Prosecutorial discretion and decision making: processing sexual assault cases

Megan Kennedy
University at Albany, State University of New York, kennedymegan2@gmail.com

The University at Albany community has made this article openly available. Please share how this access benefits you.

Follow this and additional works at: https://scholarsarchive.library.albany.edu/legacy-etd

Part of the Law Commons

Recommended Citation

This Dissertation is brought to you for free and open access by the The Graduate School at Scholars Archive. It has been accepted for inclusion in Legacy Theses & Dissertations (2009 - 2024) by an authorized administrator of Scholars Archive. Please see Terms of Use. For more information, please contact scholarsarchive@albany.edu.
PROSECUTORIAL DISCRETION AND DECISION
MAKING: PROCESSING SEXUAL ASSAULT CASES

By

Megan Kennedy

A Dissertation
Submitted to the University at Albany, State University of New York In Partial Fulfillment of
The Requirements of the
Degree of Doctor of
Philosophy

School of Criminal Justice 2018
# Table of Contents

List of Figures ....................................................................................................................................... vii

List of Tables ......................................................................................................................................... viii

CHAPTER 1 ........................................................................................................................................... 1

Introduction ........................................................................................................................................ 1

CHAPTER 2 ........................................................................................................................................... 4

Review of the Literature ....................................................................................................................... 4

Theories and Theoretical Perspectives on Prosecutors’ Decision Making ................................. 4

Uncertainty avoidance thesis ............................................................................................................. 5

Organization concerns: The importance of efficiency in the District Attorney’s
Office .................................................................................................................................................. 6

Bounded Rationality ............................................................................................................................ 12

Focal Concerns .................................................................................................................................... 12

Theoretical Perspectives of Prosecutors’ Decision Making in Sexual Assault Cases ............ 13

Legally relevant case characteristics: Evidence factors and seriousness of the
evidence ................................................................................................................................................. 13

Extralegal factors: Characteristics of the victim and victim’s behavior ............................. 17

Rape myths and the decision to prosecute ....................................................................................... 21

CHAPTER 3 ........................................................................................................................................... 30

Research Problem ................................................................................................................................. 30

Limitations of previous research ....................................................................................................... 30
The need to engage in data collection .................................................................31
The effect of the victim on case charging .........................................................32
Ethics ..................................................................................................................35
Legal and jurisdictional differences .................................................................36
Research questions ..........................................................................................37

CHAPTER 4 ........................................................................................................39
Research Method ...............................................................................................39
Research Sites ....................................................................................................39
Data collection ....................................................................................................42
Sample ................................................................................................................42
Interviews ..........................................................................................................46
Vignettes ............................................................................................................50
Transcription of interviews ..............................................................................54
Data Analysis .....................................................................................................54
Inductive analysis ..............................................................................................56
Deductive analysis .............................................................................................57
Coding .................................................................................................................59

Open coding .......................................................................................................66
Focused coding ................................................................................................66
Memoing .............................................................................................................67

Limitations .........................................................................................................68

CHAPTER 5: FINDINGS ..................................................................................70

The Structure of Decision Making in The District Attorney’s Office: Prosecutor as Individual
and Prosecutor as Part of an Organization .................................................................70

The Organization of the Office .................................................................................70

Nolan District Attorney’s Office: Organization of the Office ..............................70

Decision Making in Sexual Assault Cases in Nolan County .........................72

Jones County District Attorney’s Office: Organization of the Office ............74

Decision Making in Sexual Assault Cases in Jones County .........................76

Roland County District Attorney’s Office: Organization of the Office ..........77

Decision Making in Sexual Assault Cases in Roland County .........................79

The Prosecutor as Individual ....................................................................................81

Individual Differences and Characteristics .........................................................81

The Importance of Experience ...............................................................................85

CHAPTER 6 ..............................................................................................................89

Legal and Jurisdictional Differences .................................................................89

Variability in State Rules ....................................................................................89

Legal Rules and Procedures ...............................................................................90

Legal and time constraints ...............................................................................91

The victim testifying at grand jury: Friend or foe? .........................................95

Statutes of limitations .........................................................................................103

Criminal Penalties ..............................................................................................106

Civil Commitment .............................................................................................106

Use of Resources ...............................................................................................108

CHAPTER 7 ............................................................................................................111
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td>The Effects of Rape Myths</td>
<td>136</td>
</tr>
<tr>
<td></td>
<td>“Real Rape:” Sexual assault cases do not conform to rape myths</td>
<td>136</td>
</tr>
<tr>
<td></td>
<td>The prosecutor’s repertoire of knowledge: “I understand it but the jury won’t”</td>
<td>140</td>
</tr>
<tr>
<td></td>
<td>Delayed disclosure: “I understand it but the jury won’t.”</td>
<td>140</td>
</tr>
<tr>
<td></td>
<td>Post – incident behavior: “It’s up to you to educate the jury.”</td>
<td>141</td>
</tr>
<tr>
<td></td>
<td>Legitimate victims: moral character and risk taking behavior</td>
<td>144</td>
</tr>
<tr>
<td>9</td>
<td>The Role of the Victim</td>
<td>149</td>
</tr>
<tr>
<td></td>
<td>The importance of meeting with the victim</td>
<td>150</td>
</tr>
<tr>
<td></td>
<td>Care and concern and the need to establish a relationship</td>
<td>150</td>
</tr>
<tr>
<td></td>
<td>The challenges of meeting in Roland County</td>
<td>152</td>
</tr>
<tr>
<td></td>
<td>Honest assessment of the Case</td>
<td>154</td>
</tr>
<tr>
<td></td>
<td>Victim is in Charge</td>
<td>159</td>
</tr>
<tr>
<td></td>
<td>Forcing a victim to testify</td>
<td>163</td>
</tr>
<tr>
<td>10</td>
<td>It’s Not About Winning</td>
<td>168</td>
</tr>
<tr>
<td></td>
<td>Promotional decisions and career advancement</td>
<td>168</td>
</tr>
</tbody>
</table>
List of Figures

Figure 1 Nolan County Office Hierarchy ........................................................................ 72
Figure 2. Decision Making In Sexual Assault Cases in Nolan County .............................. 74
Figure 3 Jones County Office Hierarchy ........................................................................ 75
Figure 4. Decision Making in Sexual Assault Cases in Jones County .............................. 77
Figure 5 Roland County Hierarchy ................................................................................ 79
Figure 6. Decision Making in Roland County ................................................................. 81
Figure 7. Roland County Time Standards and Requirements .......................................... 92
Figure 8. Illustration of Case in State A ........................................................................ 97
Figure 9. Illustration of Case in State B .......................................................................... 98
Figure 10. Ethics and the Balancing of Decision Making Factors ..................................... 115
Figure 11. The Purpose of the Victim Meeting ............................................................... 150
## List of Tables

Table 1. Characteristics of the Offices ................................................................. 40

Table 2. Jones County District Attorney's Office .................................................... 44

Table 3. Nolan County District Attorney's Office .................................................... 44

Table 4. Roland County District Attorney's Office .................................................. 45

Table 5. Summary of Vignettes ............................................................................. 51

Table 6. Explanatory Variables ............................................................................. 52

Table 7. Hypothetical Scenario #1 with Variables .................................................. 53

Table 8. Hypothetical Scenario #4 with Variables .................................................. 53

Table 9. Coding Sheet ......................................................................................... 60

Table 10. Coding Sheet with Nodes ...................................................................... 66

Table 11. Jones County District Attorney's Office Other Experience ..................... 83

Table 12. Nolan County District Attorney's Office Other Experience .................... 84

Table 13. Roland County District Attorney's Office Other Experience .................. 84

Table 14. Statutes of Limitations in Sexual Assault Cases ..................................... 104

Table 15. Penalties for Rape ............................................................................... 106

Table 16. Summary of Legal Differences Between State A and State B .................. 108

Table 17. Rank Ordering of Vignettes by Nolan County Prosecutors ..................... 128

Table 18. Rank Ordering of Vignettes by Jones County Prosecutors ..................... 128

Table 19. Rank Ordering of Vignettes by Roland County Prosecutors ................... 129

Table 20. Rank Ordering of Vignettes by Prosecutors in All Counties ..................... 129

Table 21. Definitions of Success in a Sexual Assault Case ..................................... 174
Abstract

This dissertation examines prosecutorial discretion and decision making in the processing of sexual assault cases. The literature has long focused on the idea that prosecutors make decisions with the goal of avoiding uncertainty, the uncertainty being a potential acquittal. Researchers suggest this goal is the result of prosecutors’ beliefs that professional advancement is dependent upon one’s conviction record. Much of the research in this area has relied upon quantitative methods and analyses. The results of the analyses lead researchers to infer that prosecutors do indeed make charging decisions with an eye toward avoiding uncertainty. Specifically related to sexual assault cases, uncertainty comes from prosecutors’ applying stereotypes and rape myths as they make decisions. Stereotypes and rape myths stem from the prosecutors’ knowledge and beliefs about how the victims’ behavior and character will affect the likelihood the case will result in a conviction.

I used a qualitative approach in the dissertation. The qualitative approach included interviews with prosecutors that are semi-structured and also utilize carefully constructed vignettes. The vignettes provided the prosecutor with all the information they would typically have as they make charging and processing decisions. My data collection and analytical approach allowed me to use both an inductive and deductive approach. First, I asked questions to probe the areas of prosecutors’ decision making in sexual assault cases that lead researchers to conclude prosecutors choose only cases with a high likelihood of conviction. Second, I followed the data by asking open-ended questions and allowing the subjects to discuss various areas of sexual assault cases. Since I have interviewed prosecutors in three different District Attorney’s offices, and in two different states, this allowed for a comparison of practices, legal and jurisdictional differences, and policy differences between offices. The dissertation is an important step in
understanding how prosecutors make decisions in sexual assault cases and why sexual assault cases have a high rate of attrition.
CHAPTER 1

Introduction

Research has identified a significant and disturbing lack of prosecution of sexual assault cases. Sexual assault crimes are woefully underreported (Spohn & Tellis, 2012a). Unfortunately, when cases are reported to law enforcement, they are not likely to result in criminal prosecution from arrest through sentencing (Spohn & Tellis, 2012a). It is estimated that one in four women will be a victim of rape at some point in their lives (Reddington & Kreisel, 2005). A majority of those who are sexually assaulted will not report the offense to law enforcement (Reddington & Kreisel, 2005; Spohn & Tellis, 2012a). Of those who do report to law enforcement a majority will not participate in the prosecution of the alleged offender. In one study, 56% of the victims chose not to aid in prosecution (Greeson, 2011). Unfortunately, based on these statistics it is unsurprising that there is a high rate of attrition in sexual assault cases. In their compilation of data sources, Lonsway and Archambault (2012) estimate that five to 20 percent out of 100 rapes are reported (p. 157). Only seven to 27 percent of the reported rapes are prosecuted (Lonswsay & Archambault, p. 157). Finally, only three to 26 percent of cases result in a conviction (Lonsway & Archambault, p. 157).

From the sexual assault incident to case conclusion there are many actors involved in processing sexual assault cases. One of the most powerful individuals involved in this process is the prosecutor. The prosecutor has great power and discretion to decide which cases will be prosecuted. As a result, it is important to understand and explore the prosecutors’ role in the attrition of sexual assault cases.

Scholars and legal practitioners have called prosecutors the most powerful actors in the criminal justice system, stating that prosecutors hold the keys to the courthouse and are the
gatekeepers of the criminal justice system (Beichner & Spohn, 2012; Frohmann, 1991; Kerstetter, 1990; Spohn & Holleran, 2001; Spohn, Beichner, & Davis-Frenzel, 2001). This dissertation examines the many issues that surround the prosecutors’ role in charging individuals with a sex crime or continuing a sexual assault case through indictment. The issues surrounding this crucial point in the prosecutors’ role in the system include determining the prosecutors’ motivations, factors that affect decisions, and the influence of prosecutors’ individual goals on decisions.

Researchers engage in both qualitative and quantitative analysis of sexual assault cases. Their results have been largely inconsistent. Research on prosecutors’ charging decisions has been primarily focused on examining case files and police reports. Few studies have engaged in discussions with prosecutors. As a result, prosecutors’ motivations cannot be directly measured, but are instead inferred through empirical associations between case and victim characteristics and decision outcomes. This research has typically examined the same set of variables: victim characteristics, incident characteristics, and the nature of the relationship between offender and victim. These variables inform the prosecutors’ decision making as they look ahead to the possible disposition of the case. It is unclear whether the connection between case outcomes and both case and victim characteristics is the result of prosecutors’ own set of beliefs related to sexual assault, or the prosecutors’ concerns about jurors’ beliefs about sexual assault. It is these variables and their potential effect on the criminal case that researchers suggest drive prosecutors’ decisions regarding whether or not to pursue criminal charges.

Prior research has largely relied on theories that were developed decades ago. Outdated variables include out of wedlock pregnancy, hitchhiking, and working at a massage parlor. It is unclear whether these variables would necessarily lead a juror to question the authenticity of a
sexual assault claim in 2017. It is necessary to advance our use of explanatory variables to present day. As a result, in this dissertation one of the victims meets the offender through the internet. This is a more common method of meeting others than hitchhiking, a variable that has been studied since the 1960s.

Explanatory variables also include the many elements of rape myths. Rape myths are tied to questions related to the veracity of the victim. The veracity of the sexual assault victim is almost always called into question. Although our society and culture may still hold the beliefs that make up rape myths, many changes have been made in our sexual assault laws. For example, changes in definitions of sexual assault crime, availability and use of different types of evidence such as DNA, and changes to social norms surrounding rape.

This dissertation contributes to the literature by utilizing recent data from interviews with prosecutors from three different offices. These interviews, combined with open-ended questions and the use of hypothetical scenarios allowed me to probe the prosecutors’ decision-making process. The findings explore the many factors that influence prosecutors’ decisions and uncover the many factors that are beyond the individual prosecutors’ control. Importantly, the findings illustrate the importance of not generalizing the behavior of prosecutors, but instead the importance of considering the individual differences between jurisdictions, offices, and prosecutors. In addition, I uncover the prosecutors’ definitions of success, learning that these definitions are not based on conviction rates. Instead, the victim’s cooperation and ability to participate plays a large role in the prosecution of the sexual assault case. I conclude by discussing the policy implications of the findings and suggesting avenues for future research.
CHAPTER 2

Review of the Literature

Many have declared the prosecutor to be the most powerful actor in the criminal justice system. In 1913 Gans wrote that the prosecutor “exercises the broadest discretion in determining whether, when, and how he shall act” (Gans, 1913, p.121). In 1940 a Supreme Court Justice wrote: “[T]he prosecutor has more control over life, liberty, and reputation than any other person in America” (Davis, 1969, p.190). Based on this power, many have embraced the notion that prosecutors are the “gatekeepers of the criminal justice system” (Kerstetter, 1990, p.182). This phrase has been repeated in numerous articles that have examined the gatekeeping function of prosecutors that occurs through case screening (Beichner & Spohn, 2012; Frohmann, 1991; Spohn & Holleran, 2001; Spohn et al., 2001).

In this chapter the prosecutors’ gatekeeping function will be discussed through the lens of the theories and theoretical perspectives of prosecutorial discretion and decision-making. First, I will briefly describe the general theories, or theories that are utilized to explain prosecutors’ decisions in all types of cases. Second, I will discuss the application of these theories to sexual assault cases and outline the findings in current sexual assault research as it relates to prosecutors’ decision making. Third, I will provide a discussion of rape myths and address the connection between rape myths and decision making.

Theoretical Perspectives on Prosecutors’ Decision Making

Researchers have utilized many theories of prosecutorial decision-making. Although these theories are often discussed as separate and unique theories of decision-making, upon closer examination it seems they are tangled up into one common idea. The tangled web of theories could be classified as follows: theories about uncertainty avoidance (Albonetti, 1986;
Albonetti, 1987), organizational priorities (Albonetti, 1986; Albonetti, 1987; Frohmann, 1991; Littrell, 1979; Stanko, 1981), bounded rationality (Albonetti, 1986; Albonetti, 1987), and focal concerns theory (Beichner & Spohn, 2001; Spohn et al., 2001). The common idea is that prosecutors are motivated by a reward system that prioritizes high conviction rates. In order to be rewarded, prosecutors’ decisions are guided by a common set of factors, these factors being the elements of a criminal case that will lead to a conviction. Since prosecutors must often make quick decisions, these decisions utilize the knowledge of what has worked in the past, thereby leading to the use of stereotypes and shorthand assessments. I will discuss each of the theories in the sections that follow.

**Uncertainty avoidance thesis.**

The theoretical perspective most widely cited and tested in the literature that examines prosecutors’ decisions in processing criminal cases was developed by Albonetti in 1986. The theory claims that prosecutors make decisions with an eye towards avoiding uncertainty. The uncertainty they are attempting to avoid is a case that results in an acquittal.

Albonetti examined both the decision to charge a suspect with a crime and the decision to continue prosecution following indictment. In both studies she examined felony cases in the U.S. Attorney’s Office in Washington, DC. ¹ In one study, Albonetti examined cases that were presented for screening at the Prosecutor’s office. This particular office had an “Intake Section.”

---

¹ Albonetti’s research varies from most other research in this area. First, Albonetti examined cases prosecuted by the U.S. Attorney’s Office. Most research relies on state court cases. Second, the prosecutors that served as subjects in the interviews were assistant United States attorneys and not Assistant city or county prosecutors. Prosecutors employed by the federal government may have different motivations, procedures, and status or prestige than state prosecutors. Finally, Albonetti did not specifically examine sexual assault cases.
The prosecutors assigned to this unit were responsible for examining the merit of police charges. In another study she examined the decision to continue prosecution following indictment.

Albonetti’s goal in both studies was to expand upon previous research. Early studies had concluded that prosecutors’ offices had organizational goals of achieving convictions and efficiency (Jacoby, 1979; Littrell, 1979). In addition, studies prior to Albonetti’s, revealed that strength of the evidence (Miller, 1969; Neubauer, 1974) and seriousness of the offense (Miller, 1969; Neubauer, 1974) were powerful predictors of case charging. Albonetti sought to determine the net effect of case characteristics on the prosecutors’ initial decision in the case. Albonetti hypothesized that specific variables would have an influence on the decision to prosecute. These variables included types of evidence, number of witnesses, and the relationship between victim and defendant.

She found that physical evidence, severity of the offense, and corroborative evidence influenced the decision to charge or continue prosecution. Since these are all factors that would lead to a greater likelihood of conviction, the results allowed her to infer that the guiding force in making the decision to prosecute are factors related to “convictability.” Supporting her conclusion was the fact that prosecutors revealed during interviews that the criteria used by the screening prosecutor was whether the case would likely result in a jury trial conviction.

Based on these results, Albonetti (1986) concluded that “the exercise of prosecutorial discretion . . . is substantially and statistically influenced by a prosecuting attorney’s attempts to avoid uncertainty in obtaining a jury trial conviction” (Albonetti 1986, p. 638). She interpreted the significance of her study as showing the link between prosecutors’ desire for promotion within the office and uncertainty avoidance. This desire for promotion is directly related to the office’s organizational goals. It is these clear notions of the organizational goals, combined with
the results of Albonetti’s studies which show a greater likelihood for prosecution of a strong case, that leads Albonetti to the conclusion that uncertainty avoidance explains prosecutors’ decision making.

**Organizational concerns: The importance of efficiency in the District Attorney’s Office.**

Organizational theory applies to decision making because it suggests that how a prosecutor’s office operates affects the goals of prosecutors. According to Albonetti (1986, 1987) and Stanko (1982), the primary organizational goal is achieving convictions. This in turn becomes the primary goal of the prosecutor. Previous researchers have also found that prosecutors’ offices share the goal of efficient case processing (Littrell, 1979). This goal is often the result of limited resources and therefore results in using such resources primarily toward prosecuting cases that are more likely to result in a conviction. Few studies, however, have recognized that resources vary across time and place. Instead, researchers tend to generalize their findings to apply to all prosecutors.

Prosecutors have been criticized for their use of discretion, leading to guidelines and regulations formulated by the National District Attorneys Association (NDAA) and the American Bar Association (ABA). The regulations recognize there is diversity among offices and the needs of a one person office will be much different than the workings of a 300 person office (Mellon, L.R., Jacoby, J.E. & Brewer, M.A., 1981). Eisenstein and Jacob (1991) note that “[n]o research on criminal courts in the United States has national scope. For example, state trial courts work in small jurisdictions, which vary significantly. In addition, the law they administer varies from state to state; the organization of the courts often varies within states as well as between states” (p. 11). By applying an organizational perspective, variation is expected (Eisenstein & Jacob, 1991).
Although most studies generalize their findings to include all prosecutors it is important to recognize the many different offices that exist in our country. In their study of 10 large urban jurisdictions, Mellon et al., (1981) examine the organizational goal of each office in charging. Mellon et al., (1981) begin their paper by asking whether a person accused of a crime in Boulder Colorado will be treated the same as someone in New Orleans. This is an important question that is not typically considered. The uncertainty avoidance thesis has become a generalization applied to all types of prosecutors in all types of jurisdictions without consideration of the defining organizational factors. However, all jurisdictions and offices are not the same. Offices vary by policy, size, and legal rules and statutes. Unfortunately, this inability to generalize is only recognized and explained by the minority of researchers (Eisenstein & Jacob, 1991; Mellon et al., 1981).

In their study, Mellon et al., (1981) sought to examine the variability that exists among offices. Mellon et al. (1981) randomly selected study sites that were in large urban areas. The sites were necessarily diverse and dispersed geographically. The researchers examined the overall organization and policies of each office. The conclusion by Mellon et al (1981) is that “prosecutors in America cannot be discussed in universal terms” (p. 53). They found four policy types were utilized by the offices when considering whether to charge a suspect with a crime. These included trial sufficiency, system efficiency, legal sufficiency, and defendant rehabilitation (Mellon et al., 1981). They also found that offices varied with respect to decision making autonomy of individual prosecutors. They learned that prosecutors work within the environment over which they do not have control.

Legal sufficiency refers simply to the legal elements of the crime. If the legal elements of the crime are present then the case is charged. There is no consideration of possible
constitutional or evidentiary issues. This results in a large number of cases being accepted for prosecution. Although several of the states in Mellon et al.,’s (1981) study utilized this policy for charging, several variations still existed due to legal and jurisdictional differences. This point cannot be understated. The study highlights the importance of considering these factors when studying prosecutors’ decision-making.

For example, in one county in the study the law required the prosecutor to review every arrest warrant. As a result, the prosecutor is involved in screening the case at the earliest possible point. In addition, the office employed experienced prosecutors in a “Warrant Section Unit” so as to facilitate the charging of cases. The researchers noted that the office was horribly understaffed yet had clear policies that helped keep the office running efficiently despite the challenges of underfunding and understaffing. In contrast, another jurisdiction had a plethora of resources but employed very different policies. In that jurisdiction cases were charged so as to have a “top charge” and other lesser charges for plea bargaining. This was a function of the determinate sentencing laws in the state. They learned that prosecutors must become inventive and flexible due to the mandatory sentences.

System efficiency is generally found in jurisdictions with backlogged courts and overworked prosecutors (Mellon et al., p. 62). “A high volume caseload mandates the speedy and early disposition of as many cases as possible” (Mellon et al., p. 62). The researchers examined New York City and the Brooklyn District Attorney’s Office. Although prosecutors expressed a desire for dealing with cases in an efficient manner and tight organization rules, the task was difficult because the police filed cases and not the prosecutor. As a result, the system efficiency policy was not truly implemented. Given the environment and the way cases were handled or charged by police, the prosecutor typically applied a model of legal sufficiency.
Since system efficiency requires pre–trial screening, the office needed to create an Intake Unit to work at the police station. In this way, the District Attorney’s office can employ the policy and take on a greater role as gatekeeper.

The defendant rehabilitation policy is aimed at “early diversion of most defendants from the criminal justice system coupled with vigorous prosecution of those cases allowed in the system” (Mellon et al., 1981, p. 65). The researchers saw this policy at work in Boulder, Colorado. The policy was largely the result of the environment. There were few serious offenses and a generally liberal attitude. In addition, the population includes a large number of University students. The District Attorney expressed a humanitarian attitude and an acknowledgement of the consequences of criminal records. This example highlights the variation between the goals and policies of the jurisdictions.

The trial sufficiency policy dictates that a “case is accepted for prosecution only if the prosecutor is willing to have it judged on its merits and expects a conviction at trial” (Mellon et al., 1981, p. 66). The policy requires experienced prosecutors examining cases for constitutional and evidentiary issues as well as cooperation from police in the early processing of criminal cases. In contrast, the least experienced prosecutors handled the cases later, with little discretion to drop charges or plea bargain.

In one jurisdiction in their study, Mellon et al. (1981) encountered what they called a “unit style” of decision making. This style was the result of little or no guidance for individual prosecutors. The jurisdiction only employed part time prosecutors who operated in a diverse and disparate system of courts and offices. As a result, there existed little integration into one primary office or one primary organization. “The office reflected a ‘unit style’ of decision making as each assistant operated as his own policy making unit” (Mellon, et al., 1981, p. 75).
In another jurisdiction, the researchers found that prosecutors were also autonomous. There existed little control or oversight. In this jurisdiction the Chief Criminal Deputy felt that new prosecutors should be competent enough from day one to handle the cases and make decisions. In addition, a rotating system was used so that each assistant took responsibility at various times for case screening. Once a case was accepted it belonged to that assistant for the pendency of the case. The variability between jurisdictions and offices is an important factor that is examined in this dissertation yet is not recognized by many researchers.

According to Albonetti (1986) prosecutors seek convictions not to do justice, but instead to advance in one’s job. This organizational goal of attaining convictions to secure promotions is a key explanation for prosecutorial discretionary decision-making in criminal cases. Because the goal of the prosecutor’s office is to get convictions and “win” cases, the individual prosecutor believes that professional success is determined by his or her ability to meet this organizational goal. However, Mellon et al., (1981) also show us that there is great variation between offices and perhaps the goal of avoiding uncertainty is not as universal as once thought. Albonetti (1987) states “[t]here is little ambiguity within the prosecutor’s office regarding the criteria of successful movement within the profession and the hierarchically arranged office” (p. 295). Furthermore, “prosecutorial success, which is defined in terms of achieving a favorable ratio of convictions to acquittals, is crucial to a prosecutor’s prestige, upward mobility within the office, and entrance into the political arena” (Albonetti, 1987, p. 295). However, research also shows

---

2 Littrell (1979), however, learned that “prosecutors often view their positions as temporary opportunities to gain experience, before moving on to private practice, politics, government services, or some combination of all three” (p. 41). The idea that one’s employment is temporary and geared toward a goal outside of the prosecutors’ office contradicts the notion that prosecutors are focused on achieving convictions so as to ensure promotions. The difference in locale may explain the different motivations. Littrell’s study took place in a county in New Jersey whereas Albonetti’s research relied on data collected in federal courts and from federal attorneys.
the organization of offices varies widely leading to the inability to generalize as many researchers choose to do in their findings.

If as Albonetti suggests, prosecutors’ performance is measured both by personal performance and efficiency, how do they accomplish efficient case processing and a high conviction rate? The answer is found in the theories of bounded rationality and focal concerns.

**Bounded rationality.**

When considering victim characteristics and behavior, researchers suggest prosecutors use a routinized approach that is often considered under the theory of bounded rationality. This routinized approach includes assessing cases by looking for elements that have been linked to conviction in the past (Albonetti, 1986). However, the idea of routinized approaches and bounded rationality, as mentioned, appears more to be a part of the uncertainty avoidance thesis than a separate theory on its own. Uncertainty is removed by prosecuting only those cases that have the greatest chance of “winning.” Uncertainty is also removed by employing an approach that determines how to handle a case by considering past outcomes. This approach leads to efficiency and success.

**Focal concerns.**

Research has shown that court actors, including both prosecutors and judges, are guided by a set of focal concerns. In studies of judge’s sentencing decisions, researchers typically classify focal concerns into three categories: judgments of blameworthiness, concern about public safety, and practical constraints on sentencing options (Steffensmeier, Ulmer, & Kramer, 1998). Judges typically do not have all the information necessary to fully examine the likelihood the offender will reoffend or is a danger to the community. As a result, judges will engage in shorthand assessments of defendants based on stereotypes and characteristics that are thought to be common in dangerous individuals.
Like judges, prosecutors’ decisions are limited based on the potential consequences of their decisions. The potential consequences, however, are different for prosecutors. According to proponents of focal concerns theory “prosecutors’ charging decisions are guided by a set of focal concerns that revolve around reducing uncertainty and securing convictions . . . . “ (Spohn et al., 2001, p. 232). Therefore, the focal concern is merely the goal of the uncertainty avoidance thesis.

Theories that examine prosecutorial decision-making conclude that prosecutors’ decisions are made with an eye toward avoiding uncertainty. As a result, legally relevant case characteristics, if this theory applies to sexual assault cases, should have an effect on case processing. Such characteristics include strength of the evidence and offense seriousness. In a sexual assault case the research shows that both legally relevant characteristics and irrelevant characteristics related to the victim are predictive of case charging.

In the sections that follow I will discuss the theories, theoretical perspectives, and related empirical research on prosecutors’ decision making as it relates specifically to sexual assault cases.

Theoretical Perspectives of Prosecutorial Decision Making in Sexual Assault Cases

**Legally relevant case characteristics: Evidence factors and seriousness of the case.**

How are the general theoretical perspectives of prosecutors’ decision making applied to sexual assault cases? As discussed, researchers conclude that because prosecutors prioritize reducing the uncertainty of verdicts, they rely on strength of evidence and seriousness of the offense to make charging decisions. Do the empirical studies of sexual assault cases validate these theories? Although research has inferred that prosecutors make decisions with an eye
toward avoiding uncertainty, research examining case characteristics as predictors of charging
decisions in sexual assault cases has produced inconsistent results.

Many studies of sexual assault case processing have examined case characteristics in an
effort to determine the effect of various elements of a case on the decision to charge. These
case characteristics are meant to measure the relative strength or weakness of a case. Case
seriousness may be measured by the type or level of charge (i.e. rape or indecent touching) filed
against the offender (Spears & Spohn, 1997). In sexual assault cases, evidence factors have
included injury to the victim (Beichner & Spohn, 2005; Kingsnorth, MacIntosh, & Wentworth,
1999; Spears & Spohn, 1997) weapon use (Beichner & Spohn, 2005), presence of physical
evidence, (Beichner & Spohn, 2005; Kingsnorth et al., 1999; Spears & Spohn, 1997) and
incriminating statements by the defendant (Kingsnorth et al., 1999).

Studies have both supported and refuted the idea that strength of the evidence and other
evidence factors are predictive of case processing decisions. In two studies, case characteristics
were predictive of charging decisions (Beichner & Spohn, 2005; Spohn, 2005). However, the
findings were considered “surprising” in another study because strength of the evidence had no
effect on case processing decisions (Spears & Spohn, 1997).

Kingsnorth et al.’s study (1999) examined use of a weapon, injury to the victim,
incriminating remarks by the suspect, time of reporting, whether the victim resisted the attack,
and whether there were witnesses available to conflict, support, or contradict the victim’s
account. Interestingly, theirs is the only study to have included “victim’s cooperation during
prosecution,” as a variable in their regression analysis. The importance of including this variable
seems obvious yet was not included in other studies. One reason for the exclusion of this
variable is obvious, the difficulty of possibly speaking with sexual assault victims to ascertain their views of the case.

The results of the analysis indicated the model is “dominated by legally relevant variables” (Kingsnorth et al., 1999). “Several legally relevant variables, closely related to the prosecutor’s ability to secure a conviction, attain significance in the model: These include incriminating remarks by the defendant or accomplice, cooperation by the victim, degree of injury to the victim (for which a photographic record exists), and the availability of witnesses to corroborate the victim’s account” (Kingsnorth et al., 1999, p. 287).

Beichner and Spohn (2005) examined charging differences between two jurisdictions. Like Kingsnorth et al., (2005) they also found that evidence factors had an effect on charging decisions. They hypothesized that the effect of case characteristics and evidence factors on decision-making would differ between the jurisdictions because one jurisdiction included a specialized unit and the other did not. As a result, they expected the jurisdiction with the specialized unit to be less concerned with legally irrelevant characteristics. The case characteristics and evidence factors used in their analysis included injury to the victim, whether the suspect used a gun or knife, presence of physical evidence, and whether there was a witness to the assault.

Their results indicate charging decisions in the two jurisdictions “are nearly identical” (Beichner & Spohn, 2005). In Kansas City they found physical evidence increased the likelihood of prosecution. In Miami they found case seriousness and other factors such as injury, weapon use, and prompt reporting were the most influential predictors at increasing likelihood. Based on these results, they concluded prosecutors are more likely to charge a suspect when the evidence is strong, and the offense is serious (Beichner & Spohn, 2005). In keeping with the
overall focus on the theory of uncertainty avoidance, the authors conclude their study shows “prosecutors select cases with a high probability of conviction and reject charges in cases in which conviction is unlikely” (Biechner & Spohn, 2005, p.487). This study, therefore, supports the findings by Albonetti (1986, 1987) and previous researchers (Miller, 1969; Neubauer, 1974).

One study, however, did not support the notion that evidence factors and case seriousness are predictive of charging decisions. Spears and Spohn (1997) utilized data from arrests in Detroit during the year 1989. They measured seriousness of the offense as the actual charged offense. Second, they measured strength of evidence with four factors: physical evidence, whether a weapon was used, whether there was a witness, and whether the victim suffered injury.

Spears and Spohn (1997) hypothesized “that prosecutors would be more likely to file charges if there was a witness to the assault, collateral injury to the victim, physical resistance by the victim, or if the suspect used a gun or knife” (p. 512). This hypothesis was based on their assessment of previous research indicating prosecutors will attempt to avoid uncertainty by only filing charges in cases where the evidence is strong. Contrary to their hypothesis, however, they learned that charging decisions were not affected by the strength of the evidence.

The findings are surprising because they contradict Albonetti’s assertions “that strength of the evidence is one of the major predictors of convictability, and thus of prosecutor’s decision making” (Spears & Spohn, 1997, p. 518). As a result, they concluded the difference must be attributable to differences in motivation between sexual assault cases and other cases.

One potential source of difference is the existence of a victim in a sexual assault case. The victim, therefore, becomes the focus of predicting convictability. Therefore, “prosecutors attempt to avoid uncertainty by screening out cases unlikely to result in a conviction because of questions about the victim’s character, the victim’s behavior, and the victim’s credibility”
(Spears & Spohn 1997, p.519). The study’s findings, as is the case with some of the findings related to victim characteristics, are inconsistent with other empirical research. This inconsistency leads to the importance of figuring out what is driving prosecutors’ decision making. One potential explanation when considering the difference between sexual assault cases and many other cases: a victim.

**Extralegal factors: Characteristics of the victim and victim’s behavior.**

The existing research appears to show that prosecutors avoid uncertainty because it is important to achieve convictions if one wishes to advance as a prosecutor. As a result, the prosecutor wants to take only those cases that are likely to result in a conviction. In most cases the key factors that influence this decision appear to be seriousness of the offense and strength of the evidence. In sexual assault cases, however, uncertainty comes in the form of risky behavior, questionable character, and concerns regarding the victim’s credibility. Therefore, in order to explain the low rate of prosecution of sexual assault cases it is important to understand prosecutors’ motivations in general, and their customs for judging the risks of prosecuting sexual assault cases in particular.

The second major component of decision-making in sexual assault cases includes characteristics of the victim and the victim’s behavior. These factors can be considered extralegal because they are not directly related to the objective strength of the case, but instead related to the prosecutors’ view of the case based on factors that are, but perhaps should not be, considered when deciding whether to prosecute. Extralegal characteristics are elements of the case that should not matter, but often do. Research has examined the effect of these characteristics through the lens of both focal concerns and bounded rationality.
In sexual assault cases, the theory of bounded rationality purports to explain that quick assessments and stereotypes, in the absence of full information on each case, are used to make charging decisions (Beichner & Spohn, 2005; Frohmann, 1991). Most of the empirical research on prosecutors’ charging decisions in sexual assault cases includes an examination of the characteristics of the victim. These characteristics include both what is termed “evidence of moral character,” and “risk taking behavior.” Moral character (or perceived lack thereof) generally includes variables such as an out of wedlock pregnancy, prior sexual conduct, and alcohol or drug use. Risk taking includes behaviors such as hitchhiking, being in a bar alone at night, or working as an exotic dancer or in a massage parlor. It is purported that these variables are of great concern to the prosecutor because their inclusion in the case is likely to affect the outcome.

Like judges, prosecutors’ decisions are limited based on the potential consequences of their decisions. The potential consequences, however, are different for prosecutors. Focal concerns theory suggests that “prosecutors’ charging decisions are guided by a set of focal concerns that revolve around reducing uncertainty and securing convictions . . . . “ (Spohn et al., 2001, p. 232). In order to ensure that the focal concern of achieving a conviction is met, this theory posits that prosecutors examining sexual assault cases “incorporate beliefs about real rapes and legitimate victims” in their decision making (Spohn et al., 2001, p. 233). For example, a case that includes characteristics such as a victim who is a prostitute (moral character), under the influence of alcohol or drugs (risk taking behavior), reduces the uncertainty of a conviction while incorporating beliefs about potential jurors’ perceptions about “legitimate victims.” Therefore, the focal concern is merely the goal of the uncertainty avoidance thesis.
Several studies examine the role of victim characteristics and victim behavior in decision-making (Beichner & Spohn, 2005; Kingsnorth, 1999; Spears & Spohn, 1997). Each study attempted to identify predictors for prosecutors’ decisions to charge. Spears and Spohn (1997) concluded that “prosecutors can reject charges at the initial screening, either because they believe the suspect is innocent or, more frequently, because they believe the suspect is guilty but a conviction would be unlikely” (Spears & Spohn 1997, p. 502). Beichner and Spohn (2005) compared two offices to determine whether an office with a specialized sexual assault unit would have an impact on case processing. Kingsnorth (1999) created a construct of negative characteristics to consider the impact on case processing. Finally, in a recent study, Beichner and Spohn (2012) examined specific characteristics related to victim’s behavior and character to determine the effect on charging decisions. Each study examined the same characteristics of the victim’s behavior and evidence of moral character, with inconsistent findings.

Spears and Spohn (1997) conducted their study in 1997 using data from arrests in Detroit for the year 1989. They found prosecutors were significantly more likely to file charges if there were no questions about moral character or behavior at the time of the incident. The authors concluded, “[t]hese findings suggest that prosecutors attempt to avoid uncertainty by screening out sexual assault cases unlikely to result in a conviction because of questions about the victim’s character, the victim’s behavior, and the victim’s credibility” (Spears & Spohn 1997, p. 519). Such findings led to the conclusion that perhaps “prosecutors’ charging decisions in sexual assault cases are motivated by different factors than charging decisions in other types of cases” (Spears & Spohn, 1997, p. 519). They also concluded that extralegal factors play a role in deciding which cases are convictable.
The results of the 2005 study by Beichner and Spohn support the findings of the 1997 study by Spears and Spohn. In examining two separate jurisdictions they found that victim characteristics were associated with charging in each office. Specifically, in Kansas City the likelihood of charging decreased if the victim engaged in risk taking behavior. On the other hand, in Miami the likelihood of charging decreased if there were questions of moral character. As a result, this was taken as confirmation that “prosecutors select cases with a high probability of conviction and reject charges in cases in which conviction is unlikely” (Beichner & Spohn, 2005, p. 487).

