

# **THE CHALLENGES OF ADULT VICTIM SEXUAL ASSAULT CASES**

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*Medical Forensic Sexual Assault  
Examinations:*

*What Are They, and What Can  
They Tell the Courts?*

## **HANDOUTS**

- Materials for Interactive Exercises
- Glossary of Terms and Anatomical Diagrams

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# **Materials for Interactive Exercises**

- ***State v. Marsh* Case Study**
- **Suspect Examination Exercise**
- **Scope of SANE Testimony Exercise**
- ***Crawford* Exercise**
- ***Crawford* Analysis Chart**

### **Case Study**

**Background:** Defendant Daniel Marsh lived with his girlfriend, Trish Hartford, for five years. Last year, Ms. Hartford moved out and obtained a protective order against Mr. Marsh. The pleadings Ms. Hartford filed for the protective order documented a long history of Mr. Marsh's violence toward her, including several instances where Ms. Hartford called the police to come to their home. On the last occasion, Ms. Hartford told the investigating officer that Mr. Marsh was getting more and more violent. "He said if I call the police one more time or ever leave him he is going to kill me." She said, "I just want it to stop; I'm not trying to put him in jail." Those statements were documented in the police reports and in Ms. Hartford's application for the protective order. Charges were filed against Mr. Marsh on one occasion, but Ms. Hartford failed to appear at the hearing, so the charges were eventually dropped. When asked by her sister why she did not show up for court, Ms. Hartford said, "Daniel said he would make my life a living hell if I showed up at court."

**The Incident:** Four months ago, Ms. Hartford called 911, panicked and crying, and reported that Mr. Marsh had been stalking her and that he just came into her apartment and raped her. She told the 911 operator that he also "choked" her and she was having trouble swallowing. She also told the 911 operator that she was terrified and thought Mr. Marsh was outside watching her apartment building. Law enforcement was immediately dispatched to her home.

When the two officers arrived, Ms. Marsh was sobbing. They noticed a red mark on her throat. She told the officer questioning her, "He told me before that if I called the police one more time he was going to kill me." She said, "Daniel did this to me. He has been following me ever since I left. He won't leave me alone. He keeps texting me, putting comments on my Facebook page and leaving me messages." Her voice was hoarse. She sobbed as she told the officers, "He kept choking me and choking me. I couldn't breathe. I really thought I was dying." She also told the officers that he "forced me to have sex" and that he also "forced me to have oral sex." The officers took her to the local hospital, where she was examined by Molly O'Brien, a Sexual Assault Nurse Examiner (the SANE). The officers remained at the hospital, but they were not in the examining room while the SANE took Ms. Hartford's medical history and performed the examination.

**SANE Examination:** The SANE took a detailed history and did a comprehensive exam. The SANE asked Ms. Hartford what had happened to her. While the SANE was taking the history, Ms. Hartford told her, "My ex-boyfriend Daniel did this to me. I really thought he was going to kill me this time. He told me he was going to kill me. He was choking me so hard that I couldn't breathe. Since I left him, no other man would ever touch me. He would make sure of that. I don't know what to do. I think he's still outside my apartment. He's going to be furious because I called 911." Ms. Hartford also told the SANE details about the vaginal and oral assaults. The SANE documented her findings and Ms. Hartford's statements. She talked to Ms. Hartford about safety planning and gave her information about the local battered women's shelter. Ms. Hartford was prescribed

medication for sexually transmitted infections, given emergency contraception medication and provided with a discharge plan and instructions. Because Ms. Hartford had been strangled, the SANE encouraged her to schedule a follow up appointment with her primary care physician.

As part of the examination, the SANE collected evidence in accordance with the *National Protocol for Medical Forensic Sexual Assault Examinations* (2d ed. 2013) and the local hospital policy and procedures. Based on the history given, the SANE collected oral and vaginal swabs. The SANE gathered, labeled and packaged the evidence, which she then delivered to the officers at the hospital.

**The Preliminary Hearing:** At the preliminary hearing, the responding officers testified about what Ms. Hartford said, her demeanor and the red mark they observed on her throat. The prosecutor did not subpoena Ms. Hartford to testify at the preliminary hearing.<sup>1</sup> At the conclusion of the hearing, the Court bound Mr. Marsh over for trial on charges of felony sexual assault (for the oral and vaginal rapes) and felony strangulation.

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<sup>1</sup> For purposes of this exercise, assume that hearsay evidence is sufficient to establish probable cause at the preliminary hearing in your jurisdiction.

