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# The Chilling Effect

## THE POLITICS OF CHARGING RAPE COMPLAINANTS WITH FALSE REPORTING

*Lisa Avalos*<sup>†</sup>

### INTRODUCTION

On April 19, 2008, eleven-year-old Danielle Hicks-Best was gang-raped by two young men from her Washington D.C. neighborhood.<sup>1</sup> Despite the facts that she was well below the statutory age of consent and that there was medical evidence corroborating the sexual assault, police approached her case with skepticism.<sup>2</sup> One email showed that a police lieutenant called her “promiscuous” and described the “sex” as consensual.<sup>3</sup> The police failed to make any arrests in the case, and the same group of men raped Danielle again about a month later.<sup>4</sup> In the meantime, police decided that they did not believe Danielle’s accounts of rape and they arrested her for false reporting.<sup>5</sup> The rape kit from the May 12 rapes was not tested because the investigation was suspended when Danielle was charged with false reporting.<sup>6</sup>

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<sup>1</sup> Joanna Walters, *An 11-Year-Old Reported Being Raped Twice, Wound up with a Conviction*, WASH. POST: MAG. (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=.62c432beaf97](https://www.washingtonpost.com/lifestyle/magazine/a-seven-year-search-for-justice/2015/03/12/b1cccb30-abe9-11e4-abe8-e1ef60ca26de_story.html?utm_term=.62c432beaf97) [<https://perma.cc/7Q39-BG6C>] [hereinafter Walters on Hicks-Best] (account of child rape victim Danielle Hicks-Best).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

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

<sup>6</sup> *Id.*

After inquiries from the *Washington Post* in 2014, the police department launched a new inquiry into how Danielle's case was handled, and the police chief apologized to her family for mishandling her case.<sup>7</sup> But the damage to Danielle had already been done. Danielle was convicted for false reporting and had the rest of her childhood stolen from her as a result.<sup>8</sup> She spent time in juvenile detention centers and residential treatment facilities, she ran away from home, she failed to complete high school, and she became a mother at age fifteen.<sup>9</sup> The trauma of not being believed when she reported her rapes likely contributed substantially to these outcomes.<sup>10</sup>

As Danielle's case demonstrates, there is a growing awareness that we face a crisis in how sex crimes are investigated and prosecuted. The last few years have seen colleges and universities come under scrutiny for how they handle sexual assault complaints, with the U.S. Department of Education opening investigations into 458 schools since 2011.<sup>11</sup> Three hundred and thirty-seven of these investigations remain open.<sup>12</sup> There has been outrage over judges handing out sentences for sexual assault that the public has widely perceived to be excessively lenient,<sup>13</sup> and much discussion of the many reasons why a victim would elect not to report to the police.<sup>14</sup> The U.S. Senate has held hearings on the failure to investigate and prosecute rape,<sup>15</sup> Human Rights Watch has issued widely

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

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

<sup>10</sup> *Id.*

<sup>11</sup> See *Title IX: Tracking Sexual Assault Investigations*, CHRON. HIGHER EDUC., <https://projects.chronicle.com/titleix/> [<https://perma.cc/WHA3-NYW7>].

<sup>12</sup> *Id.*

<sup>13</sup> Eddie Gregg, *Rambold Sentenced to 10 Years in Prison for Raping Student Who Later Committed Suicide*, BILLINGS GAZETTE (Sept. 26, 2014), [http://billingsgazette.com/news/local/crime-and-courts/rambold-sentenced-to-years-in-prison-for-raping-student-who/article\\_9e040246-4b63-5b72-9477-cc181eafa54a.html](http://billingsgazette.com/news/local/crime-and-courts/rambold-sentenced-to-years-in-prison-for-raping-student-who/article_9e040246-4b63-5b72-9477-cc181eafa54a.html) [<https://perma.cc/8ARA-8SK7>]; Sam Levin, *'He Was Trying to Kill Me': Echoes of Brock Turner in Another Case with Same Judge*, GUARDIAN (U.K.) (Aug. 1, 2016), <https://www.theguardian.com/us-news/2016/aug/01/sexual-assault-case-brock-turner-judge-aaron-persky> [<https://perma.cc/P37A-DKR6>]; Michael E. Miller, *'A Steep Price to Pay for 20 Minutes of Action': Dad Defends Stanford Sex Offender*, WASH. POST: MORNING MIX (June 6, 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/06/06/a-steep-price-to-pay-for-20-minutes-of-action-dad-defends-stanford-sex-offender/?utm\\_term=.b7c66fd5d102](https://www.washingtonpost.com/news/morning-mix/wp/2016/06/06/a-steep-price-to-pay-for-20-minutes-of-action-dad-defends-stanford-sex-offender/?utm_term=.b7c66fd5d102) [<https://perma.cc/C932-4M5H>].

<sup>14</sup> See *Reporting Sexual Assault: Why Survivors Often Don't*, MD. COALITION AGAINST SEXUAL ASSAULT, <https://ocrsm.umd.edu/files/Why-Is-Sexual-Assault-Under-Reported.pdf> [<https://perma.cc/S2A8-E39V>]; Tyler Kingkade, *And People Ask Why Rape Victims Don't Report to Police*, HUFFPOST (Aug. 12, 2016), [http://www.huffingtonpost.com/entry/rape-victims-report-police\\_us\\_57ad48c2e4b071840410b8d6](http://www.huffingtonpost.com/entry/rape-victims-report-police_us_57ad48c2e4b071840410b8d6) [<https://perma.cc/3AE5-G4M8>].

<sup>15</sup> *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing Before the Subcomm. on Crime & Drugs of the Comm. on the Judiciary*, 111th Cong. 107 (2010), <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg64687/>

publicized reports on the issue,<sup>16</sup> and the Department of Justice (DOJ) has issued scathing reports on this problem and has made recommendations for eliminating gender bias in the law enforcement response to sexual assault.<sup>17</sup>

But little attention has been paid to the worst case scenario that confronts the most unfortunate rape victims of all—being disbelieved by police and then charged with false reporting. Although a few journalists have provided in-depth coverage of individual cases where genuine rape victims have experienced the trauma of being prosecuted when police refused to believe them,<sup>18</sup> very little research has examined this phenomenon as a systemic problem and how it is linked to the

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pdf/CHRG-111shrg64687.pdf [https://perma.cc/CH4T-267R] [hereinafter *Rape in the United States Hearing*].

<sup>16</sup> HUMAN RIGHTS WATCH, CAPITOL OFFENSE: POLICE MISHANDLING OF SEXUAL ASSAULT CASES IN THE DISTRICT OF COLUMBIA 2 (2013), [http://www.hrw.org/sites/default/files/reports/us0113ForUpload\\_2.pdf](http://www.hrw.org/sites/default/files/reports/us0113ForUpload_2.pdf) [https://perma.cc/ZZS9-HXLE] [hereinafter DC REPORT].

<sup>17</sup> U.S. DEPT OF JUSTICE, IDENTIFYING AND PREVENTING GENDER BIAS IN LAW ENFORCEMENT RESPONSE TO SEXUAL ASSAULT AND DOMESTIC VIOLENCE 16-18, 22 (2016), <https://www.justice.gov/opa/file/799366/download> [https://perma.cc/4UEA-HU2H] [hereinafter DOJ GENDER GUIDANCE]; U. S. DEPT OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 43, 45–46 (2011), [https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd\\_report.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf) [https://perma.cc/8BBC-C5G7] [hereinafter DOJ NEW ORLEANS REPORT]; U. S. DEPT OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (2016), <https://www.justice.gov/opa/file/883366/download> [https://perma.cc/PZ6R-BXZL] [hereinafter DOJ BALTIMORE REPORT]; U. S. DEPT OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE PUERTO RICO POLICE DEPARTMENT (2011), [https://www.justice.gov/sites/default/files/crt/legacy/2011/09/08/prpd\\_letter.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/09/08/prpd_letter.pdf) [https://perma.cc/9CWE-LGFP] [hereinafter DOJ PUERTO RICO REPORT]; Letter from Michael W. Cotter, U.S. Attorney, Dist. of Mont. & Jocelyn Samuels, Acting Assistant Attorney Gen., Civil Rights Div., to Fred Van Valkenburg, Cnty. Attorney 8–9 (Feb. 14, 2014), [http://www.justice.gov/crt/about/spl/documents/missoula\\_ltr\\_2-14-14.pdf](http://www.justice.gov/crt/about/spl/documents/missoula_ltr_2-14-14.pdf) [https://perma.cc/75DC-AYNF]; Letter from Michael W. Cotter, U.S. Attorney, Dist. of Mont. & 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](http://www.justice.gov/crt/about/spl/documents/missoulapdfind_5-15-13.pdf) [https://perma.cc/UTH5-HDDB] [hereinafter Engen Letter]. For reports on problems with rape investigation in other western countries see VIVIEN STERN, GOV'T EQUALITIES OFFICE, THE STERN REVIEW 28–55 (2010), [http://webarchive.nationalarchives.gov.uk/20110608160754/http://www.equalities.gov.uk/PDF/Stern\\_Review\\_acc\\_FINAL.pdf](http://webarchive.nationalarchives.gov.uk/20110608160754/http://www.equalities.gov.uk/PDF/Stern_Review_acc_FINAL.pdf) [https://perma.cc/WC6B-KWKH] [hereinafter STERN REVIEW]; AMNESTY INT'L, CASE CLOSED: RAPE AND HUMAN RIGHTS IN THE NORDIC COUNTRIES SUMMARY REPORT (2010), <https://www.amnesty.org/download/Documents/36000/act770012010eng.pdf> [https://perma.cc/FG7L-RFHW] (detailing harmful or prejudiced law enforcement practices with respect to victims of sexual assault in four Nordic Countries—Sweden, Finland, Denmark, and Norway).

<sup>18</sup> Katie J.M. Baker, “*They Told Me It Never Happened*,” BUZZFEED (Sept. 27, 2015), [https://www.buzzfeed.com/katiejmbaker/the-police-told-her-to-report-her-rape-then-arrested-her-for?utm\\_term=.ri7oEen0x#.so6BvyD8X](https://www.buzzfeed.com/katiejmbaker/the-police-told-her-to-report-her-rape-then-arrested-her-for?utm_term=.ri7oEen0x#.so6BvyD8X) [https://perma.cc/TL8H-5SSR]; T. Christian Miller & Ken Armstrong, *An Unbelievable Story of Rape*, PROPUBLICA (Dec. 16, 2015), <https://www.propublica.org/article/false-rape-accusations-an-unbelievable-story> [https://perma.cc/7TWB-PYTX]; see also BILL LUEDERS, CRY RAPE: THE TRUE STORY OF ONE WOMAN'S HARROWING QUEST FOR JUSTICE (2006); Joanna Walters, *Sara Reedy, the Rape Victim Accused of Lying and Jailed by US Police, Wins \$1.5m Payout*, GUARDIAN (U.K.) (Dec. 15, 2012), <http://www.theguardian.com/world/2012/dec/15/sara-reedy-rape-victim-wins-police-payout> [https://perma.cc/5TL9-VZUT] [hereinafter Walters on Reedy]; Walters on Hicks-Best, *supra* note 1.

broader problem of failure to investigate and prosecute sexual assault. This article bridges that gap and makes connections across several such cases.

Treating rape victims as suspects for false reporting occurs with more frequency than most people realize. In Britain, a seventeen-year-old woman reported a rape to police and told them that the rapist's semen was on her t-shirt.<sup>19</sup> The police did not bother to send the t-shirt for forensic testing; instead, they charged her with false reporting.<sup>20</sup> Her name was cleared and her rapist caught only when her mother filed a formal complaint.<sup>21</sup> The teenager was ultimately awarded compensation for the police mishandling her case, and her rapist, Liam Foard, is now in prison.<sup>22</sup>

The United States has also seen several such cases, including those of Marie, Sara Reedy, and Lara MacLeod, as well as Danielle Hicks-Best. Marie's rapist, Marc O'Leary, went on to rape several more women after Lynnwood, Washington police focused on prosecuting Marie for allegedly lying, rather than looking for her rapist. O'Leary is now serving a 327-year prison term owing to the work of police in another state.<sup>23</sup>

Sara Reedy won a \$1.5 million settlement from Pennsylvania police after they filed false reporting charges against her and failed to locate her rapist, Wilbur Brown, who is also now in prison.<sup>24</sup> Lara MacLeod was disbelieved by Virginia police and accused of false reporting when she told them that her sister's fiancé, Joaquin Rams, had raped her.<sup>25</sup> Rams has since been sentenced to life in prison for murdering his son (Lara's nephew),<sup>26</sup> to whom he had been granted access after persuading a judge that Lara was a liar.<sup>27</sup> As these cases demonstrate,

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<sup>19</sup> Sandra Laville, *Rape Victim Falsely Accused of Lying by Police Wins £20,000 Payout*, GUARDIAN (U.K.) (May 22, 2015), <https://www.theguardian.com/society/2015/may/22/victim-falsely-accused-of-lying-by-uk-hampshire-police-wins-payout> [https://perma.cc/PP7D-GXM2].

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

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

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

<sup>23</sup> Miller & Armstrong, *supra* note 18. Marie was the victim's middle name. *See id.* In the court documents she was referred to as D.M. *See* Plaintiff's First Amended Complaint, D.M. v. O'Leary, No. 2:13-cv-971 (W.D. Wash. June 6, 2013) [hereinafter D.M. Complaint] <https://www.documentcloud.org/documents/1006186-lynnwood-complaint.html#document/p4> [https://perma.cc/ERX6-KSL6].

<sup>24</sup> Walters on Reedy, *supra* note 18; *see also* Reedy v. Evanson, 615 F.3d 197 (3rd Cir. 2010).

<sup>25</sup> Baker, *supra* note 18.

<sup>26</sup> Crimesider Staff, *Virginia Father Convicted of Killing Infant Son for Life Insurance Money*, CBS NEWS (Apr. 14, 2017), <https://www.cbsnews.com/news/virginia-father-convicted-of-killing-infant-son-for-life-insurance-money/> [https://perma.cc/P5FB-EMRV].

<sup>27</sup> Baker, *supra* note 18.

skepticism towards rape victims runs high, and it is all too easy to accuse genuine rape victim of fabricating their allegations.

These cases can have devastating consequences for victims. Rape complainants convicted of false reporting have received prison sentences of up to ten years, have been sent to juvenile detention facilities, and have been separated from their children.<sup>28</sup> Rapists who have been left to reoffend as a result of victim disbelief have gone on to commit additional rapes and other crimes, including murder.<sup>29</sup> At least one rape complainant has committed suicide as a result of being prosecuted for false reporting.<sup>30</sup> Some women are left with felony convictions on their records, and some have been suspended from institutions of higher education as a result.<sup>31</sup>

False reporting charges are typically brought against rape victims in circumstances where police have failed to undertake a thorough and well-resourced investigation into the original rape complaint.<sup>32</sup> All too often, widespread police skepticism toward sexual assault victims means that the rape investigation barely scratches the surface. And a lack of accountability mechanisms means that victims have no recourse when police choose to turn the tables on them. Cases where rape victims have been charged with false reporting are important. They can help us become aware of the systemic problem of poor sexual assault investigation, and they

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<sup>28</sup> See, e.g., Simon Hattenstone & Afua Hirsch, *Layla's Story: Jailed After Reporting a Sexual Assault*, GUARDIAN (U.K.) (Aug. 12, 2011), <http://www.theguardian.com/law/2011/aug/12/layla-jailed-after-reporting-sexual-assault> [https://perma.cc/L5ZX-S6CU]; Steven Morris, *Trainee Barrister Jailed for False Rape Claims*, GUARDIAN (U.K.), (June 26, 2014), <http://www.theguardian.com/uk-news/2014/jun/26/trainee-barrister-jailed-false-rape-claims> [https://perma.cc/5XPP-5ULR] [hereinafter Morris on Brooker]; Steven Morris, *Woman Gets Two Years for False Rape Claims*, GUARDIAN (U.K.) (Mar. 4, 2010), <http://www.theguardian.com/society/2010/mar/04/rape-claims-gail-sherwood> [https://perma.cc/C35Z-DVVX] [hereinafter Morris on Sherwood]; Walters on Hicks-Best, *supra* note 1; Press Association, *Woman Jailed for 10 Years for Making Series of False Rape Claims*, GUARDIAN (U.K.), (Aug. 24, 2017) <https://www.theguardian.com/society/2017/aug/24/woman-jailed-10-years-false-rape-claims-jemma-beale> [https://perma.cc/NQJ8-NAFW].

<sup>29</sup> Joseph Bong went on to commit a robbery and sexual assault. LUEDERS, *supra* note 18, at 53. Rams was convicted of murder. Tom Jackman & Victoria St. Martin, *Virginia Man Guilty of Capital Murder in Death of 15-Month-Old Son*, WASH. POST (Apr. 13, 2017), [https://www.washingtonpost.com/local/public-safety/manassas-man-guilty-of-capital-murder-in-death-of-15-month-old-son/2017/04/13/34c1a9ee-1bc2-11e7-855e-4824bbb5d748\\_story.html?utm\\_term=.b8b32a1bc0fe](https://www.washingtonpost.com/local/public-safety/manassas-man-guilty-of-capital-murder-in-death-of-15-month-old-son/2017/04/13/34c1a9ee-1bc2-11e7-855e-4824bbb5d748_story.html?utm_term=.b8b32a1bc0fe) [https://perma.cc/Q5RV-XNYY].

<sup>30</sup> David de Freitas, *My Daughter Killed Herself After Being Charged over Rape Claims. We Need Answers*, GUARDIAN (U.K.) (Dec. 10, 2014), <https://www.theguardian.com/commentisfree/2014/dec/10/daughter-eleanor-de-freitas-killed-herself-answers-cps> [https://perma.cc/9FAS-DCNZ].

<sup>31</sup> See Hattenstone & Hirsch, *supra* note 28; Morris on Brooker, *supra* note 28.

<sup>32</sup> See generally Lisa Avalos, *Prosecuting Victims While Rapists Run Free: The Consequences of Police Failure to Investigate Sex Crimes in Britain and the United States*, 23 MICH. J. GENDER & L. 1 (2016).

demonstrate how critical it is to recognize these practices and create mechanisms to hold police accountable before such practices spiral out of control. They also demonstrate that there is a need to implement laws and policies to prevent future cases where sexual assault victims are charged with false reporting.

These cases are important for another reason—a comparative perspective can reveal how much damage results when poor practices are institutionalized. The United States does not have a monopoly on wrongful prosecutions brought against rape victims. Bringing charges against rape complainants occurs more regularly in Great Britain than in any other western industrialized country, and the British experience is a cautionary tale of what can go wrong when prosecutors actually have a policy that *encourages* such prosecutions in a context characterized by widespread, systemic failures to properly investigate and prosecute sex crimes.<sup>33</sup> In Britain, where making a false allegation of rape is considered a very serious crime, it is not unusual for a woman who is convicted to receive a two to four-year prison sentence.<sup>34</sup> Even after serving their sentences, several such women maintain that they are genuine rape victims.<sup>35</sup>

In light of studies that demonstrate unduly high levels of skepticism toward rape complainants among police, rape victims face an uphill battle to convince authorities to believe them and to investigate their cases.<sup>36</sup> To paraphrase Wisconsin District Court Judge James Peterson (writing on the separate issue of voter identification laws), a preoccupation with mostly *phantom* false allegations of rape leads to *real* incidents of failing to investigate rape and actual prosecutions of *genuine* rape victims for false

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<sup>33</sup> See *supra* note 28. In contrast to Britain, the author has been unable to find a prosecutorial policy in any other Western country that encourages charges to be filed against suspected false rape reporters, nor has she been able to find a case in which an American rape complainant endured a jury trial after being accused of false reporting. However, the case of Nikki Yovino is scheduled to go to trial in 2018. Yovino maintains her innocence. See Daniel Tepfer, *Lawyer: Yovino Will Claim at Trial She Was Raped by SHU Football Players*, CT POST (Mar. 9, 2018, 1:22 PM) <https://www.ctpost.com/local/article/Lawyer-Yovino-will-claim-at-trial-she-was-raped-12739030.php> [<https://perma.cc/PF6P-2P8G>].

<sup>34</sup> See Hattenstone & Hirsch, *supra* note 28; Morris on Sherwood, *supra* note 28; Morris on Brooker, *supra* note 28.

<sup>35</sup> Hattenstone & Hirsch, *supra* note 28; Interview by Lisa Avalos with Rhiannon Brooker, in Bristol, U.K. (Jan. 13, 2016) (on file with author); Interview by Lisa Avalos and Lisa Longstaff with Gail Sherwood, in Stroud, U.K. (Jan. 25, 2014) (on file with author).

<sup>36</sup> See generally MARTIN D. SCHWARTZ, NATIONAL INSTITUTE OF JUSTICE VISITING FELLOWSHIP: POLICE INVESTIGATION OF RAPE—ROADBLOCKS AND SOLUTIONS (2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/232667.pdf> [<https://perma.cc/4HC8-27KU>]; Jan Jordan, *Beyond Belief?: Police, Rape, and Women's Credibility*, 4 CRIM. JUST. 29 (2004); Amy Dellinger Page, *Gateway to Reform? Policy Implications of Police Officers' Attitudes Toward Rape*, 33 AM. J. CRIM. JUST. 44 (2008).

reporting.<sup>37</sup> In both the voter fraud and false allegations contexts these actions undermine, rather than enhance, confidence in the criminal justice system, particularly among rape victims.<sup>38</sup> “To put in bluntly,” the policy of prosecuting women for false allegations of rape “is a cure worse than the disease.”<sup>39</sup>

This article analyzes ill-advised prosecutions of rape victims and proposes recommendations for reform. Part I situates such prosecutions in the larger context—one marked by state responses that punish women who complain about male violence, and gravely overstated concerns about the prevalence of false allegations of rape. Part II then problematizes false reporting prosecutions of rape complainants by examining additional contextual factors that heighten the risk that genuine rape victims will be disbelieved by authorities and then prosecuted. False reporting prosecutions occur as a direct consequence of three powerful forces that work against rape victims: a failure to properly investigate *rape*, high levels of police skepticism toward rape victims, and pressures on police to clear up crimes without investing significant time or resources in solving them. This context raises grave concerns about the appropriateness of prosecuting those suspected of lying about sexual assault.

Part III then analyzes the prosecution of Eleanor de Freitas—a young woman who reported a rape and then committed suicide after she was targeted for prosecution under the British policy.<sup>40</sup> The article argues that the prosecution was misguided, and it examines some of the policy consequences of the rationales that prosecutors relied on in prosecuting her. Part IV sets out recommendations for reform.

