Police Clearance Methods: How Are They Currently Defined – and How Should They Be Used?

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In this issue of SAR, Dr. Callie Rennison does an excellent job reviewing important research recently conducted by Cassia Spohn and Katharine Tellis (2011) on the topic of police clearance procedures. In this commentary, we seek to highlight some issues raised by this research and draw out a few implications that bridge research and practice as it pertains to the Uniform Crime Reporting (UCR) Program. Many of these issues are controversial, and we do not necessarily have the answers. However, we believe the questions are very much worth asking, and we look forward to stimulating discussion and debate within the field.

In fact, we have begun this process by incorporating valuable feedback into this commentary from several leading experts in the field. We would like to thank these experts for their insightful contributions, which will be credited where appropriate: researchers Cassia Spohn and Katharine Tellis, police experts Michel Moore, Elizabeth Donegan, and Catherine Johnson, and prosecutors Herb Tanner, Anne Munch, and Patti Powers.[1]

Stepping Back: Understanding the UCR

The research conducted by Spohn and Tellis is particularly valuable because it sheds light on a "black box" in the process of investigation and prosecution – police clearance procedures and referral to prosecutors. Most research focuses only on the easily quantifiable points of attrition, such as reporting, arrest, charging/filing, and case disposition. Rarely do researchers peer into the corners of police administrative procedures, especially involving exceptional clearance, a category that is interpreted in a variety of ways by law enforcement personnel as well as social scientists. We even saw a range of interpretations among our panel of expert reviewers. Therefore, we begin by elaborating the definition of various clearance categories from the *UCR*

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Handbook, the official FBI document that offers guidance to law enforcement agencies on how to classify and score (e.g., clear) crimes reported to the UCR. [2]

But first, a few words about the UCR program itself. The Uniform Crime Report (UCR) is a nationwide statistical effort of approximately 17,000 city, county, and state law enforcement agencies that voluntarily report data on reported crimes. The UCR program was originally conceived in 1929 by the International Association of Chiefs of Police to meet a need for reliable, uniform crime statistics for the nation. Then in 1930, the Federal Bureau of Investigations (FBI) took over collecting, publishing, and archiving those statistics. Today, several annual statistical publications are produced on the basis of UCR data, and they are widely disseminated and cited for information about crime in the United States. In fact, UCR data is among the most frequently cited data in media coverage regarding crime in our communities. It is therefore very influential in terms of public opinion as well as policy -- including the evaluation of police response, policies, and procedures, and the allocation of resources within the criminal justice system. (For more information, see http://www.fbi.gov/about-us/cjis/ucr/ucr.)

Index Crimes

Within the UCR program, eight offenses serve as an index for tracking variations in the overall volume and rates of crime. Known as the Crime Index, these offenses include:

1. Murder
2. Forcible Rape
3. Robbery
4. Aggravated Assault
5. Burglary
6. Larceny / Theft
7. Auto Theft
8. Arson

(In this issue of *SAR,* there is an article by Carol Tracy and Terry Fromson of the Women's Law Project describing historic changes to the UCR definition of forcible rape. We do not address that issue in this commentary, although it is also critically important to understanding UCR coding and clearance procedures for sexual assault cases.)

Clearance Categories

Information is collected in the UCR program regarding how many Index Crimes are *completed* or *attempted* each year, as well as how they are *cleared*. The three primary

[2] The current version of the *UCR Handbook* was revised in 2004, and it is available on the FBI's website for the UCR Program: http://www.fbi.gov/about-us/cjis/ucr/additional-ucr-publications/ucr_handbook.pdf.

methods for clearance are (1) "clearance by arrest," (2) "exceptional clearance," and (3) "unfounding."

In their paper, Spohn and Tellis (2011) raise concern that UCR data is typically reported using an aggregated clearance figure, combining cases that are cleared by arrest with those that are cleared by exception. Given the important differences between these two categories, it would seem essential that they be reported separately. After all, categories can always be combined by readers – but they cannot be separated if they are presented in aggregate format. This suggests that UCR reports -- and the resulting media coverage -- may be misleading, because many people assume that clearance rates indicate how many suspects have actually been arrested and charged. There are also a variety of other issues related to this question of aggregated clearance, which we will return to later.

Clearance by Arrest

Within the UCR program, the most widely recognized clearance method is "clearance by arrest," where someone is arrested for completing or attempting the Index Crime, AND that person is charged with the commission of the offense, AND the case is turned over to the court for prosecution (*UCR Handbook*, p. 80). All three criteria must be met for a case to be cleared by arrest, according to UCR guidelines. Confusion arises, however, with the term "charged."