Other studies, however, have produced findings that do not necessarily support that notion that prosecutors will only charge cases that include “solid” or “stand up” victims. First, a recent study by Beichner and Spohn (2012) examined the specific variables that comprise the victims’ character and behavior. The goal was to determine whether certain behaviors affect case processing as opposed to merely the presence of any negative character trait or any risky behavior. The researchers used data from several jurisdictions that was compiled in the late 1990’s. They found that many of the variables related to risk taking behavior or moral character did not affect charging decisions. Second, unlike Beichner and Spohn (2012), Kingsnorth et al., (1999) used a composite of behavior to construct negative characteristics when they examined 467 cases from intake to sentencing in Sacramento County California. These variables are those used in other studies including alcohol or drug use, prostitution, transient, alone at night, hitchhiking, assisted in clothing removal, alone in a bar, and accepted a ride from a stranger. They found these negative characteristics did not play a role in decision-making. Instead they concluded the “model is dominated by legally relevant variables” (Kingsnorth et al. 1999, p. 296).
Research concerning the effect of victim characteristics in sexual assault case processing reveals inconsistent results. One result, however, that has been examined further, is the conclusion that something other than case seriousness or evidence factors may affect prosecutors’ decisions in these cases. A qualitative study by Lisa Frohmann (1991) sheds light on the additional factors that affect decision-making in these cases, most notably rape myths.

**Rape myths and the decision to prosecute.**

A cultural definition of “real rape” is a rape that consists of a violent attack by a stranger. The rape myth includes the notion that a woman is not being truthful about a sexual encounter unless a number of factors exist within the incident. These include not engaging in any risk taking behavior such as drinking or drug use, fighting the attack, and reporting the event to law enforcement immediately. Unfortunately, the prevailing culture in the United States still supports rape myths (See Lonsway & Fitzgerald, 1994; Spohn & Tellis, 2012a).

Research on rape myths and the influence of rape myths on both professionals and individual citizens began with the definition of the myths as “prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists . . . .” (Burt, 1980, p. 217). Later, Lonsway and Fitzgerald (1994) proposed a modified version defining rape myths as “attitudes and beliefs that are generally false but are widely and persistently held, and that serve to deny and justify male sexual aggression against women” (p. 134). Specific rape myths include the notion that women lie about rape and that only women possessing certain characteristics are raped. The myth provides that “primarily women with bad reputations and those from socially marginal or minority groups” are raped (Lonsway & Fitzgerald, 1994, p. 136).

Past research has shown that sexual assault cases that do not conform to rape myths are less likely to be charged (Frohmann, 1991; Spears & Spohn, 1997; Spohn & Horney, 1992). It is
less clear whether the lack of charging is due to prosecutors’ assumptions about jurors’ beliefs in the rape myth or their own belief in rape myths. Although the many rape law reforms were aimed at tearing down some of the stereotypes that are part of rape myths, the research has shown legally irrelevant victim characteristics remain predictors of case charging (Beichner & Spohn, 2012; Spears & Spohn, 1997; Spohn & Horney, 1992).

Rape myths in the criminal case include stereotypes about real rapes and real victims (Estrich, 1987). These stereotypes appear to be the foundation for the focal concerns of victim credibility and convictability, and are applied to charging decisions (Estrich, 1987; Spohn et al., 2001). These myths include the notion that women who engage in risky behavior, have a criminal record or other bad reputation, little education, and are otherwise socially marginalized cannot be real victims – that they must have precipitated, provoked, or actively participated in the incident that led to an arrest (Estrich, 1987). Factors potentially related to rape myths also include availability of a witness to corroborate (Kingsnorth, et al., 1999; Spears & Spohn, 1997), and prompt reporting of the incident by the victim to law enforcement (Beichner & Spohn, 2005; Kingsnorth et al., 1999).

Factors related to the victim and the application of rape myths to judgments about cases have been examined by Frohmann (1991) in her study that developed a specific framework to explain what factors influence prosecutors’ decisions in sexual assault cases. Frohmann (1991) utilized the uncertainty avoidance thesis as she engaged in a qualitative study of the charging decisions of prosecutors. Not only did Frohmann interview prosecutors, she also observed case filing interviews between prosecutors and victims. This is a very different approach from most

---

3 Rape law reforms have been developed and expanded over the last three decades. Reforms have included rape shield laws, removing requirements for corroboration of sexual assault, elimination of the spousal exemption, and inclusion of both genders as possible named victims.
of the other studies that focus on sexual assault case processing. Other studies typically utilize prosecutors’ case files to conduct quantitative research that examines the variables that influence charging decisions.

Frohmann concluded “that prosecutors are actively looking for ‘holes’ or problems that will make the victim’s account of ‘what happened’ unbelievable or not convincing beyond a reasonable doubt, hence unconvictable” (Frohmann, 1991, p. 214). She argues this is the result of the office’s organizational policy. First, the promotion policy provides that prosecutors will be judged based on their ability to get convictions at trial. Second, a record of acquittals is considered evidence of poor performance. Third, prosecutors are looked upon favorably if they can help to reduce the caseload for the office and the court system. Based on this organizational context, Frohmann (1991) concludes that a great number of sexual assault cases never get beyond charging, with prosecutors choosing only those cases that are “solid” or “convictable.” These findings are clearly in agreement with Albonetti’s, with a potential variation. While Albonetti suggests prosecutors go forward on only those cases with strong evidence and serious charges, Frohmann suggests prosecutors in sexual assault cases take a rather proactive approach in seeking out potential “holes” in the victim’s story.

In her interviews and observations Frohmann was able to ascertain how prosecutors justify their decisions to reject sexual assault cases. The central feature in these cases “is the discrediting of victims’ allegations of sexual assault” (Frohmann, 1991, p. 215). The two primary mechanisms used to “discredit victim’s complaints” are “discrepant accounts and ulterior motives” (Frohmann, 1991, p. 215). Based on her analysis, Frohmann developed a framework for studying decision making in these types of cases. Her framework that focuses on
these mechanisms of case rejection has been utilized, at least in part, by most of the studies that followed (See Spohn et al., 2001; Spohn & Holleran, 2001).

“Discrepant accounts” includes inconsistencies in the victim’s account. During the initial investigative process following the assault the victim is likely to give a report of the events to several individuals. If these reports vary, the prosecutor will find that there are “inconsistencies” in the victim’s story. Inconsistencies are one means that prosecutors will use to explain their rejection of a case. “Discrepant accounts” also includes the prosecutor applying their “repertoire of knowledge” to these crimes. Over time prosecutors will develop a series of “typifications of rape-relevant behavior” as “another resource for discrediting a victim’s account of ‘what happened’” (Frohmann, 1991, p. 217). These typifications include rape scenarios, post-incident interaction, rape reporting, and the victim’s demeanor. In other words, typifications are rape myths.

According to Frohmann (1991), prosecutors believe they know how these crimes typically occur, how true victims react to such crimes, and how true victims report these crimes. Therefore, if the incident, behavior, and reporting do not meet these “typifications,” the account is likely to be discredited. If the victim’s behavior is atypical, the prosecutor will anticipate problems convincing a judge or jury of the allegation. Atypical behavior includes behavior inconsistent with accepted beliefs about genuine rape. The prosecutor’s concern becomes victim credibility as it relates to the “downstream” concern of a conviction.

The second mechanism prosecutors typically used in rejecting cases was finding “ulterior motives.” “Ulterior motives,” according to Frohmann (1991), means the prosecutor believed the woman consented to the sex act and then decided to deny the act was consensual afterwards. Prosecutors usually attribute case rejection to ulterior motives based on their knowledge of the
victim’s personal history and the location in which the incident allegedly occurred. For example, Frohmann (1991) suggests “knowledge of a victim’s criminal activity enables prosecutors to ‘find’ ulterior motives for her allegation” (Frohmann, 1991, p. 223). The criminal history may reveal a history of drug use or prostitution, and the location of the event may reveal her presence in a location known for prostitution. Thus, prosecutors may conclude that the victim’s ulterior motive is avoiding an arrest for prostitution so she fabricates a rape allegation.

In an attempt to test, replicate, and extend Frohmann’s work, Spohn et al. (2001) examined cases complete with the incident report, arrest affidavit, and closeout memorandum that indicated reasons for rejection. This information was supplemented with interviews. In their analysis they examined case rejections under the theory of focal concerns and uncertainty avoidance. The results support the notion of the continued effect of rape myths on sexual assault case processing.

Spohn et al (2001) suggest that instead of focusing on case seriousness and culpability, “prosecutors charging decisions are guided by a set of focal concerns that revolve around reducing uncertainty and securing convictions and that incorporate beliefs about real rapes and legitimate victims” (Spohn et al., 2001, p. 206). The idea of “real rapes” and “legitimate victims” is very similar to the framework developed by Frohmann. As a result, rape myths have survived decades of rape law reform and are a consideration in the mind of prosecutors when they examine a case. This way of thinking, they argue, is the result of an attempt to predict how the victim will be viewed by the judge and jury. Because the goal is to avoid uncertainty and “these predictions are inherently uncertain, prosecutors develop a perceptual shorthand that incorporates stereotypes of real crimes and credible victims” (Spohn et al., 2001, p. 208). By

4 In his research, Littrell (1979) also found that prosecutors think of “imaginary jurors to consider whether a case is weak or strong.”
considering stereotypes, rape myths continue to exert an influence on perceptions of sexual assault.

To conduct their analysis, Spohn et al. (2001) “examine and categorize prosecutorial justifications for charge rejection” (Spohn et al., 2001, p. 211). As Frohmann (1991) did, Spohn et al. (2001) “create a typology of reasons for case rejection and . . . highlight the victim, suspect, and case characteristics associated with each type of case” (Spohn et al., 2001, p. 207). They “also examine the degree to which characteristics affect prosecutor’s charging decisions” (Spohn et al., 2001, p. 207).

Spohn et al. (2001) examined case outcomes including cases that were rejected by the prosecutor. The sample included a total of 140 cases. Fifty-eight of the cases were rejected by the prosecutor. However, in half of those cases the case was not prosecuted due to lack of victim cooperation. Therefore, it is important to note that it may have been impossible for the prosecutor to continue the case due to a lack of evidence. The authors examined prosecutors’ reasons for those cases that were rejected.5

They categorized the cases into three categories: first, cases rejected due to discrepant accounts; second, cases rejected due to ulterior motives; and third, cases where the victim either failed to appear, recanted, would not cooperate, or asked that the case be dropped. Although this third category was essentially out of the hands of the prosecutor it was still coded as a rejection by the prosecutor.

The findings in the first category, discrepant accounts, show that prosecutors use inconsistent statements by the victim as a reason for case rejection. Similar to Frohmann’s (1991) findings regarding the application of the prosecutor’s “repertoire of knowledge,” Spohn et

5 If the cases that were not prosecuted due to either lack of evidence of lack or victim cooperation are not included in the analysis, however, the analysis only then included 24 cases.
al. (2001) assert that prosecutors will reject cases if the victim’s behavior, reaction to the event, or delay in reporting do not match the prosecutor’s idea of victim credibility. Quite simply, prosecutors are looking for what they believe is behavior of a “genuine” rape victim. If they fail to find it, the case is likely to be rejected because it is unlikely to result in a conviction.

The authors also found that prosecutors rejected cases based on their judgments about victims’ ulterior motives. As in Frohmann’s (1991) work, the authors concluded that prosecutors find reasons the victim has filed the complaint. Common reasons include the need to deny that an encounter was consensual, the prosecutors’ knowledge of the area where the crime occurred leading the prosecutor to believe the victim was actually there as a prostitute or to purchase drugs, and the victim’s criminal record. Interestingly, in this category prosecutors include two cases where the prosecutors could not go forward with the case, yet the dismissal or failure to prosecute is attributed to a rejection by the prosecutor.

There is a real lack of research on what factors determine whether a victim will participate in the criminal justice process. The importance of this factor cannot be understated. Although a few studies have inferred through empirical associations that a victim is more likely to participate if the crime is serious (Kerstetter, 1990), the victim was injured (Spohn et al, 2008) or the perpetrator was a stranger (Tellis & Spohn, 2008), the reasons for victims’ lack of cooperation must be fully examined. As explained by Spohn and Tellis (2012a), a victim who reports the assault may decide later not to cooperate with law enforcement or prosecutors, may fail to show up for key events, and may ask that the case be dismissed (p. 172). It is important to ascertain the influence of this factor because research has shown, when the assault includes elements that do not meet the elements of a “real rape,” the victim is less likely to report the
crime, law enforcement is less likely to forward the case to a prosecutor, and the prosecutor is less likely to charge (Spohn & Tellis, 2012a).

The rape myth thesis is also widely supported by research that examines sex crime reporting and perceptions by law enforcement. This research, largely published by psychologists, focuses on some of the factors that influence victims’ decision making. Unfortunately, there lacks a synthesis between this body of literature and criminal justice literature.

It has been shown that “[p]arallel beliefs about rape survivors also exist because, as feminist researchers assert, women are expected to be prudent and cautious; thus, rape survivors who violate these expectations risk being perceived as non-legitimate rape survivors” (Anders & Christopher, 2011, p.93). Women who have not engaged in “risky” behaviors such as drinking alcohol, engaging in some consensual sexual activity, and women who resist their attacker are generally perceived as more credible and less responsible for the rape (Anders & Christopher, 2011, p. 93).

In addition, victim characteristics also influence the rape myth. In turn, these characteristics influence the likelihood of reporting the offense and the treatment of the case within the criminal justice process. As a result, the same characteristics that are thought to influence prosecutors’ decisions, are the same characteristics that influence whether a victim reports the crime to police. Therefore, it is important to note the far-reaching implications of the rape myth and its influence on victims themselves.

---

6 For example, women with a history of drinking or drug use, prostitution, or a criminal record are less likely to report the assault has been supported by research (Flowe, H., Ebbesen, E. & Putcha-Bhagavatula, 2007). Anders and Christopher (2011) found that in spite of having reported the crime to law enforcement, only 56% of those who reported actually aided in the prosecution of the case. They examined characteristics of the assault and the victim to
The existing research appears to show that prosecutors avoid uncertainty because it is important to achieve convictions if one wishes to advance as a prosecutor. As a result, the prosecutor wants to take only those cases that are likely to result in a conviction. In most cases the key factors that influence this decision appear to be seriousness of the offense and strength of the evidence. In sexual assault cases, however, uncertainty comes in the form of risky behavior, questionable character, and concerns regarding the victim’s credibility. Therefore, in order to explain the low rate of prosecution of sexual assault cases it is important to understand prosecutors’ motivations in general, the influence of the victim on case processing, and prosecutors’ customs for judging the risks of prosecuting sexual assault cases in particular.

determine the likelihood of aiding in prosecution. Their findings support a rape mythology hypothesis because cases with assault and survivor characteristics that did not comport with notions of “real rape” were less likely to be cases where the victim was willing to aid in the prosecution.
CHAPTER 3

Research Problem

There are two primary and interwoven goals of this research. First, I explored the question of whether the uncertainty avoidance thesis and accompanying theoretical perspectives are applicable to the current processing of sexual assault cases. This allowed me to address the current limitations in the existing research. Second, I explored current motivations, thought processes, and other areas related to decision making in sexual assault cases that arose out of semi-structured interviews. The limitations in existing research highlight some of the areas that are examined in this dissertation.

Limitations of Prior Research

The research to date on prosecutors’ charging decisions in sexual assault cases suffers from many limitations. First, the studies that form the empirical research in this area primarily rely on data collected in the 1980s and 1990s. This research also relies upon a tangled web of theories of prosecution developed in the 1950s through 1980s. Second, these studies fail to take into account the large measure of influence that victims may have in these cases. The studies fail to recognize the fact that cases cannot, except in rare circumstances where a witness exists, go forward without a victim’s cooperation. For example, Spohn and Holleran (2001) note that many cases may be dismissed due to an uncooperative victim, yet those same cases are included as the prosecutor’s rejection of the case. Thus, the victim’s cooperation or lack thereof, may be an important factor to consider. Although this fact is recognized in the research by psychologists that focuses on the victims’ experience within the criminal justice system, there is a lack of synthesis between this body of research and the body of research that focuses on prosecutors. Third, previous research seeks to generalize the behavior of prosecutors even though there are
significant variations between jurisdictions. Finally, these studies appear to make efforts to analyze the data so as to attribute the decision not to prosecute to prosecutors. If researchers are correct, the ethical duties of prosecutors are also a factor in case charging. Because ethics has not been examined, this is an area that should be considered. As a result, many of the current limitations in the existing research inform the research questions that will be explored.

**The need to engage in data collection.**

Most of the data collected for these studies are at least 15 years old and in some cases more than 20 old. As a result, it is important to recognize these findings may not be considered valid with respect to prosecutors in the year 2017. Not only are the data in the studies outdated on their own, much has changed respective to sexual assault laws and the structure of individual prosecutors’ offices. For example, new District Attorneys are appointed and elected while new policies are proposed, developed, and utilized by these offices. Additionally, new assistant district attorneys have been hired for various offices, there is more training and education for police, more specialized units in police departments, and a greater understanding of sexual assault and the trauma of victimization. As a result, recent studies and new data collection are crucial to the study of sexual assault case processing decisions. Perhaps a more recent study will reveal evidence of a change in case processing that results from the various social and policy changes.

Many things have changed since the 1980’s that may greatly affect these cases. Although studies have purported to show that rape myths still appear to influence case processing decisions, it is worth noting that these studies utilized data that was decades old in cases (Beichner & Spohn, 2005; Spears and Spohn, 1997). Many changes may be relevant to attitudes and perceptions of sexual assault today. First, society is more open about rape as a
crime. Second, rape shield laws now make it harder for defendants to drag legally irrelevant information into the case. Finally, there are greater consequences in sexual assault cases that may affect charging decisions, plea negotiations, and other case processing decisions. These consequences include sexual offender registries and residency requirements, lifetime parole, and civil commitment laws. As a result of these potential influential factors, the data and research need updating.

**The effect of the victim on case charging.**

The research literature thus far neglects to consider the impact of the victim’s cooperation or lack thereof on the prosecutor’s ability to “go forward” with the case. In this study cooperation was defined as the victim being “on board,” meaning willing to testify. The theoretical and empirical focus has been squarely on the effect of case characteristics, victim characteristics, and the influence of these elements on the prosecutor’s decision to charge. Charging decisions have been attributed only to the prosecutor’s desires and concerns as an employee working within an organization. It has not yet been recognized that prosecutors typically cannot “go forward” if they do not have a willing victim when there, as is often the case in sexual assault cases, is no other evidence with which to prosecute the defendant. Of course, there are likely cases where other evidence does indeed exist; however, whether the victim is willing to cooperate with the prosecution may be a crucial factor in case processing.

Although the lack of victim cooperation is a potentially significant contributor to the failure to prosecute cases, it is largely ignored in the literature and is seldom included in statistical analyses. One example of this issue is illustrative. Spohn and Holleran (2001) argue that prosecutors are the gatekeepers to the courthouse and that their findings “suggest that prosecutors’ concerns about convictability lead them to file charges when the evidence is strong,
the suspect is culpable, and the victim is blameless” (p. 676). The reader is then led to a footnote that may contradict this notion. The footnote reads:

As suggested by one of the anonymous reviewers, the decision to prosecute or not may also be reflected by the victim’s willingness to cooperate; this in turn, may be affected by the extralegal behavior and character factors. Although we could not obtain this information in either jurisdiction, in Kansas City we were able to determine the prosecutor’s reasons for rejecting the charge. (Because we were not allowed to examine the prosecutor’s files in Philadelphia, we could not obtain this information there). In 41 cases, the victim either could not be located or asked that the charges be dropped; the prosecutor filed charges in only 6 of those cases. Moreover, risk-taking behavior by the victim (but not evidence regarding moral character) was associated with the victim’s willingness to prosecute: that is, victims whose behavior at the time of the incident was questionable were significantly more likely to disappear or to ask that the case be dropped (Spohn & Holleran, 2001, p.676, FN 27).

It would seem obvious that the fact that 41 cases included in the analysis involved a victim who could not be found or wanted the case to be dismissed is a crucial factor in the analysis. Such a large number of cases would appear valuable to the analysis yet was disregarded.

An important fact to be recognized is that the research that explores prosecutors’ decision making in sexual assault cases has yet to be synthesized with the research that examines attrition rates for sexual assault cases and the relationship between attrition and victim cooperation. Researchers have shown that “attrition rates for rape cases in the criminal justice system are higher than for other violent crimes reported to law enforcement” (Anders & Christopher, 2011). With an attrition rate that far surpasses that of all other violent crime, the participation or cooperation of the sexual assault victim is a crucial aspect to prosecution of these crimes. This is true because in most cases the prosecution cannot continue without the cooperation or testimony of the victim. Although it is possible for the prosecutor to charge the offender if the
law allows, many prosecutors may not wish to start a case they know they will not be able to prosecute without the victim’s testimony. This is due to legal restrictions, ethical considerations, and the use of valuable resources.

The importance of the victim’s willingness to cooperate cannot be understated. For example, in one study when police were asked to give the most common reasons for not pursuing a rape case the police responded the prime reason was due to an unwilling or uncooperative victim (Anders & Christopher, 2011). A lack of victim cooperation may lead to a failure to prosecute sex offenders, public safety issues, and an atmosphere that rape does not lead to accountability and punishment.

Importantly, research has uncovered myriad factors that influence whether a victim will report a sexual assault to law enforcement. We have not, however, determined which factors influence a victim’s decision to continue the criminal justice process. A recent paper explained: “little is known about the factors associated with rape survivors’ post-assault prosecution decisions . . .” (Anders & Christopher 2011, p.92). “The fact that a sizable portion of rape survivors who report their assault decide not to aid in case prosecution has far-reaching implications for the survivors, the criminal justice system, and society” (Anders and Christopher 2011, p. 92). These far reaching implications, however, are not discussed in the research that places the blame for lack of prosecution squarely on the shoulders of the prosecutor. This paper noted: “[c]learly there is a need to assess factors that influence survivors’ post-assault prosecution decisions in order to strengthen the criminal justice system and adjudicate rapists” (Anders &Christopher 2011, p.92). We currently lack a complete picture of the interplay between the victim and the prosecutor that may be influencing the prosecution of these cases.
Ethics.

The Model Code of Professional Responsibility for prosecutors requires prosecutors to “seek justice, and not merely to convict” (Model Code of Professional Responsibility EC 7-13). The American Bar Association model rules includes factors that the prosecutor may consider in exercising the discretion to charge. These include “reluctance of the victim to testify” (American Bar Association Rule 3-3.9). Furthermore, “[t]he prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction” (American Bar Association Rule 3-3.9). Finally, the model rules indicate no weight should be given to personal advantages and a desire to enhance one’s conviction record (American Bar Association 3-3.9).

Although studies have concluded prosecutors are engaging in “uncertainty avoidance,” it is clear from the ethical rules that such behavior is prohibited. There are several studies that reveal potential ethical violations by prosecutors (Albonetti 1986; Albonetti 1987; Stanko 1981). This is illustrated by Albonetti (1986) who asserted “ . . .[p]rosecution is mobilized around concerns for uncertainty avoidance linked directly to concerns for career success” (p. 638). It is important to ascertain through new data collection and analysis whether prosecutors do in fact act with a goal of avoiding uncertainty, thereby violating ethical rules.

The literature also reveals a lack of understanding of the ethical rules of prosecutors. For example, Spears and Spohn (1997) argue: “Prosecutors have an ethical obligation to file charges if they believe that the suspect committed the crime in question” (p. 519). However, as stated in the ethical rules, to the contrary of their assertion, a prosecutor may decline to prosecute even if there is sufficient evidence.
It is easy to imagine there are many cases where sufficient evidence exists, yet the victim is reluctant to participate. It is also not difficult to imagine an individual who has been traumatized and who is also an exotic dancer or a prostitute, does not wish for these facts to be disclosed during a public trial. As a result, the case is not charged when the victim fails to appear, refuses to participate, or asks that the matter be dropped. In such circumstances the ethical rules do not place an obligation on the part of the prosecutor to charge the defendant, but to the contrary, an ethical obligation not to charge the defendant when they will be unable to fully prosecute the case. In fact, the model rules explain “[a] prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction” (American Bar Association Rule 3-3.9). If the victim has indicated she will not participate and there is no other evidence on which to support a charge, the prosecutor is duty bound to refrain from charging.

As a result of the studies’ findings and lack of consideration of ethics this should be explored. It seems clear that analysis of data with ethics as a part of the research would better inform the issue.

**Legal and jurisdictional differences.**

This dissertation also explored the possible effect of legal and jurisdictional differences on decision-making in sexual assault cases. Since this study includes interviews with prosecutors in different jurisdictions, the study reveals important factors that contribute to differences between jurisdictions. Currently, studies tend to generalize their findings to infer that all prosecutors act in the same manner and have the same goals and motivations.

Existing research examines the differences between prosecutors’ offices with respect to the handling of sexual assault cases. This research has included an examination of the
differences between specialized sexual units and offices without such units (Beichner and Spohn, 2005; Spohn and Holleran, 2001). Such research has considered the effect of policy on decision-making. It has not, however, examined the effect of legal differences on decision-making. For example, one jurisdiction may have higher legal and evidentiary standards as it pertains to indictment. The potential effect of this difference is important to consider. Therefore, this research endeavors to uncover and explore these differences. This dissertation explored the effect of these differences because the research takes place in three different offices in two different states.

**Research Questions**

The research problem in this study is the use of discretion and decision-making by prosecutors in sexual assault cases. The specific research questions explored these areas through a qualitative study that is open to various avenues the data may lead, but that also considered research questions in light of the limitations in existing research, areas of the research problem that have yet to be explored, and the important policy implications of the prosecution of sexual assault cases. This qualitative study explored the following research questions:

1. **What is the organizational structure of decision-making in the District Attorney’s Office and how does the organizational structure of decision making vary across District Attorney’s Offices?**

2. **How do jurisdictions differ, and how do jurisdictional and legal differences affect charging policies?**

3. **What are the ethical rules that prosecutors must follow and how do these rules influence decision making in sexual assault cases?**

4. **What factors influence prosecutors’ decisions to go forward on sexual assault charges? Is there a relationship between rape myths and decisions to prosecute a sexual assault case?**

5. **How much influence does the victim’s willingness to cooperate and participate in the prosecution of the case have on the prosecutor’s decision to prosecute?**
6. Do prosecutors believe that conviction rate is an important factor in professional advancement in any or all of these offices? If conviction rates do not determine one’s standing in the office what factors predict promotion and one’s standing as a good prosecutor?
CHAPTER 4

Research Methods

This study addressed the limitations in previous research and engages in further exploration of prosecutors’ motivations, desires, and goals as they prosecute sexual assault cases. Since the current study involved recent primary data collection there is no concern that the data is outdated such that it will impact the analysis and results. The study, however, is still able to examine the findings of previous studies because it uses vignettes that include the relevant variables previous researchers have found may be contributing to prosecutors’ case processing decisions. Finally, by conducting interviews with prosecutors this study seeks to allow prosecutors the opportunity to explain their decision-making process.

The data for this study were collected from three research sites in two different states. Data was collected using semi-structured interviews. These interviews utilized vignettes that mirrored information likely to be in the possession of the prosecutor when he or she made a decision about whether and how to proceed with a case. This included a police report, criminal record of the victim and suspect, and information regarding a meeting with the victim.

Research Sites

The research sites included three District Attorney’s Offices in two different states (Table 1 provides a breakdown of the characteristics of the offices). All three offices are prosecutors’ offices responsible for a specific county within their state. Two of the offices are much larger, employing between 60 and 80 prosecutors. The third office employs only 12 prosecutors. In addition, the county with the smaller number of prosecutors also has a significantly smaller total population. The two offices in the same state both have populations over 600,000 and less than 800,000. The third office is responsible for a population of only
159,000. Similarly, however, all offices are located in primarily urban areas. Finally, in all three offices the District Attorney is an elected official.

Table 1. Characteristics of Offices

<table>
<thead>
<tr>
<th>Offices</th>
<th>Number of Attorneys</th>
<th>Sexual Assault Unit</th>
<th>Population of County</th>
</tr>
</thead>
<tbody>
<tr>
<td>State A, Office 1</td>
<td>80</td>
<td>Yes (7 total)</td>
<td>800,000</td>
</tr>
<tr>
<td>Jones</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>State A, Office 2</td>
<td>63</td>
<td>Mixed</td>
<td>670,000</td>
</tr>
<tr>
<td>Nolan</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>State B</td>
<td>12</td>
<td>No</td>
<td>160,000</td>
</tr>
<tr>
<td>Roland County</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Research sites were initially chosen based on likelihood of access. I was concerned that access might be challenging because my goal was to discuss sexual assault cases. My concern was that the office would not be receptive given the subject matter. The reasons I had for this concern are based primarily on my experience as a prosecutor. Not only was I very protective of the victims with whom I worked, but the office I worked for instilled in me the importance of protecting the privacy and confidentiality of all sexual assault victims. To this end we filed numerous motions in court to protect the victim’s identity as an added layer of protection beyond the state laws that require sexual assault victim’s identity not be revealed. Finally, in the office where I was employed as a sexual assault prosecutor I was part of a specialized unit that focused on sex crimes exclusively.

In the office where I worked the sexual assault unit was cloaked in a sort of veil of exclusiveness. No one in the office was to handle a sex crime, no matter the issue, whether it was an arraignment or a discussion with a police officer about the investigation, unless he or she was part of the unit. There were even jokes about the sexual assault unit being like a highschool clique that no one could penetrate. Based on all of this, when I designed the study my main

---

7The population is a round number so as to protect the identity of the research sites.
concern was getting access to prosecutors that regularly handle sexual assault cases. My hope was that once I gained access, I would be able to establish a rapport with the prosecutors that would allow them to open up to me. I believed that given my experience as a prosecutor, my legal training, and my understanding of the rules and ethics of lawyering, the prosecutors would trust me given these facts.

My initial fears were realized when the first office I contacted declined my request to participate in the study. Although I assured them I was not going to ask about their current cases, this message did not seem to get through. They told me they did not want their prosecutors discussing sexual assault cases out of concern that defense attorneys could make requests that I be interviewed since I might have discoverable information. I thought this reason to make little sense, but it was clear from the start they would not participate.

The second office I contacted agreed to allow their prosecutors to be part of the study. This site was selected based on accessibility. I utilized a former professional colleague, a defense attorney I worked with when I was a prosecutor. He was able to get me access to the office and put me in contact with key decision makers, or people who would decide whether I could meet with the sexual assault prosecutors. Although this site was chosen based on accessibility, during the interviews it was clear there would be a limited population of prosecutors to interview. The reason for this was the small number of prosecutors regularly handling sexual assault cases. As I interviewed these prosecutors I was able to continuously consider what “type” of office would be good to approach as a second or third office.

Since the first office I interviewed had a specialized sexual assault unit, strict policies for prosecuting sexual assault cases, and only allowed experienced prosecutors to handle sexual
assault cases, I believed finding another office that varied in these respects might allow for exploring comparisons between the offices.

The second office I chose was also chosen based on the possibility of access since I utilized a former professional colleague to gain access there as well. However, it was also chosen because I knew it varied in many respects, from the first office. The main difference was how the office handled sexual assault cases. Finally, after completing many of the interviews in the first two offices, I realized based on conversations with lawyers that the legal standard for charging and presenting evidence to the grand jury for indictment differed between jurisdictions. Based on this knowledge I believed it would be beneficial to interview prosecutors in a different state. I then chose to approach an office that employed a small number of prosecutors and did not have strict sexual assault prosecution policies. The existing research purports to explain how all prosecutors make decisions, thereby generalizing the behavior of prosecutors regardless of the many differences that exists between offices and states. By interviewing prosecutors in three different offices, in two different states, that utilize varying policies and procedures to handle sexual assault cases I hoped to uncover whether generalizations might be incorrect.

Data Collection

Prior to beginning data collection, I requested and received permission from the University’s Institutional Review Board (IRB) to conduct this research. IRB approval was granted in November of 2011.

Sample

As discussed, I utilized a professional contact, a former defense attorney with whom I had been acquainted when I was a prosecutor, to make initial inquiry at the Jones County District
Attorney’s Office⁸, the first office that provided access to their prosecutors. I simply contacted him and described the study briefly, asking if he would be willing to discuss it with me in more detail. He agreed, and we communicated via electronic mail several times regarding the study. This particular individual held the title of First Assistant to the District Attorney. After agreeing to participate in the study he explained the general structure of the office and gave me the contact information for the chief of the sexual assault unit.

The First Assistant told me I could contact whomever I chose in his office and it would be their choice as to whether or not they wished to participate. I then contacted the chief of the sexual assault unit who agreed to provide access to her group of prosecutors for interviews. She gave me the contact information for all members of the sexual assault unit. All agreed to participate. In addition, I contacted an ADA who was not a member of the sexual assault unit but who handled adult sexual assault cases. I learned that there were only five members of the sexual assault unit and that several other attorneys in the office regularly handled felony sexual assault cases. Two additional attorneys were in the hiring process and on the cusp of joining the sexual assault unit at this time. Given their lack of experience they would not be good subjects for this study. A prosecutor was eligible for participation if they regularly handled felony sexual assault cases.

I used the same method of initial contact for each subsequent office. All three offices agreed to allow me access to their attorneys with the caveat that it be up to the particular attorney whether he or she wished to participate. In total 23 prosecutors were asked to participate and 23 agreed. The gender of the prosecutors interviewed was almost evenly divided. Prosecutors had a wide range of experience, from two to 24 years. The complete information regarding years of

⁸Pseudonyms are used to protect confidentiality.
experience, title, experience handling sexual assault cases, and gender can be found in Tables 2, 3, and 4. In addition all 23 prosecutors agreed to have their interviews audio recorded.

Table 2. Jones County District Attorney’s Office

<table>
<thead>
<tr>
<th>Name</th>
<th>Gender</th>
<th>Title</th>
<th>Experience</th>
<th>SAU</th>
<th>Years SAU</th>
<th>Prior / Other Experience</th>
</tr>
</thead>
<tbody>
<tr>
<td>001</td>
<td>Female</td>
<td>ADA</td>
<td>10 years</td>
<td>No</td>
<td>N/A</td>
<td>None¹¹</td>
</tr>
<tr>
<td>002</td>
<td>Male</td>
<td>First Assistant ADA</td>
<td>9 years</td>
<td>No</td>
<td>N/A</td>
<td>Defense Attorney</td>
</tr>
<tr>
<td>006</td>
<td>Female</td>
<td>ADA</td>
<td>12 years</td>
<td>Yes</td>
<td>4 years</td>
<td>None</td>
</tr>
<tr>
<td>007</td>
<td>Female</td>
<td>ADA</td>
<td>10 years</td>
<td>Yes</td>
<td>5 years</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>009</td>
<td>Female</td>
<td>Chief, SAU¹²</td>
<td>17 years</td>
<td>Yes</td>
<td>12 years</td>
<td>None</td>
</tr>
<tr>
<td>010</td>
<td>Male</td>
<td>ADA</td>
<td>6 years</td>
<td>Yes</td>
<td>3 years</td>
<td>General Practice</td>
</tr>
<tr>
<td>011</td>
<td>Male</td>
<td>ADA</td>
<td>2 ½ years</td>
<td>Yes</td>
<td>6 months</td>
<td>None</td>
</tr>
</tbody>
</table>

Table 3. Nolan County District Attorney’s Office

<table>
<thead>
<tr>
<th>Name</th>
<th>Gender</th>
<th>Title</th>
<th>Experience</th>
<th>SAU</th>
<th>Years SAU¹³</th>
<th>Prior Experience</th>
</tr>
</thead>
<tbody>
<tr>
<td>013</td>
<td>Male</td>
<td>ADA</td>
<td>10 years</td>
<td>No</td>
<td>1 year</td>
<td>None</td>
</tr>
</tbody>
</table>

¹⁹ The prosecutors and their respective offices names are confidential. As a result the names of these offices are pseudonyms.
¹⁰ ADA is an abbreviation for assistant district attorney, the common title for these criminal prosecutors.
¹¹ “None” indicates the prosecutor began working for the District Attorney upon graduation from law school. Many of these individuals began as interns.
¹² SAU is an abbreviation for sexual assault unit.
¹³ In Nolan County the office was transitioning from a SAU that included the only members of the office allowed to handle sexual assault cases to an office with a specialized unit, but also the assignment of these cases to other ADAs. As a result the category “Years SAU” includes years in the SAU or simply years of experience handling sexual assault cases.
<table>
<thead>
<tr>
<th>#</th>
<th>Gender</th>
<th>Title</th>
<th>Experience</th>
<th>SAU</th>
<th>Years SAU</th>
<th>Prior Experience</th>
</tr>
</thead>
<tbody>
<tr>
<td>014</td>
<td>Female</td>
<td>First Assistant ADA</td>
<td>24 years</td>
<td>No</td>
<td>20 years(^\text{14})</td>
<td>None</td>
</tr>
<tr>
<td>015</td>
<td>Female</td>
<td>Chief SAU</td>
<td>20 years</td>
<td>Yes</td>
<td>16 years</td>
<td>Rape crisis counselor</td>
</tr>
<tr>
<td>016</td>
<td>Male</td>
<td>ADA</td>
<td>13 years</td>
<td>No</td>
<td>N/A</td>
<td>None</td>
</tr>
<tr>
<td>017</td>
<td>Female</td>
<td>ADA</td>
<td>5 years</td>
<td>Yes</td>
<td>3 years</td>
<td>None</td>
</tr>
<tr>
<td>018</td>
<td>Female</td>
<td>ADA</td>
<td>15 years</td>
<td>Yes</td>
<td>10 years</td>
<td>Victim advocate</td>
</tr>
<tr>
<td>019</td>
<td>Male</td>
<td>Chief of District Court</td>
<td>13 years</td>
<td>No</td>
<td>N/A</td>
<td>Defense attorney</td>
</tr>
<tr>
<td>020</td>
<td>Female</td>
<td>ADA</td>
<td>8 years</td>
<td>Yes</td>
<td>5 years</td>
<td>None</td>
</tr>
</tbody>
</table>

**Table 4. Roland County District Attorney’s Office**

\(^\text{14}\) This prosecutor worked in the SAU for 20 years before taking the position as First Assistant to the District Attorney, the highest ranking position within the office after the District Attorney.
Interviews.

In total, data collection took approximately 15 months. Interviews in Jones County were completed within a short time frame. The interviews began in December of 2011 and were completed by the end of January 2012. In Jones County I wanted to interview all members of the sexual assault unit because it was a small group, including five individuals. All but one of the interviews in Nolan County was completed between March and April of 2012. I had some difficulty scheduling the final interview due to the subjects’ schedule. It was finally completed in September of 2012. In Roland County all but two of the interviews were completed between December of 2011 and September of 2012. Two final interviews were met with scheduling issues and were not completed until April of 2013. Some of the scheduling issues included my need to travel a significant distance to the office, as two of the offices were in one state and the other office in a different state. Additionally, issues included scheduling interviews with the prosecutors who held supervisory positions. These people were very busy. Finally, it was very difficult to schedule with the District Attorney who was willing to meet with me.

