

JUSTICE DENIED?: THE EXCEPTIONAL CLEARANCE OF  
RAPE CASES IN LOS ANGELES

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*With homicide your victim isn't going to be interviewed; their trauma is over. In most property crimes sure there is trauma, your car was stolen. But nothing can compare to sexual assault. We don't get enough training in trauma, in dealing with the trauma of victims, and the when and how of interviewing them. It's a very unique crime that victims don't get over, and they definitely won't get over it as long as the perp is rolling around.*

–Detective, Los Angeles County Sheriff's Department.<sup>1</sup>

*I worked patrol for a long time and I was one of "those" officers. The key is not to get jaded and to realize that weird stuff does happen with regards to sex crimes. Patrol officers are our first line of contact for victims and once they [victims] have a bitter taste in their mouths it's difficult. Guys [police officers] are nervous to handle it because they don't know how to talk about it and are too embarrassed to say penis, etc. I'm not saying that women rule, because there are guys out there that are fabulous. But, fortunately or unfortunately, patrol has first contact [with victims].*

–Detective, Los Angeles Police Department.<sup>2</sup>

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<sup>1</sup> Interview with Detective, L.A. Cnty. Sheriff's Dep't (2010) (transcript on file with authors).

*More often than not once they have [victims] gotten to the DA's office it's fairly rare and unlikely that they will not want to talk. They have no idea about the system and what we say means a lot. They take their cues from what we say.*

—Deputy District Attorney, Victim Impact Program, Los Angeles County District Attorney's Office.<sup>3</sup>

## I. INTRODUCTION

Thirty-five years ago, Susan Brownmiller wrote in *Against Our Will: Men, Women and Rape* that the complaints of rape victims often were met with insensitivity and/or hostility on the part of police and other criminal justice officials.<sup>4</sup> Brownmiller noted that, contrary to Lord Hale's assertion that "rape is an accusation easily to be made,"<sup>5</sup> many rape victims did not report the crime to the police, and that those who did soon discovered that, consistent with Lord Hale's homily, it was a crime "hard to be proved."<sup>6</sup>

As we enter the second decade of the twenty first century, the issue of police and prosecutor handling of sexual assault complaints continues to evoke controversy and spark debate.<sup>7</sup> Critics charge that police make inappropriate decisions regarding whether rape cases should be accepted for investigation, misclassify rape and

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<sup>2</sup> Interview with L.A. Police Dep't (2010) (transcript on file with authors).

<sup>3</sup> Interview with Deputy Dist. Attorney, Victim Impact Program, L.A. Cnty. Dist. Attorney's Office (2010) (transcript on file with authors).

<sup>4</sup> SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 364 (1975).

<sup>5</sup> *Id.* at 369.

<sup>6</sup> *Id.* In 1734, Lord Chief Justice Matthew Hale wrote that concerning rape, "it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." 1 SIR MATTHEW HALE, *HISTORIA PLACITORUM CORONAE* 634 (1st American ed., 1847).

<sup>7</sup> For example, in May of 2010, the New York Police Department publicly apologized to a rape victim whose case was inappropriately downgraded from a felony sexual assault to a misdemeanor and in June of 2010 the Baltimore Police Department came under fire after it was revealed that their unfounding rate—thirty percent—was the highest in the nation. Graham Rayman, *NYPD Forced to Apologize Publicly to Rape Victim for Downgrading Her Attack*, VILLAGE VOICE BLOG (May 10, 2010), [http://blogs.villagevoice.com/runninscared/2010/05/nypd\\_forced\\_to.php](http://blogs.villagevoice.com/runninscared/2010/05/nypd_forced_to.php); Erica L. Green & Peter Hermann, *Group to Explore City Rape Reports*, BALTIMORE SUN (June 26, 2010), <http://www.baltimoresun.com/news/maryland/bs-md-rape-investigation-team-20100628,0,3673604.story>. These—and other—exposés of the treatment of rape victims led to a Senate Hearing in September of 2010. *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing before the S. Comm. on Crime and Drugs and the S. Comm on the Judiciary*, 111th Cong. (2010), [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_senate\\_hearings&docid=f:64687.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_senate_hearings&docid=f:64687.pdf) [hereinafter "*Rape in the United States*"].

other sex crimes as non-crimes based on archaic notions of what constitutes “rape,” unfound reports at unreasonably high rates, and fail to adequately investigate the cases they do accept.<sup>8</sup> Such critics also allege that prosecutors’ assumptions regarding “real rapes” and “genuine victims” lead them to decline to file charges in cases in which it is clear that a sexual assault occurred but in which it also is clear that the odds of proving the case to a jury are low.<sup>9</sup> As Michelle Madden Dempsey put it in her testimony at a recent United States Senate hearing convened to investigate the response of the criminal justice system to the crime of rape, “the chronic failure to report and investigate rape cases . . . is part of a systemic failure to take rape seriously both within the criminal justice system and within our communities more generally.”<sup>10</sup>

Missing from these critiques is any discussion of the use (and misuse) of the exceptional clearance by police. As we explain in more detail below, cases can be cleared, or solved, by the police in two ways: by the arrest of at least one suspect or by clearing the case exceptionally. Although cases that are exceptionally cleared do not result in the arrest of the suspect, they are considered solved in the sense that the suspect is known to the police but there is something beyond the control of law enforcement that precludes the police from making an arrest (*e.g.*, the victim refuses to cooperate in the prosecution of the suspect, or the suspect has died or cannot be extradited). If police officers are clearing cases inappropriately—the rules for doing so are clearly articulated by the Federal Bureau of Investigation’s Uniform Crime Reporting Handbook<sup>11</sup>—and are either failing to investigate sexual assault cases thoroughly or not making arrests when they have probable cause to do so and when the victim is willing to go forward with the case, there is the potential for a miscarriage of justice. Specifically, the misuse of the exceptional clearance raises the possibility that individuals who may in fact be guilty of rape are not arrested, prosecuted, and punished.

Also missing from these critiques is discussion of the role that the *prosecutor* plays in clearing cases. Prior research on prosecutorial decision-making in sexual assault cases has focused on the formal

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<sup>8</sup> SUSAN ESTRICH, REAL RAPE 15 (1987).

<sup>9</sup> *Id.* at 20.

<sup>10</sup> *Rape in the United States*, *supra* note 7, at 68 (Testimony of Michelle Madden Dempsey, Associate Professor, Villanova School of Law).

<sup>11</sup> U.S. DEPT. OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING HANDBOOK (2004) [hereinafter UCR Handbook].

decision to file charges or not once an arrest has been made.<sup>12</sup> This research assumes, either explicitly or implicitly, that the prosecutor's role in the process begins when the police arrest a suspect and present the case to the screening unit for a charging decision. This ignores the fact that law enforcement officials may present the case to the prosecutor prior to making an arrest and, based on the prosecutor's assessment of the evidence in the case and evaluation of the credibility of the victim, either make an arrest or (inappropriately) clear the case exceptionally. The role of prosecutor, in other words, may begin well before an arrest is made and the decisions he or she makes may influence, indeed determine, how the case is cleared.

The purpose of this paper is to investigate the use of the exceptional clearance in sexual assault cases. Using data on sexual assaults reported to the Los Angeles Police Department ("LAPD") and the Los Angeles County Sheriff's Department ("LASD") from 2005 through 2009, we examine the way these cases are cleared, with a focus on cases that are cleared by arrest and by exceptional means. In addition, we use detailed qualitative and quantitative data on a sample of cases from 2008 to identify the characteristics of cases that are cleared exceptionally and to evaluate the reasons given by police and prosecutors to justify this type of clearance. We begin with a discussion of the circumstances under which cases may be cleared exceptionally and with a summary of the limited research examining the use of this clearance type. We then describe the decision-making context in Los Angeles, with a focus on the role played by the prosecutor in the "pre-arrest screening process." The following section examines cases cleared by exceptional means and evaluates the extent to which these cases meet the four criteria that the FBI requires be met before this clearance type can be used. We end the paper with a discussion of the policy implications of (mis)using the exceptional clearance.

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<sup>12</sup> See, e.g., Lisa Frohmann, *Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, 38 SOC. PROBS. 213, 214-15 (1991); Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 LAW & SOC'Y REV. 531, 535-37 (1997); Wayne A. Kerstetter, *Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults against Women*, 81 J. CRIM. L. & CRIMINOLOGY 267, 268 (1990); Rodney F. Kingsnorth et al., *Sexual Assault: The Role of Prior Relationship and Victim Characteristics in Case Processing*, 16 JUST. Q. 275, 283 (1999); Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decision in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUST. Q. 651, 654 (2001).

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## II. CASE CLEARANCES: CLEARED BY ARREST AND BY EXCEPTIONAL MEANS

According to the Uniform Crime Reporting Handbook, offenses are “cleared either by arrest or . . . exceptional means.”<sup>13</sup> The handbook states that “[a]n offense is cleared by arrest, or solved for crime reporting purposes, when at least one person is (1) arrested, (2) charged with the commission of the offense, and (3) turned over to the court for prosecution (whether following arrest, court summons, or police notice).”<sup>14</sup> Regarding exceptional clearances, the handbook notes that there may be occasions where law enforcement has conducted an investigation, exhausted all leads, and identified a suspect *but is nonetheless unable to clear an offense by arrest*.<sup>15</sup> In this situation, the agency can clear the offense by exceptional means, *provided that* each of the following questions can be answered in the affirmative:

- Has the investigation definitely established the identity of the offender?
- Is there enough information to support an arrest, charge, and turning over to the court for prosecution?
- Is the exact location of the offender known so that the subject could be taken into custody now?
- Is there some reason outside law enforcement control that precludes arresting, charging, and prosecuting the offender?<sup>16</sup>

To illustrate the types of cases that might be cleared by exceptional means, the handbook provides a list of examples, many of which involve the death of the offender, or an offender who is unable to be arrested because he or she is being prosecuted in another jurisdiction for a different crime or because extradition has been denied. One of the examples provided is when the “[v]ictim refuses to cooperate in the prosecution” but there is an added proviso stating that victim non-cooperation alone does not justify an exceptional clearance.<sup>17</sup> The answer must also be “yes” to the first three questions outlined above.<sup>18</sup>

In his review of the development of the uniform crime reporting

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<sup>13</sup> UCR HANDBOOK, *supra* note 11, at 78.

<sup>14</sup> *Id.* at 79.

<sup>15</sup> *Id.* at 80.

<sup>16</sup> *Id.* at 80–81.

<sup>17</sup> *Id.* at 81.