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<sup>37</sup> Judge Patterson’s original words—written in the context of striking down Wisconsin’s voter identification law and criticizing it for attacking the mostly phantom problem of voter fraud—are paraphrased. Judge Patterson said:

The Wisconsin experience demonstrates that a preoccupation with mostly phantom election fraud leads to real incidents of disenfranchisement, which undermine rather than enhance confidence in elections, particularly in minority communities. To put it bluntly, Wisconsin’s strict version of voter ID law is a cure worse than the disease.

One Wis. Inst., Inc. v. Mark L. Thomsen, 198 F. Supp. 3d 896, 903 (W.D. Wis. 2016).

<sup>38</sup> *Id.* (derived from Peterson quote).

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

<sup>40</sup> The Humble Memorial of David de Freitas, Application to Attorney General for Reference of the Inquest to the High Court 4–9 (July 6, 2015) [hereinafter de Freitas Memorial] (on file with author).

## I. THE FALLACIOUS RATIONALE BEHIND PROSECUTING SUSPECTED FALSE ALLEGATIONS OF RAPE

This Part situates false reporting prosecutions in the larger context of how society reacts to women accusing men of crimes. First, it argues that such prosecutions are part of a long-standing practice of punishing women who complain about male violence. Second, it demonstrates that another key contextual factor is the tendency to sharply overestimate the number of actual false rape allegations. Third, the Part analyzes a formal policy for undertaking such prosecutions in Britain, arguing that the policy is fueled by misconceptions concerning the prevalence and severity of both rape and false rape allegations. This analysis serves as the background for dismantling the rationales provided for charging rape complainants with false reporting.

### A. *Punishing Women Who Complain About Male Violence*

Prosecuting those suspected of making false rape allegations is a very gendered practice and punishing women who complain about men's violence is a long-standing practice. Most victims of sexual violence are female, and most rapists and investigating police officers are male.<sup>41</sup> What role do these gender dynamics play in such prosecutions? Women historically and across the world have obtained little aid when they have gone to the police to complain of rape and domestic violence, with police dismissing their complaints as trivial, as false, and as belonging in the private sphere, and with male perpetrators of violence using their ties to the police to prevent women from complaining or receiving aid.<sup>42</sup> Male perpetrators have been known to preemptively call the police to report their partners for violence in

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<sup>41</sup> *Crime in the United States, 2013: Full-time Law Enforcement Employees, by Population Group, Percent Male and Female, 2013*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-74> [<https://perma.cc/2A6F-K2MM>] (indicating that across all law enforcement agencies in the United States, 88.4 percent of officers were male); *Victims of Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/victims-sexual-violence> [<https://perma.cc/M7YP-ZFPJ>] (indicating that “90% of adult rape victims are female” and “82% of all juvenile victims [of sexual assault] are female”).

<sup>42</sup> See, e.g., *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005) (finding that a woman had no individual right to the enforcement of a restraining order against her violent partner); *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. (2009), <http://www.equalrightstrust.org/ertdocumentbank/opuz%20v%20turkey%20case%20summary%20erl%20edit.pdf> [<https://perma.cc/NW96-KW6J>] (finding that general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence); Alan Travis, *Police Treatment of Domestic Abuse Victims to Be Investigated*, GUARDIAN (U.K.) (May 17, 2016), <https://www.theguardian.com/society/2016/may/17/police-treatment-of-domestic-abuse-victims-to-be-investigated> [<https://perma.cc/E6KZ-94FF>].

order to render women's pleas for help as ineffective; police have even arrested the female victim in such cases.<sup>43</sup>

Professor Mary Anne Franks has pointed out that women are also punished when they use violence in response to men's violence towards them, and this state of affairs has the effect of both enabling men's violence toward women and constraining women's ability to fight such violence.<sup>44</sup> Professor Franks argues for a notion of optimal violence. Increasing societal tolerance of women's justified violence toward men, in Professor Franks' opinion, could actually help to reduce men's violence and thereby reduce violence overall.<sup>45</sup>

Not only are women punished for *using* violence against men; they are punished for *complaining* about men's violence. Victims of domestic violence are punished through police refusal to take their complaints seriously<sup>46</sup> and refusal to enforce their orders of protection.<sup>47</sup> As a result, women and their children have died at the hands of their abusers.<sup>48</sup> Rape victims are punished for complaining about men's violence in similar ways. They are not taken seriously and they are secondarily victimized by the state agents who are tasked with helping them.<sup>49</sup> Human Rights Watch and several British investigations have documented how police routinely threaten to charge rape victims with false reporting if they refuse to retract their allegations.<sup>50</sup> And in the

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<sup>43</sup> DOJ GENDER GUIDANCE, *supra* note 17, at 19.

<sup>44</sup> See generally Mary Ann Franks, *Men, Women, and Optimal Violence*, 2016 U. ILL. L. REV. 929 (2016).

<sup>45</sup> *Id.* at 932–33.

<sup>46</sup> See, e.g., *Castle Rock*, 545 U.S. at 753; *Opuz*, App. No. 33401/02, Eur. Ct. H.R.; *Hollie Gazzard Killer Ahser Maslin's Mum 'Begg'd' Police to Arrest Him*, BBC NEWS (Nov. 19, 2014), <http://www.bbc.com/news/uk-england-gloucestershire-30112236> [<https://perma.cc/KY62-PZUQ>].

<sup>47</sup> *Castle Rock*, 545 U.S. at 760.

<sup>48</sup> See *id.* at 753–54; see also Editorial Board, *Women's Lives, Cut Short*, N.Y. TIMES, <https://www.nytimes.com/interactive/2017/12/19/opinion/women-guns-domestic-violence.html> [<https://perma.cc/525G-LDQC>]; *Facts and Figures*, OUR WATCH, <https://www.ourwatch.org.au/understanding-violence/facts-and-figures> [<https://perma.cc/ZK3Q-CC86>]; Olga Khazan, *Nearly Half of All Murdered Women Are Killed by Romantic Partners*, ATLANTIC (July 20, 2017), <https://www.theatlantic.com/health/archive/2017/07/homicides-women/534306/> [<https://perma.cc/HX3X-2822>].

<sup>49</sup> *DSD & NBV v. The Commissioner of Police for the Metropolis*, [2014] EWHC (QB) 436, [10]–[12], [14] (U.K.), <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/dsd-and-nbv-v-met-police.pdf> [<https://perma.cc/XN2F-CMUE>] [hereinafter DSD Judgment] (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); LIZ KELLY ET AL., HOME OFFICE RESEARCH STUDY 293: A GAP OR A CHASM? ATTRITION IN REPORTED RAPE CASES 51–52 (2005), <http://webarchive.nationalarchives.gov.uk/20110218135832/rds.homeoffice.gov.uk/rds/pdfs05/hors293.pdf> [<https://perma.cc/H4TV-G8H2>] [hereinafter KELLY STUDY]; LUEDERS, *supra* note 18, at 58–63.

<sup>50</sup> DC REPORT, *supra* note 16, at 15, 74, 128; INDEP. POLICE COMPLAINTS COMM'N., SOUTHWARK SAPPHIRE UNIT'S LOCAL PRACTICES FOR THE REPORTING AND

most extreme situations, they are in fact prosecuted for reporting suspected false allegations of rape to the police.<sup>51</sup> In one astonishing British case, a victim of rape and domestic violence was even prosecuted when she retracted a *true* allegation of rape. “Sarah” retracted because of threats and pressure placed on her by her violent husband; police dropped the rape charges against the husband, but sent Sarah to prison for retracting her complaint.<sup>52</sup>

It should, therefore, be clear that the practice of charging rape victims with false reporting is intimately linked to other practices which minimize men’s violence against women and discredit women’s complaints about such violence. State actions against women who are punished for suspected false allegations of rape fit within Professor Frank’s theory of optimal violence. Suspected false rape reporters are a particular breed of gender criminal because they are perceived to be exploiting one of the few tools that women (and male victims of sexual violence) have at their disposal to use against men in a patriarchal society—the ability to accuse a man of rape and thereby tarnish his reputation. Historically, this may have been one of the few mechanisms of power that women had at their disposal to use against men.<sup>53</sup>

### B. *Misconstruing the Danger of False Allegations of Rape*

Perhaps for that reason, some segments of society have developed an excessive concern with the damages that can be

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INVESTIGATION OF SEXUAL OFFENCES, JULY 2008–SEPTEMBER 2009 4, 10, 12 (2013), <http://modern.gov.southwark.gov.uk/documents/s39650/Appendix%20one%20-%20Sapphire%20Unit.pdf> [<https://perma.cc/6D9X-ZRVQ>] [hereinafter SOUTHWARK REPORT]; Interview by Lisa Avalos with Rhiannon Brooker, in Bristol, U.K., *supra* note 35; Interview by Lisa Avalos and Lisa Longstaff with Gail Sherwood, *supra* note 35; *see also* LUEDERS, *supra* note 18, at 60–62.

<sup>51</sup> *See, e.g.*, LUEDERS, *supra* note 18, at 66; Baker, *supra* note 18; de Freitas, *supra* note 30; Hattenstone & Hirsch, *supra* note 28; Morris on Brooker, *supra* note 28; Morris on Sherwood, *supra* note 28; Walters on Hicks-Best, *supra* note 1; Walters on Reedy, *supra* note 18.

<sup>52</sup> Amelia Hill, *Woman Fails to Quash Conviction for Falsely Retracting Rape Claim*, GUARDIAN (U.K.) (Mar. 13, 2012), <https://www.theguardian.com/society/2012/mar/13/woman-retracted-rape-claim-husband> [<https://perma.cc/F5US-7GFB>].

<sup>53</sup> This may be why a seventeenth-century judge characterized rape as an accusation that is “easily to be made and hard to be proved, and harder to be defended by the party accused.” Julie Taylor, *Rape and Women’s Credibility: Problems of Recantation and False Accusations Echoed in the Case of Cathleen Crowell Webb and Gary Dotson*, 10 HARV. WOMEN’S L.J. 59, 75 (1987) (quoting SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN: 1736 635 (London ed. 1971) (1680)).

done by potential false allegations of rape.<sup>54</sup> This concern is misplaced because of several common misconceptions about false rape allegations. First, actual false allegations are much rarer than many people imagine and than police believe.<sup>55</sup> Studies have demonstrated that police officers often believe that over half the rape allegations they receive are false,<sup>56</sup> when the reality is that actual false allegations of rape are, according to the most accurate estimates, most likely less than 5 percent of all rape allegations.<sup>57</sup> That figure is consistent with the rate of false allegations for other crimes.<sup>58</sup> Police overestimate the number of false allegations for many reasons. These include rape myths and stereotypes, lack of adequate training, and the complexities involved in understanding the realistic dynamics of sexual assault and its attendant trauma.<sup>59</sup>

Second, men, like women, are much more likely to be sexually assaulted themselves than to be falsely accused of rape.<sup>60</sup> Therefore, both men and women should be concerned about how effective police are at investigating rape, and whether they will approach victims supportively or with skepticism.

Third, a large proportion of actual false allegations of rape are reports of stranger sexual assault that do not name a

<sup>54</sup> Donna Zuckerberg, *He Said, She Said: The Mythical History of the False Rape Allegation*, JEZEBEL (July 30, 2015), <http://jezebel.com/he-said-she-said-the-mythical-history-of-the-false-ra-1720945752> [<https://perma.cc/3JUL-TM5U>].

<sup>55</sup> KELLY STUDY, *supra* note 49, at xi, 50; Kimberly A. Lonsway et al., *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, 3 VOICE 1, 2 (2009), [http://www.ndaa.org/pdf/the\\_voice\\_vol\\_3\\_no\\_1\\_2009.pdf](http://www.ndaa.org/pdf/the_voice_vol_3_no_1_2009.pdf). [<https://perma.cc/XW8S-NJWW>]; Keir Starmer, *False Allegations of Rape and Domestic Violence Are Few and Far Between*, GUARDIAN (U.K.) (Mar. 13, 2013), <https://www.theguardian.com/commentisfree/2013/mar/13/false-allegations-rape-domestic-violence-rare> [<https://perma.cc/B92Q-BHBC>].

<sup>56</sup> Page, *supra* note 36, at 55; *see also* SCHWARTZ, *supra* note 36, at 53.

<sup>57</sup> According to one of the most accurate studies commissioned by the British Home Office, the rate of false allegations was less than three percent. KELLY STUDY, *supra* note 49, at 50–53; *see also* David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1330 (2010), <https://icdv.idaho.gov/conference/handouts/False-Allegations.pdf> [<https://perma.cc/8H3C-R83X>]; Lonsway et al., *supra* note 55, at 1–2. Because false allegations of rape are so rare, this article uses the terms “complainant” and “victim” interchangeably.

<sup>58</sup> DSD Judgment, *supra* note 49, at 52.

<sup>59</sup> KIMBERLY LONSWAY ET AL., FALSE REPORTS: MOVING BEYOND THE ISSUE TO SUCCESSFULLY INVESTIGATE AND PROSECUTE NON-STRANGER SEXUAL ASSAULTS 7–16, <http://www.evawintl.org/library/DocumentLibraryHandler.ashx?id=38> [<https://perma.cc/MP6F-MG28>] (last updated July 2017).

<sup>60</sup> Tyler Kingkade, *Males Are More Likely to Suffer Sexual Assault Than to Be Falsely Accused of It*, HUFFINGTON POST (last updated Oct. 16, 2015), [http://www.huffingtonpost.com/2014/12/08/false-rape-accusations\\_n\\_6290380.html](http://www.huffingtonpost.com/2014/12/08/false-rape-accusations_n_6290380.html) [<https://perma.cc/9JLC-9MZQ>] (citing various crime victim surveys; 20 to 47 percent of men have been sexually assaulted and one in six boys).

specific perpetrator.<sup>61</sup> For instance, a major study of false rape allegations made to the Los Angeles Police Department found that about half of the reports deemed to be false involved allegations of stranger rape.<sup>62</sup> It is therefore not correct to assume that each false rape allegation actually impacts the reputation of an accused person, because many complainants do not name any perpetrator at all. In fact, actual false allegations of rape typically are not made for the purpose of ruining someone's reputation; rather, they are filed by people with serious mental health issues who do so in order to gain sympathy and attention.<sup>63</sup>

In short, the situation where an innocent person is falsely accused of rape is actually quite rare, but the high levels of police skepticism toward rape victims means that the risk that an actual rape victim will be disbelieved by police is considerable. However, this risk is typically not taken into account by police and prosecutors who charge victims with false reporting or by journalists writing about these cases, who often take police assertions that the complainant is lying at face value.<sup>64</sup>

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<sup>61</sup> LAPD study found 49 percent of all false allegations involved reports of stranger rape. 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), <https://www.ncjrs.gov/pdffiles1/nij/grants/237582.pdf> [<https://perma.cc/M9G3-333U>] (reporting that of fifty-five rape allegations classified as false by the researchers, twenty-seven (or 49 percent) involved allegations of stranger rape); Lonsway et al., *supra* note 55, at 9 (“[M]any ‘real’ false reports do not involve a named suspect.”).

<sup>62</sup> SPOHN & TELLIS, *supra* note 61.

<sup>63</sup> Lonsway et al., *supra* note 55, at 9.

<sup>64</sup> Jessica Best, *Trainee Barrister ‘Cried Rape 11 TIMES to Get out of Exams’, Court Hears*, MIRROR (Apr. 3, 2014), <https://www.mirror.co.uk/news/uk-news/rhiannon-brooker-trial-trainee-lawyer-3343957> [<https://perma.cc/PGJ4-C35U>]; Jacob Gershman, *Prosecutors Say Fitbit Device Exposed Fibbing in Rape Case*, WALL ST. J. (Apr. 21, 2016), <https://blogs.wsj.com/law/2016/04/21/prosecutors-say-fitbit-device-exposed-fibbing-in-rape-case/> [<https://perma.cc/NZZ2-FBVJ>]; Keith Perry, *Trainee Barrister Cried Rape 11 Times to Avoid Taking Exams, Court Told*, TELEGRAPH (U.K.) (Apr. 3, 2014), <https://www.telegraph.co.uk/news/10741867/Trainee-barrister-cried-rape-11-times-to-avoid-taking-exams-court-told.html> [<https://perma.cc/LMD9-Q4N4>]; David Trayner, *Liar Who Made up 15 Sex Attacks—Including Gang Rape—Jailed for 10 Years*, DAILY STAR (U.K.) (Aug. 24, 2017), <https://www.dailystar.co.uk/news/latest-news/639838/Jemma-Beale-false-rape-claim-jail-sentence-10-years-lie-15-sex-attacks-Southwark-court> [<https://perma.cc/THX6-4D44>]; Victoria Ward, *Lesbian Fantasist Invented 15 Rapes and Sexual Assaults Which Saw Man Jailed to Get Sympathy from Girlfriend, Court Hears*, TELEGRAPH (U.K.) (Aug. 24, 2017), <https://www.telegraph.co.uk/news/2017/08/24/woman-falsely-accused-15-men-rape-sexual-assault-jailed-ten/> [<https://perma.cc/NF6M-PKY5>].

C. *When the Priority Is Prosecuting Rape Complainants: Britain's Policy Guidance*

Britain has issued guidance on when to prosecute individuals suspected of making false allegations of rape and domestic violence. This policy, entitled “Guidance for Charging Perverting the Course of Justice and Wasting Police Time in Cases Involving Allegedly False Allegations of Rape and/or Domestic Abuse,” (the PCJ Policy) was issued by Britain’s Crown Prosecution Service (CPS) in 2011.<sup>65</sup> This type of guidance is an anomaly in the West. I have not been able to identify any other English-speaking country with a similar policy, and several experts with whom I consulted knew of no such policy elsewhere.<sup>66</sup> Does this guidance reflect good practice that should be emulated elsewhere, or does it raise red flags? This Section considers these questions and ultimately concludes the policy is misguided.

The impetus for Britain’s policy guidance appears to have been a desire to reduce the number of rape victims inappropriately prosecuted for perverting the course of justice (PCJ), coming, as it did, in the wake of public outcry about the case of “Sarah.” A twenty-eight-year-old mother of four, Sarah was prosecuted in 2010 for PCJ when she retracted a *true* allegation of rape against her violent husband.<sup>67</sup> In Sarah’s case, prosecutors and police accepted that she was a victim of rape and domestic

<sup>65</sup> *False Allegations of Rape and/or Domestic Abuse, see: 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 SERV., [http://www.cps.gov.uk/legal/p\\_to\\_r/perverting\\_the\\_course\\_of\\_justice\\_-\\_rape\\_and\\_dv\\_allegations/](http://www.cps.gov.uk/legal/p_to_r/perverting_the_course_of_justice_-_rape_and_dv_allegations/) [<https://perma.cc/P2CF-XADY>] [hereinafter PCJ Policy]; Owen Bowcott, *Keir Starmer: Rape Claims Retracted Out of Fear Should Not Lead to Charges*, GUARDIAN (U.K.) (July 7, 2011), <https://www.theguardian.com/law/2011/jul/07/keir-starmer-rape-claims-retracted> [<https://perma.cc/U3LJ-Q3CP>].

<sup>66</sup> See, e.g., ILL. CRIM. JUST. INFO. AUTHORITY, POLICIES AND PROCEDURES OF THE ILLINOIS CRIMINAL JUSTICE SYSTEM (2012), [http://www.icjia.state.il.us/assets/pdf/ResearchReports/Policies\\_and\\_Procedures\\_of\\_the\\_Illinois\\_Criminal\\_Justice\\_System\\_Aug2012.pdf](http://www.icjia.state.il.us/assets/pdf/ResearchReports/Policies_and_Procedures_of_the_Illinois_Criminal_Justice_System_Aug2012.pdf) [<https://perma.cc/2BK3-2TLH>]; PROSECUTING ATT’YS ASS’N OF MICH. & PROSECUTING ATT’YS COORDINATING COUNCIL, PACCS/PAAM CRIMINAL HISTORY GUIDE/HANDBOOK (n.d.), [https://www.michigan.gov/documents/msp/Prosecuting\\_Attorney\\_Handbook\\_363001\\_7.pdf](https://www.michigan.gov/documents/msp/Prosecuting_Attorney_Handbook_363001_7.pdf) [<https://perma.cc/5H9P-L56T>]; MISSOULA COUNTY ATT’YS OFF., SEXUAL ASSAULT POLICY & PROCEDURE MANUAL (2014), <https://dojmt.gov/wp-content/uploads/SEXUAL-ASSAULT-POLICY-AND-PROCEDURE-MANUAL.pdf> [<https://perma.cc/VV79-AQKU>]; WASH. ASS’N OF PROSECUTING ATT’YS, CHARGING MANUAL (2004), <http://www.waprosecutors.org/MANUALS/CHARGING/Final2004charging.pdf> [<https://perma.cc/LT3M-9DAT>].

<sup>67</sup> Keir Starmer, *False Allegations of Rape and Domestic Violence Are Few and Far Between*, GUARDIAN (U.K.) (Mar. 13, 2013, 8:00 AM), <https://www.theguardian.com/commentisfree/2013/mar/13/false-allegations-rape-domestic-violence-rare> [<https://perma.cc/2JCR-ETMZ>]; see also Bowcott, *supra* note 65; Afua Hirsch, *Keir Starmer Orders Change in Dealing with Rape Claim Retraction Cases*, GUARDIAN (U.K.) (Dec. 16, 2010), <https://www.theguardian.com/society/2010/dec/16/keir-starmer-rape-claim-retraction-cases> [<https://perma.cc/E7AU-EKYM>].

violence but prosecuted her when she retracted her rape allegation after her husband threatened her with future harm.<sup>68</sup> Despite these facts, Sarah was sentenced to eight months in prison, and custody of the children was granted to her abusive husband.<sup>69</sup> She was later released by the court of appeal, finding that there should be a “broad measure of compassion for women who had already been victimised.”<sup>70</sup> Keir Starmer, the Director of Public Prosecutions at the time, indicated that he did not think “justice was done” in Sarah’s case and appears to have issued the PCJ Policy, at least in part, in order to avoid a reoccurrence.<sup>71</sup>

Despite the seemingly good intentions behind this policy, its origins are ignominious. To prosecute a woman who withdraws a rape or domestic violence claim out of fear is very unusual. Retractions and withdrawals are extremely common in cases of rape and domestic violence, particularly so in intimate relationships where the prosecution of the perpetrator would leave the victim with no way to support children, when the perpetrator minimizes his conduct and intimidates the victim into retracting, and where the victim is scared or feels unable to cope with the prospect of testifying at trial.<sup>72</sup> One would expect a more compassionate response to women in this position.

Although the PCJ Policy was designed, in part, to prevent a repeat of Sarah’s situation, the fact that Sarah was prosecuted at all suggests a tendency to punish women for complaining about male violence along the lines of Professor Franks’ concerns. And if this is the case, a policy might not eliminate that problem if the underlying attitudes and bias towards

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<sup>68</sup> Bowcott, *supra* note 65; Hirsch, *supra* note 67.

