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Linda Fairstein: Critical Perspectives on Megan's Law

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New York has had the benefits that New Jersey did not.²³⁸ We were able to take a look at the court decisions from New Jersey and modify the legislation that had previously been introduced, so that we took their issues into consideration.²³⁹ I think this notification act provides a responsible approach.²⁴⁰

One of the issues that this young lady over here raised was the issue of aftercare, and I do want to say that this law does not take that into consideration,²⁴¹ but there are many other laws in New York. And one of the reasons we did not do it in this law was that the mental hygiene law and the mental health law do take those aftercare issues into consideration.²⁴²

STEPHEN NEWMAN: Let me thank Robert Farley and call upon Linda Fairstein, who is Chief of the Sex Crimes Prosecution Unit in the Manhattan District Attorney's Office.

Ms. Linda Fairstein

LINDA FAIRSTEIN:²⁴³ Good afternoon. I am always pleased to walk around the corner from the office and participate in one event or another at New York Law School, and this one is nearer to my heart than many others. I am the non-academic, non-legislative, I guess practical

²³⁸ Daniel Feldman, *Megan's Law: An Asset or a Quick Fix? An Asset*, N.Y.L.J., Jan. 17, 1996, at 2 (stating that New York was able to learn from other states' experiences when drafting their statute).

²³⁹ *Id.*

²⁴⁰ *People v. Afrika*, 168 Misc. 2d at 624.

²⁴¹ See generally N.Y. CORRECT. LAW §168 (McKinney 1996).

²⁴² N.Y. MENTAL HYG. LAW §9.13 (McKinney 1995).

²⁴³ Chief of Sex Crimes Unit, Deputy Chief, Trial Division, New York County (Manhattan) District Attorney's Office.

prosecutorial speaker for this part of the panel. I have been asked to talk to you about various aspects of the criminal justice system, including about the crime of rape, the offenders, and plea bargaining. I will do that from the perspective that's rather a personal one, just to amplify it a little bit.

I have been prosecuting in the Manhattan District Attorney's office for twenty-four years, and for twenty-one of those years I have specialized in the prosecution of sex offenders. Our office had the first sex crimes prosecution unit in the country,²⁴⁴ and it has been modeled after many times now.²⁴⁵ All of our local offices in this city, surrounding counties, and many in New Jersey have similar units, and I mention that just because the specialty of investigating and prosecuting this category of crimes is really a very new field. And, unfortunately, I think the reason for all this current legislation is because it took us, as a society, a very long time to understand the nature of this crime and who many of the offenders are.²⁴⁶ So we are dealing with it rather belatedly, but, fortunately, dealing with it.

As some of you know, the laws enabling prosecution of these cases are really quite recent.²⁴⁷ Until only twenty years ago in this state, which has a terrible history for legislative reform and has been very slow about legislative reform,²⁴⁸ it was impossible for women and children to prosecute crimes of sexual assault because there was in existence a corroboration requirement.²⁴⁹ The corroboration requirement was a law which that said the victim's word was not legally sufficient to allow her to tell her story to a jury.²⁵⁰ That changed, as I say, in this state in the

²⁴⁴ Symposium, *The Privacy Rights of Rape Victims in the Media and in the Law*, 61 *FORDHAM U. L. REV.* 1137 (1993) [hereinafter "*Privacy Rights of Rape Victims*"].

²⁴⁵ LINDA A. FAIRSTEIN, *SEXUAL VIOLENCE: OUR WAR AGAINST RAPE* 80 (1993).

²⁴⁶ *Id.* at 14.

²⁴⁷ *Id.* at 79.

²⁴⁸ See *Privacy Rights of Rape Victims*, *supra* note 244, at 1138.

²⁴⁹ "The existence of the corroboration requirement made it virtually impossible for the state to prosecute" sexual assault crimes. *Id.*

²⁵⁰ *Id.*

mid-1970's.²⁵¹ The corroboration requirement still exists in this state for child victims,²⁵² who are one of the primarily protected classes of the Megan's Law legislation. But, Governor George Pataki's administration does have a lot of proposed legislation to help make the prosecution of child sex offenses more possible. However, it is a terrible area where there are inequities for child victims.²⁵³

I think it is important to understand some of the distinctions in kinds of sexual assault cases—I do not mean the crime designations, but in different kinds of victimization—because not all rapists are alike, and they present, as criminals, very different problems in the criminal justice system and also very different problems to society at large. It is really unfortunate to paint them all with one brush and not understand what the distinctions are.²⁵⁴ I think the legislation in both states that addresses different levels of offenders is important and sometimes gets lost in the hysteria surrounding some of the well-publicized tragedies, like the death of Megan Kanka.²⁵⁵

We in law enforcement separate these cases into two very overbroad categories. You are probably familiar with them, and I will

²⁵¹ N.Y. PENAL LAW §130.16 (McKinney 1987) (explaining in the practice commentaries that this statute amended the 1974, Chapter 14.4, sexual offenses stringent corroboration requirement to the present statute which only requires corroboration when a victim is incapable of consent because of a mental defect or mental incapacity).

