



BEYOND CONVICTION RATES: MEASURING SUCCESS IN SEXUAL ASSAULT PROSECUTIONS

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One of the most enduring realities of sexual assault is that very few cases result in arrest, prosecution, and conviction of [perpetrators].²

INTRODUCTION

The justice system is a critical component of a comprehensive response to sexual violence; there is no true offender accountability without it, and, for many victims, it is an important part of healing. When the justice system is ineffective or unresponsive, it not only fails to support victims and keep communities safe, but it has the power to undermine prevention, advocacy, and other critical efforts. The criminal justice system response requires the participation of many professionals. Few, however, have as great an impact on offender accountability and community safety as the prosecutor.³ The prosecutor serves as the gatekeeper to the criminal justice system,⁴ and has sole, but not unlimited, discretion in determining who and what to charge.⁵ Prosecutors' utilization of research-informed decision making, therefore, is pivotal to the just application of the law.

Sexual assault cases are some of the most difficult to prosecute. Although experience and specialized knowledge greatly enhance the likelihood of positive trial outcomes in these cases, experienced prosecutors know that a not-guilty verdict does not necessarily equate with "losing." A prosecutor who never loses a sexual assault case is likely charging and prosecuting only the "safe" cases, as opposed to cases that are just as important but may seem less "winnable," due to, for example, less available or unavailable "traditional" evidence, such as eyewitnesses or DNA.

For many reasons, ranging from bias to resource shortages to concern about conviction rates, prosecutors weed out far too many cases because they wrongly believe they cannot win them. Compounding these challenges is the belief that a high conviction rate is an accurate indicator of an effective prosecution response. The tendency to rely on conviction rates to mea-

sure the effectiveness of the prosecution response is understandable. A conviction is one of the few quantifiable outputs available, and the justice system has historically focused on a conviction as the sole measure of an offender's accountability, and, therefore the sole measure of success. But are conviction rates an accurate measure of effectiveness? Do they measure the quality of the process and prosecution strategies or the relative difficulty of the cases taken forward? Do conviction rates alone capture the impact of prosecution on the wholeness and healing of the victim? Or capture the impact of the prosecution of challenging cases on community safety and the prevention of future crimes? Is there a way of measuring the effectiveness of practices in these cases that would allow prosecutors to improve and sustain them?

VALUING PROSECUTORIAL PERFORMANCE BEYOND CONVICTION RATES IN SEXUAL ASSAULT CASES

A Roundtable Discussion

Prosecutors, researchers, and policymakers from across the United States sought the answers to these questions and more on January 30 and 31, 2014, in Washington, D.C. These leading professionals and experts in their field were brought together, with support from the Department of Justice Office on Violence Against Women, for "Valuing Prosecutorial Performance Beyond Conviction Rates in Sexual Assault Cases: A Roundtable Discussion" (hereinafter "Roundtable").⁶ Participants represented diverse populations including urban, rural, federal, and military jurisdictions.⁷ They were brought together to discuss the elements of effective sexual assault prosecutions, the limitations of using conviction rates as the sole measure of success in these cases, and the impact that an undue focus on conviction rates has on charging and proceeding with difficult cases. This discussion was also used to generate ideas around how to begin to measure the effectiveness of current prosecution practices and policies, organizationally and individually. The goal of the Roundtable was to take the discussion and insight learned over the course of the one-and-a-half days to better identify and measure success in the prosecution of sexual assault in order to strengthen and sustain promising practices.

This issue of STRATEGIES should serve as the first step toward improving sexual assault prosecution practices in a sustainable way by explaining how to implement performance measures to more accurately measure effective practices. The first section of this article summarizes promising sexual assault prosecution practices and the lack of research on their effectiveness. The second and third sections examine the difficulty in defining success in sexual assault cases and the limitations of tying success to conviction rates. Section three also highlights the unintentional consequences that undue concern over conviction rates has on prosecutorial decision making (*e.g.*, an alarmingly high attrition rate, as prosecutors decline or downgrade cases that they believe will not result in conviction). The fourth section provides an overview of performance measures, how they are being used, and what is and is not working. The article concludes with ideas for how performance measures can be used to more accurately measure and sustain effective prosecution practices in sexual assault cases.