<sup>69</sup> Email from Lisa Avalos, Assistant Professor of Law, Univ. of Ark. Sch. of Law, to David Malone, Barrister, Red Lion Chambers (Mar. 14, 2018) (on file with author); Email from David Malone, Barrister, Red Lion Chambers, to Lisa Avalos, Assistant Professor of Law, Univ. of Ark. Sch. of Law (Mar. 14, 2018) [hereinafter Malone Email] (on file with author) (David Malone is Sarah’s lawyer).

<sup>70</sup> Bowcott, *supra* note 65.

<sup>71</sup> See Keir Starmer, *Rape: Justice Will Be Done*, GUARDIAN (U.K.) (Dec. 16, 2010), <https://www.theguardian.com/commentisfree/2010/dec/16/justice-for-victims-of-rape> [<https://perma.cc/N73K-JJ3N>] (indicating that in some recent cases, including that of Sarah, “I do not consider justice was done”). Starmer issued interim PCJ guidance in February 2011, while launching a public consultation on the new PCJ guidance, which was ultimately issued in July 2011. See ALISON LEVITT, CHARGING THE COURSE OF JUSTICE AND WASTING POLICE TIME IN CASES INVOLVING ALLEGEDLY FALSE RAPE AND DOMESTIC VIOLENCE ALLEGATIONS 9 (2013). The interim guidance stated that a PCJ prosecution would likely not be required where “the suspect retracting the allegation has been threatened or pressurised into doing so by the person against whom the original allegation was made, his or her family, friends or other persons.” PCJ Policy, *supra* note 65.

<sup>72</sup> OR. ATT’Y GENERAL’S SEXUAL ASSAULT TASK FORCE, FALSE ALLEGATIONS, CASE UNFOUNDING AND VICTIM RECANTATION IN THE CONTEXT OF SEXUAL ASSAULT 1 (Jan. 10, 2008), <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=618> [<https://perma.cc/U2RB-QNWP>]; Lonsway et al., *supra* note 55, at 2.

victims of sexual violence are not addressed; indeed, having such a policy may perpetuate such biases. In particular, the existence of the PCJ policy may serve to reinforce scrutiny of the behavior of victims rather than the behavior of perpetrators.

The remainder of this Section examines the rationales given for the PCJ Policy and whether they make sense in light of the nature of sexual assault cases. According to the PCJ Policy, charges in these cases ought to be considered because

false allegations of rape and/or domestic abuse can have serious adverse impact on the person accused. This is why these cases must be examined thoroughly by suitably experienced prosecutors who should strike the right balance between ensuring genuine victims are believed and not criminalised whilst recognising the need to protect the innocent from false allegations.<sup>73</sup>

Despite the stated concern with protecting the innocent from false allegations, actual cases where rape complainants are charged demonstrate that protecting the reputation of an innocent person is typically *not* the reason why charges are brought against rape complainants. A major study of attrition in the rape investigation process demonstrates that the practice of labeling a case false typically occurs early in the investigative process, before a full investigation is completed.<sup>74</sup> In cases of stranger rape, this means the cases are often labeled false before the police have identified a potential suspect.<sup>75</sup>

An examination of several high-profile cases where complainants were charged with false reporting demonstrates this conclusion. For instance, Sara Reedy and Marie, who were raped by strangers, were treated by police as suspects for false reporting within days of making their complaints, before police had had time to complete a rape investigation or identify any potential rape suspects.<sup>76</sup> A similar thing happened in the case of Patty, a Madison, Wisconsin woman who was treated by police as a false reporter and whose rapist, Joseph Bong, was not identified until several years later.<sup>77</sup> Similarly, eleven-year-old Danielle Hicks-Best was branded a liar without police making any effort to identify her assailants.<sup>78</sup> Because the women were all accused of entirely

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<sup>73</sup> PCJ Policy, *supra* note 65, at ¶ 3.

<sup>74</sup> KELLY STUDY, *supra* note 49, at 34, 46.

<sup>75</sup> In contrast, in acquaintance rape cases, a false reporting charge typically means that prosecutors acknowledge that sex occurred but that they believe it was consensual.

<sup>76</sup> Reedy v. Evanson, 615 F.3d 197, 203–04 (3rd Cir. 2010); D.M. Complaint, *supra* note 23, at ¶¶ 29–35 (stating that on August 13, 2008, two days after the rape complaint, that Sgt. Mason “and others believed that [Marie] had made up the story.”); Miller & Armstrong, *supra* note 18.

<sup>77</sup> See LUEDERS, *supra* note 18, at 26–27, 33–42, 193–95.

<sup>78</sup> Walters on Hicks-Best, *supra* note 18.

fabricating the rapes, none of these prosecutions was motivated by a desire to protect an innocent man.

Similarly, British rape complainants Layla Ibrahim and Gail Sherwood were convicted of PCJ after reporting that they had been raped by strangers; their assailants have yet to be identified.<sup>79</sup> Seventeen-year-old “Jane Doe” was also charged with perverting the course of justice before a suspect was identified; Liam Foard was identified as her rapist only after Doe’s arrest.<sup>80</sup> And of course in Sarah’s case, a motivation to protect an innocent man’s reputation played no role because the CPS acknowledged that Sarah was a victim and therefore her husband was not an innocent man.<sup>81</sup> The PCJ Policy’s focus on protecting the reputations of innocent parties is therefore not reflected in how the policy is used in practice.

The PCJ Policy also sets out public interest factors where a prosecution for PCJ is “more likely” to be required, and several of these factors are problematic when authorities’ often inadequate response to sexual assault is taken into account.<sup>82</sup> In addition to favoring prosecution where an innocent person has been accused, identified, or taken into custody, as discussed above, other public interest factors include (1) where the investigation has incurred substantial cost or diverted resources from other investigations; and (2) where the false complaint was sustained over a period of time.<sup>83</sup>

The first additional public interest factor—the level of resources expended on an investigation—is hardly reason to charge someone with PCJ if there is any possibility that she is a genuine victim. Sexual assaults can be difficult crimes to investigate and may require a greater expenditure of resources than other crimes.<sup>84</sup> If a police investigation into a particular case ultimately proves fruitless, that is not the complainant’s fault. Poor training, lack of effort on the part of the officers,

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<sup>79</sup> Morris on Sherwood, *supra* note 28; Hattenstone & Hirsch, *supra* note 28.

<sup>80</sup> Laville, *supra* note 19.

<sup>81</sup> Amelia Hill, *Woman Fails to Quash Conviction for Falsely Retracting Rape Claim*, GUARDIAN (U.K.) (Mar. 13, 2012), <https://www.theguardian.com/society/2012/mar/13/woman-retracted-rape-claim-husband> [<https://perma.cc/836Z-SSKU>].

<sup>82</sup> PCJ Policy, *supra* note 65, at ¶ 35.

<sup>83</sup> *Id.* at ¶¶ 35, 37.

<sup>84</sup> See generally RODGER PATRICK, A TANGLED WEB: WHY YOU CAN’T BELIEVE CRIME STATISTICS (2014), <http://www.civitas.org.uk/content/files/ATangledWeb.pdf> [<https://perma.cc/9SSZ-TQS3>] (indicating that many crimes that are easier to solve than rape are assigned performance targets precisely because they are easier to solve and require fewer resources); David Lisak, *Understanding the Predatory Nature of Sexual Violence*, 14 SEXUAL ASSAULT REP. 49, 57 (2011), <http://www.davidlisak.com/wp-content/uploads/pdf/SARUnderstandingPredatoryNatureSexualViolence.pdf> [<https://perma.cc/Z7S6-7XL8>].

officers' reliance on rape myths, and failure to allocate adequate resources to the investigation are all factors that often result in the failure of rape investigations.<sup>85</sup> Under such circumstances, it would be grossly inappropriate to punish the victim by labeling a report false when the problem is that police did not investigate adequately or did not allocate appropriate resources to solving it.

Moreover, police officers' avoidance strategies, such as downgrading reports of rape without investigating them and aborting investigations because of skepticism, can distort officers' perceptions of how much work it takes to investigate a rape.<sup>86</sup> For instance, guidance developed by End Violence Against Women International (EVAWI) suggests that a false report that results in "hundreds of hours of investigative effort" may be occasion to consider prosecution of the false reporter.<sup>87</sup> But many rape complainants have had their complaints labeled false after officers invested just two or three days' effort into their cases.<sup>88</sup>

Similarly, the second prosecution rationale—that the complainant maintained the false allegation over time—is problematic because the complainant's insistence that the allegation was true could be precisely because it *is* true, but the victim has met with the all-too-common skeptical response from police. A major part of Marie's ordeal was repeatedly returning to the police station and insisting that she had really been raped in the face of the officers' unrelenting skepticism.<sup>89</sup> Given how often police get these cases wrong, we must consider whether the existence of the PCJ Policy actually protects victims or whether it provides skeptical officers and prosecutors with justifications to pursue cases against actual victims. Part II examines further problems with taking such prosecutions forward.

Although any of these rationales might be legitimate grounds for considering false reporting charges if there was no doubt that the report was in fact false, they are quite problematic in the *actual* climate where police exhibit high

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<sup>85</sup> See, e.g., KELLY STUDY, *supra* note 49, at 35–79; see generally DSD Judgment, *supra* note 49, at 52.

<sup>86</sup> See, e.g., DOJ BALTIMORE REPORT, *supra* note 17, at 126–27 (stating that police routinely misclassify rape reports in order to mask failures to investigate and solve rape crimes); DOJ NEW ORLEANS REPORT, *supra* note 17, at 46 (stating that police routinely focused on proving rape allegations were false from the outset); PATRICK, *supra* note 84, at 4–5.

<sup>87</sup> Lonsway et al., *supra* note 55, at 9.

<sup>88</sup> This occurred in the Sara Reedy, Marie, and Lara McLeod cases, among others. Lisa Avalos, *Policing Rape Complainants: When Reporting Rape Becomes a Crime*, 20 J. GENDER, RACE & JUST. 459, 473–75, 478–80 (2017); see also D.M. Complaint, *supra* note 23, at Ex. 2, Ex. 10, Ex. 14.

<sup>89</sup> See D.M. Complaint, *supra* note 23, at Ex. 2, Ex. 10, Ex. 14.

levels of skepticism toward sexual assault victims and routinely classify cases as false without fully investigating them. In this context, these public interest factors may function as justifications for bringing charges against genuine victims who have been disbelieved by police or prosecutors.

## II. PROBLEMATIZING FALSE REPORTING PROSECUTIONS

This Part argues that the prosecution of rape complainants for false reporting is a misguided practice for four reasons. First, police and prosecutors are often wrong in their judgments about the veracity of rape allegations, erring in the direction of grossly overestimating the number of false allegations. Second, false reporting prosecutions occur without regard to the larger context in which sexual assault is already poorly investigated and prosecuted. These two factors expose genuine victims to a prosecution risk. Third, such prosecutions are an avoidance strategy which distracts police and prosecutors from identifying and prosecuting rapists. And fourth, whenever an actual victim of sexual assault is prosecuted, the state has failed in its obligations to a crime victim to whom it owes a duty to protect. This failure results in discrimination on the basis of gender and a violation of the victim's fundamental rights.

### A. *The Risk of Prosecuting Genuine Victims*

The fact that numerous prosecutions have been brought against genuine victims demonstrates that these charging decisions can be erroneous and can result in the wrongful prosecutions of innocent women who are in fact victims of sexual violence. Most people would agree that genuine rape victims should never face prosecution for a crime they did not commit—false reporting—but the cases raised above make it clear that such victims have indeed been prosecuted. How can it be that an advanced legal system exposes rape victims to a risk of wrongful prosecution for false reporting?

According to Britain's PCJ Policy, this should never happen: if there is any evidence that the original rape complaint "might reasonably be true then there is not a realistic prospect of conviction and no charge should be brought."<sup>90</sup> But what is the process for determining that a rape complaint is false? The PCJ Policy does not provide any guidance on this matter. A recent British investigation further confirms that in Britain there is a

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<sup>90</sup> PCJ Policy, *supra* note 65, at ¶ 13.

lack of policy guidance in this area; it found that there is no official definition of a “false allegation” of rape and that “the term is used loosely to describe a wide range of circumstances.”<sup>91</sup> It also found that there was “no consensus” among officers and prosecutors “on what makes an allegation false.”<sup>92</sup> In the absence of clear guidance, it is easy to understand how genuine victims are charged with false reporting—the determination that a report of rape is false is left to the discretion of the individual officer, who might label a report false because he does not believe the victim or does not have time to do a full investigation. In short, there are no safeguards in place to ensure that victims are not wrongly accused of false reporting.

This practice stands in sharp contrast to rape investigation best practice guidelines promulgated by the International Association of Chiefs of Police (IACP), which *do* set out requirements that must be met for a report of rape to be considered false.<sup>93</sup> Under the IACP Guidelines, a report of rape can only be considered false if certain criteria are met. First, the investigation into the original rape complaint must be *thorough*, and no complaint should be labeled false prior to a *full* investigation.<sup>94</sup> Thus, this first requirement prohibits the practice of labeling rape complaints false with little or no investigation. Second, the investigation must produce evidence that no crime was committed or attempted.<sup>95</sup> And third, the officers must not rely on rape myths or on a victim’s reaction to

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<sup>91</sup> ELISH ANGIOLINI, REPORT OF THE INDEPENDENT REVIEW INTO THE INVESTIGATION AND PROSECUTION OF RAPE IN LONDON 38 (2015), [https://www.cps.gov.uk/sites/default/files/documents/publications/dame\\_elish\\_angiolini\\_rape\\_review\\_2015.pdf](https://www.cps.gov.uk/sites/default/files/documents/publications/dame_elish_angiolini_rape_review_2015.pdf) [<https://perma.cc/RK5Y-WLV7>] [hereinafter ANGIOLINI REPORT].

<sup>92</sup> *Id.* at 40. Other organizations have also expressed concern about the amount of discretion left to officers in the PCJ Policy. See, e.g., *Charging Women Who Retract Domestic Violence or Rape*, IRANIAN & KURDISH WOMEN’S RTS. ORG. (May 3, 2011), <http://ikwro.org.uk/2011/05/charging-women-who-retract-domestic-violence-or-rape-allegations/> [<https://perma.cc/C9D8-BNVH>].

<sup>93</sup> IACP NAT’L LAW ENF’T POLICY CTR., INVESTIGATING SEXUAL ASSAULTS 12–13 (2005), <http://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=328> [<https://perma.cc/C9CZ-YJTN>] [hereinafter IACP GUIDELINES]. These guidelines have been endorsed by EVAWI and are used in their training materials. See *id.* (IACP guidelines hosted on EVAWI website); see also *False Reports*, END VIOLENCE AGAINST WOMEN INT’L (last updated 2018), <http://www.evawintl.org/PAGEID16/Best-Practices/Resources/False-Reports> [<https://perma.cc/9MDZ-U9M2>]. They are also featured in the settlement agreement between the U.S. Justice Department and the Missoula Police Department. Memorandum from Michael W Cotter et al., Memorandum of Understanding Between the United States Department of Justice and the City of Missoula Regarding the Missoula Police Department’s Response to Sexual Assault 4 (May 15, 2013), [https://www.justice.gov/sites/default/files/crt/legacy/2013/05/15/missoulapdsettle\\_5-15-13.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2013/05/15/missoulapdsettle_5-15-13.pdf) [<https://perma.cc/NVM6-VX6K>].

<sup>94</sup> IACP GUIDELINES, *supra* note 93, at 13.

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

sexual assault (including retracting the complaint) to reach the conclusion that the report is false.<sup>96</sup>

The most significant reason why actual rape victims have been prosecuted for false reporting is that officers frequently do not follow these guidelines. Rather, they determine that a report is false simply because they decide not to believe the victim, and they abort the investigation as a result of that disbelief.<sup>97</sup> Officers have refused to believe victims even in cases where forensic evidence corroborates the victim's account.<sup>98</sup>

A review of CPS charging practice by EVAWI lends support to the argument that poor investigatory practice and a lack of clear guidance as to what constitutes a false report lead to a risk of prosecution for victims of sexual assault. Using the IACP Guidelines, EVAWI reviewed a study of CPS charging practices in cases of suspected false allegations of rape and domestic violence, and they found that the CPS brought or considered PCJ charges in many cases that did not appear to be false reports.<sup>99</sup> The review found that out of 121 cases where CPS prosecutors considered bringing false reporting charges against rape complainants, many "involved no clear allegation of rape at all. This was particularly true when the person was young, where drugs or alcohol were involved, and/or when the report was made by a third party."<sup>100</sup> They stated that "[i]t is difficult to understand why someone would be prosecuted for filing a false report if there is no evidence to corroborate the charge. This is clearly against policy guidance in this area."<sup>101</sup> The standard

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

<sup>97</sup> In other articles, I have used the IACP Guidelines to demonstrate the deficiencies in several rape investigations. See Avalos, *supra* note 32, at 16–40; Avalos, *supra* note 88, at 472–85.

<sup>98</sup> See, e.g., D.M. Complaint, *supra* note 23 (D.M. had genital injuries consistent with sexual assault and marks on her wrists consistent with her account of being tied up); Avalos, *supra* note 32, at 33 (Gail Sherwood had multiple injuries "consistent with sexual assault," including genital injuries.); see also KIMBERLY A. LONSWAY & JOANNE ARCHAMBAULT, END VIOLENCE AGAINST WOMEN INT'L, TRAINING BULLETIN: PROSECUTION FOR FILING A FALSE REPORT OF SEXUAL ASSAULT 6 (2014) [hereinafter EVAWI TRAINING BULLETIN], <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=581> [<https://perma.cc/S67N-98Y6>].

<sup>99</sup> See generally EVAWI TRAINING BULLETIN, *supra* note 98; ALISON LEVITT & CROWN PROSECUTION SERV. EQUAL. & DIVERSITY UNIT, CHARGING PERVERTING THE COURSE OF JUSTICE AND WASTING POLICE TIME IN CASES INVOLVING ALLEGEDLY FALSE RAPE AND DOMESTIC VIOLENCE ALLEGATIONS (2013), <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=938> [<https://perma.cc/7C4G-PMRB>] [hereinafter CPS STUDY].

<sup>100</sup> EVAWI TRAINING BULLETIN, *supra* note 98, at 1–2; see CPS STUDY, *supra* note 99, at 5–6 (There were a total of 159 cases included in the study relied upon in the EVAWI training bulletin, 121 of which involved rape allegations, 11 of which involved both rape and domestic violence, and the remainder being solely claims of domestic violence. Because rape was included in two categories, 159 was used to indicate the study's entire scope.).

<sup>101</sup> *Id.* at 2.

articulated by the IACP Guidelines, EVAWI concluded, was not met in many of the cases included in the CPS Study.<sup>102</sup>

Two examples illustrate. One case involved a young woman who reported being raped after she agreed to have sex with one man at a hostel who was then joined by two other men with whom she did not consent to have sex.<sup>103</sup> The CPS considered bringing false reporting charges against the woman even though video footage showed that “the men were exerting pressure on her to perform sex acts and that, aware of how intoxicated she was, they had deliberately sought to humiliate and degrade her.”<sup>104</sup> The report also noted that “[s]he was in a vulnerable position lying in a confined space on a bottom bunk in the corner of a room with which she was unfamiliar.”<sup>105</sup> Ultimately investigators did not bring charges against her because video footage taken by the men showed that she had not “‘consented’ in the way alleged.”<sup>106</sup>

A second case involved a fifteen-year-old-girl who was in a relationship with an older man and had reported rape.<sup>107</sup> Police had photographed multiple bruises to her legs and neck which she said were the result of assaults by the man; there was also evidence that the man was controlling and had pressured the girl to withdraw previous rape and assault complaints that she had made to police.<sup>108</sup> Police considered charging her with PCJ based on the fact that “[i]n relation to the matters previously reported as rapes, she said that although she had initially refused his advances, she had eventually succumbed and agreed to have sex with him. Thus she appeared to admit to having made false allegations.”<sup>109</sup> Eventually investigators realized that because she was below the age of consent, it would not be appropriate to prosecute her for making a false allegation of rape.<sup>110</sup> Indeed, the man had committed statutory rape by having sex with a fifteen-year-old.<sup>111</sup>

One wonders why the priority in these cases was attempting to prosecute the victim of a rape rather than focusing on building a case against the perpetrators. These are men who

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<sup>102</sup> *Id.* at 3.

<sup>103</sup> CPS STUDY, *supra* note 99, at 23–24.

<sup>104</sup> *See id.* at 23–24.

<sup>105</sup> *Id.* at 24.

<sup>106</sup> *Id.* at 23–24.

<sup>107</sup> *Id.* at 34–38.

<sup>108</sup> *Id.* at 34–37.

<sup>109</sup> *Id.* at 36–37.

<sup>110</sup> *Id.* at 37.

<sup>111</sup> The age of consent in England and Wales is sixteen. *PM Rejects Call to Lower Age of Consent to 15*, BBC NEWS (Nov. 17, 2013), <http://www.bbc.com/news/health-24976929> [<https://perma.cc/GV2Y-B57L>].

engaged in admittedly egregious behavior—one pressured a fifteen-year old for sex and assaulted her with enough force to cause visible bruising; the others overpowered an intoxicated woman in a hostel, and recorded themselves taking advantage of her, degrading her, and humiliating her. The PCJ Policy’s stated rationale of undertaking such prosecutions in order to protect the reputations of the innocent accused does not apply here—these are men who have engaged in behavior that is at best tortious and at worst criminal. Why would the emphasis be on protecting the men’s reputations rather than protecting the women from rape and assault? Investigators often ignore the coercive dynamics in a relationship that can lead to a woman complaining of rape even if the man thinks that he has done nothing wrong.<sup>112</sup> It is troubling that officials focused on considering bringing charges against women who were clearly victims of coercive and brutal treatment rather than building evidence that would help to bring the men responsible to justice.<sup>113</sup>

*B. Does it Make Sense to Prosecute Suspected False Reporters When Rape Investigation Failures Are Common?*

That rape victims have been prosecuted for false reporting can actually draw our attention to a much larger set of weaknesses in how rape is investigated and prosecuted. This is because the erroneous decision to prosecute an actual victim is one symptom of a much larger problem—an expansive and widespread failure to take sexual assault complaints seriously and effectively prosecute perpetrators. Prosecutions of rape complainants occur without careful attention given to the full context around the difficulties inherent in reporting, investigating, and prosecuting sexual assault. This context, when properly considered, raises valid questions as to whether such prosecutions should take place at all—even of genuine false reporters—given the difficulties in reporting and investigating sexual assault, the strong risk of mistakenly prosecuting actual victims of sexual violence, and the disturbingly low conviction rates for rape.

There are additional powerful forces that work against rape complainants and contribute to the risk that a genuine victim will face prosecution for false reporting. First, the high level of police skepticism toward rape victims is a key factor; it

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<sup>112</sup> See Lisak, *supra* note 84.

