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Policing Rape Complainants: When Reporting Rape Becomes a Crime

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Policing Rape Complainants: When Reporting Rape Becomes a Crime

Lisa R. Avalos*

Abstract

Rape is one of the most under-reported crimes that there is, and victims often say that they do not report because they are afraid they will not be believed. The worst case scenario for a rape victim is to be disbelieved by police and then charged with false reporting. Unfortunately, prosecutions of rape victims occur regularly, with some victims even serving time in prison. This Article analyzes why these cases occur and pays particular attention to the poor police investigatory practices that underlie the charging decisions in such cases.

The Article proceeds in four parts. Part One describes some of the key weaknesses that characterize rape investigation today. It analyzes some of the ways that police handling of rape cases is inadequate and, as a result, exposes victims to the possibility of being charged with false reporting. Part Two describes the anatomy of a failed rape investigation, arguing that such cases are marked by a failure to follow rape investigation best practice guidelines. Such guidelines, if followed, would have changed the outcome of many cases where complainants were charged with false reporting.

Part Three analyzes why certain complainants are singled out for prosecution, arguing that three factors are particularly salient: the vulnerability of the complainant, the difficulty and complexity of the rape investigation, and police or prosecutors' concern with their agency's reputation. Part Four makes recommendations for reform, including statutory reform that would require police to follow rape investigation best practices.

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I. INTRODUCTION

In 2010, advocates at a small anti-rape advocacy organization in London noticed a problem. An increasing number of women were coming to them to complain that when they went to police to report a rape, the police did not believe them and went so far as to charge them with “perverting the course of justice” for allegedly lying about rape. Perverting the course of justice (“PCJ”) is a serious crime that carries a maximum sentence of life in prison, and some of these women were indeed being sentenced to prison.¹ The problem was that they

¹ See Simon Hattenstone & Afua Hirsch, *Layla’s Story: Jailed After Reporting a Sexual Assault*, GUARDIAN (Aug. 12, 2011), <http://www.theguardian.com/law/2011/aug/12/layla-jailed-after-reporting-sexual-assault>; see also Steven Morris, *Woman Gets Two Years for False Rape Claims*, GUARDIAN (March 4, 2010) [hereinafter *Two Years for False Rape Claims*], <http://www.theguardian.com/society/2010/mar/04/rape-claims-gail-sherwood>; Steven Morris, *Trainee Barrister Jailed for False Rape Claims*, GUARDIAN (June 26, 2014) [hereinafter *Trainee Barrister Jailed*], <http://www.theguardian.com/law/2014/jun/26/trainee-barrister-jailed>.

were adamant that they were rape victims and that the police had neither taken them seriously nor fully investigated their rape complaints. Lisa Longstaff, the director of Women Against Rape, was shocked. Over the years she had observed police bungle many rape investigations, but actually arresting rape complainants for false reporting was a new and disturbing twist.

Then the problem came to a head with the case of “Sarah.”² For nine years, Sarah had been a victim of rape and abuse at the hands of her violent husband, but in November of 2009 she finally mustered up the courage to call the police.³ This call ultimately made a bad situation much worse. One year later, Sarah was the one in prison while her violent husband had custody of their four children.⁴ Although police and prosecutors accepted that Sarah had been raped multiple times by her husband, they had charged her with PCJ for retracting a *true* allegation of rape.⁵ Sarah had withdrawn her rape complaint when pressured to do so by her husband and his family—an action that is not uncommon among women with controlling partners.⁶ In fact, police knew how controlling Sarah’s husband was—she had explained that she did not have a purse, wallet, or driver’s license because her husband would not allow her.⁷ Despite this fact, prosecutors dropped the rape charges against the husband and prosecuted Sarah for PCJ.⁸ She was sentenced to eight months in prison.⁹ Although Sarah was able to obtain her release on appeal after serving just eighteen days, her criminal conviction for PCJ stands, and she is still trying to clear her name.¹⁰

According to Sarah, “It was horrible because I knew the police officers and

www.theguardian.com/uk-news/2014/jun/26/trainee-barrister-jailed-false-rape-claims; Sandra Laville, *109 Women Prosecuted for False Rape Claims in Five Years, Say Campaigners*, GUARDIAN (Dec. 1, 2014) [hereinafter *109 Women Prosecuted*], <https://www.theguardian.com/law/2014/dec/01/109-women-prosecuted-false-rape-allegations>; Sandra Laville, *Rape Victim Falsely Accused of Lying by Police Wins £20,000 Payout*, GUARDIAN (May 22, 2015), [hereinafter *Rape Victim Falsely Accused*], <http://www.theguardian.com/society/2015/may/22/victim-falsely-accused-of-lying-by-uk-hampshire-police-wins-payout>.

² Helen Pidd, *I Accused my Husband of Rape. I was Locked Up—and He was Set Free*, GUARDIAN (Nov. 26, 2010) [hereinafter *I Accused my Husband of Rape*], <https://www.theguardian.com/society/2010/nov/26/accused-husband-rape-jail>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *I Accused my Husband of Rape*, *supra* note 2.

⁹ *Id.*

¹⁰ Helen Pidd, *Jailed for False Retraction, Rape Victim to Challenge Reduced Compensation*, GUARDIAN (May 30, 2016) [hereinafter *Jailed for False Retraction*], <https://www.theguardian.com/uk-news/2016/may/30/jailed-for-false-retraction-rape-victim-sarah-challenge-reduced-compensation> (noting that the judge who authorized her release from prison replaced her custodial sentence with a two-year supervision order, so she was still being viewed as a criminal); *see also I Accused my Husband of Rape*, *supra* note 2.

the solicitors believed that the rapes did happen but the CPS [Crown Prosecution Service] wanted to prosecute me for perverting the course of justice . . . Still to this day I can't get my head around it.”¹¹ Longstaff could not get her head around what was happening either. When she tried to get the police to disclose how many rape complainants were being charged annually with PCJ, police responded that they did not have those statistics because they did not track PCJ arrests according to the underlying crime that the person reported to the police.¹² So Longstaff and her organization began to keep their own records, and ultimately learned that at least 109 women had been charged in this way in London over five years.¹³

Longstaff had stumbled upon a problem that is more common than most people realize: rape complainants regularly find themselves charged with false reporting, and jurisdictions across the United States and Britain do not collect data on how often this occurs because they do not track false reporting arrests according to the underlying crime reported to the police.¹⁴ Alleged false allegations of rape often attract a lot of press coverage, and the press tends to portray these cases as brilliant examples of police cracking a difficult case of a woman lying about rape.¹⁵ Rarely does such press coverage ask critical questions about how police approached the rape investigation, whether they thoroughly investigated the complaint, and whether there was any bias—based on gender or other factors—that may have hampered the investigation.¹⁶

Recent investigations in both countries tell a very different story. Rape is under-investigated and under-prosecuted in both the United States and Britain,

¹¹ *I Accused my Husband of Rape*, *supra* note 2.

¹² E-mail from Lisa Longstaff, Director, Women Against Rape, to author (Feb. 1, 2012) (on file with author).

¹³ *109 Women Prosecuted*, *supra* note 1; Women Against Rape, Chart of 109 Women Prosecuted for PCJ (on file with author).

¹⁴ Email from Lisa Longstaff, Director, Women Against Rape, to author (Feb. 1, 2012) (on file with author). In addition, replies to Freedom of Information Act requests sent to police departments in major cities and at large universities indicate that these departments do not track police reports labeled “false” according to the underlying crime that was originally reported. Email communications between Samantha Baker and police officials in Kansas City, MO; Austin, TX; Houston, TX; San Diego, CA; Seattle, WA; and at Purdue University and the University of Mississippi. (Sept.–Oct. 2015) (on file with author).

¹⁵ See, e.g., Myles Snyder, *Police: Women's Fitness Watch Disproved Rape Report*, ABC 27 NEWS (June 19, 2015), <http://abc27.com/2015/06/19/police-womans-fitness-watch-disproved-rape-report/>; *Mother of Three Who Faked Elaborate Rape Scenes 'For Attention' Jailed for Two Years*, DAILY MAIL (Mar. 4, 2010), <http://www.dailymail.co.uk/news/article-1255594/Mother-faked-elaborate-rape-scenes-attention-jailed-years.html>; James Tozer, *'Wicked' Woman Who Cried Rape is Jailed for Three Years Despite Being Seven Months Pregnant*, DAILY MAIL (Jul. 16, 2010), <http://www.dailymail.co.uk/news/article-1294947/Leyla-Ibrahim-jailed-crying-rape-despite-7-months-pregnant.html>; Richard Hartley-Parkinson, *Law Graduate Who Falsely Accused Boyfriend of Rape to Get Out of Exams is Jailed*, MIRROR (Jun. 26, 2014), <http://www.mirror.co.uk/news/uk-news/law-graduate-who-falsely-accused-3768882>.

¹⁶ For articles that *do* ask these questions, see Hattenstone & Hirsch, *supra* note 1; *Two Years for False Rape Claims*, *supra* note 1; *Trainee Barrister Jailed*, *supra* note 1.

with multiple investigations uncovering a number of poor practices that leave serial rapists to reoffend and evade capture for years.¹⁷ Chief among these practices is a widespread tendency on the part of the police to disbelieve those complaining of rape and, accordingly, to write off their complaints without bothering to investigate.¹⁸ These poor police practices lead to constitutional and human rights violations of the rights of rape victims, and they have other devastating consequences for victims as well, as this Article will discuss.¹⁹

This Article proceeds in four parts. Part One describes some of the key weaknesses that characterize rape investigation today. It analyzes some of the ways that police handling of rape cases is inadequate and exposes victims to the possibility of being charged with false reporting. Part Two describes the anatomy of a failed rape investigation, arguing that such cases are marked by a failure to follow rape investigation best practice guidelines. Such guidelines, if followed, would have changed the outcome of many cases where complainants were charged with false reporting. This Part probes particular police failures that lead directly to the practice of charging rape victims with false reporting; these include failing to conduct a full investigation, interrogate victims as though they are suspects, and understand how sexual assault trauma affects victims' ability to recollect events.

Part Three analyzes why certain complainants are singled out for prosecution, arguing that three factors are particularly salient: (1) the

¹⁷ See, e.g., *Capitol Offense: Police Mishandling of Sexual Assault Cases in the District of Columbia*, HUMAN RIGHTS WATCH (2013), http://www.hrw.org/sites/default/files/reports/us0113ForUpload_2.pdf [hereinafter *DC Report*]; Vivien Stern, *The Stern Review*, GOV'T EQUALITIES OFF. 28–55 (2010), http://webarchive.nationalarchives.gov.uk/20110608160754/http://www.equalities.gov.uk/PDF/Stern_Review_acc_FINAL.pdf [hereinafter *Stern Review*]; Liz Kelly et al., *A Gap or a Chasm?: Attrition in Reported Rape Cases*, HOME OFF. RES., DEV. & STATS. DIR. 193, 53 (2005) [hereinafter *Kelly Study*], <http://webarchive.nationalarchives.gov.uk/20110218135832/rds.homeoffice.gov.uk/rds/pdfs05/hors293.pdf>; Chava Gourarie, *How an Ohio Reporter Helped Convict more than 100 Rapists*, COLUMBIA JOURNALISM R. (Sept. 2, 2015), http://www.cjr.org/local_news/rape_kit_reporting.php.

¹⁸ *Kelly Study*, *supra* note 17, at 51–52 (indicating that a culture of suspicion towards rape complainants permeates the police and impedes investigations), 89 (emphasizing the need for a move away from skepticism and toward evidence-gathering and case building); U.S. DEP'T OF JUST., IDENTIFYING AND PREVENTING GENDER BIAS IN LAW ENFORCEMENT RESPONSE TO SEXUAL ASSAULT AND DOMESTIC VIOLENCE 16–18, 22 (Mar. 20, 2016), <https://www.justice.gov/opa/file/799366/download> [hereinafter DOJ GENDER GUIDANCE]; U.S. DEP'T OF JUST., C.R. DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 43, 45–46 (Mar. 16, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf; *DC Report*, *supra* note 17, at 85 (noting that many sexual assault investigations are classified as “unfounded” early in the investigative process).

¹⁹ DOJ GENDER GUIDANCE, *supra* note 18, at 23–25; Letter from Michael W. Cotter, U.S. Attorney, Dist. of Montana & Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., to John Engen, Mayor 6 (May 15, 2013) http://www.justice.gov/crt/about/spl/documents/missoulapdfind_5-15-13.pdf [hereinafter Engen Letter]; *DSD & NBV v. Comm'r of Police for the Metro* (2014) [hereinafter *DSD Judgment*] EWHC QB 436, [10], [14], (U.K.) <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/dsd-and-nbv-v-met-police.pdf> (finding that failing to investigate rape is a violation of Article 3 of the British Human Rights Act and the European Convention on Human Rights—the right to be free from cruel, inhuman or degrading treatment).

vulnerability of the victim; (2) the difficulty and complexity of the rape investigation; and (3) police or prosecutors' concern with their agency's reputation. Part Four makes recommendations for reform, including statutory reform that would require police to follow rape investigation best practices, and others.

II. PART ONE: THE BROKEN SYSTEM OF RAPE INVESTIGATION

Cases where rape complainants are charged with false reporting do not emerge in a vacuum. Rather, these cases occur in a broader context, marked by police failures to adequately investigate rape—failures which occur on a widespread and systemic scale. Police failures around rape investigations have been extensively documented in the United States, Britain, and other Western countries by numerous government and NGO investigations. In 2010, the U.S. Senate conducted hearings on the chronic failure to investigate and prosecute rape in the United States, and Baroness Vivien Stern led a similar effort in the U.K.²⁰ Sara Reedy—a rape victim who won a \$1.5 million settlement from Pennsylvania police after she was charged with false reporting—testified at the Senate hearings.²¹ In 2013, Human Rights Watch published a report documenting extensive failures to properly investigate and handle rape complaints in Washington D.C., and Amnesty International documented very similar failings in their 2010 report on rape investigation in the Nordic countries.²²

The United States Department of Justice (“DOJ”) has investigated police departments nationwide for violations of constitutional rights.²³ In the last six years, these investigations have provided substantial evidence of gender bias in the police approach to sexual assault investigations across the country, including

²⁰ *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing Before the Subcomm. on Crime and Drugs of the Comm. on the Judiciary*, 111th Cong. (2010) [hereinafter *Rape in the United States Hearing*], <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg64687/pdf/CHRG-111shrg64687.pdf>; *Stern Review*, *supra* note 17, at 3.

²¹ *Rape in the United States Hearing*, *supra* note 20, at 16–17 (statement of Sara R. Reedy, Butler Pennsylvania).

²² See *DC Report*, *supra* note 17 (describing the failure to properly investigate rape complaints); CASE CLOSED: RAPE AND HUMAN RIGHTS IN THE NORDIC COUNTRIES SUMMARY REPORT, AMNESTY INT’L (2010) [hereinafter NORDIC COUNTRIES REPORT], <https://www.amnesty.org/en/documents/ACT77/001/2010/en/> (detailing harmful or prejudicial law enforcement practices with respect to victims of sexual assault in four Nordic Countries: Sweden, Finland, Denmark, and Norway).

²³ The DOJ has authority for these investigations under the 1994 Violent Crime Control and Law Enforcement Act. This law gives the DOJ’s Civil Rights Division the “authority to investigate state and local law enforcement agencies” that are suspected of engaging in unconstitutional policies and pattern of practices and conduct. POLICE EXEC. RES. F., CIVIL RIGHTS INVESTIGATIONS OF LOCAL POLICE: LESSONS LEARNED 1 (2013) [hereinafter CIVIL RIGHTS INVESTIGATIONS OF LOCAL POLICE], http://www.policeforum.org/assets/docs/Critical_Issues_Series/civil%20rights%20investigations%20of%20local%20police%20-%20lessons%20learned%202013.pdf.

in New Orleans, Puerto Rico, Baltimore, and Missoula, Montana.²⁴ As a result of these investigations, the DOJ issued guidance in early 2016 on identifying and preventing gender bias in the law enforcement response to sexual assault and domestic violence.²⁵

Taken together, these investigations and reports demonstrate that police failures to respond appropriately to sexual assault are extensive and systemic. The DOJ's investigations into the above-referenced jurisdictions found that gender bias in sexual assault investigations takes many forms.²⁶ They noted that gender bias can be implicit or explicit, conscious or unconscious, and may include, among other things, "police officers misclassifying or underreporting sexual assault [cases;] inappropriately concluding that sexual assault cases are unfounded; failing to test sexual assault kits; [and] interrogating rather than interviewing victims and witnesses."²⁷ In some jurisdictions, poor practices in sexual assault investigations are so entrenched in the police community that the number of homicides recorded by police greatly exceeds the number of recorded rapes.²⁸ Professor Corey Yung has examined this data, arguing that America has a hidden rape crisis because the practice of downgrading reports of sexual assault, and thereby not recording them as crimes, is common across many American jurisdictions.²⁹

The nature of these failures increases the likelihood that genuine sexual assault victims will be incorrectly labeled as false reporters. In many cases, failed sexual assault investigations comprise of downgrading and eliminating reports of sexual assault. When victims are written off in this way and their cases are not investigated, police are demonstrating that they do not believe the

²⁴ U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT (2011) [hereinafter DOJ NEW ORLEANS REPORT], https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf; U.S. DEP'T OF JUST., C.R. DIV., INVESTIGATION OF THE PUERTO RICO POLICE DEPARTMENT (2011) [hereinafter DOJ PUERTO RICO REPORT], https://www.justice.gov/sites/default/files/crt/legacy/2011/09/08/prpd_letter.pdf; U.S. DEP'T OF JUST. C. R. DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (2016) [hereinafter DOJ BALTIMORE REPORT], <https://www.justice.gov/opa/file/883366/download>; Findings Letter from Thomas E. Perez, Assistant Attorney General Civil Rights Div. & Michael W. Colter, U. S. Attorney District of Montana to Missoula Mayor John Engen (May 15, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/05/22/missoulapdfind_5-15-13.pdf.

