

The “Justice Gap” for Sexual Assault Cases: Future Directions for Research and Reform

Violence Against Women

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Abstract

Media coverage often reports “good” news about the criminal justice system’s ability to effectively respond to sexual assault, concluding that the past two decades have seen an increase in rape reporting, prosecution, and conviction. The objective of this article is to examine the validity of such conclusions by critically reviewing the strengths and weaknesses of various data sources and comparing the statistics they produce. These statistics include estimates for sexual assault reporting rates and case outcomes in the criminal justice system. We conclude that such pronouncements are not currently supported by statistical evidence, and we outline some directions for future research and reform efforts to make the “good news” a reality in the United States.

Keywords

attrition, prosecution, rape

Media coverage often reports “good” news about the criminal justice system’s ability to effectively respond to sexual assault. To illustrate, an editorial appeared in the *Chicago Tribune* in 2006, pronouncing, “Rape in Decline” (*Chicago Tribune* Editorial, 2006). That same year, the *Washington Post* reported, “The number of rapes per capita in the United States has plunged by more than 85% since the 1970s” (Fahrenthold, 2006). In 2009, *USA Today* trumpeted, “Reported rapes hit 20-year low” (Leinwand, 2009). The article went on to state that “[r]ape prosecutions have improved dramatically over the past two decades.”

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Our objective in this article is to examine the validity of such conclusions by critically reviewing the strengths and weaknesses of various data sources, including estimates for sexual assault reporting rates and criminal justice outcomes. We conclude that such pronouncements are not supported by statistical evidence, and we outline some directions for future research and reform to make the “good news” a reality in the United States.

Are Sexual Assaults More Likely to Be Reported to Police Now Than in the Past?

As illustrated by the aforementioned headlines, media coverage often suggests that rape reporting has increased over the past few decades. In fact, this suggestion is not just offered by the media; the same conclusion is often arrived at in academic writing, such as the article published by the National Institute of Justice, which asked in the title, “Has Rape Reporting Increased Over Time?” (Taylor, 2006). The answer was clearly *yes*. “During the past three decades, women have become more likely to report rapes and attempted rapes—particularly those involving known assailants—to police” (Taylor, 2006, p. 28).

The author based this conclusion on statistics drawn from the National Crime Victimization Survey (NCVS), which is conducted by the Bureau of Justice Statistics (BJS), the statistical arm of the U.S. Department of Justice. Specifically, Baumer, Felson, and Messner (2003) conducted an analysis using NCVS data (and data from the National Crime Survey, which was the precursor to the NCVS). Examining only incidents involving a female victim and one or more male offenders, results suggested that the likelihood of a sexual assault being reported to police increased throughout the period of time from 1973 to 2000. Looking at the past 15 years, the NCVS estimate for the percentage of sexual assaults reported to police was 32% in 1995 (BJS, 2000) and 41.4% in 2008 (the most recent data available; Rand, 2009).

The credibility of these findings is bolstered by the many empirical strengths of the NCVS methodology, including the size and diversity of its sample and its combined methodology of contacting respondents both via telephone and in person. The NCVS is also conducted annually, so data can be compared across time to analyze trends. Yet there are a number of critical limitations to the methodology of the NCVS.

First, there are concerns with the screening questions that the NCVS uses for sexual assault. As described in the *Interviewing Manual* for NCVS Field Representatives published by the U.S. Census Bureau (2003), respondents are first asked the primary screening question: “Has anyone attacked or threatened you in any of these ways?” A number of crimes are then listed, including “any rape, attempted rape, or other type of sexual attack” (pp. B2-48). Clearly, it is problematic to screen respondents by asking if they have been “raped” or “sexually attacked” because many women who have experienced behaviors that meet the legal definition of sexual assault will say “no” when asked if they have been raped. In fact, “research has consistently found that a large percentage of women—typically over 50%—who have experienced vaginal, oral, or anal intercourse against their will label their experience as something other than rape” (Kahn, Jackson, Kully, Badger, & Halvorsen, 2003, p. 233; see also Littleton, Rhatigan, & Axsom, 2007).

For respondents who ask what is meant by any of these terms, the following definition is provided: "Forced sexual intercourse means vaginal, anal or oral penetration by the offender . . . including both psychological coercion as well as physical force" (pp. B3-71-72). If respondents answer "yes" to this question, they are then asked the follow-up question: "Do you mean forced or coerced sexual intercourse?" These questions thus raise a second primary concern, which is that the definition of sexual assault used by the NCVS does not conform to the legal definitions found in state penal codes or with behaviorally based definitions from social scientific research.

These and other concerns with the NCVS methodology have been well documented by others (e.g., Kilpatrick, 2004; Koss, 1996), and they have led the research field to the conclusion, "It is difficult to justify the NCVS's current measurement of rape and sexual assault given the evidence that other screening questions are more sensitive by a large order of magnitude" (Kilpatrick, 2004, p. 1231). Nonetheless, NCVS statistics are often cited as the authoritative source for rape prevalence rates. This is likely due in part to the credibility inferred by the federal government through BJS; the NCVS may thus appear to be the official source of information on the topic of criminal victimization.

Yet NCVS data are not the only source of information on reporting rates for sexual assault. A considerable amount of social scientific research has focused on the accurate measurement of rape-reporting rates through the use of screening questions that are designed to be behaviorally specific, so they do not ask a respondent if they have been raped or sexually assaulted. Rather, each question "describes an incident in graphic language that covers the elements of a criminal offense (e.g., someone 'made you have sexual intercourse by using force or threatening to harm you . . . by intercourse I mean putting a penis in your vagina')" (Fisher, Cullen, & Turner, 2000, p. 5). When this methodology is used to screen respondents for sexual assault victimization, the literature suggests that only about 5% to 20% of victims report the crime to law enforcement (Fisher et al., 2000; Frazier, Candell, Arikian, & Tofteland, 1994; Kilpatrick, Edmunds, & Seymour, 1992; Kilpatrick, Resnick, Ruggiero, Conoscenti, & McCauley, 2007; Tjaden & Thoennes, 2000).

Social scientific research also suggests that the likelihood of reporting rape has increased since the 1970s. To illustrate, Clay-Warner and Burt (2005) analyzed data from the National Violence Against Women Survey (NVAWS) and concluded that a sexual assault committed after 1990 was more likely to be reported than one committed before 1974. Their analysis also suggested, however, that reporting rates have remained essentially unchanged since 1990.