### **Suspect Examination Exercise**

**Background:** Within a couple hours of Trish Hartford calling 911, law enforcement officers arrested Daniel Marsh. He was still wearing the clothing that the victim had described in her interview with the officers. He appeared disheveled and nervous. He told the officers that he didn't touch Ms. Hartford and denied having any sexual contact with her whatsoever. He said that she was lying and that he hadn't gone anywhere near her since she left him and got a protective order. Since it was early Sunday morning the officers were concerned that it would take them several hours to get a warrant or a court order for a suspect physical examination. The officers knew that judges are always swamped on Sunday morning dealing with the cases from Saturday night. The officers had an evidence technician take Mr. Marsh into a private room, in which no one was present except the evidence technician and Mr. Marsh, where the technician swabbed Mr. Marsh's penis. Subsequent testing showed evidence of Ms. Hartford's DNA on the swabs taken by the evidence technician.

The officers explained that they obtained the samples because of "exigent circumstances." The officers were afraid that Mr. Marsh would destroy the evidence before the officers could get a warrant or a court order. One of the officers had recently worked on a case in which a suspect accused of digital penetration was caught sucking on his fingers to destroy the evidence. They also had a case in which a defendant spit on his hand to try to wipe DNA evidence off of his penis.

Mr. Marsh's defense attorney filed a Motion to Suppress the DNA results from the penile swabs.

**Defense Attorney's Argument:** Warrantless searches are presumptively unreasonable. The penile swabs constituted an unreasonable search in violation of the Fourth Amendment. The officers were required to get either a warrant or a court order prior to conducting the intrusive search. A penile swab is much more intrusive than a buccal swab on the inside of Mr. Marsh's cheek.

**Prosecutor's Response:** The exigent circumstances in this case warranted the search. Under these specific circumstances, the officers were justified in ordering the evidence technician to swab the defendant's penis. The strength of the probable cause, the relatively short amount of time between the assault and the search, the showing of the need to preserve the DNA evidence, and the manner in which the search was conducted, in a private room by a trained technician, all demonstrate the requisite "exigent circumstances" to justify the search in this case.

### **Suspect Examination Discussion Question**

1. Would you grant the Motion to Suppress? Why or why not?

### **Scope of SANE Testimony Exercise**

**Proposed Testimony:** The prosecutor qualifies the SANE as an expert witness. When the SANE examined Ms. Hartford she noted some redness on Ms. Hartford’s external genitalia, but she did not observe any other physical injuries to Ms. Hartford’s genitalia. She found the presence of semen and sperm in Ms. Hartford’s vagina. In addition, the SANE will testify about Ms. Hartford’s demeanor during the examination. The SANE also plans to testify that, in her opinion, her findings are consistent with vaginal penetration. She will testify that the absence of physical injuries in the genital area does not rule out a sexual assault because, in her experience, “most of the patients I have treated who present themselves as sexual assault victims” do not have visible, physical genital injuries. She will then explain some of the reasons why sexual assault victims do not exhibit these types of injuries. In addition, the SANE will testify that, in her opinion, her findings do not “rule out” sexual assault, but instead the findings are “consistent with” Ms. Hartford’s allegations that she was vaginally assaulted.

**Defense Attorney’s Argument:** As the SANE begins to testify at trial, the defense attorney objects to her stating her opinions as described above. He argues that the SANE’s opinion testimony will have the improper prejudicial effect of bolstering Ms. Hartford’s credibility. In effect, the SANE is testifying that she believes Ms. Hartford’s claim that she was raped. The defense attorney also argues that the proposed opinion testimony allows the SANE to testify as to the ultimate issue in the case, which is the province of the jury.

**Prosecutor’s Response:** The SANE will testify that, in her expert opinion, her findings do not rule out sexual assault and are consistent with Ms. Hartford’s statements. This testimony does not invade the jury’s province. To the contrary, her expert medical opinion helps the jury understand the medical findings, which is the purpose of expert testimony. The SANE is not saying that Ms. Hartford was raped, nor is she saying, “I believe the victim’s testimony.” Instead, she is offering an expert opinion consistent with her medical findings, which is permissible under the law of this jurisdiction.