Most people use the term "charged" to refer to decisions made by prosecutors to file charges (i.e., "prosecute") a case. This may be particularly true for felony cases such as those included in the UCR Crime Index (Munch, 2012). However, there is some support for the position that the term is used in the UCR definition to refer to decision making by *police* rather than prosecutors. For example, the following statement was made in a letter sent to Dr. Cassia Spohn, in response to her request for clarification, from Robert Casey, Section Chief of the Law Enforcement Support Section, Criminal Justice Information Services Division, Federal Bureau of Investigation:

> "Whether the prosecutor files a criminal complaint is *irrelevant* to law enforcement's ability to clear the offense by arrest." (emphasis original)

This statement does not appear anywhere in the *UCR Handbook* or on the UCR website. It was apparently offered in an attempt to clarify this point, with information drawn from UCR training instructors (Carnes, 2012).[3] In the same letter, dated January 14, 2011, Mr. Casey then goes on to assert that the following statement is true: "Police perception of prosecutorial action should not dictate arrest posture…" In other words, according to FBI Section Chief Robert Casey, the term "charging" refers to decisions made by police rather than prosecutors. Following this logic, the term is most likely

[3] Nancy E. Carnes serves in Supervisory Management and as a Program Analyst for the Crime Statistics Management Unit for the FBI. She was offered by Robert Casey as the point of contact when consulted about this commentary. Mr. Casey is no longer in the position he was in when he sent the letter to Dr. Cassia Spohn.

used to specifically refer to police booking procedures that are frequently conducted following an arrest.

This makes sense on some level. After all, case clearances are police decisions, so it seems reasonable to argue that they should not depend on the actions of the prosecutor's office. Moreover, law enforcement agencies must of course list the charges against a person whenever they make an arrest. Therefore, this process could be characterized as "charging" by police. However, in the vast majority of arrests where such booking procedures take place, they are not meaningfully distinct from the arrest itself. This observation therefore raises the question of why arrest and charging are listed as separate criteria in the UCR definition. In this interpretation, the two are essentially indistinguishable.[4]

Far more important, this raises the question of what clearance statistics are *supposed to be measuring.* Accepting this argument that "charging" refers to law enforcement, and that prosecutorial decision making is irrelevant for the purpose of police clearance decisions, this decouples UCR clearance statistics from any meaningful case outcome. For example, a case can be cleared by arrest when it is referred for prosecution, but this classification does not tell us whether it was investigated properly or whether it has reached "the end of the road" or not. A case that is cleared by arrest can be rejected by the prosecutor's office, for reasons that have to do with the sufficiency of the investigation as well as a host of other reasons that are outside the control of law enforcement. In addition, the prosecutor can decline to file charges and advise the police to investigate further. However, this classification does not tell us whether police followed the prosecutor's advice and investigated further, so it could be returned to the prosecutor for review -- or if the case was simply shelved as a "DA Reject," still "cleared by arrest." In other words, this clearance ultimately says nothing about how well the case was handled.

Again, we do not mean to suggest that law enforcement personnel should be evaluated or held accountable based on the filing decisions of prosecutors. Case clearance is in fact a police decision, and investigators should be able to "count" their arrests in police statistics regardless of whether or not the cases are prosecuted. The question is therefore how to interpret these numbers. In other words, what do these arrests *mean?*

[4] Spohn and Tellis (2011) provide an explanation based on a historical analysis of the UCR conducted by Feeney (2000). In it, Feeney reportedly argues that the two criterion are listed separately to "distinguish between persons who were arrested and charged with a crime by the police and persons who were arrested and brought to the station as a result of an officer's suspicions that they were involved in the crime" (Spohn & Tellis, 2011, p. 106). Feeney (2000) reportedly notes that "[t]he term 'persons charged by the police' was their way of denoting the more normal kind of arrest'" (p. 15, cited by Spohn & Tellis, 2011, p. 106). The definition and legal requirements for an arrest are very clear, and they are not based on 'an officer's suspicions.' While it is legally justified for law enforcement to temporarily detain a person while conducting a preliminary investigation to determine whether there is probable cause to arrest, as soon as a person is involuntarily transported by law enforcement they are in police custody and under arrest. What Feeney is most likely differentiating in this explanation are those cases where an arrest is made and standard booking procedures are conducted – versus an arrest that is made in the field, but the suspect is released rather than booked into jail, based on the information that is gathered during the preliminary investigation.

All too often, an arrest is seen as the outcome worth measuring – without any regard for what happens to the case after the arrest is made. We have serious concerns about this, as we will elaborate in a later section. However, it is worth noting that an agency's arrest rate will reflect a number of factors -- many of which are irrelevant to the facts of the case. These include both formal policy decisions as well as informal daily practices. As a result, one agency can have a high arrest rate, and another one can have a low arrest rate, but both numbers are meaningless without any indication of how thoroughly the cases were investigated and what happened to them after the arrest was made.