²⁵² N.Y. CRIM. PROC. LAW §60.20 (2) & (3) (McKinney 1992). Even with the amended sexual offender corroboration statute which only requires corroboration when a victim is incapable of consent because of a mental defect or mental incapacity, if a child is under twelve years of age, he must understand the oath before testifying. *Id.* If he does not, the child may still testify, however, such testimony alone is not sufficient to convict an offender. *Id.*

²⁵³ See Dennis C. Vacco, *Returning Common Sense to the State's Legal System*, N.Y.L.J., Jan. 24, 1996, at S4 (stating that Governor Pataki appointed New York Attorney General Dennis Vacco Chairman of the New York State Child Abuse Commission, and that his office has put together a program for protecting children, including new legislation).

²⁵⁴ FAIRSTEIN, *supra* note 245, at 129-31.

²⁵⁵ *Man Charged in 7-Year-Old Neighbor's Killing*, N.Y. TIMES, Aug. 1, 1994, at B5.

speak about them a bit. One is stranger rape,²⁵⁶ which is obviously the category in which the victim and her assailant have not known each other before the assault.²⁵⁷ The other is the very overbroad category called acquaintance rape,²⁵⁸ and obviously, as the name implies, it is between parties who knew each other in some degree of relationship before the assault.²⁵⁹

I shall focus on the acquaintance category for a minute. It includes, obviously, the most intimate relationships. Marital rape, all the incest cases, and certain types of child abuse within a familial setting are acquaintance rapes because the parties know each other.²⁶⁰ It then obviously encompasses people who have either a collegial relationship from work or perhaps a social one, but who have not had an intimate

²⁵⁶ FAIRSTEIN, *supra* note 245, at 129-31.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ See ANDREA PARROT & LAURIE BECHHOFFER, ACQUAINTANCE RAPE THE HIDDEN CRIME 12 (1991). "We define *acquaintance rape* as nonconsensual sex between adults who know each other." *Id.* The only requirement of the term acquaintance is that the attacker is not a stranger to the victim, no matter how incidental the relationship. *Id.* "The acquaintance relationship can be any one of a variety of acquaintanceships including platonic, dating, marital, professional, academic, or familial." *Id.*; see also FAIRSTEIN, *supra* note 245, at 130-31. "Acquaintance or date rape encompasses an extraordinarily broad range of relationships." *Id.* at 130. "Millions of cases have taken place on dates, where there has been a social connection between the parties but never a sexual one; and in just as many cases, the survivor and offender are acquainted [with each other] but just barely—for example, the attacker may work in a local supermarket and his victim knows him only by his first name, or he may sell drugs in the neighborhood and she [the victim] occasionally purchases them from him." *Id.* at 131.

²⁶⁰ VERNON R. WIEHE & ANN L. RICHARDS, INTIMATE BETRAYAL: UNDERSTANDING AND RESPONDING TO THE TRAUMA OF ACQUAINTANCE RAPE 57 (1995). "[M]arital rape [is] defined as any sexual activity by a legal spouse that is performed or caused to be performed without the consent of the other spouse. These activities, as with acquaintance rape, include fondling, oral sex, anal sex, intercourse, or any other unwanted sexual activity." *Id.*

sexual relationship before the rape.²⁶¹ But it also encompasses a huge number of cases that we deal with in the system that are what we call professional relationships.²⁶² These are the cases where it is doctor and patient, lawyer and client, clergy, teacher, just about every kind of professional relationship in which the victim and offender are exposed to each other and the victim becomes vulnerable to the offender.²⁶³ Again, these present great distinctions for a number of reasons.²⁶⁴

Society and the general public tend to fear most, for themselves

²⁶¹ *Id.* at 9-15. This book reports the findings of a study involving 278 women who had been sexually assaulted by acquaintances. *Id.* The study was conducted by questionnaire which asked the victims to describe their experiences. *Id.* "Most survivors, 50% (117), described their perpetrator as a friend. *Id.* A total of 10% (25) of the rapes involved a work situation where the perpetrator was a co-worker or the victim's boss, and 3% (7) were customers the victim served." *Id.* at 10.