<sup>18</sup> *Id.*

system, Feeney notes that the instructions contained in the early Uniform Crime Reporting ["UCR"] handbooks defined exceptional clearances very narrowly<sup>19</sup> and reflected an expectation that "most clearances would be based on arrests and that the number of exceptional clearances would be limited."<sup>20</sup> He bolsters this argument by pointing out that since the inception of the UCR, the FBI has labeled its tables of clearance data "cleared by arrest."<sup>21</sup> According to Feeney, "[t]here can be little doubt that arrest is the decisive event in the vast majority of instances in determining whether a clearance is to be recorded or not."<sup>22</sup>

Feeney also takes issue with the fact that some jurisdictions have interpreted the term "charged" in the definition of cleared by arrest (i.e., cleared by arrest requires that the suspect be charged with the commission of the offense) to mean charged by the prosecutor. He argues that the term meant (and continues to mean) charged by the police and not by the prosecutor.<sup>23</sup> Feeney bases this position on the fact that the developers of the uniform crime reporting system envisioned collecting data not only on offenses known to the police but also on persons charged by the police. According to Feeney, they used this term, rather than "persons arrested," to differentiate between "two categories of arrests: those made for the purpose of prosecution and those considered to be 'suspicion' arrests."<sup>24</sup> That is, they wanted 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 a crime. As he points out, "[t]he term 'persons charged by the police' was their way of denoting the more normal kind of arrest."<sup>25</sup>

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<sup>19</sup> Floyd Feeney, *Police Clearances: A Poor Way to Measure the Impact of Miranda on the Police*, 32 RUTGERS L.J. 1, 14 (2000). In the 1929 handbook, exceptional clearances were limited to (1) suicide of the offender; (2) double murder; (3) deathbed confession; (4) confession by an offender already in custody; and (5) offender identified as the offender if arrested or prosecuted in another city. *Id.* at 13 n.42.

<sup>20</sup> *Id.* at 14.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 18.

<sup>23</sup> For clarification, we spoke with the one of three FBI personnel who trains law enforcement agencies throughout the United States on UCR classifying and clearing of offenses. He clarified that, according to the FBI, "charged" means a *police booking procedure* which results in the suspect being turned over to the courts for prosecution, not the filing of charges by a prosecutorial agency. Interview with R. Casey, FBI personnel (January 14, 2011).

<sup>24</sup> Feeney, *supra* note 19, at 14–15.

<sup>25</sup> *Id.* at 15.

<sup>25</sup> *Id.* at 15.

Feeney's historical overview of the development of the uniform crime reporting system, then, suggests that there was an expectation that most crimes (that were cleared) would be cleared by arrest, requiring that a suspect be arrested and charged with a crime by the police, and that exceptional clearances, which were narrowly defined, would be just that—exceptional.

#### A. *Research on Case Clearances*

Because the FBI does not differentiate between cases cleared by arrest and those cleared by exceptional means, most research examining case clearances—either over time or across jurisdictions—have been conducted using the overall case clearance rate.<sup>26</sup> In fact, with the exception of a study of Chicago homicide data,<sup>27</sup> a more recent study using National Incident-Based Reporting System (“NIBRS”) data,<sup>28</sup> and one study of sexual assault case clearances,<sup>29</sup> there are no studies that examine the predictors of different types of case clearances and none that examine clearances using national data.

Jarvis and Regoeczi argue that there are compelling reasons for separating cases cleared by arrest and cases cleared by exception.<sup>30</sup> First, although both types of cases are considered solved for reporting purposes, cases cleared by exceptional means do not result in the arrest of the suspect.<sup>31</sup> This clearly is an important difference. In addition, the cases that fall into the two categories may vary widely in terms of victim, suspect, and case characteristics; thus, combining them into a single “cases cleared”

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<sup>26</sup> See, e.g., Megan A. Alderden & Timothy A. Lavery, *Predictors: A Research Note*, 10 HOMICIDE STUD. 140, 140–41 (2006); Megan A. Alderden & Timothy A. Lavery, *Predicting Homicide Clearances in Chicago: Investigating Disparities in Predictors Across Different Types of Homicide*, 11 HOMICIDE STUD. 115, 115 (2007); Catherline Lee, *The Value of Life in Death: Multiple Regression and Event History Analyses of Homicide Clearance in Los Angeles County*, 33 J. CRIM. JUST. 527, 527 (2005); Janice L. Puckett & Richard J. Lundman, *Factors Affecting Homicide Clearances: Multivariate Analysis of a More Complete Conceptual Framework*, 40 J. RES. CRIME & DELINQUENCY 171, 172 (2003); Regoeczi et al., *Clearing Murders, Is it About Time?*, 45 J. RES. CRIME & DELINQUENCY 142, 142 (2008).

<sup>27</sup> Marc Riedel & John G. Boulahanis, *Homicides Exceptionally Cleared and Cleared by Arrest: An Exploratory Study of Policy/Prosecutor Outcomes*, 11 HOMICIDE STUD. 151, 151–63 (2007).

<sup>28</sup> John P. Jarvis & Wendy C. Regoeczi, *Homicide Clearances: An Analysis of Arrest Versus Exceptional Outcomes*, 13 HOMICIDE STUD. 174, 178–79 (2009).

<sup>29</sup> Jeffrey A. Bouffard, *Predicting Type of Sexual Assault Case Closure from Victim, Suspect, and Case Characteristics*, 28 J. CRIM. JUST. 527, 531–32 (2000).

<sup>30</sup> Jarvis & Regoeczi, *supra* note 28, at 175.

<sup>31</sup> *Id.*

category raises the possibility that the effects of these characteristics may be under or overstated. Finally, combining the two types of cases can inflate a law enforcement agency's reported case clearance rate.<sup>32</sup>

The validity of these points was confirmed by Riedel and Boulahanis, who used Chicago homicide data from 1988 to 1995 to investigate the similarities and differences in cases cleared by arrest and by exceptional means.<sup>33</sup> More specifically, they examined cases cleared exceptionally because the case was "barred to prosecution,"<sup>34</sup> which meant that the Felony Review Unit of the Cook County State's Attorney's Office did not accept the case for prosecution. Interestingly, in an earlier study, Boulahanis reported the results of interviews with police and with a prosecutor in the Felony Review Unit in which he asked who made the decision to exceptionally clear a case.<sup>35</sup> According to the police, the decision was made by the prosecutor, who decides whether to approve the charges; in contrast, the prosecutor stated that the decision was "controlled solely by the police department."<sup>36</sup> As Boulahanis noted, because "all cases that are not approved because of a lack of evidence may be resubmitted for review,"<sup>37</sup> the decision to investigate further or to clear the case by exceptional means rests solely with the police department.

Riedel and Boulahanis found that 10.7% of homicide cases reported to the Chicago Police Department from 1982 to 1995 were cleared by exceptional means, while 64.6% were cleared by arrest.<sup>38</sup> "Thus, including exceptional clearances among arrest clearances can substantially increase the latter total."<sup>39</sup> When the authors examined the likelihood that the case would be exceptionally cleared (i.e., barred to prosecution), they found that cases cleared exceptionally were more likely to be domestic homicides and to have occurred in a private indoor or public outdoor location rather than a vehicle.<sup>40</sup> In addition, cases involving white offenders were less

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<sup>32</sup> *Id.*

<sup>33</sup> Riedel & Boulahanis, *supra* note 27, at 157.

<sup>34</sup> *Id.* at 153.

<sup>35</sup> John George Boulahanis, *Arrest Clearances and Exceptional Clearances: An Analysis of Chicago Homicides, 1982–1994* (1998) (unpublished Master's thesis, Southern Illinois University at Carbondale) (on file with Morris Library, Southern Illinois University at Carbondale).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 35.

<sup>38</sup> Riedel & Boulahanis, *supra* note 27, at 156.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 160–61.

likely to be cleared by exceptional means than those involving African American offenders, and cases involving male victims and male offenders were also less likely to be cleared by exceptional means than those involving female victims and male offenders.<sup>41</sup> Riedel and Boulahanis, who were careful to point out that the results of their study could not be generalized due to the fact that there are “no systematic studies of the phenomena”<sup>42</sup> of exceptional clearances, called for additional research designed to provide data on the frequency of exceptional clearances and the circumstances in which they are used.

Bouffard’s 2000 study of case closures in sexual assault cases reported to an unnamed law enforcement agency was a more comprehensive analysis than either the Reidel and Boulahanis 2007 or the Jarvis and Regoeczi 2009 studies. Bouffard’s 2000 study examined five different types of case closures: unfounded, cleared by arrest, cleared by exceptional means because of victim’s lack of cooperation, cleared by exceptional means due to lack of prosecutorial merit, and open.<sup>43</sup> For this particular law enforcement agency, 27.9 percent of the reports were unfounded, 18.1 percent were cleared by arrest, 31.6 percent were cleared by exceptional means, and 22.4 percent were still open at the time of data collection.<sup>44</sup> Bouffard found that the probability that the report would be unfounded was reduced in cases in which the victim had a prior relationship with the suspect and in cases in which the victim agreed to a sexual assault exam; reports of first and second degree rape, on the other hand, were more likely than other crimes to be unfounded.<sup>45</sup> Not surprisingly, Bouffard also found that cases in which the victim and the suspect had a prior relationship were more likely to be cleared exceptionally (due to a lack of victim cooperation and due to a decision that the case did not merit prosecution).<sup>46</sup> He further concluded that the variables included in the models “appeared to have differing effects on each type of case closure.”<sup>47</sup>

Considered together, the limited amount of research on case clearances highlights the importance of separately analyzing cases

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 162.

<sup>43</sup> Bouffard, *supra* note 29, at 530.

<sup>44</sup> *Id.* at 532.

<sup>45</sup> *Id.* at 536.

<sup>46</sup> *Id.* at 537.

<sup>47</sup> *Id.* at 540.

cleared by arrest and by exceptional means. The factors that affect these outcomes are different. Testing only for their effects on the overall case clearance rate is likely to produce misleading results and lead to inaccurate conclusions about the police investigative function.

*B. Clearing Sexual Assault Cases in Los Angeles: The Process*

The process used by the Los Angeles Police Department (“LAPD”) and the Los Angeles County Sheriff’s Department (“LASD”) to clear sexual assault cases is similar to the process reported by Riedel and Boulahanis for homicides handled by the Chicago Police Department.<sup>48</sup> Reports of sexual assault are either unfounded, cleared by arrest, cleared by exceptional means (which these agencies refer to as “cleared, other”), or are unsolved and the investigation is continuing.<sup>49</sup> If the detective investigating the crime has identified a suspect and has probable cause to arrest the suspect, the detective will either arrest the individual and then present the case to a deputy district attorney from the Victim Impact Program (“VIP”) of the Los Angeles County District Attorney’s Office for a formal filing decision, or delay making an arrest and present the case to a Deputy District Attorney for a pre-arrest screening decision. Because the District Attorney’s policy is to interview all sexual assault victims prior to filing charges, the interview with the victim typically takes place at the same time (or shortly thereafter).<sup>50</sup>

Deputy District Attorneys interviewed for this project were asked to explain why the detective investigating the crime would not make an arrest if he or she had an identified suspect and probable cause to arrest.<sup>51</sup> Most pointed to the fact that once an arrest is made, the district attorney has only forty-eight hours in which to file charges, which may not be sufficient time to conduct further investigation and gather additional evidence. As one of the respondents stated:

Generally they do that because most of the cases are going to require further investigation and they want some guidance

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<sup>48</sup> Riedel & Boulahanis, *supra* note 27, at 153.

<sup>49</sup> Bouffard, *supra* note 29, at 533.

<sup>50</sup> L.A. CNTY. DIST. ATTORNEY’S OFFICE, SEXUAL ASSAULT VICTIM INTERVIEW POLICY: CHAPTER 4: CRIME CHARGING—SPECIFIC CRIMES, <http://da.lacounty.gov/savip.pdf> at 1.