Unfounded Cases

Returning to UCR guidelines, cases should be unfounded if they are determined -- on the basis of an investigation -- to be either *false* or *baseless*. As with the other clearance categories, this definition is also a source of considerable confusion, but it is beyond the scope of this commentary to address. More information on the topic is available in the OnLine Training Institute (OLTI) hosted by End Violence Against Women International (EVAWI), specifically within the module entitled *Clearance Methods for Sexual Assault Cases* (www.evawintl.org).

Exceptional Clearance

For the purpose of this commentary, the crucial definition is exceptional clearance. As summarized in Dr. Rennison's review, UCR guidelines suggest that all four of the following criteria must be met for a case to be properly cleared by exception:

1. The offender is identified.
2. There is enough evidence to support an arrest and referral for prosecution (i.e., probable cause).
3. The offender's location is known.
4. Some factor beyond the control of law enforcement precludes arresting, charging, and prosecuting the offender (*UCR Handbook*, p. 80-81).

It is the fourth criterion that creates most of the confusion with this definition. In the UCR guidelines, examples of the fourth criterion include the death of the offender and the offender's arrest and prosecution in a different jurisdiction. They also include the victim's refusal to cooperate *after* the offender has been identified (*UCR Handbook*, p. 81). The reality is that prosecutors may decline to file charges for a number of reasons that have nothing to do with the facts of the case or the sufficiency of the evidence (Spohn, 2012). In fact, the decision may have nothing to do with the quality of the investigation at all. For example, the reason could be based on logistics (e.g., the suspect cannot be extradited from another jurisdiction) or strategic (e.g., the suspect can be brought back to court for violating conditions of his/her probation rather than prosecuting him/her for a sexual assault).

It is therefore clear that the purpose of exceptional clearance is for police agencies to "count" cases as cleared when they have done their job, but they were prevented by some outside factor from moving forward with an arrest and prosecution. As described by the FBI, exceptional clearance offers a way for police agencies to clear offenses once "they have exhausted all leads and have done everything possible in order to clear a case" (*UCR Handbook*, p. 80). If investigators can establish that they identified and located the offender, and they established sufficient information to support an arrest and referral for prosecution, they can "count" the case as a clearance – but it is cleared by exceptional means rather than arrest.[5]

Yet as with the definition of clearance by arrest, there is some confusion regarding whether a case can be exceptionally cleared based on the decisions made by a prosecutor. As with clearance by arrest, there is some support for the argument that cases can be exceptionally cleared without regard to filing decisions made by prosecutors. In the letter from FBI Section Chief Robert Casey to Dr. Cassia Spohn, he offers the following statement: "The decision by the prosecutor to file charges or not, is not one of the required critical elements that must be met when determining if an offense is cleared exceptionally." Again, this statement does not appear in the *UCR Handbook* or on the UCR website; it was reportedly drawn from guidance offered by UCR training instructors (Carnes, 2012).

This statement implies that the prosecutor's decision *can* be used as the basis for exceptional clearance, but it is not the only possibility; it is not a required criterion. Yet in a subsequent paragraph, Mr. Casey appears to rule out this possibility, by asserting that the following statement is true: "Police perception of prosecutorial action … does [not] qualify a case with probable cause to arrest (but not necessarily proof beyond a reasonable doubt to convict at trial) to be cleared exceptionally." In other words, Mr. Casey asserts that a prosecutor's decision to not file charges cannot be used as the basis for exceptionally clearing a case, as long as the police have established sufficient evidence "to support an arrest, charge, and turning over to the court for prosecution." In further support of this position, Spohn and Tellis (2011) note that the *UCR Handbook* provides ten examples of exceptional clearance, and none of them include a prosecutor's decision not to file charges.

We realize this gets rather complicated to follow; we even find ourselves twisted in the logic, every step we take. Therefore, an illustration may prove helpful. Imagine a situation where a sexual assault has been reported, police have identified and located the suspect, and they have gathered sufficient information to make an arrest and refer the case for prosecution. In some situations, officers will make an arrest first and then

[5]Prosecutor Patti Powers (2012) noted that exceptional clearance is sometimes misinterpreted as suggesting credibility challenges. She also cautioned that prior reports of sexual assault that were exceptionally cleared may be more difficult for prosecutors to introduce as evidence of "other prior misconduct." As Ms. Powers observes: "This is especially important, given what we know to be a high prevalence of repeat offenses in non-stranger sexual assault." As a result, she recommends that police and prosecutors clearly indicate the reasoning for each exceptional clearance, to prevent any connotation of credibility problems with the victim or case.