<sup>113</sup> For a discussion of the need to design rape policy around the concept of coercion rather than consent, see Catharine MacKinnon, *Rape Redefined*, 10 HARV. L. & POL’Y REV. 431, 469–76 (2016).

leads to rape investigation failures and correspondingly low rape reporting rates. Second, police officers' lack of training in the role that trauma plays in a rape victim's ability to recollect events compromises their ability to investigate effectively, which in turns leads officers to choose the easy way out of rape investigation—unfounding the case or charging the victim with false reporting.

### 1. Rape Investigation Failures & Unwarranted Police Skepticism

In the United States, a number of DOJ investigations have found gravely deficient practices with respect to rape investigation to be rampant.<sup>114</sup> Several investigations have found very similar problems in Britain.<sup>115</sup> One of the features characterizing this poor practice is a routine and institutionalized failure to believe victims who report sexual violence and to take their complaints seriously. The DOJ has found that in some communities, such as New Orleans, police approach rape investigation by trying to prove that an allegation is false at the outset; similar practices have been reported in Britain, where rape investigators have been known to downgrade reports of rape in order to reduce their workloads.<sup>116</sup> It should be obvious that a victim's chances of being charged with false reporting increase substantially when the police do not believe her, do not investigate her complaint, or are even motivated to classify her complaint as false in order to manage their workloads.

The prosecution of rape complainants for false reporting thus occurs against this backdrop—victims face high levels of disbelief and sometimes interact with officers experiencing workload pressure to downgrade reports of rape in order to avoid investigating them. Conviction rates for rape are extremely low, and the majority of victims, perhaps fearing they will be disbelieved, never even come forward to report the crimes against them.<sup>117</sup>

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<sup>114</sup> See *supra* note 17.

<sup>115</sup> See generally KELLY STUDY, *supra* note 49; STERN REVIEW, *supra* note 17; ANGIOLINI REPORT, *supra* note 91.

<sup>116</sup> See generally DOJ NEW ORLEANS REPORT, *supra* note 17; SOUTHWARK REPORT, *supra* note 50.

<sup>117</sup> See Julie Bindel, *Why is Rape so Easy to Get Away With?*, GUARDIAN (Feb. 1, 2007), <https://www.theguardian.com/society/2007/feb/01/penal.genderissues> [<https://perma.cc/UQ6S-QNRG>] (“If a man commits a rape, then he has, on average, a less than 1 [percent] chance of being convicted.”); *The Criminal Justice System: Statistics*, RAINN (last updated 2018), <https://www.rainn.org/statistics/criminal-justice-system> [<https://perma.cc/RHX7-TGR2>] (listing reasons for why rapes go unreported).

In addition, both countries have had high-profile rape investigation failures that demonstrate the systemic nature of these ills. For instance, in Cleveland, Ohio, Anthony Sowell was convicted of serially raping and murdering multiple women only after he had had time to bury eleven of his victims at his home.<sup>118</sup> He was charged with over seventy counts of rape and other crimes, and is now on death row for the murders.<sup>119</sup> In addition, the recent testing of thousands of untested rape kits in Cleveland have revealed that at least twelve serial rapists were allowed to reoffend repeatedly, ultimately committing around fifty rapes.<sup>120</sup> These individuals had gone unidentified for years as a result of failed investigations into victims' complaints.<sup>121</sup>

In Britain, serial rapist and cab driver John Worboys was given an indefinite sentence after being convicted of sexually assaulting twelve women.<sup>122</sup> However, "he has been linked to 102 complaints," and an additional nineteen women came forward with allegations against him once he had been convicted.<sup>123</sup> Worboys' crimes occurred between 2003 and 2008, and several of his victims were not taken seriously when they went to the police because they did not have a clear recollection of events and could only articulate that they "felt" as though they had been raped.<sup>124</sup> This was because Worboys had given them a date rape drug.<sup>125</sup>

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<sup>118</sup> State v. Sowell, 71 N.E.3d 1034, 1044 (Ohio 2016); Leila Atassi, *Serial Killer Anthony Sowell Began Raping Niece When Both Were Children, Witness Testifies*, CLEVELAND.COM (Aug. 3, 2011), [http://www.cleveland.com/anthony-sowell/2011/08/serial-killer\\_anthony\\_sowell\\_began\\_raping\\_niece\\_when\\_both\\_were\\_children\\_witness\\_testifies.html](http://www.cleveland.com/anthony-sowell/2011/08/serial-killer_anthony_sowell_began_raping_niece_when_both_were_children_witness_testifies.html) [https://perma.cc/4QAM-YU6L].

<sup>119</sup> ROBERT SBERNA, HOUSE OF HORRORS 198–99 (2012); *Sowell*, 71 N.E.3d at 1044.

<sup>120</sup> Leila Atassi & Rachel Dissell, *A Guide to Reinvestigating Rape: Old Evidence, New Answers*, CLEVELAND.COM (Feb. 8, 2017), [http://www.cleveland.com/rape-kits/index.ssf/2013/08/reinvestigating\\_rape\\_old\\_evide.html#incart\\_big-photo](http://www.cleveland.com/rape-kits/index.ssf/2013/08/reinvestigating_rape_old_evide.html#incart_big-photo) [https://perma.cc/BVV4-MWML]; Leila Atassi & Rachel Dissell, *Serial Rapists Terrorized Cleveland's Women and Children in the 1990s, While Police Set Cases Aside*, CLEVELAND.COM (Aug. 5, 2013), [http://www.cleveland.com/rape-kits/index.ssf/2013/08/serial\\_rapists\\_terrorized\\_clev.html](http://www.cleveland.com/rape-kits/index.ssf/2013/08/serial_rapists_terrorized_clev.html) [https://perma.cc/E49C-FVAP] ("Among the most stunning revelations from the testing is that at least 12 serial rapists, responsible for as many as 50 attacks were on the prowl in Cleveland in the early 1990s. But because some cases were ignored or quickly abandoned, more women and children were raped.").

<sup>121</sup> See *Serial Rapists Terrorized Cleveland's Women and Children in the 1990s, While Police Set Cases Aside*, *supra* note 120.

<sup>122</sup> Jessica Elgot et al., *John Worboys' Victims Hope for Reversal of Decision to Release Him*, GUARDIAN (U.K.) (Jan. 14, 2018), <https://www.theguardian.com/uk-news/2018/jan/14/john-worboys-release-justice-secretary-david-gauke-judicial-review> [https://perma.cc/6T9W-CEG6].

<sup>123</sup> *Id.*

<sup>124</sup> DSD Judgment, *supra* note 49, at 17–22, 29, 34, 51 ("An issue in the present case is the intensely held feeling by a number of victims that they were not believed by the police.").

<sup>125</sup> *Id.* at 37–39.

Around the same time, convicted rapist Kirk Reid is believed to have attacked over one hundred women before he was apprehended.<sup>126</sup> An investigation found that police had failed to allocate sufficient resources to the investigation, leaving Reid to continue to threaten public safety for several years.<sup>127</sup> January 2018 news reports indicating that Worboys might be released from prison, after serving just nine years, have caused widespread public outcry.<sup>128</sup> Kirk Reid is reportedly being considered for release as well.<sup>129</sup>

These grave shortcomings in rape investigation suggest that any policy of targeting suspected false reporters for prosecution is misguided and not in the public interest. It does not make sense for officials to take an action that will further discourage the reporting of a crime as serious as rape, particularly when rape is so poorly investigated. These prosecutions create a chilling effect—they discourage other victims, already hesitant to come forward, from reporting out of concern that they too will be disbelieved and prosecuted. This chilling effect exists regardless of whether the person being prosecuted is a genuine victim or a false reporter, because the public cannot be confident that there is a difference. What they see is a person being prosecuted after reporting a rape.

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<sup>126</sup> Sandra Laille, *Life for Rapist Left Free to Attack Women After Police Blunders*, GUARDIAN (U.K.) (June 4, 2009), <https://www.theguardian.com/uk/2009/jun/04/kirk-reid-serial-rapist-life-sentence> [<https://perma.cc/3HNV-CTWY>]; Jenny Percival, *Police Took Four Years to Arrest Serial Sex Attacker*, GUARDIAN (U.K.) (Mar. 26, 2009), <https://www.theguardian.com/uk/2009/mar/26/sex-attacker-police-blunders> [<https://perma.cc/E9Z6-GRZW>].

<sup>127</sup> INDEP. POLICE COMPLAINTS COMM'N., COMMISSIONER'S REPORT: IPCC INDEPENDENT INVESTIGATION INTO THE METROPOLITAN POLICE SERVICE'S INQUIRY INTO ALLEGATIONS AGAINST KIRK REID 12–13 (June 2010), <http://webarchive.nationalarchives.gov.uk/20100908154426/http://www.ipcc.gov.uk/kirkreidcommissionersreport.pdf> [<https://perma.cc/QWH8-KSDW>]; *Sex Attacker Kirk Reid's Criminal History*, BBC (June 28, 2010), <http://www.bbc.com/news/10438989> [<https://perma.cc/F4NV-M8DX>].

<sup>128</sup> See Julie Bindel, *I've Spoken to Worboys' Victims, and This Release is a Huge Betrayal*, GUARDIAN (U.K.) (Jan. 5, 2018), <https://www.theguardian.com/commentisfree/2018/jan/05/john-worboys-women-serial-sex-attacker-released> [<https://perma.cc/6NJB-3U7Y>]; Jamie Doward, *New Row over Advice Given to John Worboys Parole Board*, GUARDIAN (U.K.) (Jan. 13, 2018), <https://www.theguardian.com/uk-news/2018/jan/13/john-worboys-release-parole-board-undue-weight-defence-psychologist> [<https://perma.cc/43HD-YPG2>]; Jamie Grierson, *John Worboys: MP Demands Reasons for Release of 'Black-cab Rapist'*, GUARDIAN (U.K.) (Jan. 5, 2018), <https://www.theguardian.com/law/2018/jan/04/black-cab-rapist-john-worboys-released-prison> [<https://perma.cc/M854-F3KP>].

<sup>129</sup> Sandra Laille, *Serial Sex Attacker Kirk Reid to Be Considered for Release from Jail*, GUARDIAN (U.K.) (Jan. 17, 2018), <https://www.theguardian.com/uk-news/2018/jan/17/serial-sex-attacker-kirk-reid-to-be-considered-for-release-parole-board> [<https://perma.cc/CA7Q-GBX9>].

## 2. Misunderstanding Rape Trauma & Taking the Easy Way Out

There are two additional considerations that shape the context around rape and that raise additional questions as to whether false reporting prosecutions make any sense: (1) officers' frequent misunderstanding of rape trauma, and (2) the incentives officers have to take the easy way out of rape investigation.

First, officials frequently approach rape investigations without an understanding of how psychological trauma affects rape victims' recollection of events. The popularity of training in trauma-informed sexual assault investigation has been growing in recent years, but these initiatives are still fairly new, and many, perhaps most, police officers have not been exposed to such training.<sup>130</sup> This training vacuum is a significant obstacle to thorough sexual assault investigation, leaving officers free to develop unwarranted skepticism toward victims.<sup>131</sup>

EVAWI and other organizations emphasize the importance of training police officers on the role that psychological trauma plays in creating memory disruptions in sexual assault victims.<sup>132</sup> In particular, it is well established that psychological trauma impairs the brain's ability to record information, with the result that rape victims often have

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<sup>130</sup> *Trauma Informed Sexual Assault Investigation Training*, INT'L ASS'N CHIEFS POLICE, <http://www.theiacp.org/Trauma-Informed-Sexual-Assault-Investigation-Training> [<https://perma.cc/Z3E9-NL62>] (noting that the IACP received a DOJ grant to offer such training from 2014-17); *Tools for Trauma-Informed Practice*, NAT'L SEXUAL VIOLENCE RESOURCE CTR., <https://www.nsvrc.org/projects/lifespan/tools-trauma-informed-practice> [<https://perma.cc/394B-VXL5>] (listing a number of resources on this topic published between 2012 and 2015).

<sup>131</sup> I discuss this issue more fully elsewhere in another article. See Avalos, *supra* note 88, at 482-85; see also James Hopper & David Lisak, *Why Rape and Trauma Survivors Have Fragmented and Incomplete Memories*, TIME (Dec. 9, 2014), <http://time.com/3625414/rape-trauma-brain-memory/> [<https://perma.cc/DQK9-S338>].

<sup>132</sup> PATRICIA L. FANFLIK, NAT'L DIST. ATT'YS ASS'N, VICTIM RESPONSES TO SEXUAL ASSAULT: COUNTERINTUITIVE OR SIMPLY ADAPTIVE? 8-10, 14-16 (2007), [http://www.ndaa.org/pdf/pub\\_victim\\_responses\\_sexual\\_assault.pdf](http://www.ndaa.org/pdf/pub_victim_responses_sexual_assault.pdf) [<https://perma.cc/VL8W-3PUH>]; KIMBERLY A. LONSWAY & JOANNE ARCHAMBAULT, END VIOLENCE AGAINST WOMEN INT'L, DYNAMICS OF SEXUAL ASSAULT: WHAT DOES SEXUAL ASSAULT REALLY LOOK LIKE? 12, 27 (2017), <http://www.evawintl.org/library/DocumentLibraryHandler.ashx?id=42> [<https://perma.cc/UY2D-JLDH>] [hereinafter LONSWAY, DYNAMICS]; see generally KIMBERLY A. LONSWAY & JOANNE ARCHAMBAULT, END VIOLENCE AGAINST WOMEN INT'L, VICTIM IMPACT: HOW VICTIMS ARE AFFECTED BY SEXUAL ASSAULT AND HOW LAW ENFORCEMENT CAN RESPOND 7-8, 27 (2017), <http://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=656> [<https://perma.cc/VU9G-ZC79>]; Hopper & Lisak, *supra* note 131; Rebecca Campbell, Professor of Psychology, Mich. State Univ., *The Neurobiology of Sexual Assault*, Presentation Before the Nat'l Inst. of Justice (Dec. 3, 2012) [hereinafter Rebecca Campbell Transcript], <https://www.nij.gov/multimedia/presenter/presenter-campbell/Pages/presenter-campbell-transcript.aspx> [<https://perma.cc/483A-QR5X>].

fragmented and incomplete memories of the assault.<sup>133</sup> They may be able to recall certain details of the event in excruciating detail while not being able to recall other aspects at all, particularly peripheral details such as clothing, facial hair, and the time of the assault.<sup>134</sup>

A sound understanding of trauma's impact on sexual assault is critical, because rape victims are often criticized for giving accounts marked by inconsistencies, or that are inconsistent with other evidence in the case.<sup>135</sup> Officers who understand how trauma affects memory realize that such inconsistencies are very common after a sexual assault and are not a reason to accuse a complainant of false reporting.

All too often, however, officers lack this training and treat a complainant with suspicion if aspects of her account are inconsistent or difficult to explain; they also sometimes treat the interview as a search for inconsistencies that can be used to prove that the victim is lying.<sup>136</sup> Officers who take this approach frequently resort to interrogating victims as though they are suspects, looking for ways to poke holes in their accounts.<sup>137</sup> Accordingly, officers' failure to understand how trauma impacts post-sexual assault memory places genuine victims at risk for prosecution while enabling rapists to run free.

Second, officers are incentivized to look for ways to dismiss a report as false because doing so is easier and can be more professionally rewarding for the officer than actually investigating the rape. Rape is a difficult crime to investigate and prosecute. It is resource intensive, and officers typically have limited resources and find themselves pulled in many different directions.<sup>138</sup> In contrast, concluding that a rape report is false is the easier alternative. Recall that studies indicate that officers often make this decision early in the investigative process, thereby closing the case without going to the effort of fully investigating.<sup>139</sup> Therefore, concluding that a rape report is false is the easy way out, as the next section discusses more fully.

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<sup>133</sup> Hopper & Lisak, *supra* note 131.

<sup>134</sup> *Id.*

<sup>135</sup> A focus on inconsistencies in a victim's account is a theme across many cases that result in false reporting charges being brought against a victim. Avalos, *supra* note 32, at 23; *see, e.g.*, Walters on Hicks-Best, *supra* note 1; LUEDERS, *supra* note 18, at 123; Hattenstone & Hirsch, *supra* note 28; Morris on Brooker, *supra* note 28; Morris on Sherwood, *supra* note 28.

<sup>136</sup> DOJ NEW ORLEANS REPORT, *supra* note 17, at 45–46.

<sup>137</sup> *Id.*; Police Report on Lara MacLeod Rape Investigation by Bradford J. Cavender, Prince William Cty. Police Dep't, Prince William, Va. (July 25, 2011) (on file with author); Walters on Hicks-Best, *supra* note 1.

<sup>138</sup> *See* Lisak, *supra* note 84, at 57.

<sup>139</sup> *See* KELLY STUDY, *supra* note 49, at 27.

The Justice Department's investigation into the New Orleans Police Department (NOPD) illustrates both of these issues. The investigation found that NOPD officers approached rape investigations by systematically trying to *prove that they were false from the outset*—"a conclusion that is virtually impossible to draw based on a cursory investigation or preliminary victim interview."<sup>140</sup> The DOJ report also noted that NOPD's work on rape cases often:

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.<sup>141</sup>

When police are unwilling to investigate or lack appropriate training, many victims are too traumatized from the rape to be willing to try to convince hostile or skeptical officers that they are telling the truth. Many victims retract their rape complaints for precisely this reason—to end unhelpful contact with skeptical and hostile officers.<sup>142</sup> Rape investigations often fail because police are inadequately trained, do not understand how trauma affects sexual assault, and consequently display a hostile, skeptical, or otherwise unhelpful attitude toward rape survivors. Charging a complainant with false reporting can be the easy way out of a situation that an officer is not equipped to handle more appropriately.

### C. *Such Prosecutions Distract Police and Prosecutors From Prosecuting Rape*

Pursuing false reporting prosecutions takes attention away from deepening rape investigations and learning to build robust, evidence-based cases against rapists. Much evidence demonstrates that police frequently label a report false shortly after the complaint is received and *prior* to a thorough investigation.<sup>143</sup> Writing off a rape complaint as a false report is,

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<sup>140</sup> DOJ NEW ORLEANS REPORT, *supra* note 17, at 46.

<sup>141</sup> *Id.* (emphasis added).

<sup>142</sup> Avalos, *supra* note 32, at 43–47.

<sup>143</sup> See KELLY STUDY, *supra* note 49, at 34, 46; DOJ NEW ORLEANS REPORT, *supra* note 17, at 45–46 (officers approaching rape investigation by attempting to prove an allegation is false at the outset); ANGIOLINI REPORT, *supra* note 91, at 19–20; Avalos, *supra* note 32, at 6–14; Miller & Armstrong, *supra* note 18; Rebecca Campbell Transcript, *supra* note 132 (86 percent of rape complaints never make it past police to prosecutors; law enforcement tells 69 percent of victims that they should *not* go through with reporting the rape to police); see also *Reedy v. Evanson*, 615 F.3d 197, 217 (3rd Cir. 2010) (stating that other than a brief search of the woods, Evanson did not look for Reedy's

therefore, much easier than investigating it. This practice contravenes IACP best practices, however, which demand a thorough investigation of every rape complaint.<sup>144</sup> But there is another negative effect here, which is that closing a rape investigation early in the process means that officers do not develop the skills necessary to properly investigate these difficult cases. This skills deficit enables rapists to continue to offend.

Some of the cases mentioned earlier are instructive here, because in each case, police took the easy way out and charged a victim with false reporting rather than doing the more challenging investigatory work on her case. In Marie's case, Lynnwood, Washington officers gave up on the rape investigation after just two days and chose instead to pressure Marie to retract her allegations.<sup>145</sup> But in a parallel investigation in Colorado, officers from several different police forces spent months working together and assembling clues from five separate rapes in order to catch the rapist, Marc O'Leary.<sup>146</sup> Once they did catch him, Colorado officers notified Washington police that they had found pictures of Marie on O'Leary's mobile phone.<sup>147</sup> If the Washington officers had put in this level of effort at the outset, they may have prevented O'Leary from raping the five Colorado women. In the case of Patty, of Madison, Wisconsin, her rapist, Joseph Bong, committed a sexual assault in the course of a robbery just a few days after her rape.<sup>148</sup> But her investigating officer was not able to link the two crimes despite similarities in modus operandi because he had written Patty off as a false reporter and therefore did not investigate her case and look for linkages to other crimes.<sup>149</sup> As a result, it was several years before Bong was identified as Patty's rapist after a long-delayed DNA test.<sup>150</sup>

Sara Reedy's case was handled in a similar fashion by detective Frank Evanson, who made only feeble efforts to locate rapist Wilbur Brown before Reedy was charged with false reporting.<sup>151</sup> While Evanson was busy bringing charges against Reedy, Brown was busy raping another woman before eventually

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assailant at all); LUEDERS, *supra* note 18, at 58–71, 185. For my discussion of the Ibrahim and Sherwood cases, see Avalos, *supra* note 32, at 20–24, 32–38.

<sup>144</sup> IACP GUIDELINES, *supra* note 93, at 12–13.

<sup>145</sup> D.M. Complaint, *supra* note 23, at Ex. 2, Ex. 10, Ex. 14; *see also* Miller & Armstrong, *supra* note 18.

<sup>146</sup> Miller & Armstrong, *supra* note 18.

<sup>147</sup> *Id.*

<sup>148</sup> LUEDERS, *supra* note 18, at 53–54, 193–94.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 193–94.

<sup>151</sup> Reedy v. Evanson, 615 F.3d 197, 203–07 (3rd Cir. 2010).

being caught by a different police force that was more committed to catching him than Evanson was.<sup>152</sup>

It should be evident that police do not develop strong investigatory skills by dismissing rape victims as false reporters prior to thoroughly investigating their cases. Human Rights Watch has documented instances where police threatened victims with arrest for false reporting unless they agreed to retract their complaints.<sup>153</sup> In Britain, several officers have faced discipline and dismissal when they were caught fabricating reports and witness statements in order to hide the fact that the officers had not investigated rape cases assigned to them.<sup>154</sup> Accordingly, writing off reports of sexual assault as false without investigation and charging complainants with false reporting are practices that endanger the public. These practices enable rapists to commit more crimes while the police turn a blind eye to the report and even prosecute victims for false reporting.

Prematurely dismissing a sexual assault report as false also deprives the police of a critical opportunity to compile data on the activities of serial rapists and make connections between crimes reported at different times. Police failed to stop serial predators in the Marie, Reedy, and Patty cases precisely because they refused to believe victims who sought help. London “black-cab rapist” John Worboys is believed to have amassed over one hundred victims, with several of his early victims being disbelieved when they reported to the police.<sup>155</sup> One officer handling a rape complaint about Worboys concluded:

If a licensed black cab driver is involved in sexual attacks on women then this presents a real risk to the community, however the facts of this case do not support this. The victim cannot remember what happened, the forensic evidence suggests that sex had not occurred and no date rape drugs were evident and the actions of the cab driver, witnessed by police, *appear to be those of a responsible, law abiding individual*. In addition, her loss of consciousness is consistent with the

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<sup>152</sup> *Id.* at 208–09.