²⁶² FAIRSTEIN, *supra* note 245, at 155. These are cases where the relationship between victim and perpetrator was professional in nature prior to the attack. *Id.* The professional relationship can take many forms, e.g. doctor-patient, teacher-student, lawyer-client, etc. *Id.* The professional relationship cases are particularly difficult cases for law enforcement because of the professional relationship. *Id.* "Doctors, dentists, lawyers, accountants, religious leaders, teachers—educated, articulate, charming, sometimes married professional men—are often the toughest target of law enforcement officials precisely because they do not fit the public's stereotypical portrait of a rapist." *Id.* at 155.

²⁶³ *Id.* at 155-160. Consider the case of Dr. Marvin Teicher, a Manhattan dentist who was convicted of sexual abuse for fondling a female patient who lay in a drug induced state of unconsciousness during a dental exam. *Id.* This is a description of one victim's encounter with Dr. Teicher:

a twenty-five-year-old woman named Barbara was in Teicher's office for the second phase of a treatment. She, too, was injected with painkiller which she assumed would make her unconscious. Her only recollection after the needle was opening her eyes to see that the dentist [Teicher] had exposed himself, then feeling him kissing her as he fondled her breasts and vaginal area with his hands. *Id.* at 157.

²⁶⁴ See generally FAIRSTEIN, *supra* note 245.

and loved ones, the stranger rape category.²⁶⁵ In fact, national statistics indicate that less than twenty percent of women and children who are assaulted are assaulted by someone they do not know—the stranger.²⁶⁶ That is much less frequent an occurrence than acquaintance rape cases, which account for more than eighty percent of reported rapes in this city, state, and everywhere across the country.²⁶⁷ So, the person you have most to fear as a sex offense victim is more likely to be someone you

²⁶⁵ See WIEHE, *supra* note 260, at 4.

Although different terms are now being used for different types of rape—stranger rape, acquaintance rape, date rape, marital rape—unfortunately, in some instances, the public media have used these terms to distinguish the severity of the crime. Thus, stranger rape may be presented as the most serious type of rape and acquaintance rape or marital rape as the least serious or injurious because the perpetrator and victim knew each other or were married to each other. *Id.*

See generally PAULINE TRUMPE, *DOCTORS WHO RAPE* (1991) (dealing exclusively with the subject of rape in the medical profession).

²⁶⁶ See generally PARROT, *supra* note 259, at 10. Very few rapes involve the typical

stereotype rape, which is the mental image of rape many people ascribe to: crazed stranger jumps out of the bushes and drags victim into an alley at night. *Id.* The perpetrator uses a weapon such as a knife or gun to obtain compliance. The victim is severely battered and bruised because she fought back. *Id.* at 10. In fact, very few rapes fit the above description. The vast majority [of rapes] are perpetrated by someone known to the victim (Kanin, 1957; Koss, Gidycz, & Wisniewski, 1987; Parrot, 1995; Russell, 1982). *Id.*

²⁶⁷ YODANIS, *ACQUAINTANCE AND DATE RAPE: AN ANNOTATED BIBLIOGRAPHY* 39-40 (1994), citing a study by Angelyne E. Amick and Karen S. Calhoun, *Resistance to Sexual Aggression: See SALLY K. WARD ET AL., Personality, Attitudinal, and Situational Factors*, *ARCHIVES OF SEXUAL BEHAVIOR*, 16, 2:153-162 (1987). "Three-fourths of the participants reported sexual victimization, the majority [of] which, 94%, involved acquaintances." *Id.* (citing Joanne Belknap, *The Sexual Victimization of Unmarried Women by Nonrelative Acquaintances*, *VIOLENCE IN DATING RELATIONSHIPS* 205-218 (1989), "[r]ape attempts by [an] offender who knew the victim well were more likely to result in completed rapes than attempts by acquaintances."). *Id.* at 40.

know.²⁶⁸ The stranger rape category has among its offenders the criminals who are far more likely to be recidivists, in general, than most of the acquaintance population, with the exception of pedophiles.²⁶⁹ As the two speakers before me have said, it is child molesters, whether known to the victim or not, who have the highest repeat offense statistics.²⁷⁰ And there is a compulsiveness to these acts and a signature that has developed, a *modus operandi*, as the cops in the movies call them, an "M.O." that really allows us in law enforcement to read five hundred police reports and identify thirty of them, without ever speaking to a witness, that are committed by the same offender.²⁷¹ It is a very compulsive kind of conduct, and once the offender establishes a means of committing the assault that works for him, he will repeat it using the identical language, the order of the sexual acts, and the way of gaining

²⁶⁸ See ROB HALL, *RAPE IN AMERICA: A REFERENCE HANDBOOK* 83-84 (1995). "It has long been believed that acquaintance rapes account for the majority of unreported rapes, as well as the majority of total rapes." (Hall, 1994; Koss et al. 1988; McDermott 1979; National Institute of Law Enforcement and Criminal Justice 1977; Williams 1985). *Id.* at 83.

