COMMENT

POLICE DISCRETION AND THE JUDGMENT THAT A CRIME HAS BEEN COMMITTED—RAPE IN PHILADELPHIA

I. INTRODUCTION

In the administration of criminal justice, attention is usually focused on the proceedings of arrest, prosecution, conviction and sentencing. These four stages, however, all proceed on the assumption that a crime has in fact been committed. The decision that a crime has occurred, and the determination of what information will be collected in order to make that decision, are normally police functions:

The police must make important judgments about what conduct is in fact criminal; about the allocation of scarce resources; and about the gravity of each individual incident and the proper steps that should be taken.¹

This Comment is concerned with the exercise of discretion by the Philadelphia, Pennsylvania Police Department in performing these functions.²

Rape ³ and attempted rape ⁴ were chosen for study because they present to the police what is perhaps the greatest opportunity to exercise discretion in making the decisions under consideration. Although rape is "probably the most under-reported crime," ⁵ it is also "one of the most falsely reported crimes." ⁶ While the range of conduct denominated "rape" is extremely broad, the range of complaints received by the police is even broader. The problem confronting the police can best be illustrated by several examples:

(1) The complainant, a young married woman, enters the station house at 3:00 a.m., Sunday morning, and reports that

¹ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 14 (1967) [hereinafter cited as TASK FORCE REPORT: THE POLICE].

² It is a "popular misconception . . . that the police are a ministerial agency, having no discretion in the exercise of their authority." Goldstein, Police Policy Formulation: A Proposal for Improving Police Performance, 65 MICH. L. REV. 1123, 1125 (1967) ; accord, TASK FORCE REPORT: THE POLICE 18.

³ PA. STAT. ANN. tit. 18, § 4721 (Supp. 1967). The offense of statutory rape is not included in the statistics of this Comment. Mention will be made, however, when the possibility of statutory rape is affecting the statistics studied.

⁴ PA. STAT. ANN. tit. 18, § 4722 (Supp. 1967). The statutory offense is "assault with intent to ravish."

⁵ FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 1966, at 11 (1967) [hereinafter cited as 1966 FBI UNIFORM CRIME REPS.].

two men dragged her into an alley and raped her. Her person and clothing show no sign of violence and she is visibly intoxicated. Several minutes of questioning reveal inconsistencies in her story. She still maintains that she has been raped, but asks the investigators to help her perfect a story that her husband will believe.

(2) A young man calls the station house and reports that his older sister has been raped. The sister reluctantly tells the investigator that earlier in the evening a friend had invited her up to his apartment. She says that she did not want to go, but acquiesced when the friend insisted. At the apartment she had sexual relations with the friend several times and then accompanied him to a bar before returning home. She insists that she really did not want to have relations with the friend, but that at no time did he use, or threaten to use, force; that had she wanted to, she could have left the apartment at any time. The young man insists that his sister's friend be arrested for rape.

(3) The police receive a complaint about a disturbance in an apartment building. Upon arriving at the location they recognize the building as a gathering place for neighborhood teenagers. As they enter the apartment, the complainant emerges from a back bedroom partially clothed. She tells the police that six of the boys present had raped her. Questioning of the other girls present reveals that the complainant had suggested the idea and had willingly submitted to the sexual relations.

(4) The police receive a complaint concerning a disturbance in an alley. Upon arriving at the location they find a woman's clothing scattered about under a broken, third-floor window. Upon entering the third-floor apartment they find the alleged offender and the complainant in the bedroom nude, the complainant seriously injured. Later investigation reveals that after meeting him in a tavern, she had accompanied him to the apartment in search of a party. Finding none, she had jumped through the window to escape his advances, and he had then carried her back upstairs.

It is incumbent upon the police to investigate these complaints and determine whether or not to initiate arrest proceedings. They must

Because of the range of complaints received, only a very general description of the investigatory procedure is possible. The police are notified of an offense in several ways. Occasionally, they will be notified of, or come across, a "rape in progress." Sometimes a hospital will notify the police that it is treating a rape victim. Usually, the complainant or a member of her family will report the offense to a patrolman on
decide whether or not the complaint is "founded," that is, whether or not an offense has been committed.\(^8\)

Rape is the "unlawful carnal knowledge of a woman, forcibly and against her will . . . ."\(^9\) Attempted rape is distinguished only by the lack of carnal knowledge,\(^10\) that is, of penetration.\(^11\) Primarily, "[t]he law recognizes only one issue in rape cases other than the fact of intercourse: whether there was consent at the moment of intercourse."\(^12\) Lack of consent is an essential element of the crime,\(^13\) with the burden of proof upon the prosecution. To meet its burden, however, the prosecution may rest upon the complainant's testimony alone—

the street, or by telephone or in person at the station house. The report may be made within minutes of the offense or may occur several months later. Unless the complainant requires extensive hospital treatment, she will usually talk with an investigator within one hour of the report. Interviews with police investigatory personnel, in Philadelphia, February 22-25, 1968.

\(^8\) The first two offenses were "unfounded"—it was decided by the police that no offense had been committed. "An unfounded report of an offense is one which upon investigation proves to be groundless, e.g. 'No Offense' was committed or attempted." PHILADELPHIA POLICE DEPARTMENT, DIRECTIVE 54, at 3 (August 25, 1961). "This means that the investigation proves that the crime did not happen or was not attempted." PHILADELPHIA POLICE DEPARTMENT, JUVENILE AND DIVISION INVESTIGATORS MANUAL, Uniform Crime Reporting (1967) [hereinafter cited as J.A.D. MANUAL].

According to the Federal Bureau of Investigation, nearly 20% of the rapes reported nationwide are unfounded upon investigation. 1966 FBI UNIFORM CRIME REP. 11. This figure is misleadingly low, however, for it is undoubtedly based upon the number of offenses investigated as rapes. Not all rape complaints are investigated as rape offenses. See J. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 172-73 (1966). In Philadelphia, an occasional complainant is turned away by the police without an incident report being filed. Some offenses are unfounded on the incident report without any follow-up investigation report. Interviews with police investigatory personnel, Philadelphia, February 22-25, 1968. More offenses are unfounded when treated as "investigations of persons" than are officially unfounded as rapes. Interviews with Police Reports Control and Review personnel, in Philadelphia, February 28, 1968. Under the nationwide Uniform Crime Reporting system, in which Philadelphia participates, there are 26 categories of offenses. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING HANDBOOK (1966). An additional category is used by the Philadelphia Police Department as a catchall, primarily for incidents requiring an investigation report, but for which there initially exists insufficient information to place them in one of the other categories. When the investigators are very skeptical of the complainant's allegations, they tend to classify the incident and the investigation as an "investigation of persons," which is in this additional category. If further investigation confirms their initial doubts, the incident is "closed out" under this category, and thus is not recorded as a rape complaint.

One police official stated that only a "very minute" portion of the rapes reported are "founded". Interviews with Police Reports Control and Review personnel, Philadelphia, February 28, 1968. Some investigators estimate that 80% to 90% of the rapes reported are not really rapes. Interviews with police investigatory personnel, Philadelphia, February 22-25, 1968. Others concerned with the problem made similar estimates. A defense attorney who handles a large number of rape cases estimated that 75% of the offenses he tries involve some element of consent. Interview with Cecil Moore, Esquire, in Philadelphia, January 26, 1968. A pathologist estimated that 85% were not really forcible rapes. Interview with Dr. Joseph Spelman, Medical Examiner of the City of Philadelphia, in Philadelphia, February 16, 1968. Probably, at least 50% of the reported rapes are unfounded by the police.

\(^10\) PA. STAT. ANN. tit. 18, § 4722 (Supp. 1967).
independent corroboration of her account of the offense is not required to sustain a verdict of guilty.\textsuperscript{14}

Since the only testimony the prosecution needs is that of the complainant, the police could found every offense for which her story met the statutory requirements, without regard to her truthfulness. They could, in other words, perform a completely ministerial function, simply recording and investigating each complaint and passing the information on to the prosecutor. If the police are to do something more—as they do—what standards should they employ to screen out those cases not worth admission to the formal administrative process of criminal justice? Because rape is "a charge easily made and difficult to defend against,"\textsuperscript{15} the courts have developed criteria by which the jury can evaluate the complainant's credibility.\textsuperscript{16} It seems only logical that the police should utilize, during the preliminary screening process, those same factors that are to be applied by the ultimate fact-finder, the jury.\textsuperscript{17}

The purpose of the analysis that follows is to measure the response of the police, in determining whether rape has been committed, to those criteria established for the guidance of the jury. At present, the police have two "visible" standards with which to measure their performance: the number of offenses reported measures in reverse the effectiveness of their crime-preventive techniques; and the clearance rate (the percentage of offenses "cleared by arrest" or "exceptionally cleared")\textsuperscript{18}, measures their ability to apprehend the offender. With regard to the founding decision, however, there is no readily available standard.\textsuperscript{19} Conviction rates provide, at best, an inaccurate measure.\textsuperscript{20} In addition, they serve only to evaluate the correctness of positive decisions, decisions to found the offense; they cannot, obviously, serve to evaluate decisions not to found. This analysis may provide some of the needed measurement.

During the latter half of 1966, approximately 370 complaints received by the Philadelphia Police Department were investigated as

\textsuperscript{14} Commonwealth v. Ebert, 146 Pa. Super. 362, 22 A.2d 610 (1941). The very nature of the offense is such that the testimony of the complainant is frequently all the prosecution can offer.

\textsuperscript{15} See Stevick v. Commonwealth, 78 Pa. 460 (1875) (language of jury charge approved).

\textsuperscript{16} Id.

\textsuperscript{17} This is not to say that the police should utilize only these factors. There may be some criteria—such as polygraph results—that cannot be considered by a jury, but that still should be utilized by the police.

\textsuperscript{18} "Cleared by arrest" means someone has been arrested for the offense. "Exceptionally cleared" means the offender is dead or not within the jurisdiction of the state, or that the complainant will not cooperate. \textit{See} Appendix, pp. 321-22 infra.

\textsuperscript{19} There is extensive internal review. \textit{See} Appendix, pp. 321-22 infra. While the internal review creates a uniformity of procedures and decisions within the police department, it provides no yardstick with which to measure the performance of the department as a whole in its ability to correctly found or unfound complaints.

\textsuperscript{20} Conviction rates are also a function of the relative competence of the District Attorney's office and the defense bar. An additional influence is the reaction of the community to the offense involved.
rapes or attempted rapes. Upon investigation, approximately one of every five of these reports was unfounded. The basis of one portion of this analysis is the investigation reports for 295 of these offenses reported between July 1, 1966 and December 7, 1966.\(^{21}\)

About December 8, 1966, a change of policy took place within the police department.\(^{22}\) Prior to that date, an investigator could, if he desired, contact the District Attorney's office for advice; few ever did.\(^{23}\) After that date, investigators were directed to contact the District Attorney's office "when a sight arrest is made or prior to the obtaining of a warrant for arrest in a Rape case."\(^{24}\) During the following six months, contact was made in approximately one third of the investigations.\(^{25}\)

The nature of the consultations, and the relationship between the investigators and the Assistant District Attorneys contacted, is uncertain. The policy was initiated by the District Attorney to enable his assistants to perform a "purely advisory" function.\(^{26}\) Its goals were to improve the quality of the investigations and to assist the investigators with the founding decision itself.\(^{27}\) However, many of the investigators believed that the Assistant District Attorney contacted was to make the final decision.\(^{28}\) Investigation reports stated that the offenses were founded on "orders" of, and as "directed" by, the prosecutor. However, several investigators indicated that they do not find the opinion of the prosecutor controlling.\(^{29}\) The responsibility of the District Attorney for any of the changes in the decision pattern revealed by the analysis is therefore uncertain. To the extent, however, that there has been a shift in responsibility among

\(^{21}\) Only 295 of the 370 reports were used, for two reasons. The majority of those not included involved offenses investigated after the change in policy in December, although they had been reported prior to the change. See text accompanying notes 22-25 infra. Second, some reports were not available (either misfiled or in use) when the analysis was made.

\(^{22}\) A definite date could not be obtained, but references in the J.A.D. Manual and the investigation reports indicated that the new policy was announced in the early part of December, 1966. The date was tentatively "confirmed" by the Police Department. Telephone Interview with police supervisory personnel, in Philadelphia, February 5, 1968.

\(^{23}\) Only 10 of the 295 investigation reports made reference to any such contact.

\(^{24}\) PHILADELPHIA POLICE DEPARTMENT, DETECTIVE BUREAU POLICY 66-38 (December 13, 1966).