²⁵ See generally DOJ GENDER GUIDANCE, *supra* note 18 (discussing the role of gender bias in law enforcement response to sexual assault and domestic violence cases).

²⁶ *Id.* at 3.

²⁷ *Id.*

²⁸ Typically, rapes occur more often than homicides. See DOJ NEW ORLEANS REPORT, *supra* note 24, at 45 (reporting, for example, 98 forcible rapes as compared to 179 homicides in 2009); DOJ PUERTO RICO REPORT, *supra* note 24, at 57 (expressing concerns that Puerto Rico is underreporting sexual assaults based on a sharp decline in forcible rapes reported (from 228 to 39) compared to a sharp increase in murders); see generally Corey Rayburn Yung, *How to Lie With Rape Statistics: America's Hidden Rape Crisis*, 99 IOWA L. REV. 1197 (2014) (describing how police departments eliminated rape complaints from official counts).

²⁹ See generally Yung, *supra* note 28 (describing how police departments eliminated rape complaints from official counts).

victims. If they frequently do not believe the victims, there is a strong possibility that they will incorrectly label actual victims as false reporters. These actions leave rapists free to reoffend.

This section will take a closer look at three of the common poor practices identified in DOJ investigations, which can ultimately contribute to victims being incorrectly labeled as false reporters. Common poor practices include: (1) the practice of improperly unounding large numbers of rape complaints; (2) the practice of *interrogating* rather than *interviewing* victims; and (3) the failure to conduct more than a preliminary investigation before unounding, dismissing, or labeling the complaint as false.³⁰

A. Improperly Unounding Rape Complaints

“In homicide, there are real victims; all our cases are bullshit.”
 –A detective in the Baltimore Police Department Sex Offense Unit, making a comment at a party in the presence of other BPD officers and victim advocates.³¹

One of the biggest problems with handling rape complaints is the overuse of the “unounded” classification.³² Under the Uniform Crime Reporting Handbook, a crime report can be cleared as unounded “[i]f the investigation shows that no offense occurred nor was attempted.”³³ In Britain, the equivalent term is to “no-crime” a report.³⁴ Once a report is classified as unounded or is no-crime, it is closed, and all investigation ceases.³⁵

As Carol Tracy, Executive Director of the Women’s Law Project, has explained, unounding a large number of rape complaints is a sign that police do not believe that rape complainants are reported truthfully: “implicit gender bias is evident when you see a department that has a very high rate of ‘unounding’ cases (essentially stating that the department does not believe that a crime occurred), that is persistently disbelieving victims’ complaints, and that is putting cases in noncriminal categories and not investigating them.”³⁶ Accordingly, unounding large numbers of rape complaints is a clear sign that a police department does not believe victims of sexual assault. Numerous investigations have demonstrated that unounding rape complaints is a common problem across the United States, which therefore means that victims of sexual assault are being discredited by police in large numbers.³⁷

³⁰ DOJ GENDER GUIDANCE, *supra* note 18, at 3.

³¹ DOJ BALTIMORE REPORT, *supra* note 24, at 122.

³² POLICE EXEC. RES. F., IMPROVING THE POLICE RESPONSE TO SEXUAL ASSAULT 12 (2012) [hereinafter IMPROVING THE POLICE RESPONSE TO SEXUAL ASSAULT], http://www.policeforum.org/assets/docs/Critical_Issues_Series/improving%20the%20police%20response%20to%20sexual%20assault%202012.pdf.

³³ U.S. DEP’T OF JUST., UNIFORM CRIME REPORTING HANDBOOK 77 (2004), <https://www2.fbi.gov/ucr/handbook/ucrhandbook04.pdf>.

³⁴ HER MAJESTY’S INSPECTORATE OF CONSTABULARY, CRIME RECORDING: A MATTER OF FACT—AN INTERIM REPORT OF THE INSPECTION OF CRIME DATA INTEGRITY IN POLICE FORCES IN ENGLAND AND WALES 9, 41–42 (2014), <https://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/2014/05/crime-data-integrity-interim-report.pdf>.

³⁵ *Id.* at 41–42.

³⁶ CIVIL RIGHTS INVESTIGATIONS OF LOCAL POLICE, *supra* note 23, at 23.

For instance, a 2010 investigation found that the city of Baltimore classified 30% of rape cases as unfounded, which was five times the national average.³⁸ When a police department received negative publicity for having a large number of unfounded complaints, one common response was for the department to misclassify rape reports in a new way rather than to actually improve rape investigation.³⁹ Baltimore took this approach after 2010 and began to allow rape cases to linger in an “open” status even when they were not being actively investigated.⁴⁰ After this change, the unfounding rate dropped to around 6%, but 56% of cases remained open and unsolved.⁴¹ Similarly, New Orleans police extensively downgraded reports of rape by classifying them as “non-criminal miscellaneous complaints,” or Signal 21 complaints.⁴² In 2008, 63% of sexual assault complaints were downgraded in this way, versus 43–44% in 2009 and 2010.⁴³ These practices demonstrate an unwillingness on the part of police officers to investigate and solve sex crimes.

Several conclusions are apparent. First, the widespread unfounding of rape complaints means that police believe that large numbers of rape complainants are lying. Indeed this conclusion is supported by studies of police skepticism of rape victims, which demonstrate that the belief that women often lie about being raped is widely held among police officers even though the vast majority of rape allegations are truthful.⁴⁴ Sociologist Martin Schwartz found that 428 surveyed police officers believed that about 33% of the rape cases they dealt with were false complaints when, in fact, the majority were true.⁴⁵ Another sociologist, Amy Dellinger Page, found that more than half of the 891 officers she surveyed

³⁷ DOJ NEW ORLEANS REPORT, *supra* note 24, at 45–46; DOJ BALTIMORE REPORT, *supra* note 24, at 126–27; IMPROVING THE POLICE RESPONSE TO SEXUAL ASSAULT, *supra* note 32, at 12–13, 16. See *DC Report*, *supra* note 17, at 64, 85–86, 165.

³⁸ DOJ BALTIMORE REPORT, *supra* note 24, at 126.

³⁹ *Id.* at 127.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² DOJ NEW ORLEANS REPORT, *supra* note 24, at 45.

⁴³ *Id.*

⁴⁴ See generally Martin D. Schwartz, *National Institute of Justice Visiting Fellowship: Police Investigation of Rape—Roadblocks and Solutions*, U.S. DEP’T OF JUST. (Dec. 2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/232667.pdf>; see also generally Jan Jordan, *Beyond Belief? Police, Rape, and Women’s Credibility*, 4 CRIM. JUST. 29 (2004) (discussing “perceptions of women’s credibility” in sexual assault complaints).

⁴⁵ Schwartz, *supra* note 44, at 44. This study also found that female police officers and more experienced officers were more likely to believe that rape victims were truthful. *Id.* at 28–29.

believed that about half of the rape complainants they dealt with were liars.⁴⁶ To make matters worse, Page further found that 10% of these officers believed that the *majority* of rape complainants were liars; some believed that close to 100% of them were lying about being raped.⁴⁷ In contrast, the most methodologically rigorous studies of actual false reports of sexual assault indicate that false reports comprise only 2–3% of all reported rapes.⁴⁸

Second, if police believe that many rape complainants are lying, they are not motivated to investigate, because there is little point in investigating a crime that they think has not occurred. And third, because police sharply overestimate the number of rape complainants who are lying, there is a strong chance that they will wrongly accuse actual rape victims of lying. In light of these factors, it should be apparent that police judgments about the credibility of rape complainants cannot be accepted without question.

*B. Trying to Prove that She is Lying: Interrogating Rather
Than Interviewing Victims*

As a result of the widespread skepticism that police demonstrate toward rape victims, it is perhaps not surprising that they often approach rape investigations by interrogating victims as *suspects* rather than interviewing them as *victims*.⁴⁹ Rape investigation best practices instruct officers to treat each victim with dignity and respect, build rapport with her so that she will feel comfortable sharing details of a sexual assault, and ask questions in a supportive manner that does not blame her for the assault.⁵⁰ This type of approach is important to solving rapes because it optimizes an officer's chance of obtaining high quality information from the victim.⁵¹ A victim who feels blamed for the assault or who is otherwise mistreated will be less willing to participate in the investigation.⁵²

Unfortunately, police officers often ignore this guidance and instead set out to prove that a victim is lying. For instance, the DOJ's investigation of the Baltimore Police Department noted evidence that Baltimore detectives

⁴⁶ Amy Dellinger Page, *Gateway to Reform? Policy Implications of Police Officers' Attitudes Toward Rape*, 33 AM. J. CRIM. JUST. 44, 55 (2008) (noting that 53% of officers surveyed believed that between 11% and 50% of women falsely file reports of rape).

⁴⁷ *Id.* (noting that between 1% and 4% of officers surveyed believed between 51% and 100% of women lie about being raped).

⁴⁸ See, e.g., *Kelly Study*, *supra* note 17, at 53; David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1330 (2010); Kimberly A. Lonsway et al., *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, 3 THE VOICE 1, 2 (2009), http://www.ndaa.org/pdf/the_voice_vol_3_no_1_2009.pdf.

⁴⁹ DOJ GENDER GUIDANCE, *supra* note 18, at 3.

⁵⁰ *Id.* at 12–14.

⁵¹ *Id.*

⁵² *Id.*

approached reports of sexual assault with undue skepticism.⁵³ Police frequently asked victim-blaming questions and seized on inconsistencies in a victim's account in an effort to prove that the victim's account was not credible.⁵⁴ Even more disturbingly, the DOJ's investigation of the New Orleans Police Department ("NOPD") noted that officers were systematically approaching rape investigations *by trying to prove they were false at the outset*.⁵⁵ The DOJ concluded that NOPD rape reports:

clearly reflected a focus on and effort to, from the outset, "prove an allegation is false"—a conclusion that is virtually impossible to draw based on a cursory investigation or preliminary victim interview. Many of the reports emphasized the victim's inconsistent statements, gaps in knowledge or memory, or inability to give a good description of the perpetrator, none of which demonstrate that an allegation is false. Such reactions, common for sexual assault victims in crisis or suffering from posttraumatic stress, should not be used to label a report of assault as false. The determination that a report of sexual assault is false should only be made if the evidence, obtained in a thorough investigation, establishes that no crime was committed or attempted.⁵⁶

The DOJ also found that NOPD routinely treated victims in ways that heightened "victims' feelings of shame and self-blame" and their "fear of not being believed."⁵⁷ For instance, one victim said that she felt detectives were "there to catch [her] in a lie, not to help. They were unconcerned and analyzing [her] story to find fault and not the truth."⁵⁸ Another said she "felt pressured into not pressing charges."⁵⁹

It should be evident that if officers approach sexual assault investigations with the goal of proving that a victim is lying, they will look for reasons to be skeptical rather than focusing on collecting information that will aid in the apprehension of the perpetrator. Data from Britain reinforces this point, as a major government-commissioned study found that the majority of cases labeled false were so labeled early in the investigation process, before a full investigation had been completed.⁶⁰ As a result, the common practice of police

⁵³ DOJ BALTIMORE REPORT, *supra* note 24, at 122.

⁵⁴ See, e.g., DOJ GENDER GUIDANCE, *supra* note 18, at 12–14; DOJ NEW ORLEANS REPORT, *supra* note 24, at 46; KELLY STUDY, *supra* note 17, at 51.

⁵⁵ DOJ NEW ORLEANS REPORT, *supra* note 24, at 46.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 47.

⁵⁹ *Id.*

⁶⁰ *Kelly Study*, *supra* note 17, at 34 (noting that most attrition in rape investigations occurs early in the process); *id.* at 48 (indicating that rape cases labeled as "false" are typically so designated early

setting out to prove that rape victims are lying is another reason to treat police judgments of victim credibility with skepticism.

C. Failing to Fully Investigate

Rape investigation best practice guidelines indicate that police must record and thoroughly investigate all reports of sexual assault.⁶¹ Moreover, a full investigation must be completed before a report can be labeled false.⁶² As the two sections above demonstrate, police typically do not follow this guidance. Rather, they often approach rape investigations looking for ways to dismiss reports as false or unfounded early in the investigatory process precisely in order to avoid a full investigation.⁶³ The DOJ's investigations into sexual assault investigation practices in Baltimore, New Orleans and Missoula further illustrate these problems.

The DOJ investigation of the Baltimore Police Department ("BPD") concluded that the department "seriously and systematically under-investigates reports of sexual assault."⁶⁴ It found that BPD, in the majority of sexual assault cases, "fails to pursue investigations beyond the immediate, preliminary response to a report of sexual assault."⁶⁵ It also found that "BPD makes little, if any, effort to corroborate victims' accounts of their assaults" and that they made "minimal to no effort to locate, identify, interrogate, or investigate suspects."⁶⁶

The DOJ found that sexual assault investigations conducted by New Orleans police were similarly inadequate.⁶⁷ In New Orleans, the DOJ found that first-responding patrol officers did not write reports "when responding to a sexual assault complaint, although they [did] write reports for all other crimes."⁶⁸ They also found that "[d]etectives routinely failed to seek out and interview witnesses and interrogate suspects," and that "investigators failed to follow standard guidelines governing collection of physical and forensic evidence."⁶⁹

The DOJ found similar problems in Missoula, where they concluded that the Missoula Police Department ("MPD") often "does not take proper steps to

in the investigative process).

⁶¹ See *Investigating Sexual Assaults: Concepts and Issues Paper*, IACP NAT. LAW ENFORCEMENT POLICY CTR. (2005) [hereinafter *IACP Guidelines*], <http://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=328>.

⁶² *Id.* at 13.

⁶³ *Kelly Study*, *supra* note 17, at 34, 46; DOJ NEW ORLEANS REPORT, *supra* note 24, at 45–46.

⁶⁴ DOJ BALTIMORE REPORT, *supra* note 24, at 123.

⁶⁵ *Id.* at 124.

⁶⁶ *Id.* at 124–25.

⁶⁷ DOJ NEW ORLEANS REPORT, *supra* note 24, at 47–49.

⁶⁸ *Id.* at 48.

⁶⁹ *Id.* at 48–49.

obtain timely, credible statements from suspects and witnesses.”⁷⁰ The DOJ also found that “MPD detectives often fail to develop evidence regarding whether the victim was incapacitated by alcohol or drugs and whether the suspect knew this.”⁷¹ They also found “that MPD’s sexual assault investigations [were] . . . compromised by an investigator’s unwarranted gender-based assumptions and stereotypes about women,” which “result[ed] in detectives’ reports failing to capture the evidence of force or incapacitation contained in the actual victim statements.”⁷² These types of investigatory shortcomings ultimately affected whether cases were prosecuted.⁷³

The DOJ concluded that the practices found in Baltimore, New Orleans, and Missoula were evidence of gender bias in law enforcement, which resulted in discriminatory treatment against women complaining of sexual assault.⁷⁴ Failure to investigate and prosecute rape can be part of a pattern or practice of gender discrimination in violation of the Fourteenth Amendment to the U.S. Constitution, as well as of Title IV of the Civil Rights Act of 1964 and other federal laws.⁷⁵ The DOJ issued guidance on preventing gender bias in the law enforcement response to sexual assault after finding these discriminatory practices in so many different jurisdictions.⁷⁶

This evidence from the DOJ investigations and other sources demonstrates that gender bias in rape investigation is a widespread problem in the United States. The poor practices identified in these investigations compromise the ability of law enforcement to identify and apprehend sex offenders. Rape victims commonly report a reluctance to go to the police because they are afraid the police will not believe them, and these DOJ investigations demonstrate that victims have good reason to feel this way.⁷⁷ High levels of police skepticism toward victims and poor sexual assault investigation practices can create an environment with a real risk that victims of sexual assault will be charged with false reporting after being disbelieved by police. The next section of this Article

⁷⁰ Engen Letter, *supra* note 19, at 7.

⁷¹ *Id.*

⁷² *Id.* at 8.

⁷³ *Id.*

⁷⁴ DOJ PUERTO RICO REPORT, *supra* note 24, at 57–58; DOJ NEW ORLEANS REPORT, *supra* note 24, at ix; DOJ BALTIMORE REPORT, *supra* note 24, at 122–23; Engen Letter, *supra* note 19, at 6 (indicating that the Missoula Police Department’s “failure to adequately respond to reports of sexual assault has an unjustified disparate impact on women and thus violates the Safe Streets Act” and these failures also “constitute discrimination barred by the Equal Protection Clause of the Fourteenth Amendment.”).

⁷⁵ See Engen Letter, *supra* note 19, at 3, 6.

⁷⁶ See DOJ GENDER GUIDANCE, *supra* note 18, at 3–4.