### **Scope of SANE Testimony Discussion Questions**

1. **Is the proposed testimony by the SANE in this case admissible? Why or why not?**
  
2. **If the SANE found vaginal injuries and proposed to testify that the examination was “consistent with a history of blunt penetrating trauma of the vaginal orifice,” but the SANE did not testify as to the cause of the trauma, would that testimony be admissible? Why or why not?**
  
3. **If the SANE found vaginal injuries and proposed to testify that the injuries were “inconsistent with consensual intercourse” and were “consistent with nonconsensual intercourse,” would that opinion be admissible? Why or why not?**

### **Crawford Exercise**

**Background:** A few days before trial, the Victim/Witness Advocate in the prosecutor's office received a phone call from Ms. Hartford's sister, who told the advocate that Ms. Hartford could not make it to the trial. When asked why, the sister said that Daniel had "threatened Trish and scared her away again." The sister also said, "He's a scary dude and Trish is afraid of him. She thinks he's going to really hurt her if she comes to court." The prosecutor sent her investigator to contact Ms. Hartford, but the investigator could not locate her. The investigator tried calling several times and went by Ms. Hartford's apartment and office on numerous occasions, but he was unable to find her.

**The Prosecutor's Motion in Limine to Admit the SANE's Testimony:** The prosecutor filed a Motion in Limine, asking the Court to admit the SANE's testimony about what Ms. Hartford said during the examination despite the victim's absence. The prosecutor argued that the SANE's testimony, including her findings and observations, as well as the statements Ms. Hartford made while the SANE was taking the medical history and conducting the examination, are admissible under *Crawford v. Washington*, 541 U.S. 36 (2004), because the SANE's testimony is "non-testimonial" under the tests set forth by the United States Supreme Court in *Crawford* and the subsequent cases.<sup>2</sup> In the alternative, the prosecutor argued that the defendant was responsible for the victim's absence and, therefore, the SANE's testimony was admissible under the doctrine of forfeiture by wrongdoing.

The defense objected.

#### **Prosecutor's Argument:**

**(1) Ms. Hartford's statements to the SANE were "non-testimonial."** The SANE will testify that the primary purpose for the medical forensic examination she conducted on Ms. Hartford was for medical diagnosis and treatment. The SANE needed to obtain an extensive history of her patient in order to examine her properly and provide proper treatment. Ms. Hartford's statements to the SANE are integral to the SANE's ability to properly treat her patient. The statements were not made to law enforcement for the primary purpose of conducting a criminal prosecution. The SANE is an independent, experienced, specially trained health care provider whose primary purpose is always the best interest of her patient. When Ms. Hartford came to the hospital, she was hysterical and frightened for her life. The SANE needed to ascertain what happened to Ms. Hartford and why she was so frightened in order to properly assess and treat her. Although the SANE did also collect forensic evidence as part of her examination, that was not the primary purpose of the examination. Ms. Hartford's statements were made to the SANE as part of the ordinary course of the examination. A reasonable person in Ms. Hartford's position would have expected that the statements she made to the SANE were for the purpose of medical treatment, not to assist law enforcement. Ms. Hartford had spoken to the officers prior to coming to the hospital and the officers were not present for the

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<sup>2</sup> The authors of this module realize that it would be unlikely a prosecutor would move forward with this case without the victim's testimony; however, we have discovered numerous cases with adult victims in which the victim was unavailable at trial (because the defendant killed her, she died of unrelated causes, she could not travel or she was unavailable for unspecified reasons). Because the issues raised by the *Crawford* line of cases are so difficult and interesting, we are using this fact pattern to address them.

examination. Medical personnel need to be particularly careful to get a full history in cases of suspected domestic violence or intimate partner sexual abuse because safety planning is such an essential part of their treatment plan. Ms. Hartford was facing an “ongoing emergency” when she arrived at the hospital and she provided critical information to assist the SANE in conducting her examination and formulating her treatment plan.

**(2) Since the statements were non-testimonial, they are admissible under the medical exception to the hearsay rule.** Since the statements to the SANE were non-testimonial, *Crawford* does not apply and the Court must analyze the statements under the medical exception to the hearsay rule. The statements clearly fit within the medical exception, since they were made for the purpose of medical treatment and diagnosis, and, therefore, they are admissible.

**(3) Ms. Hartford’s statement to the SANE identifying Mr. Marsh as the perpetrator is also admissible.** Case law is clear that courts may exercise discretion in admitting statements under the medical hearsay exception when those statements identify the perpetrator of abuse in sexual assault, domestic violence and child abuse cases. The medical provider must know who the perpetrator is in these types of cases because the treatment will differ when the abuser is an intimate partner, a member of the victim’s family or a household member. In those cases, the abuser’s identity becomes “reasonably pertinent” to the victim’s proper treatment.