Another way of examining this question is to look at three large-scale studies that were conducted over a span of 15 years with nationally representative samples and comparable methodologies. In 1991, the National Women's Study found that 16% of all sexual assaults were reported to law enforcement (Kilpatrick et al., 1992). The NVAWS was then conducted in 1995, and it produced a slightly higher estimate of 19% (Tjaden & Thoennes, 2000). Finally, a national study conducted in 2005 found a rate of 16% (Kilpatrick et al., 2007); this was identical to the estimate reported almost 15 years earlier in the National Women's Study. This pattern of research findings thus corroborates the conclusion based on NCVS data that the likelihood of reporting a sexual assault increased from the 1960s to the 1990s but has remained stable since that time. However, estimates for the reporting rate

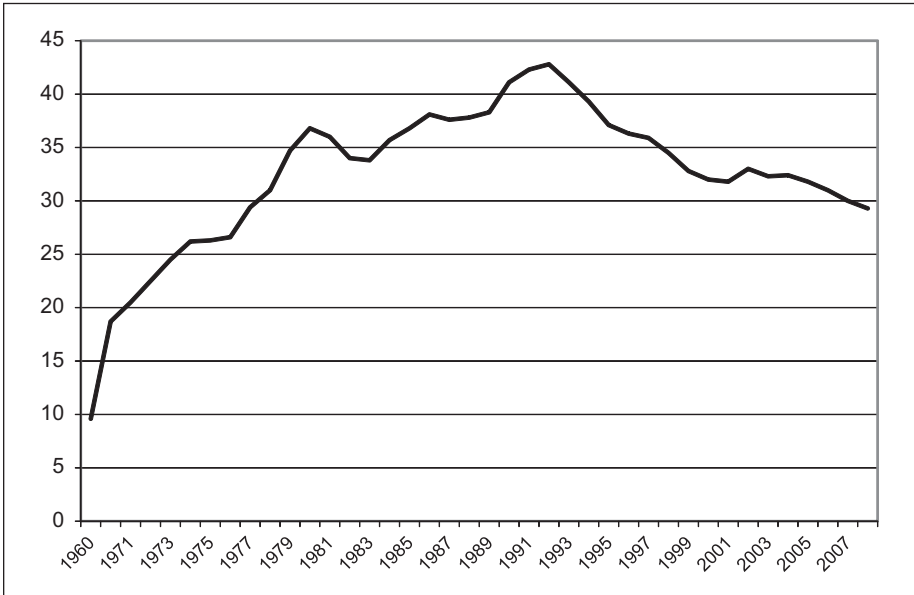


Figure 1. Forcible rapes reported to law enforcement (per 100,000 U.S. inhabitants)

Source: Uniform Crime Report statistics are reported in the *Sourcebook of Criminal Justice Statistics Online* (BJS, 2008b).

are considerably lower in these social scientific studies (16%-19%) than in the NCVS data for the same period (32%-41%). As the methods for sampling and interviewing procedures were designed to be comparable, the different estimates were likely due to the screening questions that were used.

Are More Sexual Assaults Reported to Police Now Than in the Past?

A related question is whether more sexual assaults are now being reported to law enforcement. The primary source of information to answer this question is the Uniform Crime Report (UCR) program, which is operated by the Federal Bureau of Investigation (FBI) and compiles data submitted on a voluntary basis from law enforcement agencies across the country. As illustrated in Figure 1, UCR data suggest that the number of reported forcible rapes per capita did increase dramatically from the 1960s to the 1990s, but then declined to levels that are currently comparable with the late 1970s. Specifically, the UCR's reporting rate increased from 9.6 per 100,000 U.S. inhabitants in 1960 to the peak of 42.8 per 100,000 in 1992. It then declined to 29.3 per 100,000 in 2008, the most recent data available at the time of writing (BJS, 2008b). This figure is almost identical to the rate of 29.4 that was seen in 1977, thereby justifying the conclusion on the UCR website that the rate of forcible rapes in 2008 was "the lowest figure in the last 20 years" (FBI, 2008).

However, there are a number of limitations in the UCR methodology that must be understood to properly interpret these statistics. The primary concern is the extremely narrow definition used for sexual assault. For UCR purposes, data are only collected for the crime of *forcible rape*, which, until 2012, was defined as “carnal knowledge of a female, forcibly and against her will.” Both completed and attempted acts are included in UCR data. However, this definition excludes sexual assaults that are facilitated with drugs or alcohol, that involve other forms of penetration, or that are committed against a victim who is male, unconscious, severely disabled, or below the age of 12. In fact, crimes meeting this definition are likely to represent only a minority of the sexual assaults reported to most law enforcement agencies.¹

There are also a number of organizational factors that limit the quality of information captured in UCR statistics. For example, UCR participation is voluntary for law enforcement agencies, so many do not submit data at all. UCR data, therefore, are not generalizable to the entire United States because they are not representative of all jurisdictions in the country. An additional problem is that law enforcement officers and investigators usually do not receive training in the proper use of UCR definitions and methods. Although officers and investigators are not typically the individuals responsible for the data’s tabulation and submission to the FBI, they are often the ones making important determinations about how to classify reports and how to record clearance decisions. Without consistent training and supervision, there is no assurance that they are using the same definitions and criteria for making UCR clearance decisions. Moreover, there is no requirement that clearance decisions be reviewed by a second person. Without such independent review, there is no way to evaluate the reliability of the information that is submitted. The individual or organizational unit with responsibility for entering the data will vary by agency.

As a result, it is not possible to estimate—based on UCR data—how many sexual assaults have actually been reported to law enforcement. Despite these limitations, UCR statistics are often cited in the media. As with the NCVS, this is likely due in part to the strengths of the data-collection effort, including its large scope and comparability across time (at least for those jurisdictions that consistently participate in the UCR program). It is also likely attributable to the credibility afforded by the FBI’s prominent support of the initiative, which may understandably lead public officials, members of the media, and the public to conclude that the UCR is the authoritative source for information on crime reporting.

Have Arrests Kept Pace With Reports?

According to UCR data, only a fraction of the reports of forcible rape to law enforcement result in arrests. This point is illustrated in Figure 2, which depicts the rate of reports versus arrests for forcible rape, per 100,000 U.S. inhabitants. The same pattern is also seen for all types of violent crime that are tracked by the UCR program; these data are provided in Figure 3.