Women are particularly vulnerable to acquaintance rape for several reasons. Because the assailant is someone who is known to the victim he is likely to be trusted more than a stranger. [Moreover,] victims frequently do not recognize, or chose to ignore, warning signs because of the identity of the attacker. Depending on the circumstances of the initial assault, victims may often be too embarrassed to resist [the attacker] in a manner that might [otherwise] increase their chances of avoiding rape. *Id.* In a major study [Koss et al. 1988] of rape among college women, 89 percent of the rape victims who provided information on their attackers were assaulted by someone they knew. *Id.* at 84.

²⁶⁹ See Burt Herman, *California Takes Lead in Chemical Castration Governor Says He'll Sign Measure Requiring Injections for Repeat Child Molesters*, ROCKY MOUNTAIN NEWS, Sept. 1, 1996, at 3A. "Attorney General Janet Reno has put the repeat-offender rate among child molesters at as high as 75%." *Id.*

²⁷⁰ See A Modern Day Arthur Dimmesdale: *Public Notification When Sex Offenders are Released Into the Community*, *supra* note 218, at 1211-12.

²⁷¹ FAIRSTEIN, *supra* note 245, at 82.

access to the victim.²⁷² It is really quite remarkable. So, the pedophile category and the stranger category are the two that present really the greatest risk to victims and to the general public of repeat offenses.²⁷³

Most of us who work professionally in this specialty have come to recognize that there are categories of these offenders, we call them sexual predators now, who simply are not candidates for rehabilitation.²⁷⁴ When I started doing this work in the 1970's, there were no states that separated and attempted to deal individually with sex offenders in an attempt to rehabilitate them.²⁷⁵ In the 1970's, the Avenel program was started in New Jersey.²⁷⁶ Connecticut started a similar program, and many states now do attempt to isolate and rehabilitate sex offenders in their treatment programs. There are certainly offenders who can respond to that rehabilitation and be treated and not offend again, but I have to tell you that, having prosecuted many of the Avenel graduates who have been said to be completely rehabilitated, it never ceases to shock me how many of these predators cannot be helped. In the therapeutic community there has begun in the last five years the acknowledgment that there are offenders who simply cannot be treated.²⁷⁷ Those of us who prosecute them believe that they need to be, if justly convicted, sentenced to as long a term of imprisonment as the

²⁷² *Id.* at 236.

²⁷³ *Cf.* Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203 (1992) (stating "the likelihood of recidivism by pedophiles may still be lower than it is for offenders who commit aggressive sex crimes against females").

²⁷⁴ *Id.* at 272 (stating that repeat offenders should be sentenced for life "without the possibility of parole").

²⁷⁵ *See generally* *Allen v. Illinois*, 478 U.S. 364, 373 (1986) (stating that the state is obligated to provide treatment designed to effect recovery for those deemed sexually dangerous and mentally ill, and stop treating them like ordinary prisoners).

²⁷⁶ *See, e.g.*, David Glovin, *Rapist's Care Under Fire Once A Model, Avenel's Now A Muddle*, THE RECORD (New Jersey), Dec. 22, 1992, at A1. The Avenel program started in February 1976 for the purpose of treating sex offenders who exhibit "repetitive, compulsive behavior." *Id.*

²⁷⁷ Symposium, *Men, Women, and Rape*, 63 FORDHAM L. REV. 125, 168 (1994).

law allows because they simply need to be isolated from society²⁷⁸ because they will re-offend.²⁷⁹

In the stranger category, many of you know the statistics about pattern or serial rapists and see the cases over and over again in our own communities. These are often cases that, when the arrest occurs, we will resolve between fifteen to thirty cases committed by the same assailant, often in a very short period of time.²⁸⁰ Some of you may recall last year that there was a pattern in the Stuyvesant Town community in Manhattan.²⁸¹ Five women were raped, all over a period of months, all in broad daylight, after having been followed into their buildings in early afternoon.²⁸² Those of us in law enforcement, when we were investigating the case, believed that the offender was a professional who was likely to have a history of sex offenses, because they were very bold crimes.²⁸³ They were happening in a well-patrolled community; there is good private security there, there are large buildings, and women were being followed from buses and subways in daylight into their buildings.²⁸⁴ When the offender was arrested, he, in fact, had three

²⁷⁸ FAIRSTEIN, *supra* note 245, at 272.

