

Rape Process Templates: A Hidden Cause of the Underreporting of Rape

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ABSTRACT: Fewer than a third of rape victims report their rape to the police. This low reporting rate appears to exist not only in jurisdictions with police departments that intentionally discourage victims, but also, paradoxically, in areas with departments that believe they encourage victims to report and pursue allegations of rape. Relying on original qualitative research conducted with two local police departments (a city department and a university department) as a case study, this Note identifies a likely cause of the widespread underreporting—“rape process templates”—and offers the foundation for a solution. Rape process templates are unwritten narratives about how rape allegations progress that are so commonly applied to rape investigations and prosecutions that they become preset outlines of how those investigations and prosecutions proceed. According to the templates, rape prosecutions are “he said, she said” cases that lack physical, corroborating evidence and involve a “brutal cross-examination” of the victim at trial. In reality, however, only a small fraction of rape investigations and prosecutions necessarily have these characteristics. But despite that reality, imposing these templates onto rape investigations causes the allegations to become “he said, she said” cases that will involve a “brutal cross-examination.” By prompting this self-fulfilling cycle, the templates preserve the widespread traditional hostility to rape allegations and the hesitancy to consider provable anything but a small class of those allegations. Based on these insights about rape process templates and the case study’s demonstration of the effectiveness of federal oversight of university police departments in making the departments more responsive to the realities of rape, this Note recommends a system of state oversight over municipal police departments that is designed to reduce the deployment and effect of the templates. The state oversight must require

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mandatory training on the unfounded assumptions behind the templates, regular meetings with local victim advocates, and the tracking and evaluation of granular metrics on the progress of rape allegations through police investigations.

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INTRODUCTION

Exceptionally few rape victims—fewer than a third¹—report their rape to the police; an even smaller number pursue their allegation to an arrest.² Though some victims affirmatively choose not to report, many do not report or pursue their allegations because they face powerful external barriers that make reporting seem fruitless. One powerful barrier is the treatment of rape victims by police officers, even well-intentioned and facially unbiased ones.

As this Note reveals, police detectives, often unintentionally, impose preconceived assumptions about how rape investigations inevitably will proceed onto their investigations. This imposition creates a self-reinforcing cycle in which the detectives ensure, again unintentionally, that all rape investigations do indeed fit into those preconceived templates, despite the mismatch between the templates and reality. In response, rape victims avoid or halt the investigatory process as they discover the existence of these preconceived notions of how their rape investigation will proceed and as they see how poorly these notions fit the realities of their own rape.

A significant number of rape victims choose not to officially report or pursue their allegations of rape. According to the Centers for Disease Control and

1. Jennifer L. Truman & Lynn Langton, *Criminal Victimization, 2014*, BUREAU JUST. STAT. 7 (Sept. 29, 2015), <https://www.bjs.gov/content/pub/pdf/cv14.pdf>.

2. This paper uses the terms “rape” rather than “sexual assault” and “rape victims” instead of “survivors” because the detectives interviewed tended to use these terms. This choice does not reflect a view on what terms are most appropriate outside of this context.

Prevention (CDC) and the Department of Justice (DOJ),³ about 20% of women in America (23 million women) are raped during their lives.⁴ Around two million women are raped each year.⁵ Yet fewer than a third of these victims—somewhere between 5% and 33%—report their rape to the police.⁶ More than twice that, 65% of rape victims, disclose their rape to a close friend or family.⁷ This reporting rate to police for rape is much lower than the reporting rate for other violent crime, such as assault (50%) and robbery (60%).⁸

Though the rate of false reports is low, few of the rape allegations reported lead to arrests or convictions. Fewer than 5% of rape allegations are unfounded.⁹ Yet only approximately 30% of reported rapes result in an arrest or prosecution,¹⁰

3. The Bureau of Justice Statistics (BJS) provides other statistics that are not used in this Note. The BJS National Crime Victimization Survey (NCVS) reports fewer rapes (284,000 in 2014), but acknowledges that these lower statistics likely are inaccurate. Truman & Langton, *supra* note 1, at 2 tbl.1. In fact, recognizing the “concern about potential underestimation of rape and sexual assault on the NCVS,” the BJS itself commissioned the National Research Council (NRC) to evaluate the accuracy of its own NCVS in terms of “measuring incidents of rape and sexual assault from the criminal justice perspective.” Comm. on Nat’l Statistics Div. of Behavioral & Soc. Sci. & Educ., *Estimating the Incidence of Rape and Sexual Assault: Panel on Measuring Rape and Sexual Assault in Bureau of Justice Statistics Household Surveys*, NAT’L RES. COUNCIL 2 (Candace Kruttschnitt et al. eds., 2014), <http://www.nap.edu/read/18605/chapter/1>. The NRC concluded that the NCVS “does not measure . . . rape and sexual assault with the precision needed” and that it likely underreports rape. *Id.* at 5; *see also* Corey Rayburn Yung, *Rape Law Fundamentals*, 27 YALE J.L. & FEMINISM 1, 38-41 (2015) (explaining why FBI crime statistics so dramatically undercount rape).

4. Matthew J. Breiding, Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Victimization—National Intimate Partner and Sexual Violence Survey, United States, 2011, 63 MORBIDITY & MORTALITY WKLY. RPT. SURVEILLANCE SUMMARIES 1, 4 (Sept. 5, 2014), <http://stacks.cdc.gov/view/cdc/37108>; Patricia Tjaden & Nancy Thoennes, Full Report of the Prevalence, Incidence, and Consequences of Violence: Findings From the National Violence Against Women Survey, NAT’L INST. JUST. 13 (Nov. 2000), <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf>. The report authored by Breiding defines “rape” as “completed or attempted forced penetration or alcohol- or drug-facilitated penetration.” Breiding, *supra*, at 3.

5. Breiding, *supra* note 4, at 4; *see also* Bonnie S. Fisher et al., *The Sexual Victimization of College Women*, U.S. DEP’T JUST. 10 (Dec. 2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf> (relying on data from the 1997 National College Women Sexual Victimization survey to estimate that 5% of college women are raped each year); Dean G. Kilpatrick et al., *Drug-Facilitated, Incapacitated, and Forcible Rape: A National Study*, MED. U. S.C. (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf> (reporting that 18% of women are raped in their lives).

6. Truman & Langton, *supra* note 1, at 7.

7. Lisa A. Paul et al., *College Women’s Experiences With Rape Disclosure: A National Study*, 19 VIOLENCE AGAINST WOMEN 486 (2013) (compiling statistics on the incidence and reporting of rape from dozens of published studies and surveys).

8. Truman & Langton, *supra* note 1, at 7.

9. David Lisak et al., *False Allegations of Sexual Assault*, 16 VIOLENCE AGAINST WOMEN 1318 (2010) (reporting that only 5.9% of cases at a “major Northeastern university” were false reports); Cassia Spohn et al., *Unfounding Sexual Assault: Examining the Decision To Unfound and Identifying False Reports*, 48 L. & SOC’Y REV. 161, 174 (2014) (reporting that in the Los Angeles Police Department, “4.5 percent of all cases . . . were false reports”).

10. *Sourcebook of Criminal Justice Statistics Online*, ST. U. N.Y. ALBANY tbl.4.2.2011, <http://www.albany.edu/sourcebook/pdf/t422011.pdf> (containing data on arrest rates per 100,000 inhabitants from the DOJ’s Bureau of Justice Statistics); *id.* tbl.3.106.2012, <http://www.albany.edu/sourcebook/pdf/t31062012.pdf> (containing data on the “Estimated number and rate (per 100,000 inhabitants) of offenses known to police” from the Bureau of Justice Statistics). The DOJ statistics show that in 2011, there were 27.0 forcible rapes per 100,000 people reported to the police and only 6.3 arrests per 100,000 for forcible rape. The numbers are consistent for 2010 and 2009 as well. *Id.*; *see also* Kathleen Daly & Brigitte Bouhours, *Rape and Attrition in the Legal Process*, 39 CRIME &

and of those that do result in an arrest, only around 50% are prosecuted and result in a felony conviction.¹¹ In total, between 0.5% and 5% of all rapes committed result in any conviction (felony or misdemeanor).¹²

The statistics on the incidence, reporting rates, and arrest and conviction rates for rape alone do not prove that victims choose not to pursue or to drop rape allegations because of police action. Police and prosecutors drop some cases with a cooperative victim and sometimes rape victims drop cases for reasons not directly related to their confidence in the investigation and prosecution. Rape victims may distrust the criminal justice system in general,¹³ fear its consequences for themselves¹⁴ or for their rapist,¹⁵ expect not to be satisfied with

JUST. 565, 568 (2010) (reporting that only 30% of sexual offenses reported to the police proceed to prosecution).

11. *Sourcebook of Criminal Justice Statistics Online*, *supra* note 10, tbl.5.0002.2004, <http://www.albany.edu/sourcebook/pdf/t500022004.pdf> (“Felony convictions and sentences and rate per 100 arrests”); *id.* tbl.5.58.2004, <http://www.albany.edu/sourcebook/pdf/t5582004.pdf> (“Conviction offense of felony defendants in the 75 largest counties”); Daly & Bouhours, *supra* note 10 (reporting that 12.5% of sexual offenses reported to the police result in any conviction).

12. Kimberly A. Lonsway & Joanne Archambault, *The “Justice Gap” for Sexual Assault Cases*, 18 VIOLENCE AGAINST WOMEN 145, 157 (2012) (aggregating statistics from the DOJ’s Bureau of Justice Statistics).

13. BETH RICHIE, ARRESTED JUSTICE 6 (2012) (“[M]ost vulnerable young women of color . . . d[o] not turn to formal systems as a remedy for their victimization because of the strong distrust of the criminal legal system in their disadvantaged communities.”); *see also* Donna Coker et al., *Responses from the Field: Sexual Assault, Domestic Violence, and Policing: Highlights from the Full Report*, AM. CIV. LIBERTIES UNION 3-4 (Oct. 2015), <https://www.aclu.org/report/highlights-responses-field> (providing a survey of nine hundred “[a]dvocates, service providers, attorneys, and people working in membership-based organizations” related to domestic violence and sexual assault) (reporting that over 80% of respondents believed that marginalized communities’ relationship with the police influenced victims’ willingness to contact the police).

14. Victims have a number of fears about the consequences of the criminal justice process. One is that sending their rapist to jail will lead to more violence once he returns. *See* Donna Coker & Ahjané D. Macquoid, *Why Opposing Hyper-Incarceration Should Be Central to the Work of the Anti-Domestic Violence Movement*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 585 (2015); Angela P. Harris, *Heteropatriarchy Kills*, 37 WASH. U. J.L. & POL’Y 13, 26-32 (2011). A second fear is that a report will reveal the victim’s own lawbreaking. *See* Michael Kagan, *Immigrant Victims, Immigrant Accusers*, 48 U. MICH. J.L. REFORM 915, 921 (2015) (describing undocumented immigrant victims’ concerns about deportation); Barbara S. Jones et al., *Report of the Response Systems to Adult Sexual Assault Crimes Panel*, U.S. DEP’T JUST. 8 (June 2014), http://responsesystemspanel.whs.mil/public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf (explaining that victims fear “prosecution and punishment for their own minor collateral misconduct” in the context of the military); Christopher P. Krebs et al., *The Campus Sexual Assault (CSA) Study: Final Report*, NAT’L INST. JUST. 2-9 (Oct. 2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> (College “victims . . . may be concerned about reprisal for violating [drug and alcohol] policies.”).

15. Some victims worry about the consequences of a criminal conviction for their rapist, such being added to a sex offender registry for the rest of his life. *See, e.g.*, N.J. STAT. ANN. § 2C:7-1 to 7-19 (West 2017) (requiring sex offenders to register in a state registry for the rest of their lives); Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101 (2007); Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435 (2010).

a conviction,¹⁶ or not identify what happened to them as rape.¹⁷ Fortunately, there are alternatives to the criminal justice system that may provide a better response for these victims.¹⁸

But many victims may be willing to engage with the police and want convictions, and yet do not report or pursue their allegations. A vast majority do not report because they feel that police officers will not believe them or will blame them for their rape.¹⁹ What actions and messages convey this disbelief and blame?²⁰ What can be done to prevent the communication of such messages? These are the questions that this Note seeks to answer.

