

RAPE LAW GATEKEEPING

COREY RAYBURN YUNG

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COREY RAYBURN YUNG*

Abstract: Police across the United States regularly act as hostile gatekeepers who prevent rape complaints from advancing through the criminal justice system by fervently policing the culturally disputed concept of “rape.” Victims are regularly disbelieved, rape kits are discarded without investigation, and, as a result, rapists remain free. The substantial empirical evidence and stories from victims across the United States demonstrate that any success in decreasing sexual violence hinges on removing the numerous police-imposed obstacles inhibiting investigation and adjudication in rape cases, beginning with substantial reform of police practices. An examination of modern cases and the historical record indicates that the widespread conventional wisdom among academics and activists that reforming evidentiary rules and consent standards would trickle down to police decisions has proven unwarranted. As long as rape victims do not have consistent access to the criminal justice system due to policing failures, tinkering with rules and statutes is likely to yield little progress. Consequently, reform efforts must prioritize fixing the most significant bottleneck in rape cases: police. Several such legal and policy changes are incorporated into a model statute designed to ameliorate the widespread, ongoing problems associated with police gatekeeping.

INTRODUCTION

Before the law sits a gatekeeper. To this gatekeeper comes a [person]. . . who asks to gain entry into the law. But the gatekeeper says that he cannot grant [the person] entry At the moment the gate to the law stands open, as always, and the gatekeeper walks to the side, so the [person] bends over in order to see through the gate into the inside. When the gatekeeper notices that, he laughs and says: “If it tempts you so much, try it in spite of my prohibition. But take note: I am powerful. And I am only the most lowly gatekeeper. But from room to room stand gatekeepers, each more powerful than the other”

—Franz Kafka¹

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* Professor of Law at the University of Kansas School of Law. Sincere thanks to R. Alexander Acosta, Lisa Avalos, Eric R. Carpenter, Cyra Akila Choudhury, Anita Hill, Sally Kenney, Lumen N. Mulligan, Uma Outka, Joyce Rosenberg, David L. Schwartz, Thomas G. Stacy, Elizabeth A. Kronk Warner, Howard M. Wasserman, Meaghan Ybos, and Lua Kamal Yuille for their helpful comments and suggestions. Additional thanks to Nicholas John Birdsong, Lindsey Collins, and Pam Crawford for their valuable research assistance.

Rape law is broken.

The systemic gatekeeping of rape complaints in police departments across the country substantially limits the effective scope of rape statutes.² The conventional view that legislative or judicial action related to rape trials can address the failures of the criminal justice system is not viable when police bar cases at their inception.³ The essential problem is not rape laws; it is the people charged with enforcing those laws. The actual practices of police departments reveal law enforcement aimed not at punishing and deterring sexual violence but instead policing the culturally disputed concept of “rape.”⁴ This norm of adversarial policing neutralizes legislative attempts to improve modern rape law by changing consent standards, substantive law, or trial procedures.

The systemic failure to test rape kits for forensic evidence is just the latest example. Approximately 400,000 rape kits have never been tested by police departments in the United States.⁵ Only five states presently make testing mandatory.⁶ Unlike other crime victims, those who have been raped are often billed upwards of \$1,000 for the invasive, four-to-six hour medical exam yielding the critical evidence related to their attack.⁷ Yet, state police labs regularly cast aside those kits with no intent that the evidence ever be tested.⁸ One conclusion from this evidence might be that it is a combination

¹ Franz Kafka, *Before the Law*, in THE COMPLETE STORIES 3 (Nahum N. Glazer ed., 1971).

² See STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 17, 25 (1998); Heather R. Hlavka, *Normalizing Sexual Violence: Young Women Account for Harassment and Abuse*, 28 GENDER & SOC’Y 337, 340 (2014).

³ See *infra* notes 208–238 and accompanying text.

⁴ See Melinda Tasca, Nancy Rodriguez, Cassia Spohn & Mary P. Koss, *Police Decision Making in Sexual Assault Cases: Predictors of Suspect Identification and Arrest*, 28 J. INTERPERSONAL VIOLENCE 1157, 1158 (2012).

⁵ Caitlin Dickson, *How the U.S. Ended Up with 400,000 Untested Rape Kits*, DAILY BEAST (Sept. 23, 2014), <http://www.thedailybeast.com/articles/2014/09/23/how-the-u-s-ended-up-with-400-000-untested-rape-kits.html> [<https://perma.cc/5WLX-LB3J>].

⁶ Nicholas Kristof, *Despite DNA, the Rapist Got Away*, N.Y. TIMES (May 9, 2015), <http://www.nytimes.com/2015/05/10/opinion/sunday/nicholas-kristof-despite-dna-the-rapist-got-away.html> [<https://perma.cc/W6RW-HXLJ>].

⁷ See Nora Caplan-Bricker, *Rape Victims Are Still Being Charged for Rape Kits*, SLATE (Dec. 22, 2015), http://www.slate.com/articles/double_x/doublex/2015/12/rape_victims_are_still_being_charged_for_rape_kits.html [<https://perma.cc/AJ2S-JKMC>] (discussing the commonness of rape kit charges being assigned to the person who was attacked despite federal law attempting to stop the practice); see also Elizabeth Nolan Brown, *Where Rape Victims Are Forced to Pay for Their Own Forensic Exams*, REASON (Oct. 9, 2014), <http://reason.com/archives/2014/10/09/rape-victims-charged-for-forensic-tests> [<https://perma.cc/9F38-ZZ8G>].

⁸ See Laura Finley, *It’s Not a Backlog, It’s a Lack of Concern for Rape Victims*, COUNTERPUNCH (Jan. 15, 2016), <http://www.counterpunch.org/2016/01/15/its-not-a-backlog-its-a-lack-of-concern-for-rape-victims/> [<https://perma.cc/4VVC-DRY2>]; Tyler Kingkade, *Some States Throw Untested Rape Kits in the Trash. These Survivors Want to Change That*, HUFFINGTON POST (Feb. 23, 2016), http://www.huffingtonpost.com/entry/untested-rape-kits-in-trash_us_56cb4e5ee4b041136f17b087 [<https://perma.cc/X9ZA-EJ2Q>].

of oversight and cost reduction. The reality, however, is much worse; as one officer noted, the kits were not being tested because “the [rape] allegations had already been disregarded.”⁹ Jurisdictions that are now testing discarded rape kits, often after delays of more than a decade, have found that over one-in-three of those kits contained DNA of persons in criminal databases.¹⁰ Further, police often do not submit the results from tested kits to the Combined DNA Index System (“CODIS”), making the tests essentially useless in apprehending the identified rapist.¹¹ It is unknown how many rapists have remained free to further victimize because of widespread police decisions to ignore proper rape kit testing procedures.¹²

Untested rape kits are the most visible symptom of the United States’ crippled and dysfunctional system for prosecuting rapists, but the core problem is much deeper than the rape kit “backlog.”¹³ For most rape victims, it is not a matter of *if* but a matter of *when* the criminal justice system does not believe them.¹⁴ Those targeted with sexual violence face a level of scru-

⁹ See Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1297 (2016) (“In many respects, the untested [rape] kits were a tangible sign about the disposition of these cases [A]s one police official put it: ‘The kits [that weren’t] tested were cases that we couldn’t or wouldn’t do anything about.’” (quoting REBECCA CAMPBELL ET AL., NAT’L CRIMINAL JUSTICE REFERENCE SERV., THE DETROIT SEXUAL ASSAULT KIT (SAK) ACTION RESEARCH PROJECT (ARP), FINAL REPORT 105 (2015))).

¹⁰ See Laura A. Bischoff, *Ohio’s Rape Kit Testing Effort Starts to Yield Results*, DAYTON DAILY NEWS (June 29, 2013), <http://www.mydaytondailynews.com/news/news/state-regional/ohios-rape-kit-testing-effort-starts-to-yield-resu/nYYkd/> [<https://perma.cc/54XW-PGFZ>]; Rachel Dissell, *Almost Two-Thirds of Rapes Reported in Cleveland Never Make It to Court*, CLEVELAND (May 5, 2015), http://www.cleveland.com/court-justice/index.ssf/2015/05/despite_improvements_almost_tw.html [<https://perma.cc/F3G2-7Z4W>].

¹¹ See, e.g., T. Christian Miller et al., *Upon Further Review: Inside the Police Failure to Stop Darren Sharper’s Rape Spree*, PROPUBLICA (Apr. 8, 2015), <https://www.propublica.org/article/police-fail-stop-nfl-darren-sharper-rape-spree> [<https://perma.cc/GD9B-L8TW>].

¹² See Rebecca Rosenberg, *DA Hailed After Pledging \$35M to Eliminate Rape Kit Backlogs*, N.Y. POST (Nov. 13, 2014), <http://nypost.com/2014/11/12/da-hailed-for-pledging-35m-to-eliminate-rape-kit-backlogs/> [<https://perma.cc/258V-C745>].

¹³ “Backlog” implies that the untested rape kits were in a queue awaiting testing by overburdened labs. That does not reflect the reality across the United States. In fact, untested rape kits were often simply discarded in warehouses, trash depositories, or storage closets with no intention to ever test the contents of the kits. See Finley, *supra* note 8.

¹⁴ There is no consensus about whether it is better to refer to those who have been raped as “victims” or “survivors.” Some prefer the term “survivor” because it focuses on how a person has moved past his or her experience of sexual violence. See, e.g., Rhona Dowdeswell, *Why I Must Forgive to Get Over My Rape*, WESTERN DAILY PRESS (Bristol), Jan. 25, 2002, at 8. In contrast, Andrea Dworkin offered this explanation for why she thought the “victim” label was more appropriate:

It’s a true word. If you were raped, you were victimized. You damned well were. You were a victim. It doesn’t mean that you are a victim in the metaphysical sense, in your state of being, as an intrinsic part of your essence and existence. It means somebody hurt you. They injured you.

tiny and disbelief unique among crime victims.¹⁵ Unlike people who have been robbed, beaten, or defrauded, rape victims must bypass a series of gatekeepers that, beginning with the police, impede the criminal justice system from vindicating victims' allegations.¹⁶ Victims often find that law enforcement agents spend far more time and effort policing their perceived definition of "rape" than policing rapists. In rape cases, police gatekeeping is the rule, not the exception.¹⁷

Ultimately, police are the largest obstacle to the prosecution and conviction of rapists in the United States. Police disbelieve rape victims far more often than the public and other agents involved in rape investigations.¹⁸ Research shows police believe "rape myths"¹⁹ at a much higher rate

Andrea Dworkin, *Woman-Hating Right and Left*, in *THE SEXUAL LIBERALS AND THE ATTACK ON FEMINISM* 28, 38 (Dorchen Leidholdt & Janice G. Raymond eds., 1990). Others prefer the term "victim" because it better enables them to confront their past experience of rape. See, e.g., Kate E. Bloch, *A Rape Law Pedagogy*, 7 *YALE J.L. & FEMINISM* 307, 308 n.6 (1995); Dana Bolger, "Hurry Up and Heal": Pain, Productivity, and the Inadequacy of 'Victim vs. Survivor,' *FEMINISTING*, <http://feministing.com/2014/12/10/hurry-up-and-heal-pain-productivity-and-the-inadequacy-of-victim-vs-survivor/> [<https://perma.cc/4L9Z-ZUER>] ("Compulsory survivorship depoliticizes our understanding of violence and its effects. It places the burden of healing on the individual, while comfortably erasing the systems and structures that make surviving hard, harder for some than for others. *You are your own salvation. You are your own barrier to progress.*"). This Article uses the term "victim" because of those latter arguments and because it is a label that connects those who have been raped with the universal category of crime "victims." Nonetheless, this decision conflicts with the conclusions of some persons who have been raped and, for that, this Article offers sincere apologies.

¹⁵ See SCHULHOFER, *supra* note 2, at 17–18 (analyzing how unique social attitudes hostile to rape victims create a gap between the letter of the law and law as applied); ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* 6–7 (1999) (discussing several ways that rape victims are treated differently than other crime victims); Amanda Hess, *What Cops Are Really Thinking When a Woman Claims She Was Raped*, *SLATE* (Nov. 18, 2014), http://www.slate.com/blogs/xx_factor/2014/11/18/how_cops_respond_to_rape_a_new_study_of_officers_at_one_police_department.html [<https://perma.cc/W3JN-L5KK>] (summarizing a recent research study about police hostility to victims of sexual violence).

¹⁶ See Wayne A. Kerstetter, *Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults Against Women*, 81 *J. CRIM. L. & CRIMINOLOGY* 267, 268 (1990) (using the "gateway" metaphor for understanding the difficulties that rape victims have with the criminal justice system); Tasca et al., *supra* note 4, at 1158 ("There are multiple decision points at which attrition in sexual assault cases occur, including actions taken by victims, police officers, prosecutors, juries, and judges.").

¹⁷ See *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 111th Cong. 13 (2010) [hereinafter *Senate Hearing on Rape in the United States*] (statement of Carol E. Tracy, Women's Law Project) ("[W]e are seeing chronic and systemic patterns of police refusing to accept [rape] 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.").

¹⁸ See COLLEEN A. WARD, *ATTITUDES TOWARD RAPE: FEMINIST AND SOCIAL PSYCHOLOGICAL PERSPECTIVES* 61 (1995) (finding that twenty-four percent of police did not believe that a victim was harmed by rape if she was sexually experienced in contrast to eleven percent of lawyers, six percent of doctors, and three percent of counselors).

leading to widespread distrust of rape victims; seventy-nine percent agree that “many women secretly wish to be raped” and sixty-five percent agree that women with “bad reputations” make the most rape complaints.²⁰ As a result, police often conclude that rape complaints are false without investigating or, in some cases, even interviewing the victim.²¹ Embodying the strong norms in many police departments, and in contradiction of decades of research on false reporting,²² one sheriff recently told reporters that “the majority of our rapes that are called in are actually consensual sex.”²³ Such attitudes have led the International Association of Chiefs of Police to unequivocally state that “the most significant barrier to successful prosecutions of rape is a failure on the part of the police to take rape victims seriously.”²⁴ Research shows that police departments failed to investigate approximately one million forcible rape complaints from 1995 to 2012.²⁵

This Article calls for new legislation and a fundamental reorientation of scholarly efforts targeting gatekeeping in rape cases. Without greater attention to the large stumbling blocks at the initial phases of criminal investigation of rape, the coming decades will likely resemble the many deficien-

¹⁹ See *id.*

²⁰ Amy Dellinger Page, *Judging Women and Defining Crime: Police Officers' Attitudes Toward Women and Rape*, 28 SOCIOLOGICAL SPECTRUM 389, 401 (2008).

²¹ See, e.g., Katie J.M. Baker & Alex Campbell, *When Detectives Dismiss Rape Reports Before Investigating Them*, BUZZFEED (Sep. 8, 2016), https://www.buzzfeed.com/alexcampbell/unfounded?utm_term=.cfDqvMerAZ#.faqz7rnvo3 [<https://perma.cc/FC6Z-DLWH>] (“Police routinely did little to no detective work at all, labeling rape reports unfounded after cursory interviews with the victims. Detectives who are trained to handle sex crimes often never even met or spoke with the alleged victim, but instead dismissed the allegation simply after reviewing a case report made by a beat cop.”).

²² See generally CASSIA SPOHN & KATHARINE TELLIS, POLICING AND PROSECUTING SEXUAL ASSAULT IN LOS ANGELES CITY AND COUNTY: A COLLABORATIVE STUDY IN PARTNERSHIP WITH THE LOS ANGELES POLICE DEPARTMENT, THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, AND THE LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE 49 (2012) (finding a false reporting rate of approximately four and one-half percent); David Lisak, Lori Gardinier, Sarah C. Nicksa & Ashley M. Cote, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1329 (2010) (finding a nearly six percent rate of false sexual assault reports in a study of police case files); Kimberly A. Lonsway, *Trying to Move the Elephant in the Living Room: Responding to the Challenge of False Rape Reports*, 16 VIOLENCE AGAINST WOMEN 1356, 1366 (2010) (reviewing the voluminous research about false reporting rates for rape and concluding that the rate is between two percent and eight percent, which is not high for crime reporting).

²³ Kimberlee Kruesi, *Idaho Sheriff: 'The Majority of Our Rapes That Are Called in Are Actually Consensual Sex'*, SALT LAKE TRIB. (Mar. 15, 2016), <http://www.sltrib.com/home/3667481-155/story.html> [<https://perma.cc/TLX5-VGHN>] (quoting Sheriff Craig Rowland).

²⁴ Lisa Avalos, *Britain Is Violating Rape Victims' Human Rights*, THE GUARDIAN (Dec. 2, 2014), <https://www.theguardian.com/commentisfree/2014/dec/02/britain-violating-rape-victims-human-rights> [<https://perma.cc/AK27-EHXT>] (discussing the international problem of police refusing to take rape complaints seriously).

²⁵ Corey Rayburn Yung, *How to Lie with Rape Statistics: America's Hidden Rape Crisis*, 99 IOWA L. REV. 1197, 1239–40 (2014).

cies of the last thirty years in regards to decreasing sexual violence. A few basic reforms described in this Article could make far greater gains in deterring and punishing rape than substantive redefinition of the crime. This Article includes a description of the needed legal changes as well as model federal and state statutes in the Appendixes. Hopefully, by paying greater attention to the real impediments to rape law enforcement, rapists will be incarcerated instead of finding more victims.²⁶

Part I of this Article examines empirical and institutional evidence of police acting as aggressive and hostile gatekeepers toward rape victims to the detriment of preventing future sexual violence.²⁷ Part II explores the various harms caused by police gatekeeping in rape cases.²⁸ Part III outlines a set of legal and policy reforms that could substantially reorient police practices so that criminal law in the United States could finally meet its promise of preventing and punishing sexual violence.²⁹

In presenting research in this area over the last several years,³⁰ many audiences have become essentially numb to the statistics showing the police's systemic disregard of rape complaints. As a result, at the beginning of the subsections throughout this Article, narrative accounts (in italics) illustrate the key concerns described in those subsections. Hopefully, these accounts of injustice for rape victims will resonate with certain audiences whereas neither dry statistics nor legalese would.³¹ Some are quite lengthy, but it is important that they be read. The stories show misconduct that no morally sensible person can support and should alarm us all. They also illustrate that we cannot dismiss the problems of rape law as isolated or mere mistakes. Something is truly rotten in American rape law.

