

# REVERSING THE DECRIMINALIZATION OF SEXUAL VIOLENCE

By Lisa Avalos\*

*Sexual violence has largely been decriminalized in the United States through disbelief of victims, apathy on the part of law enforcement officers, and inaction on the part of institutions. Indeed, these mechanisms are so effective at burying the problem that most people are not aware of the extent of unprosecuted sexual violence, the woefully deficient law enforcement response, and the need for sweeping reform.*

*The Article proceeds in two parts. Part I maps the extent of this problem and argues that the weakest link in the societal response to sexual assault lies at the juncture between victim and law enforcement. In particular, the law enforcement failure to effectively investigate sexual assault is the most substantial obstacle victims currently face. Part I also analyzes the relationship between the crisis indicators set out in the Article and shows how the lack of preparedness of law enforcement to respond effectively to sexual violence results in a cascade of related negative consequences which affect both victims and public safety.*

*Part II takes up the question of how to respond effectively to sexual violence. It notes that positive change is catching on in some jurisdictions and is dramatically improving the law enforcement response to sexual assault, but not all victims benefit because these measures are discretionary. The Article makes the case for legislative reform that would mandate sexual assault investigation best practices across all jurisdictions. It argues that the state of Illinois, where such reforms have already been institutionalized, can serve as a model for other jurisdictions. The Article concludes by arguing that the mandatory adoption of best practices is necessary in order to eliminate the grave deviations from best practice that exist in many jurisdictions.*

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## INTRODUCTION

Sexual violence has been decriminalized through disbelief, apathy, and inaction. Disbelief in the case of police, prosecutors, and sometimes even friends and family members who would rather not believe that a victim is telling the truth. Apathy in the case of law enforcement agencies that do not take reports of sexual assault seriously, do not investigate them effectively, and do not assign them priority when allocating time and resources. And inaction in the case of numerous institutions that fail to act when students, children, parishioners, patients, or others report that they have been sexually assaulted. Each of these responses to sexual violence contributes to its decriminalization, emboldening offenders and enabling them to repeat their crimes.

This Article argues that the societal response to sexual violence is largely inadequate, despite decades of attempted reform, because we fully appreciate neither the extent and severity of such violence, nor the woefully deficient law enforcement response. The rise of the #MeToo Movement, and the shock that many felt in learning that cultural icons such as Bill Cosby and Harvey Weinstein had engaged in long-standing patterns of sexual violence, has helped to expose the depth of our collective ignorance, but there is still a long way to go.

The Article further argues that the weakest link in the societal response to sexual assault lies at the juncture between victim and law enforcement. In particular, the law enforcement failure to effectively investigate sexual assault is the biggest obstacle victims currently face. Lack of faith in the police is the reason why so many victims do not bother to report, and police failures to investi-

gate mean that numerous complaints are closed without effective action taken against the perpetrator and without any positive resolution for the victim. Understanding the sweeping extent of sexual violence, and the law enforcement failure to respond constructively, illuminates the need to craft a response that is much more robust, comprehensive, and proactive than the procedures currently in effect in many jurisdictions.

Consider the cases of Megan Rondini and Emma Mannion, students at the University of Alabama who reported sexual assaults to the Tuscaloosa Police Department in 2015 and 2016, respectively. Both women were devastated by how the police treated them, which included being read their Miranda rights during what began as a victim interview.<sup>1</sup> Rondini learned, on the same day that she reported the rape to police, that police were contemplating bringing charges against her for accidentally discharging a firearm as she fled the scene of the rape.<sup>2</sup> She had found the firearm in her assailant's car during a frantic search for her keys, and it had discharged as she picked it up.<sup>3</sup> Police treated Rondini as a crime suspect and completely disregarded her status as the victim of a serious crime.<sup>4</sup>

Eight months later, Rondini committed suicide.<sup>5</sup> She left behind a "Health History Form" that she had filled out in order to obtain psychiatric treatment.<sup>6</sup> There she had written that she was having problems with "PTSD, depression, [and] anxiety stemming from [a] sexual assault and rape" that she had reported to Tuscaloosa police.<sup>7</sup> In answering whether "there had been major losses, changes, or crisis in [her] life," Rondini stated that she had been raped and then bullied by police about the incident.<sup>8</sup>

Mannion reported her sexual assault to Tuscaloosa police about nine months after Rondini's death.<sup>9</sup> In light of how Mannion was treated, it would appear that nothing changed in the intervening months. There is no readily available public information indicating that there had been an investigation into the police department's role in Rondini's suicide or any further training in sexual assault investigation. Mannion was told by the investigating officer, during her two-hour victim interview, that he did not believe her and was going to

<sup>1</sup> Complaint & Jury Trial Demanded at para. 53, *Rondini v. Bunn*, No. 17-cv-01114, 2018 U.S. Dist. LEXIS 229097 (N.D. Ala., May 22, 2018); Interview by Tuscaloosa Police Department with Emma Mannion 5 (Nov. 18, 2016) [hereinafter Mannion Interview] (transcript prepared by & on file with author).

<sup>2</sup> Complaint & Jury Trial Demanded, *supra* note 1, at para. 56.

<sup>3</sup> *Id.* at para. 55.

<sup>4</sup> *Id.* at para. 56.

<sup>5</sup> *Id.* at para. 100.

<sup>6</sup> *Id.* at para. 98.

<sup>7</sup> *Id.* at para. 98 (alteration in original).

<sup>8</sup> *Id.* at para. 98 (alterations in original).

<sup>9</sup> Telephone interview with Emma Mannion (Jan. 11, 2020).

charge her with false reporting.<sup>10</sup> A college freshman at the time of these events, Mannion ultimately withdrew from the university and returned home.<sup>11</sup> She is gainfully employed but has not resumed her university studies because, as she said in her own words, “I do not believe that a campus culture would keep me safe. I really don’t.”<sup>12</sup>

Both Rondini and Mannion were essentially criminalized for reporting rape while police ignored the perpetrators. At the time of these events, Tuscaloosa police had an abysmal track record in sexual assault investigation. In 2016, they handled twenty-seven rape complaints from University of Alabama students but had made arrests in only two of those cases.<sup>13</sup> By June 2017, only 10 percent of sexual assaults reported in Tuscaloosa between 2015 and 2016 were forwarded to a grand jury for a determination as to whether they should be prosecuted.<sup>14</sup>

Many of the other sexual assault reports, up to 50 percent, were misclassified under a “special inquiry” designation, which prevents them from “being counted among the official . . . rape and sexual assault statistics at the Tuscaloosa Sheriff’s Department.”<sup>15</sup>

That the priorities of Tuscaloosa police do not include sexual assault investigation is apparent from the police department’s annual report, which lists ten-year statistics on the “Big Five” crimes: burglary, unlawful breaking and entering of vehicles, robbery, auto theft, and murder.<sup>16</sup> Sex crimes do not make the list; they are rendered largely invisible. It is striking, and yet hardly accidental, that a jurisdiction that responded so poorly to Mannion’s and Rondini’s sexual assault complaints gives more attention to property crimes than to sexual violence.

Tuscaloosa is not alone in its terrible track record with respect to sexual assault. For a rapist to be convicted of his crime is the exception rather than the rule; the conviction rate for rape in the United States is under 1 percent—one of

<sup>10</sup> Mannion Interview, *supra* note 1, at 23. “Everybody who comes up with an elaborate story that’s made up is not a true victim. And I’m gonna tell you I do not believe you. I do not believe you at all.” *Id.* at 14.

<sup>11</sup> Telephone interview with Emma Mannion (Jan. 11, 2020).

<sup>12</sup> Telephone interview with Emma Mannion (Jan. 11, 2020).

<sup>13</sup> Carol Robinson, *University of Alabama Student Lied About Weekend Rape, Now Under Arrest, Authorities Say*, AL.COM (Mar. 6, 2019), [http://www.al.com/news/birmingham/index.ssf/2016/11/university\\_of\\_alabama\\_student\\_1.html](http://www.al.com/news/birmingham/index.ssf/2016/11/university_of_alabama_student_1.html) [https://perma.cc/5DH7-UQSN].

<sup>14</sup> Katie J.M. Baker, *A College Student Accused a Powerful Man of Rape. Then She Became a Suspect*, BUZZFEED (June 22, 2017, 7:40 AM), <https://www.buzzfeednews.com/article/katiejmbaker/how-accusing-a-powerful-man-of-rape-drove-a-college-student> [https://perma.cc/8KB8-K6LT].

<sup>15</sup> *Id.*; Complaint & Jury Trial Demanded, *supra* note 1, at para. 51.

<sup>16</sup> TUSCALOOSA POLICE ANNUAL REPORT 2018, at 12 (2018), [https://assets.caboosecms.com/media/2921035\\_2018-annual-report-for-publishing-ver-5.pdf?1558467938](https://assets.caboosecms.com/media/2921035_2018-annual-report-for-publishing-ver-5.pdf?1558467938) [https://perma.cc/GSS9-J8WM].

the lowest conviction rates for all serious crime.<sup>17</sup> As a result, the vast majority of sexual violence perpetrators are never held accountable for their crimes.<sup>18</sup> It is therefore not surprising that sexual assault tends to be a serial offense and that victims usually do not report sexual assault to the police, usually out of a belief that police will not believe them, will treat them poorly, and/or will not hold the perpetrator accountable.<sup>19</sup>

But there is another key dimension to the problem of how to respond effectively to sexual violence: positive change is catching on in some jurisdictions and is dramatically improving the law enforcement response to sexual assault, but not all victims benefit. The change is largely driven by organizations such as End Violence Against Women International (“EVAWI”) and the International Association of Chiefs of Police (“IACP”), which train thousands of first responders annually and have mapped out highly effective responses to sexual assault.<sup>20</sup> This excellent work gives rise to a paradox—there is great work being done, but in a society with 18,000 separate law enforcement agencies,<sup>21</sup> implementation of best practices is spotty at best, leaving victims to the luck of the geographic draw. Voluntary measures are only as good as the leaders who choose to implement them, and these voluntary efforts only reach victims for-

<sup>17</sup> Andrew Van Dam, *Less Than 1% of Rapes Lead to Felony Convictions. At Least 89% of Victims Face Emotional and Physical Consequences*, WASH. POST (Oct. 6, 2018, 4:00 AM), <https://www.washingtonpost.com/business/2018/10/06/less-than-percent-rapes-lead-felony-convictions-least-percent-victims-face-emotional-physical-consequences> [<https://perma.cc/YNW9-JFS2>]; *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> [<https://perma.cc/GU2F-DHZW>].

<sup>18</sup> According to the Rape, Abuse & Incest National Network (“RAINN”), 995 of every 1,000 perpetrators goes unpunished. *The Criminal Justice System: Statistics*, *supra* note 17.

<sup>19</sup> E.g., ROSE CORRIGAN, UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS 82–92 (2013); KIMBERLY A. LONSWAY & JOANNE ARCHAMBAULT, END VIOLENCE AGAINST WOMEN INT’L, ADDRESSING FALSE REPORTING BELIEFS: MISCONCEPTIONS ABOUT FALSE REPORTING AND ADDRESSING THE PERSISTENT CHALLENGE 4 (2016); Eliza A. Lehner, *Rape Process Templates: A Hidden Cause of the Underreporting of Rape*, 29 YALE J.L. & FEMINISM 207, 210, 217 (2017); Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 11 (2017). See *About the Campaign, START BY BELIEVING*, <https://www.startbybelieving.org/home> [<https://perma.cc/7YWW-7PAL>] and *Reporting to Law Enforcement*, RAINN, <https://www.rainn.org/articles/reporting-law-enforcement> [<https://perma.cc/RDT6-JU3A>], for resources to report sexual violence.

<sup>20</sup> EVAWI offers, free of charge, an online training institute with nearly twenty modules on different aspects of sexual assault investigation. See *About EVAWI International*, END VIOLENCE AGAINST WOMEN INT’L, [www.evawintl.org/About.aspx](http://www.evawintl.org/About.aspx) [<https://perma.cc/H2GU-3HRE>]. EVAWI also offers dozens of training bulletins, webinars, and regular annual conferences. *Id.* The IACP also offers extensive training resources under a project titled *Police Response to Violence Against Women*. See *Police Response to Violence Against Women – VAW, INT’L ASS’N OF CHIEFS OF POLICE*, <https://www.theiacp.org/projects/police-response-to-violence-against-women-va-w> [<https://perma.cc/E6YZ-QJYC>].

<sup>21</sup> U.S. DEP’T OF JUST., NCJ 249681, NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA (Apr. 2016; rev. Oct. 2016), <https://www.bjs.gov/content/pub/pdf/nlsled.pdf> [<https://perma.cc/75F3-CLK8>].

tunate enough to be sexually assaulted in the right place. For many less fortunate victims of sexual assault today, the responders seem to be stuck in 1950.

Take the case of “Marie,” who was raped by Marc O’Leary in Lynnwood, Washington, in 2008. The police handling her complaint did not believe her and decided, after only a cursory investigation, to charge her with false reporting.<sup>22</sup> They bullied her into retracting her complaint despite much evidence corroborating the assault.<sup>23</sup> They also forced her to write a statement saying that she had made the whole thing up, and threatened her with loss of her housing subsidy if she did not cooperate.<sup>24</sup>

With Marie now completely silenced, O’Leary went on to rape a woman in Kirkland, Washington, and three more in Colorado, while a fourth Colorado victim managed to thwart his attack.<sup>25</sup> But fortunately for Marie, the Colorado detectives took a completely different approach to investigating rape than the Lynnwood detectives did. They took O’Leary’s Colorado victims seriously and investigated diligently. They caught O’Leary after working collaboratively to connect clues on the four seemingly unrelated sexual assaults across four Denver suburbs.<sup>26</sup> The Colorado detectives linked O’Leary to all four attacks as well as to Marie’s rape and to the Kirkland, Washington, rape.<sup>27</sup> Thanks to the hard work of the Colorado detectives, O’Leary is now serving a 327.5-year prison term.<sup>28</sup> Unfortunately for O’Leary’s later victims, Lynnwood police were not so diligent or competent. If they had taken Marie seriously, the other five victims might have been spared, and Marie would have been spared the trauma of being criminally charged by reckless police.

How can society move to a place where victims such as “Marie,” Emma Mannion, and Megan Rondini can be assured that they will be taken seriously and that law enforcement will diligently investigate their cases, no matter where they are raped? In addressing this question, the Article proceeds in two parts. Part I analyzes the scope of our crisis in the investigation and prosecution of sexual assault. It demonstrates that catastrophically poor responses to a broad range of sex crimes contributes to the decriminalization of these crimes

<sup>22</sup> T. CHRISTIAN MILLER & KEN ARMSTRONG, A FALSE REPORT: A TRUE STORY OF RAPE IN AMERICA 1–5 (2018); Lisa Avalos, *Prosecuting Rape Victims While Rapists Run Free: The Consequences of Police Failure to Investigate Sex Crimes in Britain and the United States*, 23 MICH. J. GENDER & L. 1, 25–30 (2016) [hereinafter Avalos 2016] (referring to Marie by her initials, as used in court documents).

<sup>23</sup> Avalos 2016, *supra* note 22, at 26–27. Evidence included injuries consistent with Marie’s account and evidence that an intruder had entered her back patio. *Id.*

<sup>24</sup> MILLER & ARMSTRONG, *supra* note 22, at 4, 114–15; Avalos 2016, *supra* note 22, at 46.

<sup>25</sup> MILLER & ARMSTRONG, *supra* note 22, at 229–31; Avalos 2016, *supra* note 22, at 30; Sara Burnett, *Serial Rapist Marc O’Leary Sentenced to 327 Years in Colorado Cases*, DEN. POST (Dec. 9, 2011, 2:59 PM), [http://www.denverpost.com/ci\\_19513991](http://www.denverpost.com/ci_19513991) [<https://perma.cc/TC5S-NK54>].

<sup>26</sup> See MILLER & ARMSTRONG, *supra* note 22, at 229.

<sup>27</sup> *Id.* at 202, 229–31.

<sup>28</sup> *Id.* at 234.

in practice, if not in theory. It argues that officials convey to many perpetrators a message of impunity through their failure to prosecute most sex crimes. This Part synthesizes numerous indicators of the decriminalization of sexual violence, including many systemic patterns of sexual violence which have been revealed during the #MeToo movement as well as through other sources. Part I also analyzes the causes of this crisis, demonstrating that the weak link in the treatment of sexual violence is typically at the level of the police investigation. But the news is not all bad: the sooner we accept that sexual violence has effectively been decriminalized, the sooner we can embrace effective strategies for reversing this reality.

Part II addresses what we can do about this crisis, presenting a number of solutions addressing the decriminalization of sexual violence. These include holding law enforcement agencies accountable for sexual assault investigation through a range of best practices promoted by EVAWI and the IACP. To accomplish this goal, Part II argues for statewide statutory reform across the United States that would mandate that certain investigatory protocols be adopted by all law enforcement agencies. Part II focuses a lens on recent reforms in the state of Illinois, which can serve as a model for other jurisdictions. Ultimately, the Article argues that sexual violence can be recriminalized in practice as well as in theory, but doing so requires legislative mandates designed to ensure that needed reforms reach all law enforcement agencies and all victims.

## I. THE DECRIMINALIZATION OF SEXUAL VIOLENCE

This section analyzes the crisis in the investigation and prosecution of sexual violence that has resulted in the decriminalization of most sex offenses. This Part analyzes and synthesizes numerous indicators of the decriminalization of sexual violence, including: the inability of police to apprehend serial offenders before they have amassed multiple victims; the institutional indifference to reports of sexual violence; the crisis of untested rape kits; statistical manipulation of sexual assault statistics by law enforcement agencies; the criminalization of victims; and lenient sentencing. These indicators, taken together, illustrate the scope of the state's failure to effectively contain sexual violence, and particularly that the weakest link is at the level of the police investigation.

### A. *Long-Undetected Serial Offenders*

The #MeToo Movement, which started with a hashtag in 2006, received an enormous boost in October 2017 when Jodi Kantor and Megan Twohey published a New York Times article detailing numerous acts of sexual assault and harassment allegedly committed by Harvey Weinstein over many years.<sup>29</sup> Following this, alleged victims stepped forward to accuse over two hundred other

<sup>29</sup> Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/UK3C-68CZ>].

prominent men of similar acts. Among those accused of sexual assault or misconduct were media moguls Les Moonves and Bill O'Reilly; performers R. Kelly, Kevin Spacey, Sylvester Stallone, and Ed Westwick; celebrity chef Mario Batali; politician Roy Moore; former New York State attorney general Eric Schneiderman; mega-church pastor Bill Hybels; and then-President Donald Trump.<sup>30</sup> The fallout from #MeToo claims has been swift, with dozens of accused men resigning or being fired within weeks of allegations coming to light, even when criminal cases have not moved forward.<sup>31</sup> The #MeToo Movement is one indicator of how widespread and systematic sexual violence is, and of the lack of effective mechanisms to address the enormity and scope of this violence.

In particular, many of the emergent sexual assault allegations reveal systemic patterns of predation that police often miss because they focus on one victim complaint at a time, often with the goal of finding a way to discredit the victim and dismiss the complaint.<sup>32</sup> When they take this approach they miss the predatory pattern of behavior that is revealed across multiple complaints.

When police fail to take effective action despite numerous, similar complaints about a certain individual, this non-response is symptomatic of the decriminalization of rape. Consider the cases of Anthony Sowell and Lonnie David Franklin Jr., also known as the "Grim Sleeper." Both men raped and murdered multiple African American women over a several year period without being detected by police. In 2011, Sowell was convicted of raping and murder-

<sup>30</sup> Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html> [https://perma.cc/E33H-SHJA]; *Eric Bauman is One of 262 Celebrities, Politicians, CEOs, and Others Who Have Been Accused of Sexual Misconduct Since April 2017*, VOX (Jan. 9, 2019), <https://www.vox.com/a/sexual-harassment-assault-allegations-list/eric-bauman> [https://perma.cc/772K-9Y8B]; Emily McFarlan Miller, *Misconduct Allegations Against Willow Creek Founder Bill Hybels Are Credible, Independent Report Finds*, WASH. POST (Mar. 1, 2019, 12:55 PM), <https://www.washingtonpost.com/religion/2019/03/01/independent-report-finds-allegations-against-willow-creek-founder-bill-hybels-are-credible> [perma.cc/Y8MA-USM2]; *Post-Weinstein, These Are the Powerful Men Facing Sexual Harassment Allegations*, GLAMOUR (May 18, 2019), <https://www.glamour.com/gallery/post-weinstein-these-are-the-powerful-men-facing-sexual-harassment-allegations> [https://perma.cc/WRJ2-ZLKM].

<sup>31</sup> Carlsen et al., *supra* note 30.

<sup>32</sup> U.S. DEP'T OF JUST. CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 43, 46-47 (2011) [hereinafter DOJ NEW ORLEANS REPORT]; U.S. DEP'T OF JUST. CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 122 (2016) [hereinafter DOJ BALTIMORE REPORT]; LIZ KELLY ET AL., U.K. HOME OFF., RSCH., DEV. & STAT. DIRECTORATE, NO. 293, A GAP OR A CHASM? ATTRITION IN REPORTED RAPE CASES 1, 31-32, 42 (2005), <https://webarchive.nationalarchives.gov.uk/20110218141141/http://rds.homeoffice.gov.uk/rds/pdfs05/hors293.pdf> [https://perma.cc/886J-33JR]; HUMAN RIGHTS WATCH, CAPITOL OFFENSE: POLICE MISHANDLING OF SEXUAL ASSAULT CASES IN THE DISTRICT OF COLUMBIA (2013) [hereinafter HRW REPORT], <https://www.hrw.org/report/2013/01/24/capitol-offense/police-mishandling-sexual-assault-cases-district-columbia> [https://perma.cc/SU9R-6UTQ].



ing eleven women at his home in Cleveland, Ohio.<sup>33</sup> He carried out these murders in 2008 and 2009 with little interference from the police, despite the fact that he was a registered sex offender, having served fifteen years in prison for rape.<sup>34</sup>

Even when police received multiple complaints from terrified women who managed to flee Sowell's home, they failed to properly investigate Sowell.<sup>35</sup> They also paid no attention to a horrific stench at Sowell's home that was noticed by numerous people in the neighborhood, and which turned out to be the decomposing bodies of Sowell's murder victims.<sup>36</sup> It is hard to imagine law enforcement turning a blinder eye to violence against women than they did here. The fact that Sowell's victims were African American women who lived in an economically depressed neighborhood likely contributed to police inaction.

Similarly, Franklin murdered ten women in Los Angeles from the mid-1980s until 2007 and has been on death row since his conviction in 2016.<sup>37</sup> He is known to have sexually assaulted at least two women and may have sexually assaulted his other victims as well.<sup>38</sup> Like Sowell, he targeted African American women, some of whom were drug users or prostitutes.<sup>39</sup> He is called the Grim Sleeper because he evaded detection for so long, taking long breaks between his crimes, while living, alongside his wife, in plain sight.<sup>40</sup> Sowell and Franklin's pattern of victimizing vulnerable women shows that they understood police priorities. They raped and murdered women whose disappearances the authorities would not be motivated to investigate. These investigatory failures enabled both men to commit further crimes, causing more women to lose their lives.

<sup>33</sup> Eric Heisig, *Despite \$1 Million Settlement, Cleveland Still Faces Another Lawsuit from Anthony Sowell's Victims*, CLEVELAND.COM (Jan. 29, 2019), [https://www.cleveland.com/court-justice/2018/09/despite\\_1\\_million\\_settlement\\_c.html](https://www.cleveland.com/court-justice/2018/09/despite_1_million_settlement_c.html) [https://perma.cc/R72M-VHAE].