These questions have remained unanswered in part because the popular focus is on overtly biased detectives, their egregious actions, and their departments' toleration of their behavior. The Missoula Police Department and the University of Montana Office of Public Safety, as described in the popular nonfiction book *Missoula*²¹ and in agreements with the DOJ,²² are examples. In

16. Judith Lewis Herman, *Justice from the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 575 (2005) (“[F]or many victims, even a successful legal outcome does not promise much satisfaction because their goals are not congruent with the sanctions that the system imposes.”); Heather Strang & Lawrence W. Sherman, *Repairing the Harm*, 2003 UTAH L. REV. 15, 18.

17. Fisher et al., *supra* note 5, at 22 (reporting that more than half the victims of behavior that would be legally classified as rape do not “consider this incident to be a rape”); see ROBIN WARSHAW, I NEVER CALLED IT RAPE 50, 56 (1988).

18. For other remedies, see, for example, Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence*, 29 CARDOZO L. REV. 1487 (2008) (focusing on civil law responses); Leigh Goodmark, *Law Is the Answer? Do We Know that for Sure?*, 23 ST. LOUIS U. PUB. L. REV. 7 (2004) (exploring community-based responses to violence); and James Ptacek & Loretta Frederick, *Restorative Justice and Intimate Partner Violence*, NAT'L ONLINE RESOURCE CTR. ON VIOLENCE AGAINST WOMEN, http://vawnet.org/sites/default/files/materials/files/2016-09/AR_RestorativeJusticeIPV.pdf (focusing on “restorative justice”).

19. See Coker et al., *supra* note 13, at 3-4 (finding that 88% of respondents “reported that police ‘sometimes’ or ‘often’ do not believe victims or blamed victims for the violence” and that a similar number reported that police do not take allegations of sexual assault seriously); see also *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence*, DEP'T JUST. (Dec. 2015) [hereinafter *DOJ Gender Bias Guidance*], <https://www.justice.gov/opa/file/799366/download>.

20. Aurelio José Figueredo, *Blame, Retribution and Deterrence Among Both Survivors and Perpetrators of Male Violence Against Women*, 8 VA. J. SOC. POL'Y & L. 219, 247 (2000) (“Although rape victims who participate in the criminal justice process report callous or indifferent attitudes toward victims at every stage of the proceedings, complete qualitative and quantitative documentation of victims' experiences is lacking.”).

21. *Missoula* narrates a series of rapes and inadequate law enforcement responses in the college football town of Missoula, Montana. JON KRAKAUER, *MISSOULA* (2015). It was third on the *New York Times* nonfiction bestseller list and remained on the list for a number of weeks. *Combined Print & E-Book Nonfiction*, N.Y. TIMES (May 10, 2015), <http://www.nytimes.com/best-sellers-books/2015-05-10/combined-print-and-e-book-nonfiction/list.html>.

22. The DOJ found that the Missoula Police Department “discriminates against women in its response to sexual assault . . . [in ways that] compromise the effectiveness of sexual assault investigations from the outset, make it more difficult to undercover the truth, and have the effect of depriving female sexual assault victims of basic legal protections.” Letter from Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., and Michael W. Cotter, United States Attorney for the District of Mont., to John Engen, Mayor of Missoula at 1 (May 15, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/05/22/missoulapdfind_5-15-13.pdf. The DOJ found that the University of Montana Office of Public Safety (OPS) also “discriminates against women” because of its “deficiencies in policy, training, and practice,” which “make it more difficult for law enforcement to effectively investigate allegations of sexual assault, have had the effect of depriving female

these and similar departments, detectives explicitly humiliate and blame rape victims before closing their cases without any investigation. Detectives imply that victims are responsible for their rape or that rape is just consensual sex that victims later regret.²³ Victims learn, through their own experience and from friends, not to report to these departments. When focusing on these egregious detectives and their departments, it appears obvious that biased and unprofessional police deter victims and that reporting rates would rise if they were prevented from acting so unprofessionally.²⁴ While such a straightforward conclusion is appealing, the low reporting and arrest rates consistent across police departments throughout the country suggest that bad actors cannot be solely responsible for the underreporting epidemic. Though the attention on these bad actors is merited, the accompanying lack of attention on all other departments is not.²⁵

The more insidious and widespread problem identified in this Note is that even police departments that do not deserve or get the negative attention given to Missoula-like departments still deter victims from reporting and pursuing allegations of rape. This Note's original research conducted with two police departments suggested that these seemingly unbiased departments still deter

sexual assault victims of basic legal protections, and reduce the ability of OPS to protect the public safety of the entire campus." Letter from Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., and Michael W. Cotter, United States Attorney for the District of Mont., to Royce C. Engstrom, President, Univ. of Mont. at 1 (May 9, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/05/09/missoulafind_5-9-13.pdf; see also Press Release, Department of Justice, Department of Justice Reaches Landmark Agreement to Improve Missoula County Attorney's Office's Response to Reports of Sexual Assault (June 10, 2014), <https://www.justice.gov/opa/pr/departement-justice-reaches-landmark-agreement-improve-missoula-county-attorney-s-office-s>; *Special Litigation Section Case Summaries*, U.S. DEP'T JUST., <https://www.justice.gov/crt/special-litigation-section-case-summaries#mpd-summ>. For a similar situation with the New Orleans Police Department (NOPD), see *NOPD Consent Decree*, CITY NEW ORLEANS, <http://www.nola.gov/nopd/nopd-consent-decree/> (describing the failures of NOPD when responding to allegations of rape and other gender-based violence).

23. See the examples given in *DOJ Gender Bias Guidance*, *supra* note 19, at 12-13 (including police officers asking questions like "[w]hat did you think was going to happen after you went to his room alone?"). See also Coker et al., *supra* note 13, at 3-4.

24. See, e.g., *DOJ Gender Bias Guidance*, *supra* note 19, at 12-13 (implying, through examples of egregious behavior and standards set to counter it, that egregious behavior is largely or solely at fault for deterring victims).

25. This Note does not focus on improving dramatically underperforming police departments because insightful work on that topic exists already. For work on preventing the misclassification of rape allegations, see *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Carol E. Tracy, Exec. Dir., Women's Law Project). For research and recommendations on minimizing the role of implicit bias in rape investigations, see Joanne Archambault, *The Preliminary Sexual Assault Investigation*, SAN DIEGO POLICE DEP'T (May 3, 2001), <http://www.sandiego.gov/police/pdf/preliminary.pdf>; *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence*, POLICE EXECUTIVE RES. F. (Jan. 2016), <http://ric-zai-inc.com/Publications/cops-w0796-pub.pdf>; *Improving the Police Response to Sexual Assault*, POLICE EXECUTIVE RES. F. (Mar. 2012), http://www.policeforum.org/assets/docs/Critical_Issues_Series/improving%20the%20police%20response%20to%20sexual%20assault%202012.pdf; OnLine Training Institute, END VIOLENCE AGAINST WOMEN INT'L, <http://www.evawintl.org/onlinetraining.aspx>.

victims because they adopt subtler but still pervasive patterns of detective behavior that demonstrate skepticism to rape victims about their rape. The specific behavior uncovered in this Note is the detectives' imposition of what this Note calls "rape process templates."²⁶ These "templates" are unwritten; they reflect implicit assumptions about how rape investigations proceed that detectives unconsciously develop based on their experience with rape investigations and prosecutions and on their internalization of societal views on rape and its verifiability. Detectives who rely on these templates do not use the blatantly false rape myths or derogatory language of overtly biased departments. Instead, they impose seemingly neutral templates onto rape investigations that nevertheless echo traditional rape myths and traditional skepticism of rape victims. Such skepticism, when expressed to victims, stops them from reporting their rape. This chain creates a cycle that confirms the biases about rape allegations that underlie the templates.

Rape process templates are similar to implicit biases in that they have an unconscious effect on behavior, but they are unlike implicit biases in that they are articulated explicitly to rape victims. The aspects of the templates that remain implicit are the subject of this Note: how these templates arise from unstated assumptions about rape allegations, how they channel investigations to produce certain, predetermined results, and how they transform and thus preserve historic skepticism of rape victims despite (or because of) their facial neutrality. The Note begins in Part I by explaining the research methodology. Part II raises the puzzle that the Note seeks to solve: why are victims' experiences with police at odds with the efforts police make to encourage victims? Part III provides an answer: it explains the rape process templates and examines their effect on rape victims. Part IV explores how these templates both further entrench the skepticism that rape victims face throughout the criminal justice process and preempt legal change regarding what allegations are thought to be "provable." Finally, Part V suggests that outside systems of oversight best limit the deployment of rape process templates and thus should be used more widely.

I. METHODOLOGY

The research for this Note involved a case study of two police departments in a mid-sized city in Connecticut. The two police departments operate in the same city, but one department is the city police department (CPD) and one is the local university's campus police department (UPD).²⁷ The research from this

26. The "templates" also could be called "narratives," "heuristics," "tropes," "assumptions," "outlines," or "stereotypes." The Note adopts the term "templates" because that term best conveys the procedurally oriented, preset, and determinative nature of the templates. The term "templates" does not imply that these are written checklists, however, because they are not.

27. The identities of the police departments studied are not disclosed to protect the confidentiality of the detectives. The roles are also described only as "detective" and "supervisor" without more detail on

case study provides generalizable insights because the city's demographics make it typical of similarly sized American cities. Around 50% of the residents are white,²⁸ around 30% attended college,²⁹ and over 60% are employed.³⁰ There is meaningful income inequality between the relatively wealthy white population and the relatively poor non-white population.³¹ The UPD is representative of university police departments in its focus on campus policing, its receipt of funding from the university, and its liability under Title IX of the Civil Rights Act Amendments ("Title IX").

The research included fifteen unstructured interviews with and observations of detectives, supervisors, victim advocates, and inspectors at the UPD, CPD, and the local State's Attorney Office. Eight detectives and supervisors in the CPD Special Victims Unit (SVU) were interviewed, some multiple times. Detectives run the day-to-day investigations, interviewing victims, witnesses, and alleged rapists, and gathering forensic evidence (such as rape kits, surveillance video, and phone records). They draft arrest warrants, submit them to prosecutors, and, based on the prosecutors' decisions, either execute an arrest warrant or close the case. Junior SVU supervisors assign cases either to SVU detectives or to unspecialized officers based on the facts in the allegation, oversee SVU investigations, and manage detectives' training and caseloads. The more senior supervisors rarely interact with victims or detectives but design the process that victims follow when reporting rape and allocate resources to the SVU.

Employees at three different local victim services organizations also were interviewed to provide an outside perspective on the CPD. One organization worked closely with the CPD, while another represented reporting victims in the investigatory process, which often put the organization in a position adversarial to the CPD. Together, these organizations represent hundreds of rape victims in the city. Each advocate interviewed worked directly with rape victims on their decision to report and their experience of reporting.

The research also compared the UPD to the CPD. Three detectives and supervisors in the UPD Investigative Services Unit, half of the department at the

the precise roles to protect the officers' confidentiality even further. The citations that would reveal the city and university where the research took place are adjusted to retain the anonymity of the departments. Brackets indicate removed material. As much as possible of the citation is retained. For further information on the citations, contact the author and the *Yale Journal of Law and Feminism* at lawandfeminism@yale.edu.

28. *QuickFacts: [City], Connecticut, 2014*, U.S. CENSUS BUREAU [link removed]. This is a high percentage of nonwhite people compared to America as a whole (which is 72% white), but not compared to most cities.