PROMISING PRACTICES IN SEXUAL ASSAULT PROSECUTIONS

Over the last 40 years, studies addressing sexual violence have exposed the prevalence of sexual assault and offenders' victim selection considerations and predation. This better understanding of sexual violence has led to an evolution in the law where:

Issues of force and consent continue to change, but clear trends in the evolution of the law are identifiable. The definition of force is broadening beyond overt physical force to include other modes of coercion. There is an increasing recognition that penetration without consent or any additional force beyond penetration is a serious sexual offense. These trends demonstrate the growing understanding that unwanted and unconsented-to bodily invasion are the core wrong that sex crime laws must address. The FBI's broadening of the Uniform Crime Report (UCR) definition of rape to include penetration without consent and without force reflects these trends.⁸

As a result, there are sexual assault cases being prosecuted today that would, historically, have never been charged.⁹ Still, there remains a gap between enacted rape and sexual assault laws and the implementation of those laws.¹⁰

There are a myriad of practices thought to close this gap by improving prosecutors' response to sexual assault crimes.

These practices are built on a foundation of research that has uncovered the serial nature of the crimes committed by these perpetrators¹⁴ and their purposeful targeting of

victims who expose vulnerability (*e.g.*, age, alcohol or substance abuse, trust, love, or involvement in the sex trade). In addition, studies have contributed to an increased understanding of victim behaviors, specifically that a victim's reaction to trauma often does not match laypersons' expectations.¹⁵ Individually, any of the practices listed above would strengthen the prosecutorial response to sexual assault. Collectively, however, the adoption of all of these practices would dramatically reform and improve not only prosecutors' response, but the entire system's response.

Research has also documented various explanations of victims' inability or unwillingness to report their assaults or participate in the prosecution of the offender. Because of the uniquely personal nature of the attacks and victim blaming that sexual assault victims face, they require support unique to their victimization. Victim engagement with law enforcement and prosecutors has been found to be a major barrier to prosecuting sexual assaults. Research on this topic has propelled prosecutors to work more closely with advocates and to educate themselves on victim behavior and to support victims throughout the process, thereby encouraging participation. For example, victims who receive Sexual Assault Nurse Examiner (SANE)/Sexual Assault Response Team (SART) services are more likely to participate in the criminal justice system than those who do not; victim participation is a factor inextricably linked to positive trial outcomes.¹⁶

PROMISING PRACTICES

- Developing specialized units and specialized investigators and prosecutors who incorporate both experience and research into trauma-informed, victim-centered, offender-focused charging decisions, investigations, and trial strategies¹¹
- Identifying all relevant, potential witnesses and evidence to expand the concept of corroboration to include proof of the entire chain of events and witness credibility, not just the use of force or coercion or the identification of the offender
- Accessing and, where appropriate, introducing expert testimony at trial, particularly when necessary to explain the impact of trauma and victim behavior that does not match jurors' expectations
- Utilizing electronic evidence, *e.g.*, surveillance video, ATM video, texts, etc., where available, to overcome the consent defense¹²
- Applying an appropriate case theme
- Employing ethical but aggressive trial strategies, including filing appropriate motions
- Anticipating defense strategies
- Thoroughly cross-examining all defense witnesses
- Delivering a strong closing argument that connects the evidence to the trial theme and that overcomes juror misconceptions about the meaning of reasonable doubt
- Utilizing multidisciplinary Sexual Assault Response Teams to ensure that the victim's needs are supported during and after trial
- Arguing competently for an effective sentence
- Staying on top of post-conviction issues regarding the defendant, including prison phone calls, behavior in jail, release dates, stay away/protective provisions, orders of restitution, etc.
- Anticipate and respond to witness intimidation in your case by educating and asking victims about intimidation¹³



Figure 1. Components of an Effective Prosecutor

Adapted with permission from Teresa Scalzo, former Director of the National Center for the Prosecution of Violence Against Women and former sexual assault prosecutor.