⁷⁷ *DC Report*, *supra* note 17, at 1, 4, 120; *Kelly Study*, *supra* note 17, at 42; DSD JUDGMENT, *supra* note 19, ¶¶ 73, 135, 137; see DOJ NEW ORLEANS REPORT, *supra* note 24, at 46–47; see generally Jordan, *supra* note 44 (discussing how law enforcement “responses to sexual assault” are sometimes perceived as skeptical towards the victim reporting the assault).

demonstrates how these practices have affected actual rape complainants who were disbelieved by police.

III. PART TWO: ANATOMY OF A FAILED RAPE INVESTIGATION

The rape investigation failures enumerated in the previous section play a dispositive role in many cases where rape complainants are ultimately charged with false reporting. This section describes rape investigation best practices and explains how those best practices inform the “Actual Victim” and “Likely Victim” designations used in this article. It then demonstrates that police charge rape victims with false reporting as a result of failing to investigate their rape complaints.

A. Rape Investigation Best Practices and the Classification of Victims

In the course of my research, I have conducted a detailed review of many rape investigations by applying the rape investigation best practice guidelines issued by the International Association of Chiefs of Police (“IACP”) to actual police investigations. My methodology has included reviewing police documentation of the case, documents used at trial or in subsequent lawsuits, and any court decisions, as well as interviewing those accused or convicted of false reporting, their lawyers, and members of any advocacy organizations involved.

According to the IACP Guidelines, the starting point for an effective rape investigation is to take each rape complaint as credible on its face and thoroughly investigate it.⁷⁸ A report of sexual assault should never be labeled false unless three criteria are met: (1) the police must thoroughly investigate the case; (2) the investigation must uncover *evidence* that no crime was committed or attempted; and (3) police must not rely improperly on rape myths or on a victim’s reaction to sexual assault to reach the conclusion that the complaint is false.⁷⁹

It should be evident from Part One of this Article that rape investigations very frequently fall short of these guidelines because such investigations are commonly aborted prior to a full investigation.⁸⁰ Further, the fact that police often label complaints as false early in the investigative process further demonstrates that police commonly do not follow best practices with respect to when to label a report of rape false.⁸¹ For that reason, in this section I use the term “Likely Victim” to refer to rape complainants who were judged to be false reporters after investigations that fell short of the IACP Best Practices. Because the investigations were not thorough, there was no valid reason to conclude that

⁷⁸ See *IACP Guidelines*, *supra* note 61, at 12–13.

⁷⁹ See *id.*

⁸⁰ See *Kelly Study*, *supra* note 17, at 34, 46.

⁸¹ See *id.* at 34, 46, 53; DOJ NEW ORLEANS REPORT, *supra* note 24, at 45–47.

the complainant was lying. She should therefore continue to be viewed as bringing a credible complaint. I use the term “Actual Victim” to refer to individuals who were charged with false reporting but whose names were later cleared by the arrest of the perpetrator or by some other method.

B. Failing to Investigate Rape and How it Leads to Charging the Victim with False Reporting

Cases where rape victims are charged with false reporting are a direct outgrowth of the types of failures to investigate rape that have been exposed by the DOJ investigations discussed above. The sections below analyze some of these shortcomings. They examine: (1) how false reporting charges are brought against persons whose rape complaints have not been fully investigated; (2) how police take an adversarial approach to victim interviews in such cases; and (3) how a failure to fully train police to understand how people respond to trauma leads to improper decisions to charge victims with false reporting.

1. Failing to Investigate

When police charge a rape complainant with false reporting without conducting a full investigation of her case, they have failed to follow rape investigation best practice. Sadly, this is a common occurrence. According to Kelly, the majority of cases labeled false are so labeled early in the investigative process, and the investigation is subsequently dropped before progressing any further.⁸²

An incomplete rape investigation was featured in every case examined here. The behavior of the officers involved provides support for the DOJ’s findings from its New Orleans investigation that officers might approach cases by actively trying to prove the allegation false at the outset. For instance, in the case of Sara Reedy, an Actual Victim who was raped at gunpoint while working the late shift at a convenience store outside of Pittsburgh, Pennsylvania, police did not investigate her rape complaint at all, other than performing a cursory search of the nearby woods right after the attack.⁸³ Instead, Officer Frank Evanson accused Reedy of lying while she was at the hospital seeking treatment immediately after the attack.⁸⁴

Although Reedy was branded a liar almost immediately after she was raped, in many cases the magic number seems to be *two*—officers will investigate for two days and then decide to shut down the investigation. This is what happened in the case of nineteen-year-old D.M., an Actual Victim who was raped when an intruder entered her apartment, tied her wrists with shoelaces, photographed her, and raped her.⁸⁵ Police initially gathered compelling corroborating evidence of

⁸² See Kelly Study, *supra* note 17, at 34, 46.

⁸³ Reedy v. Evanson, 615 F.3d 197, 203–04 (3d Cir. 2010).

⁸⁴ *Id.* at 217.

⁸⁵ See Mike Carter, *Woman Sues After Lynnwood Police Didn’t Believe She Was Raped*, SEATTLE

the attack, including photographs showing abrasions on D.M.'s wrists and genitals, and evidence that an intruder came over a fence and then entered through a patio door.⁸⁶ But police cast this evidence of rape aside when they spoke with two people—one an anonymous caller—who suggested that D.M. was a liar who would fabricate a rape allegation for attention.⁸⁷ D.M. was then brought into the station and bullied into retracting her rape allegation by two male police officers.⁸⁸ She was prosecuted for false reporting, and her name was cleared only when a different police force tracked down her attacker and found a photograph of D.M. on his camera.⁸⁹ It is striking that D.M. was charged despite the physical evidence corroborating her attack; this evidence could not be explained away by the theory that she was lying, and yet she was branded a liar without any attempt made to explain the corroborative evidence.

It also took just two days for the university police at a large, public university to decide to charge two Likely Victims with false reporting.⁹⁰ Both cases featured very young undergraduates—one a freshman, the other a sophomore—who reported a sexual assault in a parking garage about a year apart.⁹¹ In the case of “Bailey Jordan,”⁹² the police officer who initially took her complaint noted that she “seemed visibly shaken” as she described being sexually assaulted in the stairwell of a parking garage while en route from her car to her dormitory; officers also discovered a Trojan condom box at the scene of the crime and a used condom about 1600 feet away.⁹³ The next day, police reviewed CCTV footage from Jordan's dormitory building and were puzzled because they could not find footage showing that she entered or left the building at times that corresponded to when she said she was sexually assaulted.⁹⁴ The police report indicates possible explanations for this disparity: first, there was another door that she could have used that was not covered by a camera, and

TIMES (June 11, 2013), <http://www.seattletimes.com/seattle-news/woman-sues-after-lynnwood-police-didnt-believe-she-was-raped/>; Complaint at ¶¶ 19, 34, Ex. 2, Ex. 9, D.M. v. O'Leary, No. 2:13-cv-971 (W.D. Wash. June 6, 2013), <https://www.documentcloud.org/documents/1006186-lynnwood-complaint.html#document/p4> [hereinafter D.M. Complaint]. See also T. Christian Miller, ProPublica & Ken Armstrong, Marshall Project, *An Unbelievable Story of Rape*, PROPUBLICA (Dec. 16, 2015), <https://www.propublica.org/article/false-rape-accusations-an-unbelievable-story>.

⁸⁶ D.M. Complaint, *supra* note 85, at Ex. 1, Ex. 5.

⁸⁷ *Id.* ¶ 30.

⁸⁸ *Id.* ¶ 37, 40–52.

⁸⁹ See Carter, *supra* note 85; see also Miller & Armstrong, *supra* note 85.

⁹⁰ In order to protect the identities of the victims who are still students, the name of the university has been concealed and pseudonyms used. All police reports are on file with the author.

⁹¹ University Police Incident Report, “Jessica Conway” Sexual Assault (March 9, 2015) (name of university withheld for victim anonymity) (on file with author) [hereinafter Conway Incident Report]; University Police Incident Report, “Bailey Jordan” Sexual Assault (Apr. 27, 2014) (name of university withheld for victim anonymity) (on file with author) [hereinafter Jordan Incident Report].

⁹² “Bailey Jordan” is a pseudonym used for the protection of the complainant.

⁹³ Jordan Incident Report, *supra* note 91, at 4–5.

⁹⁴ *Id.* at 11–12, 14.

second, there was a possibility she could be difficult to pick out of a group of people entering the building at once.⁹⁵ But they dismissed these explanations without further investigation.⁹⁶

Instead, two days after the rape they aborted the investigation as a result of the video footage and charged Jordan with false reporting.⁹⁷ The IACP Guidelines indicate that inconsistencies in a victim's account are not grounds for labeling a reporting false; this is because sexual assault is a traumatic event, and the trauma from such an event can affect victims' memories.⁹⁸ Accordingly, police should have fully investigated the case rather than simply abort the investigation when they could not reconcile the video footage with the victim's account. Jordan was adamant she was sexually assaulted: she told police, upon hearing their skepticism, "I just feel like everyone wants me to say that it didn't happen, but it did. I don't know how, but it did."⁹⁹ There is no evidence in the police report that Jordan was offered an opportunity to have a rape kit done; nor is there evidence that police sent the condom box or the used condom for testing.¹⁰⁰ Even if they had followed any of these investigatory steps, they closed the investigation before there was time to receive any laboratory results.¹⁰¹

In the case of the second student, "Jessica Conway,"¹⁰² police also took two days to decide Conway was lying when they could not reconcile video footage with her account.¹⁰³ Police had learned from a third party that Conway was sexually assaulted as she approached her car, which was parked in a garage on campus.¹⁰⁴ They asked her to come to the station and tell them what had happened.¹⁰⁵ Two days later, they asked her to return to the station.¹⁰⁶ At that point, they told her that they reviewed the parking garage footage and reached the conclusion that the cameras proved that no one else was in the garage in her

⁹⁵ *Id.* at 12, 14.

⁹⁶ *See id.* at 12, 14–16. The report provides no rationale as to why the officer labeled the report false without investigating these possible explanations.

⁹⁷ *Id.* at 15–16.

⁹⁸ *IACP Guidelines*, *supra* note 61, at 13. *Cf.* James Hopper & David Lisak, *Why Rape and Trauma Survivors Have Fragmented and Incomplete Memories*, *TIME MAG.: IDEAS* (Dec. 9, 2014), <http://time.com/3625414/rape-trauma-brain-memory/>; *DC Report*, *supra* note 17, at 16.

⁹⁹ Jordan Incident Report, *supra* note 91, at 11.

¹⁰⁰ *See id.* at 5, 9.

¹⁰¹ *Id.* at 15–16. The case was closed two days after she reported being raped. The police report provides no indication that any items seized were sent for forensic testing. *Id.*

¹⁰² "Jessica Conway" is a pseudonym used for the protection of the complainant.

¹⁰³ *See Conway Incident Report*, *supra* note 91, at 7–8.

¹⁰⁴ *Id.* at 4.

¹⁰⁵ *Id.* at 4.

¹⁰⁶ *Id.* at 7.

general vicinity at the time of the attack.¹⁰⁷ On the basis of this conclusion they aborted the investigation and made no further effort to locate Conway's attacker.¹⁰⁸

In fact, the officer was incorrect in his assessment of the video footage. The footage did actually show a man entering the garage on foot within three minutes of the time that Conway was seen on video entering the garage.¹⁰⁹ In light of the fact that the officer made a serious error and failed to see the corroborative value of the video footage, it is shocking that Conway was charged with false reporting. Both Conway and Jordan entered into plea agreements that would allow for the charges against them to be expunged after one or more years of good conduct.¹¹⁰ Both were adamant that they were in fact sexually assaulted.¹¹¹

These accounts provide corroboration for the DOJ's finding that some police systematically approach rape investigations by trying to prove they are false at the outset.¹¹² Reedy and D.M.'s officers certainly dismissed these cases as false with little or no investigation, even when, as in D.M.'s case, they had no other way to explain evidence corroborating the rape. In the university cases, the police emphasis on inconsistencies between the victim's account and the video footage suggested that their preliminary investigation focused on testing the veracity of the victim's account; if her account was contradicted by video footage, then they would write it off as a false report and simply stop investigating.

2. Interrogating Victims as Suspects and Pressuring Victims to Retract Their Allegations

The DOJ's Gender Guidance indicates that sometimes police interrogate victims as suspects.¹¹³ This is a poor practice that destroys the rapport between victim and officer and can impede the investigation.¹¹⁴ In addition, when victims develop the impression that officers do not believe them, they may lose faith in

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 8.

¹⁰⁹ Transcript of Parking Garage Footage at 1, Jessica Conway Investigation (on file with author) (noting that a man entered the fourth floor of the parking garage via the Williams Street vehicle ramp).

¹¹⁰ Local newspaper article (Aug. 19, 2015), (on file with author). Source on file with the author to respect confidentiality of the victim.

¹¹¹ Jordan Incident Report, *supra* note 91, at 11 (noting that Jordan was "adamant" about what had occurred); E-mail from Jessica Conway (Apr. 23, 2015) (indicating that she was indeed assaulted and that the police accused her of lying) (on file with author).

¹¹² DOJ NEW ORLEANS REPORT, *supra* note 24, at 46.

¹¹³ *See, e.g.,* Engen Letter, *supra* note 19, at 9; *DC Report*, *supra* note 17, at 147–48; DOJ NEW ORLEANS REPORT, *supra* note 24, at 46–47.

¹¹⁴ *See* DOJ GENDER GUIDANCE, *supra* note 18, at 13–14.

the police and their ability to effectively solve the crime.¹¹⁵ Police also engage with victims in other ways that destroy the rapport with the victim and the victim's willingness to cooperate with a police investigation. These actions can include asking victim-blaming questions, accusing victims of lying, and pressuring them to retract their complaints.¹¹⁶ Sometimes, police pressure a victim to retract her complaint and then charge her, or threaten to charge her, with false reporting.¹¹⁷

These poor practices feature in many cases where victims are charged with false reporting, including both of the university cases mentioned above. For instance, the DOJ Gender Guidance instructs officers to avoid making statements that indicate they doubt the victim's credibility¹¹⁸—guidance that was not followed in either case. Jessica Conway's officer noted in his report he told Conway "that I did not believe the sexual assault happened [and] felt that she was being untruthful about the incident."¹¹⁹ Bailey Jordan's officer told her that he did not believe her and offered to give her a polygraph test—a practice that is prohibited under federal law.¹²⁰

In Jordan's case, the police report notes that the second officer dispatched to speak with Jordan on the night of the assault approached her with skepticism because portions of a statement she had provided to another officer earlier that night "seemed odd and difficult to believe."¹²¹ This report thus documents that police approached Jordan with skepticism from very early in the investigative process, and this skepticism may have affected how thoroughly they investigated the case. When that same officer later confronted Jordan about the

¹¹⁵ See *id.*

¹¹⁶ See, e.g., *DC Report*, *supra* note 17, at 15–22; DOJ NEW ORLEANS REPORT, *supra* note 24, at 46–47; Letter from Michael W. Cotter, U.S. Attorney, Dist. of Mont., & Jocelyn Samuels, Acting Assistant Attorney Gen., C.R. Div., to Fred Van Valkenburg, Missoula Cnty. Attorney, 10–13 (Feb. 14, 2014), http://www.justice.gov/crt/about/spl/documents/missoula_ltr_2-14-14.pdf (finding that the Missoula County Attorney's Office displayed an impermissible bias against female victims of sexual assault); Engen Letter, *supra* note 19, at 8–9 (finding that the way Missoula Police Department conducts sexual assault investigations discourages victim participation).

¹¹⁷ See, e.g., *DC Report*, *supra* note 17, at 15, 128. This report discusses several cases where rape complainants were actually charged with false reporting, including, but not limited to, Rhiannon Brooker, Jessica Conway, Eleanor de Freitas, Bailey Jordan, Lara McLeod, and Gail Sherwood.

¹¹⁸ DOJ GENDER GUIDANCE, *supra* note 18, at 14.

¹¹⁹ Conway Incident Report, *supra* note 91, at 7.

¹²⁰ Jordan Incident Report, *supra* note 91, at 14. The 2005 Violence Against Women Act mandates that jurisdictions will not be eligible for S.T.O.P. formula grant funds if they ask victims of sexual violence to submit to a polygraph. INT'L ASS'N OF CHIEFS OF POLICE, *Sexual Assault Incident Reports: Investigative Strategies* 5, http://www.theiacp.org/portals/0/pdfs/sexualassaultguide_lines.pdf; see also *STOP Violence Against Women Formula Grant Program*, LANEJUDSON.COM, [hereinafter *STOP Violence Against Women Formula Grant Program*] http://lanejudson.com/doc_vawa_stop_grant.htm (last visited Feb. 18, 2017); see generally *Grant Programs*, THE U.S. DEP'T OF JUST.'S OFFICE ON VIOLENCE AGAINST WOMEN, <https://www.justice.gov/ovw/grant-programs#svaw>.

¹²¹ Jordan Incident Report, *supra* note 91, at 6.

contradiction he perceived between the available video footage and her statement to police, he stated to her that “video does not lie.”¹²² In making this statement, he implicitly suggested that if the video was not lying, then she must be lying—an implication which would most certainly cause the victim to lose faith in the police investigating her case.