29. *Id.* (noting that 34% of the city's population attended college, compared to 29% nationwide).

30. *Id.* (noting that 65% of the city's population are in the labor force, compared to 64% nationwide).

31. Natalie Holmes & Alan Berube, *City and Metropolitan Inequality on the Rise, Driven by Declining Incomes*, BROOKINGS INST. (Jan. 14, 2016), <https://www.brookings.edu/research/city-and-metropolitan-inequality-on-the-rise-driven-by-declining-incomes/>.

time,³² were interviewed, some twice. As in the CPD, the UPD detectives conduct the day-to-day investigations of rape allegations. In addition, they accompany victims to the hospital for rape kit testing and explain to victims both the criminal justice and university-specific options available. In these interviews, detectives and supervisors frequently referred to the best practices in this area codified by the Police Executive Research Forum (PERF). The PERF research thus provided additional insight into the UPD's operations.³³

The interviews were qualitative and open-ended; rather than yielding empirical results, they provided insight into detectives' subtle behaviors and messages regarding rape victims. The interviews lasted around one and a half hours and mostly were conducted in the employees' offices (with two by telephone).³⁴ The interviews included questions about the interviewees' role in the investigative process, their views on why victims tend not to report rape to police, and what they would change in the reporting and investigative process.³⁵ The questions aimed to prompt detectives to express opinions that they might not consciously identify or articulate. To elicit brief roleplay-type answers, interviewees were asked "How would you explain this to a victim?" or "What would you say to a victim in that situation?" The broad questions, the author's repeated visits, and instructions from the chiefs of the CPD and UPD to the SVU officers to cooperate fully with the interviews encouraged honest responses from the detectives and supervisors. The Note frequently uses quotations from these interviews because the quotations reveal the subtle behaviors and messages that detectives and supervisors adopt in reality, but would not mention if asked to describe their own behavior in a self-reported, rather than conversational, context.³⁶ All together, the research provided multiple vantage points on the CPD and the UPD.

32. [Citation to the [University] Police Dep't's webpage removed.]

33. *Identifying and Preventing Gender Bias*, *supra* note 19, at v; *Improving the Police Response*, *supra* note 25.

34. These interviews covered the reporting process only for adult rape victims because the process for minors is different. Victims over sixteen years old are considered adults in Connecticut. CONN. GEN. STAT. §§ 53a-70(a)(2), 53a-71(a)(1) (2015). The process of reporting for minors is different because teachers and other supervisors are mandatory reporters, so minors do not need to report rape directly to the police for a criminal investigation to be opened.

35. The informal script for these interviews consisted of the following questions:

- What is your role with regard to rape victims?
- In your experience, why do victims not report or follow through with a report of rape?
- What are victims' fears or concerns about the law enforcement process?
- How do you address those fears?
- What makes an investigation and/or case more likely to lead to a conviction? Where do you see gaps between what police officers focus their investigations on and what prosecutors expect to see in a case?
- How would you change the process for reporting and prosecuting rape?

36. A couple of outstanding detectives in the CPD did not deploy the templates and strongly disavowed them when there were raised. None of the supervisors were outstanding in this regard. This Note does not focus on the couple of detectives with exceptional attitudes and behaviors because they are the exception; this Note aims to examine the more common behaviors in the CPD, which include frequent use of the rape process templates.

II. THE PUZZLE OF RAPE REPORTING

The CPD and its effect on victims illustrates the puzzle of rape reporting: why do police departments that make great efforts to accommodate rape victims still deter them from reporting? The CPD strives to respond well to victims of rape: it operates within the typical constraints of a municipal police department but still devotes significant resources to rape allegations. It polices around 150,000 people over twenty square miles³⁷ on a budget of under \$40 million.³⁸ It patrols a city that ranks among the highest in rates of violent crime for its size.³⁹ Still, the CPD prioritizes rape investigations and rape victims: it re-created the SVU and expanded it to include eight detectives;⁴⁰ it emphasizes the Victim Services Coordinator role;⁴¹ and it provides space in the police department headquarters to the local branch of the state-sponsored Office of Victim Services to facilitate victims' introduction to the organization.

The CPD SVU detectives are compassionate and skilled investigators. The detectives help victims use the investigative process to recover. After observing and interviewing the detectives for six months, a reporter lauded the dedication of the detectives, describing them as steady and reassuring detectives who compliment victims on their courage.⁴² As one detective explained, "I tell them: when they came in, they were victims. When they leave, they are survivors."⁴³ The detectives are also careful and thorough investigators. They send all rape kits to the state lab for testing and then store the original kit and results "indefinitely" or until the statute of limitations runs.⁴⁴ They seek corroborating evidence, even when it is not readily available and requires creativity to discover (such as a distinctive mole on the penis of a rapist, which was visible only when the penis was erect and thus provided evidence that discredited his claim that he had never had sex with the victim, who described the mole perfectly).⁴⁵

Yet despite these exemplary practices, the detectives' compassion and skill do not translate into a positive experience for the victims who report their rape to the CPD. The city appears to match the low national average in the rate at

37. *QuickFacts*, *supra* note 28.

38. *Mayor's Proposed Budget for Fiscal Year 2016/2017*, [City], Connecticut, [CITY] OFFICE OF THE MAYOR §§ 1-12, 1-19 (Mar. 1, 2016) [link removed].

39. [Citation to local newspaper article from Feb. 2014 removed].

40. Interview with [City] Police Dep't Special Victims Unit Supervisors, in [City], Conn. (Apr. 5, 2016). *See also* [citations to local newspapers removed].

41. Interview with [City] Police Dep't Special Victims Unit Supervisors, in [City], Conn. (Feb. 12, 2016); [citation to local newspaper articles from Apr. 2013 removed].

42. [Citation to *New York Times* article from Jan. 2016 removed].

43. Interview with [City] Police Dep't Special Victims Unit Detectives, in [City], Conn. (Mar. 9, 2016).

44. Interviews with [University] Police Dep't Supervisors, in [City], Conn. (Apr. 5, 2016). This is in contrast to the nationwide problem of destroying rape kits without testing them. *See Rape Kit Backlogs: Failing the Test of Providing Justice to Sexual Assault Survivors: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2010).

45. Interview with [City] Police Dep't Special Victims Unit Detectives, *supra* note 43.

which rape allegations result in convictions, though direct data is hard to find.⁴⁶ More importantly, victims remember their experience with the CPD negatively according to the victim services organizations. When asked to grade the CPD on its interactions with rape victims during the reporting and investigation process, one local victim services organization gave it a C-.⁴⁷ Another gave it a D, with the caveat that “that’s probably being kind.”⁴⁸ A third reported that victims are “not satisfied” with the CPD response.⁴⁹ Victims expected that the CPD would be “more sympathetic” and “provide a less biased response” than it did.⁵⁰

According to the victim advocates, “victims feel like they’re being judged, looked down on, and that police don’t believe them.”⁵¹ The police response “ma[kes] it impossible [for victims] to deal with the whole system because it [is] too painful.”⁵² One advocate recounted an instance in which a victim was making an initial report and the officers “did nearly everything wrong:” the responding officer “could not have acted more bored. Could not have cared less about what happened. . . . He didn’t even have a pad of paper to take notes.”⁵³ In sum, somehow the efforts of the CPD and its detectives do not translate into better experiences for victims.

The UPD provides an insightful comparison with the CPD because the UPD’s efforts to accommodate rape victims appear to be more fruitful. The UPD also responds frequently to sex crimes, which are some of the most common crimes on university campuses.⁵⁴ It devotes even more resources to policing rape than the CPD does, in part because it has far more resources and in part because its policing of rape is subject to greater oversight. In terms of resources, the UPD polices around 30,000 university-affiliated people, fewer than half of whom live

46. On average nationally, only 25 to 30% of rape allegations reported to the police proceed to prosecution. Truman & Langton, *supra* note 1. A UPD supervisor estimated that the UPD receives twenty to thirty allegations of rape and sexual assault per week. Interview with [City] Police Dep’t Special Victims Unit Supervisor, in [City], Conn. (Feb. 24, 2016). If that were a typical rate, it would result in around 1,000 rape allegations per year; however, a search of all Connecticut criminal cases originating in the city in that year revealed only one sexual assault case. Search on Westlaw: within Connecticut state cases, “advanced: PR(‘[city]’)” and “after: 06-01-2015.”

47. Telephone interview with employee at victim-oriented nonprofit (Mar. 31, 2016).

48. Telephone interview with employee at victim-oriented nonprofit (Apr. 1, 2016).

49. Interview with employee at victim-oriented nonprofit, in [City], Conn. (Mar. 28, 2016).

50. Telephone interview with victim-oriented nonprofit, *supra* note 48.

51. *Id.*

52. Interview with victim-oriented nonprofit, *supra* note 49; Telephone interviews with victim-oriented nonprofits, *supra* notes 47-48.

53. Telephone interview with victim-oriented nonprofit, *supra* note 47.

54. See *Campus Safety and Security Survey*, U.S. DEP’T EDUC., <http://ope.ed.gov/campusafety/Trend/public/#/answer/3/301/main?row=-1&column=-1> (reporting that in 2014, there were 49,870 general crimes reported over 11,611 university campuses, 33% (16,709) of which were offenses under the Violence Against Women Act); *Crime in Schools and Colleges: A Study of Offenders and Arrestees Reported via National Incident-Based Reporting System Data, Uniform Crime Statistics, Federal Bureau of Investigation*, FED. BUREAU INVESTIGATION app., <https://www.fbi.gov/about-us/cjis/ucr/nibrs/crime-in-schools-and-colleges> (listing sex crimes in the top five most common violent crimes on campus).

on the downtown campus, which is only half a square mile.⁵⁵ The department has an annual budget of over \$10 million for this task.⁵⁶

In terms of oversight, the UPD, unlike the CPD, is part of a university and thus is subject to Title IX.⁵⁷ Title IX forbids discrimination “on the basis of sex” in educational institutions that receive federal funding.⁵⁸ To meet Title IX standards, the university must investigate and remediate any sexual assault or harassment that it knows of or should have known of.⁵⁹ Because Title IX subjects universities to liability (private litigation for damages)⁶⁰ and financial consequences (revocation of federal funding) if they fail to remedy known discrimination,⁶¹ the university has great incentive to comply with Title IX. From 2011 to 2012, the Department of Education’s Office of Civil Rights (OCR), which enforces Title IX, investigated the university with which the UPD is associated for violations of Title IX.⁶² As a result of this investigation, the university’s Office of the General Counsel now reviews the UPD’s classification of rape allegations, giving the Office substantial oversight over the UPD’s operations in this area.⁶³ As a UPD supervisor noted, “audits keep people honest [and] the university faces much greater scrutiny [now].”⁶⁴

In addition, as mandated by the Resolution Agreement between the university and the OCR that lists the changes that the university must adopt to comply with Title IX, the university created an internal disciplinary system to adjudicate rape allegations and a confidential resource center for university affiliates, instituted ongoing training for all UPD members on trauma-informed interviewing and investigative techniques, and began conducting periodic assessments of the campus climate.⁶⁵ The UPD also created the role of coordinator for all sensitive crimes and put the coordinator partially in charge of

55. [University:] *Facts and Statistics*, [UNIVERSITY WEBPAGE] (2016), [link removed].

56. [Citation to an article in the university’s alumni magazine from Mar./Apr. 2008 removed].

57. 20 U.S.C. § 1687 (2012); Office for Civil Rights, *Dear Colleague Letter from Secretary of Education John B. King Jr.*, U.S. DEP’T EDUC. (2016), <http://www2.ed.gov/documents/press-releases/campus-policing-letter.pdf>.

58. 20 U.S.C. § 1681(a) (2012).

59. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005); *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998); Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP’T EDUC. 3 (2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

60. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255 (2009) (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979)).

61. 20 U.S.C. § 1681(a) (2012).