I. WIDESPREAD GATEKEEPING

To fully grasp the failings of modern rape law enforcement, it is helpful to explore a little history.³² State legislatures have substantially changed

²⁶ See Rosenberg, *supra* note 12.

²⁷ See *infra* notes 32–163 and accompanying text.

²⁸ See *infra* notes 164–236 and accompanying text.

²⁹ See *infra* notes 237–278 and accompanying text.

³⁰ See generally Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCHOL., PUB. POL'Y., & L. 1 (2015) (applying statistical methods showing widespread indifference to rape and sexual assault complaints by municipal police departments and universities); Yung, *supra* note 25.

³¹ See Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971, 983–87 (1991) (contending that narrative descriptions of rape can have greater persuasive value than other means of conveying similar facts and evidence).

³² Throughout this Article, the primary focus is on cases generally considered to be rape under state laws. State laws, however, are not wholly consistent on that subject. For example, at least for the highest degree of sexual violence crimes, half of the states still require the prosecution to prove the defendant used or threatened force in addition to the other elements of rape. See MODEL

the substantive criminal laws regarding rape over the last forty years.³³ Before the nationwide rape law reform beginning in the 1970s and 80s (“reform period”), the traditional elements of the crime of rape were “(1) sexual intercourse; (2) between a man and a woman who is not his wife; (3) achieved by force or a threat of severe bodily harm; and (4) without her consent.”³⁴ In the pre-reform era, courts imposed the utmost resistance requirement, even when not explicitly part of rape statutes, so that there was no “rape” as a matter of law, unless a victim resisted to her dying breath.³⁵ The utmost resistance requirement was still applied to overturn jury verdicts at least through 1973.³⁶ Importantly, the force element of rape statutes was wholly separate and unrelated to the non-consent element such that sex was deemed as consensual if the victim “voluntarily” submitted to the rapist after use or threat of force.³⁷ Courts did not consider victims who succumbed to anything short of deadly abuse to have been raped.³⁸

PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES 36–41 (AM. LAW INST., Discussion Draft No. 2, Apr. 28, 2015). Further, some states do not use the term “rape” at all, preferring the label “sexual assault” for even forcible, nonconsensual, penetrative sex acts. *See, e.g.*, N.J. STAT. ANN. § 2C:14-2 (West 2016). It should be noted, however, that all but two states have criminalized, as a felony, non-forcible, non-consensual sexual contact in some circumstances. *See* ALA. CODE §§ 13A-6-61 to -62 (LexisNexis 2016); ALASKA STAT. §§ 11.41.410–427 (2016); ARIZ. REV. STAT. § 13-1406 (2016); ARK. CODE ANN. §§ 5-14-103 to -127 (2016); CAL. PENAL CODE §§ 261–264 (West 2015); COLO. REV. STAT. § 18-3-402 (2016); CONN. GEN. STAT. §§ 53a-70 to 73a (2016); DEL. CODE ANN. tit. 11 §§ 770–774 (2016); D.C. CODE §§ 22-3002 to -3005 (2016); FLA. STAT. ANN. § 794.011 (2016); GA. CODE ANN. §§ 16-6-1 to -22.2 (2016); HAW. REV. STAT. §§ 707-730 to -733 (2016); IDAHO CODE §§ 18-6101, -6104 (2016); 720 ILL. COMP. STAT. 5/11-1.10 to .30 (2016); IND. CODE § 35-42-4-1 (2016); KAN. STAT. ANN. §§ 21-5503, -5505 (2016); KY. REV. STAT. ANN. §§ 510.020–.060 (West 2016); LA. STAT. ANN. §§ 14:41–.43 (2016); ME. STAT. tit. 17-A § 253 (2016); MASS. GEN. LAWS ch. 265 § 22 (2016); MICH. COMP. LAWS §§ 750.520b–d (2016); MINN. STAT. §§ 609.342–.3451 (2016); MISS. CODE ANN. §§ 97-3-65, -71 (2016); MO. REV. STAT. §§ 566.030–.034 (2015) (effective Jan. 1, 2017); MONT. CODE ANN. §§ 45-5-502 to -503 (2016); NEB. REV. STAT. §§ 28-317 to -322.04 (2016); NEV. REV. STAT. § 200.366 (2016); N.H. REV. STAT. ANN. §§ 632-A:1 to A:4 (2016); N.J. STAT. ANN. § 2C:14-2 (West 2016); N.M. STAT. ANN. § 30-9-11 (2016); N.Y. PENAL LAW §§ 130.00–.52 (McKinney 2016); N.C. GEN. STAT. §§ 14-27.2 to .3 (2016); N.D. CENT. CODE §§ 12.1-20-03, -04, -07 (2016); OHIO REV. CODE ANN. §§ 2907.02–.07 (LexisNexis 2016); OKLA. STAT. tit. 21 §§ 1111–1116 (2016); OR. REV. STAT. §§ 163.305–.312 (2016); 18 PA. CONS. STAT. §§ 3121–3127 (2016); 11 R.I. GEN. LAWS §§ 11-37-2 to -8.4 (2016); S.C. CODE ANN. §§ 16-3-651 to -656 (2016); S.D. CODIFIED LAWS §§ 22-22-1 to -2 (2016); TENN. CODE ANN. §§ 39-13-502 to -506 (2016); TEX. PENAL CODE ANN. §§ 22.011, -.021 (West 2016); UTAH CODE ANN. §§ 76-5-402, -405 (LexisNexis 2016); VT. STAT. ANN. tit. 13, §§ 3252–3253 (2016); VA. CODE ANN. § 18.2-61 (2016); WASH. REV. CODE §§ 9A.44.040–.100 (2016); W. VA. CODE §§ 61-8B-3, -5 (2016); WIS. STAT. § 940.225 (2016); WYO. STAT. ANN. §§ 6-2-302 to -306 (2016). *But see* IOWA CODE §§ 709.1–.4 (LexisNexis 2016); MD. CODE ANN., CRIM. LAW §§ 3-303 to -304 (LexisNexis 2016).

³³ *See* David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 320–21 (2000).

³⁴ *Id.* (citations omitted).

³⁵ *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 590 (5th ed. 2009).

³⁶ *People v. Hughes*, 343 N.Y.S.2d 240, 242 (App. Div. 1973).

³⁷ *See* SCHULHOFER, *supra* note 2, at 19.

³⁸ *Id.* at 19–20.

Feminists criticized such doctrines and rules, leading successful efforts to reform rape laws in every state.³⁹ Most states enacted several major statutory changes suggested by feminist reformers: rape became a gender-neutral crime; all types of sexual penetration, not just vaginal intercourse, were criminalized; rape shield laws were adopted; and marital rape was finally made illegal.⁴⁰ After the initial wave of legislative reforms, some jurisdictions eliminated the force requirement as well.⁴¹ Although there was a burst of action by state legislatures during the reform period, substantive criminal rape law has remained relatively static.

There is widespread scholarly consensus that such reforms have made only slight differences in the application of rape law.⁴² Indeed, rape law's failure to address the social ill of rape after the reform period is well documented.⁴³ Courts continue to circumscribe the statutory language in rape cases so that it is interpreted narrowly.⁴⁴ Juries remain skeptical of rape victims, meaning that convictions are rare.⁴⁵ Some states showed modest progress, but most states' reforms had no measurable effect.⁴⁶ For example, even in states without a statutory force requirement, many police and prosecutors still do not investigate or prosecute cases without clear evidence of

³⁹ *Id.* at 25.

⁴⁰ See Bryden, *supra* note 33, at 319, 321.

⁴¹ See SCHULHOFER, *supra* note 2, at 32–33.

⁴² See, e.g., Tasca et al., *supra* note 4, at 1159 (“Reformers argued that these changes would lead more victims to report sexual assaults to the police and thereby increase the likelihood of arrest and successful prosecution. However, empirical data indicate that their impact has been more symbolic than instrumental.”); Tuerkheimer, *supra* note 9, at 1290–91 (“[S]ubstantive [rape] law reform has not readily translated into law enforcement.”).

⁴³ See ROSE CORRIGAN, *UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS* 3–5 (2013) (describing how local and institutional resistance to rape law reform efforts has undermined rape counseling centers, medical care of rape victims, and rape victim advocacy); *id.* at 17–18 (explaining how cultural resistance to the ideas embedded in statutory rape law reforms negated their effectiveness); TASLITZ, *supra* note 15, at 10 (“Rape law reform, despite some modest successes, has largely failed. But this has been so because the reformers did not appreciate the storied, linguistic nature of the problem.”); Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 *GEO. WASH. L. REV.* 51, 94–97 (2002) (exploring the various reasons why rape shield laws failed to exclude much of the evidence that reformers thought it would).

⁴⁴ See Bryden, *supra* note 33, at 321–22.

⁴⁵ See TASLITZ, *supra* note 15, at 7–8.

⁴⁶ See *id.* at 7. David Bryden summarized the research regarding the disconcerting state of rape law in the United States:

[A] growing body of social-scientific evidence indicates that, contrary to reformers' expectations, the much-heralded evidentiary reforms have had little impact on reporting, processing, and conviction rates in rape cases . . . [P]rogress, however, appears to be due mainly to evolving public attitudes toward acquaintance rape rather than specific legal changes, except insofar as national publicity accompanying the changes may have affected attitudes everywhere.

Bryden, *supra* note 33, at 320 (citations omitted).

actual or threatened force.⁴⁷ A verbal “no” by the victim is not usually dispositive of non-consent for police and prosecutors in some parts of the country.⁴⁸ A few states still maintain formal resistance requirements, albeit at a lower threshold than the utmost resistance standard of the prior era.⁴⁹

By the late 1990s, observers generally agreed that a significant gap between engrained cultural beliefs and the letter of the law effectively negated legal reform efforts to substantially diminish the rate of rape.⁵⁰ The consensus about why rape law reform failed is perhaps best captured in Dan Kahan’s characterization of the “sticky norms” and “hard shoves” involved in the social understanding of rape.⁵¹ Kahan concluded that:

Empirical studies suggest that a substantial percentage of men and women behave consistently with the [“no sometimes means yes”] norm, either because they perceive that women who consent too readily will be deemed “promiscuous” or because they believe that their partners view a certain degree of sexual aggression as alluring.⁵²

Police have become the enforcers of those social norms that excuse conduct that substantive rape law otherwise defines as criminal.

A. A Model of Failure

In September of 2008, Sowell raped, choked, and beat a woman in his home.⁵³ She was able to escape his grasp and fled to a bathroom. There she saw a decomposing, headless woman’s body wrapped in plastic. She ran from Sowell’s house and called the police. Her later testimony described her condition at the time: “I couldn’t walk no more. I was tore up. My body was

⁴⁷ See SCHULHOFER, *supra* note 2, at 4–10 (discussing numerous cases and scenarios in which the force requirement, de jure or de facto, blocks prosecution and conviction for rape).

⁴⁸ See Deborah Tuerkheimer, *We Preach “No Means No” for Sex, but That’s Not What the Law Says*, THE GUARDIAN (Jan. 12, 2014), <http://www.theguardian.com/commentisfree/2014/jan/12/rape-definition-use-of-force> [https://perma.cc/MJ2J-GMRJ] (“[I]n most states, the legal definition of rape still requires the use of physical force. In other words, a verbal ‘no’ isn’t always enough.”).

⁴⁹ *State v. Jones*, No. 36841, 2011 Ida. App. LEXIS 76, at *15–16 (Idaho Ct. App. Sept. 12, 2011), *aff’d*, 299 P.3d 219 (2013) (“Thus, Idaho remains one of few states that still statutorily require resistance to prove forcible rape and one of even fewer whose statute does not specify the requisite amount of resistance that will suffice.”).

⁵⁰ See, e.g., SCHULHOFER, *supra* note 2, at 4–10; TASLITZ, *supra* note 15, at 154 (“The inability to engage with cultural narratives . . . explains rape-law reform’s failure.”).

⁵¹ Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607, 623–24 (2000).

⁵² *Id.* at 623 (emphasis omitted) (citations omitted).

⁵³ Michael Daly, *Cleveland Kidnapping, Anthony Sowell Case Linked by Indifferent Police*, DAILY BEAST (May 8, 2013), <http://www.thedailybeast.com/articles/2013/05/08/cleveland-kidnapping-anthony-sowell-case-linked-by-indifferent-police.html> [https://perma.cc/H6VV-Z34H].

tore up. . . . My face, my female parts, my butt.”⁵⁴ The police would neither take a rape report over the phone nor send a squad car to pick her up despite her vivid retelling of the horrors she experienced and witnessed. She said the treatment she received during her 911 call made her feel “less than human.”⁵⁵ The police did not investigate further.

About three months later, Sowell kidnapped and brutally beat Gladys Wade.⁵⁶ While bleeding from Sowell’s attacks, she escaped Sowell’s house, flagged down police officers, and told them that Sowell had tried to rape her.⁵⁷ The police went to Sowell’s home, found Wade’s blood on the stairs, and arrested Sowell.⁵⁸ The house smelled of “death” emanating from several decomposing corpses hidden there at the time.⁵⁹ Sowell’s neighbors had made numerous complaints about the horrific odor coming from his house.⁶⁰ Nonetheless, police officers at the scene made no effort to identify the source of the ghastly smell.

At the station, police decided to release Sowell because he stated that Wade had attacked him first and they discovered that Wade had a criminal record.⁶¹ The police detective in the sex crimes unit further cited “insufficient evidence” in Wade’s story to designate her complaint as “unfounded.”⁶² Police did not even bother to check the sex offender registry or other

⁵⁴ *Id.* (quoting an unnamed victim of Anthony Sowell). Rape victims have only been named in this Article if they chose to reveal themselves through the media to the public. Otherwise, their anonymity has been maintained even if their names could be found elsewhere.

⁵⁵ *Id.* (quoting an unnamed victim of Anthony Sowell).

⁵⁶ *Easy Prey* (CNN television broadcast Nov. 7, 2010) (quoting Gladys Wade).

⁵⁷ *Id.* (quoting Gladys Wade).

⁵⁸ *Id.* (quoting Gladys Wade).

⁵⁹ *Id.* (quoting Gladys Wade).

⁶⁰ See Ian Urbina, *Neighbor Says Police Knew About Rapist’s House*, N.Y. TIMES (Nov. 2, 2009), <http://www.nytimes.com/2009/11/03/us/03rape.html> [<https://perma.cc/MC2T-TRV2>] (“The police in Cleveland were notified repeatedly about violence in the house of a convicted rapist where the decomposed bodies of six women were found last week.”).

⁶¹ See Stephanie Chen, *11 Bodies, One House of Horrors: Why Cleveland Women Were ‘Invisible,’* CNN (Oct. 26, 2010), <http://www.cnn.com/2010/CRIME/10/26/cleveland.sowell.victims.one.year/> [<https://perma.cc/7Y7Y-RRJC>] (describing Wade’s past convictions for forgery and assault as reasons why the police did not believe her version of events over Sowell’s); *Easy Prey*, *supra* note 56.

⁶² Armen Keteyian, *Missed Opportunities in Sowell Case*, CBS NEWS (Mar. 4, 2010), <http://www.cbsnews.com/news/missed-opportunities-in-sowell-case/> [<https://perma.cc/A5SJ-NTFV>]. The word “unfounded” has a particular meaning in the context of crime statistics. The term is derived from documents issued by the Federal Bureau of Investigation (“FBI”) in regards to its annual reports on violent crime, the Uniform Crime Reports (“UCR”). See FED. BUREAU OF INVESTIGATION, U.S. DEPT. OF JUSTICE, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES 2011, at 2 (2012) (“When, through investigation, an agency determines that complaints of crimes are unfounded or false, the agency eliminates that offense from its crime tally through an entry on the monthly report.”). After a complete investigation of a rape complaint, police departments are permitted to not count a crime in official tallies if the FBI if the complaint was determined to be “unfounded.” INT’L ASS’N OF CHIEFS OF POLICE, NAT’L LAW ENF’T POLICY CTR., INVESTIGATING SEXUAL ASSAULTS

criminal databases, where Sowell was listed due to his prior conviction for rape.⁶³ Sowell would rape and kill at least six more women after the police chose to ignore Wade's allegations.⁶⁴

In April of 2009, a woman in Cleveland Heights reported that Sowell kidnapped her from a bus stop and repeatedly raped her at his home.⁶⁵ The victim went to a local hospital where she was administered a forensic rape kit examination.⁶⁶ According to the police report, the woman had "numerous scratch marks on her neck and hands, . . . areas of her scalp where hair had been ripped out during a struggle," and a raspy voice "due to strangulation."⁶⁷ The Cleveland Heights police investigated her complaint only minimally but never ordered testing of DNA found during her rape kit exam.⁶⁸ Because his DNA was in the available criminal databases, such testing could have led to Sowell's arrest before he found more victims.⁶⁹

In October of 2009, several onlookers, including a few city workers, discovered a still-naked woman outside of Sowell's residence.⁷⁰ Someone summoned an ambulance. Indifferent bystanders simply took pictures on their cell phones of the nude woman lying in the grass rather than rendering assistance. A nearby security surveillance camera captured all of this. Sowell told the small crowd and paramedics that he was having sex with his wife when she accidentally fell out of the window. The paramedics let Sowell ride along with the woman, who had severe injuries from her fall, in the ambulance to the hospital. Despite the oddities and untruths in Sowell's story, police did not investigate further. Again, the police failed to check Sowell's prior criminal history.