DIFFICULTY IN DEFINING SUCCESS IN SEXUAL ASSAULT CASES

Although forward-thinking offices have implemented these and other practices to expand their ability to succeed in difficult sexual assault prosecutions, even the most committed offices still face challenges in successfully sustaining these practices. The field also still lacks a definitive model that easily lends itself to monitoring performance. As noted above, a particularly confounding issue is defining what success is as it relates to sexual assault cases. Part of the difficulty stems from the uncertainty about what the desired outcomes are. Is the desired outcome:

- Conviction of the accused on the lead charge, or conviction of any charge?
- Victim safety and/or for victims a sense that their voices were heard?
- Punishing the offender?
- Letting the community know that this offender is dangerous by charging and trying the case?
- Creating a record and holding the offender accountable by presenting sworn testimony and evidence?
- Reducing the likelihood that an offender will commit more sexual assaults?
- Some combination of all of these, or something else entirely?

There is also a strong argument to be made that success should be defined procedurally in terms of the approach and processes used by law enforcement and prosecutors to investigate and adjudicate sexual assault cases. In other words, did we do everything we could have and should have done in order to achieve certain things within our control (*e.g.*, the victim feels supported and the community knows that the police and prosecutors felt assured of the defendant's guilt and thus arrested and charged him/her)? Laws, policies, and practices for handling sexual assaults vary widely throughout the nation, and sexual assault cases are typically more complicated than they are portrayed in the media. Victims have varied experiences with reporting their assaults to law enforcement, and they may regard the justice system with anything from trust and hope to skepticism and hostility. The victim, the sys-

tem, and the public might have conflicting expectations about how a case should be handled, and what makes for a good outcome. As such, defining success in sexual assault cases is fraught with a great deal of complexity. Without a clear understanding of what society, law enforcement, prosecutors, and victims expect of the justice system with regard to sexual assault cases, we cannot measure whether success has been achieved and therefore cannot measure whether there has been sustainable improvement.

LIMITATIONS OF TYING CONVICTION RATES TO SUCCESS

The limitations in measuring success through conviction rates alone are well known,¹⁷ yet the popularity of reaching for this outcome as the measure of success demands that we revisit the problems with doing so. A conviction tells us only whether the defendant was found guilty of a lead or lesser charge after a jury or bench trial, or whether the defendant pleaded guilty to a lead or lesser charge. "Conviction rates alone give an incomplete picture of an [individual's or] office's performance—and could mask the widespread granting of lenient pleas elsewhere."¹⁸

Conviction rates also do not address the quality of prosecution practices in sexual assault cases. They don't tell us whether cases have already been rejected before trial, or even before arrest, because they were triaged out by law enforcement.¹⁹ They don't tell us whether an inappropriate declination or downgrading of cases occurred. There is no information, from conviction rates, about whether or not law enforcement or prosecutorial efforts were victim-centered or victim-blaming, or whether or not a victim's (or defendant's) rights have been honored or violated.²⁰ Conviction rates also do not reveal whether the promising practices, identified in the previous section, were used by individual prosecutors or their offices. Moreover, because of the complex nature of sexual violence cases, conviction rates provide no mechanism for comparing the relative difficulty of the cases that proceed to trial, limiting the ability to compare individuals, offices, or jurisdictions in an effort to improve the response.