62. Press Release, U.S. Dep’t of Educ., U.S. Department of Education Announces Resolution of [University] Civil Rights Investigation (June [], 2012), [link removed].

63. Interview with [University] Police Dep’t Supervisors, in [City], Conn. (Mar. 30, 2016); Interview with [University] Police Dep’t Supervisors, *supra* note 44.

64. Interview with [University] Police Dep’t Supervisors, *supra* note 63.

65. Compliance Resolution Letter from Reg’l Dir. Thomas J. Hibino, Office for Civil Rights, to [University’s General Counsel] (June [], 2012), [link removed]; *Voluntary Resolution Agreement*, [UNIVERSITY] (June [], 2012), [linked removed].

the Investigations Department.⁶⁶ The UPD created a partnership with the confidential resource center⁶⁷ that includes having the center provide the UPD with anonymized and generalized feedback about victims' experiences with the UPD.⁶⁸ The UPD's efforts to lower the stakes of a victim's initial reporting decision and to receive periodic feedback on its interactions with victims produce investigations that are both more successful and more responsive to victims' needs.

The Title IX regime renders the environment in which the UPD operates sufficiently different from that of the CPD to make it a fruitful comparison regarding the detectives' deployment of rape process templates. The UPD is an environment in which detectives are closely scrutinized, regularly trained, and informed of their effect on victims through campus climate surveys and the feedback from the resource center. This appears to have meaningful consequences on victims' satisfaction rates.

Victims who interact with the UPD appear to be more satisfied with their experience than those who interact with the CPD based on the results of a 2015 confidential survey on sexual assault at the university, called the AAU Survey.⁶⁹ Almost twice the percentage of student rape victims who report to the CPD (5.8%) report to the UPD (11.4%),⁷⁰ and the rate of reporting to the UPD as compared to the CPD has risen since 2013.⁷¹ Because university students who decide to report their rape often can choose whether to report to the UPD or the CPD, the UPD reporting rate indicates a preference for reporting to the UPD over the CPD. Additionally, the survey found that "no students reported being pressured by any official [including the UPD] to drop or abandon a complaint."⁷² That perception is in direct opposition to rape victims' qualitative perception of the CPD⁷³ and to their responses in the AAU survey, where some stated that they felt pressure "not to proceed" from the CPD.⁷⁴ Furthermore, all respondents said that the CPD was "not at all" useful to them during a rape report or investigation,

66. Interview with [University] Police Dep't Supervisors, *supra* note 63; Interview with [University] Police Dep't Supervisors, *supra* note 44.

67. [Citation to the university's confidential resource center webpage removed.]

68. *Id.*

69. David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, [UNIVERSITY] 2-3, 9-10 (Sept. [], 2015), [link removed].

70. [Citation to university's introduction to the AAU survey removed.]

71. David Cantor et al., *Westat-[University] Data Tables for the AAU Campus Climate Survey*, [UNIVERSITY] tbl.3.9c (Sept. [], 2015), [link removed]. The data tables report "s" for the category of felt pressure "not to proceed" from the CPD, compared with "—" for that category for the UPD. While "—" means that no respondents gave that response, "s" means that the cell has been "suppressed because of small sample size" in order to promote confidentiality – that is, that a small number of respondents gave that response. Cantor et al., *supra* note 69, at 10.

72. [University's introduction to the AAU survey], *supra* note 70, at 10.

73. *See supra* notes 46–52 and accompanying text.

74. Cantor et al., *supra* note 71, at tbl.3.9c. This aligns with the UPD detective's explanation that she views her first meeting with the victim as an "information session" with the victim and not as a time to pressure the victim into a choice. Interview with [University] Police Dep't Supervisors, *supra* note 63.

while some said that the UPD was “somewhat” useful.⁷⁵ In response to the question of how respectful the department was toward the victim and how helpful the police were in telling victims their options, none said the CPD was “excellent” on either score, while some said the UPD was “excellent” on both.⁷⁶

The research suggests that although they care deeply about rape victims and can conduct effective investigations, the CPD SVU detectives somehow discourage victims from reporting or pursuing their allegations of rape. This is not inevitable, as the comparison to the UPD shows. The next section examines one way that the research revealed that police officers in the CPD discourage victims: through their imposition of rape process templates onto investigations.

III. RAPE PROCESS TEMPLATES

A. The Templates: “He Said, She Said” and “Brutal Cross-Examination”

The case study revealed that even in a police department like the CPD that expresses no explicit skepticism about rape allegations, detectives still convey an implicit skepticism about them to rape victims. One way that detectives do this is by imposing their own mental templates about how the investigations will proceed onto the allegations. This Note names these expectations “rape process templates.” Unlike rape myths that question victims’ experience of rape itself, these unwritten templates or heuristics set expectations about the criminal justice system’s response to victims’ allegations of rape. Detectives deploy these templates presumptively, in effect predicting that the police investigation and legal outcome of each rape allegation will match those constructed by the templates. Although they are occasionally accurate descriptions of rape cases, these templates often are not: they encourage detectives to discount rape victims’ own narratives in favor of these predictive ones. They also justify any implicit skepticism detectives have about the provability of rape accusations. Overall, rape process templates distort the investigatory process.

The two rape process templates identified here are the “he said, she said” and the “brutal cross-examination” templates. As explained in detectives’ own words, the “he said, she said” template states that in rape cases, the only meaningful evidence is the victim’s accusation of rape (“she said”) and the

75. Cantor et al., *supra* note 71, at tbl.3.9c. This finding also is mirrored by the survey responses of victims of intimate partner violence (IPV), which is another form of gender-based violence and thus sufficiently analogous to rape to bolster the survey’s findings on rape victims. No IPV victims reported that the UPD was “not at all” useful, and over 50% reported that they were “very” or “extremely” useful, while 68% reported that the CPD was “not at all” useful and none reporting that they were “very” or “extremely” useful. *Id.* at tbl.5.2b.

76. Cantor et al., *supra* note 71, at tbl.3.9c.

alleged rapist's denial of it ("he said").⁷⁷ Outside of the context of rape, this is called a "swearing contest" because at trial, the victim and defendant each swear an oath and then recount their version of the event. The "he said, she said" framing of rape, however, adds an element that the "swearing contests" framing lacks: predefined roles and narratives set by gender. This trope creates the expectation that all rape cases will become swearing contests with roles defined by gender because the "only evidence is the victim."⁷⁸ An extreme version of this template says that "physical evidence does not matter" in rape cases because the alleged rapist always will claim the sex was consensual.⁷⁹ According to this version, even a rape case with physical evidence is a "he said, she said" case.

The second template, the "brutal cross-examination" template, also assumes that rape cases inevitably lack evidence corroborating victims' testimony. This template says that because the case at trial "depends entirely on how credible the victim is," defense attorneys will ensure that the victims' "cross-examination[s] will be brutal."⁸⁰ Anticipating a brutal cross-examination, victims may appear unsympathetic on the stand, refuse to testify, or recant their allegations because they "don't want to expose themselves."⁸¹ Without a sympathetic victim testifying, the template says, the jury will acquit.

The two templates work together. They share assumptions about what make a rape provable to someone—a prosecutor, judge, or jury—in the later stages of the criminal justice process. They tend to be deployed together to explain or justify to victims, detectives, or prosecutors how the investigation and prosecution will proceed, which often includes preemptively explaining to victims why they may or will stop pursuing their allegation.⁸² They are invoked from the start of the investigation, often the very day the victim reports,⁸³ through the end, when the prosecutors decide whether to sign the arrest warrant.⁸⁴ Often, even when only one template is explicitly stated, the other is implicitly evoked. For example, a detective may say that without physical evidence (here, the "he said, she said" template is implicitly imposed), the cross examination will focus solely on the victim's character and thus be particularly brutal (and here the "brutal cross-examination" template is explicitly applied) so the victim should consider carefully if she really wants to continue with her allegation.

77. The exact phrase "he said, she said" was used in six of the fifteen interviews conducted. In one, the term "date rape" was used to express the same idea, that is, the assumption that there would be no corroborating evidence of a rape allegation because of the type of crime rape is.

78. Interview with [City] Police Dep't Special Victims Unit Supervisors, *supra* note 41.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*; Interview with [City] Police Dep't Special Victims Unit Supervisors, *supra* note 46.

83. See *infra* notes 94–97 and accompanying text.

84. See *infra* notes 102–107 and accompanying text.

The templates are misleading, even though they are not “rape myths” that are entirely wrong.⁸⁵ For unlike rape myths, the templates occasionally describe a case accurately. For example, a rape case that hinges on the question of consent (not the existence of sex) in which the rape occurred long ago and the victim told no one at the time may result in a swearing contest. But, in the view of the experienced detectives who do not adopt the templates, even in those cases, “[h]e said/she said” is a weak excuse for a poor investigation. It is never “he said/she said.”⁸⁶ Even when “there’s no [forensic] evidence . . . , it’s all about corroboration to fit the puzzle together and create a picture the juries can see.”⁸⁷ Finding corroborating evidence—such as text messages, “any stored communications,” or credit card statements⁸⁸—is a matter of experience and dedication.⁸⁹ Particularly inaccurate according to these detectives is the template’s assumption that all rape cases lack definitive forensic evidence. In reality, “[e]very [case] is very different. Some happen where there are cameras.”⁹⁰

There is a similarly misleading dynamic in the “brutal cross-examination” template. Rape prosecutions tend to be stronger at trial when the victim testifies.⁹¹ And when the victim testifies, the cross-examination often is intense, painful, and humiliating.⁹² But only a tiny fraction of charged rape cases—fewer

85. An example of a rape myth that is entirely wrong is the myth that rape victims cannot get pregnant from rape. There are politicians who promote this myth today. Becca Andrews, *There Are Still Politicians Who Think You Can’t Get Pregnant From Rape*, MOTHER JONES (Feb. 29, 2016), www.motherjones.com/politics/2016/02/idaho-lawmaker-still-thinks-rape-cant-result-pregnancy-and-its-2016. Credible science has proven, however, that “rape and consensual sex have the same pregnancy rate.” Kate Clancy, *Here Is Some Legitimate Science on Pregnancy and Rape*, SCI. AM. (Aug. 20, 2012), <http://blogs.scientificamerican.com/context-and-variation/here-is-some-legitimate-science-on-pregnancy-and-rape/>.

86. Interview with [University] Police Dep’t Supervisors, *supra* note 63.

87. Interview with [City] Police Dep’t Detectives, *supra* note 43; *see also* *New York Times* article, *supra* note 42.

88. Interview with [City] Police Dep’t Special Victims Unit Detectives, in [City], Conn. (Mar. 29, 2016); Interview with [University] Police Dep’t Supervisors, *supra* note 63.

89. Interview with [City] Police Dep’t Special Victims Unit Detectives, *supra* note 43.

90. *Id.*; *see also* interview with [University] Police Dep’t Supervisors, *supra* note 63 (“[T]here is no typical sex assault.”).

91. Gena L. Durham, *The Domestic Violence Dilemma*, 71 S. CAL. L. REV. 641, 654 (1998); James J. Gobert, *Victim Precipitation*, 77 COLUM. L. REV. 511, 537 (1977) (noting that when a victim does not testify, it “decreas[es] the likelihood of conviction”). The perceived importance of a rape victim testifying at trial has existed for over a century. *See* William Reynolds, *The Remedy for Lynch Law*, 7 YALE L.J. 20, 21 (1897) (“In cases of rape and attempted rape it is rarely possible to obtain sufficient evidence to justify a committal or indictment, much less a conviction, without the testimony of the woman who has been assaulted.”).