Finally, in September of 2009, Sowell encountered a victim persistent enough to overcome police intransigence. Sowell asked a 36-year-old wom-

12–13 (2005). Unfortunately, police departments often use the designation without any investigation in rape cases. See, e.g., Justin Fenton, *Baltimore Falls out of Top 5 Murder Rate Cities: Rape Numbers Also on the Rise Following Reforms*, BALTIMORE SUN (June 11, 2012), http://articles.baltimoresun.com/2012-06-11/news/bs-md-ci-baltimore-murder-rate-20120611_1_visit-baltimore-nonfatal-shootings-gun-violence [<https://perma.cc/L2YF-57R3>] (discussing the Baltimore police practice of classifying rape complaints as "unfounded" as a means of discarding the cases without investigation).

⁶³ See Daly, *supra* note 53.

⁶⁴ See *Easy Prey*, *supra* note 56.

⁶⁵ Leila Atassi, *Cleveland Heights Police Failed to Test Rape Kit Linked to Serial-Killing Suspect Anthony Sowell*, CLEVELAND PLAIN-DEALER (May 13, 2011), http://blog.cleveland.com/metro/2011/05/cleveland_heights_police_faile.html.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *A Rape Kit Fiasco in Cleveland Heights*, CLEVELAND PLAIN-DEALER, (June 20, 2011), http://www.cleveland.com/opinion/index.ssf/2011/06/a_rape_kit_fiasco_in_cleveland.html [<https://perma.cc/XS75-FSK4>].

⁷⁰ Daly, *supra* note 53.

an to come back to his place to have a beer.⁷¹ At his house, Sowell choked her with an extension cord and repeatedly raped her.⁷² She convinced Sowell to let her go by telling him that she would return to his house the next day.⁷³ Instead, the woman immediately reported Sowell to the police. The sex crimes detective assigned to the case chose not to follow up on the rape complaint because “the woman had waited to go to the hospital.”⁷⁴ Still, it took police over one month after the woman reported being attacked to go to Sowell’s house with an arrest warrant.⁷⁵

When police finally served the arrest warrant for Sowell, they discovered a scene straight out of a horror movie. There were eleven women’s bodies rotting under the floors and in the walls of the house.⁷⁶ A decomposing human head was in a bucket in the main hallway. Because of the gruesome details and substantial evidence, the prosecution of Sowell was effortless. After the jury found Sowell guilty, a judge sentenced him to death.⁷⁷

Among the many terrors and missteps involved in the Sowell case, the question we have to ask is how could this happen? Indeed, high-ranking police and government officials insist that police acted properly in investigating Sowell. Twenty-year force veteran and decorated officer Ed Tomba stated that “[the police have] done a very good job . . . [They] have a solid protocol.”⁷⁸ Martin Flask, the Cleveland mayor’s appointee for police oversight, concluded that “the investigator did a good job.”⁷⁹ Cleveland Chief of Police Michael McGrath had “nothing but praise for his department” in their decisions in the Sowell case contending that the officers “were very vigilant in what [they] did.”⁸⁰ It is not surprising, then, that Sowell is just one in a long line of serial rapists who Cleveland police ignored.⁸¹

⁷¹ Chen, *supra* note 61.

⁷² Rachel Dissell, *Women Might Be Alive if Earlier Charges Against Anthony Sowell Pursued*, CLEVELAND PLAIN-DEALER, (Dec. 5, 2009), http://blog.cleveland.com/metro/2009/12/women_might_be_alive_if_earlie.html [<https://perma.cc/SBK3-5U2N>].

⁷³ Chen, *supra* note 61.

⁷⁴ Dissell, *supra* note 72 (quoting a police report filed in the case).

⁷⁵ *Id.*

⁷⁶ Daly, *supra* note 53.

⁷⁷ *Serial Killer Anthony Sowell Sentenced to Death*, CBS NEWS (Aug. 12, 2011), <http://www.cbsnews.com/news/serial-killer-anthony-sowell-sentenced-to-death/> [<https://perma.cc/BY9T-57NZ>].

⁷⁸ Chen, *supra* note 61 (quoting Ed Tomba).

⁷⁹ Keteyian, *supra* note 62 (quoting Martin Flask).

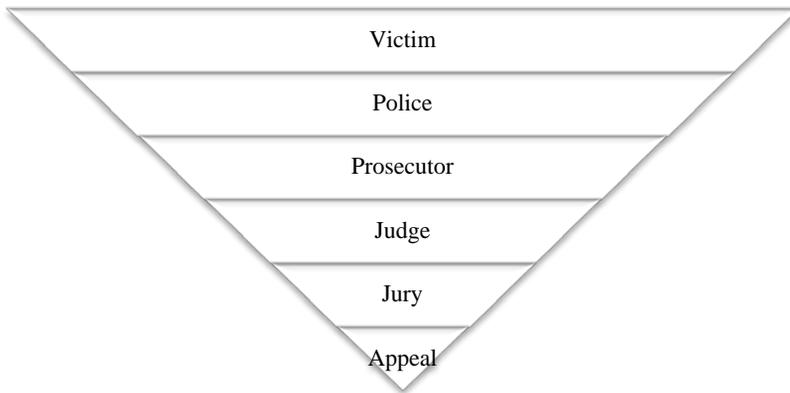
⁸⁰ *Id.*

⁸¹ See Leila Atassi & Rachel Dissell, *Serial Rapists Terrorized Cleveland’s Women and Children in 1990s, While Police Set Cases Aside*, CLEVELAND PLAIN-DEALER (Aug. 5, 2013), http://www.cleveland.com/rape-kits/index.ssf/2013/08/serial_rapists_terrorized_clev.html [<https://perma.cc/E3B9-A2KT>] (documenting the many cases in the 1990s in which Cleveland police ignored evidence implicating rapists, did not send rape kits for testing, and exhibited aggressive hostility to victims of sexual violence).

The awful and horrifying reality of the mishandled Sowell case, as well as the substantial empirical evidence of police hostility to victims, can only be explained by viewing our criminal justice system regarding rape through the lens of gatekeeping, not enforcement. As the Cleveland police and mayor's response to the mistakes made in the Sowell investigation indicate, they believed the system was operating as intended.

The crime funnel, a basic model of criminal justice administration, illustrates the importance of gatekeeping in the failure of rape law reform.⁸² The core insight of the crime funnel model is that, as cases move through the system, there is inevitably attrition.⁸³ At each stage of a criminal case, there is the potential that an actor in the system will discard the case. The pattern of active cases decreasing in number while advancing through different stages of the criminal justice system resembles a funnel.⁸⁴ The crime funnel is a helpful model for understanding the systemic effects of police gatekeeping in rape cases. Figure 1 below illustrates the six major stages in the criminal justice system where an actor can prevent a rape complaint from moving to the next stage: victim, police, prosecutor, judge, jury, and appeal.

Figure 1: Crime Funnel of Rape Case Gatekeeping



The levels of the hierarchy of rape case gatekeeping are not isolated. Recently, researchers have begun to emphasize how obstacles at the early

⁸² See BRYAN HILL & REBECCA PAYNICH, FUNDAMENTALS OF CRIME MAPPING 134–35 (2013).

⁸³ *Id.* at 134.

⁸⁴ *Id.* at 135. For example, members of the public might report only 100 of 200 actual thefts. Police might investigate ninety of those reported cases. They might make eighty arrests. Prosecutors might indict seventy defendants. Sixty of those indicted might plead guilty or be convicted. And fifty-five convictions or pleas might be upheld on appeal. This winnowing of cases is both inevitable and necessary for efficiency in an overburdened system.

stages of the criminal justice process have substantial spillover effects.⁸⁵ Many victims do not move past the first level because they do not believe they will receive justice at a later stage.⁸⁶ Police often fail to investigate rape cases because of instructions from local prosecutors who do not want to pursue anything short of “slam dunk” prosecutions to maintain high conviction rates.⁸⁷ The best evidence indicates less than one percent of rapes actually result in a prosecution.⁸⁸ Trial judges sometimes dismiss cases because they believe a jury would never convict.⁸⁹ Appellate courts ultimately shape the substance and procedures that juries, judges, prosecutors, and police enforce and apply.⁹⁰

Police exhibit normalized gatekeeping behavior in numerous ways that create substantial triage effects at the initial stages of the crime funnel. When interviewing rape victims, some police departments regularly used hostile interrogation techniques.⁹¹ Furthermore, prosecutors and police threaten or actually prosecute rape victims for filing false complaints, even in cases where forensic evidence and confessions ultimately validate their rape complaints.⁹² High-ranking police officers deter victims from reporting crimes so that their departments can meet statistical goals.⁹³ Recent research and data show a pattern of under investigating and under counting rape in police departments across the country.⁹⁴ In many cases, police have assured victims that they were busy working on their cases, but there was no actual investiga-

⁸⁵ CORRIGAN, *supra* note 43, at 4 (analyzing how doubts of allegations early in investigations have inhibited the effects of rape law reform).

⁸⁶ See W. David Allen, *The Reporting and Underreporting of Rape*, 73 SOUTHERN ECON. J. 623, 627 (2007).

⁸⁷ David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1246 (1997); see also Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 646 (2009).

⁸⁸ *The Criminal Justice System: Statistics*, RAINN, <https://rainn.org/get-information/statistics/reporting-rates> [<https://perma.cc/KR7L-HWN3>] (analyzing the National Crime Victimization Survey and UCR data to determine how rape cases proceed through the criminal justice system).

⁸⁹ Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 986, 1050 (2008).

⁹⁰ See Mary Massaron Ross, *An Advocate's Toolbox: Techniques to Help Appellate Lawyers Evaluate Precedent and Craft Analytically Precise Arguments*, 81 MICH. B.J. 25, 25–26 (2002).

⁹¹ See Justin Fenton, *Chief Says Shooting Focus Affected Rape Probes*, BALT. SUN, July 20, 2010, at 4A (describing the techniques used by Baltimore police to get rape complainants to recant).

⁹² See, e.g., *infra* note 238 and accompanying text (detailing the story of D.M.).

⁹³ See LARRY J. SIEGEL, CRIMINOLOGY 34 (11th ed. 2012) (describing a survey of 100 former New York Police Department captains and commissioners, in which some admitted to discouraging reporting).

⁹⁴ See generally Yung, *supra* note 25, at 1248 (using statistical analysis to show widespread failure to investigate and count incidents of rape in police departments across the United States).

tion because the complaint had already been labeled “unfounded.”⁹⁵ The level of disregard for rape victims exhibited by police across the United States is simply too high to continue to ignore or dismiss.⁹⁶

The decisions of police to ignore rape complaints are also almost completely unchecked.⁹⁷ Consider the story of Anthony Sowell at the beginning of this Section. In a narrow sense, many of the victims described were the lucky ones—they had their accounts eventually validated. More often, victims simply go through life with people doubting their stories. In many ways, it is incredible that these rape victims were vindicated. Because police disbelieved their stories, there was little or no investigation performed. Only because of the later capture of the rapist were their stories proven true. Yet, with systemic disregard by police of rape complaints in departments across the nation, one can only wonder how many other rapists are still on the loose because authorities did not believe their victims. There is simply no accountability for police who refuse to follow up on rape complaints.⁹⁸

Academic field research also shows widespread police hostility to rape allegations. A study of the Los Angeles Police Department (“LAPD”) and Los Angeles County Sheriff’s Department illustrate several ways that police act as gatekeepers by using heuristic rules to disbelieve victims.⁹⁹ The LAPD still imposed a corroboration requirement in determining whether to arrest or pursue charges in rape cases even though it was removed from statutes long ago.¹⁰⁰ One detective explained that “[y]ou don’t want to arrest

⁹⁵ See Kimberly A. Lonsway & Joanne Archambault, *The “Justice Gap” for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 161 (2012); Justin Fenton, *City Rape Statistics, Investigations Draw Concern*, BALTIMORE SUN (June 27, 2010), <http://www.baltimoresun.com/news/bs-md-ci-rapes-20100519-story.html> [<https://web-beta.archive.org/web/20160914201544/http://www.baltimoresun.com/news/bs-md-ci-rapes-20100519-story.html>].

⁹⁶ See Joanna Walters, *Washington Police Accused of “Disturbing” Failures to Investigate Rape*, THE GUARDIAN (Jan. 17, 2013), <http://www.theguardian.com/world/2013/jan/17/washington-police-accused-rape-failures> [<https://perma.cc/AZ3L-DU7Q>] (“There are widespread examples across the US of the police routinely neglecting crimes of sexual violence and refusing to believe victims.”).

⁹⁷ See Tasca, Rodriguez, Spohn & Koss, *supra* note 4, at 1158 (“As the initial gatekeepers of the criminal justice system, the police have considerable discretion in the investigation of crimes and the decision to make an arrest. This is particularly true with respect to sexual assault, which is less likely than other serious crimes to involve witnesses or physical evidence to connect the suspect to the crime and may often involve conflicting testimony from the victim and the suspect.” (internal citation omitted)).

⁹⁸ *But see* Tuerkheimer, *supra* note 9, at 1287 (describing a “new effort by the United States Department of Justice to hold law enforcement officers accountable for failing to protect victims of sexual assault”).

⁹⁹ Cassia Spohn & Katharine Tellis, *Justice Denied?: The Exceptional Clearance of Rape Cases in Los Angeles*, 74 ALB. L. REV. 1379, 1388–93 (2011).

¹⁰⁰ *Id.* at 1391–92.

someone and put a rape charge on them for the rest of their life”¹⁰¹ Reinforcing the police dismissiveness of rape victims, prosecutors would pressure police not to pursue cases in order to maintain high conviction percentages—the primary statistic by which they are evaluated.¹⁰² The net result of the revived corroboration requirement and prosecutor instruction was a self-reinforcing cycle where “detectives’ decision-making is influenced by their perceptions of whether charges will be filed by the district attorney’s office, and prosecutorial decision-making is influenced by the context in which the police present the case.”¹⁰³

Professor James F. Gilsinan’s study of general police culture practices is also helpful in understanding how police practices become institutionalized. Gilsinan explored how police officers’ cultural beliefs manifest in their classifications of crime based upon specific organizational frames.¹⁰⁴ He found that “police agencies do not respond directly to a situation but instead respond to an organizationally projected frame that takes ambiguous information and forms it into an understandable pattern to which the agency can then respond in a routine fashion.”¹⁰⁵ Gilsinan’s key finding was that, in determining whether an allegation of criminality was true, police necessarily used their imbedded cultural beliefs to process, frame, and comprehend a complainant’s story.¹⁰⁶ The strong biases against alleged rape narratives found in general American and law enforcement culture would lead police to classify rapes as either, in the best case, lesser crimes or, more often, as non-criminal events.¹⁰⁷ Even well-intentioned officers succumb to the strong cultural norms and narratives constantly reinforced through police training, leading them to believe that rape victims’ complaints are false far more often than in reality.¹⁰⁸

B. Systemic Failure

The tragic story of the ongoing failure of the New Orleans Police Department (“NOPD”) to investigate rape complaints begins in 2009. It was that year that the Times-Picayune first uncovered practices by the city po-

¹⁰¹ *Id.* at 1390.

¹⁰² *See id.* at 1393 (“The district attorney influences case clearances through the pre-arrest screening process, in which cases are reviewed for evidentiary sufficiency before an arrest is made.”).

¹⁰³ *Id.* at 1390–91.

¹⁰⁴ *See* James F. Gilsinan, *The Numbers Dilemma: The Chimera of Modern Police Accountability Systems*, 32 ST. LOUIS U. PUB. L. REV. 93, 101–03 (2012).

¹⁰⁵ *Id.* at 102.

¹⁰⁶ *See id.* at 101–02.

¹⁰⁷ *See Yung, supra* note 25, at 1223–24.

¹⁰⁸ *Id.* at 1224–25.

lice that indicated widespread gross indifference to rape victims.¹⁰⁹ Among various signs of gatekeeping, police used a code phrase, “Signal 21,” to categorize approximately sixty percent of all rape complaints as “noncriminal” matters.¹¹⁰ Although “Signal 21’s” can be used for a variety of legitimate reasons, police are expected to follow up with each complaint, a practice that NOPD systemically declined to do with rape complaints.¹¹¹

As with other cities across the country, the NOPD’s motive for misclassifying and not investigating rape claims was to create the statistical appearance of greater success in fighting violent crime.¹¹² New Orleans became so bold in misclassifying and ignoring rape complaints that its reported rape rate unbelievably fell below the reported murder rate in the city.¹¹³ The NOPD denied any wrongdoing but refused to make its records available for public examination.¹¹⁴ After the public outcry and political fallout from the Times-Picayune investigation, a new group of police officers took over the NOPD sex crimes cases and promised significant changes.¹¹⁵ The police department was also placed under federal court supervision leading to a subsequent consent decree with the Department of Justice requiring the NOPD to undertake numerous reforms.¹¹⁶

Just five years later, however, a state audit of the NOPD’s handling of rape cases found even greater problems during the period of 2011 to

¹⁰⁹ See Laura Maggi, *NOPD Downgrading of Rape Reports Raises Questions*, TIMES-PICAYUNE (New Orleans) (July 11, 2009), http://www.nola.com/news/index.ssf/2009/07/nopd_downgrading_of_rape_repor.html [<https://perma.cc/89MC-Y8A5>] (“More than half the time New Orleans police receive reports of rape or other sexual assaults against women, officers classify the matter as a noncriminal ‘complaint.’”).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* In 2008, there were 179 murders and seventy-two rapes reported to the FBI. *Id.* For contrast, Jackson, Mississippi, with a population almost half the size of New Orleans, had sixty-three murders and 136 rapes. *Id.*

¹¹⁴ *Id.*

¹¹⁵ See John Simerman, *Mayor Pledges Overhaul of NOPD Sex Crimes Unit in Wake of Blistering Report*, NEW ORLEANS ADVOCATE (Nov. 22, 2014), http://www.theadvocate.com/new-orleans/news/article_0c6c6859-f285-5262-ab89-43bf2106479d.html [<https://perma.cc/NS3R-7F5H>].