Prosecutors, nevertheless, may have verbal or written office policies that tether prosecution practices to undue concern over conviction rates. For example, prosecutors often argue that their ethical obligations require them to pursue only

those cases that they believe are likely to result in conviction. However, the Model Rules of Professional Conduct – as well as many mirroring state rules – that govern prosecutorial action indicate *several* factors, in addition to the probability of conviction, that prosecutors should consider when exercising their discretion to prosecute a case.²¹ Further, prosecutors' determinations of the probability of conviction are easily influenced by their own biases, misconceptions, or experiences.²² As such, if prosecutors are not regularly charging, investigating, preparing, and trying seemingly "challenging" cases, they become *incapable* of determining whether cases are or are not likely to result in a conviction. The problem with this is the fact that the challenge of sexual assault cases may appear, to the inexperienced eye, to be insurmountable, thus creating a self-perpetuating cycle and a low number of cases being taken forward. Routine elements of sexual assault cases further complicate decision making, including but not limited to, supposedly unsympathetic victims, victims who are sexually exploited, victim behaviors during or after the incident that run counter to expectations, conflicting statements, use of alcohol or drugs, victim/defendant relationship, etc. In addition, low reporting rates contribute to low prosecution rates, and fewer prosecutions may make it more challenging for the system to create an environment where victims feel they can safely report a sexual assault and achieve justice.

Significantly, conviction rates do not offer guidance on how to improve the justice system response to these crimes. The challenge is that, on its face, a victim-centered and offender-focused approach appears too subjective to be measured. The public and the media, however, have no other way to measure success and will continue to look to convictions as the determiner unless some other measure is developed and publicized.

WHAT ARE PERFORMANCE MEASURES?

Facing poor economic outlooks, government agencies and the communities they serve are increasingly focused on public accountability. Performance measurement creates transparency by assessing "[the] accomplishment of organizational strategic goals and objectives that support the agency's mission."²³ "In this climate, prosecutors must increasingly hold themselves accountable to their constituents by demonstrating their success and changing their

strategies, policies, and programs when necessary."²⁴ Defining measurable goals and objectives and implementing performance measures helps policymakers reconcile and balance expectations and understand the extent to which the goals and objectives are being met.

Performance measures must evolve from, and be based on, specific, measurable, and realistic organizational goals, answering the question of what results an organization should produce or what benchmarks should be reached. The performance measures are a tool for understanding – quantitatively – processes, products, and services. Moreover, performance measures are intended to improve performance and should be used regularly. Performance measures are not one-time snapshots of effectiveness, nor are they the same as an outcome evaluation, or cause-and-effect determinants. Performance measures should be able to tell persons the "what" but not the "why." The "why" is better left to researchers and evaluators.

Performance measures should be logical and related to goals; easy to understand; monitored regularly; readily accessible; based on specific benchmarks; quantified and measurable; and defined with specific performance targets. For the purposes of applying performance measures in sexual assault cases, there are three different types of performance measures, and it is important to understand the differences to ensure the most appropriate for the organization are used. First, there are *outcome/output measures*. Outcomes define the broader goal of an organization. In prosecution, the outcome is typically thought of as ensuring justice is achieved. To be useful as a performance measure, justice must be defined—is it safety of victims, overall public safety, holding offenders accountable, that the appropriate procedures were followed, or something else? Outputs are the tangible "products" produced by an organization. A common output in prosecution is a case disposition.

A second type of performance measures are *satisfaction and quality measures*, which focus on perceptions of victims and/or the community about how cases are handled and their outcomes. These types of measures also examine the processes used to achieve outcomes and outputs. Examples include the extent to which policies were followed, how decisions are made about cases, and specific actions and practices in case processing.

Finally, *efficiency and timeliness measures* look at timing, and are concerned with both the level of effort and resources used to bring about outcomes, as well as the length of time it takes to conduct specific activities, outputs, and outcomes. Efficiency and timeliness measures are particularly useful in that the length of time it takes to produce an output or outcome has a bearing on successful performance in the other types of measures. For example, faster case disposition can lead to increased satisfaction among victims about the process; swifter responses to criminal activity can help reduce recidivism.