Police skepticism and interrogation of a victim of sexual assault can sometimes be related to their lack of understanding of the role that coercion plays in sexual assault, particularly in acquaintance rape situations. Professor Catherine MacKinnon has argued that the consent standard for the lawfulness of a sex act is of limited usefulness because it is too broad.¹²³ “Legally valid consent in the law of sexual assault ranges from desire to despair to defeat to death.”¹²⁴ According to MacKinnon, consent is meaningless in circumstances where “acquiescence is the only realistic option.”¹²⁵ MacKinnon argues that domestic law should adopt the international law approach to the crime of rape—an approach that relies on the concept of *coercion* rather than consent.¹²⁶ The International Criminal Tribunal for Rwanda first defined rape internationally as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”¹²⁷

MacKinnon’s argument, and the notion of rape as a sex act committed under coercive circumstances, can help to explain what went wrong in the police investigation of Lara McLeod’s rape complaint. In McLeod’s case, police took a decidedly adversarial approach to her, interrogating her as a suspect and expressing skepticism for her account. Police had learned from a third party that McLeod had told family members that her soon-to-be brother-in-law, Joaquin Rams, had raped her after taking her to a concert.¹²⁸ When police learned this, they insisted that she come to the station to file a report—thus, as in Conway’s case, it was the police and not the victim who initiated the complaint process.¹²⁹

At the time of these events, McLeod was nineteen and Rams was likely

¹²² *Id.* at 14.

¹²³ Catherine MacKinnon, *Rape Redefined*, 10 HARV. L. & POL’Y REV. 431, 440–42 (2016).

¹²⁴ *See id.* at 443.

¹²⁵ *See id.* at 463.

¹²⁶ *Id.* at 469–70.

¹²⁷ *Id.* at 470 (quoting *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, ¶ 598 (Sept. 2, 1998)).

¹²⁸ Transcript of Interviews of Lara McLeod at 1–2, Bradford J. Cavender, Prince William County Police Officer Report on Lara McLeod Rape Investigation (2011) [hereinafter Transcript of Interviews of Lara McLeod]; Telephone Interview with Lara McLeod (Dec. 6, 2016) (on file with author).

¹²⁹ *See* Transcript of Interviews of Lara McLeod, *supra* note 128, at 2; *see also* Katie J.M. Baker, “*They Told Me It Never Happened*,” BUZZFEED (Sept. 27, 2015 8:17 PM), https://www.buzzfeed.com/katiejmbaker/the-police-told-her-to-report-her-rape-then-arrested-her-for?utm_term=.ri7oEen0x#.so6BvyD8X.

thirty-six.¹³⁰ Rams had asked McLeod to accompany him to a concert, claiming he had contacts there that could help her career, but after the concert, he took her back to his empty house and told her that she could either have sex with him there or he would see to it that she would be gang-raped by several men at a party they planned to attend.¹³¹

Rams was about fifty pounds heavier than McLeod and had displayed a gun to her.¹³² In addition, the sexual encounter occurred very late at night—at Rams’s house in a neighborhood with which she was unfamiliar—and Rams had earlier found an excuse to lock McLeod’s mobile phone in the trunk of his car.¹³³ Because McLeod was physically isolated, was terrified of Rams, believed he could harm her, and because he had a gun, she submitted to the sex but described it as nonconsensual.¹³⁴ In short, she reported to police that she had had sex under very coercive circumstances.

Notwithstanding these circumstances, officers asked McLeod several victim-blaming or skeptical questions during the interview process. These included why she did not keep her arms down when Rams went to take off her shirt, why she did not struggle against Rams, and why she did not leave the house or attempt to get out of the vehicle in order to get away from Rams.¹³⁵ If one understands the coercive nature of the circumstances McLeod found herself in—the physical isolation of the home in an unfamiliar neighborhood late at night, the forced separation from her phone, and being alone in the presence of a man who was bigger than she was and armed with a gun—one can understand why a woman in McLeod’s situation might conclude that physical struggle was futile. Indeed, under the coercive circumstances she had reported to the police, it should have been apparent that physically struggling against Rams could have endangered her more than submitting to him would. As MacKinnon writes, “[u]nder unequal conditions, many women acquiesce in or tolerate sex they cannot as a practical matter avoid or evade.”¹³⁶

¹³⁰ See Transcript of Interviews of Lara McLeod, *supra* note 128, at 13; Baker, *supra* note 129; Telephone Interview with Lara McLeod, *supra* note 128.

¹³¹ Transcript of Interviews of Lara McLeod, *supra* note 128, at 6 (describing the events occurring at Rams’s house); Baker, *supra* note 129 (describing the threat of being gang-raped by a group of men); Telephone Interview with Lara McLeod, *supra* note 128 (reiterating the non-consensual intercourse with Rams).

¹³² Transcript of Interviews of Lara McLeod, *supra* note 128, at 6 (noting how Rams frequently carried a gun); Telephone Interview with Lara McLeod, *supra* note 128, at 3 (describing how Rams displayed a gun).

¹³³ Transcript of Interviews of Lara McLeod, *supra* note 128, at 5–6, 12 (describing that the encounter occurred in Rams’s residence, and that McLeod did not feel comfortable going for help in that neighborhood); Baker, *supra* note 129 (noting that Rams put McLeod’s phone in the trunk).

¹³⁴ Baker, *supra* note 129 (describing how McLeod was “terrified” of Rams); Transcript of Interviews of Lara McLeod, *supra* note 128, at 7, 8, 12 (describing how McLeod was afraid of Rams).

¹³⁵ Transcript of Interviews of Lara McLeod, *supra* note 128, at 7, 8, 12.

¹³⁶ MacKinnon, *supra* note 123, at 465.

However, police did not consider these possibilities and instead developed a robust skepticism of McLeod's account, ultimately charging her with falsely reporting a rape despite the fact that they had *insisted* she come to the station and report it. The officer in charge of the investigation concluded, "[d]espite being contradicted on almost every part of her story from the first interview, [McLeod] refused to admit that she lied about reporting the rape. She continued to assert that she was an unwilling participant."¹³⁷

In addition to interrogating rape victims as suspects and asking victim-blaming or skeptical questions, police engage in additional behaviors that diminish victim trust in the police and cause investigations to fail. One of the most critical shortcomings of such behaviors is that they exert pressure on victims to retract their rape allegations and, in some cases, they use those retractions to charge victims with false reporting. Human Rights Watch found that Washington D.C. police threatened to charge several victims with false reporting if they did not retract their allegations.¹³⁸ An Independent Police Complaints Commission Investigation in London found the London Metropolitan Police exerted this sort of pressure on victims, and one retired police superintendent stated during an interview that victims faced "massive pressure" to retract their allegations.¹³⁹ The primary motivation, it appears, is to allow police to reduce their workload by not having to investigate complex crimes. Additionally, British cases that have ended in the prosecution of a rape complainant demonstrate that a retraction statement is golden to a prosecutor trying to send the complainant to prison.¹⁴⁰ However, it is important to note that the IACP Guidelines indicate that reports of sexual assault must not be labeled false on the basis of a victim recantation.¹⁴¹ The IACP and End Violence Against Women International recognize that victims recant for a variety of reasons, including pressure placed on them to do so, and a desire to disengage

¹³⁷ Transcript of Interviews of Lara McLeod, *supra* note 128, at 13.

¹³⁸ *DC Report*, *supra* note 17, at 15, 74, 128.

¹³⁹ INDEPENDENT POLICE COMPLAINTS COMMISSION, *Southwark Sapphire Unit's Local Practices for the Reporting and Investigations of Sexual Offences, July 2008–September 2009*, 10–11 (2013), http://www.ipcc.gov.uk/sites/default/files/Documents/investigation_commissioner_reports/Southwark_Sapphire_Units_local_practices_for_the_reporting_and_investigation_of_sexual_offences_july2008_sept2009.PDF [*hereinafter Southwark IPCC Report*]; Interview by Lisa Avalos with Peter Barron, former Detective Chief Superintendent, Metropolitan Police, in London, United Kingdom (Dec. 12, 2014); see also PUBLIC ADMINISTRATION COMMITTEE, PARLIAMENT, *Written Evidence from Peter Barron*, CST0003, 6 (Oct. 2013), http://data.parliament.uk/writtenevidence/committee_evidence.svc/evidencedocument/public-administration-committee/crime-statistics/written/3277.pdf.

¹⁴⁰ Rhiannon Brooker and Gail Sherwood, whose cases are discussed in this article, were both placed under intense pressure to retract their allegations. See Lisa Avalos, *Prosecuting Rape Victims While Rapists Run Free: The Consequences of Police Failure to Investigate Sex Crimes in Britain and the United States*, 23 MICH. J. OF GENDER & LAW 1, 45–47 (2016); Interview by Lisa Avalos with Rhiannon Brooker, Bristol, United Kingdom (Jan. 13, 2016) (on file with author) [*hereinafter Interview with Rhiannon Brooker*] (highlighting the pressure from police to retract the rape allegations).

¹⁴¹ *IACP Guidelines*, *supra* note 61, at 12–13.

from the criminal justice system.¹⁴²

Pressure to retract allegations was a factor in most of the cases that I have examined closely. Actual Victims Reedy, D.M., and Patty reported such pressure, and two of them did retract even though they were actually raped.¹⁴³ In light of that fact, we must consider how many Likely Victims may also have retracted under intense pressure despite actually being victimized. Gail Sherwood, Layla Ibrahim, and Rhiannon Brooker all faced pressure to retract their rape allegations; all three reported that the pressure was so intense that they could not withstand it and retracted their allegations even though they had been raped.¹⁴⁴

Jessica Conway's experience demonstrates how police elicit retractions from rape complainants. Two days after they received her report, the police used a technique also used in the Patty, D.M., and Sherwood cases and asked Conway to return to answer some additional questions about the sexual assault.¹⁴⁵ Twelve minutes into that interview, the officer pressured her to retract by delivering a two-and-a-half minute speech that expressed his strong skepticism of her account and included the following comments:

I've spent two long days working on this case. And we don't really want to have to spend much more time and alarm all these students for something that didn't happen.

I'm not saying there's a chance it happened; I *know* it didn't happen.

We need to get this straight because what if we do find someone meeting the description, who was seen [in the area] that day. Do you want him to sit in prison for ten years for something he didn't do? You know, I mean just because he fit the description and he was there.

Now's the time to come [clean] with it all.¹⁴⁶

Conway then retracted her sexual assault complaint and was charged with false reporting.¹⁴⁷ She later explained that she did so because "he made me feel like the only way out was to say it didn't happen. I just wanted to get out of that room and away from the detective."¹⁴⁸

¹⁴² *Id.*; Heather J. Huhtanen, Attorney General's Sexual Assault Task Force, *False Allegations, Case Unfounding and Victim Recantations in the Context of Sexual Assault* 1 (Jan. 10, 2008), <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=618>.

¹⁴³ Avalos, *supra* note 140, at 45.

¹⁴⁴ *Id.*; Interview with Rhiannon Brooker, *supra* note 140.

¹⁴⁵ Conway Incident Report, *supra* note 91, at 7.

¹⁴⁶ Transcript of Interview of Jessica Conway (March 11, 2015) (on file with author).

¹⁴⁷ Conway Incident Report, *supra* note 91, at 8.

¹⁴⁸ E-mail from Jessica Conway (Apr. 23, 2015) (on file with author).

3. Lack of Understanding of Sexual Assault Trauma and Memory

One of the most critical factors in explaining why police erroneously charge rape victims with false reporting is that they often approach investigations without an understanding of how trauma affects memory and victim behavior during or after a sexual assault. The effects of trauma after a sexual assault are well documented.¹⁴⁹ For instance, psychological trauma has demonstrable effects on the brain's ability to record information.¹⁵⁰ Rape victims often have fragmented, incomplete memories of the assault.¹⁵¹ They may be able to recall the central details of the assault with extraordinary accuracy but be unable to recall other key aspects of the event, such as what color the assailant's sweater was, and whether he had facial hair.¹⁵²

For these reasons, there are often inconsistencies in a victim's account of a sexual assault, and the IACP Guidelines make it clear that such inconsistencies are not a reason to label a report of sexual assault false.¹⁵³ Inconsistencies can include internal discrepancies in the victim's account, and they can also include discrepancies between what the victim remembers and what another source of information shows, such as video footage. However, in nearly every false reporting case I have examined, police relied very heavily on inconsistencies in the victims' account when they labeled a report false.

The case of Actual Victim Danielle Hicks-Best illustrates these problems.¹⁵⁴ Hicks-Best reported being gang-raped twice in her Washington D.C. neighborhood in 2008, when she was just eleven years old.¹⁵⁵ Despite the fact that she was well below the age of consent, her attackers were adult men, and there was medical evidence of sexual assault, police charged her with false reporting.¹⁵⁶ They justified this decision based on their view that her description of the sexual assault was "confusing" and her story shifted.¹⁵⁷ Detective William Weeks of the Youth Investigations Division wrote in his report that Hicks-Best told him "[a] myriad of stories . . . [She] continuously changed her stories whenever confronted with inconsistencies from the previous tale. It became apparent that the Complainant was determined to get any story across that she

¹⁴⁹ Hopper & Lisak, *supra* note 98.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *IACP Guidelines, supra* note 61, at 12–13.

¹⁵⁴ Joanna Walters, *An 11-Year-Old Reported Being Raped Twice, Wound Up With a Conviction*, WASHINGTON POST (Mar. 12, 2015), https://www.washingtonpost.com/lifestyle/magazine/a-seven-year-search-for-justice/2015/03/12/b1cccb30-abe9-11e4-abe8-e1ef60ca26de_story.html?utm_term=.cbc9d6bd06b1 [hereinafter *An 11-year-old Reported Being Raped Twice*].

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

could, regardless of how incredible it might be”¹⁵⁸ When interviewed by a journalist about this experience, Hicks-Best commented “I don’t remember giving lots of different accounts What I remember was being confused, and I was exhausted, and I was still wearing the same clothes and I felt horrible.”¹⁵⁹

Hicks-Best’s behavior is consistent with a person who has memory impairment as a result of a traumatic event. That such inconsistencies were used to undermine her credibility is particularly disturbing in light of her age and the fact that the officers dealing with her case should have understood issues involving trauma and youthful victims. Washington D.C. police had a best-practices memorandum on these issues that had been in effect since 2003.¹⁶⁰

One particular way that trauma affects brain function is by impairing a person’s ability to encode time sequencing information, so a person may remember the sequence of events incorrectly or may have a distorted understanding of the duration of an event.¹⁶¹ In Jessica Conway’s case, police concluded that the sexual assault could not have happened the way she reported it because she believed she was in the parking garage where the assault took place for about ten minutes, but video footage showed that she drove out of the garage less than four minutes after entering on foot.¹⁶² The effects of trauma on memory can easily explain this discrepancy. Conway reported a sexual assault which involved the assailant very quickly putting his hands down the front of her pants.¹⁶³ The assault itself probably lasted just seconds, but from the victim’s perspective, it must have felt like a much longer period of time because of the sheer horror she felt. The reporting officer did not consider this possibility; indeed, his report shows no understanding of the role of trauma in shaping memory, nor of the best practice guidance which indicates that inconsistencies in a victim’s account should not be used to conclude the report is false.¹⁶⁴ Instead, he simply concluded that the time discrepancy indicated that she was lying.

Details may also emerge days after the assault, when the trauma recedes.¹⁶⁵ This happened in the case of Patty, an Actual Victim who was raped by an intruder, Joseph Bong.¹⁶⁶ There was a delay of several years in bringing

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *An 11-Year-Old Reported Being Raped Twice*, *supra* note 154.

¹⁶¹ Hopper & Lisak, *supra* note 98.

¹⁶² Conway Incident Report, *supra* note 91, at 5, 6; Transcript of Interview of Jessica Conway, *supra* note 146.

¹⁶³ Conway Incident Report, *supra* note 91, at 4.

¹⁶⁴ *See generally* Conway Incident Report, *supra* note 91 (noting that these principles are never mentioned anywhere in this incident report).

¹⁶⁵ *Sexual Assault Incident Reports: Investigative Strategies*, *supra* note 120, at 5.

¹⁶⁶ *See generally* BILL LUEDERS, *CRY RAPE: THE TRUE STORY OF ONE WOMAN’S HARROWING QUEST FOR JUSTICE* (2006) (indicating that various details came back to Patty in the days after the

Bong to justice because police initially focused on their theory that Patty fabricated the attack.¹⁶⁷ One particular detail that Patty remembered days after the attack was that Bong had grabbed her by the hair and had forced her mouth down to his crotch.¹⁶⁸ She remembered this detail when she went to brush her hair and noticed some of her hair was falling out.¹⁶⁹ When she notified the police of this new detail they were suspicious of her for not having reported it earlier.¹⁷⁰ By focusing their attention on Patty's actions, they missed a window of opportunity to link Patty's crime to another crime in the area where Bong had attempted a sexual assault during a bank robbery.¹⁷¹ During that crime, which occurred just days after Patty's rape, Bong grabbed a woman by the hair and also forced her head to his crotch.¹⁷² Had the police picked up on this similarity, they could have linked Bong to Patty's rape much earlier.¹⁷³ Instead, they used Patty's delayed recollection against her and failed to consider the link between trauma and memory difficulties.