92. *See* *Bell v. Harrison*, 670 F.2d 656, 658 (6th Cir. 1982) (“The rationale behind [rape shield] statutes is that evidence [at trial] of a rape victim’s prior sexual activity is of dubious probative value and relevance and is highly embarrassing and prejudicial. Often such evidence has been used to harass the prosecuting victim.”); Vivian Berger, *Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 13-14 (1977) (For rape victims, “[c]ross-examination by the defense may prove to be extremely grueling” as well as “personal or embarrassing.” The harshness of the cross-examination is hard to prove, though, because “a cold record can never convey counsel’s harsh or insinuating tone or expression of utter incredulity.”); Laura E. Boeschen et. al., *Rape Trauma Experts in the Courtroom*, 4 PSYCHOL. PUB. POL’Y & L. 414 (1998); *see also* Catharine A. MacKinnon, *Feminism, Marxism, Method*,

than eight percent—go to trial.⁹³ Thus, for most cases, warning the victim about the cross-examination in the early days of an investigation is unnecessary. Why, then, do police officers raise the topic so often?

It is typically supervisors who raise the topic, and they justify doing so as part of their “duty to be transparent” with victims so that they can conserve the department’s resources for rape allegations that will result in successful prosecutions.⁹⁴ Perhaps surprisingly, given that a trial is years away at this point, the template often is deployed in the first call with victims, within hours of their initial report. A supervisor explained that she calls victims immediately after they report their rape, before deciding whether to assign their investigation to a qualified SVU detective or less qualified patrol officer (a decision that greatly affects the quality of the investigation and thus the outcome of the case), to “ask her if she really wants to move forward. Because we don’t have that many resources.” On the call, she “tell[s] the [victims] their chances, as raw as they come. If they don’t like it, they don’t want to hear the truth.” She is particularly “honest” about a victim’s “chances” when the rape involved “drugs, alcohol, or domestic violence.”⁹⁵ This supervisor believes that when a victim drops her allegation after this call, it casts doubt on “whether the victim really wants services.”⁹⁶ This view allows the supervisor to see the victim’s decision as confirmation that her aggressive questioning is necessary to conserve department resources rather than seeing the decision as a reaction to her aggressive and skeptical questioning.⁹⁷

The “he said, she said” template also allows detectives to overlook the effect of their actions on victims and investigations. Detectives believe that they disassociate their personal beliefs from their investigations when they use the “he said, she said” template. The detectives are certain that in investigations “it’s not what we believe, but what we can prove.”⁹⁸ The detectives say that their belief about the allegations is irrelevant: “even if I don’t believe [the victim], I’m going to work the case. And as bizarre as [the allegation] seems, it could have happened.”⁹⁹ They have been trained to think that what they believe is independent from what they can prove: the same supervisor who said that

and the State, 8 SIGNS 635, 651 (1983) (“Rather than deterring or avenging rape, the state, in many victims’ experiences, perpetuates it. Women who charge rape say they were raped twice, the second time in court.”).

93. Daly & Bouhours, *supra* note 10; *Sourcebook of Criminal Justice Statistics Online*, *supra* note 10.

94. Interview with [City] Police Dep’t Special Victims Unit Supervisors, *supra* note 41.

95. Interview with [City] Police Dep’t Special Victims Unit Supervisors, *supra* note 46.

96. Interview with [City] Police Dep’t Special Victims Unit Supervisors, *supra* note 41.

97. Interview with [City] Police Dep’t Special Victims Unit Supervisors, *supra* note 40. Victim advocates mentioned that raising the question of whether a victim will drop out to her is highly problematic because it makes her starting questioning why other victims drop out and whether she should drop out as well. Interviews with victim-oriented nonprofit, *supra* note 49.

98. Interview with [City] Police Dep’t Special Victims Unit Supervisors, *supra* note 41.

99. Interview with [City] Police Dep’t Special Victims Unit Detectives, *supra* note 88.

“physical evidence does not matter” because all rape cases end up as “he said, she said” cases explained that supervisors tell victims that they need physical evidence to pursue an allegation because “we believe [them], but need to show the court that [their accusation] is true.”¹⁰⁰ In reality, there is no requirement of physical evidence either in the standard for an arrest warrant or in the legal definition of rape.¹⁰¹ The “he said, she said” template excuses the supervisor’s imposition of his “personal belief” about the provability of rape onto the victim’s allegation by framing his belief in terms of the evidence “the court” needs despite the disconnect of the narrative from the legal standards.

Even when detectives disavow them, the templates still create a self-fulfilling cycle. Detectives expect prosecutors not to sign arrest warrants for cases that prosecutors are “going to have to fight to prove” because “they don’t want a loss under their belt.”¹⁰² Detectives believe that prosecutors are wary of rape cases because the prosecutors fear that jurors also apply the “he said, she said” template onto rape cases and thus that they must present physical evidence or a testifying victim to overcome the jurors’ skepticism. Specifically, based on their experiences with arrest warrants that prosecutors refused to sign,¹⁰³ detectives conclude that “prosecutors want a rape kit” or DNA evidence.¹⁰⁴ Appeal to SVU supervisors on denied arrest warrants is ineffective because the supervisors, further from the daily reality of investigations, more uniformly apply the “he said, she said” template.¹⁰⁵

These impediments discourage detectives and train them to approach messy or unusual rape allegations with less vigor. When they expect that the prosecutor will reject an arrest warrant, even if they believe in the case, the detectives devote

100. *Id.*

101. *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-70(a) (West, Westlaw through Jan. 1, 2017) (defining rape); CONN. GEN. STAT. ANN. § 54-2a(a) (West, Westlaw through Jan. 1, 2017) (setting for the standard for an arrest warrant).

102. Interview with [City] Police Dep’t Special Victims Unit Detectives, *supra* note 88.

103. All the CPD detectives interviewed had investigated cases that they believe had sufficient corroborating evidence to justify an arrest warrant, but that prosecutors had refused to sign arrest warrants for.

104. Interview with [City] Police Dep’t Special Victims Unit Detectives, *supra* note 88 (“[P]rosecutors almost always take [the case] when there’s a DNA hit from rape.”). It is possible that detectives use this explanation to shift the blame for insufficient investigations and unsigned arrest warrants onto prosecutors. But interviews with the inspector in the local State’s Attorney Office make that theory seem unlikely. The inspector in the local State’s Attorney Office is a retired police detective, with no legal training, who reviews the arrest warrants for prosecutors to determine if there is sufficient evidence to support an arrest warrant. He can reject an arrest warrant without a prosecutor ever seeing it. In an interview, he said that he “personally believe[s] it is hard to prosecute these [rape] cases” because “[h]e said / she said happens every day.” He prefers cases with physical evidence, yet also discounts the physical evidence available: “with sexual assault, physical evidence will not have the same meaning,” he believes, because the alleged rapist always says the sex was consensual. The inspector’s personal beliefs and preferences carry great weight in his evaluation of applications because there is no checklist or set of guidelines that he must follow when he evaluates applications for arrest warrants. He believes that with regard to evaluating evidence in rape cases, “[i]f you do it enough, you don’t need a checklist as a guidance.” Interview with employee at State’s Attorney Office, [City], Conn. (Mar. 3, 2016).

105. Interviews with [City] Police Dep’t Special Victims Unit, *supra* notes 40, 41, 46.

less time and fewer resources to uncovering the corroborating evidence in the case. This produces a weaker case, which prosecutors then reject.¹⁰⁶ This process confirms detectives' perception that prosecutors will not pursue messy or unusual rape cases and prosecutors' belief that messy or unusual rape cases lack corroborating evidence.¹⁰⁷

Biased detectives may use the templates intentionally to discourage victims. Detectives know well that “[i]f [detectives] don’t want the case, it’s easy to convince the victim that it was their fault and to retract the case.”¹⁰⁸ This intentional use is rare in the CPD: when asked about such behavior, the detectives called in their supervisor to recount when a detective in the department (“a piece of shit,” the supervisor called him) was found to be blaming and discouraging victims. He was sent to the Chief to be disciplined and was removed from the Investigations Unit.¹⁰⁹

But even in the CPD, where detectives pride themselves on their rejection of the explicit biases that underlie the templates, the detectives and supervisors are so steeped in the templates that they apply too stringent a screen on which cases to investigate. They do not see how this screening process strengthens the cycle they disavowed. Detectives learn to expect when it is unlikely that a prosecutor will sign an arrest warrant even though they, the detectives, believe the evidence is sufficient.¹¹⁰ But the detectives do not push the prosecutors to sign the arrest warrants. Instead, they close a case based on the prosecutor’s hinted disapproval because the “he said, she said” and “brutal cross-examination” templates imply that prosecutors are right to take on only the most provable cases.¹¹¹ These narratives justify the detectives’ acquiescence and let them dodge the question

106. Interview with [City] Police Dep’t Special Victims Unit Detectives, *supra* note 88. The CPD detectives are thoughtful about how they close an investigation. A detective explained that when she closed an investigation, she called the victim and explained to her that the “case is closed until we receive any further information. If you get more information, call us and we’ll pick it up again.” *Id.*

107. *Id.*; see also [New York Times article], *supra* note 42.

108. Interview with [City] Police Dep’t Special Victims Unit Detectives, *supra* note 43. The fact that police officers can manipulate victims so easily, according to an exceptional detective who does not adopt the rape process templates, is “the reason this has to be a special unit. You need to have people who have pride in the work they do and who want to do these cases.” *Id.*; Interview with [City] Police Dep’t Special Victims Unit Detectives, *supra* note 88. See also [New York Times article], *supra* note 42.

109. Interview with [City] Police Dep’t Special Victims Unit Detectives, *supra* note 88; Interview with [City] Police Dep’t Special Victims Unit Supervisor, in [City], Conn. (Mar. 29, 2016).

110. The legal standard for an arrest warrant is probable cause. U.S. CONST. amend. IV (“[N]o warrants shall issue, but upon probable cause.”); see also CONN. GEN. STAT. ANN. § 54-2a(a) (West, Westlaw through Jan. 1, 2017) (A court may issue “bench warrants of arrest upon application by a prosecutorial official if the court or judge determines that the affidavit accompanying the application shows that there is probable cause to believe that an offense has been committed and that the person complained against committed it.”). The standard is not beyond a reasonable doubt. *State v. Usry*, 205 Conn. 298, 312 (1987) (“Even though the recited facts may not be sufficient to establish beyond a reasonable doubt that the defendant was guilty of the crimes charged . . . , they establish a substantial basis for the magistrate’s finding of probable cause for the defendant’s arrest.”); see also *Nez v. United States*, 365 F.2d 286, 287-88 (10th Cir. 1966) (holding that an “oral statement by the victim,” along with some corroborating evidence, is sufficient probable cause for an arrest warrant related to an allegation of rape).

111. See *supra* notes 102–107 and accompanying text.

of whether they believe the victim and whether they could have conducted a more thorough investigation. Detectives generally want to both help victims and produce successful investigations, so a justification that appears to be neutral and inevitable is appealing to detectives when prosecutors or detectives drop plausible allegations.¹¹²

Use of rape process templates is not inevitable or necessary. The comparison of the CPD and the UPD reveals that investigations can proceed without the templates. It appears that the UPD detectives very rarely deploy rape process templates. When asked about the templates in interviews (not as “the templates,” but as the “he said, she said” and “brutal cross-examination” narratives), the UPD detectives strongly disavowed them.¹¹³ They also never raised them spontaneously as an explanation for certain behaviors or results, as the CPD supervisors did.¹¹⁴ More broadly, the UPD detectives see successful policing of rape as critical to their department’s success. In the words of one supervisor, “It’s one thing to take a gun off the street. It’s another thing to fail a victim. If the men and women on the front line do not have the tools to respond to sexual assault or gender violence, then the department will only be partially successful.”¹¹⁵

The UPD’s disavowal of the templates is exemplified by the difference in how the CPD and the UPD address the possibility that a prosecutor may not sign an arrest warrant. In the CPD, the supervisor previews the possibility that the prosecutor will not sign an arrest warrant as a test for the victim, to see if she is serious about her complaint.¹¹⁶ In the UPD, on the other hand, the supervisor talks through all of victim’s options at the beginning of the investigation, so that the victim is aware that even if the prosecutor rejects the case, she still has choices. If the prosecutor does reject the case, this early explanation allows the supervisor to say, “We talked about this. Now we’ll go to Plan B.” The UPD approach ensures that the victim does not view the prosecutor’s decision as embodying doubt about her allegation; in anticipating the potential need for a Plan B, the UPD supervisor already implied that she still would believe the victim even if this happened.¹¹⁷

The UPD supervisor often has more Plan Bs available than a CPD detective has because there are university-based adjudication procedures for university-

112. This cycle is exacerbated by the fact that the CPD lacks funding to train detectives on a regular basis. Supervisors believe that “there are so many cases and so many different cases here that that is a form of training itself.” Interview with [City] Police Dep’t Special Victims Unit Supervisors, *supra* note 40. The problem with this approach to training is that when detectives learn only by investigating the cases assigned to them, in conjunction with the same inspectors and prosecutors, they do not gain new perspective on their approach. They miss the opportunity to have an outside speaker or new data challenge the narratives and assumptions the entire department adopts regarding what rape allegations are provable.