<sup>34</sup> Stephanie Chen, *11 Bodies, One House of Horrors: Why Cleveland Women Were 'Invisible'*, CNN (Oct. 26, 2010, 2:49 PM), <https://www.cnn.com/2010/CRIME/10/26/cleveland.sowell.victims.one.year/index.html> [https://perma.cc/3VC4-BQMU].

<sup>35</sup> *Id.* For example, police went to Sowell's home after Gladys Wade reported that Sowell tried to rape and strangle her. *Id.* Despite the fact that police knew that Sowell was a sex offender and that they saw visible drops of blood in the home, they took no action. *Id.* Six more women disappeared after Wade's complaint. *Id.*

<sup>36</sup> *Id.*; Ian Urbina & Christopher Maag, *After Gruesome Find, Anger at Cleveland Police*, N.Y. TIMES (Nov. 5, 2009), <https://www.nytimes.com/2009/11/06/us/06cleveland.html> [https://perma.cc/G532-C6ND] ("[T]he smell should have been the first clue to the authorities that something was awry." (quoting Zack Reed)).

<sup>37</sup> Mike McPhate, *Los Angeles Man Is Convicted in 'Grim Sleeper' Serial Killer Case*, N.Y. TIMES (May 5, 2016), <https://www.nytimes.com/2016/05/06/us/grim-sleeper-lonnie-franklin-los-angeles.html> [https://perma.cc/N43F-636A].

<sup>38</sup> *Id.*

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

<sup>40</sup> *Id.*; Karen Workman, *'Grim Sleeper' Serial Killer Gets Death Sentence*, N.Y. TIMES (Aug. 10, 2016), <https://www.nytimes.com/2016/08/11/us/grim-sleeper-serial-killer-gets-death-sentence.html> [https://perma.cc/DB6N-4L3C].

In some cases, a perpetrator's victims number in the hundreds before he is brought to justice. John Worboys, the driver of a London black cab, raped over one hundred women in the back of his cab over a six-year period before his arrest in 2008.<sup>41</sup> Worboys' modus operandi was to claim that he had won the lottery and ask his victim to have a celebratory glass of champagne with him.<sup>42</sup> Some victims accepted the drink because they thought it would be impolite to refuse.<sup>43</sup> Worboys had added a date rape drug to the drink, with the result that many of his victims had very little recollection of what had happened to them.<sup>44</sup>

At least ten women reported Worboys to police prior to his arrest.<sup>45</sup> None were taken seriously, as evidenced by the police's failure to progress any investigation into Worboys and to stop his predatory crimes over the six-plus-year period from 2002 until his arrest in February 2008.<sup>46</sup> Worboys undoubtedly chose his modus operandi knowing that drugging his victims would sharply decrease the odds of police believing them and undertaking a thorough investigation—that is, if they even remembered enough of what happened to make a report.

Police records reveal that officers regarded Worboys' victims with unsubstantiated skepticism, as the following comments note:

The cab driver appears to have acted over and above the call of duty to look after his fare and in a way that would be highly unlikely for a man who had indecently assaulted or raped a woman. . . .<sup>47</sup>

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 . . . . The risk is therefore low.<sup>48</sup>

The victim cannot remember anything past getting in the cab. It would seem unlikely that a cab driver would have alcohol in his vehicle, let alone drug substances.<sup>49</sup>

The first two comments were recorded in 2003, early in Worboys' offending career, while the third comment was recorded just one year before Worboys

<sup>41</sup> DSD & NBV v. Commissioner of Police for the Metropolis [2014] EWHC (QB) 436 [10], <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/dsd-and-nbv-v-met-police.pdf> [https://perma.cc/BJ2C-52S9].

<sup>42</sup> *Id.* at para. 15.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at para. 15, 17–18.

<sup>45</sup> *Id.* at para. 33, 37, 40.

<sup>46</sup> *Id.* at para. 36–39.

<sup>47</sup> *Id.* at para. 255 (note is from a police log dated Aug. 18, 2003, which is early in Worboys' offending career).

<sup>48</sup> *Id.* at para. 257 (from the closing report concerning DSD's rape allegation; DSD reported being raped on May 7, 2003). *See id.* at para. 22.

<sup>49</sup> Sandra Laville & Vikram Dodd, *Police Errors Left Rapist John Worboys Free to Strike – but No Officers Face Sack*, *GUARDIAN* (Jan. 19, 2010, 7:05 PM), <https://www.theguardian.com/uk/2010/jan/20/police-ipcc-john-worboys-errors> [https://perma.cc/4L9B-48WF].

was caught.<sup>50</sup> Police were still in the dark about Worboys' activities at that point. In hindsight, it is evident that police skepticism enabled Worboys' to continue offending for several years.

The Worboys, Sowell, and Franklin cases are representative of a widespread phenomenon. In each case, police wrote off one victim at a time and failed to see the larger picture—that one very dangerous man was behind multiple attacks in each community. Similarly, we now know that men such as Bill Cosby, Harvey Weinstein and Jeffrey Epstein had each collected a long trail of victims before being criminally charged.<sup>51</sup>

Amassing one hundred victims takes time. If police pay attention, can they catch a serial perpetrator before he reaches that number? Police missed this opportunity in the case of Jonas Dick, a San Diego serial rapist, until one of his victims took matters into her own hands. Dick participated in the “manosphere,”—a blog space where men gather to discuss ways to seduce women through a system of psychological manipulation that can evolve into rape.<sup>52</sup> When Dick's victim, “Claire,” found herself ignored by the police who were supposed to be investigating her rape case, she did the investigating herself. She discovered that Dick was active in the manosphere and had blogged about raping her.<sup>53</sup> Dick was convicted on the evidence Claire gathered and was sentenced to eight years in prison.<sup>54</sup>

Even more chilling is evidence collected by the manager of Dick's apartment building rather than by police. According to her, a video camera placed outside of Dick's apartment revealed that Dick and his friends “would come in with women who were happy and relaxed,” but woman after woman would come out “look[ing] stunned and upset with the same tense body language . . . .”<sup>55</sup> The apartment manager went on to say, “I don't know if they were raped, but if there is a body language to rape, what I saw would have been it.”<sup>56</sup>

Dick and his friends had lured Claire home at two o'clock in the morning, a time he referred to as “‘pull o'clock’ because of how easy it was to bring

<sup>50</sup> See *supra* notes 47–49.

<sup>51</sup> Madeleine Carlisle, *23 of Jeffrey Epstein's Accusers Finally Got Their Day in Court. Here's What They Said*, TIME (Aug. 27, 2019, 10:22 PM), <https://time.com/5662688/jeffrey-epstein-accusers-court> [<https://perma.cc/R8C4-54U8>]; Kantor & Twohey, *supra* note 29; *Timeline: Bill Cosby: A 50-year Chronicle of Accusations and Accomplishments*, L.A. TIMES (Sept. 25, 2018, 11:34 AM), <https://www.latimes.com/entertainment/la-et-bill-cosby-timeline-htlstory.html> [<https://perma.cc/VAF5-9ZK2>].

<sup>52</sup> Brandy Zadrozny, *The Pickup Artist Rape Ring*, DAILY BEAST (July 12, 2017, 8:17 PM), <https://www.thedailybeast.com/pickup-artists-preyed-on-drunk-women-brought-them-home-and-raped-them?ref=scroll> [<https://perma.cc/LGZ6-XQ5Z>].

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

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

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

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

home the last women leaving the bars.”<sup>57</sup> This strategy is similar to what cab driver John Worboys did—picking up intoxicated women who needed a ride home after a night out.<sup>58</sup> And it is also the tactic used by Reynhard Sinaga, a thirty-six year old graduate student who was studying in the United Kingdom, when he was jailed for life for 136 rapes against forty-eight male victims.<sup>59</sup> Sinaga used a “tried-and-tested” formula for finding victims:

He would go out after midnight to wait outside clubs, . . . [preying on] young men who had been kicked out by bouncers or lost their friends or partners. Some had no money for a cab home or their phone batteries had run out, while others had been sick.

All were in a state of inebriation when they were approached by the slight, smiling man in black-rimmed glasses, who appeared harmless. When he asked the men if they wanted to come back to his flat and sleep on the floor or have a few more drinks, they agreed.<sup>60</sup>

Sinaga is thought to have sexually assaulted 195 men over two-and-a-half years.<sup>61</sup> And yet all of this activity flew under police radar until Sinaga’s final victim, “Peter,” woke up mid-attack, disoriented, and called police.<sup>62</sup> But Peter was initially treated as a suspect and was arrested on suspicion of assaulting Sinaga.<sup>63</sup> After being held in a cell for eleven hours, detectives discovered video footage of the attacks on Sinaga’s phone and realized that Peter had been truthful when he told police he was a rape victim.<sup>64</sup>

Notably, the Jonas Dick, Reynhard Sinaga, and John Worboys cases demonstrate a serial predator practice that may be quite common—namely, searching for potential victims late at night who are easy targets because they are intoxicated and thus more vulnerable. Their intoxication means that they may be easily persuaded to accept an offer of help from someone they have just met, and they may not remember much about what happens afterwards. Predators such as Dick, Sinaga, and Worboys clearly understood these dynamics and took advantage of them. It is striking that police have not caught on to this pattern of predatory conduct and have not adjusted their practices accordingly.

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

<sup>58</sup> *DSD & NBV v. Commissioner of Police for the Metropolis* [2014] EWHC (QB) 436 [15]–[18], <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/dsd-and-nbv-v-met-police.pdf> [<https://perma.cc/W8X3-XLU3>].

<sup>59</sup> Helen Pidd & Josh Halliday, *Reynhard Sinaga Jailed for Life for Raping Dozens of Men in Manchester*, *GUARDIAN* (Jan. 6, 2020, 9:23 AM), <https://www.theguardian.com/uk-news/2020/jan/06/reynhard-sinaga-jailed-life-drugging-raping-men-manchester> [<https://perma.cc/A8T5-LTCL>].

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

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

<sup>62</sup> Nazia Parveen, *Reynhard Sinaga Victim: ‘I Thought I Might Have Killed Him,’* *GUARDIAN* (Jan. 26, 2020, 9:15 AM), <https://www.theguardian.com/uk-news/2020/jan/26/reynhard-sinaga-victim-i-thought-i-might-have-killed-him> [<https://perma.cc/4YV6-6V77>].

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

<sup>64</sup> *Id.*; Pidd & Halliday, *supra* note 59.

The cases discussed in this section demonstrate that serial rapists tend to have a modus operandi that they use to identify likely victims, violate their boundaries, and commit crimes against them.<sup>65</sup> Police systematically failed to spot these offenders and realize the extent of their crimes, in part because they looked at each offense as one discrete crime report rather than making a concerted effort to look for patterns across offenses. Looking at each report in isolation, they often chose to disregard the report because of the characteristics of the victim—he or she appeared to be drunk, or a drug addict, or from the wrong neighborhood, or lacking credibility for a multitude of other reasons. This approach enables predators and creates an atmosphere where sex crimes can flourish.

### *B. Institutional Indifference to Reports of Sexual Violence*

Another core aspect of serial sexual violence is that many perpetrators have status and power within institutions that allow them to use those institutions as a shield. The institution then assists the perpetrator by facilitating and covering up his sexual misconduct. Some of these cases have involved sexual harassment, which is only actionable via a civil claim, but many cases have involved criminal sexual assault and rape. Institutions have enabled offenders to victimize dozens, and sometimes hundreds of victims, by responding inappropriately to complaints of abuse. Why is the actual institutional response to sexual violence so different than the response that most people expect? People typically imagine that an institution will confront a predator, hold him accountable, and care for victims. But all too often the institutional response is to silence the victims, bury the complaints, and hope the whole problem will go away. This response is ineffective. Predators who are not stopped continue to amass additional victims, magnifying the severity of the problem.

A number of cases illustrate that the lack of effective institutional response to sexual violence is a systemic, ongoing problem; it is the rule rather than the exception, and this is true across many types of institutions. The purpose of this ill-suited response is typically to protect the institution's reputation from harm at the expense of the victims. The examples below demonstrate the extent of the problem. They paint a picture of institutions responding to sexual violence by suppressing victim complaints, trying to keep the issue quiet, and preserving the reputation of the institution. Most institutions also take little to no effective action against the perpetrator, thus leaving him to reoffend. Once the extent of the sexual violence is revealed, which is often several years after the institution received the first victim complaint, the institution leaps into crisis management mode. There is often an investigation documenting the extent of the violence, the experience of the victims, and the measures taken by the institution to cover

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<sup>65</sup> See David Lisak, *Understanding the Predatory Nature of Sexual Violence*, 14 SEXUAL ASSAULT REP. 49, 56 (2011).

everything up. Sometimes criminal charges against institutional leaders follow, although this is rare.

This section sets out several examples of institutional indifference to reports of sexual violence in order to reveal certain consistent patterns that exist across many settings. It examines (1) the Catholic church, (2) schools and universities, (3) additional institutions such as the media and health care organizations, and (4) child sexual exploitation rings. It ultimately demonstrates that institutional inaction to sexual violence is an entrenched, systemic problem.

### 1. *The Catholic Church*

The exposure of sexual violence within the Catholic church demonstrates that such violence has flourished in the United States and indeed around the world, including in countries as diverse as Argentina, Australia, the Central African Republic, France, Kenya, and Poland.<sup>66</sup> In order to draw attention to the global scope of sexual violence within the Catholic church, the Center for Constitutional Rights (“CCR”) and the Survivors Network of those Abused By Priests (“SNAP”) have filed complaints with international bodies, including a formal complaint to the International Criminal Court (“ICC”) in 2013.<sup>67</sup> Although the ICC declined to hear the complaint on jurisdictional grounds, its filing highlighted the disturbing global scale of the problem and the need to seek

<sup>66</sup> See, e.g., Aurelien Breeden, *Ex-Priest in France Is Convicted of Abusing Dozens of Scouts*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/world/europe/bernard-preynat-france-abuse.html> [https://perma.cc/HD5H-TNGV]; Livia Albeck-Ripka, *Cardinal George Pell Knew of Clergy Sex Abuse, Australian Report Finds*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/2020/05/07/world/australia/cardinal-george-pell.html> [https://perma.cc/68Z4-7RLD]; Daniel Politi & Karen Zraick, *2 Priests Convicted in Argentina of Sexual Abuse of Deaf Children*, N.Y. TIMES (Nov. 25, 2019), <https://www.nytimes.com/2019/11/25/world/americas/argentina-catholic-priests-sex-abuse.html> [https://perma.cc/FR2N-H4S9]; Marc Santora & Joanna Berendt, *‘Tell No One’: Poland Is Pushed to Confront Abuse of Children by Priests*, N.Y. TIMES (May 17, 2019), <https://www.nytimes.com/2019/05/17/world/europe/poland-priests-sex-abuse-film.html> [https://perma.cc/V8UT-R7QY]; Nicole Winfield & Rodney Muhumuza, *Church Accused of Covering up Priest’s Abuse, and Paternity*, AP NEWS (Oct. 8, 2019), <https://apnews.com/c7e44292147a4a24b7ad5ee2997678d8> [https://perma.cc/2J9N-8QED] (addressing priest abuse in Kenya); Ivana Kottasová, *Caritas ‘Outraged’ by Child Abuse Scandal Uncovered by CNN*, CNN (Nov. 21, 2019, 9:59 AM), <https://www.cnn.com/2019/11/21/africa/caritas-internationalis-luk-delft-intl/index.html> [https://perma.cc/X29W-MRUE] (spotlighting the case of a Belgian priest who sexually abused children in the Central African Republic after being convicted of sexually abusing children in Europe); see also Nima Elbagir et al., *How a Catholic Order Dedicated to Protecting Children Failed Them*, CNN, <https://edition.cnn.com/interactive/2019/11/africa/luk-delft-intl> [https://perma.cc/PZ5S-TL8E].

<sup>67</sup> *Clergy Sex Victims File International Criminal Court Complaint Case Charges Vatican Officials with ‘Crimes Against Humanity’*, CTR. FOR CONST. RTS. (Nov. 13, 2013), <https://ccrjustice.org/home/press-center/press-releases/clergy-sex-victims-file-international-criminal-court-complaint-case> [https://perma.cc/Q48U-EPLL].

redress for victims of priest abuse.<sup>68</sup> SNAP and the CCR have also filed reports with the United Nations Committee on the Rights of the Child and the United Nations Committee Against Torture, in connection with those committees' responsibilities in overseeing the Vatican's compliance with their obligations under the Convention on the Rights of the Child and the Convention Against Torture, respectively.<sup>69</sup> Both of these UN bodies have expressed concern with the Vatican's failure to address the problem effectively.<sup>70</sup>

In the United States, multiple priests have been accused of sexual misconduct in all fifty states and the District of Columbia.<sup>71</sup> Major inquiries into clergy sexual abuse in the U.S. have been conducted in response and multiple reports have been issued, including from grand juries and state attorneys general in Maine, Massachusetts, New York, New Hampshire, and Pennsylvania.<sup>72</sup>

<sup>68</sup> Laurie Goodstein, *Hague Court Declines Inquiry into Church Abuse Cover-Up*, N.Y. TIMES (June 13, 2013), <https://www.nytimes.com/2013/06/14/world/europe/hague-court-declines-inquiry-into-church-abuse-cover-up.html> [<https://perma.cc/Q4CX-TBPY>].

<sup>69</sup> *Vatican Summoned Before UN Committee on Rights of the Child*, CTR. FOR CONST. RTS. (Feb. 28, 2013) [hereinafter *Rights of the Child*], <https://ccrjustice.org/home/press-center/press-releases/vatican-summoned-un-committee-rights-child> [<https://perma.cc/MFY5-EU5E>]; *Vatican Summoned to Report to UN Committee on Torture*, CTR. FOR CONST. RTS. (Apr. 14, 2014), <https://ccrjustice.org/home/press-center/press-releases/vatican-summoned-report-un-committee-torture> [<https://perma.cc/E7UU-7JDR>].

<sup>70</sup> *Rights of the Child*, *supra* note 69 ("The UN committee has summoned the Vatican to report on its record of ensuring children are protected from sexual violence and safeguarding children's well-being and dignity, the first time the Holy See will have been called to account for its actions on these issues before an international body with authority."); *UN Committee Addresses Clergy Rape and Sexual Violence as Torture*, CTR. FOR CONST. RTS. (May 23, 2014), <https://ccrjustice.org/home/press-center/press-releases/un-committee-addresses-clergy-rape-and-sexual-violence-torture> [<https://perma.cc/X5UT-UMRT>] ("The committee expressed serious concerns about the Vatican's failure to prevent and punish rape and sexual violence.").

<sup>71</sup> *Database of Publicly Accused Priests in the United States*, BISHOPACCOUNTABILITY.ORG, <http://bishop-accountability.org/member/psearch.jsp> [<https://perma.cc/M9FU-MBLJ>].

<sup>72</sup> *E.g.*, WESTCHESTER CNTY. GRAND JURY, REPORT OF THE APRIL 'E' 2002 GRAND JURY CONCERNING COMPLAINTS OF SEXUAL ABUSE AND MISCONDUCT AGAINST MINORS BY MEMBERS OF THE CLERGY 1–2 (2002), [http://www.bishop-accountability.org/reports/2002\\_06\\_19\\_Westchester\\_NY\\_Grand\\_Jury](http://www.bishop-accountability.org/reports/2002_06_19_Westchester_NY_Grand_Jury) [<https://perma.cc/RFU8-M2G7>]; SUFFOLK CNTY. SUP. CT. SPECIAL GRAND JURY, GRAND JURY REPORT CPL §190.85(1)(C) 2–3 (2002), [http://www.bishop-accountability.org/reports/2003\\_02\\_10\\_SuffolkGrandJury](http://www.bishop-accountability.org/reports/2003_02_10_SuffolkGrandJury) [<https://perma.cc/Q7ES-SPJN>]; PETER W. HEED ET AL., N.H. OFF. ATT'Y GEN., REPORT ON THE INVESTIGATION OF THE DIOCESE OF MANCHESTER 1 (2003), <https://www.bishop-accountability.org/resources/resource-files/reports/ManchesterReport02.pdf> [<https://perma.cc/XE8F-YWWH>]; THOMAS F. REILLY, COMMONWEALTH OF MASS. OFF. ATT'Y GEN., THE SEXUAL ABUSE OF CHILDREN IN THE ROMAN CATHOLIC ARCHDIOCESE OF BOSTON 1–2 (2003), <http://www.bishop-accountability.org/resources/resource-files/reports/ReillyReport.pdf> [<https://perma.cc/Z9E4-AV2L>]; FIRST JUD. DIST. PA. CNTY. INVESTIGATING GRAND JURY, REPORT OF THE GRAND JURY 1–2 (2003) [hereinafter 2003 PA. GRAND JURY], [https://www.bishop-accountability.org/reports/2005\\_09\\_21\\_Phillly\\_GrandJury/Grand\\_Jury\\_Report.pdf](https://www.bishop-accountability.org/reports/2005_09_21_Phillly_GrandJury/Grand_Jury_Report.pdf) [<https://perma.cc/AGB8-ZHMY>]; STATE OF ME. OFF. ATT'Y GEN., ON THE ALLEGATIONS OF SEXUAL ABUSE OF CHILDREN BY PRIESTS AND OTHER CLERGY MEMBERS ASSOCIATED WITH THE ROMAN CATHOLIC CHURCH IN MAINE 1 (2004), <http://www.bishop-accountability.org/resour>

Pennsylvania is perhaps the most thoroughly scrutinized state, with three grand jury investigations that have covered every diocese in the state.<sup>73</sup> The most comprehensive of these identified over three hundred accused priests and one thousand child victims in six dioceses (Pennsylvania has eight), while also estimating that there were probably thousands more victims.<sup>74</sup>

That report revealed a systemic, institutional non-response to complaints of sexual violence—a strategy crafted to avoid scandal rather than helping children.<sup>75</sup> FBI special agents participating in the investigation revealed what the report called a “playbook for concealing the truth” which involved cover-up strategies such as transferring abusive priests rather than removing them from the priesthood, failing to disclose to parishioners the reasons for a priest’s removal, using euphemisms rather than real words to describe sexual violence against children, and, most importantly, not reporting priests’ sex crimes to police.<sup>76</sup> Each diocese also kept abuse complaints locked in a secret archive—an archive required by the church’s Code of Canon Law, and to which only the bishop could have the key.<sup>77</sup>

## 2. *Schools and Universities*

Schools and universities reveal a similar institutional non-response to reports of sexual violence committed by employees in positions of authority. At numerous private college preparatory schools, teachers and other employees have sexually assaulted students over the course of decades. Recent reports have addressed the extent of such abuse at Emma Willard School in New York, Choate Rosemary Hall in Connecticut, the New York School for the Deaf, St. George’s School in Rhode Island, Horace Mann in the Bronx, and Poly Prep in Brooklyn, to name just a few.<sup>78</sup> Horace Mann appears to have a particularly in-

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ces/resource-files/reports/MaineAG.pdf [https://perma.cc/897E-4NEM]; FIRST JUD. DIST. PA. CNTY. INVESTIGATING GRAND JURY XXIII, REPORT OF THE GRAND JURY 1–2 (2011) [hereinafter 2011 PA. GRAND JURY], [http://www.bishop-accountability.org/reports/2011\\_01\\_21\\_Philadelphia\\_Grand\\_Jury\\_Final\\_Report\\_Clergy\\_Abuse\\_2.pdf](http://www.bishop-accountability.org/reports/2011_01_21_Philadelphia_Grand_Jury_Final_Report_Clergy_Abuse_2.pdf) [https://perma.cc/69MW-Z776]; COMMONWEALTH OF PA. OFF. ATT’Y GEN., A REPORT OF THE THIRTY-SEVENTH STATEWIDE INVESTIGATING GRAND JURY 6 (2016), [http://www.bishop-accountability.org/reports/2016\\_03\\_01\\_Pennsylvania\\_Grand\\_Jury\\_Report\\_on\\_Diocese\\_of\\_Altoona\\_Johnstown.pdf](http://www.bishop-accountability.org/reports/2016_03_01_Pennsylvania_Grand_Jury_Report_on_Diocese_of_Altoona_Johnstown.pdf) [https://perma.cc/ARS4-B9NS]; COMMONWEALTH OF PA. OFFICE OF THE ATT’Y GEN., 40TH STATEWIDE INVESTIGATING GRAND JURY REPORT 1, INTERIM—REDACTED 1 (Pa. 2018) [hereinafter AG REPORT I], [http://www.bishop-accountability.org/PA\\_40th\\_GJ/2018\\_08\\_14\\_Interim\\_Redacted\\_PA\\_GJ\\_Report.pdf](http://www.bishop-accountability.org/PA_40th_GJ/2018_08_14_Interim_Redacted_PA_GJ_Report.pdf) [https://perma.cc/TS4K-3JZV].