\(^{25}\) Specific mention was made in 25 of the 75 investigation reports. The new policy required the investigators to consult the prosecutor only when the offense was to be founded and an offender was known and about to be arrested. In addition, many investigators were hesitant to call the Assistant District Attorney during the night unless they faced a search or arrest warrant problem, or had serious doubts concerning the founding of the offense. Interviews with police investigatory personnel, Philadelphia, February 22-25, 1968.

\(^{26}\) Interview with Arlen Specter, District Attorney, in Philadelphia, February 21, 1968.

\(^{27}\) Interview with Donald C. Marino, Assistant District Attorney, in Philadelphia, January 23, 1968.


\(^{29}\) See text accompanying notes 138-39 infra.
the decision makers, the second portion of the analysis is devoted to determining how this shift has affected the resulting decisions.

The basis of this part of the analysis is a representative sample (totaling 75 cases) of the investigation reports from offenses reported between December 8, 1966 and June 30, 1967. To ease the task of the reader, discussion of each factor in the decision-making process will focus first on the period before the change in policy, and then on the period following the change in policy. The former will be labeled the "police" response, the latter the "police-prosecutor" response.

II. THE FOUNDING DECISION

A. Promptness of Complaint

The rapidity with which the alleged victim complains of the assault has been deemed an important test of her sincerity by the courts. Lack of a prompt complaint "tends to show" that the complainant consented to the intercourse, and in assessing her credibility juries are instructed to consider whether a speedy complaint was made. It is not crucial that the complainant failed to inform the first person she encountered following the rape. In Commonwealth v. Oyler, the court found that the jury had acted properly in discounting the failure of the victim to "complain" to "two total strangers." Similarly, a complainant's failure to inform strangers of the offense while awaiting the return of her husband was held justifiable, although it was held error not to instruct the jury to consider the extended delay in reporting the crime to the police. When the delay exceeds several hours and becomes days, weeks, or even months, intervening events that appear to trigger the complaint are to be taken into account in evaluating the weight to be given to the report.

To analyze the significance to the police of a prompt complaint, two factors were considered: the promptness of the complaint (if any)

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30 The sample was selected to maintain the same proportion of unfounded offenses and a similar chronological and geographical distribution as would have resulted had all of the investigation reports for the period been included. However, as with the first sample, several investigation reports were not available. Because these reports were not replaced with others, the sample contained a slightly higher unfounding proportion than planned—23% rather than 20%.

31 The "police-prosecutor" response refers to all investigations made after the change in policy, regardless of whether or not the prosecutor was actually contacted in any given case.


to persons other than the police, and the promptness of the report to
the police. Where persons other than the police were first informed
of the offense, three categories of "promptness" were established:

- **Immediate**, if the complainant reported the offense to the first
  person she had an opportunity to inform;
- **Prompt**, if the complaint was not made to the first possible
  person but was made to the first person one would definitely
  expect the complainant to inform; ³⁹
- **Delayed**, if the complainant failed to report the offense at first
  opportunity to a person one would expect her to tell.

Of the 173 offenses in the sample, ⁴⁰ 19 per cent were unfounded
by the police. The distribution according to the promptness of the
complaint is shown in Table 1.

### Table 1

*Promptness of Complaint to Persons Other Than Police:*

<table>
<thead>
<tr>
<th></th>
<th>Founded</th>
<th>Unfounded</th>
<th>Per Cent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Immediate</td>
<td>80</td>
<td>10</td>
<td>11</td>
</tr>
<tr>
<td>Prompt</td>
<td>29</td>
<td>11</td>
<td>28</td>
</tr>
<tr>
<td>Delayed</td>
<td>32</td>
<td>11</td>
<td>26</td>
</tr>
<tr>
<td>Total</td>
<td>141</td>
<td>32</td>
<td>19</td>
</tr>
</tbody>
</table>

This table would seem to suggest that the police distinguish only
between cases in which the complainant informs the first person she
encounters after the offense and those in which she does not, ⁴¹ thus
ignoring the distinction between strangers and nonstrangers suggested
by the court in Oyler. ⁴² If, however, one removes from the sample those
offenses where the report to the police occurred more than twenty-four
hours after the offense (on the assumption that the corresponding com-
plaints to others were also delayed by more than twenty-four hours),
the Oyler distinction appears in the pattern of decision by the police.
With the sample so limited, the police unfounded

³⁹ In most cases, this would be the complainant's parents or husband.

⁴⁰ Not included in the sample are offenses that were reported by a person other
than the complainant or that were reported by the complainant directly to the police.

⁴¹ The differential between the percentages of unfounded offenses in the last two
categories—prompt and delayed complaints—is not significant. The test used here and
throughout this Comment for determining significance is a rough one, but probably as
accurate as necessary in view of the size of the sample studied. If, had one offense in
the smaller of two categories been decided differently, the differential would remain, it
is considered significant.

⁴² See text accompanying note 36 supra.
11 per cent of the offenses where the complaint to others was immediate;
27 per cent of the offenses where the complaint to others was prompt; and
39 per cent of the offenses where the complaint to others was delayed.

Table 1 might also, of course, be explained on the ground that the police ignore the promptness of the complaint to others and make their decision solely on the rapidity with which the offense is reported to the police. Five categories were established to analyze the importance of a prompt report to the police:

- immediate, if the police were notified within several hours;
- prompt, if the police were notified within twenty-four hours;
- weekly, if the police were notified in more than one day but within one week;
- monthly, if the police were notified in more than one week but less than one month; and
- yearly, if the police were notified after one month had elapsed.

Of the 261 offenses in the sample, 48 per cent were unfounded by the police. The distribution by category is shown in Table 2.

<table>
<thead>
<tr>
<th>Per Cent</th>
<th>Founded</th>
<th>Unfounded</th>
<th>Unfounded</th>
</tr>
</thead>
<tbody>
<tr>
<td>Immediate</td>
<td>131</td>
<td>31</td>
<td>19</td>
</tr>
<tr>
<td>Prompt</td>
<td>52</td>
<td>21</td>
<td>29</td>
</tr>
<tr>
<td>Weekly</td>
<td>11</td>
<td>3</td>
<td>21</td>
</tr>
<tr>
<td>Monthly</td>
<td>7</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Yearly</td>
<td>5</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>206</td>
<td>55</td>
<td>21</td>
</tr>
</tbody>
</table>

As there is clearly no direct relationship between the delay in reporting offenses to the police and the percentage of offenses unfounded, it seems apparent that this is by no means the only determinative factor. Table 3 compares police response in light of both the promptness of the victim's complaint to others and the report to the

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48 All of the 171 cases in Table 1 are included in this sample. If, however, the offense was reported to the police by someone other than the complainant or a person informed by her, the offense was omitted from the sample.
police. Again, offenses reported to the police more than twenty-four hours after their occurrence have been removed.\footnote{44}

**Table 3**

*Police Response*  
*(Percentage of Cases Unfounded)*

<table>
<thead>
<tr>
<th>Complaint</th>
<th>Immediate</th>
<th>Prompt</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>10</td>
<td>22</td>
</tr>
<tr>
<td>to Prompt</td>
<td>40\footnote{45}</td>
<td>22</td>
</tr>
<tr>
<td>Others Delayed</td>
<td>— *</td>
<td>41</td>
</tr>
</tbody>
</table>

\* The factors used in determining the promptness of the complaint to others are not strictly temporal, as are those used in determining the promptness of the report to the police. Therefore, it would be possible to have a delayed complaint to others and an immediate report to the police. Such a situation is, however, unlikely, and no such cases were reported in the sample used.

Table 3 indicates that if the report to the police is prompt (within twenty-four hours), the police fail to distinguish between an immediate complaint to others and a prompt one, but do make a distinction between prompt and delayed complaints. This is, of course, a perfect example of the *Oyler* distinction: that the complainant waits to inform a close friend or relative of the offense rather than immediately informing a comparative stranger is not considered by the police to impair her credibility. If, however, she fails to inform the first person to whom one would definitely expect her to mention the assault, the police are less likely to believe her story.

The response of the police-prosecutor team to the promptness of complaints to others and to the police was not unlike the police response. Tables 4 and 5, respectively corresponding to tables 1 and 2, show comparable results.\footnote{46}

\footnote{44} When the report to the police occurred more than 24 hours after the offense, other factors seem best to explain the small percentage of unfounded offenses. Of the 14 cases in the weekly sample, 11 involved juvenile complainants; in 5 of these 11 cases, the alleged offender was a relative of the victim. (The term “relative” here includes persons related by blood or marriage, including common-law marriage. True incest offenses were rarely encountered.) Of the 12 cases in the remaining two samples, 8 involved juvenile complainants and offenders who were either relatives or “friends” roughly three times the age of the complainant.

The seeming inconsistency between the police decision patterns and the court-established guidelines is presumably understandable, if not reconcilable, if one considers the factors above. Additionally, the placement of the offender in an authoritarian relationship to the young complainant could well be a satisfactory explanation of the delay in reporting the offense. Finally, many of the late-reported offenses are initially classified as “investigations of persons,” see note 8 *supra*, and cases that would otherwise be listed as unfounded rapes are closed without being so classified.

\footnote{45} There were only 5 offenses in this category, 2 of which were unfounded. The significance of this figure is therefore low.

\footnote{46} No table for police-prosecutor response comparable to Table 3 is presented for want of sufficient data to be significant.
TABLE 4

Promptness of Complaint to Others: Police-Prosecutor Response

<table>
<thead>
<tr>
<th>Per Cent</th>
<th>Founded</th>
<th>Unfounded</th>
</tr>
</thead>
<tbody>
<tr>
<td>Founded</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Immediate</td>
<td>16</td>
<td>2</td>
</tr>
<tr>
<td>Prompt</td>
<td>17</td>
<td>3</td>
</tr>
<tr>
<td>Delayed</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>Total</td>
<td>40</td>
<td>7</td>
</tr>
</tbody>
</table>

TABLE 5

Promptness of Report to the Police: Police-Prosecutor Response

<table>
<thead>
<tr>
<th>Per Cent</th>
<th>Founded</th>
<th>Unfounded</th>
</tr>
</thead>
<tbody>
<tr>
<td>Founded</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Immediate</td>
<td>28</td>
<td>6</td>
</tr>
<tr>
<td>Prompt</td>
<td>14</td>
<td>5</td>
</tr>
<tr>
<td>Weekly</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Monthly</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Yearly</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>48</td>
<td>14</td>
</tr>
</tbody>
</table>

It will be observed, however, that although both groups unfounded 11 per cent of the complaints made immediately to others, the police were far more likely to unfound a case when the complaint to others fell into the prompt category: the police unfounded 28 per cent of such cases, and the police-prosecutor team only 15 per cent. This apparent difference, however, can probably be accounted for by differences in the composition of the sample. Other differences between police and police-prosecutor response are likely to have a similar explanation.47

B. Physical Condition of Complainant

The physical condition of the complainant immediately following the offense is considered by courts to be another indication of whether or not she consented to the intercourse; the lack of any signs of violence is one of the “circumstances of defense, not as conclusive, but...
as throwing distrust upon the assumption that there was a real absence of assent."

Observations by the first official (policeman or investigator) who responded to the complaint were employed to analyze the reaction of the police to the physical condition of the complainant. The observations were categorized as supporting or not supporting the complainant's allegations regarding the violence involved in the offense. Table 6 gives the distribution of unfounded offenses according to the police observation.

**Table 6**

*Police Observation of Complainant's Appearance: Police Response*

<table>
<thead>
<tr>
<th>Per Cent</th>
<th>Founded</th>
<th>Unfounded</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supports Allegation</td>
<td>26</td>
<td>4</td>
</tr>
<tr>
<td>Does Not Support Allegation</td>
<td>12</td>
<td>12</td>
</tr>
<tr>
<td>Not Reported</td>
<td>172</td>
<td>39</td>
</tr>
<tr>
<td>Total</td>
<td>210</td>
<td>55</td>
</tr>
</tbody>
</table>

While the response followed judicial guidelines where an observation was made, the small number of observations reported suggests that the complainant's appearance is not considered very important by the police. Observations were recorded in only 20 per cent of the reports. There is some indication, however, that observations are made more often when the allegations suggest them. Thus, where the complainant alleged that a struggle occurred, observations were noted in 28 per cent of the reports; and where the offender allegedly assaulted the complainant, observations were noted in 29 per cent of the reports.


50 Blackened, swollen eyes and scratches and bruises on the limbs are normally indicative of violence. However, if the complainant alleged a violent struggle with the offender, the presence of only a swollen eye or bruised limb was classified as non-supporting. The classification is the author's, a sizable portion of the reports having simply listed the injuries, without any judgment by the investigator.

51 Where the report to the police was *weekly, monthly* or *yearly* the offense was not included in the sample. (See p. 284 *supra* for the definitions of these terms.)