In Bailey Jordan's case, the officer's statement that "video does not lie," along with its implication that therefore *she* must be lying, further illustrates the damage that can be done by an officer who is unfamiliar with the ways that trauma affects memory. As stated above, Jordan was adamant that she had been raped, although she could not explain why the dormitory video cameras did not show her coming and going at the times she remembered. Was her memory of the time incorrect? Did she use a different door than the one she ordinarily used? Did she enter the building in the middle of a group of people that obscured the camera's view of her? Although Jordan could not explain this discrepancy, Hopper and Lisak note that

[i]t is not reasonable to expect a trauma survivor—whether a rape victim, a police officer or a soldier—to recall traumatic events the way they would recall their wedding day. They will remember some aspects of the experience in exquisitely painful detail. Indeed, they may spend decades trying to forget them. They will remember other aspects not at all, or only in jumbled and confused fragments.¹⁷⁴

assault, such as how Bong had grabbed her by the hair); *see also* Chantelle Janelle, *Wisconsin City Apologizes to Rape Victim*, WIS 10 (Dec. 6, 2006, 6:20 PM), <http://www.wistv.com/story/5779521/wisconsin-city-apologizes-to-rape-victim>.

¹⁶⁷ LUEDERS, *supra* note 166, at 58–63, 272.

¹⁶⁸ *Id.* at 23–24.

¹⁶⁹ *Id.* at 23.

¹⁷⁰ *Id.* at 23, 52, 59.

¹⁷¹ *Id.* at 53, 193–94.

¹⁷² *Id.* at 194.

¹⁷³ Bong was serving an eighteen-year prison sentence for the robbery when he was finally linked to Patty's rape. LUEDERS, *supra* note 166, at 193–94.

¹⁷⁴ Hopper & Lisak, *supra* note 98.

It could indeed be the case that Jordan was raped but remembered something incorrectly because of how she was affected by the ensuing trauma. Unfortunately, the officer showed further insensitivity to this possibility when he later told Jordan that “it was clear the assault did not occur as she had described and since she was insistent that [it had] then there may be an underlying undiagnosed physiologic [sic] issue.”¹⁷⁵ He then suggested that Jordan might want “to sit down with a mental health professional in order to try to determine the cause of her belief that she had been assaulted.”¹⁷⁶ Rather than conduct a full investigation of the case, officers in Jordan’s case aborted the investigation because of the discrepancy between Jordan’s account and the video footage and used this discrepancy to charge her with false reporting.¹⁷⁷

This section has demonstrated some of the ways that rape investigations fail and end in prosecution of the complainant. First, these cases are typically characterized by a failure to fully investigate. Studies show that most cases labeled false are so labeled early in the process, before a full investigation has been conducted, and the individual case studies included here illustrate that dynamic. Second, officers often interrogate victims as suspects. Doing so creates an adversarial dynamic between victim and officer, and police then tend to seize on inconsistent statements as proof that the victim is lying. Officers also engage in further behaviors that undermine victim confidence and cooperation, such as asking victim-blaming questions and pressuring victims to retract their allegations. Third, officers are often not well trained in the ways that trauma shapes memory and victims’ reactions to sexual assault. This lack of understanding contributes to officers’ tendency to construe inconsistencies in a victim’s account against the victim rather than understanding those discrepancies as resulting from trauma. Having conducted less-than-thorough investigations, and having developed a strong, if misguided, impression that victims are lying to them, some officers then proceed to charge victims with false reporting.

IV. PART THREE: FROM RAPE VICTIM TO CRIMINAL—WHO GETS CHARGED?

As much as rape investigation practices need to be improved, most investigations do not result in false reporting charges being brought against the complainant. What, then, are some of the factors that explain why some complainants are charged with false reporting while others are not? A failed investigation is a necessary precondition anytime a rape victim is charged with false reporting, but a failed investigation alone is typically not enough to generate charges against a victim. Usually something more is in play.

This section examines a few of the additional factors that help to explain why some rape complainants and not others are charged with false reporting. It

¹⁷⁵ Jordan Incident Report, *supra* note 91, at 15.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 15–16.

will highlight three issues: (1) how false reporting charges benefit police by allowing them to avoid a lengthy rape investigation; (2) how the vulnerability of the complainant plays a role; and (3) how police or prosecutors sometimes use false reporting charges to cover up a problem or to protect their agency's reputation.

A. Workload Benefits to Police

In some cases, rape complainants are charged with false reporting because doing so benefits the police in some way. This dynamic is most commonly seen in cases that are dismissed as false early in the process, prior to a full investigation. It should be clear that this practice violates the IACP Guidelines, but it is a favored approach among some police officers because labeling a report as false early in the process justifies their decision to avoid doing a full investigation. Several of the cases discussed here involved victims who were charged within two days of making a report, including Sara Reedy, D.M., Lara McLeod, Jessica Conway, Bailey Jordan, and Danielle Hicks-Best.¹⁷⁸ The quick dismissal of these cases as false allowed the police to close the cases quickly without fully investigating them. This allowed police to avoid the expenditure of resources—both time and money—on an investigation. The resources saved in this way help to explain why so many complaints are labeled false early in the process.

B. Complainant Vulnerability

The vulnerability of the complainant is a key factor in determining who gets charged with falsely reporting a rape. Vulnerable complainants are easier targets because they have fewer resources—both social and financial—with which to challenge the police's treatment of them. Important aspects of vulnerability include age, a past history of sexual or physical violence, disability, and socioeconomic status. In addition, a victim's mental illness or experience with domestic violence can also contribute to her vulnerability. It is striking that in Britain, the CPS has issued guidance on when to charge rape complainants with allegedly false allegations of rape.¹⁷⁹ This guidance specifically cautions against bringing such charges against those under the age of eighteen, those with mental illness, and those who have suffered domestic violence.¹⁸⁰ And yet many cases

¹⁷⁸ Joanna Walters, *Sara Reedy, the Rape Victim Accused of Lying and Jailed by US Police, Wins \$1.5m Payout*, GUARDIAN (Dec. 15, 2012, 7:45 AM) [hereinafter *Sara Reedy, the Rape Victim Accused of Lying*], <http://www.theguardian.com/world/2012/dec/15/sara-reedy-rape-victim-wins-police-payout>; D.M. Complaint, *supra* note 85, ¶¶ 29, 36; Transcript of Interviews of Lara McLeod, *supra* note 128, at 11; Conway Incident Report, *supra* note 91, at 4, 7–8; Jordan Incident Report, *supra* note 91, at 5, 15–16; *An 11-Year-Old Reported Being Raped Twice*, *supra* note 154.

¹⁷⁹ *Guidance for Charging Perverting the Course of Justice and Wasting Police Time in Cases Involving Allegedly False Allegations of Rape and/or Domestic Abuse*, CROWN PROSECUTION SERVICE [hereinafter CROWN PROSECUTION SERVICE], http://www.cps.gov.uk/legal/p_to_r/perverting_the_course_of_justice_-_rape_and_dv_allegations/#a09%20 (last visited Feb. 17, 2017).

¹⁸⁰ *Id.* ¶¶ 7–8.

feature women in exactly these categories.

Many of the women discussed in this Article were teenagers when charged, such as Reedy, D.M., McLeod, Conway, and Jordan; and Hicks-Best was only eleven years old at the time of her arrest.¹⁸¹ In addition, Layla Ibrahim and Eleanor de Freitas, discussed below, were in their early twenties.¹⁸²

Many of these women also experienced other forms of disadvantage. Previous physical or sexual violence was a factor for many victims, including Reedy, D.M., Patty, and Hicks-Best, while Sarah and Rhiannon Brooker were victims of domestic violence at the time they were charged.¹⁸³ Gail Sherwood and Patty both suffered from visual disabilities that affected their ability to give descriptions of their assailants, while Eleanor de Freitas, discussed below, had mental health issues.¹⁸⁴ Nearly every Actual Victim and Likely Victim case that I have examined features women affected by one or more of these vulnerabilities. This suggests that police target such women for false reporting charges because it is an easy way to close a case with little chance that the affected victim will complain.

C. Police or Prosecutor Cover-Up

There is an additional category of cases that provide evidence of another motive. These cases suggest that authorities sometimes bring false reporting charges against a rape complainant in order to cover up a botched investigation, official misconduct, or political expediency. I provide three examples here. All involve investigations that survived beyond the preliminary stage, so there was some indication that the officers involved believed the victim or felt that they needed additional evidence before concluding that the report was false. In fact, in two of the three cases, the officers who worked most closely with the victim

¹⁸¹ Reedy was nineteen. *Reedy v. Evanson*, 615 F.3d 197, 202 (3d Cir. 2010). D.M. was eighteen. Carter, *supra* note 85. McLeod was nineteen. Transcript of Interviews of Lara McLeod, *supra* note 128, at 13. Conway was nineteen. Conway Incident Report, *supra* note 91, at 1. Jordan was eighteen. Jordan Incident Report, *supra* note 91, at 1. Hicks-Best was eleven. *An 11-Year-Old Reported Being Raped Twice*, *supra* note 154.

¹⁸² Layla Ibrahim was twenty-one. Hattenstone & Hirsch, *supra* note 1. Eleanor de Freitas was twenty-three. Karen McVeigh, *Alexander Economou Denies Harassing Father of Woman Who Killed Herself*, GUARDIAN (May 26, 2016, 1:14 AM), <https://www.theguardian.com/uk-news/2016/may/26/alexander-economou-denies-harassing-father-woman-killed-herself-de-freitas>.

¹⁸³ See Sara Reedy, *the Rape Victim Accused of Lying*, *supra* note 178 (describing the case of Sara Reedy); Miller & Armstrong, *supra* note 85 (describing the case of D.M.); LUEDERS, *supra* note 166, at 4, 6 (describing Patty); *An 11-Year-Old Reported Being Raped Twice*, *supra* note 154 (describing the case of Hicks-Best); *I Accused my Husband of Rape*, *supra* note 2 (describing “Sarah” who was periodically raped by her husband); Interview with Rhiannon Brooker, *supra* note 140.

¹⁸⁴ Gail Sherwood only has sight in one eye. E-mail from Gail Sherwood (Aug. 6, 2015) (on file with author). Patty suffers from macular degeneration and is legally blind. Janelle, *supra* note 166; LUEDERS, *supra* note 166, at 3. Eleanor de Freitas suffered from bipolar disorder. *Economou v. de Freitas* [2016] EWHC 1853 (QB) 2, <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/economou-v-de-freitas-2016-ewhc-1853-qb-28-07.pdf>.

believed her throughout the process, but the decision to prosecute her was taken out of their hands and made either by prosecutors or by higher-ranking police officers. These cases demonstrably show how catastrophic consequences may result from a misguided decision to prosecute. For each case, I explain why each complainant can be viewed as a Likely Victim and why she was charged with false reporting.

1. Gail Sherwood: This Case is Too Difficult to Solve

Likely Victim Gail Sherwood, of Gloucestershire, England, was convicted of perverting the course of justice after reporting two rapes in April and June of 2008.¹⁸⁵ Sherwood is now appealing her conviction.¹⁸⁶ She told police that a stranger had stalked her for more than six months.¹⁸⁷ These events escalated in intensity, finally culminating in the first rape.¹⁸⁸ On both occasions after she reported the rape, she was found tied to a fence in the woods, several miles from her home.¹⁸⁹ On both occasions she had genital injuries consistent with sexual assault, as well as other injuries consistent with the account she gave, such as bruises from receiving a blow to the head, and scratches from being forced to walk through thick brush.¹⁹⁰ She was arrested just seventeen days after the second rape occurred.¹⁹¹

¹⁸⁵ Steven Morris, *Jailed for Crying Rape: Fantasist or Genuine Victim?*, GUARDIAN (Mar. 9, 2010, 8:19 AM) [hereinafter *Jailed for Crying Rape*], <http://www.theguardian.com/uk/2010/mar/09/gail-sherwood-jailed-campaigners>. Sherwood's stalker has never been identified, nor does she recognize him as an acquaintance. *Id.* See also Detective Sergeant John Wood, Statement of Witness 1, (Nov. 24, 2008) (on file with author) [hereinafter John Wood Statement Nov. 24, 2008] (describing Sherwood as a "devious calculated woman, [sic] who clearly has instigated and prepared in fine detail, the false rape reports").

¹⁸⁶ Telephone Interview with Gail Sherwood, Rhean Bailey, Sherwood's Solicitor, and David Malone, Sherwood's Barrister (Dec. 9, 2016) (on file with author).

¹⁸⁷ *Jailed for Crying Rape*, *supra* note 185; John Wood Statement Nov. 24, 2008, *supra* note 185, at 1. According to Sherwood, the stalker ultimately raped her four times, but only the first two are addressed here because the police arrested her for false reporting after two rapes. See *Jailed for Crying Rape*, *supra* note 185 (discussing the first two instances of kidnapping and rape); Interview by Detective Sergeant John Wood with Gail Sherwood, in Stroud, U.K. (Jan. 25, 2014) (discussing the remaining two instances of rape).

¹⁸⁸ *Jailed for Crying Rape*, *supra* note 185.

¹⁸⁹ John Wood Statement Nov. 24, 2008, *supra* note 185, at 1. Letter from Gail Sherwood to "Caroline," Gail Sherwood's Solicitor 9, 19 (July 5, 2008) [hereinafter Sherwood Letter to Solicitor] (on file with author) (describing how Sherwood had been tied to a fence, and also noting how the rapist had a radio).

¹⁹⁰ Information Form for the Examination of the Complainant, Victim: Gail Sherwood, signed by Dr. [signature illegible] (Apr. 26, 2008) (describing numerous scratches and bruises that could be consistent with the allegation of assault, and one square centimeter of redness and tenderness near the vaginal opening); Medical Record of Gail Elizabeth Sherwood, Beeches Green Surgery 1–2, (Mar. 1, 2008–Oct. 23, 2014) (indicating the following observations on Apr. 28, 2008: a reported rape and an examination showing "superficial cuts to forarms [sic] and marks to wrists"; "visible.hit [sic] on head"; "has other wounds all photographed"; "Saturday at police station." The record also noted injuries to the right breast and vagina on June 11, 2008) (on file with author).

¹⁹¹ See Detective Sergeant John Wood, Statement of Witness, (Dec. 7, 2009) (on file with author).

Under the IACP Guidelines, Sherwood should be considered a Likely Victim because police charged her without fully investigating her case and without evidence that no crime was committed or attempted. I have written extensively about Sherwood's case elsewhere; here I will simply demonstrate that Sherwood was disbelieved and then charged with PCJ without a full investigation into her rape claims.¹⁹² The four factors that prove this point all involve evidence the police failed to fully examine.

First, police failed to investigate leads provided by CCTV footage that showed an unknown male on Sherwood's property at the time of the second rape.¹⁹³ After the first rape, police had installed a hidden CCTV camera aimed on the front façade of Sherwood's home.¹⁹⁴ On the night of the second rape, Sherwood reported that she had been knocked unconscious in her home and that she had woken up about fifteen minutes later as a passenger in her own car, which was being driven by the rapist.¹⁹⁵ Police arrested her for lying because the CCTV footage seemed to show only one person entering Sherwood's car that night.¹⁹⁶ Although that person could not be seen clearly because the camera was not designed to operate well in low light conditions, police assumed that it was Sherwood, and that she had driven herself away and staged the rape.¹⁹⁷

But to arrive at this conclusion, police had to overlook another, crucial piece of evidence. That same camera picked up the figure of a man on Sherwood's property about one hour before her car left the property.¹⁹⁸ The man met her description of her stalker, and was caught on camera close enough to her car to touch it, and within about fifteen feet of her house.¹⁹⁹ Police never followed up on this lead, never tried to determine the man's identity, and in fact carried on as though the camera had never recorded the man's image.²⁰⁰ According to Sherwood and a court observer, Detective Sergeant John Wood,

¹⁹² Avalos, *supra* note 140, at 32–38.

¹⁹³ DVD: Video from Sherwood's Driveway in Stroud, UK (CCTV 2008) (on file with author) [hereinafter DVD Video from Sherwood's Driveway].

¹⁹⁴ Detective Chief Inspector Paul Shorrocks, Statement of Witness (Oct. 27, 2008) (on file with author) [hereinafter Paul Shorrocks Statement].

¹⁹⁵ *Id.*; Sherwood Letter to Solicitor, *supra* note 189, at 17.

¹⁹⁶ Paul Shorrocks Statement, *supra* note 194, at 3–4; DVD Video from Sherwood's Driveway, *supra* note 193 (crucially showing an assailant that could have driven the car out of camera range and then loaded Sherwood into the car because Sherwood's driveway is seventy-two feet long, and the camera picked up only the upper fourteen feet of the driveway—the portion nearest the house). See also E-mail from Gail Sherwood to Author (Sept. 25, 2014) (on file with author).

¹⁹⁷ Paul Shorrocks Statement, *supra* note 194, at 3–4; Jonathan Spencer, *A Report on the Video Evidence in the Case of Regina v. Gail Sherwood* 8–11 (Sept. 30, 2009) (on file with author) (describing that in the low-light setting, the camera could not identify the unknown person; but the report noted the unknown person was of the same height and had the same hair as Sherwood, and also a chin and “lipped horizontal mouth” consistent with that of Sherwood).

¹⁹⁸ DVD Footage from Sherwood's Driveway, *supra* note 193.

¹⁹⁹ *Id.*

²⁰⁰ None of the police reports in this case mention the man caught on camera.

who was in charge of the investigation, testified in court that he had never seen any footage of this man.²⁰¹ The unexamined CCTV footage is a clear failure to fully investigate, particularly because it corroborated the rape claim and could have led to apprehension of the perpetrator.

