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## Prosecuting Rape Victims While Rapists Run Free: The Consequences of Police Failure to Investigate Sex Crimes in Britain and the United States

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PROSECUTING RAPE VICTIMS WHILE RAPISTS  
RUN FREE: THE CONSEQUENCES OF POLICE  
FAILURE TO INVESTIGATE SEX CRIMES IN  
BRITAIN AND THE UNITED STATES

*Lisa Avalos\**

ABSTRACT

*Imagine that a close friend is raped, and you encourage her to report it to the police. At first, she thinks that the police are taking her report seriously, but the investigation does not seem to move forward. The next thing she knows, they accuse her of lying and ultimately file charges against her. You and your friend are in shock; this outcome never entered your minds. This nightmare may seem inconceivable, but it has in fact occurred repeatedly in both the United States and Britain—countries that are typically lauded for their high levels of gender equality. In Britain, where perverting the course of justice is a serious crime with a potential term of life in prison, many rape complainants have been sent to prison for two and three year terms. This five-part Article analyzes this problem and sets out recommendations for legal reform.*

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\* Assistant Professor of Law, University of Arkansas School of Law. I would like to thank Lisa Longstaff, Nina Lopez, Rodger Patrick, Sharon Foster, Peter Barron, Ilene Seidman, Lorie Graham, and William Foster for their insightful comments on this paper. Additionally, I would like to thank Samantha Baker, Ann Marie Carson, and Grace Casteel for their superb research assistance. This paper was prepared in consultation with Women Against Rape (“WAR”), a London-based grassroots organization that has campaigned for justice for rape survivors since 1976. I have collaborated with WAR since 2012, when I learned of their work with women who were pressured by police to withdraw their rape allegations. In 2007, WAR first launched a campaign to end the British policy of prosecuting women who report rape and are disbelieved, and their research into how frequent these prosecutions are is ongoing. I am grateful to WAR for introducing me to several of the survivors of these practices and their families, including Gail Sherwood and others.

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## INTRODUCTION

On July 26, 2014, British law student Rhiannon Brooker was sentenced to prison for three-and-a-half years on charges of attempting to pervert the course of justice (“PCOJ”). These charges resulted from Rhiannon reporting to the police the multiple episodes of domestic violence and rape that she had experienced at the hands of her then-boyfriend.<sup>1</sup> A jury found her guilty of twelve of the twenty counts of PCOJ brought against her during an eleven-week trial, indicating that they did not believe that she was an actual victim of rape and domestic violence.<sup>2</sup> Her sentence caused her to be separated from her nine-month-old daughter.<sup>3</sup> The judge in Brooker’s case, Julian Lambert, said that she had acted in an “utterly wicked” way.<sup>4</sup> Four years earlier, Lambert also presided as judge in the case of 52-year-old Gail Sherwood, who was convicted of three counts of PCOJ when a jury similarly did not believe that she had twice been raped by a stalker who left her tied to a fence in the woods.<sup>5</sup> Sherwood’s trial lasted six weeks and she was sent to prison for two years, enduring a separation from her three daughters, the youngest of whom were fourteen and sixteen at the time.<sup>6</sup> At Sherwood’s trial, Lambert said that Sherwood was a “cunning and highly deceitful” woman responsible for a “huge waste” of police resources.<sup>7</sup>

In addition to having their cases heard by the same judge, Brooker and Sherwood were similar in another way—they were both adamant that they were in fact victims of the crimes they had reported to the police, and that authorities did not take their complaints seriously or properly investigate the crimes. Both women maintain their innocence today.

“Jane Doe,”<sup>8</sup> a seventeen-year-old British girl, was somewhat more fortunate than Brooker and Sherwood. Doe was raped in 2012 and was charged with PCOJ after police officers failed to fully investigate her case. The police concluded within just two days of receiving her initial complaint

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1. Steven Morris, *Trainee Barrister Jailed for False Rape Claims*, GUARDIAN (U.K.), June 26, 2014, <http://www.theguardian.com/uk-news/2014/jun/26/trainee-barrister-jailed-false-rape-claims>.
  2. *Id.*; Steven Morris, *Law Graduate Found Guilty of Falsely Accusing Former Boyfriend of Rape*, GUARDIAN (U.K.), June 5, 2014, <http://www.theguardian.com/society/2014/jun/05/law-graduate-guilty-falsely-accusing-boyfriend-rape>.
  3. Morris, *supra* note 1.
  4. *Id.*
  5. Steven Morris, *Woman Gets Two Years for False Rape Claims*, THE GUARDIAN, March 4, 2010, <http://www.theguardian.com/society/2010/mar/04/rape-claims-gail-sherwood>; Letter from Gail Sherwood to Caroline (July 5, 2008) (on file with author).
  6. Letter from Gail Sherwood, *supra* note 5.
  7. *Id.*
  8. Press reports do not identify the victim by name.

that she was lying.<sup>9</sup> The officers had failed to send a t-shirt for forensic testing even though they had received information indicating that the shirt might contain the rapist's DNA.<sup>10</sup> After Doe's arrest, Doe's mother filed a formal complaint. The case was then re-examined and the t-shirt was sent for forensic testing.<sup>11</sup> The testing did in fact reveal the rapist's DNA, and Liam Foard was convicted of rape and sentenced to six years in prison.<sup>12</sup> Jane Doe was subsequently awarded £20,000 compensation for her poor treatment by the police force.<sup>13</sup> As Jane Doe's case reveals, genuine rape victims have been charged with false reporting as a direct consequence of police failure to fully and properly investigate their complaints. Are Brooker and Sherwood also genuine rape victims whose cases were not taken seriously by police or prosecutors? If so, they are not unique. In both the United States and Britain, rape victims have been disbelieved by police, who have failed to investigate their cases and have ultimately charged them with false reporting.

This Article proceeds in five parts. Part One situates the prosecutions of disbelieved rape complainants in the larger context, which is the widespread and systematic failure to prosecute rape in the West. These failures to prosecute go hand-in-hand with a firmly entrenched tendency of police, in both the United States and Britain, to approach rape complainants with skepticism.

Part Two analyzes the prosecutions of disbelieved rape complainants in light of international best practice guidelines for rape investigation. It argues that cases where complainants are charged with false reporting are marred by a failure to fully investigate the rape complaint in accordance with recommended best practice. This Article uses several case studies to demonstrate that the charging decisions in these cases cannot withstand scrutiny when best practices are applied.

Part Three analyzes further factors that fuel prosecutions of disbelieved rape complainants—the performance management pressures that provide police with perverse incentives to downgrade reports of sexual violence and even to pressure victims to retract their allegations.

Part Four describes the consequences of the problem, including the human rights violations that result, the chilling effect that these practices have on sexual assault victims, and the perpetuation of rape myths. This

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

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

section also calls attention to one of the most critical consequences—that these practices allow rapists to continue to offend with impunity.

Part Five then provides recommendations for ending the prosecution of rape complainants, improving rape investigations, and remedying the miscarriages of justice that have occurred.

#### I. THE CHRONIC FAILURE TO INVESTIGATE RAPE IN THE WEST

*Since Women Against Rape began in London in 1976, we have been campaigning for all rape to be taken seriously. We've won major changes in the law, such as the criminalization of rape in marriage. A mass movement of survivors demanding justice has put a new spotlight on rapists, particularly those in positions of power. The rape and sexual assault of thousands of children, most of them in care, have caused public outrage. But while more survivors are coming forward, the conviction rate for reported rape remains a shameful 6.7%.*

—Lisa Longstaff, *Women Against Rape*<sup>14</sup>

The problem of rape complainants being charged with false reporting must be understood within a larger context in which Western countries do a surprisingly poor job of investigating and prosecuting rape. A growing body of evidence demonstrates that police and prosecutors often fail to respond appropriately to complaints of sexual violence. They fail to adequately investigate such complaints, are reluctant to initiate prosecutions, and correspondingly obtain few convictions of rapists.<sup>15</sup> These failings are consistent across many countries lauded for their high levels of development and gender equality including the United Kingdom, the United States, and the Scandinavian countries.<sup>16</sup> As this Article will demonstrate, the practice of

14. Memorandum from Lisa Longstaff and Nina Lopez, Women Against Rape (Aug. 8, 2015) (on file with author).

15. See, e.g., HUMAN RIGHTS WATCH, CAPITOL OFFENSE: POLICE MISHANDLING OF SEXUAL ASSAULT CASES IN THE DISTRICT OF COLUMBIA (2013), [http://www.hrw.org/sites/default/files/reports/us0113ForUpload\\_2.pdf](http://www.hrw.org/sites/default/files/reports/us0113ForUpload_2.pdf) [hereinafter DC REPORT]; INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INVESTIGATING SEXUAL ASSAULTS: CONCEPTS AND ISSUES PAPER (2005), [www.ncdsv.org/images/InvestigatingSexualAssaultsConceptsIssues.pdf](http://www.ncdsv.org/images/InvestigatingSexualAssaultsConceptsIssues.pdf) [hereinafter IACP GUIDELINES]; VIVIEN STERN, GOVERNMENT EQUALITIES OFFICE, HOME OFFICE, THE STERN REVIEW 28–55 (2010), [http://webarchive.nationalarchives.gov.uk/20110608160754/http://www.equalities.gov.uk/PDF/Stern\\_Review\\_acc\\_FINAL.pdf](http://webarchive.nationalarchives.gov.uk/20110608160754/http://www.equalities.gov.uk/PDF/Stern_Review_acc_FINAL.pdf) [hereinafter STERN REVIEW].

16. See, e.g., AMNESTY INTERNATIONAL, CASE CLOSED: RAPE AND HUMAN RIGHTS IN THE NORDIC COUNTRIES SUMMARY REPORT (2010), <http://www.amnesty.org/en/>

charging rape complainants with false reporting is grounded in a failure to investigate rape and is, accordingly, one consequence of this landscape of investigatory failure.

The following key facts shape the landscape of rape prosecution today: first, most reliable studies indicate that only about 2–3% of rape complaints are false, and that rate is lower than the rate of false reports for other crimes.<sup>17</sup> Second, the vast majority of rapes are not reported to the police.<sup>18</sup> Third, most rapes are committed by serial rapists.<sup>19</sup> Serial rapists represent a severe threat to public safety because they will typically go on to rape additional victims if complaints against them are not taken seriously and are not properly investigated by the police.<sup>20</sup> Fourth, very few rapes result in the conviction of the perpetrator. For example, in Britain only about 6% of reported rapes have resulted in a conviction.<sup>21</sup> Fifth, police and prosecutors, like society generally, are affected by victim-blaming myths about rape and may regard a rape complainant with skepticism, disbelief, or with a victim-blaming attitude.<sup>22</sup> And finally, studies on attrition demonstrate that police decline to investigate many cases that they label as false allegations, and that there is further attrition in rape cases at many points farther along in the case building process.<sup>23</sup>

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library/asset/ACT77/001/2010/en/5ba7f635-f2c3-4b50-86ea-e6c3428cf179/act77-0012010eng.pdf [hereinafter NORDIC COUNTRIES REPORT] (detailing harmful or prejudiced law enforcement practices with respect to victims of sexual assault in four Nordic Countries—Sweden, Finland, Denmark, and the Netherlands); DC REPORT, *supra* note 15 (detailing similar practices in Washington, DC).

17. *See, e.g.*, LIZ KELLY ET AL., HOME OFFICE RESEARCH, DEVELOPMENT AND STATISTICS DIRECTORATE, HOME OFFICE RESEARCH STUDY 293: A GAP OR A CHASM? ATTRITION IN REPORTED RAPE CASES 53 (2005), <http://webarchive.nationalarchives.gov.uk/20110218135832/rds.homeoffice.gov.uk/rds/pdfs05/hors293.pdf>; David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1330 (2010); Kimberly Lonsway et al., *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assaults*, 3 THE VOICE, 1, 2 (2009), [http://www.ndaa.org/pdf/the\\_voice\\_vol\\_3\\_no\\_1\\_2009.pdf](http://www.ndaa.org/pdf/the_voice_vol_3_no_1_2009.pdf).
18. KELLY ET AL., *supra* note 17, at 13; Lisak et al., *supra* note 17, at 1331; SYLVIA WALBY & JONATHAN ALLEN, HOME OFFICE RESEARCH, DEVELOPMENT AND STATISTICS DIRECTORATE, HOME OFFICE RESEARCH STUDY 276: DOMESTIC VIOLENCE, SEXUAL ASSAULT, AND STALKING: FINDINGS FROM THE BRITISH CRIME SURVEY 97 (2004), <http://www.avaproject.org.uk/media/28792/hors276.pdf>.
19. Lonsway et al., *supra* note 17 at 51.
20. *See id.*
21. KELLY ET AL., *supra* note 17, at 1.
22. Lisak et al., *supra* note 17, at 1321; MARTIN D. SCHWARTZ, NATIONAL INSTITUTE OF JUSTICE VISITING FELLOWSHIP: POLICE INVESTIGATION OF RAPE – ROADBLOCKS AND SOLUTIONS, Doc. No. 232667 53 (2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/232667.pdf>; KELLY ET AL., *supra* note 17, at xi, 83.
23. KELLY ET AL., *supra* note 17, at 83.



*A. The Heart of the Failure to Prosecute Rape: Failing to Believe Victims and Failing to Investigate*

The heart of the failure to prosecute rape lies at the nexus of two related issues—police failure to believe complainants, and their corresponding failure to investigate. These linked problems have been the subject of several official reports, as well as the subject of a landmark court decision in Britain. They have also attracted scrutiny from the Department of Justice (“DOJ”) and the Department of Education (“DOE”) in the United States.

1. A Culture of Suspicion: Police Failure to Believe Rape Victims

The systemic failure to properly investigate and prosecute rape begins with a failure to believe victims. When police do not believe victims of sexual assault, they tend to not take them seriously and, consequently, do not adequately investigate their cases. A number of studies, investigations, and a key court decision have identified police failure to believe victims as a critical factor in rape investigation failures.

A study commissioned by the British Home Office on reasons for attrition in rape cases found that there is a “culture of suspicion” towards rape complainants among police officers, even among some of those who are specialists in rape investigation.<sup>24</sup> This study noted that there is an embedded tendency to disbelieve rape complainants within the police and quoted one officer as saying: “I have dealt with hundreds and hundreds of rapes in the last few years, and I can honestly probably count on both hands the ones that I believe are truly genuine.”<sup>25</sup> The study also quoted a forensic nurse who stated that police officers’ “automatic disbelief of a complainant” is a problem that she has observed “time and time again.”<sup>26</sup> The study concluded that this culture of skepticism reinforced an investigative culture that emphasized looking for ways to prove that a complaint was false—something that occurred “at the expense of a careful investigation, in which the evidence collected is evaluated.”<sup>27</sup>

These findings are corroborated by three separate American studies, which have also found unduly high levels of skepticism toward rape complainants among police officers. First, a 2013 Human Rights Watch (“HRW”) report on how the Washington, D.C. police respond to rape found that rape complainants were regularly disbelieved and treated with

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24. *Id.* at 51.

25. *Id.*

26. *Id.*

27. *Id.* at 52.

skepticism.<sup>28</sup> The report also found that police sometimes claimed to have conducted a “thorough investigation” when the actual investigation was minimal and was carried out primarily to undermine the victim’s credibility rather than to investigate the rape allegations.<sup>29</sup> The report also found that D.C. police frequently threatened to charge rape complainants with false reporting if the complainants did not retract their allegations.<sup>30</sup> Accordingly, this report’s findings suggest that failure to believe victims was the first step in a chain of poor police practices that also involved declining to investigate sexual assault cases and ultimately threatening complainants with false reporting charges.

Second, research has demonstrated that throughout the United States, the belief that women often lie about being raped is widely held among police officers even though the vast majority of rape allegations are truthful.<sup>31</sup> Sociologist Martin Schwartz asked 428 police officers to estimate what percentage of all reported rape cases were false; overall this group estimated that 32.7% of all rape allegations were false despite the fact that the majority were in fact true.<sup>32</sup> Importantly, this study found that female police officers and more experienced officers were more likely to believe that rape victims were truthful.<sup>33</sup>

Third, a study conducted by Amy Dellinger Page surveyed 891 police officers and found that 53% of these officers believed that up to 50% of victims lied about being raped.<sup>34</sup> A further 10% of these officers believed that between 51 and 100% of rape victims were lying.<sup>35</sup> Echoing the findings of Schwartz and Page, an attorney with many years of experience addressing sexual assault in the state of Kentucky stated:

The biggest obstacle in rape investigation is that police think women lie. This is a very widespread attitude. One man, who was the third-in-command with the state police, told me that in thirty years he had never investigated a “real rape.” The state

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28. HUMAN RIGHTS WATCH, CAPITOL OFFENSE: POLICE MISHANDLING OF SEXUAL ASSAULT CASES IN THE DISTRICT OF COLUMBIA, FACT SHEET 9 (2013), [http://www.hrw.org/sites/default/files/reports/FactSheet\\_0.pdf](http://www.hrw.org/sites/default/files/reports/FactSheet_0.pdf) [hereinafter DC REPORT FACT SHEET].

29. *Id.*

30. DC REPORT, *supra* note 15, at 15–16.

31. *See generally* SCHWARTZ, *supra* note 22.

32. SCHWARTZ, *supra* note 22, at 44.

33. *Id.* at 28–29.

34. Amy Dellinger Page, *Gateway to Reform? Policy Implications of Police Officers’ Attitudes Toward Rape*, 33 AM. J. CRIM. JUST. 44, 55 (2008).

35. *Id.*

police is Kentucky's top law enforcement agency. That gives a sense of the backwardness of the attitudes.<sup>36</sup>

In contrast to this culture of suspicion, both American and British studies show that only 2–10% of rape allegations are false, and that the most reliable methodology has produced estimates in the 2–3% range.<sup>37</sup> Accordingly, although police skepticism towards rape victims is widespread, such skepticism has no factual basis and is unfairly prejudicial.

## 2. Major Reports on the Failure to Investigate Rape in the West

The failure of prosecutors and police to respond adequately to rape has been the subject of several reports, including major reports by Human Rights Watch in 2013 on the failure to investigate rape in Washington, D.C., and by Amnesty International in 2010 on the failure to prosecute rape in the Scandinavian countries.<sup>38</sup> Additionally, in 2010, the U.S. Senate conducted hearings into the chronic failure to investigate and prosecute rape in the United States, and Baroness Vivien Stern led a similar effort in the UK.<sup>39</sup>

The Stern Review, published in 2010—the same year that Gail Sherwood was convicted of perverting the course of justice—examined how rape is investigated and handled by police and prosecutors in Britain, and made suggestions for improving the handling of rape cases.<sup>40</sup> The Stern Review found that some rape victims have received appalling treatment at the hands of the police and that some serial rapists attacked large numbers of victims because police did not believe complainants and did not make rape investigation a sufficiently high priority.<sup>41</sup> It also found a pattern on the part of the police of disbelief, disrespect, victim-blaming, minimizing the seriousness of rape, and therefore deciding not to record it as a crime.<sup>42</sup> In short, the Stern Review found that police failure to investigate rape was closely linked to their tendency to disbelieve rape complainants.

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36. Telephone interview with MaryLee Underwood (Oct, 10, 2013) (Ms. Underwood worked as an attorney with the Kentucky Association of Sexual Assault Programs for eleven years).