<sup>73</sup> 2003 PA. GRAND JURY, *supra* note 72; 2011 PA. GRAND JURY, *supra* note 72; AG REPORT I, *supra* note 72, at 1, 9.

<sup>74</sup> AG REPORT I, *supra* note 72.

<sup>75</sup> *Id.* at 2.

<sup>76</sup> *Id.* at 3.

<sup>77</sup> *Id.* at 2.

<sup>78</sup> E.g., Ginia Bellafante, *She Was 4 and Deaf. That’s When the Sexual Abuse Began, She Said*, N.Y. TIMES (Oct. 16, 2019), <https://www.nytimes.com/2019/10/16/nyregion/new-york-school-deaf-sexual-abuse.html> [https://perma.cc/KL3N-SQFV]; Elizabeth A. Harris, *Sexual*



grained problem, with a report prepared by its alumni demonstrating a longer pattern of offending, and a larger number of offenders, than twenty similar schools.<sup>79</sup>

A Boston Globe report on sexual assault committed by teachers at New England private schools found that over one hundred private schools have experienced such incidents over the last twenty-five years and over two hundred schools since the 1950s.<sup>80</sup> The Globe report identified more than three hundred alleged victims of sexual abuse or harassment at these schools.<sup>81</sup> At least twen-

*Abuse at Choate Went on for Decades, School Acknowledges*, N.Y. TIMES (Apr. 13, 2017), <https://www.nytimes.com/2017/04/13/nyregion/sexual-abuse-choate-connecticut-school.html> [https://perma.cc/7GA7-YEZM]; Mike Kennedy, *Girls Boarding School in Troy, N.Y., Discloses Decades of Sexual Misconduct by Teachers*, AM. SCH. & UNIV. (Apr. 19, 2017), <https://www.asumag.com/safety-security/crime-bullying-prevention/article/20855452/girls-boarding-school-in-troy-ny-discloses-decades-of-sexual-misconduct-by-teachers> [https://perma.cc/6WCX-GUDL]; Bella English, *Former Student Forces R.I. Prep School to Confront Its Past*, BOS. GLOBE (Dec. 14, 2015, 6:32 PM), <https://www.bostonglobe.com/arts/2015/12/14/stgeorges/QBq1IfsItk6relwmpQJbRP/story.html> [https://perma.cc/V5A7-D75M]; Katharine Q. Seelye, *At Prestigious Rhode Island School, an Investigation into Sexual Abuse*, N.Y. TIMES (Dec. 17, 2015), <https://www.nytimes.com/2015/12/18/us/prestigious-rhode-island-school-announces-sexual-abuse-investigation.html> [https://perma.cc/94LU-J2QS]; Amos Kamil, *Prep-School Predators*, N.Y. TIMES MAG. (June 6, 2012), <https://www.nytimes.com/2012/06/10/magazine/the-horace-mann-schools-secret-history-of-sexual-abuse.html> [https://perma.cc/U349-L43F]; Valerie Strauss, *An Extraordinary Story of Alleged Sex Abuse of Students at Elite Private School over Decades*, WASH. POST (May 27, 2015, 9:19 AM), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/05/27/an-extraordinary-story-of-sex-abuse-of-students-at-elite-private-school-over-decades> [https://perma.cc/M4GA-B9VA]; Sophia Hollander, *Report: Wider Abuse at Horace Mann School*, WALL ST. J. (May 26, 2015, 8:57 PM), <https://www.wsj.com/articles/report-wider-abuse-at-horace-mann-school-1432688264> [https://perma.cc/DT4E-SANG]; Michael O'Keeffe, *Poly Prep Settles Lawsuit Claiming Football Coach Phil Foglietta Sexually Abused Hundreds of Boys*, N.Y. DAILY NEWS (Dec. 26, 2012), <https://www.nydailynews.com/sports/i-team/poly-prep-settles-sex-abuse-suit-article-1.1227827> [https://perma.cc/2T2F-9Q78]; Michael O'Keeffe, *Lawsuit Claims Poly Prep Covered up Iconic Football Coach Phil Foglietta's Sex Abuse of Young Boys for Decades*, N.Y. DAILY NEWS (Dec. 6, 2011), <https://www.nydailynews.com/sports/i-team/lawsuit-claims-poly-prep-covered-iconic-football-coach-phil-foglietta-sex-buse-young-boys-decades-article-1.987284> [https://perma.cc/ASA6-6B5D]; Mosi Secret, *Suit Settled over Claims of Sex Abuse at Poly Prep*, N.Y. TIMES (Dec. 27, 2012), <https://www.nytimes.com/2012/12/28/nyregion/sexual-abuse-case-at-poly-prep-in-brooklyn-is-settled.html> [https://perma.cc/6LCV-TA8A].

<sup>79</sup> Strauss, *supra* note 78; LAURA WINIG, MAKING SCHOOL SAFE: AN INVESTIGATION INTO SEXUAL ABUSE AT THE HORACE MANN SCHOOL, WITH RECOMMENDATIONS FOR HOW INDEPENDENT SCHOOLS CAN PROTECT OUR CHILDREN 3, <http://makingschoolsafe.com/the-report> [https://perma.cc/P5FE-XM5F].

<sup>80</sup> Jenn Abelson et al., *Private Schools, Painful Secrets*, BOS. GLOBE (May 6, 2016, 9:12 PM), <https://www.bostonglobe.com/metro/2016/05/06/private-schools-painful-secrets/OaRI9PFpRnCTJxCzko5hkN/story.html> [https://perma.cc/6CQ7-2B8M]; Globe Staff, *Understanding the Sexual Abuse Allegations at New England Prep Schools*, BOS. GLOBE (July 23, 2016, 9:21 PM) [hereinafter *Prep School Abuse*], <https://www.bostonglobe.com/news/special-reports/2016/07/23/understanding-sexual-abuse-allegations-new-england-prep-schools/on22ht2ORzSB9Z2Prz5v0O/story.html> [https://perma.cc/H3SG-44UW].

<sup>81</sup> *Prep School Abuse*, *supra* note 80.

ty-two schools have started investigations since the Globe began reporting in December 2015. The Globe also identified at least fifteen instances of apparent retaliation against students or employees who complained about sexual harassment or abuse at the hands of teachers or other employees.<sup>82</sup>

A desire to keep the abuse quiet and to preserve the institution's reputation is a common theme across these schools and helps to explain why little is done to help the victims. Marje Monroe was Dean of Students at Stoneleigh-Burnham School in Massachusetts when she met with a student who had been sexually groped by the acting head of the school in 2007.<sup>83</sup> Monroe wanted to report the accusations to state child welfare officials but was advised not to do so by the school's attorney.<sup>84</sup> The school was in serious financial trouble at the time, and administrators were concerned that reporting "a scandal involving the head of [the] school could make matters worse."<sup>85</sup> Monroe was silenced, and the school allowed the perpetrator to remain in his position.<sup>86</sup> The student had to do her best, on her own, to avoid her abuser.<sup>87</sup>

Universities are no better than secondary schools at ferreting out employees who use their positions to perpetrate sexual assault. Sports doctor Larry Nassar apparently amassed over 300 victims in the two decades before his 2017 convictions in a federal child pornography case and two state child sexual abuse cases.<sup>88</sup> He operated under the cover of credibility he gained through his associations with Michigan State University ("MSU") and USA Gymnastics.

Michigan State University paid \$500 million to settle claims from 332 women and girls who said they were sexually assaulted by Nassar during supposed treatments or physical examinations.<sup>89</sup> At least eight women came for-

<sup>82</sup> *Id.*; Globe Staff, *The Unexpected Price of Reporting Abuse: Retaliation*, BOS. GLOBE (July 20, 2016, 8:33 PM), <https://www.bostonglobe.com/metro/2016/07/20/victims-abuse-private-schools-sometimes-face-retaliation-instead-sympathy/6SdTGZKxzkaApl84NKHO/story.html> [https://perma.cc/WB5T-DMUQ].

<sup>83</sup> Globe Staff, *supra* note 82.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* (a state commission found that the school unlawfully retaliated against Monroe; "[t]he two sides reached a confidential settlement").

<sup>87</sup> *Id.*

<sup>88</sup> Benjamin Hoffman, *Gymnastics Doctor Larry Nassar Pleads Guilty to Molestation Charges*, N.Y. TIMES (Nov. 22, 2017), <https://www.nytimes.com/2017/11/22/sports/larry-nassar-gymnastics-molestation.html> [https://perma.cc/MKV4-EVQ8] (Ingham County, Mich. case); Christine Hauser, *Larry Nassar Is Sentenced to Another 40 to 125 Years in Prison*, N.Y. TIMES (Feb. 5, 2018), <https://www.nytimes.com/2018/02/05/sports/larry-nassar-sentencing-hearing.html> [https://perma.cc/WQ38-BRER] (Eaton County, MI. case); Maggie Astor, *Gymnastics Doctor Who Abused Patients Gets 60 Years for Child Pornography*, N.Y. TIMES (Dec. 7, 2017), <https://www.nytimes.com/2017/12/07/sports/larry-nassar-sentence-gymnastics.html> [https://perma.cc/BP7S-Q9CF] (federal case).

<sup>89</sup> David Eggert & Ed White, *Michigan State Reaches \$500M Settlement for 332 Victims of Larry Nassar*, CHI. TRIB. (May 16, 2018), <https://www.chicagotribune.com/sports/college/ct-spt-michigan-state-larry-nassar-settlement-20180516-story.html> [https://perma.cc/UDS5-XG

ward to MSU officials to report Nassar's sexual misconduct during the two decades before his arrest, but MSU did not act on these complaints.<sup>90</sup> Nassar was not convicted until 2017 when one of his victims, lawyer Rachel Denhol-lander, filed a criminal complaint in 2016 that gained traction when earlier complaints did not.<sup>91</sup>

After Nassar's convictions, the Michigan state attorney general's office opened a criminal investigation into MSU's role in the Larry Nassar scandal.<sup>92</sup> Thus far, it has resulted in criminal charges being brought against three prominent former university employees, including former MSU president Lou Anna Simon and former dean of the MSU College of Osteopathic Medicine, William Strampel.<sup>93</sup> Strampel was sentenced to one year in prison for misconduct in office and willful neglect for his handling of the allegations against Nassar, as well as his own sexual misconduct—pressuring female medical students for sexual favors.<sup>94</sup>

MSU's bungled handling of complaints against Larry Nassar is not an isolated incident. It is very similar to Penn State's handling of Jerry Sandusky's abuse of young boys at Penn State facilities over the course of more than a decade.<sup>95</sup> Sandusky, like Nassar, is now in prison for life, and an investigation at Penn State found that university officials turned a blind eye to complaints about Sandusky's behavior and attempted to keep these complaints out of public view.<sup>96</sup> In 2001, three top university officials received a complaint from a graduate assistant who observed Sandusky sexually abusing a boy in a shower on

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<sup>90</sup> *Id.*

<sup>91</sup> Hoffman, *supra* note 88; Tim Evans et al., *Former USA Gymnastics Doctor Accused of Abuse*, INDYSTAR (Jan. 24, 2018, 4:35 PM), <https://www.indystar.com/story/news/2016/09/12/former-usa-gymnastics-doctor-accused-abuse/89995734> [<https://perma.cc/4VWH-WWJT>]; Kim Kozlowski, *How MSU Doc Became Suspect in Dozens of Rapes*, DETROIT NEWS (Aug. 11, 2017, 12:35 PM), <https://www.detroitnews.com/story/news/local/michigan/2017/08/10/rise-fall-larry-nassar/104491508> [<https://perma.cc/EY8K-34R7>].

<sup>92</sup> WILLIAM FORSYTH, STATE OF MICH. DEP'T ATT'Y GEN., STATUS OF THE INDEPENDENT SPECIAL COUNSEL'S INVESTIGATION INTO MICHIGAN STATE UNIVERSITY'S HANDLING OF THE LARRY NASSAR MATTER 1 (2018), [https://www.michigan.gov/documents/ag/MSU\\_Investigation\\_Status\\_Update\\_final.redacted\\_JOB\\_644663\\_7.pdf](https://www.michigan.gov/documents/ag/MSU_Investigation_Status_Update_final.redacted_JOB_644663_7.pdf) [<https://perma.cc/F52B-QY67>].

<sup>93</sup> Neil Vigdor, *Michigan Attorney General Clarifies Status of Nassar Inquiry, Saying It's at an Impasse*, N.Y. TIMES (Dec. 24, 2019), <https://www.nytimes.com/2019/12/24/sports/Larry-Nassar-investigation.html> [<https://perma.cc/Y8L2-57XB>].

<sup>94</sup> *Id.*; Megan Banta, *Former MSU Dean William Strampel Sentenced to One Year in Jail*, LANSING ST. J. (Aug. 7, 2019, 2:20 PM), <https://www.lansingstatejournal.com/story/news/local/2019/08/07/former-msu-dean-william-strampel-sentenced-larry-nassar-michigan-state/1933906001> [<https://perma.cc/6PKA-KF5L>]. Strampel was also convicted for using his position to demand sexual favors from female students. *Id.*

<sup>95</sup> See FREEH SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY 14 (2012) [hereinafter FREEH REPORT].

<sup>96</sup> *Id.* at 16.

campus.<sup>97</sup> They failed to report this incident to police or to child welfare authorities, with the result that Sandusky was allowed to continue to sexually assault children for over a decade, until he was finally arrested in 2011.<sup>98</sup>

The Freeh report into Penn State's handling of the situation concluded:

The most saddening finding by the Special Investigative Counsel is the total and consistent disregard by the most senior leaders at Penn State for the safety and welfare of Sandusky's child victims. . . . Four of the most powerful people at The Pennsylvania State University – President Graham B. Spanier, Senior Vice President-Finance and Business Gary C. Schultz, Athletic Director Timothy M. Curley and Head Football Coach Joseph V. Paterno – failed to protect against a child sexual predator harming children for over a decade. These men concealed Sandusky's activities from the Board of Trustees, the University community and authorities. They exhibited a striking lack of empathy for Sandusky's victims by failing to inquire as to their safety and well-being . . . .<sup>99</sup>

Spanier, Schultz, and Curley all faced criminal proceedings for their roles in the cover-up.<sup>100</sup> After years of litigation, Penn State president Spanier's conviction for child endangerment was overturned on a technicality, allowing him to avoid a two-month prison sentence.<sup>101</sup> Athletic Director Curley and Vice President Schultz pleaded guilty and each served several months in prison.<sup>102</sup>

Other universities have been similarly affected, including The Ohio State University, where Dr. Richard Strauss sexually abused and assaulted at least 177 male students between 1979 and 1996.<sup>103</sup> University personnel were first

<sup>97</sup> The Associated Press, *Penn State Ex-Officials Plead Guilty in Sandusky Case*, N.Y. TIMES (Mar. 13, 2017), <https://www.nytimes.com/2017/03/13/sports/ncaafootball/penn-state-ex-officials-guilty-pleas-sandusky.html> [https://perma.cc/ZM3F-Y77F].

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

<sup>99</sup> FREEH REPORT, *supra* note 95, at 14. Paterno died in 2012. Richard Goldstein, *Joe Paterno, Longtime Penn State Coach, Dies at 85*, N.Y. TIMES (Jan. 22, 2012), <https://www.nytimes.com/2012/01/23/sports/ncaafootball/joe-paterno-longtime-penn-state-coach-dies-at-85.html> [https://perma.cc/CG8Z-HJ3V].

<sup>100</sup> Jon Hurdle & Richard Pérez-Peña, *Former Penn State President Gets Jail Time in Child Molestation Scandal*, N.Y. TIMES (June 2, 2017), <https://www.nytimes.com/2017/06/02/us/penn-state-graham-spanier-child-molestation-sentence.html> [https://perma.cc/8FHB-EPDZ]; Billy Witz, *Judge Overturns Conviction of Ex-Penn State President in Sandusky Case*, N.Y. TIMES (Apr. 30, 2019), <https://www.nytimes.com/2019/04/30/sports/penn-state-spanier-sandusky.html> [https://perma.cc/5KUF-GXT4].

<sup>101</sup> Hurdle & Pérez-Peña, *supra* note 100; Witz, *supra* note 100. Spanier was originally sentenced under a 2007 law that was wrongly applied retroactively to actions he took in 2001. *Id.* The court held, in overturning his conviction, that his actions had to be considered under the 1995 version of the law. *Id.*

<sup>102</sup> David Wenner, *Former Penn State Official Gary Schultz Is Out of Jail*, PENN LIVE (Jan. 5, 2019), [https://www.pennlive.com/news/2017/09/sandusky\\_scandal\\_penn\\_state\\_co.html](https://www.pennlive.com/news/2017/09/sandusky_scandal_penn_state_co.html) [https://perma.cc/8B7C-DV2B]; Matt Miller, *Ex-Penn State Athletic Director Tim Curley Freed from Prison, Under House Arrest*, PENN LIVE (Jan 5, 2019), [https://www.pennlive.com/news/2017/10/penn\\_state.html](https://www.pennlive.com/news/2017/10/penn_state.html) [https://perma.cc/3ENP-NKKU].

<sup>103</sup> CARYN TROMBINO & MARKUS FUNK, PERKINS COIE LLP, REPORT OF THE INDEPENDENT INVESTIGATION: SEXUAL ABUSE COMMITTED BY DR. RICHARD STRAUSS AT THE OHIO STATE UNIVERSITY 1 (2019), <https://presspage-production-content.s3.amazonaws.com/uploads/217>

alerted to his inappropriate behavior in 1979 but took no action against him until 1996, allowing Strauss to continually prey on additional victims.<sup>104</sup> An investigation found that at least fifty university personnel knew of Strauss' actions at the time, and that many students felt that his behavior was an "open secret."<sup>105</sup> Another investigation revealed that the State Medical Board of Ohio closed an investigation of Strauss without leveling any penalty against the doctor, despite the fact that the investigation had "yielded evidence of wrongdoing" by 1996.<sup>106</sup> Although Strauss was removed from his duties treating patients in 1996, he retained his status as a tenured faculty member until his voluntary retirement in 1998.<sup>107</sup> Strauss was never criminally charged, and he retained emeritus status until his death by suicide in 2005.<sup>108</sup>

At the University of Southern California ("USC"), gynecologist George Tyndall allegedly committed sexual misconduct against patients from the 1990s until he was finally suspended in 2016.<sup>109</sup> After years of inaction, university officials conducted an investigation that resulted in his removal, but they failed to report their findings to the California Medical Board, although in hindsight, the university admits that it should have done so.<sup>110</sup> Tyndall is in custody awaiting trial on twenty-nine counts of sexual penetration and sexual battery by fraud—charges that carry up to fifty-three years in prison.<sup>111</sup> The University of Southern California has reached a \$215 million class-action settlement with his former patients.<sup>112</sup> In a turn of events akin to the MSU and Penn State scandals, USC president C.L. Max Nikias resigned over his handling of the George Tyndall situation, after being asked to do so by over two hundred USC professors

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O/finalredactedstraussinvestigationreport-471531.pdf?10000 [https://perma.cc/A7MX-29JA]; Alan Blinder, *Officials Ignored 'Clear Evidence' of Abuse by Ohio State Doctor*, N.Y. TIMES (Aug. 30, 2019), <https://www.nytimes.com/2019/08/30/sports/ohio-state-doctor-abuse.html?searchResultPosition=2> [https://perma.cc/K7BB-5ADK]; Victor Mather, *Ohio State Finds Team Doctor Sexually Abused 177 Students*, N.Y. TIMES (May 17, 2019), <https://www.nytimes.com/2019/05/17/sports/ohio-state-sexual-abuse.html?searchResultPosition=4> [https://perma.cc/7LYX-8JAR].

<sup>104</sup> Mather, *supra* note 103.

<sup>105</sup> *Id.*; TROMBINE & FUNK, *supra* note 103, at 88.

<sup>106</sup> Wenner, *supra* note 102; Blinder, *supra* note 103.

<sup>107</sup> TROMBINE & FUNK, *supra* note 103, at 4.

<sup>108</sup> *Id.* at 2.

<sup>109</sup> Harriet Ryan et al., *Must Reads: A USC Doctor Was Accused of Bad Behavior with Young Women for Years. The University Let Him Continue Treating Students*, L.A. TIMES (May 16, 2018, 6:25 AM), <https://www.latimes.com/local/california/la-me-usc-doctor-misconduct-complaints-20180515-story.html> [https://perma.cc/EA52-TVT6].

<sup>110</sup> *Id.* (noting the university claimed their investigation was a personnel matter and they had no legal obligation to report to the Medical Board, however; state law requires hospitals and clinics to notify the medical board if they suspend or terminate physicians for any reason).

<sup>111</sup> Mariel Padilla, *Judge Signals Approval of U.S.C.'s \$215 Million Settlement with Ex-Gynecologist's Patients*, N.Y. TIMES (Jan. 7, 2020), <https://www.nytimes.com/2020/01/07/us/george-tyndall-usc-settlement.html> [https://perma.cc/CNR4-ZGGV].

<sup>112</sup> *Id.*

who faulted him for failing to protect the university community from “repeated and pervasive sexual harassment and misconduct.”<sup>113</sup>

### 3. *Other Institutions*

Churches, schools, and universities are not the only organizations ill-equipped to respond appropriately to sexual violence, although it may be that they have a greater share of the victims because they include many vulnerable young people: children, as well as young adults who have little life experience and who need the credentials that universities grant.

The activities of sex offender Jimmy Savile demonstrate that other institutions, including the British Broadcasting Corporation (“BBC”) and several hospitals, were equally ill-equipped to confront the challenge posed by a determined sex offender. Savile, who died in 2011, was a British media personality and fundraiser who is thought to have sexually assaulted over five hundred victims across six decades of his life.<sup>114</sup> Savile was never prosecuted, but the scandal, revealed after his death, prompted investigations by many organizations that Savile was affiliated with, in order to determine how he was able to evade detection for so long.<sup>115</sup>

A BBC inquiry into Savile’s sexual abuse found that the BBC’s “management structure and corporate culture had failed to hold Mr. Savile accountable for a catalog of sexual abuse that had taken place in ‘virtually every one of the BBC premises at which he worked,’ including on the set of ‘Top of the Pops’ and in the star’s dressing room.”<sup>116</sup> It found that he had raped eight people, including an eight-year-old child, and sexually abused seventy-two victims on BBC premises.<sup>117</sup> Concerns about Savile’s activities prompted at least forty-one National Health Service hospitals to conduct investigations.<sup>118</sup> Stoke Mandeville Hospital and Leeds General Infirmary were major sites of Savile’s sexual assaults on patients, staff, and visitors.<sup>119</sup>

<sup>113</sup> Jennifer Medina & Tim Arango, *200 Professors Call for Ouster of U.S.C. President, Citing Lack of ‘Moral Authority’*, N.Y. TIMES (May 22, 2018), <https://www.nytimes.com/2018/05/22/us/usc-faculty-president-nikias.html> [<https://perma.cc/GPW3-VNJU>]; Sarah Mervosh, *U.S.C. President Resigns Amid Pressure to Exit Before School Year*, N.Y. TIMES (Aug. 7, 2018), <https://www.nytimes.com/2018/08/07/us/usc-president-cl-max-nikias-wanda-austin.html> [<https://perma.cc/9YXT-M4FB>].