Each interview took place in a room with a closed door, often the prosecutor’s personal office. The interviews ranged from the shortest of 45 minutes to the longest being 90 minutes. The average interview took approximately 70 minutes. Prior to the interview the subjects received, via e-mail, an explanation of the study, informed consent form, and four hypothetical scenarios.16

---

15 There were two other individuals assigned to the sexual assault unit who were not interviewed because they were only assigned to the unit during the prior week. Therefore, when I first began interviewing these prosecutors were in their second week in the sexual assault unit. As a result, they did not meet the criteria for participation because they did not regularly handle felony sexual assault cases.

16 See Appendix 1 for the hypothetical scenarios.
Upon meeting the subjects, the consent form was reviewed and signed, and the subjects were asked whether they would consent to the interview being audio recorded. All except three of the prosecutors did not skip a beat when I asked that the interview be recorded. Three prosecutors needed extra reassurance that their responses would be confidential and could not be traced to them. I explained that I would be using pseudonyms, describing the office in such a way that it could not be identified, and that I would be keeping all recordings on a locked and password-protected computer until the project was complete, at which point they would be destroyed.

One prosecutor was very knowledgeable about current research related to prosecutors. This surprised me. It was for this reason that she was the most reluctant. Based on her disdain for the research community based on what she thought were laughable conclusions, she was originally less than thrilled at participating and having her interview recorded. As time went on, perhaps because I was a former prosecutor, she loosened up and we had a fruitful discussion. One of the other prosecutors wanted simply to know whether everyone else agreed to recording. When I said yes, they had, she readily agreed. The final prosecutor to show some hesitation and was the last member of the group from the entire sexual assault unit to be interviewed. He seemed as if he was only participating because everyone else did and this created some peer pressure. He was not as engaging as the other members in his office.

Overall, I found the prosecutors to be engaging and open. Of course, there is no way for me to know whether they were, in fact, open and honest. However, aside from the prosecutors I mentioned, each interview felt more like a discussion with a person I was getting to know. It felt as if rapport was established easily. This could be due in part to the fact that all of the prosecutors knew I was a former prosecutor. In some cases, this was due to the fact that I told
them as soon as our conversation began. In others the prosecutor learned through someone that I already interviewed. During the conversations there were times when the prosecutor would say “well, you know . . .” or “I don’t know how you did it where you worked, but here . . . .” In many cases it was clear we were speaking the same language, so to speak. One example from a discussion with one of the prosecutors in Jones County illustrates this point:

Q: What do you feel like it [a sexual assault case] usually looks like?

A: (laughs) Like most of your scenarios. (laughs)

Q: So you find these to be realistic?

A: *Oh, absolutely.* I mean, I was joking, but I was actually talking to [another prosecutor], the woman you are interviewing as well, and I was like “I don’t know about you but I could put names on these.” (laughs)

Q: (Laughs)

A: She’s like “I know I feel like she went through my file cabinet,” cause this truly is the case. I mean these are the kinds of stories we deal with every single day.

We were able to talk and laugh because I understood the difficulties of prosecuting sexual assault cases. There was a lot of laughing because I got along very well with these people. Prosecuting persons charged with a sexual assault crime is a very challenging and draining job. Prosecutors must engage in some comic relief in order to deal with the day-to-day stress of meeting with children who have been molested and adults who have been raped. There is little reward.

I created vignettes that were representative of the cases these prosecutors deal with every day and I was part of the club because I knew how challenging the cases could be. I did not present them with scenarios that were not part of their experience. Instead I understood, as they told me, that “most cases suck.” I believe by doing so, they trusted me, and this allowed for a
connection. The connection provided the opportunity for them to speak freely and openly. In some cases, it allowed us to connect and allowed the interviewee to provide a response they might not have otherwise offered. For example, in this portion of an interview with a Jones County prosecutor we were discussing conviction rates and taking cases to trial:

Q: Sort of, it was, you know, I knew who in the sexual assault unit, there was like a running joke about this one woman, the things that she would do to get out of having to try a case and some, I remember one of the advocates like having worked there for six years saying “I’ve never even heard of her going to trial” and you know it was like everyone knew that she was gonna try and talk a victim out of it or whatever she had to do to get out of trying a case and then there were people who it didn’t matter if they were going to be able to convince a jury that someone, they would take it anyway.

A: Yeah I think we have the same thing. I think everyone has their units and then I think certain people get the more difficult cases that come along and that’s just the nature of the business. Along that same line there used to be a superior court prosecutor and the person he reported to called him Zeus cause every time his case got ready for trial he said that Zeus would come down and throw a lightning bolt at his case and ruin his case so he couldn’t go to trial cause there was something wrong with his case EVERY single time it was ready for trial. So, I agree with that one hundred percent.

Specifically, the interviews loosely followed an interview instrument that was meant to aid in the discussion.\textsuperscript{17} As the previous example demonstrates, I was able to include some of my personal experience. Therefore, I did not strictly follow the interview guide. The interviews, therefore, were semi-structured and followed the subject in the directions they chose to go. Some areas were specifically addressed, however, so as to probe the specific research questions. For example, prosecutors were asked about the case review process, promotion process and decision-making, and the strengths and weaknesses in sexual assault cases. In addition, we discussed, generally toward the end of the interview, the vignettes.

\textsuperscript{17} See Appendix 2 for the interview instrument.
I continued interviewing prosecutors in each office until reaching saturation. Saturation occurs when new subjects are not offering any new information, or adds too little (Weiss, 1994). After interviewing the entire sexual assault unit in Jones County, I knew there was nothing to add by interviewing additional prosecutors in the office. In the other two offices I interviewed prosecutors until continuing to do so included new subjects clearly adding little to justify the additional time. I only stopped when I was certain there was sufficient data to address the research questions.

Vignettes.

The vignettes provided a very useful tool to discuss and expand upon the issues prosecutors see in sexual assault cases. My experience as a prosecutor allowed me to use prior knowledge of real sexual assault cases as I developed the hypothetical scenarios. In fact, the scenarios are loosely based on cases I was either assigned as a prosecutor or had some knowledge of during my career. The latter would be cases I either heard about within the sexual assault unit, or cases that I watched during trial. The goal of the vignettes was to provide a realistic set of facts to the prosecutors so as to give us real cases to talk about without needing to ask the prosecutor about their actual cases. All of the prosecutors were asked whether they found the vignettes to be realistic. All responded that they were. As in the previous interview excerpt, the prosecutors readily agreed. For example, as the Jones County prosecutor explained:

Q: So, did you think that they were realistic?
A: Oh my God, yeah. I probably had every one of these. That’s why [ADA name] and I were like, talking about it and I go “I have every one of these in my file cabinet right now, should I pull ‘em out and bring ‘em to the meeting or what?” (Laughs)
I knew the prosecutors, out of fear of disclosing sensitive information, possible concerns over evidentiary discovery rules, ethical concerns, or myriad other factors, would not be inclined to discuss their real cases. The vignettes gave me the opportunity to discuss both realistic cases and the variables that are currently examined in the existing literature. Tables 7 and 8 show excerpts from vignettes accompanied by the key variable to be examined. The highlighted portion shows the important text. This text, I hypothesized would be mentioned by the prosecutor as a key factor in charging and prosecuting the case. In Table 6 I show the variables that have been examined in previous studies and the variables I include in my vignettes. The vignettes are meant to contain all of the information a prosecutor is likely to have prior to charging a criminal case. I based this on my experience as a criminal prosecutor. As a result, the vignettes include the police report, the criminal record of both the victim and the defendant, and the victim’s current position as to cooperation or participation. A brief synopsis of the vignettes is shown in Table 5.

**Table 5. Summary of Vignettes**

<table>
<thead>
<tr>
<th>Vignette</th>
<th>Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>#1 “Teenager at a party”</td>
<td>Girl alleges she was held down by a classmate and forced to have intercourse with a different classmate when she was 14 years old. The incident took place at a party. Victim was drinking alcohol. One month after the incident the victim willingly engaged in intercourse with the perpetrator. The victim reported the incident to the police one year later.</td>
</tr>
<tr>
<td>#2 “College student”</td>
<td>A 20 year old female college student alleged she was raped by a male college student she met at a college party. She agreed to go back to the male’s dorm room, but says she told him she would not have sex with him. The two engaged in mutual kissing and touching but she alleges she told him to stop when he began intercourse. She reported the incident to the police about one month later. The perpetrator made a statement to the police admitting to intercourse, but claiming it was consensual.</td>
</tr>
<tr>
<td>#3 “Craigslist meeting for drugs”</td>
<td>The victim met a man on craigslist. She agreed to meet him to perform oral sex in exchange for both cocaine and money. She met the man and began performing oral sex when the man took out a knife threatening her if she did not get in the back seat. She complied. He then engaged in forcible...</td>
</tr>
</tbody>
</table>
intercourse. As he did so he beat her. The victim was bloodied and bruised as she exited the car. She was seen by two teenagers and her screams were heard by neighbors. An ambulance was called to the scene. The victim was taken to the hospital where she submitted to a rape kit, photographs, and medical treatment. The DNA was a match to the defendant. The defendant has a criminal record that includes sexual assault.

#4 Teenager assaulted by church pastor”

The victim reports to the police that she was sexually assaulted by her pastor ten years earlier. She alleges she was approximately fourteen when she began spending a lot of time with her church pastor who was in his twenties at the time. During their time together they kissed, he touched her breasts, and penetrated her vagina with his finger. The victim explained that she was coming forward now because she knew the defendant still worked with youth and had three young children.

<table>
<thead>
<tr>
<th>TABLE 6. Explanatory Variables</th>
</tr>
</thead>
<tbody>
<tr>
<td>Explanatory Variables in Sexual Assault Cases</td>
</tr>
<tr>
<td>CASE CHARACTERISTICS</td>
</tr>
<tr>
<td>Seriousness</td>
</tr>
<tr>
<td>Evidence</td>
</tr>
<tr>
<td>VICTIM CHARACTERISTICS</td>
</tr>
<tr>
<td>Risk Taking Behavior</td>
</tr>
<tr>
<td>Moral Character</td>
</tr>
<tr>
<td>PROSECUTOR’S CONSIDERATIONS</td>
</tr>
<tr>
<td>Ethics</td>
</tr>
<tr>
<td>Victim Cooperation</td>
</tr>
</tbody>
</table>

NOTE: Variables that are underlined and bold are variables that are examined in the study and have also been examined repeatedly in previous studied. Variables that are only underlined have not been examined in previous studies. Variables that are neither underlined nor bold are the variables that I did not include in this study based on their being outdated.
### TABLE 7. Hypothetical Scenario #1 Summary with Variables.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Hypothetical Scenario #1</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alcohol</td>
<td>Jane explained that during the summer of 2010 when she was fourteen years old she went to a party with some of her friends. At the party were Dave and Alex, both seventeen years old at the time. Alcohol was provided at the party and Jane said she had a couple of drinks of rum and coke.</td>
</tr>
<tr>
<td>Delay in Reporting</td>
<td>When the group returned from the pool Jane said she wanted to leave and go home. She left with a friend. The two walked home together. I asked Jane if she told her friend what happened and she said she had not. I asked her why and she said she did not know. A few weeks later Jane says she was having an online conversation with a friend. She told that friend what had happened. The friend told her she needed to tell her parents. She made her friend promise not to tell anyone.</td>
</tr>
<tr>
<td>Rape Relevant Behavior</td>
<td>She says she had sex with Dave at the party but that she was a willing participant. When asked why she would do that with the person who raped her she dropped her head and started to cry. She said “I thought it would make me feel better. I mean I thought it would make the other time go away, like it wasn’t really rape if I had sex with him and wanted to.”</td>
</tr>
</tbody>
</table>

### TABLE 8. Hypothetical Scenario #4 Summary with Variables.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Hypothetical Scenario # 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prostitution</td>
<td>When interviewed the victim stated she had posted an ad on craigslist and had met the man after speaking to him on the phone. She indicated she had done this on at least a dozen other occasions and had never had a problem. She agreed to meet the man and perform oral sex.</td>
</tr>
<tr>
<td>Prior sexual conduct</td>
<td></td>
</tr>
<tr>
<td>Moral character</td>
<td></td>
</tr>
<tr>
<td>Physical injury</td>
<td>Photographs were taken of her injuries. She had bruising on her face, arms, torso, and upper thighs.</td>
</tr>
<tr>
<td>Drug and alcohol use</td>
<td>Her blood alcohol content was .18. Blood tests also revealed cocaine.</td>
</tr>
<tr>
<td>Victim Cooperation</td>
<td>When the defendant was arrested the victim came to the office for a meeting. She said she wasn’t sure she could participate in the prosecution of the defendant. After that meeting the victim has disappeared. Several people have attempted to locate her, including police, and she cannot be located.</td>
</tr>
<tr>
<td>Corroboration Witnesses</td>
<td>He got out of the car and walked over to her. He held the knife out and grabbed her purse from her. At the time there were two teenagers who had just entered the area of the elementary school. The two teenagers told police they saw a man steal a purse from a woman who was lying on the ground. It looked like he had something in his hand when he took it. They were too far away, however, to see her injuries. The teenagers said the man then got in the car and drove off.</td>
</tr>
</tbody>
</table>
Vignettes were provided to the prosecutors as an attachment with the e-mail I sent to them prior to the interview. It was expected that they would have read the vignettes prior to our meeting. Generally during the interview, the vignettes would be discussed last. However, I found the content of the vignettes often came up in the course of the conversation, without my asking specifically about them.

**Transcription of interviews.**

I transcribed all of the interviews verbatim. This resulted in more than 400 pages of single spaced text. I began transcribing interviews during the Spring of 2012. Transcription of all 23 interviews was completed in May of 2013. All of the interviews have been transcribed with the use of pseudonyms. I created a list of all interviewees and applied a number so as to protect confidentiality. For prosecutors who were mentioned frequently, such as supervisors, I created pseudonyms so that I would be able to follow who the speaker was. For example, in one office the sexual assault unit chief was mentioned so frequently that I needed to create a name for her so that I could follow the transcript. I did this to protect her confidentiality. All of the interview transcripts use only the number that I assigned to each interviewee or the pseudonyms. This was done to protect confidentiality when the transcripts were printed during analysis.

**Data Analysis Strategy**

This dissertation relied on qualitative analytical methods that are both inductive and deductive. Many of the research questions focused on examining the continued validity of previous findings. As a result, the research used a deductive approach. However, I also examined areas in such a way so as to follow the data wherever it led. This is possible through use of an inductive approach. These methods are of tremendous benefit because they allow the
researcher to focus on specific questions and to test the validity and reliability of existing research and theories.

Data analysis in a qualitative study often includes many steps. Immediately following each interview, I made written notes about the interview in a small book that I carried. These notes were important because they reflected my initial impressions and allowed me to adjust my questions for the next interview. This was especially important because I did not always have time to transcribe one interview before the next. This step of writing notes was the first, albeit preliminary step in my analysis. Insights and questions may develop during this initial step (Weiss, 1994). There is no reason to wait until all data is collected to begin analysis. In fact, I would have found that an almost impossible task. Once the interviews were taking place I was already thinking about common threads and speculating about the existence of themes.

The second step in the analysis occurred during transcription. While transcribing the interviews I again made written notes. These notes would later assist me in coding the interviews. As I transcribed, I took notes in my notebook about anything that was surprising, interesting, or important to ask in future interviews. Once the interview was transcribed it was printed so that I had a hard copy.

Each printed interview was read in its entirety. Again, I made notes as I read the interview. This is also the time at which I realized many interviewees were mentioned numerous times and I needed to create pseudonyms for them. This required making changes to the interview that was stored on my computer, adding a pseudonym and re-printing the interview so as to protect the identity of the individual prosecutors and their offices. Therefore, some of the note taking was aimed at keeping track of the speakers, and some note taking again allowed me to alter future interviews and ask additional questions. For example, I began to realize
prosecutors did not agree that a high conviction rate was the appropriate measure of success in a sexual assault case. The logical question to ask then is, what is success in a sexual assault case? This is an example of being open to wherever the data may lead. I began asking this question of the prosecutors so as to collect enough data to examine the question of what constitutes success in a criminal case. In the next sections I offer an in-depth discussion of the analytical process.

**Inductive analysis.**

In this study I used both an inductive and deductive approach to the analysis. The inductive approach allowed for exploration of data with no set hypotheses. Often the inductive approach is exploratory and not aimed at testing hypotheses. Such areas require a grounded theoretical perspective utilizing an open and inductive analytical approach (Glaser & Strauss, 1967). Since I used an interview instrument as a guide, but not as a strictly required set outline, I hoped to uncover additional data that are not the focus of set questions.

Research aimed at examining prosecutors’ decision making in sexual assault cases has long used the same set of variables. As a result, a grounded theory approach was essential so as to uncover variables that currently affect prosecutors’ decision-making. Using a grounded theory approach, I engaged in inductive and open coding, allowing the analysis to follow the path the data set out. In doing this type of data analysis, the researcher must become “grounded” in the data and follow analytic induction to allow themes to emerge (Glaser & Strauss, 1967).

In this study, the inductive method and open coding provided the opportunity for me to remain open to all of the prosecutors’ potential motivations related to decision making. Although my experience helped inform my creation of the vignettes and the research questions, this approach allowed me to consider the transcripts without preconceived notions or hypotheses. In this way, themes emerged from the data and I followed these themes to create theoretical
explanations for prosecutors’ decision making. One example illustrates this method of analysis.

As I reviewed the transcripts it became clear that prosecutors attempt to develop a strong relationship for their victims.

A: . . . knowing what would have happened to her on the stand I wouldn’t have put her through that process unless that is what she wanted to do.

Q: It sounds like you didn’t think it would have been successful at trial.

A: No, I don’t think it would have been successful but again I don’t, especially for these kinds of cases, I don’t think conviction versus acquittal is the measuring stick. I wouldn’t have been devastated if there was an acquittal in the case, I was more worried about what was going to happen to her on the stand because the statements that she had made, the first complaint statements, everything that I was, couldn’t prevent from coming in through cross examination I thought would be very emotionally disabling for her, I thought she was in a very good place now, or at least a better place now, . . . there was a lot of negative things that would come out. Her actions at the party, her actions with other partygoers would have come out, and it would have been a negative experience.

This excerpt illustrates the use of the inductive method because, although we are discussing the likelihood of conviction, a topic I clearly set out to discuss and analyze, the prosecutor is clearly expressing her care for the victim. Although I did not set out to examine the possibility of prosecutors expressing care and concern for the victim, this theme emerged from the data. Since I was open to new ideas, explanations, and variables, I was able to allow themes such as the care and concern for victims to emerge.

**Deductive analysis.**

The deductive approach is a method of qualitative research that generally is aimed at testing hypotheses. In this study I set out to examine the continued utility of the uncertainty avoidance thesis. In addition, I set out to examine the variables that researchers have been studied in sexual assault cases for many years. As a result, a deductive approach was necessary.
Deductive analysis allowed me to approach the data while considering the already agreed upon variables.

The use of a semi-structured interview guide and vignettes allowed me to use the deductive approach. The semi-structured interview guide included specific questions meant to probe prosecutors’ decision making. It also included questions aimed at uncovering the methods used in promoting prosecutors and whether prosecutors consider conviction rates to be important for success as a prosecutor. Therefore, direct questions were asked about these issues. For example, this section of the interview protocol is a portrayal of the deductive approach.

**Uncertainty Avoidance.**

*issue: Do prosecutors make charging decisions in sexual assault cases based on their concerns for convictions and upward mobility within the office?*

a. **General Questions**
   Take me through the typical case review process. At what stage of a case do you review it? Who makes the decision whether to charge? Do you discuss with a supervisor? Who has the final say? What steps are taken before the final decision is made?
   1. What factors affect/contribute to the final decision?
   2. When you decide to charge a case what are some of the typical reasons for doing so?
   3. When you decide not to charge a case what are some of the typical reasons for not doing so?
   4. *issue = Is whether or a not a conviction can be achieved a factor in charging? Question = what considerations about the potential result of the case come into play when you are deciding whether to charge?*
   5. What level of sufficiency is needed for charging?
      a. Trial, conviction, probable cause
   6. Have you ever prosecuted a defendant at trial who was acquitted?
      When a defendant is acquitted at trial how do you typically feel? What factors impact your reaction to the result?
   7. When you prosecute a case at trial and the defendant is acquitted, how do you feel that is viewed by your supervisor and your superiors within the office?
Asking specific questions aimed at specific hypotheses was an important part of this study. Engaging in deductive analysis of the data related to the uncertainty avoidance thesis would necessarily involve asking specific questions and reviewing the transcripts for answers to the questions in the interview guide. I also created a list of headings, later turned into codes, so that I had a list of the ideas and theoretical concepts I was searching for in my analysis. These headings or initial codes were directly related to the questions in the interview guide.

In addition, although the vignettes included new variables, the vignettes include some of the variables commonly found to influence prosecutors’ decisions (See Table 6). In this study, this part of the analysis is necessary to examine the “already agreed on professional definitions found in literature reviews” (Ryan & Bernard, 2003, p. 88). In essence the researcher is able to ask the same questions as researchers who used a quantitative analytical approach. For example, using this approach I was able to examine whether the prosecutors’ decisions were affected by the same variables that other researchers have found to influence charging decisions.

The next step in the analysis was coding the data. As a qualitative study relying on both inductive and deductive methods, coding was done with an eye toward examining the continued validity of previous findings, and also without any preconceived notions of the research.

Coding.

Coding is a method of organizing data and is part of the analytical method because it begins the process of discovering themes (Lofland, Snow, Anderson, & Lofland, 2006; Ryan & Bernard, 2003). The initial coding of the interviews began with a reading of the transcripts. As I read each transcript I made notes on the page, added color coded tabs to identify possible codes, and continued to make notes in my notebook. By taking these steps, when I was at the point for coding the data and organizing it, I was confident of the codes and organization. This
final step in coding included creating two separate documents using Microsoft Word. The first document is a “coding sheet” for each prosecutor’s office, as shown below. This sheet includes the list of codes and a list of the interviewees and line number where the text falls under the code. An example of such a coding sheet can be found in Table 9 as follows:

Table 9. Example of Coding Sheet

<table>
<thead>
<tr>
<th>Theme: Charging Consideration / Standard</th>
<th>Codes</th>
<th>Transcript Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>Future oriented thinking</td>
<td>WDA002, 197-201; 128-136; 365-372</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA011, 505-518; 315-322</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA001, 303-308</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA006, 466-467</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA009, 138-141</td>
<td></td>
</tr>
<tr>
<td>Ethics</td>
<td>WDA007, 439-483</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA002, 271-296</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA011, 312-322; 470-487</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA006, 466-467</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA001, 191-200</td>
<td></td>
</tr>
<tr>
<td>Standard</td>
<td>WDA002, 123-136; 271-296; 365-372</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA011, 312-343</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA001, 191-200</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA009, 156-160</td>
<td></td>
</tr>
<tr>
<td>Fairness to defendant</td>
<td>WDA007, 516-533</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA001, 191-200</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA006, 466-467</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA009, 141-145</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA007, 2-11; 100-102; 204-210; 257</td>
<td></td>
</tr>
<tr>
<td>Prosecutor’s personal view/concerns</td>
<td>WDA007, 2-11; 100-102; 204-210; 257</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA002, 189-201; 365-372</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA011, 505-518; 312-322; 481-487</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA006, 421-424; 878-994</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA007, 257</td>
<td></td>
</tr>
<tr>
<td>Victim’s Willingness to Participate</td>
<td>WDA007, 200-210; 119-121; 269-274; 516-533; 533-538</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA002, 68-78; 189-201; 169-180</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA001, 182-183; 573-577</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA006, 456-467</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA010, 230-258; 560-561; 905-9</td>
<td></td>
</tr>
<tr>
<td>Topic</td>
<td>References</td>
<td></td>
</tr>
<tr>
<td>------------------------</td>
<td>-------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>Credibility of Victim</td>
<td>WDA007, 257; 276-281; 629-635</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA011, 312-322</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA006, 421-428; 290-298</td>
<td></td>
</tr>
<tr>
<td>Public Safety</td>
<td>WDA006, 604-608</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA009, 303-319</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WDA007, 533</td>
<td></td>
</tr>
</tbody>
</table>
The text that is referenced in the coding sheet is also contained in a separate document that I titled “Coding Sheet Cut and Paste.” This document includes all of the text that has been coded under the specific code. Therefore, in the example provided, in this particular office, the prosecutors discussed the charging standard and considerations for charging. These considerations included future oriented thinking, ethics, the legal standard, fairness to the defendant, their own personal view or concerns, the victim, the victim’s credibility, and public safety. Some researchers call these parent nodes and child nodes. In this case “charging considerations” is the parent node, and the considerations are child nodes. One such child node is “standard for prosecution.” An example of the document I created for all the codes and corresponding text is shown in the example below. For each code all of the corresponding text was cut and pasted underneath that code. I created cut and paste documents for every code. The excerpt used to display an example follows:

**CODE: Standard For Prosecution**

Q: So why do you use that standard, beyond reasonable doubt? Like, why is that, what it has to pass for you?

A: Because I, well I use the standard beyond reasonable doubt because I think that’s my mandate. I mean I think that, we as prosecutors, that’s what we do. I mean if we can’t prove it beyond a reasonable doubt we shouldn’t be charging. (WDA009, 156-160)

---

Q: So, when a case is charged, you said you get involved in some of the sexual assault charging in superior court, is there a certain level of the evidence that you feel like there needs to be, as far as, you know, probable cause versus can we get a conviction beyond a reasonable doubt, that kind of thing?

A: I think before it’s charged in Superior Court you should have a reasonable belief that you can prove it beyond a reasonable doubt. If you can’t, if you don’t think before you actually bring a charge that you actually can convince a judge or jury 18 months from now that this happened, then you shouldn’t indict that case.
Q: So, there is, are you sort of looking forward to see can I really convince 12 people or whatever it might be? Six people?

A: That’s right. *(WDA002, 123-136)*

---

Q: So, do you ever find as a prosecutor that there might be a difference between, you might find yourself in a situation where you speak to a victim or you read a report and in your mind you believe the event, but you have concerns about whether a jury will believe the event.

A: That’s right. You need to have good faith that you can get a conviction in front of a jury. And that’s not counting statistics. That’s your ethical obligation to believe you can prove the case beyond a reasonable doubt. And I’m trying to think of a good situation a good example of that with sexual assault cases, nothing comes to mind with sexual assault cases right now, but I’ve certainly had shooting cases where I’ve thought to myself I know that this person did it because they admitted to firing the bullets, but I also know by looking at the tape of their interview Miranda wasn’t properly given and we’re never gonna get that in front of a jury, and therefore with the evidence we have, even though we know he did it, it’s a not guilty and I can’t move that case forward.

Q: Do you find that difficult?

A: I do but you gotta realize that if you don’t follow the ethical rules, if you’re just making decisions based on what your heart tells you, that’s not what the system is set up. That’s not the way it should work because they’re supposed to have protections as defendants. We’re supposed to be, I know this sounds corny, I had a totally different role as a defense attorney, I was supposed to be a zealous advocate for my client. I could be sitting there and he could be telling me that he did this terrible thing and that would mean that there were certain defenses I couldn’t use, but that didn’t mean that I couldn’t go outthere and try to do the best I could to get him a not guilty. As a prosecutor I’m supposed to be working in the interest of justice, so the interest of justice does not, means I have to follow the rules, I have to get ‘em, not only do I have to get a conviction on that person I have to get it the right way. Okay, so. *(WDA002, 271-296)*

---

MK: You said that you believed her, do you find that, I know you’re thinking about what you believe, are you also thinking, I now you also said you’re thinking what the jury might believe?

A: And in that case I thought I could convince the jury to believe her, I thought there was enough circumstantial evidence, and enough motive
evidence, and reason why she would come forward, and just like this case, there were injuries, so you had the corroboration, so yeah I guess the first step is I have to believe her or him, but the second step is do I think I can convince a jury to believe her and I thought there was. (WDA002, 365-372)

- - -

Q: So, when you’re, so is part of it trying to figure out whether you believe the person?

A: Yeah, cause just, cause for me this unit has been full of ethical dilemmas compared to my prior assignment. So I just have a real problem sometimes with looking at everything that’s been presented to me as the prosecutor where I have, I always keep in mind in my head that I have the burden beyond a reasonable doubt, not just did this person probably do it or maybe did it, and then the defense will have their side and we’ll just sort it out in the end, like if I’m thinking you know I don’t know about this, I don’t know if I believe her and if I’m talking to the interviewer afterward and she’s kind of like wasn’t it weird how she said this, then I just, it’s a real problem for me then going forward charging and you know making that initial offer to defense, like we’re getting into a year or something like that when in the back of my head I’m like is this girl even credible. Ya know?

Q: So, what, so when you are thinking about charging are you thinking reasonable doubt?

A: I am, yeah. It’s something that I’ve started to say at that initial meeting when we bring in whoever is here whether it’s {State department of welfare for children} or the mom or the dad or both. I try to get that out right away. We all have different roles here, [state department of welfare] has their rules as far as standards of abuse and neglect. If we take up charges mine is beyond a reasonable doubt. I try to hit that home with them, to say that it’s not like maybe or probably, but I try not to come off as if I don’t know if I believe your daughter. But it’s something that I try to always keep in mind.

Q: How come?

A: Just cause once the case starts that’s how high of a burden it is and I just think that’s what you have to keep in mind. When I started out in this unit some of the people who have been here the longest kind of drove that home with me. Like in the beginning I would sit in on the SAIN with them, I sat in on probably ten SAINs before I had my own, just watching. I tried to watch as many as I could to see like what happens, you know like what questions do they ask into the microphone, how do they relate to the victim afterwards, how do they relate to the cop, you know did they charge, did they not charge and they’re all different here, everyone’s different, you know I’m different from
them too. But a lot of people told me like always keep in the back of your head can I prove this, not just you know sympathy or how fired up is this mother but think about can you prove this case. \(\text{(WDA011, 312-343)}\)

Q: So, before charging were you thinking probable case or conviction?

A: No I was always thinking beyond a reasonable doubt because I mean I had a hard case and the family was really really upset about what happened and they really wanted the person arrested and I’m like we can go out and arrest him, like that’s not the issue but I have to be ethical and think of this person’s life and this person has no record, he’s 18 years old and we’re going to charge him with rape, a rape that I can’t prove. Do I think he did it, yes I think everyone knows, thinks he did, but I have to convince a jury and it’s not even, that’s not even when it’s a tough case, that’s different, well a jury could think this, I would never arrest just on probable cause on that kind of case. \(\text{(WDA001, 191-200)}\)

Interviews were coded office by office. This means I coded an entire office before moving on to the next. Once the coding sheet was created I used it as a template for the next office. If any new codes were created in the next office I made notes so that I would go back and look for text that applied to those codes in the previous office. Coding was done in a line-by-line format. Line-by-line coding means reading each line of an interview transcript while looking for themes to emerge, then placing the text into categories, themes, or sub themes (Lofland et. al., 2006). Since this research involves both questions previously posed by other researchers and an open approach to the emergence of new themes, coding required both looking for the themes that emerge to answer specific questions and being open to themes not coming from any set research question.

These techniques are also known as open, initial, and focused coding (Lofland et. al., 2006). Placing text in thematic categories through coding themes allowed me to examine the emerging concepts that provided the important findings for this study.
Open coding.

Open coding is also known as initial coding and begins when reading the transcripts and notes (Lofland et al., 2006). As I read each transcript I was engaging in line-by-line coding, creating numerous possible codes to describe what the interviewer was saying and what the text might represent. This was done during the phase of my analysis when I was transcribing or reading the interviews. This resulted in the creation of numerous codes, many of which I later found to be duplicates that referenced material belonging in multiple codes, and also codes that could be narrowed into more focused codes.

Focused coding.

After creating a coding sheet for the first office I used that sheet as a template for the next office. In this way I was able to focus my coding in a more directed way. This means I had already determined that some of the codes were important for categorizing the data (Lofland et al., 2006). Focused coding allows for achieving two important goals. First, appropriately labeling data. Second, more efficiently retrieving and pasting the data under appropriate codes (Lofland et al., 2006). An example of interview text and the corresponding codes is shown in Table 10.

Table 10. Coding Sheet with Nodes.

<table>
<thead>
<tr>
<th>Interview Text</th>
<th>Text coded at nodes:</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Number one (consideration in charging) I’d say is, is the victim on board, because in sexual assault cases I don’t believe in forcing them to go forward.”</td>
<td>Victim influence  Testify  Concern</td>
</tr>
<tr>
<td>“I just think it’s so personal to people and the damage you can do by forcing someone to go forward . . . You don’t want to make it worse for the person.”</td>
<td>Victim influence  Testify  Concern</td>
</tr>
<tr>
<td>“To me the victim is the one who’s in charge.”</td>
<td>Victim influence</td>
</tr>
<tr>
<td>“I always leave it up to the victim, definitely.”</td>
<td>Victim influence</td>
</tr>
</tbody>
</table>
| “... I think the number one strength or weakness would be whether someone is willing to go forward, ...” | Victim influence  
Strengths / Weaknesses |
| --- | --- |
| “... in sexual assault cases I don’t believe in forcing them to go forward. When I was in the gang unit and particularly here in [this county] with people shooting up neighborhoods, and gang kids, we do make them go forward and bring them in under arrest if necessary, but I would never do that to a sexual assault victim.” | Victim influence  
Forcing to testify  
Sexual assault cases are unique |

Another aspect of qualitative research I used in this study is thematic analysis. Thematic analysis allows the researcher to discover themes in the data. In this study the data are the interview transcripts. The researcher reads the text with an eye toward determining whether the text is related to an important theme. Once themes are identified, the researcher also identifies sub-themes. This process is also part of focused coding, where the researcher is finding sub-categories of broader themes. This process requires narrowing the themes to those the researcher believes are most important so that there are a manageable number of themes to analyze. Finally, the researcher will link themes into theoretical models (Ryan & Bernard, 2003). This analysis allowed me to identify patterns of responses and to place the text of the transcript under the appropriate code, or theme. The themes and subthemes become the basis of the study’s findings. Many of these themes emerged during the many memos I created.

**Memoing.**

Throughout data gathering, transcription, and coding I was constantly writing notes in my research notebook. These notes about my ideas, experiences, the connection between codes and text, and the possibility of interconnectedness of certain themes is often referred to as memoing (Lofland et al, 2006). Memos help the researcher focus future interviews and improve upon the study. For example, in one memo I wrote: “Different standards for grand jury – RDA – can’t simply rely on hearsay.” This memo alerted me to the fact that legal differences between
jurisdictions might be an important avenue to explore. Some memos are simple ideas or thoughts that came to me as I either transcribed or listened to the interview. These memos were important to jot down so as not to forget. One example includes this note: “Prosecutors are subjective – just like juries.”

Memos can also be aimed at clarifying codes or the beginning of theoretical considerations. For example, some of the memos I wrote focused on possible explanations that were arising out of my review of the transcripts. One of my notes reads: “Albonetti’s theory of uncertainty avoidance does not apply to sexual assault cases due to the major and inherent differences between these sensitive cases and the cases in her study.” And in another I wrote: “If uncertainty avoidance is a universal principle that prosecutors follow how is it that there is little agreement among the subjects regarding which is the best or worst cases in the hypos?” These memos are classified as theoretical memos because they are written ideas about the uncertainty avoidance thesis and the codes and corresponding text that were emerging in my study. Many of these memos were the beginnings of my analysis, the discovery of and linking of themes, and the beginnings of my findings.

Limitations

This study is not without limitations. The research included interviews with 23 prosecutors in three different offices. Given the size of the sample and the number of offices in the study the findings cannot be generalized. I would argue, however, that it is not possible to generalize regardless of the number of prosecutors interviewed or the offices included. This is because of the effect of legal, political, and other jurisdictional differences. Nevertheless, I recognize sample size as a limitation of this study.
There are also limitations inherent in a study that is only conducted by one person. Since only I conducted the interviews, transcribed, coded, and analyzed the data there is no possibility for an examination of the reliability of my particular method of coding and analyzing the data. In addition, I must recognize my particular standing as a former prosecutor. Although I believe this fact allowed the prosecutors to feel more engaged and open in the interviews, I must allow for the possibility that subjects wanted to paint a particular picture of themselves and/or their office and/or all prosecutors that is positive. Surely the prosecutors I interviewed do not want to be portrayed as unethical and selfish. Many of the prosecutors, however, in my estimation appeared to offer a view that was largely unfiltered. I think this was the result of my having been a sexual assault prosecutor. I do not know if these interviewees would have felt comfortable telling someone without my background that “you know, I mean that woman was craaaazzzzzy.” Someone else may not have understood the prosecutor was adding humor to a very sad fact because it is necessary in coping with the constant reminder of human suffering at the hands of others.
FINDINGS

CHAPTER 5

The Structure of Decision Making:
Prosecutor as Individual and Prosecutor as Part of an Organization

The findings begin with a review of the structure of each office in the study. The organization of the District Attorney’s Office is directly related to the structure of decision making when processing sexual assault cases. The existing research does not examine the variability among offices with respect to prosecutors’ individual differences, office sizes and policies, and the legal differences among state laws. In this Chapter I examine the relationship between organization structure, the experience of individual prosecutors, and the decision-making process.

The Organization of the District Attorney’s Office

The structure of decision-making varied among the three offices. Although most research has examined the decision whether to charge a suspect with a crime, this dissertation reveals the first decision made by prosecutors may be better described as whether to continue prosecution of the defendant. In most cases, in the three counties, the decision to charge has been made by police and the prosecutor is forwarded the case to decide whether to continue prosecution, seek indictment, or change the existing charges. As a result, the prosecutor’s first decision may more accurately be described as a decision related to case processing. The organization of the office is important in considering how case processing decisions are made.

Nolan County District Attorney’s Office:18 The Organization of the Office

The Nolan County District Attorney’s Office employed approximately 60 prosecutors. The Office had a hierarchal structure of supervision (the hierarchal structure of the office can be

18 Each office was promised confidentiality. As a result, office names are fictitious.
found in Figure 1). The District Attorney is, of course, the person with the greatest authority. The First Assistant to the District Attorney is considered the second in command. This person is responsible for reviewing cases that are being considered for indictment, promotional decisions, supervision of all prosecutorial staff, and a variety of other duties. The Chief of the District Court supervises all District Court Personnel and is also involved in the promotion of prosecutors. Throughout this structure there are also numerous supervisors and chiefs of departments. For example, there is a Chief of the Superior Court staff, individual court supervisors, Chief of Homicide, Chief of the Sexual Assault and Domestic Violence Unit, and various other specialized chiefs.

Prosecutors are assigned to either the District Court or the Superior Court. The District Court handles misdemeanors and felonies with concurrent jurisdiction in the Superior Court. District Court only provides a six-person jury and at a maximum will sentence a defendant to jail. Superior Court, however, handled more serious cases, felonies, and carries the potential for greater sentences that are carried out in state prison.

A prosecutor assigned to the District Court typically has little or no experience as a lawyer. A prosecutor, after years of experience, may be promoted to the Superior Court. Only experienced prosecutors handle serious felonies and prosecute cases in the Superior Court. In addition, only experienced prosecutors handle sexual assault cases.

This office did not have a defined sexual assault unit, but instead utilized a hybrid model. This means that a core group of seven prosecutors handled the significant majority of sex offenses including all of the sex offenses against children. It was expected, however, that other prosecutors will also, on occasion, handle adult sexual assault cases. These remaining attorneys were responsible for all other offenses. Although anyone in the Superior Court staff may be
assigned a sexual assault case, this included only attorneys with significant prior experience and is a selective process. Finally, I was told there are several attorneys who simply are not given sexual assault cases. The office employed a Chief of Sexual Assault who is involved in all parts of decision making in sexual assault cases.