37. Lisak et al., *supra* note 17, at 1329–31; KELLY ET AL., *supra* note 17, at 83.

38. See DC REPORT, *supra* note 15; NORDIC COUNTRIES REPORT, *supra* note 16.

39. *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing before the Subcomm. On Crime and Drugs of the Comm. On the Judiciary, 111th Cong.* 107 (2011), <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg64687/pdf/CHRG-111shrg64687.pdf> [hereinafter *Rape in the United States Hearing*]; STERN REVIEW, *supra* note 15.

40. STERN REVIEW, *supra* note 15, at 96–125.

41. *Id.* at 3–5.

42. *Id.* at 14.

The 2010 U.S. Senate hearings on the chronic failure to investigate rape found a similar link between the practices of disbelieving rape complainants and failing to investigate. Carol E. Tracy of the Women's Law Project testified:

Initially I thought the reports of egregious police conduct were isolated incidents. However, it is clear that we are seeing chronic and systemic patterns of police refusing to accept cases for investigation, misclassifying cases to non-criminal categories so that investigations do not occur, and “unfounding” complaints by determining that women are lying about being sexually assaulted. Victims are interrogated as though they are criminals, are presumptively disbelieved, are threatened with lie detector tests and/or arrest, and are blamed for the outrageous conduct of perpetrators.<sup>43</sup>

Tracy provides support for the notion that some “false” rape reports are actually the result of police misconduct and failure to investigate. In light of how widespread police failures are in relation to rape investigation, it is extraordinary that no oversight mechanisms are in place to ensure that rape complainants are not improperly charged with false reporting by police officers who are eager to dispense with cases by any means necessary. In 1993, former New York City sex crimes prosecutor Alice Vachss described police who fail to investigate rape and who blame rape victims for the conduct of perpetrators as “collaborators” with rapists.<sup>44</sup> As this Article will demonstrate, this state of affairs continues in many police departments in both Britain and the United States.

### 3. Britain: the *DSD* & *NBV* Decision on the Failure to Investigate Rape

Official bodies in both the United States and Britain have begun to recognize that such egregious rape investigation failures violate the fundamental rights of complainants. In 2014, a British court found that the police failure to properly investigate rape is a violation of the British Human Rights Act (“HRA”) and the European Convention on Human Rights (“ECHR”) because it subjects the complainants to cruel and inhuman treat-

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43. *Rape in the United States Hearing*, *supra* note 39, at 13.

44. See generally ALICE VACHSS, *SEX CRIMES: TEN YEARS ON THE FRONT LINES PROSECUTING RAPISTS AND CONFRONTING THEIR COLLABORATORS* (1994).

ment under Article 3 of both conventions.<sup>45</sup> The case was a lawsuit brought against the London Metropolitan Police by DSD and NBV, two victims of a taxi driver who drugged and raped over eighty-five of his passengers.<sup>46</sup>

The court held that Article 3 of the ECHR imposes upon the police a duty to conduct timely investigations into severe and violent acts perpetrated by private parties.<sup>47</sup> The duty is triggered when a person is a victim of torture or cruel, inhuman, or degrading treatment.<sup>48</sup> Allegations of rape and sexual assault fall within this category because of the grave and serious nature of these offenses.<sup>49</sup> The court of appeals upheld the decision in June 2015, and the two victims received financial settlements from the police.<sup>50</sup>

#### 4. United States: Federal Investigation into the Handling of Rape Complaints in Missoula, Montana

In 2012, the DOJ and DOE commenced investigations into whether sexual assault complaints were handled appropriately by the Missoula, Montana, police department, the Missoula County Attorney's Office ("MCAO"), and the University of Montana.<sup>51</sup> The investigations found substantial evidence that all of the entities involved responded poorly to sexual violence.<sup>52</sup> For instance, the MCAO discriminated against women by

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45. *DSD & NBV v. The Commissioner of Police for the Metropolis*, [2014] EWHC QB 436, [10], [14], (U.K.) <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/dsd-and-nbv-v-met-police.pdf>.

46. *DSD & NBV*, [2014] EWHC QB 436, [1] (U.K.).

47. *DSD & NBV*, [2014] EWHC QB 436, [14] (U.K.).

48. *DSD & NBV*, [2014] EWHC QB 436, [3], [214] (U.K.).

49. *DSD & NBV*, [2014] EWHC QB 436, [215] (U.K.).

50. *DSD & NVD*, [2014] EWHC QB 436, [436] (U.K.). The *DSD & NBV* decision was upheld in June, 2015. See Press Association, *Met Loses Appeal Against Compensation Ruling for John Worboys Assault Victims*, GUARDIAN (U.K.), June 30, 2015, <http://www.theguardian.com/uk-news/2015/jun/30/met-lose-appeal-john-worboys-compensation-victims>.

51. Press Release, Dept. of Justice, Justice Dept. Reaches Settlement to Reform the Missoula, Mont. Police Dept.'s Response to Sexual Assault (May 15, 2013), (<http://www.justice.gov/opa/pr/justice-department-reaches-settlement-reform-missoula-mont-police-departments-response-sexual>); Press Release, Dept. of Justice, Justice Dept. Finds Substantial Evidence of Gender Bias in Missoula Cnty. Attorney's Office (Feb. 14, 2014) (<http://www.justice.gov/opa/pr/justice-department-finds-substantial-evidence-gender-bias-missoula-county-attorney-s-office>).

52. Letter from Anurima Bhargava, Chief, U.S. Dep't of Justice, Civil Rights Div., Educ. Opportunities Section & Gary Jackson, Reg'l Dir., U.S. Dept. of Educ., Office of Civil Rights, Seattle Office, to Royce Engstrom, President, Univ. of Montana, & Lucy France, Univ. Counsel, Univ. of Montana (May 9, 2013) (<http://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf>); Letter from Michael W. Cotter, United States Attorney, Dist. of Montana & Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., to Royce C. Engstrom, Presi-

failing to prosecute sexual assault cases, attached low priority to such cases, treated complainants with disrespect, and frequently made statements that diminished the seriousness of sexual violence and minimized the culpability of those who commit it.<sup>53</sup> The Missoula Police Department was found to respond inadequately to rape complaints by failing to collect evidence, failing to obtain witness statements, failing to develop evidence regarding whether victims were incapacitated by drugs or alcohol, and failing to probe suspects about whether or how they obtained the victims' consent.<sup>54</sup>

The investigations found strong evidence that the inadequate response to sexual violence violated the U.S. Constitution and several federal anti-discrimination laws.<sup>55</sup> Each of the entities investigated entered into agreements with the DOJ and/or DOE in order to substantially improve their responses to sexual assault and to ensure that they eliminated gender bias and discrimination.<sup>56</sup> The DOJ and DOE indicated that the agreement

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dent, Univ. of Montana (May 9, 2013) ([http://www.justice.gov/crt/about/spl/documents/missoulafind\\_5-9-13.pdf](http://www.justice.gov/crt/about/spl/documents/missoulafind_5-9-13.pdf)); Letter from Michael W. Cotter, United States Attorney, Dist. of Montana & Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., to John Engen, Mayor (May 15, 2013) ([http://www.justice.gov/crt/about/spl/documents/missoulapdfind\\_5-15-13.pdf](http://www.justice.gov/crt/about/spl/documents/missoulapdfind_5-15-13.pdf)); Letter from Michael W. Cotter, United States Attorney, Dist. of Montana, & Jocelyn Samuels, Acting Assistant Attorney Gen., Civil Rights Div., to Fred Van Valkenburg, Cnty. Attorney (Feb. 14, 2014) ([http://www.justice.gov/crt/about/spl/documents/missoula\\_ltr\\_2-14-14.pdf](http://www.justice.gov/crt/about/spl/documents/missoula_ltr_2-14-14.pdf)).

53. See Letter from Cotter & Samuels to Van Valkenburg, *supra* note 52, at 2–3.

54. See Letter from Cotter & Perez to Engen, *supra* note 52, at 7–9.

55. These anti-discrimination laws include the Fourteenth Amendment to the U.S. Constitution, the Violent Crime Control and Law Enforcement Act of 1994, the Omnibus Crime Control and Safe Streets Act of 1968, Title IV of the Civil Rights Act of 1964, and Title IX of the Educations Amendments of 1972. The investigations into the University of Montana and the Missoula Police Department concluded in May, 2013. See Press Release, DOJ/Mont. Police Dept., *supra* note 51. The investigation into the MCAO concluded in February, 2014. See Press Release, DOJ/MCAO, *supra* note 51.

56. Memorandum of Understanding Between the U.S. Dept. Justice and the City of Missoula Regarding the Missoula Police Dept.'s Response to Sexual Assault (May 15, 2013) ([http://www.justice.gov/sites/default/files/crt/legacy/2013/05/15/missoulapd-settle\\_5-15-13.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2013/05/15/missoulapd-settle_5-15-13.pdf)); Agreement Between the Montana Attorney General and the Missoula Cnty Attorney's Office (June 2014) (<https://dojmt.gov/wp-content/uploads/MTAGO-MC-June2014.pdf>); Resolution Agreement Among the Univ. of Mont. - Missoula, the U.S. Dept. of Justice, Civil Rights Div., Educ. Opportunities Section and the U.S. Dept. of Educ., Office for Civil Rights (May 8, 2013) (<http://www.justice.gov/sites/default/files/crt/legacy/2013/05/09/montanaagree.pdf>); Agreement Between the Montana Attorney General and the Missoula Cnty Attorney's Office (June 2014) (<https://dojmt.gov/wp-content/uploads/MTAGO-MC-June2014.pdf>); Resolution Agr. Among the Univ. of Mont.-Missoula, the U.S. Dept. of Justice, Civil Rights Div., Educ. Opportunities Section and the U.S. Dept. of Educ., Office for Civil Rights (May 8, 2013) (<http://www.justice.gov/sites/default/files/crt/legacy/2013/05/09/montanaagree.pdf>).

they had reached with the University of Montana would “serve as a blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault.”<sup>57</sup>

The DOE is now investigating over one hundred colleges and universities for responding inadequately to sexual assault.<sup>58</sup> The sheer number of these investigations is further evidence that the failure to respond adequately to sexual assault complaints is a widespread and systematic problem across the United States.

### *B. Perverting Justice: the Prosecution of Genuine Rape Victims*

In light of the high levels of police skepticism toward rape complainants and the accompanying failures to investigate, three things are clear. First, failure to believe victims substantially impedes the investigation process since police have no incentive to investigate crimes that they do not believe occurred. Second, perpetrators can more easily get away with rape if they know that their victims will not be believed and that police will not bother to investigate. And finally, the consequences of police skepticism for disbelieved rape complainants are very serious. Not only does police skepticism leave perpetrators free to reoffend, such skepticism also means that police may take their disbelief one step further and actually charge genuine victims with false reporting.

Rape survivor Sara Reedy gave direct evidence of this problem at the 2010 Senate hearings on rape.<sup>59</sup> She shared her harrowing account of being raped while working a late night shift at a Pennsylvania convenience store by a man who also robbed the store.<sup>60</sup> The detective assigned to her case did not believe her and ultimately refused to investigate the case, instead charging her with false reporting.<sup>61</sup> Eventually, her name was cleared when a different detective caught her assailant, Wilbur Brown, a serial rapist who

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57. See Letter from Bhargava & Jackson to Engstrom *supra* note 52.

58. These investigations are being conducted under Title IX of the Education Amendments Act of 1972. Press Release, U.S. Dept. of Educ., U.S. Dept. of Educ. Releases List of Higher Educ. Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014) (<http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations>); Tyler Kingkade, *106 Colleges Are Under Federal Investigation For Sexual Assault Cases*, HUFFINGTON POST, April 6, 2015, [http://www.huffingtonpost.com/2015/04/06/colleges-federal-investigation-title-ix-106\\_n\\_7011422.html](http://www.huffingtonpost.com/2015/04/06/colleges-federal-investigation-title-ix-106_n_7011422.html); Edwin Rios, *The Feds Are Investigating 106 Colleges for Mishandling Sexual Assault. Is Yours One of Them?*, MOTHER JONES, Apr. 8, 2014, <http://www.motherjones.com/politics/2015/04/departement-of-education-investigation-colleges-sexual-assault>.

59. *Rape in the United States Hearing*, *supra* note 39, at 16–17.

60. *Id.*

61. *Id.* at 17.



confessed to twelve rapes, including Reedy's.<sup>62</sup> Reedy testified: "[a]fter this experience, it left me concerned if I would ever be able to rely on an officer to do his job. Because of Detective Evanson's uncooperative attitude and unwillingness to believe me . . . a serial rapist was allowed to continue attacking and assaulting other women."<sup>63</sup> Reedy sued the police and ultimately obtained a \$1.5 million settlement.<sup>64</sup>

Similar cases also show a link between disbelieving a victim, failure to investigate, and ultimately charging the victim with false reporting. The police in Madison, Wisconsin, victimized "Patty" when she reported that someone entered her home at night and raped her.<sup>65</sup> Madison police accused Patty of lying and even coerced her into falsely confessing that she lied about the rape.<sup>66</sup> In so doing, they did not fully investigate Patty's case, and overlooked important connections between her case and a similar sexual assault that was committed just a few days later.<sup>67</sup> This failure to investigate meant that there was a delay of several years in identifying Patty's rapist. When he was finally identified through DNA evidence, Patty's name was cleared and she received a financial settlement from the Madison city council.<sup>68</sup>

Another rape victim, eighteen-year-old D.M., in 2008 was similarly targeted for prosecution by her local police in the state of Washington.<sup>69</sup> Just a few days after D.M. reported the rape, the police pressured her into admitting that she had lied about being raped, and they dropped their investigation.<sup>70</sup> After D.M.'s prosecution for false reporting, her rapist, Marc

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62. *Id.*

63. *Id.*

64. Joanna Walters, *Sara Reedy, the rape victim accused of lying and jailed by US police, wins \$1.5m payout*, THE GUARDIAN, Dec. 15, 2012, <http://www.theguardian.com/world/2012/dec/15/sara-reedy-rape-victim-wins-police-payout>.

65. See BILL LUEDERS, CRY RAPE: THE TRUE STORY OF ONE WOMAN'S HARROWING QUEST FOR JUSTICE 66–67 (2006) (describing how an officer informed the victim he would charge her with obstructing an officer after she denied she made up the story of her rape).

66. See *id.* at 60–63 (depicting police interrogation).

67. *Id.* at 193–94. (noting that in both cases, the assailant "grabbed [the victim's] hair and pulled her head down toward his groin." The police overlooked this similarity in the rapist's *modus operandi*).

68. *Id.* at 266.

69. See T. Christian Miller & Ken Armstrong, *An Unbelievable Story of Rape*, PROPUBLICA (Dec. 16, 2015), <https://www.propublica.org/article/false-rape-accusations-an-unbelievable-story>; see also Casey McNerthney, *Police: Lynnwood Rape Report was a Hoax*, SEATTLE PI (Aug. 19, 2008, 3:00 PM), <http://blog.seattlepi.com/seattle911/2008/08/19/police-lynnwood-rape-report-was-a-hoax/>.

70. See Mike Carter, *Woman Sues After Lynnwood Police Didn't Believe She was Raped*, SEATTLE TIMES, June 11, 2013, <http://www.seattletimes.com/seattle-news/woman-sues-after-lynnwood-police-didnt-believe-she-was-raped/> (quoting D.M.'s



O’Leary, was caught in Colorado and was linked to D.M.’s rape through pictures on his mobile phone.<sup>71</sup> He was ultimately found to be responsible for several rapes, many of which occurred *after* police failed to investigate D.M.’s complaint, and is now serving a 327-year prison term.<sup>72</sup> In January 2015, D.M. reached an out-of-court settlement with the police for \$150,000.<sup>73</sup>

Sara Reedy, D.M., and Patty were fortunate in the sense that their rapists were ultimately identified and prosecuted, revealing that they had been telling the truth all along. Reedy and D.M. were vindicated because other police forces continued to investigate their rapes and ultimately identified the perpetrators even while the local force focused on prosecuting the victims. Patty was vindicated when DNA collected from her home was matched to her rapist several years after the assault.<sup>74</sup> In light of how frequent rape investigation failures are, we must ask how many survivors of rape are prosecuted for false reporting and subsequently never succeed in clearing their names because the police have stopped looking for their attackers.

## II. A FALSE REPORT, OR A DISBELIEVED RAPE COMPLAINANT? THE IMPORTANCE OF BEST PRACTICES IN RAPE INVESTIGATION

*Perhaps the most significant barrier to a successful sexual assault investigation and prosecution, and one that influences victims as well, is the powerful and pervasive myth that most sexual assault allegations are false.*

—IACP Sexual Assault Investigation Guidelines<sup>75</sup>

The rape investigation failures described in Part One mean that reporting a rape to the police can land genuine victims in prison—particularly in Britain, where rape investigation failures and disbelief of victims drive

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claim that the officers “put words in her mouth,” in contrast to officers’ written reports, that state, “[b]ased on her answer and body language it was apparent D.M. was lying about the rape.”).

71. *Id.*

72. O’Leary raped an Aurora woman in October 2009, attempted to assault a Lakewood woman in July 2010, and raped a Westminster woman in August 2010. See Sara Burnett, *Serial Rapist Marc O’Leary Sentenced to 327 Years in Colorado Cases*, DENVER POST, Dec. 10, 2011, [http://www.denverpost.com/news/ci\\_19513991](http://www.denverpost.com/news/ci_19513991).

73. Mike Carter, *Lynnwood to Pay Rape Victim \$150,000 in False Claim Suit*, SEATTLE TIMES, Jan. 14, 2014, [http://seattletimes.com/html/localnews/2022669813\\_lawsuitsettled1xml.html](http://seattletimes.com/html/localnews/2022669813_lawsuitsettled1xml.html).

74. LUEDERS, *supra* note 65, at 273.

75. IACP GUIDELINES, *supra* note 15, at 12.

false reporting prosecutions. At least 109 women have been prosecuted in the last five years for making false allegations of rape.<sup>76</sup> Ninety-eight of these cases involved prosecutions for perverting the course of justice, which carries a maximum sentence of life in prison.<sup>77</sup> The following two examples illustrate the nature of this problem. In June 2010, Layla Ibrahim was sentenced to three years in prison for PCOJ when police did not believe her account of rape.<sup>78</sup> Her case followed that of Gail Sherwood, who was sentenced to serve a two-year prison term in March 2010 for the same crime.<sup>79</sup> Both cases, as discussed below, were marked by gravely deficient police investigations and a high level of police skepticism about the women's complaints. What sets these two cases apart from the cases of Reedy, D.M., Patty, and Jane Doe is that their attackers have never been found.<sup>80</sup> The police skepticism of Ibrahim and Sherwood, the investigatory failures in their cases, and the absence of safeguards ensuring that their complaints were handled appropriately all cast serious doubt on the women's convictions for PCOJ.

#### A. *The IACP Best Practice Guidelines*

To demonstrate this point, this Part analyzes several false reporting prosecutions in light of the best practices in rape investigation promulgated by the International Association of Chiefs of Police ("IACP") (the "IACP Guidelines").<sup>81</sup> As a leader in changing poor practices in sexual assault investigation, the IACP has developed robust training materials and guidance on sexual assault investigation.<sup>82</sup> These materials represent sophisticated think-

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76. Sandra Laville, *109 Women Prosecuted for False Rape Claims in Five Years*, *Say Campaigners*, *GUARDIAN*, Dec. 1, 2014, <http://www.theguardian.com/law/2014/dec/01/109-women-prosecuted-false-rape-allegations>.

