

Spring 2021

Sometimes They Don't Die: Can Criminal Justice Reform Measures Help Halt Police Sexual Assault on Black Women?

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Recommended Citation

Michelle S. Jacobs, *Sometimes They Don't Die: Can Criminal Justice Reform Measures Help Halt Police Sexual Assault on Black Women?*, 44 Harv. J. L. & Gender 251 (2021)

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SOMETIMES THEY DON'T DIE: CAN CRIMINAL JUSTICE REFORM MEASURES HELP HALT POLICE SEXUAL ASSAULT ON BLACK WOMEN?

MICHELLE S. JACOBS*

ABSTRACT

In the eighteen months between March 2019 and August 2020, at least eight Black women were murdered by the police. Breonna Taylor was one of them. Officer Brett Hankison, one of the three officers who murdered Breonna Taylor, was eventually discharged from the Louisville Police Department. In the memo discharging him, the police chief cited behavior that amounted to an extreme indifference to the value of human life: Hankison blindly fired ten rounds into the home of Ms. Taylor's neighbor. Additionally, in the aftermath of Ms. Taylor's death, two women came forward and accused Hankison of sexually assaulting them while he was in uniform. Breonna Taylor's case highlights the intersection of police violence and sexual violence against Black women. Police who are accused of brutal violence often have histories of misconduct, with numerous complaints from civilians. For many women, the police misconduct is sexual assault. The women don't die, but the assault strips away their dignity and sense of security.

This paper will challenge the belief that police sexual misconduct is an infrequent, hidden crime. In fact, it is a common occurrence and is allowed to continue in most police departments. Both adult women and children are victims of police sexual misconduct. The unwillingness of federal and state authorities to tackle this issue forced researchers and journalists to create their own databases of police officers who commit crimes, including sexual misconduct.

Our nation is primed to tackle the issue of police reform in a way it has not been in recent years. This paper will argue that unless police reform efforts look beyond a narrow, male-centered understanding of police violence, the

* Professor of Law, University of Florida, Levin College of Law. My thanks as always to Professor Taunya L. Banks who always reads a draft before anyone should ever see it. Thanks also to three of my former students who are true warriors fighting every day to protect women and girls: Andrea J. Ritchie, activist and author of *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR*; Andrea Williams, Director of Advocacy Training and Engagement at STEPS to End Family Violence; and Yasmin Vafa, Executive Director of Rights4Girls.org. I hope my work will be useful to you all on the ground.

opportunity to create reform that helps protect Black women from police sexual misconduct will be lost.

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THE SPRING AND SUMMER OF OUR DISCONTENT

In the eighteen months between March 2019 and August 2020, at least eight Black women were murdered by the police. They were Brittany McLean,¹ Latasha Walton,² Nina Adams,³ Pamela Turner,⁴ Crystal Ragland,⁵

¹ Live 5 Web Staff, *Coroner Identifies Women Who Died While in Custody at Dorchester County Detention Center*, LIVE 5 (Mar. 19, 2019), <https://www.live5news.com/2019/03/10/coroner-identifies-woman-who-died-while-custody-dorchester-county-detention-center/> [https://perma.cc/ZNV6-NTWF].

² *Family of Woman Shot by FHP Trooper Wants DOJ to Investigate*, NBC MIAMI (Mar. 19, 2019), <https://www.nbcmiami.com/news/local/family-latasha-walton-fhp-trooper-shooting/80153/> [https://perma.cc/6ZDH-2S9Z].

³ *Woman Killed in Greensburg Police-involved Shooting Identified*, CBS PITTSBURGH (Mar. 14, 2019), <https://pittsburgh.cbslocal.com/2019/03/14/greensburg-woman-police-involved-shooting-victim-identified/> [https://perma.cc/KKP4-3GF2].

⁴ Minyvonne Burke & Janelle Griffith, *Texas Woman Fatally Shot by the Police Officer was not Violent, Family Says*, NBC NEWS (May 15, 2019 6:31 PM) <https://www.nbcnews.com/news/us-news/woman-had-several-bad-experiences-texas-officer-who-fatally-shot-n1006176> [https://perma.cc/HC8A-7SXV].

⁵ Ashley Thusius, *Huntsville Police: Woman Killed in Confrontation Told Them to Shoot Her*, WAAY 31 (May 31, 2019), <https://www.waaytv.com/content/news/Huntsville-police-Woman-killed-in-confrontation-with-officers-told-them-to-shoot-her-510678221.html> [https://perma.cc/22PE-XN7P].