Second, the police lost a knife that may have contained the rapist's DNA.²⁰² On the night of the second rape, Sherwood stated that she stabbed her rapist's shoulder with a small pocket knife that she was carrying.²⁰³ The police recovered this knife from the crime scene, photographed it, and planned to send it for DNA testing.²⁰⁴ The knife was critical evidence because Sherwood's rapist had reportedly taken measures to avoid leaving his DNA behind, thus the knife may have been the only chance to recover any DNA.²⁰⁵ However, the knife went missing while being stored in the police station's secure evidence room.²⁰⁶ At Sherwood's trial, the police admitted this and could provide no explanation for how it went missing.²⁰⁷ It is particularly shocking that Sherwood was prosecuted for PCJ since evidence that could have verified her claims went missing while in police custody. Allowing the case against Sherwood to go forward under these circumstances essentially rewarded the police for being careless with—or destroying—evidence.

The lost knife relates to the third point: Sherwood repeatedly told police that she feared that her stalker was a police insider, which makes the knife's disappearance even more disturbing.²⁰⁸ Sherwood told police that on several occasions she could hear a police radio in the background when her stalker was nearby.²⁰⁹ Fourth, police arrested Sherwood just two weeks after her second rape

²⁰¹ 3 NOTES OF COURT OBSERVER LISA LONGSTAFF ON TRIAL OF GAIL SHERWOOD 15 (Jan. 2010) (on file with author) [hereinafter BOOK 3].

²⁰² 1 NOTES OF COURT OBSERVER LISA LONGSTAFF ON TRIAL OF GAIL SHERWOOD 5, 8 (Jan. 2010) (on file with author) [hereinafter BOOK 1]; *Id.* at 2, 3, 9, 26.

²⁰³ Transcript of Video Interview of Gail Sherwood at 9–10, (June 5, 2008) (on file with author) [hereinafter Sherwood Interview June 5, 2008].

²⁰⁴ BOOK 1, *supra* note 202, at 2, 3, 9, 26.

²⁰⁵ He used condoms and gloves, and he wiped Sherwood's entire body down with some sort of liquid, presumably in an effort to avoid leaving any traces of DNA behind. Transcript of Video Interview of Gail Sherwood at 22, 27, 30, (Apr. 26, 2008) (on file with author) [hereinafter Sherwood Interview Apr. 26, 2008]; Sherwood Interview June 5, 2008, *supra* note 203, at 11.

²⁰⁶ BOOK 3, *supra* note 201, at 2–3, 9, 26.

²⁰⁷ *Id.*

²⁰⁸ BOOK 1, *supra* note 202, at 11. PC Clare Sadler testified at trial on April 1, 2008, Sherwood stated that she heard a radio in her stalker's car "like a police radio." *Id.* See also 4 NOTES OF COURT OBSERVER LISA LONGSTAFF ON TRIAL OF GAIL SHERWOOD 10, 14 (Jan. 2010) (on file with author) [hereinafter BOOK 4] (revealing the defense attorney references police radios twice in closing speech); Sherwood Letter to Solicitor, *supra* note 189, at 9, 19, 32.

²⁰⁹ Transcript of Interview of Gail Sherwood at 19, 38–30, (Apr. 9, 2008) (on file with author) (indicating presence of police radio during multiple encounters with stalker); Sherwood Interview Apr. 26, 2008, *supra* note 205, at 27–28 (indicating presence of police radio at rape scene on Apr. 25, 2008).

report, which was four weeks *before* lab results would have been available from the evidence collected at the time of the second rape.²¹⁰ The fact that police decided to charge her before reviewing the lab results further proves that they did not fully investigate Sherwood's rape complaints before charging her with false reporting.

Gloucestershire Constabulary may have had a number of motives for prosecuting Sherwood for false reporting. First, the force may have prosecuted her to cover up sexual misconduct committed by a police insider. Sexual offences committed by police officers are quite common; studies have demonstrated that sexual misconduct is the second most common type of complaint that the public makes against officers.²¹¹ The IACP recommends that all forces have a policy on investigating misconduct by police officers, and they have made a model policy available.²¹² But as we have seen, police frequently do not follow IACP recommendations. Gloucestershire Constabulary does not have such a policy.²¹³

Second, Gloucestershire County had the lowest conviction rate for rape in England around the time of Sherwood's conviction for false reporting.²¹⁴ It could be that Sherwood's case, which by all indications involved a sophisticated, forensically trained criminal, was simply too difficult for the force to solve with the training and resources that they had. To make matters worse, Sherwood was a pest. Because she was experiencing a pattern of stalking events, she was calling them repeatedly and was not going to go away on her own, the way a woman might if she was just raped once. The tone of the police reports suggests that they were getting annoyed by her calls for help.²¹⁵ Accordingly, it may have been easier for them to brand Sherwood as a liar and dispense with her case in that way.

²¹⁰ Officers Report from Detective Constable Claire Hudman to Detective Sergeant John Wood (June 13, 2008) (on file with author) (noting that Hudman had obtained forensic test results between June 10 and 12, 2008).

²¹¹ David Packman, *2010 NPMSRP Police Misconduct Statistical Report—Draft*, CATO INST., Figure 2 (Apr. 5, 2011, 12:55 AM), <https://www.policemisconduct.net/2010-npmsrp-police-misconduct-statistical-report/>.

²¹² Carrie Abnor et al., *Addressing Sexual Offenses and Misconduct by Law Enforcement*, INT'L ASS'N OF CHIEFS OF POLICE 5–7 (June 2011), <http://www.theiacp.org/portals/0/pdfs/addressingsexualoffensesandmisconductbylawenforcementexecutiveguide.pdf>.

²¹³ See GLOUCESTERSHIRE CONSTABULARY, <https://www.gloucestershire.police.uk/> (last visited Feb. 13, 2017) (lacking a description of such a policy on their website).

²¹⁴ Tom Geoghegan, *Are Rapists Getting Away With It?* BBC NEWS MAG. (Jan. 31, 2017, 17:30 GMT), http://news.bbc.co.uk/2/hi/uk_news/magazine/6314445.stm.

²¹⁵ See, e.g., Detective Sergeant John Wood, Statement of Witness (Oct. 27, 2009) (describing another officer's comments describing Sherwood as being "paranoid," and that it could be "in her head and having some kind of mental breakdown") (on file with author); Detective Sergeant John Wood, Restricted Information Form, Gloucestershire Constabulary (Nov. 24, 2008) (describing Sherwood as a "devious calculated women" [sic], as concocting stories, and as someone who will "stop at nothing for her own gratification." Wood further recommends that there should be "a robust approach to the defendant when considering prosecution.") (on file with author).

2. Rhiannon Brooker: Police Need to Save Face

Rhiannon Brooker, of Bristol, England, was convicted in 2014 of twelve counts of PCJ after reporting multiple incidents of rape and domestic violence committed by her ex-partner in 2009 and 2010.²¹⁶

In Brooker's case there was strong evidence that she had been violently assaulted multiple times; there were numerous photographs of her injuries, and she had been diagnosed with post-traumatic stress disorder ("PTSD") and was receiving treatment for it.²¹⁷ Friends had witnessed her receiving threatening text messages and had observed her arriving to work and school covered in bruises.²¹⁸ Brooker did not report to the police voluntarily, but because a friend insisted that she do so; like many victims of domestic violence, she did not necessarily want to send her partner to prison, but she wanted the violence to end.²¹⁹ The domestic violence-trained officers who investigated her case believed that she had been raped.²²⁰ They worked very hard to build trust with Brooker and coax her to disclose all of the violence she had experienced.²²¹ At one point, they believed they were in a position to bring twenty charges of rape and domestic violence against Brooker's ex-partner, Paul Fensome.²²² They sent these charges to the CPS so that Fensome could be prosecuted for rape and domestic violence.²²³

However, the CPS declined to bring charges against Fensome because of discrepancies between Brooker's statements to police and cell phone evidence that suggested that some of the assaults could not have happened at the times

²¹⁶ Steven Morris, *Law Graduate Found Guilty of Falsely Accusing Former Boyfriend of Rape*, GUARDIAN (June 5, 2014) [hereinafter *Law Graduate Found Guilty*], <https://www.theguardian.com/society/2014/jun/05/law-graduate-guilty-falsely-accusing-boyfriend-rape> (describing Brooker's conviction for falsely accusing her former boyfriend of rape); *Trainee Barrister Jailed*, *supra* note 1 (describing Brooker's sentence of three and a half years).

²¹⁷ Trial Note Prepared by Defense Barristers, *Regina v. Rhiannon Brooker*, *Trial Note: Summing Up Onwards 7–19* (May 27–Jun. 5, 2014) [hereinafter *Brooker Trial Summing Up*] (describing the numerous assaults) (on file with author). Trial Note Prepared by Defense Barristers, *Regina v. Rhiannon Brooker*, *Trial Note: Speeches 11, 34* (May 23–27, 2014) [hereinafter *Brooker Trial Speeches*] (providing photographs of the injuries) (on file with author). See also Interview by Lisa Avalos with Rhiannon Brooker, Bristol, United Kingdom (Jan. 13, 2016) (indicating that Brooker had been diagnosed with PTSD prior to being arrested and was supposed to begin counseling for her PTSD symptoms on November 28, 2012).

²¹⁸ *Brooker Trial Summing Up*, *supra* note 217, at 6, 10–15, 17.

²¹⁹ Interview with Rhiannon Brooker, *supra* note 140.

²²⁰ *Brooker Trial Speeches*, *supra* note 217, at 13, 30.

²²¹ *Id.* at 30, 35 (indicating that the officers who took Brooker's original complaints of rape and domestic violence were sometimes "dragging the info" out of her, and that it was the "good work" of these officers that persuaded her to come forward and make a complaint).

²²² Interview with Rhiannon Brooker, *supra* note 140.

²²³ See *id.* (describing the process of prosecution, including the investigation, statements, and number of counts).

Brooker thought that they had.²²⁴ This could well have been a case that failed due to the investigators' lack of attention to the impact that trauma has on memory after sexual assault. As mentioned above, people affected by trauma often have particular difficulty remembering time sequencing information accurately.²²⁵ Brooker had a great deal of memory impairment as a result of the trauma she had experienced, and she had particular difficulty remembering dates.²²⁶ At trial her defense team argued vigorously that Brooker had indeed been assaulted by Fensome multiple times, but she did not have an accurate recollection of specific dates, times, and even locations.²²⁷ The fact that the pattern of abuse was ongoing and not a one-time occurrence made it even more challenging for her to try to pin down events to specific times and dates.²²⁸

The case took a substantial turn for the worse when supervising officers decided to set aside the conclusions reached by the officers who investigated Brooker's case.²²⁹ These senior officers decided to bring charges against Brooker for PCJ²³⁰—a move that effectively used Brooker's PTSD memory impairment against her. A police memo confirms that police focused on inconsistencies in Brooker's account in deciding to charge her.²³¹ "The reason the arrest for pervert [sic] the course of justice was approved was there was [sic] 3 [sic] cases where further enquiries had been completed and the rapes could not have happened as suggested and the victim had already been given the chance to provide a further account."²³²

The inconsistencies in Brooker's account provided a rationale for charging

²²⁴ *Brooker Trial Speeches*, *supra* note 217, at 13 (describing Fensome's alibis for some nights).

²²⁵ Hopper & Lisak, *supra* note 98.

²²⁶ *Brooker Trial Summing Up*, *supra* note 217, at 3, 9, 10, 15 (describing Brooker's difficulty at remembering dates, and maintaining a consistent timeline of events); Interview with Rhiannon Brooker, *supra* note 140 (noting Brooker indicated that she was uncertain about many dates and experienced memory difficulties as a result of the assaults).

²²⁷ *Brooker Trial Summing Up*, *supra* note 217, at 11 (noting that Brooker "may be wrong about location" and although "she remembers the violence and sex [she] cannot remember more").

²²⁸ *Id.* at 2, 10 (noting that Brooker has difficulty remembering dates, in part because the "events after that left her feeling freaked out").

²²⁹ Police Detective Inspector Janice Pearson, *Policy Decision—Video Interview of Rhiannon Brooker 2* (Jan. 4, 2012), [hereinafter *Pearson Policy Document*] (on file with author) (describing how the investigating officers never meant to push Brooker "until she broke down and made an admission so she could be arrested for [perverting the course of justice] but rather intended to give Brooker an opportunity to account for the discrepancies in her story in a "very victim focused way"); *Brooker Trial Speeches*, *supra* note 217, at 13, 28 (noting that the "superior officers had different views" from the investigating officers).

²³⁰ *Pearson Policy Document*, *supra* note 229, at 1; *Brooker Trial Speeches*, *supra* note 217, at 13, 28.

²³¹ See generally *Pearson Policy Document*, *supra* note 229 (describing how the perverting the course of justice charge was approved because Brooker could not account for inconsistencies in her story).

²³² *Id.* at 1.

her, albeit a rationale that contravened the IACP Guidelines.²³³ But the decision to actually take the prosecution forward was largely driven by a concern with protecting the constabulary's reputation. Their reasoning was that because Brooker's ex-partner had spent about a month in jail while the rape allegations were investigated, and because police were worried that he might go to the press and complain about the police, Brooker would have to be charged: "The original suspect [Brooker's ex-partner] had spent some time in prison and had been on Court bail for an extended period of time. As such, I felt the reputational risk to the Constabulary was great if the original suspect made a complaint or went to the media."²³⁴

In a shocking move, it seems that police therefore decided to arrest Brooker in order to protect the constabulary's reputation. Notably, there is no indication that the constabulary considered the seriousness of bringing charges against someone who could actually be a victim of several serious crimes. This is true despite the fact that a police memo acknowledges this possibility stating

[t]he arrest of the original victim [Brooker] was to be done in a very respectful manner understanding that there *may be some truth to the account* or that she had a previous history of abuse which was manifesting itself with this case.²³⁵

It is extraordinary that police recognized, *even while planning to arrest her*, that Brooker might in fact be telling the truth. Even more strikingly, they opined that arresting Brooker was the only way that she would understand why they were dropping charges against her ex-partner. The same police memo notes that the officer in charge determined that Brooker "would be very upset if the case was dropped and she would need an explanation which we would not provide sufficiently without arrest."²³⁶

The constabulary's own documents thus demonstrate quite clearly that Brooker was charged with PCJ not because of compelling evidence that she had fabricated rape and assault claims, but because the police were worried about public criticism over how they had handled this complex case. They needed a way to explain to the public why the ex-partner had been held in prison for thirty days and then released without ever being charged. Had the police had a better understanding of the ways that trauma affects memory after sexual assault, they may have approached Brooker's memory difficulties with greater compassion, and they may have even found a way to take the rape case forward. Tragically, Brooker was sentenced to prison and was released after serving eighteen months.²³⁷ She is now considering her options for appeal.²³⁸

²³³ *IACP Guidelines*, *supra* note 61, at 12–13 (stating that inconsistencies are not a reason to label a rape complaint false).

²³⁴ *Pearson Policy Document*, *supra* note 229, at 1.

²³⁵ *Id.* (emphasis added).

²³⁶ *Id.*

²³⁷ Steven Morris, *Court Rejects Calls for Woman's Jail Term Over False Rape Claims to be*

3. Eleanor de Freitas: Political Payoff for the Prosecutor²³⁹

Eleanor de Freitas' case is unusual in two respects. First, the CPS prosecuted de Freitas for perverting the course of justice over the objections of the specially trained sex crimes officers who investigated her case.²⁴⁰ Second, the CPS made this decision while ignoring the best evidence in the case—the two-hour long, video-taped interview that Eleanor gave the police.²⁴¹ They labeled this interview as unused evidence.²⁴² The case is also tragic because de Freitas took her own life just three days before her trial was set to begin.²⁴³

De Freitas reported a rape to the London Metropolitan Police in January 2013, indicating that she had gone to have brunch with an acquaintance, John Doe, at his apartment as a first date, and that he assaulted her and may have drugged her.²⁴⁴ She told police that although she typically avoided alcohol, Doe had urged her to drink some alcoholic cider and had also succeeded in pressuring her to take two pills that he claimed were Vitamin C, although he refused to show her the bottle.²⁴⁵ She further told police that with her ability for rational thought compromised by the alcohol and unknown pills she had ingested, she later reluctantly agreed to spend the night at Doe's apartment because he insisted: "I wasn't thinking logically and I kind of thought . . . 'I'm probably going to have to stay here overnight because the door's locked' and I didn't want to create a scene and put myself in more danger by causing any friction"²⁴⁶

Increased, GUARDIAN (Sept. 25, 2014) [hereinafter *Court Rejects Calls*], <https://www.theguardian.com/uk-news/2014/sep/25/court-rejects-solicitor-general-rhiannon-brooker-jail-term-false-rape-claims>; Interview with Rhiannon Brooker, *supra* note 140.

²³⁸ Agenda for Telephone Interview with Rhiannon Brooker (Jan. 18, 2017) (on file with author) (discussing Brooker's options for appeal).

²³⁹ For a more in-depth treatment of the Eleanor de Freitas case, including a detailed examination of the evidence that prosecutors used against her, see Lisa Avalos, *Helping Rapists Win: the Politics of Charging Rape Complainants With False Reporting*, 83 BROOK. L. REV. (forthcoming, Mar. 2018).