forward the case for prosecution. If the prosecutor declines to file charges, it seems relatively clear that this case should be cleared by arrest. But what if the officer sends the case to the prosecutor's office for review without making an arrest – and the prosecutor then declines to file charges? In this case, the police could have made an arrest and then forwarded the case for prosecution, so it seems clear that at this point the prosecutor's decision is the "reason outside law enforcement control that precludes arresting, charging, and prosecuting the offender." In fact, this would explain why the definition separately lists "arresting, charging, and prosecuting the offender." Within this interpretation, the case would be cleared by exceptional means.

It is clear that this is how the definition was interpreted by personnel in the two police agencies involved in the research; the most common reason given for exceptional clearance was "a prosecutorial declination to file charges because of insufficient evidence" (Spohn & Tellis, 2011, p. 125). Comments from expert reviewers also suggested that this practice is in place in other agencies as well. As Powers (2012) noted, "A prosecutor could also be involved in determining 'exceptional clearance,' if the prosecutor has been consulted regarding the investigation and determines that it is insufficient."

The second most common basis for exceptional clearance, in the two departments studied is the victim's refusal to cooperate with the prosecution (Spohn & Tellis, 2011, p. 126). Often referred to with the terminology of "victim declines prosecution" (or "VDP"), this is a proper basis for exceptional clearance (according to the *UCR Handbook*), as long a suspect has been identified and there is sufficient evidence to make an arrest and refer the case for prosecution; in other words, all the other criteria have been met. At that point, there is nothing stopping police from making an arrest, except the wishes of the victim and the likelihood of prosecution. It is therefore difficult to explain how this common use of the exceptional clearance mechanism is different from other cases where the prosecutor chooses not to file for other reasons (e.g., the suspect is dead, cannot be extradited). As noted by Powers (2012): "Regarding the fourth criterion for 'exceptional clearance,' some factor beyond the control of law enforcement precludes arresting, charging and prosecuting the offender; it is interesting to note that most of the criterion relates to prosecution."

Spohn and Tellis Research

In their research with two large law enforcement agencies, Spohn and Tellis reportedly uncovered a number of problems with exceptional clearance. Many of these served to artificially inflate the percentage of cases that were cleared by exception. For example, they noted that some cases were improperly cleared by exception when the suspect had not been identified. Clearly, this does not meet the criteria outlined in UCR guidelines, and these cases should not be exceptionally cleared.

Other cases were improperly cleared by exception when an arrest *had* actually been made. In these cases, a person was arrested by police but not charged by prosecutors. This again highlights the confusion surrounding the use of the term "charged."

Nonetheless, we agree with the authors that these cases should have been cleared by arrest rather than exception, according to the UCR guidelines. One of the agencies involved in the study reportedly had a practice of clearing such cases with an arrest initially, but then changing it to exceptional clearance if the prosecutor declined to file charges.

In fact, Spohn and Tellis (2011) found that that one-third to one-half of the sexual assault cases in the two departments they studied had been cleared by exception. As they note, this defies the characterization of this particular clearance category as "exceptional."

Beyond Law Enforcement Control?

The authors appear to be most concerned, however, about the practice of law enforcement personnel clearing a case by exception – when they have sufficient evidence to support an arrest – because a prosecutor has indicated that charges *will not be filed.* The authors argue that this elevates the standard of proof for making an arrest from *probable cause* to the trial sufficiency standard of *beyond a reasonable doubt*, thus ceding arrest decisions from police to prosecutors, and thwarting justice for victims.

Spohn and Tellis also highlight the importance of corroboration as a key factor in prosecutor decision making. Indeed, some form of corroboration is required for charges to be filed by many prosecutors' offices across the country. Regardless of the fact that corroboration was eliminated as a legal requirement, it remains a necessity in practice if not law. This highlights the fact that the evidentiary standard required for prosecutors is higher than it is for police (i.e., prosecutors may realistically need corroborative evidence to file charges, but police do not, in order to make an arrest). Yet the reality is that the decisions made by police and prosecutors are often interdependent; they frequently engage in a process of consultation as a case progresses, with prosecutors advising police regarding the sufficiency of evidence to support an arrest warrant, the timing for filing a case in relation to the timing of the arrest, specific charges to be listed, etc. This consultation can be a very good thing for the effective functioning of our criminal justice system, but it blurs the line between the standard that is required for police to make an arrest versus prosecutors to file charges (Munch, 2012). It also suggests that prosecutor perspectives are often factored into the police decision to exceptionally clear a case, based on the police investigator's understanding of the prosecutor's intention to reject a case.