<sup>114</sup> Josh Halliday, *Jimmy Savile: Timeline of His Sexual Abuse and Its Uncovering*, GUARDIAN (June 26, 2014, 6:38 AM), <https://www.theguardian.com/media/2014/jun/26/jimmy-savile-sexual-abuse-timeline> [<https://perma.cc/YXR2-3S2H>].

<sup>115</sup> Dan Bilefsky, *Jimmy Savile Inquiry Accuses BBC of Failing to Report Sexual Abuse*, N.Y. TIMES (Feb. 25, 2016), <https://www.nytimes.com/2016/02/26/world/europe/jimmy-savile-report-bbc.html> [<https://perma.cc/R38D-5JLF>].

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

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

<sup>118</sup> See *Jimmy Savile Abuse Reports: At-a-Glance*, BBC NEWS (Feb. 26, 2015), <https://www.bbc.com/news/uk-31637937> [<https://perma.cc/JL9X-WSUB>].

<sup>119</sup> *Id.*

#### 4. *Child Sexual Exploitation Rings*

Widespread sexual violence can also flourish outside of formal institutions when police, prosecutors, and child welfare organizations ignore it. Whereas Larry Nassar used his affiliations with Michigan State University and USA Gymnastics to gain access to child victims, sexual predator Jeffrey Epstein operated outside of formal institutions for nearly two decades, from 2001 to 2019.<sup>120</sup>

According to court documents, Jeffrey Epstein created a “vast network of underage victims” for the purpose of sexual exploitation in locations including New York, Palm Beach, and the U.S. Virgin Islands.”<sup>121</sup> Epstein used his great wealth to purchase sexual access to underage girls, often targeting those from disadvantaged backgrounds.<sup>122</sup> He also paid his victims hundreds of dollars to recruit additional girls in what prosecutors have called a “trafficking pyramid scheme.”<sup>123</sup> Virgin Islands prosecutors claim, in court documents, that Epstein and his associates transported female victims, including children, to Epstein’s private island where they were “raped, sexually assaulted[,] and held captive.”<sup>124</sup> Prosecutors further state that Epstein and others acted with the criminal purpose of “placing a steady supply of vulnerable female children and young women into sexual servitude in service of Epstein’s desires, and those of his associates.”<sup>125</sup>

In 2007, despite a fifty-three page indictment detailing the full extent of Epstein’s crimes, Florida prosecutors agreed to a non-prosecution agreement

<sup>120</sup> See Eggert & White, *supra* note 89; Evans et al., *supra* note 91; Emily Michot & Julie K. Brown, *How a Future Trump Cabinet Member Gave a Serial Sex Abuser the Deal of a Lifetime*, MIA. HERALD (Nov. 28, 2018), <https://www.miamiherald.com/news/local/article220097825.html> [<https://perma.cc/G99X-9XE8>]; Patricia Mazzei, *Years After Plea Deal in Sex Case, Jeffrey Epstein’s Accusers Will Get Their Day in Court*, N.Y. TIMES (Nov. 29, 2018, 4:14 PM), <https://www.nytimes.com/2018/11/29/us/jeffrey-epstein-acosta-florida-sex-abuse.html> [<https://perma.cc/DQV5-7W5U>]; Complaint at para. 43, U.S. Virgin Islands v. Estate of Jeffrey Epstein, No. ST-20-CV-014 (Super. Ct. V.I. Jan. 15, 2020), <https://www.vicourts.org/workspaces/One.aspx?objectId=16364025&contextId=15978985&parentId=16363985> [<https://perma.cc/GD72-DN2N>]. See generally, JAMES PATTERSON ET AL., *FILTHY RICH: THE SHOCKING TRUE STORY OF JEFFREY EPSTEIN* (2016).

<sup>121</sup> Sealed Indictment at para. 2, United States v. Jeffrey Epstein, 19 Crim 490 (S.D.N.Y. 2019); see Complaint, *supra* note 120.

<sup>122</sup> Michot & Brown, *supra* note 120.

<sup>123</sup> Complaint, *supra* note 120, at para. 57.

<sup>124</sup> Complaint, *supra* note 120, at para. 37.

<sup>125</sup> Complaint, *supra* note 120, at para. 42. At least two victims attempted, unsuccessfully, to escape by swimming away from the island. *Id.* at paras. 54–55. Some of Epstein’s victims, including Virginia Roberts Guiffre and Sarah Ransome, have stated that Epstein also forced them to have sex with other men. Julie K. Brown, *Jeffrey Epstein Arrested on Sex Trafficking Charges*, MIA. HERALD (July 11, 2019, 5:50 PM), <https://www.miamiherald.com/news/state/florida/article232374872.html> [<https://perma.cc/9GNW-EKLH>]; Julie K. Brown, *With Jeffrey Epstein Locked Up, These Are Nervous Times for His Friends, Enablers*, MIA. HERALD (July 9, 2019, 2:38 PM), <https://www.miamiherald.com/article232385422.html> [<https://perma.cc/XX8S-B22L>].

with Epstein which allowed him to plead guilty to minor charges and serve only thirteen months in the county jail.<sup>126</sup> This agreement shut down an ongoing FBI investigation into “whether there were more victims and other powerful people who took part in Epstein’s sex crimes”<sup>127</sup> while also granting immunity to “any potential co-conspirators” involved in these crimes.<sup>128</sup> Twelve years later, federal prosecutors in New York indicted Epstein on sex trafficking charges.<sup>129</sup> This effort ended when Epstein was found dead in his prison cell in August 2019.<sup>130</sup> Although police in 2007 felt that they had built a very strong case against Epstein that could have led to a long prison term, prosecutors declined to prosecute the case, and it is still not clear why.<sup>131</sup> But this case is further evidence of the myriad ways in which sexual violence has been decriminalized and the suffering of victims ignored.

The Epstein case may appear shocking at first glance, but it is not unique. In the United Kingdom, organized child sexual exploitation has been rampant over the last two decades, revealing a substantial inability on the part of authorities to identify crimes of sexual violence even when the victims are children and number in the thousands. These sexual exploitation scandals typically involved men, many of them taxi drivers, grooming middle-school-aged girls by offering them attention, drugs, alcohol, and mobile phones.<sup>132</sup> The victims often came from abusive or neglectful homes and were eager for the apparent gifts the men offered.<sup>133</sup> Once the girls were addicted to the drugs or alcohol, they were forced to provide sex for large numbers of men, and their traffickers stayed in contact with them using the phones they had provided the girls.<sup>134</sup>

<sup>126</sup> Michot & Brown, *supra* note 120. Perhaps most disturbingly, the agreement allowed Epstein to leave jail twelve hours per day on work release. *Id.*

<sup>127</sup> Michot & Brown, *supra* note 120.

<sup>128</sup> *Id.*; Non-Prosecution Agreement and Addendum between R. Alexander Acosta, U.S. Attorney, and Jeffrey Epstein at 5, *In re* Investigation of Jeffrey Epstein, No. 10-cv-21586 (May 17, 2010).

<sup>129</sup> Sealed Indictment, *supra* note 121.

<sup>130</sup> William K. Rashbaum et al., *Jeffrey Epstein Dead in Suicide at Jail, Spurring Inquiries*, N.Y. TIMES (Aug. 10, 2019), <https://www.nytimes.com/2019/08/10/nyregion/jeffrey-epstein-suicide.html> [<https://perma.cc/Q6SF-PVBD>].

<sup>131</sup> See PATTERSON ET AL., *supra* note 120, at 159–60, 165, 173–74; Michot & Brown, *supra* note 120 (“Facing a 53-page federal indictment, Epstein could have ended up in federal prison for the rest of his life.”); *In re* Wild, 955 F.3d 1196, 1228–29 (11th Cir. 2020) (Hull, J., dissenting) (discussing the non-prosecution agreement) (“What happened next remains baffling, to put it mildly. . . . The victims were not told that plea negotiations were ongoing, much less that the Office was seriously considering a non-prosecution agreement granting federal immunity to Epstein and his co-conspirators. Rather, the parties made great efforts to keep that secret from the victims and the public, too.”).

<sup>132</sup> ALEXIS JAY, INDEPENDENT INQUIRY INTO CHILD SEXUAL EXPLOITATION IN ROTHERHAM 37 (2014), <https://www.rotherham.gov.uk/downloads/file/279/independent-inquiry-into-child-sexual-exploitation-in-rotherham> [<https://perma.cc/J8YC-NAYC>].

<sup>133</sup> *Id.* at 31–32, 37.

<sup>134</sup> *Id.* at 35–38.



Girls who tried to escape, or families who tried to intervene to protect them, were often threatened with severe violence.<sup>135</sup>

Authorities estimate, conservatively, that 1,400 girls were victims of this type of sexual exploitation in Rotherham between 1997 and 2013.<sup>136</sup> Forty-five defendants have been convicted for child sexual exploitation in Rotherham since 2010, and the investigation is ongoing.<sup>137</sup> Similar criminal enterprises have been uncovered in many other British communities including Banbury, Bristol, Derby, Halifax, Manchester, Newcastle, Oxford, Peterborough, Rochdale, and Telford, with dozens of individuals convicted to date.<sup>138</sup>

<sup>135</sup> *Id.* at 36, 38, 43, 85, 88; *see, e.g.*, SARAH WILSON, VIOLATED: A SHOCKING AND HARROWING SURVIVAL STORY FROM THE NOTORIOUS ROTHERHAM ABUSE SCANDAL (2015).

<sup>136</sup> JAY, *supra* note 132 at 1. Operation Stovewood, the National Crime Agency's investigation into sexual exploitation in Rotherham, has identified 1,523 potential victims. Frances Perraudin, *Rotherham: Six Men Jailed for Sexually Exploiting Teenage Girls*, GUARDIAN (Nov. 16, 2018, 12:26 AM), <https://www.theguardian.com/uk-news/2018/nov/16/rotherham-six-men-jailed-for-sexually-exploiting-teenage-girls> [https://perma.cc/3CGN-HMCK].

<sup>137</sup> *Five Rotherham Men Jailed for Child Sex Offences*, BBC NEWS (Nov. 4, 2010), <http://www.bbc.com/news/uk-england-south-yorkshire-11696508> [https://perma.cc/A8YW-VABC]; Lisa O'Carroll, *Ringleader of Rotherham Child Sexual Abuse Gang Jailed for 35 Years*, GUARDIAN (Feb. 26, 2016, 8:27 AM), <https://www.theguardian.com/uk-news/2016/feb/26/three-brothers-jailed-over-rotherham-child-sexual-abuse>; [https://perma.cc/CC72-JJVV]; *Rotherham Child Abuse Charges: Eight Guilty*, BBC NEWS (Oct. 17, 2016), <https://www.bbc.com/news/uk-england-37682136> [https://perma.cc/6NGX-M4JG]; *Men Jailed for Rotherham Child Sexual Abuse*, BBC NEWS (Feb. 2, 2017), <https://www.bbc.com/news/uk-england-south-yorkshire-38845332> [https://perma.cc/E84H-K5DU]; Adele Forrest, *Grooming Gang Member Joins Fellow Offenders Behind Bars*, ROTHERHAM ADVERTISER (May 12, 2017), [https://www.rotherhamadvertiser.co.uk/news/view\\_grooming-gang-member-joins-fellow-offenders-behind-bars\\_22576](https://www.rotherhamadvertiser.co.uk/news/view_grooming-gang-member-joins-fellow-offenders-behind-bars_22576) [https://perma.cc/R7YH-NBU5]; Frances Perraudin, *Three Men Charged with Indecent Assault Against a Child in Rotherham*, GUARDIAN (Dec. 14, 2016, 10:01 AM), <https://www.theguardian.com/uk-news/2016/dec/14/operation-stovewood-three-men-charged-indecent-assault-against-child-rotherham> [https://perma.cc/87MZ-8UM6]; *Rotherham Taxi Driver Jailed for Raping Grooming Victim*, BBC NEWS (Feb. 9, 2018), <https://www.bbc.com/news/uk-england-south-yorkshire-43007655> [https://perma.cc/5TCS-PRW5]; *Rotherham Child Sex Abuse Inquiry 'To Continue for Years'*, BBC NEWS (May 20, 2020), <https://www.bbc.com/news/uk-england-south-yorkshire-52737527> [https://perma.cc/K9SU-628L].

<sup>138</sup> *Arrests in Banbury Child Sexual Exploitation Raids*, BBC NEWS (Mar. 28, 2017), <https://www.bbc.com/news/uk-england-oxfordshire-39415747> [https://perma.cc/989J-5N2M]; *Banbury Child Sexual Exploitation Gang Sentenced*, BANBURY GUARDIAN (Apr. 19, 2015), [https://www.newenglishreview.org/blog\\_direct\\_link.cfm/blog\\_id/60562/Banbury-child-sexual-exploitation-gang-sentenced](https://www.newenglishreview.org/blog_direct_link.cfm/blog_id/60562/Banbury-child-sexual-exploitation-gang-sentenced) [https://perma.cc/76QV-BT2E]; Steven Morris, *13 Men Guilty of Enforced Prostitution and Rape of Vulnerable Girls in Bristol*, GUARDIAN (Nov. 27, 2014, 6:58 AM), <https://www.theguardian.com/uk-news/2014/nov/27/guilty-prostitution-bristol-rape-girls-sex-abuse-somali> [https://perma.cc/5X4D-T79S]; *Calderdale Gang Jailed for Grooming and Abusing Girls*, BBC NEWS (June 17, 2016), <https://www.bbc.com/news/uk-england-leeds-36559092> [https://perma.cc/VEB2-E2EU]; PA Media, *Police Officer Among 16 Men Charged in Halifax Child Abuse Inquiry*, GUARDIAN (Dec. 18, 2019, 10:03 AM), <https://www.theguardian.com/uk-news/2019/dec/18/police-officer-among-16-men-charged-with-child-sexual-abuse-in-halifax> [https://perma.cc/8VN9-JLHM]; Joseph Curtis, *Romanian Gang Are Jailed for 25 Years After Schoolgirl, 12, Was Repeatedly Raped*

Although these convictions are a positive sign, the size of these criminal enterprises, their sophistication in targeting and grooming vulnerable young teens, and the length of time they have been allowed to flourish suggest a failure of law enforcement to contain the activity when it was at a nascent stage. Investigations have also revealed a disturbing lack of interest in doing so. For instance, an independent inquiry into child sexual exploitation in Rotherham between 1997 and 2013 found that the scale and seriousness of the problem was “underplayed by senior managers,” as children were raped by multiple perpetrators, trafficked to other towns and cities, abducted, beaten, and intimidated into silence.<sup>139</sup> The report also found that police gave no priority to child sexual exploitation, treating many child victims with contempt and refusing to treat the acts against them as crimes.<sup>140</sup> City officials also turned a blind eye to the ongoing sexual violence against children despite the fact that several prior reports, produced between 2002 and 2006, laid out the extent of the violence in vivid detail.<sup>141</sup> Seminars for elected government leaders presented the abuse in the most explicit terms, such that “nobody could say we didn’t know.”<sup>142</sup> As early as 2006, staff working with children considered the “level of intimidation, physical beatings and rape amongst exploited girls . . . to be very severe and their situation to be very serious.”<sup>143</sup> And yet police failed to act.<sup>144</sup>

Across the United Kingdom, determined networks of sexual abusers of children have worked together for decades, engaging in crimes against children with impunity and without arousing the interest of the police.

### 5. *Institutional Failure Around Sexual Violence is Systemic*

Clear patterns emerge across all of these cases of institutional blindness to sexual violence. The institutional response is often to silence the victims and cover up the abusers’ crimes for the sake of the institution’s reputation. This is a toxic response that allows perpetrators to continue offending. At some point, perhaps after decades of offending, word leaks out, the public is outraged, and there are investigations and reports into why nothing was done to stop the sexual misconduct at the time.

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*in Park as Part of 'Relentless' Sexual Grooming Campaign*, DAILY MAIL (Sept. 24, 2019, 5:24 AM), <https://www.dailymail.co.uk/news/article-7497917/Romanian-gang-jailed-25-years-repeatedly-raping-girl.html> [<https://perma.cc/RQ6L-EKW7>]; Frances Perraudin, *Eighteen People Found Guilty over Newcastle Sex Grooming Network*, GUARDIAN (Aug. 9, 2017, 10:19 AM), <https://www.theguardian.com/uk-news/2017/aug/09/newcastle-sex-grooming-network-operation-shelter> [<https://perma.cc/AC7A-UZVR>].

<sup>139</sup> JAY, *supra* note 132, at 1.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 2 (internal quotation marks omitted).

<sup>143</sup> *Id.* at 88.

<sup>144</sup> *See id.* at 1, 83.

Certainly the sexual abuse and violence within the Catholic church fits this pattern. The church perfected, over decades and across the world, an institutional response to sexual misconduct that tolerated abuse, enabled it, and shielded the church and its internal predators from criminal and civil complaints. Similarly, sex offenders Sandusky, Nassar, Strauss, and Tyndall all had access to vulnerable victims through their university positions, and yet multiple complaints from victims failed to spur university officials to take action. It is also noteworthy that Nassar may have had an ally in his dean, who himself was engaged in sexual misconduct, and that two USC Deans were also faulted for sexual misconduct.<sup>145</sup> This similarity suggests that some schools may have a culture of tolerating sexual misconduct that is rooted at the highest level. Horace Mann school would appear to be one of these.

It is striking that the institutional failure to respond to reports of sexual violence at both MSU and Penn State were profound enough to result in criminal charges against some of the schools' highest administrators, and that university presidents of three of the affected schools were forced out of office. Because it is safe to assume that no university official wants to be charged with a crime, and no university president welcomes being forced to resign, these circumstances suggest a profound inability of top officials across many institutions to effectively lead in addressing sexual misconduct. Rotherham and the related British child exploitation scandals reveal law enforcement agencies with no effective means of stopping perpetrators who commit widespread sexual violence, whether or not those individuals have power and privilege.

The many cases discussed here are not aberrations. Taken together, they demonstrate a systemic inability of institutions to identify and stop sexual violence, revealing that many institutions lack a proactive strategy for addressing sexual violence before it affects large numbers of victims.

### C. *Untested Rape Kits*

The sheer number of untested rape kits in the United States conveys a great deal about the magnitude of the sexual violence crisis. The federal government estimates that over 200,000 untested rape kits are currently being stored by police departments across the country.<sup>146</sup> Some estimates indicate that the number of untested kits could be much higher.<sup>147</sup> The website *End The Backlog* tracks

<sup>145</sup> Ryan et al., *supra* note 109; Sarah Parvini et al., *USC Medical School Dean Out Amid Revelations of Sexual Harassment Claim, \$135,000 Settlement with Researcher*, L.A. TIMES (Oct. 6, 2017, 9:45 AM), <https://www.latimes.com/local/lanow/la-me-usc-dean-harassment-20171005-story.html> [<https://perma.cc/BDS7-GCPX>].

<sup>146</sup> Barbara Bradley Hagerty, *An Epidemic of Disbelief: What New Research Reveals About Sexual Predators, and Why Police Fail to Catch Them*, ATLANTIC (July 22, 2019, 11:17 AM), <https://www.theatlantic.com/magazine/archive/2019/08/an-epidemic-of-disbelief/592807> [<https://perma.cc/MH2W-LMTK>].

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

untested rape kits by state, as well as states' progress in testing such kits and legal reform efforts designed to eliminate the rape kit backlog.<sup>148</sup>

Untested rape kits demonstrate the low priority attached to solving sex crimes in many jurisdictions. They also indicate a failure to appreciate that rape is often a serial offense and that people who commit rape are often *generalist criminals* who commit many other offenses.<sup>149</sup> As one example, Cuyahoga county, Ohio, where Cleveland is located, has tested over seven thousand backlogged rape kits as of December 2019.<sup>150</sup> The testing of these kits has led to the identification of 1,334 serial sex offenders and rapists, and to 766 indictments.<sup>151</sup> One convicted rapist, Nathan Ford, was linked to twenty-two rape kits once testing was complete.<sup>152</sup> By that time he was already sitting in prison, having been sentenced to 138-years in 2006, after forensic evidence linked him to eight rapes that occurred between 1996 and 2004.<sup>153</sup> Ford also “[pled] no contest to more than 50 charges of rape.”<sup>154</sup>

It would not have been difficult to stop Ford much earlier if his victims had been taken seriously and their rape kits tested in a timely fashion. As former Cuyahoga County prosecutor Tim McGinty said, “They’re morons. We were letting morons beat us.”<sup>155</sup>

#### *D. Statistical Manipulation Conceals the Extent of Sexual Assault*

A further indicator of the extent to which sexual violence has been decriminalized is the prevalence of the misclassification of sexual assault offenses by police. Research has indicated that in some law enforcement agencies, numerous sexual offenses have been recorded as much less serious crimes than what the complainants actually reported, with some not recorded as crimes at all. Statistical gamesmanship conceals the actual extent of sexual violence that is reported to police and then dismissed with no action.

<sup>148</sup> *How We Determine and Track State Reforms*, END THE BACKLOG, <http://www.endthebacklog.org/ending-backlog-government-responses-state/how-we-determine-and-track-state-reforms> [https://perma.cc/9TDG-UQL7].

<sup>149</sup> Hagerty, *supra* note 146; *Research Reveals New Insights into Rapist Behavior, Assists Rape Investigations and Prosecutions*, CASE WESTERN RESERVE U.: NEWS & PUBLICATIONS (June 29, 2016), <https://case.edu/socialwork/about/news-publications/research-reveals-new-insights-rapist-behavior-assists-rape-investigations-and-prosecutions> [https://perma.cc/AZ2L-YXAE] (“Rapists have long criminal histories that often began before their first documented sexual assault and continued after it.”).

<sup>150</sup> *Cleveland*, END THE BACKLOG, <http://www.endthebacklog.org/cleveland> [https://perma.cc/2PMC-8PD9].

<sup>151</sup> *Id.*

<sup>152</sup> Hagerty, *supra* note 146.

<sup>153</sup> Rachel Dissell, *Nathan Ford, Linked to at Least 15 Cleveland Rapes, Blames ‘Irresistible Impulses,’* CLEVELAND.COM (Jan. 11, 2019) [https://www.cleveland.com/rape-kits/2017/03/nathan\\_ford\\_now\\_linked\\_to\\_15\\_a.html](https://www.cleveland.com/rape-kits/2017/03/nathan_ford_now_linked_to_15_a.html) [perma.cc/4H3Q-4ANL].

<sup>154</sup> *Id.*

<sup>155</sup> Hagerty, *supra* note 146.