77. *Id.* See also *Guidance for Charging: Perverting the Course of Justice and Wasting Police Time in Cases Involving Allegedly False Allegations of Rape and/or Domestic Abuse*, CROWN PROSECUTION SERVICE ¶ 28, [http://www.cps.gov.uk/legal/p\\_to\\_r/perverting\\_the\\_course\\_of\\_justice\\_-\\_rape\\_and\\_dv\\_allegations/#a09%20\(last%20visited%20Aug.%204,%202015](http://www.cps.gov.uk/legal/p_to_r/perverting_the_course_of_justice_-_rape_and_dv_allegations/#a09%20(last%20visited%20Aug.%204,%202015) (last visited Aug. 4, 2015) ("Perverting the course of justice is a serious offence.").

78. See Simon Hattenstone & Afua Hirsch, *Layla's Story: Jailed after Reporting a Sexual Assault*, *GUARDIAN*, Aug. 12, 2011, <http://www.theguardian.com/law/2011/aug/12/layla-jailed-after-reporting-sexual-assault>.

79. Steven Morris, *Jailed for Crying Rape: Fantasist or Genuine Victim?*, *GUARDIAN* (UK), Mar. 9, 2010, <http://www.theguardian.com/uk/2010/mar/09/gail-sherwood-jailed-campaigners>.

80. Which should not be surprising, because the police made very little effort to look for them.

81. See generally IACP GUIDELINES, *supra* note 15 (addressing field investigative procedures and best practices for working with victims of criminal sexual violence).

82. Most of these materials are available free of charge on the IACP website, so cost should not be a factor in accessing best practices. See, e.g., IACP GUIDELINES, *supra*

ing about sexual assault from multiple experts and they are designed to greatly strengthen law enforcement's response to such crimes<sup>83</sup> Many of the principles found in the IACP materials have contributed to significant improvements in the police response to sexual assault in U.S. cities including Philadelphia, Pennsylvania, Austin, Texas, Kansas City, Missouri, and Grand Rapids, Michigan.<sup>84</sup> Human Rights Watch relied on IACP materials for the recommendations in their 2013 report, *Improving Police Response to Sexual Assault*.<sup>85</sup> In addition, the Missoula Police Department, in its 2013 agreement with the Department of Justice, agreed to adopt many components of the IACP model sexual assault policy.<sup>86</sup>

The IACP Guidelines set out detailed procedures for investigating rape, and they do not condone charging rape complainants with false reporting.<sup>87</sup> The Guidelines are also designed to minimize the chances that police will incorrectly dismiss complaints as false, requiring that police com-

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note 15; IACP, POLICE RESPONSE TO VIOLENCE AGAINST WOMEN, <http://www.theiacp.org/Police-Response-to-Violence-Against-Women> (last visited July 28, 2015); IACP, INVESTIGATING SEXUAL ASSAULTS PART I: ELEMENTS OF SEXUAL ASSAULT & INITIAL RESPONSE (TRAINING KEY #571) (2004), <http://www.theiacp.org/portals/0/pdfs/571InvestigatingSexualAssaultsPart1.pdf>; IACP, INVESTIGATING SEXUAL ASSAULTS PART II: INVESTIGATIVE PROCEDURES (TRAINING KEY #572) (2004), <http://www.theiacp.org/portals/0/pdfs/572InvestigatingSexualAssaultsPart2.pdf>; IACP, INVESTIGATING SEXUAL ASSAULTS PART III: INVESTIGATIVE STRATEGY & PROSECUTION (TRAINING KEY #573) (2004) <http://www.theiacp.org/portals/0/pdfs/573InvestigatingSexualAssaultsPart3.pdf>; IACP, IACP SEXUAL ASSAULT INCIDENT REPORTS: INVESTIGATIVE STRATEGIES, <http://www.theiacp.org/portals/0/pdfs/SexualAssaultGuidelines.pdf> [hereinafter IACP INVESTIGATIVE STRATEGIES]; IACP, TRAUMA INFORMED SEXUAL ASSAULT INVESTIGATION TRAINING, <http://www.theiacp.org/Trauma-Informed-Sexual-Assault-Investigation-Training>; IACP, SEXUAL ASSAULT INCIDENT REPORTS: TIPS, [http://www.theiacp.org/Portals/0/pdfs/IACP\\_SexAssaultRpt\\_TIPScard.pdf](http://www.theiacp.org/Portals/0/pdfs/IACP_SexAssaultRpt_TIPScard.pdf); IACP, INVESTIGATING SEXUAL ASSAULTS: MODEL POLICY (2005) (on file with author).

83. For instance, End Violence Against Women International is one of the expert organizations that has substantially contributed to the IACP materials. See generally END VIOLENCE AGAINST WOMEN INTERNATIONAL, <http://www.evawintl.org> (last visited Aug. 2, 2015).

84. See HUMAN RIGHTS WATCH, IMPROVING POLICE RESPONSE TO SEXUAL ASSAULT 3–4 (2013), [http://www.hrw.org/sites/default/files/reports/improvingSAInvest\\_0.pdf](http://www.hrw.org/sites/default/files/reports/improvingSAInvest_0.pdf) [hereinafter IMPROVING POLICE RESPONSE] (“Experts and detectives in each of the cities we researched repeatedly stressed the importance of a victim-centered approach . . .”) (hereinafter IMPROVING POLICE RESPONSE).

85. See generally *id.*

86. Memorandum of Understanding Between the U.S. Department of Justice and the City of Missoula Regarding the Missoula Police Department's Response to Sexual Assault, *supra* note 56 at 1–3.

87. See generally IACP GUIDELINES, *supra* note 15, at 2.

ply with three protocols before reaching such a conclusion.<sup>88</sup> First, police must fully investigate the sexual assault complaint.<sup>89</sup> Second, they must obtain evidence demonstrating that no sexual assault was committed or attempted.<sup>90</sup> And third, they must ensure that they do not rely on the victim's post-assault behavior in determining the report is false.<sup>91</sup> These points are expanded below.

The first protocol is that no report can be labeled false without first completing a thorough investigation:

The determination that a report of sexual assault is false can be made only if the evidence establishes that no crime was committed or attempted. *This determination can be made only after a thorough investigation.* This should not be confused with an investigation that fails to prove a sexual assault occurred. In that case the investigation would be labeled unsubstantiated (emphasis in the original).<sup>92</sup>

The second protocol is that a report cannot be categorized as false unless, as stated above, the evidence establishes that “no crime was committed or attempted.”

*The determination that a report is false must be supported by evidence that the assault did not happen* (emphasis in the original).<sup>93</sup>

The third protocol indicates that investigators must not rely on the victim's post-assault behavior to conclude that a report of a sexual assault is false, because a victim's reaction to sexual assault can easily be misinterpreted.<sup>94</sup> Some cases are improperly labeled as false because officers base their assessment on the victim's behavior rather than on investigative facts. In particular, there are a number of post-assault behaviors and reactions exhibited by victims which research has demonstrated are realistic, common reactions to sexual assault.<sup>95</sup> These behaviors include, among others, a delay

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88. IACP GUIDELINES, *supra* note 15, at 2–3. The IACP Guidelines provide in-depth and detailed guidance, however, this analysis focuses on the application of just three protocols taken from the guidance in order to craft an analysis within the constraints of a law review article.

89. *Id.* at 1.

90. *Id.*

91. *Id.* at 5.

92. *Id.* at 1.

93. *Id.*

94. *Id.* at 5.

95. *Id.*

in reporting the sexual assault, discrepancies in the victim's story, the victim's uncertainty of events, and recantation by the victim.<sup>96</sup> According to the IACP, such behaviors "should not be seen as a basis for labeling a sexual assault report as false (or baseless) and, therefore, as never having happened . . . . Even if aspects of the victim's account . . . are missing, exaggerated, or false, this does not automatically imply that the sexual assault did not occur."<sup>97</sup>

When followed, the IACP Guidelines serve as an essential safeguard for victims, ensuring that police follow correct procedures when investigating rape and before labeling a report as false. The analysis that follows demonstrates that police often decide rape reports are false in circumstances where the investigation has not followed best practice, and, accordingly, where the IACP Guidelines would *not* have permitted the report to be labeled as false. That was the dynamic behind the Reedy, D.M., and Patty cases, where a genuine victim was charged with false reporting. It is similarly the dynamic behind several other cases, including those of Layla Ibrahim and Gail Sherwood, where the perpetrator has not been identified. Accordingly, there is strong reason to be skeptical of the police's premature conclusion that complainants such as Ibrahim and Sherwood were not genuine victims.

#### *B. Failure to Use Best Practice: the Case of Layla Ibrahim*

Layla Ibrahim, of Carlisle, England, reported a rape to the police in January 2009.<sup>98</sup> She told investigators that as she was walking home late one night after being out with friends, two young men sprang out of the darkness and attacked her.<sup>99</sup> They left her with several injuries later documented by physicians, including a concussion resulting from a blow to the back of her head, swelling in the same area, injuries to her breasts, cuts on her knee, and a black eye.<sup>100</sup> She also sustained injuries that caused vaginal bleeding, and some of her clothing was torn.<sup>101</sup>

At first Ibrahim had the impression that the police were being diligent and meticulous as they took her report, but about two weeks into the investigation she noticed that their approach had changed and they seemed to be investigating *her*.<sup>102</sup> They drew attention to what they felt were inconsisten-

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96. *Id.*

97. *Id.* at 2.

98. Hattenstone & Hirsch, *supra* note 78.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

cies in her account and gaps in her memory of the attack, and they chided her about other aspects of her account, such as her statement that her mobile phone battery was dead at the time of the attack.<sup>103</sup> Seemingly most important, they were suspicious of the fact that she stated that she had tried to defend herself with a pair of blunt scissors, which the attackers had apparently used to cut off some of her hair.<sup>104</sup> The police were suspicious because the scissors contained Ibrahim's DNA, and they argued that Ibrahim had deliberately cut herself with the scissors to stage the attack.<sup>105</sup> But according to Ibrahim, "of course my DNA was on the scissors—they are my scissors."<sup>106</sup>

Ibrahim was ultimately convicted of perverting the course of justice and sentenced to three years in prison, despite some very compelling evidence that she was a genuine rape victim.<sup>107</sup> First, there were the numerous physical injuries physicians documented, including genital injuries involving damage to the perineum and bruising on the hymen.<sup>108</sup> Moreover, police initially recovered male blood from the crime scene, and a blond male pubic hair from Ibrahim's body.<sup>109</sup> In addition, Ibrahim had five expert witnesses testify at her trial in her defense.<sup>110</sup> One of these was a police-employed physician who conducted sexual assault examinations for the police and testified that Ibrahim had indeed been sexually assaulted.<sup>111</sup>

Another disturbing feature of the prosecution of Ibrahim was the existence of many police failures to investigate her rape complaint. Although the blond pubic hair was one of the most compelling pieces of evidence of the attack, Ibrahim later learned that it had been destroyed in the forensics lab.<sup>112</sup> The police were also dismissive of the male blood found at the crime scene because, they said, it did not match anything in the DNA database.<sup>113</sup> They did not seem to consider that it was clear evidence corroborating Ibrahim's account, and that she had described her attackers as young, and therefore perhaps without a history of other offenses. Police also failed to submit numerous articles of clothing for DNA testing.<sup>114</sup> These items in-

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103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Ibrahim is dark-haired, so the fact that this pubic hair was blond and was identified as coming from a male was particularly important. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

cluded a shoe, leggings, and a bra containing blood—all of which had likely come into contact with the assailants.<sup>115</sup> Police also failed to investigate links between the assault on Ibrahim and other attacks in the area, despite a striking similarity between the description she gave of one of her attackers and that of a suspect in the other attacks.<sup>116</sup>

Applying the IACP Guidelines to Ibrahim's case reveals severe shortcomings in how the police handled her complaint. The first step in the protocol requires police to conduct a full investigation before determining that a report is false, and police clearly did not complete this step in Ibrahim's case. As indicated above, they failed to send several articles of clothing to be tested for DNA, failed to follow up with a key suspect lead, and failed to investigate linkages to other cases. Moreover, a forensics lab destroyed a crucial piece of evidence—a pubic hair from the assailant. These shortcomings are compelling evidence that the police did not thoroughly investigate Ibrahim's case.

The second protocol requires police to obtain evidence that an assault did not happen. Simply put, there was no evidence in this case that Ibrahim was not assaulted, and plenty of evidence—including serious physical injuries—that she was. On what basis, then, did police conclude that she was lying? Keir Starmer, the Director of Public Prosecutions at the time, indicated that the scissors containing Ibrahim's DNA was a "crucial piece of prosecution evidence."<sup>117</sup> This is despite the fact that, as Ibrahim herself pointed out, her own scissors would logically contain her own DNA, and the presence of such scissors at the crime scene could not possibly prove that she was not attacked.<sup>118</sup> In addition to the scissors, the police relied on other circumstantial evidence that they felt suggested that Ibrahim had a motive to fabricate an attack.<sup>119</sup> For instance, prosecutors said that she had argued with her boyfriend over a tomato sandwich earlier, and that as revenge she fabricated the attack.<sup>120</sup>

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115. *Id.*

116. *Id.*

117. *Id.*

118. Ibrahim had a long-standing habit of carrying scissors, needle, and thread with her. *Id.*

119. *Id.*

120. This included a hearsay statement from a potentially unreliable source indicating that a friend of Ibrahim's had refused to share a cab home with her that evening, and that she had said to the friend, "If anything happens to me, you will be sorry." The statement was provided to the police by Ibrahim's ex-boyfriend, whose motives in conveying such information is uncertain. The friend in question, Richard Dent, did not provide this information to the police when he was interviewed shortly after the assault but only confirmed it more than a year later. *Id.* This course of events should call into question the reliability of the information. But even if the information is reliable, such a statement is not evidence that an assault did not happen.



The police reliance on the presence of scissors at the crime scene and the tomato sandwich argument demonstrate why the second protocol is necessary. Had the police carefully considered the evidence upon which they were relying, it should have been clear that they did not have any proof that the assault did not happen. At most, they were engaged in conjecture—a pet theory—that Ibrahim might have a motive to lie and the means—scissors—with which to harm herself and then claim that she was attacked. But there were glaring shortcomings with this explanation. Police claimed that Ibrahim cut her hair and her knee using the scissors; they did not attempt to argue that the scissors were responsible for her genital injuries.<sup>121</sup> Nor could the scissors explain some of her other serious injuries, notably her concussion, swelling to the head, and black eye. Accordingly, under the IACP Guidelines, there was no proof that the assault did not happen.

The police approach to Ibrahim's case also fell short of the third protocol in that the police based their conclusion that Ibrahim was lying on some inconsistencies in Ibrahim's account and her uncertainty of events—reactions to sexual assault which are actually common and should not be used to discredit victims. Inconsistencies and memory loss around a sexual assault are common reactions that result from how the brain processes memories of traumatic events.<sup>122</sup> Accordingly, such inconsistencies are a normal aspect of sexual assault reporting and should not be taken as evidence that a victim is not credible. In addition, in some cases a victim experiences physical trauma that interferes with her ability to give a clear and consistent account of the assault.<sup>123</sup> That occurred here, where Ibrahim actually experienced a blow to the head and a temporary loss of consciousness during the attack.<sup>124</sup> Ibrahim stated that one of her attackers “fell on top of me, and I don't really remember a lot after that. I woke up . . . and it hurt down below.”<sup>125</sup> It is striking that in a case such as this, where the victim actually experienced a head injury and loss of consciousness, that police and prosecutors would use her memory difficulties against her.

In short, the police handling of Ibrahim's case fell glaringly short of all three IACP protocols for determining whether a report of sexual assault is false. Because investigators did not complete a full investigation, did not have evidence that the assault did not happen, and inappropriately relied on the victim's reaction to the sexual assault, Ibrahim should never have been arrested for perverting the course of justice. The evidence for such an arrest simply did not exist. That Ibrahim was actually convicted at trial and went

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121. *Id.*

122. IACP INVESTIGATIVE STRATEGIES, *supra* note 82, at 4.

123. *Id.*

124. Hattenstone & Hirsch, *supra* note 78.

125. *Id.*



to prison indicates that very severe miscarriages of justice can occur when police and prosecutors pursue rape complainants for false reporting without regard to best practices for such investigations.

*C. Applying the IACP Guidelines to the Reedy, D.M., & Patty Cases*

The rape investigation failures in Ibrahim's case are not unique. In fact, they closely mirror the deviation from best practice that undergirded the charging decisions in the American cases of Sara Reedy, D.M., and Patty—the women, discussed in Part One, who were all later confirmed to be genuine rape victims.

1. The Case of Sara Reedy

As noted above, the first protocol of the IACP Best Practices indicates that police must fully investigate a case before making a determination that it is false. In Reedy's case, police did not comply with this protocol because there simply *was* no investigation into Reedy's rape. The Appellate Court opinion notes Detective Evanson's "undisguised suspicion of Reedy from practically the moment she reported the attack."<sup>126</sup> It also makes the disturbing observation that:

Evanson's investigation into the reported rape and robbery appears to have focused exclusively on the theory that Reedy was a liar and a thief. The police report—and, for that matter, the entire record—indicates that, after a brief search of the woods on the night of the incident, Evanson and the other officers made no effort to locate Reedy's assailant.<sup>127</sup>

It also notes that "[a]s Reedy tells it, the night she was attacked, while she was still in the hospital . . . and before Evanson had done any further investigation, he called her a liar and repeatedly accused her of stealing money from the store."<sup>128</sup> When Reedy began to cry as a result of Evanson's hostile questioning at the hospital, he told her not to bother crying because "[your] tears aren't going to save [you] now."<sup>129</sup>

Because Detective Evanson did not investigate Reedy's rape allegations, there was never any opportunity to conduct a *full* investigation prior to determining that her report was false, as the guidelines require. Although Reedy went to the hospital and a rape kit was collected, it was never

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126. *Reedy v. Evanson*, 615 F.3d 197, 203 (3d Cir. 2010).

127. *Reedy*, 615 F.3d at 217.

128. *Reedy*, 615 F.3d at 217.

129. *Reedy*, 615 F.3d at 204.

processed, despite the fact that it contained a fingernail that could have yielded DNA from the rapist.<sup>130</sup> Instead of investigating the rape, Evanson immediately began investigating Reedy and preparing to bring charges against her for robbing the gas station and for filing a false rape report.<sup>131</sup> His complete refusal to investigate directly contradicts the IACP Guidelines and provides support for Carol Tracy's observation of systemic police misconduct in investigating rape.<sup>132</sup>

As to the second protocol, police clearly did not have proof that the reported rape did not happen, because Reedy was in fact raped. Although police did not yet have Wilbur Brown's confession when they charged Reedy, they could not possibly have had proof that the rape did not occur. Why, then, did police charge Reedy? As in Ibrahim's case, Evanson likely approached Reedy with a pet theory that governed his decision-making. According to Reedy's attorney, Evanson may have been motivated by the fact that Reedy's then-boyfriend had had prior contact with law enforcement as a suspect, and Evanson thought that the boyfriend and Reedy had a motive for robbing the gas station—they needed money to put a deposit on a trailer that they wanted to rent.<sup>133</sup> Whether or not Reedy's attorney is correct, what is clear is that Evanson did not have any evidence that Reedy was actually lying when he charged her. The IACP Guidelines, if properly followed, would ensure that rape victims receive fair and unbiased treatment even in situations such as this where an officer may have a pre-existing bias against a victim.

As a direct result of Evanson's failure to investigate the crime that Reedy reported, rapist Wilbur Brown was free to continue raping. He was caught only after raping another victim on October 13, 2004, three months after attacking Reedy. He was ultimately convicted of raping at least ten women and was sentenced to life in prison.<sup>134</sup>

## 2. The Case of D.M.

Eighteen-year-old D.M. was raped on the morning of August 11, 2008, when her assailant, later identified as Marc O'Leary, entered her apartment through a sliding door.<sup>135</sup> He threatened D.M. with a knife and

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130. Walters, *supra* note 64.