52 During the interviews with the investigators, however, the physical condition of the complainant was one of the two factors most frequently mentioned as being determinative of the investigators' initial reaction to the complaint and of the "tone" or nature of the investigation. The other factor was promptness of complaint. Interviews with police investigatory personnel, in Philadelphia, February 22-25, 1968. This is strong evidence that the reports do not always show all the factors actually considered. For purposes of intra-departmental review, however, and for this Comment, it is assumed that any given report does contain all the factors considered.

53 This appeared in 112 of the reports.

54 This appeared in 96 of the reports.
A second factor to be considered here is the medical examination. Investigators are directed to have juvenile complainants “transported to the [Philadelphia General Hospital] for medical examination or treatment if so required.” Generally, unless she refuses to go or the offense involved is a nonviolent rape, an adult complainant is taken to the hospital. The manual directs that all complainants under 18 years of age be later examined by a physician associated with the juvenile court, but this directive is not invariably followed. While medical examinations or treatment were definitely made in 60 per cent of the total sample of offenses, the “results” were reported in only 18 per cent.

The police response to the results of the medical examination is interesting. Negative violence reports caused 47 per cent of the offenses to be unfounded, while positive violence reports resulted in only 8 per cent being unfounded. The statistics further indicate that the police place much greater reliance upon the violence aspect of the medical report than upon the intercourse aspect. Where the medical report indicated that the complainant had recently engaged in sexual intercourse, 19 per cent of the offenses were unfounded, compared with 29 per cent where the report was either inconclusive or negative, a differential not nearly so significant as that for violence. In addition, where the medical report was negative with regard to both violence and intercourse, 44 per cent of the offenses were unfounded, a number not significantly different from the number unfounded when just the violence report was negative.

Greater reliance upon the violence report is not improper. The requirement of carnal knowledge is met by “any entry, however slight . . . and there need be no emission of seed.” A negative intercourse report, therefore, is not conclusive proof of lack of carnal knowledge, and, even in the best of circumstances, the results of such intercourse examinations are uncertain and difficult to interpret. The

56 Of the 195 complainants aged 16 years and older, 102 were treated or examined by a doctor, compared with 69 of 90 juvenile complainants.
58 See note 56 supra.
59 Offenses involving a monthly or yearly report-to-the-police were excluded from the sample.
60 There were 15 negative violence reports.
61 There were 25 positive violence reports.
62 With attempted rapes, however, the offense was always founded, regardless of a negative report of violence. There were 5 such cases.
63 There were 23 such medical reports.
64 There were 31 inconclusive or negative reports.
65 There were 18 such reports.
investigators are aware of the inaccuracy and inconclusiveness of these reports and, in general, do not consider them very useful with regard to the founding decision. However, the complainant's refusal to submit to medical attention resulted in an unfounded offense 56 per cent of the time. This strong reaction is undoubtably the result of a belief on the part of the investigators that only an untruthful complainant would refuse medical attention and be uncooperative.

Table 7, pertaining to the police-prosecutor response, contains a significant variation with regard to the physical condition of the complainant. Again, observations were recorded for only one of every five offenses. They were recorded in 23 per cent of the offenses when the complainant allegedly struggled and 26 per cent of the offenses when she allegedly was assaulted. The variation appears in the much stronger reaction to a nonsupporting observation.

| TABLE 7 |
| Police Observation of Complainant's Appearance: Police-Prosecutor Response |
| Founded | Unfounded | Per Cent |
| Supports | Allegation | 6 | 1 | 14 |
| Does Not Support | Allegation | 0 | 5 | 100 |
| Not Reported | 42 | 9 | 18 |
| Total | 48 | 15 | 24 |

Medical examinations or treatment were involved in approximately 60 per cent of the offenses dealt with under the changed policy, and the results reported in approximately 20 per cent. While the sample is too small to establish with certainty continued reliance upon the violence aspect of the medical report, the distribution is not inconsistent with it. When the prosecutor was actually contacted, the offense was always founded, regardless of the medical report.

C. Prior Behavior of Complainant

The behavior of the complainant during the hours preceding the offense is also an important factor at trial:

---


70 Such refusals occurred in 117 cases.

71 An attempted rape was founded without regard to the results of the medical report. There were 4 such cases.
The jury . . . weigh[s] the woman's conduct in the prior history of the affair. . . . It . . . is moved to be lenient with the defendant whenever there are suggestions of contributory behavior on her part.\textsuperscript{72}

Some writers infer that this action of the jury departs from a strict application of the law regarding consent\textsuperscript{73} and is an application of an extra-legal "assumption of risk" theory.\textsuperscript{74} However, the courts do recognize that the "events leading up to allegations of rape are important in the final determination whether consent was given or force was used."\textsuperscript{75} Generally, the two approaches overlap considerably—the complainant who would assume the risk of entering the residence or automobile of a stranger or casual acquaintance arguably might also be more likely to have consented to any resulting sexual relations than the complainant who would not assume this risk.

The police response to the conduct of the complainant prior to the offense was analyzed by a determination (by the author) whether or not the reported conduct supported the allegation. The categorization was to a large degree based upon the complainant's account of events. Where the prior conduct appeared to be "neutral," or where the investigation report contained insufficient information on which to base a determination, the offense was categorized as "not reported." As Table 8 indicates, the police do respond to this factor appropriately.

\begin{table}
\centering
\caption{Complainant's Behavior Prior to Offense: Police Response}
\begin{tabular}{llll}
\hline
 & Founded & Unfounded & Per Cent

\hline
Supports & & & \\
Allegation & 91 & 10 & 10

\hline
Does Not Support & & & \\
Allegation & 73 & 36 & 33

\hline
Not Reported & 70 & 13 & 16

\hline
Total & 234 & 59 & 20

\hline
\end{tabular}
\end{table}

Sufficient information on which to base a determination was recorded most often where negative, nonsupporting determinations were made. Where the offense occurred indoors, in an automobile,

\textsuperscript{73} Id.
\textsuperscript{74} Id. at 254.
or in the offender's residence, the complainant's prior conduct least often supported the allegation. These factors—the location of the offense and the social relationship between the complainant and the offender—are then objective, general indicators of the complainant's prior conduct. Table 9 gives the unfounding percentages for these factors.

Table 9

Location and Relationship: Police Response by Percentage of Cases Unfounded

<table>
<thead>
<tr>
<th>Complainant's Residence</th>
<th>Offender's Residence</th>
<th>Automobile</th>
<th>Other Indoors</th>
<th>Outdoors</th>
<th>Total Unfounded</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strangers</td>
<td>8%</td>
<td>0%</td>
<td>29%</td>
<td>17%</td>
<td>23%</td>
</tr>
<tr>
<td></td>
<td>(48)</td>
<td>(2)</td>
<td>(7)</td>
<td>(12)</td>
<td>(47)</td>
</tr>
<tr>
<td>Acquaintances</td>
<td>22%</td>
<td>20%</td>
<td>33%</td>
<td>46%</td>
<td>19%</td>
</tr>
<tr>
<td></td>
<td>(9)</td>
<td>(10)</td>
<td>(9)</td>
<td>(11)</td>
<td>(11)</td>
</tr>
<tr>
<td>Friends</td>
<td>14%</td>
<td>13%</td>
<td>25%</td>
<td>30%</td>
<td>24%</td>
</tr>
<tr>
<td></td>
<td>(29)</td>
<td>(23)</td>
<td>(9)</td>
<td>(11)</td>
<td>(17)</td>
</tr>
<tr>
<td>Dates</td>
<td>40%</td>
<td>100%</td>
<td>0%</td>
<td>0%</td>
<td>—</td>
</tr>
<tr>
<td></td>
<td>(0)</td>
<td>(5)</td>
<td>(1)</td>
<td>(1)</td>
<td>(0)</td>
</tr>
<tr>
<td>Total</td>
<td>12%</td>
<td>16%</td>
<td>32%</td>
<td>31%</td>
<td>24%</td>
</tr>
</tbody>
</table>

The small samples and the closeness of the figures prevent one from drawing any solid conclusions from this table. There are indications, though, that the police are influenced more by the "assumption of risk" approach than they are by conditions indicative of consent. Arguably, the complainant assumes a greater risk by being in the company of an acquaintance than she does by being in the company of a friend, although the probability of consent is presumably less. The

---

76 The categories established to define the location of the offense are: outdoors—on the street, in an alleyway, vacant lot or an abandoned automobile; indoors—within a building other than the residence of either the complainant or the offender or the common areas of the building within which the complainant or the offender has her or his residence; automobile—in any mobile vehicle; common residence—residence of both the complainant and the offender; complainant's residence; and offender's residence.

77 The categories established to define the relationship between the offender and the complainant are: strangers—their first contact was at the time of the offense; acquaintances—they first met during the hours immediately preceding the offense; friends—they had known each other for a period of time previous to the day of the offense; dates—they were or had been seeing each other socially; relatives—they were related by blood or marriage, including common law marriages.

78 The categories of "common residence" and "relatives" are not included due to insufficient data.
higher percentage of unfounded offenses where acquaintances, rather than friends, were involved suggests that, for the police, "assumption of risk" has greater weight than possible consent.  

Another factor relevant to both the "assumption of risk" and the "probability of consent" approaches to the complainant's prior conduct is her sobriety. While the number of offenses where the investigator made note of possible intoxication of the complainant is not large, the influence it had upon the police decision is considerable: 82 per cent of the complaints were unfounded where the report indicated intoxication, but only 15 per cent where the report failed to mention it. Did the police overreact to the intoxication of the complainant? The analysis would suggest that they did, but this could also be the result of inaccurate investigation reports. Several investigators were confronted with the hypothetical situation of an intoxicated complainant. One suggested that he would not mention her intoxication in his report if he were to found the offense. Several others indicated that they might mention it but would deemphasize it; that once the decision to found the offense had been made, their task was to report it "impartially," but also to "focus" upon the offender and his guilt. Likewise, if the offense were to be unfounded, the intoxicated state of the complainant would be emphasized.

The police-prosecutor team reacted more strongly to the complainant's behavior prior to the offense than had the police investigating earlier complaints. Table 10 illustrates the police-prosecutor reaction:

<table>
<thead>
<tr>
<th>Complainant's Behavior Prior to Offense:</th>
<th>Police-Prosecutor Response</th>
<th>Per Cent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Founded</td>
<td>Unfounded</td>
<td>Unfounded</td>
</tr>
<tr>
<td>Supports Allegation</td>
<td>29</td>
<td>0</td>
</tr>
<tr>
<td>Does Not Support Allegation</td>
<td>19</td>
<td>11</td>
</tr>
<tr>
<td>Not Reported</td>
<td>9</td>
<td>6</td>
</tr>
<tr>
<td>Total</td>
<td>57</td>
<td>17</td>
</tr>
</tbody>
</table>

79 With most of the remaining categories, the greater "risk" assumed corresponds closely with the greater possibility of consent, although an obvious exception is where the offense occurred in the complainant's residence and was part of a burglary or other forcible entry.

80 There were 22 such reports.

81 There were 271 cases in this category.

Although the police and police-prosecutor teams reacted similarly in cases where the complainant's prior behavior did not support her allegations, where it did the police-prosecutor team invariably founded the offense. Whether the higher percentage of unfounded offenses where the complainant's behavior was not reported is significant is questionable. It is certainly doubtful that any significant difference is due to the influence of the prosecutor's office: where the complainant's prior behavior was not reported, all seven of the offenses for which the prosecutor had been contacted were founded.

The injection of the prosecutor into the founding decision moderated the reaction of the decision-makers to an intoxicated complainant.\(^8\)

The authorities generally hold that the act of sexual intercourse is against the woman's will when, from any cause, she is not in a position to exercise any judgment about the matter. Thus intercourse with a woman who is mentally unconscious from intoxication . . . is generally held to be rape.\(^4\)

The police do not appear to follow this reasoning, having unfounded 82 per cent of the offenses in which the complainant was noted on the report as being intoxicated. While the prosecutor was actually consulted only once after the change in policy (in a case where the offense was founded), three other offenses involving intoxicated complainants were subsequently founded by the investigatory unit that had consulted the prosecutor.\(^5\) It is quite likely that the decisions in these subsequent offenses were influenced by the prior consultation.

D. Actions During the Offense

The alleged actions of both the complainant and the suspect during the offense are deemed relevant in determining if consent was given.

In common usage the word "consent" refers to a self-perceived attitude; one consents when he himself thinks he consents. And if a woman were to use the word "consent" to describe her attitude (as she perceives it) toward an act of coitus, both she and others would conclude that she had,

\(^{8}\) No table corresponding to Table 9 is presented for want of sufficient data.