**Figure 1 Nolan county office hierarchy**

*Decision making in sexual assault cases in Nolan County.*

In Nolan County sexual assault cases are brought to the attention of the office through two mechanisms. First, police may make an arrest and forward the case to the District Attorney’s Office. However, some police departments work more closely with the office and will inform the office prior to charging. This is especially true in cases involving child sexual assault victims. In child abuse cases Nolan County is referred the case in one of two ways: 1) arrest of the offender, 2) referral by child protective services to both police and District

73
Attorney’s Office. The most common scenario is for a case to be referred for a forensic sexual assault interview by a qualified and trained child interviewer. Often these cases are not charged until after the interview takes place. Importantly, any sexual assault or child abuse case requires close supervision by a supervising attorney in this county. For example, an assistant prosecutor was not allowed to dismiss or resolved a case without first meeting with the Chief of the Sexual Assault Unit to discuss the resolution. As explained by one sexual assault prosecutor in Nolan County, “you have no discretion whatsoever, you call a supervisor who tells you what to do.”

In Nolan County felony charging decisions were made by a group that is called the “indictment committee.” The indictment committee received cases from the District Court staff that have jurisdiction in the Superior Court. The lower court staff handled cases brought in the District Court where penalties are less severe and jury trials only include six jurors. District Court, however, had jurisdiction over misdemeanors and a significant number of felony charges. These cases have already been charged by law enforcement. In all three offices, one exception to this is in the case of children. All prosecutors indicated it was more typical to see a child sexual assault brought to the attention of the District Attorney’s Office prior to charging.

The indictment committee determined whether cases will be advanced to the Superior Court staff or remain with the District Court staff. This was a group of attorneys who had already attained the highest supervisory and authoritative positions in the office. Members of this committee included the District Attorney, First Assistant District Attorney, Chief of the Sexual Assault Unit, Chief of the District Court, and Chief of the Superior Court. This group convenes weekly to review the cases that have felony jurisdiction and are being considered for

\[19\] Prosecutors in all 3 offices explained that a majority of sexual assault cases involving children were referred to the office via a child protection agency and not the police department.

\[20\] In this jurisdiction defendants can only be sentenced to state prison if convicted in the Superior Court. A conviction in District Court may result in a jail sentence.
indictment. Not only did they determine whether a case will remain in District Court or be indicted, they also assigned each case that will be indicted to an attorney from the Superior Court staff.

Once a decision was made whether the case should be assigned to a member of the Superior Court staff, the First Assistant chooses which attorney will handle the case. As a result, when the assistant district attorney gets the case the decision has already been made that the case will be prosecuted. The expectation is that the case will be indicted and prosecuted by the assigned attorney. Importantly, the people making the charging decision are not going to handle the case and are a group that has already achieved the highest status in the office. The prosecutor must consult with unit chief and chief trial counsel in the prosecution of each criminal case. If the prosecutor wants to offer a plea deal to a defendant, the prosecutor must first discuss this possibility with their superior. Any plea deal that is offered in a sexual assault case must first be approved by a supervisor. Figure 2 illustrates the case assignment process of sexual assault cases.

![Diagram of case assignment process](image)

**Figure 2. Decision Making in Sexual Assault Cases in Nolan County**

**Jones County District Attorney’s Office: The Organization of the Office**

The Jones County District Attorney’s Office employed approximately 80 prosecutors. The hierarchical structure was very similar to that of the Nolan County District Attorney’s Office (See Figure 3). The office also included prosecutors in various positions of authority including
court supervisors, heads of units, and First Assistant to the District Attorney. Like Nolan County, because it is in the same state, the structure of the courts was the same. Therefore, Jones County employed prosecutors divided between the District Court and the Superior Court with one exception. The exception is sexual assault prosecutors. Sexual assault prosecutors handled cases in both District Court and Superior Court, following a vertical model of prosecution. This ensured that the same prosecutor will have the case from its beginning to end.

This office had a separate unit devoted only to sexual assault cases. The sexual assault unit included a supervisor. The prosecutors in the sexual assault unit handled only sexual assault and child abuse cases. There are, however, some attorneys who were not assigned to this unit who occasionally are assigned adult sexual assault cases. Regardless, assignment of sexual assault cases required experience.

Figure 3. Office hierarchy in Jones County.
**Decision making in sexual assault cases in Jones County.**

The process for case charging in Jones County relies upon a relationship between the police and the prosecutor’s office. When a sexual assault occurs the law enforcement agency is expected to contact the chief of the sexual assault unit for guidance. This guidance includes help with search warrants, setting up a meeting with the victim, forensic sexual assault interviewing, directing the police to interview witnesses or gather evidence, and collaboration on the final charging decision. In reality, however, this does not always happen. In many cases the police department simply makes the charging decision and forwards the case to the District Attorney’s Office. In the cases where the District Attorney’s Office is able to interview an adult victim prior to charging the focus of the interview is largely centered on whether the victim is willing to participate in the court process. A pre-charging interview is largely centered on educating the victim on the court process and often results in explaining to the victim that an investigation will commence provided the victim is willing to meet with police to be interviewed and believes that they will be willing to testify if necessary.

In Jones County sexual assault prosecutors are responsible for all the cases coming out of their assigned courts. Figure 3 illustrates the process of case assignment in Jones County. This means an individual prosecutor may be responsible for several specific courts but many different cities and towns because the courts operate inside of districts. As a result, the prosecutor assigned to that court is responsible for every sexual assault that arises in that district court from the beginning of the case to its disposition.

Once the case is forwarded to the individual prosecutor that prosecutor determines how the case is handled. This, however, involves a large amount of oversight. As in Nolan County decision making in sexual assault cases must be discussed with the Chief of the Unit. For
example, if a prosecutor wants to indict a case in Jones County the prosecutor must meet with the Chief of the unit and must get approval from the first assistant to the district attorney. Prosecutors explained that case strength or weakness and victim’s cooperation or reluctance might influence the prosecutor’s decision regarding how to proceed. Prosecutors in this office frequently mentioned the likelihood of a guilty plea as an important factor in deciding whether to indict a defendant or seek a guilty plea in the District Court. If a defendant was willing to plead guilty to avoid being indicted the prosecutor would strongly consider this on cases they believed would not be successful at trial. All dispositions must also be reviewed. Therefore, if the prosecutor wishes to resolve the case or dismiss it he or she needed prior approval.

**Figure 4 Decision Making in Sexual Assault Cases in Jones County**

**Roland County District Attorney’s Office: Organization of the Office**

The Roland County District Attorney’s Office employed 12 prosecutors. The office structure varied greatly from both Nolan and Jones Counties. The Roland County District Attorney’s Office included only the District Attorney and a First Assistant District Attorney as prosecutors with supervisory authority. Figure 5 illustrates the hierarchal structure in Roland County.

The structure of the courts in Roland County differs from Nolan and Jones counties. The courts are not divided into district courts that are responsible for numerous cities and towns. Whereas in both Jones and Nolan counties each district court handles all of the cases from the many cities and towns in the particular district, in Roland county each city and town have its own
court. Roland County, however, does include a system whereby more serious cases must be indicted and transferred to a higher court if the defendant is charged with a felony. In Roland County prosecutors were assigned to the various courts, meaning someone must cover every individual court in the jurisdiction. Some of these courts are in rural areas and do not meet on a daily basis, but only once per week in some instances.

Prosecutors were not promoted between a lower and higher court in this county, but instead will handle all the felonies and misdemeanors that are adjudicated in their assigned courts. This means a less experienced prosecutor was responsible for handling a felony case from its beginning to its end shortly after being hired.

This office did not have a unit devoted to prosecuting only sexual assault cases. Therefore, any prosecutor, regardless of years of experience, may be assigned a sexual assault case. Although there are no specialized units within the office, the individual prosecutors informally divided themselves into specialized areas. The previous administration did employ specialized units. Currently the prosecutor who was part of the sexual assault unit prior to a change in administration has assumed the role of supervisor for all sexual assault cases.
In Roland County rarely did the prosecutors have any influence on the charging decision. Instead they typically received the case once the police charged the suspect. In Roland County, the prosecutors were also assigned to specific towns or courts. Unlike Jones County, however, each prosecutor was assigned to all cases arising out of their courts. This means any case that was arraigned in a court becomes the responsibility of the prosecutor who is assigned to that court regardless of the nature of the crime. This also meant, regardless of experience, prosecutors will often be assigned very serious cases simply because the offense occurred in the town or city where they are assigned court duty.

In Roland County there is no sexual assault unit. In fact, any prosecutor, regardless of level of experience can handle a sexual assault case. Although there is no sexual assault supervisor there was one prosecutor who is supposed to review all sexual assault cases that come in and determine whether the person who has the case is capable of handling it. If it is a serious sexual assault such as a case that resulted in significant injuries to the victim, a serial rapist, or
any other case that receives significant media attention, it may be given to someone with more experience. After this point there is no oversight of the case. Therefore, the prosecutor was free to make whatever decisions they choose about the case, including dismissal, indictment, plea bargain, or trial. As explained by the District Attorney:

What I do in this office is say certain folks that review certain types of cases, one person reviews every sex abuse case, she has no problem doing that, she assesses them and then makes a determination as to whether or not the individual has that case, ‘cause it’s a vertical prosecution office, starts in your local court, it is your case for starters, if it is a serious sex abuse case, special victim case, homicide, extravagant violence, we might take that one from you kid, but will let you ride herd on it because you’re gonna have to learn, . . .

The prosecutor who handles this responsibility explains:

. . . [S]o if someone who is assigned to say [town name] is a newer prosecutor and that person receives a sex crime I might make the determination that they don’t have enough experience in this area and haven’t been here long enough to handle such a serious sex crime, so at that point I would either take the case or maybe assign it to someone else who I thought maybe could handle the case.

But, there is no chief of the sexual assault unit. The District Attorney did not think it necessary to award someone the title. He explained it this way:

I gotta have somebody who’s the go to person for the sex cases, and they don’t get titles, they don’t get chief names and, you know, and I’ve had “can I have a title?” “What so you can put it on your resume, sure go right ahead, make it up, I don’t care, I’ll sign off on it, I don’t really give a shit about that, we’re all equal . . .

In Roland County the individual prosecutor is the ultimate decision maker in whether a case proceeds once law enforcement has charged and forwarded the case to the prosecutor. The process is illustrated in Figure 6. Therefore, I was able to examine their decision-making process. The decision-making process in Roland County, due to its small size, included a concern regarding the lack of resources available in such a small office. The issue of limited resources and a small staff was mentioned by every prosecutor I interviewed, including the
District Attorney. As a result, this meant prosecutors might be more willing to resolve a case via plea bargain on a lower charge, such as a misdemeanor, as opposed to using limited resources to indict the case and possibly proceed to trial. This was especially true if the case was weak and the victim was reluctant to cooperate with the prosecution.

![Figure 6. Decision Making in Roland County](image)

**The Prosecutor as Individual**

Within each organization are the members that make up that organization. The individual attributes of the members are important in the District Attorney’s Office. Each individual brings their own personal and professional experience to their decision making as a prosecutor. These differences have long been overlooked in previous research. This study revealed that personal attributes are an important factor in how one individual will view a criminal case, compared to another individual.

**Individual differences and characteristics.**

Differences between prosecutors that had an impact on decision making, included gender, professional experience in other fields, professional experience as a prosecutor, and life experience. These differences shape the use of discretion by prosecutors since their personal and professional experience has an effect on how they view the facts alleged in a sexual assault case.
An interesting theme in the study was the different views between the male prosecutors and the female prosecutors. The sample was almost evenly divided between the two genders. The differences highlight the value of engaging in research that examines the different views of male and female prosecutors as they make decisions in sexual assault cases. This was shown through the prosecutors’ responses to the discussion of vignette number two.

In vignette number two a female college student alleges she was assaulted by a male acquaintance in her dorm room. None of the male prosecutors found the victim credible. For example, when asked about the male student’s version of events, the first assistant district attorney in Roland County responded:

Q: What did you think about his statement? Did that have any impact?

A: It did. Well it did. It did only because it, it sounds within, it has the ring of truth to it, and I don’t mean . . . gospel truth, but I could see something like this happening. You know I was a guy once. Once. (laughs). I was in college once, a guy for a long time. Although I was never involved in anything personally, you know, guys talk, people talk and I’ve heard lots of things similar to this. I don’t know that I’ve ever seen a case exactly like this but . . . I mentioned earlier the sniff test, you know, when someone tells you a story sometimes you know it just doesn’t sound right, it just doesn’t smell right there isn’t anything here in his side of the story that sounds so incredible that it just couldn’t have happened, it sounds entirely within the realm of possibility and to me because of that that’s almost built in reasonable doubt in a criminal court setting where they, they emphasize that there has to be proof beyond a reasonable doubt.

Beyond gender, the individual prosecutors had a wide range of both professional and personal experience. Interestingly, prosecutors also came to the position with their own backgrounds making them each unique, something often forgotten when researchers generalize about the behavior of prosecutors. Two prosecutors previously worked as defense attorneys. They believed their experience as defense attorneys allowed them to see the case from many different angles. They believed it helped them anticipate the motions and arguments the defense
would make in the case. As Tables 11, 12, and 13 show each prosecutor’s past includes various experiences that may inform their opinions and decisions.

The chief of the sexual assault unit in Nolan County grew up with a close friend who was sexually abused. Her relationship to this friend and her empathy and compassion for her friend drew her to volunteer as a rape crisis counselor. As a result, when she later became a prosecutor she was drawn to working with sexual assault victims. Another prosecutor working in Nolan County worked for years as a victim witness advocate. This work informed her view of the experience for the victims, leading her to believe that the best resolution to a sexual assault case was a plea because it meant the victim would not have to testify. Other prosecutors had absolutely no experience nor any desire to work with sexual assault cases or victims, quite the opposite.

Table 11. Jones County District Attorney’s Office Other Experience

<table>
<thead>
<tr>
<th>Name</th>
<th>Gender</th>
<th>Title</th>
<th>Experience&lt;sup&gt;21&lt;/sup&gt;</th>
<th>SAU</th>
<th>Years SAU</th>
<th>Prior / Other Experience</th>
</tr>
</thead>
<tbody>
<tr>
<td>001</td>
<td>Female</td>
<td>ADA&lt;sup&gt;22&lt;/sup&gt;</td>
<td>10 years</td>
<td>No</td>
<td>N/A</td>
<td>None&lt;sup&gt;23&lt;/sup&gt;</td>
</tr>
<tr>
<td>002</td>
<td>Male</td>
<td>First Assistant ADA</td>
<td>9 years</td>
<td>No</td>
<td>N/A</td>
<td>Defense Attorney</td>
</tr>
<tr>
<td>006</td>
<td>Female</td>
<td>ADA</td>
<td>12 years</td>
<td>Yes</td>
<td>4 years</td>
<td>None</td>
</tr>
<tr>
<td>007</td>
<td>Female</td>
<td>ADA</td>
<td>10 years</td>
<td>Yes</td>
<td>5 years</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>009</td>
<td>Female</td>
<td>Chief, SAU&lt;sup&gt;24&lt;/sup&gt;</td>
<td>17 years</td>
<td>Yes</td>
<td>12 years</td>
<td>None</td>
</tr>
</tbody>
</table>

<sup>21</sup> Experience refers to the prosecutor’s experience as a prosecutor. Many of the prosecutors had prior experience as attorneys in other subject areas. In addition, many of the prosecutors had worked for the District Attorney for years in other positions.

<sup>22</sup> ADA is an abbreviation for assistant district attorney, the common title for these criminal prosecutors.

<sup>23</sup> “None” indicates the prosecutor began working for the District Attorney upon graduation from law school. Many of these individuals began as interns.
<table>
<thead>
<tr>
<th>Name</th>
<th>Gender</th>
<th>Title</th>
<th>Experience</th>
<th>SAU</th>
<th>Years SAU</th>
<th>Prior Experience</th>
</tr>
</thead>
<tbody>
<tr>
<td>010</td>
<td>Male</td>
<td>ADA</td>
<td>6 years</td>
<td>Yes</td>
<td>3 years</td>
<td>General Practice</td>
</tr>
<tr>
<td>011</td>
<td>Male</td>
<td>ADA</td>
<td>2 ½ years</td>
<td>Yes</td>
<td>6 months</td>
<td>None</td>
</tr>
</tbody>
</table>

**Table 12. Nolan County District Attorney’s Office Other Experience**

<table>
<thead>
<tr>
<th>Name</th>
<th>Gender</th>
<th>Title</th>
<th>Experience</th>
<th>SAU</th>
<th>Years SAU</th>
<th>Prior Experience</th>
</tr>
</thead>
<tbody>
<tr>
<td>013</td>
<td>Male</td>
<td>ADA</td>
<td>10 years</td>
<td>No</td>
<td>1 year</td>
<td>None</td>
</tr>
<tr>
<td>014</td>
<td>Female</td>
<td>First Assistant ADA</td>
<td>24 years</td>
<td>No</td>
<td>20 years</td>
<td>None</td>
</tr>
<tr>
<td>015</td>
<td>Female</td>
<td>Chief SAU</td>
<td>20 years</td>
<td>Yes</td>
<td>16 years</td>
<td>Rape crisis counselor</td>
</tr>
<tr>
<td>016</td>
<td>Male</td>
<td>ADA</td>
<td>13 years</td>
<td>No</td>
<td>N/A</td>
<td>None</td>
</tr>
<tr>
<td>017</td>
<td>Female</td>
<td>ADA</td>
<td>5 years</td>
<td>Yes</td>
<td>3 years</td>
<td>None</td>
</tr>
<tr>
<td>018</td>
<td>Female</td>
<td>ADA</td>
<td>15 years</td>
<td>Yes</td>
<td>10 years</td>
<td>Victim advocate</td>
</tr>
<tr>
<td>019</td>
<td>Male</td>
<td>Chief of District Court</td>
<td>13 years</td>
<td>No</td>
<td>N/A</td>
<td>Defense attorney</td>
</tr>
<tr>
<td>021</td>
<td>Female</td>
<td>ADA</td>
<td>8 years</td>
<td>Yes</td>
<td>5 years</td>
<td>None</td>
</tr>
</tbody>
</table>

**Table 13. Roland County District Attorney’s Office other Experience**

<table>
<thead>
<tr>
<th>Name</th>
<th>Gender</th>
<th>Title</th>
<th>Experience</th>
<th>SAU</th>
<th>Years SAU</th>
<th>Prior Experience</th>
</tr>
</thead>
<tbody>
<tr>
<td>003</td>
<td>Male</td>
<td>ADA</td>
<td>3 years</td>
<td>N/A</td>
<td>N/A</td>
<td>None</td>
</tr>
<tr>
<td>004</td>
<td>Female</td>
<td>ADA</td>
<td>6 ½ years</td>
<td>N/A</td>
<td>N/A</td>
<td>None</td>
</tr>
</tbody>
</table>

24 SAU is an abbreviation for sexual assault unit.
25 In Nolan County the office was transitioning from a SAU that included the only members of the office allowed to handle sexual assault cases to an office with a specialized unit, but also the assignment of these cases to other ADAs. As a result, the category “Years SAU” includes years in the SAU or simply years of experience handling sexual assault cases.
26 This prosecutor worked in the SAU for 20 years before taking the position as First Assistant to the District Attorney, the highest ranking position within the office after the District Attorney.
The importance of experience.

Prosecutors in the study had a wide range of experience, from two to 24 years. Both Nolan and Jones counties required prosecutors be experienced before they are part of the sexual assault unit or handle sexual assault cases. In Roland County a brand new prosecutor might find that the first case they handle at trial is a sexual assault case. Interestingly, none of the prosecutors indicated any desire to work with sexual assault cases. When asked whether they liked working with sexual assault cases or had wanted to be part of the sexual assault unit, responses ranged from horror at the thought of choosing to prosecute sexual assault to complaining that the cases took more work than others. A female prosecutor from Jones County told me that no one wanted to do sexual assaults, explaining:

I was a prosecutor for five years. Number one I had no idea this stuff went on in the world. I was in the system for five years and was cclllluuuuueeelessss. I think everybody sees this stuff on the news and goes “oh, that’s awful,” and then they just forget about it, because people don’t want to know. Every training I go to people are asked: “what do you do, what would you most want to do, and what would you never want to do?” Every single prosecutor says they would never want to do sexual assaults, every single one of them. Nobody wants to do them.
If the prosecutor does not have any personal experience with sexual assault the nature of these cases is foreign to them and requires a learning process to figure out the common characteristics in these types of cases. Prosecutors without any personal experience were dumbfounded initially by the facts in the cases, reporting delay, and the fact that most cases are perpetrated by someone known to the victim.

The importance of experience for prosecutors handling sexual assault cases was well explained by the chief of the unit in Jones County. In Jones County they found themselves hiring new prosecutors directly into their sexual assault unit, something they had not done before. It was necessary because it was part of a federal grant. My discussion with the Chief of the Sexual Assault unit there is as follows:

Q: Do the people who are in the sexual assault unit, are they generally more experienced, have done other things first?

A: Yes, except this year. There was a grant that was written for exploited children and the way that they wrote it, and the way that they got the grant were for two new ADAs and I got a sister that’s a grant writer and she tried to explain to me that the reason that they do this for new staff is because when they give grants out they want to see that they are adding to jobs in the United States. So, when the federal government is doling out money, or whomever, they can say that they’ve added jobs to the economy, so that looks good. But in reality it’s a challenge, and they’re great people that have been hired but when you’re brand new just out of law school and you’re asked to look at child pornography and deal with child sexual abuse, and exploited children, off the street, it’s very difficult to really accomplish a lot and I think it’s really difficult to be put in that position.

Q: That’s difficult even if you have experience, to do those things.

A: I don’t think it’s good, no. And the challenge about it is obviously you don’t want to say no to that money because you can’t and I, you know I tried to express some of the difficulties that I thought would be to the grant writer, it was overruled so you get what you get. But, they hired two great people and they’re really enthusiastic so like I’ll just look at the good and they try very, very hard, but it’s like “I can’t give you this, I can’t give you this, even though this is what you do,” so it’s like more on your plate, so it’s like “I’ll take this one and I’ll work it with you and I’ll teach you how to do it.” They’ll come along, but I think it’s gonna take a while, but I think it’s kind of unfair to them to
like kind of set them up to put them in there, I mean cause it’s really hard. . . . They do put certain people [in the unit]. I’ve noticed it’s an honor to be in the child abuse unit cause the real lawyering is in child abuse cause you never know what you’re gonna get and it always stinks, I mean there’s always difficult challenges as a lawyer so you can kind of become a real lawyer when you do child abuse cases. I mean this is a very challenging, you know it’s just not a professional witness going “Oh and then what happened” you know, you know the police officer that’s testified in drug cases three thousand times and is just polished, you’re not gonna get any polish, it’s just not like that.

Another prosecutor was also in charge of supervising these new prosecutors. One of the new prosecutors “shadowed” her, essentially following her around so as to learn by listening and watching everything that she did. Her take on the hiring of new prosecutors into the sexual assault unit follows:

A: . . . we have two brand new, like brand new prosecutors. There is a child sexual predator grant that we got that’s part of a federal grant and that grant obligated us to hire two brand new lawyers. So, they’re brand new and they’re doing sex assaults on kids.

Q: Wow so these are people who have never prosecuted a case before?

A: They’ve never stepped in a courtroom before. . . . It’s a tough thing to jump in feet first, but so they shadow me and Maya, so one of them is with me, one of them is with her all the time, just sort of last month they’ve been here, just sort of getting their feet wet. They have some cases of their own but it’s sort of slow going, obviously.

The way Jones County is handled their new prosecutors is in stark contrast to the handling of new prosecutors in Roland County. In Roland County there is little to no assistance for new prosecutors and there seems to be no concern about having a new prosecutor handle a sexual assault case. For example, one prosecutor explained that his second trial was a rape case and he had not yet been in the office for a year. In Roland county prosecutors simply do not stay very long, making it difficult to gain experience. In addition, the office lacks resources and has a small staff. This is a very unfortunate fact because this study revealed the many

27 Pseudonym for the Chief of the Sexual Assault Unit in Jones County.
advantages that come from having experienced prosecutors handling these cases. The variability between the offices and their approach to sexual assault prosecution highlights the findings in Mellon et al.’s (1981) study.

The offices also varied in their approach to sexual assault cases based on the applicable laws. Since this study took place in two states I was able to examine the impact of different statutes related to grand jury, evidence, and penalties, on case processing decisions.
CHAPTER 6

Legal and Jurisdictional Differences

A study that examines prosecutorial decision-making in different states has the distinct advantage of being able to consider the effects of legal and jurisdictional differences between the two states. The value of conducting research in multiple locations was clearly shown by Mellon et al. (1981) and Eisenstein and Jacob (1977) who explained the many possible differences between states, offices, and policies. Differences between jurisdictions has yet to be examined in studies considering the decision-making process in these types of cases. Some studies of sexual assault crimes (Beichner & Spohn, 2005) have examined the difference between offices with specialized units and those without such units but have not taken into account the legal and jurisdictional differences. Instead, the researchers commonly believe the findings from studies of decision-making in sexual assault cases are generalizable to prosecutors as an entire group. This study shows how such generalizations do not apply.

Interesting differences existed between the two states. First, evidentiary rules for grand jury and trial proceedings vary in important and influential ways. Second, offices necessarily employed different polices based on resources available. Further, states vary with respect to statutes of limitations, available penalties, evidentiary rules, criminal procedure laws, and office policies. A brief discussion of some of the legal and jurisdictional differences follows.

Variability Among State Rules

Each state has different rules for the time standards and evidentiary rules for presentation of a case to the grand jury, probable cause hearings, and / or preliminary hearings. This variability creates a different framework for decision-making and an inability to generalize
when reporting the findings of prosecutors’ decisions. A discussion of the legal rules and procedures follows.

**Legal Rules and Procedures**

A brief explanation of the charging rules and procedures follows. In most cases, the case begins with a complaint brought in a lower court. The complaint is a charging document that states the facts supporting the charge (Federal Rules of Criminal Procedure 3). Once a complaint is issued the defendant is either summoned to court or arrested (Federal Rules of Criminal Procedure 4). In some state if the defendant is charged with a felony that will be prosecuted in a higher court the defendant is entitled to a preliminary hearing prior to the case being moved to that higher court. This procedure is the same in the federal rules and in State B. The federal rules provide:

“(a) In General. If a defendant is charged with an offense other than a petty offense, a magistrate judge must conduct a preliminary hearing unless:
(1) the defendant waives the hearing;
(2) the defendant is indicted;
(3) the government files an information under Rule 7(b) charging the defendant with a felony;
(4) the government files an information charging the defendant with a misdemeanor; or
(5) the defendant is charged with a misdemeanor and consents to trial before a magistrate judge.”

(Federal Rules of Criminal Procedure 5.1).

A grand jury is made up of 16 to 23 citizens and occurs in secret. A grand jury may indict if only 12 jurors agree (Federal rules of criminal procedure, Rule 6(f)). A felony offense must be prosecuted by indictment unless the defendant waives the right to be indicted. If the defendant waives indictment he or she may be prosecuted by information. “The indictment or information must be a plain, concise, and definite written statement of the essential facts.

---

28 In order to protect the confidentiality of the respective research locations and research subjects the federal model rules are used to explain the process. The differences between the laws are included.
constituting the offense charged and must be signed by an attorney for the government” (Federal rules of criminal procedure, 7(c)(1)). The defendant is then arraigned, at which time a bail hearing may occur.

In State A, the complaint begins the process in the lower court and an indictment begins the process in Superior Court. In State A the defendant only has the right to a probable cause hearing if the case is not indicted. The probable cause hearing occurs before a judge who must find probable cause to send the case to the Superior Court. In order to avoid duplicating similar procedures, the prosecutor can indict a case prior to a probable cause hearing. As a result, the prosecutor has the power to determine whether a case is indicted by the grand jury prior to a probable cause hearing. In contrast, in State B it is the defendant who must waive his right to a preliminary hearing otherwise a hearing is required.

In State A the prosecutor maintains control over whether the case proceeds by complaint, probable cause hearing, or indictment. A complaint (as opposed to an indictment) requires the case to remain in district court. A district court case does not allow for the possibility of a state prison sentence. If the prosecutor wishes to seek a state prison sentence, something that accompanies felony charges, he or she must proceed against the defendant with an indictment. At this point the prosecutor can decide whether to have a probable cause hearing or go directly to the grand jury. In both states, a case is initially charged by the police. This charging step involves the police seeking a complaint.

**Legal and time constraints.**

One major difference between the two states was the time requirements for charging or indicting cases. Every defendant has the right to a "speedy trial” under the sixth amendment. However, the speedy trial right is not “quantifiable” and there are numerous reasons the speedy
trial clock stops ticking. Instead, “states are free to prescribe a reasonable period consistent with constitutional standards” (Barker v. Wingo, 1972, p. 522). In the two larger counties in State A timing was not an issue. In fact, one prosecutor explained that they might give the victim “the gift of time,” meaning time to think about whether they wished to cooperate. Prosecutors felt they could prolong the initial stages of the case in order to give the victim time to prepare for participation in the case. In State B timing was a major challenge for the prosecutors, always weighing heavily on their minds, with a prosecutor describing time constraints for filing an information or seeking a grand jury indictment like a “ticking time bomb.” The time standards and requirements for State A are illustrated in Figure 7.

Figure 7. Roland County Time Standards and Requirements

In Roland County prosecutors explained that arrests were often made by police without notifying prosecutors, creating problems because a clock starts running once the individual is arrested. This created difficulty because it meant there would be no time to build rapport with the victim if the prosecutors hoped to hold the accused in jail. As explained by a male prosecutor in Roland County:

[V]ery often you won’t find out about a case until it’s arraigned which is what we try to avoid with the sex offenses, especially with kids, because we know that it’s going to take a lot of time to build that trust up in us, to get them to talk and if they make an arrest, within that forty five days that the person is incarcerated before they can file a writ to get out to indict that case and ultimately six months to indict it and if we don’t do it within the six months we can’t do anything . . .
One prosecutor used a recent example to explain the difficulties and challenges.

[T]his one we just went to on Monday [the suspect] was mom’s boyfriend living in the house so they went out and made an arrest but we didn’t know about it prior. It would have been nice to know about it prior, “hey this is what’s going on, this complaint came in,” but they may have just decided “hey he’s in the house we’ve got the proof,” and that’s ultimately it with the police agencies. So, they have what they need to arrest, but hey look at the big picture, it’s like you’ve got one job to do we’ve got another job to do.

Q: So, if it was before they had made an arrest your goal would be to meet with the victim?

A: Try to streamline the process, get that kid ready for a grand jury at their pace, cause right now we don’t have a waiver, this guy was arrested almost 3 weeks ago and he hasn’t waived time so he’s being held so we have forty five days if we want to make sure he stays in during the pendency of the criminal action and we’re having to push this child along faster if we’re going to get this case indicted within the forty five days. So, if they hadn’t made an arrest we could not push this case during the holidays, like what’s worse than being a kid during the holidays and talking about this shit.

There are numerous considerations related to time constraints that come through in the preceding excerpt. First, in Roland County a defendant being held in custody will be released if the case is not indicted within 45 days of arrest. Second, in order to proceed to grand jury, the victim will need to testify. Third, there is little time to prepare the child for his or her testimony. These same issues do not exist in State A.

One of the prosecutors in Roland County expressed great anxiety over the time constraints contained within the state laws. Not only must the offender be indicted within 45 days or he will be released from custody, if the case is not indicted within six months of being transferred to Superior Court the case is simply dismissed. One Roland County prosecutor explained how he felt as if there were “ticking time bombs” all over the place. He explained:

The thing that keeps me up at night is you could have a defendant come in and he’ll be like R and R’d [release on his own recognizance] cause he’s like “Yup I beat up my wife,” you know, pretty bad beating, say he broke her eye orbital. So
serious physical injury or maybe he did it with a lead pipe so that’s a, that’s assault 2nd by dangerous instrument. So, the defense attorney shows up at the arraignment, the judge says okay we’re gonna set five thousand dollars bail, you know, whatever happens, let’s waive this up judge this is gonna be a felony. It gets waived up. If that file gets somehow lost or misplaced it’s, it, it’s, it doesn’t get reviewed every month in district court because district court is glad, they just throw the file up to Superior court, the physical file actually comes over to Superior court and it just sits there like a little f-ing time bomb and if you don’t indict within 6 months, poof it goes away, so it’s just like all these little files are like tick tick tick tick tick everywhere, all over the place, which one’s gonna blow up?

On top of the ticking time bombs, the time constraints place an extra burden on the prosecutor to get the case into a preliminary hearing within 144 hours of arrest if the defendant does not waive his or her opportunity to have the hearing. This is the requirement under the law. State A does not have this requirement. Instead, it has a review date for each case every 30 days, thereby negating the fear of the “ticking time bomb.” As a result of the requirements in State B, the prosecutor is often disappointed when the police make an arrest without notifying the District Attorney’s office because the clock starts ticking and the prosecutor may know nothing about the case nor have ever met the victim. But, once a suspect is arrested, that victim would be required to testify in open court, subject to cross examination, within a very short time, 144 hours if the offender is in custody. On the other hand, if the prosecutor went straight to grand jury the defendant would not be present, there would be no cross examination, and the testimony would be in a closed and secret proceeding. A male prosecutor from Roland County explained:

Sometimes I prefer to hold off on arrest because sometimes I prefer to go to grand jury first, because then that stops, then we don’t have to have a preliminary hearing, so that doesn’t necessarily have anything to do with meeting with her, but sometimes if a sex case is brought to us before any arrest is made sometimes I prefer to meet with the victim first and see if we can just go right to grand jury because in our grand jury here, like I said there is no defendant, no defense attorney, no judge it’s a much easier experience for the victim to tell the story to the grand jury, whereas if we have an arrest and the defendant is incarcerated, within one hundred and twenty to one hundred and forty four hours we have to
have a hearing. . . . If the police can hold off, and in sex cases in general sometimes if the police can hold off on arrest, that is kind of on a situation by situation thing, like is this guy a threat, does he live with children and he’s molesting children, well then I’m not gonna wait two weeks to get my grand jury together.

Due to the differences in state law, the prosecutors in both Nolan and Jones Counties did not mention any concerns about timing. The prosecutors did not mention speedy trial rights or the dismissal of cases due to unreasonable delays. There was no anxiety over lost files. There was no anxiety over grand jury scheduling or needing to indict a case lest the offender be released from custody. Instead, the case was simply reviewed in the District Court every 30 days to check on the progress at grand jury. The feeling over time was actually the complete opposite. Prosecutors in State A they felt that giving the victim time to think about whether or not she wanted to prosecute was a “gift.” It also gave them time to meet with the victim to prepare her for court proceedings and to establish a relationship. Another important difference between State A and State B are the evidentiary rules at grand jury.

The victim testifying at grand jury: Friend or foe?

In both states in order for a case to be tried in the Superior Court where the penalties are greater and the charges more serious, the case must be indicted. In United States v. Costello, the Supreme Court stated, “an indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charges on the merits” (p. 359). The question then follows as to what constitutes an indictment that is valid? What is the evidence necessary to support an indictment? The answer to this question varies among the states, and in particular between State A and State B.

The Supreme Court has determined that an indictment may be based solely on hearsay (Costello v. U.S., p. 359). The Federal Rules of Evidence define hearsay as: “a statement the
declarant does not make while testifying at the current trial or hearing, offered in evidence to prove the truth of the matter asserted” (Federal rules of Evidence, 801). When applied to grand jury proceedings this means a hearsay statement would include the sexual assault victim’s report of the assault to a police officer. As a result, this means in a sexual assault case the victim may never have to testify at the grand jury. However, the rule that hearsay may support an indictment is not followed by every state. States are free to impose stricter requirements for securing an indictment.

In Costello v. United States, the Court determined that the grand jury is an investigatory body that “should not be bound by evidentiary rules” (p. 359). The lack of evidentiary rules is followed in the grand jury proceedings in State A. This means the prosecutors can choose whether or not they wish to call the victim to testify at grand jury. In most cases the victim has given a report of the crime to the police and a police officer testifies at grand jury. In State B, however, an indictment is not valid if supported only by hearsay. This results in the necessity of the victim’s testimony at grand jury. Since hearsay may be used at grand jury in State A, the prosecutors used this evidentiary rule (or lack thereof) to their advantage. However, because it is not a universal rule applicable in all states, there is variation resulting in a question of whether the grand jury is friend or foe.

In State A both offices use the grand jury as a tool in several different ways: first, as a tool to “test” a victim’s testimony; second, to gauge the victim’s willingness to participate; and third, as a mechanism for giving the victim the “gift of time.” Prosecutors explained there is a review date every 30 days in court, but pressures to indict the case quickly are non-existent. As a result, a prosecutor might give the victim time to think about the possibility of a plea to a lesser charge in the district court so as to avoid testifying at any hearings. Prosecutors in both offices
explained that this was a tactic that could be used to both satisfy the victim and dispose of the case. However, if the case was going to be indicted, there are important differences between the two states (See Illustrations 8 and 9).

**Figure 8. Illustration of Case in State A.**
Use of an example from the hypothetical scenarios will best illustrate these differences. In hypothetical number three, the craigslist meeting for drugs vignette, a prostitute is raped and beaten. She is missing. In State B if the offender is arrested and in custody he is entitled to a preliminary hearing within 144 hours unless he waives his right to the hearing. Offenders might choose to waive the hearing if there is a potential for a plea bargain. The victim typically will need to testify at the preliminary hearing. Therefore, if the victim is not found within 144 hours the offender is released from custody. In State A the prosecutors can use some time to try to find the victim without fear that the offender will be released from custody.

Next, assuming the victim is located, the prosecutor in State A will have the opportunity to establish rapport with the victim and she will not be required to testify until trial. In State B, unless the offender waives his right to a preliminary hearing, within 144 hours she will be required to testify, be subjected to cross examination, and testify in open court. She will then be
required to testify a second time at grand jury, a mere 45 days later. In State A the victim will
neither have to testify at a probable cause hearing nor at grand jury, but only at the trial. If the
defendant enters a guilty plea she will never have to testify at all. Figures 7 and 8 illustrate
these differences.

The differences are remarkable and highlight our inability to generalize the motivations
and behaviors of prosecutors. Since hearsay is allowed at grand jury proceedings in State A,
prosecutors use the ability to present hearsay at grand jury to their advantage. They use it to
protect fragile victims not yet ready to testify about what happened to them and to force victims
to testify in cases that seem questionable. In Roland however, prosecutors find themselves with
no choice based on state law that does in fact require victims to testify because a different
evidentiary rule is followed.

In Jones County the Chief of the sexual assault unit explained they are able to give the
victim “the gift of time.” This means they have time to consider whether they wish to participate
in the case after the prosecutor meets with them to explain the process, the strengths and
weaknesses of the case, and what will be required of them. There are major differences between
these two mechanisms for moving a case to the Superior Court. Most notably, the grand jury
proceeding is done in secret, not open to the public, and a group of jurors decides. In a probable
cause hearing the case is open to the public and a judge decides whether probable cause exists.