131. *Reedy*, 615 F.3d at 204–07.

132. IACP GUIDELINES, *supra* note 15, at 12–13; *Rape in the United States Hearing*, *supra* note 39, at 13.

133. Telephone Interview with David Weicht, Reedy's Attorney (Feb. 4, 2013).

134. Walters, *supra* note 64.

135. Carter, *supra* note 70; Complaint at ¶ 5, Ex. 2, Ex. 9, D.M. v. O'Leary, Case 2:13-cv-00971 (W.D. Wash. June 6, 2013) (on file with author) [hereinafter D.M. Complaint].

used a pair of shoestrings to bind D.M.'s hands together before raping her vaginally.<sup>136</sup> He also dumped the contents of her purse onto her bedroom floor and fished out her identification so that he could call her by her name.<sup>137</sup> D.M. reported the rape to the police immediately.<sup>138</sup> Sergeant Mason and Detective Rittgarn, two male officers, investigated the case.

a. First Protocol Violated: Failure to Investigate

As in Sara Reedy's case, the officers did not do a full investigation prior to charging D.M. with false reporting, thus violating the first protocol of the IACP Guidelines. Police took an initial report from D.M. and collected evidence from the crime scene and from the hospital, where D.M. was examined immediately after the rape.<sup>139</sup> But Mason and Rittgarn appear to have ignored all of this evidence. Instead, they became skeptical of D.M.'s account of the rape after they spoke with three people who stated that they were doubtful that the rape had occurred.

The first person was an anonymous caller who called police on August 12 (the day after the rape) to state that D.M. had a past history of trying to get attention and that the caller doubted that D.M. had been raped.<sup>140</sup> Mason felt this call was important enough to note in his report.<sup>141</sup> On August 14, Mason spoke with two other people—a friend of D.M.'s and her foster mother (with whom D.M. had recently argued) who also expressed doubts that D.M. was telling the truth.<sup>142</sup> None of these individuals were with D.M. at the time of the rape or had first-hand knowledge, but their statements emboldened Mason and Rittgarn to regard D.M. with skepticism.

As a result, and without considering any of the evidence collected from the crime scene, Mason and Rittgarn again questioned D.M. on August 14 and pressured her to retract the rape allegation, which she did.<sup>143</sup> The issue of police pressuring victims to retract rape allegations will be addressed below. Here, what is important to note is that in charging D.M. with false reporting, police turned a blind eye to striking evidence corroborating D.M.'s account of her attack. First, there was a hospital report documenting injuries to both of D.M.'s wrists as well as genital injuries (abrasions to her labia minora) immediately after the rape.<sup>144</sup> Mason's and

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136. Carter, *supra* note 70; D.M. Complaint, *supra* note 135, at ¶ 19–20, Ex.2, Ex. 9.

137. D.M. Complaint, *supra* note 135, at Ex. 9.

138. *Id.* at Ex. 2, 5.

139. *Id.* at Ex. 1, Ex. 2, Ex. 7.

140. *Id.* at ¶ 31, Ex.2.

141. *Id.*

142. *Id.*

143. *Id.* at ¶ 36–54.

144. *Id.* at Ex. 7.

Rittgarn's reports make no mention of this medical evidence; in fact, Rittgarn's report disregards this evidence because it states that Rittgarn did not notice any marks on her wrists when he looked at them on August 11.<sup>145</sup> This observation would appear to be contradictory in light of the hospital report indicating that trauma to both wrists was documented and photographed at the hospital.<sup>146</sup>

In addition, the Crime Scene Technician Report written by Detective Miles noted that a wooden enclosure which surrounded D.M.'s back porch was covered with dirt and debris but that "there was an area about 3 feet wide that did not have any dirt or debris. It looked as if someone had wiped the dirt/debris off by climbing over the top of the enclosure."<sup>147</sup> Detective Miles took into evidence a number of other items that corroborated D.M.'s account of the rape, including a shoestring tied to a pair of underwear which had been used to gag D.M., a large kitchen knife laying next to the bed that the rapist had used to threaten D.M., and a pair of scissors that D.M. had used to cut the shoestring binding her wrists.<sup>148</sup>

The reports written by Mason and Rittgarn make no mention of any of this compelling evidence, nor do they give any record of these officers questioning D.M. about these items, about specific details of the rape, or about her state of mind during the rape.<sup>149</sup> In short, not only did Rittgarn and Mason fail to complete a full investigation of the rape, they also disregarded compelling evidence that a rape had in fact occurred.

b. Second Protocol Violated: No Evidence the Rape Did Not Happen

As in Reedy's case, Mason and Rittgarn's actions were not in compliance with the second protocol of the IACP Guidelines because they did not have any evidence that the rape did not happen, and in fact they disregarded compelling evidence that it *did* occur. The IACP Guidelines state that an allegation can be determined to be false only when the police obtain evidence that no crime occurred. But Mason and Rittgarn acted without this proof. Just three days after D.M. was raped, the investigators abandoned any effort to complete the rape investigation and instead focused their effort on building a case that D.M. was lying about the rape. To do so, they used her post-rape behavior to discredit her, which is exactly what the third protocol of the IACP Guidelines is designed to prevent.

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145. *Id.* at Ex. 10.

146. *Id.* at Ex. 7.

147. *Id.* at Ex. 1.

148. *Id.*

149. *Id.* at Ex. 2, Ex. 10, Ex. 14.

c. Third Protocol Violated: Grounding Conclusions in Victim's Reaction to Sexual Assault Rather than in Investigative Facts

The IACP Guidelines note the type of investigatory error that the officers made: "some cases may be improperly labeled as false because they are not grounded in investigative facts, but rather in the particular reactions of the victim."<sup>150</sup> Rittgarn's and Mason's conclusion that D.M. was lying was directly tied to how they judged her behavior, and not to any facts that proved that the rape did not occur, as these excerpts from Rittgarn's report show:

. . . Based on her answers and body language it was apparent that [D.M.] was lying about the rape. . . .

. . . Based on numerous interviews with other victims, to include rape victims, it was apparent that [D.M.] was continuously lying about this event. . . .

. . . Based on our interview with [D.M.] and the inconsistencies found by Sgt. Mason in some of the statements we were confident that [D.M.] was now telling us the truth that she had not been raped. . . .<sup>151</sup>

Mason's report also demonstrates that he questioned D.M.'s credibility because she did not behave in the way that he seemed to think a rape victim *should* behave:

. . . [D.M.] made statements that she had believed the rape happened instead of stating the rape absolutely happened. . . .<sup>152</sup>

. . . Detective Rittgarn told [D.M.] there were certain evidentiary issues that did not support her story. [D.M.] did not question what Detective Rittgarn had said and she did not adamantly say the incident had occurred. [D.M.] instead sat quietly and looked at the table not making eye contact with myself or Detective Rittgarn. . . .<sup>153</sup>

Mason's first statement has him splitting hairs between whether a rape "happened" or whether it "absolutely happened," while the second reveals an expectation that a real rape victim would respond in just one way to a

150. IACP GUIDELINES, *supra* note 15, at 13.

151. D.M. Complaint, *supra* note 135, at Ex. 10.

152. *Id.* at Ex. 2.

153. *Id.*

challenge from a skeptical officer—with a confident and assertive declaration. Rittgarn also criticized D.M. for not being more assertive:

. . . Sgt. Mason explained to her that there were some inconsistencies with her statement and the evidence to support her story. Rather than take a stand and demand that she had been raped, [D.M.] told us that she didn't know why [the officers thought there were inconsistencies]. . . .<sup>154</sup>

It appears that these officers had not received training addressing the fact that rape victims have experienced tremendous trauma and may respond to police questioning in many different ways, including by having fears about being disbelieved.<sup>155</sup> Female victims may also find it extremely painful and humiliating to discuss a sexual assault with two skeptical male officers, particularly with no support person present.<sup>156</sup>

A bit later, D.M. *did* in fact become more assertive, with Rittgarn's report stating that she "became more animated, pounded the table and said that she was 'pretty positive that it happened.'"<sup>157</sup> But rather than take this assertion as an indication of her credibility, Rittgarn responded with further hairsplitting and skepticism: "I asked her if she was 'pretty' positive or actually positive. . . ." <sup>158</sup> Three days later, D.M. told the officers she wanted to take a polygraph to demonstrate that she was being truthful.<sup>159</sup> Rittgarn's response was hostile: "I told [D.M.] that if she took a polygraph and failed then I would book her into jail."<sup>160</sup> That response was enough to deter her.

Rittgarn and Mason also relied on supposed inconsistencies in D.M.'s account to justify their disbelief, but as D.M.'s attorney points out, these alleged inconsistencies were nothing more than "the difference between the unfounded speculations and conjecture" that D.M. had made up the story,

154. *Id.* at Ex. 10 (Detective Rittgarn's Report, dated Aug. 15, 2008).

155. DC REPORT, *supra* note 15. See IACP GUIDELINES, *supra* note 15, at 7 (describing how victims of sexual assault may delay any reports to the police due to a fear of being doubted by investigators).

156. IACP INVESTIGATIVE STRATEGIES, *supra* note 82, at 4 (inferring that allowing a victim to have a support person present at the time of a police investigation may help make a victim feel more willing to trust the investigators).

157. D.M. Complaint, *supra* note 135, at Ex. 10.

158. *Id.*

159. D.M. Complaint, *supra* note 135, at Ex. 14. Offering a polygraph is actually prohibited by IACP Best Practices because doing so implies that the officers do not trust the victim to tell the truth, and can therefore interfere with building rapport with the victim. IACP GUIDELINES, *supra* note 15, at 13; IACP SEXUAL ASSAULT INCIDENT REPORTS: INVESTIGATIVE STRATEGIES 5 (n.d.), <http://www.theiacp.org/portals/0/pdfs/SexualAssaultGuidelines.pdf>.

160. D.M. Complaint, *supra* note 135, at Ex. 14.

and D.M.'s statements to the police "corroborated by objective evidence collected by Lynnwood Police Department and Providence Hospital on the day of the rape."<sup>161</sup>

In February 2011—two and a half years after raping D.M.—Marc O'Leary was arrested in Colorado for raping at least four more women between October 2009 and January 2011.<sup>162</sup> He was sentenced to 327 years in prison for those rapes.<sup>163</sup> Had the Lynnwood police actually investigated D.M.'s rape rather than prosecuting her, they might have caught O'Leary before he committed additional rapes in Colorado. These tragic consequences could have been avoided had police followed the IACP Guidelines and fully investigated D.M.'s complaint.

### 3. The Case of "Patty"

The investigation into Patty's case was marked by a set of missteps very similar to those in D.M.'s case, with police concluding that Patty's report was false without fully investigating her case and without evidence that the rape did not happen.<sup>164</sup> Police also misinterpreted Patty's post-rape behavior, contrary to the third protocol of the IACP Guidelines.

Patty, a visually impaired woman, was raped when an unknown man entered her home in Madison, Wisconsin, in September 1997. Her rapist was later identified as Joseph Bong.<sup>165</sup> Just one month after reporting the attack, Detective Tom Woodmansee accused Patty of lying about the rape and pressured her to recant.<sup>166</sup> She did recant, although she immediately retracted her recantation and went back to her original account once she was no longer in police custody.<sup>167</sup> Four months later, she was formally charged with obstruction of a police officer as a result of her withdrawing her retraction statement, insisting that she was in fact raped, and complaining to Woodmansee's superior that he had pressured her to recant.<sup>168</sup>

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161. *Id.* at ¶ 57.

162. Sarah Burnett, *Serial Rapist Sentenced to 327 Years in Prison for Colorado Rapes*, THE DENVER POST (Dec. 10, 2011, 10:00 AM MST), [http://www.denverpost.com/ci\\_19513991](http://www.denverpost.com/ci_19513991).

163. *Id.*

164. LUEDERS, *supra* note 65, at 53–54, 239–41, 250–51, 272.

165. *Id.* at 193.

166. *Id.* at 58–63.

167. *Id.* at 58–63, 66–72.

168. *Id.* at 271. On October 22, 1997, The Wisconsin State Journal ran an article, based on a police department press release, saying that a woman who had reported being raped had later admitted to lying. This article prompted Patty to write to Woodmansee's supervisor, complaining that Woodmansee had compelled her to recant. The supervisor gave Patty's correspondence to Woodmansee, who, just two days later, forwarded Patty's case file to the Dane County District Attorney's Office, recom-

As in the cases of Reedy and D.M., police did not conduct a full investigation of the rape prior to determining that her report of rape was false.<sup>169</sup> Most critically, the evidence that police collected from Patty's home after the rape included a bedsheet that contained the rapist's semen.<sup>170</sup> However this bedsheet was not subjected to DNA testing until nearly *nine months after* police pressured Patty to retract her rape allegation: even then it was only tested at the insistence of Patty's attorney.<sup>171</sup>

As with the Reedy and D.M. cases, the police had no evidence proving the rape did not happen, since Patty was in fact raped. What Detective Woodmansee relied on in choosing to believe the report was false was a series of misinterpreted behaviors—a reliance which was unwarranted under the IACP Guidelines. Woodmansee believed Patty was too calm after the attack; for instance, she sounded very calm on the telephone when she called 911 to report the rape. In his view, a “real” rape victim would have been much more distraught than Patty appeared to be.<sup>172</sup> The IACP Guidelines caution police to recognize the impact of trauma on the behavior of rape victims.<sup>173</sup> People react differently to trauma, and the presence or absence of emotion is not an indicator of whether a report is legitimate.<sup>174</sup> Woodmansee's skepticism was therefore misplaced.

Police were also skeptical of apparent inconsistencies in Patty's account and the fact that she remembered different details of the attack at different times. For instance, at some point after first reporting the rape, Patty was brushing her hair and several large clumps fell out.<sup>175</sup> When that occurred, she remembered that the suspect had grabbed her hair and pulled her head down towards his crotch.<sup>176</sup> At her rapist's trial, the defense criticized Patty for not mentioning this detail to the police.<sup>177</sup> But this criticism was unwarranted. The IACP Guidelines indicate that victims may experience “difficulty remembering all the details of the sexual assault due to traumatic

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mending that Patty be prosecuting for obstructing an officer. Patty was charged with obstruction on February 9, 1998. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 272.

172. *Id.* at 14. Patty indicated that she made an effort to stay calm in order to help her 18-year-old daughter, who was extremely distressed upon learning that her mother had been raped. *Id.*

173. IACP INVESTIGATIVE STRATEGIES *supra* note 82, at 4 (undated), <http://www.theiacp.org/portals/0/pdfs/SexualAssaultGuidelines.pdf>.

174. *Id.*

175. LUEDERS, *supra* note 65, at 23.

176. *Id.* at 23–24.

177. *Id.* at 233; *see id.* at 52 & 59 for fuller discussion of police skepticism of Patty's account because of perceived inconsistencies.



response. This does not mean they are lying or leaving out details intentionally. Often with time and as trauma recedes, details will emerge.”<sup>178</sup>

In short, police determined that Patty was a liar without fully investigating her case, without evidence that the assault did not happen, and by relying on behaviors that were part of Patty’s reaction to the rape trauma and that should not have been used against her. It was only after the DNA testing was performed on her bedsheet that the district attorney decided to drop the obstruction case against her, indicating that the state could not prove “beyond a reasonable doubt” that Patty had lied about the attack.<sup>179</sup> Patty succeeded in getting police to reopen the rape investigation, but her rapist was not identified until June of 2001, due to a delay in getting his DNA into a federal DNA data bank.<sup>180</sup>

The DNA identification of Bong as Patty’s rapist proved that Patty had been truthful all along and that the police had failed her miserably. Bong was convicted of rape in 2004 and sentenced to fifty years in prison.<sup>181</sup> In 2006 the Madison City Council issued a formal apology to Patty and offered her a \$35,000 settlement, calling her ordeal “one of the most enormous, colossal failures the city has perpetrated.”<sup>182</sup>

#### *D. The Case of Gail Sherwood*

Gail Sherwood is another example of a disbelieved rape complainant who was prosecuted in Britain despite grave deficiencies in the investigation into her complaints. Sherwood first came to the attention of her local Gloucestershire police in March of 2008, when she sought help after a man, who had been stalking her for six months, escalated his pursuit and chased her in his vehicle.<sup>183</sup> Over the next month, the stalker’s pursuit of Sherwood further escalated, with Sherwood calling the police several times in a

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178. INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 173.

179. LUEDERS, *supra* note 65, at 272.

180. *Id.* at 272–273.

181. Chantelle Janelle, *Wisconsin City Apologizes to Rape Victim*, WIS 10 (Dec. 6, 2006, 6:20 PM), <http://www.wistv.com/story/5779521/wisconsin-city-apologizes-to-rape-victim>.

182. *Id.*

183. Detective Sergeant John Wood, Statement of Witness (Nov. 24, 2008) (on file with author). Sherwood’s stalker has never been identified, nor does she recognize him as an acquaintance.

panic.<sup>184</sup> The stalker raped Sherwood twice—on April 25 and June 1—before the police arrested her for lying.<sup>185</sup>

On both occasions, police found Sherwood in a secluded, wooded area, naked from the waist down, with her hands tied tightly together and secured to a fence.<sup>186</sup> She reported that the June 1 incident began when the assailant broke into her home in the early hours of the morning, delivered a blow to her head which rendered her unconscious, and abducted her in her own car.<sup>187</sup> After both attacks, Sherwood had genital injuries consistent with sexual assault as well as other injuries, such as scratches and bruises, consistent with the harrowing account of rape that she gave.<sup>188</sup> Police also noted that she was extremely distressed.<sup>189</sup>

Despite this evidence, police did not believe that Sherwood was telling the truth and accused her of faking both rapes for attention-seeking pur-

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184. *Id.* One of the most frightening events occurred on the night of April 9, 2008, when Sherwood heard noises coming from the downstairs of her home while she was in bed upstairs. Going down to investigate, Sherwood found a man dressed in motorcycle gear standing in her living room. He said to her, “don’t worry, it’s not tonight, but I just had to see you and hear your voice.” He then turned and left through a patio door. Sherwood called the police, and a responding officer noted in his report that Sherwood was shaking with fear when he arrived. Mark Moody, Statement of Witness (Dec. 7, 2009) (noting that Sherwood was “very distressed; I could see that she was physically shaking”) (on file with author).
185. Detective Sergeant John Wood, Statement of Witness (Dec. 7, 2009) (on file with author). As discussed *infra*, Sherwood was raped again by the same man *after* her arrest, on September 4, 2008, and again in December 2013. Record of Tape Recorded Interview by Detective Sergeant Adrian Stratton with Gail Sherwood, Stroud Police Station (Oct. 30, 2008) (on file with author); Interview with Gail Sherwood, Stroud, U.K. (Jan. 25, 2014).
186. Detective Sergeant John Wood, Restricted Information Form (Nov. 24, 2008) (on file with author); Letter from Gail Sherwood, *supra* note 5, at 9, 19.
187. Detective Chief Inspector Paul Shorrocks, Statement of Witness (October 27, 2008) (on file with author); Letter from Gail Sherwood, *supra* note 5, at 17.
188. Information Form for the Examination of the Complainant, Victim: Gail Sherwood, signed by Dr. [signature illegible] (Apr. 26, 2008) (indicating numerous scratches and bruises which could be consistent with allegation of assault and one centimeter square area of redness and tenderness near the vaginal opening); Patient Record of Mrs. Gail Elizabeth Sherwood, Beeches Green Surgery, (clinical data from Mar. 1, 2008–Oct. 23, 2014) (indicating the following observations on Apr. 28, 2008: Raped; Examination: superficial cuts to forearms [sic] and marks to wrists; visible hit on head; has other wounds all photographed Saturday at police station; and the following on June 11, 2008: noted injuries to right breast and to vagina) (on file with author).
189. Gloucestershire Constabulary Initial Investigation Proforma, Victim: Gail Elizabeth Sherwood (n.d.) (noting date of incident is Apr. 25, 2008 and that victim was “very shaky” and “cold”) (on file with author).

poses.<sup>190</sup> She was arrested for perverting the course of justice on June 18, 2008, just seventeen days after she reported the second rape.<sup>191</sup> Sherwood was shocked by these accusations. She was around fifty years old, a mother with three daughters, and had a full life with her children, a partner, and two businesses breeding dogs and caring for children in her own home.<sup>192</sup> She had no history of mental illness.<sup>193</sup> Nevertheless, she was charged with three counts of PCOJ, convicted by a jury on all three counts, and sentenced to two years in prison.<sup>194</sup>

An analysis of Sherwood's case against the IACP Guidelines reveals many shortcomings in the police's approach to her case. Police failed to comply with the first protocol—doing a full investigation prior to determining that a report is false. These failures are quite striking, and very much related to the deep skepticism that police showed toward Sherwood from the outset of their contact with her. Police were skeptical of Sherwood's account of several stalking incidents even before the April 25 rape occurred.<sup>195</sup> Because they did not believe her, they failed to take all possible investigatory steps once she reported the rape. The officers' own records document the fact that they approached Sherwood with disbelief from the earliest stages of the investigation.