\(^{5}\) There were 8 reports of an intoxicated complainant in the police-prosecutor sample; 4 were founded.
in fact, consented. However, in a courtroom demonstration of the attitude, the fact finder must rely heavily on the woman's behavior at the time of the alleged crime. ... [F]or the consent standard to function without jeopardizing innocent males, the woman must have a clearly formulated, self-perceived attitude toward the act, reliably evidenced by her behavior at the scene. 86

In early English law, "the fact that no outcry was made when the deed was supposed to have been committed carried a strong presumption that the woman's testimony was false or feigned." 87 Failure to make an outcry during the commission of the offense is still an important factor in testing the complainant's credibility regarding the issue of consent. 88 Another is physical resistance. Where the complainant is conscious and capable of resisting, the failure to do so "will be taken as her assent." 89 Except where "consent" is induced by threats of great bodily injury or death, 90 a minimal amount of resistance appears to be necessary. 91 The actual amount required is that which it is "reasonable to offer under the circumstances." 92 The complainant need not continue her struggle for the duration of the offense. 93

In order to analyze the response of the police to the behavior of the complainant two factors were recorded: screaming by the complainant and struggling by the complainant. The data are presented in Table 11.

---


87 D. Neville, Rape in Early English Law, 121 Just. P. 223, 224 (1957).


90 See id.


The jury could also consider that this girl found herself on this dark and unknown road with these three defendants, and determine what bearing that had on her ability effectively to resist under the circumstances.


The amount of force necessary on the part of the offender is also dependent on the circumstances. Commonwealth v. Steele, 75 Dauph. 241, 246 (Pa. C.P. 1960). A threat of serious personal injury or death is sufficient force to fulfill the statutory requirement. Id. See also Comment, supra note 86, at 57.
TABLE 11

Actions of Complainant During the Offense: Police Response

<table>
<thead>
<tr>
<th>Founded</th>
<th>Unfounded</th>
<th>Per Cent</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Founded</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Unfounded</td>
</tr>
<tr>
<td>Struggled</td>
<td>62</td>
<td>10</td>
</tr>
<tr>
<td>and Screamed</td>
<td></td>
<td>14</td>
</tr>
<tr>
<td>Struggled Only</td>
<td>46</td>
<td>5</td>
</tr>
<tr>
<td>Screamed Only</td>
<td>18</td>
<td>1</td>
</tr>
<tr>
<td>Neither</td>
<td>108</td>
<td>43</td>
</tr>
<tr>
<td>Total</td>
<td>234</td>
<td>59</td>
</tr>
</tbody>
</table>

The response of the police to the behavior of the complainant during the offense is probably better than Table 11 indicates, although even there it is not inconsistent with the judicial guidelines. A disruptive influence on the table is that for 120 of the included offenses, the allegations of the complainant were "investigated" for possible corroborating evidence. While the overall results of the "investigations" were essentially neutral—as many of the complainants were corroborated as were contradicted—the results for the individual categories were not neutral. A disproportionate number of the allegations in offenses where the complainant "struggled and screamed" were contradicted (33.3 per cent), while relatively fewer were contradicted where she only "struggled" (7 per cent) or only "screamed" (8 per cent). This could account for the disparity between the unfoundings where the complainant alleged she struggled and screamed and the unfoundings where she alleged only struggling or screaming.

The seeming preference of the police in Table 11 for an outcry over resistance can be accounted for by considering the actions of the complainant in reference to the actions of the offender in Table 12.

94 See pp. 309-10 infra.

95

Behavior of Complainant During Offense—Police Response

<table>
<thead>
<tr>
<th>Investigations Made</th>
<th>Per Cent Corroborating</th>
<th>Per Cent Contradicting</th>
</tr>
</thead>
<tbody>
<tr>
<td>Struggled and Screamed</td>
<td>48</td>
<td>56</td>
</tr>
<tr>
<td>Struggled only</td>
<td>15</td>
<td>67</td>
</tr>
<tr>
<td>Screamed only</td>
<td>12</td>
<td>33</td>
</tr>
</tbody>
</table>
TABLE 12

Actions of Complainant With Regard to Weapon of Offender:
Police Response

<table>
<thead>
<tr>
<th></th>
<th>Founded</th>
<th>Unfounded</th>
<th>Per Cent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Struggled and</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Weapon</td>
<td></td>
<td>2</td>
<td>22</td>
</tr>
<tr>
<td>Screamed</td>
<td>7</td>
<td>2</td>
<td>22</td>
</tr>
<tr>
<td>Struggled</td>
<td></td>
<td>8</td>
<td>13</td>
</tr>
<tr>
<td>Weapon</td>
<td>10</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Only</td>
<td>36</td>
<td>5</td>
<td>12</td>
</tr>
<tr>
<td>Screamed</td>
<td></td>
<td>8</td>
<td>11</td>
</tr>
<tr>
<td>Weapon</td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Only</td>
<td>10</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Neither</td>
<td></td>
<td>28</td>
<td>16</td>
</tr>
<tr>
<td>Weapon</td>
<td></td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>None</td>
<td>80</td>
<td>38</td>
<td>32</td>
</tr>
<tr>
<td>Total</td>
<td>53</td>
<td>8</td>
<td>13</td>
</tr>
<tr>
<td>Weapon</td>
<td></td>
<td>181</td>
<td>22</td>
</tr>
<tr>
<td>None</td>
<td>51</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Where the offender had a weapon during the offense—and thus ipso facto the ability to inflict grave bodily harm or death—the police responded accordingly, unfounding 13 per cent as compared to 22 per cent when no weapon was involved. Where the complainant alleged only a struggle, the offender possessed a weapon for only 22 per cent of the offenses, while he possessed a weapon during 44 per cent of the offenses where the complainant alleged only an outcry. A similar reaction is apparent in the offenses where the complainant neither struggled nor screamed: 16 per cent were unfounded when the offender had a weapon, and 32 per cent were unfounded when he did not.

It is the relationship between the presence of the weapon and the allegations of the complainant which is important, and not just the presence of the weapon alone. The total picture is not inconsistent with the application of a “resistance standard”:

uses force to overcome resistance at least as great as the maximum resistance a female in the circumstances of the alleged victim could reasonably offer to prevent penetration while avoiding serious risk of death or serious bodily injury.97

96 This standard is studied in Comment, The Resistance Standard in Rape Legislation, 18 Stan. L. Rev. 680 (1966).
97 Id. at 688.
In applying the standard, the first inquiry is whether the complainant did in fact resist.98 "Proof of resistance that was unsuccessful is proof of force sufficient to overcome the resistance." 99 The second inquiry is, if the complainant did not resist, why not? For the offense to be founded, it must appear that she had a reasonable belief that bodily harm or death would have resulted had she resisted.100

A shift in emphasis with the police-prosecutor team from a presumption of the complainant's veracity to a presumption of her untruthfulness appears to be the only reasonable explanation of their decision pattern. First, they unfounded a higher percentage of cases than the police where the complainant only struggled:  

Table 13

| Actions of Complainant During the Offense: Police-Prosecutor Response |
|-----------------------------|-----------------------------|-----------------------------|
|                             | Founded | Unfounded | Per Cent |
| Struggled and Screamed      | 14      | 2          | 13        |
| Struggled Only              | 6       | 4          | 40        |
| Screamed Only               | 7       | 1          | 13        |
| Neither                     | 30      | 10         | 25        |
| Total                       | 57      | 17         | 23        |

It is to be noted, moreover, that where the complainant allegedly struggled and screamed or only screamed, the special investigation corroborated her allegations 69 per cent of the time; and where the complainant allegedly only struggled, the result of the only investigation was neutral.101 Furthermore, when the complainant neither struggled

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98 Id. at 685.
99 Id.
100 Id. at 686.
101
nor screamed, they unfounded almost the same percentage of cases when the offender had a weapon (22%) as when he did not (26%). To the police-prosecutor team, the crucial test was not whether the offender possessed a weapon, but whether he committed a battery upon the complainant, an action more conducive of verification.

**TABLE 14**

*Actions of Offender During the Offense: Police-Prosecutor Response*

<table>
<thead>
<tr>
<th></th>
<th>Founded</th>
<th>Unfounded</th>
<th>Per Cent Unfounded</th>
</tr>
</thead>
<tbody>
<tr>
<td>Weapon, Threat and Battery</td>
<td>4</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Weapon and Threat</td>
<td>7</td>
<td>3</td>
<td>30</td>
</tr>
<tr>
<td>Weapon Only</td>
<td>2</td>
<td>1</td>
<td>33</td>
</tr>
<tr>
<td>Threat and Battery</td>
<td>7</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Threat Only</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Battery Only</td>
<td>12</td>
<td>1</td>
<td>8</td>
</tr>
<tr>
<td>None</td>
<td>23</td>
<td>12</td>
<td>34</td>
</tr>
<tr>
<td>Total</td>
<td>57</td>
<td>17</td>
<td>23</td>
</tr>
</tbody>
</table>

**TABLE 15**

*Actions of Complainant With Regard to a Battery by Offender: Police-Prosecutor Response*

<table>
<thead>
<tr>
<th></th>
<th>Founded</th>
<th>Unfounded</th>
<th>Per Cent Unfounded</th>
</tr>
</thead>
<tbody>
<tr>
<td>Struggled and Battery</td>
<td>11</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Screamed None</td>
<td>3</td>
<td>2</td>
<td>40</td>
</tr>
<tr>
<td>Struggled Battery</td>
<td>4</td>
<td>3</td>
<td>43</td>
</tr>
<tr>
<td>Only None</td>
<td>2</td>
<td>1</td>
<td>33</td>
</tr>
<tr>
<td>Screamed Battery</td>
<td>0</td>
<td>0</td>
<td>—</td>
</tr>
<tr>
<td>Only None</td>
<td>7</td>
<td>1</td>
<td>13</td>
</tr>
<tr>
<td>Neither Battery</td>
<td>8</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>None</td>
<td>22</td>
<td>10</td>
<td>31</td>
</tr>
</tbody>
</table>

The police-prosecutor team appears to have founded primarily those offenses where the complainant's story could be verified.

---

102 The offender had a weapon in 9 cases and did not in 31 cases.
That the strong reaction of the police-prosecutor to a battery allegation appears not only where the complainant offered minimal resistance, but throughout Tables 14 and 15, and the fact that when the complainant neither struggled nor screamed, she was disbelieved just as often when the offender had a weapon as when he did not, suggest that the resistance standard was abandoned and that the significance of the actions of the complainant and the offender were considered by the police-prosecutor to be basically unrelated.

E. Reputation for Chastity

The complainant's reputation for chastity is also deemed relevant by the courts:

At common law, and under the statute . . . evidence of bad reputation for chastity is admissible on a rape charge as substantive evidence bearing on the question of the female's consent. 103

The police, however, make such an investigation only rarely, and usually only when the investigator has doubts about the complainant's allegations. 104 The police made 28 such investigations; 22 uncovered a "bad" reputation, and 11 of these offenses were unfounded. The police-prosecutor team made 5 investigations, 4 of which revealed a "bad" reputation. Two of these 4 cases were unfounded. 105

F. Ages of Participants

Age is not a factor deemed relevant by the courts. Apparently, however, the investigators do react to the ages of the participants. The police decision pattern with regard to the age of the offender is shown in Table 16. 106

<table>
<thead>
<tr>
<th>Age of Offender</th>
<th>Founded</th>
<th>Unfounded</th>
<th>Per Cent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adult</td>
<td>168</td>
<td>33</td>
<td>16</td>
</tr>
<tr>
<td>Juvenile</td>
<td>35</td>
<td>5</td>
<td>13</td>
</tr>
<tr>
<td>Total</td>
<td>203</td>
<td>38</td>
<td>16</td>
</tr>
</tbody>
</table>

The actual spread between the percentages in table 16 is partially hidden by the sample composition. In general, offenses by adults tended to occur in locations where the unfounding rate was low. 107

104 See text accompanying notes 158-64 infra.
105 The offense was founded in both cases in which the prosecutor was actually contacted.
106 Offenses involving multiple offenders where some, but not all, were juveniles, are not included in the sample.
while offenses by juveniles occurred more often where the unfounding rate was high.\(^{108}\)

The police appear to have been less concerned with the founding of an offense and the placing of a juvenile in jeopardy than they were when the offender was an adult. In the former situation, the police decision was likely to be particularly crucial,\(^{109}\) since the pre-\textit{Gault}\(^{110}\) juvenile court was not required to make a determination of the facts through a traditional adversary proceeding, but merely through "an inquiry of the facts."\(^{111}\) The lack of police response to the additional responsibility caused by the absence of any definite safeguards in juvenile court proceedings is disappointing. However, a definite conclusion that the police did discriminate against the youthful offender is not possible. The inability to determine the reduction caused by the sample composition, and the fact that a separate investigatory unit, the Juvenile Aid Division,\(^{112}\) often handles the investigations involving juvenile offenders, prevent doing so.