<sup>51</sup> In June and July of 2010 we interviewed thirty deputy district attorneys about, among other things, their standards for filing charges, the difficulties encountered in prosecuting sexual assaults, and the ways in which they evaluated victim credibility.

on what will be needed to put the case together. We have a very narrow window in which to file if the suspect is in custody. On occasion, if the suspect is in custody, he will have to be released because we don't have enough at that time to file charges. We don't want to tip our hand and let the suspect know that he is under investigation. If he doesn't know that he is under investigation, he doesn't have time to come up with a story or an alibi. We need the time to put the case together because most of them are one-on-one situations.<sup>52</sup>

Other respondents echoed this, noting that the pre-arrest screening allowed the district attorney to indicate to the investigating officer whether the evidence currently available met the office's filing standard and to specify what additional steps the officer should take to bolster the evidence in the case.<sup>53</sup> As the respondent quoted above stated, "sometimes cases are rejected outright because there just isn't anything there that we can work with but other times they are rejected for further investigation."<sup>54</sup> This district attorney estimated that about eighty percent of the cases presented for a pre-arrest screening decision were rejected, *most for further investigation*.<sup>55</sup>

Detectives from the two law enforcement agencies also were asked to comment on the pre-arrest screening process. Many acknowledged that although it was not unique to sex crimes. Pre-arrest screening occurred much more frequently in these types of crimes because "sex crimes—especially those involving acquaintances—are very hard to prove."<sup>56</sup> Another common comment was that it was important "to run things by the DA before making an arrest" to ensure the evidence was sufficient for filing.<sup>57</sup> As one detective put it:

It could be a moral issue. Is it right to arrest this person and take away his freedom even if for only forty-eight hours? Also it is not always wise to arrest the person right off the bat because you may need to do more work on the case—a pretext phone call, and so on. You may want the DA's

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<sup>52</sup> Interview with authors (2010) (transcript on file with authors).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

opinion as to whether it's [sufficient evidence] there or not.<sup>58</sup>

Another detective put it similarly, noting that "you don't let the DA decide your case, but even if you've investigated the case thoroughly you may need a second opinion to see whether the case will be filed. The DA may give advice regarding the investigation needed to get a successful filing."<sup>59</sup> It is important to note that detectives were not unanimous in asserting a need to include the DA's office in a case prior to making an arrest. Many emphasized the role of detective discretion in whether to make an arrest, particularly in sexual assaults involving nonstrangers. For instance, one detective stated, "It boils down to my judgment. You don't want to arrest someone and put a rape charge on them for the rest of their life, but you don't want someone to get away with it either."<sup>60</sup> Another noted the differing standards of action for the police and prosecutors, emphasizing that "[i]f I've got probable cause for an adult and it's a felony crime there's no decision there, they're getting arrested. I can't think of a time where I haven't arrested when I have probable cause."<sup>61</sup> Taking this logic a step further, another detective said:

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.<sup>62</sup>

This detective's remark highlights the powerful role of the police in setting the tone for sexual assault victims' access to the criminal justice system, which is further affirmed by the following statement from a deputy district attorney:

Very often the police officer will present the case to us before making an arrest. If we don't believe that it is file-able, an arrest won't be made. There isn't any point if we aren't going to file charges. If they have probable cause to make an arrest, they can go ahead and do so and then present it to us for a filing decision.<sup>63</sup>

These comments suggest that detectives' decision-making is

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

influenced by their perceptions of whether charges will be filed by the district attorney's office, and prosecutorial decision-making is influenced by the context in which the police present the case. For example, a prosecutor stated, "[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."<sup>64</sup> Taken together, these findings indicate that the decision to arrest (or not) has serious implications for both sexual assault suspects (potentially getting off "scot free") and victims (potentially seeing no action taken by the police).

Returning to the pre-arrest screening process, the deputy district attorney reviewing the case prior to arrest of the suspect can accept the case for prosecution, send the case back to the investigating officer for further investigation, send the case to the city attorney for prosecution as a misdemeanor, or decline the case for prosecution. If the evidence in the case meets the DA's standard for filing (see below), the suspect will be arrested and the case will be cleared by arrest. If the case is sent back for further investigation or if the evidence is deemed insufficient to justify charging, the investigating officer will either continue the investigation and, once additional evidence is obtained, resubmit the case for a second review by the DA, or clear the case by exceptional means.

It is also important to point out that the standard used by the Los Angeles County District Attorney's Office in screening cases (either before or after arrest) is a trial sufficiency standard.<sup>65</sup> That is, the deputy district attorney will file charges only if there is sufficient evidence to prove the case beyond a reasonable doubt at a jury trial. Moreover, the policy in sexual assault cases is that charges will not be filed without some type of corroboration<sup>66</sup> of the victim's

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<sup>64</sup> *Id.*

<sup>65</sup> JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 204 (1980); Interview with L.A. Cnty. Dist. Attorney's Office (2010) (transcript on file with authors).

<sup>66</sup> The persistence of corroboration requirements raises questions about the true impact of rape law reform, as was demonstrated during the US Senate hearing about rape in September 2010. See *Rape in the United States*, *supra* note 7, at 66–68. Along with her testimony, Professor Dempsey provided a copy of a letter sent to the Cook County State's Attorney's office in Illinois alleging that:

[T]he Cook County State's Attorney's Office is generally not authorizing felony charges for sexual assault reported by victims against non-strangers unless there is 'corroborative evidence' such as bodily injury, a third-party witness, or an offender confession. Whether or not this custom is explicitly endorsed by written policy, it appears that the Cook County State's Attorney's Office has adopted a charging standard that effectively adds extrastatutory elements to the crime of sexual assault. This practice protects most rapists from the threat of criminal prosecution, devastates most victims who seek criminal justice assistance, and leads to the continued silence of most

testimony: DNA evidence that establishes the identity of the perpetrator, injuries to the victim, witnesses who can corroborate the victim's testimony, or physical or medical evidence that is consistent with the victim's account of the incident. Many of the respondents interviewed for this project emphasized that rejection is likely if the incident is a "she said/he said" situation in which the victim is claiming that she was forced to engage in sexual relations but the suspect contends that the sexual acts were consensual and there is no corroboration of the victim's testimony. In fact, when asked whether there are any types of "she said/he said" cases that would be filed without corroboration of the victim's allegations, one deputy district attorney replied "No. That would be a violation of office policy. There are cases where I would like to, but no."<sup>67</sup>

It is also important to note that, historically—although inconsistently practiced—the Los Angeles Police Department's policy has been that a felony crime can be cleared by arrest only if the district attorney files felony charges in the forty-eight hour window of time after an arrest.<sup>68</sup> In other words, the LAPD interprets the UCR Handbook's statement that "[a]n offense is cleared by arrest . . . when at least one person is (1) arrested, (2) charged with the commission of the offense, and (3) turned over to the court for prosecution" to require the filing of charges by the *prosecutor*.<sup>69</sup> Thus, if the suspect is arrested but the deputy district attorney reviewing the case declines to file charges the case will be cleared by exceptional means, and not cleared by arrest, depending on informal norms at the detective's division and the preferences of his or her supervisor. This is contrary to the policy statements in the UCR Handbook, which indicate that cases can be cleared by exceptional means if the police have an identified suspect but, for reasons beyond their control, are unable to make an arrest.<sup>70</sup> Conversely—albeit also inconsistently—the LASD accurately interprets the UCR Handbook's criteria to require solely the arrest of the offender and turning him or her over to the court for prosecution, *irrespective* of the prosecutorial decision to file felony

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victims of sexual assault.

*Id.* at 76.

<sup>67</sup> Interview with L.A. Cnty. Dist. Attorney's Office (2010) (transcript on file with authors).

<sup>68</sup> L.A. POLICE DEPT., MANUAL OF THE LOS ANGELES POLICE DEPARTMENT § 3.14–10 (2005) available at [www.lapdonline.org/assets/pdf/volume5.pdf](http://www.lapdonline.org/assets/pdf/volume5.pdf); see also STEVE HODEL, BLACK DAHLIA AVENGER 524–25 (2004).

<sup>69</sup> UCR HANDBOOK, *supra* note 11, at 79.

<sup>70</sup> *Id.* at 81.

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charges.

To summarize, although the responsibility for clearing cases rests with law enforcement officials, the *process* of clearing cases in Los Angeles involves discretionary decisions by both police/sheriff detectives and the prosecutor. The district attorney influences case clearances through the pre-arrest screening process, in which cases are reviewed for evidentiary sufficiency before an arrest is made. If the evidence is deemed sufficient, an arrest is made; if not, the case is either investigated further and resubmitted to the district attorney or cleared exceptionally. As Riedel and Boulahanis noted regarding a similar process in Chicago, both agencies benefit from this system:

On the one hand, the Felony Review Unit does not have to include in its conviction percentage the cases that were never prosecuted. On the other hand, cases barred to prosecution are included in exceptional clearances . . . so that the total clearance rate of CPD appears substantially higher than it actually is.<sup>71</sup>

### III. CASE CLEARANCES IN SEXUAL ASSAULT CASES: A FOCUS ON THE EXCEPTIONAL CLEARANCE

In this section, we present descriptive data on case clearances in rape and attempted rape cases, with a focus on cases cleared by arrest and cleared by exceptional means. These data are from two sources. Each agency provided an electronic data file of all sexual assaults involving female victims over the age of twelve that were reported from January of 2005 through December of 2009. There were 10,832 sexual assaults reported to the LAPD and 3301 reported to the LASD. For this analysis, we selected only cases involving rape or attempted rape (N = 5031 for LAPD; N = 2891 for LASD). In addition, we obtained the case files for a sample of 2008 sexual assaults reported to the LAPD (N = 401) and for all 2008 sexual assaults reported to the LASD (N = 543). We use the 2005–2009 data to illustrate the patterns of case clearances and the 2008 data to identify the characteristics of cases cleared by exceptional means.

As shown in Table 1, which presents case outcomes for reports of rape and attempted rape handled by the two agencies from 2005 to 2009, a substantial number of cases reported to each agency are

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<sup>71</sup> Riedel & Boulahanis, *supra* note 27, at 156.

cleared by exceptional means. In fact, cleared by exceptional means is the *modal* case clearance type for the LASD, where 54.2% of all cases are exceptionally cleared. Coupled with an arrest rate of 34.7%, this gives the LASD an overall case clearance rate of 88.9%. The pattern is similar for the LAPD, although this agency has an overall clearance rate (45.7%) that is only about half the clearance rate for the LASD. Of rapes and attempted rapes reported to the LAPD, 12.2% were cleared by arrest and 33.5% were cleared by exceptional means. For each agency, then, combining exceptional clearances with clearances by arrest substantially inflates the overall case clearance rate.

