The Most Dangerous Power of the Prosecutor

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Hello!

I AM JULIE GERMANN

Always do right. This will gratify some people and astonish the rest.
~Mark Twain

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Minister Of Justice

Protect The Public

Punish Offenders

Zealous Advocate

Rights of All Respected

Rehabilitate Offenders
“The Court will allow the cape but will draw the line at the wind machine.”
“[T]he prosecutor has more control over life, liberty, and reputation than any other person in America.”

~Supreme Court Justice Robert Jackson, 1940
“So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury generally rests entirely in his discretion.”

*Bordenkircher v. Hayes, 1978*
Prosecutorial Decisions that are Unreviewable

- To prosecute or not to prosecute.
- Selection of charges.
- Admission into diversion programs.
- Dismissal of charges.
Charging Decisions

Gatekeepers of Criminal Justice
Standard 3-4.3 (Standard for Filing)
(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.
4-2.2 Propriety of Charges
A prosecutor should file charges that he or she believes adequately encompass the accused's criminal activity and which he or she reasonably believes can be substantiated by admissible evidence at trial.
Ethics of Prosecuting a Losing Case

Should a prosecutor go forward when they believe they are likely to lose but they also believe the accused committed the crime?
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What’s at Stake...

Wrongful conviction

Loss of Confidence in the Justice System
Recourse

**Defendant**
- Motion to Dismiss
- Full trial on Merits
- Motion for Judgement of Acquittal
- Motion for a New Trial
- Appeal to Court of Appeals
- Appeal to Supreme Court

**Victim**
- Writ of Mandamus to Compel Prosecutor to Charge
- Private Prosecution
#MeToo
Sexual Assault Convictions

**Reports, arrests and convictions for rape**

<table>
<thead>
<tr>
<th>Incident</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Estimated incidents</td>
<td>75%</td>
</tr>
<tr>
<td>Reported to police</td>
<td>31.0%</td>
</tr>
<tr>
<td>Arrested</td>
<td>5.7%</td>
</tr>
<tr>
<td>Referred to prosecutor</td>
<td>1.1%</td>
</tr>
<tr>
<td>Convicted of a felony</td>
<td>0.7%</td>
</tr>
<tr>
<td>Incarcerated</td>
<td>0.6%</td>
</tr>
</tbody>
</table>

Source: Analysis of 2010-2014 Justice Dept. figures by Rape, Abuse and Incest National Network

**Figure 5. Visual schematic for attrition of rape cases in the criminal justice system**

Note: This visual schematic is based on research summarized in the article, estimating that 5% to 20% of all forcible rapes are reported to law enforcement; of these reports, 7% to 27% are prosecuted and 3% to 26% yield a conviction. The 2004 State Court Processing Statistics then suggest that 62% of all defendants who are arrested and prosecuted for rape will be convicted; of these, 95% will be sentenced with incarceration (BJS, 2008a). The National Violence Against Women Survey (Tjaden & Thoennes, 2006) revealed that 17.6% of female and 3% of male respondents were raped at some time in their lives. Based on U.S. Census data, this translates to 17.7 million women and 2.8 million American men (Tjaden & Thoennes, 2006, p. 7).
In 2016, 481 people were convicted of felony-level sex assaults in Minnesota, the lowest total since 1983, according to data from the Minnesota Sentencing Guidelines Commission. Only 1 in 4 sexual assault cases in Minnesota is ever referred to a county attorney, according to a Star Tribune analysis of more than 1,300 sexual assault cases filed in 2015 and 2016.

Prosecutors reject half the cases police send them.

They reject cases that include DNA evidence, witnesses, and sometimes even confessions, records show. They rarely ask police to conduct additional investigations, case files show, and in interviews, victims say they are often never told why their assailant won’t be charged with a crime.
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How did we get here?

Lord Hale Rule
○ Victim had to resist to her “utmost”
○ Rape had to be corroborated
○ Victim had to be of good character

Instruction of Lord Hale
○ Rape is a charge that is easily made by the victim,
○ Rape is a charge that is difficult for the defendant to disprove,
○ The testimony of the victim requires more careful scrutiny by the jury than the testimony of the other witnesses in the trial.

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Justice Department investigating 80 Missoula rapes; county attorney blasts feds

As 'Missoula' Shines Spotlight on Campus Rape, Women Share How Their Allegations Changed Them Forever

Sex Charges Cast a Pall on a College Town
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What practices in Missoula CAO were highlighted:

1. Declination without documented explanation.
2. Declination without guidance to MPD regarding what evidence would be sufficient for charging.
3. Performed no independent investigation.
4. Failed to charge where sufficient evidence existed.
“After an extensive review of police files, our prosecutorial expert concluded that the factors considered as part of the charging decision process depart from standards of the profession.”

Examples included:
- Two Confessions (unconscious/MI victim)
- Heightened Vulnerability (alcohol)
- Victims with mental/physical disability
Errors in Charging

- Inexperienced Prosecutor
- Lack of Independent Investigation
- Explicit or Implicit Bias
- Inadequately Trained Prosecutor
- Misunderstanding of Effects of Trauma
- Focus on Win/Loss record
Finding the Right 2018 Hypothetical Jury Standard
Some ethics rules suggest prosecutors should consider the likelihood of getting a conviction.