Where the offender is an adult and the complainant a juvenile, the possibility of an additional offense, statutory rape,\(^{113}\) exists. The police response to this situation is shown in Table 17.\(^{114}\)

| TABLE 17 |
| Relative Ages of Participants: Police Response by Percentage of Cases Unfounded |
| (sample sizes given in parentheses) |

<table>
<thead>
<tr>
<th>Offender</th>
<th>Juvenile</th>
<th>Adult</th>
</tr>
</thead>
<tbody>
<tr>
<td>Juvenile</td>
<td>15% (33)</td>
<td>8% (53)</td>
</tr>
<tr>
<td>Adult</td>
<td>27% (15)</td>
<td>20% (148)</td>
</tr>
</tbody>
</table>

\(^{107}\) Some 56% of the offenses by adults were committed in locations with an unfounding rate below the average.

\(^{108}\) Some 69% of the offenses by juveniles were committed in locations with an unfounding rate above the average.

\(^{109}\) Technically, there still exists the decision by the investigator as to whether the incident should be handled as "remedial"—the offender reprimanded and placed into the custody of his parents—or an "arrest." However, when the offense is rape, and the complainant wishes to prosecute, the offender is placed on the upper limit of the remedial scale. From there it only requires a "fair" rather than "good" home to place him within the "arrest" scale. \textit{J.A.D. MANUAL, supra note 8, Investigator's Aid in Determining Arrest or Remedial Action}.\(^{110}\)

\(^{111}\) In \textit{re Gault}, 387 U.S. 1 (1967).

\(^{112}\) \textit{PA. STAT. ANN}. tit. 11, § 250 (1965).

\(^{113}\) \textit{J.A.D. MANUAL, Morals Squad, supra note 8}.\(^{114}\)

\(^{114}\) \textit{PA. STAT. ANN}. tit. 18, § 4721(B) (Supp. 1967).

\(^{114}\) The sample includes in the juvenile offender category offenses in which there were multiple offenders, not all of whom were juveniles. These offenses were ex-
The police were less likely to unfound any offense involving a juvenile complainant; they were least likely to do so where the offender was an adult.\textsuperscript{115} This was so despite the fact that the prior behavior of the juvenile complainant was less likely to support, and more likely to contradict, the offense than the prior behavior of an adult complainant. In addition, these juvenile complainants were less likely to have resisted or screamed, less likely to have encountered a weapon, threat or battery, and more likely to be a friend of the offender.

The response of the police-prosecutor team to the age of the offender is shown in Table 18.

**Table 18**

*Age of Offender: Police-Prosecutor Response*

<table>
<thead>
<tr>
<th>Per Cent</th>
<th>Founded</th>
<th>Unfounded</th>
<th>Unfounded</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adult</td>
<td>37</td>
<td>12</td>
<td>25</td>
</tr>
<tr>
<td>Juvenile</td>
<td>14</td>
<td>1</td>
<td>7</td>
</tr>
<tr>
<td>Total</td>
<td>51</td>
<td>13</td>
<td>20</td>
</tr>
</tbody>
</table>

Although the adult offender was now more likely to strike in a location with a high unfounding rate,\textsuperscript{116} and the juvenile where the unfounding rate was low,\textsuperscript{117} a disproportionately large number of adult offenders who were related to the complainant probably counteracts any exaggeration this may have caused in the spread. Thus, Table 18 reflects quite accurately an increased influence of the age of the offender on the founding decision. In addition, the differential is much greater than one would expect to result merely from the fact that a different investigatory unit handled the offenses involving juvenile offenders. It is indicative of the application of a different standard with regard to the age of the offender, with a juvenile put in jeopardy more easily than an adult.

This increased influence of the age of the offender is dramatically shown in Table 19.

\textsuperscript{115} Even if one were to assume that all of the offenses involving relatives were founded and were to remove them from the sample, still only 10\% of the cases involving juvenile complainants and adult offenders would be unfounded.

\textsuperscript{116} About 29\% of the adult offenders struck in a location with an above average unfounding rate.

\textsuperscript{117} None of the juvenile offenders struck in a location with an above average unfounding rate.
TABLE 19

Relative Ages of Participants: Police-Prosecutor Response by Percentage of Cases Unfounded
(sample sizes given in parentheses)

<table>
<thead>
<tr>
<th>Offender</th>
<th>Juvenile</th>
<th>Adult</th>
</tr>
</thead>
<tbody>
<tr>
<td>Juvenile</td>
<td>0%</td>
<td>16%</td>
</tr>
<tr>
<td>(8)</td>
<td>(19)</td>
<td></td>
</tr>
<tr>
<td>Adult</td>
<td>9%</td>
<td>30%</td>
</tr>
<tr>
<td>(11)</td>
<td>(30)</td>
<td></td>
</tr>
</tbody>
</table>

The table further indicates that the age of the complainant, regardless of the age of the offender, also continued to influence the founding decision. If one were to assume that the influence of the age of the offender had not changed, 41 per cent of the offenses involving juvenile offenders and adult complainants would have been unfounded. And if one were to assume that the influence of a juvenile complainant per se had not changed, 27 per cent of the offenses involving juvenile offenders and complainants would have been unfounded, a significantly greater proportion than actually were unfounded when the offender was an adult. Thus the possibility of a statutory rape charge continued to cause the offense to be founded more often.

G. Race of Participants

Another factor not relevant to the judicial guidelines is the racial composition of the offense. Its influence upon the founding decision of the police appears in Table 20.118

<table>
<thead>
<tr>
<th>Race of Participants: Police Response</th>
<th>Founded</th>
<th>Unfounded</th>
<th>Per Cent Unfounded</th>
</tr>
</thead>
<tbody>
<tr>
<td>Both Black</td>
<td>188</td>
<td>53</td>
<td>22</td>
</tr>
<tr>
<td>Both White</td>
<td>23</td>
<td>3</td>
<td>12</td>
</tr>
<tr>
<td>Interracial</td>
<td>24</td>
<td>4</td>
<td>14</td>
</tr>
<tr>
<td>Total</td>
<td>235</td>
<td>60</td>
<td>20</td>
</tr>
</tbody>
</table>

It has been suggested that "members of certain racial groups, such as Negroes, are in many instances held to a lesser standard of account-

118 All but one of the interracial offenses involved white complainants and black offenders.
ability than are majority groups in the same community. The police would appear to be "guilty as charged," and the lack of a significant difference between the all-white and the interracial categories suggests that the lesser standard applies to a black offender only when the complainant is also black. However, the behavior of the black complainant prior to the offense contributes much, if not all, of the differential between the two intraracial categories: it was the least likely to be consistent, and the most likely to be inconsistent with the offense. In all other respects, there were no significant differences among the three categories of complainants.

Table 21 suggests that the police may have also overreacted to the prior behavior of the black complainant.

### Table 21

<table>
<thead>
<tr>
<th>Race of Complainant: Police Response by Percentage of Cases Unfounded</th>
<th>(sample sizes given in parentheses)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Outdoors Stranger</td>
</tr>
<tr>
<td>Black</td>
<td>34%</td>
</tr>
<tr>
<td></td>
<td>(38)</td>
</tr>
<tr>
<td>White</td>
<td>0%</td>
</tr>
<tr>
<td></td>
<td>(9)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Race of Complainant's Residence</th>
<th>Outdoors Stranger</th>
<th>Outdoors Acquaintance</th>
<th>Outdoors Friend</th>
<th>Indoors Stranger</th>
<th>Indoors Friend</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black</td>
<td>0%</td>
<td>25%</td>
<td>14%</td>
<td>—</td>
<td>14%</td>
</tr>
<tr>
<td></td>
<td>(29)</td>
<td>(8)</td>
<td>(28)</td>
<td>(0)</td>
<td>(21)</td>
</tr>
<tr>
<td>White</td>
<td>21%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td></td>
<td>(19)</td>
<td>(1)</td>
<td>(1)</td>
<td>(2)</td>
<td>(2)</td>
</tr>
</tbody>
</table>

---

119 W. La Fave, Arrest: The Decision to Take a Suspect Into Custody 492 (1965).

120 The percentages of consistent prior behavior are:
Black 31%
White 50%
Interracial 54%.

121 The percentages of inconsistent prior behavior are:
Black 40%
White 35%
Interracial 18%. 
The only category in which the black complainant is always believed, and the only category in which the white complainant is sometimes doubted, is where the offense was committed in the complainant's residence by a stranger, probably a burglar. In this category the question of consent is usually not involved (offenses being unfounded not because the investigators believed that the complainant consented, but because the investigators did not believe there was an offense), and the behavior of the complainant prior to the offense is therefore less important. In addition, of the 29 founded offenses in this category involving black complainants, 26 had no identified offender and were classified either "inactive" or "active pending further investigation." No offender was placed in jeopardy by the founding of these 26 offenses.

It appears impossible, then, not to conclude that the differential for the whole table resulted primarily from lack of confidence in the veracity of black complainants and a belief in the myth of black promiscuity. The investigators, however, claimed that black complainants were more likely to report a "marginal" offense than were white complainants. They believe that this accounts for the racial differential in the unfounding percentages and, to some extent, for the larger number of offenses involving black complainants.

The response of the police-prosecutor to the racial composition of the offense is shown in Table 22.

<table>
<thead>
<tr>
<th>Race of Participants: Police-Prosecutor Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Founded</td>
</tr>
<tr>
<td>---------</td>
</tr>
<tr>
<td>Both Black</td>
</tr>
<tr>
<td>Both White</td>
</tr>
<tr>
<td>Interracial</td>
</tr>
<tr>
<td>Total</td>
</tr>
</tbody>
</table>

But see M. Amir, Victim-Precipitated Forcible Rape, 58 J. CRIM. L.C. & P.S. 493 (1956). Defining "victim precipitation" as "those rape situations in which the victim actually, or so it was deemed, agreed to sexual relations but retracted before the actual act or did not react strongly enough when the suggestion was made by the offender(s)," Amir's analysis revealed that white complainants were associated more often with victim precipitation events than were black complainants. Id. at 495, 496. His analysis is based upon 646 cases in Philadelphia during 1958 and 1960. If one assumes that Amir's "victim precipitation" corresponds with the "prior behavior" in the present analysis, his results appear to contradict those of the present study. However, it is probable (there is no definite indication in the article) that his sample included only founded offenses.

While more black complainants had been intoxicated, the absolute number is not large enough to influence the overall sample. Further, while the black complainant was slightly less likely to have struggled, she was more likely to have been assaulted.

Categories without comparison value have been omitted from the table.
Because of the relatively small number of offenses in the all-white category, the differential between the percentage of unfounding in the all-white and in the all-black categories is not a reliable statistic. The differential between the interracial and intraracial categories—which at first glance looks racist—appears rather to have resulted from the behavior of the complainant prior to the offense: where the offense was intraracial, the prior behavior of black and white complainants was indistinguishable; where the offense was interracial, the complainant's prior behavior was consistent with the offense a disproportionate amount of the time.

Table 23 might appear to indicate something of a change of view toward the veracity and promiscuity of the black complainant as compared with the white. This, however, is probably not the case. The apparent removal of "discrimination" from Table 23 as compared with Table 21 more likely results from (1) the smaller sample size and (2) actual contact with the prosecutor. He was contacted in 34 per cent of the all-black offenses, 20 per cent of the all-white offenses, and 50 per cent of the interracial ones. In 96 per cent of the cases where the prosecutor was contacted, the offense was founded.

<table>
<thead>
<tr>
<th>Complainant's Residence</th>
<th>Complainant's Acquaintance</th>
<th>Complainant's Stranger</th>
<th>Offender's Residence</th>
<th>Offender's Acquaintance</th>
<th>Offender's Stranger</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Black</td>
<td>0%</td>
<td>14%</td>
<td>100%</td>
<td>0%</td>
<td>0%</td>
<td>13%</td>
</tr>
<tr>
<td></td>
<td>(3)</td>
<td>(7)</td>
<td>(1)</td>
<td>(1)</td>
<td>(2)</td>
<td>(15)</td>
</tr>
<tr>
<td>White</td>
<td>14%</td>
<td>0%</td>
<td>—</td>
<td>—</td>
<td>—</td>
<td>13%</td>
</tr>
<tr>
<td></td>
<td>(7)</td>
<td>(2)</td>
<td>(0)</td>
<td>(0)</td>
<td>(2)</td>
<td>(15)</td>
</tr>
</tbody>
</table>
If the sample is representative of the prosecutor’s tendency to almost always “recommend” that an offense be founded, the crucial question then becomes, what causes the investigator to contact the prosecutor? This question will be considered below.