TABLE 1. CASE OUTCOMES, RAPES, AND ATTEMPTED RAPES REPORTED TO THE LAPD AND THE LASD, 2005–2009

Case Outcomes	LAPD (N = 5031)		LASD (N = 2891)	
	N	%	N	%
Case Cleared	2300	45.7	2569	88.9
Cleared by Arrest	615	12.2	1002	34.7
Cleared by Exceptional Means	1684	33.5	1567	54.2
Unfounded	546	10.9	30	1.0
Investigation Continuing	2185	43.4	292	10.1

It is important to note that the overall clearance rate for the LAPD is similar to the national clearance rate for forcible rape. According to the FBI report, *Crime in the United States, 2009*, 41.2% of all forcible rapes were cleared by arrest or exceptional means in 2009.<sup>72</sup> The clearance rate for the LASD, on the other hand, is more than twice the national rate. This reflects both a very low unfounding rate (only thirty reports, or 1.0% of all reports from 2005–2009, were unfounded) and a small number of cases that were not solved and in which the investigation was continuing (292 or 10.1%). Although the FBI does not consistently report national or regional data on unfounding, a specialized report, *SEX OFFENSES AND OFFENDERS*, noted that eight percent of the forcible rapes reported to law enforcement agencies in 1995 were unfounded.<sup>73</sup>

<sup>72</sup> U.S. DEPT. OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, *CRIME IN THE UNITED STATES 2009: TABLE 25: PERCENT OF OFFENCES CLEARED BY ARREST OR EXCEPTIONAL MEANS (2009)*, [http://www2.fbi.gov/ucr/cius2009/data/table\\_25.html](http://www2.fbi.gov/ucr/cius2009/data/table_25.html).

<sup>73</sup> U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, *SEX OFFENSES AND OFFENDERS 7 (1997)*.

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The LAPD unfounding rate (10.9%) was somewhat higher than this, but the LASD rate (1.0%) was substantially lower.<sup>74</sup>

*A. Characteristics of Cases Cleared by Exceptional Means*

We use data on sexual assaults reported to the LAPD and the LASD in 2008 to examine the characteristics of cases cleared by exceptional means. Information on these cases was collected from redacted copies of the case files, which were provided to us by each agency. These files included the initial report taken by the patrol officer, the follow-up reports written by the detective to whom the case was assigned for investigation, and the charge evaluation worksheets for cases that were presented to the district attorney for a charging decision (either before or after arrest). The files included the victim's statement, summaries of interviews with witnesses, the suspect's statement (if the suspect was interviewed), the results from forensic evidence collection ("SART exam"), and descriptions of evidence that was collected at the scene of the crime.

Table 2 presents information on the case/crime characteristics, the victim characteristics, the suspect characteristics, and characteristics of the police investigation for these exceptionally cleared cases. Although a discussion of this data is beyond the scope of this paper, we can paint a picture of the "typical" exceptionally cleared case. The typical case that was cleared by exceptional means was a case in which:

- The most serious charge was rape;
- The suspect subdued the victim using bodily force only;
- The suspect and victim were acquaintances or intimate partners;
- The victim did not engage in any risk-taking behavior (drinking, using drugs, walking alone late at night, accepting a ride from a stranger) at the time of the incident;
- The victim did not have a motive to lie and did not make

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<sup>74</sup> Officials in the Los Angeles County Sheriff's Department speculated that reports deemed "false or baseless" were handled differently by that agency. They noted that it is within Deputy Sheriffs' discretion to utilize a non-crime report entitled "Suspicious Circumstances, Possible Rape" when they are uncertain if the elements of the crime of rape are present. This tends to occur in "he said/she said" acquaintance cases involving alcohol and some form of impaired memory on the part of the victim. Notably, as of January 2010, the LAPD utilizes a similar non-crime report entitled "Undetermined Sexual Assault." It is important to recognize that—for both agencies—depending on the extent of follow up investigation and detectives' discretion, these cases do not necessarily get reclassified into actual crime reports and thus are excluded from their rape statistics.

- inconsistent statements during interviews;
- The victim did not report the crime immediately;
  - The victim was able to identify the suspect by full name and address;
  - The suspect (of those interviewed by police) either claimed that the victim consented or that the incident was fabricated;
  - There was no physical evidence to corroborate the victim's allegations;
  - There were no witnesses who could corroborate the victim's allegations.

TABLE 2. SEXUAL ASSAULTS CLEARED BY EXCEPTIONAL MEANS,  
LAPD AND LASD, 2008

Case/Crime Characteristics	LAPD (N = 125)		LASD (N = 277)	
	N	%	N	%
<b><i>Type of Crime</i></b>				
Rape	92	73.6	193	69.7
Attempted rape	9	7.2	25	9.0
Sexual battery	24	19.2	22	8.0
Statutory rape/sex crime with a child	—	—	35	12.6
Suspect used bodily force only to subdue victim	101	80.8	229	82.6
Suspect used a weapon	9	7.2	27	9.7
Suspect drugged victim	6	4.9	23	8.3
<b><i>Relationship between victim and suspect</i></b>				
Strangers	26	20.8	57	20.6
Non-strangers	63	50.4	145	52.3
Intimate partners	36	28.8	72	25.9
Victim injured	56	44.8	124	44.8
Victim also physically assaulted	58	46.4	101	36.5
Rape + stranger or weapon or injury to victim	49	39.2	113	40.8
Rape + stranger or weapon	18	14.4	57	20.6

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<b><i>Victim Characteristics</i></b>				
<b><i>Background Characteristics</i></b>				
Age (mean)	25.7		28.7	
<b><i>Race/Ethnicity</i></b>				
Caucasian	42	33.6	65	23.5
Hispanic/Latina	54	43.2	122	44.0
African American	22	17.6	60	21.7
Asian American/Other	7	5.6	15	5.4
<b><i>Credibility Factors</i></b>				
Criminal record	16	12.8	13	4.7
Gang affiliation mentioned in report	2	1.6	2	0.7
Drinking at time of incident				
Drunk at time of incident	45	36.0	70	25.3
Using illegal drugs at time of incident	39	31.2	46	16.6
Passed out (not drugged)	10	8.0	20	7.2
Prior sexual relationship with suspect*	19	15.2	27	9.7
Walking alone late at night	37	45.7	63	40.1
Accepted a ride from a stranger	8	6.4	8	2.9
Mental health issues	4	3.2	8	2.9
Sex worker	14	11.2	27	9.7
Inconsistent statements to police	10	8.0	4	1.4
No physical or verbal resistance	25	20.	29	10.5
Verbal resistance only	33	26.4	72	26.0
Physical resistance only	20	16.0	55	19.9
Verbal and physical resistance	15	12.0	21	7.6
Investigating officer questions	57	45.6	129	46.6
credibility	20	16.0	12	4.3
<b><i>Cooperation With Law Enforcement</i></b>				
Reported within one hour	29	23.2	33	11.9
Had a SART exam	63	50.4	99	36.0
Declined SART exam	7	5.6	12	4.3
Identified suspect by full name and address	75	60.0	170	61.4
Cooperative during police investigation	67	54.0	165	60.0
Recanted her allegation	5	4.0	10	3.6
Could not be located	20	16.0	38	13.7
Had a motive to lie	32	25.6	23	8.3

<b>Suspect Characteristics</b>				
Affiliated with a gang	10	8.0	30	10.8
Police interviewed suspect	72	57.6	121	43.7
Defense in statement to police**				
Consent	37	51.4	50	42.0
Incident fabricated	29	40.3	53	44.5
Incorrect ID	1	1.4	—	—
Admitted/Confessed	5	6.9	16	13.4
<b>Police Investigation/Evidence</b>				
Some type of physical evidence	53	42.4	103	37.2
Mean number of police interviews of victim	1.95		1.79	
Mean number of witnesses	0.60		0.77	
Police interviewed witnesses***	43	78.2	92	87.6
Police conducted pretext phone call	12	9.6	13	4.7

\* Of cases involving non-strangers and intimate partners.

\*\* Of the identified suspects who spoke with the police.

\*\*\* Of the cases with witnesses where the suspect spoke to the police.

In the sections that follow, we examine the cases cleared by exceptional means by the LAPD and the LASD in 2008. We begin with a discussion of each agency's practice of changing the case clearance from cleared by arrest to cleared by exceptional means if the district attorney refuses to file felony charges. We then attempt to determine whether these cases meet the four criteria that are required for an exceptional clearance.

### *B. Evaluating Exceptional Clearances*

As noted above, in order to clear a case by exceptional means, a law enforcement agency must be able to identify the suspect and must know the suspect's exact location so that he or she could be arrested. In addition, there must be enough evidence to support the police officer's decision to arrest and charge the suspect and to turn him or her over to the court for prosecution, as well as something beyond the control of law enforcement that prevents law enforcement from arresting and charging the suspect with a crime. Moreover, *each* of these four criteria must be met in order to exceptionally clear the case.

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## 1. The Mutual Exclusivity of Arrest and the Exceptional Clearance

We began this project with an assumption that cases in which the police or sheriff's department makes an arrest would be categorized as *cleared by arrest*. However, Table 3, which presents data on 2008 cases reflecting the criteria for clearing a case by exceptional means, reveals that both agencies clear cases by exceptional means when the suspect is arrested but the prosecutor declines to file charges. There were forty such cases (32% of all exceptional clearances) in the LAPD sample and fifty-three (19.9% of all exceptional clearances) in the LASD data. In other words, upon making the arrest the case is cleared by arrest, but if the DDA reviewing the case declines to file charges, the case clearance is changed from cleared by arrest to cleared by exceptional means.

TABLE 3. SEX OFFENSES CLEARED BY EXCEPTIONAL MEANS, LAPD AND LASD, 2008

Criteria for Exceptional Clearance	LAPD (N = 125)		LASD (N = 267)*	
	N	%	N	%
Suspect identified and can be located	121	96.8	191	71.5
Suspect not arrested, DA said insufficient evidence	55	44.0	77	28.8
Suspect not arrested, victim refused to cooperate	26	20.8	61	22.8
Suspect arrested but DA declined to file charges	40	32.0	53	19.9
Suspect not identified or cannot be located	4	3.2	76	28.4

\* There were ten LASD cases with missing data; therefore, the number of cases is 267 rather than 277.

Tracing the origins of this dynamic requires consideration of, on the one hand, the need for the FBI to clarify and refine aspects of the UCR<sup>75</sup> program, and, on the other hand, specifically pertaining

<sup>75</sup> The significant positive impact that revisions to the UCR program would have on the investigative efforts of local police and sheriffs' departments in sexual assault cases was an important focus of discussion during the September 2010 Senate hearing. See *Rape in the United States*, *supra* note 7, at 28–30 (Testimony of Scott Berkowitz, President and Founder of RAINN); *Id.* at 12–19 (Testimony of Carole E. Tracy, Executive Director of Women's Law Project) (giving an overview of the efforts to facilitate change at the federal level).

to the LAPD, the historical context of policing in Los Angeles. First, as Feeney noted in his discussion of the development of the Uniform Crime Reporting system, to clear by arrest requires a booking procedure *by the police*, which leaves the suspect subject to the court's discretion as to prosecution.<sup>76</sup> Although use of the term "charged" has generated some confusion among law enforcement agencies as to whether it is the police or the prosecutor who must file charges, the UCR handbook clearly states that the exceptional clearance is to be used when the suspect's identification and location is known, there is enough evidence *to justify the arrest and prosecution* of the offender, but for reasons beyond police control they are *unable* to make an arrest.<sup>77</sup> Stated simply, if an arrest is made, the case is to be cleared by arrest. Thus, these cases should have remained cleared by arrest.