The challenge in measuring performance of the justice system and in sexual assault cases in particular is that specific goals are not clearly articulated. In addition, sexual assault cases are unique:

[They] involve complex dynamics that call for detail-oriented investigations and statutory analyses. Sex offenders often employ unique, manipulative, and murky methods in order to victimize. When the criminal justice system does not invest appropriate training and resources in its response to sexual assault, rape myths lead them to disbelieve victims, victims do not report, rapists are not caught, arrested, or prosecuted, and perpetrators are likely to reoffend.²⁵

Moreover, goals may differ from person to person, and from agency to agency. Nonetheless, it is possible to establish appropriate goals and accompanying performance measures—overarching performance measures have been developed for the juvenile justice system, for the prosecution profession in general, and for the Judge Advocate General Program at the U.S. Department of the Navy (specifically for sexual assault cases). Once in place, if used appropriately to measure individual, office, or system-wide performance, they can be extraordinarily helpful for policymakers and prosecutors to improve prosecution practices in sexual assault cases.

DEVELOPMENT OF PERFORMANCE MEASURES CAN REDUCE ATTRITION AND PROMOTE THE SUSTAINABILITY OF PROMISING PRACTICES

In 2003, the American Prosecutors Research Institute (APRI) brought together 32 federal, state, and local prosecutors; researchers; and funding agencies to examine possible performance measures in prosecution. Over a series of

meetings they discussed what performance measures “are” and identified three goals.²⁶ The information was translated from broad ideas and concepts to specific quantifiable goals and outcomes and finally operationalized into performance measures. Because of the traditional emphasis on convictions and public safety as the primary indicators of effectiveness, APRI conducted comprehensive research in two large jurisdictions on both measures to assess their validity and reliability as measures of success. The research confirmed the many criticisms of conviction rates and public safety as performance indicators of prosecutors’ offices. In particular, both measures were found to be susceptible to an external locus of control and were unreliable, as the measures didn’t mean the same thing to everyone.²⁷ In addition, both conviction rates and measures of public safety were found to be susceptible to manipulation based on what was being counted and how it was being counted. These lessons can and should be translated into developing performance measures in sexual assault cases.

Moving forward to think about performance measures in sexual assault cases, there are a number of possibilities for performance measures but undoubtedly any set of measures must include some type of outcome or output measure. This is typically the point at which conviction rates become the default measure. However, a better and more accurate option is the concept of accountability. Accountability can be defined to include a variety of measurable indicators including:

- Punishment and retribution: Incarceration/incarceration length; cases receiving maximum penalty; convictions
- Deterrence: Timeliness of adjudication; certainty of consequences; length/severity of sentence; incarceration
- Rehabilitation: Diversion/deferred prosecution; offenders placed in treatment; assessment of criminogenic needs (*i.e.*, the factors that research has shown to underline criminal behavior) for tailoring programming; recidivism
- Restoration: Victim satisfaction; victim safety; restitution

Beyond the outcomes/output measures, it is also appropriate to incorporate measures of quality, timeliness, and efficiency. If the intent is to use performance measures to improve practice (as it should be), then such measures provide valuable information about the prosecution process itself

and not just the outcomes. Moreover, without this information, it is nearly impossible to fully understand why prosecutors are not meeting their performance targets for the identified outcomes. If, for example, the target is that 100% of victims who ask for protection are provided with no-contact orders, but the data show that such orders are obtained only 50% of the time, the obvious question remains, why?

To ensure that the performance measures selected promote the use and sustainment of effective practices for rape and sexual assault responses, it is important to map the practices and the measures. The map, which is essentially a graphic representation that links practices to the intended outputs, outcomes, and performance measures, helps to make sure that there is a clear and logical relationship between all of these elements. Once developed, the map can be very helpful in articulating policy and procedures for prosecuting sexual assault cases.

There are four main components to the map that need to be considered:

1. **Inputs**, which define resources (people, materials, money, policy, legislation, etc.) that already exist and serve as the foundation for the activities to be undertaken;
2. **Activities** enumerate the specific practices that will be used to produce the outcomes;
3. **Outputs**, which represent the immediate result of a practice (*e.g.*, the activity of training individuals produces an output of a specific number of people trained); and
4. **Outcomes**, which reflect the long-term change that is envisioned (*i.e.*, what will be different as a result of the activities).