H. Miscellaneous Variables

The variables just considered are not the sole determinants of the founding decision. Other variables, not prevalent enough to analyze without a much larger initial sample, do influence the investigators. An exhaustive list of these will not be attempted, but several examples will be given for illustration.

(1) The complainant is an eleven-year-old girl who alleges that she was abducted following school and taken to a house and raped. She appears unusually calm and talks about the offense with some embarrassment, but little emotion. However, her account of the offense closely parallels that involving a fourteen-year-old the previous week. The offense is founded.

(2) The complainant tells the investigator that she was forced into the back of a station wagon parked along a busy street and raped. Her panties are found on the floor of a station wagon parked along the same block. The investigator concludes, based upon the economic status of the complainant and the condition of the panties, that she would not have voluntarily left them behind. The offense is founded.

Perhaps the most common variable of this sort was the willingness of the complainant to admit that sodomy was involved. Several in-

126 All the interracial offenses in the table involved white complainants.
127 For the black complainant, the behavior prior to the offense supported the offense for 36% of the offenses and contradicted the offense for 42% of them. The white complainant’s prior behavior supported 40% of the offenses and contradicted 40%.
128 Prior behavior supported the offense in 4 cases and contradicted it in only 1.
129 Of the offenses where the prosecutor was not consulted, only 68% were founded. The lone offense unfounded after contact between the investigator and the prosecutor involved two young adult Negroes: the complainant made no complaint to others and a weekly report to the police; her behavior prior to the offense did not support her allegation; the offense occurred in the offender’s residence, and she had a dating relationship with the offender; there was neither an observation of her physical appearance by the investigator nor a hospital report; and she alleged neither having struggled nor screamed, nor that her date had had a weapon, had threatened her or had committed a battery upon her.
130 Physical evidence, such as seminal stains, of course is also relevant to the investigation.
131 The relevant definition of sodomy is the carnal knowledge of “any male or female person by the anus or by or with the mouth . . . .” In Pennsylvania, sodomy is a felony. Pa. Stat. Ann. tit. 18, § 4501 (1965).
vestigators indicated that the complainant of a truly forcible rape is usually reluctant to admit that penetration had occurred, but that once she admits that sodomy is involved, they can be relatively certain of the penetration.\footnote{Interviews with police investigatory personnel, in Philadelphia, February 22-25, 1968.}

I. Conclusions

The analysis of the founding decision does not permit specific conclusions to be drawn regarding the absolute or relative influence of the variables considered.\footnote{The promptness of complaint and the physical condition of the complainant, however, were the factors most often mentioned as crucial by the investigators. See text accompanying note 156 infra.} Its purpose was rather to indicate the response of the police to certain variables in order to determine whether they were following the guidelines established by the courts. The analysis indicates that they were, and were doing so with some recognition of the refinements of the guidelines. The investigators not only considered the chronological length of a delay before complaint or report, but also were concerned with its explanation. Furthermore, they were concerned with the interaction of the participants during the offense, not only with the actions of each separately.

Where a variable was inconclusive, the offense was more likely to be founded than where the factor did not support it. This presumption of the complainant’s veracity demonstrates an understanding on the part of the investigators that, although they were applying principles established for the jury, they were not functioning as a jury. The complainant was not required to establish that an offense had occurred. One problem, however—beyond the scope of this Comment—arises here. If the investigator was not convinced that an offense had \textit{not} occurred, the offense was founded. If such a founding decision should, without more, result in an arrest, it would seem clear that the standards for probable cause have not been met. It is by no means clear, however, that close cases of this type frequently result in arrests.

Questions are also raised with regard to the response of the police to several variables. The consideration of the ages and races of the participants is clearly unjustifiable. Furthermore, the tendency to found a forcible rape offense more often when statutory rape is involved is unfortunate. It subjects the offender to a jeopardy he does not deserve. The police should only be concerned with determining what crime has been committed and by whom. That the higher charge of forcible rape places the prosecutor in a better position for plea-bargaining or for a compromise jury verdict should not enter into the police decision process. It also distorts crime statistics. Under the Uniform Crime Reports system, statutory rape is not in-
cluded with forcible rape and attempted rape as a "Part I" (major) offense, but it is a "Part II" offense. The classification of a consensual offense as a Part I offense overemphasizes the crime problem. In addition, the offender is usually known in a consensual offense, but not nearly as often when forcible offenses occur. The upgrading of the consensual offenses (actually the failure to downgrade them) raises the clearance rate for Part I offenses and creates a false impression of the performance of the department.

With regard to the police-prosecutor response, the attitude towards the marginal complainant was more hostile than the police. The investigators began to scrutinize the complainants more closely and applied to all a greater burden of proof. Inconclusive information which once had been treated not unlike information supporting the offense was treated more like information contradicting the offense. The presumption of the complainant's veracity was replaced to some extent by a presumption of her untruthfulness.

At first glance, it appears surprising that the unfounding rate for the second sample—20 per cent— is approximately the same as that for the first sample. Upon closer reflection, however, the lack of a significant change in the overall rate becomes understandable and expected. Rather, the change is only reflected within given variables. For example, although the police-prosecutor team was much harsher on complainants concerning their behavior during the offense, they removed the overreaction the police were displaying towards an intoxicated complainant. Thus an alteration of standards, but no change in the overall rate, took place. A further reason for the lack of change in the overall rate lies in the reaction of the investigators to the new policy: although they resented the intrusion of the District Attorney's Office, it offered an escape hatch for offenses the investigator wanted to found but lacked sufficient information to do so. He would simply contact the prosecutor, confident that he could convince the Assistant District Attorney to found the offense. He was then "off the hook"; if the decision was wrong, the "load was off his shoulders." Thus an offense that the investigator would not found on his own was often founded as a result of contact with the prosecutor.

135 One out of five offenses—20%—was unfounded in the first sample. See text pp. 289-91 supra. It is interesting to note that the prosecutor was unaware at the time the new policy was initiated that the investigators had been screening out such a large proportion of the offenses. Interview with Arlen Specter, District Attorney, in Philadelphia, February 21, 1968.
136 See p. 297 supra.
137 See p. 293 supra.
138 Interviews with police investigatory personnel, in Philadelphia, February 22-25, 1968. As one investigator put it, "any investigator who needs the assistance of the prosecutor with regard to the founding decision shouldn't be on the force." Id.
139 Id. This shortcut solution to the problem offense could also account for the decrease in the number of special investigations.
The situation is further confused by the fact that the Assistant District Attorneys handling the consultations were reportedly only concerned with the existence of a prima facie case. Thus, the end result of the change in policy was that the investigators were generally much harsher on all complainants, but if they did contact the prosecutor for a borderline case, it would almost invariably be founded.

There is no way to ascertain whether the shift from a presumption of veracity to a partial if not total presumption of untruthfulness placed an undesirable burden on the complainant. None of the complainants whose offenses had been unfounded sought redress elsewhere, but, on the other hand, most of them were not informed that the offenses had been unfounded.

III. SPECIAL INVESTIGATORY TECHNIQUES

The usual investigation report was composed mainly of information furnished by the complainant. Some reports, however, contained descriptions of the investigators' efforts to obtain additional information on which to base the founding decision or efforts to obtain assistance in making that decision with the existing information. Because such special investigations produce information or expertise that leads to the founding or unfounding of offenses, the decision to conduct them is of importance.

A. The Complainant's Account of the Offense

The most frequently conducted special investigation seeks to discover information either corroborating or contradicting the complainant's account of the offense. Such an investigation consists of both an attempt to locate persons who might have seen or heard something connected with the alleged offense and an examination of the scene of the offense for physical evidence. The effort required of the investigator to obtain information about the offense varies greatly. A special "behavior investigation" was considered to have been conducted whenever the investigation report contained information gathered from sources other than the complainant and the alleged offender, or indicated that such information was not available. Behavior investigations were conducted for 41 per cent of the offenses in the first sample.

141 Interview with Arlen Specter, District Attorney, in Philadelphia, February 21, 1968; Interview with police supervisory personnel, in Philadelphia, January 15, 1968. In addition, the files of the District Attorney's Complaint Bureau were checked to see if any of the complainants of the unfounded offenses during the first sample had attempted to obtain a private warrant. (On July 8, 1966 the District Attorney requested that all city magistrates refer persons seeking private warrants to his office for screening. DISTRICT ATTORNEY'S OFFICE, MEMORANDUM (November 14, 1966).) No record could be found under the complainants' names during 1966.
The natural tendency was to conduct investigations when the possibility of obtaining information appeared great. They were most often conducted when the complainant struggled and screamed, least often when she did neither; more often when she only screamed than when she only struggled; and more often when the complainant's physical condition supported the offense than when it did not. Several factors suggest that the investigations were conducted more often when it appeared that the offense would be founded. For example, investigations were made more often when the behavior of the complainant prior to the offense supported the offense than when it did not. The influence of both the likelihood of obtaining information and the likelihood that the offense would be founded is evident when one looks at the number of investigations conducted compared with the promptness of the complaint to others and the report to the police. When the former is immediate, the likelihood that the offense will be founded is greater than where it is only prompt, and when the latter is immediate the possibility of obtaining information is greater than when it is only prompt. When both were immediate, investigations were conducted for 41 per cent of the offenses. When either one became only prompt, the percentage dropped to about 30 per cent. That investigations were conducted for 67 per cent of the offenses where the complainant's physical condition supported the offense, but for only 42 per cent where it did not, is probably the result of both the likelihood of founding and the possibility of success in obtaining information.

The police-prosecutor team conducted the behavior investigation for much the same types of offenses as had the police, but not as often. Investigations were made into only 30 per cent of the offenses. The most significant difference in investigative response concerned the ages of the participants. When the complainant was a juvenile and the offender an adult—so that the possibility of a statutory rape charge existed—the police-prosecutor conducted an investigation into only 6 per cent of the offenses, compared with 26 per cent for the police.

B. Medical Information

A second special investigatory technique is to obtain information concerning the complainant's physical condition from the examining doctor. Although the complainant received medical attention in 60

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143 Investigations were conducted for 71% of the offenses where the complainant struggled and screamed (72 cases); for 30% where she did neither (151 cases); for 69% where she only screamed (19 cases); and for 33% where she only struggled (51 cases).

144 Investigations were conducted for 67% of the offenses when the complainant's physical condition supported the offense (30 cases), and 42% when it did not (24 cases).

145 Investigations were conducted for 43% of the offenses when the behavior supported the offense (101 cases), and 35% when it did not (109 cases).

146 The latter sample contained 53 cases, the former 19 cases.
per cent of the cases, medical information was included in only 18 per cent of the investigation reports. It is because of this low percentage that obtaining this information is considered here to be a special investigation.

The age of the complainant was the most influential factor for the police in deciding whether to obtain medical information. The investigation reports contained medical information for 29 per cent of the offenses involving juvenile complainants, but for only 15 per cent of those involving adult complainants.\textsuperscript{147} Two reasons for this are apparent: first, the juvenile complainant could more easily be forced to submit to a medical examination; and second, the findings of the examination are more likely to be meaningful for the juvenile complainant.\textsuperscript{148}

Unlike the information acquired from the behavior investigation, medical information was obtained more often when it appeared that the offense would be unfounded. When the complaint to others was immediate, the information was reported for 16 per cent of the offenses; when prompt, for 21 per cent; and when delayed, for 32 per cent.\textsuperscript{149} Although examinations were conducted for approximately the same proportion of offenses whether the prior behavior supported the offense or not,\textsuperscript{150} the results were obtained more often when the behavior of the complainant prior to the offense did not support the allegations (36 per cent) than when it did (9 per cent). When the prior behavior was inconclusive,\textsuperscript{151} the examination was conducted most often (70 per cent) and the information was obtained most often (48 per cent). Although the examination was conducted least often when the physical appearance of the complainant did not support her account of the offense,\textsuperscript{152} the results of the examination were reported most often in such cases.\textsuperscript{153} The indications are that the police desired more information on which to base their decision when indications were that the offense would be unfounded.

\textsuperscript{147} The former sample contained 86 cases, the latter 163 cases.

\textsuperscript{148} The juvenile complainant is more likely to be virgin prior to the offense and less likely to be having regular sexual relations. However, the investigation reports reveal that the investigators tended to rely heavily on such factors as the size and elasticity of the hymenal opening. These are not, however, conclusive indicia of penetration because they are influenced by the complainant's personal hygiene habits and history of masturbation. Interview with Dr. Joseph Spelman, Medical Examiner of the City of Philadelphia, in Philadelphia, February 16, 1968.

\textsuperscript{149} The respective samples were 90 cases, 40 cases, and 43 cases.

\textsuperscript{150} When it supported the offense (101 cases), examinations were made for 54\% of the offenses; when it did not (109 cases), for 58\%.

\textsuperscript{151} There were 83 such cases in the sample.