²⁴⁰ The Humble Memorial of David de Freitas, Application to Attorney General for Reference of the Inquest to the High Court, 10–11 (Jul. 6, 2015) [hereinafter *de Freitas Memorial*] (on file with author).

²⁴¹ Attendance Note, *Re R V Eleanor de Freitas* (Jan. 24, 2014) [hereinafter *Attendance Note*] (on file with author).

²⁴² *Id.*; see also Letter from Alison Saunders, Director of Public Prosecutions, to Harriet Wistrich, 3 (Dec. 3, 2014) (on file with author).

²⁴³ *de Freitas Memorial*, *supra* note 240, at 1.

²⁴⁴ *Id.* at 3–4; Transcript of Interview by Police with Eleanor de Freitas at Fulham Police Station, London, Eng., 2–3, 22–35 (Jan. 4, 2013) [hereinafter *de Freitas Police Interview*] (on file with author). The interview was transcribed at the University of Arkansas School of Law because neither the police nor prosecutors ever transcribed it; the final transcript is thirty-six pages. I refer to Eleanor's alleged assailant using a pseudonym because the rape case against him did not go forward.

²⁴⁵ *de Freitas Police Interview*, *supra* note 244, at 3–5, 25–26. According to the police interview, at one point de Freitas agreed to take one of the pills, but Doe insisted that she take two. *Id.* at 5.

²⁴⁶ *Id.* at 33.

De Freitas reported that the next morning, she woke up feeling that she had been raped.²⁴⁷ She told police “‘I feel violated I feel really[,] really weird this morning.’ . . . I’m shaky, my heart’s racing, I know that he’s had sex with me . . . something is really[,] really wrong here.”²⁴⁸ De Freitas believed that Doe had sex with her when she did not have capacity to consent due to psychiatric medication she was required to take, a small amount of alcohol interacting with that medication, date rape drugs, or a combination of these factors.²⁴⁹ Her memory of the evening’s events appeared sharply impaired, based on the police interview.²⁵⁰

Because of her memory difficulties, the police asked several questions designed to establish whether or not de Freitas and Doe actually had sex.²⁵¹ De Freitas was certain that sex had occurred once on the living room sofa.²⁵² She described this sex as “‘horrific,’” but something she “‘let him do” because then “‘maybe I might be able to go home.”²⁵³ When asked directly whether she consented to that sex, she said “‘I don’t think so, no,” but she also made clear that the sex on the sofa was not her main concern.²⁵⁴ Her main concern was that she believed sex had occurred later that night in the bedroom, after she had taken her psychiatric medication, and when she therefore did not have the capacity to consent due to the sedative effects of the medication.²⁵⁵ When police asked de Freitas to explain why she believed that sex had taken place in the bedroom, her best answer was that she was at least “‘80%” sure that it had, and that she remembered seeing open packets of lubricant when she woke up the next morning.²⁵⁶ She was unable to recall any details of actually engaging in sex in the bedroom, however.²⁵⁷

The officers who dealt directly with de Freitas regarded her as a credible rape complainant.²⁵⁸ But perhaps as a result of de Freitas’ memory difficulties—and particularly the difficulty of establishing with certainty that any sex had

²⁴⁷ *Id.* at 12.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 4–6, 25–26.

²⁵⁰ *Id.* at 6, 8–10, 12, 29–30.

²⁵¹ de Freitas Police Interview, *supra* note 244, at 29–30, 32.

²⁵² *Id.* at 32–35.

²⁵³ *Id.* at 35.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 34–35 (stating that her psychiatric medication has an extremely sedating effect, that she does not usually remember things that happen once she has taken it, and that she also told Doe of these effects).

²⁵⁶ *Id.* at 34.

²⁵⁷ de Freitas Police Interview, *supra* note 244, at 32–36.

²⁵⁸ de Freitas Memorial, *supra* note 240, at 10–11 (noting that the police recorded de Freitas’ complaint as a criminal complaint of rape, did not believe there was evidence that she had lied, and did not support the CPS decision to prosecute de Freitas).

occurred when de Freitas was incapacitated—they concluded that they did not have enough evidence to proceed against John Doe.²⁵⁹

After the rape case was dropped, the case took a very unusual turn. Doe initiated a private prosecution of de Freitas for perverting the course of justice, and this private prosecution was taken over by the CPS in December 2013.²⁶⁰ The CPS took this action over the objections of the investigating officers, who maintained that there were no grounds to label de Freitas' complaint false.²⁶¹ De Freitas was never tried, because she committed suicide three days before the trial was set to begin.²⁶² Months later, Doe went to the media and shed light on one of the core questions in the case: he stated that he and de Freitas had had sex “multiple times” that night, thereby removing any doubt about whether sex had occurred beyond the one sex act that Eleanor could remember.²⁶³

Under the IACP Guidelines, de Freitas should be considered a Likely Victim because prosecutors charged her without fully investigating her case and without evidence that no crime was committed or attempted against her. I will demonstrate that de Freitas was charged (a) without evidence that no crime was committed or attempted against her, and (b) without a full investigation into her rape claims.

a. No Evidence of No Crime

De Freitas should be viewed as a Likely Victim because the prosecution relied almost exclusively on material incapable of proving that no crime was committed against her. Having disregarded Eleanor's videotaped police interview—which was never viewed by the private prosecutor, nor by the CPS lawyer who attended court to take over the case—the prosecution argued that Eleanor's behavior *after* the events in question was inconsistent with having been raped.²⁶⁴ The notion that one can tell whether a woman has really been raped by how she behaves afterwards is a rape myth, as the CPS itself has acknowledged in the guidance on sexual offenses that it provides to

²⁵⁹ *Id.* at 4.

²⁶⁰ *Id.* at 4, 6.

²⁶¹ *Id.* at 10–11.

²⁶² *Id.* at 1.

²⁶³ Angella Johnson, *The Double Life of the Tragic Suicide Girl Who Accused Me of Rape—Tycoon's Son Says: 'Don't Judge Me Before You Know the Whole Story'*, DAILY MAIL (Nov. 29, 2014), <http://www.dailymail.co.uk/news/article-2854324/The-double-life-tragic-suicide-girl-accused-rape-tycoon-s-son-says-Don-t-judge-know-story.html>.

²⁶⁴ See Notes from Meeting Between David de Freitas (father of Eleanor de Freitas), his legal representatives, and Alison Saunders, Director of Public Prosecutions, Crown Prosecution Service, London 1–2 (Nov. 20, 2014) (on file with author); Attendance Note, *supra* note 241. Instead of viewing and transcribing Eleanor's police interview, the prosecution relied on a five-page summary of the interview written by one of the officers who interviewed Eleanor. [John Doe] v. Eleanor de Freitas Case Summary, ¶ 1.2 (Aug. 2, 2013) (on file with author) [hereinafter Prosecution Case Summary]. The actual interview transcript is thirty-six pages, so this summary omitted a great deal of information.

prosecutors.²⁶⁵

Eleanor's prosecutors ignored this expert guidance and relied on social media communications which occurred before and after the alleged rape, as well as CCTV footage from a shopping trip that occurred the next morning, in order to construct an argument that she had not really been raped. The CCTV footage showed Doe and de Freitas visiting a lingerie shop.²⁶⁶ The social media communications included Facebook messages between Doe and de Freitas. They occurred prior to the date and consisted of lighted-hearted, sexual banter about activities that the two might engage in.²⁶⁷ De Freitas had also sent text messages to friends immediately after her date with Doe that did not mention that she had been raped and that had a positive tone.²⁶⁸

Neither type of evidence is capable of proving that no crime was committed or attempted. The CCTV footage segment is of five minutes' duration, has no sound, and simply shows two people shopping.²⁶⁹ It should be obvious that footage of this nature cannot prove whether or not a rape occurred because it cannot, by its very nature, speak to the question at the heart of this case—whether de Freitas consented to sex hours before. Even the Director of Public Prosecutions, Alison Saunders, discounted the video footage on this basis, stating that “[t]he fact a person remains in the company of the person who they say has just raped them in order to go shopping does not mean their allegation is untrue.”²⁷⁰

As to the text messages to friends, the fact that de Freitas may have sounded positive and declined to mention the rape immediately afterward to certain individuals does not prove that she was not raped; victims have a right to decide *who* to share their experience with, and when, and victims often delay reporting.²⁷¹ Moreover, in the hours immediately after a rape, a victim is often in a state of shock that can result in emotional numbness or in the victim appearing

²⁶⁵ *Rape and Sexual Offences: Chapter 21: Societal Myths*, CROWN PROSECUTION SERVICE, http://www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences/societal_myths/#a6.

²⁶⁶ Alexander Economou, *Official CCTV in Eleanor de Freitas False Rape Case (Explanation Below)*, YOUTUBE (Nov. 20, 2015), <https://www.youtube.com/watch?v=F9Ex5mGMG8E>; Johnson, *supra* note 263.

²⁶⁷ Forensic Phone Report of [John Doe's] Phone, Exhibit Ref. LJ/13005-04/1, 370–74 (on file with author).

²⁶⁸ Prosecution Case Summary, *supra* note 264, at ¶¶ 4.3, 4.7, 4.8. The CPS confirmed that when they took over the prosecution, they relied on this case summary and declined to add any new evidence. *Economou v. de Freitas* [2016] EWHC 1853 (QB) 2, ¶¶ 21, 174(1), 175, <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/economou-v-de-freitas-2016-ewhc-1853-qb-28-07.pdf>; *see also* Attendance Note, *supra* note 241.

²⁶⁹ Economou, *supra* note 266.

²⁷⁰ Letter from Alison Saunders, Director of Public Prosecutions, to David de Freitas, 4 (Dec. 3, 2014) [hereinafter Saunders Letter] (on file with author). The video footage shows tension between de Freitas and Doe; *see Avalos*, *supra* note 239 (including a detailed analysis of this footage).

²⁷¹ *See IACP Guidelines*, *supra* note 61, at 13 (indicating that delayed reporting is common and not a reason to label a report false).

unusually calm.²⁷² In addition, in acquaintance rape situations, victims will often be in denial immediately after the rape and will attempt to carry on as though nothing bad has occurred.²⁷³ For all of these reasons, the fact that a woman does not immediately mention being raped does not mean that she has lied. De Freitas did in fact later disclose the alleged rape to certain friends, family members, and to her physician.²⁷⁴

The Facebook messages also cannot prove that no crime was committed or attempted because they occurred *prior* to the alleged rape. Even if de Freitas gave consent to sex in a Facebook message, she would have the right to withdraw consent at a later time.²⁷⁵ For that reason, such messages cannot possibly amount to conclusive evidence that no crime was committed or attempted. As a result, these messages do not reach the standard of evidence necessary to label a report false under the IACP Guidelines. Saunders, however, ignored this right to withdraw consent; she erroneously concluded that the messages “supported the falsity of Eleanor’s allegation of rape” because the things that Eleanor had complained of were “foreshadowed in this text message exchanges . . . in which they were discussed and agreed to by her.”²⁷⁶

b. No Full Investigation into the Rape Complaint

The investigation into de Freitas’ rape complaint was incomplete because it never established how many times sex occurred between Doe and de Freitas and what evidence, if any, established her consent.²⁷⁷ When police interviewed Doe

²⁷² *Rape and Sexual Offences: Chapter 21: Societal Myths*, CROWN PROSECUTION SERVICE, http://www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences/societal_myths/#a6.

²⁷³ JON KRAKAUER, *MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN* 254–55 (2015) (quoting sexual assault expert David Lisak stating “one of the first reactions for many people is to try and undo it, to try to pretend like it didn’t happen,” and that it is quite common in the aftermath of a rape for a rape victim to have quite extensive interaction with the perpetrator as a way of denying that a rape just occurred).

²⁷⁴ de Freitas Memorial, *supra* note 240, at 3–4 (indicating that de Freitas’ medical records indicated that on December 31, 2014 she reported a sexual assault to her physician); Eleanor de Freitas, Text Message to a Friend, December 27, 2012 (on file with author) (stating that John Doe had tied her up, tried to strangle her and traumatized her in other ways); *Economou v. de Freitas* [2016] EWHC 1853 (QB) 2, ¶¶ 21–22, <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/economou-v-de-freitas-2016-ewhc-1853-qb-28-07.pdf> (indicating that de Freitas reported a rape or assault to Henriette Schroder on Dec. 25, 2012 and to Tanya Macrae on or before Jan. 3, 2013); Interviews Between Lisa Avalos and David de Freitas, and with two other people close to Eleanor (June 2016) (on file with author) (each party stating directly to Avalos that Eleanor had disclosed that Doe had raped her) (two individuals decline to be named here, citing the ongoing libel litigation between David de Freitas and John Doe).

²⁷⁵ The Facebook messages show Doe asking if he could tie de Freitas up and asking whether she had ever tried “a little (gentle) asphyxiation”? Eleanor responded “whatever you like” but also stated “but no kissing. And no touching erogenous zones.” At best, there is, pre-encounter, an ambivalent message about consent here. Forensic Phone Report of [John Doe’s] Phone, *supra* note 267, at 370–74.

²⁷⁶ Saunders Letter, *supra* note 270, at 8.

²⁷⁷ de Freitas Memorial, *supra* note 240, at 5–6. The investigation was incomplete in additional

during the rape investigation, he gave a “no comment” interview and refused to answer any of their questions.²⁷⁸ Astoundingly, the CPS agreed to prosecute de Freitas without ever obtaining the answers from Doe that the police never obtained.²⁷⁹ Specifically, prosecutors never established what led Doe to believe that he had de Freitas’ consent to each sex act.

A person can, of course, consent to some sex acts but not others; she is entitled to withdraw consent at any time. Therefore, consent to sex must be established with some specificity, and de Freitas could only be convicted of lying about rape if the prosecution could prove that she consented to each sex act. According to the private prosecution case summary, Doe admitted to four instances of sexual activity, but he did not make this admission until several months after police dropped charges against him.²⁸⁰ Moreover, his admission does not preclude the fact that sex may have occurred more than the number of times to which he admitted. Prosecutors therefore labeled de Freitas’ rape complaint false without a full investigation into her claims, which is contrary to the IACP Guidelines. In light of the lack of full investigation coupled with de Freitas’ inability to remember any details of more than one instance of sex, it would appear to be impossible to prove that no crime was committed or attempted against her.

This is a particularly tragic case since the attempt to prosecute de Freitas ended in her death, and the decision to prosecute seems particularly flawed for a number of reasons. First, it was initiated not by public authorities but by the alleged assailant. Although private prosecutions are generally not allowed in the United States, British rape complainants must face the possibility that an individual accused of rape—and who may well desire revenge—will launch a prosecution for PCJ against his accuser.²⁸¹ In such cases, there is a further danger that the prosecution will proceed without any of the training in rape investigation that prosecutors can be expected to have, and with a reliance on rape myths.

Second, in addition to ignoring available guidance on rape myths, this prosecution proceeded despite CPS guidance cautioning against bringing PCJ

respects that are not addressed here. For instance, prosecutors never interviewed people close to de Freitas and in whom she had confided after the alleged rape. In addition, de Freitas had been told, by friends, about two other women who had experienced coercive and inappropriate behavior from Doe; she had these names prior to her police interview, but authorities never contacted and interviewed these women.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ Prosecution Case Summary, *supra* note 264, at 3.3, 3.4 & 4.1. This document was prepared more than five months after charges were dropped against Doe on February 20, 2013. *Id.* at 1.6.

²⁸¹ *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (finding that a private citizen lacks a judicially cognizable interest in the prosecution of another). Private prosecutions are rare in Britain because of the high cost. Paul Peachey, *Two-tier Justice: Private Prosecution Revolution*, INDEPENDENT (Aug. 16, 2014), <http://www.independent.co.uk/news/uk/crime/two-tier-justice-private-prosecution-revolution-9672543.html>.

prosecutions against individuals with known mental illness.²⁸² De Freitas was known to suffer from significant mental illness, and the CPS even had a psychiatric report indicating that there would be a risk of suicide if they took the prosecution forward.²⁸³ Third, the case seemed particularly unwinnable for the CPS, since de Freitas made it clear that she had little memory of events that evening and could not even be sure how many times she had sex. To prove that she was guilty of PCJ, the prosecution would have had to prove that she consented to each instance of sex.

That would seem an impossible task under circumstances where she could not clearly remember having sex but where the alleged assailant had confirmed that sex had occurred several times. Why, then, would the CPS take the case forward? Doe's motive was clearly his own self-interest,²⁸⁴ but the CPS was not obligated to embrace that motive or to get involved in the case at all, and they had the power to shut down the prosecution.²⁸⁵ Another possibility is that the prosecution was taken forward for political reasons that had nothing to do with the merits of the case. There is circumstantial evidence that supports this theory. At the time of the de Freitas prosecution, the CPS had been under fire for prosecuting certain high-profile men for rape.

In particular, there were three such cases that ended in the acquittal of prominent men—two actors and one politician—who some members of the public felt had been unfairly accused of rape.²⁸⁶ By taking forward the case against de Freitas, the CPS could send the message that they were serious not only about prosecuting rape but also about prosecuting false allegations of rape. In other words, the de Freitas prosecution may have been a way to even the score and perhaps take pressure off of the CPS for pursuing certain rape cases. If this was the goal, it would not matter to the CPS whether the case ended in the acquittal or conviction of de Freitas—all that mattered would be the fact that the CPS at least attempted to prosecute her. If this was the goal, then Eleanor de

²⁸² See generally CROWN PROSECUTION SERVICE, *supra* note 179 (demonstrating “core considerations” that prosecutors should consider when determining whether to prosecute individuals suspected of making false allegations of rape).