¹¹⁶ See *id.* (“The massive federal consent decree that Landrieu signed more than two years ago, detailing a vast array of court-mandated reforms to the NOPD, described 17 steps the department must take to better handle reports of alleged sexual assaults. Among them, the decree said, the department must develop ‘clear policies and procedures’ for responding to such reports; create specific guidelines for on-scene and follow-up investigations; follow protocols for examining victims and alleged suspects; and have ‘direct supervision’ of investigators. The consent decree also required more training for officers and supervisors in responding to reported sexual assaults, and it called for establishing a committee made up of community members to review randomly picked sexual assault probes.”).

2013.¹¹⁷ *Investigative journalism from local media, this time The New Orleans Advocate, and the New York Times supplemented the state audit.*¹¹⁸ In total, the media and state auditor found that the NOPD sex crimes unit failed to investigate over 840 cases in three years by designating those reports as “miscellaneous” matters.¹¹⁹

Beyond the gross numbers, individual cases illustrated heinous disregard of sexual assault complaints in New Orleans. In one instance, police failed to investigate a case where a two year old arrived in an emergency room with a positive test for a sexually transmitted disease.¹²⁰ Another detective assigned exclusively to sex crimes cases stated in front of nurses and victims that he refused to investigate because he “did not believe that simple rape should be a crime.”¹²¹ Based upon the NOPD’s continuous willful neglect of rape cases, it is impossible to know how many rapists have remained free because of the Department’s actions. It was during this time frame, however, that former professional football player Darren Sharper raped women in the city with impunity.¹²² Indicative of similar problems on a national level, Sharper raped women with no investigation from police in at least three other cities as well.¹²³

Several dedicated local reporters have uncovered extensive police mishandling of rape complaints in other cities as well. In 2012, Justin Fenton of the *Baltimore Sun* exposed his city’s widespread failure to investigate rape cases while also substantially misreporting its data submissions as part of the Uniform Crime Reports (“UCR”) program submitted to the Federal Bureau of Investigation (“FBI”).¹²⁴ From 1995 until 2010, the Baltimore

¹¹⁷ See Campbell Robertson, *New Orleans Police Routinely Ignored Sex Crimes, Report Finds*, N.Y. TIMES (Nov. 12, 2014), https://www.nytimes.com/2014/11/13/us/new-orleans-police-special-crimes-unit-inquiry.html?_r=0 [https://perma.cc/M6SU-C74U].

¹¹⁸ *Id.*; see also John Simerman, *IG Report Slams Work of 5 NOPD Sex-Crimes Detectives*, NEW ORLEANS ADVOCATE (Nov. 16, 2014), http://www.theadvocate.com/new_orleans/news/article_76a1d452-bf80-5895-8de7-63ed4a479867.html [https://perma.cc/CE6D-LGFJ].

¹¹⁹ See Robertson, *supra* note 117; John Simerman, *Marchers Protest Failures in NOPD’s Handling of Rape Allegations*, NEW ORLEANS ADVOCATE (Dec. 16, 2014), http://www.theadvocate.com/new_orleans/news/article_4287955b-9d5f-51ae-9d57-8816f226461e.html [https://perma.cc/4FZP-KUXL].

¹²⁰ Robertson, *supra* note 117.

¹²¹ *Id.*

¹²² See Ryan Gabrielson, T. Christian Miller, John Simerman & Ramon Antonio Vargas, *Upon Further Review: Inside the Police Failure to Stop Darren Sharper’s Rape Spree*, NEW ORLEANS ADVOCATE (Apr. 12, 2015), http://www.theadvocate.com/new_orleans/news/article_4e659d1a-87c0-5d63-883d-738a66c38e22.html [https://perma.cc/79P3-6GGZ].

¹²³ *Id.*

¹²⁴ See Fenton, *supra* note 62 (detailing the role of the *Baltimore Sun* in uncovering police underreporting of rape to the FBI). The UCR are the primary means of measuring violent crime in the United States. See NATHAN JAMES & LOGAN RISHARD COUNCIL, CONG. RESEARCH SERV., RL34309, HOW CRIME IN THE UNITED STATES IS MEASURED 2 (2008) (“UCR data are now used

Police Department reported that the rate of rape declined by an amazing seventy-seven percent in the city.¹²⁵ Fenton's investigation demonstrated that the marked decline was a myth and the product of the police's institutionalized statistical manipulation.¹²⁶ Instead, police were simply discarding rape complaints with minimal or no investigation at all.¹²⁷

The story of the Baltimore police failing to investigate rape cases is noteworthy, in part, because it illustrated the deeply embedded beliefs among many police in that department. Baltimore Police Commissioner Frederick H. Bealefeld III identified the cultural roots of police distrust of rape accusations and stated that the Baltimore Police Department "didn't just suddenly veer off the road and strike a tree—this was a very long process that led to this problem."¹²⁸ Police in Baltimore, and elsewhere, necessarily operate within larger cultural superstructures embodying "rape myths" while internalizing added elements unique to law enforcement.¹²⁹

Similar media investigations exposed systemic police failures in rape cases in Philadelphia and St. Louis.¹³⁰ The exposed police departments did

extensively by academics and government officials for research, policy, and planning purposes, and the data are widely cited in the media. The UCR also provides some of the most commonly cited crime statistics in the United States."); SIEGEL, *supra* note 93, at 30 ("The UCR is the best known and most widely cited source of official criminal statistics."). *But see* Lonsway & Archambault, *supra* note 95, at 149 (noting the limitations of relying on UCR data and concluding that "[widespread citation to the UCR] is . . . likely attributable to the credibility afforded by the FBI's prominent support of the [UCR], which may understandably lead public officials, members of the media, and the public to conclude that the UCR is the authoritative source for information on crime reporting"). The UCR is based upon data submitted by ninety-eight percent of police departments in the United States to the FBI. *See* JAMES & COUNCIL, *supra*, at 5–6 (citing statistics for 2005).

¹²⁵ Fenton, *supra* note 95.

¹²⁶ *See id.*

¹²⁷ *See id.*

¹²⁸ Erica Goode, *Rape Definition Too Narrow in Federal Statistics, Critics Say*, N.Y. TIMES (Sept. 29, 2011), <http://www.nytimes.com/2011/09/29/us/federal-rules-on-rape-statistics-criticized.html> [https://perma.cc/ZKY4-4YKZ] (quoting Commissioner Frederick H. Bealefeld III).

¹²⁹ *See* Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOC. PSYCHOL. 217, 218 (1980); Kimberly A. Lonsway & Louise F. Fitzgerald, *Rape Myths: In Review*, 18 PSYCHOL. WOMEN Q. 133, 134 (1994) (defining "rape myths" as "attitudes and beliefs that are generally false but are widely and persistently held, and that serve to deny and justify male sexual aggression against women"); Kathryn M. Ryan, *The Relationship Between Rape Myths and Sexual Scripts: The Social Construction of Rape*, 65 SEX ROLES 774, 774–75 (2011).

¹³⁰ *See* Mark Fazlollah, Michael Matza & Craig R. McCoy, *How to Cut City's Crime Rate: Don't Report It*, PHILA. INQUIRER, Nov. 1, 1998, at A01; Jeremy Kohler, *Waivers Wipe Out Reports of Rape*, ST. LOUIS DISPATCH, Aug. 29, 2005, at A1; Maggi, *supra* note 109; Michael Matza, *Victims' Testimony at Congressional Hearing Show "Chronic Failure" in Rape Investigations*, PHILA. INQUIRER, Sept. 15, 2010, at B1, available at <http://www.nsvrc.org/news/3068> [https://perma.cc/F456-LUR8].

not adequately investigate rape complaints but also created the appearance of low crime levels by using several difficult-to-detect techniques.¹³¹

Empirical research found that those four cities caught aggressively dismissing rape complaints are hardly alone.¹³² Between 1995 and 2012, of jurisdictions containing populations of at least 100,000 people, at least forty-six out of 210 police departments providing UCR data significantly undercounted the number of rapes reported to police.¹³³ In doing so, they likely conducted no investigation, labeled the reports unfounded, or counted the rapes as lesser offenses all while creating the impression that rape was declining.¹³⁴ In total, this research found that approximately one million rapes were not included in the UCR.¹³⁵ Such cases, by virtue of the techniques used to hide them, were neither properly investigated nor prosecuted.

Further, not only have these police departments been underreporting rape, the rate of systematic undercounting and disregarding of rape complaints has steadily increased since 1995, as Figure 2 shows.¹³⁶

¹³¹ The FBI simply has not supervised the UCR data to deter misreporting by police departments. See Michael D. Maltz, *Missing UCR Data and Divergence of the NCVS and UCR Trends*, in UNDERSTANDING CRIME STATISTICS 269, 270 (James P. Lynch & Lynn A. Addington eds., 2007). As a result, police have developed three widely used techniques, uncovered in the media investigations. First, police departments have abused the UCR rule that “an agency determine[d] that complaints of [rape were] unfounded or false.” FED. BUREAU OF INVESTIGATION, *supra* note 62 (“When, through investigation, an agency determines that complaints of crimes are unfounded or false, the agency eliminates that offense from its crime tally through an entry on the monthly report.”); see Kohler, *supra* note 130; Fenton, *supra* note 124; Maggi, *supra* note 109. Second, the police departments suppressed rape incident counts by classifying rape complaints as lesser offenses that were not reported to the FBI through the UCR program. See Yung, *supra* note 25, at 1223–24. Third, many police officers would simply create no written report that a complaint was even made. According to one investigation of the Baltimore police practices, forty percent of rape complaints were disposed of with neither a written report nor an investigation. *Senate Hearing on Rape in the United States*, *supra* note 17; see also Kohler, *supra* note 130; Matza, *supra* note 130; Fenton, *supra* note 95.

¹³² See Yung, *supra* note 25, at 1221–25.

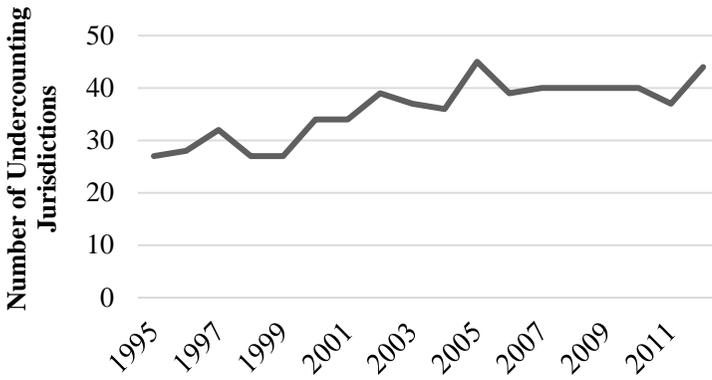
¹³³ See *id.* at 1237.

¹³⁴ See *id.*; *supra* note 131 and accompanying text.

¹³⁵ See Yung, *supra* note 25, at 1239–40.

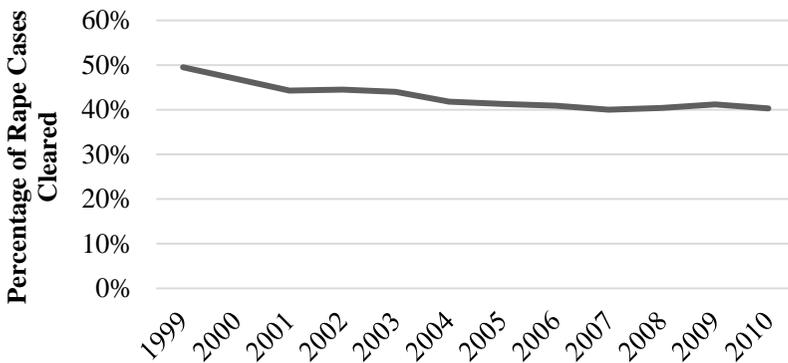
¹³⁶ Figure 2 previously appeared in Yung, *supra* note 25, at 1238.

Figure 2: Substantially Undercounting Jurisdictions, 1995–2012



The undercounting that results from police gatekeeping has a chilling impact. During the 1970s, one out of two rape reports led to an arrest.¹³⁷ Since 2005, that rate has dropped to one out of every four rape reports.¹³⁸ Figure 3 shows that the rate of clearance of rape cases by police has declined from approximately fifty percent to about forty percent of reported rapes from 1999 to 2010.¹³⁹

Figure 3: Percentage of Rape Cases Cleared, 1999-2010



Despite the widespread evidence of police gatekeeping, stories of police mistreatment of rape victims are often characterized as “isolated acts”

¹³⁷ Lonsway & Archambault, *supra* note 95, at 150.

¹³⁸ *Id.*

¹³⁹ *Id.* at 149–50.

or as the result of a few bad apples in the police force.¹⁴⁰ Defenders of the status quo point toward inconsistencies in the stories of traumatized victims to defend police hostility to rape complaints.¹⁴¹ Some say that intoxicated victims are the real problem.¹⁴² They refer to “Duke Lacrosse” or the “*Rolling Stone* article on UVA” as though those outlying cases are at all typical of rape victim reports.¹⁴³ Activists claim that men are railroaded by a criminal justice system based upon radical feminist conceptions of sexual violence.¹⁴⁴ They contend that false reporting, and not rape, is the real concern.¹⁴⁵

Such defenses of police mishandling of rape complaints are untenable against the substantial evidence demonstrating systemic police hostility to victims of sexual violence.¹⁴⁶ The institutional and narrative evidence of police gatekeeping is consistent with empirical academic research and media investigations regarding police handling of rape cases. The media often

¹⁴⁰ See, e.g., Craig R. McCoy & Nancy Phillips, *City Freed from Police-Sex Suit*, PHILA. INQUIRER, Nov. 3, 2006, at B01 (quoting Philadelphia’s police commissioner Sylvester M. Johnson as stating that rapes committed by police officers in his jurisdiction and subsequent mishandling of the case were “isolated acts”).

¹⁴¹ Brett Erin Applegate, *Prior (False?) Accusations: Reforming Rape Shields to Reflect the Dynamics of Sexual Assault*, 17 LEWIS & CLARK L. REV. 899, 924–25 (2013).

¹⁴² See, e.g., Heather Mac Donald, *The Obama Administration’s Deserving Victims*, NAT’L REV. (May 8, 2014), <http://www.nationalreview.com/article/377492/obama-administrations-deserving-victims-heather-mac-donald> [<https://perma.cc/3CXY-PET7>] (“The alleged campus-rape epidemic could be stopped overnight if women’s advocates sent a simple message to girls: Don’t get drunk and get into bed with a guy whom you barely know.”).

¹⁴³ See, e.g., A.J. Delgado, *Crying Rape*, NAT’L REV. (May 19, 2014), <http://www.nationalreview.com/article/378310/crying-rape-j-delgado> [<https://perma.cc/X387-NBT9>] (citing the indictment of Duke lacrosse players as evidence about “how far the pendulum has swung in the other direction! Now, the term ‘rape’ or ‘sexual assault’ is thrown around almost effortlessly, accusations easily made and lives easily ruined After all, for every legitimate, actual rape claim there may be another that was not: a girl who cried rape.”); Thomas Sowell, *Sexual Assault on Campus*, NAT’L REV. (May 13, 2014), <http://www.nationalreview.com/article/377804/sexual-assault-campus-thomas-sowell> [<https://perma.cc/7TVX-RLBX>] (“Have we already forgotten the lynch-mob atmosphere on the Duke University campus a few years ago, when three young men were accused of raping a stripper? Thank heaven that case was handled by the criminal-justice system, where all the evidence showed that the charge was bogus, leading to the district attorneys being removed and disbarred There are many unintended consequences of lynch-law policies that poison the atmosphere on campus and diminish American life in general.”).

¹⁴⁴ See Cassia Spohn, Clair White & Katharine Tellis, *Unfounding Sexual Assault: Examining the Decision to Unfound and Identifying False Reports*, 48 LAW & SOC’Y REV. 161, 162 (2014).

¹⁴⁵ See, e.g., Christina Hoff Sommers, *Rape Culture Is a ‘Panic Where Paranoia, Censorship, and False Accusations Flourish,’* TIME (May 15, 2014), <http://time.com/100091/campus-sexual-assault-christina-hoff-sommers/> [<https://perma.cc/9YHN-CV2K>] (“Cases [based upon false accusations] are proliferating The list of falsely accused young men subject to kangaroo court justice is growing apace It appears that we are in the throes of one of those panics where paranoia, censorship, and false accusations flourish—and otherwise sensible people abandon their critical facilities.”).

¹⁴⁶ See *infra* notes 237–278 and accompanying text.

fixates on the rare false reports of rape with little attention given to the widespread failure to investigate rape complaints.¹⁴⁷ Indeed, individuals are likely far more familiar with the *Rolling Stone* article about the University of Virginia—even though no alleged rapist was ever named or prosecuted—than the numerous stories of police failings throughout this Article.

The best data indicates that police, at a systemic level, often fail to investigate even forcible stranger rapes. Until very recently, the federal government has only tracked rapes involving force, vaginal penetration, and women victims, so observed police manipulation of such data indicates a general disregard of cases that most informed commentators believe are the most likely to be investigated.¹⁴⁸

C. Distribution of Failure

*In St. Louis, throughout 2002, police received reports from prostitutes who had been kidnapped and raped.*¹⁴⁹ *Erinn Steinbeck called 911 after escaping her attacker. She reported that she had been held captive for two days and raped repeatedly. A sex crimes detective took her to the police station but created no written report of her allegations. Instead, the officer created an informal memorandum regarding Steinbeck, a practice the St. Louis Police Department used at the time to avoid having to count incidents of rape in their official crime statistics.*¹⁵⁰ *The document dismissed Steinbeck as “intoxicated” and “mentally ill.”*¹⁵¹

*Steinbeck pleaded with the officers to let her take them to where she had been held against her will. Instead, a detective called Steinbeck’s mother telling her to pick up Steinbeck. Steinbeck stated that a sex crimes detective told her, “Nobody is going to believe a crackhead. All the guy would have to say is that he didn’t pay her and she was upset.”*¹⁵²

Later in the year, another prostitute reported being abducted, beaten, and raped. The officer who met her observed clear injuries to her face. Fol-

¹⁴⁷ Kenneth Dowler, *Sex, Lies, and Videotape: The Presentation of Sex Crime in Local Television News*, 34 J. CRIM. JUST. 383, 385 (2006).