However, there appears to be a consistently widening gap between the numbers of reports versus arrests for forcible rape, which differs markedly from the pattern seen with

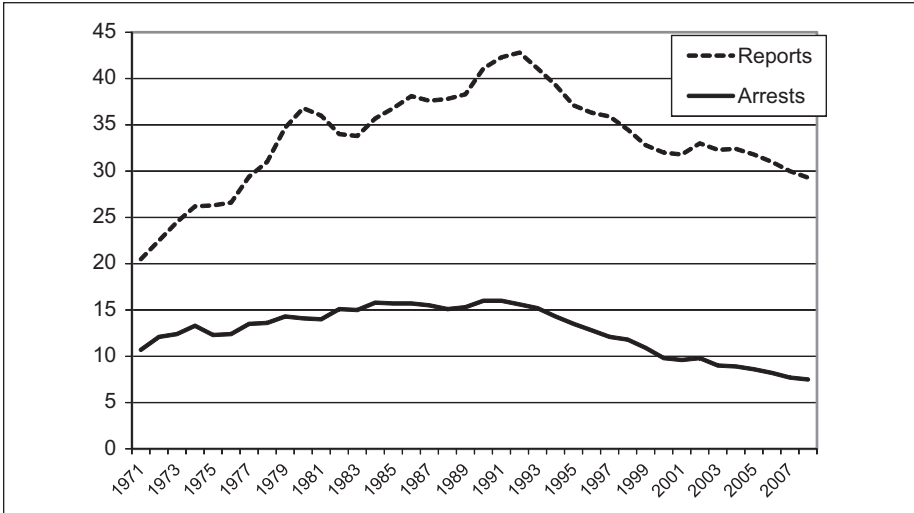


Figure 2. Rate of reports and arrests for forcible rape (per 100,000 U.S. inhabitants)

Source: Uniform Crime Report statistics are reported in the *Sourcebook of Criminal Justice Statistics Online* (BJS, 2008b).

other violent crimes included in this data-collection effort. We computed this ratio across time, simply by dividing the per capita rate of reports for forcible rape by the per capita rate of arrests for forcible rape using UCR data from 1971 to 2008 (the most recent year available at the time of writing). The pattern is visually depicted in Figure 4. As an illustration, the per capita rate for reports of forcible rape in 2008 was 29.3 per 100,000 U.S. inhabitants, and the rate for arrests was 7.5 per 100,000. This comparison of 7.5 and 29.3 translates to a ratio of 1 in 3.9 (or essentially 1 in 4) and computes to the exact percentage of 25.6%.

When this computation was made for forcible rape across time, the ratio of reports to arrests was in the 50% range in the 1970s and decreased steadily to 26% in 2008 (BJS, 2008b). In other words, the statistics suggest that about 1 in 4 forcible rapes reported to police in 2008 resulted in an arrest; the ratio was approximately 1 in 2 throughout the 1970s.²

Yet this pattern of consistent decline in arrest rates was not seen for other types of violent crime tracked by the UCR. In fact, the ratio of arrests to reports for all types of violent crime held remarkably steady in the time period between 1971 and 2008, with a figure of 44% in both of those years and little variation in between. The low was 36% in 1980, and the highs were 48% in 1974 and 47% in 1999. None dip as low as the 26% ratio seen for forcible rape in 2008, which continues to exhibit a consistent downward trend (BJS, 2008b).

Given the previously described problems with the UCR data collection, this pattern may simply be an artifact. It may be caused by differences across time in the sample of participating departments, the definitions and criteria used for making clearance decisions, and/or the procedures implemented by law enforcement agencies to collect data and submit it to the FBI. Clearly, caution is warranted any time conclusions are made on the basis of UCR data. However, there is no evidence for a consistent pattern of change in these

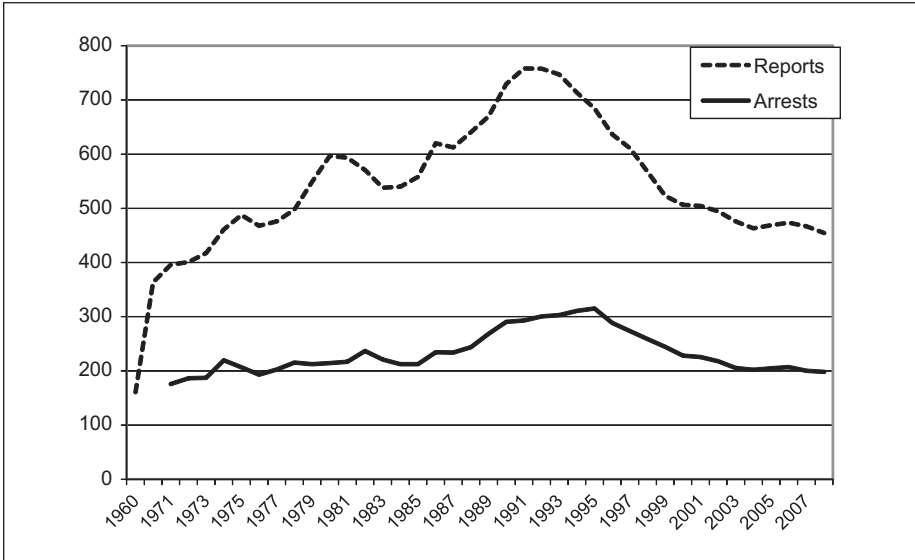


Figure 3. Rate of reports and arrests for all violent crimes (per 100,000 U.S. inhabitants)
 Source: Uniform Crime Report statistics are reported in the *Sourcebook of Criminal Justice Statistics Online* (BJS, 2008b).

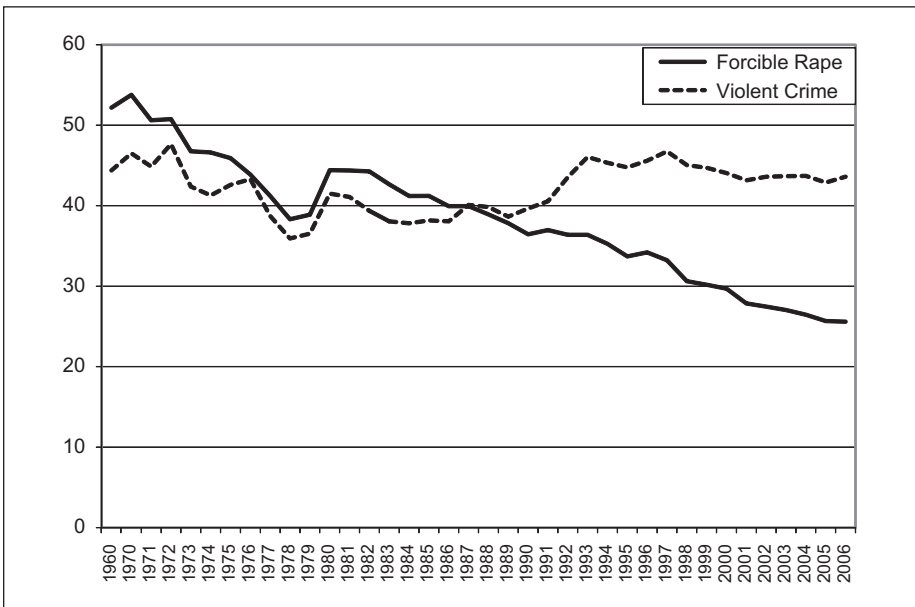


Figure 4. Ratio of arrests to reports: Forcible rape and all violent crimes
 Source: Computations based on Uniform Crime Report statistics, as reported in the *Sourcebook of Criminal Justice Statistics Online* (BJS, 2008b).

methodological factors that would cause a continuous decline in the arrest rates for forcible rape. Therefore, it seems reasonable to speculate about the possible causes of such a pattern across time.