\textsuperscript{152} Examinations were conducted for only 46\% of these cases (24 in all), compared with 67\% when it supported the offense (30 cases) and 60\% when the observation was neutral or not made (211 cases).

\textsuperscript{153} When a medical examination was made, results were reported for 46\% of the offenses where physical appearance did not support the complainant's account of the offense (24 cases), but for only 40\% of the offenses where physical appearance did support the complainant's account (30 cases), and for only 27\% of the offenses where no observation of physical appearance was made (211 cases).
The police-prosecutor investigation reports contained medical information for 19 per cent of the offenses, an insignificantly small increase over the percentage of police reports containing such information. Again the information was reported more often for offenses involving juvenile complainants.\(^{154}\) However, this higher reporting percentage resulted almost entirely from obtaining the information more often when it was available, while with the police the difference can be partially accounted for by the fact that juvenile complainants were treated or examined more often.\(^{155}\)

Indications are that the police-prosecutor team was more concerned with obtaining additional information about offenses likely to be founded than had been the police. For the two factors most often mentioned by the investigators as determinative of the founding decision—promptness of complaint and physical condition of the complainant\(^{166}\)—the medical information was obtained most often when these factors favored founding.\(^{157}\)

C. Reputation for Chastity

Occasionally, an investigation was conducted into the complainant's reputation for chastity.\(^{158}\) The usual sources of information concerning the complainant's reputation were her neighbors and associates, and occasionally the person alleged to have committed the offense.\(^{159}\) Reputation investigations were conducted for 10 per cent of the offenses in the first sample.

Time seems to have been a crucial factor in determining whether to conduct a reputation investigation. The busiest investigative unit conducted the fewest reputation investigations (5 per cent), and the least busy unit conducted the most (57 per cent). The other units fell along a line with only slight deviations.

\(^{154}\) For juvenile complainants (27 cases), 25%; for adult complainants, 17% (41 cases).

\(^{155}\) The police acting alone had examinations made of 75% of the juvenile complainants, but of only 56% of the adults. The police-prosecutor team had examinations made of 63% of the juvenile complainants and of 62% of the adults.


\(^{157}\) Medical information was obtained for 25% of the offenses for which there was an immediate complaint to others (18 cases); for 22% of the offenses for which there was a prompt complaint to others (20 cases); and for 11% of the offenses for which there was a delayed complaint to others (9 cases). Where the physical condition of the complainant supported the offense (7 cases), medical information was obtained for 29% of the offenses; where the physical condition was inconclusive or not reported (51 cases), medical information was obtained for 20% of the offenses.

\(^{158}\) The often-conducted check for a police record was not considered to be a reputation investigation.

\(^{159}\) Most of the investigators indicated that they would have a record check made of the complainant if the offender challenged her reputation. At least one indicated he would also conduct a reputation investigation on the strength of the offender's word alone. Interviews with police investigatory personnel, in Philadelphia, February 22-25, 1968.
Police Discretion

Unlike the behavior investigation, the reputation investigation was conducted more often when it appeared the offense would be unfounded. A delayed complaint to others,\(^{160}\) prior behavior that did not support the offense\(^{161}\) and intoxication\(^ {162}\) were the factors that most often triggered a reputation investigation. An age differential between the complainant and the offender also influenced the decision, with more investigations being conducted when the complainant was the older.\(^ {163}\) The complainant's physical appearance following the offense and her allegations concerning the offense do not appear to have influenced the decision to investigate.\(^ {164}\)

The police-prosecutor team conducted reputation investigations for only 7 per cent of the offenses. It is difficult to make any significant comparisons, however, because only five investigations were conducted. It does appear that time was again a factor, however, since the two busiest units conducted but one of the five investigations. Furthermore, although the prior behavior of the complainant and her intoxication again seemed to trigger a reputation investigation, the investigations were conducted most often on an immediate and prompt complaint to others, and never for a delayed one. Aside from these exceptions, no differential factors could be found.

D. Reputation for Veracity

Another investigation only occasionally conducted was the solicitation of opinions about the complainant's reputation for veracity. The most common technique was to ask persons who knew the complainant whether they believed her account of the offense. The complainant's parents or husband were asked most often; occasionally, a close friend or neighbor was questioned. The police sought this advice for 8 per cent of the offenses in the first sample.

Apparently, the police solicited opinions on veracity under much the same circumstances for which they conducted an investigation into reputation for chastity: a veracity opinion was solicited most often when it appeared that the offense would be unfounded. A delayed

\(^{160}\) Investigations were conducted for 21% of the offenses involving a delayed complaint to others (43 cases), for 6% of the offenses involving an immediate complaint to others (90 cases), and for 3% involving a prompt complaint to others (40 cases).

\(^{161}\) Investigations were conducted for 17% of the offenses where prior behavior did not support the offense (109 cases), for 2% where it did (101 cases), and for 10% where it was inconclusive or unreported (103 cases).

\(^{162}\) Investigations were conducted for 23% of the offenses involving an intoxicated complainant (22 cases), but for only 9% of those involving a sober one (271 cases).

\(^{163}\) One might hope it to be otherwise, since a bad reputation for chastity on the part of the victim is a defense to a statutory rape charge, lowering the act to fornication. \textit{Pa. Stat. Ann.} tit. 18, § 4721(B) (Supp. 1967).

\(^{164}\) For example, where the physical condition of the complainant supported her allegations (30 cases), the investigation was conducted for 10% of the offenses; where it did not (24 cases), for 8%; and where it was inconclusive (211 cases), for 11%. 
complaint to others,\textsuperscript{165} prior behavior that did not support the offense,\textsuperscript{166} and the intoxication of the complainant\textsuperscript{167} most often resulted in an inquiry into veracity. An age differential between the complainant and the offender again influenced the decision to conduct a special investigation.\textsuperscript{168} Since an inquiry into veracity could be considered a polite way of asking the complainant's family about her reputation for chastity, the similarity between the effect of an age differential on a reputation investigation and on a veracity inquiry is not surprising. That the solicitation of a veracity opinion was not as dependent upon the workload of the investigatory unit as the chastity investigation is also not surprising. When the complainant was a juvenile (and usually when she was not) the complainant's family was present during the standard investigation. Little effort was required to obtain the information.

The injection of the prosecutor into the investigations resulted in a slight increase in the percentage of offenses for which a veracity opinion was solicited of the complainant's family (11 per cent). Again the small number prevents reaching any definite conclusions. However, it must be noted that of the three factors which triggered the inquiry previously, only the behavior of the complainant prior to the offense retained its influence;\textsuperscript{169} the intoxication of the complainant\textsuperscript{170} and the promptness of her complaint\textsuperscript{171} did not materially affect the decision to solicit an opinion.

E. Polygraph Examination

For eight of the offenses in the first sample, the complainant was requested to submit to a polygraph examination. Four of the eight complainants refused, and the offenses that they had alleged were unfounded. Of the four who submitted to the examination, two

\textsuperscript{165} Where the complaint to others was delayed (43 cases), a veracity opinion was solicited for 21\% of the offenses, compared to 8\% when it was prompt (40 cases) and 4\% where it was immediate.

\textsuperscript{166} An inquiry into veracity was made for 8\% of the complaints where prior behavior did not support the offense (109 cases), but for only 5\% where it did (101 cases).

\textsuperscript{167} A veracity opinion was solicited for 14\% of the offenses where the complainant was intoxicated (22 cases), but for only 8\% where the complainant was sober (271 cases).

\textsuperscript{168} Veracity opinions were solicited for 14\% of the offenses where one participant was an adult and the other a juvenile (68 cases); for 3\% where both participants were juveniles (33 cases); and for 5\% when both participants were adults (148 cases).

\textsuperscript{169} Veracity opinions were never solicited when prior behavior supported the offense (29 cases), but they were solicited for 10\% of the offenses where prior behavior did not support the offense (30 cases), and for 33\% where prior behavior was either inconclusive or not reported (15 cases).

\textsuperscript{170} A veracity opinion was solicited for 11\% of the cases involving intoxicated complainants (8 cases), and for 10\% of the cases involving sober ones (67 cases).

\textsuperscript{171} An inquiry into veracity was made for 11\% of the offenses where the complaint was immediate (18 cases) or delayed (9 cases), and for 5\% when it was prompt (20 cases).
“failed” and the offenses were unfounded. That the police regarded the polygraph examination as an unusual investigatory technique is evidenced not only by its limited use, but also by the type of offense for which it was used. The polygraph was resorted to most often when the complaint to others was delayed or when the complainant was intoxicated. It was never used when the complainant’s prior behavior or physical appearance, or the medical information, supported the offense. It was used more often when these factors did not support the offense than when they were unreported or inconclusive. Thus, it appears that the polygraph examination was not employed as an alternate means of founding. Rather, the investigators were giving the complainant whom they did not believe one last chance.

The second sample contains no offense for which the complainant was confronted with a polygraph examination. This is undoubtedly a result of the small sample size, however, since the investigators do continue to use the examination to found the offense of the disbelieved complainant.

F. Contacting the Prosecutor

A special technique used to obtain assistance in the founding decision on the basis of information already acquired was a consultation with the prosecutor. For ten (3 per cent) of the offenses in the first sample, the investigator consulted the District Attorney’s office. The consultation was apparently considered by the investigators in much the same manner as were the other special investigatory techniques. Consultation was relied upon most often when it appeared that the offense should be unfounded. Thus, the prosecutor was contacted more often when the complaint to others was delayed, when the behavior of the complainant prior to the offense and her physical condition following the polygraph was used for 97 of the offenses where the complaint to others was delayed (43 cases), but for only 2% where it was immediate (90 cases), and for only 3% where it was prompt (40 cases).

Polygraph examinations were given to 5% of the intoxicated complainants (22 cases), and to 3% of the sober ones (271 cases).

When the complainant’s prior behavior did not support the offense (109 cases), the polygraph was employed for 5% of the offenses, compared with 4% when the prior behavior was inconclusive or not reported (83 cases). The polygraph was used in 13% of the cases when the complainant’s physical appearance did not support the offense (24 cases), and for 2% when it was not reported (211 cases). And the polygraph was employed for 7% of the offenses when the medical information indicated no violence (15 cases), and only 1% where the medical information was not reported.

The investigators indicated that the “lie box” was useful when they were convinced that the complainant was lying, but could not “break” her story. Interviews with police investigatory personnel, in Philadelphia, February 22-25, 1968.

The prosecutor was contacted for 9% of the offenses where the complaint to others was delayed (43 cases), for 5% when the complaint to others was prompt (40 cases), and for 4% when it was immediate (90 cases).

The prosecutor was never contacted when the prior behavior of the complainant supported the offense (101 cases), but was contacted for 4% of the offenses when the prior behavior did not support the offense (109 cases).
the offense did not support her allegations, and when she was intoxicated. There is at least one indication that consultation was considered to be a "last resort"—50 per cent of the consultations concerned offenses for which the complainant had either refused to take, or had taken but failed, a polygraph examination.

The new policy that the investigator contact the prosecutor "when a sight arrest is made, or prior to the obtaining of a warrant for arrest in a Rape case" did not eliminate the consultation as a special investigatory technique. The investigators did not contact the prosecutor for every founded offense. While 58 of 75 offenses in the second sample were founded, the prosecutor was contacted concerning only 25 offenses, of which 24 were eventually founded. However, the policy did add other reasons for the investigators to contact the prosecutor, making it impossible to determine whether the investigator was following the directive or conducting a special investigation.

G. Conclusions

The major obstacle to conducting a special investigation was always time. Responsibilities at preliminary hearings and trial can reduce a twelve-man squad to four or six investigators available to handle new offenses. Much time is consumed by the typing of the many reports required to process an offense. Although one investigator stated that he would always find the time to conduct a full investigation for the offenses under consideration, many indicated that they lacked the time to do a thorough job. Thus, the small number of investigations into the reputation of the complainant for chastity is understandable. However, the indifference to the medical information is not. Most of the investigators expressed the belief that the results of the medical examinations could not be obtained before trial, and considered the medical report as an evidentiary matter for trial, not as a means of corroborating the complainant's account of the offense. While the official medical report is not immediately available, at least some of the investigators were able to obtain verbal opinions from the examining doctor at the hospital. Some means should be provided to

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179 The prosecutor was contacted for 8% of the offenses when the complainant's physical condition did not support the offense (24 cases), and for 3% of the offenses where it did (30 cases).

180 The prosecutor was contacted for 5% of the offenses when the complainant was intoxicated (22 cases), and for 3% when she was not (271).