¹⁴⁸ FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES 2013: RAPE ADDENDUM (2014); Charlie Savage, *U.S. to Expand Its Definition of Rape in Statistics*, N.Y. TIMES (Jan. 6, 2012), http://www.nytimes.com/2012/01/07/us/politics/federal-crime-statistics-to-expand-rape-definition.html?_r=0 [<https://perma.cc/2FBX-DAEK>]. See generally Yung, *supra* note 25.

¹⁴⁹ See Jeremy Kohler, *Missing Patterns*, ST. LOUIS POST-DISPATCH, Aug. 30, 2005, at A1, available at 2005 WLNR 24322959 (describing the facts of the Maury Travis investigation as discussed in this Section unless otherwise noted).

¹⁵⁰ See Kohler, *supra* note 130 (describing the various methods, including informal memorandums, that St. Louis police used to avoid recording rapes in department statistics).

¹⁵¹ Kohler, *supra* note 149.

¹⁵² *Id.* (quoting Erinn Steinbeck).

lowing proper procedure, the officer referred the case to the sex crimes section. Again consistent with department practice at the time, however, the sex crimes detective only created a memorandum regarding the case. Unlike the previous complainant, this most recent victim knew her attacker: Maury Travis. Nonetheless, police did not investigate further.

It is unknown how many women Travis raped or killed. Police believe that he raped and murdered as many as twenty. It is also unclear how many women were raped or killed after the initial complaints were made and ignored by the St. Louis Police Department. Travis targeted prostitutes specifically, which helped him escape police attention. When Travis was finally arrested, he committed suicide while in jail. As a result, the government made no effort to determine the effects of police ignoring early accusations of Travis's rapes.

The failure of the criminal justice system in the United States is not evenly distributed. All of Anthony Sowell and Maury Travis's victims were black. They were also often sex workers and/or drug addicts.¹⁵³ The stories from New Orleans as well as the recent prosecution of Oklahoma City police officer Daniel Holtzclaw also fit a pattern wherein black victims in majority-minority neighborhoods are least likely to be believed by police.¹⁵⁴ There is substantial evidence that police simply take the rape reports of whites more seriously.¹⁵⁵ Focusing crime prevention efforts on certain neighborhoods can also cause substantial disparities along racial lines.

Race and ethnicity have long created unusual patterns in rape law enforcement. For example, rape claims from victims who are black women and other women of color are regularly ignored regardless of the race of the perpetrator.¹⁵⁶ Before the Civil War, black women, even those who had been "freed," were sexually victimized with little concern by prosecutors for their defilement.¹⁵⁷ In modern America, black women have still not been

¹⁵³ See Chen, *supra* note 61.

¹⁵⁴ See Lilly Workneh, *Daniel Holtzclaw and the Reality of Police Brutality Against Black Women*, HUFFINGTON POST (Dec. 11, 2015), http://www.huffingtonpost.com/entry/daniel-holtzclaw-and-the-reality-of-police-brutality-against-black-women_us_566b0b4ee4b080eddf580671 [https://perma.cc/6JF3-L9UM].

¹⁵⁵ Katharine M. Tellis & Cassia C. Spohn, *The Sexual Stratification Hypothesis Revisited: Testing Assumptions About Simple Versus Aggravated Rape*, 36 J. CRIM. JUST. 252, 252 (2008).

¹⁵⁶ See Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 42–43 (2006).

¹⁵⁷ See *id.* at 7–8 ("The history of rape prosecution has always been inextricably intertwined with the history of race relations in this country Raping a Black woman was not a crime for the majority of this Nation's history. First, the rape of a Black woman was simply not criminalized. And even when there was an argument that a statute was race neutral as to victimization, prosecutorial inaction and Court holdings made clear the lack of recourse for Black women who were raped.").

recognized as rape victims because they have been perceived as overly promiscuous and not capable of being defiled.¹⁵⁸

Instead, the fear of female defilement through rape has primarily been focused on myths about wild black men terrorizing white women. The “Black beasts” narrative has long dominated rape law and was famously exemplified in trials of the “Scottsboro Boys,” wherein black teenagers in the South were wrongfully convicted for rape and sentenced to death.¹⁵⁹ The death penalty for rape was largely derived from lynchings of blacks in southern States and almost never applied to white defendants.¹⁶⁰

Other populations also experience greater levels of police hostility to their rape complaints. A survey of police showed that, given no other information about the rape complaint, only forty-eight percent said they would believe a male victim.¹⁶¹ This has led to male-to-male rapes being ignored across the United States.¹⁶² Transgendered populations, despite being subject to higher rates of sexual violence, are also less likely to be believed by police.¹⁶³

II. CONSEQUENCES OF GATEKEEPING

There are tremendous consequences associated with the collective denial of rape complaints, first exhibited by police toward victims when they report having been attacked. These harms go well beyond any justification that might be proffered for not investigating rape complaints due to resource constraints. The most significant results to gatekeeping can be effectively divided into three major categories: allowing rapists to find more victims, creating widespread distrust of the criminal justice system, and orienting reform efforts away from the greatest impediments to diminishing the level of sexual violence in the United States.

¹⁵⁸ See *id.* at 22–23 (“Although the laws no longer defined crimes and punishments by race of victim and race of offender, those with the discretionary power to wield the law—police, prosecutors and judges—mostly acted as if nothing had changed . . . This resulted in the stark continuation of the two-pronged gendered racism in criminal prosecution and punishments for rape . . . Black men and women were still considered sexually promiscuous in a way that allegedly endangered White women and made rape of a Black woman legally impossible . . . Similarly, no Black woman was presumed virginal or chaste and was therefore presumed promiscuous.”).

¹⁵⁹ See TASLITZ, *supra* note 15, at 29–30.

¹⁶⁰ See Carol S. Steiker, *Remembering Race, Rape, and Capital Punishment*, 83 VA. L. REV. 693, 699 (1997) (book review).

¹⁶¹ Page, *supra* note 20, at 406.

¹⁶² Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1307 (2011).

¹⁶³ See Rebecca L. Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 AGGRESSION & VIOLENT BEHAVIOR 170, 173, 176 (2009).

A. Rapists Remain Free

In 2004, Wilbur Brown raped Sara Reedy.¹⁶⁴ Yet police decided to treat Reedy as the sole criminal suspect in their investigation. Reedy worked at a Gulf gas station in a suburb of Pittsburgh, Cranberry Township. Wilbur Brown entered the station, brandished a gun, emptied the cash register, and raped Reedy. Brown ordered Reedy to perform oral sex on him and to swallow all of his semen, threatening to shoot her if she did not comply.¹⁶⁵ After Brown left, Reedy ran to a neighboring gas station and called the police. Officers at the scene described Reedy as “crying, shaking, . . . and [] hysterical.”¹⁶⁶

Detective Frank Evanson first met Reedy at a local hospital where Reedy underwent a rape examination. Detective Evanson asked Reedy how many times she did “dope” every day.¹⁶⁷ He called her a liar and accused her of making up the rape to cover her theft of the gas station’s cash register. Detective Evanson told Reedy’s mother and stepfather that Reedy’s story was not credible because she reported that the station was robbed at 10:40 PM, the exact time the cash register was recorded to have opened, and “nobody that’s in this kind of a hysteria would know exactly what time it was.”¹⁶⁸

Within three months after Brown attacked Reedy, he robbed another location where he sexually assaulted his victim in a manner very similar to his attack of Reedy.¹⁶⁹ Detective Evanson was assigned to the new case as the lead investigator.¹⁷⁰ He completely ignored the similarities of the two cases. In subsequent civil litigation, the Court of Appeals for the Third Circuit documented the incredible connections between Reedy’s case and the other complaint:

Both occurred in Cranberry Township, separated by 3 months. Both occurred at businesses located on Route 19, approximately 1.5 miles apart from one another. Both attacks occurred at the same time of evening—approximately at 10:40 p.m. In both attacks, the assailant made no effort to conceal his identity. In both attacks, the female victim was assaulted while at work or while

¹⁶⁴ Reedy v. Evanson, 615 F.3d 197, 202 (3d Cir. 2010) (describing the facts of the Maury Travis investigation as discussed in this Section unless otherwise noted).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 203–04.

¹⁶⁷ *Id.* at 204.

¹⁶⁸ *Id.* at 206 (quoting Detective Frank Evanson). The impossible position for Reedy was that, had she given another time for the robbery, her complaint could have been easily dismissed because that stated time would be inconsistent with other evidence.

¹⁶⁹ *Id.* at 207–08.

¹⁷⁰ *Id.* at 207.

leaving work. Both victims described their assailant as a Caucasian male with brown (Reedy) or light brown hair (Landmark), wearing blue jeans. Both victims described their assailant as being around the same age. The Landmark victim described her assailant as in his late-30s while Reedy described her assailant as in his mid-30s to early 40s. In both attacks, the assailant used a black handgun. Both victims were robbed, in addition to being sexually assaulted. Both victims were ordered to bare their breasts and had their breasts fondled by the assailant. Both victims were forced to perform oral sex upon the assailant.¹⁷¹

Instead of investigating the two cases as likely perpetrated by the same offender, Detective Evanson began drafting an affidavit for a criminal complaint against Reedy for filing a false police report.¹⁷² At the same time, Detective Evanson received a report that the DNA from the second attack (there was none obtained after Reedy's attack) matched a known criminal. Evanson, however, decided to focus his energies at Reedy.

Detective Evanson went to Reedy's house with a marked police car for backup.¹⁷³ For forty-five minutes, he browbeat Reedy in front of her neighbors, telling her to change her statement and admit that she had invented her rape story.¹⁷⁴ Despite Reedy's steadfast commitment to her statement to police, Detective Evanson sought and obtained an arrest warrant for Reedy.¹⁷⁵ Reedy was arrested and bond was set at \$5,000 because Detective Evanson insisted that Reedy was a flight risk.¹⁷⁶ At the time, Reedy was four-months pregnant and, because she was unable to pay her bail, held in jail.¹⁷⁷ After receiving a bail reduction, she was released while she awaited trial.¹⁷⁸

Thirteen months after Brown raped Reedy, police in another jurisdiction apprehended Brown.¹⁷⁹ Brown confessed to twelve sexual assaults, including his rape of Reedy.¹⁸⁰ Brown raped at least two women after Reedy filed her initial complaint while police focused their investigation on Reedy.¹⁸¹ The prosecutor finally decided to drop the charges against

¹⁷¹ *Id.* at 207–08.

¹⁷² *Id.* at 208.

¹⁷³ *Senate Hearing on Rape in the United States*, *supra* note 17, at 17 (statement of Sara Reedy).

¹⁷⁴ *Id.*

¹⁷⁵ *See id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *See Avalos*, *supra* note 24.

Reedy.¹⁸² *Reedy settled a civil suit against Cranberry Township, but the town refused to admit that the authorities acted wrong in any way.*¹⁸³ *After the settlement, the Cranberry Township Town Manager stated that “[T]here was no wrongdoing. Every action [Detective Evanson] took was approved by all law enforcement agencies involved and at every level It was just unfortunate.”*¹⁸⁴ *Detective Evanson was not disciplined and suffered no adverse employment action.*¹⁸⁵

Every time a valid rape complaint is not fully investigated, a rapist is left free to find more victims.¹⁸⁶ Ignoring rape complaints emboldens and reinforces the criminal behavior of rapists who can continue their sexual violence with impunity. As the Sowell and Travis cases indicate, the failure to investigate sometimes leaves murderers free as well.

Yet, police are often blind to this substantial risk because of their belief in various myths about rape. For example, one prominent rape myth identifies the motivation for sexual assault as exclusively sexual.¹⁸⁷ Another widespread myth is that women falsely report rape after they regret having had consensual sex.¹⁸⁸ Police in particular are more likely to discount the effects of rape if they perceive a victim to be sexually experienced.¹⁸⁹

Rape myths have long been a concern and object of study. In 1980, Martha Burt defined rape myths as “prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists.”¹⁹⁰ Kimberley Lonsway and Louise Fitzgerald softened the emphasis on falsity by characterizing rape myths as “attitudes

¹⁸² *Senate Hearing on Rape in the United States*, *supra* note 17, at 17 (statement of Sara Reedy).

¹⁸³ Karen Kane, *Cranberry’s Insurer Approves \$1.5 Million Settlement Over Arrest*, PITTSBURGH POST-GAZETTE, Dec. 17, 2012, at A1, available at <https://insurancenewsnet.com/oarticle/Cranberrys-insurer-approves-15-million-settlement-over-arrest-%5BPittsburgh-Pos-a-367273> [https://perma.cc/N3MR-ZEJE].

¹⁸⁴ *Id.* (quoting Cranberry Township Town Manager Jerry Andree).

¹⁸⁵ *Id.*

¹⁸⁶ *See Reporting on Rape Kit Backlog Leads to New Law and Arrests in Ohio*, NPR (May 19, 2015), <http://www.npr.org/2015/05/19/407766821/reporting-on-rape-kit-backlog-leads-to-new-law-and-arrests-in-ohio> (“Many rapists who were never convicted might have been if only there had been follow-up on the evidence that was collected Rapists who might’ve been convicted were free to assault other women.” (quoting Terry Gross)).

¹⁸⁷ Rosemary Iconis, *Rape Myth Acceptance in College Students: A Literature Review*, 1 CONTEMP. ISSUES EDUC. RES. 47, 48 (2008).

¹⁸⁸ LeeAnn Kahlor & Matthew S. Eastin, *Television’s Role in the Culture of Violence Toward Women: A Study of Television Viewing and the Cultivation of Rape Myth Acceptance in the United States*, 55 J. BROADCASTING & ELECTRONIC MEDIA 215, 215–16 (2011).

¹⁸⁹ WARD, *supra* note 18 (finding that twenty-four percent of police did not believe that a victim was harmed by rape if she was sexually experienced in contrast to eleven percent of lawyers, six percent of doctors, and three percent of counselors).

¹⁹⁰ Burt, *supra* note 129, at 217.

and beliefs that are generally false but are widely and persistently held, and that serve to deny and justify male sexual aggression against women.”¹⁹¹

For Lonsway and Fitzgerald, “false or apocryphal” rape myths “serve to justify existing cultural arrangements.”¹⁹² Such beliefs are not innocuous—they discourage victims, embolden rapists, and shape society’s beliefs so as to support rapists while disbelieving victims.¹⁹³ Dolf Zillman and James Weaver called rape myths “the most self-serving justification of sexual coercion ever invented by callous men.”¹⁹⁴ As a result, the culturally engrained mistaken ideas, further distorted and magnified through media, shape public discourse, policy formulation, and agenda-setting concerning rape.¹⁹⁵ Rape myths ultimately serve to increase social tolerance of high levels of sexual violence.¹⁹⁶ Police, in particular, are more likely to discount the effects of rape if they perceive a victim to be sexually experienced.¹⁹⁷

Rape myths create cognitive biases among police officers that blind them to the real costs of leaving rapists free. No rational, morally sensible person would believe that allowing a rapist to find more victims is justified by an officer’s gut feeling that a rape complainant is lying. Because officers have integrated various rape myths into their belief systems, however, their motivated reasoning causes them to simply discount the real risk of ongoing sexual violence.

B. Illegitimacy

In December of 2000, in East Baltimore, Maryland, a nineteen-year-old woman reported that a man threatened her with a pocketknife and forcibly removed her from a city park.¹⁹⁸ Her attacker raped her after he had removed her from public sight. After her rapist released her, the woman reported her victimization to the authorities. Police doubted her story because they believed it was too outlandish and farfetched. Although she underwent

¹⁹¹ Lonsway & Fitzgerald, *supra* note 129, at 134.

¹⁹² *Id.*

¹⁹³ *Id.* at 136.

¹⁹⁴ Dolf Zillmann & James B. Weaver, *Pornography and Men’s Sexual Callousness Toward Women*, in *PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS* 101 (Dolf Zillmann & Jennings Bryant, eds. 1989)

¹⁹⁵ LeeAnn Kahlor & Dan Morrison, *Television Viewing and Rape Myth Acceptance Among College Women*, 56 *SEX ROLES* 729, 730 (2007).

¹⁹⁶ Kahlor & Eastin, *supra* note 188, at 215.

¹⁹⁷ See Ward, *supra* note 18, at 61 (finding that twenty-four percent of police did not believe that a victim was harmed by rape if she was sexually experienced in contrast to eleven percent of lawyers, six percent of doctors, and three percent of counselors).

¹⁹⁸ See Erica L. Green, *Rape Cases Dismissed by Baltimore Police Later Found Valid*, *BALT. SUN* (July 26, 2010), http://articles.baltimoresun.com/2010-07-25/news/bs-ci-unfounded-rape-conviction-20100725_1_east-baltimore-baltimore-police-sexual-abuse [<https://perma.cc/QZ98-CMR5>] (describing the facts of the Lawrence Mosley case unless otherwise noted).

a medical examination to determine if there was forensic evidence of rape, police did not order testing of the resultant rape kit. Police browbeat the victim during multiple interrogations in an attempt to uncover inconsistencies in her story.

When the rape victim found that she was pregnant, police became convinced that she invented a rape story to cover for having cheated on her boyfriend. The police designated her claim as “unfounded” and performed no further investigation. They also made no effort to determine if there were other complaints similar to the one by the victim.