One example of this phenomenon is the undercounting of reports of sexual assault, which was revealed by the Department of Justice (“DOJ”) to be a significant problem with sexual assault investigation in New Orleans and Puerto Rico.<sup>156</sup> The DOJ found that in both of these jurisdictions, the number of murders reported to police far exceeded the number of rapes—a statistical anomaly that suggests that sexual assaults are being undercounted.<sup>157</sup> For instance, in 2009, New Orleans police reported “98 forcible rapes and 179 homicides, when in virtually every other city the number of rapes far outpace the number of homicides.”<sup>158</sup> The Justice Department also noted that Puerto Rico has historically recorded fewer rapes than murders, with the number of rapes reported annually to police declining sharply, from 228 to 39, from 2000 to 2010.<sup>159</sup> During this same period, the number of murders rose from 695 to 983.<sup>160</sup> These numbers—just thirty-nine rapes recorded for a population of three million—send a message to the community that rapists enjoy impunity.<sup>161</sup>

Professor Corey Yung has found that this pattern of undercounting rape in relation to murders exists in a number of other cities including Baltimore, Detroit, Philadelphia, Washington, D.C., and others.<sup>162</sup> He found considerable undercounting from 1995 to 2012 in 22 percent of 210 police departments he studied.<sup>163</sup> He estimates that during this time period, between “796,213 to 1,145,309 complaints of forcible vaginal rapes of female victims nationwide disappeared from the official records from 1995 to 2012.”<sup>164</sup>

Comparing recorded rapes to murders in certain cities reveals the extent of the undercounting problem. It is ordinarily very rare for cities with a population over 100,000 to report more murders than rapes.<sup>165</sup> It simply does not make sense that a particular jurisdiction would experience 983 murders in one year

<sup>156</sup> DOJ NEW ORLEANS REPORT, *supra* note 32, at 45; U.S. DEP’T OF JUST. C.R. DIV., INVESTIGATION OF THE PUERTO RICO POLICE DEPARTMENT 57 (2011) [hereinafter DOJ P.R. REPORT].

<sup>157</sup> DOJ NEW ORLEANS REPORT, *supra* note 32, at 45; DOJ P.R. REPORT, *supra* note 156; HRW REPORT, *supra* note 32.

<sup>158</sup> DOJ NEW ORLEANS REPORT, *supra* note 32, at 45.

According to 2009 UCR data: In New York City there were 471 homicides and 832 rapes; Los Angeles 312 homicides and 903 rapes; Pittsburgh, Pennsylvania 39 homicides and 116 rapes; Austin, Texas 22 homicides and 265 rapes; Las Vegas, Nevada 111 homicides and 698 rapes; Louisville, Kentucky 62 homicides and 230 rapes; and Nashville, Tennessee 77 homicides and 262 rapes.

*Id.* at 45 n.18.

<sup>159</sup> DOJ P.R. REPORT, *supra* note 156.

<sup>160</sup> *Id.*

<sup>161</sup> *Quick Facts: Puerto Rico*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/PR> [<https://perma.cc/PFY4-6FHP>] (regarding population estimates as of July 1, 2019).

<sup>162</sup> Corey Rayburn Yung, *How to Lie with Rape Statistics: America’s Hidden Rape Crisis*, 99 IOWA L. REV. 1197, 1203 (2014).

<sup>163</sup> *Id.* at 1237.

<sup>164</sup> *Id.* at 1198, 1239.

<sup>165</sup> HRW REPORT, *supra* note 32.

but only thirty-nine rapes. Rather, these numbers strongly suggest police are dispensing with rape complaints by some other mechanism. The actual undercounting is achieved using several techniques, including police failure to record some reported rapes while improperly unfounding other rapes, and downgrading or misclassifying others.<sup>166</sup> Evidence suggests that these techniques are prevalent. For instance, the Justice Department found that the New Orleans Police Department was widely misclassifying rapes as non-criminal complaints, using a coding category intended for miscellaneous complaints.<sup>167</sup> This strategy effectively foreclosed the full investigation of a substantial proportion of reported sex crimes.<sup>168</sup> In 2008, almost 63 percent of reported rapes in New Orleans received this treatment.<sup>169</sup>

Unfounding rape complaints is another strategy for excluding rapes from official police statistics. The “unfounded” classification should “only [be used] for a report of rape that [has been] found, after [a full] investigation, to be either false or baseless.”<sup>170</sup> However, the Baltimore Police Department (“BPD”) applied the “unfounded” classification to more than 30 percent of reported rapes in 2010; in other words, they were unfounding rape cases at a rate that was five times the national average.<sup>171</sup> It is not unusual for a police department to change their strategy for misclassifying rape in response to criticism, but doing so does not necessarily mean that rape investigation has improved. When an audit revealed that the BPD had misclassified more than half of the rape cases they classified as “unfounded” in 2010, BPD’s use of that category dropped sharply, to just 10 percent of all rapes, between 2010 and 2016.<sup>172</sup>

However, this did not correspond to an improvement in the investigation and prosecution of rape. The Justice Department found that BPD had simply shifted to a strategy of keeping the majority of its rape cases in an “open” status. In 2015, for instance, BPD only closed 17 percent of rapes by arresting a suspect.<sup>173</sup> The Justice Department concluded that:

Taken in the aggregate, this data suggests that BPD is keeping the majority of its rape cases in an “open” status, thus drastically reducing the rate of its rape cases closed as “unfounded”—and creating the illusion of having made meaningful reforms to its procedures for identifying and classifying sexual assaults.<sup>174</sup>

<sup>166</sup> Yung, *supra* note 162, at 1201–02.

<sup>167</sup> DOJ NEW ORLEANS REPORT, *supra* note 32, at 45.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> DOJ BALTIMORE REPORT, *supra* note 32, at 126.

<sup>171</sup> *Id.* See, e.g., Justin Fenton, *City Rape Statistics, Investigations Draw Concern*, BALT. SUN (June 27, 2010), [http://articles.baltimoresun.com/2010-06-27/news/bs-md-ci-rapes-20100519\\_1\\_rosalyn-branson-police-detectivepolice-figures](http://articles.baltimoresun.com/2010-06-27/news/bs-md-ci-rapes-20100519_1_rosalyn-branson-police-detectivepolice-figures) [https://perma.cc/7PYV-FK38].

<sup>172</sup> DOJ BALTIMORE REPORT, *supra* note 32, at 126–27.

<sup>173</sup> *Id.* at 127.

<sup>174</sup> *Id.*

In Washington, D.C., a Human Rights Watch (“HRW”) investigation found that numerous sexual assault cases were either unfounded or classified as “office information” or “miscellaneous” cases without any investigation.<sup>175</sup> Many of these cases were not treated as crime reports at all; HRW found that between 2009 and 2011, eighty-two such cases were classified as “office information,” and did not receive a case number or an incident report, contrary to internal guidelines.<sup>176</sup> HRW also documented numerous instances where victims reported a rape to police at a hospital while having a forensic exam, but police did not make an official record of the complaint.<sup>177</sup>

Baltimore and New Orleans are now operating under consent decrees designed to provide oversight and monitoring as those cities work to improve the police response to sexual assault.<sup>178</sup> But the work of the Justice Department and HRW in investigating these police failures raises questions about how prevalent these poor practices are in law enforcement agencies across the country.

The undercounting of rape is not a problem limited to the United States. In Britain, the accuracy of police-recorded crime statistics has long been called into question, with sources revealing that police fiddle with crime figures for various performance management reasons.<sup>179</sup> In 2014, Britain’s Office of National Statistics stripped police-recorded crime numbers from their status as official “national statistics” as a result of concerns about their unreliability, and that status continues today.<sup>180</sup> Members of parliament have heard evidence that

<sup>175</sup> HRW REPORT, *supra* note 32.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Order Granting Consent Decree, *United States v. New Orleans*, No. 12-CV-01924 (E.D. La. Oct. 2, 2018); Order Granting Consent Decree, *United States v. Police Dep’t of Balt.*, No. JKB-17-99 (D. Md. Apr. 7, 2017); *City of Baltimore Consent Decree*, CITY OF BALT., <https://consentdecree.baltimorecity.gov> [<https://perma.cc/Q2HD-VRMR>]; New Orleans Police Department, *NOPD Consent Decree*, NOLA.GOV, <https://nola.gov/nopd/nopd-consent-decree> [<https://perma.cc/Q9ZQ-GR4S>].

<sup>179</sup> Avalos 2016, *supra* note 22, at 40–41; Alan Travis, *Police Crime Figures Lose Official Status Over Claims of Fiddling*, GUARDIAN (Jan. 15, 2014, 8:56 AM), <https://www.theguardian.com/uk-news/2014/jan/15/police-crime-figures-status-claims-fiddling> [<https://perma.cc/85XT-3ECS>]; RODGER PATRICK, A TANGLED WEB: WHY YOU CAN’T BELIEVE CRIME STATISTICS 7 (2014).

<sup>180</sup> See, e.g., OFF. FOR NAT’L STAT., U.K. STAT. AUTH., STATISTICS ON CRIME IN ENGLAND AND WALES: ASSESSMENT OF COMPLIANCE WITH THE CODE OF PRACTICE FOR OFFICIAL STATISTICS ¶ 1.3.1 (2014); PUB. ADMIN. SELECT COMM., HOUSE OF COMMONS, CAUGHT RED-HANDED: WHY WE CAN’T COUNT ON POLICE RECORDED CRIME STATISTICS 11 (2014) [hereinafter CAUGHT RED-HANDED]; HER MAJESTY’S INSPECTORATE OF CONSTABULARY, CRIME RECORDING: A MATTER OF FACT ¶ 3.7 (2014); Richard Alleyne, *Pcs Told to Downgrade Crimes to Help Meet Targets*, TELEGRAPH (May 5, 2008, 8:17 PM), <http://www.telegraph.co.uk/news/uknews/1929667/Pcs-told-to-downgrade-crimes-to-help-meet-targets.html> [<https://perma.cc/EW5U-6H9L>]; Alan Travis, *Police Fail to Record 800,000 Crimes a Year, Including One in Four Sex Offences*, GUARDIAN (Nov. 18, 2014, 5:24 AM), <http://www.theguardian.com/uk-news/2014/nov/18/police-dismiss-one-in-four-sex-crimes-watchdog> [<https://perma.cc/8P56-2YJK>]; Travis, *supra* note 179; PATRICK, *supra* note 179, at 82–83. In Britain, “national statistics” are those “which have been assessed by the Office for Statistics Regulation

police downgrade offenses to less serious crimes, work to persuade victims to withdraw their complaints, and sometimes only record crimes once they have been solved.<sup>181</sup> The latter strategy improves performance statistics for the agency, because it allows police to avoid having open, unsolved crimes on record.<sup>182</sup>

Sexual offenses in particular have been subjected to misclassification and manipulation in Britain, with police failing to record 26 percent of sexual offenses reported to them.<sup>183</sup> This compares to their failures to record 19 percent of all crimes reported.<sup>184</sup> If police are failing to record one out of every four reported sexual offenses reported, those offenses are neither counted in crime statistics, nor investigated or prosecuted. The result is a misleading picture of the extent of sexual violence. Undercounting masks the extent to which offenders are allowed to commit such violence with impunity. It keeps the general public in the dark—they remain unaware of the magnitude of the offenses that are going unpunished. The public does not realize that anything is wrong, when the reality is that police allow rapists to run free and also obstruct victims' access to justice.

#### *E. Criminalizing Victims*

To make matters even worse for victims of sexual violence, sometimes police focus on bringing criminal charges against them rather than prosecuting the offender who has sexually violated them. We saw this in the Rondini and Mannion cases, *supra*, where both women were charged with crimes while the Tuscaloosa police disregarded their reports of sexual assault. These cases are not unusual.

Victims of sex trafficking have also faced horrible mistreatment from police as the case of Chrystul Kizer illustrates. Kizer was a sixteen-year-old African American who was groomed, sexually assaulted, and repeatedly sex trafficked by thirty-three-year-old Randy Volar.<sup>185</sup> Although police soon learned that Volar, who was white, had similarly abused and trafficked about a dozen underage African American girls, they allowed him to remain free on bond and delayed bringing charges against him.<sup>186</sup> He was still free on bond when Kizer

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as fully compliant with the Code of Practice for Statistics.” *Types of Official Statistics*, U.K. STAT. AUTH., <https://www.statisticsauthority.gov.uk/about-the-authority/uk-statistical-system/types-of-official-statistics> [https://perma.cc/3RF9-3JJP].

<sup>181</sup> Travis, *supra* note 179.

<sup>182</sup> See CAUGHT RED-HANDED, *supra* note 180, at 14; PATRICK, *supra* note 179, at 20–21.

<sup>183</sup> HER MAJESTY’S INSPECTORATE OF CONSTABULARY, CRIME-RECORDING: MAKING THE VICTIM COUNT 18 (2014), <https://www.justiceinspectors.gov.uk/hmicfrs/publications/crime-recording-making-the-victim-count> [https://perma.cc/6B6N-FFPX].

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

<sup>185</sup> Jessica Contrera, *He Was Sexually Abusing Underage Girls. Then, Police Said, One of Them Killed Him*, WASH. POST (Dec. 17, 2019), <https://www.washingtonpost.com/graphics/2019/local/child-sex-trafficking-murder> [https://perma.cc/G5NX-EQZV].

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



shot and killed him.<sup>187</sup> According to Kizer, she killed him while resisting a sexual assault, but the prosecutor believed the crime was premeditated and charged Kizer with murder.<sup>188</sup> She is currently awaiting trial and faces life in prison.<sup>189</sup> The prosecutor appears to have disregarded Kizer's status as a sixteen-year-old sex trafficking victim in bringing charges against her. As of January 11, 2021, over 1,475,875 people have signed a change.org petition demanding that the charges be dropped.<sup>190</sup>

Victims of sexual violence face other forms of poor treatment. They are sometimes charged with false reporting if police do not believe their complaints, bullied by police into retracting their allegations, and threatened with false reporting charges if they do not retract. A HRW investigation into how police in Washington, D.C., handle rape complaints found that complainants were regularly disbelieved and treated with skepticism.<sup>191</sup> It also found that police frequently threatened to charge rape complainants with false reporting if the complainants did not retract their allegations.<sup>192</sup>

Genuine rape victims have been wrongfully charged with false reporting in many cases.<sup>193</sup> Usually such cases occur as a result of a failure to fully investigate, often because police have not received adequate training in sexual assault investigation and accordingly resort to rape myths and stereotypes in assessing a victim's credibility.<sup>194</sup> Studies have also demonstrated that many cases labeled false are so labeled early in the investigative process, prior to a thorough investigation.<sup>195</sup> Doing so is in contravention of best practice, which requires a full investigation before a report of sexual assault can be labeled false.<sup>196</sup>

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

<sup>188</sup> *Id.*

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

<sup>190</sup> #FREECHRYSTUL DEF. COMM., *Drop All Charges Against Incarcerated Trafficking Survivor Chrystul Kizer!*, CHANGE.ORG, <https://www.change.org/p/drop-all-charges-against-incarcerated-trafficking-survivor-chrystul-kizer> [https://perma.cc/A6LF-UPBC].

<sup>191</sup> HRW REPORT, *supra* note 32.

<sup>192</sup> *Id.*

<sup>193</sup> Avalos 2016, *supra* note 22, at 14; Lisa R. Avalos, *Policing Rape Complainants: When Reporting Rape Becomes a Crime*, 20 J. GENDER, RACE & JUST. 459, 476 (2017) [hereinafter Avalos 2017]; Lisa Avalos, *The Chilling Effect: The Politics of Charging Rape Complainants with False Reporting*, 83 BROOK. L. REV. 807, 809 (2018) [hereinafter Avalos 2018].

<sup>194</sup> Avalos 2016, *supra* note 22, at 6–7, 9–11; Avalos 2017, *supra* note 193, at 464–72; Avalos 2018, *supra* note 193, at 809–12. See JOANNE ARCHAMBAULT ET AL., END VIOLENCE AGAINST WOMEN INT'L, RAPED, THEN JAILED: THE RISKS OF PROSECUTION FOR FALSELY REPORTING SEXUAL ASSAULT 7–10 (2019) [hereinafter RAPED THEN JAILED].

<sup>195</sup> KELLY ET AL., *supra* note 32, at 37–38, 48, 52–53; RAPED THEN JAILED, *supra* note 194, at 8 (“Once an investigator starts down this path, any meaningful inquiry into the sexual assault typically comes to an end.”).

<sup>196</sup> IACP NAT'L L. ENF'T POL'Y CTR., INVESTIGATING SEXUAL ASSAULTS 12–13 (2005), [http://www.ncdsv.org/images/IACP\\_InvestigatingSAConceptsIssuesPaper\\_7-2005.pdf](http://www.ncdsv.org/images/IACP_InvestigatingSAConceptsIssuesPaper_7-2005.pdf) [https://perma.cc/JJM6-58VM]; HEATHER HUHTANEN, LISA AVALOS & KIMBERLY A. LONSWAY, END VIOLENCE AGAINST WOMEN INT'L, GENDER BIAS IN SEXUAL ASSAULT RESPONSE AND INVESTIGATION, PART 4: VICTIM RECANTATIONS 14 (2018).

Attempts to dismiss sexual violence complaints as false reports are a further symptom of a police failure to approach these cases as the work of serial predators. Rather, when police focus on making such cases go away, one by one, by attacking the victim's credibility, they lose the opportunity to see any pattern in offending that the cases, taken together, might reveal. And yet the practice of charging rape victims with false reporting persists, because without accountability to outside agencies, it is an easier way for officers to dispense with a difficult case. Who wants to investigate a rape case when it can be discarded by charging the victim with false reporting? In most instances, the victim has nowhere to complain and is on the defensive. She may have even retracted her allegations in order to disengage from the police—a not uncommon approach to being disbelieved, but one the police will sometimes seize on in order to charge the victim with false reporting.<sup>197</sup>

That this non-approach to rape investigation can backfire is an understatement, as the case of Marc O'Leary, *supra*, shows. O'Leary was left free to carry out additional rapes across several jurisdictions when Marie was disbelieved and charged with false reporting.<sup>198</sup> The same thing has happened in other cases. Sara Reedy was charged with false reporting after being raped at a gas station in Pennsylvania; her rapist, Wilbur Brown, confessed to raping Reedy after being apprehended for a similar crime that he committed after Reedy's rape.<sup>199</sup> Reedy ultimately secured a \$1.5 million settlement from the police.<sup>200</sup> A Wisconsin woman, "Patty," was also charged with false reporting and had to wait years before learning the identity of her rapist.<sup>201</sup> Despite the fact that Joseph Bong was apprehended for robbery within days of raping Patty, police missed the similarities between his rape of Patty and an attempted sexual assault he committed on another woman during the course of the robbery.<sup>202</sup> Patty also secured a financial settlement from the city of Madison, Wisconsin, for how she was treated.<sup>203</sup>

In a perversion on this theme, Shana Grice, a British woman, was killed by her ex-boyfriend, Michael Lane, after she was charged with wasting police time and fined.<sup>204</sup> Grice's crime? She had gone to police five times over a six-month

<sup>197</sup> HUHTANEN ET AL., *supra* note 196, at 7–11; Avalos 2016, *supra* note 22, at 43–47; Avalos 2017, *supra* note 193, at 476–81. See RAPED THEN JAILED, *supra* note 194, at 20.

<sup>198</sup> See Avalos 2016, *supra* note 22, at 15–16.

<sup>199</sup> Avalos 2016, *supra* note 22, at 14–15, 24–25; Joanna Walters, *Sara Reedy, the Rape Victim Accused of Lying and Jailed by US Police, Wins \$1.5M Payout*, GUARDIAN (Dec. 15, 2012, 7:45 AM), <http://www.theguardian.com/world/2012/dec/15/sara-reedy-rape-victim-wins-police-payout> [https://perma.cc/9QDL-EYAQ].

<sup>200</sup> Walters, *supra* note 199.

<sup>201</sup> Avalos 2016, *supra* note 22, at 15, 30–32; BILL LUEDERS, *CRY RAPE: THE TRUE STORY OF ONE WOMAN'S HARROWING QUEST FOR JUSTICE* 92 (2006).

<sup>202</sup> LUEDERS, *supra* note 201, at 193–95.

<sup>203</sup> *Id.* at 266.

<sup>204</sup> Kevin Rawlinson, *Shana Grice Murder: Police Officer's Hearing Was a Sham, Say Parents*, GUARDIAN (July 30, 2019, 5:02 PM), <https://www.theguardian.com/uk-news/2019/jul/>

period, with complaints that Lane was stalking and harassing her.<sup>205</sup> Her pleas for help were never properly investigated, leaving her with no police protection and ultimately leading to her murder.<sup>206</sup>

A decision by Virginia police to charge Lara McLeod with falsely reporting a sexual assault also ended in tragedy. McLeod had told police that her sister's fiancé, Joaquin Rams, had raped her while her sister was recovering from giving birth to a child fathered by Rams.<sup>207</sup>

Rather than investigate the rape, police charged McLeod with false reporting.<sup>208</sup> Their efforts to brand McLeod as a liar worked in Rams' favor when McLeod's sister ended her relationship with Rams as a result of the rape.<sup>209</sup> Rams was ultimately able to gain the right to unsupervised visitation with the son he had with McLeod's sister, but he murdered the child for life insurance money when the boy was only fifteen months old.<sup>210</sup>

In each of these cases, the police's reckless decision to criminalize the victim and focus on prosecuting her left a sexual offender or murderer at large to commit additional, and sometimes more serious, crimes.

#### F. Lenient Sentencing

The lenient sentences that have been meted out to some sexual offenders are further evidence of the low priority accorded to crimes of sexual violence, and the lack of seriousness with which certain sex crimes cases are regarded at the judicial level. These cases also demonstrate that the judiciary is sometimes out of step with the changing public perceptions of sex crimes. But these cases also offer a glimmer of hope, indicating a willingness on the part of ordinary citizens to be change agents, and of elected officials to update sex crimes laws to better reflect the seriousness of these crimes.

Former Stanford University freshman Brock Turner was famously sentenced to only six months in jail for sexually assaulting an incapacitated woman

30/shana-grice-misconduct-finding-over-harassment-case [https://perma.cc/4VMA-JXK7].

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

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

<sup>207</sup> Avalos 2017, *supra* note 193, at 478; Katie J.M. Baker, *The Police Told Her to Report Her Rape, Then Arrested Her For Lying*, BUZZFEED (Sept. 27, 2015, 8:17 PM), <https://www.buzzfeednews.com/article/katiejmbaker/the-police-told-her-to-report-her-rape-then-arrested-her-for> [https://perma.cc/L9QK-BSDT].

<sup>208</sup> Avalos 2017, *supra* note 193, at 480.

<sup>209</sup> See Luke Mullins, *Joaquin Rams Seemed Like the Perfect Family Man. He Wasn't*, WASHINGTONIAN (Dec. 13, 2013), <https://www.washingtonian.com/2013/12/13/joaquin-rams-hera-mcleod> [https://perma.cc/J89J-PXRF].