As noted earlier, the (mis)use of the exceptional clearance when a suspect is arrested but the district attorney refuses to file charges is based on an LAPD policy that a case can be cleared by arrest only if felony charges are filed;<sup>78</sup> in contrast, the LASD policy is consistent with UCR guidelines but the policy is not always followed by LASD detectives.<sup>79</sup> The fact that the LAPD clears a case by arrest only if felony charges are filed by the district attorney means that—practically speaking—their arrest practices are based upon a *prosecutorial standard of proof beyond a reasonable doubt*, rather than the *police standard of probable cause*. An attempt to understand the logic behind this practice requires a glimpse into the darker days of the LAPD's past. Operation Hammer, for example, was a large-scale response to escalating gang violence by the LAPD's CRASH<sup>80</sup> unit during 1987–1988, the consequences of which amounted to four million dollars in civil liability for the city of Los Angeles.<sup>81</sup> A *Los Angeles Times* article published in the aftermath of the Rampart scandal<sup>82</sup> reported that at Operation

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<sup>76</sup> Feeney, *supra* note 19, at 12.

<sup>77</sup> UCR HANDBOOK, *supra* note 11, at 80–81.

<sup>78</sup> LOS ANGELES POLICE DEP'T. MANUAL, *supra* note 68, at § 3.14–10.

<sup>79</sup> See Interview with Authors (2010) (transcript on file with authors).

<sup>80</sup> MALCOLM W. KLEIN, *THE AMERICAN STREET GANG: ITS NATURE, PREVALENCE, AND CONTROL* 164 (1995). The Community Resources Against Street Hoodlums ("CRASH") is now disbanded. *Rampart Scandal Timeline*, PBS.ORG, <http://www.pbs.org/wgbh/pages/frontline/shows/lapd/scandal/cron.html> (last visited Mar. 22, 2011).

<sup>81</sup> John L. Mitchell, *The Raid That Still Haunts L.A.*, LOS ANGELES TIMES, Mar. 14, 2001, <http://articles.latimes.com/2001/mar/14/news/mn-37553>.

<sup>82</sup> For background about LAPD misconduct, the aspects of LAPD culture that undermine attempts to promote positive change, the Rampart scandal, and the continuing need for reform, see BLUE RIBBON RAMPART REVIEW PANEL, RAMPART RECONSIDERED: THE SEARCH

Hammer's height in August 1988, officers descended on two apartment buildings on 39th Street and Dalton Avenue in South Los Angeles and "smashed furniture, punched holes in walls, destroyed family photos, ripped down cabinet doors, slashed sofas, shattered mirrors, hammered toilets to porcelain shards, doused clothing with bleach, and emptied refrigerators."<sup>83</sup> In response to criticism over the high number of arrests generated by Operation Hammer relative to charges filed by the courts, former Chief Daryl F. Gates was quoted in a PBS interview saying that (prosecutorial) complaints were filed against seventy percent of the arrestees.<sup>84</sup> Taken together, incidents such as Operation Hammer, a history marked by institutional reluctance to thwart unconstitutional policing that lacked probable cause, and, more recently, federal oversight of the LAPD in response to the Rampart scandal,<sup>85</sup> are inevitably factors that influenced senior LAPD officials' perceptions (and subsequent policy dictates) pertaining to the credibility of, and controversy over, arrests made by LAPD officers. Thus, given this context, it is feasible that the merit of an arrest being measured by its ability to "stick," which is police jargon meaning a prosecutor filed charges, emerged over time—in part due to ambiguous UCR guidelines—amidst a new generation of command staff in an era concerned with accountability and reform.

In the following sections, we discuss the four criteria that must be met to exceptionally clear a case, beginning with an identified suspect and a known location for that suspect.

## 2. Criteria Required for Clearing by Exceptional Means

The first two criteria for clearing a case by exceptional means are straightforward and objective. There must be an identified suspect and knowledge of the exact location where the suspect can be found.<sup>86</sup> Therefore, all of the cases that were cleared in this way should, by definition, meet these criteria. As shown in Table 3,

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FOR REAL REFORM SEVEN YEARS LATER (2006), <http://www.lacp.org/2006-Articles-Main/071506-Rampart-Reconsidered-Full-Report.pdf>. For a review of both LAPD and LASD changes in response to misconduct, see generally SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* (2005).

<sup>83</sup> Mitchell, *supra* note 81, at 1.

<sup>84</sup> Interview by Frontline, PBS with Daryl Gates, Chief, L.A. Police Dep't. (Feb. 27, 2001), available at <http://www.pbs.org/wgbh/pages/frontline/shows/lapd/interviews/gates.html>.

<sup>85</sup> *Rampart Scandal Timeline*, *supra* note 81. (indicating that on September 19, 2010, the Los Angeles City Council voted to allow the U.S. Department of Justice to oversee LAPD reforms).

<sup>86</sup> UCR HANDBOOK, *supra* note 11, at 150.

there were only four cases (3.2%) in the sample of exceptionally cleared cases from the LAPD in which the suspect was either not identified or was identified but his location was not known.<sup>87</sup> In contrast, of the 2008 cases exceptionally cleared by the LASD, 76 (28.5%) were cases in which the suspect was not identified or could not be located; 43 (15.5%) were cases without an identified suspect and 33 (12.9%) were cases in which an identified suspect could not be located.<sup>88</sup> The fact that more than one fourth of the LASD cases cleared by exceptional means did not meet these basic criteria means that they are using this clearance category inappropriately in a substantial number of cases. Applying just the first two criteria articulated by the UCR Handbook suggests that these cases (four LAPD cases and seventy-six LASD cases) should not have been cleared; they should have remained open until a suspect was identified and his or her location established.

The third and fourth criteria required to exceptionally clear a case pertain to the sufficiency of the evidence needed to clear a case this way and the inability of the police to clear the case by making an arrest.<sup>89</sup> To reiterate, the UCR Handbook states that to exceptionally clear a case, there must be *enough information* to support arresting, charging, and turning the suspect over to the court for prosecution, as well as something *beyond the control of law enforcement* that prevents them from arresting the suspect.<sup>90</sup> In other words, the police have probable cause to make an arrest but are prevented from doing so by something beyond their control: the suspect has died, is being prosecuted for another crime in a different jurisdiction, cannot be extradited, or the victim refuses to cooperate in the prosecution of the suspect.

Determining whether the sexual assault cases cleared by exceptional means by the LAPD and the LASD meet these two criteria is complicated by the fact that there is no objective indicator in the case file of whether the investigating officer had probable cause to make an arrest. We do not know, in other words, whether the officer had sufficient evidence to make an arrest and cleared the case exceptionally when he or she was unable to arrest the suspect, or whether the officer simply presented a weak case (i.e., a case without probable cause to make an arrest) to a deputy district

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<sup>87</sup> See *supra* Part III.B.1, Table 3.

<sup>88</sup> *Id.*

<sup>89</sup> UCR HANDBOOK, *supra* note 11, at 81.

<sup>90</sup> *Id.* at 80–81.

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attorney for a pre-arrest filing decision, and cleared the case exceptionally when the DDA decided that the case did not meet the office filing standard of proof beyond a reasonable doubt.

Determining whether the cases meet these criteria is also complicated by the fact that the UCR Handbook does not precisely define what is meant by reasons outside the control of law enforcement that prevent arresting, charging, and prosecuting the suspect.<sup>91</sup> As noted earlier, the Handbook provides a list of possible situations, many of which involve the death of the suspect, that meet this criterion. The ten examples provided, which the Handbook acknowledges are not exhaustive, include refusal of the victim to cooperate in the prosecution of the suspect but do not include a prosecutorial declination to file charges because of insufficient evidence, which, as we explain below, is the most common reason given by the LAPD and LASD investigating officers for clearing a case by exceptional means.<sup>92</sup> In short, if the agency has an identified suspect and probable cause to make an arrest, the agency should clear the case by arrest as it is within their control to arrest, charge, and turn the suspect over to the district attorney for prosecution. To do otherwise is not only counter to the FBI's guidelines, but it becomes an avenue through which to prematurely dispose of the nonstranger sexual assault cases which, as discussed above, are the most common type of sexual assault and require specialized investigation to overcome the consent defense.

Although we cannot determine whether the officer investigating the crime had probable cause to make an arrest, we can evaluate the reasons given by the officer for clearing the case by exceptional means, as these are documented in the case files. Of the 121 LAPD exceptionally cleared cases in which the suspect was identified and his location known, fifty-five (44%) were cases in which the prosecutor stated that there was insufficient evidence to try the case before a jury and twenty-six (20.8%) were cases in which the victim did not want to cooperate in the prosecution of the suspect.<sup>93</sup> The remaining forty cases (32%) were cases in which the police did make an arrest but the case was exceptionally cleared when the DA declined to file felony charges.<sup>94</sup> Of the 191 LASD cases, seventy-seven (28.8%) involved a prosecutorial assessment that the evidence

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<sup>91</sup> *Id.* at 81.

<sup>92</sup> *See supra* Part III.B.1, Table 3.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

was insufficient and sixty-one (22.8%) involved a reluctant victim.<sup>95</sup> The remaining fifty-three cases (19.9%) were cases in which sheriff's deputies did make an arrest.<sup>96</sup> In other words, the exceptionally cleared cases in both agencies most often involved a prosecutorial assessment of insufficient evidence, followed by the victim declining to cooperate with the prosecution. Although they are not mutually exclusive and can occur simultaneously, we address prosecutorial assessments of evidence first, followed by victim cooperation.

### 3. Exceptional Clearances Based on Insufficient Evidence

In order to analyze exceptional clearances that occur when a prosecutor declines to file charges, it is important to understand what prosecutors need in order to file charges in sexual assault cases; that is, how much legally admissible evidence is sufficient to prove the defendant's guilt beyond a reasonable doubt in front of a jury. As noted earlier, deputy district attorneys interviewed for this project stated that the pre-arrest screening process determines whether the evidence amassed by law enforcement at the time of screening justifies prosecution, or whether additional investigation is required before the suspect can be arrested and turned over to them for prosecution. When asked what they needed to file felony charges, prosecutors unanimously stated that office policy requires corroboration of the victim's allegations, especially in "she said/he said" cases in which the suspect and victim are nonstrangers.<sup>97</sup> Corroboration was described as some form of documentation independent of the victim's word that "the jury can look at"<sup>98</sup> and that substantiates her claims: vaginal or anal trauma, eyewitnesses, bodily injuries, ripped clothing or other signs of force at the crime scene, phone records, security camera video, a fresh complaint witness,<sup>99</sup> a pre-text<sup>100</sup> phone call, or a 911 call from the

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Interestingly, all prosecutors interviewed for this study agreed that stranger cases are *incredibly* rare; prototypical cases involve either adult acquaintances, or children molested by family members or other known authority figures or acquaintances. The major difference between adult and child cases, many noted, is that jurors/society inherently trust child victims yet are inherently *distrusting* of teenage and adult female victims. Interview with Authors (2010) (transcript on file with authors).

<sup>98</sup> *Id.*

<sup>99</sup> A fresh complaint witness is someone the victim discloses to and/or interacts with after the assault who can speak to behavior, appearance, or some other issue that is consistent with the allegations. Catherine Paquette, *Handling Sexual Abuse Allegations in Child Custody Cases*, 25 NEW ENG. L. REV. 1415, 1436 (1991).