<sup>153</sup> Human Rights Watch found that police in Washington D.C. would routinely threaten to prosecute victims for false reporting if the victim did not agree to withdraw her complaint and go away. It was evident, therefore, that police used this threat as a way to avoid investigating rape. DC REPORT, *supra* note 17, at 128.

<sup>154</sup> SOUTHWARK REPORT, *supra* note 50, at 3; Sandra Laville, *Detective Jailed After Failing to Properly Investigate Alleged Rape*, GUARDIAN (U.K.) (Dec. 6, 2013, 4:41 PM), <https://www.theguardian.com/uk-news/2013/dec/06/detective-jailed-failing-investigate-alleged-rape-hannah-notley> [<https://perma.cc/2NEV-9QR3>]; Sandra Laville, *Former Met Officer Admits Failing to Investigate Rape Cases*, GUARDIAN (U.K.) (Sept. 12, 2012, 2:51 PM), <https://www.theguardian.com/uk/2012/sep/12/met-police-officer-rape-cases> [<https://perma.cc/2CW4-TXFU>].

<sup>155</sup> DSD Judgment, *supra* note 49, at 10, 51.

alcohol and cocaine she consumed given her recent abstinence. The risk is therefore low.<sup>156</sup>

It is tragic that this officer's judgment was incorrect. Similarly, Jimmy Savile, considered by some to be Britain's worst sex offender, is thought to have sexually assaulted "around 500 vulnerable victims as young as two years old."<sup>157</sup> Not a single one of Savile's victims was taken seriously by the police while Savile was still alive.<sup>158</sup> When police write off victims as false reporters, they turn their backs on a crucial opportunity to collect and analyze evidence of serial attacks.

#### D. *Discrimination Against Victims of Sexual Assault*

The prosecution of someone accused of making a false report to the police is fundamentally different than the prosecution of other crime suspects. A rape complainant has come forward to report a crime to the police and to obtain help from them. Police and prosecutors thereby assume a duty to the complainant, and this is especially so when she reports a crime as serious as rape or sexual assault. Accordingly, it follows that a breach of this duty—such as by failing to investigate a rape complaint and charging the complainant with false reporting—exposes the state to liability for violating a crime victim's rights.

Under international law, the "due diligence" principle requires states to investigate and prosecute acts of violence carried out by private parties.<sup>159</sup> The U. S. Department of Justice, British courts, and the European Court of Human Rights have found that police owe particular duties to rape complainants, and that violations of human rights can result when officials do not fulfill these duties.<sup>160</sup> In particular, police and prosecutors have duties to take rape complainants seriously, to fully investigate their complaints, and to diligently work to identify and charge the perpetrators.<sup>161</sup> As we have seen,

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<sup>156</sup> *Id.* at 112 (emphasis added).

<sup>157</sup> Josh Halliday, *Jimmy Savile: Timeline of His Sexual Abuse and Its Uncovering*, Guardian (U.K.) (June 26, 2014), <https://www.theguardian.com/media/2014/jun/26/jimmy-savile-sexual-abuse-timeline> [<https://perma.cc/2K2T-CT7C>].

<sup>158</sup> *See id.*

<sup>159</sup> Convention on the Elimination of All Forms of Discrimination Against Women, General Recommendations made by U.N. Comm. on the Elimination of Discrimination Against Women, No. 19, 11th Sess., ¶ 9, U.N. Doc. A/47/38 (1993) [hereinafter Gen. Rec. No. 19].

<sup>160</sup> *See* DOJ GENDER GUIDANCE, *supra* note 17, at 23–24; Engen Letter, *supra* note 17, at 6–7; *see generally* DSD Judgment, *supra* note 49, at 10–14.

<sup>161</sup> *See* DSD Judgment, *supra* note 49, at 14–15.

widespread failures to fulfill these obligations have occurred on an appalling scale.

In the United States, DOJ investigations of police departments in Baltimore, New Orleans, Puerto Rico, and Missoula found evidence of discriminatory policing on the basis of gender, in violation of the U.S. Constitution and federal law.<sup>162</sup> For instance, the investigations found that the Missoula Police Department's failure to adequately respond to reports of sexual assault has an unjustified disparate impact on women and therefore violated the Safe Streets Act; the DOJ also found that these failures constituted discrimination barred by the Equal Protection Clause of the Fourteenth Amendment.<sup>163</sup>

The U.S. Supreme Court has asserted that under the Fourteenth Amendment, states are prohibited from denying any person the equal protection of the laws, and that "[d]enying includes inaction as well as action. And denying the equal protection of the laws includes the omission to protect."<sup>164</sup> The DOJ, in its Gender Guidance, points out that

[m]any courts have extended this principle to a law enforcement agency's under-enforcement of crimes that disproportionately affect women, where it is established that the agency has a policy, practice or custom of intentionally providing unequal protection to community members on the basis of sex, in the form of failing to respond with equal effort to victims of those crimes the same as it does with victims of other comparable crimes.<sup>165</sup>

If failing to respond to reports of sexual assault with the same vigor as other crimes amounts to discriminatory policing, a further layer of discriminatory treatment is added when an actual victim is then also prosecuted for false reporting.

Similar principles apply in Britain, where a court has found that failing to investigate rape amounts to a violation of the victim's Article 3 rights under the British Human Rights Act.<sup>166</sup> Article 3 enumerates the right to be free from "torture" and "cruel, inhuman or degrading treatment."<sup>167</sup> The European Court of Human Rights has found similar violations of Article 3 in a range of cases involving failure to investigate and state

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<sup>162</sup> See *supra* note 17.

<sup>163</sup> Engen Letter, *supra* note 17, at 6.

<sup>164</sup> *Bell v. Maryland*, 378 U.S. 226, 309 (1964) (Goldberg, J., concurring) (internal citation omitted).

<sup>165</sup> DOJ GENDER GUIDANCE, *supra* note 17, at 23–24.

<sup>166</sup> DSD Judgment, *supra* note 49, at 10–14.

<sup>167</sup> Human Rights Act, (1998) ch. 42, § 3 (U.K.).

failure to exercise due diligence to prevent, prosecute, and punish these crimes.<sup>168</sup>

It follows that in any case where the state brings false reporting charges against an actual rape victim, the state is responsible for additional human rights violations that *compound* the failure to investigate rape. Having failed to conduct a thorough investigation, the state has then made the erroneous move of treating a rape victim as an offender and charged her with a crime. Recognizing this breach of human rights, a number of prosecuted rape victims have received financial settlements from the entities responsible for prosecuting them. In the United States, for instance, Reedy, Marie, and Patty all received financial settlements, with Reedy's settlement reaching \$1.5 million.<sup>169</sup> In Britain, Jane Doe is the first such British rape victim to receive a settlement for wrongful prosecution.<sup>170</sup> British victims in the Jon Worboys case and others have also received financial settlements for the state failure to investigate their rape cases.<sup>171</sup>

In light of this legal framework, states expose themselves to significant liability when they adopt a policy or practice of bringing false reporting charges against rape complainants. In light of how frequently police are wrong in their judgments of rape complainants' credibility, there is a significant risk that they will bring charges against genuine rape victims in breach of the relevant human and/or constitutional rights protections and other relevant laws. This is particularly the case in Britain, where the PCJ Policy may actually serve as an incentive to bring such charges as a way of resolving difficult rape cases. Police and prosecutors who make mistaken judgments about complainants

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<sup>168</sup> DSD Judgment, *supra* note 49, at 10–14; *Sečić v. Croatia*, App. No. 40116/02, 2007-VI Eur. Ct. H.R. ¶ 53 (May 31, 2007); *M.C. v. Bulgaria*, App. No. 39272/98, Eur. Ct. H.R. ¶ 151 (Dec. 4, 2003); *Pretty v. the United Kingdom*, App. No. 2346/02, Eur. Ct. H.R. ¶ 49 (Apr. 29, 2002); *E. and Others v. the United Kingdom*, App. No. 33218/96, Eur. Ct. H.R. ¶ 86 (Nov. 26, 2002); *Z and Others v. the United Kingdom*, App. No. 29392/95, Eur. Ct. H.R. ¶¶ 73–75 (May 10, 2001).

<sup>169</sup> Mike Carter, *Lynnwood to Pay Rape Victim \$150,000 in False-Claim Suit*, SEATTLE TIMES (Jan. 15, 2014), <http://www.seattletimes.com/seattle-news/lynnwood-to-pay-rape-victim-150000-in-false-claim-suit/> [<https://perma.cc/FXE3-JEJ6>]; Chantelle Janelle, *Wisconsin City Apologizes to Rape Victim*, WISTV.COM (Dec. 6, 2006), <http://www.wistv.com/story/5779521/wisconsin-city-apologizes-to-rape-victim> [<https://perma.cc/4AF3-2EAB>]; Walters on Reedy, *supra* note 18.

<sup>170</sup> Laville, *supra* note 19.

<sup>171</sup> Sandra Laville, *John Worboys Victims Win Met Police Compensation Claim*, GUARDIAN (U.K.) (Feb. 28, 2014), <https://www.theguardian.com/uk-news/2014/feb/28/john-worboys-victims-met-police-compensation> [<https://perma.cc/6TJM-SCYU>]; Rachel Williams, *Metropolitan Police Pays out over Flawed Rape Investigation*, GUARDIAN (U.K.) (Dec. 13, 2012), <https://www.theguardian.com/uk/2012/dec/13/metropolitan-police-rape-investigation> [<https://perma.cc/3MSM-YLSL>].

and end up bringing charges against victims expose themselves to potential liability for human rights violations.

### III. THE REAL CONSEQUENCES OF FALSE REPORTING PROSECUTIONS: THE ELEANOR DE FREITAS CASE

“I will regret reporting this [rape] . . . for the rest of my life. I did that as my duty to this country and to women. I have given up caring if he does re-offend . . . . What happens if I lose? Will I go to prison? . . . It appears that on 24/12/2013 I would have been better off being hit by a car.”

Eleanor de Freitas, upon learning that she was to be prosecuted for PCJ.<sup>172</sup>

In 2014, the Crown Prosecution Service decided to prosecute Eleanor de Freitas for perverting the course of justice after deciding that they did not believe her rape complaint. Eleanor maintained that she was an actual rape victim right up until her death by suicide just three days before her trial was to begin. This Part analyzes the de Freitas prosecution by comparing the police and prosecutors’ actions to the standards set forth in the PCJ Policy and IACP Guidelines. It argues that Eleanor should not have been prosecuted because there was not evidence sufficient to meet the standards for labeling a complaint false under either policy.

A close examination of the de Freitas case is important for several reasons. First, it requires us to consider evidence suggesting that the CPS charges rape complainants with PCJ without following their own guidance in this area and without due regard for best practice in rape investigation. Second, it shows that rape complainants continue to face discrimination and reliance on rape myths in how complaints are handled. Despite substantial evidence corroborating the rape complaint, officials will still classify a report as false. These forms of discriminatory treatment violate complainants’ human rights, denying them the equal protection of the laws. Eleanor’s case illustrates these problems.

Third, because many individuals prosecuted for false reporting maintain that they were really raped, it is important to scrutinize such cases and consider whether there is evidence suggesting that genuine victims have been prosecuted. And finally, such cases have had extremely serious outcomes. Eleanor’s case in particular should be scrutinized because of the possibility that a poor policy decision led to a rape victim’s death.

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<sup>172</sup> de Freitas Memorial, *supra* note 40, at 6–7 (emphasis omitted).

The remainder of this section will address (a) Eleanor's rape complaint, (b) the flawed prosecution arguments, and (c) evidence which corroborated Eleanor's account of rape but which was ignored by the CPS.

### A. *Eleanor's Rape Complaint*

On January 4, 2013, Eleanor de Freitas reported an acquaintance rape to the London Metropolitan police—about ten days after the incident.<sup>173</sup> Her two-hour police interview was videotaped.<sup>174</sup>

According to the videotaped interview, Eleanor, age twenty-two, told police that she had met the alleged perpetrator (John Doe), age thirty-three, through mutual friends and had known him for several months before agreeing to go to his apartment for brunch.<sup>175</sup> The date had been preceded by playful and flirtatious banter on Facebook.<sup>176</sup> Once she arrived at his apartment, she said, Doe pressured her to drink alcohol, although she typically avoided drinking.<sup>177</sup> Eleanor told police that he also pressured her to take two pills he claimed were Vitamin C, but he refused to show her the bottle that they came from.<sup>178</sup> Although police were never able to confirm what was in these pills, they knew, from Eleanor's interview, that she had experienced significant memory impairment over the course of the evening. Throughout the interview, she repeatedly stated that she was having difficulty remembering what had happened that night and that it was "all a bit of a muddle" in her mind.<sup>179</sup>

Eleanor had a history of mental illness and had been diagnosed with bipolar disorder; her illness had adversely

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<sup>173</sup> Transcript of Police Interview with Eleanor de Freitas at Chelsea Police Station, London, Eng. 2 (Jan. 4, 2013) [hereinafter *de Freitas Police Interview*] (on file with author).

<sup>174</sup> I watched and transcribed the video. As far as I know, neither police nor prosecutors had transcribed the interview.

<sup>175</sup> *de Freitas Police Interview*, *supra* note 173, at 2. I refer to Eleanor's alleged assailant using a pseudonym because he was not ultimately charged or prosecuted for rape. Doe has denied the allegations made against him by Eleanor.

<sup>176</sup> *Id.* at 2, 22.

<sup>177</sup> *Id.* at 3–5, 25–26.

<sup>178</sup> *Id.* at 4–5, 25–26.

<sup>179</sup> *Id.* at 9. It was not possible to run blood tests on Eleanor because of the delay in reporting the incident. Her interview responses are littered with evidence of memory impairment from that night. *Id.* at 9 ("it's all a bit of a muddle in my mind"); *id.* at 8 ("Everything after that gets a bit hazy in my mind."); *id.* at 9 ("I believe he was helping me wash my hair but I can't really remember"); *id.* at 9 ("I can't exactly remember whether this [sex] [was] on his sofa or on his bed or possibly both"); *id.* at 27 ("I don't want to tell you the wrong thing . . . I'm not recalling every detail perfectly"); *id.* at 30 ("my memory is a bit hazy to be honest with you and I don't want to tell you something that's wrong"); *id.* at 36 ("I'm sorry I've been a bit foggy at times . . . I tried to tell you to the best of my knowledge").

affected her judgment on previous occasions, and she took psychiatric medication by prescription.<sup>180</sup> At least one of Doe's acquaintances had cautioned him to stay away from Eleanor on the grounds that he could be perceived as unfairly taking advantage of a woman who was mentally unwell.<sup>181</sup>

According to Eleanor's police account, several events took place that she clearly found disturbing and traumatic. Eleanor was very concerned that her mobile phone had somehow been left behind in the car and that Doe would not let her leave the apartment to retrieve it.<sup>182</sup> Finally, she told police, Doe agreed to retrieve the phone on the condition that Eleanor allow him to tie her up.<sup>183</sup> But once she was tied up, he did not retrieve the phone, saying that it was "too late" for that and that he was going to "dominate" her, according to the police interview.<sup>184</sup> While she was tied up, Eleanor stated, Doe proceeded to waterboard her and strangle her—activities that were punctuated by angry, frightening outbursts from him.<sup>185</sup>

In her interview with the police, she described how terrified she became during these alleged events:

Instantly and my heart is racing, I'm feeling panicked, I don't feel like I'm in control, . . . [H]e . . . started strangling me to the point where I was really quite scared and my eyes started to water . . . and he was like "I bet you love this, I bet you're really into this kinky shit, I'm going to press down harder" . . . I'm like, literally frozen with fear. I'm not the kind of girl that gets intimidated easily but I'm very very scared . . .<sup>186</sup>

Doe never retrieved her phone, but as she put it, Eleanor did manage to "negotiate getting untied."<sup>187</sup>

<sup>180</sup> de Freitas Memorial, *supra* note 40, at 2–3; *see also* Economou v. de Freitas [2016] EWHC 1853 (QB) 15 [162]–[163] (Eng.), <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/economou-v-de-freitas-2016-ewhc-1853-qb-28-07.pdf> [<https://perma.cc/6SJJN-AJ4M>] [hereinafter de Freitas Libel Judgment] (explaining Eleanor's history of mental illness).

<sup>181</sup> Witness Statement of Sebastian Noel Cavendish Gosden-Hood, [2016] EWCH 1853 (QB) ¶ 4 (Apr. 28, 2016) [hereinafter Gosden-Hood Witness Statement] (on file with author) (stating that Doe took an interest in Eleanor at a party and Gosden-Hood tried to put him off on the basis that she had psychological problems and, to Gosden-Hood, appeared vulnerable); *id.* at ¶ 7 (stating that Gosden-Hood reminded Doe, in summer 2013, that "he should never have gone near" Eleanor); *id.* at ¶ 8 (stating that Doe had been told that Eleanor "was unstable and mentally unwell" and that in Gosden-Hood's opinion, "that if [Doe] tried to get with her it was absolutely taking advantage of her.").

<sup>182</sup> de Freitas Police Interview, *supra* note 173, at 2–4, 12, 26–27.

<sup>183</sup> *Id.* at 26.

<sup>184</sup> *Id.* at 28.

<sup>185</sup> *Id.* at 6–7 (strangling, waterboarding); *id.* at 9, 10, 32, 35 (anger).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 36.

She next recalled having sex with Doe on the same sofa where she had been tied up.<sup>188</sup> She described this sex as “horrific,” but something she “let him do” because then “I might be able to go home . . . maybe he’s going to stop being angry.”<sup>189</sup> When police asked 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.<sup>190</sup> Her main concern was that Doe may have had sex with her later that night, after she had taken her psychiatric medication, which had a sedating effect.<sup>191</sup> She told police that Doe had pressured her to stay the night, and that she had acquiesced in order to avoid an argument.<sup>192</sup>

Eleanor told police she had awakened the next morning feeling like something was wrong; in particular, she believed that Doe had sex with her while she was unconscious.<sup>193</sup> Shortly thereafter, Eleanor and Doe ran errands together before she headed to work.<sup>194</sup> Eleanor said that she impulsively visited a lingerie shop called Ann Summers because she felt “dirty” from the previous evening and felt the need for some “shocking retail therapy.”<sup>195</sup>

Later that evening, signs that she had been traumatized apparently began to emerge. Family members expressed concerns that she was unusually noncommunicative, and they reported that she had a panic attack while driving the familiar route to her grandmother’s house.<sup>196</sup> She ran out of gasoline and had to be rescued.<sup>197</sup> According to Eleanor’s medical records, she went to the doctor the next day, where she was diagnosed with a urinary tract infection and given emergency contraception.<sup>198</sup> The medical records also indicate she told her doctor that she

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<sup>188</sup> *Id.* at 9, 35.

<sup>189</sup> *Id.* at 35.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 6, 26, 34–35.

<sup>192</sup> *Id.* at 33 (She explained that he insisted she stay the night and “I wasn’t thinking logically . . . I 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 . . .”).

<sup>193</sup> *Id.* at 12.

<sup>194</sup> *Id.* at 13–14.

<sup>195</sup> *Id.* at 14, 17.

<sup>196</sup> *Id.* at 18–19 (Eleanor stated that her mother sent her a text message that day which read “Darling, hope you’re okay this whole noncommunication thing is really weird, we’re all worried about you, drive safe, see you later.”; Eleanor also told police “[she] didn’t want to go home because [her] father would see [her] in the state that [she] was [in].”); see also de Freitas Libel Judgment, *supra* note 180, at [165] (Eleanor’s father found her manner odd and distant the day after the alleged assault; she seemed to be in a state of confusion); Progress Notes by Dr. Christopher Bench on Eleanor de Freitas (Dec. 31, 2012) [hereinafter Dr. Bench Progress Notes] (on file with author).

<sup>197</sup> de Freitas Libel Judgment, *supra* note 180, at [165]; Dr. Bench Progress Notes, *supra* note 196.

<sup>198</sup> de Freitas Libel Judgment, *supra* note 180, at [166]; Dr. Bench Progress Notes, *supra* note 196.

had been sexually assaulted.<sup>199</sup> She also told police that, as the daughter of a sexual health nurse, she would not have agreed to have sex without a condom.<sup>200</sup>

Eleanor approached the police for help within twenty-four hours of receiving three angry and threatening communications from Doe.<sup>201</sup> On January 3, 2014, Doe warned her, via text message, to “stop spreading nasty lies,” that he would “expose the truth,” and “that she was no longer welcome in his neighborhood.”<sup>202</sup> A few minutes later, he sent her an email stating, “Every person you lied [sic] is being notified right now. Continued lying by you will result in both civil and criminal prosecutions against you. Now fuck off.”<sup>203</sup>

The next day, Doe sent another email to Eleanor.<sup>204</sup> In this email, Doe again accused Eleanor of intentionally lying about him to mutual friends, and he stated that if she “continue[d] to lie e.g. to the police and pervert the course of justice, then that carries a maximum sentence of life in prison.”<sup>205</sup> He also suggested that under civil defamation law, “financial sanctions and injunctions” could be imposed on Eleanor.<sup>206</sup> He then stated:

[T]his evening I intend to visit Chelsea police station and file a report against you. That way all the facts are officially on the record. I will pass on all evidence, including all text, fb, messages, statements that others have made, details of all my phone calls with you and third parties . . . I will also visit Ann Summers and Harrods to get the names of the shop attendants and pass on their names to police as witnesses, as well as passing on the names of my friends who you have lied to. And a full report of our evening and day together in every detail. Alternatively you will contact every person you have lied to, you will retract your lies and tell them the truth and do everything in your power to repair the damage you have caused. . . . I would urge you to do so right now, because as soon as I leave the office tonight I will take the [fourteen] bus straight to Chelsea Police to file the report . . .<sup>207</sup>

Doe did indeed go to Chelsea police station, where he was immediately arrested on suspicion of rape.<sup>208</sup> But instead of telling

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<sup>199</sup> Dr. Bench Progress Notes, *supra* note 196.

<sup>200</sup> de Freitas Police Interview, *supra* note 173, at 36.

<sup>201</sup> Prosecution Case Summary, *Economou v. de Freitas*, [2016] EWHC 1853 (QB) 15 [5.8]–[5.9], [6.1] [hereinafter Case Summary] (on file with author). The Case Summary itself, prepared by Doe’s lawyers, describes these messages as “angry.” *Id.*

<sup>202</sup> *Id.* at [5.8].

<sup>203</sup> *Id.* at [5.9].

<sup>204</sup> *Id.* at [6.1].