113. See, e.g., Interview with [University] Police Dep’t Supervisors, *supra* note 63.

114. For the CPD’s use of these templates, see *supra* note 77-110 and accompanying text. For the UPD’s lack of use, see interview with [University] Police Dep’t Supervisors, *supra* note 63.

115. Interview with [University] Police Dep’t Supervisors, *supra* note 44.

116. See *supra* note 95 and accompanying text.

117. Interview with [University] Police Dep’t Supervisors, *supra* note 63.

related rape allegations. But that alone does not explain why the UPD supervisor goes out of her way to ensure that the prosecutor's decision is not given determinative weight. Instead, the UPD supervisor's explanation can be seen as a direct counter to the assumptions underlying the templates: while a supervisor who adopted the templates would fit the prosecutor's decision into the narrative that rapes are unprovable and thus that the prosecutor's decision was correct, the UPD supervisor offsets the implication that the prosecutor's decision was inevitable or right and instead poses it as merely one stumbling block that a victim can overcome.

The fact that the UPD rarely deploys rape process templates and that the UPD victims are more satisfied with the UPD than the CPD victims are with the CPD¹¹⁸ suggests that the use of rape process templates is not the inevitable result of detectives' long tenure in the SVU or necessary to weed out false complaints. The example of the UPD suggests that it is possible to have a police department whose near elimination of rape process templates results in interactions with victims that are far less discouraging.

B. The Effect of the Templates on Victims

The rape process templates effectively discourage victims from reporting and pursuing their rape allegations in large part because they concern victims who are already particularly susceptible to discouragement. Rape victims likely hear questions about provability and credibility as expressing skepticism about their rape because society primes rape victims to expect disbelief.¹¹⁹ This priming exacerbates victims' perception that the templates transmit disbelief of the allegation itself even though on their face the templates refer only to the processes around rape prosecutions. Three contextual factors particularly can arouse victims' expectations that they will be disbelieved and thus magnify the discouraging effect the templates have on victims' decisions regarding reporting rape.

First, most rape allegations pit a woman's allegation against a man's denial¹²⁰ and many women anticipate that their narrative will be drowned out by a man's.¹²¹ When detectives suggest that the case will come down to a female victim's story against her male rapist's story ("he said, she said"), as told by an

118. See *supra* note 70-76 and accompanying text.

119. See Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 946-47 (2004).

120. Rape is usually of women by men. Twenty percent of women in the United States (23 million women) have been raped, and 99% of them have had only male perpetrators. By contrast, only 1.7% of men in the United States (two million) have been raped, also mostly by men. Breiding, *supra* note 4, at 2.

121. See Linda L. Carli, *Gender and Social Influence*, 57 J. SOC. ISSUES 725, 726 (2001) ("A meta-analytic review of the results of 29 studies revealed that, in mixed-sex groups, men exert more influence than women.").

aggressive, male¹²² defense lawyer (“brutal cross-examination”), detectives tap into the gendered dynamics of speech and credibility that victims may know well.

Second, victims who have heard the real rape myth may expect that any allegation that does not match the real rape script will be discounted. Susan Estrich identified this myth as saying that a “real rape” occurs when a “stranger puts a gun to the head of his victim, threatens to kill her or beats her, and then engages in intercourse.”¹²³ All other rapes are viewed by police, prosecutors, judges, and juries as misunderstood or regretted consensual sex.¹²⁴ Victims may have internalized this myth, in part because it is so widespread and in part because it is easier to believe it than to acknowledge that women are so vulnerable to rape, especially by men they know.¹²⁵ Once they have internalized this myth, victims compare their own rape to it and doubt themselves when their rapes diverge from the script. As a UPD detective explained,

[I]t is very hard for someone to think of herself as a victim of sexual assault. . . . Victims don’t think twice about reporting a robbery. People don’t ask themselves, “Did I voluntarily give him the money?” People don’t get asked, “What did you expect? You were hold[ing] your phone out in your hand.” It’s just different when someone walked you home because you were a little drunk and you don’t see yourself as a victim of a sex assault.¹²⁶

Already torn about what they believe themselves, victims fear having their doubts confirmed by detectives, prosecutors, judges, and juries.¹²⁷

Third, because the personal consequences of reporting can be so large, due to stigma and risk of retaliation,¹²⁸ and the benefits can be so small, the decision

122. Stephanie A. Scharg & Roberta D. Liebenberg, *First Chairs at Trial: More Women Need Seats at the Table*, A.B.A. 13 (2015), http://www.americanbar.org/content/dam/aba/marketing/women/first_chairs2015.authcheckdam.pdf (reporting that 67% of defense lawyers in criminal cases are men and 79% of lawyers who appear at trial are men).

123. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1092 (1986).

124. *Id.*

125. See, e.g., Howard N. Snyder, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics*, U.S. DEP’T JUST. 10 (July 2000), <https://www.bjs.gov/content/pub/pdf/saycrle.pdf> (reporting that over 90% of rapes of children and teens are committed by someone the victim knows).

126. Interview with [University] Police Dep’t Supervisors, *supra* note 63.

127. Interview with employee of State’s Attorney Office, in [City], Conn. (Feb. 23, 2016) (noting that panic around trial stems first and foremost from the fact that victims are “afraid to not be believed”); Telephone interviews with victim-oriented nonprofits, *supra* notes 47, 48.

128. Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 NEW CRIM. L. REV. 644, 660 (2010) (“Rape law has been wrong to help create, perpetuate, and enforce moral judgments on women’s sexual lives.”); Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 938 (2001) (describing how rape victims “experience anxiety, embarrassment and self-blame as a result of sexual victimization”); Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2091 n.259 (2016) (explaining how promises that reporting rape is confidential are often “illusory”).

to report is often already a fine balance. It may take only unspoken indications of disbelief to change a victim's mind. The statistically low probability of arrest and conviction for rape already discourages victims because often the "main thing" they want is a conviction.¹²⁹ As a detective explained, victims "research everything. If they research rape and see that the rapist has less than a three percent chance of jail time, they think: 'Report for what? To ruin my reputation?'"¹³⁰ Seeing the low chances of conviction, created in part by these templates, victims decide reporting is not worth the cost.

With all these background reasons not to report rape, victims' bar for dissuasion based on police behavior is low: "[o]ne thing is all it takes to get [a victim] to back out."¹³¹ Victims react especially strongly to detectives' expressions of disbelief. "The number one reason why people disengage with the police department is because of the first experience that they have with a police officer."¹³² The "experience" that prompts victims to drop out is one that convinces them that the detectives will "not believe[] a victim because [they] are predisposed to not believe the victim."¹³³

Victims do not need to speak to a police officer for police skepticism to discourage them from reporting. The majority of victims disclose their rape to someone else before reporting to the police,¹³⁴ and the victims "place [great] weight on the reactions of these individuals."¹³⁵ Thus, in the words of detectives, whether victims report or not often "depends on what [families, friends, and classmates] tell them. . . . If someone tells their friend, 'this happened to me,' and the friend says, 'Me too, it's better to let it go,' they will not report."¹³⁶ Someone who has had a bad experience with the police department will confirm the victims' fears about the police treatment she will receive and will advise her

129. Interview with [City] Police Dep't Detective, *supra* note 43 ("All [the victim] wanted was an arrest.").

130. See Interview with [University] Police Dep't Supervisors, *supra* note 63. The statistic that the detective referred to comes from the Rape, Abuse & Incest National Network (RAINN), which reports that only 3% of rapists spend a day in jail. *97 of Every 100 Rapists Receive No Punishment, RAINN Analysis Shows, RAPE, ABUSE & INCEST NAT'L NETWORK*, (Mar. 27, 2012), <https://www.rainn.org/statistics/criminal-justice-system>.

131. Interview with victim-oriented nonprofit, *supra* note 49.

132. *Id.*; see also Interview with [City] Police Dep't Special Victims Unit Supervisors, *supra* note 40 ("[Patrol officers] are the first person who a victim sees and can shape the investigation and make it easier or harder for [detectives]."); Telephone interview with victim-oriented nonprofit, *supra* note 47 (If the responding patrol officers are rude, "it doesn't matter how good the SVU is because they're never going to see the victim.").

133. Telephone interview with victim-oriented nonprofit, *supra* note 47.

134. Interview with [City] Police Dep't Special Victims Unit Detectives, *supra* note 43; see Victoria Sit & Regina A. Schuller, *Understanding Support Providers' Views of "Helpful" Responses to Sexual Assault Disclosures*, J. INTERPERSONAL VIOLENCE 1, 2 (2015) ("Victims frequently turn to friends, relatives, and romantic partners, and are considerably less inclined to report their experiences to formal helpers."). See generally Paul et al., *supra* note 7.

135. Sit & Schuller, *supra* note 134, at 3.

136. Interview with [City] Police Dep't Special Victims Unit Detectives, *supra* note 43.

not to report.¹³⁷ For example, because of the bad experiences victims have had with the CPD, the victim services organizations do not encourage victims to report to the CPD unless they affirmatively express a desire to do so.¹³⁸ In this way, the templates can underlie even the decisions of rape victims who choose never to report to the police.

In sum, many rape victims modify their reporting decisions in response to indications of detectives' disbelief of their accusation, which can be expressed through detectives' use of rape process templates. Though explicitly only about the allegation's strength and the victim's ability to withstand the normal tests required by the criminal justice process, the rape process templates—especially to those primed to hear skepticism—sound like heightened skepticism about the allegation itself. Statements about the supposedly unique features of a rape prosecution are heard as statements about the credibility of the allegation itself. To the extent that victims do not report due to fear of disbelief, the rape process templates contribute to victims' hesitancy to report or pursue their allegations of rape.

Recognizing the templates and parsing their effects partially explain a broad phenomenon: victims tend not to report their rape even in jurisdictions where the police departments do not harass and humiliate victims intentionally. In the CPD, for example, even these facially-neutral templates are imposed unintentionally. But regardless of the intentions, they reinforce the behaviors in detectives that discourage victims from reporting or pursuing allegations of rape and signal disbelief to victims. Although they seem more innocuous than the “real rape” myth, the rape process templates undermine the effective prosecution of rape. The next section discusses how, in doing so, the templates preserve the historic skepticism that rape victims face when seeking criminal consequences for their rapist.

IV. THE CONSEQUENCES OF RAPE PROCESS TEMPLATES

The skepticism about rape allegations at the heart of the rape process templates fits into a long tradition of police skepticism of rape allegations, even though that skepticism is now presented in the newer narrative of rape process templates rather than the traditional narrative regarding the definition of rape. The legal definition of rape shapes the criminal justice process around rape and for this reason is the focus of many legal scholars.¹³⁹ But scholars have noted the

137. See *DOJ Gender Bias Guidance*, *supra* note 19, at 8 (“[I]f law enforcement agencies do not respond effectively to an incident of sexual assault . . . , victims are less likely to participate in the investigation and prosecution of their case or seek police assistance in the future.”).