What Explains the Declining Arrest Rate?

There are a number of possible explanations for the declining arrest rates for forcible rape, some of which are based on the observation that fewer sexual assault reports now resemble the cultural stereotype of “real rape.” The evidence suggests, for example, that a higher percentage of reported sexual assaults now involve nonstrangers, as compared with cases reported decades ago (Archambault & Lindsay, 2001; Baumer et al., 2003; Clay-Warner & Burt, 2005). Anecdotal evidence also suggests that reports made now are more likely to be for sexual assaults that are committed against a victim who is incapacitated, severely disabled, or otherwise unable to consent, as well as those from specific vulnerable populations.

At the same time, research documents that an arrest is more likely to be made in cases of sexual assault that resemble the most prominent cultural stereotype of this crime—namely, assaults that are committed by a stranger to the victim, involve a weapon, and result in physical injury of the victim (e.g., Bouffard, 2000; Jordan, 2002). This pattern is at least partly attributable to the widely held cultural perceptions of sexual assault. As documented with a substantial body of research, police officers and other members of society are frequently skeptical of reports that do not resemble the aforementioned stereotypical image (e.g., Campbell, 1995; Frazier & Haney, 1996; Kerstetter, 1990; Lonsway & Fitzgerald, 1994). This may be particularly true when the sexual assault involves factors that may cause others to see the victim as culpable, such as drug/alcohol use or involvement in other high-risk behaviors.

The research literature thus supports the conclusion that fewer sexual assault reports now resemble the stereotype of “real rape” and that these reports are less likely to result in an arrest. This conclusion is consistent with the statistical evidence demonstrating that the ratio of arrests to reports of forcible rape has declined consistently over the past few decades. Social scientific research has not generally explored the question of *why* this might be the case. However, anecdotal information provided by practitioners in the fields of law enforcement and victim advocacy may assist in the generation of hypotheses about the causes of this phenomenon.

For example, it is possible that a decreasing percentage of cases are being formally documented with a police report. Although this would not affect documented patterns of case attrition within the criminal justice system, victims would likely be surprised to learn that the information they provided was never formally recorded in a written report. This does not contribute to a climate that encourages victims of sexual assault to report the crime to law enforcement. It is also possible that fewer reports are now being coded as a crime and/or thoroughly investigated. This would mean that a greater number of sexual assaults—that were initially reported to law enforcement by the victim or someone else—would not show up in any written records. Alternatively, they might be coded with a non-criminal code (e.g., “call for service”). In either case, the report would not show up in any

formal statistics reported by the law enforcement agency. If there were systematic differences in the type of reports that moved forward, with more “difficult” cases disappearing from the process in these ways, it could certainly influence the arrest rate.

However, it is possible that a greater number of sexual assaults could be unfounded as a false or baseless report. This could be particularly concerning if the determination was made prematurely, without conducting a thorough, evidence-based investigation. Again, these reports would be excluded from any official statistics on forcible rape submitted by the law enforcement agency to the UCR program or reported in the media.

There is also the possibility that a decreasing percentage of cases are being formally referred to the prosecutor’s office, with more cases presented informally to prosecutors by law enforcement investigators. Cases could thus be rejected on the basis of a single conversation, and these referrals may not be counted in any formal statistics because no arrest was made; this makes it very difficult to document or test the idea with empirical research.

Another possibility is that more cases are being cleared by exception because there is sufficient evidence to make an arrest, but the victim is unable to participate in the criminal justice process. Research suggests that the most common reason given by law enforcement for not pursuing sexual assault cases is because the victim is unwilling or unable to participate in the investigation (e.g., Frazier & Haney, 1996; Office of the City Auditor, 2007). Anecdotal information from law enforcement sources suggests that this situation may be more likely to arise when the victim and suspect know each other. Again, this hypothesis is impossible to test with published UCR data on clearance categories because they are not separated out by arrest versus exception. However, it suggests that cultural attitudes may not be the only explanation for the declining arrest rate. Rather, the decreasing likelihood of arrest may also partly reflect the wishes of victims in these cases. As nonstranger sexual assaults are more frequently reported to police, the result could be a decrease in arrest rates and an increase in other case outcomes such as exceptional clearance. However, this may not necessarily be a bad thing in a victim-centered, community response system.

Are Arrest Rates a Meaningful Indicator of Success?

It is not currently possible to determine whether the declining arrest rate (if it exists) is a good or bad thing. However, it is worth noting that the declining arrest rate may not necessarily be a bad thing if it indicates an increased willingness among law enforcement investigators to take the time to conduct a thorough, evidence-based investigation, rather than rushing to make an arrest and clear the case. For UCR purposes, a report can be cleared with an arrest if at least one suspect is arrested and the case is referred for prosecution. However, just because a case is referred for prosecution does not mean that charges are actually filed. If there is insufficient evidence—because the law enforcement investigation was inadequate—the prosecutor will not file charges and the suspect will simply be released. This can hardly be seen as a “success.”

In fact, anecdotal reports from the field suggest that arrests are often made by law enforcement without conducting the type of thorough investigation that is needed to produce sufficient evidence for successful prosecution. This is because it is relatively easy for

officers to make an arrest based on a preliminary investigation of a sexual assault; the evidence only needs to support the legal standard of *probable cause*. Once this type of a field arrest is made, however, the prosecutor must typically appear in court and charge the defendant within 24 to 72 hr (depending on the jurisdiction). Yet it is almost impossible to conduct the kind of evidence-based investigation that is necessary to support successful prosecution within such a short time frame. Most sexual assault investigations will actually take weeks, if not months, to complete, depending on the course of the investigation and the laboratory work that is requested. By waiting to make an arrest of the suspect(s), law enforcement investigators can often gather the type of evidence that will meet the higher standard of proof that is needed for successful prosecution—*proof beyond a reasonable doubt*—rather than just establishing probable cause.

For this reason, arrest rates are not necessarily a good measure of success, although they are often used in this way. Rather, we argue that law enforcement performance should be evaluated based on the quality of the investigations that are conducted, regardless of outcome. Specific recommendations are offered in a later section on alternative measures of success.

How Many Reports Result in Conviction and Incarceration?