In State A the prosecutors are able to use the grand jury rules to their advantage. It
becomes a tool for them in the prosecution of the case. Instead of being required to call the
victim to testify, the prosecutor uses his or her discretion to determine whether to call the victim
to testify. For example, some prosecutors explained they might require a victim to testify at a
probable cause hearing and / or grand jury so as to “test” the victim or the case. This happens if
the prosecutor has questions about the victim’s willingness to participate or the strength of the case. It also happens when the prosecutors believed the Judge at probable cause might determine there is not enough evidence to bind the case over. In essence, the prosecutor is giving the victim their day in court and potentially avoids being the person to determine the case is too weak to prosecute. This shifts the decision making to the Judge and away from the prosecutor. This also means much more is being asked of the victim from the beginning of the case. Instead of protecting a victim from the rigors of testifying, the prosecutor is requiring the victim to testify shortly after arraignment at both the probable cause hearing and later at grand jury. It becomes clear how these mechanisms are the friend of State A prosecutors and the foe of State B prosecutors. A prosecutor in Nolan County used an example to explain how this might work:

I had a woman in Grand Heights District Court, she was applying to be an escort and she had answered an ad in the [city newspaper] and she went on an interview in [city name], interviewed meaning she had to give a blow job, and he said I’ll call you if I want to hire you. Then the next day invited her over to his house and he had sex with her and she then reported a few days later that she had been raped. So, there was like 2 counts of rape, one for the one in [city name] for the hotel and then one for this guy’s house, . . . So [advocate name] when we met with the woman [the advocate] was like “no one is gonna believe you.” She said “you’ll have to take the stand and you’ll have to say I was applying to be an escort, I was applying for a position where I would be having sex with men for a fee and now you’re claiming, you know, so . . .”

Q: So, say the woman who was applying to be an escort, say she said, “I don’t care, he raped me, and I’m willing to testify, the truth is I was applying to be an escort and that happened, but you’re not going to be able to persuade me that I shouldn’t participate,” then what?

A: Well then we would’ve done the case. It was nolle prossed because she said she didn’t want to put herself through the scrutiny of people judging her, but we kind of left it up to her, and that is sort of my overriding theme in all of these, is that it would be very victim based, like I’d sort of take cues from the victim in terms of what they’d want to see happen.

---

29 A case that is “bound over” must proceed to grand jury after a Judge finds probable cause exists.
30 Pseudonym for one of the District Courts in Nolan County.
Q: So, in that escort case if you had gone forward and you had a trial what do you think the likelihood of conviction would have been? Would you say that was a weak case?

A: Well yeah there’s, I mean she consented to, she was an adult, so it wasn’t like a stat rape case, that would have been a case where I would have had her go to grand jury and testify, you’d almost want to see, like I’ve learned to value grand jury a lot in, . . . it’s a good forum to, if you are feeling shaky about something, to have the witnesses show up and not just do it through the police officer, . . . I would have had her go there. It would have been a weak case. Now that I remember it, she said she consented the first time when she said she gave the guy the blow job in the interview, but the second time he forced himself on her and it would have been real tough, real tough.

In Nolan County the prosecutors use the probable cause hearing to test the case and the victim. They also use the probable cause hearing to put the decision whether the case would move forward on the judge. For example, when I asked a prosecutor in Nolan County what types of cases would result in a probable cause hearing she told me: “Cases that are not strong at all, to be perfectly blunt that the office just hopes will go away, that a judge will say there is no probable cause.” The difference between this approach and the requirement of the victim’s testimony in Roland County is remarkable. In Roland County, the prosecutor does not have the opportunity to decide that the victim won’t testify because in almost all cases there is not enough evidence to prove an assault without the victim’s testimony.

In the preceding scenario the prosecutor is trying to shift the decision making to the Judge so as to not tell the victim they are not going to prosecute and to see how serious the victim is about participating since they will need to participate in a probable cause hearing. In choosing to do an unnecessary probable cause hearing the Nolan County prosecutor decides to put:

Everything on the judge to make the decision because you could flush everything out at a grand jury and just hope that a grand jury won’t issue an indictment. But there’s no cross examination at grand jury so I think a lot of times our office, well
we don’t do a lot of probable cause hearings, but if we do it’s because we just want to flush it out and hope that maybe a judge doesn’t issue it, . . .

The prosecutors also made strategic decisions regarding the use of the victim in grand jury. Although in State A hearsay is allowed, some prosecutors would at times call the victim to testify. When asked why, the prosecutor told me: “Because I would want her on record, I would want the defense to have the benefit of that transcript to see what she’s able to do because I would think this is a case that if they believe her to be on board, would be a plea.” Since the victim was missing in hypothetical number three, the craigslist meeting for drugs vignette, several of the prosecutors explained they would want her to testify before the grand jury if she was located. If she testified it would mean there was a recording of her testimony should she disappear again and it would also be more likely that the offender would plead guilty. None of these considerations exist in Roland County because the victim would be required to testify.

Depending on the strength of the case the prosecutor will either go to grand jury and have the victim testify or not. Also, it may be strategic. By explaining the grand jury process to the victim, the prosecutor is giving the victim a chance to think about whether or not they are “on board.” For example, as one prosecutor from Jones County explained that they typically do not put the sexual assault victim into the grand jury to testify.

I had a case very similar to this [Hypo #2] except she invited the guy to her house and it was like the same thing where she was like “no,” blah, blah, blah,” but they were fooling around, but she didn’t want to have sex, he kept trying, he kept asking, and finally she was just like “Ughh,” and the thing that I like about her was she was honest cause I was like “are you saying that you just kind of like gave up and were like ‘fine just get it over with?,’” and she was kind of like “Yeah.” She didn’t say, at some point she stopped saying “no,” and just “ugh, okay just hurry up so it can be over, done and over with.” Now is that rape? Or is that someone wearing you down and annoying you to the point where you just give in. In my mind it was her giving in because she didn’t say “no.” Like she said no like once in the beginning. And then he kept trying and trying and eventually it happened. She didn’t say he forced her, she said he forced her like in her head, but she didn’t verbalize it again, like you know what I mean? So, I
was like, so I wanted to null pros the case, it was already charged and I was like this is the craziest thing. . . . She was so upset that I wanted to get rid of the case. Because I said to her “it’s not my job just to go to court and prosecute every file that lands on my desk, it’s my job to do what I think is ethical,” and I’ve never said that to anyone. I’m like this is the first time I’m saying this to anyone. I don’t, this is to me under the letter of the law, is not rape. . . . So anyway, long story short, I lobbied it with the judge and asked her to retain jurisdiction of it because I knew she was super pro-defense and put in on for a probable cause hearing. I told the victim, “You know what maybe I am too close to it, I’m gonna put you up, you can tell your story, and I’m gonna let the judge decide if there is enough evidence to charge with rape.” And when I told the judge the facts, literally her jaw dropped that it was charged. And so we had the hearing, judge asked her a bunch of questions too, and then she found no probable cause. And I was like “thank you.”

The evidentiary rules vary among states and the impact on prosecution is clearly great. This variability is a factor in the prosecution of criminal cases. Other variations also exist that impact a prosecutors’ decision making in sexual assault cases. These include statutes of limitations and civil commitment laws.

**State Rules: Statutes of Limitations**

The statute of limitations for crimes varies widely among states. This is particularly true with respect to sexual assault crimes. As I interviewed the prosecutors in Roland County they explained to me that hypothetical scenario number four, the hypothetical involving a woman who waited more than a decade to report a sexual assault by her pastor, would not be charged because the statute of limitations had passed. However, in Jones and Nolan counties there would be ample time remaining to prosecute the case. As a result, the statute of limitations is but another factor to consider in the prosecution of sexual assault crimes. It is also another factor that points to the inability to generalize about the behaviors and motivations of prosecutors.

---

31 I cannot include the specific statutes or citations to statutes of the states involved in this study because the participants were promised confidentiality. Instead, I use examples to illustrate the variability among states in the U.S.
In some states there is no statute of limitation for felonies. In addition, in some states the laws are complicated and include provisions for the discovery of DNA, and the provision that the statute of limitations does not begin tolling until the victim reaches the age of 18. Still others require independent corroboration after a certain amount of time has passed. Table 14 provides examples of several states’ statute of limitations.

In the wake of high profile sexual assault cases like Jerry Sandusky and Bill Cosby there are calls to extend or get rid of statutes of limitations in sexual assault cases. In the United States 34 states have statutes of limitations for sexual assault crimes. These laws range from 3 years to 30 years. There are additional rules, including exemptions for DNA matches that occur later, however this is not always the case. This means that the location of the assault has a direct effect on the ability to prosecute the case.

Table 14. Statutes of Limitations in Sexual Assault Cases.

<table>
<thead>
<tr>
<th>State</th>
<th>Crime</th>
<th>Statute of Limitations</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>Rape Cal. Penal Code sec. 261</td>
<td>1. If victim was under 18 at the time of the offense, any time before victim’s 40th birthday (but only for crimes committed on or after January 1, 2015, or for which the statute of limitations was in effect prior to January 1, 2015, has not run as of January 1, 2015; Otherwise, prosecution must bring a case within 6 years after the commission of the offense. Cal Penal Code sec. 801.1(a)(1) sec.801.1(a)(2) and sec. 800 2. Exceptions for DNA: A criminal complaint for rape may be filed within one year after the identity of the suspect is conclusively established by DNA testing. Cal Penal Code sec. 803(g)</td>
</tr>
<tr>
<td>Georgia</td>
<td>Rape GA. Code sec. 16-6-1</td>
<td>1. If forcible rape the prosecution must commence within 15 years of the offense; or 2. If the rape is not forcible, but is committed against a person under age 18, then prosecution must be commenced within 7 years of the offense; or 3. If the victim is under the age of 16 on the date of the commission of the offense and the offense was committed on or after July 1, 1992, but before June 30, 2012, then the period does not run until the victim reaches the age of 16 or the</td>
</tr>
</tbody>
</table>
4. If the victim is under the age of 16 on the date of commission of the offense, then prosecution may be commenced at any time for offenses occurring on or after July 1, 2012. GA Code sec. 17-3-1 and 17-3-2.1

5. Exceptions based on discovery of DNA: No statute of limitations for rape when DNA is used to establish the identity of the accused. 17-3-1(d)

<table>
<thead>
<tr>
<th>State</th>
<th>Code Section</th>
<th>Time Limitations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arkansas</td>
<td>Rape Ark. Code sec. 5-14-103</td>
<td>1. Within 6 years of the commission of the offense; or</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2. If the crime was committed against a minor prosecution may be commenced at any time, or</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3. Exceptions to the rule based on discovery of DNA: If biological evidence of the alleged perpetrator is identified that is capable of producing a DNA profile the period of limitation is eliminated. (Ark Code Sec. 5-1-109(b)(1)(B)</td>
</tr>
<tr>
<td>Idaho</td>
<td>Rape Idaho code sec. 18-6101</td>
<td>1. There is no statute of limitations for rape. Idaho code sec. 19-401</td>
</tr>
</tbody>
</table>

The differences among the states related to statutes of limitations create different challenges for each location. These differences are another reason there is great diversity among prosecutors in how they handle sexual assault crimes.

The penalties, crimes, and definitions of these crimes for sexual assault crimes also vary greatly between the states. For example, the definition and penalty for rape varies among the states. In some states rape requires penetration of the vagina with the penis. In other states rape is defined as any penetration of the vagina, no matter how slight and no matter the object of penetration. When determining how to approach a case the prosecutor must consider the legal definitions and potential penalties available for the crime. As can be seen from the examples in Table 15 penalties vary widely and between crimes.
**State Rules: Criminal Penalties**

**Table 15. Penalties for rape.**

<table>
<thead>
<tr>
<th>State</th>
<th>Crime</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>Rape</td>
<td>Imprisonment for 3, 6, or 8 years.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1. If the victim is under the age of 14 imprisonment for 9, 11, or 13 years.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2. If the victim is a minor older than 14: 7, 9, or 11 years.</td>
</tr>
<tr>
<td>Georgia</td>
<td>Rape GA Code Ann. 16.6.1</td>
<td>1. Imprisonment for life without parole; or</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2. Imprisonment for life; or</td>
</tr>
<tr>
<td></td>
<td></td>
<td>3. Split sentence that is a term of imprisonment for not less than</td>
</tr>
<tr>
<td></td>
<td></td>
<td>25 years and not exceeding life imprisonment, followed by probation for life.</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Rape 5-14-103</td>
<td>Imprisonment between 10 and 40 years, of life imprisonment. But,</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1. If the victim is less than 14 years old, a minimum of 25 years</td>
</tr>
<tr>
<td></td>
<td></td>
<td>imprisonment. 5-4-401</td>
</tr>
<tr>
<td>Idaho</td>
<td>Rape</td>
<td>Imprisonment for up to one year to life imprisonment within Judge’s</td>
</tr>
<tr>
<td></td>
<td></td>
<td>discretion.</td>
</tr>
</tbody>
</table>

Although I cannot provide the specific legal rules from the states included in this study due to concerns related to confidentiality, it is clear that there are numerous differences between states. In particular, the differences related to grand jury and penalties for rape are clear. Analysis of a sexual assault case that includes a delay in reporting may require consideration of statute of limitations. In addition, potential penalties accompany charging decisions and the potential to plead a case to a lesser included charge.

**State Rules: Civil Commitment**

One similarity between the states is that both states provide for the civil commitment of sex offenders following completion of the criminal sentence. This is yet another legal factor in processing sexual assault cases. Currently there are 20 states with sex offender commitment laws. These laws influence the prosecutor’s decision making when they are confident the offender will be committed following the criminal sentence. Both of the states involved in this
study have sex offender commitment laws that might result in the offender being committed following the criminal sentence.

Sex offender commitment or “sexually dangerous person” laws gained favor in the 1990s. The goal of these laws is the prevention of crime, not punishment. However, because these laws result in the extension of incarceration through commitment to a state hospital they operate the same as criminal punishment in restricting the defendant’s freedom. In Kansas v. Hendricks (1997) the Supreme Court held that laws resulting in the commitment of sexually violent predators are constitutional. The Court held that past behavior is taken into account so as to determine future dangerousness and not used to punish. In addition, courts must determine whether the offender is currently suffering from a mental disorder. Finally, the commitment is meant to protect the public and rehabilitate the offender so that he or she can be released when they are no longer a danger to self or others.

In our discussion of hypothetical number three the prosecutors in State A explained the most important thing was to get a conviction regardless of the sentence. Since the offender had a history of rape the prosecutors believed the offender would be committed after serving a sentence. Therefore, prosecutors explained that if he pled guilty it would mean a likely civil commitment and therefore the sentence did not matter, simply the conviction. In addition, it would also mean the victim could be spared from ever being required to testify in the case (See Figure 8).

Interestingly the prosecutors in state B did not mention this is as a factor. Perhaps it is because in State A the District Attorney makes the first petition for a commitment hearing when the offender’s release date approaches. In State B the Attorney General (AG) is responsible for all petitions related to sex offender commitments, whereas in State A the Attorney General is
responsible for all petitions following the first civil commitment. Therefore, in each office in State A the prosecutor is responsible for handling these petitions and trials. There is no such prosecutor charged with this duty in Roland County. This might explain why prosecutors included potential commitment as a factor in decision making in State A and not in State B. This is yet another example of the differences between jurisdictions. Although both states have sex offender commitment laws the application of those laws is not the same. A summary of the differences between the states can be found in Table 16.

**Table 16. Summary of Legal Differences Between State A and State B.**

<table>
<thead>
<tr>
<th></th>
<th>State A</th>
<th>State B</th>
</tr>
</thead>
<tbody>
<tr>
<td>Grand Jury</td>
<td>Indictment may rely on hearsay</td>
<td>Hearsay is not sufficient to return an indictment</td>
</tr>
<tr>
<td>Penalty for Rape</td>
<td>Life in prison, or any period of years</td>
<td>5 to 25 years</td>
</tr>
<tr>
<td>Civil Commitment of Sexually Dangerous Persons</td>
<td>Yes (first petition filed by DA; subsequent petitions filed by AG)</td>
<td>Yes (All petitions filed by AG)</td>
</tr>
</tbody>
</table>

**Use of Resources**

The office in state B is considerably smaller than either office in State A. Use of resources was not mentioned as a consideration in either of the offices in State A. However, in State B it was a major consideration. In explaining the many considerations in charging criminal cases, the District Attorney in Roland County explained the factors in decision-making in the following excerpt:

I think my job is to make sure that number one the cases are being assessed appropriately from day one . . . in other words, . . . what is the right thing to do here, what is justice for this individual who stands charged, what is justice for the people of the state of [name], all those factors, criminal history, all those things that the law kind of lays out, and then we have to assess the strength and weakness of our case and whether or not it is appropriate to apply resources to try that case in lieu of everything else that we have to do and resources plays a huge part in all of that, especially in this office . . . .
He continued by explaining whether it was appropriate to spend precious resources on a “dead bang loser,”

You got a lousy case, you gotta do the assessment thing . . . is it the right thing to do, to go out and hire an expert, get out of state DNA or something, whatever, whatever resources you gotta spend on that particular prosecution for what you see as a dead bang loser.

Prosecutors explained that sex offense cases generally take more work than do other cases. However, this was only a common theme in Roland County. Perhaps it is because the prosecutors have a variable caseload and none of the prosecutors are handling only sexual assault cases. As a result, these prosecutors felt that sexual assault cases took more time than other types of criminal cases. One male prosecutor in Roland County explained:

A: All of the sex offenses though I’m gonna try to resolve prior to indictment, almost all of them, every case, if they’re sex offenses.

Q: How come?

A: It just, the realities of not having to do the extra work on it, to move on to the other cases that you can’t resolve. If I can resolve ‘em before indicting it, you know, we have a guaranteed result . . .

The lack of resources and small size of the office in Roland County had a significant effect on the prosecution of cases. The office also employs a small number of prosecutors, mostly new lawyers. Given the time and resources it would take to indict a case the prosecutor was more likely to discuss a potential resolution to the case with the defense attorney as a way of avoiding the work needed in going to grand jury. This also gave the prosecutor some leverage in plea bargaining by providing an offer of a plea deal instead of indicting the case which would result in exposure to higher penalties. This research supports the findings by Mellon et al., (1981) and Eisenstein and Jacob (1981) as it further shows that the structure of the organization of both the office and the jurisdiction has a direct effect on prosecution. With the many legal and
jurisdictional differences, we cannot generalize the motivations and behaviors of prosecutors.

Although generalities fail, there are universal ethical standards applied to prosecutors.
CHAPTER 7

Ethics and the Standard for Prosecution

One of the most common themes to arise in the interviews was the importance of ethics in decision making by prosecutors. This Chapter examines the Model Rules of Professional Conduct for prosecutors as well as the prosecutors’ application of ethics to their decisions in sexual assault cases. Prosecutors are in the unique position of being a minister of justice and not an attorney charged with representing a single individual and advocating for that individual’s cause. Prosecutors explained that they often have to explain this fact to victims who mistakenly believe that the prosecutor represents them.

Prosecutorial Ethics Model Rules

The American Bar Association Model Rules provide guidelines for prosecutors’ professional conduct. However, each individual state has its own set of ethical rules. It is the duty of the prosecutor to know the ethical rules and to follow these rules. A prosecutor who violates their ethics may be disbarred, reprimanded, or censured.

The most important mandate for prosecutors is the requirement to “seek justice, and not merely to convict” (American Bar Association, Model Code of Professional Responsibility ED 7-13). When discussing the work of the prosecutor, and decisions related to case processing, the ethical duty of the prosecutor was a common theme, with half of the prosecutors explaining that ethics was a factor in decision making. Interestingly, however, the prosecutors had varying ideas of their ethical mandate when deciding whether to charge a defendant with a crime. This is in spite of the fact that all prosecutors are required to know the ethical rules in their state.

Although both Nolan and Jones counties were in the same state and therefore required to follow the same ethical code, the prosecutors in those offices had very different ideas about the
ethical charging standard. In Nolan County the prosecutors adhered to a probable cause, or charging sufficiency, standard. In Jones County, however, the prosecutors adhered to a reasonable doubt standard, or trial sufficiency standard. In Roland County the prosecutors varied quite a bit in their opinion on the appropriate charging standard.

The American Bar Association (ABA) has created a set of model rules. The prosecutors, although they had a particular state mandate, were often guided by the ABA model rules in their decisions making. These rules are the basis for state ethics rules that create obligations for prosecutors and potential disciplinary action at the state level. Figure 17 illustrates the balancing of factors in charging sexual assault cases as outlined by the Model Rules. In that section of the model rules the prosecutor is instructed:

**Standard 3-4.3 Minimum Requirements for Filing and Maintaining Criminal Charges**

(a) A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.

(b) After criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt.

(c) If a prosecutor has significant doubt about the guilt of the accused or the quality, truthfulness, or sufficiency of the evidence in any criminal case assigned to the prosecutor, the prosecutor should disclose those doubts to supervisory staff. The prosecutor’s office should then determine whether it is appropriate to proceed with the case.

(d) A prosecutor’s office should not file or maintain charges if it believes the defendant is innocent, no matter what the state of the evidence (American Bar Association, Standard 3 – 4.3).

In choosing to prosecute a criminal defendant there are numerous factors the prosecutor may consider, most of which are not considered by previous researchers as possible charging considerations and vary among the states’ ethical rules. The Model Rules include a section for
Standard 3-4.4 Discretion in Filing, Declining, Maintaining, and Dismissing Criminal Charges

(a) In order to fully implement the prosecutor’s functions and duties, including the obligation to enforce the law while exercising sound discretion, the prosecutor is not obliged to file or maintain all criminal charges which the evidence might support. Among the factors which the prosecutor may properly consider in exercising discretion to initiate, decline, or dismiss a criminal charge, even though it meets the requirements of Standard 3-4.3, are:

(i) the strength of the case;
(ii) the prosecutor’s doubt that the accused is in fact guilty;
(iii) the extent or absence of harm caused by the offense;
(iv) the impact of prosecution or non-prosecution on the public welfare;
(v) the background and characteristics of the offender, including any voluntary restitution or efforts at rehabilitation;
(vi) whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender;
(vii) the views and motives of the victim or complainant;
(viii) any improper conduct by law enforcement;
(ix) unwarranted disparate treatment of similarly situated persons;
(x) potential collateral impact on third parties, including witnesses or victims;
(xi) cooperation of the offender in the apprehension or conviction of others;
(xii) the possible influence of any cultural, ethnic, socioeconomic or other improper biases;
(xiii) changes in law or policy;
(xiv) the fair and efficient distribution of limited prosecutorial resources;
(xv) the likelihood of prosecution by another jurisdiction; and
(xvi) whether the public’s interests in the matter might be appropriately vindicated by available civil, regulatory, administrative, or private remedies (American Bar Association, Standard 3 – 4.4).

An additional section that provides guidance for the charging decision includes:

Standard 3-3.9 Discretion in the Charging Decision.

(a) A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.

(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some
circumstances and for good cause consistent with public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:

(i) the prosecutor’s reasonable doubt that the accused is in fact guilty;
(ii) the extent of the harm caused by the offense;
(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
(iv) possible improper motives of a complainant;
(v) reluctance of the victim to testify;
(vi) cooperation of the accused in the apprehension of conviction of others; and
(vii) availability and likelihood of prosecution by another jurisdiction.

(c) A prosecutor should not be compelled by his or her supervisor to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused.

(d) In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions.

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

(f) The prosecutor should not bring or seek charges greater in number or degree that can reasonable be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense.” (American Bar Association Standard 3-3.9)

There are several important mandates in the ethical rules that are not discussed in the literature. First, a prosecutor must not continue to prosecute a case when he or she knows there is not sufficient evidence to sustain a conviction (American Bar Association Standard 3-4.3). Second, a prosecutor may decline to prosecute even if there is sufficient evidence to support a conviction (American Bar Association Standard 3-4.4(a). Reasons to decline to prosecute include “views of the victim” (American Bar Association, Standard 3-4.4(vii). Third,
prosecutors are not permitted to give any weight in their decision making to personal advantages or disadvantages or a desire to enhance one’s conviction record (American Bar Association Standard, 3 – 3.9).

**Figure 10. Ethics and the Balance of Decision Making Factors**

Although each state also has its own model rules of professional responsibility, the prosecutors relied largely on some mix of rules from the American Bar Association and their state’s ethical mandate. In the state where Roland County is located a prosecutor shall not charge an individual with a crime if it is *obvious* the charge is not supported by probable cause.

In the state where both Jones and Nolan counties are located a prosecutor must not charge if the prosecutor *knows* the charge is not supported by probable cause. The mandates are almost identical with the words “obvious” and “knows” the key differences between the 2 states. In addition, neither state includes the nuances and specific factors of the ABA Model Rules to be

---

The Model Rules for the respective states that were part of this research are not included verbatim here to protect confidentiality.
considered in prosecution and charging. In spite of this, the prosecutors engaged in the balancing of factors that is contained within the ABA’s Model Rules.

Most interesting are the standards applied by the prosecutors in this study. Most prosecutors in Jones County were clear in their belief that they could (and should) only charge a criminal case if they could prove the case beyond a reasonable doubt. The prosecutors strongly believed this was their ethical mandate. The exceptions to this finding included prosecutors who explained that they would charge a case if they were at least certain they could prove a lesser included charge. For example, being able to prove an assault in a lower court but charging the offender with a rape. In contrast, the prosecutors in Nolan county held to the belief that they should charge a case if they had only probable cause. The finding is interesting because the ethical standard in both counties is identical.

Prosecutors explained that ethical dilemmas seemed greater in prosecuting sexual assault cases because they were working with victims and not simply police officers. Prosecutors explained that these cases require a “moral compass” so as to avoid creating unreasonable expectations of conviction and sentence. Due to the sensitive nature of sexual assault victimization and the high stakes for the defendant, prosecutors cited an element of fairness toward both defendant and victim as elements of the moral compass used to guide decision making. In other words, prosecutors believe the “stakes are high” in these cases in a way that is not comparable to any other crime. It is far easier, they explained, to explain to a police officer that they would not be able to achieve a conviction against a drug dealer because there was an illegal search and the evidence will be excluded from trial, than to tell a sexual assault victim that the case is weak because jurors will not understand why she waited a year to tell anyone she was raped.
An examination of prosecutorial ethics is missing in the academic literature on prosecutors’ charging decisions. The subject of ethics, however, was a frequent theme in my interviews with sexual assault prosecutors. Prosecutors should be aware of ethics because “[i]t is the duty of the prosecutor to know and be guided by the standards of professional conduct…” (American Bar Association, Standard 3-1.2). In addition, in all but 3 states a lawyer must pass the Professional Responsibility exam in order to pass the state’s bar exam. This exam is based on the American Bar Association’s Model Rules which could be the reason the prosecutors seemed more aware of the Model Rules rather than their particular states’ rules. Therefore, prosecutors must be aware of these rules prior to becoming lawyers.

Although studies have concluded prosecutors are engaging in “uncertainty avoidance,” it is clear from the ethical rules that such behavior is prohibited. There are several studies that reveal potential ethical violations by prosecutors (Albonetti 1986; Albonetti 1987; Stanko 1981). This is illustrated by Albonetti (1986) who asserted “[p]rosecution is mobilized around concerns for uncertainty avoidance linked directly to concerns for career success” (p. 638). It is important to ascertain through new data collection and analysis whether prosecutors do in fact act with a goal of avoiding uncertainty, thereby violating ethical rules.

The literature also reveals a lack of understanding of the ethical rules of prosecutors. For example, Spears and Spohn (1997) argue: “Prosecutors have an ethical obligation to file charges if they believe that the suspect committed the crime in question” (p. 519). However, the Michigan Rules of Professional Conduct, the relevant rules for the study of Detroit prosecutors do not include any such requirement. Instead, the rules require prosecutors “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause” (Michigan
Rules of Professional Conduct, Rule 3.8). An obligation not to charge does not create an obligation to charge if probable cause exists.

Highlighting the divide between research and the behavior of prosecutors is shown in the most recent large-scale study of prosecutors (Spohn & Tellis, 2012a). In their study of Los Angeles County’s policing and prosecution of sexual assault crime, Spohn and Tellis (2012b) create various recommendations for the prosecutor’s office. Many of these recommendations were contrary to the prosecutors’ ethical obligations. This is one of the many reasons the District Attorney’s office delivered a scathing reply to the authors’ recommendations (Spohn & Tellis, 2012b, Appendix C). The District Attorney’s office went so far to say they regretted participation in the study, the study was fundamentally flawed, and that they met with the researchers “on more than one occasion and expressed serious concerns about factual inaccuracies in the study. Evidence was provided that many of the premises held by the researchers were false, and thus their conclusions were incorrect” (Spohn & Tellis, 2012b, Appendix C). This underscores the divide between the research done by various researchers, the practice of law, and ethics of prosecutors. For example, the authors created policy implications stating:

The DA’s Office should file charges in more cases that meet the legal elements of the crime and in which the victim is willing to cooperate. To clarify, we are recommending that in cases in which the victim is cooperative, the DA’s Office should more often use a legal sufficiency standard, as opposed to a trial sufficiency standard. We are not recommending that the DA’s Office file charges using a probable cause standard (Spohn and Tellis, 2012b, p. VIII)

In response, the District Attorney’s office explained:

The conclusions reached in this report regarding the role of the prosecution ignore the real world needs of victims, community expectations of fairness and the ethical obligations of criminal justice professionals. Instead the authors substitute an agenda which views every accused as guilty until proven innocent. In fact, the researchers consistently and stunningly expressed the position that proof beyond a
reasonable doubt was too high a case filing standard and recommended that cases be filed to meet only the standard of proof required to survive a preliminary hearing. To adopt many of the recommendations of this project would be imprudent, unethical, unprofessional and harmful to the public confidence in the fairness of the criminal justice system (Spohn and Tellis, 2012b, Appendix C).

It is easy to imagine there are many cases where sufficient evidence exists yet the victim is reluctant to participate. It is also not difficult to imagine an individual who has been traumatized and who is also an exotic dancer or a prostitute, does not wish for these facts to be disclosed during a public trial. As a result, the case is not charged when the victim fails to appear, refuses to participate, or asks that the matter be dropped. In such circumstances the ethical rules do not place an obligation on the part of the prosecutor to charge the defendant, but to the contrary, an ethical obligation not to charge the defendant when he or she knows they will be unable to fully prosecute the case. In fact, the model rules explain “[a] prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction” (American Bar Association Rule 3-3.9). A conviction is supported by evidence that proves the charges beyond a reasonable doubt, also known as the trial sufficiency standard. In contrast, the legal sufficiency standard requires only probable cause. If the victim has indicated she will not participate and there is no other evidence on which to support a charge, the prosecutor is duty bound to refrain from charging.

In this study, many of the prosecutors felt they could not proceed on a case if they knew after meeting with the victim, that the victim would never be willing to testify. One prosecutor explaining that “you could have a case where you have probable ‘cause but you know the victim is never gonna testify, that would be kind of an uneasy moral ground for me to push that case forward.” Another prosecutor explaining the importance of explaining to the victim that
although they are there for them, they “also have certain ethical obligations” to “fulfill to the court.” These statements are clearly in line with the response by the Los Angeles County District Attorney’s Office to the study by Spohn and Tellis and their recommendations (2012b).

Application of the Ethical Rules

“It’s not my job to go to court and prosecute every file that lands on my desk, it’s my job to do what I think is ethical.”

The standard for prosecution that the prosecutors adhered to in each office varied considerably. This is interesting given that the ethical rules ask prosecutors to consider whether the case can be proven beyond a reasonable doubt. Although the ethical rules for prosecutors provide some guidelines for charging an individual with an offense, it seemed few prosecutors were aware of the actual ethical rules. To put it another way, prosecutors explained that they were guided by ethics, but they did not apply the correct rules. For example, in both states only the legal sufficiency (or probable cause) standard is ethically required. However, in Jones County the prosecutors believed that their ethical mandate was to follow a trial sufficiency, or reasonable doubt standard. Therefore, many prosecutors had the wrong idea of what was required of them. The standards of prosecution employed in the offices ranged from proof beyond a reasonable doubt to probable cause. The Model Rules provide: “A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice” (American Bar Association, Model Rule 3-4.3(a). This ethical mandate was applied in Jones County even though the state ethical rule required only that probable cause either exists or could be uncovered in an investigation.
At the far end of the spectrum, the First Assistant District Attorney in Noland County explained that she would charge any case so long as she did not think the victim was lying. The hypothetical scenarios helped us to discuss her view. She explained that when she reviewed the scenarios she felt that she would charge all of them. She explained her thoughts and how the concern related to lying came up in one case in this excerpt:

A: If she’s willing to go forward I don’t know that there’s one of these [vignettes] that if the victim is saying I want to go forward, I want my day in court we would say sorry. I don’t remember anybody coming across as, ya know, lying.

Q: So, is that what needs to happen? You need to feel like someone is lying?

A: Yeah, I need to feel like somebody is lying. I need to feel like somebody is abusing the system. I mean if I don’t believe that somebody is being truthful, ethically we can’t go forward.

Q: Has that ever happened?

A: Yes.

Q: To you?

A: Yes. It was a Superior Court case, the eve of trial.

Q: The eve of trial?

A: Yup, and it was a case that had attracted a fair amount of publicity.

Q: And you felt like the person wasn’t being truthful?

A: I was pissed. . . . I believed throughout that case that she was not, that she had laid out a scenario of two men being involved in, she was at a bar, they were stockbrokers from [name of city] or something, and laid out a scenario of being at the bar with them and both being involved with raping her, and I don’t know, just really struggled with some of what she said, just I don’t know, all the facts and everything, and the investigation wasn’t making sense to me, we kept at it, the State Police were involved in it so it was our investigation, eve of trial she came clean and said she had lied about one of the guys, he wasn’t there, which is what I always thought. So, we dropped the case.
All of the prosecutors indicated they considered the victim’s credibility when determining the strengths of the case. The preceding excerpt is a good example of the prosecutor’s intuition leading them to believe the victim was being less than truthful. As provided in the ethical rules, “the prosecutor’s doubt that the accused is in fact guilty” is a factor the prosecutor “may properly consider in exercising his or her discretion” (American Bar Association, 3-4.4).

Prosecutors differed on their approach related to whether or not they would charge an individual with a crime if they knew the victim would not testify and therefore they could not prove the case. For example, in the second hypothetical the victim indicates she does not want to testify. When asked what would happen if the victim indicated she was refusing, several prosecutors explained, “well I think you can’t prove it any other way, so I don’t think that it’s, I think that you have an ethical responsibility not to take out charges.” This quote by the prosecutor is directly in line with the ethical rule providing: “After criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt (American Bar Association, Model Rule 3-4.3(b)). Although this ethical mandate does not appear anywhere in the state’s ethical rules, the prosecutors believed they should dismiss the case is they were aware the victim would no longer be willing to testify because it would likely mean they could not prove the case.

In Nolan County the prosecutor gets the case after a decision has been made that it should be prosecuted. However, they may later learn through meeting with the victim or being unable to find the victim that there will not be enough evidence to prosecute. Prosecutors explained this might happen in a case where the victim indicated they did not want to testify.
Although the case has been assigned for indictment, there are still scenarios under which the case could be dismissed. One such scenario is an unwilling victim. A Nolan County prosecutor explained why it is important not to charge in such a scenario, also applying the ethical rule against charging without sufficient admissible evidence:

I know some people do this, but I don’t want to charge someone just to try to get a plea and cause they’ve, we’ve said that, I mean sometimes victims say “well can we just get him charged and figure it out later,” and I don’t like, I mean, I don’t, people do that and that’s always made me uneasy because then, if you know in the back of your head. Well there are a couple of things, ‘cause as a prosecutor you’re supposed to have at least probable cause, that’s at least an ethical standard before you go, so, I mean you could have a case where you have probable cause but you know the victim is never gonna testify, that would be kind of an uneasy moral ground for me to push that case forward.

Responses varied among prosecutors and offices regarding what standard they applied to prosecution of sexual assault cases. In some cases, prosecutors varied their idea of the appropriate standard based on the status of the case, or the type of case. None of the prosecutors applied a defendant rehabilitation standard. Instead, although no specific policy existed in any of the offices, each individual prosecutor employed the legal sufficiency and trial sufficiency policies in State A, and both those policies and the system efficiency policy in State B. These standards for prosecution were often tied to both ethics and notions of fairness.

In Roland County prosecutors applied a standard of prosecution that ranged between probable cause (legal sufficiency) and reasonable doubt (trial sufficiency). The standard sometimes depended on what was happening in the case. Interestingly, some of the responses were forceful, such as one prosecutor explaining that reasonable doubt is for prosecutors and probable cause is for police officers. Still another prosecutor explained when they choose to prosecute they begin with probable cause and start thinking about reasonable doubt later as the case unfolds. Another prosecutor suggested charging whatever he or she might be able to
support with probable cause because it might help later, so they “shoot for the stars” because “maybe there is more proof out there.” Along these lines one prosecutor explained that they will go to trial if they feel there is proof beyond a reasonable doubt and leave it up to the jury. Finally, another prosecutor explained it is not fair to indict if you don’t think it good faith you will be able to prove it or that the victim won’t testify.

As a minister of justice and not an advocate for one party the prosecutor also must consider the public as well as the accused. The ethical rules provide that a prosecutor must not proceed on a case if there is reasonable doubt about the guilt of the accused. In addition, prosecutors are required to provide exculpatory evidence to the defendant. Such requirements lend themselves to basic notions of fairness in prosecution of sexual assault crimes. Many of the prosecutors discussed fairness toward the defendant as a factor in their charging decision.

In Jones County prosecutors felt strongly that a case should not be indicted unless the victim was willing to testify in the case. As one prosecutor explained:

A: There is a part of me that is uncomfortable with indicting something and not knowing where the victim is. . . . I am uncomfortable indicting something knowing full well that day two, or month one, I have no idea where she is, she’s never going to be here in a year and a half, two years from now. So, I guess, yeah, I’m uncomfortable with the notion of indicting something when I know I have an uncooperative or reluctant witness. I don’t like it.

Q: Why? Tell me why.

A: Because I just don’t think it’s appropriate. You’re going to think I’m so liberal. I mean I don’t like the idea of someone sitting in jail for two years when I know we’re never going to have a witness at trial. That’s, that’s not okay in my mind.

Prosecutors were concerned with fairness toward the defendant, especially in so far as they were thinking about a victim that would not testify in the case. Prosecutors did not want to proceed on cases if they knew they could not be able to go forward. This is one of the reasons
the meeting with the victim is so important. Prosecutors believed that they could explain everything to the victim so that the victim could make an informed decision prior to the case being indicted. One experienced female prosecutor in Jones County felt so strongly about this that she explained she would later force a victim to testify if the case was indicted. Part of her reasoning was the effect the case would have on the defendant and the lack of fairness in later dismissing the case.

A: I’m at the point now where I say to people “if I indict this, you do not have a choice of backing out, like you will have to testify, like if it takes two years to get to trial, and in two years you say to me ‘I’m all set, I’ve moved on, I want to put it behind me, don’t want to deal with it,’ you’re not gonna have that option, you will have to come in and testify, you will be subpoenaed, you will have to come take the stand,” because it just happens too often.

Q: People back out in the middle?
A: Yeah, I think that’s a horrible thing to do, you know, to someone, to someone’s life, their reputation, to charge them with rape.

