors affecting the probability of obtaining an indictment. Nevertheless, there is little reason to suspect any great

¹³⁷ For further praise of Austin's response to the rape problem, see LEAA REPORT, *supra* note 1, at 5.

variance in the effect that those factors have upon the mental processes of jurors in rape cases or in the societal attitudes that influence them.¹³⁸ Understanding the operation of these factors in even a single community contributes to our knowledge of the functioning of rape laws generally.

¹³⁸ Many of the statistics discussed in the recent federal study of forcible rape parallel the observations of this article. See LEAA REPORT, *supra* note 1, *passim*.

APPENDIX

This analysis applies a log-linear technique to examine the data presented in the three-dimensional contingency tables appearing in the text.¹³⁹ G^2 goodness-of-fit statistics¹⁴⁰ are used to test models of increasing simplicity (fewer variables) in order to determine for each pair of factors which, if any, of the three types of effects—interactive, combined, or single-factor—explains variations observed in the rate of prosecution.¹⁴¹

Like multiple regression analysis, selecting the best log-linear model involves two steps. The procedure begins by testing for any effect upon the dependent variable and then examines individual terms to see if either or both of the independent variables individually affected the dependent one. If the pair of factors is found to have had an effect, but independent influences are rejected, the analysis concludes that the factors' interaction explains the variation.

One first derives a G^2 statistic and a corresponding probability for the dependent variable, prosecution, alone. If this probability is greater than .050, the analysis stops. The independent variables had no significant effect, either alone or together. A G^2 probability of less than .050 indicates some influence, though not which of the three kinds. One next tests a model positing simultaneously independent (combined) effects. If the G^2 probability is less than .050, neither of the two factors had an independent effect. The only model left that explains the influence detected is the interaction model. Force-resistance fits this pattern.

If the G^2 probability from the test for independence is greater than .050, at least one and possibly both of the factors are good predictors of prosecution. The second step determines if the combined effects model can be simplified into one with a single factor. If the G^2 probability of one of the two factors acting alone is greater than .050, that factor is a likely candidate. A backwards stepwise procedure is used to test this hypothesis. One subtracts the combined effects model's G^2 statistic and degrees of freedom, respectively, from those of the candidate factor. The remainders determine another G^2 probability. If this probability is less than .050, the difference is statisti-

¹³⁹ For a full discussion of the log-linear method used, see Y. BISHOP, S. FIENBERG, & P. HOLLAND, *DISCRETE MULTIVARIATE ANALYSIS: THEORY AND PRACTICE* 31-42, 155-58 (1975).

¹⁴⁰ The G^2 likelihood statistic is similar to the common Pearson chi-square. *Id.* at 125-31.

¹⁴¹ Thus, there are three variables: the two factors and prosecution itself. The first two are considered independent and the last, dependent.

cally significant and the combined effects model cannot be simplified without losing explanatory power. In such a case, one concludes that the combined effects model best explains the data. Force-relationship and force-corroboration are in this category. If, on the other hand, the test results in a G^2 probability of greater than .050, the difference is not significant. One may assume that factor alone influenced prosecution. Force-situation, resistance-corroboration, situation-corroboration, and relationship-corroboration are reduced to one-factor models by this method.

Table A lists the G^2 statistics, the degrees of freedom, and the G^2 probabilities for each of these steps, including the stepwise tests. This information appears in the same order in which the factor pairs were considered in the text. For convenience and brevity, the table employs the following notations for the variables:

PR	Prosecution
FO	Force
RS	Resistance
RL	Relationship
SI	Situation
CO	Corroboration

The notations in the first set of brackets identify the independent variables being considered. For example, in line I. A., [FO RS] indicates that force and resistance are being tested. The succeeding bracket or brackets state the test being performed. Model A in each case is the test for any effect at all. The [PR] notation states that prosecution is being tested as a dependent variable with no reference to the type of effect. Models B, C, and D include two variables in each set of brackets. The first is the independent variable and the second the dependent one, which is always prosecution. Thus, the notation [FO PR] [RS PR] in line I. B. means that the independent, simultaneous effects of force and resistance are being considered—the combined effects model. Models C and D in each set of data are the individual independent effects models, and the first notation in the brackets represents the factor being tested.

TABLE A. STATISTICAL ANALYSIS

<i>Model</i>	<i>G²</i>	<i>Degrees of Freedom</i>	<i>Probability</i>
I. Force and Resistance			
A. [FO RS] [PR]	40.19	6	.000
B. [FO RS] [FO PR] [RS PR]	12.36	2	.002
C. [FO RS] [FO PR]	32.46	4	.000
D. [FO RS] [RS PR]	20.91	4	.000
II. Force and Relationship			
A. [FO RL] [PR]	26.41	10	.003
B. [FO RL] [FO PR] [RL PR]	3.40	4	.494
C. [FO RL] [FO PR]	18.84	8	.016
D. [FO RL] [RL PR]	9.46	6	.149
Stepwise—D - B	6.06	2	.040
III. Force and Situation			
A. [FO SI] [PR]	28.00	6	.000
B. [FO SI] [FO PR] [SI PR]	4.00	2	.135
C. [FO SI] [FO PR]	20.27	4	.001
D. [FO SI] [SI PR]	8.76	4	.067
Stepwise—D - B	4.76	2	.089
IV. Force and Corroboration			
A. [FO CO] [PR]	71.08	6	.000
B. [FO CO] [FO PR] [CO PR]	0.22	2	.500+
C. [FO CO] [FO PR]	62.12	4	.000
D. [FO CO] [CO PR]	6.66	4	.155
Stepwise—D - B	6.44	2	.031
V. Resistance and Relationship			
A. [RS RL] [PR]	40.02	10	.000
B. [RS RL] [RS PR] [RL PR]	4.62	4	.328
C. [RS RL] [RS PR]	21.62	8	.006
D. [RS RL] [RL PR]	24.02	6	.001
VI. Resistance and Situation			
A. [RS SI] [PR]	46.95	6	.000
B. [RS SI] [RS PR] [SI PR]	4.86	2	.088
C. [RS SI] [RS PR]	28.21	4	.000
D. [RS SI] [SI PR]	27.20	4	.000
VII. Resistance and Corroboration			
A. [RS CO] [PR]	21.53	6	.002
B. [RS CO] [RS PR] [CO PR]	1.36	2	.500+
C. [RS CO] [RS PR]	8.95	4	.062
D. [RS CO] [CO PR]	5.02	4	.284
Stepwise—C - B	7.59	2	.015
Stepwise—D - B	3.66	2	.166

VIII. Situation and Relationship

A. [SI RL] [PR]	35.69	10	.000
B. [SI RL] [SI PR] [RL PR]	1.92	4	.500+
C. [SI RL] [SI PR]	16.23	8	.039
D. [SI RL] [RL PR]	19.69	6	.003

IX. Situation and Corroboration

A. [SI CO] [PR]	72.01	6	.000
B. [SI CO] [SI PR] [CO PR]	2.12	2	.347
C. [SI CO] [SI PR]	58.25	4	.000
D. [SI CO] [CO PR]	7.60	4	.107
Stepwise—D - B	5.48	2	.059

X. Relationship and Corroboration

A. [RL CO] [PR]	71.86	10	.000
B. [RL CO] [RL PR] [CO PR]	1.92	4	.500+
C. [RL CO] [RL PR]	61.48	6	.000
D. [RL CO] [CO PR]	9.04	8	.339
Stepwise—D - B	7.12	4	.129