Returning to the research literature, many have asked what percentage of sexual assault reports eventually lead to a conviction or incarceration. One source of information is the Offender-Based Transaction Statistics, which were compiled by BJS from 1979 to 1990. In 1990, the data suggested that approximately 80% of those arrested for rape were prosecuted.³ An estimated 50% of those arrested and prosecuted for rape were then convicted of a felony, and 8% were convicted of a misdemeanor. In contrast, 36% of those arrested and prosecuted for rape saw their case dismissed by the courts, 3% were acquitted, and 1% received a judgment other than a conviction or acquittal. This rate of felony conviction for rape was higher than for all violent offenses, which was 38% (Perez, 1994).⁴

These estimates generally converge with the State Court Processing Statistics, which were compiled biennially between 1988 and 2004 for felony defendants in the 75 largest counties in the United States. In 2004, the most recent data available at the time of writing suggested that a total of 54% of those charged with rape were convicted of a felony and 8% of a misdemeanor. This is quite similar to the figure for all violent crimes; the 2004 data suggested that 52% of all felony defendants charged with a violent offense were convicted of a felony and 9% of a misdemeanor (BJS, 2008a).⁵

Official data thus suggest that approximately half of those arrested and prosecuted for rape will be convicted on a felony charge (although not necessarily rape). They also suggest that once an individual is convicted of rape, incarceration is almost inevitable. The Offender-Based Transaction Statistics from 1990 indicated that 95% of those convicted of rape were incarcerated (76% in prison and 19% in jail). An identical figure of 95% was seen in the 2004 State Court Processing Statistics for the percentage of defendants convicted of rape who received a sentence of incarceration (65% in prison and 30% in jail). When this is compared with the overall category of violent offenses, it appears that rape

convictions were more likely to lead to incarceration, and incarceration was more likely to be in prison and less likely to be in jail. Specifically, 83% of defendants convicted of a violent offense were sentenced to incarceration (47% prison and 36% jail; BJS, 2008a).

Yet the key to understanding the statistics lies in the *denominator* of the equations used to compute them. The statistics cited here were computed based on the number of felony defendants who were arrested *and prosecuted* for rape. The statistics may therefore be misleading because so many reports are screened out before an arrest is made or charges filed.

Critique of Prosecution Statistics

Common sense suggests that studies of case attrition within the criminal justice system must begin with a report and end with a conviction or other formal disposition. Conviction rates are meaningless if they are computed based on a starting point where most of the attrition has already taken place. In fact, this method of calculating conviction rates creates a perverse incentive for law enforcement agencies to filter out all but the “strongest” cases—so prosecutors can achieve the high conviction rates that serve as their primary measure of performance. It also fuels practices such as the informal referrals described earlier, with prosecutors rejecting cases presented verbally by investigators without necessarily having to account for these decisions in any formal statistics. A more realistic measure of conviction rates would include in the denominator of the equation *all reports of sexual assaults received by law enforcement*—including those that did not result in an arrest or referral for prosecution (e.g., those that were unfounded or exceptionally cleared). This information is currently only available in social scientific research or from individual agencies, and it suggests (contrary to the “official” data) that only a very small percentage of sexual assault reports eventually result in a conviction.

Other concerns stem from the type of cases that are included in the federal data. The 1990 report for the Offender-Based Transaction Statistics states that “the OBTS standards use the FBI’s National Crime Information Center (NCIC) offense codes” (Perez, 1994, p. 9). As the NCIC codes cover a broad range of crimes, this strategy could potentially avoid problems such as the extremely narrow definition of forcible rape that is used for UCR purposes. However, at least the text of the report does not clarify which types of sexual assault are included versus excluded using the NCIC codes. The definition used for the State Court Processing Statistics is more clearly stated. The definition of rape reportedly included “forcible intercourse, sodomy, or penetration with a foreign object” (Reaves & Smith, 1995, p. 38). However, it did not include “statutory rape or nonforcible acts with a minor or someone unable to give legal consent, nonviolent sexual offenses, or commercialized sex offenses” (Reaves & Smith, 1995, p. 38). Thus, the data set excluded some sexual assault cases that are relatively more likely to result in conviction (e.g., statutory rape and other sexual offenses involving minor victims). However, it also excluded some types of sexual assault that are commonly reported to law enforcement yet rarely result in successful prosecution (e.g., sexual assaults committed against an incapacitated victim or someone who is unable to consent due to alcohol/drug use or severe disability). To that extent, the overall conviction rates obscure the high rates of attrition that are seen for certain types of sexual assault (e.g., those where a consent defense is available).

These issues are perhaps illustrated best with an excellent report that was published in 2007, describing the results of a study of sexual assaults reported to Alaska State Troopers in 2003-2004 (Postle, Rosay, Wood, & TePas, 2007). Similar to the federal data sources described above, these authors reported that 80% of the cases “accepted” by prosecutors resulted in a conviction. Unlike the federal sources of information, however, the authors also calculated the conviction rate based on the total number of reports received, which was only 22%. Clearly, this is a more realistic measure of case attrition because it includes those cases that resulted in an arrest or referral for prosecution, as well as those that were closed using other means (e.g., declined, exceptionally cleared, closed by investigation, or unfounded). Yet this rate would likely decrease even further if it were computed separately for victims who were children versus adolescents or adults. Like other studies of attrition, this report did not separate out prosecution rates for these two groups, which likely had very different case outcomes. The findings also may not be generalizable to the rest of the United States, given the unique characteristics of the state.

Estimates From Social Science Research

Limited prosecution statistics are available from disparate sources within federal and state governments, but the information must be supplemented with research conducted independently by social scientists. As reviewed by Campbell (2005), data collected from a wide range of sources “have generated replicated, triangulated findings” (p. 56) suggesting that 7% to 27% of the sexual assaults that are initially reported to law enforcement eventually result in charges being filed, and of these reports, only 3% to 26% yield some type of conviction (also see Koss, 2006). The 22% estimate from the Alaska study is consistent with this conclusion, as it falls within the 3%-to-26% range. To that extent, data from such research provides the missing context that is needed to understand state prosecution statistics compiled by the federal government. Although federal statistics estimate that more than half of those arrested or charged with rape will be convicted, social scientific research clarifies the fact that attrition has already claimed at least half—and probably considerably more than half—of the sexual assaults that were originally reported to law enforcement.

The Full Picture of Attrition

To provide the full picture of attrition for sexual assault cases (i.e., those that “fall out” of the criminal justice system at various points before or after charges are filed), it is necessary to put together the various sources of information that were reviewed so far. (As the individual sources were cited previously in the article, they are not repeated here.) First, there is the social scientific research suggesting that about 5% to 20% of all rapes are reported to law enforcement, 7% to 27% of these reports are prosecuted, and 3% to 26% yield a conviction. Then, there is the most recent federal data from the 2004 State Court Processing Statistics, which suggest that 62% of all defendants who are arrested and prosecuted for rape will be convicted, with 54% of these convictions for a felony and 8% for