**(4) Even if the statements were “testimonial,” which they are not, the statements are admissible under the “forfeiture by wrongdoing” doctrine, since Mr. Marsh caused Ms. Hartford to be “unavailable” for trial.** The defendant caused Ms. Hartford to be “unavailable” for trial, so he is not allowed to complain that his Fourth Amendment right to confrontation is violated by her absence. He acted with the intent to silence her, to make her unavailable and to deprive this Court of relevant evidence. According to the US Supreme Court in *Giles v. California*, 554 U.S. 353 (2008), the intent to silence a witness can be inferred from an ongoing pattern of abuse in domestic violence cases. The prosecution does not have to prove that it was his sole intention, just that Mr. Marsh acted in part to silence Ms. Hartford. The evidence shows Mr. Marsh’s long history of perpetrating domestic violence against Ms. Hartford, even after she left him and obtained a protective order. Ms. Hartford’s sister is here and she will testify as to the threats Mr. Marsh made to Ms. Hartford. The SANE is also available to testify as to the threatening statements Ms. Hartford said the defendant made. We also have Ms. Hartford’s application for her protective order, which documents Mr. Marsh’s long history of violence toward Ms. Hartford, as well as the police reports from the previous times Ms. Hartford had to call the police to stop Mr. Marsh’s violent behavior toward her.<sup>3</sup>

The totality of the evidence set forth in this case establishes that Mr. Marsh intended to isolate Ms. Hartford from outside help, including from the aid of law enforcement and the judicial process.

The burden of proof on this issue is by a preponderance of the evidence. The State has demonstrated that the statements Ms. Hartford made to the SANE are non-testimonial, but

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<sup>3</sup> See facts set forth in the Case Study.



even if that were not the case, Mr. Marsh is precluded by the doctrine of forfeiture by wrongdoing from objecting to their admissibility.

**Defense Attorney's Response:**

**(1) The statements Ms. Hartford made to the SANE are absolutely “testimonial” as defined by the US Supreme Court.** The police drove Ms. Hartford to the hospital for the express purpose of a forensic examination. SANEs are an active participant in formal criminal prosecutions and they receive specialized training on how to assist the police by gathering evidence for the case. They are state actors involved in formal out-of-court interrogations of witnesses to gather evidence for trial. The primary purpose of a SANE is to act as an arm of law enforcement and collect evidence to aid in a criminal prosecution. Any objective witness would know that the purpose of a SANE examination is to help gather evidence to develop the criminal case. There was no ongoing emergency when Ms. Hartford went to the hospital.

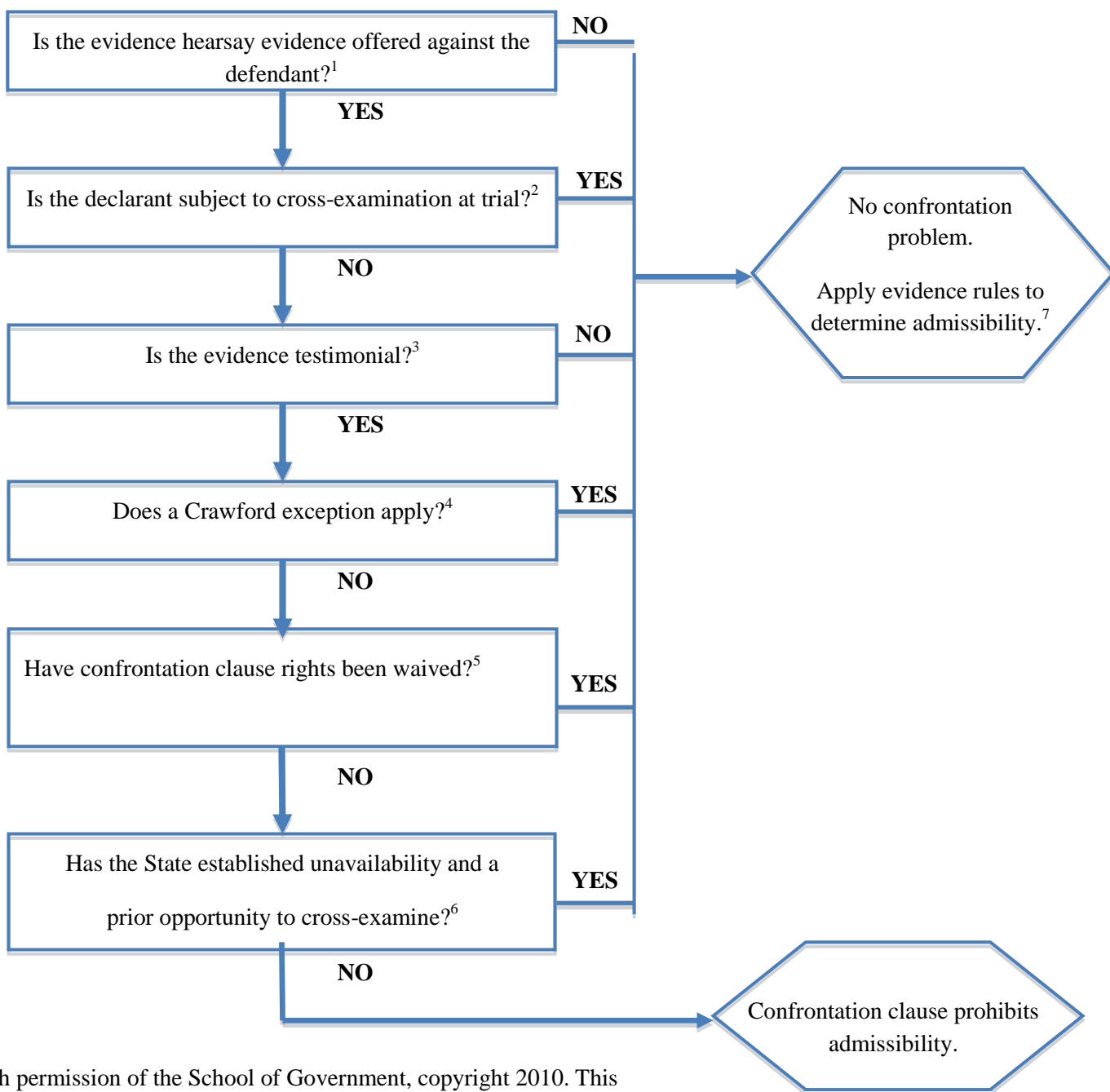
**(2) Ms. Hartford's alleged identification of my client to the SANE is inadmissible hearsay under any analysis.** Statements that attribute fault or establish the identity of an alleged assailant are inadmissible under the *Crawford* line of cases and under any medical hearsay exception.