<sup>210</sup> *Id.*; 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](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) [https://perma.cc/7Y4M-DGMC].

after a fraternity party in January 2015.<sup>211</sup> He was released after serving three months, although he must register as a sex offender for life.<sup>212</sup> Although the maximum sentence for Turner's crime was fourteen years and the prosecutor had asked for a six-year sentence, Turner's sentencing judge, Aaron Persky, stated that he considered the "severe impact" that a longer sentence would have on Turner's life; he also considered the fact that Turner had been drinking to be a mitigating factor.<sup>213</sup> Judge Persky also stated that he did not think that Turner would be a danger to others going forward.<sup>214</sup> Voters in California responded by removing Judge Persky from office, the first California judge to be recalled in over eighty years.<sup>215</sup> In addition, the California legislature responded by revising the "penal code to require judges to sentence [sex offenders] to prison time rather than [to] probation or jail."<sup>216</sup>

Montana high school teacher Stacy Rambold's case also caused outrage when he was sentenced to just thirty-one days in prison for having sex multiple times with one of his students, a fourteen-year-old girl.<sup>217</sup> Rambold was fifty-four at the time.<sup>218</sup> The judge who sentenced Rambold, G. Todd Baugh, described the victim as "older than her chronological age" and said she was "as much in control of the situation" as Rambold.<sup>219</sup> When a public outcry ensued,

<sup>211</sup> Daniel Victor, *Brock Turner Wanted Only 'Outercourse,' Lawyer Argues in Appeal*, N.Y. TIMES (July 26, 2018), <https://www.nytimes.com/2018/07/26/us/brock-turner-victim-outercourse-appeal.html> [https://perma.cc/ZHY5-EHQX]; Christine Hauser, *Brock Turner Loses Appeal to Overturn Sexual Assault Conviction*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/us/brock-turner-appeal.html> [https://perma.cc/Q828-XYC9].

<sup>212</sup> Hauser, *supra* note 211.

<sup>213</sup> Sam Levin, *Stanford Sexual Assault: Read the Full Text of the Judge's Controversial Decision*, GUARDIAN (June 14, 2016, 6:00 PM), <https://www.theguardian.com/us-news/2016/jun/14/stanford-sexual-assault-read-sentence-judge-aaron-persky> [https://perma.cc/86JB-FWH4].

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

<sup>215</sup> Meagan Flynn, *Voters Remove Judge Who Sentenced Brock Turner to Six Months in Stanford Sexual Assault Case*, WASH. POST (June 6, 2018, 4:58 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2018/06/06/voters-remove-judge-who-sentenced-brock-turner-to-six-months-in-stanford-rape-case/> [https://perma.cc/F6DU-3ZXK].

<sup>216</sup> *Id.*

<sup>217</sup> Ashley Nerbovig, *Teacher Who Raped Student to Be Paroled to California After Less than 3 Years in Prison*, BILLINGS GAZETTE (Mar. 10, 2017), [https://billingsgazette.com/news/state-and-regional/crime-and-courts/teacher-who-raped-student-to-be-paroled-to-california-after-less-than-3-years-in/article\\_0e96cce1-e322-517e-9fcc-24ad8e4f7598.html](https://billingsgazette.com/news/state-and-regional/crime-and-courts/teacher-who-raped-student-to-be-paroled-to-california-after-less-than-3-years-in/article_0e96cce1-e322-517e-9fcc-24ad8e4f7598.html) [https://perma.cc/6KVV-R39E]; James Woodcock, *State Supreme Court Overturns Judge Baugh's Sentencing in Teacher Rape Case*, BILLINGS GAZETTE (Mar. 2, 2017), [https://billingsgazette.com/news/local/state-supreme-court-overturns-judge-baugh-s-sentencing-in-teacher/article\\_00e10a22-4a06-55ff-922c-63cb98094df1.html](https://billingsgazette.com/news/local/state-supreme-court-overturns-judge-baugh-s-sentencing-in-teacher/article_00e10a22-4a06-55ff-922c-63cb98094df1.html) [perma.cc/NEM9-DJQP].

<sup>218</sup> Michael Winter, *Ex-Teacher Resentenced to Prison for Raping Teen*, USA TODAY (Sept. 26, 2014), <https://www.usatoday.com/story/news/nation/2014/09/26/montana-rape-resentencing/16276429> [perma.cc/Q3SG-MRDF].

<sup>219</sup> Joseph Serna, *Rapist First Sentenced to 31 Days Gets 10 Years in Prison*, L.A. TIMES (Sept. 26, 2014, 11:38 AM), <https://www.latimes.com/nation/nationnow/la-na-nn-montana-rapist-resentencing-judge-20140926-story.html> [https://perma.cc/9U2U-SY47].

Rambold was re-sentenced to ten years in prison, although he was released after serving just two-and-a-half years of the sentence.<sup>220</sup> The Montana Supreme Court ordered Judge Baugh to be suspended and publicly censured over his conduct in the Rambold case.<sup>221</sup> The court ruled unanimously that Rambold's original sentence was illegal under state law, which required a two-year minimum at the time of Rambold's sentencing.<sup>222</sup>

In both cases, the attitudes that Judges Baugh and Persky brought to the bench had not kept up with changing public perceptions around sex crimes, and the public played a role in the judges' removal from their positions. Neither judge displayed an understanding of sex crimes as serial offenses, nor appeared to have considered whether the offenders might strike again.

Judge Persky opined that Turner was not a danger to the public. In reaching this conclusion, Judge Persky ignored substantial evidence in the prosecutor's sentencing brief that indicated that Turner was a continuing danger to the public, based on the predatory nature of his crimes.<sup>223</sup> The brief pointed out that Turner's victim was the third woman that he had approached in a sexually aggressive manner within a week's time.<sup>224</sup> A week earlier, he had approached the first woman at a party and proceeded to put his hands on her waist, stomach, and upper thighs while trying to dance directly behind her.<sup>225</sup> She extricated herself from the situation and described him as having "'creeped' her out because of his persistence."<sup>226</sup> She had never met Turner before the night in question.<sup>227</sup>

The night of his arrest, Turner approached a different woman who complained about his sexually aggressive behavior before he found and sexually assaulted the victim.<sup>228</sup> This second woman reported that Turner approached her without warning on two separate occasions that night, both times grabbing

<sup>220</sup> *Id.*; Winter, *supra* note 218; *Former Billings Teacher Convicted of Rape to Be Released on Parole*, KULR8 (Mar. 10, 2017), [https://www.kulr8.com/news/former-billings-teacher-convicted-of-rape-to-be-released-on-parole/article\\_de86f76a-d59c-52a7-8795-30f537578e06.html](https://www.kulr8.com/news/former-billings-teacher-convicted-of-rape-to-be-released-on-parole/article_de86f76a-d59c-52a7-8795-30f537578e06.html) [https://perma.cc/KX8F-V2T8].

<sup>221</sup> Clair Johnson, *Supreme Court Orders Suspension, Public Censure for Judge Baugh*, BILLINGS GAZETTE (June 4, 2014), [https://billingsgazette.com/news/local/supreme-court-orders-suspension-public-censure-for-judge-baugh/article\\_8463a87e-cc15-5b5e-b317-98da9c52ce07.html](https://billingsgazette.com/news/local/supreme-court-orders-suspension-public-censure-for-judge-baugh/article_8463a87e-cc15-5b5e-b317-98da9c52ce07.html) [https://perma.cc/KDV5-HMWM].

<sup>222</sup> *Id.*

<sup>223</sup> People's Sent'g Mem. at 21, *People v. Turner*, No. B1577162 (Super. Ct. Cal. May 27, 2016).

<sup>224</sup> *Id.* at 7–8.

<sup>225</sup> *Id.* at 8.

<sup>226</sup> *Id.*

<sup>227</sup> *See id.*

<sup>228</sup> *Id.* at 7.

her suddenly or touching her inappropriately, and trying to kiss her.<sup>229</sup> The sexual assault for which Turner was arrested happened after these events.<sup>230</sup>

In deciding that Turner posed no danger to the public, Judge Persky did not give any consideration to these events and what they foreshadowed for future women who might run into Turner. The prosecution tried to point out this risk to Judge Persky, writing that “the Defendant was on the prowl and attempted to ‘hook up’ with women who were strangers to him, and who were clearly not interested in his sexual advances,” and also that Turner’s behavior was “akin to a predator who is searching for prey. The prey in this case was a young woman who drank too much and was unable to protect herself.”<sup>231</sup> Judge Persky disregarded the warning.

Judge Persky also concluded, incredibly, that he viewed Turner’s alcohol consumption as a mitigating factor in his sentencing.<sup>232</sup> This logic ignored the fact that Turner had a prior arrest at Stanford for underage drinking and had a fake driver’s license.<sup>233</sup> It also ignored the fact that he lied in a statement to the court where he claimed to be an inexperienced drinker, when in fact evidence from his mobile phone indicated that he had a great deal of experience with alcohol and illegal drugs that dated back to high school.<sup>234</sup> Judge Persky’s ruling turned a blind eye to Turner’s lies and omissions and ignored the very real concern that a man who could not control himself while intoxicated posed a grave danger to the community. As prosecutors noted in their sentencing memorandum, “[Th]e prior arrest, coupled with the current case, demonstrate that in his short stint in the adult world, he is a continued threat to the community.”<sup>235</sup>

Judge Persky’s sentencing remarks showed that his real concern was not with the victim, the sexual assault, or the danger that Turner posed to the community; rather, his true concern was for the severe impact that a long sentence would have on Turner’s future. Judge Persky ignored the extremely severe impact that Turner’s actions had on his victim. It was particularly disturbing that Judge Persky quoted the victim’s impact statement at length in his sentencing remarks, but appeared to entirely disregard it when he meted out Turner’s lenient sentence.<sup>236</sup>

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 14, 15.

<sup>232</sup> Levin, *supra* note 213.

<sup>233</sup> People’s Sent’g Mem., *supra* note 223, at 21.

<sup>234</sup> *Id.*, at 24–25.

<sup>235</sup> *Id.*, at 21.

<sup>236</sup> Persky quoted Turner’s victim at length in his written remarks, in part:

Ruin a life, one life, yours. You forgot about mine. Let me rephrase for you. “I want to show people that one night of drinking can ruin two lives” – you and me. “You are the cause; I am the effect. You have dragged me through this hell with you, dipped me back into that night again and again. You knocked down both our towers. I collapsed at the same time you did. Your damage was concrete: Stripped of titles, degrees, enrollment. My damage was internal, unseen. I car-

Judge Baugh exhibited similar attitudes to Judge Persky. Judge Baugh appeared not to have regarded what Rambold did as a crime at all—after all, the fourteen-year-old was just as much in control of what happened as her fifty-four-year-old teacher. This logic completely disregards the purpose of statutory rape laws—to protect those who are too young to meaningfully consent to sex.<sup>237</sup> Rambold’s fourteen-year-old victim clearly fell into this category; the age of consent in Montana is sixteen.<sup>238</sup> Moreover, in 2019, the Montana legislature revised its sexual assault laws to specify that students in elementary through high school grades are incapable of consenting to sex with any school employee “who has ever had instructional, supervisory, [or] disciplinary” authority over him or her.<sup>239</sup> This act further solidified the wrong that the public perceived in Rambold’s actions and was missed by Judge Baugh. Under the current Montana law, Rambold’s actions would expose him to a mandatory minimum sentence of four years.<sup>240</sup>

### G. Accounting for the Decriminalization of Sexual Violence

Part I has thus far demonstrated that the disparate broken parts of the system—the enabling of serial rapists, the institutional failures to identify and stop predators, the rape kit backlog, the criminalization of victims, the statistical manipulation of sexual assault data, and the lenient sentencing of sex offenders—are clear evidence that rape has largely been decriminalized, and that successful prosecutions are the exception, not the rule.

Serial offenders are able to amass very large numbers of victims because police are not effectively interrupting their activities and holding them accountable for their crimes. They are emboldened by police disinterest and may form the view that there is nothing wrong with what they are doing, since no one is stopping them.

Institutions are in crisis mode when it comes to managing reports of sexual misconduct. The frequent repetition of the pattern of discovering a scandal and writing a report in response demonstrates a reactive rather than a proactive response; this is crisis management rather than risk management. As long as institutions remain locked in crisis management mode, their inaction not only fails to stop predators, it also enables them and facilitates victimization. This reaction is the result of an institutional concern with avoiding reputational harm by silencing bad publicity, thus leaving the public ignorant of the risk posed by

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ry it with me. You took away my worth, my privacy, my energy, my time, my safety, my intimacy, my confidence, my own voice, until today.

Levin, *supra* note 213.

<sup>237</sup> See generally NOY S. DAVIS & JENNIFER TWOMBLY, U.S. DEP’T OF JUST., STATE LEGISLATORS’ HANDBOOK FOR STATUTORY RAPE ISSUES (2000).

<sup>238</sup> MONT. CODE ANN. § 45-5-501(b)(iv) (2019).

<sup>239</sup> *Id.* § 45-5-501(b)(x); H.B. 173, 2019 Leg., 66th Sess. (Mont. 2019).

<sup>240</sup> MONT. CODE ANN. § 45-5-503(3)(a) (2019) (mandatory minimum of four years when victim is less than 16 years old and offender is four or more years older than victim).

the offender. The consequence of this approach is to facilitate predators' access to additional, unsuspecting victims.

Predators also learn to manage the weak interventions that an unprepared institution might occasionally throw at them. Part of Nassar's *modus operandi* was to cultivate a community-wide reputation of someone who was a good person, willing to go out of his way to help anyone at any time.<sup>241</sup> Between the strong reputation he built for himself and his use of medical jargon to quash any objections to his so-called treatments, he was able to extinguish investigations into his conduct in the nascent stage.<sup>242</sup> It was unthinkable, to people in the community, that he would do the things he was accused of.<sup>243</sup> Surely his accusers were lying.

Sowell operated off the grid, so to speak. By leading an apparently quiet life and selecting victims who were marginalized and not considered of value to mainstream society, he was able to fly under the radar, even though, incredibly, police knew he was a registered sex offender.<sup>244</sup> Police demonstrated a keen lack of interest in his activities, despite complaints from women, missing persons reports, and the stench of decay emanating from his home.

The result of institutional indifference to sexual assault is that police and prosecutors may not realize the magnitude of the job that they are ignoring. The follow-on consequence is that additional, entirely preventable rapes occur in the community. As rapes pile up, police are further overburdened, and yet they often do not have the staff, expertise, training, supervision, and other resources required to effectively confront sexual assault.<sup>245</sup> This is because no one has appreciated how much work there is to do, and that existing training and resources are insufficient to undertake it successfully.<sup>246</sup>

As uninvestigated, unsolved rape complaints pile up, the number of untested rape kits grows. Police feel pressure to discourage victims from reporting at all, and to advise against having a rape kit done if a victim does report. In many places, the backlog has grown to number in the thousands—a concrete display of officials' indifference to and inability to effectively intervene in sexual violence cases. Laws requiring testing of sexual assault kits are a recent acknowledgement of this crisis in sexual assault investigation and of the need for sweeping reform.<sup>247</sup>

<sup>241</sup> JOHN BARR & DAN MURPHY: *START BY BELIEVING: LARRY NASSAR'S CRIMES, THE INSTITUTIONS THAT ENABLED HIM, AND THE BRAVE WOMEN WHO STOPPED A MONSTER* 113, 173–76 (2020).

<sup>242</sup> *Id.* at 113, 173–76.

<sup>243</sup> *Id.* at 113.

<sup>244</sup> See Chen, *supra* note 34.

<sup>245</sup> Avalos 2016, *supra* note 22, at 6–14.

<sup>246</sup> *Id.*

<sup>247</sup> See *END THE BACKLOG*, <http://www.endthebacklog.org> [<https://perma.cc/XU9H-6AUZ>], for the database of which states currently test sexual assault kits.



Statistical manipulation is a logical response to sexual violence out of control. In some law enforcement agencies, it is a necessary substitute for doing the job right and a way to convince the community that sexual violence is not prevalent. Police erase sexual assaults by not recording them at all, by pressuring victims to retract their allegations, and by threatening to charge them with false reporting. Seen in this light, police mistreatment of rape victims occurs for two reasons—to make them go away and to discourage other victims from reporting at all. The disinterest, verbal abuse, and threats of (or actual) false reporting charges are all by design, and intended to cover up what is really going on: that law enforcement officials do not know how to respond effectively to sexual assault complaints.

When all else fails, police discourage victims by criminalizing them. Prosecuting a victim for false reporting is a sure-fire way to discourage other people in the community from reporting a rape or sexual assault. Because victims are already afraid that police will not believe them, charging victims with false reporting sends a clear message to other victims: we might not believe you, and then we will prosecute. Victims have enough to worry about without also being charged with false reporting. Many will heed the message and stay silent rather than go to the police and risk prosecution.

At the end of this process, in the rare event where a rapist is convicted and sentenced to prison, lenient sentences are a final slap in the face to a victim who made it through the gauntlet and arrived at a successful result.

The irony here is that if law enforcement agencies responded robustly to reports of sexual assault, they would have less work to do. They would stop predators earlier, before they had amassed large numbers of victims, and the number of sexual assaults in each community would actually decrease. But without the necessary expertise to tackle the difficult and complex task of sexual assault investigation, some law enforcement agencies do the next best thing—they find ways to make victims disappear so that it looks like they are doing their job. They shame other victims to give the community the impression that women who are lying about rape are wasting police time and resources.

Many victims complain that engaging with the criminal justice process feels like being raped all over again, and this section has explained why. And some victims do not survive the process. Megan Rondini committed suicide, leaving evidence that she felt bullied by police. Eleanor de Freitas also committed suicide three days before she was to be prosecuted for perverting the course of justice for telling police that she thought she had been raped but was not sure what happened because she may have also been drugged.<sup>248</sup> Stacy Rambold's teenage victim committed suicide in part because of his actions.<sup>249</sup> And music

<sup>248</sup> Avalos 2018, *supra* note 193, at 840–44.

<sup>249</sup> Greg Tuttle, *Mother of Billings Rape Victim: Attention Has 'Almost Restored Faith in Humans'*, MISSOULIAN (Aug. 29, 2013), <https://missoulian.com/news/state-and-regional/>

student Francis Andrade, assaulted by one of her teachers, ended her life after enduring grueling cross-examination in court.<sup>250</sup>

The indicators discussed in this Article reveal that sexual violence is common, systemic, and poorly understood. For those reasons, officials react with disbelief, apathy, and inaction—responses that create a chain reaction of adverse consequences for victims and for the safety of the community. A problem this complex requires system-wide solutions that will guarantee a rational, comprehensive, and effective response to each case of sexual violence.

## II. REVERSING THE DECRIMINALIZATION OF SEXUAL VIOLENCE

Re-criminalizing sexual violence is a difficult task, but it can be accomplished if the political will exists to do so. The solution involves holding law enforcement agencies accountable for investigating sex crimes and promoting transparency. Law enforcement agencies need procedures that ensure that all agencies are equally effective in handling cases of sexual assault, and that allow the general public to assess whether these cases are being investigated thoroughly, particularly in light of long-standing difficulties with investigator bias and not taking rape complaints seriously.

The weakest link in the failure to investigate and prosecute sexual assault typically occurs at the level of the law enforcement investigation. As we have seen, it is common for law enforcement agencies to investigate rape complaints only superficially, if at all, to disbelieve victims, and to generally fail to progress investigations. Accordingly, solutions must be focused on remedying this state of affairs. I propose a three-part solution to this problem. First, law enforcement agencies must adopt sexual assault investigation best practices that have been pioneered by organizations that are taking the lead in transforming the law enforcement response to sexual assault. Second, legislative reform, requiring agencies to adopt sexual assault investigation best practices, is critical. The state of Illinois is already leading the way and can help other jurisdictions. And third, accountability to the public can be assured with use of a mandatory reporting indicator designed to allow the general public to compare law enforcement agencies' responses to sexual assault on various measures, so that they can readily access information about how any one law enforcement agency's response to sex crimes compares to that of other agencies.

### A. *Adopting Best Practices in Sexual Assault Investigation*

Over the last two decades, a number of organizations have been working diligently to improve the way that sex crimes are investigated and prosecuted.

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mother-of-billings-rape-victim-attention-has-almost-restored-faith/article\_4f7e713c-10d5-11e3-863d-001a4bcf887a.html [https://perma.cc/QSP6-93K9].

<sup>250</sup> Peter Walker, *Frances Andrade Killed Herself After Being Accused of Lying, Says Husband*, GUARDIAN (Feb. 10, 2013, 8:05 AM), <https://www.theguardian.com/uk/2013/feb/10/frances-andrade-killed-herself-lying> [https://perma.cc/6ZYW-J9SP].

These organizations, including EVAWI, the IACP, the United States Department of Justice, and the National District Attorneys Association (“NDAA”), have identified certain core best practices that are highly effective at shaping a much more effective and robust response to sex crimes. Information about these best practices is currently available to any interested law enforcement agency, and the best practices themselves are being adopted by an increasing number of agencies.<sup>251</sup>

But these best practices are typically not mandatory, and in a country of 18,000 law enforcement agencies, their use is uneven.<sup>252</sup> The result is a wide variation in the response victims receive depending on the level of training and sophistication in the jurisdiction’s response to sexual assault. One agency might believe the victim, undertake an effective investigation, and charge a suspect, while another agency might dismiss the victim’s report as false with little to no investigation and charge the victim with a crime for filing a perceived false report. This is exactly what happened in the case of Marc O’Leary, the dangerous serial rapist who was caught as a result of the diligent work of multiple law enforcement agencies in the Denver area, after police in Lynnwood, Washington, charged one of his victims with false reporting.<sup>253</sup> It was the Denver-area police who linked O’Leary to two earlier rapes in Washington.<sup>254</sup> Through an accident of geography, the first Washington victim found herself disbelieved and charged with a crime, while the Colorado victims were taken seriously. The tragic irony is that the Colorado victims might not have been raped at all had the Washington police responded to the rape complaint with the same effective investigation techniques used by the Colorado police.

This section analyzes which best practices should form the core response of any law enforcement agency’s response to sexual assault, while the next section addresses the lack of uniformity across agencies. First, a note about the major actors in this field. EVAWI is a professional training organization whose goal is to improve the criminal justice response to sexual assault.<sup>255</sup> Since its founding in 2003, EVAWI has received more than \$8.9 million in public and private funding for its programs, including from the United States Department of Justice Office on Violence Against Women.<sup>256</sup> Headquartered in Washington

<sup>251</sup> A range of online training, training bulletins, and other resources on best practices in sexual assault investigation are available online. See *Best Practices*, END VIOLENCE AGAINST WOMEN INT’L., <https://www.evawintl.org/Best-Practices> [<https://perma.cc/D3P9-U347>]; *Police Response to Violence Against Women – VAW*, INT’L ASS’N OF CHIEFS OF POLICE, <https://www.theiacp.org/projects/police-response-to-violence-against-women-vaaw> [<https://perma.cc/CZ65-9ZRG>].

<sup>252</sup> See U.S. DEP’T OF JUST., *supra* note 21, and accompanying text.

<sup>253</sup> MILLER & ARMSTRONG, *supra* note 22, at 1–5; Avalos 2016, *supra* note 22, at 25–30.

<sup>254</sup> MILLER & ARMSTRONG, *supra* note 22, at 202; Avalos 2016, *supra* note 22, at 25–30.

<sup>255</sup> END VIOLENCE AGAINST WOMEN INT’L, 2018 ANNUAL REPORT 1 (2018), <https://www.evawintl.org/images/uploads/Disclosures/2018%20Annual%20Report.pdf> [<https://perma.cc/SC48-V8EP>].

<sup>256</sup> *Id.* at 18.

state, EVAWI offers annual and regional conferences, as well as an Online Training Institute and numerous Training Bulletins and Webinars, available free of charge on its website.<sup>257</sup> EVAWI's influence is growing rapidly in the field of sexual assault investigation and response. For instance, in 2018, "3,200 professionals completed 69,945 hours of training through [EVAWI's] OnLine Training Institute."<sup>258</sup> Over two thousand people attended EVAWI's 2018 annual conference, including 892 victim advocates, 549 criminal justice and legal professionals, and 206 health care professionals.<sup>259</sup> But this is a small fraction of the law enforcement agencies across the United States.