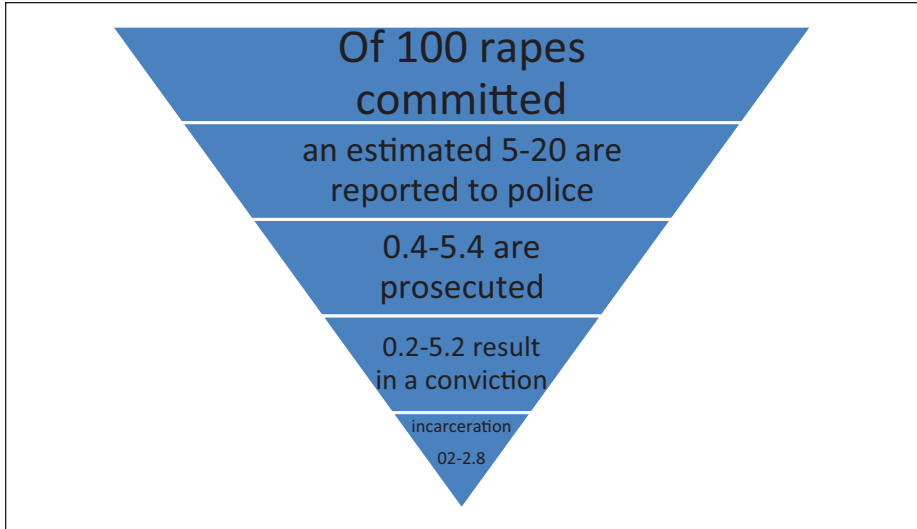


Figure 5. Visual schematic for attrition of rape cases in the criminal justice system

Note: This visual schematic is based on research summarized in the article, estimating that 5% to 20% of all forcible rapes are reported to law enforcement; of these reports, 7% to 27% are prosecuted and 3% to 26% yield a conviction. The 2004 State Court Processing Statistics then suggest that 62% of all defendants who are arrested and prosecuted for rape will be convicted; of these, 95% will be sentenced with incarceration (BJS, 2008a). The National Violence Against Women Survey (Tjaden & Thoennes, 2006) revealed that 17.6% of female and 3% of male respondents were raped at some time in their lives. Based on U.S. Census data, this translates to 17.7 million women and 2.8 million American men (Tjaden & Thoennes, 2006, p. 7).

a misdemeanor. Of these convictions, the data suggest that 95% will ultimately lead to a sentence of incarceration, with 65% in prison and 30% in jail.

To translate this to an illustrative computation, we have combined these estimates in a visual representation in Figure 5, using the upper bound of the range of estimates for each stage of attrition. The starting point is the commission of a forcible rape, and the funnel of attrition is demonstrated through the stages of reporting, conviction, and a sentence of incarceration. In other words, of 100 forcible rapes that are committed, approximately 5 to 20 will be reported, 0.4 to 5.4 will be prosecuted, and 0.2 to 5.2 will result in a conviction. Only 0.2 to 2.9 will yield a felony conviction. Then an estimated 0.2 to 2.8 will result in incarceration of the perpetrator, with 0.1 to 1.9 in prison and 0.1 to 0.9 in jail.

Of course, it is important to keep in mind that the definition of rape differs for many of these data sources, and most focus exclusively on forcible rape (excluding other types of sexual assault). However, even with the considerable margin of error that is inevitable when estimating such a computation based on different data sources, it is clear that only a very small minority of sexual assault cases end in a prosecution, conviction, and a sentence of incarceration.

Have Prosecution Rates Increased?

In 1993, the Senate Judiciary Committee published a report reviewing criminal justice outcomes for crimes of violence against women. In that report, they conducted a very similar computation to the one we offer here, based on the data sources that existed at the time. As a result of this analysis, they concluded that only 1.9% of all sexual assaults ultimately resulted in a sentence of imprisonment for the perpetrator (Senate Judiciary Committee, 1993). There were a number of important limitations of the study, many of which similarly influence the current enterprise. For example, the study used data from a number of different sources (as we do here), which means there are concerns stemming from differences in the definitions used for sexual assault, the criteria for including versus excluding cases in the sample, the methodology for recording and analyzing data, and any protections for data accuracy and reliability. In other words, interpreting the findings requires quite a few assumptions—and a healthy dose of faith.

The title of that report was “The Response to Rape: Detours on the Road to Equal Justice.” Sadly, there is every reason to believe that the same title is equally relevant today. Federal data sources suggest that there is little or no change in the rate of prosecution, conviction, and incarceration for rape in the past two decades. For example, there are the most recent State Court Processing Statistics from 2004 suggesting that 54% of those charged with rape were convicted of a felony (BJS, 2008a). When this is compared with data from 12 years earlier, the figure for rape was identical (Reaves & Smith, 1995). Similarly, social scientific research yields no evidence that the legislative reforms have significantly increased the rates of reporting, charging, prosecution, and conviction for sexual assault (e.g., Horney & Spohn, 1990; Matoesian, 1993). Moreover, when Koss conducted the same type of computation in 2006 that the Senate Judiciary Committee did in 1993, using data from the National Violence Against Women Survey (Tjaden & Thoennes, 2000), the results suggested that only 0.35% of the rapes committed against female respondents were reported, prosecuted, and resulted in a sentence of incarceration. The decrease from 1.9% to 0.35% may not be sufficient to argue that prosecution rates have declined over the past 30 years, but it certainly challenges any suggestion that they have increased.

In fact, research suggests, “In virtually all countries where major studies have been published, the number of reported rape offences has grown over the last two decades, yet the number of prosecutions has failed to increase proportionately, resulting in a falling conviction rate” (Lovett & Kelly, 2009, p. 5). This pattern has not generally been reported in the American media, but it has been reported in other countries. In the United Kingdom, for example, the media reported on research findings by the British Home Office, indicating that only “5.7 percent of rapes officially recorded by police in England and Wales end in a conviction” (Jordan, 2008, p. A01). In Scotland, the rate was 6%, and these figures were described as the lowest conviction rates for rape in Europe (“Rape Ruling,” 2004). Reporters and researchers have thus decried the fact that these high rates of attrition appear to be increasing, in a pattern that is described as a widening “justice gap.” As Temkin and Krahe (2008) concluded, “To say that convictions have not kept pace with the number of recorded rapes would appear to be a massive understatement” (p. 20).

Reasons for the Pattern of Attrition

Many experts have concluded that the primary reason the legislative reforms have failed to produce changes in criminal justice outcomes is because the laws have changed but attitudes have not (e.g., Seidman & Vickers, 2005; Temkin & Krahe, 2008). However, other factors also come into play. For example, we have already described evidence suggesting that more sexual assault cases being reported to law enforcement diverge from the cultural stereotype of a “real rape.” These changes could be the positive result of legislative and cultural reform. Yet research demonstrates that such cases of sexual assault are less likely to result in a conviction (e.g., Bouffard, 2000; Bryden & Lengnick, 1997; Campbell, Wasco, Ahrens, Sefl, & Barnes, 2001; Frazier et al., 1994; Kingsnorth, MacIntosh, & Wentworth, 1999; Spears & Spohn, 1997; Spohn, Beichner, Davis-Frenzel, & Holleran, 2002).

As Koss (2000) notes, this does not necessarily mean that prosecutors personally believe in the stereotypic beliefs and attitudes surrounding sexual assault. “Although prosecutors may personally reject the appropriateness of these grounds, they feel themselves positioned downstream of jurors, so they nevertheless incorporate these factors into decision making” (p. 1334). The same type of “downstream orientation” also likely influences police officers and even victims, leading to the patterns of reporting and attrition reviewed here.