**(3) The prosecutor failed to meet her burden of proving forfeiture by wrongdoing, which does not even apply in this case.** There is no evidence that Mr. Marsh caused Ms. Hartford to be unavailable at this trial and the prosecutor cannot meet her burden of showing that Mr. Marsh did anything with the intention of preventing Ms. Hartford from testifying. She has a long history of making ridiculous accusations against my client and then not showing up for trial after she has put him through the wringer. It's time to put an end to this endless harassment of my client. This Court should deny the prosecutor's Motion in Limine, dismiss this case and let my client try to get on with his life.

**Crawford Exercise Discussion Questions**

- 1. Are Ms. Hartford's statements to the SANE "non-testimonial" under the *Crawford* line of cases, as the prosecutor argues, or are they "testimonial" as claimed by the defense? Explain your reasoning.**
- 2. Assume, just for this part of the exercise, that the statements are "testimonial." Is Mr. Marsh precluded by the doctrine of "forfeiture by wrongdoing" from raising an objection to the admission of Ms. Hartford's statements to the SANE? Why or why not?**
- 3. Assuming that *Crawford* does not bar the statements from being admitted at trial, are they admissible under your jurisdiction's medical exception hearsay rule? Why or why not?**
- 4. Are the statements in which Ms. Hartford identifies Mr. Marsh as her assailant also admissible under your jurisdiction's medical exception hearsay rule? Why or why not?**

### **Crawford Analysis Chart**



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# **THE CHALLENGES OF ADULT VICTIM SEXUAL ASSAULT CASES**

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*Medical Forensic Sexual Assault  
Examinations:  
What Are They, and What Can  
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## **GLOSSARY OF TERMS and Anatomical Diagrams**

**Source:** National Judicial Education Program, Presenting Medical Evidence in an Adult Rape Trial (DVD Video Reference Guide) (2002).

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***Female Genital Anatomy and Functions:***

**Vulva:** external female genitalia

**Labia majora:** outer folds of skin that protect the more delicate structures underneath

**Labia minora:** inner folds of tissue that cover the vaginal and urinary openings

**Fossa navicularis:** shallow depression at the bottom of the vulva, in front of the posterior fourchette

**Posterior fourchette:** fold of mucous membrane that connects the labia minora to the base of the vulva

**Urethra:** urinary opening

**Posterior fornix:** back of the vagina behind the cervix

**Introitus:** vaginal opening

**Hymen:** collar or semi collar of tissue around the opening of the vagina

**Vagina:** muscular tube that serves as passageway between the uterus and the outside of the body

**Uterus:** hollow muscular organ, pear shaped; it is where the fetus grows before birth

**Cervix:** lower portion of the uterus that protrudes into the vagina

**Os:** Entrance to the cervix

**Rectum:** Terminal portion of the lower intestine

**Anus:** muscular ring that serves as the opening of the rectum

**Perineum:** bridge of flesh between the vulva and the anus

**Myth About the Hymen**

Many jurors believe that the first time a woman has intercourse there will always be injury to the hymen, and if the first intercourse is a rape, she will present in the emergency room with visible hymenal tears. Not always.