²⁷⁹ *Id.* at 236.

²⁸⁰ Symposium, *Patterns of Stranger and Serial Rape Offending: Factors Distinguishing Apprehended and at Large Offenders*, 78 J. CRIM. L. & CRIMINOLOGY 309, 311 (1987). ("[T]he availability and reliability of information about incidents and offenders plays a key role in determining the ability of the police to solve crimes and apprehend offenders").

²⁸¹ Russell Ben-Ali, *Cops Ask Info on 3 Attacks*, NEWSDAY, Feb. 4, 1994, at A31. Police were seeking rapists responsible for sexual assaults and robberies in the East 14th Street area of Manhattan since November. *Id.*

²⁸² *Id.*

²⁸³ *Suspect in Rapes Pleads Guilty*, N.Y. TIMES, Apr. 29, 1995, §1 at 27. "Monagas [the attacker] would hold open the door to an apartment building for a woman laden with groceries. Once inside, he would pull a knife and force the woman to a secluded area where he would rape and sodomize her." *Id.*

²⁸⁴ Ben-Ali, *supra* note 281. In each of the assaults, the women were followed home from East 14th Street and First Avenue. *Id.*

felony convictions for sexually assaulting women.²⁸⁵ He had been convicted and incarcerated in Florida.²⁸⁶ His family blamed the bad environment in Florida for the crimes, so when he was paroled, they flew down to Florida and brought him up to New York, and he was being treated in an offender rehabilitation center on 14th Street, which is what brought him from Brooklyn to the Stuyvesant Town area across the street. After he would go to his offender treatment class, he would walk across the street and prowl for victims.²⁸⁷ He is illustrative of that kind of offender-recidivist population in the stranger category.²⁸⁸

The problems for victims of stranger rape are obviously the trauma and survival of the act itself.²⁸⁹ The major problem thereafter is for law enforcement to identify and apprehend the offender.²⁹⁰ That is not the problem, obviously, in acquaintance cases, where the victim knows who the offender is, knows where he can be found, and may know his full name or address: the victim is able to lead the police in some way or another to apprehending him.²⁹¹ So far, many more acquaintance rapists are arrested, and far many more acquaintance

²⁸⁵ Anthony M. DeStefano & David Kocieniewski, *Sex Attack Charges*, NEWSDAY, Apr. 6, 1994, at A20. Anthony Monagas was arrested in Florida where he had served ten years of a twenty-two-year sentence for a prior rape conviction. *Id.*

²⁸⁶ *Id.*

²⁸⁷ See generally *Rapist Gets 40 Years*, N.Y. TIMES, May 17, 1995, at B7. Justice Franklin Weissberg said Mr. Monagas's "sole purpose in life seems to be to rape, sodomize, and terrorize defenseless women wherever he finds them." *Id.* The judge also stated that Monagas was "a raping machine." *Id.*

²⁸⁸ James Dao, *Pataki Bars Sexual Offenders From New Probation Program for Nonviolent Felons*, N.Y. TIMES, May 1, 1995, at B4. New York Governor George Pataki stated that Monagas was an example of recidivism since he already served time for rape in Florida, and pled guilty to three rapes in Stuyvesant Town. *Id.*

²⁸⁹ See generally FAIRSTEIN, *supra* note 245, at 16.

²⁹⁰ "In cases in which the victim had never seen or met her attacker previously, the issue for the investigator is one of identification, of finding out who the perpetrator of the crime was in order to apprehend and prosecute him." *Id.* at 130.