Spohn and Tellis argue that a prosecutor's charging decision does not preclude law enforcement from making an arrest, and of course technically this is true. Police can make an arrest after a prosecutor has declined to file charges in a case. It is worth asking, however, what would be gained by making such an arrest, because it is clear what can potentially be lost. In this situation, the case is not at all likely to be prosecuted, so the arrestee will be promptly released, and the decision by police to make an arrest after the prosecutor declined to file charges will almost certainly damage the collaborative relationship between police and prosecutors that is needed for them to

work effectively together. As prosecutor Herb Tanner (2012) commented: "I would be mighty unhappy with an officer who, knowing I will not charge a suspect, arrests him anyway." This is especially true if the report was not properly investigated in the first place. It is all too easy for an officer to make an arrest without conducting a proper investigation that will support prosecution, and then send the case over to the prosecutor's office for a decision, knowing that it will be rejected. Dr. Cassia Spohn refers to this process as sending a case to the prosecutor "for a reject."

The question therefore remains whether this is an *accurate* interpretation of UCR guidelines -- but ***far more important*** -- whether it is the ***appropriate*** one. Ultimately, the bottom line should be whether the interests of justice (and sexual assault victims) are served when an arrest is made in every case where law enforcement has probable cause, so the cases can then be cleared by arrest.

To Arrest or Not?

In our opinion, these questions are inextricably linked with the question of how to view an arrest. On the one hand, arrests have traditionally been seen as a measure of "success." We have repeatedly argued that this is not appropriate -- and there are alternative approaches to meaningfully evaluate the performance of law enforcement agencies and personnel (e.g., Archambault, 2004; Lonsway & Archambault, in press). Equally important is the question of what goals are currently being met when an arrest is made, and whether there are alternative ways of meeting those goals without the negative consequences that result when arrests are made prematurely and prosecutors are forced to make charging decisions before a thorough investigation has been completed. We will address each of these issues separately.

Arrest as a Measure of Success

First, it is clear that arrest rates are often used as a measure of "success," by law enforcement personnel and laypeople alike. Yet it can hardly be seen as a success when a suspect is arrested and the case referred for prosecution – but law enforcement failed to conduct the type of thorough investigation needed to support a successful prosecution. As Spohn and Tellis (2011) note, for example, the suspect was only interviewed in less than a third (29.9%) of the sexual assault cases included in their study. It is not clear how often this happened because the suspect invoked his/her right to not talk with law enforcement, and it is unknown what other investigative steps might have been taken in all of the cases (e.g. interviewing witnesses, collecting evidence). However, it raises concern that some of these investigations may have been minimal and thus insufficient to support successful prosecution. When arrests are made prematurely or without sufficient evidence to support successful prosecution, the prosecutor will have to reject the case and the suspect will be released.

Sadly, we know this is a common scenario – in part because it is relatively easy for officers to make an arrest based on probable cause. Once an arrest is made, however, the clock starts ticking. Prosecutors must typically make a charging decision within 24-

72 hours (depending on the jurisdiction), and within that timeframe, it is almost impossible to conduct the type of evidence-based investigation needed to support successful prosecution of a non-stranger sexual assault. As the International Association of Chiefs of Police (IACP) state in the *Concepts and Issues Paper* supporting their *Sexual Assault Investigations Model Policy:*

> "Officers should be discouraged from making an immediate arrest unless there is a reason to believe that the offender may flee the jurisdiction, destroy evidence, or is posing a danger to the victim or other members of the community. This allows the officer time to locate and interview any potential witnesses and to use investigative techniques such as pretext phone calls (where allowed by law)" (IACP, 2005, p. 7).

Not only pretext phone calls, but a wide range of techniques are available for investigators before a suspect has been arrested, including non-custodial interviews and phone interviews. Once the suspect is arrested, however, a Miranda warning must be given before any interview or interrogation is conducted. Legal representation will also be provided once the suspect is arrested and charged by the prosecutor, and most defense attorneys will prevent any future contact with suspects once represented. This can be particularly damaging to the investigation of a non-stranger sexual assault, because these suspects often provide a wealth of valuable information for the prosecution, if they can be interviewed. Unlike suspects in many other kinds of cases, those being investigated for sexual assault are often especially willing to talk to police, either because they truly view themselves as innocent and/or because they believe they can work the system and avoid prosecution.