138. Telephone interview with victim-oriented nonprofits, *supra* note 48.

139. See, e.g., STEPHEN J. SCHULHOFER, *UNWANTED SEX* 254 (1998) (dedicating an entire book to the definition of rape); Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1407 (2005) (devoting an entire Article to the definition of rape); Deborah Tuerkheimer, *Sex Without Consent*, 123

limitations of a singular focus on legal definitions when evaluating the legal treatment of rape. As Estrich wrote, “the answer is not to write the perfect statute. While some statutes invite a more restrictive application than others, there is no ‘model statute’ solution to rape law, because the problem has never been the words of the statutes as much as our interpretation of them.”¹⁴⁰

Estrich saw how the “real rape” myth, rather than the statutory definition of rape, determined what rapes led to criminal punishment. Though the statutory definition of rape rarely requires that the victim resist physically or that the rapist be unknown to the victim, “[w]here less force is used or no other physical injury is inflicted, where threats are inarticulate, where the two know each other, where the setting is not an alley but a bedroom . . . , the law, as reflected in the opinions of the courts, the interpretation, if not the words, of the statutes, and the decisions of those within the criminal justice system . . . tell us that no crime has taken place.”¹⁴¹ That is, the “real rape” myth grafted additional requirements onto the legal definition without any decision by legislators to do so. The additional requirements embedded in the real rape myth make it even more likely that the criminal justice process will discourage victims and will not serve their goals.

The rape narratives that shape the criminal justice system and the manner in which they shape the process today have changed since Estrich wrote. The real rape myth remains,¹⁴² but subtler skepticism expressed through devices like the rape process templates has emerged.¹⁴³ The templates are like the earlier rape myths in their origin and their result. They originate from an implicit skepticism by detectives or prosecutors about the credibility of rape victims and their allegations. They result in the imposition onto investigations of rape additional requirements not imposed on other crimes and not mandated by the statutory language. And they make it less likely that detectives conduct investigations that lead to arrests. In producing and justifying these results, both the real rape myth and the rape process templates deter victims from reporting their rape to the police by conveying to them disbelief about their allegations.

YALE L.J.F. 335 (2013) (same). The debate over the Model Penal Code’s definition of rape is illustrative. The relevant article, Article 213, is “outdated” in the words of the ALI, *Model Penal Code: Sexual Assault and Related Offenses*, AM. L. INST. (2016), <https://www.ali.org/projects/show/sexual-assault-and-related-offenses/>, but the effort to update the Article is so controversial that the project to update it has dragged out over three years and three “tentative” or “discussion” drafts, see *Model Penal Code: Sexual Assault and Related Offenses: Shop Individual Parts*, AM. L. INST. (2016), <https://www.ali.org/publications/show/sexual-assault-and-related-offenses/#drafts>.

140. Estrich, *supra* note 123, at 1093; see also Kimberlé Crenshaw, *Mapping the Margins*, 43 STAN. L. REV. 1241, 1271 (1991) (“[T]he degree to which legal reform can directly challenge cultural beliefs that shape rape trials is limited.”).

141. Estrich, *supra* note 123, at 1092.

142. Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1305 (2011) (“[T]he fact remains that law enforcement officers, prosecutors, jurors, and judges are still measuring each rape allegation against a preexisting ‘real rape’ script.”); Lonsway & Archambault, *supra* note 12, at 152 (“[P]olice officers . . . are frequently skeptical of reports that do not resemble the . . . stereotypic image [of violent, stranger rape].” (citation omitted)).

143. See *supra* Part III.

The rape process templates also meaningfully differ from the real rape myth: they create these extra-statutory impediments by a more indirect and facially neutral route. Rape process templates do not address the victims' experience with the rape itself, as the real rape myth does. Instead, they question the process. They ask whether the rape left enough evidence and happened to an articulate enough victim to make the rape worth investigating, prosecuting, and ultimately punishing. Though framed in terms of whether it is possible to prosecute certain rapes successfully, implicit in the templates' doubt is a question of whether it is right and fair to prosecute these rapes given the supposed lack of physical evidence or presumed uncertainty of the victim's testimony at trial.

By creating this indirect and seemingly neutral route for disbelief, rape process templates allow the "preservation through transformation" of the traditional real rape myth.¹⁴⁴ As Reva Siegel articulates, preservation through transformation occurs when, because reformers successfully challenge the legitimacy of an existing power regime, legislators and judges "both cede and defend status privileges—gradually relinquishing the original rules and justificatory rhetoric of the contested regime and finding new rules and reasons to protect such status privileges as they choose to defend."¹⁴⁵ Rather than overthrowing the existing power regime as they hoped to do, the reformers only "pressur[e] legal elites to translate [the regime] into a more contemporary, and less controversial, social idiom."¹⁴⁶

Just as Siegel predicts, the rape process templates are the "less controversial, social idiom" used today to express the doubt about rape allegations that the real rape myth stated more directly.¹⁴⁷ Reformers have challenged, but not overthrown, the power regimes inside and outside the criminal justice process that disempower, disbelieve, and silence rape victims. The skepticism of rape victims remains protected; only the direct expression of it has been relinquished.

This understanding of the templates reveals why they are so consequential: they shape the law of rape. More specifically, they reveal how detectives shape the law of rape: by choosing which allegations to investigate, to investigate carefully, and to bring to prosecutors, they filter which rape allegations have a chance of making it to court and thus into case law. To the extent that they impose the rape process templates onto cases when they make these investigatory decisions, detectives unintentionally ensure that the more contested, less provable cases never end up in front of a judge or a jury. The imposition of these templates at the investigatory stage creates a cycle in which the more messy and

144. Reva B. Siegel, "*The Rule of Love*": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996).

145. *Id.*

146. *Id.*

147. Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1959 (2016) ("Whenever there is progressive movement in the law, one might predict a backlash designed to secure the privilege that the law is in the process of disrupting. Unsurprisingly, there has been a backlash against the progressive reform movement in rape law.").

contested cases do not advance through the criminal justice system, so prosecutors, judges, and juries are not pushed to reconsider their assumptions about rape or about what a provable rape allegation is. When detectives close rape cases without physical evidence or without an articulate and willing victim (even when required to by prosecutors), they avoid pressuring judges and juries to question or at least acknowledge the existence of their assumptions. By contrast, researching all cases thoroughly and pursuing more contested cases on a regular basis would force all of them to broaden their understanding of the reality of rape. The templates and the premature closures of investigations which the templates partially cause eliminate the opportunity for judges or juries to affirm the victim, credit her allegation, and convict the rapist without physical evidence or without an articulate and willing victim.

The detectives know that “if you don’t do [rape cases] often enough, you’ll never win. You won’t have the tools and techniques necessary to get the corroborating evidence.”¹⁴⁸ The same applies to prosecutors (who do not learn how to prosecute effectively the full range of rape cases) and to judges (who tend to respond conservatively to cases they find unfamiliar). By imposing rape process templates onto allegations at the first stage of the criminal justice process, detectives unintentionally keep prosecutors and judges from getting the experience with rape cases they themselves value so highly. They keep from prosecutors and judges the reality of rape allegations: that they can be messy, incomplete, and contested, and yet real nonetheless. Only once detectives, prosecutors, judges, and juries face the messiness of all rapes will they be able to investigate, prosecute, and judge rape allegations in a way that vindicates victims who report their rape to the police.

V. OUTSIDE OVERSIGHT OVER LOCAL POLICE DEPARTMENTS

A. *State-Based Oversight*

To police and prosecute rape more effectively, detectives must stop imposing rape process templates to predict and thus ensure that rape allegations have certain characteristics (“he said, she said” cases lacking physical evidence and resulting in a “brutal cross-examination”). This would be difficult for police departments to do unilaterally. It appears hard for police officers to recognize their deployment of the templates on their own. And, given police departments’ place in the larger system—that is, so long as detectives respond to prosecutors, and so long as prosecutors fear losing rape cases in front of a judge or a jury—internal efforts by police departments alone will be ineffective.

148. Interview with [City] Police Dep’t Special Victims Unit Detectives, *supra* note 43.

The UPD's success under federal and university oversight at improving its response to victims suggests that a system of outside oversight is one way to reduce the deployment and effect of the templates. Although the CPD and the UPD made similar efforts to respond better to rape victims (for example, sufficiently staffing the SVU, training detectives, and partnering with victim-oriented groups) and have similarly good intentions, the UPD appears to have reduced its detectives' use of the templates far more effectively than the CPD has.¹⁴⁹

What is the source of this difference? Though it is impossible to know for sure, many of the structural, staffing, and experiential changes to the UPD that seem effective in reducing the use of the templates today arose out of the OCR's Title IX investigation of the university.¹⁵⁰ This investigation created two channels of oversight—one by the Office of the General Counsel over the UPD¹⁵¹ and one by the OCR over the university as an institution¹⁵²—and required that the UPD conduct honest evaluations with victim advocates, assess if it discourages victims from reporting or pursuing allegations of rape through anonymous surveys, and address whatever its assessments reveal to be the sources of discouragement. That is, outside oversight prompted the UPD and the university to look to the results that their improvements achieved rather than just to the efforts devoted to the improvements.

Though the CPD-vs.-UPD comparison suggests that a form of federal oversight, Title IX, drove effective change for the university police department, state oversight is the more practical and likely form of outside oversight for municipal police departments. This is in part because today's systems of direct federal oversight over local police departments appear unsuited to this task, given their emphasis on individualized support, intensive fact finding, and tailored supervision. The federal oversight established under the Obama Administration was valuable but limited: the DOJ signed consent decrees based on sex-based discrimination in policing with only four police departments.¹⁵³ The DOJ lacks the resources to impose consent decrees or any form of tailored federal oversight on all 18,000 law enforcement agencies in the United States.¹⁵⁴ Moreover, federal oversight over local police departments that are not found to be in violation of federal laws, as those four departments have been, raises potential

149. See *supra* Part III.

150. See *supra* notes 57–76 and accompanying text.

151. Interviews with [University] Police Dep't Supervisors, *supra* notes 44, 63.

152. Letter from Thomas J. Hibino, *supra* note 65; *Voluntary Resolution Agreement*, *supra* note 65.

153. See *Special Litigation Section Cases and Matters*, U.S. DEP'T JUSTICE, <https://www.justice.gov/crt/special-litigation-section-cases-and-matters0#police> (listing four consent decrees focused on gender-biased policing); see also *supra* note 22 for the Montana consent decrees.

154. Brian A. Reaves, *Census of State and Local Law Enforcement Agencies, 2008*, U.S. DEP'T JUST. (July 2011), at 2, <https://www.bjs.gov/content/pub/pdf/cs1lea08.pdf> (noting there are "17,985 state and local law enforcement agencies employing at least one full-time officer or the equivalent in part-time officers" nationwide).

issues of federalism.¹⁵⁵ Conversely, state-based oversight allows states to tailor national policies to their needs, based on their financial resources, geographic and demographic trends, and existing strengths and weaknesses of the local police departments.

State oversight of rape policing can build on state oversight systems that already exist. For example, the state of Connecticut already has the Police Officer Standards and Training Council (POSTC), a part of the Department of Emergency Services & Public Protection. POSTC determines the training requirements and runs the training sessions necessary both to become a police officer and to retain certification as a police officer within the state of Connecticut.¹⁵⁶ Given that the legal and logistical structure for this training already exists, adding specialized training on the rape process templates and how to avoid their deployment should be straightforward.