²⁸³ See de Freitas Memorial, *supra* note 240, at 8–9.

²⁸⁴ See *Economou v. de Freitas* [2016] EWHC 1853 (QB) 2, ¶ 260, <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/economou-v-de-freitas-2016-ewhc-1853-qb-28-07.pdf>.

²⁸⁵ *Private Prosecutions*, CROWN PROSECUTION SERVICE, http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/.

²⁸⁶ Josh Halliday & Helen Pidd, *Nigel Evans Cleared of Raping University Student and All Other Charges*, GUARDIAN (Apr. 10, 2014, 9:25 AM), <https://www.theguardian.com/uk-news/2014/apr/10/nigel-evans-cleared-raping-university-student>; Helen Pidd, *Coronation Street Actor William Roache Acquitted of Rape and Assault Charges*, GUARDIAN (Feb. 6, 2014, 3:38 PM) [hereinafter *Coronation Street Actor William Roache Acquitted of Rape*], <https://www.theguardian.com/uk-news/2014/feb/06/coronation-street-actor-william-roache-acquitted>; Hugh Muir, *William Roache is Not Guilty. Should He Even Have Been Prosecuted?*, GUARDIAN (Feb. 7, 2014, 6:21 AM), <https://www.theguardian.com/commentisfree/2014/feb/07/william-roache-not-guilty-prosecuted>; see Nigel Bunyan, *Michael Le Vell Acquitted of Child Sex Offenses*, GUARDIAN (Sept. 10, 2013, 11:04 AM), <https://www.theguardian.com/uk-news/2013/sep/10/michael-le-vell-acquitted-child-abuse>.

Freitas paid a high price for being in the wrong place at the wrong time.

The cases of Eleanor de Freitas, Rhiannon Brooker, and Gail Sherwood provide support for the argument that police and prosecutors pursue PCJ cases against rape complainants for reasons unrelated to the merits of the case. The de Freitas prosecution took place in a context where the CPS had been sharply criticized for prosecuting certain celebrities for rape, and prosecuting de Freitas provided a chance to even the score. The Brooker prosecution took place in a context where the police were worried that Brooker's alleged assailant might create a media storm that would further damage the reputation of a constabulary that was already known for its poor track record in prosecuting rape. The Sherwood prosecution occurred when police were unsuccessful at obtaining any real leads against a criminal who was very skilled at evading capture. In short, these cases suggest that officials often act in their own self-interest, even when doing so causes harm to complainants.

These cases further demonstrate that a victim's vulnerability is a factor in who gets charged with PCJ. Sherwood has a visual disability, de Freitas had a history of mental illness, and Brooker was a victim of multiple episodes of domestic violence and had an abusive upbringing. These prosecutions were pursued despite CPS guidance instructing prosecutors to exercise caution before bringing PCJ charges against vulnerable individuals, including those with a history of mental health issues or domestic violence.²⁸⁷

In addition, each case demonstrates that complainants are pursued even when there has not been a full investigation of their rape complaints and even when the investigation has failed to generate evidence that the complaint is, in fact, false. Perhaps most disturbingly, the cases reveal a striking gap in protection for victims of rape and domestic violence—namely that the police and prosecutors involved had no safeguarding procedure in place to ensure that genuine victims would not be charged with false reporting. Part Four addresses this protection gap.

V. PART FOUR: RECOMMENDATIONS

It is very evident from the arguments presented here that rape investigation must improve in measurable and significant ways. Such reforms are critical not only to ensure that rape victims are not prosecuted for false reporting. They are also critical to ensure that rape is more effectively investigated and prosecuted, and that perpetrators are identified and punished. It is further apparent that several key sources, such as the IACP, End Violence Against Women International, and DOJ, offer robust and effective guidance on how to make these improvements. These initiatives are very important, but implementing them will take time. While this change process is playing out, there is an urgent need to put measures in place to stop the prosecution of rape victims for false reporting. This section sets out those recommendations for reform.

²⁸⁷ CROWN PROSECUTION SERVICE, *supra* note 179, ¶¶7–8.

A. *Modify the Violence Against Women Act to Prohibit Charging Rape Complainants with False Reporting.*

In the United States, federal law should prohibit the practice of charging rape complainants with false reporting. This section will explain how this can be accomplished. It will also discuss the arguments for a comprehensive prohibition.

Congress should add a provision to the federal Violence Against Women Act which would prohibit the use of Services/Training/Officers/Prosecutors (“STOP”) grant funds by police departments that engage in any pattern or practice of arresting or threatening to arrest rape complainants for false reporting. The STOP Violence Against Women Formula Grant Program is designed to “improv[e] the criminal justice [sic] system’s response to violent crimes against women.”²⁸⁸ It does so by making grant monies available for purposes such as training law enforcement officers, judges, and prosecutors to more effectively identify and respond to violent crimes against women, including the crimes of sexual assault, domestic violence, and dating violence.²⁸⁹

The eligibility requirements of the program require any state or territory applying for an award to “certify that they are in compliance with the statutory eligibility requirements of [sic] the Violence Against Women Act” (the “Act”).²⁹⁰ These eligibility requirements already prohibit grant recipients from engaging in certain actions that are contrary to the goal of responding more effectively to violence against women. For instance, grant recipients must certify that they do not require victims of sexual assault to pay any of the costs associated with a forensic medical exam,²⁹¹ and they must certify that they do not require sexual assault victims to submit to a polygraph examination as a condition for proceeding with the investigation of an offense.²⁹² A provision should be added to the Act which requires grant recipients to certify that they prohibit the practice of charging or arresting complainants for false reporting when either a complainant comes forward to report a sexual assault or when the police learn about the sexual assault from a third party. This provision would be in keeping with the purpose of the Act because charging sexual assault complainants with false reporting is a practice that runs contrary to the goal of improving the criminal justice response to violence against women.

There are several reasons for favoring an approach that prohibits all such

²⁸⁸ *STOP Violence Against Women Formula Grant Program*, *supra* note 120; 42 U.S.C. § 3796gg (2015). The program can also be used to cover services for similarly situated men, such as male victims of sexual violence. *Frequently Asked Questions (FAQs) About STOP Formula Grants*, U.S. DEP’T OF JUST. OFFICE ON VIOLENCE AGAINST WOMEN 1, 1–2 (Feb. 2016), <https://www.justice.gov/ovw/file/827531/download>.

²⁸⁹ *See* 42 U.S.C. § 3796gg-4(2015).

²⁹⁰ *STOP Violence Against Women Formula Grant Program*, *supra* note 120.

²⁹¹ 42 U.S.C. § 3796gg-4(2015).

²⁹² 42 U.S.C. § 3796gg-8(2015).

false reporting arrests, at least in the current climate. First, police are not capable of reliably identifying genuine false reporters. Poor investigatory practices and skepticism towards victims create a strong probability that truthful victims will be ensnared in unjust prosecutions unless they are prohibited by law. Since allowing police and prosecutors to take such charges forward has a demonstrable negative effect on actual victims who are wrongly accused of lying, the practice cannot be tolerated.

Second, rape investigation practices are so deficient that the urgent priority must be on improving them. Allowing false reporting cases to proceed hampers these efforts and encourages police officers to spend their time focusing on the wrong thing: trying to prove that complainants are lying rather than developing the skills to solve sex crimes. As we have seen, police often focus on trying to poke holes in a complainant's story in order to be able to dismiss the complaint as false early in the investigative process, and they do so precisely in order to avoid fully investigating the complaint. Each time police neglect to fully investigate a rape, they lose the opportunity to develop key skills that will allow them to become more effective at investigating and solving sex crimes. Eliminating the possibility of charging complainants with false reporting forces police to focus on the goal of thoroughly investigating each rape complaint and building the investigatory skills that the public needs them to develop.

Third, false reporting cases have a chilling effect, discouraging victims from reporting to police.²⁹³ This, in turn, increases the danger rapists pose to the general public because victims are reluctant to report rape out of a fear that they will be disbelieved and charged. It is important to note that this chilling effect operates even when a genuine false reporter is being charged; this is because fear of being disbelieved by police is widespread among sexual assault victims. Rape victims have no way of determining whether the person being charged is a true false reporter or a disbelieved rape victim. In the words of one police chief whose department follows a policy of not charging complainants with false reporting: "Primarily, we want to serve as a victim center. Even the few people who file false claims often have some problems going on in their lives and need some kind of services. We try not to punish people for coming forward with allegations."²⁹⁴ Treating all complainants with dignity and focusing on investigating and prosecuting rape, rather than false reporting, is the most effective strategy for encouraging victims to come forward.

Some will argue that surely there must be some cases where false reporters should be charged. Although it is true that some false reporters may get away with making false reports if such charges are completely prohibited, that is a

²⁹³ Avalos, *supra* note 140, at 52–54; Telephone Interview with Megan Jones Williams, Sexual Assault Program Coordinator, The Women's Center (Sept. 4, 2013); *see also* Lisa Longstaff, *The Rape Victims Prosecuted for "False" Rape Allegations*, OPEN DEMOCRACY (Dec. 16, 2013), <https://www.opendemocracy.net/5050/lisa-longstaff/rape-victims-prosecuted-for-false-rape-allegations> (noting the widely publicized cases of Gail Sherwood and Layla Ibrahim as examples of cases that can cause the chilling effect).

²⁹⁴ IMPROVING THE POLICE RESPONSE TO SEXUAL ASSAULT, *supra* note 32, at 12.

cost that is worth living with to ensure that genuine victims are never charged with false reporting. As this section has just set out above, rape investigation practices are currently so deficient that there is no reliable way to identify genuine false reporters, and resources poured into prosecuting false reports come at the expense of prosecuting rape. In light of the fact that very few rapists serve time for their crimes, prosecuting rape more effectively must be the priority.²⁹⁵

There are additional considerations to bear in mind. Approximately half of genuine false reports involve stranger rape.²⁹⁶ Therefore, it is not correct to assume that every such case destroys an innocent person's reputation. Moreover, remedies, such as defamation actions, exist for individuals who truly have their reputations damaged by false allegations. Because of the chilling effect that false reporting arrests can have, an effort to shore up someone's reputation through a false reporting arrest can actually inflict greater damage on the community when victims become more reluctant to come forward.

B. Require Certification for Officers Investigating Rape and Other Victim Safeguards

A key feature of false reporting prosecutions discussed was the dismal quality of investigations into the original rape complaint. They may have involved officers with little experience or general training investigating sex crimes. One pervasive feature is that officers are largely unfamiliar with the ways trauma affects memory and the importance of adopting a trauma-informed approach to sexual assault investigation. Their lack of training causes them to reach incorrect conclusions about victims, leading them to drop cases improperly. It is incredibly disturbing that they have the authority to investigate these cases and take action clearly against the interests of victims when they do not have the skills nor the interest to investigate these cases with necessary competence.

No sexual assault victim should have to experience the nightmare of having her case investigated by an officer or detective who is ill-equipped for the task, approaches the investigation in inappropriate ways, and ultimately charges the victim with false reporting. One way to avoid this outcome is to require that all first responders and other officers who have contact with victims of sex crimes

²⁹⁵ See *Kelly Study*, *supra* note 17, at 1 (noting the conviction rate for *reported* rapes in Britain is less than 6%); Patricia Tjaden & Nancy Thoennes, *Extent, Nature, and Consequences of Rape Victimization: Findings From the National Violence Against Women Survey*, NAT'L INST. OF JUST. 5, 33 (2006), <https://www.ncjrs.gov/pdffiles1/nij/210346.pdf> (finding that in the United States, the conviction rate for rape overall (both reported and unreported) is about 3%; this finding is based on a survey of 16,000 victims).

²⁹⁶ See CASSIA SPOHN & KATHARINE TELLIS, *POLICING AND PROSECUTING SEXUAL ASSAULT IN LOS ANGELES CITY AND COUNTY: A COLLABORATIVE STUDY IN PARTNERSHIP WITH THE LOS ANGELES POLICE DEPARTMENT, THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, AND THE LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE 50-51* (2012) (reporting that of 55 rape allegations classified as false by the researchers, 27 (49.1%) involved allegations of stranger rape); *Kelly Study*, *supra* note 17, at 48-49.

achieve a licensing or certification before they can investigate such crimes. This certification could require a minimum number of training hours to ensure basic competency as well as continuing education requirements.

British Home Secretary Amber Rudd has recently proposed that police officers who investigate complex cases against the vulnerable be required to obtain a license to practice, the purpose of which would be to demonstrate their competency to investigate such crimes.²⁹⁷ “Police professionals investigating complex cases against the vulnerable should hold a license to practise so the public can have confidence that an officer has the necessary knowledge and skills to carry out such important work.”²⁹⁸ The head of Britain’s College of Policing favors this proposal and takes the view that those officers so licensed would be expected to “undergo continuing professional development to keep their skills up to date and link learning directly to practice.”²⁹⁹

In addition to licensing or certifying police officers, departments should adopt procedural safeguards to ensure that sexual assault complainants are not charged with false reporting. One obvious way to do this is for departments to adopt the IACP Best Practice Guidelines. Specifically, the portion of that guidance indicating that a report of sexual assault should never be classified as false unless the investigation has been thorough, police have obtained evidence that no crime was committed or attempted, and police have not relied on rape myths or victim reactions to sexual assault in making this determination should become part of the procedure.

C. Improve Data Collection

Data collection with respect to false reporting arrests and charges of rape complainants must be improved. Federal and state law should be modified to require police departments to track false reporting arrests, charges, and convictions by the underlying crime charged. This allows the general public to easily determine how many sexual assault complainants in any jurisdiction have been charged with false reporting.

Having this data readily accessible will allow police as well as other organizations to monitor the frequency by which sexual assault complainants are being charged with false reporting and under what circumstances accurately and efficiently. Such cases can then be counted, tracked, and reviewed to see whether the original rape investigation complied with good practice and whether there was any risk that charges were brought against actual victims. This would provide accountability across police departments.

²⁹⁷ Alan Travis, *Police Will Need Licence to Practise for Child Sex Abuse Cases, Says Rudd*, GUARDIAN (Nov. 30, 2016), <https://www.theguardian.com/uk-news/2016/nov/30/police-need-licence-to-practise-child-sex-abuse-cases-says-rudd>.

²⁹⁸ *Id.* (quoting Home Secretary Amber Rudd).

²⁹⁹ *Id.* (quoting Home Secretary Amber Rudd).

D. Review of Charges in Alleged False Reporting Cases

Any jurisdiction that does allow rape complainants to be charged with false reporting should set up a rigorous process for reviewing charges in these cases. The protocol should ensure that jurisdictions fully comply with the IACP Guidelines. First, it should require officers to document that all investigative leads were fully pursued. Second, it should require them to document what evidence they have to demonstrate that no crime was committed or attempted. And third, it should require officers to document that the decision did not rely on rape myths—such as delayed reporting or officer beliefs about how rape victims ought to behave—in reaching the conclusion that the report was false. It should also require officers to document their familiarity with trauma-informed sexual assault investigation strategies. They should be able to demonstrate that they did not rely on any victim reactions that could result from trauma—such as errors or inconsistencies in the victim’s account—in deciding that the report is false.

Moreover, cases where false reporting charges are being contemplated should be reviewed by other agencies that can review and render an independent judgment as to whether false reporting charges are appropriate. Having an officer’s supervisor sign off on the charging decision is inadequate, because supervisors’ interests are often aligned with officers’ through experiencing the same work load pressures and training limitations. Many of the cases discussed here proceeded against an Actual or Likely Victim after a supervisor agreed to the charges.³⁰⁰ Instead, women’s advocacy or sexual assault support organizations would be better situated to ask questions about whether the investigative process has sufficiently protected the interests of victims.

VI. CONCLUSION

Rape is a highly traumatic experience. To have that trauma compounded by being disbelieved, charged with false reporting, and even sent to prison is a horror that is beyond comprehension for most people. It is of grave concern that police departments typically operate without safeguards in place to prevent disbelieved sexual assault victims from being prosecuted.

As we have seen here, rape is still poorly investigated and prosecuted on a routine and systemic basis. Police and prosecutors sometimes make self-interested, politically expedient decisions when deciding to prosecute a complainant for false reporting. It is disturbing that there has been an utter

³⁰⁰ *An 11-Year-Old Reported Being Raped Twice*, *supra* note 154 (indicating that a supervisor signed off on Detective Weeks’ report); Paul Shorrock Statement, *supra* note 194 (indicating Shorrock’s agreement with the conclusions reached by his subordinates in the Gail Sherwood investigation); *see also supra* text accompanying notes 216–86 (discussing the Rhiannon Brooker and Eleanor de Freitas cases, where supervisors decided to charge each woman with perverting the course of justice over the objections of the officers who conducted the rape investigations).

failure to link false reporting prosecutions to these widespread failures in rape investigation, with many officials not even considering the possibility that those being prosecuted might be disbelieved victims. The need for reform is urgent. The recommendations set out in this Article, if implemented, would go a long way towards ending the reprehensible practices described here. No rape victim should ever fear prosecution for reporting his or her rape to the police.