We also know that victims are typically able to provide only basic information in the immediate aftermath of a sexual assault. When interviewed 24-48 hours later, they will often be able to provide more detailed information in a follow-up interview conducted by investigators. At that point, they will have had a chance to eat, sleep, and receive support, as well as simply taking time to absorb the fact that they have been victimized. This time period is also critical for police investigators as well as survivors. When a report of sexual assault is made, patrol officers are typically responding to a situation of relative chaos. Their primary responsibilities are to assess the situation, address any critical safety needs, and begin gathering information to determine whether the elements of an offense are met. The investigator's job is then to review all the reports and information gathered by patrol officers, fill in the gaps, and clarify anything that appears inconsistent, before analyzing any evidence obtained and submitting the appropriate evidence to the crime laboratory for analysis. Needless to say, all of this follow-up investigation takes time. Moreover, in some jurisdictions there is a requirement that the prosecutor have a face-to-face meeting with all sexual assault victims before making a filing decision in their case. This is the situation in Los Angeles County, where Spohn and Tellis conducted their research. The bottom line is that a significant amount of follow-up and collaborative work is needed before a prosecutor can file criminal charges in a sexual assault case, and it is going to be impossible in

most jurisdictions to do this well, in the short time frame between an arrest and a prosecutor's filing decision.

We thus caution against the common perception that *arrest equals success.* However, even more important is to avoid equating an arrest with *justice.* Where is the justice if an arrest doesn't result in a thorough investigation, let alone successful prosecution?

As we argue elsewhere, case tracking and measures of attrition will only be realistic if they begin at the point a crime is reported to police and end with a formal disposition in the prosecutor's office (Lonsway & Archambault, in press). Just as arrest rates are meaningless without any context of prosecutorial outcomes, so too are conviction rates, if they are calculated from the point where prosecutors have already decided to file charges. Such cases are highly selective, because most of the real attrition has taken place by that point. Therefore, it would seem critical that the UCR program include some tracking of the real-world outcome of sexual assault cases. Either the prosecutor's decision should be incorporated into the police decision to clear a case by arrest versus exception, or an additional tracking mechanism should be added so we can hold police departments and prosecutor's offices accountable for outcomes. In fact, this latter approach may make the most sense, because it separates out the administrative purposes of police clearance from the larger goals of evaluating case outcomes in a meaningful way.

However, tracking cases from police report to prosecutorial disposition is extremely difficult, as we learned firsthand while conducting research in 8 diverse U.S. communities over the period of several years (see http://www.evawintl.org/mad.aspx). Yet this is the only way to track case attrition and outcomes in a truly meaningful way. Such a strategy also revises the current incentive structure, where police "count" every arrest, regardless of the quality of their work or the outcome of the case. Such tracking also serves to hold prosecutors accountable for their filing rates -- within the full context of the crime reports made in a community, rather than the small percentage of cases where prosecutors already made a decision to file charges.

Goals of an Arrest

The second question pertains to the goals of an arrest, and whether there are alternative means of achieving those goals without the negative consequences that would result if an arrest were made every time law enforcement had probable cause to do so.

The most immediate goal of an arrest is to protect the victim and community from further harm, and of course, this is a critically important issue that must be addressed when deciding whether or not to make an arrest. If there does not appear to be an immediate threat to the victim or community, we believe the victim's interests are more likely to be protected with a thorough investigation that can support successful prosecution – rather than a premature or unsupported arrest. If an investigation does not yield sufficient evidence for a prosecutor to file charges, the suspect will simply be "cut loose" and potentially pose an even more significant threat to the safety of the

victim as well as the rest of the community. [This also begs the question of whether the arrest itself can be a deterrent, and if so, in which cases (Munch, 2012).] In this common scenario, the suspect will no doubt assume that the criminal justice system has given him/her a free pass to continue perpetrating acts of sexual violence.

A second goal of an arrest is to ensure that the suspect appears in court. However, cases are routinely sent to the prosecutor's office without an arrest, and a summons or notify warrant may be issued providing the suspect with a date to appear in court. Thus, an arrest is not needed to meet this goal unless the suspect is deemed to be a flight risk; how frequently this is the case (or could be the case) for felony sex offenders would be a question for future debate.

A third goal may not be justifiable with legal theory, but understandable in terms of human behavior. For many law enforcement professionals, they feel a sense of satisfaction arresting the suspect in a sexual assault case. This is particularly true because so few sexual assault cases are successfully prosecuted. In many cases, this is the only meaningful sanction a perpetrator may face. This point is poignantly articulated by a detective quoted by Spohn and Tellis (2011):

> *First, you do the investigation and have a game plan to arrest the guy. If the DA files charges then good, but if not then it [the arrest] is still on his record. A lot of times that is the avenue we have to take because a lot of times you know the DA will not file so if we don't arrest then he is getting off scot free* (p. 112).
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> A fourth reason is also described in a quote, this time by a prosecutor:
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> *[i]f I believe that what they [the detective] present is enough then I will file it. If the suspect is in custody I am more likely to take that chance* (Spohn & Tellis, 2011, p. 113).