"The International Association of Chiefs of Police . . . is the world's largest and most influential professional association for police leaders," with 30,000 members in 160 countries.<sup>260</sup> Headquartered in Virginia, it is committed to advancing the safety of communities worldwide through thoughtful, progressive leadership.<sup>261</sup> The IACP provides resources on the Police Response to Violence Against Women, including guidance on best practices for investigating sexual assault.<sup>262</sup>

The United States Department of Justice has conducted in-depth investigations into gender-biased policing and sexual assault investigation failures in several locales including Baltimore, Maryland; Missoula, Montana; New Orleans, Louisiana; and Puerto Rico.<sup>263</sup> It has also issued guidance on identifying and preventing gender bias in police investigations of sexual assault.<sup>264</sup>

NDAA's mission is to support prosecutors across the United States and is the leading source of national expertise on the prosecutor function.<sup>265</sup> It has issued numerous guidance materials in relation to prosecuting sexual assault. These include publications that focus on sexual assault investigation best practices, prosecuting alcohol-facilitated sexual assault, introducing expert testimony to explain victim behavior in sexual and domestic violence prosecutions, and the role of the sexual assault nurse examiner.<sup>266</sup>

<sup>257</sup> See *Best Practices*, *supra* note 251 and accompanying text.

<sup>258</sup> END VIOLENCE AGAINST WOMEN INT'L., *supra* note 255, at 3.

<sup>259</sup> *Id.* at 9.

<sup>260</sup> About IACP, INT'L ASS'N OF CHIEFS OF POLICE, <https://www.theiacp.org/about-iacp> [<https://perma.cc/KA2D-2YGX>].

<sup>261</sup> *Id.*

<sup>262</sup> *Best Practices*, *supra* note 251.

<sup>263</sup> DOJ BALTIMORE REPORT, *supra* note 32, at 122–24; DOJ NEW ORLEANS REPORT, *supra* note 32, at 43, 46–47; DOJ P.R. REPORT, *supra* note 156, at 57; Complaint from Lisa Avalos, Assistant Professor of L., Louisiana State Univ. Paul M. Hebert L. Ctr., to the Criminal Cases Review Commission 15–16 (Jan. 29, 2020) (on file with author).

<sup>264</sup> U.S. DEP'T OF JUST., IDENTIFYING AND PREVENTING GENDER BIAS IN LAW ENFORCEMENT RESPONSE TO SEXUAL ASSAULT AND DOMESTIC VIOLENCE 3 (2015) [hereinafter DOJ GENDER GUIDANCE], <https://www.justice.gov/opa/file/799366/download> [<https://perma.cc/K5R3-AWM6>].

<sup>265</sup> About NDAA, NAT'L DIST. ATT'YS ASS'N, <https://ndaa.org/about/aboutndaa> [<https://perma.cc/GX4X-SP7Z>].

<sup>266</sup> *Publications & Videos*, NAT'L DIST. ATT'YS ASS'N, <https://ndaa.org/resources/publication>

The resources produced by these organizations have been highly influential, and together they reveal a consensus around certain key factors that are essential components to sexual assault investigation best practices. In particular, law enforcement agencies investigating sexual assault should (1) use trauma-informed protocols, (2) use an evidence-based approach, (3) conduct investigations using victim-centered and offender-focused practices, and (4) adopt a multi-agency approach including the use of sexual assault response teams.

### 1. *Use of Trauma-Informed Protocols*

Adopting a trauma-informed approach means “recognizing the presence of trauma symptoms and acknowledging the role that trauma has played in a sexual assault or sexual abuse victim’s life.”<sup>267</sup> Law enforcement agencies using such an approach follow best practices that have been demonstrated to minimize the re-traumatization often associated with the criminal justice process.<sup>268</sup> A trauma-informed approach is also critically important because without it, law enforcement officers have difficulty understanding victims’ post-assault behavior—such as their gaps in memory—and have often reacted with undue skepticism, even accusing victims of lying.<sup>269</sup>

One of the most critical effects of trauma is its impact on how a victim’s memory functions during and after an assault.<sup>270</sup> Experiencing a traumatic event impairs the brain’s normal functions, with the result that the brain typically does not record a linear and chronological account of the event in the usual way.<sup>271</sup> Rather, a person experiencing trauma finds that his or her brain focuses on certain details of the traumatic event that are central to what he or she is experiencing, while completely failing to record other details that are peripheral to his or her experience.<sup>272</sup> The result is significant gaps in the victim’s memory in relation to the event. For instance, victims often cannot give good

ns-videos [https://perma.cc/SG67-L3TW].

<sup>267</sup> 725 ILL. COMP. STAT. ANN. § 203/10 (West, Westlaw through P.A. 101-651); ROGER CANAFF ET AL., END VIOLENCE AGAINST WOMEN INT’L, TRAUMA-INFORMED INTERVIEWING AND THE CRIMINAL SEXUAL ASSAULT CASE 6 (2020) [hereinafter TRAUMA INTERVIEWING], https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=1387 [https://perma.cc/4Z6F-HHQP].

<sup>268</sup> TRAUMA INTERVIEWING, *supra* note 267, at 6–7.

<sup>269</sup> KIMBERLY A. LONSWAY ET AL., END VIOLENCE AGAINST WOMEN INT’L, BECOMING TRAUMA INFORMED: LEARNING AND APPROPRIATELY APPLYING THE NEUROBIOLOGY OF TRAUMA TO VICTIM INTERVIEWS 5–6, 19 (2019) [hereinafter TRAUMA INFORMED], https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=1364 [https://perma.cc/3K2G-N4FZ].

<sup>270</sup> *Id.* at 9–19; CHRISTOPHER WILSON ET AL., END VIOLENCE AGAINST WOMEN INT’L, UNDERSTANDING THE NEUROBIOLOGY OF TRAUMA AND IMPLICATIONS FOR INTERVIEWING VICTIMS 23–24 (2016) [hereinafter NEUROBIOLOGY OF TRAUMA], https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=842 [https://perma.cc/VMV3-WWGG].

<sup>271</sup> TRAUMA INFORMED, *supra* note 269, at 9–10; TRAUMA INTERVIEWING, *supra* note 267, at 18–19; NEUROBIOLOGY OF TRAUMA, *supra* note 270, at 14, 31.

<sup>272</sup> TRAUMA INFORMED, *supra* note 269, at 11–12.

descriptions of their attackers' clothing, and they are terrible at estimating how long various events lasted.<sup>273</sup> In one case, a rape victim failed to notice that her attacker had a large, obvious Yankees' tattoo on his face, because the tattoo was peripheral to her experience of the traumatic event.<sup>274</sup> It is not possible for an investigator to decide which details of an attack should be central and which should be peripheral to the victim; rather, this is a function of what the victim's brain decides to focus on at the time of the traumatic event.<sup>275</sup> The investigator can only learn which details were central and peripheral to a given victim by carefully interviewing him or her.<sup>276</sup>

The experience of sexual assault victim Jemma Beale illustrates both how gaps in memories can arise and how law enforcement officers without trauma-informed training can fail to understand those gaps. Beale told police that she was attacked in an alley by several men after leaving a bar late one night.<sup>277</sup> When a loud noise made her attackers flee, Beale remembered hiding in some nearby bushes while she tried to contact her family by phone.<sup>278</sup> Police later established that Beale had also spent about thirteen minutes hiding in a hidden corner that was on the far side of a nearby building.<sup>279</sup> Beale had never mentioned hiding in this space to police, but DNA evidence and some possessions she had lost there—an earring and a few coins—suggested that she had indeed visited that hidden corner.<sup>280</sup> Upon further police questioning, Beale stated that she had no recollection of getting to or being in the corner, although she admitted that she must have been there since her belongings were found there.<sup>281</sup>

Police used the inconsistency between Beale's recollection and what the physical evidence showed to charge her with false reporting, overlooking, as they did so, much evidence that corroborated her account of being sexually assaulted.<sup>282</sup> They interpreted her memory gap as a sign of deception, not understanding that such gaps in memory are actually quite consistent with the aftermath of traumatic events. From a trauma-informed perspective, it is evident that Beale's brain was concerned with the central details of getting away from her attackers and calling for help. The details of how she got from the alley to

<sup>273</sup> *Id.* at 12; NEUROBIOLOGY OF TRAUMA, *supra* note 270, at 29–30.

<sup>274</sup> NEUROBIOLOGY OF TRAUMA, *supra* note 270, at 26.

<sup>275</sup> *Id.* at 25, 26.

<sup>276</sup> *Id.* at 26.

<sup>277</sup> *Full Transcript of DVD Recorded Interview with J Beale*, Regina v. Jemma Beale (Apr. 23, 2013) (on file with author).

<sup>278</sup> *Id.* at 7, 73.

<sup>279</sup> Final Draft of Jemma Beale Complaint to Criminal Cases Review Commission 24 (Jan. 29, 2020) (on file with author).

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 35–42 (covering substantial evidence including statements from witnesses, injuries consistent with Ms. Beale's account, mobile phone records, and Ms. Beale's post-assault demeanor); Interview by London Police with Jemma Beale, in West London Central Police Station (June 29, 2014, 13:30 hours) (transcript on file with author).

the corner where she hid, and how long she stayed in that corner, were peripheral to the immediate task of survival and therefore were never recorded into her long-term memory. If the officers handling Beale's case had had training in trauma-informed sexual assault investigation, they would likely have realized that Beale's memory gaps were not indicative of deception but rather compelling evidence that she had genuinely experienced a very traumatic event.

Training in trauma-informed sexual assault investigation techniques helps officers to adjust their interviewing strategies to accommodate the memory challenges trauma victims experience. Officers learn that the typical interrogation techniques they have learned, focusing on getting the basics of what happened—who, what, when, where, and so forth—are counter-productive with trauma victims.<sup>283</sup> These victims often cannot provide details such as what an assailant looked like, what clothes they were wearing, and how long an attack lasted because that information was not central to their experience of the attack. Such questions may even generate inaccurate responses as trauma victims, not understanding why they cannot answer such simple questions such as what their attacker was wearing, seek to fill in the gaps with guesses and assumptions.<sup>284</sup> Guesses and assumptions can, in turn, lead to further inconsistencies with the evidence.<sup>285</sup> In this way, poor police practices in interviewing trauma victims can actually produce the inconsistencies that police use against victims.<sup>286</sup>

Trauma-informed training challenges officers to suppress interrogation mode and learn to ask open-ended questions that allow the victim to tell the story without requiring her to stick to a chronology.<sup>287</sup> Such training also instructs officers to ask sensory questions, because victims often have additional information about the traumatic event encoded in memory alongside sensory experiences they had at the time.<sup>288</sup> Accordingly, asking victims about what they recall seeing, hearing, smelling, tasting, and touching can help them to access these memories. For instance, Beale told police that as one man attacked her, she remembered smelling spicy chicken, saying that her assailant “stunk of it.”<sup>289</sup> Her interviewing officers ignored this comment.<sup>290</sup> Officers with trauma-informed training would have encouraged her to provide more details about the spicy chicken smell, because it may have brought more information about the attack to the surface of her memory.

<sup>283</sup> TRAUMA INFORMED, *supra* note 269, at 6.

<sup>284</sup> NEUROBIOLOGY OF TRAUMA, *supra* note 270, at 26–27, 30.

<sup>285</sup> *Id.* at 27, 30, 31.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 31; TRAUMA INFORMED, *supra* note 269, at 7.

<sup>288</sup> NEUROBIOLOGY OF TRAUMA, *supra* note 270, at 32; TRAUMA INFORMED, *supra* note 269, at 7.

<sup>289</sup> Interview by Catherine Bray with Jemma Beale, in Weybridge (Sept. 10, 2013, 13:09 hours) (transcript on file with author).

<sup>290</sup> The interview concluded without further questioning after Beale's comment. *Id.*

In another case, a rape victim remembered further details about her rape two weeks afterwards, when she picked up her saxophone and began rehearsing band music.<sup>291</sup> The act of playing triggered a recollection that she had heard saxophone music during the rape, and this memory brought to her conscious mind further details of the assault.<sup>292</sup> During the rape, her attacker, who had been stalking her, had played a recording of her playing the saxophone.<sup>293</sup> She found the memory so distressing that she could not continue to play the saxophone that day.<sup>294</sup>

A second point about the importance of trauma-informed training is that it can help investigators avoid making assumptions about how “real” rape victims behave after an assault. There is no one right way to behave after a traumatic event, and victims of sexual assault often react in ways that might seem counter-intuitive to others.<sup>295</sup> In particular, victims of acquaintance rape often initially react by downplaying the sexual assault and even denying that they were raped because acknowledging the rape, as well as the breach of trust that occurred, can be too painful.<sup>296</sup>

This is a particularly important consideration in this day and age, where acquaintance rape victims sometimes write text messages or other social media communications referencing the incident, including messages they may have sent to the assailant. Those messages may minimize or downplay the attack, leading to police skepticism about the rape when they, as is now common, ask to see the victim’s phone.<sup>297</sup> In some cases, police have used the victim’s messages or social media communications to charge her with false reporting.<sup>298</sup>

In 2018, police in Lawrence, Kansas, brought charges against a University of Kansas graduate student for allegedly lying about being raped by an acquaintance.<sup>299</sup> Police made this decision after the three officers handling her

<sup>291</sup> Telephone call with Gail Sherwood (Aug. 9, 2019) (notes on file with author).

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

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> Jennifer Gentile Long, *Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases*, VOICE (2006), <http://www.ncdsv.org/images/Explaining%20Counterintuitive%20victim%20behavior.pdf> [<https://perma.cc/F7NM-LGVF>].

<sup>296</sup> JON KRAKAUER, *MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN* 254–55 (2015) (quoting David Lisak).

<sup>297</sup> Anonymous, *Rape Victims Should Not Be Forced to Hand Over Their Phones. It Feels Like More Abuse*, GUARDIAN (Sept. 21, 2019, 2:00 AM), <https://www.theguardian.com/mentisfree/2019/sep/21/rape-victims-hand-over-phones-police> [<https://perma.cc/MZ86-GGF A>].

<sup>298</sup> Katie Shepherd, ‘This Happened’: A Grad Student Refused to Recant Her Rape Accusation Even After Police Arrested Her and Said She Lied, WASH. POST (Oct. 29, 2019, 4:12 AM), <https://www.washingtonpost.com/nation/2019/10/29/this-happened-grad-student-refused-recant-her-rape-accusation-even-after-police-arrested-her-lying> [<https://perma.cc/46GS-84VW>].

<sup>299</sup> *Id.*



case, none of whom regularly worked sex crimes, decided she was lying.<sup>300</sup> They made this judgment within ninety minutes of speaking with the victim and without testing her rape kit or completing other investigatory steps.<sup>301</sup> Only one of the three had any training in dealing with victims of trauma, and that was only one week of training about taking reports from abused children, not adult reports of sexual assault, which can involve complex issues of consent.<sup>302</sup>

When word of these charges reached the community, student groups, journalists, and others pressured the police to reconsider the case and raised questions about whether the officers involved had received appropriate training in investigating sexual assault and interpreting victims' post-assault behavior.<sup>303</sup> Ultimately, the department dropped the false reporting charges against the woman and implemented training in trauma-informed sexual assault investigation, hiring an expert affiliated with EVAWI to do the training.<sup>304</sup>

A third consideration about the importance of trauma-informed training is the insights it can offer officers in understanding why victims of sexual assault sometimes retract their complaints. Victims of sexual assault report to police to get help. If they encounter a disbelieving or otherwise hostile response, their main concern is to get to a place of psychological and physical safety, and sometimes the fastest way to do that is to withdraw the complaint.<sup>305</sup> In some cases, police have used a retraction to charge a victim with false reporting, and HRW found that Washington, D.C., police regularly threatened to bring false reporting charges if a victim did not retract.<sup>306</sup>

According to EVAWI founder and CEO Joanne Archambault, "[I]nterrogating victims and challenging them about inconsistencies just shuts them down or causes them to recant, which reinforces law enforcement's belief that so many of these cases are unfounded."<sup>307</sup> Trauma-informed training can help police to understand that poor treatment of victims can lead to victim recantations, that such recantations can be a sign that victims do not have confidence in the police to help them, and that police need a better approach.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* The woman sent text messages after the alleged assault in which she had downplayed the assault. *Id.* But it is common for victims to downplay an assault in the immediate aftermath because many people have difficulty acknowledging that they have been raped, particularly when the perpetrator is someone known to them. In this case, the woman had awoken, intoxicated, at her boyfriend's apartment and had found his roommate having sex with her. She had very little memory of exactly what had happened, but she also had numerous injuries consistent with sexual assault. *Id.*

<sup>303</sup> *Douglas County Making Changes After False Rape Report Cases*, AP (Feb. 7, 2020), <https://apnews.com/7723b2e5701a4e5d5f8c89263bf40158> [<https://perma.cc/3B2L-35MR>].

<sup>304</sup> *Id.*; Shepherd, *supra* note 298.

<sup>305</sup> See HUHTANEN ET AL., *supra* note 196, at 7.

<sup>306</sup> Avalos 2016, *supra* note 22, at 43; Avalos 2017, *supra* note 193, at 477–81.

<sup>307</sup> MILLER & ARMSTRONG, *supra* note 22, at 247.

## 2. *Use of an Evidence-Based Approach*

A second core principle of best practices in sexual assault investigation is the use of an evidence-based approach in investigating and making decisions about sexual assault cases. An evidence-based approach requires officers to undertake a full investigation of every sexual assault and make case decisions based on the evidence, rather than aborting an investigation simply because they are skeptical of the victim.<sup>308</sup>

As simple as this sounds, this is a crucial point. Failed sexual assault investigations often end simply because officers are skeptical of the victim, despite having no evidence that the victim is lying or is otherwise not credible.<sup>309</sup> Victims have also been charged with false reporting despite physical evidence corroborating their account of sexual assault.<sup>310</sup> For instance, Marie, the Lynnwood, Washington, victim of serial rapist Marc O'Leary, had red marks on her wrists from where O'Leary had tied her wrists together with a shoestring, and she also had genital injuries consistent with sexual assault.<sup>311</sup> Officers ignored this evidence and charged her with false reporting, based, in part, on three phone calls they received from people expressing the view that Marie was a liar.<sup>312</sup> "The marks on my wrists weren't lies," Marie later said.<sup>313</sup>

EVAWI has noted that in many cases where victims are charged with false reporting, there is more evidence corroborating the sexual assault than there is evidence supporting the notion that the victim has lied.<sup>314</sup> In such instances, false reporting prosecutions result from decisions to credit rape myths and stereotypes and to discredit victims rather than to follow an evidence-based approach. The latter approach helps to ensure that law enforcement agencies follow the evidence rather than base judgments on misperceptions about victims, or on a refusal to believe that sexual predators exist in the community.

## 3. *Victim-Centered and Offender-Focused Practices*

Victim-centered care refers to focusing on the needs and concerns of a victim in order to ensure compassionate and sensitive delivery of services in a nonjudgmental manner.<sup>315</sup> Taking a trauma-informed approach goes a long way towards ensuring good victim care. If victims are comfortable with how offic-

<sup>308</sup> HUHTANEN ET AL., *supra* note 196, at 7; RAPED THEN JAILED, *supra* note 194, at 17–18.

<sup>309</sup> MILLER & ARMSTRONG, *supra* note 22 at 248 (noting, *inter alia*, that once Lynnwood, Washington police decided that Marie was lying, they stopped investigating her case and destroyed her rape kit).

<sup>310</sup> Avalos 2016, *supra* note 22, at 20–22, 25–27, 30–32, 37–38; Avalos 2017, *supra* note 193, at 474–76; RAPED THEN JAILED, *supra* note 194, at 14–16.

<sup>311</sup> Avalos 2016, *supra* note 22, at 26–27.

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

<sup>313</sup> MILLER & ARMSTRONG, *supra* note 22, at 252.

<sup>314</sup> RAPED THEN JAILED, *supra* note 194, at 14.

<sup>315</sup> *Glossary*, OFF. FOR VICTIMS OF CRIME, <https://www.ovc.gov/model-standards/glossary.html> [https://perma.cc/LY4C-VBBX].

ers are treating them, they are more willing to participate in the investigation and take the case forward, and officers will be better equipped to glean the best possible information from the victim interview.<sup>316</sup> Victim interviews sometimes disintegrate into interrogations, such as in the Rondini and Mannion cases, discussed at the beginning of this Article, when police read both women their Miranda rights. This approach establishes an adversarial relationship between the sexual assault victim and the officers tasked with investigating her or his case. It sends the message to victims that they are suspects in an investigation and that anything they say may be used against them—a counter-productive message to convey to a victim of a violent and serious crime.

Offender-focused practices are those investigatory practices that focus on the characteristics of the perpetrator so that the investigation can identify him and link him to the crimes in question.<sup>317</sup> When his identity is known, these practices help investigators to focus on the pattern underlying his crimes so that complaints from separate victims can be linked.

An offender-focused investigation contrasts with investigations that begin by focusing on the complainant and her credibility. We have seen that law enforcement agencies across many jurisdictions begin sexual assault investigations by scrutinizing victims and finding excuses to drop cases on the basis of how they perceive victims' credibility. In cases where police decide that the complainant is not a perfect victim—maybe she is a sex worker, or uses drugs, or was intoxicated, or knew her assailant, or has complained of rape before—they may decide to drop the investigation without any further work because they think it will be too difficult to prove in court.

An investigatory focus on discrediting the victim is self-defeating. Police can nearly always find reasons to drop a case because every sexual assault victim is imperfect. Indeed, perpetrators often select victims whom they think will not be credible if they do contact police—individuals who are intoxicated, drug users, mentally or physically disabled, very young or old, of low socioeconomic status, or otherwise vulnerable.<sup>318</sup> When police refuse to investigate because of their perceptions of the victim's credibility, they play right into the offender's hand. They also miss the opportunity to discover compelling information that could build a case against the offender.

The Colorado detectives' response to O'Leary's assaults in the Denver area demonstrates the power of an offender-focused investigation. The detectives

<sup>316</sup> DOJ GENDER GUIDANCE, *supra* note 264, at 12; KIM LONSWAY ET AL., END VIOLENCE AGAINST WOMEN INT'L, IMPROVING RESPONSES TO SEXUAL ASSAULT DISCLOSURES: BOTH INFORMAL AND FORMAL SUPPORT PROVIDERS 7–9 (2020), <https://evawintl.org/Library/DocumentLibraryHandler.ashx?id=1336> [<https://perma.cc/LXS3-8ZH5>].

<sup>317</sup> See, e.g., HOLLYWOOD, FLA. POLICE DEP'T, OFFENDER FOCUSED DOMESTIC VIOLENCE INITIATIVE SUMMARY, HOLLYWOOD, FL (n.d.) [https://popcenter.asu.edu/sites/default/files/16-06\\_hollywood\\_fl.pdf](https://popcenter.asu.edu/sites/default/files/16-06_hollywood_fl.pdf) [<https://perma.cc/SZ6V-GAP5>].

<sup>318</sup> See THE MO. COAL. AGAINST DOMESTIC & SEXUAL VIOLENCE, UNDERSTANDING THE NATURE AND DYNAMICS OF SEXUAL VIOLENCE 10, 28–29, 31, 39 (2012).

worked together to build a profile of a serial offender who turned out to be O'Leary.<sup>319</sup> O'Leary deliberately committed rapes in different jurisdictions in order to minimize his chances of being caught, because he knew that "police departments often did not communicate."<sup>320</sup> Despite this, officers succeeded at identifying O'Leary because they took each one of his victims seriously, regardless of how credible they found her, and without knowing that a dangerous serial rapist was behind each crime. Each victim gave them the gift of one piece of a larger puzzle. Had officers thrown one of those gifts into the trash by ignoring the complaint, pressuring the victim to retract, or even charging her with false reporting, the puzzle would have been missing pieces—pieces that turned out to be instrumental in identifying O'Leary.