POSTC also administers the state-mandated accreditation program of police departments.¹⁵⁷ As part of this accreditation process, POSTC sets the standards, determines departments' initial compliance with the standards, and conducts periodic audits of the departments' statistics and surveys.¹⁵⁸ Unlike the police officer training, departments can choose not to seek accreditation by POSTC. But because the accreditation program reduces departments' civil liability, the choice to forgo accreditation is expensive.¹⁵⁹ In addition, POSTC creates "model policies, procedures, and guidelines" for certain popular topics.¹⁶⁰ There can be political pressure on local police departments to adopt those policies, particularly when the publication of the models prompts the creation of state initiatives and partnerships to disseminate and implement the policies.¹⁶¹

The state oversight board already has a procedure for the hardest part of the implementation and evaluation of standards: collecting and evaluating statistics. At the outset of its accreditation process, POSTC requires that police departments sign an agreement promising to share all necessary documentation with POSTC.¹⁶² While some of the recommendations regarding rape process

155. See Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2246 (2014).

156. CONN. GEN. STAT. ANN. § 7-294d (West, Westlaw through Jan. 1, 2017). For original training, see CONN. AGENCIES REGS. § 7-294e-3 (amended 2015). For re-training, see CONN. AGENCIES REGS. §§ 7-294e-2, 7-294e-14(c) (updated 2015).

157. CONN. GEN. STAT. ANN. § 7-294d(22).

158. *Id.*

159. CONNECTICUT POLICE OFFICER STANDARDS AND TRAINING COUNCIL, ACCREDITATION STANDARDS MANUAL (5th ed. June 1, 2016), <http://www.ct.gov/post/cwp/view.asp?a=2058&q=393770&postNav=>.

160. See, e.g., *Connecticut Statewide Model Policy: Police Response to Crimes of Family Violence*, ST. CT. (Sept. 2016), http://www.ct.gov/post/lib/post/publications/police_response_to_crimes_of_family_violence_2016.pdf.

161. See, e.g., *Law Enforcement Initiative*, CT. COALITION AGAINST DOMESTIC VIOLENCE, <http://www.ctcadv.org/projects-initiatives/law-enforcement-initiative/>; see also *Law Enforcement Program: The Benefits*, CALEA, <http://www.calea.org/content/law-enforcement-program-benefits>.

162. *Law Enforcement Accreditation Program Application*, CT. DEP'T EMERGENCY SERVS. & PUB. PROTECTION (2017), <http://www.ct.gov/post/cwp/view.asp?a=2058&q=394972>.

templates would require police departments to track new or more in-depth metrics, the basic structure for tracking metrics within the police departments and sharing them with the state is already established.

Other states have similar systems to POSTC that provide training, standards, and oversight to local police departments in their state.¹⁶³ Standards for how police deal with rape victims could be deployed quickly and collegially through state oversight systems because, as POSTC illustrates, these oversight systems already engage in exactly this type of standards- and process-setting exercise. Using these existing systems to address rape process templates is likely to engender less resistance than federal oversight would. Although local tailoring creates the possibility for serious dilution of the standards, the recommendations set forth below (such as the emphasis on honest feedback from local victim advocates and metrics) can reduce the possibility of significant dilution.

One downside of state oversight as it exists today is that these systems do not subject police departments to liability or revocation of funding if they fail to improve their response to rape. Financial consequences tend to ensure that good results, not just good efforts, exist. This extra impetus is important given the subtlety of the rape process templates and their reinforcement throughout the criminal justice system. To remedy this gap, states can attach local funding conditions or incentive payments for compliance with the state standards, heightening the stakes of noncompliance. For departments like the CPD that genuinely believe that they do not deter victims, this liability may be unnecessary; simply providing structures that adequately inform them, both quantitatively and qualitatively, of the reactions that victims have to their department may be sufficient. But for other departments, a more consequential form of oversight may be necessary.

As Connecticut's structure illustrates, it is both feasible and likely effective to attach systems of oversight for the policing of rape allegations onto existing systems of state oversight. These state systems already conduct training, set standards, and evaluate departments. State oversight allows quick deployment of new standards, local tailoring, and reliance on existing structures for ongoing audits. These state systems of oversight offer great potential to teach police about rape process templates and evaluate whether police can successfully avoid their deployment.

163. See, e.g., *Criminal Justice Policy Boards and Commissions*, N.Y. DEP'T CRIM. JUST. SERVS., <http://criminaljustice.ny.gov/pio/boards/index.html> (describing the New York State police accreditation council, the Law Enforcement Agency Accreditation Council, which operates like POSTC, but in the state of New York); *Our Mission Statement*, CAL. POLICE ACCREDITATION COALITION, <http://www.californiapac.org/index.html> (describing the California Police Accreditation Coalition, a nonprofit organization that operates like POSTC for the state of California).

B. Key Components of State-Based Oversight

An effective system of state oversight should focus on ensuring that police departments engage productively with victims and their concerns. More concretely, an effective state-oversight system should mandate that police departments do three things: first, train police officers on rape process templates and the common reactions of rape victims to their imposition; second, conduct regular meetings with local victim advocates; and third, evaluate metrics regarding their handling of rape complaints from the complaint to its final disposition. It must place the responsibility on police departments to learn whether, to what extent, and how they deter victims by employing these templates (or any other discouraging devices) and to devise programs and procedural changes that counter or eliminate their use. Such a system would educate police officers about the effects of their actions, force them to change the actions that discourage victims, and give them the tools necessary to push back on skeptical detectives, supervisors, and prosecutors.

The first component of oversight is training for police officers on the rape process templates and victims' common reactions to them. But almost every recommendation on how to improve a police department—or any organization, for that matter—starts with a recommendation of additional training. How is this different? This training, as opposed to much police training, would not focus on what police do (wrong), but instead on the typical, unique, and potentially counterintuitive concerns of rape victims. To the extent that this training focuses on police officers, it explains how their potentially good intentions can be misread or misdirected. The emphasis on how the good intentions of police officers can be misunderstood is crucial to this training because, as this Note illustrates, many officers who deter victims have good intentions, particularly when they work in a specialized SVU. Discouraging them or questioning their intentions is counterproductive. Thus, this training must focus on a side that police training tends to overlook: the victims' perspective, both independent of and in conjunction with police behaviors.

This training should be informed by the growing body of both scholarship and practical experience on police training that emphasizes the importance of equal treatment of all types of victims and suspects.¹⁶⁴ This training focuses on

164. See, e.g., Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003) (arguing that the success of policing depends in large part on residents' cooperation with the police and that residents cooperate with the police when they believe the police act fairly toward those in their community); Tom Tyler, *Police Discretion in the 21st Century Surveillance State*, 2016 U. CHI. LEGAL F. 579, 580 (2016).

topics such as implicit bias¹⁶⁵ and stereotyping.¹⁶⁶ This more common training can provide guidance on training about rape process templates because it focuses on unintended and unconscious police behavior and victims' and suspects' reactions to that behavior, and on effective ways to inform people that they engage in this unconscious behavior without accusing them of conscious bias.

Second, oversight systems should require regular meetings with local victim services organizations. Some of the most surprising and counterintuitive insights of this Note arose from the interviews with local victim services organizations about victims' perceptions of the CPD SVU. Even more than the author's direct observations of the CPD, these interviews elucidated what victims expect, how victims confirm or dispel their fears based on how police officers act, and how victims filter their view of police officers through their (socially imposed) expectations and fears. Victim advocates also provided a more accurate view of how the CPD operates as opposed to how it aspires to operate.

Without formal mechanisms for feedback, victim advocates do not feel comfortable providing feedback to police departments. Individual victims who chose to drop their allegations out of frustration with the police department are unlikely to deem any further contact with the police department productive. Victim advocates express fear that providing honest feedback would undermine their relationship with the police department, a relationship which is crucial to their success on behalf of the victims they support.¹⁶⁷ Police departments can counter this hesitancy by setting up formal feedback structures and even anonymous online forms.

The meetings with local victim services organizations should be regularly scheduled and include as wide a range of advocates as possible. Victim advocates from local rape crisis centers, rape hotlines, women's shelters, local universities, and any other group with frequent contact with rape victims should be invited. While standards cannot set any concrete requirements for who should be invited, both the local police and the state oversight board together should choose the groups to be included, to avoid exclusion of unpopular or critical victim advocates. To be most productive, these meetings should focus not on resolution of individual complaints, but instead on the broader trends around the relationship between police department and victims in the area.

Third, there must be frequent and uniform tracking and review of metrics on rape complaints. Metrics are where the rubber meets the road. Yet today, updated and uniform metrics on how rape allegations progress through police departments do not exist. Because of this gap, this final recommendation—that

165. See generally Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 *YALE L.J. F.* 406, 407 (2017); Robert J. Smith, *Reducing Racially Disparate Policing Outcomes: Is Implicit Bias Training the Answer?*, 37 *U. HAW. L. REV.* 295, 296 (2015).

166. See generally Cynthia J. Najdowski et al., *Stereotype Threat and Racial Differences in Citizens' Experiences of Police Encounters*, 39 *L. & HUM. BEHAV.* 463, 468 (2015).

167. Telephone interview with victim-oriented nonprofits, *supra* note 47.

the metrics on the progress of rape allegations must be tracked at a granular level and evaluated regularly—underlies the success of the other recommendations. Like meetings with victim advocates, metrics can shift police departments from evaluating their success based on the extent of their improvement efforts to evaluating the actual impact of their improvements on victims. Metrics can reveal the success or failure of the improvements.

While they must be determined ultimately by the state board, specific metrics should include how many rape allegations are reported to the police, categorized by the reporting means used; how many rape kits are collected, compared to allegations reported; how many include a victim interview; how many proceed to physical evidence collection; how many include an interview with the alleged rapist; how many are submitted to a prosecutor for an arrest warrant; how many result in a signed arrest warrant; how many result in an arrest; how many result in a trial; and how many result in a conviction (of any kind, by kind). At a minimum, these metrics allow police departments to evaluate if there are any parts of the reporting and investigation process that are particularly problematic for victims and their allegations. At best, the metrics encourage police departments to assess each stage of the investigatory process for opportunities to encourage victims.

Together, these elements of an oversight system can help police departments evaluate and reduce their deployment of rape process templates. Training is crucial because rape process templates are subtle and strongly supported by cultural perceptions of rape. Meetings with local victim advocates ensure that police departments accurately perceive how often they deploy the templates and how that affects victims' experiences. Tracking metrics underlies both the training and the meetings because it provides another way to measure if the improvements help solve the original problem: the low rates at which victims report and pursue their allegations of rape. The implementation of these recommendations is a first step towards recognizing and reducing the power of rape process templates in police departments and potentially increasing the reporting rates for rape.

CONCLUSION

This Note helps explain a possible reason why, despite efforts to improve policing, fewer than a third of rape victims report their rape to the police and an even smaller number pursue those allegations to an arrest. Based on a case study of two local and well-intentioned police departments, this Note suggests that one cause of the low rates of reporting rape is police officers' unintentional use of rape process templates, namely the "he said, she said" and "brutal cross-examination" templates. These templates manifest themselves in comments and attitudes that subtly signal skepticism to rape victims about their allegations.

Rape victims respond strongly to these hints because they fear and are primed to expect skepticism. An unexpected insight of the Note's research was that even police officers who care deeply about victims often still impose these discouraging templates, thus preserving the historically entrenched disbelief of rape allegations despite their best intentions.

The Note proposes a solution to the deployment of these templates, also grounded in the case study of the two police departments. With outside oversight, the UPD has countered the rape process templates more effectively than the CPD has. This suggests that state oversight may provide a solution, particularly when it comes with financial stakes and if it includes training on rape process templates, regular meetings with local victim services organizations, and tracking and evaluating metrics on the progression of rape allegations.

Rape process templates do not just stop individual rape victims from reporting their rape. They also slow the development of the law regarding what rape allegations are considered credible, provable, and ultimately, real. It matters little that the legal definition of rape expands if police officers use an outdated, narrow, and unconscious definition to determine what rape allegations are credible enough to be investigated fully or which rape victims deserve a chance in court. For the response to rape to evolve sufficiently to mirror expanding legal definitions and social understandings of rape, state oversight boards must ensure that local police departments do not deploy rape process templates. They must provide police officers with the training, local contacts, and statistics necessary to enable them to enact their good intentions.