²⁹¹ It is that prior contact that makes the assailant's identity more easily determinable by the police. *Id.*

rapists are actually brought into the criminal justice system.²⁹²

The stranger rapist presents a much bigger problem for a police officer in identifying him.²⁹³ We now have a DNA databank, which has been one of the most successful tools in helping us in stranger cases to identify assailants because we are now doing DNA genetic fingerprinting of all convicted sex offenders and murderers in the state, and as they are released to parole, and as these patterns develop, we develop the genetic fingerprint from the evidence found in the victim's body or at the crime scene and match that to convicted offenders.²⁹⁴ These databanks have been in place in more than twenty states for the last several years, and it really is the tool of the future for resolving these cases.²⁹⁵ The victim of stranger rape, in this day and age, does very well in the criminal justice system.²⁹⁶ She is believed with much greater frequency than an acquaintance rape victim, and the issue at the trial is not an attack on her credibility about whether the crime occurred.²⁹⁷ It generally is whether her identification of her assailant is reliable.²⁹⁸

²⁹² More than half of reported rapes are assaults by acquaintances. *Id.* at 129. Moreover, "an even greater proportion of what comes to a prosecutor's office involves acquaintance rape, not stranger rape, since known assailants are easier to apprehend than strangers." *Id.*

²⁹³ *Id.* at 130.

²⁹⁴ "DNA analysis, like the theory of fingerprint evidence, is based on the unique nature of each human being's DNA." *Id.* at 179. "The use of DNA technology in rape cases is a tool that promises more satisfactory outcomes in cases that might have been difficult or impossible to prosecute previously." *Id.* at 184.

²⁹⁵ *Id.* at 180.

²⁹⁶ See generally FAIRSTEIN, *supra* note 245, at 124 (stating only twenty years ago, rape victims were treated ruefully when testifying, however today "not a single inquiry about the victim's sexual history should enter the case at all"); N.Y. CRIM. PROC. LAW §60.42 (McKinney 1996) (stating the several exceptions to today's general rule).

²⁹⁷ *Id.*

²⁹⁸ Identification in rape cases, as compared with other crimes involving only one eyewitness, is very reliable. FAIRSTEIN, *supra* note 245, at 201-02. "Rapes and other sexual assaults are not, generally, accomplished in a matter of minutes." *Id.* "A victim and her attacker are rarely together for less than twenty minutes." *Id.* "It is that extended, [face-to-face] exposure, so unique to sex offenses," that makes victim identification so reliable. *Id.*

I invite those of you who are students here and have time tomorrow or Monday, to attend a very interesting stranger rape case on trial now. The victim testified yesterday. It was a case that had a lot of media attention last summer because the victim lived in a luxury building on the upper east side of Manhattan, and the assailant followed her into the building from an ATM machine, past the doorman, who was fighting with another employee of the building. The attacker just walked in past security, into the elevator, followed the victim into her apartment, tied her up, and raped her repeatedly for over an hour and then left.²⁹⁹ He had been released from jail just eleven days earlier.³⁰⁰ Fingerprints found at the crime scene were matched through the computer system that we have in the state, and he was arrested twenty-four hours later; there was also a DNA match.³⁰¹ The victim was on the witness stand less than an hour for the direct case, and I think I timed the cross-examination at eight minutes. I must say that the adversary and my young colleague do not have a lot to work with in this case.³⁰² The offender refused to take a plea.³⁰³ The evidence is overwhelming, but he

²⁹⁹ The assailant in the case was a 24-year old Manhattan resident named Raymond Clyde. See Lawrence Van Gelder, *Parolee is Arrested for a Rape in Upper East Side Apartment*, N.Y. TIMES, July 15, 1995, at A25.

³⁰⁰ Clyde was paroled less than two weeks prior to the incident, after serving a four and one-half year sentence for robbery and sale of heroin in Pennsylvania. *Id.*

³⁰¹ A high-speed computer system enabled the police to identify Clyde within 35 minutes from fingerprints found on doorknobs, a knife, and in the bathroom of the crime scene. *Id.* From another computer system, the police were quickly able to learn that Clyde had recently been released from prison. *Id.*

³⁰² Clyde's defense counsel was Richard Armstrong. Doug Simpson, *Rape Suspect Found Guilty, Faces 50-Year Sentence*, UPPER EAST SIDE RESIDENT (New York), Mar. 7, 1996. The People of the State of New York were represented by Assistant District Attorney Francine James. *Id.*

³⁰³ Clyde claimed that the sex was consensual. *Id.* Mr. Armstrong argued that "jurors could never know what really happened between the victim and his client." *Id.* Nevertheless, Clyde was convicted after a jury deliberated just two hours. *Id.* Manhattan Supreme Court Justice Herbert Altman sentenced Clyde to 50-100 years, saying that Clyde "has forfeited his right to live among civilized human beings." Barbara Ross, *Judge Gives Rapist 50 Yrs. for Attack*, DAILY NEWS (New York), Apr. 4, 1996, at 70. Judge Altman

does not want to be in state prison as a rapist because he claims to already have trouble in the prison population.³⁰⁴