In other words, police officers may make an arrest in order to encourage the prosecutor to file charges, even if the message is an implicit one reflecting the presumed judgment of the arresting officer.

Criminal History

Another set of goals relate to the procedures that are conducted following an arrest, many of which can be used to identify -- and potentially prosecute -- repeat perpetrators. For example, when someone is arrested, the arrest will appear in his/her criminal history (i.e., "rap sheet"). Booking also typically includes photographs and fingerprints, but it is worth noting that those can also be easily collected by patrol officers without booking a suspect in jail.

It is important to keep in mind that a rap sheet includes very limited information. Specifically, it documents the date of an arrest, the original charges, and the disposition

of the arrest. It does not document any details about the crime, including the name of the victim(s), or the suspect's behavior and method of operation (M.O.). That information has to be obtained from the crime report and investigative follow up as well as any court documents (if the suspect was prosecuted). In theory, the information collected for the rap sheet is uploaded to the FBI's National Crime Information Center (NCIC), so it can be searched by law enforcement. However, we have heard that this does not always happen, particularly with the recent growth in the number of self-contained jails being operated by large municipal police departments.

DNA Sample

Second, many states have legislation authorizing the collection of a DNA sample at the point of arrest. As with the criminal history, this is essential given the high rate of re-perpetration among sexual assault offenders. Also like the criminal history, this DNA sample is typically collected and documented at the point of police booking. In states with authorizing legislation, the DNA profile developed from this reference sample can be uploaded into CODIS. In others, it may be added to a smaller database that is managed at the local, regional, or statewide level. These smaller databases often produce "hits" that can yield investigation and prosecution at the local level (Tanner, 2012)

Again, however, the question is whether this sample can be taken and the DNA profile archived in the absence of a physical arrest. For this issue, we do have some suggestions. For example, even in states without laws specifically authorizing the collection of DNA samples from arrestees, A DNA sample can be collected from a suspect either with a warrant or consent. Warrants are routinely used to collect evidence as part of an investigation, and suspects are not arrested simply because a warrant was served to search their house, car, or body. In some states like Colorado, certain types of evidence (including a DNA sample) can be collected in some circumstances using a process that requires a standard of proof less than the probable cause standard needed for a warrant (Munch, 2012).[6] However, the easiest route is simply to ask the suspect for consent. Frequently, suspects in a sexual assault case will in fact consent to having a DNA sample collected during the course of an investigation.

Finally, some states have a statute specifically authorizing the collection of a DNA from a person who is arrested for certain offenses. Assuming law enforcement has established probable cause to make an arrest, the suspect in a sexual assault case can therefore be arrested but then released after a DNA sample has been collected. For example, in California, penal code 849(b) states, "Any peace officer may release from custody, instead of taking such person before a magistrate, any person arrested without a warrant whenever he or she is satisfied that there are insufficient grounds for making a criminal complaint against the person arrested. "Arrest and release" is a common

[6] For example, see Rule 41.1, Colorado Rules of Criminal Procedure: Court Order for Nontestimonial Identification.

practice for suspects who are arrested for a felony, but further investigation is needed before a prosecutor can file an accusatory pleading charging the suspect with an offense. Or, in states such as Colorado, the suspect can simply be released after collecting a DNA sample (Munch, 2012). The bottom line is that many of these procedures are seen as dependent upon a physical arrest, but they do not necessarily need to be -- either as a matter of law or common practice.

Arrest Statistics

Of course, another reason to make an arrest is so the police agency can clear the case by arrest, because this has traditionally been viewed as a successful outcome. We hope we have addressed this issue, by challenging the appropriateness of arrest statistics as a measure of success. However, as long as they continue to be viewed in this way, the incentive will remain for law enforcement personnel to make arrests even when they are premature or unsupported with sufficient evidence to support prosecution.

To emphasize this point, it is worth clarifying what the negative consequences would be if every suspect in a sexual assault case were arrested the moment law enforcement established probable cause. Although some prosecutors want to review every sexual assault reported in their jurisdiction, most do not. If all cases were forwarded to the prosecutor's office -- with the (24-72 hour) clock ticking on a filing decision -- this would create an overwhelming workload for prosecutors, with a great deal of time pressure. It would therefore reduce the chances that any of the cases would receive a quality review. Surely this cannot be viewed as a "success," let alone justice for victims. Moreover, this will not solve the problems outlined here -- if it is used as a way to simply "pass the buck" from the police department to the prosecutor's office (Tanner, 2012).

