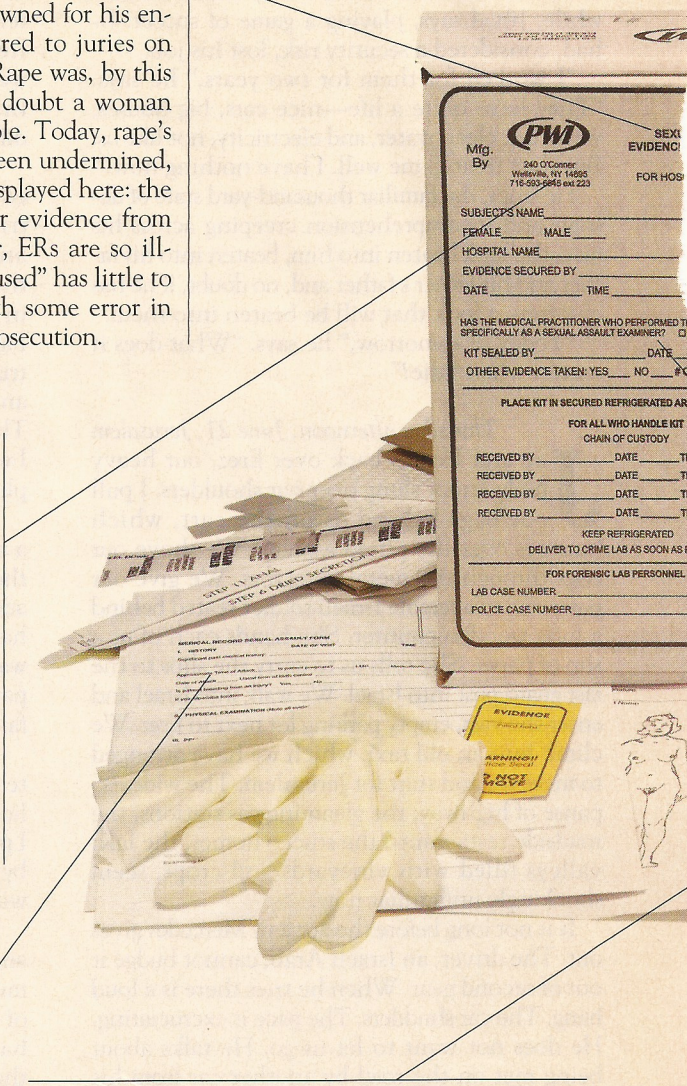
BURDEN

Too often, sexual-assault exams only add

"[R]ape . . . is an accusation easy to be made and hard to be proved, and harder to be defended by the party accused tho' never so innocent." Some version of this caution—written by Sir Matthew Hale, a seventeenth-century English jurist renowned for his enthusiastic prosecution of witches—was delivered to juries on most American rape trials up until the 1970s. Rape was, by this instruction, an allegation with an asterisk; to doubt a woman crying rape, it warned, can never be unreasonable. Today, rape's official distinction as "hard to be proved" has been undermined, at least in principle, by the arsenal of science displayed here: the "rape kit," used by emergency rooms to gather evidence from victims of sexual assault. In practice, however, ERs are so ill-trained in the use of these kits that a "party accused" has little to fear—nearly half of the kits arrive at labs with some error in gathering that can render them unusable in a prosecution.