For example, Detective Inspector Ginn's diary documents that police expressed skepticism from within *hours* of rescuing Sherwood.<sup>196</sup> His 3:00

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190. Morris, *Jailed for Crying Rape*, *supra* note 79; John Wood, Restricted Information Form (Nov. 24, 2008) (on file with author).

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

192. Morris, *Jailed for Crying Rape*, *supra* note 79; Interview with Gail Sherwood, Stroud, U.K. (Jan. 25, 2014).

193. Patient Record of Mrs. Gail Elizabeth Sherwood, Beeches Green Surgery (clinical data from Mar. 1, 2008–Oct. 23, 2014) (showing an absence of any reference whatsoever to any mental illness) (on file with author).

194. Morris, *Jailed for Crying Rape*, *supra* note 79.

195. In mid-April, Sherwood was at the police station and told Detective Wood that she overheard a junior officer—Carnie—make pejorative comments about Sherwood's mental health. Detective Sergeant John Wood, Statement of Witness (October 27, 2009). As Wood reported it, Carnie stated that there "wasn't a shred of evidence" regarding suspects for Sherwood's stalking claims, that Sherwood may be "paranoid," that it could be "in her head" and that she may be having "some kind of mental breakdown." *Id.* Wood's report notes that he apologized to Sherwood for Carnie's statements but that he also stated to her that "a potential reason for these comments was because the police had to cover all aspects of an investigation and test the veracity of Mrs. Sherwood's account and that this was a genuine line of enquiry." *Id.*

196. See Detective Inspector Ginn, Criminal Investigation Division, Diary (Apr. 26, 2008) (on file with author) ("given doubt about [Sherwood's] account of events. . .").

a.m. diary entry on April 26 indicates that he had requested that her home be searched “for any physical evidence that might suggest her direct involvement and that this has been planned and done by herself, to herself.”<sup>197</sup> This skepticism continued to grow over the next several hours. Ginn’s 6:00 a.m. diary entry notes that two other detectives who had had contact with Sherwood were “skeptical of her initial account, stating anomalies are present.”<sup>198</sup> Ginn did not give additional details, but any anomalies were likely the typical discrepancies that are common when a person affected by a traumatic event tries to give an account of her experience. As such, using them to conclude that Sherwood was lying would have contravened the third protocol of the IACP Guidelines and suggests a lack of understanding about the impact that trauma has on human behavior.<sup>199</sup>

Ginn’s diary further indicates that police allowed their skepticism of Sherwood to influence the investigation of her case. For instance, on the morning of April 26—the day after the rape—a question had arisen as to whether the crime scene should be searched by a specialist police search advisor or whether that task should be left to ordinary detectives.<sup>200</sup> Ginn decided to leave it to the ordinary detectives, indicating that “given the flaws in Sherwood’s account” he did not consider it “proportionate” to call in the specialist search advisor on the weekend.<sup>201</sup> The decision not to call in a search advisor was crucial, because it meant that the police were not making their best effort to search and secure evidence from the scene.

Later that day when the BBC expressed interest in giving press coverage to the case, Ginn declined to share details, stating that “given the flaws in [Sherwood’s] account I am keen to downplay the matter so as not to falsely raise fear of crime.”<sup>202</sup> But by not releasing a description of the suspect to the general public, the police reduced their chances of apprehending the rapist. Accordingly, police skepticism impeded the investigation into Sherwood’s first rape report and might have contributed to her being raped a second time.

The June 1 rape investigation was marred by even more serious failures than the first investigation. A great deal of evidence was recovered from the crime scene and sent for forensic testing.<sup>203</sup> Police knew that it took

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197. *Id.*

198. *Id.*

199. IACP INVESTIGATIVE STRATEGIES, *supra* note 82, at 5 (n.d.), <http://www.theiacp.org/portals/0/pdfs/SexualAssaultGuidelines.pdf>

200. Detective Inspector Ginn, Criminal Investigation Department, Diary (Apr. 26, 2008) (on file with author).

201. *Id.*

202. *Id.*

203. See Detective Inspector Glenn McGlade, Statement of Witness (Dec. 22, 2009) (on file with author) (citing and including Exhibit GM3, an email from McGlade to

about six weeks to get test results back from the laboratory, as they had not received the results from the April 25 rape until early June.<sup>204</sup> However, their knowledge of the time frame did not stop them from treating Sherwood as a suspect for PCOJ beginning on June 9, just eight days after the rape, and several weeks before any forensic test results would have been available.<sup>205</sup> Accordingly, police did not consider all the evidence in Sherwood's case before charging her, and her complaints were therefore treated as false without a full investigation.

The second protocol of the IACP Guidelines requires police to have evidence that each rape did not happen. The police based their false reporting case against Sherwood on one key piece of evidence which does not satisfy this criterion.<sup>206</sup> CCTV footage from a hidden camera that police had trained upon Sherwood's driveway showed just one individual getting into the driver's seat of Sherwood's car at 1:38 a.m. on June 1 (the night of the reported abduction) and then driving the car out of the camera's range.<sup>207</sup> Police used this piece of footage to develop their pet theory: that the driver of the car was Sherwood, and that she was therefore lying about being raped and stalked.<sup>208</sup>

There are three problems with this conclusion. First, the footage was of extremely poor quality because the camera was not designed for use in low light conditions.<sup>209</sup> Consequently, it was impossible to see the person

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Detective Chief Inspector Paul Shorrocks on June 2, 2008, listing evidence seized on June 1, 2008 and outlining the suggested forensic strategy).

204. See Officers Report from Detective Constable Claire Hudman to Detective Sergeant John Wood (June 13, 2008) (on file with author) (noting that Hudman had obtained forensic test results between June 10 and 12, 2008, for items sent for testing after the April 25, 2008, rape at Haresfield Beacon).
205. See Detective Chief Inspector Paul Shorrocks, Statement of Witness (October 27, 2008) (on file with author); Operation Whitney Interview Strategy, Gloucestershire Constabulary (on file with author).
206. Police also relied on a confession that was obtained from Sherwood at the police station, under duress. Interview by Detective Sergeant Adrian Stratton with Gail Sherwood, *supra* note 185. The issue of police placing pressure upon rape complainants to retract allegations will be discussed *infra*. Here, it should suffice to note that under the IACP Guidelines, a retraction should not be used as evidence that a rape did not happen. IACP GUIDELINES, *supra* note 15, at 13.
207. DVD: Footage from Sherwood's driveway in Stroud, UK (CCTV, 2008) (on file with author). Crucially, an assailant could have driven the car out of camera range and *then* loaded Sherwood into the car. Sherwood's driveway is seventy-two feet long; the camera picked up only the upper fourteen feet of the driveway—the portion nearest the house. *Id.*
208. Detective Sergeant John Wood, Statement of Witness (Nov. 24, 2008) (on file with author).
209. JONATHAN SPENCER, A REPORT ON THE EVIDENCE IN THE CASE OF: REGINA V GAIL SHERWOOD 6 (Sept. 30, 2009) (on file with author).

entering the car with any clarity. In fact, a facial mapping expert rendered an opinion indicating that on a scale of zero to eight, the *best* image of the face fell between level one and level two, meaning that the footage “fell grossly short of the standard necessary to demonstrate an identification.”<sup>210</sup> The expert’s report also noted that the facial images were “of *extremely* poor resolution” and “provide no information on which to base an opinion of the driver’s sex.”<sup>211</sup> It is striking, then, that police used this footage to conclusively identify a rape victim and prosecute her for false reporting when no other evidence supported the position that she had made a false report.

Second, even if Sherwood *was* the driver of the car, that fact would not be evidence that the rapes did not happen. Video footage collected on June 1, cannot possibly negate Sherwood’s reported rape from April 25. The police could only arrive at that conclusion by speculating that if she lied about the June 1 rape, she must also be lying about the April 25 rape. Such speculation is not evidence. Moreover, the footage is also not evidence that the June 1 rape did not happen. If Sherwood *did* drive the car on June 1, at worst this would have been an inconsistency in her account, and police would still be obligated to fully investigate the case. Furthermore, Sherwood reported two blows to the head that night, one of which caused her to black out and lose her memory.<sup>212</sup> In light of these considerations, and the third protocol’s instruction not to use discrepancies in the victim’s account as evidence of a false report, the video footage was not sufficient evidence to call off the investigation and label the report false.

Third, and perhaps most disturbingly, the June 1 video footage actually shows a man meeting the description of the stalker at Sherwood’s home that evening.<sup>213</sup> About one hour before Sherwood’s reported abduction, the camera caught this man about fifteen feet from her home and walking towards it. The footage also showed a flashlight beam being trained upon Sherwood’s house just before the man appears. Moreover, it showed automobile headlights that were consistent with a second unknown person being dropped off in front of Sherwood’s house at 1:00 a.m., after all family members were home for the night.<sup>214</sup> That footage corroborated a statement provided by a neighbor, who observed a person being dropped off at

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210. *Id.* at 12.

211. *Id.* at 1 (emphasis added).

212. Letter from Gail Sherwood, *supra* note 5, at 17.

213. Footage from Sherwood’s driveway, Stroud, UK, *supra* note 207. Sherwood had reported that her rapist was tall and very muscular, with broad shoulders. E-mail from Gail Sherwood to Lisa Avalos (Apr. 7, 2016, 04:29 CST) (on file with author). The man caught on camera can only be seen from the waist up, but he has very broad shoulders and looks quite fit. *See id.*

214. *See id.* The movement of automobile headlights caught on camera indicates that a car stopped in front of Sherwood’s home just long enough to drop someone off. *See*

Sherwood's house at that time.<sup>215</sup> Taken together, this evidence suggested that two intruders might have been in the vicinity of Sherwood's home that night—a man who arrived on foot around 12:34 a.m., and a second person that was dropped off around 1:00 a.m. and spotted by a neighbor. Either one of them could have driven Sherwood's vehicle. Police never explored this crucial, corroborating evidence, and they never followed up with the neighbor.<sup>216</sup>

Sherwood was raped a third time on September 4, 2008, when the same assailant came to her home.<sup>217</sup> Having already been arrested for PCOJ, Sherwood did not report this rape to the police, although a friend did so.<sup>218</sup> Police documents demonstrate that Detective Wood decided to “no crime” this rape report because he did not believe that the rape happened.<sup>219</sup> Police did not bother to interview Sherwood or attend the crime scene before making this judgment, although Sherwood's medical records indicate that she still had genital injuries consistent with sexual assault five days after this reported rape.<sup>220</sup> Their handling of the third rape report violated all of the IACP Guidelines discussed here, because the police conducted no investigation whatsoever before writing off the report as false.

*E. “Best Practices” Analysis Reveals that Investigatory Failures Lead to Miscarriages of Justice*

The result of this analysis of five false reporting cases is both straightforward and disturbing. When the IACP Guidelines are applied, the false reporting cases against all five of the women evaporate. Had best practices been followed, *none* of the five would have been charged with a crime. Ibrahim and Sherwood would never have gone to prison, because the evi-

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*id.* Earlier footage proves that all members of Sherwood's family were already home for the night when these events occurred. *See id.*

215. *See id.*; Mike Jones, Statement of Witness (Jan. 8, 2009) (on file with author).

216. House to House Enquires, Gloucestershire Constabulary (June 1, 2008) (on file with author). The House to House Enquires indicated that Mike Jones had no relevant information, *id.*, when in fact, he submitted a statement voluntarily with very relevant information. *See Jones, supra* note 215.

217. Interview by Detective Sergeant Adrian Stratton with Gail Sherwood, *supra* note 185.

218. *Id.*

219. Full Incident Record From Detective Sergeant John Wood (Sept. 11, 2008) (“Due to the on-going investigation against Mrs [sic] Sherwood for wasting police time and perverting the course of justice the decision has been made that this will not be crimed as we do not believe that a crime of rape has occurred. [sic]”)

220. Patient Record of Mrs. Gail Elizabeth Sherwood, Beeches Green Surgery (clinical data from Mar. 1, 2008–Oct. 23, 2014) (entry for 10 Sep 2008 notes “small 1/2 cm perianal haematoma” and that “although assault was vaginal rape assailant apparently pushed against anal area before vaginal rape”) (on file with author).



dence marshalled against them was not sufficient to bring a false reporting charge under the IACP Guidelines. The police evidence does not indicate that Ibrahim and Sherwood were less truthful than the other women. Rather, it indicates that all five cases suffered from gravely deficient investigations, and that Ibrahim and Sherwood did not have the benefit of investigators who continued to search for their assailants even when the original investigators had given up.

The quick arrest of Sherwood less than three months after she first complained about stalking strongly suggests that Sherwood's local force was not adequately trained to investigate this type of crime. Stalking cases can be complex and can take substantial time to solve, as the case of a very similar stalker, Michael McClellan, demonstrates. In that case, it took Fort Wayne, Indiana, detective Lorrie Bandor five *years* of investigation in order to obtain evidence sufficient to secure McClellan's stalking conviction.<sup>221</sup> Sherwood had also been stalked for years, and this stalking culminated in rape—making her case even more complex than the McClellan case.<sup>222</sup> But the investigation into her stalking complaints had barely scratched the surface when police acted on their skepticism and arrested her for lying about rape just three *months* after she sought their help in relation to the stalking. The enormous contrast in the time invested in these two cases suggests an utter failure to take Sherwood seriously.

Unfortunately, the police response to Sherwood is not unusual. A 2005 British Home Office study on attrition in rape cases clearly documents that the typical police approach to identifying supposedly false allegations of rape deviates from the IACP Guidelines on a widespread and systematic basis.<sup>223</sup> The study found that a significant amount of attrition occurs *early* in the rape investigation process, where the police dismissed many rape complaints as false allegations shortly after they were reported, and accordingly did not investigate them.<sup>224</sup> This is a clear deviation from the IACP Guidelines, because cases should *never* be dismissed as false allegations prior to a full investigation. The practice of dismissing cases as false

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221. See Jeff Neumeyer, *Fort Wayne Stalking Case Gets National Publicity*, ABC 21 ALIVE (Dec. 6, 2013, 6:11 PM), <http://www.21alive.com/news/local/Fort-Wayne-Stalking-Case-Gets-National-Publicity-234810541.html>. McClellan was sentenced to ten years.

222. Police knew, in 2008, that Sherwood reported that the same man stalked her for six months in 2000/2001 before disappearing until 2007. He has continued his stalking campaign ever since, through 2015. Letter from Gail Sherwood to Caroline, *supra* note 5; Detective Chief Inspector Paul Shorrock, Statement of Witness (Oct. 27, 2008) (on file with author); Interview with Gail Sherwood, Stroud, U.K. (Aug. 10, 2015).

223. KELLY ET AL., *supra* note 17, at 36–53.

224. *Id.* at 52.



prior to investigating them corroborates the finding of a 2014 policing report that investigatory skills are poor across many forces.<sup>225</sup> Consequently, it should be apparent that when police fail to follow best practice guidelines prior to charging a rape complainant with false reporting, there is in fact a great risk that they are charging a genuine rape victim and letting a rapist run free.

### III. THE ROLE OF PERFORMANCE MANAGEMENT CULTURE IN FUELING FALSE REPORTING PROSECUTIONS

This Part of the Article analyzes two additional factors that fuel the problem of charging rape complainants with false reporting. First, a performance management culture within the police affects the approach police take to rape cases. In particular, pressure to meet performance targets incentivizes police to close rape cases through improper means. Second, as a result of these performance management pressures, police have frequently subjected rape complainants to intense pressure to retract their allegations so that police can avoid investigating the rapes and recording them as crimes.

#### *A. Performance Management and Workload Management Strategies that Harm Rape Complainants*

It is well established that police behavior can be perversely affected by a performance management culture that emphasizes the achievement of performance targets over core policing values, such as reducing crime and protecting victims.<sup>226</sup> Under a performance management regime, police chiefs

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225. HER MAJESTY'S INSPECTORATE OF CONSTABULARY, STATE OF POLICING: THE ANNUAL ASSESSMENT OF POLICING IN ENGLAND AND WALES 2013/2014 30 (2014), <http://www.leics.pcc.police.uk/Document-Library/Our-Work/HMIC-Reports/HMIC-Report-State-of-Policing-2013-2014-November-2014.pdf> (finding that 18 of 43 forces need to improve their investigatory skills).

226. See, e.g., HOUSE OF COMMONS PUBLIC ADMINISTRATION SELECT COMMITTEE, CAUGHT RED-HANDED: WHY WE CAN'T COUNT ON POLICE RECORDED CRIME STATISTICS 14 (2014), <http://www.publications.parliament.uk/pa/cm201314/cm-select/cmpubadm/760/760.pdf> [hereinafter CAUGHT RED-HANDED]; Richard Alleyne, *PCs Told to Downgrade Crimes to Help Meet Targets*, THE TELEGRAPH (May 5, 2008), <http://www.telegraph.co.uk/news/uknews/1929667/Pcs-told-to-downgrade-crimes-to-help-meet-targets.html>; Alan Travis, *Police Fail to Record 800,000 Crimes a Year, Including One in Four Sex Offenses*, THE GUARDIAN (U.K.), Nov. 18, 2014, <http://www.theguardian.com/uk-news/2014/nov/18/police-dismiss-one-in-four-sex-crimes-watchdog>; HER MAJESTY'S INSPECTORATE OF CONSTABULARY, CRIME RECORDING: A MATTER OF FACT (2014), <https://www.justiceinspectors.gov.uk/hmic/wp-content/uploads/2014/05/crime-data-integrity-interim-report.pdf> [hereinafter CRIME RECORDING: A MATTER OF FACT]. See generally RODGER PATRICK, A TANGLED WEB: WHY YOU CAN'T BELIEVE CRIME STATISTICS (2014).

find their performance judged according to how well they do at reducing crime rates.<sup>227</sup> Performance management culture has been condemned because it creates a perverse incentive to under-record crime, because “failing to record unsolved crimes improves the percentage of crimes detected.”<sup>228</sup> In other words, officers are incentivized to only record crimes that they have actually *solved*.