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victim or a witness. One respondent summed up corroboration as “pieces of evidence that couldn’t be explained unless the victim was victimized.”<sup>101</sup>

In reference to the avenues for acquiring such evidence, prosecutors remarked on the need to “[a]sk the right questions to get the whole story and look for corroboration in those little points. If the victim said ‘I was afraid and I called my mother,’ get the phone records.”<sup>102</sup> Prosecutors also spoke of the need to examine the suspect’s history—prior relationship partners, friends, acquaintances, and family who can speak to behavioral patterns—and criminal record—including crime reports and arrests, not just convictions. They emphasized the importance of these types of evidence, which could be used to demonstrate the suspect’s propensity towards aggressive behavior, sexual or otherwise. Also of importance, they noted, are such things as the suspect’s post-assault behavior in terms of attempts to contact the victim, activity on social media websites such as Facebook, and, perhaps most importantly, whether the suspect made any incriminating admissions to the police.

According to both detectives and prosecutors, one of the biggest challenges in obtaining corroborative evidence is delayed reporting of the assault. The problem with delayed reporting is that any injuries from the assault will likely be healed and witnesses may no longer be available. Delayed reporting also drastically decreases the probability of retrieving any biological evidence from either the victim’s body (crime scene number one) or the actual crime location (crime scene number two).<sup>103</sup> Notably, detectives and prosecutors who reported receiving the most training and expressed the most job satisfaction commented that delayed reporting is the *norm* and is to be expected in all types of sexual assault cases, regardless of the victim’s age. Given the ubiquity of delayed reporting, especially in nonstranger sexual assaults, they emphasized the critical

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<sup>100</sup> Pre-text phone calls involve the police recording the victim calling the suspect to discuss what transpired with the goal of obtaining incriminating statements. *Training Key # 574: Pretext Phone Calls in Sexual Assault Investigations*, INT’L ASS’N OF CHIEFS OF POLICE, <http://www.theiacp.org/LinkClick.aspx?fileticket=b4en4XkfWVo%3D&tabid=87> (last visited Mar. 22, 2011). Detectives and prosecutors repeatedly emphasized the importance of doing a pre-text phone call in nonstranger cases. Interview with Authors (2010) (transcript on file with authors).

<sup>101</sup> Interview with Authors (2010) (transcript on file with authors).

<sup>102</sup> *Id.*

<sup>103</sup> Sexual Assault Nurse Examiners now conduct forensic evidence collection up to ninety-six hours after an assault, whereas standard practice previously was up to seventy-two hours post-assault. Interview with G. Abarbanel (Nov. 9, 2010) (transcript on file with authors).

importance of specialized training in *interviewing* victims and *interrogating* suspects. For example, a detective in a specialized unit made the following observation:

The DA's office needs as much training as we do. I did a presentation about trauma and interviewing and most of those attending were DA's. Their reviews were more enlightening to me than the detectives.' Their eyes were opened in terms of interviewing a traumatic victim. We're so used to interviewing the day it happened. With sexual assault you have to go backwards and do a comprehensive cognitive interview because memory fails with trauma. VIP training is specialized but there are times where you will get a DA who screens these cases and closes the door. They are in the law enforcement family and they stick together and defend their own even when they're wrong as we do.<sup>104</sup>

Formal policies requiring proof beyond a reasonable doubt and corroboration of the victim's testimony prior to filing can, of course, be loosened, or even circumvented, as a result of *informal* norms on charging that reflect the discretion accorded to individual prosecutors and the varying supervisory styles at courthouses throughout the county. As one prosecutor stated, "[t]he reality of what happens is different than what policy dictates. Many DA's do not file when they are not easy cases."<sup>105</sup> Along similar lines, another prosecutor stated, "[i]f I thought it was an absolutely righteous case and there was anything to corroborate what the witness said and I was unsure what a jury would do, but I thought I could do it, then I would file."<sup>106</sup> It is also important to consider these issues in relation to the police decision to arrest, along with how a detective's perceptions and handling of a sexual assault report sends a message to the prosecutor about—what interviewees from all three agencies often referred to as—the “righteousness” of a case. For example, a prosecutor stated that, “usually when they bring in a case we'll ask ‘is it a filing or a reject?’ They'll often say ‘a

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<sup>104</sup> *Id.*

<sup>105</sup> Interview with authors (2010) (transcript on file with authors). Echoing this sentiment, another prosecutor stated:

There is a wide range of DA interpretation as to what sufficient evidence will result in a conviction. I will say this because it is anonymous that there are people who are attracted to sex crimes because you can get high sentences and they reject ones that are not a slam dunk.

*Id.*

<sup>106</sup> *Id.*

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reject.”<sup>107</sup> Additionally, a detective who had just come from doing a case “drop off” at the DA’s office prior to being interviewed for this study reported feeling pleasantly surprised that the DA filed charges in the case because she was sure it would be rejected. The detective attributed the filing to having made the effort to speak to the prosecutor *in person* rather than just sending the case file over by facsimile.

Given the frequency of references to it, perhaps the most important underlying factor is how police and prosecutors evaluate the victim’s believability and credibility. Most respondents emphasized that their evaluation of the strength of evidence in the case was closely linked to their assessment of the victim’s credibility and some prosecutors stated that they would file charges in a weak case if the victim was a “righteous victim.” This is evidenced by the following statement from a prosecutor:

Do I file things I think will be hard to prove? Yes. If I interview a victim I find incredibly compelling and there’s a richness to the detail, a believability and ring of truth to how she describes things then I will file it explaining to her that the odds are really low and is she still willing to go forward. I tell her we have problems here and we could very well lose. If I have a go ahead from the victim then I will go forward. It’s all about the victim. She is on trial. All the legislation we have about not revictimizing the victim, but at the end of the day we are putting her on trial; why she wore what she wore, went where she did, and so on. She is being judged.<sup>108</sup>

Along similar lines, another prosecutor commented by way of the following analogy:

There is a double standard in these cases that I try to explain to jurors. For example, I am driving in my car and I realize that I am short of cash and need to go to the ATM. I pull up to an ATM and see that there are scary looking gang members standing outside of the ATM. Although I am nervous, I need money so I park and go to the ATM and I subsequently get robbed. Do we not arrest the suspects because I should have known that might happen and thus should not have gone to the ATM?<sup>109</sup>

Although interviewees repeatedly emphasized the serious nature

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

of rape, they focused most often on suspects and their own apprehensions around making arrests and filing criminal charges, rather than the consequences of victimization for rape survivors and the subsequent impact on their behavior during a criminal investigation. For example, a prosecutor commented that “[w]e are supposed to interview the victims pre-arrest to determine credibility and gather other information that would help strengthen our case, although it does not happen every time. Sometimes they arrest the suspect and bring the case to us after the arrest but that is rare.”<sup>110</sup> This suggests that law enforcement officials believe that it is important to assess the victim’s credibility before taking action against a suspect. The law enforcement officials interviewed for this project also emphasized that rape is unique because, of the two crimes (rape and homicide) deemed to be the most serious, it is the only one in which there is a *live* victim who makes or breaks the case. Given this reality, then, it is critical that the way in which information is obtained from victims does not create any further complications for what is already a difficult crime to prosecute. For instance, a prosecutor noted:

The problem with police and prosecutors is that we ask different types of questions so reports based on our interviews may *appear to be inconsistent* but in reality it is an artifact of questioning. Everything is discoverable so any interviews with the victim prior to trial the defense gets. For example: the victim tells the detective ‘he touched me.’ The detective writes ‘victim said suspect penetrated me with his finger.’ Those are two different charges. I have to ask for clarification and now this becomes two different statements (the officer interpreting it as penetration and me clarifying) and it makes the victim look like a liar, which undermines her credibility.<sup>111</sup>

#### 4. A Case Cleared by Exceptional Means Due to Insufficient Evidence

Consider the following 2008 case example in which the detective presented the case to a deputy district attorney prior to making an arrest. When the district attorney declined to file charges the detective cleared the case exceptionally due to insufficient evidence:

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

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The victim is a thirteen-year-old runaway who stayed with various friends, all of whom were gang members (the victim is not a gang member). One night the victim and a female friend were invited to a party at a gang member's residence. The victim admitted to drinking more than ten beers and smoking marijuana. One of the partygoers, whom the victim knew only by first name, told her she could sleep at his house. The suspect let the victim sleep in his living room on a fold out bed. The victim said she fell asleep but woke up because the bed was moving. She said the suspect was on top of her and grinding his pelvis against her. She said they were both clothed; however, she thought the suspect's penis was outside his pants. The victim told the investigating officer that she pushed the suspect off her. The suspect then began touching the victim's breasts. The victim came in and out of consciousness. She said she felt the suspect rubbing her buttocks and told him to stop. The victim then felt the suspect penetrate her rectum. The victim told the suspect that it hurt and told him to stop. The suspect then rolled over and fell asleep.

This case is emblematic for many reasons: first, the vulnerability of the victim given her age and her status as a runaway. Second, she is acquainted with the suspect and somewhat dependent on him in this particular scenario for a place to sleep. In terms of evidence, the police report included the SART exam, which stated that sexual abuse was "highly suspected" because of acute anal trauma. More specifically, the victim's injuries—which were photographed during the SART exam—included a fresh laceration in the anus along with anal bleeding. The victim was interviewed numerous times; during the first interview the officers noted the smell of alcohol on her breath. The victim told the detective that her friend (a fresh complaint witness) would not cooperate because she was a gang member. She also told the detective that there were rumors the suspect had sexually assaulted another girl previously and that he had recorded it.

The suspect in this case was identified via photo line-up and interviewed at the station but never arrested. He had a criminal record including an arrest for conspiracy to commit crime, and convictions for contempt of court and vandalism. Additionally, the suspect lied to the detective about his moniker and gang affiliation. The suspect denied assaulting the victim, claiming instead that he went straight to bed and that he shared a room with his father—also a gang member—who, the suspect stated, would testify to this. Further, the suspect stated that the victim snuck into his house and

slept in his living room without his knowledge, and the suspect's father corroborated his story, stating that the suspect returned home alone the night of the incident. He said that he was certain the victim was not at the apartment when he went to sleep.

The detective in this case faxed the report to the district attorney's office and emphasized that the victim stayed with the suspect one to two days after the assault, which, without sufficient context and in conjunction with not having made an arrest, effectively undermined her credibility. This is subtly indicated by the deputy district attorney's choice of words to justify rejecting charges, despite the fact that the SART exam findings corroborated the victim's allegations: "V[ictim] is a runaway who gives inconsistent and unlikely versions of her adventures. No evidence of any assault taking place. D[efendant] had a wit[ness] that corroborates his version."<sup>112</sup> It is unknown whether the rape kit in this case was tested, because if it was and the suspect's DNA was present, it would indicate that he lied given that he denied having any sexual contact with the victim.

In summary, filing decisions in sexual assault cases are based on prosecutorial assessments of the sufficiency of the evidence, which vary depending on the depth and quality of the detective's investigation, the prosecutor's perceptions of victim credibility, and the available corroboration. Upon being presented with a case, if a prosecutor decides that sufficient evidence exists and the police have not already arrested the suspect (and cleared the case by arrest), he or she will issue a warrant and the police will arrest the suspect, clear the case by arrest, and from there the prosecutor takes over. Conversely, if the prosecutor decides that the evidence as it currently stands is insufficient, he or she will either outright reject the case, or reject it for further investigation. It is at this point that some detectives clear the case exceptionally, although other detectives stated that the case should be kept open and investigated further.