Additional factors were described by a sample of British judges and barristers who were quoted by Temkin and Krahe (2008). In their interviews, they described a number of significant problems from their perspective, including poor evidence gathering by police (especially victim interviews), intimidating defense tactics, incompetent prosecutors, and inappropriate decision making by jurors. This last factor is particularly enlightening; at least one judge suggested that jurors were simply unable to accept that the events they heard described in witness testimony could actually take place, especially between people who know each other. Others suggested that jurors have difficulty convicting because the penalties for sexual assault are too high. The authors note that this suggestion is supported with research indicating that mock jurors are more likely to convict in a sexual assault case if the defendant will be given a shorter sentence (Temkin & Krahe, 2008).

Yet despite their recognition of these factors, most of the judges and barristers were reportedly unwilling to accept the notion of a justice gap for sexual assault cases. At least one dismissed the idea as “nonsense” (p. 139). Instead, many blamed the high rate of attrition on a lowering of the standards for prosecution and/or the presence of women on the jury. The authors concluded that this attitude poses a significant barrier to improvement: “If the justice gap is to be reduced, it does require an acceptance among all key players of its reality” (Temkin & Krahe, 2008, p. 141).

Future Research Directions

Clearly, research is needed to document the full picture of attrition for sexual assault cases, with measures of reporting, charging, and conviction that are realistic. This may be one of the most important priorities for research in the field. However, work is also needed to

better understand why such a high rate of attrition persists and how we can reduce it. As a wider range of sexual assault crimes are reported than in the past, it is reasonable to expect that attrition might increase for a period of time. Although efforts during the “first wave” of rape reform were successful in changing laws (e.g., enacting rape shield laws and eliminating marital rape exceptions, evidentiary corroboration requirements, and cautionary instructions), a primary challenge for the “second wave” of reform is to develop and evaluate best practices for successfully investigating and prosecuting these challenging cases (Seidman & Vickers, 2005).

Alternative Measures of Success

As previously noted, arrest rates are meaningless if they are made without conducting the type of investigation that is likely to support successful prosecution. It is therefore important for future research to incorporate more meaningful indicators of success, including the total number of reported sexual assaults and the percentage of reports that are referred for prosecution and/or result in a charge or conviction. Yet case outcomes are not the only measure of success within the criminal justice system. Another indicator may be found with evidence that more police officers are conducting thorough, evidence-based investigations, regardless of the potential case outcome. This could be evaluated by determining whether officers are taking specific investigative steps, such as interviewing the victim, suspect, and witnesses; collecting evidence from the victim’s/suspect’s body/clothing; and collecting evidence from the crime scene(s). Another indicator of success could be establishing methods of accountability within law enforcement agencies for every sexual assault incident that is reported to them. This accountability could be assessed by determining whether all sexual assault reports are documented with a written report and investigated to the fullest extent possible.

Success in this context also means that officers are not unounding cases based on faulty methods or reasoning, such as relying solely on the victim’s initial statement or a cursory preliminary investigation. In fact, any evaluation of success should include some effort to determine whether sexual assault cases are being properly cleared using the UCR criteria. This is important because the clearance categories of unfounded and exceptionally cleared are too often used as a “dumping ground” for sexual assault cases that are viewed as dubious or difficult to investigate.

According to UCR guidelines, a crime report can be unfounded if it is determined on the basis of investigative findings to be either false or baseless. A report can only be determined to be *false* on the basis of evidence that the crime was not committed or attempted. Thus, a crime report cannot be unfounded if no investigation was conducted or if the investigation failed to prove that the crime occurred; this would be considered inconclusive or an unsubstantiated investigation (which is not a UCR category).

However, crime reports can be determined to be *baseless* if they do not meet the elements of the offense or if they were improperly coded as a sexual assault in the first place. For example, individuals sometimes report sexual acts to law enforcement that are unwanted but do not meet the elements of a sexual assault offense. One illustration would be an adult

who reports to police that they felt pressured into sexual contact, but the coercion did not meet the criteria for a forcible sexual assault. If recorded in a formal crime report, this case should be cleared as unfounded because it is baseless. If the report was not recorded in a crime report, the agency would most likely file the report as informational only.

For evaluation purposes, case files for unfounded reports could thus be reviewed to determine whether the decision was made prematurely, or if it was based on evidence from a meaningful investigation. Another measure of success could be achieved by tracking unfounded cases to determine whether they were cleared this way because they were false *versus* baseless.

Similarly, sexual assault cases that are *exceptionally cleared* could be reviewed to determine whether they meet the proper UCR criteria. This requires that the case have sufficient evidence to support an arrest and referral for prosecution, but an arrest is precluded by some factor outside law enforcement control (e.g., the victim declines prosecution). All too often, cases are exceptionally cleared because victims are reluctant to participate during the preliminary investigation and/or cannot be located for any follow-up investigation. However, this is not a sufficient basis for the case to be exceptionally cleared unless there is evidence that would otherwise be sufficient to support an arrest and referral for prosecution. These cases cannot properly be exceptionally cleared; they should remain open but inactivated. By reviewing case files, it would be possible to determine whether these UCR clearance decisions were made appropriately.

Specific Investigative Steps

Another future research objective could be to explore the role that specific investigative steps play in predicting case outcomes. For example, some of the decisions made by law enforcement explicitly determine case outcomes (e.g., the decision to unfound the case). However, other decisions are made as a result of process. For instance, a deliberate decision is made in many cases to *not* conduct any follow-up interview with the victim, *not* interview the suspect or any witnesses, and *not* seek to collect any other kind of evidence beyond the preliminary victim interview. In these cases, it is virtually impossible for the case to move forward for successful prosecution, so the range of outcomes is narrowed to unbounding, exceptional clearance, or inactivation. This decision would likely be justified based on the lack of evidence to support prosecution. However, this justification may mask the actual reasons for not investigating the case. Any future research evaluating the impact of various factors on case outcomes should therefore take into account the moderating influence of process variables, such as the specific investigative steps taken by law enforcement.

Research on Juror Decision Making

No review of the criminal justice response to sexual assault should conclude without mentioning the need for better research on juror decision making. The few studies on this subject that do exist are mostly outdated and often focus on rape trauma syndrome.

However, many experts caution against using this terminology and framework and instead recommend providing more general expert testimony that simply describes common behaviors and reactions of sexual assault victims (Boeschen, Sales, & Koss, 1998; Stefan, 1994; Torrey, 1995).