Almost a decade later, a laboratory finally tested the victim’s rape kit in response to growing public attention focused on the issue of untested rape kits. A DNA sample from semen obtained from the victim’s body matched Lawrence Mosley, who was already in prison for another crime. Mosley’s DNA was also found in a second rape kit, containing evidence derived from a different rape in Baltimore with a similar modus operandi, collected two days before the aforementioned attack in East Baltimore. Police similarly disbelieved the prior victim, who was also nineteen years old, because they thought she made up the rape story to hide the fact that she was sexually active.

After forensic examiners identified the DNA match, the second victim refused to cooperate and testify against Mosley because of the degradation and humiliation she suffered during repeated interrogations over a week by the police when she made her initial complaint. Thus far, prosecutors have not charged Mosley with either rape even though his DNA was found on the victims.

The damage to the legitimacy of the criminal justice system because of police gatekeeping has been significant. Unlike the stories earlier in this Article, the story of Lawrence Mosley contains no hint that justice will be done. Rape reporting is extremely low with only about one third of the victims of rape reporting it to the police.¹⁹⁹ One reason may be that victims have internalized police gatekeeping. Police serve a central role in the criminal justice system’s legitimacy in regards to rape cases.²⁰⁰ If the police decide that there is insufficient evidence for a rape prosecution, the public (including rape victims) interprets that conclusion to mean that there was no rape. As the criminal funnel model predicts, the spillover effects from police gatekeeping create a cycle that insures even fewer rapists will be apprehended and prosecuted.

¹⁹⁹ See *The Criminal Justice System: Statistics*, *supra* note 88.

²⁰⁰ See Bryden & Lengnick, *supra* note 87, at 1378.

Research shows that over half of rape cases are short circuited at the victim stage when those who have been raped fail to report being attacked.²⁰¹ The decision not to report, however, does not occur in isolation. It is based in part upon a victim's assessment about the estimated likelihood that reporting being raped will lead to arrest and punishment of the rapist.²⁰² If a victim believes that reporting will only bring humiliation with little chance for case advancement, the individual rational choice is to not report.²⁰³ As a result of the interdependence of the actors involved with rape cases, breakdowns at any early level have magnified effects. For example, if police gain a reputation as hostile toward rape victims, those victims report fewer incidents.²⁰⁴ The role of police reputation is particularly important because no case proceeds until it moves past the officers of the law. Among all of the possible gatekeepers in the criminal justice system, police are the most significant independently because of the collateral effects they create throughout the crime funnel. Any effort to increase prosecutions and convictions of rapists will fail as long as police exercise aggressive triage patterns during the intake and investigation of rape complaints.

Such results fuel a vicious cycle of perceptions of illegitimacy about the criminal justice system, leading to greater victim non-reporting and non-cooperation. Even if police allow the case to move to the prosecution stage, there are still several hurdles before a conviction, which is the only clear signal to the public that there was a rape. When the legitimacy of the criminal justice system is called into doubt, civilians simply see no reason to participate within it.²⁰⁵

High levels of gatekeeping reinforce the already low levels of rape reporting by telling victims that there is no justice to be had by filing a complaint. Enforcement of rape law fundamentally depends on victims' actions. If victims do not report their attacks, cases are virtually impossible to prosecute. If victims cease cooperating during the investigation or trial, there is almost no chance for a conviction. As a result, legitimacy of the criminal justice system in the eyes of victims is absolutely essential to the proper functioning of rape law. If rape victims do not trust the police, there can be little hope of positive change even with broad statutory enactments hoping to change the substantive law of rape.

²⁰¹ JENNIFER L. TRUMAN & LYNN LANGTON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, 2014, at 7 (2015).

²⁰² Allen, *supra* note 86, at 625–27.

²⁰³ *Id.* at 626–27.

²⁰⁴ Karen Oehme et al., *A Deficiency in Addressing Campus Sexual Assault: The Lack of Women Law Enforcement Officers*, 38 HARV. J.L. & GENDER 337, 350–51 (2015).

²⁰⁵ See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 7 (2006).

C. Mistaken Focus

In 2003, Anthony Alliano broke into the home of sixteen-year-old Meaghan Ybos.²⁰⁶ Alliano wore a ski-mask, held a knife to Ybos' throat, and put a blanket over her face while he raped her.²⁰⁷ Ybos underwent a rape kit exam, but it would not be tested for another nine years.²⁰⁸ Because Alliano was able to hide his face during the attack, the substantial delay in testing Ybos' rape kit prevented any chance of linking Alliano to her rape. Looking back at the aftermath of her attack, Ybos recently concluded "[t]he law enforcement response was worse than the rape. . . . I was just interrogated as if I was a suspect myself. They kept saying, 'You know you can go to jail for making this up, right? You're not just doing this for attention, right?'"²⁰⁹

In 2004, police found Alliano, who was thirty-three at the time, in a motel room with an apparently drugged sixteen-year-old girl.²¹⁰ The victim had a rape kit exam but it was not tested until eight years later.²¹¹ Alliano confessed to having sexually penetrated the girl twice, but prosecutors dismissed the charges against him.²¹²

In total, Alliano sexually assaulted at least seven victims in their Memphis-neighborhood homes before finally being prosecuted.²¹³ At least five of those victims were after Ybos reported her attack.²¹⁴ Local prosecutors have stated that they were unaware of Alliano's reign of sexual violence because police repeatedly acted as gatekeepers.²¹⁵ At least three rape kits were gathered with Alliano's DNA but either were not tested or not put into CODIS at the time.²¹⁶ As of 2014, Memphis had at least 12,000 untested rape kits, the highest per capita rate in the United States.²¹⁷ As part of her efforts to bring greater attention to police hostility to rape victims, Ybos remarked: "You start to wonder, is rape really illegal? . . . Apparently, it

²⁰⁶ Marc Perrusquia, *Serial Rapist's Victims Talk About Failures of Investigation*, COMMERCIAL APPEAL (Memphis) (Apr. 2, 2014), <http://www.commercialappeal.com/news/serial-rapists-victims-talk-about-failures-of-investigation-ep-355846761-328989891.html> [https://perma.cc/HM5N-MQ4J].

²⁰⁷ Lori Jane Gliha, "Is Rape Really Illegal" When Rape Kits Go Untested?, AL JAZEERA AMERICA (May 6, 2014), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/5/5/when-rape-kits-gountestedaisrapereallyillegala.html> [https://perma.cc/T44M-366J].

²⁰⁸ *Id.*

²⁰⁹ *Id.* (quoting Meaghan Ybos).

²¹⁰ Perrusquia, *supra* note 206.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Marc Perrusquia, *DA Weirich: Prosecutors Couldn't Have Stopped Serial Rapist*, COMMERCIAL APPEAL (Memphis) (Mar. 21, 2014), <http://www.commercialappeal.com/news/da-weirich-prosecutors-couldnt-have-stopped-serial-rapist-ep-355877699-328998921.html> [https://perma.cc/B83H-6K87].

²¹⁵ *Id.*

²¹⁶ Perrusquia, *supra* note 206.

²¹⁷ *Id.*

*was not a big deal for the nine years Alliano was on the loose. The law says it's illegal, but in practice, if nothing's done, I have to wonder, is it really illegal?"*²¹⁸

Stories like Alliano's highlight how little effect efforts to redefine rape or change rape cases' evidentiary rules will have on actual rape prosecutions. Gatekeeping relegates rape law reform to an entirely academic pursuit—in the worst sense of the word. For example, although it might ideally make sense to implement an affirmative consent standard (colloquially referred to as “yes means yes”), enacting such a rule would be a mistake in modern America.²¹⁹ It would make little to no positive difference on the amount of cases that get through police gatekeeping because police would continue to discard rape complaints and implement a definition of “rape” far narrower than the statutes. Furthermore, the backlash that has already emerged when such standards have been adopted for colleges and universities shows that cultural retrenchment undermining reform would potentially cripple rape law further. The practical realities of rape law in America leaves Americans far away from a cultural environment where such proposals are considered palatable and, therefore, enforceable. As a result, efforts should be focused not just on correcting trial or evidence rules but instead upon altering the behavior of police and other gatekeepers in the criminal justice system.

The common focus on trial procedures and rules has led to erroneous conclusions about desirable policy reform. For example, research has indicated that forensic evidence gathered from rape kits is rarely introduced at trial.²²⁰ This research led many to believe that post-rape medical exams were of limited utility in rape cases.²²¹ This belief reinforced the behavior of police not to test rape kits. More recent scholarship, however, clearly shows that police are far more likely to arrest suspects if there is forensic evidence available even if it is never used at trial.²²² Using trials as a proxy for overall rape law practice is often misleading.

The history of rape law and culture shows that attempts to fix rape law have aimed at fixing the wrong stages of the criminal justice system. Stephen Schulhofer offered perhaps the clearest explanation of the pernicious effects of cultural norms in shaping the understanding of rape: “Social attitudes are tenacious, and they can easily nullify the theories and doctrines

²¹⁸ Gliha, *supra* note 207 (quoting Meaghan Ybos).

²¹⁹ Cf. William M. Welch, *California Adopts 'Yes Means Yes' Law*, USA TODAY (Sept. 29, 2014), <http://www.usatoday.com/story/news/usanow/2014/08/28/california-bill-yes-means-yes-sex-assault/14765665/> [<https://perma.cc/4V85-KZYZ>].

²²⁰ See Tasca, Rodriguez, Spohn & Koss, *supra* note 4, at 1172.

²²¹ *See id.*

²²² *Id.*

found in the law books. The story of failed [rape law] reforms is in part a story about the overriding importance of culture, about the seeming irrelevance of law.”²²³ Similarly, Andrew Taslitz extensively catalogued and analyzed the numerous ways that rape stories are invalidated in the criminal justice system through gatekeeping practices.²²⁴ The hostile attitudes that infect police work neutralize the effectiveness of trial or appellate level solutions to sexual violence. Although spillover effects in the crime funnel give hope that changing trial rules will alter police behavior, history has shown there is little hope in that regard. The collateral implications of police gatekeeping, however, have been substantial because police discretion has been used to keep rape cases from ever advancing to the courtroom.

The various proposed piecemeal measures designed to reform substantive rape law and evidence rules in rape cases should generally be deprioritized in favor of police reforms.²²⁵ The misplaced focus on substantive legislative solutions to the problems of rape law may actually worsen adversarial policing. The “myth of radical change” has long haunted rape law reform.²²⁶ When activists convinced state legislatures to enact numerous reforms, the public falsely believed that far more radical laws were enacted.²²⁷ As a result, there has been a long-term mismatch between the application of the law and the public’s ideas about its scope. The public’s belief that police and courts apply rape legislation broadly has contributed to cultural backlash against rape law.²²⁸ The growing intransigence has made a particularly “sticky norm” against accepting the values embedded in rape law reforms.²²⁹ Continued legislative efforts will likely fuel opposition to rape law while failing to overcome police gatekeeping, rendering such reforms futile. The heightened level of resistance to rape law might ultimately cause police, jurors, and judges to rebuff attempts to prosecute rapes because they mistakenly believe rape law has gone too far.²³⁰

To understand how such a focus could do more harm than good, consider the recent public and media reaction to state and university actions to allow discipline of students using a so-called “affirmative consent” standard. After President Barack Obama called for greater efforts to address sex-

²²³ See SCHULHOFER, *supra* note 2, at 17.

²²⁴ See TASLITZ, *supra* note 15, at 7–8.

²²⁵ This is not to say that the proposals could not be woven into a larger set of policies that diminish the possibility of backlash undermining the reform efforts.

²²⁶ See SCHULHOFER, *supra* note 2, at 10–12.

²²⁷ See *id.*

²²⁸ CORRIGAN, *supra* note 43, at 246.

²²⁹ Kahan, *supra* note 51, at 623 (“The career of rape law reform furnishes a dramatic example of the sticky norms problem. . . . The failure of rape law reform fits the profile of a self-defeating ‘hard shove.’”).

²³⁰ See *id.* at 624.

ual violence at universities in January of 2014,²³¹ the backlash was swift and severe.²³² Political agendas instantly overrode any pragmatic and thoughtful consideration regarding university student sexual assault.²³³

The idea that an affirmative consent standard might cure the shortcomings of modern rape law is a dangerous one. Implementing such a rule might simply repeat the errors of the prior reform era. Another hard shove against a sticky norm might accomplish little when it does not address police gatekeeping in any significant way. The resultant backlash, however, could substantially undermine the willingness of institutional actors to enforce rape law even further.²³⁴

Fixating on how to change the decisions of jurors, judges, and even prosecutors will do little or nothing to change the stage where most rape cases fails: police investigation.²³⁵ Because police arrest less than seven suspects for every hundred rapes,²³⁶ more attention must be paid to the body of cases that are filtered out before trial. Empirical and narrative evidence shows that the bottleneck in rape cases is substantial and proposed solutions to sexual violence should be tailored accordingly.

III. ADDRESSING GATEKEEPING

Because of the long-term, systemic nature of police gatekeeping of rape complaints, it would be easy and convenient to assume that the problem is simply intractable. Indeed, many academics and activists have essentially

²³¹ See Jennifer Steinhauer, *White House to Press Colleges to Do More to Combat Rape*, N.Y. TIMES (Apr. 28, 2014), https://www.nytimes.com/2014/04/29/us/tougher-battle-on-sex-assault-on-campus-urged.html?_r=0 [<https://perma.cc/6SZN-N7SE>].

²³² See, e.g., Ashe Schow, *Backlash: College Men Challenge 'Guilty Until Proven Innocent' Standard for Sex Assault Cases*, WASH. EXAMINER (Aug. 11, 2014), <http://www.washingtonexaminer.com/backlash-college-men-challenge-guilty-until-proven-innocent-standard-for-sex-assault-cases/article/2551863> [<https://perma.cc/RQ5F-VUZH>]; Cathy Young, *Guilty Until Proven Innocent: The Skewed White House Crusade on Sexual Assault*, TIME (May 6, 2014), <http://time.com/88407/the-white-houses-report-on-campus-sexual-assault-relies-on-the-lowest-common-denominator/> [<https://perma.cc/2G94-GGAG>].

²³³ See Corey Yung, *The National Review and the Politicization of Rape*, CONCURRING OPINIONS (May 22, 2014), <https://concurringopinions.com/archives/2014/05/the-national-review-and-the-politicization-of-rape.html> [<https://perma.cc/F7FD-CVW6>].

²³⁴ One response to this argument might be that because the public already believes rape law is far broader than it is, it might as well be codified to fulfill that mistaken belief. Indeed, there is substantial evidence that members of the public mistakenly believe that rape law has an applicability far greater than its real limits. See SCHULHOFER, *supra* note 2, at 17–18. This line of thinking has some appeal. It substantially underestimates, however, the degree to which further backlash is possible and would cause retrenchment of cases that are presently prosecuted.

²³⁵ See, e.g., TASLITZ, *supra* note 15, at 154 (discussing how masculine language norms at trial have undermined rape law reform); Gregory M. Matoesian, *Language, Law, and Society: Policy Implications of the Kennedy Smith Rape Trial*, 29 LAW & SOC'Y REV. 669, 672 (1995) (discussing the failure of rape law reform as due in part to juror hostility to rape victims).

²³⁶ *The Criminal Justice System: Statistics*, *supra* note 88.

concluded as such because of the embedded social attitudes that have undermined rape law reform.²³⁷ Such cynicism, however, has tremendous costs. It results in focus on misplaced solutions and often underestimates the positive potential of certain targeted policing reforms to make a significant difference. Model federal and state statutes embodying the proposals described below are included at the end of this Article, in Appendix A and B, respectively.

A. Resource Utilization

In 2008, an eighteen-year-old woman in Lynnwood, Washington, known only as “D.M.” in court filings, reported that she was tied up, threatened with a knife, and raped over a period of hours in her home.²³⁸ She alleged that her rapist avoided leaving evidence by wearing gloves and a mask, using wet wipes, forcing her to brush her teeth and shower, and taking her bedding and clothes with him. As police would discover much later, D.M.’s rapist also took photographs while he raped her.

Rather than investigate her accusation, the police dismissed her complaint as the product of an overactive imagination. Officers threatened that she would lose her state-subsidized housing if she failed a lie-detector test they wanted her to take. The victim’s foster parents and friends similarly doubted her because of perceived inconsistencies in her story. As a result of police intimidation, she decided not to pursue her criminal complaint further. Rather than simply let the case go, prosecutors charged D.M. with filing a false police report. To avoid higher criminal penalties and put the matter behind her, she pled guilty, paid a \$500 fine, and agreed to mental-health counseling.

Colorado police later found pictures of D.M. from the attack, as well as her identification card at the home of a serial rapist, Marc O’Leary. O’Leary confessed to multiple rapes in Washington and Colorado, including of D.M., leading to a prison sentence of over 300 years. Police in Washington reimbursed D.M. for the \$500 fine she paid based upon her guilty

²³⁷ See, e.g., Lewis Field, *The Fear of the Vindictive Shrew: Using Alternative Forms of Punishment to Change Societal Sentiment About Rape Laws*, 17 J. GENDER RACE & JUST. 515, 532–33 (2014); Corey Rayburn [Yung], *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUM. J. GENDER & L. 437, 480–83 (2006) (concluding that only radical reform or cultural change can decrease the rate of sexual violence in the United States).