The importance of this juncture in an investigation cannot be underestimated given that the police retain the authority to gather more evidence and present the case again,<sup>113</sup> whereas prosecutors cannot work with a case that never comes before them, and will be less inclined to take on a case that, on paper, is unclear, inconsistent, and raises doubts about the victim's credibility. By

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<sup>112</sup> Interview with Authors (2010) (transcript on file with authors).

<sup>113</sup> Riedel & Boulahanis, *supra* note 27, at 156.

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the time a victim is interviewed by the district attorney's office he or she has already been interviewed *at least twice* by the police: by a patrol officer and by a detective. In other words, rapport, good or bad, is already established. Nevertheless, the power of the police notwithstanding, the findings from this study indicate that prosecutors are equally—if not more—powerful players in this process, especially given the informalities of their interdependent relationship with law enforcement and the subsequent impact on the extent to which the police investigate allegations of sexual assault.

##### 5. Exceptional Clearance Based on Lack of Victim Cooperation

A situation in which the victim refuses to cooperate in the prosecution of the suspect is listed as an example of a case that might be cleared by exceptional means, provided that the other three criteria are met. All of the LAPD and LASD cases that were exceptionally cleared because the victim refused to cooperate were cases with identified suspects whose locations were known. Further analysis of these cases (for both agencies combined) revealed that two-thirds of them were “simple rapes”<sup>114</sup> that did not involve strangers, weapons, or visible injuries to the victim. In terms of relationship, 51.7% of the cases involved non-strangers and 26.8% involved intimate partners.<sup>115</sup> In almost all of the cases (95.4%) the victim did not report the crime within one hour; in fact, in about 70% of the cases the victim did not report the crime within 24 hours and in 21.8 % of the cases the victim waited one month or longer to report the crime to the police.<sup>116</sup> Interestingly, the police did not interview the suspect in 70.1% of these cases.<sup>117</sup> Perhaps these victims decided that they did not want to cooperate in the prosecution of the case because they did not view themselves as “genuine victims.”<sup>118</sup> They were not attacked by strangers wielding guns or knives, and they waited at least one day before reporting the crime to the police.

Given the salience of victim cooperation to the success of a case, we asked sexual assault survivors about their decision to report to

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<sup>114</sup> See *supra* Part III.A, Table 2; ESTRICH, *supra* note 8, at 4.

<sup>115</sup> See *supra*, Part III.A, Table 2.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> See generally GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT (1989).

the police and their experiences with the criminal justice system. One woman who was raped in her home by a stranger while her boyfriend was tied up and forced to watch offered the following:

I wish their communication was better. I saw the rapist's face twice but when police asked me about the sketch they kept asking me more questions, which I couldn't answer. I needed them to stop pressing me but they kept asking questions about the incident. The police had no clue how to talk to me, especially as the rape lasted five hours. I felt interrogated. They could have been more sensitive to the trauma. It's all about the approach by the police.

The following reflections come from a woman whose experience was emblematic of the classic she said/he said scenario:

I was raped two years ago at a New Year's Eve party so I knew everyone there, including my rapist. I was pretty drunk and this guy who I'd known since I was five asked me to follow him to another room where he pushed me on the bed and I passed out. There were injuries to my arms, face, and I was incredibly sore. I'd never passed out before. A friend found me passed out on the bed and the rapist ran out. I reported the following day at night. There were several hours in-between. I never remembered being raped. I remember trying to fight him off and my next memory is of my friends holding my hair and I'm vomiting. I woke up the next morning thinking I had not been raped but there was a pain in my vagina and then I realized what happened. I talked to my mother and she noticed I wasn't wearing tights or underwear. I spent the whole day deciding whether to report or not. I decided to tell my father who wouldn't be able to stand it if there was no justice so he called the police, who came to my house. Three police cars showed up with their lights flashing. I was harshly interrogated by a male officer. The female officer present never said anything. The police officer was incredibly rude and harsh; well, not rude, harsh. Their main focus was that I was drunk and how drunk was I but they never considered if I was too drunk to consent . . . . I gave a statement and again they fixated on how much I had drank and moved towards blaming me because the rapist was someone I knew. The plan was to have me call him and to tape his call. It was a really stressful exercise. The rapist spoke with a lawyer and came in voluntarily to speak with the police. At that point they

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believed him because I was drinking a lot and they made the assumption it was consensual.

After a thoughtful pause she added:

One of the things that still bothers me is during the initial interrogation I was asked if I'd blacked out before and I said no and later in the investigation the facts were mingled and I was misquoted several times. They [the police] asked if I'd ever got physically ill from drinking and I told them yes, a dozen or so times when I was in college. Meanwhile my rapist was never arrested and charges [by the DA's office] were rejected because in the report it said that I'd been known to black out but this was inaccurate and not what I'd told them. I asked them to bring out the tape from the initial interrogation when I was told there was no tape and it wasn't recorded. My friends were at the party and could pinpoint people who were present at the party. I gave their contact info to police. And I kept asking if my rape kit had been processed. I was told there was no point in processing the rape kit once the rapist stated that sex had occurred.

When asked what she would do if someone disclosed a sexual assault to her and wanted advice about whether to report and cooperate with the prosecution she stated:

I would not report but if I knew who it was I would take revenge. I don't believe that reporting acquaintance rape does anything for the victim. I would express what happened to me but I would share my experience and that taking care of it yourself may give you results because my experience was so negative. I have lost a lot of friends over this. I haven't seen my rapist but I've seen his friends. Evidence from my case was going to be presented to another DA but I was frustrated and decided to just not think about it anymore so I gave up on prosecuting. The DA's office was looking for a slam dunk and my case wasn't a slam dunk.

The preceding reflections provide context to the decision not to cooperate with the prosecution as it relates to a victim's experience with the police, which sets the tone for subsequent interaction with the district attorney's office. Many of the victims, including those who were assaulted by strangers, reported not being believed and stated that their credibility was challenged by the police. For instance, consider the reflections from a woman who was kidnapped at gunpoint by a stranger during winter break at college. After being held hostage for almost twenty-four hours she went to a local

hospital in fear of being pregnant or having caught a sexually transmitted infection, which triggered a call to the police from the hospital staff:

They asked me if I wanted a woman police officer; I didn't care. A police officer is a police officer. I had never had any contact with the police. I didn't know they might treat you differently. Immediately they told me I was lying and on drugs. Straight up! 'You're on drugs.' My eyes were blood shot because I was so stressed and traumatized. [They kept saying] 'You're lying, you're lying! Stand up, close your eyes, and count to thirty. Can you count to thirty?' I got to thirty. Apparently they talked to my friends, because they were two guys. They said 'You put her up to this. You told her to do this for fun. You are all on drugs. Here is how it is: stop telling me this fairytale. Tell me the truth or you will personally go to prison for lying to a police officer. And I will send you to an all women prison so women could rape you.' I was stunned. Why was I defending myself? The victim shouldn't have to. The officer said most women would rather die than be raped. Then he told me at least three or four times to say I was lying and this won't go on further. He said we can drop this and forget all about it. For a moment I thought that maybe I should say that I was lying so I wouldn't have to deal with this anymore.

These statements indicate that despite the existence of rape law reform and victim advocacy, adult female sexual assault victims, whether assaulted by strangers or nonstrangers, continue to be met with scrutiny and distrust by both the criminal justice system and society at large (as represented by juries). Illustrating the salience of this specifically to nonstranger sexual assault, a prosecutor commented that:

General society still has an archaic perception that if a woman voluntarily goes with a man to have a drink and she is intoxicated—although no one wants to articulate it—there is still an idea that she is loose. I'm not sure if it is the job of the police or the district attorneys to change that, but it needs to happen.<sup>119</sup>

Similarly, Temkin notes that false beliefs about rape are “so many and various” but some of the “most damaging” include the following:

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<sup>119</sup> Interview with authors (2010) (transcript on file with authors).

True rape is rape by a stranger . . . . True rape . . . takes place [outdoors] and involves physical violence against a victim who does all she can to resist . . . . A woman can always prevent rape by fighting off her assailant . . . . A woman can always withhold consent to sex now matter how drunk she is . . . . Women have only themselves to blame for rape because of their clothes, drinking habits, previous sexual relationships, and risky behavior . . . Consent to sex can be assumed because of dress or certain types of behavior, such as flirting or kissing . . . . [and] [g]enuine victims report rape immediately . . . display great emotions when recounting the events in question . . . and always give a thoroughly consistent account.<sup>120</sup>

The persistence of rape myths provides a context for understanding sexual assault case attrition in the criminal justice system because if police action is based on erroneous stereotypes about what rape is and what a “real” victim should do, victims whose cases fail to meet these criteria will not be given the respect, time, and investigative resources they deserve. The same logic applies to prosecutors. If erroneous stereotypes and misconceptions cloud prosecutors’ perceptions of “real rape,”<sup>121</sup> their course of action when presented with acquaintance rape—which, according to this study, is the prototypical type of rape seen in Los Angeles City and County—will inevitably fall short of the rights guaranteed by Marsy’s Law<sup>122</sup> to crime victims under the California Constitution.

#### IV. DISCUSSION AND CONCLUSION

The purpose of this paper was to investigate law enforcement’s use (and misuse) of the exceptional clearance in sexual assault cases. A key finding is that both the LAPD and the LASD clear a substantial number of cases by exceptional means. In fact, cases cleared by exceptional means accounted for more than half of all

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<sup>120</sup> Jennifer Temkin, “*And Always Keep a Hold of Nurse, for Fear of Finding Something Worse*”: *Challenging Rape Myths in the Courtroom*, 13 NEW CRIM. L. REV. 710, 715 (2010).

<sup>121</sup> See Lisa Frohmann, *Discrediting Victims’ Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, 38 SOC. PROBS. 213, 217–22 (1991) (discussing common prosecutorial assumptions about rape); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 639–45 (2009) (noting that societal norms treat date rape victims differently than traditional rape victims).

<sup>122</sup> Cal. Const. art. 1, § 28 (2011). Number one of the sixteen rights is “[t]o be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process.” *Id.* at § 28(b)(1).

case clearances for the LASD and for a third of all case clearances for the LAPD.<sup>123</sup> This clearly is inconsistent with Feeney's assertion that UCR guidelines (as articulated in early UCR handbooks) reflect an expectation that "most clearances would be based on arrests and that the number of exceptional clearances would be limited."<sup>124</sup> For these two law enforcement agencies, exceptional clearances of sexual assault reports are common, not exceptional. An important implication of this is that UCR data on "cases cleared by arrest" are misleading.<sup>125</sup> Combining exceptional clearances with cases cleared by arrest resulted in 2005–2009 arrest rates for rape and attempted rape of 88.9% for the LASD<sup>126</sup> and 45.7% for the LAPD,<sup>127</sup> but the "true" arrest rates (i.e., the percentage of cases that were cleared by the arrest of a suspect) were only 34.7% (LASD)<sup>128</sup> and 12.2% (LAPD).<sup>129</sup> Combining the two types of case clearances, in other words, substantially inflates the rates of "cases cleared by arrest" for each agency.