Q: You’re talking about the defendant?
A: Yeah, it’s like “You need to, You need to stick with it, if this is what you want to do, you’re doing it,” and I tell people that, “you’re not going to have an option.” I’m telling you now so later, when you get a subpoena and you’re pissed, I’m gonna say “we had this conversation,” and I’ll document it.

In Jones County prosecutors also had a similar way of explaining their ideas about the standards for prosecution. Prosecutors mentioned everything from probable cause to reasonable doubt. Some prosecutors put all the emphasis on the future jury, arguing that they did not determine whether the defendant was guilty or not guilty, that it was up to a jury. Since probable cause is all that is needed for charging, they argued it was okay to simply charge and let the jury decide. For example, on prosecutor explaining they felt fine so long as they had probable cause because they believed it was always possible to find the person guilty.
Interestingly, the variation was quite a contrast between the prosecutors and the first assistant and the chief of the sexual assault unit. As far the chief and First Assistant were concerned reasonable doubt was the clear standard. As the chief of the unit argued:

I use the standard beyond reasonable doubt because I think that’s my mandate. I mean I think that, we as prosecutors that’s what we do. I mean if we can’t prove it beyond a reasonable doubt we shouldn’t be charging.

She also explained:

I always have to go back to my mantra and every case I do it, it’s never failed me, my gut, my, one do we have probable cause which is always yes ‘cause you can find probable cause on anything but do we have enough to go into a courtroom and prove beyond a reasonable doubt this happened.

The First Assistant also believed reasonable doubt was the appropriate standard stating that it is the second step in his analysis of the charging of the case. He explained further:

I think before it’s charged in Superior Court you should have a reasonable belief that you can prove it beyond a reasonable doubt. If you can’t, if you don’t think before you actually bring a charge that you actually can convince a judge or jury 18 months from now that this happened, then you shouldn’t indict that case.

Another prosecutor presented the issue in a similar way by saying:

So I just have a real problem sometimes with looking at everything that’s been presented to me as the prosecutor where I have, I always keep in mind in my head that I have the burden beyond a reasonable doubt, not just did this person probably do it or maybe did it, and then the defense will have their side and we’ll just sort it out in the end . . . .

The first assistant explained the need to be able to believe you could prove a case beyond a reasonable doubt based on the ethical rules in the following excerpt:

Q: You need to have good faith that you can get a conviction in front of a jury. That’s your ethical obligation to believe you can prove the case beyond a reasonable doubt. And I’m trying to think of a good situation a good example of that with sexual assault cases, nothing comes to mind with sexual assault cases right now, but I’ve certainly had shooting cases where I’ve thought to myself I know that this person did it because they admitted to firing the bullets, but I also know by looking at the tape of their interview Miranda wasn’t properly given and we’re never gonna get that in front of a jury, and therefore with the evidence we
have, even though we know he did it, it’s a not guilty and I can’t move that case forward.

A: Do you find that difficult?

Q: I do but you gotta realize that if you don’t follow the ethical rules, if you’re just making decisions based on what your heart tells you, that’s not why the system is set up. That’s not the way it should work because they’re supposed to have protections as defendants. We’re supposed to be, I know this sounds corny, I had a totally different role as a defense attorney, I was supposed to be a zealous advocate for my client. I could be sitting there and he could be telling me that he did this terrible thing and that would mean that there were certain defenses I couldn’t use, but that didn’t mean that I couldn’t go out there and try to do the best I could to get him a not guilty. As a prosecutor I’m supposed to be working in the interest of justice, so . . . I have to follow the rules, I have to get ’em, not only do I have to get a conviction on that person I have to get it the right way.

Responses by prosecutors largely followed the ethical rules. The Rules allow for charging if the prosecutor believes there is probable cause and sufficient evidence to support a conviction. Prosecutors, however, vary in their personal and subjective view of the case. One prosecutor may believe probable cause exists, while another does not. This study shows the subjective nature of prosecution based on individual differences and the importance of judging credibility.

The Subjective Nature of Prosecution and Determining Credibility

Within the District Attorney’s Office each individual prosecutor is a subjective individual with any variety of personal and professional experiences (See Tables 11, 12, and 13 for prosecutors’ experience). Through the interviews with prosecutors it was very clear that each prosecutor has a personal view of a sexual assault case. This is yet another factor that prevents broad generalizations of prosecutors.

A consistent theme among prosecutors was the subjective nature of case review. In deciding whether or not to charge a suspect with a crime one of the greatest factors was whether the prosecutor believed the victim. As explained by one prosecutor, “I guess the first step is I
have to believe her or him, but the second step is do I think I can convince a jury to believe her.”

Whether the prosecutor believes a witness is truthful is an ethical factor to be considered. But, this view is clearly subjective. During the interviews I asked each prosecutor to rank the hypothetical scenarios from best to worst, or strongest to weakest. The variability is highlighted in Tables 17, 18, and 19, where the ranking of hypothetical scenarios varied considerably. Prosecutors overall agreed on the strongest case, but variability existed among the other cases.

Table 17. Rank Ordering of Vignettes by Nolan County Prosecutors

<table>
<thead>
<tr>
<th></th>
<th>NDA 021</th>
<th>NDA 014</th>
<th>NDA 013</th>
<th>NDA 015</th>
<th>NDA 016</th>
<th>NDA 017</th>
<th>NDA 018*</th>
</tr>
</thead>
<tbody>
<tr>
<td>#1 Teenager at a party</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>#2 College student</td>
<td>4 tie</td>
<td>3</td>
<td>3</td>
<td>4</td>
<td>3</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>#3 Craigslist meeting for drugs</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>#4 Teenage victim of church pastor</td>
<td>4 tie</td>
<td>4</td>
<td>4</td>
<td>1</td>
<td>2</td>
<td>2</td>
<td></td>
</tr>
</tbody>
</table>

Table 18. Rank Ordering of Vignettes by Jones County Prosecutors

<table>
<thead>
<tr>
<th></th>
<th>WDA 001</th>
<th>WDA 002</th>
<th>WDA 006</th>
<th>WDA 007</th>
<th>WDA 009</th>
<th>WDA 010</th>
<th>WDA 011</th>
</tr>
</thead>
<tbody>
<tr>
<td>#1 Teenager at a party</td>
<td>2</td>
<td>4</td>
<td>3</td>
<td>2/3 tie</td>
<td>3</td>
<td>3</td>
<td>No charge³⁴</td>
</tr>
<tr>
<td>#2 College student</td>
<td>4 tie</td>
<td>3</td>
<td>4</td>
<td>4</td>
<td>4</td>
<td>4</td>
<td>No charge</td>
</tr>
<tr>
<td>#3 Craigslist meeting for drugs</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>#4 teenager</td>
<td>4 tie</td>
<td>1</td>
<td>2</td>
<td>2/3 tie</td>
<td>2</td>
<td>2</td>
<td>No charge</td>
</tr>
</tbody>
</table>

³³ * This prosecutor refused to indicate how she would rank the other three vignettes without meeting the victim. She simply reiterated “it would come down to meeting the victim.”
³⁴ This prosecutor indicated he would not charge so he could not rank it in order, that essentially all three he would not charge could be ranked the same.
Table 19. Rank Ordering of Vignettes by Roland County Prosecutors.

<table>
<thead>
<tr>
<th>Hypothetical</th>
<th>RDA 002</th>
<th>RDA 003</th>
<th>RDA 005</th>
<th>RDA 012</th>
<th>RDA 022</th>
<th>RDA 004</th>
<th>RDA 008</th>
<th>RDA 023</th>
</tr>
</thead>
<tbody>
<tr>
<td>#1 Teenager at a party</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>4</td>
<td>2</td>
<td>4</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td>#2 College student</td>
<td>4</td>
<td>2</td>
<td>4</td>
<td>3</td>
<td>4</td>
<td>3</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>#3 Craigslist meeting for drugs</td>
<td>1</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>#4 Teenage victim of church pastor</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>2</td>
<td>4</td>
<td>2</td>
<td>2</td>
<td>2</td>
</tr>
</tbody>
</table>

Note: In Roland County the prosecutors informed me the statute of limitations would prevent the office from prosecuting case #4. Nevertheless, we discussed the case as if it could be prosecuted if the crime occurred within the statute of limitations.

Table 20. Rank Ordering of Hypotheticals by Prosecutors in All Counties

<table>
<thead>
<tr>
<th>Hypothetical</th>
<th>Best</th>
<th>Worst</th>
</tr>
</thead>
<tbody>
<tr>
<td>#1 Teenager at a party</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>#2 College student</td>
<td>0</td>
<td>12</td>
</tr>
<tr>
<td>#3 Craigslist meeting for drugs</td>
<td>18</td>
<td>1</td>
</tr>
<tr>
<td>#4 Teenage victim of church pastor</td>
<td>2</td>
<td>5</td>
</tr>
</tbody>
</table>

In determining whether the prosecutor believed the victim, their life experiences came into play. Interestingly, several of the prosecutors had previous career experience or volunteer experience that would influence their views of sexual assault crimes and sexual assault prosecution. For these prosecutors the hypothetical scenarios and the reactions by the victim was
normal based on their experiences. However, some of the prosecutors explained that it took time for them to learn that there are no “normal” reactions to sexual assault.

The individual prosecutor views a criminal case through their own lens. Professional and personal experiences are a part of the prosecutor. As I learned through the interviews, prosecutors learn more about the “typical” sexual assault case as they spend more and more time as a prosecutor. In addition, the prosecutors in this study come from various backgrounds. This includes a former social worker, a former victim advocate, and a former rape crisis counselor. On the other hand, there are several prosecutors who explained to me that they were stunned by the cases they saw because they had various misconceptions about sexual assault crimes, including reporting delay and the lack of stranger cases. Certainly, a prosecutor with experience as a rape crisis counselor may judge the credibility of a victim differently than a prosecutor with little to no personal or professional experience. This fact is important because all the prosecutors explained judging credibility was of great importance.

Although a majority of the prosecutors said that credibility was a key factor in determining the strength or weaknesses of a case and whether to prosecute, prosecutors had a very difficult time articulating exactly what it meant to appear credible. For example, I asked: “Are there attributes that you can articulate that make someone credible or not credible? Is that a tough question?” The First Assistant District Attorney in Roland County responded: “It’s kind of tough, but I think in general terms if they’re capable of telling their story consistently, and also holding up under cross examination, and even when it comes to admitting some of the weaknesses, . . .”
Assessing credibility also includes something of a gut feeling it seems. For example, when discussing the first hypothetical scenario, one prosecutor explained: “if when meeting with the girl that kind of, you know, I kind of felt, after listening to her, observing her, and you know, gauge, if I gauge that that was in fact the case, and that’s what I got from our conversations, it matched up with the hypo. . . [and she was on board],” the case would go forward. Beyond this assessment is determining truthfulness as an element credibility. I asked, “So when you met with her [vignette number one teenage victim at a party], you’d want to sort of get a sense of her credibility?” The answer:

Oh absolutely, her credibility is gonna be key. And I, I wouldn’t just rely on her. I’d be talking to her friend, I’d be talking to other people at this party to try and get a, as full a picture as possible, because in this business there are people that are gonna, that are unfortunately, are gonna lie to you, they are not gonna tell you the truth or they are gonna shade the truth, they’ve got their own motives for doing certain things so you’ve got to kind of flush that out.

Q: How do you do that? I guess that’s what I’m curious about, like how do you make that kind of assessment when you’re, so say you met with this girl, is there any way to define that, or describe what you are looking for?

A: It’s really tough, and I think it’s just a gut, it’s a gut instinct and I think it’s an intangible, and I don’t know if it’s, I’m sure, I think everyone has it, and I think everyone is gonna have a similar, I mean because it’s just like we tell jurors all the time, you know, listen it’s gonna be your sole job to, you know, assess the credibility of this person and you kind of bring in your everyday life experiences. I mean I’ve had 37 years of talking to people, of having relationships to people, communicating with people, interacting with people, friends, family, you know, acquaintances, people I don’t know, people I do know, and you got to take all that into consideration. And doing my last job and doing this job, you just take, you know, I guess you’ve grown kind of a, or I have my own radar, and I kind of know when people are selling me a line of BS or if they’re really, they’re being genuine and truthful. Have I been duped I’m sure I have, I’m sure someone has duped me, but you know, all I can, you know, as a prosecutor, is make sure that I’ve reviewed everything and I’ve done everything I can do to properly assess the case. And met with this person a couple different times probably, any peripheral information kind of take that into account and you know judge that person’s credibility.

And another prosecutor:
So I just have a real problem sometimes with looking at everything that’s been presented to me as the prosecutor where I have, I always keep in mind in my head that I have the burden beyond a reasonable doubt, not just did this person probably do it or maybe did it, and then the defense will have their side and we’ll just sort it out in the end, like if I’m thinking you know I don’t know about this, I don’t know if I believe her and if I’m talking to the interviewer afterward and she’s kind of like wasn’t it weird how she said this, then I just, it’s a real problem for me then going forward charging and you know making that initial offer to defense, like we’re getting into a year or something like that when in the back of my head I’m like is this girl even credible.

The vignettes provided an excellent platform for discussing the prosecutors’ views of credibility and the subjective nature of the case. A clear theme in our discussion was the prosecutor’s view of the case, which is by necessity, or naturally subjective. The prosecutor is examining the case and the evidence to determine whether he or she believes the case can ethically be proven beyond a reasonable doubt. Each prosecutor will have a view that is based on his or her own personal and professional experiences. An objective view of case prosecution would not account for the numerous nuances and factors in each individual case. In discussing hypothetical number two one male prosecutor from Jones County remarked:

[E]thically we have to be sure we are doing the right thing and then we definitely, you know I’d want to sit down with the victim too just to make sure that she was credible before I would feel comfortable proceeding forward on it, and this is one of those cases I would go back to the police, like you’ve observed the witnesses first hand, what do you think, I mean if you don’t, if you believe her or you believe him, or do you have probable cause, I mean you have to really think about that kind of thing.

Q: So, you think this one is a close call?

A: Well I don’t know, if I sat with this victim and she was incredibly credible it wouldn’t be a close call really and if I looked at the tape and it looked okay but I still thought she was credible.

Prosecutors discussed the importance of believing the victim and ethical concerns. As one prosecutor noted about hypothetical number one and the issue of the victim consenting to the
intercourse on the second occasion. Several prosecutors, those with prior relevant experience, understood her behavior, and others did not. It was clear that those with prior relevant personal or profession experience, and female, understood the victim’s behavior. The men did not understand her behavior. These individual differences influenced the prosecutors’ subjective view. One male prosecutor from Jones County explained his opinion of the case as an ethical concern, explaining:

So, I guess for me that’s, um, that’s kind of an ethical concern for me, about her willing, her honesty the first time, like why would she then later have sex with him willingly if before you know there was forced rape. So, um, it’s not like in my head I’m saying I definitely don’t believe this girl but if I’m kind of having a dilemma as the prosecutor I’m thinking the jury is obviously going to have some problems with this down the line. That’s when I get back to can I prove this. And do I want to be the ADA standing up, you know, asking for this person to be convicted if in the back of my head I’m kind of having some ethical problems with it.

Another prosecutor from Jones County, also a male, had similar issues with hypothetical number one:

I would not want to charge the first one. Based in part cause I’m somewhat concerned, not that I don’t believe her, not that I don’t, not that I do or don’t, but I have some problems with the, having sex with him later and the explanation. That’s kind of an ethical dilemma with me, and at the same time I think it’s weak.

Prosecutors also must explain to victims that they are not required to prosecute every possible case. Instead, they must approach each case from an ethical perspective. However, waters become murky when prosecutors believe they can get a plea from a defendant despite knowing they will not have enough evidence to prove the case at trial. Opinions varied in this regard with some prosecutors believing it was unethical to prosecute a case knowing the victim would never testify. Others were comfortable with the bluff that might lead to a guilty plea as evidenced here in the remarks of a female Nolan County prosecutor:

[I]f I think it’s a loser, you know I’ve still said charge on a lot them even if I don’t think we’re gonna have enough, cause we don’t know if defense is gonna want to
plea quickly or push you to prove your case, cause if I believe the person that it happened I don’t have any ethical problems obviously with pleading it out.

Without evidence to sustain a conviction many prosecutors felt the case should not be charged. This is directly in line with the ethical rule that requires sufficient admissible evidence to sustain a conviction. As explained by a Roland County prosecutor:

Q: You said that one of the things you are looking at are the strengths or the merits of the case, what, what do you mean by that?

A: . . . what charge has been filed by the police, in other words, what crime do they think has been committed. Looking at that and having a general idea of what elements of that crime are, and then going over the police reports, the accusatory instrument, and any other depositions to see if those elements are satisfied by the evidence that is there or can be derived from there. I want to make sure that it’s a meritorious charge because if it’s a charge that is questionable, if it were missing some evidence on merits or we don’t have a sufficient or a competent way to obtain evidence to prove one of the elements then it, as far as I’m concerned it’s unethical for us to pursue that unless we can develop it otherwise."

One prosecutor explained that he would not proceed on a case if he had questions about whether or not the incident actually occurred. If such a case landed on his desk he would ask to be reassigned. This is interesting to consider because the prosecutors varied quite a bit in their impressions of the hypothetical cases. This highlights the subjective nature of prosecution and evaluation of credibility. He explained:

Q: So how does that come into play, like the ethics part of it? What role does that play when you’re thinking about charging?

A: It’s huge for me just 'cause I don’t have any open cases now where I don’t, that I have some questions about whether or not it happened. There are ones where I’m like I don’t know if I can prove this at all, where I’m like it’s a loser but I still believe the girl, so I just, I would almost want to, if I had that happen to me after her SAIN where like the victim was so fired up where literally I feel like I can’t shut this down or it’s gonna blow up and they’re gonna call the office and everything, I would almost just if charges were taken out I would ask to be reassigned. I just, like I just can’t personally handle the case if I honestly have questions about whether or not it even happened.
The offices, and prosecutors therein had different ideas about the standards for charging and presenting cases for indictment. These differences were not only the result of the prosecutor’s understanding of ethics and the applicable legal rules, but also the prosecutor’s personal views and concerns. A prosecutor’s subjective view is directly related to their belief or disbelief in rape myths.
CHAPTER 8

The Effects Of Rape Myths

In this chapter I examine the effects of common rape myths on the prosecutors’ perceptions of sexual assault cases. I examined how rape myths affected decision making through the use of vignettes.

The value of qualitative research lies in allowing the prosecutor to explain why cases that include elements that are related to rape myths are not prosecuted and whether they believe rape myths. Rape myths in the criminal case include stereotypes about real rapes and real victims (Estrich, 1987). These stereotypes appear to be the foundation for the focal concerns of victim credibility and convictability, and are applied to charging decisions (Estrich, 1987; Spohn et al., 2001). These myths include the notion that women who engage in risky behavior, have a criminal record or other bad reputation, little education, and are otherwise socially marginalized cannot be real victims – that they must have precipitated, provoked, or actively participated in the incident that led to an arrest (Estrich, 1987).

Prosecutors explained that they are always worried about how a jury will perceive the facts of the case. Prosecutors view each case through the lens of what they believe a jury will see or find believable. Although previous researchers have inferred that this means prosecutors are squarely focused on their conviction record and that prosecutors apply rape myths to case processing, this study shows that prosecutors do not define success in a sexual assault case on conviction. Both professional and personal success is measured in ways that do not revolve around convictions. In addition, prosecutors explained that cases do not conform to the idea of “real rapes” and “legitimate victims,” but believe that jurors expect cases to conform to common rape myths. As a result, prosecutors concerns related to rape myths are connected to their focus
on potential jurors and not their own personal beliefs. Quite simply, the prosecutors in this study do not believe that sexual assault conforms to commonly held rape myths.

The Prosecutor’s View of Sexual Assault and “Real rapes”: Sexual Assault Cases Do Not Conform to Rape Myths

Prosecutors largely said that case characteristics affect the strength or weakness of a case but would not necessarily determine whether or not the case was charged, indicted, or prosecuted. Only one of the three hypothetical cases included case characteristics that would typically lead a prosecutor to believe the case is strong. These characteristics include injuries, corroborating witnesses, prompt reporting, and DNA evidence. The other cases lacked witnesses to any part of the incident, included a delay in reporting, lack of injury, and lack of physical evidence.

Although the hypothetical cases did not conform to rape myths, the prosecutors all agreed the vignettes were realistic. In fact, this excerpt from an interview illustrates the realistic nature of the vignettes:

Q: What do you feel like it [a sexual assault case] usually looks like?
A: Like most of your scenarios.
Q: So, you find these to be realistic?
A: Oh, absolutely. I mean, I was joking, but I was actually talking to [another prosecutor] and I was like “I don’t know about you but I could put names on these” . . . these are the kinds of stories we deal with every single day.

In fact, prosecutors informed me the more common sexual assault case lacks injury, witnesses, DNA, and other strong case characteristics, and often boils down to a “he said, she said” type of case. In these cases, the only evidence, explained prosecutors, is often the victim’s testimony. As a result of time delay, relationships, and lack of physical evidence, most prosecutors agreed that sexual assault cases are typically not particularly strong cases.
Rape myths perpetuate the notions that sexual assault perpetrators are usually strangers, that these crimes are reported immediately, and that physical injuries accompany the assault. However, prosecutors describe the typical sexual assault case much differently. Many prosecutors explained that this knowledge only comes with experience. As one prosecutor explained:

> My biggest misconception personally was you come in to the sexual assault unit and you think about the case, you know the jogger in Central Park, which happens, you have completely unknown, never seen before horrible rapes, and they happen, but they are what two out of a hundred. It’s always boyfriend, ex-boyfriend, uncle, step dad, father, neighbor. I mean 95% of the cases it’s a known person.

In addition, one prosecutor who had worked in the sexual assault unit for seven years said she had never been assigned a stranger case. She explained that the victim and offender typically know each other, and the rape with terrible injuries, perpetrated by a stranger, is the exception. Therefore, the hypothetical scenario I provided to the prosecutors involving injuries was described as a case the prosecutors rarely encountered. As explained by the First Assistant District Attorney from Nolan County, with more than two decades experience:

> The scenario of the stranger sexual assault is the exception, the norm is the quasi boyfriend or date or something of that kind that somebody might have been on or some of these college scenarios where there is drinking, so the stranger danger kind of stuff is very unique. But those cases, those get reported right away, the you’re grabbed walking home, you’re raped and beaten up, that gets reported. The I met some guy in a bar and things got out of hand in some way shape or form for a whole host of reasons, those don’t get reported right away, the uncle who perps the kid that doesn’t get reported right away.

> Strong cases, prosecutors said, are the exception, and not the rule. For example, one prosecutor, when asked what a strong case would be explained that the vignettes with their elements of known perpetrators, reporting delay, alcohol use, risk taking behavior, and lack of physical evidence are more accurate depictions of a common sexual assault case. Therefore, the
typical sexual assault case does not fit the mold outlined by common rape myths and prosecutors are well aware of this fact.

Prosecutors interviewed for this study do not believe that the typical sexual assault case conforms to the myths of “real rape” and “legitimate victims.” Although the results show prosecutors do not believe only “certain types of women” are raped and that women “routinely lie” about sexual assault, they are concerned about the views of jurors as they prosecute cases. As explained by one female sexual assault prosecutor from Jones County:

I think sexual assault cases often times it’s her word, well to be stereotypical it’s her word against his word. I’ll have conversations all the time with victims and families. I call it the CSI talk. We live in a world where everyone watches [CSI] and we’re gonna try a case and people are gonna want to know where’s the fingerprints, where are the hair follicles, where’s the DNA, where’s the witness, where’s the video, and that’s just not how most cases are tried. I think [in] sexual assaults testimony can be all that you have. The lack of physical evidence I think oftentimes is what can make them harder and that’s just the way current status of society is.

As this interview excerpt indicates prosecutors believes cases generally do not have elements of physical evidence, witnesses, or other characteristics that might make the case a “real rape,” yet they are concerned about the jury who they believe will expect this type of evidence. The influence of rape myths is squarely aimed at the jury’s view and not centered on the prosecutors’ own beliefs about sexual assault crimes. Nevertheless, this belief about jurors’ potential beliefs does influence the “downstream” concerns as outlined by Frohmann (1991).

It is clear that the idea of “rape culture” and “rape myths” are pervasive. Not only are prosecutors concerned about the potential jurors’ view, research shows victims are concerned about how their behavior will be perceived in a sexual assault case (Anders & Christopher, 2011).
The Prosecutor’s Repertoire of Knowledge: “I understand it but the jury won’t.”

A recurring theme in the interviews was the idea that the prosecutor understood the reasons for the victims’ behavior but believed potential jury members would not understand the victim’s behavior. Two elements that are examined in the study are delayed disclosure and post incident behavior. Unlike in Frohmann’s (1991) study, however, the prosecutors did not believe in rape myths, but instead focused their concern on potential jurors.

Delayed disclosure: “Juries don’t really understand late reporting.”

All but one of the four hypothetical scenarios included a delayed disclosure. When asked if victims typically report sexual assault immediately, all of the prosecutors who were questioned about the hypothetical scenarios said no. In fact, they said immediate reporting was rare. However, prosecutors also believe juries want an immediate disclosure and that jurors believe a “real victim” will immediately report a sexual assault. As a result, prosecutors believe this is a weakness in the case that must be dealt with directly. As explained by a female Jones County prosecutor when discussing a vignette number four, the teenager assaulted by her church pastor, that included a 10 year reporting delay:

It’s all gonna be about educating the jury. People want to know that you are telling someone immediately “I was raped,” or “I was sexually abused,” or whatever. But in reality it just doesn’t happen like that. So is it a surprise to me that she waited 10 years, no that doesn’t surprise me, is it gonna surprise someone on a jury, yeah absolutely, because the people on your jury are for the most part people who don’t have these types of experiences. They haven’t been sexually abused, they don’t know anyone who has been sexually abused. They are gonna listen to the attorneys and they are going to decide what sounds most credible to them, most realistic to them. Is what the prosecutor is telling me, does that happen, or is it what the defense attorney is telling me, is that what happens? And [the jury] can’t find this person credible because she was sexually abused ten years ago and she is only coming forward now.

Prosecutors explained that a lack of immediate reporting requires explanation to the jury. During jury selection, jurors will be asked whether they or someone they know has ever been the
victim of a sexual assault. If they answer in the affirmative, as the prosecutor explained, they are not likely to sit on the jury. As a result, the prosecutor will be arguing the case to a group of individuals with no experience related to sexual assault. This means the prosecutor believes it will be their job to explain why the person should be believed in spite of the reporting delay.

Prosecutors suggested there are myriad reasons why victims do not report, reasons that can be explained to the jury by the victim, and in some cases an expert. Reasons offered include the person’s relationship to the offender, shame and embarrassment, and a fear of others learning of the assault. One prosecutor explained:

I think people blame themselves a lot. I think it’s emotional and hard to feel violated. There is an emotional and psychological impact from being sexually abused. I think it’s normal for people to not come out right away and tell.

Although the prosecutor understands why victims do not report immediately, prosecutors explain: “. . . late reporting is always an issue because juries don’t really understand late reporting a majority of the time.”

Prosecutors believe it is their job to educate the jury and explain why a victim is not likely to report right away. In this way the prosecutor applies the rape myth, but to their beliefs about the jurors’ view. As a result, rape myths permeate the prosecutor’s decisions in how they manage the case, but do not affect whether or not they choose to prosecute or believe the victim.

Post–incident behavior: “It’s normal and it’s up to you to educate the jury.”

In one of the vignettes I included post incident behavior that would provide an opportunity for the prosecutor to discuss myths surrounding the “appropriate” reactions of a rape victim. In vignette number two, the teenager at a party, a 14 year-old girl is raped and one month later willingly has sex with the perpetrator. All but two of the prosecutors explained the post incident actions of the victim were “normal” or could be explained. One of the prosecutors
indicated he would not charge this case because he could not believe the victim’s explanation. On the other hand, prosecutors with more experience explained that it was their job to inform the jury that there is no normal behavior after a rape. However, these prosecutors were concerned with the jury’s view. The common theme was a response of “I understand but the jury will not understand.”

Years of experience for prosecutors in this study ranged from two years to 24 years. The average years of experience for the prosecutors in the study is 10 years. Many of the prosecutors explained their view of a sexual assault case was based largely on experience with cases, victims, or in some other aspect of their life. For example, several prosecutors came from related careers prior to becoming lawyers. One prosecutor was a rape crisis counselor, 1 a social worker, and another a victim advocate working in a district attorney’s office. Jurors, however, do not enjoy this same range of experience when they are called to sit as jurors on a criminal case. As explained by one of the prosecutors from Jones county:

The people on your jury are for the most part people who don’t have these types of experiences. They haven’t been sexually abused, they don’t know anyone who has been sexually abused. Maybe they do, but if they do you know, ten to one they’ve told the judge already, hey I was sexually abused or my sister was sexually abused or my cousin was and I’m not comfortable sitting on this jury. So, you are not going to get those people. . . .

Prosecutors are concerned the jury will not include people who understand sexual assault, but instead subscribe to rape myths. However, the prosecutors themselves explain that they understand the post incident behavior of a victim who does something that might appear to be counter to the behavior of a “legitimate victim.” Certainly, sex with the perpetrator is something many people might question. As these excerpts demonstrate the prosecutor believes the behavior is normal but would affect the juror’s view of the case and the victim.
I can understand that from some of the things that I have seen, but I think it will be hard for some of the jurors to wrap their heads around that, so just because I understand that because I see it, I think it would be very difficult to explain away to a jury. I think a juror might hear that and then just be gone.

Another prosecutor explaining:

The fact that she has sex with him *after*, but her reasoning makes sense to me, I think that a lot of girls you know sort of feel that way, you know a lot of girls don’t report right away, especially teens and stuff because, exactly that, they’re so like, number one they blame themselves and they almost want to act like it was okay so they don’t feel that they were raped . . .

Instead of deciding the case cannot proceed given the weakness in the case, the prosecutors largely explained that they would need to explain the victim’s behavior to the jury. Among the prosecutors who would charge this case, all explained that dealing with the weaknesses in a sexual assault cases are simply part of the job. They explained it was their responsibility to educate the jury and to spin the evidence such that it would not have a negative impact. Female prosecutors from Jones County explained how they might deal with the issue of the victim having sex with the perpetrator one month later, one explaining:

She has sex with him again in between, so yeah I would stay to someone “yeah, you’re going to get ripped to shreds on that.” But I also say to people “you can’t hide from the negatives, you have to just accept them as part of your case and turn them into a positive,” like don’t hide from it. That’s the kind of thing, anything bad in my case I’m bringing it out in my opening, I’m bringing it out in my direct, I’m gonna bring it out any which way I can to try and show that we’re not ashamed of that, and explain why it is that it happened that way, explain why it is that she had sex with him the second time.

Although almost all of the prosecutors who discussed the vignettes said they 1) found the behavior to be normal, and 2) would need to educate the jury, two prosecutors indicated they did not understand the victim’s behavior. This caused both of them to consider the possibility that the victim was lying and not credible. The two prosecutors who indicated they did not understand the victim’s behavior were both male. In addition, both were part of the sexual assault unit in Jones county, having the least amount of experience working exclusively with
sexual assault cases, 6 months and 2 ½ years respectively. An examination of the level of experience of prosecutors and their view of sexual assault cases would perhaps shed light on this discrepancy.

**Legitimate victims: moral character and risk taking behavior.**

The vignettes included elements related to both moral character and risk taking behavior. Many themes emerged during these discussions. First, prosecutors did not base their case processing decisions on any single element, instead looking at the case as a whole. Second, the prosecutors all said they needed to meet with the victim in order to decide how to proceed with the case.

Vignette number three, the craigslist meeting for drugs scenario, sparked a lot of discussion related to what would fit under the umbrella of “legitimate victims.” The victim in the case was a woman who met a man on craigslist and agreed to perform oral sex for money and drugs. She was beaten and raped during the encounter. It is an example of a “real rape” because it includes injuries and forensic evidence. However, it is also an example of a case that includes questions of moral character and risk taking behavior because the victim was a prostitute, drug user, and had a criminal record.

Although the case included risk taking behavior, questionable moral character, and other elements of prevailing rape myths, one prosecutors described the case by saying: “She’s beaten, she’s got injuries, there’s a rape kit. I mean, it’s like, to me, this is like, I hit the lottery if this case landed on my desk, like that’s an awesome case.” Why is it like hitting the lottery? Because in spite of the victim being a prostitute, the case has elements the jury expects to hear. The Jones County prosecutor explained:

That’s just like what the jury expects and wants to see in a rape trial cause they think it’s gonna be like TV, like a shock and awe type, “you’re gonna hear the
woman was literally screaming by the school,” you know, “you’re gonna hear from a stranger that heard it, and you’re gonna see pictures and records of how beaten she was,” things like that. We usually don’t have that.

Although there are elements of “real rape,” many prosecutors discussed the issues that come with a case that includes a prostitute as the victim. All of the prosecutors explained the victim would not be likable and the jury would not be able to relate to her choices. For example, one Jones County prosecutor explained:

I mean I don’t think that she’s gonna be likeable on the stand. They could even easily spin it, like, you know, the government is asking you to believe someone who literally agrees to perform blow jobs on a complete stranger for money.

All of the prosecutors explained that no one on the jury would like the victim. Prosecutors discussed ways they would deal with the negatives and even explained the negative aspects related to her character and how the facts could be spun into positives to convince the jury.

During my discussions with the prosecutors many launched into a closing argument that would be given to the jurors to convince them to believe the victim as these excerpts show:

Listen like she just got up there . . . you don’t have to like her, you don’t have to like the decisions she made, you don’t have to want to go out to dinner with her or anything like that, but she got up and she owned all of that in front of you . . .

Another prosecutor arguing:

You have a girl that takes the stand and says that she would perform oral sex for cocaine, and that she agreed to do that on this occasion, and that she did it all the time. I mean, if she’s gonna make up a rape she’d say she was on her way to church and this guy pulled her aside and raped her, but you didn’t hear that from her, you heard, I mean, she coulda spun that any number of ways, but she told you all the dirty, nasty details, including the rape, I think that credits her testimony.

As can be seen in this example, the prosecutor is pointing out the “ideal” victim as a person coming home from church and arguing the actual victim is more credible based on being honest about all of the details. Nevertheless, it is clear rape myths are still a dominant concern because the prosecutor is concerned the jury will neither like nor believe the victim based on her
behavior. Although the prosecutors were worried the victim would not be believed, they expressed great concern for vulnerable victims, explaining that disadvantaged victims need to be protected. Instead of being concerned that the case would not result in a conviction and negatively affect the prosecutor’s standing in the office, prosecutors were very concerned with the public safety aspect of this case. For example, as the First Assistant in Nolan County explained:

If one looks at part of what we do as being [able] to protect vulnerable people, prostitutes are very vulnerable people because the bias and everything else says “hey, they’re prostitutes,” but they don’t deserve to have somebody beat the shit out of them, rape them, and then take off and go to the next prostitute and do the same thing and get away with it basically, he’s a creep and he’s gonna do it again.

Another prosecutor explaining:

He’s putting himself in a position where he can gain access to people that are disadvantaged or that he doesn’t think will report it and he’s gonna use that to take advantage of them.

The prosecutors’ concern for the individual victim as well as the community at large was evident in the interviews. Evidence of the victim’s moral character and risk taking behavior were concerns for prosecutors as they processed sexual assault cases. The concerns, however, we centered on protecting the community and a belief about how the jury would view negative elements in the case, and not part of the prosecutor’s belief that only real sexual assault conforms to rape myths.

This dissertation shows that rape myths are a part of the processing of sexual assault cases and the way the prosecutor views elements in a sexual assault case. This view of the case and its elements, however, is centered on the prosecutor’s assumptions about how the jury will view these elements and not their own personal beliefs.
Prosecutors’ descriptions of a typical sexual assault case do not include the elements of a “real rape,” as defined by cultural rape myths. In addition, prosecutors are not actively looking for holes and discrediting victims if the case does not include a “real rape” and a “legitimate victim.” The attorneys in this study present a picture much different than the one portrayed by the prosecutors in Frohmann’s (1991) study. In this study, prosecutors explained that sexual assault cases do not conform to rape myths.

Previous research has typically concluded that only those cases that conform to rape myths will be taken seriously by police, prosecutors, and potential jurors. Perhaps, prosecutors' understanding of rape and its attendant elements has grown over time, such that prosecutors no longer subscribe to rape myths. One example illustrates this point. In her research, Frohmann (1991) found that prosecutors believe victims will report an assault immediately unless the victim is suffering from rape trauma syndrome. However, in this study all of the prosecutors indicated victims almost never report the assault right away. Researchers have also inferred that prosecutors choose not to prosecute cases that include negative elements such as delay in reporting because they are concerned the case will not result in a conviction. The prosecutors in this study did not approach these negative elements with an eye toward avoiding uncertainty.

Many of the prosecutors found weaknesses in the cases to be problems that needed to be dealt with as opposed to issues that might be the death knell of a case. For example, prosecutors believed it was their job to educate the jury. Post incident behavior and reporting delay, two variables that have been found to influence charging decisions in previous research, were seen by the prosecutors in this study as issues to be explained to the jury. It is clear the prosecutors had “downstream concerns” related to the jury’s view of the case. However, these concerns were a factor in how to prosecute the case and not whether to prosecute the case.
This study failed to replicate the findings by Albonetti (1986), Frohmann (1991), and the many researchers who have conducted studies of sexual assault case processing. It also reveals prosecutors, at least in these three counties, have a more educated and knowledgeable view of sexual assault. The prosecutors in these counties are concerned about a jury’s belief in rape myths, but they do not subscribe to such myths.
CHAPTER 9
The Role of the Victim

Prosecutors expressed a high level of care and concern for victims of sexual assault. This chapter provides an examination of the prosecutors’ perception of the victim and the victim’s role in the case. Since it is typically impossible to prosecute a defendant in a sexual assault case without the victim the role of the victim cannot be understated. The victim’s unwillingness to aid in prosecution has been given as the most common reason police departments did not pursue rape cases (Anders and Christopher, 2011; Frazier and Haney, 1996; Kerstetter and Van Winkle, 1990). “The fact that a sizeable portion of rape survivors who report their assault decide not to aid in prosecution has far reaching implications for the survivors, the criminal justice system, and society (Anders and Christopher, 2011, p. 92). There is little research on the factors that influence victims’ decisions. Data in this study are analyzed to determine what impact that victim’s cooperation (or lack thereof) has on the prosecutors’ decisions.

Although police departments indicate the most often cited reason for not pursuing a rape investigation is due to lack of cooperation by the victim (Frazier and Haney, 1996), it is difficult to ascertain the victim’s reasons for being unavailable or unwilling due to the confidential nature of sexual assault reporting. Like a majority of the research examining attrition of rape cases at the prosecutorial level, the few studies examining attrition focusing on victim lack of cooperation rely upon police files and not interviews with victims (Frazier and Haney, 1996; Anders and Christopher, 2011).

During the interviews, through the use of the vignettes, and in our informal discussions, several themes emerged. There was variability among responses between the smaller office and
the larger offices, with little variability between the two large offices. The scarcity of resources and statutory differences between the two states exert influence over the prosecutors’ ability to work with the victim.