In O'Leary's case, an offender-focused investigation meant the officers fixed their attention on identifying a suspect. The opposite approach produced a drastically different outcome in Worboys' case, the "black cab rapist" who terrorized women in London for seven years.<sup>321</sup> There, police routinely threw puzzle pieces into the trash—they dismissed one of his earliest victims as a drunk who had gotten injured when she fell down, and they did not bother to take Worboys' contact information when a good Samaritan insisted that the cab driver take one victim to the police station.<sup>322</sup> After seven years of attacks, a specialist team identified Worboys within hours of typing certain search terms, including "black cab," "won money," and "alcohol" into a police computer.<sup>323</sup> Until that day in 2008, no member of the police force had been looking for evidence linking disparate reports of rapes by the driver of a black cab.<sup>324</sup> Worboys is thought to have raped over one hundred women.<sup>325</sup> The police failure to run an offender-centered investigation, and to instead focus on discrediting Worboys' victims one by one, is a significant factor which enabled these rapes.<sup>326</sup> An offender-focused strategy would likely have produced a much better result.

#### 4. *Sexual Assault Response Teams and the Use of a Multi-Agency Approach*

One of the most effective ways of improving the law enforcement response to sexual assault investigation is through the adoption of a multi-disciplinary, multi-agency approach, also known as a sexual assault response team or SART.

<sup>319</sup> See MILLER & ARMSTRONG, *supra* note 22, at 215–16.

<sup>320</sup> *Id.* at 237.

<sup>321</sup> See DSD & NBV v. Commissioner of Police for the Metropolis [2014] EWHC (QB) 436 [10], <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/dsd-and-nbv-v-met-police.pdf> [<https://perma.cc/8DJS-MWHS>].

<sup>322</sup> *Id.* at para. 7, 21, 22.

<sup>323</sup> *Id.* at para. 79.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at para. 1.

<sup>326</sup> *Id.* at para. 32, 35, 38, 251, 255, 275, 276, 289, 292.

A SART is a community-wide team of professionals tasked with responding to sexual assault from their multiple disciplines, using a shared philosophical approach to sexual violence.<sup>327</sup> This philosophical approach is typically to respond to victims in a compassionate, trauma-informed and victim-centered manner, and to conduct offender-focused, evidence-based investigations.<sup>328</sup>

SARTs usually include law enforcement officers, victim advocates, sexual assault nurse examiners (“SANEs”), and prosecutors.<sup>329</sup> They can also involve a range of other relevant professionals, including personnel from mental health or public health services, child protective services, sexual assault forensic examination teams, and college or university Title IX offices and police departments.<sup>330</sup> These professionals collaborate together in investigating and prosecuting sexual assault and in providing victim care.<sup>331</sup>

The formation of a SART in a community introduces a coordinated, multi-disciplinary approach to handling sexual assault complaints. Victims benefit from streamlined, harmonized services in relation to the law enforcement interview, forensic examination, health care, and counseling.<sup>332</sup> This coordination

<sup>327</sup> See Megan R. Greeson & Rebecca Campbell, *Coordinated Community Efforts to Respond to Sexual Assault: A National Study of Sexual Assault Response Team Implementation*, 30 J. INTERPERSONAL VIOLENCE 2470, 2471 (2015); SEXUAL ASSAULT INTERAGENCY COUNCIL, DENVER SEXUAL ASSAULT RESPONSE PROTOCOL 13, 15–16 (2011) [hereinafter DENVER PROTOCOL], <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=97> [https://perma.cc/X4K5-5D3A]; KY. ASS’N OF SEXUAL ASSAULT PROGRAMS, DEVELOPING A SEXUAL ASSAULT RESPONSE TEAM: A RESOURCE GUIDE FOR KENTUCKY COMMUNITIES, at A82 (2002) [hereinafter KENTUCKY PROTOCOL], <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=440> [https://perma.cc/CH6M-K4R9]; LAURA WILLIAMS, SEXUAL VIOLENCE JUST. INST., CULTIVATING SART EFFICACY: INSIGHTS ON THE IMPACT OF THE VIRGINIA SEXUAL ASSAULT RESPONSE TEAM MANDATE 1 (2017), <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=944> [https://perma.cc/PS2C-KAZM]; SEXUAL VIOLENCE JUST. INST., SEXUAL ASSAULT RESPONSE TEAMS & SYSTEMS CHANGE 1 (n.d.), <https://www.mncasa.org/wp-content/uploads/2019/11/SARTS-and-Systems-Change-Handout.pdf> [https://perma.cc/E8VE-QYXD].

<sup>328</sup> N.J. STAT. ANN. § 52:4B–52(i) (West, Westlaw through L.2020, c. 61) (“The program coordinator shall: . . . [c]ollaborate with law enforcement officials and the county rape care program to ensure that the needs of victims of sexual assault are met in a compassionate manner.”); DENVER PROTOCOL, *supra* note 327, at 15–16; KENTUCKY PROTOCOL, *supra* note 327, at A82; WILLIAMS, *supra* note 327, at 2.

<sup>329</sup> CAL. PENAL CODE § 13898.1 (West, Westlaw through Ch. 8 of 2020 Reg. Sess.); N.J. STAT. ANN. § 52:4B–54 (West, Westlaw through L.2020, c.37); Greeson & Campbell, *supra* note 327, at 2472; KENTUCKY PROTOCOL, *supra* note 327, at A82; *Protocols and Guidelines for Sexual Assault Response Teams*, NAT’L SEXUAL VIOLENCE RESOURCE CTR., <https://www.nsvrc.org/sarts/protocols-and-guidelines> [https://perma.cc/M294-HH8W].

<sup>330</sup> CAL. PENAL CODE § 13898.1 (West, Westlaw through Ch. 8 of 2020 Reg. Sess.). See *Protocols and Guidelines for Sexual Assault Response Teams*, *supra* note 329, and Greeson & Campbell, *supra* note 328, at 2472, for a range of approaches to the implementation of SARTs.

<sup>331</sup> WILLIAMS, *supra* note 327, at 1.

<sup>332</sup> DENVER PROTOCOL, *supra* note 327, at 15–16; KENTUCKY PROTOCOL, *supra* note 327, at A82 (“[D]ealing with sexual victimization requires the collaborative and cooperative efforts

provides benefits such as shorter wait times for a forensic exam, SANEs who are prepared to testify in court, and the convenience for victims of accessing comprehensive services by approaching any agency that is part of the SART.<sup>333</sup> Whether she first contacts the police, a rape crisis center, or a hospital, she can access the same consistent level of quality, compassionate care. SARTs improve the response to victim needs and significantly improve efforts to hold offenders accountable.<sup>334</sup>

The SART approach has been so popular that some states have mandated their establishment, while other states encourage communities to form them.<sup>335</sup> Currently there are hundreds of communities in the United States using multidisciplinary SART teams to respond to reports of sexual assault.<sup>336</sup>

Communities with effective SARTs are able to create a robust, multi-agency structure for handling reports of sexual assault. SARTs institutionalize a systemic, structural response to sexual assault, thereby ensuring that each victim receives an appropriate and effective response irrespective of her individual circumstances and any biases held by the responding officer. This approach makes it much more difficult for an individual officer to drop a case without investigating it or to improperly charge a victim with false reporting. The system-wide response to each victim means that law enforcement officers should have the training they need to respond effectively to sexual assault, and they should be aware of the other agencies who share involvement in each new case. If any officer lacks the appropriate training or skills, he is surrounded by a community of professionals who are equipped to advise him. As a result, the temptation to handle reports of sexual assault by disbelieving victims, engaging

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of a network of services. Thus, a team approach helps to meet the victim's diverse needs . . .").

<sup>333</sup> SAN DIEGO CNTY., SEXUAL ASSAULT RESPONSE TEAM SYSTEMS REVIEW COMMITTEE REPORT 2012–2013, at 7–8 (2015), <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=445> [<https://perma.cc/9TCS-LMC2>]; KENTUCKY PROTOCOL, *supra* note 327, at A83. “Many physicians are reluctant to do sexual assault forensic evidence collection because of the possibility of legal involvement. It is part of a SANE’s training and job to provide expert witness testimony.” *Id.* (citation omitted).

<sup>334</sup> Greeson & Campbell, *supra* note 327, at 2482; DENVER PROTOCOL, *supra* note 327, at 16; SAN DIEGO CNTY., *supra* note 333, at 8.

<sup>335</sup> These include California, the District of Columbia, Indiana, Kentucky, New Jersey, Oregon, and Virginia. CAL. PENAL CODE § 13898.1 (West, Westlaw through Ch. 8 of 2020 Leg. Sess.); CAL. PENAL CODE § 13898.2 (West, Westlaw through Ch. 8 of 2020 Reg. Sess.); D.C. CODE ANN. § 4-561.12 (West, Westlaw through Aug. 6, 2020); IND. CODE § 16-21-8-1.5 (2020), <http://iga.in.gov/legislative/laws/2020/ic/titles/016#16-21-8-1.5> [<https://perma.cc/8W6V-TSY9>]; N.J. STAT. ANN. § 52:4B–52 (West, Westlaw through L.2020, c. 61); N.J. STAT. ANN. § 52:4B–54 (West, Westlaw through L.2020, c. 37); KENTUCKY PROTOCOL, *supra* note 327, at A80; *Protocols and Guidelines for Sexual Assault Response Teams*, *supra* note 329.

<sup>336</sup> Greeson & Campbell, *supra* note 327, at 2472.

in gender bias, and attempting to discredit the victim should be eliminated or minimized.<sup>337</sup>

The problem that victims currently face is that the implementation of SARTs across the United States is uneven, with the result that victims may receive a very different response to their complaint depending on where the assault occurred and whether the responsible jurisdiction uses an effective SART approach. Implementation of the SART model is uneven even in states requiring it. In Virginia, for instance, not all communities enjoy meaningful SART collaboration despite a state mandate, and this situation exists in other states as well.<sup>338</sup> Moreover, research suggests that some SARTs have not been sustainable over the long term, perhaps as a result of resource constraints and staff turnover.<sup>339</sup>

The SART approach effectively introduces systemic-wide change by embracing community-wide collaboration and the collective adoption of best practices. The collaborative nature of this approach sends a message to all stakeholders that effective response to sexual assault is a community priority and that resources and consultation are available to anyone who needs it. This type of collaboration also enshrines structural accountability among the varied stakeholders, such that it is not possible for one team member, such as a police officer, to simply drop a case that he is not inclined to investigate. SARTs have the ability to track each case and see how they are progressing through the legal, medical, and other systems. Use of SARTs standardizes procedures for addressing sexual assault complaints and can ensure that all victims, regardless of their personal circumstances, receive the same standard of quality care.

SARTs—along with trauma-informed interviewing strategies and evidence-based, offender-focused investigations—are a substantial step in the right direction. But not all victims benefit from these innovations because they are not used consistently across the United States. That goal can be accomplished through legislative reform.

### *B. Legislative Reform*

Legislative reform mandating best practices in sexual assault investigation across all jurisdictions is the essential next step if we are to move towards a society where all sexual assault victims receive a comparable high standard of care and all sexual assault complaints are investigated robustly. Victims of sexual assault currently encounter substantially disparate treatment depending upon how their law enforcement agency handles such complaints, as the Marc

<sup>337</sup> Gender-biased assumptions do not harm only female victims. Male victims can also be disbelieved and receive poor treatment if the responding officers hold biased assumptions about men, such as the notions that men always want sex, can defend themselves in any circumstance, or are claiming rape in order to hide their homosexuality—such as from female partners.

<sup>338</sup> WILLIAMS, *supra* note 327, at 12.

<sup>339</sup> Greeson & Campbell, *supra* note 327, at 2485.

O’Leary prosecution, discussed throughout, demonstrates. Surely “Marie” would have been treated very differently had she been raped in Lakewood, Colorado rather than Lynnwood, Washington.

How a victim is treated, and whether there is any chance of her rapist being held accountable, should not depend on geography. While organizations such as EVAWI and the IACP have developed an extensive library of high quality training materials for sexual assault investigation, this guidance is useless if it is not implemented and if there are no mechanisms in place to ensure that law enforcement agencies across the United States use it consistently and with uniformity.

The state of Illinois has recently undertaken a legislative reform process with the goal of ensuring a consistently effective response to sexual assault across all jurisdictions, and their experience can serve as a guide for other states. The Illinois Sexual Assault Incident Procedure Act became effective January 1, 2017, and it requires every law enforcement agency in Illinois to develop and implement written policies for responding to sex crimes using evidence-based, trauma-informed, and victim-centered protocols.<sup>340</sup> The Act required Illinois law enforcement agencies to have these policies in place by January 1, 2018, and they must be consistent with comprehensive guidelines (the “Guidelines”) developed by the Illinois Office of the Attorney General.<sup>341</sup> These Guidelines are publicly available on the Illinois Attorney General’s website and can easily be downloaded and adapted by any law enforcement agency, anywhere in the world.<sup>342</sup> Based on sexual assault investigation policies originally developed by the IACP, the Guidelines have several core features that aid in creating a consistently fair and thorough approach to all complaints of sexual assault.<sup>343</sup>

First, the Guidelines require all officers interacting with victims of sex crimes, including initial responders, to use “evidence-based, trauma-informed, victim-centered interview questions and techniques,” and to complete a written report in response to every complaint of sexual assault or sexual abuse.<sup>344</sup> Trauma-informed interview strategies identified in the Guidelines include allowing the victim to complete at least two full sleep cycles before an in-depth interview; accommodating the victim’s request to have a victim advocate, attorney, or other support person present during the interview; and not requiring

<sup>340</sup> 725 ILL. COMP. STAT. ANN. 203/15 (West, Westlaw through P.A. 101-651) (amended Jan. 1, 2019).

<sup>341</sup> *Id.*

<sup>342</sup> OFF. OF ILL. ATT’Y GEN., COMPREHENSIVE GUIDELINES FOR CREATION OF A LAW ENFORCEMENT AGENCY POLICY ON EVIDENCED-BASED, TRAUMA-INFORMED, VICTIM-CENTERED SEXUAL ASSAULT AND SEXUAL ABUSE RESPONSE AND INVESTIGATION PURSUANT TO 725 ILCS 203/15(B) (2017) [hereinafter ILLINOIS GUIDELINES], [https://illinoisattorneygeneral.gov/victims/Law\\_Enforcement\\_Sexual\\_Assault\\_Response\\_Policy-ComprehensiveGuidelinesDec2018.pdf](https://illinoisattorneygeneral.gov/victims/Law_Enforcement_Sexual_Assault_Response_Policy-ComprehensiveGuidelinesDec2018.pdf) [<https://perma.cc/4MN6-FMYJ>].

<sup>343</sup> *Id.* at 1, 7.

<sup>344</sup> *Id.* at 3, 4.



victims to submit to an interview.<sup>345</sup> Supervisors must ensure that officers are properly trained in these methods and follow them in practice.<sup>346</sup>

The Guidelines indicate that written reports should document signs of physical and psychological trauma to the victim as well as the victim's subtle and overt actions indicating consent or lack of consent.<sup>347</sup> Officers are instructed to use the victim's own words in written reports and not to "sanitize or clean up the language used by the victim."<sup>348</sup> The purpose of this instruction is to ensure that officers do not downplay the seriousness of the assault through their choice of words.<sup>349</sup>

The Guidelines also instruct officers to "[i]nvestigate and interview possible suspects, focusing on suspect conduct, behavior, and statements made before, during, and after the assault."<sup>350</sup> As simple as this direction sounds, it contrasts sharply with the practice commonly seen in many poorly handled cases of focusing on the victim's behavior and using it to discredit the victim and close the case without ever interviewing the suspect.<sup>351</sup>

With respect to sexual assault evidence kits (rape kits), the Guidelines indicate that when such evidence is collected and the victim has consented to having the evidence tested, the responsible law enforcement agency must take custody of the evidence within five days of completion of the medical forensic exam and must submit such evidence for testing within ten days of receipt.<sup>352</sup> The Guidelines strictly prohibit agencies from failing to send kits for testing when the victim has consented to such testing.<sup>353</sup> In cases where forensic evidence is collected but the victim does not consent to testing, such evidence must be held for at least five years to give the victim ample opportunity to consent to testing at some future date.<sup>354</sup> The Guidelines also give victims the right

<sup>345</sup> *Id.* at 4.

<sup>346</sup> *Id.* at 5.

<sup>347</sup> *Id.* at 4.

<sup>348</sup> *Id.* This instruction applies to interviews with witnesses and suspects as well as victims. *Id.*

<sup>349</sup> See JOANNE ARCHAMBAULT ET AL., END VIOLENCE AGAINST WOMEN INT'L, EFFECTIVE REPORT WRITING: USING THE LANGUAGE OF NON-CONSENSUAL SEX 10–11 (2019), <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=43> [<https://perma.cc/L73U-Z4JJ>]; *Investigating Sexual Assaults*, IACP LAW ENFORCEMENT POL'Y CTR. 11 (2017), <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=328> [<https://perma.cc/39ZM-JD2D>].

<sup>350</sup> ILLINOIS GUIDELINES, *supra* note 342, at 4.

<sup>351</sup> See Avalos 2016, *supra* note 22, at 19–20, 38; Avalos 2017, *supra* note 193, at 466, 470.

<sup>352</sup> ILLINOIS GUIDELINES, *supra* note 342, at 5.

<sup>353</sup> *Id.* ("No law enforcement agency having jurisdiction may refuse or fail to send sexual assault evidence for testing that the victim has consented to be tested.").

<sup>354</sup> *Id.* If the victim is under age eighteen, the evidence must be retained for five years beyond her eighteenth birthday. *Id.* In the case of suspected drug or alcohol-facilitated sexual assault, urine samples, when collected, must be retained for a minimum of ten years, to give the victim ample opportunity to consent to testing. *Id.* at 6.

to obtain information about the submission and testing of their forensic evidence.<sup>355</sup>

Finally, the Guidelines encourage law enforcement agencies to form SARTs “with community organizations and [victim] advocates in order to create a more supportive atmosphere for victims throughout the reporting and investigation process.”<sup>356</sup>

By publishing detailed guidelines that all law enforcement agencies are responsible for following, the Illinois approach removes from individual officers the capacity to exercise discretion in negative ways, such as by discouraging victims from reporting or refusing to investigate their cases because they do not like the victim or do not believe the victim’s account. This approach removes inappropriate discretion and thereby takes much of the guesswork out of sexual assault investigation.

Illinois passed the Sexual Assault Incident Procedure Act because of an effort led by the Illinois Attorney General to implement reforms that would improve the response to sexual assault and increase the success rate in prosecuting sexual assault statewide.<sup>357</sup> Any state with leadership similarly motivated could implement comparable reforms, but what about jurisdictions where investigating and prosecuting sexual assault is not seen as a priority? Federal action, through amendments to the Violence Against Women Act (“VAWA”), is one way to encourage and even require all states to implement the best practices described in this Article. Since its original passage in 1994, VAWA makes funds available to states to implement various programs to improve the law enforcement response to crimes against women.<sup>358</sup>

The 2019 revision of VAWA, currently awaiting reauthorization, for the first time encourages law enforcement agencies to incorporate trauma-informed strategies for sexual assault investigation by making funds available for pilot programs that use such strategies.<sup>359</sup> This is a step in the right direction, but we

<sup>355</sup> Victims have the right to know the date when their evidence kit was sent for testing; they are also entitled to receive test results within seven days of the law enforcement agency receiving the results from the lab. *Id.* These results include information about any DNA profile obtained, whether that profile was searched against federal and state DNA databases, whether it was matched to any specific individual. *Id.*

<sup>356</sup> *Id.* at 7.

<sup>357</sup> *Improving Response to Sexual Assault Crimes in Illinois*, OFF. OF ILL. ATT’Y GEN., [http://www.illinoisattorneygeneral.gov/victims/improvingresponsetosa\\_il.html](http://www.illinoisattorneygeneral.gov/victims/improvingresponsetosa_il.html) [https://perma.cc/VVR2-BZLE].

<sup>358</sup> LISA N. SACCO, CONG. RSCH. SERV., R45410, THE VIOLENCE AGAINST WOMEN ACT (VAWA): HISTORICAL OVERVIEW, FUNDING, AND REAUTHORIZATION 1 (2019), <https://crsreports.congress.gov/product/pdf/R/R45410> [https://perma.cc/Y38E-CY6W].

<sup>359</sup> The brainchild behind this initiative is Abby Honold, a Minnesota college student whose rapist was convicted only after she was retraumatized by the police investigating her case and then had to gather evidence herself before she was taken seriously. *Sexual Assault Survivor Leads Charge on New Police Training*, CBS MINN. (Oct. 12, 2017, 6:21 PM), <https://minnesota.cbslocal.com/2017/10/12/sexual-assault-victim-police-training> [https://per

urgently need more than pilot programs. All sexual assault victims deserve the same high standard of care when they report a crime to police. We must act now to ensure that all law enforcement agencies are equally equipped to provide this level of service—both for individual victims, and because public safety demands a better, robust, and consistent response to sexual assault. Achieving this goal depends on legislative reform in every state; reform that requires a consistent, effective, and robust police response to every reported case of sexual assault.

### CONCLUSION

The need to reverse the decriminalization of sexual violence is urgent. For far too long, authorities have enabled sex crimes by disbelieving victims, leaving serial offenders at large to reoffend, and failing to test rape kits. Law enforcement agencies have also engaged in statistical manipulation to conceal the extent of sexual assault, and have criminalized victims by charging them with crimes while ignoring the sexual violence they have reported. Institutions have similarly enabled sex crimes by systematically concealing these crimes from public view and protecting perpetrators. Taken together, these responses to sexual violence demonstrate a systemic, institutionalized failure to enforce criminal laws against sexual violence. Sex crimes have effectively been decriminalized.

Survivors deserve a very different response to sexual violence, and the safety of the general public demands it. Some jurisdictions are spearheading positive change through the use of SARTs as well as investigative protocols that are trauma-informed, evidence-based, and offender-focused. These reforms eliminate guess work and bias from the investigation process, institutionalizing core practices that ensure a full investigation of each sex crime report. Such change has positively transformed the investigation and prosecution of sexual assault in some jurisdictions, but it does nothing to help victims in the great majority of jurisdictions that have not embraced change on their own. Reversing the decriminalization of sexual violence is not a task for volunteers. Only legislative reform can compel all law enforcement agencies to adopt best practices that will transform their approach to sexual assault investigation. Illinois

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ma.cc/F33T-94HL]; Brandon Stahl, *After Authorities Did Not Charge Her Rapist, U Student Fought Back*, STAR TRIB. (Oct. 23, 2016, 9:39 AM), <http://www.startribune.com/after-authorities-did-not-charge-her-rapist-u-student-fought-back/398051931> [https://perma.cc/36Z2-29PT]. VAWA's reauthorization in Congress has stalled over a provision that prevents abusers from owning guns. Sarah Jones, *Domestic Violence Survivors Want Legal Protections, Not Platitudes*, CUT (Feb. 14, 2020), <https://www.thecut.com/2020/02/new-ads-target-senator-joni-ernst-on-her-vawa-vote-the-nra.html> [perma.cc/S8QG-T4Q9]; Michael Macagnone & Katherine Tully-McManus, *Senate Talks on Crafting Bipartisan Violence Against Women Act Break Down*, ROLL CALL (Nov. 7, 2019, 4:17 PM), <https://www.rollcall.com/2019/11/07/senate-talks-on-crafting-bipartisan-violence-against-women-act-break-down> [https://perma.cc/UC3J-KQNY].

has proven that such transformation is possible through statutory reform. Sexual violence can be recriminalized. The challenge is to do so on a national and global scale, benefiting every victim and every survivor.