In other words, if cases are not thoroughly investigated, it does not matter on some level whether they hit their dead end in the police department or the prosecutor's office. Justice is not served in either scenario. To meaningfully pursue the goal of successfully investigating and prosecuting sexual assault, cases must be investigated thoroughly, and police and prosecutors must work together collaboratively -- to gather evidence, so cases have a reasonable likelihood of having charges filed.

Of course, we recognize that there is a problem in deciding when that likelihood of prosecution is in fact "reasonable" given our cultural environment that is so steeped in rape myths that jurors fail to convict in sexual assault cases -- even when the law and evidence are incontrovertible. Any seasoned prosecutor can offer examples of cases that essentially constitute jury nullification, where the evidentiary standard is clearly met yet the jury failed to convict – often because they didn't want to "ruin" the defendant's life. As Frohman (1997) observed, prosecutors frequently decide not to file charges in sexual assault cases based on the downstream orientation that juries will not convict. This too must change, and as prosecutors try these difficult cases and collectively shift public perceptions, hopefully they will begin "expanding what is perceived as 'convictable'" (Frohmann, 1997, p. 553).

What Next?

As stated at the outset of this commentary, we certainly do not have the answers, but we are grateful that Spohn and Tellis (2011) have highlighted these critical questions for our field. As a first step, it is clear that we need to engage in meaningful dialogue about the UCR criteria for various clearance categories – not only to come to a common understanding of how they are *actually being interpreted* across the country – but also to forge consensus about how they *should be interpreted*. This may even require *redefining the clearance categories,* so they reflect the realities of contemporary policing, rather than the practices that were in place in the 1930's, when they were originally adopted. As we have seen with the recent change in the definition of forcible rape, the antiquated system of the UCR can in fact be brought in line with current realities and practices. If the FBI can revise the definition of forcible rape that has guided data collection since the 1930's, then anything is possible.

Assuming the goal of the UCR program is to collect meaningful data to inform our communities and to guide policy and practice, it is also clear that the two primary clearance categories should be disaggregated in all UCR reports and publications. As previously stated, this aggregated category (for clearance by arrest as well as exceptional means) makes it difficult to understand the various paths of attrition for sexual assault cases. We also wonder whether this practice of aggregation has discouraged law enforcement agencies from seeking clear and consistent practices for clearing by arrest versus exception. If cases that are cleared by arrest are only going to be combined with those that are cleared by exception, it does not matter on some level which label they are initially given.

The more important step, however, may be to ensure that cases are tracked on the basis of their prosecutorial outcome instead of – or in addition to – arrest. This is not to say that we should hold law enforcement investigators responsible for the decisions of prosecutors. However, we need to recognize that UCR clearance statistics, as they are currently used, do not tell us anything meaningful about what is happening to sexual assault cases being reported in our communities.

Ultimately, there is no meaningful difference, in terms of outcome, between cases that are rejected by prosecutors *with* versus *without* an arrest. Either way, the case is cleared by police and rejected by prosecutors. The only real difference is whether the suspect is booked into jail, especially if we pursue alternative means of accomplishing the other related objectives of an arrest as described in this commentary. The primary issue is therefore not whether a physical arrest is made; the question is whether a proper investigation is conducted and whether the suspect is subject to the associated procedures that take place when an arrest is made. These procedures are arguably critical in the identification – and prosecution -- of repeat perpetrators. But if we are going to argue that they should be conducted every time an officer has established probable cause, then we have to ask ourselves why this does not happen in cases where the victim "declines prosecution." This was the second most common basis for exceptional clearance in the two police departments Spohn and Tellis studied, yet it is

based entirely on factors related to prosecution, not law enforcement's ability to make an arrest. This classification takes into account the victim's stated wishes, but the definition is clearly framed in terms of the effect these wishes will have on potential prosecution (hence the term that is commonly used to describe this category of exceptional clearance: "victim declines prosecution" or "VDP").

Moreover, it is worth keeping in mind that a sexual assault as a felony crime is – in theory -- actually committed against the state, and it is the state that makes the decision regarding prosecution. This concept has very difficult implications for survivors, but it reminds us that the definitions for clearance methods are based on legal theory – not the dynamics of sexual assault victimization.

Conclusion

As we have worked with these issues, to develop this commentary as well as other training materials, we have found them to become increasingly complicated, difficult, and open to multiple interpretations. No matter which thread we pull, the picture continues to unravel into complexity and challenge. Therefore, while we are not at all confident we have the answers, we are convinced that these are the right questions, if we want to move forward with an agenda of improving the investigation and prosecution of sexual assault. We look forward to discussion and debate on each of these points.

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