Acquaintance rape cases are entirely different.³⁰⁵ The police investigation is rarely the issue in an acquaintance rape trial.³⁰⁶ It is still the kind of case in which the attack is very much on the credibility of the victim.³⁰⁷ The defense will blame her either for what they will call her participation in the events and either claim consent,³⁰⁸ that she was with the offender and consented to the act of intercourse and thereafter cried rape,³⁰⁹ or the argument will be that no crime occurred, that she is fabricating the incident for some revenge reason to get back at the offender.³¹⁰ In the trial itself, the acquaintance rape victim, and especially the child abuse victim, has a much harder time going through the criminal justice system than the stranger rape victim does.³¹¹ There are other disparities that follow down the line. Generally, in the stranger rape case, the sentence tends to be much closer to the maximum all over the country than when the acquaintance rapist is convicted. So, in many of these cases, the stranger rape victim will receive the maximum

further declared that he would recommend that Clyde never be paroled. ASSOC. PRESS, *Rape Sentence Is 50 Years*, N.Y. TIMES, Apr. 4, 1996, at B3.

³⁰⁴ See, e.g., Rob Tripp, *The Bernardo Trial: Fellow Inmates Despise Homolka*, OTTAWA CITIZEN, July 11, 1995, at A3 (stating "[t]here is an unwritten code that regards sex offenders and child abusers lowest on the prison pecking order").

³⁰⁵ FAIRSTEIN, *supra* note 245, at 129-54 (describing the special problems facing such victims including anti-victim bias, lack of appreciation of seriousness of crime and lack of understanding of the real damage done by such attacks).

³⁰⁶ See Allison West, *Tougher Prosecution When The Rapist Is Not A Stranger: Suggested Reform to the California Penal Code*, 24 GOLDEN GATE U. L. REV. 169, 182 (1994).

³⁰⁷ FAIRSTEIN, *supra* note 245 at 133; see also Matthew J. Sauter, *Post Conviction Mediation of Rape Cases: Working Within the Criminal Justice System to Achieve Well Rounded Justice*, J. DISP. RESOL. 175, 180 (1993).

³⁰⁸ West, *supra* note 306, at 182.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

sentence. In New York, as opposed to some other states, we have indeterminate sentencing. Thus, a maximum for a first offender might be, if he got twenty-five years, eligibility for parole would occur after eight and a third,³¹² and the problem is that many of our offenders, because of the prison overcrowding, have been released on early parole.³¹³ New York has more than 3,000 sex offenders in the prison system at any given point in time,³¹⁴ and somewhere between thirty and one hundred of them have received any kind of treatment with an

³¹² N.Y. PENAL LAW §70.00 (McKinney 1996) (stating indeterminate sentences are imposed for most felonies, subject to a few exceptions, and the term is defined by a minimum term of one year or more and a maximum depending on the class of felony, particular type of crime, prior convictions and a number of other factors); *see also* N.Y. CORRECT. LAW §212 (McKinney 1996) (defining who is eligible for parole: essentially all prisoners sentenced to indeterminate sentences who have served their minimum sentence are eligible at the discretion of the Board of Parole).

³¹³ *See* Joe Mahoney, *State Issues Rules to Eye Parolee Guidelines Focus on Rapists and Child Molesters*, TIMES UNION (Albany, New York), Aug. 25, 1994, at B2 (reporting Board of Parole aide's statement that most paroled sex offenders have had to be let out of prison under mandatory conditional release after serving two-thirds of their maximum term; and reporting number of more than 1,100 sex offenders on parole in New York); *see also* Kyle Hughes, *Advance Warning Proposed for Sex Offender Release*, GANNETT NEWS SERVICE, Aug. 9, 1994, available in LEXIS, News Library, Arcnws file (quoting state Parole Division figures showing that 94% of sex offenders are freed only after serving a maximum sentence). A maximum sentence in New York works out to two-thirds of the maximum term. *Id.* *But see* Kyle Hughes, *Pataki Orders Tighter Watch on Sex Offenders*, GANNETT NEWS SERVICE, Nov. 15, 1995, available in LEXIS, News Library, Arcnws file (quoting state Parole Division figures showing that only 6% of imprisoned sex offenders earn parole, with most serving their mandatory sentences before being released from prison, compared with parole rate for all offenders of about 59% and reporting that "very rarely does a parole board parole discretionarily a sex offender").