A notable exception is the recent work of Ellison and Munro (2009), which involved presenting a series of mini-trial scenarios to mock jurors and varied complainant demeanor, time of report, and physical injury. The researchers also varied whether mock jurors received educational guidance on the topic of sexual assault victimization; they found that educational guidance appeared to increase mock jurors' understanding of the dynamics of victim demeanor and delayed reporting. However, it appeared to have little impact on beliefs regarding victim injury and physical resistance. The authors concluded that such educational guidance in rape trials "represents a pragmatic, defensible and efficient means of redressing at least some of the unfounded assumptions and attitudinal biases that prevent too many victims of sexual assault from accessing justice" (Ellison & Munro, 2009, p. 379).

As so little is known about how to influence juror decision making, investigators and prosecutors can only speculate about the impact of various types of evidence, testimony, and arguments on the likelihood of conviction. Fortunately, some particularly promising directions for future research have been outlined by Temkin and Krahé (2008). These authors reviewed social scientific research indicating that people are more likely to attribute responsibility to someone for an event (such as a rape) when they (a) know more about that person as compared with the other party; (b) generate alternative courses of action that the person could have taken; and (c) know the outcome of the event in advance. To illustrate, Rempala and Bernieri (2005) conducted a study in which irrelevant biographical information (e.g., college major or city of residence) was provided to research participants about the complainant versus the defendant in a rape case.

When biographical information was provided about the complainant, but not the defendant, just over half the participants found the alleged defendant guilty. In contrast, when biographical information was provided about the defendant, but not the complainant, 90% of participants found the defendant guilty. (p. 49)

The implications for sexual assault trials are interesting, suggesting that the victim may be the more obvious target for culpability at least in part when more detailed information is provided about the victim rather than the suspect. It is therefore possible that investigators could be taught to provide information with the same level of detail regarding the *suspect* in a sexual assault case. This would include information about how the suspect targeted the victim on the basis of vulnerability characteristics, whether the suspect provided the victim with drugs and/or alcohol, and how the suspect used specific techniques to "groom" the victim. The need for such information may be particularly critical because the suspect is not required to testify at trial—and typically will not—whereas sexual assault trials virtually always involve detailed testimony by the victim. This provocative suggestion can be explored in future research.

Some might argue that research on juror decision making should not necessarily be a high priority for future research because such a small percentage of sexual assault cases end up going to trial. However, we believe that the existence of the downstream orientation within the criminal justice system undermines this argument. If prosecutors do not believe they can persuade jurors to convict in a sexual assault case, they may charge and try fewer cases. Then as law enforcement investigators see that fewer cases are being charged and tried, they may forward fewer cases to the prosecutor's office. Finally, as fewer cases proceed through the stages of investigation and prosecution, victims may be less likely to report their sexual assault to law enforcement. Therefore, any change that is targeted at the final point in the attrition process has the potential to push for reforms all the way "upstream," even to the point of victim reporting.

Clearly, tension exists between the pressure to win cases and the need to hold offenders accountable. Research and reform efforts may therefore be needed to reformulate the perceived "convictability standard," so prosecutors file charges in a broader range of sexual assault cases. Although the short-term result of such an effort may be a decrease in convictions, it is possible that the longer term legacy would be a reduction in the justice gap for sexual assault cases. "If prosecutors dealt with actual juries to prosecute more of these cases, they might learn how to win the cases, hence expanding what is perceived as 'convictable'" (Frohmann, 1997, p. 553).

Restorative Justice

Another direction for future research within the criminal justice system is to implement and evaluate programs for restorative justice. Although such programs are often viewed as controversial, we believe questions about their efficacy, fairness, and impact on victims are ultimately empirical and deserve to be tested with rigorous social scientific research. One example is the research conducted by Koss (2006), which demonstrated positive changes in increased offender responsibility and heightened empathy for the victim using qualitative methods. This evaluation effort is ongoing, and future work will be used to determine whether there is any positive impact in victim outcomes such as increased satisfaction, reduced distress, and increased perceptions of fairness and control of the offender sanctions.

Success Outside the Criminal Justice System

Although most of the attention so far has focused on success in terms of criminal justice outcomes, future evaluation research could also incorporate alternative measures of success *outside* the criminal justice system. For many sexual assault cases, successful prosecution is not possible, so it is important to widen our definition of what constitutes success. At least equally important is the ability of a community to determine in a coordinated way which services are most needed by victims and to assist victims in accessing those services.

For example, many adults and adolescents fall through the cracks of existing community services. This includes individuals who have been victimized repeatedly, are homeless, or

have engaged in survival sex, promiscuous sex, drug use, or other criminal activity. Therefore, one example of a “best practice” is for communities to establish multidisciplinary review committees to discuss how best to provide outreach and assistance for these individuals. Another form of assistance that is often overlooked but nonetheless critically important for victims is increasing access to civil attorneys who can help address problems with housing, employment, education, and immigration status (Seidman & Vickers, 2005). Evaluation of success could thus include the assessment of these alternative forms of collaboration, outreach, and victim assistance.

Conclusion

In the present article, we offer several ideas for future research. Yet we want to note that such research will only be fruitful if it translates into meaningful reform efforts. Some of the concrete changes that are needed include eliminating the emphasis on arrest rates, evaluating case outcomes in terms of prosecution and conviction, emphasizing the quality of investigations and prosecutions regardless of case outcomes, and exploring alternative measures of success outside the criminal justice system. We remain optimistic that we can make the “good news” of increased reporting rates and decreased attrition for sexual assault cases a reality in this country.

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Notes

1. To illustrate, EAW International led a data-collection effort in eight diverse U.S. communities as part of the “Making a Difference (MAD) Project.” In these eight communities, a total of 12 law enforcement agencies submitted data on 2,059 sexual assault cases. When cases with missing data were excluded, a total of 95% involved female victims, 66% were perpetrated using “force, threat or fear,” and 65% involved penile–vaginal penetration. When these three variables were combined, just less than half (49%) of all cases involved all three characteristics (Lonsway & Archambault, 2010). As the MAD project excluded cases involving child victims, however, the real percentage is likely to be far lower, suggesting that forcible rapes as defined by the UCR program represent a minority of sex crime cases.

2. Social scientific research provides a range of estimates that are generally consistent with these UCR statistics. Specifically, research estimates that 18% to 50% of the sexual assaults reported to law enforcement will result in an arrest (Frazier et al., 1994; Koss, Bachar, Hopkins, & Carlson, 2004; Spohn & Horney, 1992). However, the evidence is not sufficient to make any claims regarding trends in arrest rates across time.
3. Although the report does not define what is meant by the term *prosecuted*, it likely refers to charges being filed.
4. For more information on the Offender-Based Transaction Statistics, please see the website for the National Archive of Criminal Justice Data, maintained by the University of Michigan at <http://www.icpsr.umich.edu/icpsrweb/NACJD/>
5. For more information on the State Court Processing Statistics, please see the website for the National Archive of Criminal Justice Data, maintained by the University of Michigan, at <http://www.icpsr.umich.edu/icpsrweb/NACJD/>

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Bios

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