Not clear whether the evidence should be evaluated from the perspective of biased or impartial jury.
Jury Studies

Prior Sexual History
- Jurors who receive this evidence viewed the complainant as
  - Less Credible
  - More Blameworthy
  - More Likely to have Consented

Alcohol or Drug Use
- Mock jurors more likely to view victim as at least partially responsible for what happened to her if she voluntarily consumed alcohol or drugs.
Why Do We Lose Sexual Assault Trials?

- Victim Testifies
- Detective Testifies
- Expectations about investigations and evidence.
- Expectations about victims and perpetrators
- Real Rape Myth
- CSI Effect

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“Real Rapes” occur when the victim is walking home from church in modest clothing and is attacked by a stranger who jumps out from behind some bushes holding a weapon. The victim fights back, screams but ultimately suffers vaginal injuries and other injuries from resisting. She reports to the police immediately, is able to give a detailed description of her attacker. The victim cooperates throughout the criminal justice process and always displays the appropriate amount of emotion, shedding at least one tear while testifying.
Public Opinion of the Criminal Justice System

- Reporting of crime
- Providing evidence to the police
- Attending court as witness, victim or juror
BIASES

Do prosecutors have an obligation to try to correct public biases?

What about their own biases?
Gender Bias

Explicit
○ Bumper Sticker Bias

Implicit
○ Titanic Bias
"A bad system will beat a good person every time."

--Deming
A NEW STANDARD...

SHOULD THE JURY CONVICT RATHER THAN WOULD THE JURY CONVICT?
TRAUMA INFORMED PROSECUTION
### Legal Variables
- Statutory Elements of the offense
- Severity of the crime
- Type, strength and admissibility of the evidence
- Culpability of defendant

### Extralegal Variables
- Socio-demographic and personal characteristics of the victim
- Socio-demographic and personal characteristics of the defendant
- Relationship between victim and defendant
- Assessment of victim's character and reputation
- Deviation from normative gender and moral codes

### Blame & Believability Variables
- Victim's moral character
- Victim's risk-taking behavior
- Resistance to the attacker
- Time taken to report the offense
WHAT DOES “NO” LOOK LIKE?

Non-verbal signs of non-consent

- Avoiding eye Contact
- Not initiating any sexual activity
- Pushing someone away
- Avoiding touch
- Shaking head no
- Crying and/or looking sad or fearful
- Closed body language, stiff, tense or closed expressions, turning away from someone
- Silence
- Just lying there
- Sleeping/Unconscious
Pre-Trial Motions

- Rape Shield Laws – narrow circumstances under which prior sexual conduct comes in
- Relationship Evidence
- Prior Bad Acts to show intent, motive, plan, etc.
- Impeachment with prior convictions
- Notice of Intent to use expert witness testimony
- Supportive motions for victim’s testimony
It’s Not Really Jury Selection...
Goals of Strategic Voir Dire in Sexual Assault Case

- Dispel myths and educate your jury
- Prepare jury for evidence
- Address the CSI Effect - Prepare jury for lack of physical evidence
- Prepare jury for lack of injuries
- Touch on difficult facts
- Prepare the jury for use of graphic testimony
**BAD FACT MYTH/MISUNDERSTANDING**

- Inconsistencies in statement

**VOIR DIRE QUESTIONS ANALOGIES**

- Car Accident Analogy
And then what happened...

© Trauma focused interviewing, not just for officers
Using Experts to Overcome Jury Bias

- Trauma and the Brain
- “Typical” victim reaction
  - Delayed Report
  - Counter Intuitive Victim Behavior

- SANE – Sexual Assault Nurse Examiner or other medical provider who collected evidence
- DNA expert (even if DNA not found)
- Toxicologist (if alcohol or drugs are involved)
Focus on the Offender

- Focus on choices and actions of the offender
- Recognize typical non-traditional weapons (alcohol, drugs, manipulation, grooming)
- Electronic evidence
- Offender’s evidence collection kit
- Explore serial perpetration
CHANGE YOUR MEASURE OF SUCCESS

- Reduced reliance on myths and generalizations in decision-making
- Increased reporting
- Increased referral rates from law enforcement
- Increased prosecution rates
- Increased trust in the criminal justice system
- Identification of serial offenders
- Meaningful collaboration with allied professionals
- Victim input solicited and respectfully considered
- Introduction of all relevant and probative evidence
More Indicators of Success

- Exclusion of irrelevant evidence
- Protection of victim privacy and safety consistent with justice
- Support of victims throughout the process
- Trial strategies that expose predatory behavior
- Trial strategies that educate the factfinder
- Plea or litigated conviction to the most appropriate charge and degree
- Appropriate sentences accounting for the serious nature of the crime, the offender’s behavior, and impact to the victim.
- Reduced incidence of sexual violence
WHAT CAN BE DONE?

TRANSPARENCY
ACCOUNTABILITY
OVERSIGHT
What Will You Do Differently?

1. What did I learn in this session?

2. What is one thing that I plan to do based on what I learned?
Thanks!

ANY QUESTIONS?

Justice consists not in being neutral between right and wrong but in finding out the right and upholding it.

Theodore Roosevelt

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