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at [6.3], [6.4].

officers his side of the story, he gave a “no comment” interview in which he declined to respond to detailed questions about the particulars of Eleanor’s complaint.<sup>209</sup> This was despite the police warning he was given indicating that the court was entitled to draw an adverse inference if he decided to say nothing when he could have reasonably given an account at the police station.<sup>210</sup>

Ultimately, however, police did not think they had enough evidence to charge Doe with rape.<sup>211</sup> Once Doe was informed that charges had been dropped, he pressured the police to charge Eleanor with perverting the course of justice for making a false rape allegation against him.<sup>212</sup> They declined to do so, indicating that there was no evidence that Eleanor had lied.<sup>213</sup> Doe then initiated a private prosecution against Eleanor for perverting the course of justice.<sup>214</sup>

In the private prosecution case summary, Doe gave his version of events for the first time, sharing information unknown to the police when they dropped the case against him. Most significantly, he admitted to having four instances of sexual activity with Eleanor during their date, claiming that it was all consensual.<sup>215</sup> Strikingly, Eleanor’s police interview indicates that she could only clearly remember *one* instance of sex, but said that she was “eighty percent sure” that Doe had had sex with her more than once.<sup>216</sup>

Eleanor’s lawyers advised her that they should ask the CPS to take over the prosecution because they were sure the

<sup>209</sup> Interview by Philip Dyer, Detective Constable and Mr. Denton, Detective Constable with John Doe (Jan. 5, 2013) [hereinafter Interview with John Doe] (on file with author).

<sup>210</sup> *Id.* at 3.

<sup>211</sup> de Freitas Memorial, *supra* note 40, at 10–11; de Freitas Libel Judgment, *supra* note 180, at [210-11].

<sup>212</sup> de Freitas Libel Judgment, *supra* note 180, at [23]–[25]. Doe was not content to walk away once charges were dropped against him. *Id.* at [69]. He allegedly sent threatening emails to Eleanor and her parents. *Id.* He sued Eleanor’s father for libel, was charged with harassment of Eleanor’s father, had a restraining order placed on him, and purchased the domain name “eleanordefreitas.com” where he displayed photos of Eleanor along with material suggesting that she was a prostitute and had excessive spending habits. *Id.* at [2], [70], [76]. Doe was cleared of harassment at a bench trial. *Id.* at [2]–[3], [8]–[9]; Tristan Kirk, *Tycoon’s Son is Cleared of Harassing Father of Woman Who Accused Him of Rape*, EVENINGSTANDARD (U.K.) (June 2, 2016, 11:14 AM), <http://www.standard.co.uk/news/uk/tycoon-s-son-is-cleared-of-harassing-father-of-woman-who-accused-him-of-rape-a3262041.html> [<https://perma.cc/29JJ-A3K3>]; Press Ass’n, *Alexander Economou Cleared of Harassing Father of Rape Accuser*, GUARDIAN (U.K.) (June 2, 2016), <https://www.theguardian.com/uk-news/2016/jun/02/alexander-economou-cleared-harassing-father-david-de-freitas-eleanor> [<https://perma.cc/E67D-JN5X>].

<sup>213</sup> de Freitas Memorial, *supra* note 40, at 10.

<sup>214</sup> *Id.* at 4.

<sup>215</sup> Case Summary, *supra* note 201, at [3.3]–[3.4], [4.1].

<sup>216</sup> de Freitas Police Interview, *supra* note 173, at 9, 29–30, 33–34.

CPS would stop it.<sup>217</sup> They were wrong. The CPS adopted the private prosecution case in its entirety without altering the case.<sup>218</sup> The CPS did not give Eleanor's lawyers a copy of her videotaped interview until four or five days before trial, despite a court order requiring disclosure to be made six weeks before trial.<sup>219</sup> Eleanor was scheduled to meet with her lawyers three days before the trial date; at that meeting they planned on telling her that she would not have to testify because they had finally seen the interview and felt that it was sufficient evidence of her innocence.<sup>220</sup> Eleanor ended her life before receiving this message.<sup>221</sup>

The CPS had nothing further to say about the case until seven months after Eleanor's death. At that time, Alison Saunders, the Director of Public Prosecutions, announced that she would "personally investigate why a decision was made to proceed with the prosecution."<sup>222</sup> Saunders' announcement came seven weeks after Eleanor's father had written to her demanding answers to questions surrounding the decision to prosecute.<sup>223</sup> But her completion of the personal investigation was relatively speedy; she met the de Freitas family and their lawyers just two weeks later, and she announced that the CPS decision to prosecute had been correct.<sup>224</sup>

## B. *The Flawed Prosecution Case*

A full analysis of the de Freitas case, using rape investigation best practice guidance, tells a different story. The prosecution case against Eleanor was flawed for two reasons: (1) it was marked by procedural irregularities; and (2) the prosecution arguments against Eleanor did not meet the standard necessary for labeling a report false.

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<sup>217</sup> de Freitas Memorial, *supra* note 40, at 6.

<sup>218</sup> *Id.*; de Freitas Libel Judgment, *supra* note 180, at [188]; Attendance Note, Re R v Eleanor de Freitas 3 (Jan. 24, 2014) (on file with author) [hereinafter Attendance Note].

<sup>219</sup> Attendance Note, *supra* note 218, at 2; de Freitas Libel Judgment, *supra* note 180, at [188].

<sup>220</sup> de Freitas Libel Judgment, *supra* note 180, at [190].

<sup>221</sup> *Id.*; de Freitas Memorial, *supra* note 40, at 9.

<sup>222</sup> Sandra Laville, *Eleanor de Freitas Rape Case: Coroner Calls on DPP to Explain*, GUARDIAN (U.K.) (Nov. 7, 2014), <https://www.theguardian.com/law/2014/nov/07/eleanor-de-freitas-coroner-dpp-rape-claim-alison-saunders> [<https://perma.cc/E3JE-JJ4A>].

<sup>223</sup> Letter from David de Freitas to Alison Saunders, Dir. of Pub. Prosecutions, Crown Prosecution Serv. (Sept. 19, 2014) (on file with author).

<sup>224</sup> Meeting Notes by Alison Saunders, Dir. of Pub. Prosecutions, Crown Prosecution Serv. with de Freitas Family (Nov. 20, 2014) (on file with author); see also Alison Saunders, *Statement from the Director of Public Prosecutions on Eleanor de Freitas*, CPS (Sept. 12, 2014), <http://blog.cps.gov.uk/2014/12/statement-from-the-director-of-public-prosecutions-on-eleanor-de-freitas.html> [<https://perma.cc/VT3G-7LB6>] [hereinafter Saunders Statement].

## 1. Procedural Irregularities

A number of procedural irregularities characterized the prosecution against Eleanor. First, Eleanor was never arrested and interviewed as a suspect for PCJ.<sup>225</sup> This meant that she never had the opportunity to hear the evidence against her and offer her version of events.<sup>226</sup> Second, the CPS took the prosecution forward over the objections of the police officers who had dealt with the case.<sup>227</sup> For a prosecutor to take a case forward over the objections of police is highly unusual, as even Saunders acknowledged.<sup>228</sup>

Third, the CPS took over the prosecution while disregarding Eleanor's two-hour statement to the police. The CPS lawyer who attended court in order to take over the prosecution admitted that she did not have access to Eleanor's interview and was instead proceeding on the basis of a five-page summary prepared by one of the police officers who interviewed Eleanor.<sup>229</sup> Neither the police nor the CPS ever transcribed Eleanor's full interview. Since the transcript of the full interview comprised thirty-six pages, the summary only conveyed a small portion of the full interview.<sup>230</sup> Incredibly, the CPS actually labeled Eleanor's interview as "unused material" and was not planning to rely on it at trial at all.<sup>231</sup> Prosecuting someone for lying to police would require identifying the specific false statements made by the suspect. The CPS was in a position where it was virtually impossible for them to do this.

The procedural irregularities in Eleanor's case are significant because they suggest discrimination in the way that Eleanor was treated as compared to other crime suspects. The failure to interview Eleanor as a suspect was a violation of her due process rights and denied her the opportunity to answer the

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<sup>225</sup> de Freitas Memorial, *supra* note 40, at 12–13; de Freitas Libel Judgment, *supra* note 180, at [182] (noting that Eleanor had "never been interviewed under caution as a suspect, and thus had been denied the opportunity to put her case in response before being charged").

<sup>226</sup> de Freitas Memorial, *supra* note 40, at 12–13.

<sup>227</sup> *Id.* at 10–11; *see also* Attendance Note, *supra* note 218, at 1 (Prosecutor indicating case is unusual because the investigating police officer was refusing to cooperate with the CPS); Saunders Statement, *supra* note 224.

<sup>228</sup> Saunders Statement, *supra* note 224.

<sup>229</sup> Attendance Note, *supra* note 218 (indicating the police still have not turned over the interview tape to the CPS, and that the CPS is proceeding on the basis of the original case summary). The original prosecution case summary was prepared on the basis of the five-page interview summary because the private prosecutor was not given access to the actual videotaped interview. de Freitas Libel Judgment, *supra* note 180, at [188].

<sup>230</sup> Eleanor's interview was transcribed at the University of Arkansas School of Law after her death.

<sup>231</sup> Letter from Alison Saunders, Dir. of Pub. Prosecutions, Crown Prosecution Serv., to Harriet Wistrich, Birnberg Pierce & Partners 3 (Dec. 3, 2014) (on file with author) [hereinafter Saunders Letter to Wistrich].

charges. The highly unusual decisions to prosecute Eleanor over the objections of the police and to prosecute her for lying without relying on anything she actually said to police, represent deviations from ordinary practice governing the majority of cases. Her case was therefore singled out for differential treatment.

## 2. The Flawed Prosecution Arguments

In prosecuting Eleanor, the CPS violated both their own PCJ Policy and the IACP Guidelines. Had either guidance been followed, Eleanor could not have been charged with perverting the course of justice. As we have seen, the PCJ Policy identifies two questions that must be addressed prior to commencing a PCJ prosecution for a false rape or domestic violence claim:

- “[W]hether the suspect has in fact made a clear and unambiguous complaint of a crime;” and
- “[W]hether there is sufficient evidence to prove that the allegation was in fact false.”<sup>232</sup>

With respect to the second question, although there is not a consensus in Britain as to what constitutes a false report, the IACP Guidelines provide a standard.<sup>233</sup> In order for a rape complaint to be labeled false:

- The allegation must be fully investigated;
- The investigators must discover evidence demonstrating that no crime was committed or attempted; and
- They must be sure not to rely on rape myths or on common victim reactions to sexual assault in reaching this conclusion.<sup>234</sup>

This Section therefore addresses (a) whether the rape complaint was clear and unambiguous; and (b) whether there was sufficient evidence to prove that the complaint was false; as well as (c) what explains the decision to prosecute in light of lack of compliance with these guidelines.

### *a. Was the Rape Complaint Clear & Unambiguous?*

Eleanor’s police interview indicates that she did not make a clear and unambiguous complaint of rape to the police. The PCJ Policy indicates that a complaint might not be clear and

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<sup>232</sup> PCJ Policy, *supra* note 65, at ¶ 12–13.

<sup>233</sup> ANGIOLINI REPORT, *supra* note 91, at 38; IACP GUIDELINES, *supra* note 93, at 12–13.

<sup>234</sup> IACP GUIDELINES, *supra* note 93, at 12–13; Avalos, *supra* note 32, at 17–20.

unambiguous in certain situations, including those where the complainant

merely expressed a concern or a feeling that they might have been the victim of a crime which was then perhaps treated as a complaint by others. This may be the case where the suspect cannot remember all the details, perhaps as a result of taking alcohol or drugs. In such a case this would merely be a truthful reflection of the suspect's state of mind rather than a positive complaint of a crime.<sup>235</sup>

Under this guidance, therefore, if a complaint is not clear and unambiguous, then a PCJ prosecution should not proceed.

During her police interview, Eleanor never directly stated that Doe raped her.<sup>236</sup> She could only clearly recall one instance of sex, which she said occurred on Doe's sofa.<sup>237</sup> Her description of this encounter included *only* the following statements, neither of which makes a clear allegation of rape:

I know that we did have sex, definitely, and it was unprotected. I can't exactly remember if this is on his sofa or on his bed or possibly both . . . I remember at some point that he was like "oh why don't we use this massage oil?" I think this is before we had sex . . . I don't really know . . .

I think it was on his sofa . . . he definitely . . . ejaculated inside of me because . . . I could feel it.<sup>238</sup>

Apart from these statements, Eleanor did not return to the subject of sex *at all* until the police asked her pointed questions at the end of the two-hour interview. Upon being asked by police whether she consented to the sex on the sofa, she gave an equivocal answer:

Eleanor: What went through my mind was "this is horrific but if I'd just let him do this then maybe I might be able to go home . . . maybe he's going to stop being angry . . ." I was really scared, and I thought "well, if he gets more angry he might try to physically hurt me" so if I just let him do this then it might just be a better option . . .

Officer: So in your mind . . . you didn't want to have sex with him?

Eleanor: I don't think so, no.

Officer: Is there any way he would realize that you didn't want to have sex with him?

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<sup>235</sup> PCJ Policy, *supra* note 65, at ¶ 12.

<sup>236</sup> See generally de Freitas Police Interview, *supra* note 173. These words never appear in the interview transcript.

<sup>237</sup> *Id.* at 9, 35.

<sup>238</sup> *Id.* at 8–9.

Eleanor: I certainly didn't say yes. . . . I didn't say anything actually[,] I was literally frozen with fear after the whole tying up thing . . . I'd only just negotiated to be untied and I felt very vulnerable.<sup>239</sup>

These statements convey Eleanor's state of mind—that she did not want to have sex, but she was frightened and acquiesced in order to avoid an argument. These statements are ambiguous in terms of consent and cannot be read as Eleanor accusing Doe of rape because she admitted to letting him proceed even though she did not want the sex.

In fact, Eleanor's *main* concern was that Doe may have had sex with her after she took her psychiatric medication around 3:00 a.m.<sup>240</sup> This medication was sedating and typically impeded her memory once she had taken it, such that she would have been unconscious and incapable of consent.<sup>241</sup>

Eleanor stated that she woke up the next morning feeling “violated,” thinking “I know that he's had sex with me,” and “something is really, really wrong here.”<sup>242</sup> These are statements of her state of mind at the time, and of a concern that she *may* have been raped or otherwise taken advantage of while unconscious. They do not amount to a clear allegation of rape because Eleanor did not have a clear memory of what happened. Indeed, police were able to elicit only a few details from Eleanor about any sex beyond the one sofa incident; recall that she was only “eighty percent” sure that sex occurred after that.<sup>243</sup> She remembered seeing some open packets of lubricant on the nightstand, and little else.<sup>244</sup> Eleanor's memory difficulties were quite evident throughout the interview; she used phrases such as “[e]verything after that gets a bit hazy in my mind,” “it's all a bit of a muddle in my mind,” and “I remember just feeling really panicked.”<sup>245</sup>

Eleanor's statements to police appear to fit squarely within the PCJ Policy's guidance that it is not appropriate to bring a PCJ prosecution against an individual who expresses a concern that she may have been a victim of a crime because she cannot remember all the details of what occurred.<sup>246</sup> The PCJ Policy asserts that such statements should be viewed as truthful reflections of a person's state of mind rather than a positive

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<sup>239</sup> *Id.* at 35–37.

<sup>240</sup> *Id.* at 34–35. Her main concern was that sex could have occurred: “[p]otentially after taking the medication and that's the main reason why I'm quite frightened and why I'm quite confused because [loss of memory] is a very common side effect.” *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 12.

<sup>243</sup> *Id.* at 34.

<sup>244</sup> *Id.* at 33–34.

<sup>245</sup> *Id.* at 8–9, 11.

<sup>246</sup> PCJ Policy, *supra* note 65, at ¶ 12.

complaint of a crime, and that *prosecution should not be pursued in such cases*.<sup>247</sup> As such, Eleanor did not make the sort of clear and unambiguous allegation of rape that the PCJ Policy requires for a PCJ prosecution to proceed. She never used the terms “rape” or “sexual assault,” she admitted to reluctantly acquiescing to one instance of sex, and she expressed a fear that Doe may have taken advantage of her while she was unconscious.

As in the hostel case from the CPS study, it is disturbing that the CPS prosecuted Eleanor despite evidence suggesting that she may have been assaulted while unconscious. The CPS were aware that this case involved alcohol, comments Doe had made on Facebook about “slipping a surprise” into women’s cocktails, and multiple statements in Eleanor’s police interview indicating memory impairment and other behaviors that could possibly be consistent with the presence of a date rape drug.<sup>248</sup> The case also involved prescription psychiatric medication with side effects that could have been confirmed by Eleanor’s doctor. The CPS did not probe these matters before proceeding against Eleanor.<sup>249</sup>

Their approach is of particular concern in light of a 2014 court judgment noting that although high quality guidance on drug-facilitated sexual assault (DFSA) is available to police, officers were not necessarily trained in the content of this guidance and were largely ignoring it.<sup>250</sup> If the failure to follow this guidance was commonplace, that would account for a failure on the part of either CPS or the police to recognize and investigate the possible signs of DFSA.

*b. Was There Sufficient Evidence to Prove that the Allegation Was False?*

The second question posed by the PCJ Policy is whether there is sufficient evidence to prove that the allegation was in fact false. Doe admitted that sexual activity occurred at least

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<sup>247</sup> *Id.*

<sup>248</sup> In particular, Eleanor reported having cognitive difficulties after ingesting a drink that Doe had prepared, and police confirmed, during the interview, that Eleanor had not seen him pour the drink. de Freitas Police Interview, *supra* note 173, at 6, 12, 24–25. An email sent from a police officer to Eleanor’s father after her death states Eleanor suggested that Doe had drugged her, but police found no evidence corroborating this claim when they searched Doe’s flat. Email from Detective Constable Julian King to David de Freitas (Aug. 27, 2014) (on file with author). The email also notes that because Eleanor reported the alleged rape about ten days after it allegedly occurred, “a suggestion could well be made that [Doe] had since tidied the flat.” *Id.*

<sup>249</sup> de Freitas Libel Judgment, *supra* note 180, at [188] (noting that the CPS confirmed that they took the prosecution against Eleanor forward on the basis of the case summary prepared by the private prosecutor, with no new evidence).

<sup>250</sup> DSD v. Comm’r of Police for the Metropolis [2014] EWHC (QB) 436 [8]–[9] (Eng.).

four times that night and into the next morning. To find Eleanor guilty of making a false allegation of rape, it would be necessary to prove that she consented to each instance of sex. This is because a person can, of course, consent to some instances of sex but not others; a person also has the right to withdraw consent at any time. Therefore, a rape complaint would only be demonstrably false if each instance of sex was accounted for and proven to be consensual. For that reason, the core issue to address under this inquiry is whether Eleanor consented to each instance of sexual activity.

As a threshold matter, it would be necessary to definitively establish how many times sex occurred. This seems an impossible task, because Eleanor only had a clear memory of one sex act, Doe admitted to four, and there is no way to be sure that there were *only* four. It would also seem impossible to definitively prove that Eleanor consented to all four sex acts admitted to by Doe given that her police interview revealed substantial memory difficulties. The interview also suggested that she may have been too incapacitated to consent, particularly after taking her medication. Eleanor was not able to provide details, beyond open lubrication packets and the way her body felt upon awakening, of any sex that took place beyond the first instance.

It is striking that the CPS appears to have made no effort to establish how Doe obtained Eleanor's consent to sex. This oversight stands in direct contrast to guidance that Saunders issued for prosecutors on this point in June 2014 when she stated: "Where cases turn on the issue of consent, prosecutors must focus on what steps a suspect has taken to seek consent from the complainant and the extent to which an alleged victim is capable of giving consent."<sup>251</sup>

The CPS investigation was incomplete on this crucial matter. The prosecution case summary provides no evidence of Eleanor's consent; it merely states that "all sexual activity which took place was entirely consensual" without providing any evidence that supports that conclusion.<sup>252</sup> Doe was never successfully interviewed about why he believed he had Eleanor's consent to each sex act. He answered "no comment" to nearly

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<sup>251</sup> *Police and CPS Announce New Measures to Tackle Rape*, NAT'L POLICE CHIEFS' COUNCIL (June 6, 2014), <https://news.npcc.police.uk/releases/police-and-cps-announce-new-measures-to-tackle-rape> [<https://perma.cc/HT94-L7BY>].

<sup>252</sup> Case Summary, *supra* note 201, at [3.4], [4.1].

every question when interrogated by police, and the CPS prosecuted Eleanor without questioning him further.<sup>253</sup>

Because the investigation was incomplete, and because of the impossibility of proving Eleanor's consent, the case did not meet the threshold for labeling a report false under either the IACP Guidelines or the PCJ Policy. The CPS thus violated its own policy in taking the prosecution forward against Eleanor.

*c. Rape Myths and the Decision to Prosecute: You Can Tell Whether a Woman Was Raped by How She Acts*<sup>254</sup>

Why, then, did they prosecute? In claiming that Eleanor's report was false, the CPS did not rely on Eleanor's interview with the police; they categorized it as "unused material."<sup>255</sup> Instead, they placed primary importance on Eleanor's text messages to Doe and to mutual friends after the alleged assault, as well as CCTV footage showing Doe and Eleanor shopping at a lingerie shop within hours of the alleged assault.<sup>256</sup> The CPS used these messages to argue that Eleanor had behaved in ways that were inconsistent with having been raped. The CPS found the communications with Doe were noteworthy due to their "positive tone."<sup>257</sup> Notably, none of the materials relied upon by the CPS directly addressed the events in question, and none spoke to the question of whether Eleanor consented to sex and how Doe obtained her consent.

In essence, the prosecution relied wholly on a rape myth that had already been identified and repudiated in prior CPS guidance. Namely, that one can tell if a woman has "really been raped by how she acts."<sup>258</sup> The prosecution argued that a woman who had "really been raped" would not have sent the messages Eleanor sent after the encounter and would not have gone to a lingerie shop with Doe if he had really raped her.<sup>259</sup>

The notion that one can tell if a woman has been raped by how she acts has been discredited because sexual assault

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<sup>253</sup> de Freitas Memorial, *supra* note 40, at 5–6; de Freitas Libel Judgment, *supra* note 180, at [188].

<sup>254</sup> *Rape and Sexual Offences—Chapter 21: Societal Myths*, CPS, <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-21-societal-myths> [<https://perma.cc/NF73-RKPV>] [hereinafter CPS on Rape Myths].

<sup>255</sup> Saunders Letter to Wistrich, *supra* note 231.

<sup>256</sup> Case Summary, *supra* note 201, at [8.2].

<sup>257</sup> *Id.*; see also Attendance Note, *supra* note 218 (indicating that the prosecution proceeded on the basis of the original case summary).

<sup>258</sup> CPS on Rape Myths, *supra* note 254 (internal quotations omitted).