In 2013, strong evidence emerged that British police had been deliberately manipulating crime figures in order to meet performance targets, and official investigations into these practices followed.<sup>229</sup> These manipulations have included downgrading reported crimes (e.g. downgrading a burglary to “criminal damage”),<sup>230</sup> and not recording reported crimes at all by labeling them as “no crime” or as “crime-related incidents” (“CRIs”) when these categories are inappropriate.<sup>231</sup> After an investigation, authorities determined that police-recorded crime data was inaccurate.<sup>232</sup> The UK Statistics Authority therefore stripped this data of its National Statistics designation.<sup>233</sup>

The police treatment of sex crimes has been particularly affected by these poor practices. Police fail to record about twenty percent of all crime reported to them, but twenty-six percent of reported sex offenses go unrecorded.<sup>234</sup> Moreover, sexual offenses are frequently “no-crime” or recorded as “crime-related incidents” when these latter designations are improper.<sup>235</sup> A police inspector’s report gave numerous examples of reports of rape that were “no-crime” by the police when they should have been reported as rapes.<sup>236</sup> Retired Metropolitan Police Detective Chief Superintendent and Force Crime Registrar Peter Barron stated that officers use the “no-crime” and “CRI” designations with rape cases in order to help them manage their workloads:

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227. RODGER PATRICK, *A TANGLED WEB*, *supra* note 226, at 1–2.

228. *Id.* at 2. *See also* CAUGHT RED-HANDED, *supra* note 226, at 3.

229. CRIME RECORDING: A MATTER OF FACT, *supra* note 226; Alan Travis, *supra* note 226.

230. Richard Alleyne, *supra* note 226; Interview with Peter Barron, former Detective Chief Superintendent, Metropolitan Police, London, U.K. (Dec. 12, 2014).

231. CAUGHT RED-HANDED, *supra* note 226, at 14. Recording an incident as “no crime” means that an incident initially recorded as a crime was later found, upon further investigation, not to be a crime. A “crime-related incident is one where the balance of probabilities suggests that a crime was committed, but no victim can be found to confirm this.” *Id.* at ¶ 10.

232. *See generally* CAUGHT RED-HANDED, *supra* note 226.

233. *Id.* at 3.

234. *Id.* at 16.

235. CRIME RECORDING: A MATTER OF FACT, *supra* note 226, at 59–62; CAUGHT RED HANDED, *supra* note 226, at 14–17.

236. CRIME RECORDING: A MATTER OF FACT, *supra* note 226, at 15, 42, 60–62.

Rape is a difficult crime to investigate, and it can be traumatic for the investigators. You can only have so many rapes that you are investigating open at one time. So one coping mechanism is to record it as a CRI. Keep it on the back burner, but never on the books as part of your workload.<sup>237</sup>

Accordingly, a policing culture that emphasizes performance management creates barriers to justice for victims of sexual violence because it encourages police to focus on offenses that are easiest to solve and record as crimes.<sup>238</sup> This emphasis perversely channels resources away from more difficult crimes and investigations. For instance, during the investigation of prolific serial rapist Kirk Reid, a supervisor requested that four additional officers be allocated to the investigation.<sup>239</sup> She was only given two officers, both of whom were removed from the investigation shortly thereafter.<sup>240</sup> This left the Reid investigation with no one actively working on it.<sup>241</sup>

When a performance management culture is coupled with the police culture of suspicion toward rape victims, these two cultures are mutually reinforcing. A performance management culture predisposes officers to look for ways to avoid investigating more difficult crimes by justifying a “no-crime” or CRI designation, such as by rationalizing a conclusion that the complainant is lying about being raped.<sup>242</sup> From the officer’s perspective, it may not make sense to put resources into investigating a crime that the

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237. Interview with Peter Barron, former Detective Chief Superintendent, Metropolitan Police, London, U.K. (Dec. 12, 2014).

238. See *CAUGHT RED-HANDED*, *supra* note 226, at 78 ([C]oncerns were expressed that the importance attached to crude detection rates were leading officers to concentrate on ‘low-hanging fruit’, focusing unduly on offences that were easier to clear up”).

239. INDEPENDENT POLICE COMPLAINTS COMMISSION, COMMISSIONER’S REPORT: IPCC INDEPENDENT INVESTIGATION INTO THE METROPOLITAN POLICE SERVICE’S INQUIRY INTO ALLEGATIONS AGAINST KIRK REID, 9 (2010), [http://www.ipcc.gov.uk/sites/default/files/Documents/investigation\\_commissioner\\_reports/kirkreidcommissionersreport.pdf](http://www.ipcc.gov.uk/sites/default/files/Documents/investigation_commissioner_reports/kirkreidcommissionersreport.pdf).

240. *Id.*

241. See *id.* Reid was convicted of twenty-seven rapes; police think he may be responsible for an additional one hundred attacks. *Met Officers Face Sack over Failures in Kirk Reid Investigation*, THE TELEGRAPH (June 28, 2010), <http://www.telegraph.co.uk/news/uknews/law-and-order/7859011/Met-officers-face-sack-over-failures-in-Kirk-Reid-investigation.html>.

242. This is, in part, because performance management cultures typically do not impose performance targets on the most serious crimes, such as rape and murder, but rather on lesser crimes. As a result, a police force can be incentivized to direct resources away from the most serious crimes and towards crimes that are being counted for performance management purposes. If a crime is not being counted, then there is less incentive to solve it. Rodger Patrick has referred to this practice as “skewing.” See *generally* RODGER PATRICK, A TANGLED WEB, *supra* note 226 at 40–45.

officer will not get credit for solving under the targets in effect at the time.<sup>243</sup> This mindset then reinforces the culture of suspicion because by disbelieving rape complainants, police can actually reduce their workloads.

Target culture thus incentivizes police to be skeptical of victims, compounding the difficulties that victims face in being believed, having their cases investigated, and obtaining justice. Target culture helps explain why rape victims often report pressure from the police to retract their allegations.

### *B. Making Rape Disappear By Pressuring Victims to Retract Allegations*

Pressuring victims to retract allegations of crime is a strategy that police officers have used to make crime disappear, thus allowing forces to more easily meet performance targets. This is poor practice. According to Human Rights Watch, experts “strenuously object to threatening victims implicitly or explicitly with charges for false reporting.”<sup>244</sup> Under the IACP Guidelines, a victim’s retraction statement should not be used as evidence that a sexual assault did not occur.<sup>245</sup> Despite this fact, police in both the United States and Britain have frequently engaged in precisely this behavior, pressuring rape complainants—including genuine victims—to retract, and then using that retraction as proof that no rape occurred.

Solving a sexual offense will likely take a great deal of time and investigatory resources, and this investment may seem nonsensical to overburdened officers when easier alternatives are available—namely, keeping the offense off the books entirely by pressuring a victim to retract her allegation. HRW reported several cases where Washington, D.C., police accused rape complainants of lying about being raped, including four cases where victims were explicitly threatened with prosecution for false reporting.<sup>246</sup> The pervasiveness of the practice of threatening victims with false reporting charges suggests a systemic problem rather than the isolated actions of one or two rogue officers; as the report noted, a former rape crisis center volunteer reported that a police detective stated, during a training for volunteers, that “We make it very clear to survivors that there is a penalty for false reporting” and that “[we] repeatedly remind the victim that they cannot false report.”<sup>247</sup>

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243. See Patrick, *supra* note 226, at 40–46; see generally CAUGHT RED-HANDED, *supra* note 226, at 76–89.

244. IMPROVING POLICE RESPONSE, *supra* note 84, at 9.

245. IACP GUIDELINES, *supra* note 15, at 12–13.

246. DC REPORT, *supra* note 15, at 128.

247. *Id.*

In Britain, the same practice has been tied to the manipulation of crime statistics.<sup>248</sup> Peter Barron stated that the police will “often ring back victims and begin to challenge whether or not the crime actually occurred. . . .”<sup>249</sup> They will also attempt “to persuade the victim that a less serious crime than that originally alleged has been committed.”<sup>250</sup> Police also use “false reporting strategies” to encourage victim recantation and have thus “succeeded in suppressing crime levels dramatically.”<sup>251</sup>

According to Peter Barron, rape victims face “massive” pressure to retract allegations as a result of police concern with meeting performance targets.<sup>252</sup> A 2013 Independent Police Complaints Commission (“IPCC”) report into Metropolitan Police rape investigation practices found that pressure was placed on officers to obtain retraction statements from victims because such statements benefitted the unit’s performance statistics by enabling police to “no crime” certain rape allegations.<sup>253</sup> Reacting to these findings, the Public Administration Select Committee stated in 2014 that “[a]ny instance of deliberate misrecording of sexual offences is deplorable, but especially so if this has been brought down by means of improperly persuading or pressurising victims into withdrawing or downgrading their report.”<sup>254</sup>

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248. See INDEPENDENT POLICE COMPLAINTS COMMISSION, SOUTHWARK SAPPHIRE UNIT’S LOCAL PRACTICES FOR THE REPORTING AND INVESTIGATIONS OF SEXUAL OFFENCES, JULY 2008–SEPTEMBER 2009 10–11 (2013), [http://www.ipcc.gov.uk/sites/default/files/Documents/investigation\\_commissioner\\_reports/Southwark\\_Sapphire\\_Units\\_local\\_practices\\_for\\_the\\_reporting\\_and\\_investigation\\_of\\_sexual\\_offences\\_july2008\\_sept2009.PDF](http://www.ipcc.gov.uk/sites/default/files/Documents/investigation_commissioner_reports/Southwark_Sapphire_Units_local_practices_for_the_reporting_and_investigation_of_sexual_offences_july2008_sept2009.PDF) [hereinafter SOUTHWARK IPCC REPORT].

249. Peter Barron, Written Evidence on Crime Statistics, CST0003, Public Administration Committee, Parliament 6 (Oct. 2013), <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-administration-committee/crime-statistics/written/3277.pdf>.

250. *Id.*

251. See generally PATRICK, *supra* note 226, at chapter 1 (explaining how police strategies for dealing with suspected false reports result in far fewer crimes being recorded).

252. Interview with Peter Barron, former Detective Chief Superintendent, Metropolitan Police, in London, U.K. (Dec. 12, 2014).

253. SOUTHWARK IPCC REPORT, *supra* note 248, at 10–11. Officers sometimes tried to justify these “no-crime” decisions on the basis of the victim’s mental health or similar issues of vulnerability—an approach which has caused researcher Betsy Stanko to conclude that the rape of people with high levels of vulnerability has essentially been decriminalized. See Melanie Newman, *Rape Has Been ‘Decriminalised’ for the Most Vulnerable Says Senior Met Advisor*, BUREAU OF INVESTIGATIVE JOURNALISM (Feb. 28, 2014), <https://www.thebureauinvestigates.com/2014/02/28/rape-has-been-decriminalised-for-the-most-vulnerable-says-senior-met-adviser/>; CAUGHT RED-HANDED, *supra* note 226, at 15.

254. CAUGHT RED-HANDED, *supra* note 226, at 39.

The consequences for rape complainants of the pressure—and threats—that police place on them to retract rape allegations is evident in the five cases discussed in-depth in this Article. Strikingly, all five of these women —Sara Reedy, D.M., Patty, Layla Ibrahim, and Gail Sherwood—experienced strong police pressure to retract their rape allegations. Police actually *did* extract false confessions from both D.M. and Patty—proven rape victims—as well as from Sherwood. The fact that genuine rape victims have been coerced into giving false confessions helps to illustrate why the IACP Guidelines do not allow police to conclude that a report is false based on a victim’s recantation.<sup>255</sup> If police are pressuring victims to retract allegations, and victims are frightened enough to give in to the pressure and falsely confess, then the investigatory process is tainted miserably and fails victims. Revisiting some of these cases will demonstrate how police coerce victims to retract rape allegations.

In Patty’s case, detective Tom Woodmansee asked her, under false pretenses, to come to the station so that she could answer further questions that would assist in the investigation into her rape claim.<sup>256</sup> When she arrived, he detained her and accused her of fabricating the rape claim.<sup>257</sup> He then proceeded to threaten her and exert pressure on her until he extracted a false confession from her,<sup>258</sup> a tactic that he had used with numerous other possible crime victims.<sup>259</sup> Patty recanted because “if she didn’t admit to making this up, she could never again expect police to believe her or to come to her assistance in a time of a need.”<sup>260</sup> She later set the record straight, writing: “Have you asked the detectives in this case why I suddenly changed my mind and said I made it up? . . . I was interrogated for two hours in a closed room, without any possibility of leaving unless I said it did not happen.”<sup>261</sup>

Similarly, in the case of D.M., two male police officers in Washington state lured her to the police station under false pretenses, telling her that they needed her to answer further questions to aid the rape investigation.<sup>262</sup> Upon arrival at the station, the officers accused D.M. of lying about the

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255. IACP GUIDELINES, *supra* note 15, at 13.

256. LUEDERS, *supra* note 65, at 56–57 (telling Patty he wanted to meet in order to acquire additional hair samples when in fact he planned to accuse her of false reporting).

257. *Id.* at 58.

258. *See id.* at 58–63.

259. *See id.* at 32–34.

260. *Id.* at 60–61.

261. LUEDERS, *supra* note 65, at 69. This quotation comes from a letter Patty wrote to local newspaper, explaining herself and criticizing their decision to run an article saying that she admitted to lying about rape. *Id.* at 68–69.

262. *See* D.M. Complaint, *supra* note 135, at 10.

rape, repeatedly expressed their skepticism of her account, and interrogated her as a suspect without complying with their obligation to inform her of her right to remain silent.<sup>263</sup> The officers even threatened her, stating that they would see to it they she lost her housing subsidy if she did not cooperate with them by admitting that she fabricated the rape claim.<sup>264</sup>

The police pressure on D.M. to retract the rape claim was intense, and they effectively put words in her mouth. One of the officers admitted that when the first written retraction statement that D.M. produced was not satisfactory to him because it stated that the rape really happened, he insisted that she rewrite it:

We went over the statement I noticed that she hadn't mentioned that she made up the story . . . I asked her why she didn't write that she made up the story and she began crying and said that she believed her other story actually happened.<sup>265</sup>

He pressured her to rewrite the statement to admit she lied.<sup>266</sup> D.M. eventually did so in order to end this traumatic encounter with the police and get out of the station.<sup>267</sup>

The methods used in Gail Sherwood's case were nearly identical to those used in Patty and D.M.'s cases. About two-and-a-half weeks after Sherwood's second rape report, she was called into the police station under false pretenses, with police saying they needed her to bring a piece of evidence that was at her home.<sup>268</sup> She was not allowed even a single phone call,<sup>269</sup> but, she reported, was subjected to intense pressure to state that she had fabricated all of the rape and stalking claims.<sup>270</sup> According to Sherwood, the duty solicitor that the police called for her told her that if she did not retract her allegations, the police would see to it that she went to prison and that she would lose her children.<sup>271</sup> Under these circumstances, Sherwood recanted. Strikingly, all three women later retracted their confessions.

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263. *Id.*

264. *Id.* at 16.

265. *Id.* at Exhibit 10, 4.

266. *Id.*

267. *Id.* at 12.

268. Operation Whitney Interview Strategy, Gloucestershire Constabulary (undated) (on file with author).

269. Letter from Gail Sherwood, *supra* note 5, at 26.

270. See Interview by DS Stratton with Gail Sherwood, in Stroud Police Station, Gloucester, U.K. (Oct. 30, 2008).

271. *Id.* at 8.



Sara Reedy was similarly pressured by detective Frank Evanson to retract her rape claim, but she managed to stand her ground.<sup>272</sup> A month after the rape, Evanson and another officer came to her home and pressed her to retract the rape allegation.<sup>273</sup> Reedy stated in her deposition: “I asked him to leave several times, just leave, leave me alone. [I said] I’m not changing my statement. And he refused . . . . He had me completely hysterical, and . . . [i]t was totally embarrassing, insulting.”<sup>274</sup> Although Reedy managed to resist Evanson’s pressure, her case is further evidence of the pressure placed on rape victims to retract allegations.<sup>275</sup>

In light of the clear evidence that police officers have an incentive to charge rape complainants with false reporting in order to manage their workloads, there is an obvious need for safeguards to be put in place to ensure that rape cases are fully investigated and that complainants are not subjected to this sort of pressure. Moreover, the interaction between workload management pressures and the police culture of suspicion toward rape complainants work together to heighten the risk that rape complainants will be treated unfairly—their cases are not properly investigated, and some experience pressure to retract their allegations. This, in turn, creates an intolerable risk that genuine victims will be prosecuted for false reporting.

#### IV. THE CONSEQUENCES OF GETTING RAPE WRONG

*The enthusiasm of law enforcement for prosecuting women, compared to the police’s careless and biased investigations of rape and domestic violence, is remarkable. Women and children are not only ignored when they come forward, they are accused of perverting the course of justice, a very serious crime which can land a person in jail for many years, or charged with offenses such as prostitution or underage drinking while their attackers go free. The criminalization of victims undermines every gain of the anti-rape movement for the last 35 years.*

—Nina Lopez, Co-founder, Legal Action for Women.<sup>276</sup>

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272. *Reedy v. Evanson*, 615 F.3d 197, 207 (3rd Cir. 2010).

273. *See Reedy*, 615 F.3d at 207 (the context clearly implies that when the officers asked Reedy to “change” her statement, they were asking her to retract the statement and admit that she was lying about being raped).

274. *Reedy*, 615 F.3d at 207.

275. Evanson claims that Reedy stated, “I just want to drop the whole thing” and “I just want this whole thing to go away.” He felt these comments were indicative of her lying. *Reedy*, 615 F.3d at 211–13.

276. Written Statement from Nina Lopez, Co-Founder, Legal Action for Women (Aug. 8, 2015) (on file with author).



The phenomena described in this Article demonstrate a widespread failure on the part of the police to handle sexual assault complaints according to recommended best practice. Investigators have shown disregard for the welfare of victims by expressing skepticism of them, refusing to investigate reported crimes, and actually pressuring them to withdraw allegations. This section analyzes several consequences of these poor practices. First, genuine victims of sexual assault have been prosecuted for false reporting as a direct result of police failure to handle their complaints properly. Second, a number of additional poor public policy outcomes result from this mishandling of rape complaints. And third, the human rights of sexual assault victims are violated when police focus on trying to prove complainants are lying instead of investigating their complaints.

*A. False Reporting Prosecutions Ensnare Genuine Victims*

*It is better that ten guilty persons escape than that one innocent suffer.*

—William Blackstone<sup>277</sup>

Blackstone's formulation notwithstanding, there appears to be an eagerness to prosecute disbelieved rape complainants for false reporting despite the fact that such persons could be genuine victims. Sara Reedy, D.M., Patty, and Jane Doe are examples of genuine rape victims who were disbelieved by police and then pursued for falsely reporting rape. The IACP Guidelines require a full investigation of each complaint precisely because the vast majority of sexual assault allegations reported to the police are true, and because there is no way, short of a full investigation, to accurately identify the small number of allegations that may be false. These IACP Guidelines require every complaint to be regarded as truthful unless, and until, a full investigation has been completed and evidence has proven that the reported assault did not happen.