The process for building the map is to first identify the intended outcomes. Once outcomes have been drafted, the case processing events, techniques, and practices along with their associated outputs that should produce the intended outcomes should be enumerated. Next, the inputs that are needed to support the activities should be defined.

The final step in defining success for sexual assault responses is to add performance measures and targets to the map. The purpose of performance measures is not to evaluate a cause-and-effect relationship between activities and out-

comes but rather to provide a tool for local policymakers and practitioners to continuously monitor and assess their response to sexual assault based on the map.

In this way, research-informed practices and the need to evaluate and refine them are promoted as critical to achieving the core mission of the prosecutor.

CONCLUSION

Rape and sexual assault cases are some of the most difficult to prosecute. Although the passage of the Violence Against Women Act (VAWA) and other legislative and advocacy efforts have prompted significant advances in the justice system's response to these crimes, these improved practices have been discontinued in many jurisdictions. Prosecution practices will always remain subject to the attitudes and philosophies of individual prosecutors, unit and division chiefs, and elected or appointed officials. Many are still courageous enough to counter the criticisms levied against them for allocating scarce resources to going forward in difficult or seemingly "unwinnable" cases. The attrition of these cases, however, risks the creation of an unresponsive and ineffective justice system that only fails to support victims and keep communities safe, and has the power to undermine prevention, advocacy, and other critical efforts. This STRATEGIES has aimed to lay the foundation to measure and sustain promising practices and to offer professionals both inside and outside the justice system a plan to develop and use performance measures that are transparent and that allow for the continual improvement of policy and practice.

ENDNOTES

- 1 Jennifer G. Long is Director of AEQuitas and Elaine Nugent-Borakove is President of The Justice Management Institute. The authors would like to thank Teresa Scalzo, former Director of the National Center for the Prosecution of Violence Against Women and former sexual assault prosecutor; Charlene Whitman, AEQuitas Associate Attorney Advisor; and Viktoria Kristiansson, AEQuitas Attorney Advisor, for their significant contributions to this article.
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- 5 United States v. Peskin, 527 F.2d 71 (7th Cir. 1975).
- 6 Roundtable participants contributed significantly to the ideas and development of this STRATEGIES; their participation at the Roundtable, however, is not necessarily an endorsement of the views expressed herein.
- 7 Participant list on file with AEQuitas.
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- 9 AEQUITAS: THE PROSECUTORS' RESOURCE ON VIOLENCE AGAINST WOMEN, VALUING PROSECUTORIAL PERFORMANCE BEYOND CONVICTION RATES IN SEXUAL ASSAULT CASES: SUMMARY OF A ROUNDTABLE DISCUSSION (2014) (*hereinafter* "Roundtable Summary").
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- 11 The research around the impact of this specialization supports that a specialized unit, in and of itself, will not improve prosecution rates unless the prosecutors are specially trained, aggressive, informed and skilled trial attorneys, and understand that they need to measure performance beyond conviction rates. Dawn Beichner & Cassia Spohn, *Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit*, 16 CRIM. JUST. POL'Y REV. 461 (2005).
- 12 Victim privacy and confidentiality concerns should be paramount in determining whether evidence is admitted at trial. For a discussion of relevant confidentiality and privacy concerns, *see generally* Viktoria Kristiansson, *Walking a Tightrope: Balancing Victim Privacy and Offender Accountability in Domestic Violence and Sexual Assault Prosecutions Parts 1 & 2*, 9, 10 STRATEGIES (2013).
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- 25 David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17(1) VIOLENCE & VICTIMS 73 (2002) (internal citations removed)(Research shows that not only do an

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This article was supported by Grant No. 2009-TA-AX-K024 awarded by the U.S. Department of Justice, Office on Violence Against Women (OVW). The opinions, findings, conclusions, and recommendations expressed in this document are those of the author(s) and do not necessarily reflect the views of OVW.

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