<sup>259</sup> Case Summary, *supra* note 201, at [4.1]–[5.9], [8.2].

victims react to sexual assault in a variety of ways, including by being unusually calm, by trying to normalize their relationship with the perpetrator, and by blaming themselves for the assault.<sup>260</sup> They also typically have confusing, fragmented, or incomplete memories of the assault as a result of the trauma they have experienced.<sup>261</sup> These factors are addressed more fully in the Sections below, in conjunction with the specific material relied on by the prosecution.

i. Text Messages: You Can Tell Whether a Woman Was Raped by What She Texts

The prosecution relied, in part on messages exchanged *prior* to the sexual encounter to demonstrate that Eleanor consented to events that took place *during* the encounter.<sup>262</sup> Such reliance is gravely misplaced. Messages exchanged prior to a sexual encounter cannot prove consent because a person has the right to withdraw consent before and even during a sexual encounter.<sup>263</sup> Nonetheless, the prosecution case summary offered pre-encounter messages such as Eleanor asking Doe what his “biggest fantasy” was, as evidence that she must have consented to sex that occurred later.<sup>264</sup>

Other messages, which Eleanor sent after the alleged rape but while she was still in Doe’s company, indicated that they had “had huge fun together,” and thanked a friend for playing matchmaker.<sup>265</sup> Still others, sent a few days later, indicated Eleanor’s distress, such as one which said “he fucked me and chucked me.”<sup>266</sup>

Arguing that these messages were inconsistent with Eleanor’s claim of rape betrays a lack of understanding about the realistic dynamics of sexual assault and ignores guidance around trauma and sexual assault. According to trauma experts,

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<sup>260</sup> JON KRAKAUER, MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN 254–55 (2015); *see generally* NAT’L DISTRICT ATT’YS ASS’N, *supra* note 132; Andrey K. Miller et al., *Self-Blame Among Sexual Assault Victims Prospectively Predicts Revictimization: A Perceived Sociolegal Context Model of Risk*, 29 BASIC & APPLIED SOCIAL PSYCHOL. 129 (2007); Hopper & Lisak, *supra* note 131.

<sup>261</sup> KRAKAUER, *supra* note 260, at 254–55; Hopper & Lisak, *supra* note 131.

<sup>262</sup> Case Summary, *supra* note 201, at [2.3]; Saunders Letter to Wistrich, *supra* note 231.

<sup>263</sup> Shelby F. Colb, *Withdrawing Consent During Intercourse: California’s Highest Court Clarifies the Definition of Rape*, FINDLAW (Jan. 15, 2003), <http://supreme.findlaw.com/legal-commentary/withdrawing-consent-during-intercourse.html> [<https://perma.cc/7S24-TE82>]; *What Consent Looks Like*, RAINN, <https://www.rainn.org/articles/what-is-consent> [<https://perma.cc/Z2H2-L4S2>].

<sup>264</sup> Case Summary, *supra* note 201, at [2.3].

<sup>265</sup> *Id.* at [4.3].

<sup>266</sup> *Id.* at [4.7].

in the early stages after a sexual assault, victims will often pretend that the assault did not happen and will try to normalize their relationship with the perpetrator as a way of trying to undo the assault.<sup>267</sup> One such expert is David Lisak, whose testimony about trauma, sexual assault, and related topics has been accepted by U.S. courts.<sup>268</sup>

Testifying at one rape trial, Lisak stated that “one of the first reactions for many people is to try and undo [the rape], to try to pretend like it didn’t happen.”<sup>269</sup> He also stated that it is common in the aftermath of a rape for a victim to have “quite extensive interaction with the person who’s alleged to have committed the assault as an attempt to try to undo it. . . . You know, if I interact with this person normally, then I can tell myself that . . . what I feared just happened to me didn’t really happen.”<sup>270</sup> That reasoning may explain why Eleanor’s statement that she had had fun with Doe, and her attempt to stay upbeat, are not inconsistent with a rape claim. As a further example, Lisak also indicated that it is not uncommon for a rape victim to give the perpetrator a ride home after a rape.<sup>271</sup> Eleanor’s shopping trip with Doe shortly after the alleged rape is very similar.

Lisak’s insights explain why some of Eleanor’s seemingly counter-intuitive, post-encounter behavior could be consistent with having been raped. The morning after the date, Eleanor texted an inquiring friend that she had had a good time with Doe.<sup>272</sup> Days later, she sent conciliatory messages, stating that she wanted to resolve things “in a mature adult fashion[,] but he refuses to” and that she did not understand “what I have done wrong.”<sup>273</sup> She may have been trying to minimize the experience and tell herself that nothing unpleasant had happened. Lisak has stated that it is not uncommon “for victims to go back and forth between feeling like something really bad happened to them, and being very confused, and even trying to deny that something bad happened . . . as a way of trying to essentially tell themselves that, no, something bad didn’t really happen to

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<sup>267</sup> KRAKAUER, *supra* note 260, at 254–55.

<sup>268</sup> *Forensic Consultant*, DAVID LISAK PHD, <http://www.davidlisak.com/services/forensic-consultant/> [<https://perma.cc/R8MU-596L>] (David Lisak has been qualified as an expert in U.S. state, federal, and military courts. He has provided consultation and testimony on the behavior & characteristics of rapists, as well as related topics. He has also provided training on these topics in all fifty states.).

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* (omission in original) (internal quotations omitted).

<sup>271</sup> *Id.* at 255.

<sup>272</sup> Case Summary, *supra* note 201, at [4.3].

<sup>273</sup> *Id.* at [4.8], [5.2].

me.”<sup>274</sup> This point helps to explain why Eleanor’s post-encounter messages, which reflected a mix of emotions, from joy, to distress, to a desire for reconciliation, do not rule out the possibility that she was raped.

Lisak’s work also clarifies that it is not unusual for a rape victim to engage in self-blame, and that self-blame is therefore not inconsistent with having been raped. According to Lisak, acquaintance rape is more difficult to recover from than stranger rape because an assault by someone who is known and trusted suddenly makes the world “a very, very terrifying and unpredictable place.”<sup>275</sup> Self-blame is a strategy for regaining control: it is “much easier and feels better than living in fear.”<sup>276</sup> Accordingly, statements such as “I don’t understand what I have done wrong” should not be construed as proof that a rape did not occur.

CPS guidance draws on principles similar to those offered by Lisak. Specifically, it instructs officials to avoid making assumptions about a victim based on her post-assault behavior, and it rejects the notion that it is possible to tell if a woman has really been raped by how she acts afterwards.<sup>277</sup> Eleanor’s prosecutors appear to have ignored this guidance.

It is disturbing that the prosecution overlooked the fact that none of the messages they relied on spoke to the questions at the heart of this case—whether Eleanor consented to each instance of sex, and whether Doe believed he had Eleanor’s consent. The policy implications of allowing communications such as these to be used as evidence against rape victims are enormous. Relying on communications sent before a sexual encounter conveys to victims that they have no right to withdraw consent and that their feelings at the time of sex do not matter. This approach tells potential rapists that once armed with a text message from a victim seemingly granting consent, they can do anything they want. Relying on communications sent afterwards tells victims that their post-assault behavior will be closely scrutinized for any type of inconsistency that can be construed against their rape claim. The only victim likely to survive this gauntlet is the one who severs all ties to her perpetrator at the moment of rape, but this is simply not how most victims behave.

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<sup>274</sup> KRAKAUER, *supra* note 260, at 254 (omission in original) (internal quotations omitted).

<sup>275</sup> *Id.* at 255 (internal quotations omitted).

<sup>276</sup> *Id.* (internal quotations omitted).

<sup>277</sup> CPS on Rape Myths, *supra* note 254 (pointing out that reactions to rape are “highly varied and individual” and that “many women experience a form of shock after a rape that leaves them emotionally numb or flat—and apparently calm”).

ii. CCTV Footage: You Can Tell Whether a Woman Was Raped by How She Shops

The CPS also planned to rely on closed-circuit television (CCTV) footage showing Eleanor and John Doe making purchases at a lingerie shop on the morning after the alleged assault. The footage is from the store's security cameras, but it was obtained and edited by Doe.<sup>278</sup> It should be apparent that this sort of CCTV footage would be an unsuitable basis for labeling a report of sexual assault as false, because it cannot possibly convey to the viewer whether the parties consented to sexual activities that occurred several hours previously. Nor can it shed light on the question of how many instances of sex occurred.

Nevertheless, Doe thought that the footage was “prima facie evidence of the falsity of [Eleanor’s] allegation,” presumably because he believed that her willingness to go to a lingerie shop with him after their date proved that she was not raped.<sup>279</sup> This is an argument that even Saunders did not accept: “The 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.”<sup>280</sup> Such footage cannot possibly indicate whether Eleanor consented to sex several hours previously because her consent to sex is not the subject of the footage. Under the IACP Guidelines, this footage cannot be construed in any way that supports the conclusion that no crime was committed or attempted against Eleanor.

C. *The CPS Failed to Scrutinize the Alleged Perpetrator and His Potential Motives*

According to the PCJ Policy, “[p]rosecutors should ensure that they have all the information about the background of the suspect *and the person against whom the allegation was originally made*. They should ensure that the police have conducted appropriate enquiries to obtain this information.”<sup>281</sup> This guidance is particularly important because many rapists are repeat offenders, so it is crucial for investigators to explore behavioral patterns associated with repeat offending.<sup>282</sup> Rapists

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<sup>278</sup> Case Summary, *supra* note 201, at [4.4], [8.2].

<sup>279</sup> *Id.*

<sup>280</sup> Letter from Alison Saunders, Dir. of Pub. Prosecutions, Crown Prosecution Serv., to Mr. & Mrs. De Freitas 4 (Dec. 3, 2014) (on file with author).

<sup>281</sup> PCJ Policy, *supra* note 65, at ¶ 9 (emphasis added).

<sup>282</sup> See generally LONSWAY, DYNAMICS, *supra* note 132; David Lisak & Paul Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73 (2002), <http://www.davidlisak.com/wp-content/uploads/pdf/RepeatRapein>

are statistically likely to have committed both previous rapes *and* other acts of violence, so a thorough investigation “of the accused’s social networks might well uncover additional crimes.”<sup>283</sup> Neither the PCJ Policy nor the CPS Policy on Prosecuting Rape provides more detailed guidance on what it means to fully investigate the background of the perpetrator of the alleged rape.<sup>284</sup> The IACP *does* provide detailed guidance on investigating and interviewing rape suspects, although there is no evidence that the CPS uses IACP resources.<sup>285</sup>

In this case, the CPS charged Eleanor without collecting and considering all relevant information about the man she accused of rape. Investigators should have considered the broader pattern of behavior that Doe allegedly engaged in with Eleanor, allegations communicated to them regarding other possible victims, and Doe’s Facebook communications.

Eleanor, in her police interview, attributed to Doe certain behaviors that may have been consistent with behaviors identified by experts as being associated with “undetected rapists.”<sup>286</sup> According to psychologist and sexual assault expert David Lisak, the majority of rapists are never apprehended and never serve time for their crimes in large part because most police have not learned to recognize the patterns of behavior associated with acquaintance rape.<sup>287</sup> Lisak uses the term “undetected rapists” to describe individuals whose actions meet the statutory definition of rape, but who do not understand their actions to be rape.<sup>288</sup> This is because they share society’s perception that rapists are “knife-wielding men in ski masks”

UndetectedRapists.pdf [https://perma.cc/X2PA-53XG]; Atassi, *supra* note 118; Amanda Marcotte, *Rape Victims Are Common. Rapists Are Not.*, SLATE (May 1, 2014), [http://www.slate.com/blogs/xx\\_factor/2017/08/25/anti\\_choice\\_activists\\_are\\_using\\_down\\_syndrome\\_parents\\_to\\_argue\\_against\\_abortion.html](http://www.slate.com/blogs/xx_factor/2017/08/25/anti_choice_activists_are_using_down_syndrome_parents_to_argue_against_abortion.html) [https://perma.cc/D4NQ-DHYW]; Stephanie Saul, *When Campus Rapists Are Repeat Offenders*, N.Y. TIMES (Jan. 24, 2017), <https://www.nytimes.com/2017/01/24/us/when-campus-rapists-are-repeat-offenders.html?mcubz=0> [https://perma.cc/ZQ3J-W3NN].

<sup>283</sup> Lisak & Miller, *supra* note 282, at 81.

<sup>284</sup> See *CPS Policy for Prosecuting Cases of Rape*, CPS, <https://www.cps.gov.uk/publication/cps-policy-prosecuting-cases-rape> [https://perma.cc/HHD3-K3T9] (last updated Sept. 2012).

<sup>285</sup> IACP GUIDELINES, *supra* note 93, at 11–12; INT’L ASS’N OF CHIEFS OF POLICE, INVESTIGATING SEXUAL ASSAULTS MODEL POLICY 7 (2005), <http://www.evawintl.org/library/DocumentLibraryHandler.ashx?id=93> [https://perma.cc/MRV3-HSFF].

<sup>286</sup> See Lisak, *supra* note 84, at 56.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 50, 56; see also PATRICIA TJADEN & NANCY THOENNES, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN (2000), <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf> [https://perma.cc/DZH3-BHKG]; Maru P. Koss et al., *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 J. CONSULTING & CLINICAL PSYCHOL. 162, 169 (1987).

who attack strangers, whereas their own behavior is directed at acquaintances who rarely report them.<sup>289</sup> One American rape survey found that 7.7 percent of college men engaged in behaviors “that met the legal definition of rape,” although none of these men had been identified as rapists by the criminal justice system.<sup>290</sup> A study of incarcerated rapists found that many viewed their actions as congruent with consensual sexual activity even though they used physical force and injured their victims.<sup>291</sup> Both of these studies support the notion that some men do not accurately understand the degree of force and coerciveness involved in certain sexual encounters, and they do not correctly interpret a woman’s nonconsent and resistance to their advances.<sup>292</sup> The unwillingness of such men to see their actions as rape could explain why a perpetrator in an acquaintance rape situation might vigorously assert his innocence even when his actions meet the legal definition of rape.

According to Lisak, undetected rapists routinely engage in five behaviors that enable them to avoid detection. Undetected rapists (1) “[a]re extremely adept at identifying ‘likely’ victims and testing [their] boundaries;” (2) “[p]lan and premeditate their attacks, using sophisticated strategies to groom their victims . . . and to isolate them physically;” (3) “[u]se ‘instrumental’ [and] not gratuitous violence;” in other words, they “use only as much violence as is needed to . . . coerce their victims into submission;” (4) “[u]se psychological weapons—power, control, manipulation and threats—backed up by . . . force, and almost never resort to weapons such as knives or guns;” and (5) “[u]se alcohol deliberately to render victims more vulnerable to attack, or completely unconscious.”<sup>293</sup>

Although CPS materials do not provide detailed guidance on investigating the background of individuals accused of rape, Lisak’s work points to the types of behaviors that investigators should consider in probing suspects’ backgrounds.<sup>294</sup>

Whether or not the CPS was familiar with Lisak’s work, they had reason to be aware of the behaviors of undetected rapists because of the 2008 case of cab driver John Worboys.<sup>295</sup> Worboys engaged in all of the behaviors that Lisak described. He selected likely victims by offering rides to young women who had

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<sup>289</sup> Lisak, *supra* note 84, at 56.

<sup>290</sup> Koss et al., *supra* note 288, at 169.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> Lisak, *supra* note 84, at 56.

<sup>294</sup> DAVID LISAK PHD, *supra* note 268.

<sup>295</sup> DSD Judgment, *supra* note 49, at 10–11.

been out drinking on weekend nights.<sup>296</sup> He then isolated them in the back of his cab and elicited their cooperation with a carefully prepared story—that he had just won the lottery and wanted them to celebrate with him by accepting an alcoholic drink from him.<sup>297</sup> He typically avoided overt violence but used psychological manipulation—many victims said they felt it would be impolite to turn down the drink.<sup>298</sup> Worboys added a date rape drug to the drink, rendering his victims unconscious and with little memory of what occurred.<sup>299</sup>

In her police interview, Eleanor described behaviors that fit each of the categories identified by Lisak. Lisak's first point pertains to identifying likely victims and testing their boundaries. According to Eleanor's report, Doe stated that he would only retrieve her phone from the car if he could tie her up first.<sup>300</sup> This statement may have been designed to test Eleanor's boundaries since most women would likely refuse to accept this condition. Doe's pre-encounter Facebook messages to Eleanor mentioning restraints and asphyxiation could also be viewed as a means of testing Eleanor's boundaries.<sup>301</sup> Some women would be put off by these suggestions and innuendos; the fact that Eleanor did not reject them may have been an indication to Doe that she would be easy to take advantage of. After Eleanor's death, a former friend of Doe's submitted a statement to the court alleging that he warned Doe to stay away from Eleanor because of her mental ill health which, in the friend's opinion, rendered Eleanor vulnerable.<sup>302</sup>

Lisak's second point pertains to perpetrators' use of sophisticated strategies to groom their victims and isolate them physically. This point gives significance to several otherwise innocuous behaviors that Eleanor described in her police interview. Doe's persuading Eleanor to come to his flat on the first date meant that their encounter would occur in his private space; Eleanor also told police that he made joking comments about how his neighbors were all away for the holidays so that if she screamed, no one would hear her.<sup>303</sup> She also told police

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<sup>296</sup> *Id.* at 15.

<sup>297</sup> *Id.* at 16–17.

<sup>298</sup> *Id.* at 17.

<sup>299</sup> *Id.* at 16–17.

<sup>300</sup> de Freitas Police Interview, *supra* note 173, at 6. In his private prosecution case summary, Doe admitted that he did indeed tie Eleanor up as a condition for retrieving her phone, although the phone was never retrieved. Case Summary, *supra* note 201, at [3.2]–[8.2].

<sup>301</sup> Forensic Phone Report of [John Doe's] Phone, Exhibit Ref. LJ/13005-04/1, p. 371–72 (on file with author).

<sup>302</sup> Gosden-Hood Witness Statement, *supra* note 181, at ¶¶ 4, 7–8.

<sup>303</sup> de Freitas Police Interview, *supra* note 173, at 5.

that upon her arrival, Doe placed all of the Christmas gifts she had just purchased in another room, making it difficult for her to leave abruptly.<sup>304</sup> This action could be interpreted as a deliberate, additional step toward physical isolation; indeed Eleanor's police interview captured the fact that she was puzzled by Doe's insistence on moving the gifts out of the living room and into the bedroom.<sup>305</sup>

Lisak's third and fourth points pertain to the use of instrumental violence and psychological weapons rather than gratuitous violence and force. According to Eleanor's police interview, Doe did not use explicit force or weapons, but she did describe behaviors that could be viewed as psychologically manipulative. Eleanor told police that he engaged in angry outbursts, prevented her from retrieving her phone, and refused to collect it himself even after tying her up.<sup>306</sup> Eleanor also recalled pressure to take pills, coupled with a refusal to show her the bottle. After the alleged strangling and waterboarding which Eleanor reported, she said she was so "frozen with fear" that she did not resist when Doe then had sex with her.<sup>307</sup>

Lisak's fifth point pertains to the use of substances to render victims more vulnerable to attack or completely unconscious. Eleanor told police that despite the fact that she was on psychiatric medication and made a habit of refraining from alcohol, Doe pressured her to drink and to take the alleged Vitamin C tablets. She also stated that she stayed the night at Doe's apartment only after intense pressure from him to do so. She further stated the Doe knew her psychiatric medication would render her deeply unconscious: "I did tell him that once I take this medication . . . I'm no good to anyone really. It's very sedative."<sup>308</sup>

There was additional evidence pertaining to the man Eleanor accused which was not fully explored by the CPS. Eleanor informed police that Doe had allegedly behaved in a sexually inappropriate manner in relation to another young woman.<sup>309</sup> An acquaintance of Doe's—who was also the brother of that young woman—mentioned that incident in a witness statement that he submitted to court, having learned of the

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<sup>304</sup> *Id.* at 23.

<sup>305</sup> *Id.* ("Immediately when we came back from Harrods he put all my bags in his bedroom . . . all my shopping bags and I was a bit like 'why did you put them in your bedroom . . . why don't you just put them . . .'").

<sup>306</sup> *Id.* at 3–4, 8.

<sup>307</sup> *Id.* at 7.

<sup>308</sup> *Id.* at 35.

<sup>309</sup> de Freitas Memorial, *supra* note 40, at 17.

incident directly from his sister.<sup>310</sup> In his witness statement, he also alleged that he had seen Doe behave inappropriately toward a third young woman.<sup>311</sup> There is no evidence that the CPS made any attempt to locate and interview either woman or Doe's acquaintance. According to the acquaintance's witness statement, like Eleanor, both of these women were significantly younger than Doe at the time of these incidents. The women were nineteen and seventeen respectively, while Doe was around age thirty.<sup>312</sup>

Also available to the CPS, but ignored by them, were a series of communications from Doe that should have suggested a need for further investigation and questioning regarding his views on women and consent. His Facebook posts and texts prior to the encounter with Eleanor included remarks such as:

- “Maybe slip a little surprise in those cocktails.”
- “[G]irls would probably do anything under the influence of alcohol.”
- “I find the best way to seduce a womans [sic] mind is to ply her with booze all night, accidentally distract her from the time so she misses her last train.”
- “I admit that sometimes (at drinks parties) I might make a few gestures whilst talking and then accidentally brush my arm past a girls nip . . . I might do it three times . . . If the arm does the brushing then you can totally get away with it, but never the hand. Nonono [sic].”<sup>313</sup>

The above information was relevant to Eleanor's complaint and should have been fully examined as part of a thorough investigation, but apparently it was not.

#### D. *Analysis of the de Freitas Prosecution*

The facts of the de Freitas case are very compelling and are sure to attract the attention of scholars, law enforcement professionals, activists, students, and others for years to come. This analysis reveals several systemic weaknesses that led to the

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<sup>310</sup> Email from Sebastian Noel Cavendish Gosden-Hood to Harriet Wistrich (Nov. 18, 2014, 4:38 PM) [hereinafter Gosden-Hood Email to Wistrich] (on file with author).

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> de Freitas Memorial, *supra* note 40, at 4–5; *see also* de Freitas Libel Judgment, *supra* note 180, at [176]. Police obtained access to Doe's Facebook account in January 2013 when they were investigating him for rape. Interview with John Doe, *supra* note 209.

prosecution of a vulnerable rape complainant. These weaknesses included (1) a PCJ Policy which was discriminatory; (2) rape investigation practices that deviated from best practice; (3) a lack of understanding about the role that coercion plays in sexual assault; and (4) the absence of a multidisciplinary review process which would serve as a check on the actions of any one agency.

### 1. Discrimination

The nature of the PCJ Policy is discriminatory. It singles out for prosecution rape and domestic violence complainants suspected of making false allegations while not providing guidance on prosecuting those suspected of making false allegations of any other crime. This is discriminatory toward this class of crime victims in two different respects. First, because the vast majority of complainants for these crimes are women, the PCJ Policy discriminates on the basis of sex.