Each agency's case clearance data is further compromised by the fact that cases that result in the arrest of a suspect are cleared by exceptional means when the district attorney declines to file charges. As noted earlier, this is based on an LAPD *policy* to clear by arrest only when the prosecutor files felony charges and reflects a *lack of training* for the LASD,<sup>130</sup> whose policy is to clear by arrest if a suspect is arrested.<sup>131</sup> Although we could not determine the percentage of 2005–2009 cases in which this occurred (the data file we were provided included only the final case clearance type), we were able to determine this for the 2008 cases. Forty (32%) of the 125 rapes and attempted rapes in the LAPD sample and 53 (19.9%) of the cases in the LASD sample were cases in which a suspect was arrested but the case was cleared by exceptional means when the district attorney refused to file charges.<sup>132</sup> Because the UCR Handbook clearly states that the exceptional clearance is to be used only in cases in which law enforcement is *unable to make an arrest* due to factors beyond their control, these cases are incorrectly

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<sup>123</sup> See *supra* Part III, Table 1.

<sup>124</sup> Feeney, *supra* note 19, at 18.

<sup>125</sup> UCR HANDBOOK, *supra* note 11, at 79.

<sup>126</sup> See *supra* Part III, Table 1.

<sup>127</sup> See *id.*

<sup>128</sup> See *id.*

<sup>129</sup> See *id.*

<sup>130</sup> LAPD MANUAL, *supra* note 68, at § 3.14-10.

<sup>131</sup> *Id.*

<sup>132</sup> See *supra* Part III.B.1, Table 3.

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cleared by exceptional means.<sup>133</sup> The implication of this error is that each agency's arrest rate is lower than it should be. In fact, adding these inappropriately cleared cases to the agency's arrest rate more than doubles the rate for the LAPD (12.1% to 26.7%) and increases the LASD rate by about a third (from 31.7% to 43.6%).

Law enforcement agencies should not base the validity of an arrest (measured by clearing a case by arrest) on whether a prosecutor files charges. It translates into a higher standard than what is required by the FBI, it is counter to the reasoning for the development of the exceptional clearance category for cases in which police are *unable* to make an arrest, and, it artificially decreases the agency's arrest rate.<sup>134</sup> Furthermore, specific to the LAPD, in the post-Consent Decree Era<sup>135</sup> under the leadership of former Chief William Bratton and continuing with current Chief Charlie Beck, there is full institutional commitment to, and priority placed upon, constitutional policing.<sup>136</sup> Thus, assuming thorough and professional police work, an arrest does not need to be signed off on by a prosecutor to render it valid for FBI crime reporting purposes.

Our analysis revealed that the exceptional clearance is being used incorrectly in two additional situations. The first is when the suspect is not identified and/or his or her location is not known; this is more problematic for the LASD (28.4% of its exceptionally cleared cases did not meet these two criteria)<sup>137</sup> than for the LAPD (only 3.2% of its exceptional cleared cases failed to meet these criteria).<sup>138</sup>

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<sup>133</sup> UCR HANDBOOK, *supra* note 11, at 80–81.

<sup>134</sup> Most officials within both departments—due to FBI guidelines—spoke of clearance rates based on current UCR summary reporting practices which are calculated by *combining* the total number of cases cleared by arrest and cases cleared exceptionally. In other words, the concept of considering them separately seemed unnecessary given that is how they are reported nationally. It is important to note that along with the movement to expand the FBI definition of forcible rape, discussion at the Senate hearing about rape also focused on the need for the UCR to begin publishing arrest and exceptional clearance rates separately. *See also* Jarvis & Regoeczi, *supra* note 28, at 175.

<sup>135</sup> In the wake of the Rampart Scandal, the United States Department of Justice filed a lawsuit against the LAPD and the city of Los Angeles, alleging that the LAPD had engaged in a pattern or practice of depriving individuals of constitutional rights through the use of excessive force, false arrests, and improper searches and seizures. *See* United States v. City of Los Angeles, No. CV0011769(GAF), 2001 WL 314976, at \*1 (C.D. Cal. 2001). The lawsuit was settled on June 15, 2001, with a Consent Decree between the city of Los Angeles and the Department of Justice. *See Rampart Scandal Timeline*, *supra* note 80.

<sup>136</sup> Upon becoming Chief of the LAPD in 2009, Charlie Beck appointed Gerald Chaleff, former head of the Consent Decree Bureau (first appointed by Chief William Bratton in 2003), as his Special Assistant for Constitutional Policing. *GeraldChaleff*, LAPD, [http://www.lapdonline.org/home/comm\\_bio\\_view/7588](http://www.lapdonline.org/home/comm_bio_view/7588) (last visited Mar. 22, 2011).

<sup>137</sup> *See supra* Part III.B.1, Table 3.

<sup>138</sup> *See id.*

Because an identified suspect and knowledge of the suspect's location are *required* in order to clear a case by exceptional means, these cases should not have been cleared but should have remained open until a suspect was identified. The second situation in which cases may be cleared incorrectly by exceptional means is where probable cause to arrest the suspect exists but the detective chooses instead to present the case to the district attorney's office, where charges are rejected based on insufficient evidence. This situation is problematic in that it does not involve something beyond the control of the law enforcement that prevents the arrest of the suspect. There is probable cause to make an arrest but the case is cleared exceptionally because a prosecutor determined that the evidence is insufficient to prove the case beyond a reasonable doubt to a jury. In this situation, the case should not be exceptionally cleared as it is *within the control of the police* to arrest and charge the suspect and turn him or her over to the court for prosecution.

It seems clear that in cases where probable cause exists (and in which the victim is willing to cooperate), the police should make an arrest and clear the case by arrest. Whether a suspect is arrested should not be contingent on whether the prosecuting attorney believes that the evidence meets a standard of proof beyond a reasonable doubt and that the case therefore would result in a jury conviction. Doing so subjects the decision to arrest to a higher standard of proof than is required by law and effectively gives the prosecutor control over the decision to arrest. It also means that individuals who may have committed a serious crime are not held accountable for their behavior and denies justice to victims who made a difficult decision to report the crime and are willing to cooperate with the police and prosecutor as the case moves forward. Failure to make an arrest in spite of probable cause to do so is reminiscent of police inaction in response to domestic violence prior to the implementation of mandatory arrest policies. Although we are not suggesting that police departments should adopt mandatory arrest policies for sexual assault cases, they should make an arrest when there is sufficient evidence that a crime occurred and that the suspect is the person who committed the crime.

Failure to arrest when there is probable cause to make an arrest has other implications as well. It means that the suspect's behavior in this case will not be part of his or her criminal record and therefore cannot be used to link the suspect to subsequent cases with similar modus operandi. Detectives interviewed for this study emphasized the importance of examining a suspect's criminal

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history for evidence of prior allegations that could corroborate the victim's account of the crime. Failure to arrest the suspect means that this type of corroborative evidence will not be available. Related to this, if the suspect is arrested for a felony his or her DNA must be entered into the state's DNA database.<sup>139</sup> If the suspect commits a subsequent sexual assault and leaves behind forensic evidence, the fact that his or her DNA is part of the state DNA database means the suspect's identity can be determined.<sup>140</sup> Conversely, if the suspect is not arrested his or her DNA does not become part of the database and the suspect cannot be linked to subsequent crimes.

Presenting the case to the district attorney for a pre-arrest filing decision and clearing the case by exceptional means if the district attorney does not believe that the evidence meets the standard of proof beyond a reasonable doubt also inflates the district attorney's charging rate. Cases rejected by the prosecutor during the informal pre-arrest screening process are not included in the calculation of the charging rate. The fact that the suspect is not arrested, in other words, means that the case is not presented to the district attorney for a formal filing decision and the district attorney does not have to formally reject the case. Because a substantial number of sexual assaults reported to each agency were cleared by exceptional means as a result of the district attorney's conclusion that the evidence was insufficient to file charges, the "official" charging rate for the 2008 cases (i.e., the percentage of cases in which an arrest was made, the case was forwarded to the district attorney for a charging decision, and the district attorney filed charges) was 82.3% for cases forwarded by the LAPD and 70% for cases forwarded by the LASD. These rates are artificially high. If cases screened out by the district attorney prior to arrest were included, the rates would be significantly lower.

Clearly, there are cases where the police cannot—indeed should not—make an arrest. If probable cause to arrest does not exist or if the prosecutor rejects the case for further investigation as a result of a pre-arrest screening process, the case should be left open and investigated further. These cases *should not* be cleared by exceptional means, as they do not meet the UCR criterion that there

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<sup>139</sup> CAL PENAL CODE § 296.1(a)(2)(A) (2007).

<sup>140</sup> A nurse who has specialized in forensic evidence collection in sexual assault cases for fifteen years stated that an added benefit of having the suspect in custody is the ability to conduct a suspect SART exam without a search warrant on the basis of exigent circumstances. Interview with K. Adams (Dec. 29, 2010) (transcript on file with authors).

must be “enough information to support an arrest, charge, and turning over to the court for prosecution.”<sup>141</sup> The case cannot be solved—that is, cleared—if probable cause to make an arrest does not exist. Cases in which the police know who and where the suspect is and in which probable cause exists to make an arrest, but the victim refuses to cooperate with the police can legitimately be cleared by exceptional means if the victim’s lack of cooperation means that the police cannot make an arrest. However, even in these situations, the outcome is affected by the investigation of the case and the treatment of the victim. Interview data evidenced a need for further training of both the police—patrol officers and detectives—and prosecutors about rapport building and interview skills with trauma victims, which would ideally have a positive impact on victim cooperation.

Our review of the pathways through which LAPD and LASD sexual assault detectives clear cases by arrest or exceptional means, in conjunction with the role that the Los Angeles County District Attorney’s Office plays in this process by screening cases prior to arrest, revealed that the exceptional clearance is being used too frequently, in some cases inappropriately, in sexual assault cases. Although many detectives and prosecutors conduct themselves professionally and with integrity, myths and stereotypes about adult female rape victims and what constitutes “real” rape continue to influence police and prosecutorial efforts in these cases.<sup>142</sup> Specialized training is required to work sexual assault cases—regardless of victim age—because of the skills required to conduct lengthy interviews with traumatized individuals, the evidentiary challenges, and the fact that, second to homicide, rape is the most serious—yet simultaneously the most underreported and underprosecuted—crime. Law enforcement executives are uniquely positioned to facilitate change in this arena, and the authors would like to recognize the initiative of LAPD Chief Charlie Beck, Los Angeles County Sheriff Leroy Baca, and Los Angeles County District Attorney Steve Cooley for choosing to partner with researchers to examine the factors that underlie sexual assault case attrition in Los Angeles as a means to better serve victims and the

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<sup>141</sup> UCR HANDBOOK, *supra* note 11, at 80.

<sup>142</sup> Several prosecutors noted anecdotally that male rape victims are not received with the same distrust and skepticism as female rape victims, and the few cases they were aware of involving male victims were fully prosecuted. Interview with Authors (2010) (transcript on file with authors).

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pursuit of justice in these cases.<sup>143</sup> It is leadership of this nature that will translate into a criminal justice environment in which victims are not intimidated, rape myths are challenged rather than accepted, and suspects are appropriately investigated and held accountable.

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<sup>143</sup> In response to this study, the Los Angeles Police Department is reevaluating case clearance protocols to ensure that the correct interpretation of the FBI's Uniform Crime Reporting criteria.