³¹⁴ *See* Hughes, *Advance Warning*, *supra* note 313 (showing 3,200 sex offenders in state prisons in 1994). *But see* KATHLEEN MAGUIRE & ANN L. PASTORE, U.S. DEPT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (1994) (showing number of incarcerated sex offenders in New York state at 4,159 in 1994 with figures supplied voluntarily by states based on each jurisdiction's own definition of "sex offender").

attempt to involve therapy for the sex offender problem in particular,³¹⁵ so most of these people are being released to the community without any effort to deal with the particular problem, and therefore many of them obviously will offend again. So this administration, as well, has recommended changes in the parole system.³¹⁶ I think one of the most important aspects of the law that has been enacted in our state is that there is a real need for law enforcement to know when these offenders are back in the community.³¹⁷ I am less an advocate of community notification. I think there are serious constitutional issues; I think there are serious problems with vigilantism.³¹⁸ I do not know that a tragedy like the Kanka case could ever have been prevented. I do not know that the Kanka family would ever have picked up a phone and called a number to find out if any of the neighbors had histories of sex offenses,

³¹⁵ See generally Joe Mahoney, *Your Neighbor Could Be a Rapist: The Governor Wants to Require Authorities to Tell Communities When a Sex Offender Moves to the Area; Critics Call the Idea an Invasion of Privacy*, TIMES UNION (Albany), Aug. 6, 1994, at A1 (quoting New York State parole agency spokesman stating that "many sex offenders resist counselling and treatment, deny their behavior was deviant, and sometimes convince themselves they were helping a child they molested;" and that "while some paroled sex offenders are required to receive counselling. . . his agency is coping with a paucity of such therapeutic programs across the state").

³¹⁶ See, e.g., Luther F. Bliven, *Pataki Bars Felony Sex Offenders from Program the Governor Said They Must Serve Their Time in Prison and Not Receive Probation*, THE POST-STANDARD (Syracuse, New York), May 1, 1995, at A8 (stating that the Governor of New York, George Pataki, issued an executive order prohibiting sex offenders from participation in a special probation program).

³¹⁷ See *People v. Afrika*, 168 Misc. 2d at 622 (stating that registration will aid law enforcement in investigation, apprehension, and prosecution of sex offenders); Gene Warner, *Public Not Fully Protected by Sex Offender Law*, BUFFALO NEWS, July 20, 1996, at A1 (stating that registration and notification laws aid law enforcement agencies in solving sex attacks more quickly).

³¹⁸ See Lewis, *supra* note 213, at 112 (asserting that vigilantism is a foreseeable consequence of community notification); see generally Michelle Ruess, *Offenders Fear Vigilantism; Say Megan's Law Would Do More Harm Than Good*, THE RECORD (New Jersey), Sept. 18, 1994, at A4 (asserting that vigilantism is an inevitable result of public notification); Josephine Sacco, Note, *New York's Megan's Law: Retroactive Application Determines the Fate*, 13 N.Y.L. SCH. J. HUM. RTS. 179 (1997).

but I certainly think that people hiring teachers for our school systems or people working in hospitals should be notified if a sex offender is employed by them.

We now have five cases pending where hospital employees have committed sex offenses against patients in the hospital. One is a janitor who put on a white robe whenever he found one and entered patients' rooms, told them he was a doctor, and conducted vaginal exams. The latest one occurred at one of our Manhattan hospitals. The defendant was just fired from Bronx Lebanon Hospital for doing exactly the same thing and had a conviction for doing the same thing years earlier at University Hospital. Nobody had a way of knowing that because there was no registry before this time to check. So there are certainly high risk occupations where I think it is very important for both people in the occupational field and people in law enforcement to know. I think the value, for example, when a stranger rapist has moved back into the community, is for the Manhattan Special Victims Squad to get that information so that if a new crime occurs, they know to include him in the suspect group to look at as a possible offender. But I think in cities like this, the idea of community notification really does no good³¹⁹ when you have someone who moves back into Greenwich Village and takes the train to Brooklyn or Harlem or the upper east side to commit offenses. Notifying the community is really not a very important tool for the way that most of these crimes occur in large metropolitan areas.³²⁰ That is the overview that I wanted to give you.

STEPHEN NEWMAN: The next speaker is John J. Gibbons, Professor at Seton Hall University School of Law and former Chief Judge of the U. S. Court of Appeals for the 3rd Circuit.

³¹⁹ See Montana, *supra* note 180, at 582 (asserting that law enforcement agencies in large cities lack the resources, funding, and manpower to effectively enforce notification laws).

³²⁰ See generally *id.*