²³⁸ See Sara Burnett, *Wash. Victim Reported ‘08 Rape, Was Charged: Case Now Linked to Colo. Assault Suspect*, DENVER POST, Apr. 11, 2014, at B1, available at 2011 WLNR 29294746; Ken Armstrong & T. Christian Miller, *An Unbelievable Story of Rape*, MARSHALL PROJECT (Dec. 16, 2015), <https://www.themarshallproject.org/2015/12/16/an-unbelievable-story-of-rape> [<https://perma.cc/HN74-CEDX>]; Diana Hefley, *Lynnwood Settles with Rape Victim for \$150K*, HERALD NET (Everett, Washington) (Jan. 16, 2014), <http://www.heraldnet.com/news/lynnwood-settles-with-rape-victim-for-150k/> [<https://perma.cc/8KMM-YXEL>]. These three articles describe the facts of the O’Leary case in this Section unless otherwise noted.

plea for filing a false report. D.M.'s subsequent lawsuit against the city was settled for \$150,000.

There are numerous resources for rape investigation that are substantially underutilized. First, rape kits should be tested as part of normal police practice. The value of rape kit testing is simply too high to ignore. Although the mass of untested rape kits in the United States is sometimes referred to as a “backlog,” the reasons for its existence show the term is inappropriate.²³⁹ The decision to not test rape kits is often a deliberate and conscious one. Further, any resource constraints that might have existed have been cured through federal allocations for rape kit testing.²⁴⁰ The evidence is substantial that even skeptical police are more likely to pursue cases with positive rape kit matches.²⁴¹

Second, police should be required to use the FBI's Violent Criminal Apprehension Program (“ViCAP”) and CODIS in every reported rape case.²⁴² The federal government created ViCAP in 1985 to allow for police to be able to access data, forensic information, and pattern analysis from law enforcement units across the country.²⁴³ Despite its potential utility in homicide and rape investigations and easy accessibility via the Internet, po-

²³⁹ See Jennifer E. Laurin, *Remapping the Path Forward: Toward a Systemic View of Forensic Science Reform and Oversight*, 91 TEX. L. REV. 1051, 1087–88 (2013) (“Once gathered, evidence typically makes its way to a storage location (often though not always within a police department) to await further decisions about its fate. Will it be submitted to a crime laboratory for analysis? If so, what will that analysis entail? And if that analysis is obtained, what will be the investigative response? Each of these decisions is far less automatic, far more variable, and far more subject to the discretion of upstream, nonlaboratory actors than is commonly understood.”); JOSEPH PETERSON ET AL., NAT’L INST. OF JUST., *THE ROLE AND IMPACT OF FORENSIC EVIDENCE IN THE CRIMINAL JUSTICE PROCESS* 122 (2010) (“[I]t is clear that criminal justice officials external to the laboratory screen much of the forensic evidence and have a major influence on evidence examination priorities and practices.”).

²⁴⁰ OFFICE OF THE PRESS SEC’Y, *Fact Sheet: Investments to Reduce the National Rape Kit Backlog and Combat Violence Against Women*, WHITE HOUSE (Mar. 16, 2015), <https://www.whitehouse.gov/the-press-office/2015/03/16/fact-sheet-investments-reduce-national-rape-kit-backlog-and-combat-viole> [<https://perma.cc/CUC6-DUN4>] (“The Sexual Assault Kit Initiative complements past legislation to address DNA backlogs, including the Sexual Assault Forensic Evidence Reporting (SAFER) Act, passed by Congress as part of the 2013 reauthorization of the Violence Against Women Act (VAWA). SAFER focuses on ending the rape kit backlog. The Sexual Assault Kit Initiative also builds upon the Debbie Smith Act of 2004, which amended the DNA Analysis Backlog Elimination Act of 2000 to include DNA testing of sexual assault kits.”).

²⁴¹ See Tasca, Rodriguez, Spohn & Koss, *supra* note 4, at 1172.

²⁴² *ViCAP Homicides and Sexual Assaults*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/wanted/vicap/homicides-and-sexual-assaults> [<https://perma.cc/8ACN-KHXS>] (last visited Jan. 13, 2016).

²⁴³ *ViCAP: Fighting Violent Crime for 25 Years*, FED. BUREAU OF INVESTIGATION (Aug. 26, 2010), https://www.fbi.gov/news/stories/2010/august/vicap-anniversary/vicap_anniversary [<https://perma.cc/CK4U-BHH5>].

lice rarely use ViCAP.²⁴⁴ The result is that police fail to identify serial rapists, such as O’Leary, who move between jurisdictions.²⁴⁵ Further, police also fail to submit new information to ViCAP because they do not use data for their department’s cases, creating a self-reinforcing cycle undermining ViCAP’s incredible potential. A mandate for use upon a rape report would solve the collective action and police apathy problems in regard to ViCAP. CODIS similarly provides a national DNA database that is not effectively used in rape cases.

Third, and of a more systemic nature, more resources need to be allocated to rape cases instead of broken windows and drug war policing. This proposal would require a more radical shift in police priorities but is consistent with numerous other calls for policing reforms in the last few years. Adding more officers and money to rape cases can bear direct as well as indirect benefits.²⁴⁶ For example, one common justification for aggressive disposal of rape cases by police is that investigations are resource and cost intensive.²⁴⁷ That lack of resources, however, also encourages police in the practice of “cutting corners” and developing bad habits in investigating rape cases.²⁴⁸ Providing adequate institutional support and incentives would afford police far more time to investigate rape complaints. By reorienting police away from traffic stops, stop and frisks, and petty crime and toward sexual violence cases, police can be encouraged to treat rape cases as more than a triage operation.

B. Training and Discipline

In 2008, an eleven-year-old girl in Washington, D.C., Danielle Hicks-Best, reported to the metropolitan police that she was raped by several men

²⁴⁴ See T. Christian Miller, *Why Can’t the FBI Identify Serial Rapists?*, THE ATLANTIC (July 30, 2015), <http://www.theatlantic.com/politics/archive/2015/07/vicap-fbi-database/399986/> [https://perma.cc/3EUZ-E8ZQ] (“Only about 1,400 police agencies in the U.S., out of roughly 18,000, participate in the system. The database receives reports from far less than 1 percent of the violent crimes committed annually. It’s not even clear how many crimes the database has helped solve. The FBI does not release any figures. A review in the 1990s found it had linked only 33 crimes in 12 years.”).

²⁴⁵ See *id.* (“emerging research suggests that [ViCAP] could be especially useful in rape investigations”).

²⁴⁶ See Rose Corrigan, *The New Trial by Ordeal: Rape Kits, Police Practices, and the Unintended Effects of Policy Innovation*, 38 LAW & SOC. INQUIRY 920, 926 (2013).

²⁴⁷ See Tasca, Rodriguez, Spohn & Koss, *supra* note 4, at 1159 (“[P]olice may be selective in allocating investigatory resources, due in part to the pressure to clear (or solve) cases and invest resources in cases they believe are likely to result in successful prosecution.” (internal citation omitted)).

²⁴⁸ See Rachel Dissell, *Missed Opportunities to Catch Serial Rapists Reveal Need for Better Investigations, More Detectives*, CLEVELAND PLAIN-DEALER (May 5, 2015), http://www.cleveland.com/court-justice/index.ssf/2015/05/post_14.html [https://perma.cc/SMH7-TC2V] (quoting Rebecca Campbell).

in their late teens and early twenties.²⁴⁹ At the time of her rapes, her parents reported to police that Hicks-Best was missing from home. Hicks-Best remembered being held in an abandoned building and raped repeatedly throughout the night by a number of adult attackers. Her attackers released her when someone told the rapists about a flier indicating that Hicks-Best had been reported missing.

Police repeatedly interrogated Hicks-Best to identify inconsistencies in her story even though two separate forensic examinations found evidence of non-consensual penetration including “vaginal tears, cuts, and scrapes.” Regardless of whether the case could have been prosecuted as a forcible rape, Hicks-Best was well below the age of consent (sixteen in the District) and any sex act with the alleged attackers would have constituted statutory rape in the jurisdiction. Nonetheless, police demanded a high level of specificity from Hicks-Best. Still traumatized and in the same clothes she wore during the attack, the eleven-year-old Hicks-Best had trouble remembering what had happened.

Several days after the original rape, Hicks-Best was staying with her uncle. He sent Hicks-Best to the corner store alone at night. At that time, several young men, including one who she says raped her during her previous kidnapping, abducted Hicks-Best again. She was taken to the same location as before and raped by two of the men who had previously raped her. Again, she was reported missing and police found her in the car of a person who had found her wandering the streets and was driving Hicks-Best home.

With her description of one of her attackers, police found and interviewed a twenty-one-year-old man. The man admitted knowing Hicks-Best but denied any role in her rape. Rather than investigating further, based upon discrepancies in her accounts, prosecutors charged Hicks-Best with filing a false complaint. With little legal assistance and confusion about the plea deal offered, Hicks-Best entered an Alford plea.²⁵⁰ The court made her a ward of the state and Hicks-Best was removed from her family. In response to the court’s decision, Hicks-Best turned to her father and said, “Daddy, I got raped and I got locked up.”²⁵¹

Through Freedom of Information Act requests, the Washington Post secured emails between police related to the case.²⁵² In one communication

²⁴⁹ See Joanna Walters, *An 11-Year-Old Reported Being Raped Twice, Wound Up with a Conviction*, WASH. POST (Mar. 12, 2015), https://www.washingtonpost.com/lifestyle/magazine/a-seven-year-search-for-justice/2015/03/12/b1cccb30-abe9-11e4-abe8-e1ef60ca26de_story.html?utm_term=.4338d3dbbd11 [https://perma.cc/UH4G-9PK5].

²⁵⁰ An Alford plea allows the defendant to concede that the state could prove criminal wrongdoing without admitting to that wrongdoing during allocution or otherwise. See generally *North Carolina v. Alford*, 400 U.S. 25 (1970).

²⁵¹ Walters, *supra* note 249 (quoting Mayo Best).

²⁵² 5 U.S.C. § 552 (2012).

between police lieutenants, the sender concluded “[a]ll sex was consensual [sic]. Parents are unable to accept the fact of this child’s promiscuous behavior caused this situation.”²⁵³ Hicks-Best’s rape kit was never tested because police concluded that she filed a false report. Because of the Post’s 2015 investigation of the rapes, the case has been reopened. The police have refrained from disciplining any police officers involved in mishandling the case “because too much time has passed since problems in the handling of the investigation came to light.”²⁵⁴

The attitudes exhibited by the police in regards to the rapes of Hicks-Best might seem poor fits for effective training. That conclusion undervalues the research showing how carefully designed training programs have shifted police attitudes.²⁵⁵ Regardless, for those police officers that do not respond to training, discipline provides a secondary mechanism for insuring police officers assigned to rape cases do not act like those investigating the Hicks-Best attacks. If systemic indifference to rape complaints impedes application of consistent disciplinary measures, civilian oversight or complaint mechanisms could be established.

The best available evidence has concluded that targeted training can have a real impact on policing practices in rape cases.²⁵⁶ When activists identify problems with policing, there are often vague calls for better training. What is sometimes missing, however, are specific proposals for reforming practices that have been shown to have positive effects. Many approaches to better policing practices are proven to make meaningful differences directly relevant to overcoming police hostility for victims.²⁵⁷ Evidence shows that well-designed cultural awareness training programs can make significant dif-

²⁵³ Walters, *supra* note 249.

²⁵⁴ Joanna Walters, *D.C. Seeks to Improve the Way Police Handle Rape Cases Involving Juveniles*, WASH. POST (May 20, 2015), https://www.washingtonpost.com/local/crime/dc-seeks-to-improve-the-way-police-handle-rape-cases-involving-juveniles/2015/05/20/f35eb9b6-f33b-11e4-bcc4-e8141e5eb0c9_story.html [https://perma.cc/QX5B-X6SZ].

²⁵⁵ See Joanna Jamel, *Researching the Provision of Service to Rape Victims by Specially Trained Police Officers: The Influence of Gender—An Exploratory Study*, 13 NEW CRIM. L. REV. 688, 693–94 (2010) (“Previous research on rape attrition has suggested that there have been improvements in some countries regarding the police response to female rape victims. Four police forces that had established specialist units to offer services to victims of rape, sexual assault, and domestic violence were evaluated, and it was found that these developments had led to some improvements in the treatment of rape victims.”).

²⁵⁶ *See id.*

²⁵⁷ See HUMAN RIGHTS WATCH, IMPROVING POLICE RESPONSE TO SEXUAL ASSAULT 3–4 (2013) (reviewing evidence gathered from national experts on police training regarding sexual assault finding how a victim-centered approach has significant positive effects); POLICE EXEC. RESEARCH FORUM, IMPROVING THE POLICE RESPONSE TO SEXUAL ASSAULT 9–10 (2012) (describing the ways that proper training can encourage police to stop focusing on statistical goals and instead fully investigate cases).

ferences in the handling of cases involving ethnic, racial, and sexual minorities.²⁵⁸ Making police aware of neurobiology research about how victims of trauma respond can overcome their distrust of rape victims.²⁵⁹ The simple fact is that most police officers involved in rape cases have no training regarding rape victims.²⁶⁰

Also, police training conducted in combination with prosecutor training has shown positive effects as well. As the crime funnel illustrates, police do not make their decisions in rape cases in isolation.²⁶¹ Prosecutors in particular can shape the heuristics and police methods so that they are not as distrusting of rape victims.²⁶² As discussed earlier in regards to the LAPD field research, prosecutors gave specific instructions to police officers to only pursue cases with corroborating evidence and force.²⁶³ Combining training for prosecutors and police can help prevent either miscommunication or reinforcement of negative police practices.²⁶⁴

When training fails, police officers who fail to investigate rape complaints need to be held accountable. Norms of discarding rape cases without any inquiry do not develop overnight. Removing the bad apples from rape cases as well as providing a clear disciplinary system can supplant hostile norms in police departments.²⁶⁵

C. Aligning Incentives

*In the Washington Heights neighborhood of New York City, in 2002, Daryl Thomas committed at least seven sexual assaults before police finally caught him.*²⁶⁶ *Police would likely have apprehended him sooner if they had investigated the numerous complaints against him.*²⁶⁷ *Instead, the police who*

²⁵⁸ See Commissioner M.J. Palmer, *Foreword to PSYCHOLOGY AND POLICING*, at ix (Neil Brewer & Carlene Wilson eds., 2013).

²⁵⁹ Rebecca Ruiz, *Why Don't Cops Believe Rape Victims?*, SLATE (June 19, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/06/why_cops_don_t_believe_rape_victims_and_how_brain_science_can_solve_the.html [<https://perma.cc/B5RC-QZT8>].

²⁶⁰ See AM. CIVIL LIBERTIES UNION, *RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING* 35–36 (2015).

²⁶¹ See *supra* notes 78–108 and accompanying text.

²⁶² See Rachel M. Venema, *Police Officer Schema of Sexual Assault Reports: Real Rape, Ambiguous Cases, and False Reports*, 31 J. INTERPERSONAL VIOLENCE 872, 879 (2016).

²⁶³ See Spohn & Tellis, *supra* note 99, at 1389.

²⁶⁴ AM. CIVIL LIBERTIES UNION, *supra* note 260, at 37–38.

²⁶⁵ *Id.* at 40–41.

²⁶⁶ Graham Rayman, *NYPD Tapes 3: A Detective Comes Forward About Downgraded Sexual Assaults*, VILLAGE VOICE (June 8, 2010), <http://www.villagevoice.com/news/nypd-tapes-3-a-detective-comes-forward-about-downgraded-sexual-assaults-6429667> [<https://perma.cc/DRV5-9LL9>].

²⁶⁷ See *id.* (according to retired NYPD Detective First Grade Harold Hernandez, “Thomas lived in the neighborhood, which made it even more likely that he would have been caught had a pattern been announced”).

interviewed his victims downgraded the reported offenses to low-priority designations such as “criminal trespassing.”²⁶⁸

New York Police Department (“NYPD”) Detective First Grade Harold Hernandez eventually arrested Daryl Thomas, leading to the discovery of prior bungled police efforts. When Officer Hernandez interrogated Thomas for his last sexual assault, Thomas admitted to committing similar crimes on “seven or eight” prior occasions, all within two months of his arrest in the Washington Heights neighborhood.²⁶⁹ Officer Hernandez was surprised because there had been no alert issued regarding a wanted offender matching Thomas’ description. Thomas provided the dates and locations of his prior attacks to Officer Hernandez. This information allowed Officer Hernandez to comb through police records to see if those attacks were reported and, if so, how they were investigated.

To the officer’s horror, in the six instances where Thomas’ sexual assaults had been reported, none of the cases had been classified as rapes or even lower-level sexual assaults. Instead, police had categorized the crimes alleged as misdemeanor trespass and, in one case, criminal possession of a weapon. The facts of the cases told a different story: Victims alleged that Thomas had kidnapped them at knifepoint, often in apartment hallways, before sexually assaulting them in their homes. With the information gathered by Officer Hernandez, prosecutors were able to indict Thomas for multiple counts of sexual assault resulting in a total sentence of fifty years imprisonment.²⁷⁰

The reason for prior downgrading and misclassifying the sexual offenses was to make the precinct’s crime statistics look better on paper by having fewer violent crimes reported.²⁷¹ As the NYPD switched its policing to the CompStat system that linked precinct success to statistics of reported crimes, high ranking officers would regularly pressure officers to downgrade sexual offenses to petty crimes. None of the officers or their commanders were disciplined for what was, and continues to be, widespread police practice. In the case of Daryl Thomas, he attacked at least seven victims after the first report to police of his criminal sexual conduct in Washington Heights.

The manner through which the police gatekeeping involved in the Daryl Thomas case became public also illustrates the systemic pattern of police failing to investigate rape complaints. In 2008 and 2009, NYPD Officer Adrian Schoolcraft, serving in the 81st Precinct of the NYPD in Brooklyn, decided

²⁶⁸ *Id.* (based upon recorded statements of retired NYPD Detective First Grade Harold Hernandez).

²⁶⁹ *Id.* (quoting Officer Hernandez’s statement about what Thomas told him).