**The Importance of Meeting with the Victim**

Prosecutors stressed the importance of meeting with the victim. When asked “after reading the vignette, what would you most like to know?” the prosecutors universally responded by saying “I would most like to meet with the victim.” Among the reasons for meeting with the victim as quickly as possible include prosecutors’ goal of establishing a trusting relationship with the victim as a key component of the case. In addition, meeting with the victim provides the opportunity to provide an honest assessment of the case, establish a relationship with the victim, and determine whether the victim is willing to participate. Lastly, many prosecutors also said they use this as an opportunity to assess the credibility of the victim.

**Figure 11. The Purpose of the Victim Meeting**

![Diagram of Victim Meeting]

**Care and concern for the victim and the need to establish a relationship.**

In meeting with the victim each office employs victim advocates to assist with the victim. In Jones county and Nolan county the advocates are specially assigned to the sexual assault unit.
The advocate acts as a primary point of communication for the victim, provides referrals and resources, and is present when the prosecutor in Jones or Nolan Counties meets with the victims.

The importance of meeting with the victim was stressed by all of the prosecutors due to the nature of the case. The quick victim meeting was a distinguishing factor between the processing of sexual assault cases and other types of cases. In fact, in both Nolan and Jones counties prosecutors explained they would want to meet with a sexual assault victim as quickly as possible and would not indict a case without first meeting with the victim. For example, I asked the prosecutors directly:

Q: Is there a difference between how you would handle a sexual assault case and a general case? So, if it lands on your desk from the indictment meeting and you’ve got a sexual assault case, or a burglary, or trafficking, is there a difference?

A: Yeah, I’d want to meet with the victim very soon, and some like, cause I’ve had a lot of robberies like of stores, we’re a lot more comfortable having the advocates do a lot of that initial like “hey, how you doing,” or the police like “hey, how are you doing, what was stolen, what are your thoughts,” and you know like we’ll get paperwork from clerks who have been robbed and I don’t necessarily meet with them early on, but with, but with sex, I’d meet with victims before I go to the grand jury.

A common theme that shone through the interviews was the prosecutor’s care and concern for the sexual assault victim. The initial meeting allows the prosecutor to introduce him or herself so as to begin a long relationship throughout the case. Unfortunately for the prosecutors in Roland County they often do not have the time to meet with victim quickly, or before the grand jury or preliminary hearing date.

Prosecutors recognized the psychological impact of the crime and sought to minimize the damage done. As one prosecutor explained: “I never want to put folks in the spot where this is gonna make their lives worse, being in court, being in the system is gonna make things worse for them is the last thing I want.” Prosecutors were largely protective of their victims and believed
the victim needed to know they had someone who cared for them. Prosecutors worried about victims hurting themselves and several indicated victims in their cases had attempted suicide leading them to feeling they needed to tread lightly when dealing with sexual assault victims.

Prosecutors also expressed a desire to establish a relationship with the victim so as to gain their trust and prepare them for court. Prosecutors will also try to help the victim get comfortable in the courtroom, explaining that many victims become very nervous leading up to the trial. For example, as a Jones County prosecutor explained:

. . . the trials coming up, the thought of facing that person in the courtroom is getting to them, and the not knowing is getting to them, so usually we show them the courtroom. If I can, I show them the exact courtroom we’ll be in, show them where everything is in the courtroom, tell them the function of everyone in the courtroom, show them where security sits, tell them how many security officers will be in the courtroom, then we practice. And then we usually, lots of times I find that, you know you get into the event, you do the background, school, you’re like what school, and then you take a minute to say “oh by the way you’re just testifying,” and they think about it a little bit differently and think okay I’ll give it a shot. So, I’m not going to force anybody to go to trial but I think there’s a difference between that and cold feet. When we see cold feet, . . . we see it all the time.

Victim meetings allow the prosecutor to establish a relationship that will later help the victim testify in the case. By beginning the relationship early when the victim will not be required to testify the victim will hopefully become comfortable over time. Later, it will be the prosecutor’s job to prepare the victim for testifying in the case. If the prosecutor has established a relationship with the victim at an early point this will be an easier task. Unfortunately, the prosecutors do not have the opportunity to develop a relationship with victims.

**The challenges of meeting with victims in Roland County.**

Roland county faces several challenges that make meeting with the victim prior to testimony difficult. These challenges include the statutory requirements for timeliness and evidentiary rules related to hearsay. As a result, the prosecutor often meets the victim for the first
time on the date of their testimony. On the other hand, in both Nolan and Jones counties the
prosecutors did not make any case processing decisions without meeting with the victim. The
difference is remarkable.

The District Attorney in Roland County expressed his desire to meet with victims but
stated that it is often not feasible. He explained, “[I]n the real world we’d want to have the
victim in, prep her, maybe even a couple times, put her though a mock direct and cross
examination, even before the grand jury to see how she holds up. . .” Interestingly, the desires of
the District Attorney are exactly how the prosecutors in Noland and Jones handle cases with
sexual assault victims. In Roland, prosecutors’ approaches were varied from the importance of
a face-to-face meeting, to phone conversation, to meeting for the first time the day of grand jury.
One prosecutor told me there would be no time for a face-to-face meeting, but that a phone call
was very important.

Meeting with the victim prior to charging is more challenging in Roland County. This is
due to the lack of resources and the time constraints. If the defendant is being held in jail the
prosecutor has limited time to present the case for indictment. In addition, rules of evidence
require the victim to testify before the grand jury. Although prosecutors in Roland County
expressed a desire to establish a relationship and meet with the victim they often felt legal
restraints and limited resources made this very challenging. One prosecutor in Rolan County
explained the challenges this way:

Most of our cases are reactionary. The police will make an arrest, if it’s a felony
whoever is on call will get a call saying we need a bail recommendation, but very
often you won’t find out about a case until it’s arraigned which is what we try to
avoid with the sex offenses, especially with kids because we know that it’s going
to take a lot of time to build that trust up in us, to get them to talk, and if they
make an arrest, a summary arrest, with that forty five days that the person is
incarcerated before they can file a writ to get out to indict that case and ultimately
six months to indict it and if we don’t do it within the six months we can’t do
anything so we try to tell local police agencies, unless that kid is in imminent danger, you know, it’s dad raping the little girl at home, let’s not make an arrest, let’s try to build a case first and get that kid ready and prepped for grand jury and then you guys can go out and arrest him on the warrant.

If the defendant is being held in jail and the prosecutor wants to make sure he is not released the prosecutor must get the case indicted quickly. One prosecutor from Roland County explained using an example of a case he was currently working on that needed to be before the grand jury during the holiday season:

Try to streamline the process, get that kid ready for a grand jury at their pace, cause right now we don’t have a waiver, this guy was arrested almost 3 weeks ago and he hasn’t waived time so he’s being held so we have forty five days if we want to make sure he stays in during the pendency of the criminal action and we’re having to push this child along faster if we’re going to get this case indicted within the forty five days so if they hadn’t made an arrest we could not push this case during the holidays, like what’s worse than being a kid during the holidays and talking about this shit.

The contrast between the two states is remarkable. Prosecutors in State A have the luxury of meeting with a victim prior to grand jury, of taking the time to establish a relationship. However, in State B the prosecutors are hamstrung by the strict statutory requirements for filing of cases, preliminary hearings, and grand jury. It is clear that these differences have an impact on case processing and the handling of sexual assault cases.

**Honest Assessment of the Case: “I feel like they need to know what they’re in for.”**

Prosecutors explained it is important to give victims and their families an honest assessment of the case. This includes discussing the court process, strengths and weaknesses in the evidence, and possible outcomes. The vignettes were an excellent tool for exploring how a prosecutor might discuss a criminal case with a victim. For example, in discussing the hypothetical involving a teenage rape victim, the prosecutor explained: “This is something that
would be prosecuted but this is definitely something that we would tell the victim and her parents about some of the difficulties before we encountered them so they were not surprised.”

Providing an honest assessment of the case gives the victim (and their family) a clear idea of the potential pitfalls and possibilities in the case. Victims (and their families) are often unaware of the rules of evidence, the restraints of what can be presented to the jury, and the different steps in the process. It would unfair to allow these elements and factors in the court process to be surprises to victims. Prosecutors are aware of the procedural process and requirements due to their education and professional experience. The victim, however, according to prosecutors, comes to the case with a total lack of knowledge about the criminal justice process and procedural rules of the court. For example, one prosecutor explaining “it’s easy for me because I know what it’s all about. It’s hard for someone who’s a novice to the system to have any idea what to expect.”

The honest assessment of the case and meeting with the victim gives the prosecutor an opportunity to educate the victim (and their family). If the prosecutor does not provide an honest assessment the victim may have no understanding of the system or their particular case. Prosecutors explained it was important to give the good, the bad, and the ugly. One prosecutor from Jones County stating:

You know my approach is I’m definitely not going to sugar coat what occurs in the process. I want them to know what the system entails and what to expect so that they’re not surprised at any turn, you know, because this is in essence a re-victimization.

The idea of “re-victimization” was a common theme among the prosecutors. Re-victimization or secondary victimization occurs when a victim re-lives the incident through testimony or discussion of the case or feels blamed or judged for the victimization (Parsons & Bergin, 2010; Anders and Christopher, 2011). The victim needing to tell her story numerous
times is often referred to as a “second rape” that increases the victim’s distress (Walsh and Bruce, 2011).

Research has shown that secondary victimization is common with most studies finding that victims are to some degree dissatisfied with legal personnel (Greeson and Campbell, 2011). As explained by one prosecutor, it is also important to allow the victim to understand the case may not result in a conviction. She told me: “. . . that’s the meeting that you have and you sit down with somebody. . . , here are the strengths and here are the weaknesses . . . at the end of the day I just want to make sure that if it’s a not guilty that you’re going to be okay with that, . . .” Prosecutors worried the victim would expect a conviction and be disappointed if a conviction did not follow a trial. As a result, they felt

it is like knocking down unreasonable expectations of the criminal justice system. A lot of time people don’t like what I have to say and I say this to everyone, and I say that to them, “I say this to everyone.” If this was a slam dunk case, then even that, I would say to them “there’s no guarantee.

The prosecutors’ concerns are well placed based on research by psychologists that shows it may be more detrimental to victims to go through the process of a trial that results in an acquittal than if a suspect is never apprehended (Greeson and Campbell, 2011, p. 612).

Another reason to provide an honest assessment of the case is to prepare the victim for testifying in court. If the prosecutor does not provide an assessment by explaining the possible weaknesses the victim could be blindsided by the questions in cross-examination. The importance of this meeting is exemplified in this excerpt from a Jones County prosecutor:

You just have to be very candid, very open, and again I’m not judging them and I want to make sure they do not feel like they are being judged for their actions, but realistically I wouldn’t be doing my job and it would be inappropriate I think, especially for you know a teenage to young twenty something person to get on the stand and without knowing exactly what’s coming, gonna be coming at them, so I think that, that would be helpful in this case.
If the prosecutor is explaining weaknesses, likelihood of conviction, and the pressures of testifying, it stands to reason that the victim might feel they are being told not to testify. In the interviews I asked whether these honest assessments of the case make a victim choose not to testify. Here is an example from a Nolan County prosecutor:

Q: Do you think sometimes people hear all those weaknesses and they get nervous or scared and that’s when they sort of back off or that’s what makes them think they can’t go through it?

A: I do, but I think that a person at least when we’re at that level is either gonna go forward with it or not go forward with it.

The prosecutor went on the discuss a particular case she had been working on:

Even if in that particular case, when we went through strengths and weaknesses even if she hadn’t signed the affidavit (that indicates she doesn’t want to participate) then and she didn’t actually, she came in on another date to sign it, she was already going down that, going down that route. I mean I felt pretty strongly that she would file, would sign the affidavit, not wanting to go forward.

The prosecutor continued by explaining what might happen when giving the honest assessment of the case and explaining why it is still important to explain the weaknesses and prepare the victim for the court case:

I definitely think you could affect a witness’ decision to testify or not testify when they actually see it in black and white. But sometimes they actually color the facts in their own mind so they actually can’t see or hear what you are saying. But they would have to be confronted with the weaknesses of the case, just so they were prepared for cross examination. And that’s where going into who the defense attorney is going to be would affect that. A lot of sexual assault cases that are like this one, these first two fact scenarios, I find that they are more likely to have private counsel which in my mind makes for a more aggressive cross examination, not every single time but I think that, I think that they would definitely have an impact. So if I didn’t go forward with the, you know they’re going to cross examine you with, “no one forced you to drink, you drank yourself, no one forced you to go into his apartment, you went in yourself, he didn’t force you onto his bed, you did that yourself,” you know they have to be confronted with that because again we’re not judging them but it really wouldn’t be appropriate to just throw somebody up on the stand, cause you know we get to ask “what happened next,” and they get to narrate, where the defense attorney gets to, you know, to lead and have a much more, can have a much more forceful cross,
and if they are not prepared for it, I think that they can be really traumatized by that kind of process.

Due to the sensitive nature of these types of cases most prosecutors explained the victim is in charge and the victim’s wishes would be taken into consideration in deciding whether to prosecute. As a result, the victim needs to have all possible information to make a decision in the case. Therefore, prosecutors what the victim to understand as much as possible what they might be in for as exemplified by this Jones County prosecutor’s explanation:

I feel like they need to know what they’re in for. I always say to people, I got this from one of my old bosses, “I’m never going to lie to you, I’ll never make promises I can’t keep, and I will always be honest with you, even if it’s something you don’t want to hear, cause you’re making really hard choices about yourself, your life, and your family.” I never want people in a spot where they say to me six months from now “well why didn’t you tell me this could happen. What about this, why didn’t you tell me that, I would have made a different choice.” It’s not fair, it’s not fair at all, cause this process is difficult for people no matter what it is, it’s a difficult process. I always want to put ‘em on notice, let em know what they’re in for, let em know what to expect, good, bad, or otherwise, cause otherwise you can’t make an educated decision.

Another Jones County prosecutor explained:

I say to them, you know, “this is typical, these are the cases, they’re tough cases. And this is why it’s not you and your case, all cases are like this, and I’m not here to tell you what you want to hear, I’m here to tell you the truth so you can go into the process knowing what the realities are so you can make an informed decision.” You know people get so, it runs the gamut of like, reactions, but like, number one it’s just my personality and number two I feel like it’s my job, like you have to know the brutal reality if you’re gonna get involved in a case like this.”

By establishing a relationship with the victim, explaining the court process, and the strengths and weaknesses of the case the prosecutor believes they are putting the victim in the best possible position to decide whether or not he or she wants to participate in the prosecution of the case.
Victim is in Charge: “I start with a premise that they should get their day in court.”

Prosecutors explained that one of the main reasons to explain the process and the strengths and weaknesses to victims is to allow them to make a decision about whether or not they are willing to participate in the case. The single greatest factor in case assessment and charging is the sexual assault victim. In both Jones County and Nolan County a common theme was that the victim is in charge. In Roland County, however there was some disagreement among the prosecutors about how much influence the victim has in case processing with most prosecutors following the victim’s lead. Several, however, felt that the victim should be consulted, but that all decisions were strictly in the province of the prosecutor.

In Jones County the goal of the Chief of the Sexual Assault Unit is to avoid charging cases prior to meeting with the victim. In Nolan County the first question asked in deciding whether to accept a case for indictment is whether the victim is “on board.” These two facts underscore the role of the victim in case processing in these two counties. As explained by one prosecutor who is part of the indictment committee:

I start with a real simple bias and I certainly believe that if somebody is coming in and they are reporting a sexual assault and . . . we investigate and they want to go forward, I start with a premise that they should get their chance and their day in court, so that’s kind of where I begin. . . .

When this prosecutor was asked why she would go forward with each hypothetical scenario in spite of believing a case was unlikely to result in a conviction she explained:

Because if you have a victim who is saying, none of these cases make me say somebody is lying, in each of these cases if the underlying premise is that, now I read all these cases, and let’s say that for me the underlying belief is these people are all telling the truth. Now granted some of their stories may be better than others in terms of whether they are winnable or not, that’s using a determination of winnable in a courtroom and there are lots of other ways, as we started this conversation, in which, winnable to me isn’t the same thing as winnable to a victim and winnable for me personally is even more complicated than that, so if somebody is putting forward what we believe to be a crime, they are willing to go
forward, they are willing to testify in court, and we think that in good faith we can stand up and represent to the court that they’ve been raped, then we’re gonna go forward.

Q: So winnable does not mean conviction?

A: Noooo. It never equals a conviction and ya know I think that’s where it all gets all screwed up. I think it is, there is a sense of doing justice all the time. Justice sometimes is just giving somebody the chance to come in and be heard, . . . and having their day in court, that’s justice.

This part of the interview exemplifies a common theme throughout the interviews. The victim is central to the case and is a key part of the prosecutor’s decisions related to the case. This is made clear by the previous statement that seeks to provide justice for the victim regardless of whether the case is “winnable” in terms of achieving a conviction. In asking a prosecutor directly, how much input the victim has, a Nolan County prosecutor highlighted the importance of the victim’s input.

Q: So, when you meet with the victims how much does their input play in role in your decision making throughout the case?

A: A lot. An enormous amount.

Q: Why is that?

A: Because they’re what the case is about, it’s about their lives. So, it’s important that their needs are respected, but also realistically, who they are, how they feel about things, their ability to participate is gonna have a huge impact on the end result.

I pressed the prosecutor by asking how they handled explaining to a victim the many weaknesses of a particular case when discussing whether the victim wanted to go forward and whether they explained this to the victim. She explained:

[T]hat’s the meeting that you have and you sit down with somebody and it’s a lousy case and you say, you know, “I want you to think about this, here are the strengths and here are the weaknesses of the case and at the end of the day I just want to make sure that if it’s a not guilty that you’re going to be okay with that, and that for you success isn’t only going to be measured in whether or not we get
a guilty cause I can’t tell you that we’re gonna get a guilty but if at the end of the
day you’re gonna know I had the chance to say what happened, that he had to
listen to me as I said what happened, and that that is empowering, and that feels
like something you can tolerate, if after going through all of that you hear a jury
say not guilty, then let’s go.

The idea that the victim is in charge was prominent in a significant majority of the
interviews. As a result, the prosecutors, in most cases, were not making quick assessments of
the cases, but were waiting to meet with the victim prior to forming an opinion about the case.
However, the conversation that took place with the victim would be influenced by the facts of
the case. This in turn would affect how the prosecutor handled a case. In Nolan County a
prosecutor might test the case and the victim’s testimony by choosing to put the victim before the
grand jury instead of solely relying on hearsay. As a result, the prosecutor chooses to follow the
victim’s lead, but expose her to grand jury or a probable cause hearing, thereby giving her a day
in court. For example, this anecdote from Nolan County illustrates this point:

I had a woman in Grand Heights District Court, she was applying to be an escort
and she had answered an ad in the [city newspaper] and she went on an interview
in [city name] and the guy like being interviewed, interviewed meaning she had to
give a blow job, and he said I’ll call you if I want to hire you and then he, then the
next day invited her over to his house and he had sex with her and she then
reported a few days later that she had been raped, so there was like 2 counts of
rape, one for the one in [city name] for the hotel and then one for this guy’s
house, . . . So [advocate name] when we met with the woman was
like “no one
is gonna believe you,” she said, “you’ll have to take the stand and you’ll have to say
I was applying to be an escort, I was applying for a position where I would be
having sex with men for a fee and now you’re claiming, you know, so.”

Q: So, say the woman who was applying to be an escort, say she said, “I don’t
care, he raped me, and I’m willing to testify, the truth is I was applying to be an
escort and that happened, but you’re not going to be able to persuade me that I
shouldn’t participate,” then what?

A: Well then we would’ve done the case. It was nolle prossed because she said
she didn’t want to put herself through the scrutiny of people judging her, but we
kind of left it up to her, and that is sort of my overriding theme in all of these, is
that it would be very victim based, like I’d sort of take cues from the victim in
terms of what they’d want to see happen.
Q: So, in that escort case if you had gone forward and you had a trial what do you think the likelihood of conviction would have been? Would you say that was a weak case?

A: Well yeah there’s, I mean she consented to, she was an adult, so it wasn’t like a stat rape case, that would have been a case where I would have had her go to grand jury and testify, you’d almost want to see, like I’ve learned to value grand jury a lot in, . . . it’s a good forum to, if you are feeling shaky about something, to have the witnesses show up and not just do it through the police officer, . . . I would have had her go there. It would have been a weak case. Now that I remember it, she said she consented the first time when she said she gave the guy the blow job in the interview, but the second time he forced himself on her and it would have been real tough, real tough.

When victims in Jones and Nolan counties decide they will not participate the prosecutors provides an affidavit for them to sign to indicate their lack of willingness to participate. As explained by one prosecutor from Nolan County:

If they come to tell they’re just not gonna be involved then we gotta think long and hard about what we’re gonna do, probably have to let it go. We have a form we have people sign, “decline to prosecute,” you know, basically saying “I don’t wish to be involved in the prosecution, I will not participate, I recognize that you are ready, willing, and able to go forward”

Allowing the victim to decide whether or not they are willing to participate is a way of giving control back to the victim.

They just don’t want to feel like somebody is telling them “we’re just not gonna do this.” We never do that. I mean, I’ve, I think there’s only one case that I’ve gone in and said we’re not charging this case, we’re not doing it and you know that had its own problems, but most of the time you go in and you say “this is your decision, we’re gonna do it.

Prosecutors also attempt to restore some control by not forcing a sexual assault victim to testify. This is yet another way the victim is in charge in a way that is unique from other types of cases.
Forcing a Victim to Testify: “It is about restoring control in a crime that has taken away control.”

Researchers have largely failed to recognize the lack of victim participation as a possible factor in the decision whether or not to prosecute a sexual offense. Perhaps this is due in part based on the challenges in collecting data related to a victim’s perceptions and motivations related to the prosecution of the case. Most sexual assault cases require the victim’s testimony at trial. The question then is what happens if the victim refuses to testify or participate in prosecution of the case. I asked prosecutors this question and heard a variety of answers. The most common theme was the goal of avoiding re-victimization of the victim.

Re-victimization often creates additional trauma. Given prosecutors’ trepidation over the possibility of re-victimization most prosecutors indicated they would not force a sexual assault victim to testify.

For example, prosecutors stated:

My general rule would be along the lines of not making a victim a victim twice, so I’m not gonna punish someone and I’m not gonna arrest my own victim and have them brought to court and held in contempt unless they testify. . . . .”

And another prosecutor stating:

I just wouldn’t force any sexual assault victim to go forward. I just think it’s something so personal to people and the damage you can do by forcing someone to go forward is not as bad as the act of course, but you don’t want to be part of making it worse for the person. . . .

All of the prosecutors were concerned about the potential psychological damage that could be done to a victim if they were forced to testify against the accused. In one interview the Jones County prosecutor explained the unique nature of the sexual assault case by explaining that a person who was a victim of a robbery is in a much different position than a person who is a victim of sexual assault. She explained a robbery victim would indeed be forced into court, but
In sexual assault cases I don’t believe in forcing them to go forward. When I was in the gang unit and particularly here in [this county] with people shooting up neighborhoods, and gang kids, we do make them go forward and bring them in under arrest if necessary, but I would never do that to a sexual assault victim.

Prosecutors did express exceptions to their personal and office policy rule of not forcing sexual assault victims to testify. For example, one prosecutor indicated that if she went to the trouble indicting the case she would later force the victim. The other exception explained by prosecutors as a factor in charging a case regardless of the victim’s wishes and possibly forcing a victim to testify is a case that creates concern on the part of the prosecutor that the offender will harm other people. Prosecutors explained that some cases require consideration of the public at large and not only the individual victim. Prosecutors mentioned this as a concern when discussing both the third and fourth hypothetical scenarios.

In the fourth hypothetical scenario the offender is a pastor who assaults a young female congregant. The third hypothetical scenario includes the beating and rape of a woman who met a man on craigslist. In that scenario the victim had agreed to exchange oral sex for drugs. The use of a hypothetical that included a violent offender with a history of sexual assault gave us a platform for discussing this issue. The third hypothetical that includes a defendant previously convicted of rape that brutally rapes a prostitute also allowed for a discussion of the possibility of forcing a victim to testify due to public safety concerns.

A: Yeah, and I can tell you I’ve had a couple cases in my career where we had like a serial rapist charged and the victim was hesitant about participating and we didn’t give them as many choices as we normally would because we need to get the serial rapist off the streets, but that is extremely rare.

Q: So that’s like a rare, and public safety

A: Yeah, and still even in that I wouldn’t, I’ve never had to drag an unwilling victim into court.
The prosecutors explained the differences between the types of cases as the driving factor in giving victims choice. This is demonstrated in this question and answer with a Nolan County prosecutor about the different handling of the types of cases:

Q: So, would you say, how a sexual assault case is handled would be different than any other type of case, save maybe domestic violence?

A: Yeah, I think so.

Q: So how are they different?

A: Well, you know, it is the classic analogy that somebody uses where they say, say wait a minute, “uh, when there is a bank robbery we don’t say to the people in the bank robbery, by the way your statement that you gave to the police, that was really very helpful and now we want to call you in as a witness,” and when they say “go screw,” we don’t say “okay, yeah sure, now I’m going to go away.” We give them a subpoena and we drag them to court. In a sexual assault case, in a rape case, a victim says I don’t want to do this and we may have further conversations about that, and what their fears and concerns are, and at the end of that process we may say “okay, we’re not going to force you to do this.”

Q: So why not force them?

A: I think that that has, that answer becomes a philosophical discussion about whether that is re-victimizing somebody, whether or not you subscribe to a view that we are trying to give people back control of their life, that this is a very unique crime. And so if somebody is saying “I can’t do this, I cannot get up in front of a jury and answer these questions and be torn apart by a defense attorney,” I don’t think that you have that conversation with the witness that you do in the bank robbery, they’re not gonna be emotionally scarred and traumatized, maybe occasionally, but for the most part they are not gonna be by being put through that court process.

Prosecutors explained there are several factors that will affect the decision of how much to push the victim to participate in the case. If the prosecutor is concerned for the general public the victim will be either forced or pushed to testify. On the other hand, the prosecutor will also consider whether the victim should not be forced or even gently encouraged to testify. Factors the prosecutor will consider include the victim’s refusal to participate, recantation, and inability to locate the victim, as well as the likelihood of psychological distress.
If a case has already been charged in Jones county the prosecutors had different ideas about how they would handle the case. One prosecutor emphatically stated she would force a victim to participate if the case was indicted and the victim later changed her mind. In Roland county prosecutors largely indicated they would do their best to get the victim to plea if they did not want to participate. The prosecutors would also have a conversation about the reasons why the victim did not want to testify. In Roland county one prosecutor was facing the very issue and explained to me:

Q: Say a sexual assault victim said, “I don’t want to testify it’s gonna cause me further emotional distress.” Would you still subpoena them and bring them in?

A: Personally, I think I fall into that situation now. [I have] a felony sexual abuse, it’s with a young child, we’ve prepped her, I’ve met with her every week except Christmas and New Year’s Eve, and she is ready to go, and she is ready to go into grand jury, and to be honest with you she probably already should have gone, but we keep going and getting her ready. But do I want to say you have to tell this most horrendous thing that has ever happened in your life, you have to go in a room now and tell that 16 to 23 people because the defendant does not want to take state prison. So, I’m kind of dragging my feet to kind of get the defense attorney, kind of puffing out my chest going nope she’s gonna testify, she’s gonna testify. The suckiest thing about this job is every time we review it you’re having her live through it again. So, it’s almost in my mind I should just have her testify, and then it’s over until the trial, but you know, that goes back to your question, you know, would I subpoena her to come in, subpoena her, yeah I guess I would, cause we’re attorneys and we have certain duties and I’m not getting fired.

Hearings are scheduled and everyone is looking at me like you’re victim’s not here what are you doing, and in that way it would be to be the cop out answer it would be C-Y-A, cover my ass, listen I subpoenaed her she didn’t show up, I’m going to mark the file appropriately I’m going to contact her once the hearing is over and, listen “you’ve been subpoenaed, you’re not here, I’m taking that as you are not willing to participate I’m going to mark my file as such, please give me a call if you want to talk about it further.” Would I do like a material witness order and have her arrested and put her in jail, no, maybe if someone told me to do it, don’t get me wrong if the DA comes in and tells me to do it I would, but in my mind if I had the discretion and she’s not there I don’t think I’m, cause I have, I have files full of willing victims to spend my time on. But I think you can’t, I think with this you can’t just have, like with a victim like that you can’t just meet with her once, you can’t just call her up the week before the hearing and be like “by the way I’m ADA so and so, about 3 months ago something unbelievable horrendous happened to you, you’ve never talked to me before and, but I need to
see you, it is now my emergency so you have to come in tomorrow at 2, yeah come in the courthouse, oh okay, google it, I don’t know how to tell you to get here, just google it, and I will see you tomorrow at 2, oh and if you don’t come, by the way I am going to subpoena you and you are going to be arrested, okay, yeah.” You know I think it has to be more than that.

Although prosecutors expressed their desire to help victims and not re-victimize them, this was also related to the perceived strength or weakness of the case. For example, prosecutors indicated they would absolutely not force the victim in hypothetical one to testify and would go so far as to explain the case is not likely to be successful. Several prosecutors in Jones County indicted they would try to “shut down” a weak case. In contrast, prosecutors explained they would give someone a “pep talk” in a strong case or one that included issues related to public safety. Prosecutors in Jones County indicated they would employ strategies to get the victim to participate if they had changed their mind. This is part of the importance of being open and honest in the beginning, so that the victim is not surprised later and wanting to stop cooperating.
CHAPTER 10

Defining Success: It’s Not About Winning

“If you’re keeping track of wins and losses you are in this job for the wrong reason”
(First Assistant District Attorney, Nolan County).

Researchers suggest prosecutors make decisions based on concerns for promotion and career advancement. In this study I was able to discuss promotions and the definition of a good prosecutor with the prosecutors. I asked each prosecutor how they define success in a sexual assault case so as to examine whether differences exist between individual prosecutors, offices, and among type of cases. This study does not support the notion that prosecutors are focused on achieving convictions, but instead that success can mean many different things.

Promotional Decisions and Career Advancement

I was able to interview key individuals in the promotional process for prosecutors in two of the three offices. In Roland County, however, there is no possibility of promotion. The office employs a total of 12 prosecutors. Ten of these prosecutors are assistant district attorneys, one is the elected District Attorney, and one is the First Assistant to the District Attorney. As a result, there are only two people in supervisory positions, the elected District Attorney and the First Assistant District Attorney.

In Roland County there is no opportunity for advancement. Prosecutors bemoaned this fact since it gave them nothing to strive for. I did not determine whether there were other possible rewards for good performance but did learn that budget crises meant an inability to reward good performance or hard work with raises in salary. Interestingly, at the time of this writing, not a single person I interviewed in the Roland County District Attorney’s Office is still employed there. Given the low pay and lack of reward structure prosecutors use their employment to establish professional connections and gain courtroom experience. During their
time in the office they are focused on building a reputation for ethical behavior and hard work. These positive elements are not related to conviction rates.

In the two larger offices the structure of the courts and the offices is different. These counties include courts of two different levels. Newly hired prosecutors start out in the District Court. A promotion is required to join the Superior Court staff where cases and penalties are more serious. In addition, there are numerous opportunities for promotion to supervisory positions. Also, assignment to the sexual assault unit is considered a promotion in both offices.

In both Nolan and Jones Counties several themes emerged that explain how or why an individual prosecutor is promoted. Although promotion does not occur in Roland County the prosecutors still had thoughts about how to define a skilled prosecutor. These included one’s willingness to go to trial and one’s work ethic. In addition, within the theme of one’s willingness to go to trial was the agreement among prosecutors that you can’t measure good performance by counting wins and losses.

**Conviction rates don’t matter.**

All of the prosecutors interviewed were adamant that conviction rate plays no role in promotional decisions or one’s opinion of a prosecutor’s skill as an attorney. During the interview prosecutors were directly asked whether they believed their conviction rate influenced their chance for promotion. This was an important question because all of the prosecutors in Jones and Nolan counties had at one point been promoted, whether to the sexual assault unit, Superior Court, or a supervisory position.

The response by almost all of the prosecutors was to laugh as they explained that conviction rate could not have played a role in their promotion because they did not believe anyone actually kept track, many believed they had lost more than they had won, and because
conviction rate is not an accurate measure of good performance due to the unpredictable nature of juries and jury trials. Although prosecutors cannot be promoted in Roland county, they agreed that conviction rate had nothing to do with one’s status, or perception of one’s ability within the office.

Prosecutors explained that having a successful career as a prosecutor has nothing to do with an ability to get convictions. For example, as one prosecutor from Nolan County explained:

I have never felt, in the entire time I have been here, I never felt that anybody looked at my conviction record and made decisions about what my career in the office might look like based upon whether I succeeded or failed in terms of convictions. And partly that’s because I think there is a shared view that success isn’t always about winning.

Instead of conviction rates prosecutors believed they were promoted because they worked hard and were willing to go to trial.

**Willingness to go to trial**

In both Nolan and Jones County, the prosecutor’s willingness to take a case to jury trial, no matter how weak the case might be, was a recurring theme when prosecutors were asked about promotions. In some instances the prosecutor in Nolan and Jones county must be willing to go to trial on any case that their superiors require them to take to trial. A prosecutor’s shying away from this requirement or trying to convince victims not to participate is considered evidence of poor work ethic. Combined with the willingness to try cases was the individual’s work ethic, including preparedness and understanding of the job. In essence, beyond whether they are willing to try a case, a skilled prosecutor understands how to present a case to a jury by creating persuasive arguments, the proper introduction of evidence, and effective examination of witnesses. The demonstration of these skills has a greater effect on one’s reputation than the
particular outcome of the case. The First Assistant District Attorney in Nolan County explained how willingness to go to trial and preparation affected her view of their skills as a prosecutor:

I don’t know their conviction record, quite honestly. I hear whether they’re good lawyers or not, and that’s not always, especially if they are coming out of doing domestic violence and sexual assault for instance, they might have a lot of not guilty, but they might have tried a lot of cases . . . And to me it’s, well did they put all the evidence in, did they . . . know how to do that, did they put in the victim in a case appropriately, did they do any DNA evidence, were there forensics that they could use in that case, did they recognize that there were things like that, . . . who were the other witnesses, so if they had the ability to see all of issues of the case and did a good job putting it in, I don’t really care whether they won or lost.

Prosecutors who take a challenging case to trial are held in higher esteem than prosecutors who only want to try cases that they feel confident they can win. Several prosecutors explained that “some cases just need to be tried.” If the prosecutor has a victim who is willing to testify and the prosecutor does not have ethical concerns about the victim’s veracity, despite possible challenges, the case “should be up to the jury.” This is exemplified in my conversation with the Chief of District Courts in Nolan County. At the time of the interview the office was considering four prosecutors for promotion to the Superior Court. In ranking the prosecutors, this prosecutor told me the four were initially ranked on seniority but that his number one choice “has lost more trials than he’s won because he takes all the harder cases.” This was a valued attribute because there are many cases that simply need to be tried regardless of the potential outcome. He explained:

So, the cases that this person is taking are not those cherry picked cases that ‘oh, I can win.’ He’s taking those cases where the victim is the most vociferous victim that we have in the system at that time, or it’s a multi-defendant case where you have 5 or 6 defense counsels attacking you from different sides. He’s taking some of the high risk assessment cases where you get a victim who’s on the edge about whether they’re going to testify or not, . . . can you put the case together without the victim? This individual is the one you give the case to versus the rank and file ADA who is sort of cookie cutter in how they address their case be it because of their lack of experience or quite frankly they just don’t give a shit.
This prosecutor’s explanation clearly exemplifies the characteristics that are valued in a prosecutor beyond conviction rates. Characteristics that consistently came up in the interviews were willingness to go to trial, hard work, competence, not caring about conviction rates, and caring about the job. Not only is one’s conviction rate a poor indicator of success or one’s likelihood of being promoted, prosecutors invariably indicated wins and losses fail to capture whether someone is a good prosecutor.

**Counting wins and losses does not measure good performance.**

Prosecutors expressed the view that there are too many variables in a case to judge a person on their conviction rate. In addition, many expressed the view that juries are unpredictable. In fact, several prosecutors gave examples of cases that they believed were slam dunk cases that resulted in acquittals, and cases that were very weak that resulted in convictions. This led them to the conclusion that you can’t judge performance by conviction rate.

Prosecutors suggested many variables that might impact the ability to achieve a conviction. Variables that might impact the ability to achieve a conviction included strength or weakness of the case, how the victim testified, whether the victim was liked by the jury, the defense attorney, whether the case was tried near the holidays, and the weather. Ultimately, the overall notion was as follows:

Someone can try ten cases and win three of them and be doing a much better job than someone who wins five cases in a row, because the difficulty of the case, the difficulty of the evidence to get in . . ., you can’t count wins and losses to decide.

Not only do prosecutors indicate that the level of difficulty can vary, but that juries are incredibly unpredictable. One prosecutor noting, “I think every case has a fifty-fifty chance at trial.” Another prosecutor when asked about convictions in relation to charging decisions:
Q: So, when you’re thinking about this, about the case being charged or the case being indicted and that kind of thing, is it in your mind, can I win at trial? Is that something that factors into the equation?

A: No, not at all for me because I don’t think, I think any case can win at trial, and I think any case can lose at trial, . . . .”

Finally, better lawyers are more likely to get the more difficult cases and this may negatively impact their conviction rate. As explained by the First Assistant in Nolan County,

In assigning cases, you know if I had, truthfully some of these cases would go to better lawyers because I know that there are other lawyers who are not thrilled about trying cases and they are not gonna give that victim their day in court so I wouldn’t assign them a particular case.

Not only are there numerous variables that influence conviction rates, much of the decision making in sexual assault cases is not up to the individual prosecutor. The result is an inability to simply pick cases that are more likely to result in a conviction so as to protect one’s batting average.

**Defining Success in a Sexual Assault Case**

If a conviction is not the measure of success and if prosecutors do not make processing decisions based on their concerns for achieving a conviction, it is important to consider how prosecutors then define success. Conviction, of course, can mean after a trial, or as the result of a guilty plea. Prosecutors in all three offices said that a conviction, however attained, was not an appropriate measure of success in sexual assault cases. One exception was the District Attorney in the small county. He did in fact explain that conviction is the appropriate measure of success. Table 21 provides a distribution of the prosecutors’ responses when I asked how they defined success in a sexual assault case. Prosecutors explained that success in a sexual assault case is unique because the cases involve victim and are always more demanding and challenging than other types of cases.
Table 21. Definitions of Success in A Sexual Assault Case.

<table>
<thead>
<tr>
<th>Success</th>
<th>Prosecutors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Victim is satisfied / empowered</td>
<td>12</td>
</tr>
<tr>
<td>Prepared/ do my best</td>
<td>6</td>
</tr>
<tr>
<td>Plea</td>
<td>2</td>
</tr>
<tr>
<td>Conviction</td>
<td>1</td>
</tr>
</tbody>
</table>

**Sexual assault cases are demanding and challenging**

“Any victim case is gonna be right off the bat a tougher case ‘cause you’ve got to do more work to prosecute the case.” (Jones County prosecutor)

There are many differences between sexual assault cases and other types of cases. The prosecutors found these differences were reasons the prosecution of a sexual assault case was more demanding and more challenging. One of the reasons is the fact that a civilian witness is needed in a sexual assault case. It is very rare that a sexual assault case can proceed without the victim’s testimony because there is not likely to be enough other evidence available to prove the case. This is in great contrast to other types of cases that might be provable without victim testimony and require only the testimony of police officers. For example, a drug case relies primarily upon police officers. The police officer may have put a lot of effort into the investigation but their emotional investment is not similar to the emotional toll a sexual assault survivor may experience while testifying. It is likely the first and only time the victim will testify in front of a jury whereas police officers often testify numerous times during their career.