181 PHILADELPHIA POLICE DEPARTMENT, DETECTIVE BUREAU POLICY 66-38 (December 13, 1966).


184 Id.

185 Id.
enable all of the investigators to receive an immediate, summary report regarding possible penetration and external and internal trauma.\textsuperscript{186}Polygraph examinations in appropriate cases should be continued. That the results are not admissible at trial should not be controlling. The investigator's principal concern at this stage of the process is whether the offense should be founded. Indications are that the polygraph is now used only for offenses where the investigator would have unfounded the offense had the complainant not "passed" the examination. Fears that the threat of a polygraph test will "scare off" complainants seem groundless. The real problem is that too many complaints are groundless.\textsuperscript{187}

The injection of the prosecutor into the founding decision produced few significant changes. With regard to the special investigatory techniques, the overall number of such investigations decreased. In addition, special investigations were conducted more often for offenses likely to be founded. The emphasis appears to have shifted from acquiring additional information for the founding decision to the gathering of evidence for trial.

IV. Recommendations

There should be little doubt that someone must regulate the inflow of offenses into the formal administrative process of criminal justice. The court backlogs prevalent today indicate that the judges, courtrooms, and attorneys now available cannot handle the existing volume of criminal trials. To grant every complainant the opportunity to submit her story to a judge or jury would place too great stress upon an already strained system.

The criteria developed by the courts concerning rape are appropriate factors to utilize to determine whether or not an offense has been committed. Given the manpower to overcome the obstacle of time—an obstacle particularly troublesome in the area of special investigations—decisions can often be made with a good deal of confidence. There need be little reluctance to dismiss a complaint which the criteria label as "unfounded."

Such a selection process is especially important for rape cases, since accusation is so easy and defense so difficult.\textsuperscript{188} In addition, the absence of a rational and meaningful selection system would further accentuate the problem of crowded courtrooms.

In utilizing the judicially developed criteria, the decision makers of course need not be restricted by courtroom rules of evidence. Investigators should be further trained in utilizing these criteria both to

\textsuperscript{186}Even though a doctor's opinion as to penetration and trauma might not help the prosecution at trial, see note 194 \textit{infra}, such an opinion can be of great assistance to investigators in the founding decision.

\textsuperscript{187}See text accompanying note 6 \textit{supra}; note 8 \textit{supra}.

\textsuperscript{188}See text accompanying note 15 \textit{supra}.
insure rational decisions and to develop more uniformity in the decision making process.

Who should serve to regulate the inflow, the police or the prosecutor? Both should, but at separate stages of the process. The prosecutor does have an opportunity, after arrest but before trial, to screen out those probably innocent. Who then did he intrude into the police founding decision process? In Philadelphia, rape had become a matter of great concern for the white community. Two major newspapers usually report only the interracial offenses. Seldom are offenses involving only blacks reported. Offenses involving only whites are reported occasionally, but not as conspicuously as interracial ones. Few Philadelphians who read that 535 rapes were reported in 1966 are aware that only 10 per cent of them were interracial. In 1965, the present District Attorney emphasized the rape problem during his campaign for that office. Early in 1967, he announced his candidacy for the mayoralty standing upon his record as a prosecutor, particularly upon his conviction rate for rape offenses. This occurred but a few months after his office had initiated the new policy. The implications are obvious. The founding decision provided a low-visibility means of selecting those offenses that would come to trial during the campaign.

The dangers involved in a joint effort are more than political. The sharing of responsibility by two independent agencies can result in neither agency meeting its responsibility. To operate properly, the founding decision cannot be trial-oriented. Its task is to determine the probability that a crime has been committed, unhampered by rules.

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192 Philadelphia Police Department, 1966 Statistical Report 8 (1967). At one time the Inquirer reported a rape and stated that it “brought to nine the number of women sexually assaulted in Philadelphia during the last two months.” Philadelphia Inquirer, July 13, 1966 at 27, col. 1. In fact there had been 46 offenses reported during May, 34 during June, and 63 during July of that year. Philadelphia Police Department, 1966 Statistical Report 8 (1967).

193 The visibility was apparently not low enough. During the campaign, “District Attorney Arlen Specter was accused . . . of prosecuting only a ‘small percentage’ of rape complaints. . . .” It was alleged that “he carefully screens all alleged rape complaints and only prosecutes a small percentage which seem to suggest the best chance of a successful result.” Philadelphia Inquirer, Oct. 18, 1967 at 6, col. 3 (quoting W. F. Kileen, Chairman of Former District Attorneys Opposing Arlen Specter).

Furthermore, the District Attorney’s purpose was somewhat frustrated by the fact that the Assistant District Attorneys only applied a “prima facie” test when consulted by the investigators. See text accompanying note 140 supra.
of evidence and tactical trial decisions. The decision not to prosecute once the offense has been founded should remain separate from the decision whether there is an offense to prosecute. Assuming that the investigators do require legal assistance, the better alternative is to rely upon intradepartmental aid. The Philadelphia Police Department now has its own legal advisor. The policy with regard to rape cases is presently being rewritten. In the future, investigators will be directed to contact their legal advisor when he is available, and to contact the prosecutor only if a problem exists. But the danger remains that, unless the directive is properly worded, the investigators will continue to contact the prosecutor whenever they think it helpful. Perhaps the better policy would be to remove any access to the prosecutor, to insist that any necessary legal assistance be obtained from the department's own counsel, and, if necessary, to hire additional attorneys in order to provide twenty-four-hour service.

When this analysis was first contemplated, the author was advised that the investigation reports were not intended for such use, and that their function was to supply basic statistical information concerning the number of offenses and the clearance rate and to indicate the chronological and geographical distribution of offenses to assist in the deployment of manpower. But it is these reports that are used by the department to review the investigators' decisions. Too many of them lacked sufficient information for an effective intradepartmental review. It is suggested that each investigation report contain at least the following basic information:

1. The period of time between the offense, the complaint to others, and the report to the police. Although the investigation report does contain a place to record the time of occurrence and the time of the report, the investigators often insert the same time for both, or the time they were assigned the offenses as the time of report.

2. The complainant's physical appearance as observed by the first member of the department to observe her and by the investigator if he was not the first to observe her.

194 The District Attorney questioned the use of the polygraph examination because its results are not admissible at trial, and commented that the obtaining of an opinion regarding penetration and trauma from the examining doctor at the hospital could not help, but could only harm the prosecution. Interview with Arlen Specter, District Attorney, in Philadelphia, February 21, 1968.


196 "Presently" refers to April 1, 1968. The new policy will probably be in effect at the date of this Comment's publication.


3. An examining doctor's opinion regarding penetration and the existence of signs of violence; all complainants should be taken to the hospital for examination. The report should be used, not as conclusive evidence of penetration or its absence, but as possible corroboryatory or contradictory information with which to evaluate the complainant's credibility.

4. A detailed account of the complainant's conduct prior to the offense, including her social relationship to the offender. If the complainant had been drinking, the report should contain the officer's evaluation of her state of sobriety.

5. A detailed account of the actions of both participants during the offense. Where the offender did not possess a weapon or where the complainant did not scream or struggle, this should be included in the report, and not be left to be inferred by the absence of any mention of noise or violence.

6. Any information derived from a record check, which should be made for every complainant. Where a further reputation investigation is conducted, its results should be reported regardless of the findings.

7. The detailed results of any efforts to corroborate the complainant's account of the offense. For example, if the adjoining buildings are checked for persons who might have heard the complainant's screams, the names and addresses of the persons questioned should be reported.

8. The opinion of the complainant's husband or parents regarding the truthfulness of her allegations.

9. The results of any polygraph examination, as well as the refusal of any complainant to submit to the test. A polygraph examination should be conducted when the complainant's condition at the time of the complaint (for example, intoxication or freedom from injury) gives rise to doubts as to veracity which cannot be resolved by the use of other evidence.

The above list also suggests what the investigation should entail. All of the information must be available to the investigator to enable him to reach the proper decision at the founding stage. Inclusion in the investigation report is necessary if there is to be meaningful review of his decision. The present case-by-case method used by the police is not adequate. A periodic analysis similar to that undertaken here could be made if all decisions concerning rape complaints were included. The use of the "investigation of persons" classification, which "hides" rape complaints, must be discontinued.
However, inclusion of all the information in the investigation report can present problems for the prosecutor at trial, since the report is generally available to defense attorneys. Although the investigations of the offenses in the first sample were not focused upon the trial stage, the investigators were not unconcerned about the trial. Damaging information was watered down or omitted from the report. Some investigators "prepped" their witnesses before trial, using the report to "refresh" their recollection. Others omitted details from the reports, knowing that by the time of trial they would be forgotten and that they then could "honestly" testify that all that they could recall was the information contained in the report. 199 These practices do not affect the founding decision or the initial review of that decision by the investigator and his immediate supervisor before the report is filed. However, alterations and omissions do eliminate the possibility of meaningful review, and an effort should be made to prevent them. There are at least two solutions. One would be to protect the investigatory report from discovery by defense attorneys; the other would be to have the police function as unbiased investigators serving both the prosecution and the defendant. The police would probably prefer the former; 200 the Constitution perhaps requires the latter. 201

APPENDIX

A Complaint or Incident Report, Form 75-48, is used to "establish and maintain a permanent written record of all offenses, arrests, complaints, incidents and services requiring police action . . . ." 202 The "48" is prepared at the time each complaint or incident report is initially received or observed. 203 The report records the date, time, place and district of the occurrence, along with a summary of the details of the occurrence. 204 The Operations Supervisor inserts the crime or incident classification and code that conforms with the details, and indicates whether the report is founded or unfounded. 205 The original is then forwarded directly to the Reports Control and Review Section, the first carbon copy retained in the district and the second copy forwarded.

201 United States ex rel. Meers v. Wilkins, 326 F.2d 135 (2d Cir. 1964); see Brady v. Maryland, 373 U.S. 83 (1963).
203 Id.
204 Id. at 2, 3.
205 Id. DIRECTIVE 54 gives several examples of when a "48" may be marked as unfounded: "A burglary, which proves upon investigation to be a case of a man climbing through the window to his home because he had forgotten his keys, or a report of an auto theft where the car merely was taken by another member of the family." Id. at 3.
to the appropriate investigatory unit.\textsuperscript{208}

The investigatory unit prepares the initial Investigation Report, Form 75-49.\textsuperscript{207} With certain exceptions not relevant here, a "49" is prepared for every "48" forwarded to an investigatory unit. Where the offender is an adult, the rape or attempted rape is investigated by the Detective Division for the district where the incident occurred. Cases involving juvenile offenders are the responsibility of the Juvenile Aid Division.\textsuperscript{208} In addition to the basic information on the "48," the "49" contains accounts of "Interviews and Interrogations" (complainants, witnesses and suspects); "Action Taken" (description of the investigation conducted and the evidence gathered); "Remarks" (relevant information and observations not reported elsewhere); and "Messages" (transmissions sent by radio, teletypewriter and bulletins, including information concerning the name, race, age and address of the offender).\textsuperscript{209}

The case is assigned a status if founded: "Active—indicates a current active investigation"; "Inactive—indicates all leads have been investigated"; "Cleared by Arrest—person arrested for the offense"; and "Exceptional[ly] Cleared"—the known offender is dead, outside the jurisdiction and extradition is denied, or the complainant refuses to cooperate in the prosecution.\textsuperscript{210}

Supplemental reports contain the same basic information as Form 75-48. The supplemental reports, known as "52's," are required "to record Classification Changes, Status Changes, Additional Information in an investigation, and Court Dispositions."\textsuperscript{211} In practice, the "52" is usually filed at the same time as the "49." The policy that the investigator file a complete account of the preliminary hearing, grand jury proceedings, and trial is observed more often in its breach than in compliance. The investigation reports are forwarded to Reports Control and Review and the Assistant District Attorney at the preliminary hearing.\textsuperscript{212}

Within the police department, the reports are reviewed first by the investigator's immediate supervisor and lieutenant, or by the commanding officer of the district, and then at the Reports Control and Review Section.\textsuperscript{213} Inadequate reports are returned for reinvestigation. Some apparently adequate reports are returned for a spot-check investigation.\textsuperscript{214}

\textsuperscript{206}Id. at 6.
\textsuperscript{207}PHILADELPHIA POLICE DEPARTMENT, DIRECTIVE 61, at 1 (April 30, 1963).
\textsuperscript{208}Id. at 2. See also J.A.D. MANUAL, Morals Squad, supra note 8.
\textsuperscript{209}PHILADELPHIA POLICE DEPARTMENT, SAMPLE FORMAT: 75-49.
\textsuperscript{210}Id. at 2.
\textsuperscript{211}PHILADELPHIA POLICE DEPARTMENT, DIRECTIVE 61, at 3 (April 30, 1963).
\textsuperscript{212}Id. at 5.
\textsuperscript{213}Id. at 4.
\textsuperscript{214}Id. at 4, 5.