This threshold was never reached in any of the cases discussed in this Article. As demonstrated in Part Two, none of the investigations were thorough, and *none* of them produced evidence that the reported assaults did not happen. Therefore, under the IACP Guidelines, none of the complainants should have been prosecuted for false reporting. The reason that Reedy, D.M., Patty, and Jane Doe were cleared while Sherwood and Ibrahim were not is the result of luck, not merit. In Reedy and D.M.'s cases, officers in other jurisdictions continued to search for the rapists even when the women's local police had stopped investigating. In Jane Doe's case, her

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277. 4 WILLIAM BLACKSTONE, COMMENTARIES \*352.

mother's determination to challenge the police forced them to re-investigate. Sherwood and Ibrahim were not so fortunate, but their cases were tainted by the same investigatory failures present in the other cases. And when their local police gave up on them, they had no recourse.

How many genuine rape victims are branded as liars as a result of police failures to follow best practices? It is difficult to say, because most jurisdictions do not track the number of rape complaints that end in the prosecution of the victim. But the systemic failures identified in this Article—such as the failure to investigate rape, the culture of suspicion toward victims, and the practice of pressuring victims to retract allegations—provide a context where it is quite possible that wrongful prosecutions of genuine rape victims are widespread.

This context provides ample reason to question the entire class of arrests and prosecutions of women for false rape claims. As demonstrated above, there are compelling reasons to believe that the prosecution of genuine rape victims is a systemic problem affecting many victims, Ibrahim and Sherwood among them.

#### *B. Poor Public Policy Outcomes That Result From the Prosecution of Rape Victims*

Police skepticism of rape complainants is likely to produce a large number of false positives—cases where police *incorrectly* conclude that an actual rape victim is lying. These false positives result in poor public policy outcomes for rape investigation, for victims, and for society as a whole. First, a focus on prosecuting complainants for false reporting enables rape because police turn a blind eye to rapists while they focus instead on prosecuting rape victims. Second, such prosecutions further traumatize survivors of sex crimes, thus compounding the horrors they have already experienced. Third, such prosecutions have a chilling effect on other victims, who are reluctant to come forward for fear that they, too, will not be believed and will be prosecuted for false reporting. And finally, such prosecutions contribute to the perpetuation of rape myths.

##### 1. Police Inaction Enables Rapists

As the cases discussed in this Article demonstrate, failing to believe victims and take their complaints seriously results in perpetrators being left at large to offend repeatedly, further endangering the public. In the case of Jon Worboys—a London cab driver who drugged and raped at least eighty-five women before being caught—police made little effort to investigate the victims' complaints because they did not believe the victims' reports of sex-

ual assault.<sup>278</sup> With no appetite for taking on a celebrity, police similarly ignored several of Jimmy Savile's victims.<sup>279</sup> Police inaction essentially gave a green light to both of these serial sex offenders, further emboldening them to commit additional crimes.<sup>280</sup>

When police take their disbelief one step further and charge victims with false reporting, they send a strong message to offenders that they can carry on offending. The men who raped Sara Reedy, D.M., and Patty all went on to commit further sex crimes while the police investigated the victims rather than trying to catch the rapist. Wilbur Brown raped another woman just three months after raping Reedy and confessed to twelve sexual assaults altogether.<sup>281</sup> After raping D.M. in Washington state, Marc O'Leary raped several additional women in Colorado before being captured.<sup>282</sup> And Patty's assailant, Joseph Bong, committed another sexual offense during the course of a robbery just days after raping Patty.<sup>283</sup>

After Gail Sherwood was branded a liar, she gave police a statement indicating that her assailant continued to stalk her, sending her cards indicating he was aware that she was being prosecuted for PCOJ.<sup>284</sup> She reported that one card stated, "he was really sorry my bail date had been changed again" and that it was "unfair what she was being put through."<sup>285</sup>

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278. See Sandra Laille & Vikram Dodd, *Police Errors Left Rapist John Worboys Free to Strike – But No Officers Face Sack*, THE GUARDIAN (Jan. 19, 2010), <http://www.theguardian.com/uk/2010/jan/20/Police-ipcc-john-worboys-errors>; INDEPENDENT POLICE COMPLAINTS COMMISSION, COMMISSIONER'S REPORT: IPCC INDEPENDENT INVESTIGATION INTO THE METROPOLITAN POLICE SERVICE'S INQUIRY INTO ALLEGATIONS AGAINST JOHN WORBOYS (2010), available at [https://www.ipcc.gov.uk/sites/default/files/Documents/investigation\\_commissioner\\_reports/worboys\\_commissioners\\_report.pdf](https://www.ipcc.gov.uk/sites/default/files/Documents/investigation_commissioner_reports/worboys_commissioners_report.pdf).

279. Jimmy Savile has been called the U.K.'s most prolific sex offender and is thought to have victimized over 400 people before his death in 2011. DAVID GRAY & PETER WATT, GIVING VICTIMS A VOICE: JOINT REPORT INTO SEXUAL ALLEGATIONS MADE AGAINST JIMMY SAVILE 11 (Jan. 2013), <https://www.nspcc.org.uk/globalassets/documents/research-reports/yewtree-report-giving-victims-voice-jimmy-savile.pdf>. In 2009, when Savile was asked by a reporter about allegations of sexual violence against him, his response drew on the popular rape myth that women often lie about rape: "There's women looking for a few quid, we always get something like this coming up to Christmas, and normally you can brush them away like midges." Stephen Wright & Miles Goslett, *Savile and the Tapes that Damn the Police*, DAILY MAIL (Oct. 15, 2013), <http://www.dailymail.co.uk/news/article-2461443/Jimmy-Savile-tapes-damn-police-The-special-treatment-allowed-DJ-escape-justice.html>.

280. See *id.*; Laille & Dodd, *supra* note 278.

281. *Rape in the United States Hearing*, *supra* note 39, at 17.

282. See Burnett, *supra* note 72.

283. LUEDERS, *supra* note 65, at 193–94.

284. See Record of Tape Recorded Interview by Detective Sergeant Adrian Stratton with Gail Sherwood, Stroud Police Station (Oct. 30, 2008) (on file with author).

285. *Id.*

She also told police that shortly before the third rape, she had received a card where the assailant stated, “how useless you all [the police] were . . . that he could be stood next to you and piss on your boots and you couldn’t catch him.”<sup>286</sup>

She further explained to police that when a friend had confronted her about the fact that she had burned some of these cards rather than preserve them as evidence, she told her friend, “What’s the point of keeping them, giving them to the police, they don’t believe me, they say I’m a liar so there’s no point giving them stuff because he isn’t out there as far as they’re concerned.”<sup>287</sup> Gloucestershire police ignored these statements, instead clinging to their belief that Sherwood’s stalker and rapist did not exist. As this example of police conduct in Sherwood’s case demonstrates, the decision to prosecute sexual assault complainants can actually render sexual predators invisible to the police. Once police take the position that they do not believe a victim, they may feel like they cannot reverse course without looking foolish. Prosecuting complainants for false reporting thus *enables* sexual predators to continue offending with impunity.

## 2. Further Trauma to Victims of Sex Crimes

Prosecuting a rape victim for false reporting inflicts severe trauma on victims who are already traumatized from being raped. Rape is a highly traumatic experience, and to report to the police, be disbelieved, and also subjected to a criminal charge of perverting the course of justice greatly magnifies the trauma that a rape victim has already experienced.

This trauma is further exacerbated when the women sent to prison are mothers of minor children. Sherwood’s conviction separated her from her children for eight months and thrust her oldest daughter into the position of caring for her two teenage sisters.<sup>288</sup> This forced separation from her daughters was doubly traumatic in Sherwood’s case, because she believed that her stalker was still at large and had entered her home on more than one occasion.<sup>289</sup> This left her fearing for her daughters’ safety while she was in prison.<sup>290</sup>

Layla Ibrahim was sentenced to three years in prison when she was six months pregnant.<sup>291</sup> She gave birth in prison and was kept in a mother-and-

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286. *Id.*

287. *Id.*

288. E-mail from Gail Sherwood to Lisa Avalos (Apr. 7, 2016, 04:29 CST) (on file with author).

289. *Id.*

290. *Id.*

291. Hattenstone & Hirsch, *supra* note 78.

baby unit until she was released after serving thirteen months.<sup>292</sup> Rhiannon Brooker was sentenced to three-and-half years and was separated from her nine-month old daughter when she was sent to prison.<sup>293</sup> Despite the fact that Brooker was the mother of such a young child, the solicitor general even tried to get her sentence lengthened.<sup>294</sup> Brooker's partner has stated that their daughter "was missing her mother desperately."<sup>295</sup>

Even if Sherwood, Ibrahim, and Brooker actually lied about being raped, such long custodial sentences seem extraordinarily unjust for a non-violent crime and could certainly discourage other victims from reporting rape, particularly if they have children. The compelling evidence that actual rape victims have been separated from their children and imprisoned as a result of police disbelief of their complaints is deeply disturbing.

### 3. The Chilling Effect

The one message that the prosecutions of Sherwood, Ibrahim, and Brooker send to rape victims is *not* to go to the police to report rape, because the risk of being disbelieved and consequently sent to prison for false reporting is very real. Lisa Longstaff of Women Against Rape in London has noted that prosecuting rape victims for false reporting, and the media attention it attracts, "discourages women from coming forward and boosts the die-hard myth that women and children often lie about rape."<sup>296</sup> Megan Jones Williams, Sexual Assault Program Coordinator of the Women's Center in Carbondale, Illinois, stated that after the prosecution of a rape complainant in her community, several people, including individuals calling her agency's crisis hot line, told her that there was no way they would report a sexual assault out of fear that something would get twisted and they could be charged with false reporting.<sup>297</sup> In addition, some individuals who were already clients of her agency when the prosecution occurred told her that they were scared to death the police will come after them.<sup>298</sup> If victims are afraid to come forward, then police will have less information about sexual

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292. *Id.*

293. Morris, *Trainee Barrister Jailed for False Rape Claims*, *supra* note 1.

294. Steven Morris, *Court Rejects Call for Woman's Jail Term Over False Rape Claims to be Increased*, THE GUARDIAN, Sept. 25, 2014, <http://www.theguardian.com/uk-news/2014/sep/25/court-rejects-solicitor-general-rhiannon-brooker-jail-term-false-rape-claims>.

295. *Id.*

296. *Id.*; see also Lisa Longstaff, *The Rape Victims Prosecuted for "False" Rape Allegations*, OPEN DEMOCRACY (Dec. 16, 2013), <https://www.opendemocracy.net/5050/lisa-longstaff/rape-victims-prosecuted-for-false-rape-allegations>.

297. Telephone Interview with Megan Jones Williams, Sexual Assault Program Coordinator, The Women's Center (Sept. 4, 2013).

298. *Id.*

predators and will be ill positioned to conduct effective investigations. Accordingly, even diligent, well-trained officers will not have access to all of the necessary information about sexual predators in the community.

#### 4. The Perpetuation of Rape Myths

*To prosecute and even imprison those who report rape not only hurts individual victims and scares others off reporting, it feeds the old sexist myth that women and girls lie about rape, and shifts blame for the low conviction rate away from the authorities. We have uncovered at least 109 women who were prosecuted after reporting rape in the past five years. This must stop.*

—Lisa Longstaff, *Women Against Rape*<sup>299</sup>

The practice of prosecuting complainants for falsely reporting rape perpetuates the myth that women often lie about being raped. Although actual false allegations of rape are extremely rare,<sup>300</sup> cases where women are prosecuted tend to get a great deal of press coverage, most of which is unsympathetic to the accused. In the cases of Sherwood, Ibrahim, and Brooker, several newspapers ran unflattering headlines such as “Mother Of Three Who Faked Elaborate Rape Scenes ‘For Attention’ Jailed For Two Years;”<sup>301</sup> “‘Wicked’ Woman Who Cried Rape Is Jailed For Three Years Despite Being Seven Months Pregnant;”<sup>302</sup> and “Law Graduate Faces Jail After Lying About Being Raped 11 Times By Boyfriend To Excuse Exam Failures.”<sup>303</sup> In these cases, only one newspaper—the *Guardian*—gave any con-

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299. Written Statement from Lisa Longstaff, Women Against Rape (Aug. 8, 2015) (on file with author).

300. See KELLY ET AL., *supra* note 17, at 83; Lisak et al., *supra* note 17, at 1330; Lonsway et al., *supra* note 17, at 2.

301. Daily Mail Reporter, *Mother of Three Who Faked Elaborate Rape Scenes ‘For Attention’ Jailed for Two Years*, DAILY MAIL (U.K.), Mar. 4, 2010, <http://www.dailymail.co.uk/news/article-1255594/Mother-faked-elaborate-rape-scenes-attention-jailed-years.html>.

302. James Tozer, *‘Wicked’ Woman Who Cried Rape is Jailed for Three Years Despite Being Seven Months Pregnant*, DAILY MAIL (U.K.), Jul. 16, 2010, <http://www.dailymail.co.uk/news/article-1294947/Leyla-Ibrahim-jailed-crying-rape-despite-7-months-pregnant.html>.

303. Richard Hartley-Parkinson, *Law Graduate Who Falsely Accused Boyfriend of Rape to Get Out of Exams is Jailed*, MIRROR (U.K.), Jun. 26, 2014, <http://www.mirror.co.uk/news/uk-news/law-graduate-who-falsely-accused-3768882>.

sideration to the investigatory failures in these cases that suggested that the complainants might have been telling the truth.<sup>304</sup>

These headlines' pejorative portrayal is particularly troubling in light of the fact that the investigations into Ibrahim and Sherwood's complaints were inadequate, under the IACP Guidelines, to support a conclusion that the complaints were false. This sort of press coverage exploits failed rape investigations to reinforce the myth that women frequently lie about rape. The beliefs that are perpetuated in this way then affect not just the general public, but also the judges and prosecutors involved in subsequent cases.

For instance, Judge Julian Lambert presided over the Gail Sherwood prosecution in 2010 as well as Rhiannon Brooker's prosecution in 2014. At Sherwood's sentencing, Lambert described Sherwood as having a "perverted mind" that invented a "malicious fantasy world."<sup>305</sup> In light of the evidence strongly indicating that Sherwood's case was never properly investigated, the decision to prosecute her likely strengthened rape myths that then harmed Brooker's chance at a fair trial since Brooker's case was heard by the same judge. Lambert used similar adjectives to describe Brooker and then said, in a bizarre twist, that her actions made it more difficult for real rape victims to be believed in court.<sup>306</sup> It is not the actions of rape complainants, but rather the police failure to properly investigate these cases that creates hardship for future rape victims.

This section has demonstrated that the practice of charging rape victims with false reporting results in several adverse public policy outcomes including the perpetuation of rape myths, a chilling effect which prevents victims from coming forward, further trauma to victims, and impunity for rapists. The next section considers the human rights violations that occur.

### *C. Violations of the Human Rights of Rape Victims*

Both the failure to investigate rape and the abhorrent practice of charging rape complainants with false reporting result in human rights violations under the British Human Rights Act ("HRA"), the European Convention on Human Rights ("ECHR"), and other treaties. These practices also result in constitutional rights violations in the United States.<sup>307</sup> This

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304. See, e.g., Hattenstone & Hirsch, *supra* note 78; Morris, *Jailed for Crying Rape: Fantasist or Genuine Victim?* *supra* note 79; Morris, *Trainee Barrister Jailed for False Rape Claims*, *supra* note 1.

305. Morris, *Woman Gets Two Years for False Rape Claims*, *supra* note 5.

306. Morris, *Trainee Barrister Jailed for False Rape Claims*, *supra* note 1. Lambert called Brooker's actions "utterly wicked." *Id.*

307. Failure to investigate and prosecute rape can be part of a pattern or practice of gender discrimination in violation of the Fourteenth Amendment to the U.S. Constitution. See *supra* note 55.



section of the Article more fully examines some of the violations that occur under human rights treaties.

### 1. State Breach of the Duty to Investigate and Punish: Violations of HRA, ECHR, CEDAW, and the Istanbul Convention

The due diligence principle in international human rights law provides a way to measure whether states have complied with their obligations to respect, protect, and fulfill individuals' human rights. In accordance with this principle, states might be responsible for private acts of violence if they "fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence."<sup>308</sup> As a result of this principle, failure to investigate rape violates Article 3 of the HRA and ECHR, as well as the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW").<sup>309</sup>

The Council of Europe's Convention on Preventing and Combating Violence Against Women and Domestic Violence (the "Istanbul Convention") also obligates state parties to "take the necessary legislative or other measures to protect all victims from any further acts of violence."<sup>310</sup> It further requires state parties to ensure that there are "appropriate mechanisms to provide for effective cooperation between all relevant state agencies" in supporting victims.<sup>311</sup> Moreover, state parties must ensure that measures taken must be "based on a gendered understanding of violence against women," must "focus on the human rights and safety of the victim," and must aim at "avoiding secondary victimisation."<sup>312</sup>

Prosecuting complainants for allegedly false allegations of rape, when their complaints have not been fully investigated and unequivocally deter-

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308. U.N., Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19, 11th Sess., ¶ 9, U.N. Doc. A/47/38 (1992) [hereinafter Gen. Rec. No. 19].

309. See *DSD & NBV v. The Commissioner of Police for the Metropolis*, [2014] EWHC QB 436, ¶ 12–13 (U.K.); Gen. Rec. No. 19, *supra* note 308, at ¶ 9.

310. Council of Eur. Convention on Preventing and Combating Violence against Women and Domestic Violence, art. 18.1, Apr. 12, 2011, C.E.T.S. No. 210 [hereinafter Istanbul Convention].

311. *Id.* at art. 18.2.

312. *Id.* at art. 18.3. Secondary victimization occurs when institutions that are supposed to provide services to rape victims do so in a manner that is victim-blaming, insensitive, or prioritizes the needs of the institution over the needs of the victim, thus resulting in further trauma to the victim. See Priscilla Schulz (2000) (article review) (reviewing Rebecca Campbell & Sheela Raja, *Secondary Victimization of Rape Victims: Insights from Mental Health Professionals Who Treat Survivors of Violence*, 14(3) VIOLENCE AND VICTIMS 26 (1999)), available at <https://mainweb-v.musc.edu/vaw-prevention/research/victimrape.shtml>.



mined to be false, violates these requirements. In these cases, complainants experience secondary victimization when they are disbelieved and prosecuted. Their rights are also violated because the state decision to prosecute the complainant (rather than investigate the rape) is taken contrary to the mandate to focus on the human rights and safety of the victim, and to take measures based on a gendered understanding of violence against women. Moreover, when such victims are subjected to further acts of violence from private perpetrators because the state has failed to adequately protect the victim, a violation of the Istanbul Convention also occurs. This type of violation very likely happened in the case of Gail Sherwood, who was raped repeatedly when her local police failed to take her complaints seriously. Such convention violations are also a concern in cases involving stalking, where threatening behaviors can be repetitive and victims become terrified because they do not know when the perpetrator will strike again.