The hymen is a collar or semi collar of tissue around the opening of the vagina. Its appearance and elasticity change over a woman's life span due to hormones like estrogen. After the onset of puberty, estrogen causes the hymen to be elastic and easily stretched. Therefore, a woman may have intercourse with no tears or bleeding, even if it is the first time she has had intercourse or if she was raped. In fact, some women do not have any tears to the hymen even during childbirth.

***Male Genital Anatomy and Functions***

**Penis:** male organ of reproduction and urination

**Shaft:** cylindrical portion of the penis

**Glans:** cone shaped head of penis

**Foreskin (prepuce):** moveable hood of skin that covers the glans of the penis; this structure is removed in circumcision

**Urethra:** urinary opening in the end of the penis

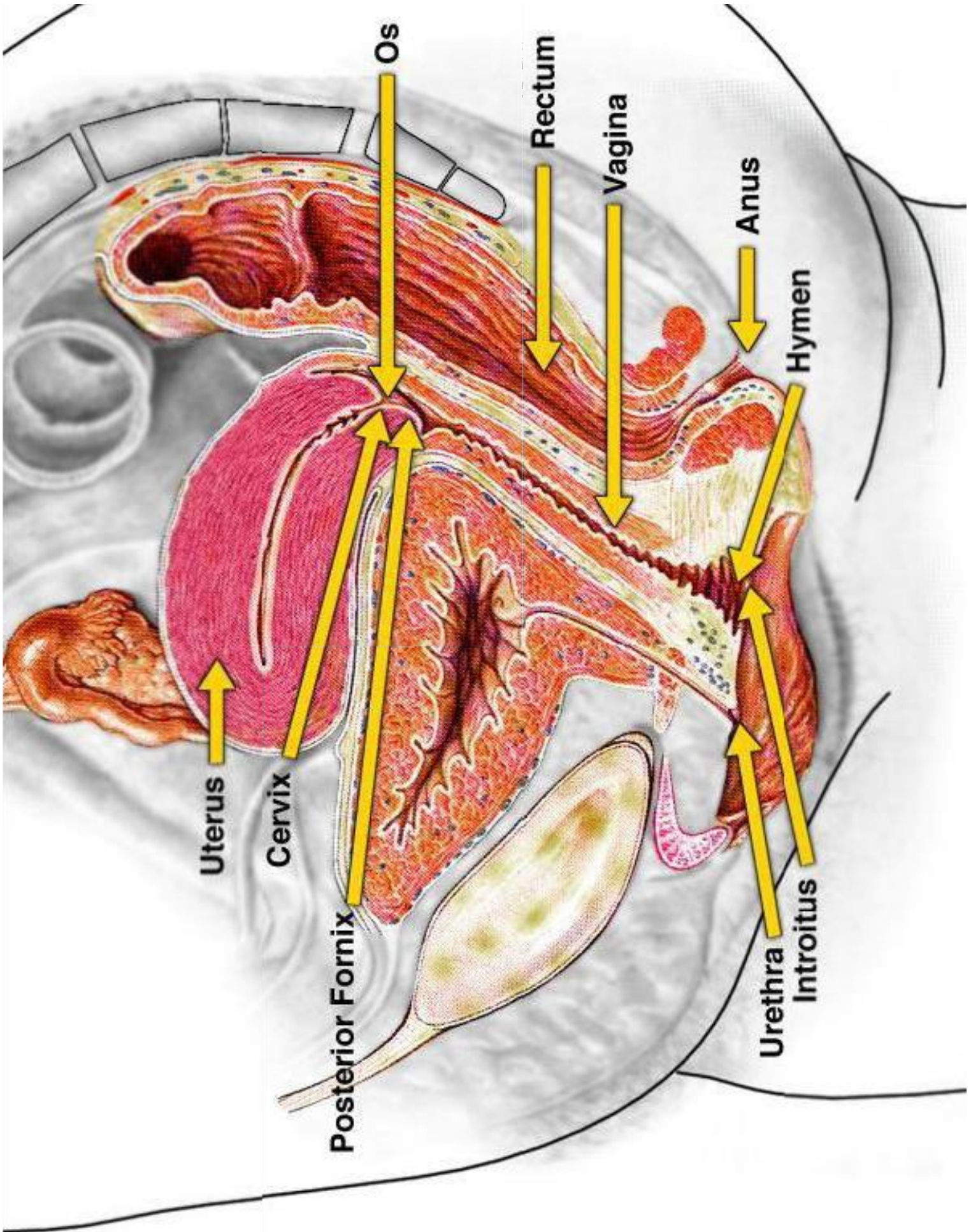
**Scrotum:** double pouch of skin that holds the testicles