²⁷⁰ *Id.*

²⁷¹ *Id.*

to turn his investigative skills toward uncovering the corruption among his colleagues and superiors.²⁷² Officer Schoolcraft had become outraged by the widespread corruption he had observed in the NYPD. To that end, he began surreptitiously recording his interactions with other officers. The recordings that Officer Schoolcraft later made available to the Village Voice included numerous instances of command officers personally calling victims to intimidate them into withdrawing complaints, ordering the downgrading of criminal offenses to make the Precinct's key crime statistics look better, and linking compensation and promotions to individual officer crime statistics. When other police officers in the 81st Precinct discovered Officer Schoolcraft's notes about police corruption, they tried to discredit him. Deputy Chief Michael Marino went with other officers to Schoolcraft's home. They forced Schoolcraft to a psychiatric care facility where they had him involuntarily committed for six days.²⁷³ There was no actual evidence that Officer Schoolcraft suffered from any mental illness and the facility repeatedly resisted efforts to admit him before succumbing to pressure from the police.²⁷⁴ The officers hoped to create a record that Officer Schoolcraft was mentally ill so that his allegations would be disbelieved. They did not know that he had recordings validating his notes and the police intrusion in his house leading to the involuntary commitment.

When the Village Voice released Officer Schoolcraft's tapes, dozens of current and retired officers came forward to offer similar stories of police mishandling of investigations.²⁷⁵ Among them was Officer Hernandez. He provided the newspaper with the evidence showing how police had allowed a serial sexual offender, Daryl Thomas, to remain loose through gatekeeping practices widely used at the time. Without Officer Schoolcraft's courageous actions, the story of police unscrupulousness in regard to Daryl Thomas would likely have never been made public.

The research and stories throughout this Article have indicated that many rape cases are not investigated because of intentional conduct and not because of mere mistaken beliefs. These intentional acts are often the result of department policies that actually create incentives for ignoring rape complaints. Statistical policing in particular has either caused or exacerbated

²⁷² Graham Rayman, *The NYPD Tapes: Inside Bed-Stuy's 81st Precinct*, VILLAGE VOICE (May 4, 2010), <http://www.villagevoice.com/news/the-nypd-tapes-inside-bed-stuys-81st-precinct-6429434> [<https://perma.cc/YE6S-8NED>].

²⁷³ Jim Dwyer, *An Officer Had Backup: Secret Tapes*, N.Y. TIMES (Mar. 13, 2012), <http://www.nytimes.com/2012/03/14/nyregion/whistle-blower-police-officer-had-backup-secret-recordings.html> [<https://perma.cc/BHE6-DP6B>].

²⁷⁴ *Id.*

²⁷⁵ Rayman, *supra* note 272.

many of the problems outlined in this Article.²⁷⁶ That is, police have increased gatekeeping practices in response to political and institutional pressures to meet benchmarks for decreased crime.²⁷⁷ Moving away from such statistical goals, at least in sexual violence cases, would eliminate one of the primary motives for police to dismiss rape complaints at early stages of investigation. Further, it would allow police to reorient training problems so that paper clearances are not incentivized.

The culture in the NYPD that led Adrian Schoolcraft to spy on his co-workers was the product of a system that rewarded failure and condemned actual investigation. That is because police officers were judged by clearing cases whether or not they actually investigated the underlying complaint. Officers wishing to keep their jobs and/or advance their careers viewed rape cases as a waste of time and resources. NYPD captains regularly reinforced such behavior by telling officers to discourage complaints to meet statistical quotas.²⁷⁸ Such practices must be banned for norms to change in police departments.

CONCLUSION

The attitudes of police are often more hostile and dismissive of rape victims than those exhibited in the general population. The gatekeeping mentality of police toward rape victims is both a symptom and cause of the general cultural hostility toward stories of sexual violence. Consider the numerous stories of victims reporting rapes peppered throughout this Article. All the events described have occurred since the turn of the millennium and cannot be dismissed as shortcomings of past practices.²⁷⁹ Individually, each account could be just an anomaly to a functioning criminal justice sys-

²⁷⁶ See Ryan Jacobs, *Just Like in "The Wire," Real FBI Crime Stats Are "Juked,"* MOTHER JONES (June 19, 2012), <http://www.motherjones.com/mojo/2012/06/fbi-crime-stats-fudged-the-wire-nypd> [<https://perma.cc/3CAW-EL2T>] (describing the way statistical benchmarking in police causes detrimental policing practices).

²⁷⁷ See Yung, *supra* note 25, at 1245 ("What is worse is that the extent of rape in America has been covered up—rape victims have been denied basic dignity, so that some police could manipulate statistics to simply achieve artificially designated crime benchmarks.").

²⁷⁸ SIEGEL, *supra* note 93, at 34.

²⁷⁹ Police disbelief of rape victims has a long history, but this Article focuses on cases that could not be dismissed merely as history. It is also not a phenomenon unique to the United States. For example, Canada's deadliest serial killer, Clifford Olson, might have been apprehended far sooner had police simply believed an early report of his sexual violence. In 1981, Kim Werbecky reported that Clifford Olson repeatedly raped her for twelve hours at gunpoint. *Olson Freed After 1981 Rape, Woman Charges*, GLOBE AND MAIL (Canada), June 10, 1994, LEXISNEXIS NEWS. The police discovered Werbecky had been a child prostitute and concluded that she was lying, as if being a victim of child prostitution was a reason to disbelieve a person. *Id.* After Werbecky's complaint, Olson went on to rape and kill ten girls and women before he was finally arrested, charged, and convicted. *Id.*

tem. Collectively, however, they paint a picture of problems far more systemic in nature. Each narrative contains instances of what most would consider egregious police misconduct and are horrific to read in their entirety. Common symptoms of gatekeeping are present in each example.

At some point, it must be asked if the American criminal justice system can continue to abide the systemic injustices in modern rape law. How can anything or anyone justify the Washington, D.C. police choosing not to investigate an eleven year old's kidnapping and gang rape by adults because—as a police lieutenant's emails indicate—officers believed that “[a]ll sex was consensual [sic] [and] [p]arents are unable to accept the fact of this child's promiscuous behavior caused this situation”?²⁸⁰ How is it acceptable that the police sex crimes unit in New Orleans conducts absolutely no investigation in a case in which a two year old tested positive for a sexually transmitted infection and classifies over 1,300 rape complaints in three years as non-criminal matters?²⁸¹ How have decades of rape law reform produced little to no differences in the rate at which rape cases are prosecuted and fewer still that result in conviction?²⁸²

A remarkable aspect of the stories discussed in this Article is that they involved rapes by strangers. Longstanding conventional wisdom has been that the criminal justice system is generally reliable, or at least more reliable, in addressing stranger complaints.²⁸³ Yet, police aggressively rebuffed complaints even with evidence of substantial physical injuries and the identity of the perpetrator. In a world where police regularly dismiss complaints of violent stranger rapes, an intoxicated victim of non-stranger rape with no outward injuries stands little chance in seeing his or her claim investigated.

Although the narrative accounts provide one lens for understanding the failings of the criminal justice system in regard to rape, the substantial institutional and empirical evidence described in this Article supports the same conclusions. Surveys of police, studies of police-generated crime data, and extensive investigative journalism all point to systemic failure by police to

²⁸⁰ See Walters, *supra* note 249.

²⁸¹ See *supra* notes 109–148 and accompanying text (discussing the repeated and systemic failings of New Orleans police in handling rape cases uncovered by local and national media as well as state-level investigations).

²⁸² See Francis X. Shen, *How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform*, 22 COLUM. J. GENDER & L. 1, 8–9 (2011) (“Rape thus remains a critical policy problem, despite a series of federal, state, and local reforms It is clear, then, that many resources have been invested in solving the problem of rape in the United States. It is also clear, however, that these investments have not led to great payoff.”).

²⁸³ See, e.g., Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147, 155 (2011) (“While ‘real-stranger’ rapes—the paradigmatic rape narrative of a stranger forcing himself on a chaste victim in a dark alley—are treated very seriously by the criminal justice system, acquaintance rapes are still underreported, under-enforced, and under-punished.”).

investigate rape cases. Additionally, the evidence based upon police clearance rates and submitted crime data shows that the problems of police gatekeeping are getting worse, not better.

Until police gatekeeping in rape cases is addressed, even the most well-intentioned statutory and evidentiary reforms will fail if not coupled with changes to policing practices. The role of police gatekeeping in short-circuiting rape cases is too fundamental to overlook. History has shown that there is no trickle-down effect from trial-focused reforms on policing practices. Whether the reforms or statutes suggested in this Article are adopted, hopefully the arguments herein will at least encourage scholars and activists to stop obsessing over consent standards, rape shield laws, and other trial-level reforms. Unless attention is redirected at the most significant bottleneck in rape criminal justice, police, there simply will not be any meaningful progress made in decreasing sexual violence in America. Society will continue to overlook that basic reality at the peril of people across the country.

APPENDIX A: MODEL FEDERAL STATUTE

TITLE I: ENHANCING POLICE RESPONSIVENESS TO SEXUAL VIOLENCE COMPLAINTS

Congress finds that the high incidence of sexual violence in the United States threatens the peace, security, and general welfare of the Nation and its citizens. To prevent sexual violence and to insure the greater safety of the people, law enforcement efforts must be better coordinated, intensified, and made more effective at all levels of government.

Congress finds further that sexual violence is primarily, but not exclusively, a problem that must be dealt with by State and local governments if it is to be controlled effectively.

It is therefore the declared policy of the Congress to assist State and local governments in strengthening and improving law enforcement at every level by national assistance. It is the purpose of this Title to (1) encourage States and units of general local government to prepare and adopt comprehensive plans based upon their evaluation of State and local problems of law enforcement; (2) authorize grants to States and units of local government in order to improve and strengthen law enforcement; and (3) encourage research and development directed toward the improvement of law enforcement and the development of new methods for the prevention and reduction of crime and the detection and apprehension of criminals.

PART A—LAW ENFORCEMENT ASSISTANCE

SECTION 101: AUTHORITY – All States, Tribal governments of federally recognized Indian tribes, and units of local government, as defined by the Violence Against Women Reauthorization Act of 2013:

- (1) receiving federal funds as part of the Omnibus Crime Control and Safe Streets Act, whether or not specifically authorized by the Violence Against Women Reauthorization Act of 2013;
 - (2) that accept federal funds or assistance as part of this Act;
 - (3) having been the location of sexual violence having a nexus with interstate commerce, foreign commerce, or commerce from or to Indian Country; or
 - (4) having had persons commit sexual violence and travel in interstate commerce, foreign commerce, or commerce from or to Indian Country;
- shall be subject to the provisions of this Act.

SECTION 102: REQUIREMENTS – All States and units of local government shall insure that:

- (1) while recognizing the inherent resource constraints present in any governmental unit, police officers fully investigate all rape or sexual assault complaints as outlined in the Federal Bureau of Investigation's

- (FBI) Uniform Crime Reporting Program before determining that any such complaint is false or unfounded;
- (2) all crime data submitted through the FBI's Uniform Crime Reporting Program or National Incident-Based Reporting System includes information about all reported rapes in each jurisdiction;
 - (3) no police department offers financial or professional incentives or rewards that encourage police to clear rape and sexual assault cases without full investigation;
 - (4) police officers whose duties include any role in sexual assault and/or rape cases in their jurisdictions are given regular training that:
 - a. insures best practices when interviewing persons reporting having been victims of sexual violence;
 - b. is culturally competent as to differing norms and behavior of responses of victims of sexual violence when interviewed; and
 - c. includes the best available research from various disciplines about the rates of false reporting of rape and sexual assault.
 - (5) police officers who fail to fully investigate complaints of sexual assault or rape, or assign others to fail to do so, as described in this Act are subject to appropriate discipline. Such discipline, at a minimum, will insure that no police officer is employed who has failed on at least three occasions to fully investigate complaints of sexual assault or rape in any jurisdiction;
 - (6) potential evidence contained within a sexual assault kit (SAK), sexual assault forensic evidence (SAFE) kit, sexual assault evidence collection kit (SAECK), sexual offense evidence collection (SOEC) kit, or physical evidence recovery kit (PERK) will be tested without delay;
 - (7) the cost of a SAK, SAFE kit, SAECK, SOEC kit, or PERK shall either be paid by either the State, unit of local government, or health insurance company and not the person tested; and
 - (8) police officers submit all appropriate information found as the result of testing of a SAK, SAFE kit, SAECK, SOEC kit, or PERK to the FBI's Violent Criminal Apprehension Program (ViCAP) without delay.

SECTION 103: GRANTS – For the next five fiscal years, the Attorney General shall make the following funds and assistance available to all States, Tribal governments of federally recognized Indian tribes, and units of local government, as defined by the Violence Against Women Reauthorization Act of 2013, for:

- (1) comprehensive police training for all police officers in the jurisdiction who have any normal role in sexual violence cases. Such training will comply with the requirements of Section 102(4) of this Act; and
- (2) technological assistance for use of federal and state databases which collect forensic and other evidence of perpetrators of sexual violence.

PART B – COMPLIANCE AND ACCOUNTABILITY

SECTION 101: NON-COMPLIANCE – Any State, Tribal government of federally recognized Indian tribes, or unit of local government who fails to meet the Requirements of this Act shall:

- (1) be immediately denied any funding or assistance provided under this Act, Omnibus Crime Control and Safe Streets Act, and the Violence Against Women Reauthorization Act of 2013;
- (2) compensate the Federal Government of the United States of America for any costs accrued by the failure to meet the terms of this Act; and
- (3) be subject to immediate audit review by the Attorney General for compliance in all other federal crime programs.

SECTION 102: ACCOUNTABILITY – All grants awarded by the Attorney General under this Act shall be subject to the following accountability provisions:

- (1) Audit Requirement – beginning in the first fiscal year beginning after the date of the enactment of this Act, and in each fiscal year thereafter, the Inspector General of the Department of Justice shall conduct audits of recipients of grants under this Act to prevent waste, fraud, and abuse of funds by grantees. The Inspector General shall determine the appropriate number of grantees to be audited each year; and
- (2) Annual Reports – each jurisdiction receiving grants under this Act shall submit annual reports to the Attorney General concerning the status of compliance of that jurisdiction with the provisions of this Act.

APPENDIX B: MODEL STATE STATUTE²⁸⁴

TITLE I: ENHANCING POLICE RESPONSIVENESS TO SEXUAL VIOLENCE COMPLAINTS

The State finds that the high incidence of sexual violence threatens the peace, security, and general welfare. To prevent sexual violence and to insure the greater safety of the people, law enforcement efforts must be better coordinated, intensified, and made more effective at all levels of government.

PART A—LAW ENFORCEMENT ASSISTANCE

SECTION 101: REQUIREMENTS – All units of local government shall insure that:

- (1) while recognizing the inherent resource constraints present in any governmental unit, police officers fully investigate all rape or sexual assault complaints as outlined in the Federal Bureau of Investigation's (FBI) Uniform Crime Reporting Program before determining that any such complaint is false or unfounded;
- (2) all crime data submitted through the FBI's Uniform Crime Reporting Program or National Incident-Based Reporting System includes information about all reported rapes in each jurisdiction;
- (3) no police department offers financial or professional incentives or rewards that encourage police to clear rape and sexual assault cases without full investigation;
- (4) police officers whose duties include any role in sexual assault and/or rape cases in their jurisdictions are given regular training that:
 - a. insures best practices when interviewing persons reporting having been victims of sexual violence;
 - b. is culturally competent as to differing norms and behavior of responses of victims of sexual violence when interviewed; and
 - c. includes the best available research from various disciplines about the rates of false reporting of rape and sexual assault.
- (5) police officers who fail to fully investigate complaints of sexual assault or rape, or assign others to fail to do so, as described in this Act are subject to appropriate discipline. Such discipline, at a minimum, will insure that no police officer is employed who has failed on at least three occasions to fully investigate complaints of sexual assault or rape in any jurisdiction;

²⁸⁴ Because each state's governmental design is different, the provisions in this model statute would obviously need to be tailored to the specifics of the relevant state.

- (6) potential evidence contained within a sexual assault kit (SAK), sexual assault forensic evidence (SAFE) kit, sexual assault evidence collection kit (SAECK), sexual offense evidence collection (SOEC) kit, or physical evidence recovery kit (PERK) will be tested without delay;
- (7) the cost of a SAK, SAFE kit, SAECK, SOEC kit, or PERK shall either be paid by either the State, unit of local government, or health insurance company and not the person tested; and
- (8) police officers submit all appropriate information found as the result of testing of a SAK, SAFE kit, SAECK, SOEC kit, or PERK to the FBI's Violent Criminal Apprehension Program (ViCAP) without delay.

SECTION 103: GRANTS – For the next five fiscal years, the State shall make the following funds and assistance available to all units of local government for:

- (1) comprehensive police training for all police officers in the jurisdiction who have any normal role in sexual violence cases. Such training will comply with the requirements of Section 101(4) of this Act; and
- (2) technological assistance for use of federal and state databases which collect forensic and other evidence of perpetrators of sexual violence.

PART B – COMPLIANCE AND ACCOUNTABILITY

SECTION 101: NON-COMPLIANCE – Any unit of local government who fails to meet the Requirements of this Act shall:

- (1) be immediately denied any funding or assistance provided under this Act;
- (2) compensate the State for any costs accrued by the failure to meet the terms of this Act; and
- (3) be subject to immediate audit review by the State for compliance in all other federal crime programs.

SECTION 102: ACCOUNTABILITY – All grants awarded by the State under this Act shall be subject to the following accountability provisions:

- (1) Audit Requirement – beginning in the first fiscal year beginning after the date of the enactment of this Act, and in each fiscal year thereafter, the State shall conduct audits of recipients of grants under this Act to prevent waste, fraud, and abuse of funds by grantees. State shall determine the appropriate number of grantees to be audited each year; and
- (2) Annual Reports – each jurisdiction receiving grants under this Act shall submit annual reports to the State concerning the status of compliance of that jurisdiction with the provisions of this Act.