Second, the very existence of the policy sends the message that the CPS places a *priority* on identifying and prosecuting false allegations in relation to *these particular crimes*. Although the CPS provides legal guidance on a range of different topics, it only provides guidance on charging “perverting the course of justice” offenses with respect to false allegations of rape and domestic violence, and not with respect to any other type of false complaint.<sup>314</sup> This policy emphasis puts officers and prosecutors on notice that they should actively look for suspected false allegations of rape and domestic violence and prosecute them. Because rape myths and stereotypes remain very entrenched, the policy reinforces these myths and actively reinforces the skeptical approach that police and prosecutors so often take towards victims of such crimes.

This message accordingly fuels the culture of suspicion toward those who report rape and domestic violence. So long as a policy flags certain types of complaints as potentially being false, those reporting such crimes face a risk of prosecution, and this risk disproportionately falls on female victims. Once that suspicion is fueled, it is easy for officials to quickly press ahead with a prosecution without due regard for some of the questions raised in the policy that are designed to safeguard victims of sexual assault.

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<sup>314</sup> PCJ Policy, *supra* note 65; see *Prosecution Guidance*, CPS, <https://www.cps.gov.uk/prosecution-guidance> [<https://perma.cc/X9TV-FXDM>].

## 2. Deviating From Rape Investigation Best Practice

This overzealous pursuit of a rape complainant is what appears to have occurred in Eleanor's case, where the prosecution moved forward in contravention of rape investigation best practice standards in several respects. First, Eleanor was prosecuted despite the fact that she had not made a clear and unambiguous complaint of rape. It is difficult to see any logic in prosecuting someone who described whether she consented not in black and white terms but in shades of grey, and who told police that she was concerned that she may have been raped while she slept.

Second, Eleanor was prosecuted despite the IACP's guidance that a rape complaint should not be labeled false unless evidence proves that no crime was committed or attempted. As the police correctly pointed out, there was no evidence proving that Eleanor had lied and that no crime had been committed against her.<sup>315</sup> Specifically, there was no proof that Eleanor consented to each instance of sex at the time it took place. Prosecutors pursued a case against her despite this fact.

Third, Eleanor was prosecuted despite the fact that there was a clear possibility that her complaint was true. In particular, she could only remember one instance of sex while Doe admitted to performing four sex acts during their time together. These facts clearly raise concerns about whether she was capable of consenting to each of these sex acts, but prosecutors disregarded this key consideration.

Fourth, Eleanor faced prosecution in part because in Britain there is no clear standard for what constitutes a false report, as there is under the IACP Guidelines. Similarly, the CPS approach to this case was also deficient for its failure to structure the inquiry around the crucial question of Eleanor's consent and how Doe obtained it, if at all. In bringing a case against Eleanor, the CPS relied on after-the-fact communications that provided no information about whether and how Eleanor consented to sex, despite Saunders' admission that asking these questions about consent *should* be the core inquiry in any rape or PCJ investigation.

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<sup>315</sup> de Freitas Libel Judgment, *supra* note 180, at [46], [106[6]]; Sandra Laville, *Call for Prosecutors to Answer for Trial of Alleged Rape Victim Who Killed Herself*, GUARDIAN (U.K.) (Nov. 6, 2014), <https://www.theguardian.com/law/2014/nov/06/call-crown-prosecutors-account-suicide-alleged-rape-victim> [<https://perma.cc/28QP-EUFQ>].

### 3. Consent, Coercion, and Vulnerability: What Officials Can Learn

Eleanor was failed by prosecutors who lacked understanding of the role that coercion and vulnerability play in sexual assault. Some scholars have argued that coercion, rather than consent, should be the standard for judging whether a sex act is lawful. Specifically, Professor Catharine MacKinnon has argued that the consent standard is too broad and is meaningless in situations where “acquiescence is the only realistic option.”<sup>316</sup> She has argued that domestic law should adopt same approach to rape that is used in international law, which relies on the concept of *coercion* rather than consent.<sup>317</sup> 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.”<sup>318</sup>

Betsy Stanko has similarly argued that the concept of exploitation is critical to understanding how rape happens, and that a recognition of this exploitation must be at the heart of reform efforts.<sup>319</sup> She has argued that anything less is “tinkering around the edges.”<sup>320</sup> Lisak’s work on undetected rapists gets at the same concept—that rapists exploit victims’ vulnerability and they use calculated, nonviolent strategies, such as physical isolation, alcohol, and drugs, to coerce their victims into sex.<sup>321</sup>

In her police interview, Eleanor described many coercive dynamics that would have stood out to an experienced sex crimes investigator or prosecutor. She described being incapacitated, she had significant memory difficulties, and she reported that the accused had tied her up, frightened her, refused to retrieve her phone, placed his own phone on airplane mode, told her the neighbors were away, and placed her packages in another room so that she could not easily leave. In her own words she explained how successful these strategies were—she was too frightened to say no or resist the sex. She thought, “this is horrific but if I’d just let him do this then maybe I might be able to go home.”<sup>322</sup>

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<sup>316</sup> MacKinnon, *supra* note 113, at 463.

<sup>317</sup> *Id.* at 469–70 (internal quotations omitted).

<sup>318</sup> *Id.* at 470 (quoting Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 598 (Int’l Crim. Trib. for Rwanda Sept. 2, 1998)).

<sup>319</sup> Melanie Newman, *Revealed: Why the Police Are Failing Most Rape Victims*, BUREAU OF INVESTIGATIVE JOURNALISM (Feb. 28, 2014), <https://www.thebureauinvestigates.com/2014/02/28/revealed-why-the-police-are-failing-most-rape-victims/> [<https://perma.cc/JL6H-F8G6>].

<sup>320</sup> *Id.*

<sup>321</sup> See Lisak, *supra* note 84, at 56.

<sup>322</sup> de Freitas Police Interview, *supra* note 173, at 35.

In the same way that the CPS did not fully explore and weigh the evidence contained in these statements before proceeding against Eleanor, they missed the coercive dynamics present in the examples taken from the CPS study of PCJ charging decisions. For instance, the intoxicated woman at the hostel reported a coercive experience—she was pressured into performing sex acts with two men she had never met.<sup>323</sup> Consent is not a particularly meaningful concept when the circumstances effectively rob a woman of any meaningful choice in the matter. The same is true in the case of the fifteen-year-old girl whose adult “partner” had beaten her and pressured her for sex until she gave in.<sup>324</sup> These examples provide evidence of a systemic pattern within the CPS of considering charges against rape complainants in situations where there is no evidence that the complaint is false.<sup>325</sup> In these cases, it defies logic to suggest that the complaints were false when a woman acquiesced to sex that she believed she could not avoid. Accordingly, the concept of coercion offers investigators a more comprehensive way to understand acquaintance rape dynamics.

#### 4. Multidisciplinary Review Panel

The circumstances of the de Freitas case also demonstrate the importance of EVAWI’s recommendation to establish multidisciplinary review panels to scrutinize the handling of sexual assault complaints. Elsewhere I have argued that one agency—the CPS—may have pursued Eleanor for political reasons.<sup>326</sup> Around the time of her rape complaint, the CPS had faced public criticism for taking forward several rape prosecutions against prominent figures who were ultimately acquitted.<sup>327</sup> The decision to prosecute Eleanor may have been a

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<sup>323</sup> CPS STUDY, *supra* note 99, at 23–24.

<sup>324</sup> *Id.* at 34–38.

<sup>325</sup> EVAWI TRAINING BULLETIN, *supra* note 98, at 1–3.

<sup>326</sup> Avalos, *supra* note 88, at 501–02.

<sup>327</sup> Nigel Bunyan, *Michael Le Vell Acquitted of Child Sex Offences*, GUARDIAN (U.K.) (Sept. 10, 2013), <https://www.theguardian.com/uk-news/2013/sep/10/michael-le-vell-acquitted-child-abuse> [<https://perma.cc/2DNP-GL5N>]; Josh Halliday & Helen Pidd, *Nigel Evans Cleared of Raping University Student and All Other Charges*, GUARDIAN (U.K.) (Apr. 10, 2014), <https://www.theguardian.com/uk-news/2014/apr/10/nigel-evans-cleared-rape-university-student> [<https://perma.cc/LV62-KRE6>]; Hugh Muir, *William Roache Is Not Guilty. Should He Even Have Been Prosecuted?*, GUARDIAN (U.K.) (Feb. 7, 2014), <https://www.theguardian.com/commentisfree/2014/feb/07/william-roache-not-guilty-prosecuted> [<https://perma.cc/Y79F-BCVN>]; Helen Pidd, *Coronation Street Actor William Roache Acquitted of Rape and Assault Charges*, GUARDIAN (U.K.) (Feb. 6, 2014), <https://www.theguardian.com/uk-news/2014/feb/06/coronation-street-actor-william-roache-acquitted> [<https://perma.cc/9JM3-39NL>] [hereinafter *Coronation Street Actor William Roache Acquitted of Rape*].

symbolic response to critics, designed to convey the message that the CPS was willing to prosecute not just rape, but also suspected false allegations of rape.

A multidisciplinary review panel ensures careful review of how rape complaints are handled and can ensure that victims receive the highest standards of care as agencies and stakeholders work together to address concerns from multiple perspectives.<sup>328</sup> In Eleanor's case, just two agencies were involved—the police and the CPS—and the police strongly opposed the decision to prosecute her.<sup>329</sup> Rather than work to resolve the police's concerns, CPS lawyers went over the heads of the police officers involved and appealed to an assistant police commissioner to force the officers to cooperate.<sup>330</sup> It is a striking feature of Eleanor's case that the prosecution decision was made at a high level, over the objections of the officers who dealt with her directly. The fact that Eleanor was prosecuted, as this article has demonstrated, in contravention of the CPS's own policy, as well as in contravention of the IACP Guidelines, provides support for the theory that she was prosecuted because of CPS's reputational concerns rather than the merits of the case. Although it may not ever be possible to conclusively establish this motive, the timing and circumstances of what occurred demonstrate why it is critical to have multiple agencies and stakeholders involved in these decisions. Multiple agencies can scrutinize a decision from all angles and provide a way for agencies to place checks on one another and keep the focus on victim care.

When an agency makes a wrong prosecution decision, it is extremely difficult for those involved to admit the error. No agency wants the sort of reputational hit that would result if the public learned that they had prosecuted a potentially genuine rape victim for false reporting. These high stakes put sexual assault victims at even greater risk, because an agency's temptation to buckle down against the victim rather than admit error would be significant, particularly where victims do not

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<sup>328</sup> *Rape in the United States Hearing*, *supra* note 15, at 12 (statement of Carol E. Tracy, Executive Director, Women's Law Project); HUMAN RIGHTS WATCH, IMPROVING POLICE RESPONSE TO SEXUAL ASSAULT 32–34 (2013), [https://www.hrw.org/sites/default/files/reports/improvingSAInvest\\_0.pdf](https://www.hrw.org/sites/default/files/reports/improvingSAInvest_0.pdf) [<https://perma.cc/KT4Q-MWR2>]; Avalos, *supra* note 32, at 63–64; Lonsway et al., *supra* note 55, at 8; *DC Council Passes Landmark Sexual Assault Reforms*, COLLECTIVE ACTION FOR SAFE SPACES (Apr. 8, 2014), <http://www.collectiveactiondc.org/about/in-the-news/press-releases/dc-council-passes-landmark-sexual-assault-reforms/> [<https://perma.cc/Z5HL-SUSN>].

<sup>329</sup> Sandra Laille, *Eleanor de Freitas Should Never Have Been Charged, Police Say*, GUARDIAN (U.K.) (Dec. 9, 2014), <https://www.theguardian.com/uk-news/2014/dec/09/police-eleanor-de-freitas-rape-complaint-perverting-course-justice> [<https://perma.cc/C6UQ-GZVA>].

<sup>330</sup> *Id.*

have the power or resources to challenge the decision to prosecute. Given the high stakes behind getting a decision wrong and the temptation to conceal the error, victims can be better protected by discouraging such prosecutions altogether.

#### IV. RECOMMENDATIONS

In order to stop unwarranted prosecutions of rape victims, several changes are in order, particularly at the legislative level.

##### A. *Legislation to Strengthen Rape Investigation Practices*

First, it is not enough to issue rape investigation guidelines and expect police and prosecutors to follow them. The chronic, persistent, and widespread failures to take rape complainants seriously demonstrates that leaving the impetus to change the system in the hands of officers and prosecutors on the ground is not the answer. Rather, we need laws that mandate robust rape investigation protocols that police must follow or face disciplinary action. Illinois just passed such a law.<sup>331</sup> It is designed to improve the police response to sex crimes in Illinois by requiring police to write a report on each and every rape complaint that they receive; it also requires all law enforcement officers to “receive evidence-based, trauma-informed” sexual assault training by January 1, 2020.<sup>332</sup> The new law makes additional training resources available to officers, including the IACP Guidelines and EVAWI’s Online Training Institute.<sup>333</sup>

Professor Corey Yung has drafted model federal and state legislation which would, if adopted, require police to fully investigate each rape or sexual assault complaint before determining that any such complaint is unfounded.<sup>334</sup> His proposal would also require appropriate discipline for police officers who fail to undertake adequate investigations, including

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<sup>331</sup> See Sexual Assault Incident Procedure Act, Pub. Act 099-0801, Ill. Gen. Assemb. 99th (2017), <http://www.ilga.gov/legislation/publicacts/99/PDF/099-0801.pdf> [<https://perma.cc/B2YZ-TS5S>].

<sup>332</sup> *Improving Response to Sexual Assault Crimes in Illinois*, ILL. ATT’Y GENERAL, [http://www.illinoisattorneygeneral.gov/victims/improvingresponsetosa\\_il.html](http://www.illinoisattorneygeneral.gov/victims/improvingresponsetosa_il.html) [<https://perma.cc/2T2Z-WSZS>]; *Sexual Assault Incident Procedure Bulletin for Law Enforcement—Public Act 099-0801*, ILL. ATT’Y GENERAL (Dec. 22, 2016), [http://illinoisattorneygeneral.gov/victims/The\\_Sexual\\_Assault\\_Incident\\_Procedure\\_Bulletin\\_For\\_Law\\_Enforcement.pdf](http://illinoisattorneygeneral.gov/victims/The_Sexual_Assault_Incident_Procedure_Bulletin_For_Law_Enforcement.pdf) [<https://perma.cc/X3CU-Z6KM>].

<sup>333</sup> *Improving Response to Sexual Assault Crimes in Illinois*, *supra* note 332.

<sup>334</sup> Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B. C. L. REV. 205, 255 (2017).

termination for officers who habitually fail to fully investigate such complaints.<sup>335</sup> This approach should be widely adopted.

*B. Legislation Shielding Rape Complainants from Prosecution*

Second, legislative efforts must extend even further, to curbing and even eliminating the prosecution of rape complainants. Rape victims need protections, along the lines of rape shield laws, that ensure that they will not be prosecuted when they come forward to report rape and are disbelieved. Such legislation should prohibit the prosecution of rape victims and likely rape victims for suspected false reports. It can do this by mandating that certain stringent criteria—as specified by the IACP Guidelines—must be met in order for any such prosecution to go forward. The law should require that prosecutors must have *dispositive proof* that no crime was committed or attempted and accordingly, that the complainant is not a victim of sexual assault.

These legislative efforts would ensure that false reporting prosecutions could only go forward in the case of actual, demonstrably false reports, and not in cases of *suspected* false reports. Such legislation would ensure that police and prosecutors meet the burden of proving a report is false based on evidence and not as a result of speculation or skepticism. All legislative efforts and accompanying protocols must emphasize that the priority in every instance must be to investigate and prosecute *rape*.

Legislation should further specify that prior to bringing any charges against a rape complainant, the case must be examined by a multidisciplinary external review panel comprised of stakeholders from a range of agencies, including rape crisis organizations, victim support organizations, and others with sophisticated training in sexual assault response. Such panels are recommended as best practice by leading organizations.<sup>336</sup> They can subject evidence in each case to an independent examination, and their approval would be necessary before charges could be brought against a rape complainant. These panels should also be tasked with considering the impact on the broader community of bringing such charges against a proven false reporter, in light of the evidence that indicates that any such prosecution could have a

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<sup>335</sup> *Id.*

<sup>336</sup> HUMAN RIGHTS WATCH, *supra* note 328, at 16–18; Lonsway et al., *supra* note 55, at 9.

chilling effect on rape reporting rates. Such panels help to safeguard victims because they provide a mechanism for slowing down the decision to prosecute a rape complainant and probing all of the evidence in the case. This type of review can help to eliminate the risk of a charging decision being made for improper reasons such as professional advancement or a personal dislike of a complainant.

Finally, legislation should make it clear to all of the actors involved that false reporting prosecutions should be extraordinary, taking place only in the rarest of circumstances—because false reports of rape are extremely rare, because rape is a vastly under-reported crime, and because rape investigations remain woefully deficient in many jurisdictions.

### *C. Legislation Mandating Improved Data Collection*

A third reform lies in the area of data collection. Governments in both the United States and Britain should mandate that data be collected across all jurisdictions on the number of sexual assault complainants charged with false reporting. Currently most police departments compile data on the number of individuals charged with false reporting *generally*, but jurisdictions do not typically break this data down according to the type of crime that the complainant initially reported. By mandating that this data be collected, nongovernmental organizations and other observers will be able to easily track how frequently sexual assault complainants are charged with false reporting in each jurisdiction. This change will allow trends to be scrutinized more easily and will make it easier to identify jurisdictions with a disproportionately large number of such cases.

### *D. Recommendations for Britain*

Two additional recommendations are specific to the British situation. First, Britain should stop prosecuting disbelieved rape complainants and reorient their official guidance in the direction of fully investigating rape complaints. Britain appears to be the only jurisdiction in the West with a policy that encourages police and prosecutors to charge disbelieved rape complainants with false reporting. This practice is at odds with the direction suggested by the most sophisticated organizations working in the field of sexual violence. There is a wealth of high quality, carefully considered guidance on rape investigation best practices that has been developed by EVAWI and the IACP. These materials are

available worldwide, free of charge, and are designed to strengthen the investigatory response to rape complaints.

Both organizations' guidance on handling suspected false reports of sexual assault emphasizes that unwarranted officer skepticism is a frequent stumbling block in rape investigation, and that the solution to this problem is strengthening rape investigation procedures. Notably, these organizations do not recommend the prosecution of individuals suspected of making false rape allegations. This is because in a context where rape is so under-reported and under-prosecuted, the priority must be on building stronger prosecution cases against rapists, not on targeting suspected false reporters.

American jurisdictions are increasingly relying on EVAWI and IACP guidance as they strengthen rape investigation policies. The Missoula, Montana Police Department adopted the IACP Guidelines after the U.S. Department of Justice investigated rape-investigation failures in Missoula.<sup>337</sup> Illinois has made resources from EVAWI and the IACP available on the state Attorney General's website in conjunction with the new Illinois law strengthening rape investigation.<sup>338</sup> The influence of EVAWI and the IACP is also evident in several other American jurisdictions that have focused on improving their approach to rape investigation.<sup>339</sup>

None of these jurisdictions have issued policy guidance that involve targeting rape complainants for false reporting. To the contrary, these jurisdictions are adopting approaches that directly confront police skepticism of rape victims. This typically includes implementing policies and procedures designed to help police set skepticism aside long enough to do a full evidence-based, trauma-informed investigation of each reported sexual assault so that more perpetrators can be brought to justice. It should be evident that when rooting out and prosecuting suspected false reporters is the priority, then there is no opportunity for a stronger, evidence-based, trauma-informed approach to take hold. A focus on prosecuting suspected false reporters is not compatible with genuinely improving rape investigation practices.

Second, Britain should also ban the use of private prosecutions in cases where an individual accused of rape wants to prosecute his accuser. Allowing such prosecutions is poor public

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<sup>337</sup> Engen Letter, *supra* note 17.

<sup>338</sup> *Improving Response to Sexual Assault Crimes in Illinois*, *supra* note 332.

<sup>339</sup> For a discussion of some of these jurisdictions, including Austin, Texas, Kansas City, Missouri, and others, see generally HUMAN RIGHTS WATCH, *supra* note 328.

policy because of the deterrent effect on rape victims who may decline to report out of fear that they could be prosecuted by an aggressive perpetrator. Best practice guidance on rape prosecution increasingly requires special training for police and prosecutors who handle these cases, including training in “evidence-based, trauma-informed” sexual assault investigation.<sup>340</sup> Allowing private prosecutions to proceed undercuts these efforts in several ways.

An alleged perpetrator has a vested interest in prosecuting his accuser—he lacks the objectivity that a police officer or prosecutor is expected to bring to an investigation. Second, he typically does not have the training in sexual assault investigation that can be required of police, prosecutors, and other officials. And third, as seen from Lisak’s work, rapists do not always view their actions as rape even when such actions meet the legal definition of rape.<sup>341</sup> For these reasons, allowing private prosecutions of rape complainants is ill-advised. If this practice is allowed to continue, it could contribute to future catastrophes similar to Eleanor’s decision to take her own life.

## CONCLUSION

As long as prosecutors are willing to bring false reporting prosecutions in spite of the prevalence of skepticism towards victims of sexual assault and the all-too-common failures to thoroughly investigate rape, victims are caught in a bind. They must confront the possibility that reporting a rape to the police may make them much worse off than keeping it to themselves. Accordingly, such prosecutions have a chilling effect on the reporting of rape.

Some officials argue that they prosecute suspected false reporters in order to show the public how seriously they take rape. But this argument is fallacious. The way to take rape seriously is to investigate rape cases thoroughly and to prosecute rapists. Increasing the percentage of rape cases referred to prosecutors and increasing rape conviction rates are the most effective ways of demonstrating a commitment to prosecuting rape.

The point of effective law enforcement is deterrence; prosecuting suspected false reporters sends a clear warning to

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<sup>340</sup> See, e.g., *Improving Response to Sexual Assault Crimes in Illinois*, *supra* note 332; *Tools for Trauma-Informed Practice*, NAT’L SEXUAL VIOLENCE RES. CTR, <https://www.nsvrc.org/projects/lifespan/tools-trauma-informed-practice> [<https://perma.cc/TT5W-252P>]; *Trauma Informed Sexual Assault Investigation Training*, INT’L ASS’N OF CHIEFS OF POLICE, <http://www.theiacp.org/Trauma-Informed-Sexual-Assault-Investigation-Training> [<https://perma.cc/5PME-7EGY>].

<sup>341</sup> Lisak, *supra* note 84.

other victims that if police or prosecutors suspect them of lying, they could be prosecuted. Having a policy of undertaking such prosecutions therefore deters victims from reporting. It certainly does not deter rape or aid in the detection of rapists. The focus must be on prosecuting rapists, not rape victims.