**Testicles:** egg shaped reproductive glands that produce spermatozoa; housed in the scrotum

**Semen:** thick fluid released by the male during ejaculation; mixture of fluids from various glands plus the spermatozoa

**Ejaculation:** release of reproductive fluid via the male urethra; the ejaculate may or may not contain spermatozoa

**Perineum:** bridge of skin between the scrotum and the anus



Uterus

Cervix

Posterior Fornix

Os

Rectum

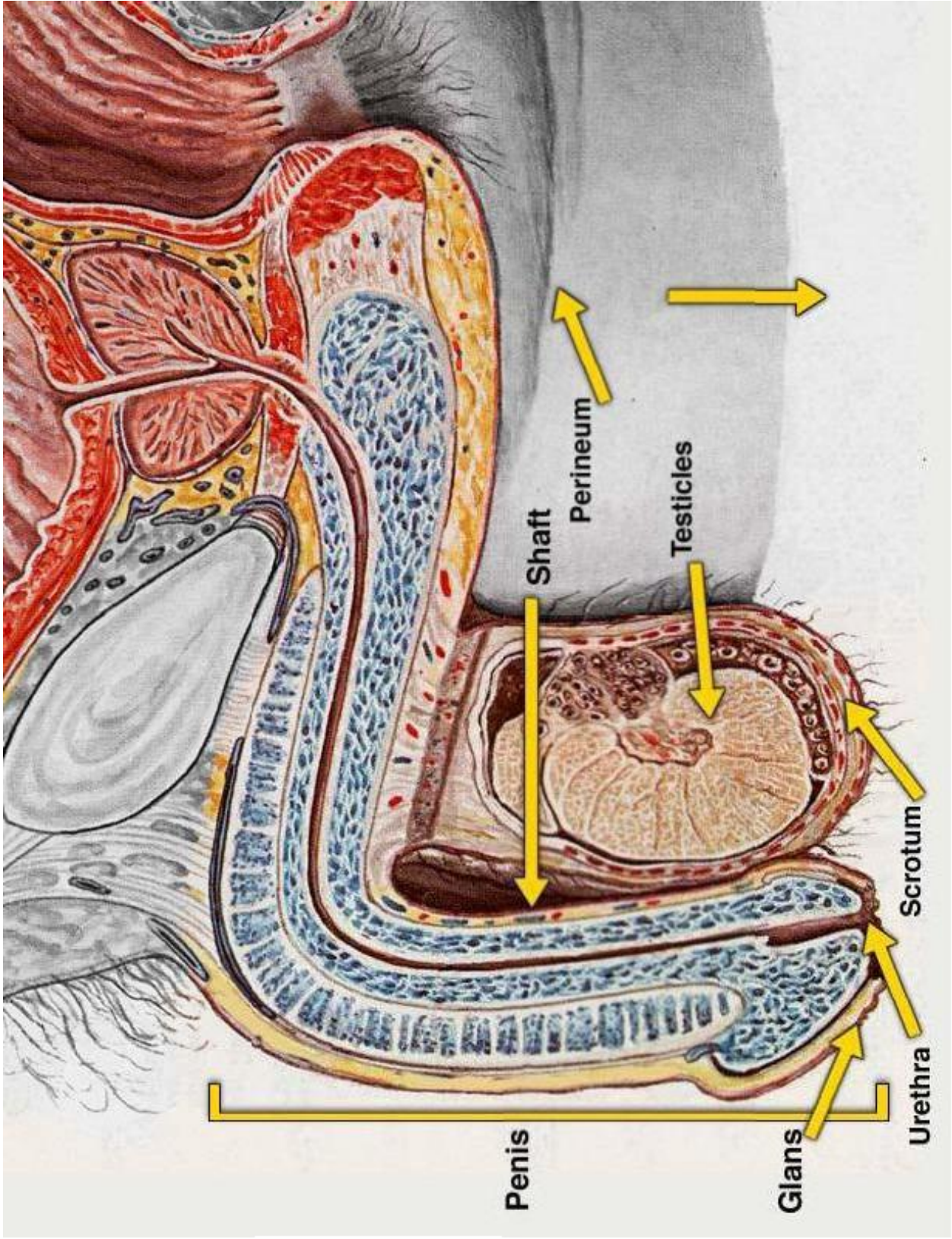
Vagina

Anus

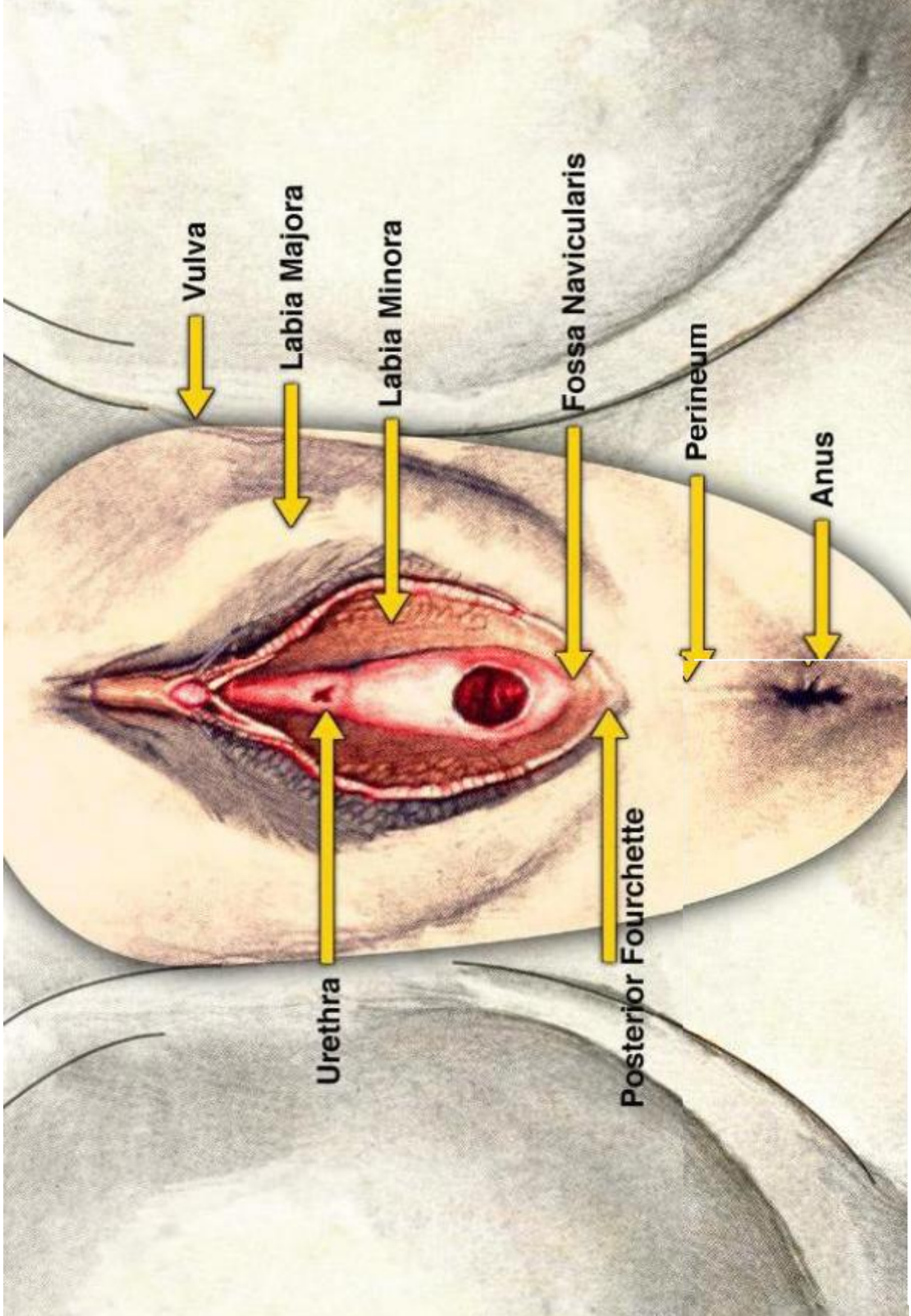
Hymen

Urethra

Introitus







Vulva

Labia Majora

Labia Minora

Fossa Navicularis

Perineum

Anus

Urethra

Posterior Fourchette