Furthermore, some of these prosecutions, such as the cases of Rhianon Brooker and Eleanor de Freitas, have involved prosecutions moving forward at the behest of the British Crown Prosecution Service *over* the strong objections of the police.<sup>313</sup> For example, rape complainant Eleanor de Freitas took her own life in April 2014, just three days before she was to stand trial for perverting the course of justice when prosecutors disbelieved her rape complaint. The CPS had moved forward with the prosecution of de Freitas despite the fact that the police officers involved in the rape investigation believed de Freitas and refused to cooperate with prosecutors.<sup>314</sup>

In these cases, there was a violation of the requirement that all relevant state agencies cooperate effectively in order to support victims. The priority in all cases involving gender-based violence must be to ensure that no further violence is inflicted on the victim.<sup>315</sup> In summary, for a state entity to treat a person reporting gender-based violence as a suspect for false reporting after an inadequate or nonexistent investigation is a very grave matter. This treatment of victims violates the Istanbul Convention's principles enu-

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313. See, e.g. Morris, *Trainee Barrister Jailed for False Rape Claims*, *supra* note 1; Interview with Nigel Richardson, Solicitor, in London, U.K. (Dec. 11, 2014); Sandra Laville, *Eleanor de Freitas Should Never Have been Charged, Police Say*, THE GUARDIAN (U.K.) (Dec. 9, 2014), <http://www.theguardian.com/uk-news/2014/dec/09/police-eleanor-de-freitas-rape-complaint-perverting-course-justice>; Humble Memorial of David De Freitas, Application to Attorney General for Reference of the Inquest to the High Court (July 6, 2015), paras. 40–44 (on file with author).

314. The Humble Memorial of David de Freitas, Application to Attorney General for Reference of the Inquest to the High Court (on file with author); Sandra Laville, *Eleanor de Freitas Should Never Have Been Charged, Police Say*, THE GUARDIAN (U.K.), Dec. 9, 2014, <http://www.theguardian.com/uk-news/2014/dec/09/police-eleanor-de-freitas-rape-complaint-perverting-course-justice>.

315. See Istanbul Convention, *supra* note 310, at art. 18(1).

merated above—particularly the obligation to place priority on the victim’s human rights and safety, to avoid secondary victimization, and to protect the victim from further acts of violence.

## 2. The Right to be Free from Torture or Cruel, Inhuman, or Degrading Treatment

Article 3 of the HRA<sup>316</sup> and ECHR<sup>317</sup> protects individuals from torture or cruel, inhuman or degrading treatment. Rape qualifies as cruel, inhuman, and degrading treatment, and can rise to the level of torture.<sup>318</sup> The police failure to adequately investigate rape complaints violates Article 3 of the HRA and ECHR because such failure contributes to the cruel, inhuman, or degrading treatment experienced by victims.<sup>319</sup> In cases where police go on to charge a rape victim with false reporting after they have failed to fully investigate her case, the Article 3 violations are magnified. It is inhumane and degrading to accuse a victim of lying when her case has not been fully investigated, and it is similarly poor treatment to pressure her to retract her allegations and to threaten her with prosecution in the event that she does not retract.

In addition to these Article 3 violations, charging a rape victim with false reporting also strips away her entitlement to lifetime anonymity.<sup>320</sup> Moreover, a conviction can leave a victim with a criminal record, which can make it difficult or impossible for her to find employment. These consequences may also fall under Article 3.

## 3. The Right to Nondiscrimination on the Basis of Sex

Article 14 of both the HRA<sup>321</sup> and the ECHR<sup>322</sup> state that the enjoyment of the rights and freedoms set out in these conventions shall be “secured without discrimination on any ground,” including sex. Both rape

316. Human Rights Act, 1998, c.42, sch. 1, art. 3 (U.K.).

317. European Convention on Human Rights, art. 3, Nov. 4, 1950, 213 U.N.T.S. 222.

318. *DSD & NBV v. The Commissioner of Police for the Metropolis*, [2014] EWHC QB 436, [1] (U.K.); *see generally* *M.C. v. Bulgaria*, 2003-XIII Eur. Ct. H.R. 1; *Maslova and Nalbandov v. Russia*, Eur. Ct. H.R. 2008, <http://hudoc.echr.coe.int/eng?i=001-84670>; *Aydin v. Turkey* [GC], 1997-VI Eur. Ct. H.R. 1866.

319. Human Rights Act, *supra* note 316, art. 3; European Convention on Human Rights, *supra* note 317, art. 3. *See also DSD & NBV*, [2014] EWHC QB 436 (U.K.) (finding that failure to investigate rape is an Article 3 violation); *M.C.*, 2003-XIII Eur. Ct. H.R. 1.

320. Sexual Offences (Amendment) Act, 1992, c. 34 (U.K.), *available at* [http://www.legislation.gov.uk/ukpga/1992/34/pdfs/ukpga\\_19920034\\_en.pdf](http://www.legislation.gov.uk/ukpga/1992/34/pdfs/ukpga_19920034_en.pdf).

321. Human Rights Act, *supra* note 316, at art. 14.

322. European Convention on Human Rights, *supra* note 317, at art. 14.

victims whose cases are not adequately investigated and those who are accused of false reporting experience violations of their rights under CEDAW as well as Article 14 of the HRA<sup>323</sup> and ECHR.<sup>324</sup> In most cases, the Article 14 right to nondiscrimination on the basis of sex is violated because the vast majority of rape complainants are female and the majority of perpetrators are male.<sup>325</sup> Consequently, the police failure to believe rape victims and failure to investigate their cases has a disproportionate impact upon women, because police do not take effective action against crimes involving sexual offenses against women. The largely male composition of most police forces<sup>326</sup> is another factor that contributes to the violation of Article 14. Male officers may be more likely than female officers to adhere to certain rape myths, such as the belief that men cannot be raped, and the notion that many rape complainants are actually lying.<sup>327</sup> The continued state reliance on police forces that are disproportionately male may also contribute to the Article 14 violations of rape victims' human rights for these reasons.

When rape victims are charged with false reporting, the Article 14 violations are magnified because these cases typically involve male officers expressing skepticism of female victims, pressuring female victims to retract their complaints, and initiating charges against female victims. As demonstrated above, Sara Reedy, D.M., Patty, and Gail Sherwood were all pressured by skeptical male officers to retract their rape allegations, and all were subsequently charged with false reporting.

It is striking that in the twenty-first century, police and judicial authorities have failed to perceive the discriminatory nature of poor police practice around rape and they have failed to implement measures to correct for this systemic gender discrimination. Although the IACP Guidelines, if followed, would go a long way toward ensuring that rape complainants receive unbiased treatment, they are only effective if the guidelines are adopted by police departments and stringently followed. Poor police practices urgently require change in order to end Article 14 violations.

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323. Human Rights Act, *supra* note 316, at art. 14.

324. European Convention on Human Rights, *supra* note 317, at art. 14.

325. PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 21 (2006).

326. See LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, WOMEN IN LAW ENFORCEMENT, 1987–2008 (2010); ELEANOR WOODS, POLICE WORKFORCE, ENGLAND AND WALES, 31 MARCH 2015, HOME OFFICE STATISTICS (2015).

327. SCHWARTZ, *supra* note 22, at 28–29.

#### 4. The Right to an Effective Remedy

Article 13 of the HRA and ECHR states that anyone who experiences a violation of a convention right shall have a right to an effective remedy before a national authority.<sup>328</sup> Rape victims whose cases are not investigated also experience violations of their rights under Article 13 of the HRA and ECHR. Their Article 13 rights are violated because they are denied an effective remedy when the police fail to take diligent action in response to their complaints of rape or other ill treatment falling within Article 3. When victims are charged with false reporting, the Article 13 violations are magnified because not only are they denied any effective remedy for being raped, they are also treated as suspects. The result is that they are thrust into an even worse situation than they would have faced had they never gone to the police.

Violations of rape victims' human rights under Articles 13 and 14 have not yet been tested in court, but it would be timely for such a case to be brought in the wake of the *DSD and NBV* decision.<sup>329</sup>

#### 5. The Right to a Fair Trial

When rape victims are charged with false reporting, there is typically a violation of the Article 6 right to a fair trial.<sup>330</sup> This is because, as this Article has demonstrated, the decision to charge the complainant is usually made before the police have completed a full investigation of the rape complaint.<sup>331</sup> Consequently, the jury does not have access to all of the information relevant to the case. Moreover, these cases have not been put before juries with any sensitivity for the high levels of police skepticism exhibited toward rape complainants, the police failure to adequately investigate these cases, and the strong evidence that police regularly pressure victims to retract their allegations. Without this context, and in light of the deep levels of skepticism demonstrated toward victims facing these charges, a fair trial is virtually impossible.

#### 6. The Right Against Self-Incrimination

As this Article has demonstrated, in several cases where rape victims have been charged with false reporting, police have pressured victims to

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328. Human Rights Act, *supra* note 316, at art. 13; European Convention on Human Rights, *supra* note 317, at art. 13.

329. *DSD & NBV*, [2014] EWHC (QB) at [10], [14] (U.K.).

330. Human Rights Act, *supra* note 316, at art. 6; European Convention on Human Rights, *supra* note 317, at art. 6.

331. *KELLY ET AL.*, *supra* note 17, at 36–53.

recant in circumstances where they have been held in custody and questioned as suspects without receiving a warning of their right to remain silent.<sup>332</sup> In the United States context, suspects must be read their *Miranda* rights.<sup>333</sup> This right was violated in the cases of Reedy, D.M., and Patty.<sup>334</sup>

## V. RECOMMENDATIONS

*Leadership is about challenging myths, not exploiting them.*

—Rodger Patrick, Former Chief Inspector, West Midlands Police

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In light of the multiple problems with rape investigation enumerated in this Article, a number of recommendations are in order. First, police forces must implement safeguards to protect victims from wrongful prosecution. Second, the police response to rape generally must be strengthened and perverse incentives eliminated. Third, transparency is essential to improving how rape complaints are handled. Finally, victims who have been wrongfully prosecuted deserve measures to remedy miscarriages of justice.

### *A. Safeguarding Victims from Prosecution: Stop False Reporting Prosecutions and Adopt the IACP Best Practice Guidelines*

The analysis presented in this Article casts significant doubt on the legitimacy of prosecutions that target disbelieved rape complainants for false reporting. It demonstrates that at least some of those prosecuted are genuine victims, and that many more may also be genuine victims, in light of the culture of suspicion toward rape complainants and the widespread rape investigation failures that precede such prosecutions. It is beyond belief that any advanced society prosecutes genuine sexual assault victims for lying. It is equally surprising that those responsible for such policies have not perceived the need to closely scrutinize these practices in order to prevent exactly this type of prosecution from occurring.

Such prosecutions must stop. The priority of police forces must be to improve the investigation and prosecution of rape. A focus on prosecuting disbelieved complainants ensnares genuine victims, erroneously perpetuates

332. See *Reedy v. Evanson*, 615 F.3d 197, 207 (3rd Cir. 2010); D.M. Complaint, *supra* note 135, at ¶ 99; LUEDERS, *supra* note 65, at 58-63.

333. *Miranda v. Arizona*, 384 U.S. 436 (1966).

334. *Reedy*, 615 F.3d at 207; D.M. Complaint, *supra* note 135, at ¶ 99; LUEDERS, *supra* note 65, at 58-63.

335. Interview with Rodger Patrick, Former Chief Inspector, West Midlands Police, in West Midlands, UK (Aug. 6, 2015).

the myth that women often lie about being raped, and detracts from the more critical goal of prosecuting violent sexual offenders.

Sexual assault expert David Lisak has offered the following cautionary note regarding such prosecutions:

The bottom line is this: with a twenty percent reporting rate, and an enormous amount of case attrition, the vast majority of rapists run free to prey on vulnerable members of society. Most of these offenders are serial rapists, and many of them amass large numbers of victims over the course of their offending careers. *These offenders should be the focus of our efforts and energy, not the tiny fraction of victims who maliciously make false reports* (emphasis added).<sup>336</sup>

Similarly, shadow attorney general<sup>337</sup> Emily Thornberry has stated that the British government's priority ought to be ensuring that more rapists are successfully prosecuted and addressing "the widening gulf between the soaring numbers of rape allegations made to the police and the dwindling proportion that ever get prosecuted."<sup>338</sup>

Accordingly, best practice entails stopping the prosecution of rape complainants and instead focusing on the investigation and prosecution of rape. Genuine false reports are so rare that a policy focused on rooting out and prosecuting such cases is unjustified and carries too many adverse risks—in particular, the risks that rapists will be free to reoffend repeatedly, that genuine rape victims will be the targets of such prosecutions, and that some victims will not come forward due to fear of being disbelieved and prosecuted.

In addition, police forces affected by a culture of suspicion toward rape victims and a failure to believe them should adopt the IACP Guidelines' protocol for handling suspected false reports. As we have seen, these guidelines require that police (1) undertake a thorough investigation into each rape complaint; (2) label the report "false" *only* where evidence clearly

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336. Email from Dr. David Lisak, Forensic Consultant, to Lisa Avalos, author (Sept. 1, 2013) (on file with author).

337. In the UK Parliament, the Official Opposition party nominates a Member of the Parliament to shadow each of the members of the Cabinet, ensuring that the Opposition can question each government department thoroughly. *Shadow Cabinet, Glossary Page*, UK PARLIAMENT, <http://www.parliament.uk/site-information/glossary/shadow-cabinet/> (last visited Jan. 27, 2016).

338. Steven Morris, *Court Rejects Call for Woman's Jail Term Over False Rape Claims to be Increased*, GUARDIAN (U.K.), Sept. 25, 2014, <http://www.theguardian.com/uk-news/2014/sep/25/court-rejects-solicitor-general-rhiannon-brooker-jail-term-false-rape-claims>.

indicates that no crime was committed or attempted; and (3) ensure that they do not rely on common victim reactions to sexual assault—including discrepancies in the victim's account and a victim's retracted allegation—when determining that a report is false.<sup>339</sup>

In order for these best practice guidelines to be effective, compliance with them must be mandatory and not merely recommended. Police officers should be required to document that they have fully investigated each rape complaint and that they have not aborted a rape investigation because they did not believe the victim. If police conclude that a report is false, they should be required to document that they have actual evidence that supports this conclusion and that they have not relied on the complainant's reactions to the rape, or other post-assault behavior, in reaching that conclusion. If the cases analyzed here are any guide, consistent use of the IACP Guidelines will result in much more thorough investigations of rape and far fewer false allegations charges against complainants. Only by making these best practice guidelines mandatory will victims be adequately safeguarded against wrongful prosecution.

### *B. Strengthen Rape Investigation More Generally*

Robust sexual assault investigation guidelines exist in both the United States and Britain; the problem is that compliance with such guidance is uneven and left to the discretion of individual officers.<sup>340</sup> In light of the serious consequences that result when sexual assault is not taken seriously and not properly investigated, this state of affairs is unacceptable and must change. The public interest requires higher standards in how rape is investigated and prosecuted.

It is essential that each jurisdiction develop procedures for holding police accountable for conducting thorough rape investigations in compliance with recommended best practice. The IACP, End Violence Against Women International, Human Rights Watch, and the *Start by Believing* Campaign all offer more detailed guidance on specific approaches police can take to strengthen rape investigation and ensure officer accountability.<sup>341</sup> Jurisdictions such as Philadelphia, Pennsylvania; Kansas City, Missouri; and

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339. See IACP GUIDELINES, *supra* note 15, at 13.

340. DAME ELISH ANGIOLINI, REPORT OF THE INDEPENDENT REVIEW INTO THE INVESTIGATION AND PROSECUTION OF RAPE IN LONDON 10 (Apr. 30, 2015), available at [http://www.cps.gov.uk/publications/equality/vaw/dame\\_elish\\_angiolini\\_rape\\_review\\_2015.pdf](http://www.cps.gov.uk/publications/equality/vaw/dame_elish_angiolini_rape_review_2015.pdf); see generally IACP GUIDELINES, *supra* note 15.

341. See generally IACP GUIDELINES, *supra* note 15; END VIOLENCE AGAINST WOMEN INTERNATIONAL, <http://www.evawintl.org/> (last visited Aug. 2, 2015); IMPROVING POLICE RESPONSE, *supra* note 84; and START BY BELIEVING, <http://www.startbybelieving.org/> (last visited Aug. 24, 2015).



Austin, Texas offer models of excellent practice.<sup>342</sup> Implementing policies for ensuring that all sexual assault investigations comply with best practice guidelines will eliminate the human rights violations that occur as a result of the failure to properly investigate rape.

Furthermore, perverse incentives must be eliminated. Police departments and other stakeholders must ensure that it does not advantage police officers to fail to record sex crimes, pressure victims to retract, or charge complainants with false reporting. In fact, police officers should be expressly prohibited from pressuring victims to retract allegations, and they should be subject to disciplinary action if they do so. Instead, officers investigating rape should be rewarded based on the thoroughness of their investigations and their effectiveness in actually securing convictions of rapists.

### *C. Transparency: External Review of Sexual Assault Investigations*

Jurisdictions with strong sexual assault investigation policies are increasingly using an external review process to ensure that police follow best practices in investigating sexual assault. For example, some experts recommend a multidisciplinary external advisory board consisting of professionals from the community (victim advocates, prosecutors, and others) who can advise the police and help to implement a coordinated community response to sexual assault.<sup>343</sup> Such a board can also help ensure that police have fully explored all investigatory leads on each case, and that prosecutors prosecute every case where it is feasible to do so.<sup>344</sup>

This type of review board was implemented in Philadelphia, Pennsylvania, in the late 1990s as part of an overhaul to correct poor sexual assault investigation practices; it is now an entrenched part of the community approach to sexual assault there.<sup>345</sup> More recently, similar review panels have been implemented in Missoula, Montana, and Washington, D.C., in response to investigations into prior poor practices.<sup>346</sup> Other cities that embrace transparency by using an external review process include Baltimore, Maryland; Grand Rapids, Michigan; and Lafayette Parish, Louisiana.<sup>347</sup>

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342. IMPROVING POLICE RESPONSE, *supra* note 84, at 23-31.

343. Lonsway et al., *supra* note 17, at 8.

344. IMPROVING POLICE RESPONSE, *supra* note 84, at 32-34.

345. See *Rape in the United States Hearing*, *supra* note 39, at 12 (statement of Carol E. Tracy, Executive Director, Women's Law Project); IMPROVING POLICE RESPONSE, *supra* note 84, at 29-30.

346. Memorandum of Understanding Between the U.S. Department of Justice and the City of Missoula, *supra* note 56, at 11-13; *DC Council Passes Landmark Sexual Assault Reforms*, COLLECTIVE ACTION FOR SAFE SPACES (Apr. 8, 2014), <http://www.collectiveactiondc.org/tag/sexual-assault-victims-rights-amendment-act-of-2013/>.

347. IMPROVING POLICE RESPONSE, *supra* note 84, at 32-34.



When an external review process is in place, the organizations involved would likely identify any case that had not been fully investigated well before it reached a point where police charged the complainant with false reporting.

*D. Remediating Miscarriages of Justice*

*My daughter still maintains she was attacked . . . I will fight for her innocence to my dying day. What happened to her was horrific, she suffered that night, she suffered in prison and she is still suffering.*

—Sandra Allen, mother of Layla Ibrahim<sup>348</sup>

Convictions of rape complainants who maintain their innocence must be re-examined. Where the original investigation fell short of the best practice standards discussed here, such convictions should be overturned, the complainants' criminal records should be expunged, and complainants compensated financially for their poor treatment. In each case where the perpetrator remains at large, the rape investigation must be reopened. Given the devastating effects that a wrongful conviction can have on an innocent person, these types of cases should be re-examined regardless of how long ago the conviction occurred.

Moreover, because of the information that has come to light in Britain in the last few years about the systemic under-recording of crime and the massive failures to investigate rape,<sup>349</sup> victims of these terrible practices should, as a class, have their cases reopened without having to undertake a lengthy and expensive appeals process. For a rape victim to be prosecuted for false reporting is a particularly extraordinary miscarriage of justice. Not only is the accused innocent of any crime: she is also a crime *victim*. These prosecutions must be stopped. ❀

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348. Laville, *109 Women Prosecuted for False Rape Claims in Five Years*, *supra* note 76.

349. As discussed in Part III *supra*.