Prosecutors explained that sexual assault cases are more demanding and more challenging due to the nature of the case and the need to prepare the victim.

Almost all of the prosecutors in Jones and Nolan Counties began their careers handling “general” cases. General cases are all cases except domestic violence and sexual assault. In, Roland County, however, prosecutors begin their careers handling all types of cases. It was interesting to learn how prosecutors’ thinking change and shifted as they began working with the
more demanding and challenging cases involving sexual assault. One prosecutor was moved to
the sexual assault unit in Jones County after a lengthy career in the drug unit. She explained:

I mean this is a very challenging, you know it’s just not a professional witness
going “Oh and then what happened?” You know, the police officer that’s testified
in drug cases three thousand times and is just polished, you’re not gonna get any
polish, it’s just not like that.

The prosecutor was surprised by the challenges she faced. After a career calling
mostly police officers and drug experts to testify she then had to work with sexual assault
victims. This was a major shift and she felt the cases were much different. Though she
did not seek out a spot in the sexual assault unit she wanted to be moved to a different
court. This was typical, the notion that prosecutors did not seek out assignments in the
sexual assault unit. I asked her how she ended up in the sexual assault unit. She told me:

Cause I just didn’t want to commute to [city] anymore. Cause I mean I would be
in the car sometimes four hours, traffic would be so bad coming to [city] So I
would have done anything. So, they put me in sexual assault and I was like “oh,
whatever, that’ll be good.” And I hated it, when I tell you I hated it, I mean I
hated it. Because my whole background was like gun cases and drug cases. I
wasn’t used to victims, you know civilian witnesses. I was used to having
evidence, meaning drugs, you know, guns, stuff I can introduce to a jury. And
then all of a sudden I come to sexual assault and I’m like “well, okay.” I was like
the typical juror, “well where’s the proof?” You know what I mean? But after I
tried my first rape case in superior court I was like in love with it.

She explained that she fell in love with the job due to its challenges:

I fell in love with it because for me. . . it’s challenging. There’s so much more
work to be done, there’s so much more lawyering to be done in sexual assault
cases than there is in a drug case or a gun case. I mean that’s like “where’d you
find it, what’d you do, how’d you bag it, how’d you tag it, where’d you put it, is
this the cert, yup, okay,” introduce it. You know there’s not a lot of lawyering
‘cause it’s obvious, you know. Even, it’s like one word against the other, delayed
disclosure ten years, that’s when you have to draw inferences and make
arguments and try to convince a jury to see it your way and not the other way. I
just thought it was so challenging. I loved it.
Prosecutors explained there is more work to be done on sexual assault cases making them more demanding of the prosecutor’s time and skill. The District Attorney in Roland County explained:

Number one you gotta work with the victims, number two the evidence is always, always, it’s not concrete, come on, it can take you, to prepare a witness who’s the victim of a violent sexual assault or a child witness period, takes tons of time and one or two sex cases are gonna take ya, is gonna take you about as long as eleventy million narcotics cases. When I went over to narcotics, or when I started doing narcotics after all the sex cases it was like ehhh I can do a narcotics indictment right now. Good morning ladies and gentlemen this is the State of [name] versus Ralph Smith and he’s charged with sale of controlled substance, blah, blah, blah, first witness officer blah, blah, Officer Blah Blah what did you do blah, blah, blah. Second witness, snitch, CI, what did you do, blah, blah, that’s the case, anybody have any questions? Here’s the law again, leave you to deliberate, it’ll take you about sixteen minutes if that if that to put that case in the grand jury.

Prosecutors explained the importance of meeting with the victim as something that is very time consuming. They also explained that these types of cases are more serious, the stakes are higher. In addition, prosecutors explained that sexual assault cases are often more difficult to prove. For example, one prosecutor explained:

I think for a number of reasons, I think sexual assault cases often times it’s her word, well to be stereotypical, it’s her word against his word and even I’ll have conversations all the time with victims and families, I call it the CSI talk, we live in a world where everyone watches, there’s at least four CSIs that I know about, and we’re gonna try a case and people are gonna want to know where’s the fingerprints, where are the hair follicles, where’s the DNA, where’s the witness, where’s the video, and that’s just not how most cases are tried. I think sexual assaults are similar to domestic violence, I mean those are testimony, testimony is probably the most, can be all that you have, in either case. I mean in drug cases you have seven cops come in and say he had a huge dime bag of crack cocaine on him, and then they show you the bag of cocaine, I mean that’s easy. Or they have the Uzi in the trunk. I mean bring it in and show everyone. The lack of physical evidence I think oftentimes is what, can make them harder and that’s just the way current status of our society is, people are watching way too much tv.

In addition to being more difficult to prove, the fact that there is a victim is another issue. In both Nolan County and Jones Counties the prosecutor tries to meet with
the victim as soon as possible. Often a victim witness advocate is assigned even before the case is charged.

Interestingly, the Chief of the Sexual Assault unit in Nolan County explained that she found her sexual assault cases to be even more challenging than a homicide trial. She explained:

A: Well I think that’s true, I think I tried my first homicide this past fall and I have to tell you, to be honest with you, in a way I felt it was easier, and I had a mental health defense, it was a tough case. I had a mentally ill defendant and it was criminal responsibility was the issue, but compared to my sexual assault cases, like picking a jury on a sexual assault case is horrible, no one ever wants to sit on those cases, everyone has issues with it, and in a murder case people want to be, the jurors that you want, want to be on there.

Q: But didn’t you have a family, like, that you were worried about though?

A: Yeah, yes and I had an incredibly high maintenance family, an incredibly high maintenance family on my murder case, but still I even had a live victim too, cause the guy had murdered one victim and the other survived, so I had a live victim too, which is similar, but you know, it was an assault victim, and not a sexual assault victim so that was very different as well, you know no one was even, the defense didn’t even cross examine the witness as opposed to a rape victim who would probably be on the stand for two days, you know I didn’t even feel in preparing them, you know you prepare them but I didn’t have to, the tough questions that they were worried about it, I was like I don’t think anybody is gonna even ask you that, and it was absolutely true they didn’t ask.

The fact that there is a victim was universally important as shown in this excerpt:

Well in a drug case society is the victim, there is no like named victim so I never had to worry. I mean it’s just sort of what I felt was right and as long as I felt like I just talked to whoever the lead detective on a case was. So, I had a lot more, I guess a lot more freedom to just sort of make decisions in terms of what I thought was right. So challenging is, you have victims who’ve obviously had something awful happen to them so they, they come to us and we meet with them and they’re either hurt from that or they’re angry, there’s just a lot of emotion to it, so I think that the emotions are ramped up a lot higher on sexual assault cases, so that makes it more challenging, and then I think the stakes are very high cause I think that, at least from, I have not had a sex trial in Superior Court, but in District Court, you know when a jury says not guilty to an, and you’ve had a victim testify in a sex case, I mean that just, the effect of that, as opposed to like maybe just a regular assault and battery case where it’s just a fight, it’s a lot more personal and so I
found that, I found that when you did win, I mean it’s very rewarding to win, but then if you lose it’s just like a, you’re in a funk for a while, you know

Prosecutors even explained the motivations for the offenders are different.

I think with sex cases in general they’re just always tough cases. I think there is kind of a general, I don’t know if it’s a stereotype but the way in which they are defended, the victim is gonna be the one put on trial so, there’s the defense attorney is always gonna be barking in your ear that the victim’s no good, they’re not gonna cooperate, they got all these problems. You know, the defendant who is a sex offender is the least likely to accept responsibility, at least in my experience, for what they’ve done. I mean, a drug dealer, for them it’s, when they get busted it’s the price of doing business, so they are looking for the best deal their attorney can get ‘em, they’ll plead guilty and tell you what they did and be on their way. . . . Whereas a sex offender I think they are just, they’re sick people and they just don’t, they don’t want to take responsibility with what’s happened and they want to minimize everything, their involvement in what was going on, they’re gonna push things to the brink, . . .

Many of the challenges of prosecuting sexual assault cases are tied to the definitions of success. Success is complicated and may vary from case to case. As explained by one female prosecutor in Noland County:

It never equals a conviction and I think that’s where it all gets all screwed up. I think . . . there is a sense of doing justice all the time. I always think that for me that has always been the biggest piece of this, that having this job is about doing justice and doing justice looks different in every single case and justice doesn’t equate with guilty verdicts.

Success was described in myriad ways. Success can come as the result of a guilty verdict at trial, or a guilty plea, or even the dismissal of a case. Prosecutors also explained that success might mean choosing not to prosecute because the victim refuses to testify, prosecution would violate ethical rules, or exculpatory evidence means the case should not be prosecuted. In these explanations I learned that success is unique to each criminal case even though there are several recurring themes that help define success in a sexual assault case.
The victim feels empowered and satisfied.

If a case goes to trial, success, according to the prosecutors, is not measured by a conviction. For example, prosecutors indicated success occurred if the victim got something out of the process. One Jones County male prosecutor explained a recent case that ended in a not guilty verdict, yet the victim was content, and he counted that as a victory. He explained:

She was happy. Well she wasn’t happy. She got to testify, she testified pretty well, when they deliberated they made their decision and she was comfortable with that. I think in sexual assaults oftentimes is the most difficult cases to prove and I don’t think the only satisfying part is if you get a conviction.

And yet another prosecutor from Nolan County, when asked directly to describe success in a case explained:

That the victim is proud of the fact that she came forward and is content. I don’t know if that’s the right word, is as satisfied as she possibly can be with her decision to go forward with the case and if it’s a not guilty that she is still happy with the fact that she did it, that is brought her some kind of closure, that she can try to move on with her life and know that at least she got up and said in open court what somebody did, and that he had to face what he did.

The victim – centered concern is evident in many of the prosecutor’s explanations of success in a criminal case. Unlike the research purports to show, prosecutors chief concern is the victim’s reaction to having participated even if it means the case did not result in a conviction. During the time she is waiting for the jury to hear a verdict one Jones County prosecutor explained she is thinking about the victim and how the victim will feel if the jury comes back not guilty. As she explained:

There is nothing better than hearing the words guilty, but . . . that’s not for me, . . . when they say there is a verdict and I am walking down all I am thinking is about that phone call I am going to have to make to my victim, and is it going to be a good one, or is it going to be one of those ones that just sucks. It’s not about me, . . . I can’t really explain what I think success is, it’s definitely not wins.
Part of being a good and successful prosecutor is helping the victim through the process and helping them feel empowered. As one prosecutor explained: “Success I think is empowerment to a victim, helping a victim realize that this doesn’t define them and that they are bigger and stronger than they ever thought they could be.” Prosecutors largely expressed deep care and concern for the victims with whom they worked. This was especially true in our discussion of success in sexual assault cases.

**A guilty plea protects the victim from having to testify or prepare for trial.**

Another victim-centered response to the question of success in a sexual assault case was the opinion that a guilty plea was the best result because it meant the victim would not have to testify or prepare to testify. Several prosecutors said that trials were generally not a success due to the potential trauma to victims that have to testify. The prosecutors who made these statements had more than a decade of experience working with sexual assault victims and had prepared countless victims for court involvement.

As stated by one prosecutor: “I think a plea, before someone has had to prepare for trial is better. There is almost just as much trauma involved in preparing for trial as actually testifying. I think that the damage in that is just as much.” Prosecutors also explained that they believed the victim really wanted to hear the defendant take responsibility for the crime. For example, a prosecutor in Nolan County explained:

I feel like guilty or not guilty is not a way to measure success. I think a plea is by far the best outcome you can possibly have because a victim gets to sit in court and see a defendant stand up and say, “yes I did it,” I feel like that would be the best closure, the best satisfaction, that the victim can get.

Instead of relying on going to trial and achieving a conviction this prosecutor explained the best outcome occurs prior to trial in a plea. She explained:
I’m happy when I think somebody received a sentence that was reasonably just considering the factors that we have at play, and when the victim and their family also feels that way as way. In general, I think a plea, before someone has had to prepare for trial is better.

Finally, one prosecutor from Jones County became particularly animated and excited when she described a victim that disclosed a sexual assault. She was animated because my question regarding how she defines success brought this to mind and she relished the memory. In her opinion, success is simply a victim who is able to disclose a sexual assault. She felt that it was a major victory when someone was able to say, even if only in an interview, that they were victimized.

Whether people know it or not, my experience has been, what it is they really wanna accomplish is they want to be validated, they want people to acknowledge that what has happened to them has really happened, and they want somebody up there to say, “I did it, I’m wrong, and I’m sorry.” Whether they know it or not that’s ultimately what they always come back to me and say, “that’s what I wanted to hear.”

**Case Variability: “All that matters is doing my best”**.

Finally, prosecutors also explained that the only way to know whether they were successful was if they had put in the hard work and done their best. This was true because they believed any case could be a guilty or a not guilty, and “any case can win at trial, and I think any case can lose at trial.” In essence, “every case has a 50 - 50 chance.”

Since it is impossible to predict the outcome prosecutors want to feel that they have done their best and that the victim and the victim’s family is happy with the job they have done. For example, one prosecutor noted: “when a case is over and we’re waiting for a verdict if the family is happy with the job that I did that’s all I care about.”
Conviction

The least common factor for success mentioned by the prosecutors was conviction. The District Attorney in Roland County however, did say that he believed the measure of success in a criminal sexual assault case is conviction. Given that this prosecutor was the elected official it is possible that his focus would rest more so on conviction rates.
CHAPTER 11
CONCLUSION

Discussion

This qualitative study explored the structure of decision making across three District Attorney’s Offices. The findings indicate that jurisdictions vary relative to organizational structure, law, policy, and ethics. Factors that influence how prosecutors view sexual assault cases also varied among offices and individual prosecutors. One of the most important factors in the minds of the prosecutors was revealed to be the willingness of the victim to cooperate. Finally, this study revealed variation among offices with respect to promotion policies (or lack thereof).

Although existing research indicates prosecutors are the first criminal justice actor to determine criminal charges, the three offices included in this study showed it is often the police making the first decision regarding charging. The prosecutor then followed by deciding whether or not to continue prosecution of the case. Key factors in this decision include the victim’s willingness to cooperate in the case. This factor was moderated by the strength of the case. For example, in a vignette that included a violent rapist with a criminal record for rape, all of the prosecutors indicated the victim might be forced to testify in the case based on public safety concerns.

Success in a criminal case has long been considered to be defined by achieving a conviction. In fact, previous research purports to show that prosecutors will only charge cases if they believe the likelihood of achieving a conviction of high. The organizational goal is to utilize precious resources for “winnable” cases, and to win those cases so as to be promoted through the organization. However, only one person in this study, the District Attorney in Roland
County, indicated a conviction is a measure of success. Instead, prosecutors indicated success is measured by the victim’s satisfaction with the prosecutor’s work, whether the prosecutor believes they have done a good job, and whether the case results in a plea.

In addition, the relationship between promotion and conviction rate was not supported in this study. In fact, prosecutors in Roland County do not get promoted, leaving them with no promotion to attain. Supervisors in Jones and Nolan counties indicated promotion is based on hard work and a willingness to take cases to trial even if the outcome is an acquittal. Many of the prosecutors found the idea that their promotion (or lack thereof) might be based on their conviction rate.

There are important policy implications in the handling of sexual assault cases that must be mentioned here. While several prosecutors indicated they would not “sugarcoat” the issues the case might face, messages about the potential to earn a conviction may translate to a lack of validation or a lack of belief in the victim’s experience of sexual violence. Given the psychological impact of sexual assault these subtle messages could have an impact on the victim’s ability to heal. It is important that all victims, whether the case is prosecuted or not, are supported by counselors and victim – witness advocates.

Interestingly, prosecutors spoke frequently, and at length, about their ethical obligations. However, upon review of the actual ethical codes it became clear that the prosecutors did not know the accurate ethical mandate they were required to follow. Currently attorneys must take and pass a professional responsibility exam in order to become members of the bar for their respective state. Policy implications include requiring attorneys to master the specific ethical code in their state, and for prosecutors in particular to be knowledgeable of the ethical obligations of prosecutors in their respective states.
**Implications for Future Research**

As noted by Anders and Christopher (2011), “qualitative research, where survivors are asked about what went into their initial and later decisions of whether to aid in prosecution,” could shed light on the reasons for high rates of attrition in sexual assault cases. It is not enough to make inferences because too many questions are left unanswered. Our society maintains false, but widely held beliefs about “real rape.” These beliefs are pervasive, known by victims themselves, likely held by jurors, and exert influences on decision making from the victim to police to prosecutor. Research and education need to begin at the very beginning ground level. Synthesis is also needed between disciplines. Criminal justice scholars, psychologists, social workers, educators, and legal personnel must work together to dispel rape myths and increase prosecution of sexual assault crimes.

This study sought to explore the continued utility and accuracy of the uncertainty avoidance thesis. It also sought to explore whether seriousness of the offense and evidence factors are predictors of case processing in sexual assault cases. In addition, this study’s results shed light on the applicability of both bounded rationality and focal concerns theory as applied to sexual assault cases.

Uncertainty avoidance is an important thesis because the idea that prosecutors process criminal cases with an eye toward avoiding uncertainty so as to avoid an acquittal has been consistently applied to the research examining prosecutor’s decisions. However, in this study there was no support found for the theory that prosecutors make case processing decisions based on concerns for upward mobility within the office. In fact, prosecutors placed greater value on one’s willingness to go to trial regardless of the strength or weakness of a case.
This study reveals the fact that the uncertainty avoidance thesis, bounded rationality, and the focal concern of victim credibility are not applicable in the counties studied. Perhaps attitudes and values in prosecutors’ offices have changed since Albonetti’s study. It is also possible that the findings from Albonetti’s (1986) study do not apply to state prosecutor’s offices. The two original studies by Albonetti in 1986 and 1987 were both conducted using data from a United States Attorney’s Office. In this study the prosecutors worked in state offices. Certainly, it is possible that a high batting average in terms of convictions is necessary for upward mobility in the federal system. Nevertheless, there was no evidence of uncertainty avoidance to protect one’s conviction rate in any of the three counties in the instant study.

It is also possible that the definition of success has evolved, especially in the area of sexual assault cases. As explained by the prosecutors, sexual assault cases generally require the participation of the victim. In many cases the victim is traumatized and hesitant about participating in the process. It is clear from the discussions with prosecutors that their ideas about the typical sexual assault case do not conform to the notions in rape myths. In addition, prosecutors specifically stated they do not measure success in terms of achieving a conviction. Given greater knowledge and understanding, prosecutors may now have a different measure of success in a sexual assault case, other than a conviction.

The focal concern in this study proved to be the welfare of the victim. It is not, however, consistent with findings in other cases. This study revealed that prosecutors are concerned with succeeding so that the victim has closure, satisfaction with the process, or feels empowered. This is in contrast to the focal concern of victim credibility that has been found in other studies that suggest victim credibility is a focal concern because it might impact convictability.
The idea that prosecutors take routine approaches to cases, ascribing rape myths, was also lacking in this study. As a result, this study does not support the theory of bounded rationality that prosecutors will examine a case through the lens of considering what has been successful in the past. Instead, this study revealed that prosecutors do not consider victim characteristics as stereotypes. To the contrary, prosecutors explained that case assessments could only be complete if they had met the victim.

One of the key findings in this study is the support for the notion that findings cannot be generalized. As noted, by Mellon et al., (1981) “it is inherently inappropriate to evaluate any agency or function on the basis of factors beyond its control” (p. 79). In this study the variation between offices highlighted the inability to generalize. Between the two states there are numerous legal and statutory differences exerting an effect on case processing decisions.

This study revealed that weaknesses in a sexual assault case that are akin to rape myths are often seen as issues that need to be explained to a jury as opposed to issues that will result in a failure to prosecute the case or a victim that should not be believed. Since prosecutors explained that they do not believe a typical sexual assault case meets the definition of a cultural definition of a “real rape,” and prosecutors are concerned with the jury’s view of this fact, we must endeavor to determine whether jurors in fact subscribe to rape myths. Instead of “winning” these prosecutors are focused on the victim, defining success at a satisfied and empowered victim. The importance of the victim in sexual assault cases was clear in this study by the emphasis placed on the victim’s willingness to cooperate, the care and concern for victims, and the victim – centered focus of the meaning of “success.”

Decisions in sexual assault cases appear to be victim-focused. The fact that most of the prosecutors focused on the victim’s willingness to participate in spite of weaknesses in the case
means further research is needed to explore the interaction between the victim’s stance and the prosecution of the case. For example, how do prosecutors determine the victim’s willingness to participate and do prosecutors ever force victims to testify? In addition, if the prosecutor needs to assess the victim’s willingness at what point does this happen and how? A deeper exploration of the victim and prosecutor relationship is needed.

More research is needed to examine sexual assault case processing. Sexual assault cases have a very high attrition rate from arrest to sentencing. Yet sexual assault crimes are devastating to victims and communities. The nature and impact of the cases make it clear that further research is needed to uncover the factors that influence case attrition. Research in this area should examine whether there are other potential factors that influence case processing in sexual assault cases. Additional studies are needed to compare the policies of offices in diverse jurisdictions. Potential areas to examine include ethics, the legal standard employed by the office, the prosecutor’s personal view, credibility, and public safety.
REFERENCES


Costello v. United States, 350 U.S. 359 (1956)


APPENDIX A

VIGNETTES

Hypothetical Case #1
You receive this case in August of 2011. No arrests have been made.

Police Report
On July 12, 2011 fifteen year old Jane came to the police station with her parents. Jane’s mother informed me her daughter had been raped by a senior from Jane’s high school. I asked to speak with Jane alone and her parents agreed. I took Jane to an interview room. She appeared upset and shy. Jane would not make eye contact with me. I asked her why she was at the police station. She said she had been raped by a classmate the prior summer. She said her parents found out about it from another parent. Apparently there was some talk on the internet about her having had sex with a particular boy. She said she told her parents the truth when they asked about it. I asked her to tell me what happened.

Jane explained that during the summer of 2010 when she was fourteen years old she went to a party with some of her friends. She said it was a small gathering of high school students, maybe five or six people. At the party were Dave and Alex, both seventeen years old at the time. Alcohol was provided at the party and Jane said she had a couple of drinks of rum and coke. At some point several of the kids were outside playing in the pool. Jane remained inside with Dave and Alex. Alone in a room Dave dared Jane to kiss him. She said she didn’t want to in front of Alex. They continued playing video games in the room. After a while Dave kissed Jane. She said she didn’t resist even though the other boy was there. I asked her why and she said she liked Dave and wanted him to like her. Dave then tried to touch Jane’s breast over her shirt and she told him not to. She motioned to Alex who was playing the video game. Dave persisted. She continued kissing him and allowed Dave to touch her breast. Dave then leaned onto Jane putting his body on top of hers. She said “I’m not going to have sex with you.” Dave did not respond. She tried to push Dave off of her but his weight was too much. She struggled with Dave but he continued to kiss her and touch her. Alex came over and placed his hands on Jane’s shoulders. Jane put her head down and said that while Alex held her down Dave had sex with her.

When the group returned from the pool Jane said she wanted to leave and go home. She left with a friend. The two walked home together. I asked Jane if she told her friend what happened and she said she had not. I asked her why and she said she did not know.

A few weeks later Jane says she was having an online conversation with a friend. She told that friend what had happened. The friend told her she needed to tell her parents. She made her friend promise not to tell anyone.

When asked whether she has seen either boy again Jane says they were at parties together throughout the summer because they have the same friends. Jane says she saw Dave at another party and that she had been drinking. It was about a month later. She says she had sex with Dave at the party but that she was a willing participant. When asked why she would do that with the person who raped her she dropped her head and started to cry. She said “I thought it would make me feel better. I mean I thought it would make the other time go away, like it wasn’t really rape if I had sex with him and wanted to.”
The police interviewed everyone who was at the party. All interviewed agreed they went out to the pool for a period of time and Dave, Alex, and Jane remained inside the house. No one reported that Jane appeared upset or shaken when they went inside from the pool. Everyone said they walked in and the three were playing video games. One of the kids did say when they walked home from the party Alex said to him “I did something really messed up.” When asked what he was talking about Alex said “I really messed up. Things could get really ugly for me.” Also, one witness did say they heard Jane liked Dave and wanted to go out with him.

The friend, Maria, when interviewed said a few weeks later Jane told her that Dave had raped her and Alex held her down while he did so. She said Jane made her promise not to tell anyone. Maria is the friend who walked home with Jane and said during the walk Jane appeared fine.

**Criminal Record/Background**
Both Dave and Alex are eighteen years old and going into their senior year in high school. Neither has a criminal record. You have learned that each boy is considered popular at the high school and both participate in sports. Both boys have refused to discuss the matter with police.

**Victim Meeting**
Jane and her parents come to the office for a meeting. As soon as they sit down the parents say “So what are you going to do about these two rapists.” The parents allow you to speak with Jane alone. She gives the same account she gave the police. She also says she wants both boys charged with rape.

**Hypothetical #2**

**Police Report**
A 20 year old college student, Amy, came into the police station to report she had been raped. Amy told a detective she went to a party at her college where she drank enough alcohol that she felt its effects but she says she was not drunk. At the party she spent a lot of time talking to a guy she really liked. The guy, Joe, asked her if she wanted to go for a walk. She agreed. During the walk he held her hand. Amy said she liked that he did that. He then asked her if she wanted to go to his room. She agreed.

At this point Amy started to cry and get upset. She explained that she went to his room because she thought they would talk and watch TV. Once they arrived at his room they sat on the bed and watched tv and talked. After a little while they started kissing. Amy explained that she liked him and wanted to kiss him. She said he then started touching her all over her body and still she felt comfortable. At this point they were lying down and Joe had removed her shirt. Amy said he then started to remove her pants and when he did this she said to him “I don’t want to have sex.” She said he responded “ok.” They continued kissing and touching and Joe removed her pants. After a bit she said she knew he was going to try to have sex with her again so she said “Really, I don’t want to have sex with you.” She said he responded “Ok. Ok. Don’t worry.” A few minutes later he tried to have sex with her and she said “no, please stop.” Amy says he continued anyway. I asked her whether she tried to stop him physically and she said Joe is a lot bigger than her and she was intimidated and scared. She said that she pushed his shoulders and kept saying “no.” When it was over Amy said he acted like nothing happened. He tried to lay in
the bed with her but she just got up and left. Amy said she told a friend what happened about a week after the rape.

Amy said this happened about a month ago. I asked her why she was coming forward now and she said it had really been bothering her.

Detective Jones spoke to Amy’s roommate who stated she noticed Amy had appeared quiet and withdrawn lately.

Detective Jones also spoke to Sarah who is the first person Amy told. Sarah said Amy told her Joe had taken advantage of her and that she was really angry about it. According to Sarah, Amy had too much to drink and went to Joe’s dorm room with him. Once inside the room the two started “hooking up” and Joe took it too far. Sarah explained that Amy told her she really didn’t want to have sex with him because that would make her a slut. She said she told him “no” but he did it anyway.

**Defendant Criminal Record/Background/Statement**

The defendant has no criminal record. He is a twenty one year old junior in college. He agreed to speak to police. He said he knew Amy and that he had hung out with her at parties a few times. When told that she was accusing him of rape he appeared shocked and upset. He responded “What? What? Are you kidding me?” He continued “I had sex with her. I admit I had sex with her. I didn’t rape her.” When Detective Jones explained she saw it differently he shook his head and dropped his head into his hands. He said “I can’t believe this.” Joe’s sequence of events was essentially the same as Amy’s. He agreed they had both been drinking. He said when they started “hooking up” she did say she didn’t want to have sex. He explained she only said that once and when she said it he told her they didn’t have to. He said later on she took off her pants and underwear and she also removed his pants and underwear. He said once their clothing was removed they had sex. He said she never said another word and that he assumed she just changed her mind. Detective Jones told Joe the investigation would continue and he could leave. When he got up to leave he started to cry and said “I can’t believe this I would never rape a girl.”

**Victim**

The victim agreed to meet with a prosecutor. She tells you the same story she told police. She says she doesn’t know if she could testify and is scared of going to court. She says she mostly just wants him to be kicked out of school.

**Hypothetical Case #3**

The defendant is 45 years old and has a lengthy criminal record. He was convicted of sexual assault ten years prior to the offense. He served three years in state prison and is a registered sex offender. The offense was a Forcible Rape.

The defendant has been arrested and is being held in custody awaiting indictment.

**Police Report**

On July 4, 2011 police received a report of a woman screaming behind the elementary school. Several neighbors called police to report a woman screaming. When they arrive a woman is found partially clothed. She is bleeding from the face. An ambulance is called. At the hospital
the woman tells a nurse she was raped and beaten by a man behind the school. She agrees to have a sexual assault examination by a certified forensic nurse. Photographs were taken of her injuries. She had bruising on her face, arms, torso, and upper thighs.

When interviewed the victim stated she had posted an ad on craigslist and had met the man after speaking to him on the phone. She indicated she had done this on at least a dozen other occasions and had never had a problem. She agreed to meet the man and perform oral sex. He said he would give her cocaine and $60 in exchange. They met outside a bar on 2nd Avenue. Victim said she frequented the bar and had gone in for a drink or two prior to meeting the man. I asked her exactly how much she had to drink and she said “No more than two mixed drinks. I think it was vodka.” She then waited outside and a man pulled up, reached over and shoved the door open. She got in and they started to drive around. She said he was friendly and they made small talk in the car.

He drove to an elementary school and parked behind it. Inside the car she performed oral sex. He told her to stop after a minute and she did. He then told her to get in the back seat and she said no. She said she was only willing to perform oral sex. He called her a “whore” and grabbed her arm. As he twisted her arm she begged him to stop. He took a knife from his pocket and yelled at her to get in the back seat. This time she complied.

When she stepped out of the car he followed. He shoved her from behind and when she turned around he punched her in the face. He told her to get up and get in the car which she did. He grew more and more violent, yanking at her clothes and periodically hitting her. He got on top of her and engaged in intercourse. When it was over he told her to get out of the car which she did. She was bloodied and bruised. He got out of the car and walked over to her. He held the knife out and grabbed her purse from her. At the time there were two teenagers who had just entered the area of the elementary school. The two teenagers told police they saw a man steal a purse from a woman who was lying on the ground. It looked like he had something in his hand when he took it. They were too far away, however, to see her injuries. The teenagers said the man then got in the car and drove off. The woman lay in the rear of the school sobbing until the police arrived.

Hospital Report

A 26 year old female was brought into the hospital with bruising on her face, arms, and legs. She was also bleeding from the mouth and nose. She was crying and upset. The first nurse to examine her was told she had been raped and beaten by a man in the park. She said nothing else about the attack. A rape kit was performed. The woman smelled of alcohol and a blood alcohol level was taken prior to giving her sedatives since she was so hysterical. Her blood alcohol content was .18. Blood tests also revealed cocaine. The victim required 10 stitches above her left eye. She remained in the emergency room until blood tests revealed a lack of drugs or alcohol in her blood. During that time she was treated with ice to reduce the swelling on her face. She repeatedly asked to leave the emergency room.

Defendant has refused to speak to police.

Rape Kit

During the examination the nurse examiner noted bruising around the victim’s upper thighs. There also appeared to be trauma to the vaginal area. The rape kit reveals sperm cells.
results are sent to the DNA databank and a “hit” occurs. The tested sample belongs to the defendant.

**Victim Contact**
When the defendant was arrested the victim came to the office for a meeting. She said she wasn’t sure she could participate in the prosecution of the defendant. After that meeting the victim has disappeared. Several people have attempted to locate her, including police, and she cannot be located.

**Victim’s Criminal Record**
Victim has a criminal record that includes arrests for prostitution and drug possession.

**Hypothetical Case #4**

**Criminal Record**
The defendant has a minor criminal record that includes a DWI, Possession of Marijuana, and several misdemeanor driving offenses. He is not currently on probation nor does he have any open cases.

**Police Report**
The defendant is 38 years old. He is married and has three young children. They are 8, 6, and 4. The defendant is a pastor in a local church. He is a soccer coach for his two oldest children. He belongs to numerous town committees and is very active in the community.

On July 10, 2011 Amy Jones walks into the police station to report she was sexually assaulted ten years prior. A detective met with her to get her story. She explained that she is now twenty five years old and is dealing with having been raped by the defendant. Amy claims she attended the defendant’s church beginning when she was thirteen years old and she moved to the town with her mother. Her parents had just been divorced. She began going to youth group meetings at the church and participating with youth group activities. The defendant was a junior pastor at the time and led the youth group meetings and events. She explained that the divorce was particularly nasty and difficult for her. The defendant was very kind and understanding. He would take extra time to talk to her before and after the meetings. She said these talks really helped with her feelings about the divorce. She really enjoyed the talks so she would plan to get to the meetings a little early and help set up chairs and snacks before anyone else arrived. This also gave her time alone with the defendant. About a year into it was the first time something happened. She said she had just spent the weekend with her father and was upset because her father introduced her to a woman he had been dating. She and the defendant were talking about this when he leaned over and kissed her. She believes she was fourteen when this happened. When it was over neither one of them said anything about it. Amy says she can see now how their relationship changed once they kissed.

The defendant began calling her on the phone and they would occasionally go places together. She says although the defendant was so much older than her her mother was supportive because she thought it was good for her to have someone to talk to.

After a short while the defendant told Amy that he loved her. Their encounters started to escalate into touching. When asked exactly what that meant she said he touched her breast and
later he would put his hand in her pants and “finger” her. I asked if she ever told him “no” or asked him to stop. She said no, she was confused. When she told me this her demeanor was carefree and she was almost giggling.

She explained that she looked up to him and cared about him. Finally one day when they were alone after youth group they had sex. She said there was a couch in the room and that is where it happened. He got on top of her and had sex with her. She said she just sort of lay there and let him do it. He kept saying he loved her so she figured it was okay. She believed she was fifteen at the time and he was twenty five. She said she thought she loved him and they would get married and it felt like they were together. Soon after they had sex the defendant seemed to distance himself from her. He was making excuses for not talking on the phone or spending time together. She soon found out that he was dating someone. She stopped going to youth group and never told anyone what happened. I asked her who was the first person she told and she said she recently told her therapist.

Victim Contact
The victim came to the office for a meeting. She is willing to participate and cooperate with all aspects of the prosecution. She says she is concerned because the defendant has daughters and he still works with youth at the church and in the community.
APPENDIX B

INTERVIEW INSTRUMENT

1. **Introduction/Background.** I want to start by getting a sense of your background, your time with the DAs office, and your career goals.
   1. How long have you been working as an ADA?
   2. Why did you become a prosecutor?
   3. What types of cases have you prosecuted?
      a. Specifically what types of cases have you prosecuted at trial?
      b. Do you know how many trials you have done throughout your career? Do you know how many resulted in a conviction?
   4. What are your future goals? Do you plan/hope to be a career prosecutor?
   5. What is the most challenging aspect of your job?
   6. What is the most rewarding part of your job?

2. **Organizational Structure of District Attorney’s Office.**
   a. Specific Questions for District Attorney:
      1. Who makes decisions about promotions?
      2. How are the decisions made?
      3. Do the prosecutors know how the decisions are made?
      4. What is the typical trajectory for promotion? How long is the ADA typically an ADA before they are promoted?
      5. Does the office give out awards? Recognize achievement?
         1. How is this done? Merit based? Conviction record based?
   b. Questions for Assistant District Attorneys
      ---Now I want to talk specifically about the promotion process in the office.
      1. How are prosecutors promoted?
      2. What is the promotional process?
         a. Take me through your history with the office and your personal stages of promotion?

3. **Uncertainty Avoidance.**
   --Now I’d like to talk a bit about the case review process.
   a. General Questions
      1. Take me through the typical case review process. At what stage of a case do you review it? Who makes the decision whether to charge? Do you discuss with a supervisor? Who has the final say? What steps are taken before the final decision is made?
      2. What factors affect/contribute to the final decision?
      3. When you decide to charge a case what are some of the typical reasons for doing so?
4. When you decide not to charge a case what are some of the typical reasons for not doing so?

5. issue = Is whether or a not a conviction can be achieved a factor in charging? Question = what considerations about the potential result of the case come into play when you are deciding whether to charge?

6. What level of sufficiency is needed for charging?
   a. Trial, conviction, probable cause

7. Have you ever prosecuted a defendant at trial who was acquitted? When a defendant is acquitted at trial how do you typically feel? What factors impact your reaction to the result?

8. When you prosecute a case at trial and the defendant is acquitted, how do you feel that is viewed by your supervisor and your superiors within the office?

b. **Victim Cases**. I’d like to talk about cases that involve victims.
   1. Are there any differences in approaching the review of a case that has a victim and a case that does not?
   2. Specifically regarding sexual assault cases, are there any differences in how those cases are approached for charging purposes as opposed to all other types of cases?
      i. Are there any differences with respect to the treatment of sexual assault cases for plea bargaining and trials compared to other cases involving victims and cases that do not involve victims?
   3. Can you explain to typical contact you have with sexual assault victims during the process. What type of communication do you have with sexual assault victims? For example, at what point in the process are they consulted, if at all?
      i. When do you explain the trial process to a victim?
      ii. Can you discuss a bit about how victims react during these conversations?

4. **Victim Impact on Case Processing.**
   a. How much influence does the victim have on the decision to charge? For example in any of the hypothetical scenarios would the victims’ attitude toward prosecution affect the decision to charge?
   b. Do you discuss the case with the victim prior to charging?
   c. What are the factors that may a case weak or strong? What do you do when the case is very weak but the victim wishes
to see the matter pursued regardless of the potential outcome?

i. In any of the hypothetical cases do you believe the case is “weak?” Can you tell me what you would do in such a case if the victim is adamant that the case proceed?

4. Issues:
   a. Do prosecutors attempt to discredit victims’ allegations in an effort to avoid prosecuting cases that are less likely to result in a conviction?
   b. Is there a relationship between case characteristics and victim characteristics and the likelihood a case will be charged.
      1. Case characteristics:
         a. Do any of the hypothetical cases exhibit these characteristics and how would they affect decision making:
            i. exculpatory evidence
            ii. strength of the evidence
            iii. witnesses,
            iv. weapon,
            v. physical evidence,
            vi. inconsistent statements,
         b. time of reporting issue
   c. Do prosecutors fail to charge cases based on concerns of risk taking behavior, moral character, and the nature of the relationship between the victim and offender?

        Now I’d like to talk more about the hypothetical scenarios.
   d. Can you rank the hypothetical fact patterns in order of strongest case to weakest case? Why do you order them that way?
   e. Can you rank the hypothetical fact patterns in order of most likely to be charged and least likely to be charged? Why?
   f. Do any of the hypothetical fact patterns represent a case that includes such information that you feel your ethical duty would be not charging the case? Why?
   g. Do any of the fact patterns contain information that leads you to question the victim’s allegations? What information? Why? What would you do as a result?
      i. For example, in three of the cases there is a delay in reporting, does such an issue affect charging?
   h. Victim characteristics:
      i. In evaluating the hypothetical fact patterns as you would a typical case you review for charging, how much do you consider the victim’s potential appearance in front of a judge or jury?
         a. Do you think any of the victims would do well in front of a jury?
      ii. Do you have any questions or doubts about the cases based on what you have read? Are these similar to the types of cases you see