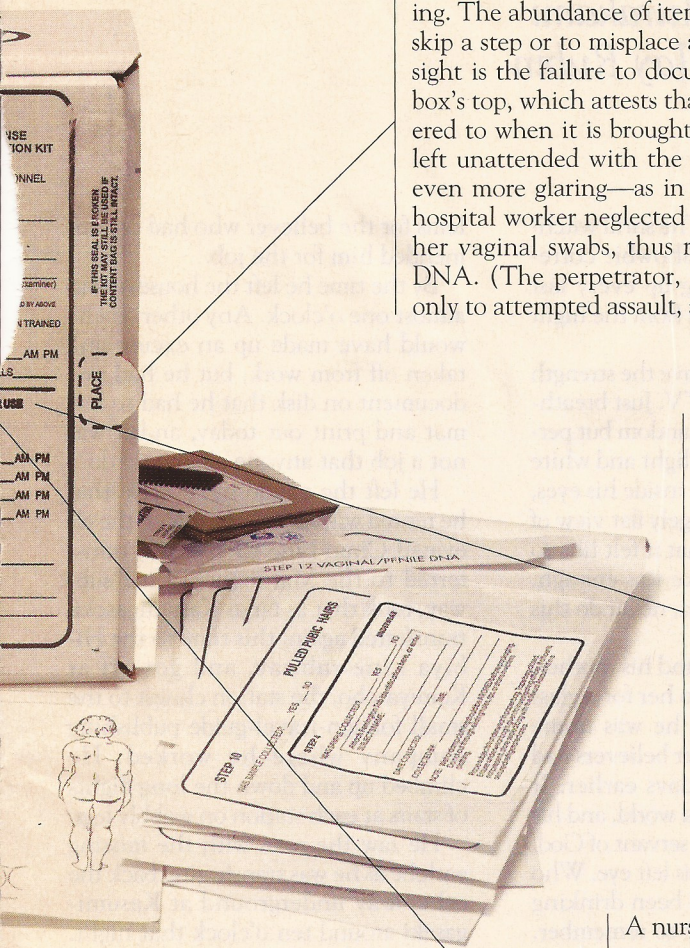
This is New York's standard evidence kit for sexual assault; 7,000 are distributed each year to hospitals and emergency rooms statewide for use in forensic examinations. For a rape victim in the U.S. who hopes to bring her (or his) attacker to justice, undergoing such an exam is an invasive but necessary ordeal. The process lasts for two to four hours and is often conducted in cramped quarters, with no psychological counselor present. The victim's blood is drawn, so that her attacker's DNA, if found, can be differentiated from her own. Her hair and pubic hair are plucked—the root is needed—and her underpants are taken into custody. She should not drink water or rinse out her mouth, which, if she was forced to fellate her attacker, could contain DNA evidence. Nor should she urinate (more DNA to preserve) until the examiner has swabbed mouth, vagina, and rectum.

With such excruciating demands, the exam is intended to undergird a sturdy prosecution, and yet the kit's interview form is far from adequate for the task. It fails to ask how many assailants there were; whether the victim was orally, vaginally, or rectally assaulted; whether she was assaulted with a hand, penis, or other object. Nowhere does it ask if she displayed symptoms of being drugged, but this omission may not matter anyway—most police labs still lack the equipment required to test for "date-rape drugs," even as the prevalence of these drugs (especially GHB, a hypnotic sedative now ubiquitous in the nightclub scene) has increased dramatically in the last five years.

Examiners are expected to detail the victim's injuries—many of which, in a rape, are microscopic and occur in or around the vagina and anus—on crudely drawn four-inch figures with one-inch genital insets. (The vulva, a common injury site, is represented here by a Rice Krispie–size oval.) A typical examiner may not even be able to see such injuries—most ERs lack a colposcope, a specialized gynecological microscope able to discern nearly twice as many genital abrasions as can the naked eye.

OF PROOF

nsult to injury, *by Jennifer Baumgardner*



The kit's box is packed to the brim even before the evidence is collected; after the exam is complete it can barely be closed, much less sealed with the sticker that ensures against tampering. The abundance of items also makes it easy for examiners to skip a step or to misplace an element. The most frequent oversight is the failure to document the "chain of custody" on the box's top, which attests that the evidence, from when it is gathered to when it is brought into the courtroom, has never been left unattended with the victim. Occasionally, the lapses are even more glaring—as in a 1999 Brooklyn case, in which the hospital worker neglected to include the victim's underwear or her vaginal swabs, thus retaining no trace of the assailant's DNA. (The perpetrator, a serial sex offender, pleaded guilty only to attempted assault, and will be released in 2003.)

It is not sufficient to refrigerate the samples; they must be thoroughly dried (underwear, swabs, jeans, and all) before the kit is sealed, or else the evidence is at risk of molding. Even when its contents are properly dried and stored, the kit may be shelved for quite some time, along with over 180,000 other kits nationwide that currently languish in storage, awaiting analysis. A federal law, passed last December, now offers funding to test this backlog, but it is, in many cases, an empty gesture; some of the New York Police Department's 16,000 waiting rape kits date as far back as 1995, which means that the state's statute of limitations for prosecuting the crimes—five years—has already passed. (At least five states have recently eliminated their statutes of limitations for rape cases in which DNA evidence exists, and five more have extended them.)

A nurse specifically trained in these exams will make few serious errors, but only 600 of the nation's more than 5,000 hospitals have one on staff. Pending federal legislation would fund the training of forensic examiners, but many hospitals consider such programs too complex to maintain, and medical schools rarely touch on the topic. For the victims of rape, then, this exam too often represents a squandered opportunity—not just to send an attacker to prison but to wrest, from the crime of rape itself, the asterisk (*hard to be proved*) upheld both by the indifference of the medical establishment and by the enduring prejudices of the law. Consider that the cost of conducting this exam ($800 to $1,000) in some states will, in the absence of insurance, fall upon the victim herself—a demand akin to asking a gunshot victim to foot the bill for his own ballistics. If ever the allegation of rape was, in Hale's dubious assertion, "easy to be made," he might be pleased to learn that in 2001 quite the opposite is true.

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