Atatiana Jefferson,⁶ Priscilla Slater,⁷ and Breonna Taylor.⁸ As was the case with most of these women, Breonna Taylor's death received little media attention outside of local media.⁹ Ms. Taylor was killed days before Kentucky shut down due to the threat of the coronavirus.¹⁰ The national news, as well as all local news, went on a coronavirus-only reporting cycle. Even though Ms. Taylor was an Emergency Medical Technician—an essential worker—her death still did not receive media attention.¹¹ In fact, she was not mentioned by the Louisville media again until her boyfriend was released from jail.¹² However, the news story was about him, and she was not referenced by name.¹³ The police killing of George Floyd on May 25, 2020,¹⁴ and the subsequent protests helped bolster the efforts of Ms. Taylor's family, local activists, and the Black Lives Matter movement to bring attention to the fact that the police officers who killed her had been neither fired nor arrested.¹⁵ Although one police officer was fired and indicted for the events of that fatal night, he was not discharged for causing her death but rather for jeopardizing her neighbors and their property.¹⁶

⁶ *Fort Worth Police Officer Fatally Shoots Woman in Her Own Home*, CBS NEWS (Oct. 12, 2019 9:21 PM), <https://www.cbsnews.com/news/police-officer-shooting-white-fort-worth-police-officer-fatally-shoots-Black-woman-in-her-own-home-today-2019-10-12/> [https://perma.cc/RW58-ZNWX].

⁷ Alan Campbell, *Family Demands Answers After Woman Dies in Harper Woods Police Custody*, WXYZ NEWS DETROIT (June 11, 2020), <https://www.wxyz.com/news/region/wayne-county/family-demands-answers-after-woman-dies-in-harper-woods-police-custody> [https://perma.cc/XZ2H-8FPA].

⁸ Billy Kobin, *LMPD Officer Shot, Woman Killed During Drug Investigation Off St. Andrews Church Road*, LOUISVILLE COURIER J. (Mar. 13, 2020), <https://www.courier-journal.com/story/news/crime/2020/03/13/louisville-police-officer-shot-suspect-killed-springfield-drive/5040349002/> [https://perma.cc/QZ8Y-8DMR].

⁹ See *id.* (standing as one of the only news stories to mention Taylor in the immediate aftermath of her death).

¹⁰ See Dylan Lovan, *Federal Look into Breonna Taylor's Death Casts a Wider Net*, AP NEWS (Mar. 12, 2021), <https://apnews.com/article/federal-investigation-breonna-taylor-death-111213346787cdb5fb7b3266a3ddc402> [https://perma.cc/H3L3-GJGP].

¹¹ See Richard A. Oppel Jr. et al., *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html> [https://perma.cc/TY6A-NZMJ].

¹² See John P. Wise, *Judge Releases Man Who Shot Cop During Deadly Confrontation 2 Weeks Ago*, WAVE 3 NEWS (Mar. 27, 2020 1:10 PM), <https://www.wave3.com/2020/03/27/judge-releases-man-who-shot-officer-during-deadly-confrontation-weeks-ago/> [https://perma.cc/34VG-SBJ2].

¹³ *Id.*

¹⁴ Tom Cleary, *George Floyd: Minnesota Man Who Died in Minneapolis Police Custody Is Identified*, HEAVY.COM (May 28, 2020), <https://heavy.com/news/2020/05/george-floyd-minneapolis-minnesota-video/> [https://perma.cc/LF3K-JAF3].

¹⁵ Steve Almasy, Dakin Andone, Faith Karimi, & Sara Sidner, *Unrest Mounts Across Multiple US Cities over the death of George Floyd*, CNN (May 30, 2020), <https://www.cnn.com/2020/05/29/us/minneapolis-george-floyd-friday/index.html> [https://perma.cc/QF7P-6S2Y]; Ganesh Setty & Holly Yan, *New York City Protest Demanding Justice for Breonna Taylor Ends with 12 Arrests*, CNN (Sept. 27, 2020), <https://www.cnn.com/2020/09/27/us/nyc-blm-protest/index.html> [https://perma.cc/7JSP-6P7X].

¹⁶ See Darcy Costello, *Third Anonymous Grand Juror in Breonna Taylor Case: 'No Additional Charges Were Allowed'*, LOUISVILLE COURIER J. (Oct. 30, 2020), <https://www.courier-journal.com/story/news/local/breonna-taylor/2020/10/30/third-anonymous->

A recent *Washington Post* article stated that two hundred and forty-seven women have been killed by the police between 2015 and 2020.¹⁷ According to the *Washington Post*, Black women made up 20% of those killed, for a total of forty-eight out of the two hundred forty-seven.¹⁸ Among women killed by police while unarmed, Black women comprised 28%.¹⁹ Black women comprise only 13% the female population, leading reporters to conclude that Black women are fatally shot at higher rates than women of other races.²⁰ Other compilations of information about Black women killed look further into history than 2015 and list many more Black women and girls killed by the police.²¹ The #SayHerName project created by Professor Kimberlé Crenshaw and Andrea J. Ritchie served as the focal point for the collection of names.²²

Most of these deaths involved horrific explosions of police violence, where the women were deprived of their Fourth Amendment right to be secure from unreasonable search and seizure.²³ And no matter how violent the killing, when the woman dies, her suffering may end, but it will only just begin for her family, loved ones, and community.²⁴ An even greater number

grand-juror-comes-forward-breonna-taylor-case/6091411002/ [https://perma.cc/HZP3-NUVA]. The officer who shot Taylor and the officer who supplied what may have been false information to obtain the no-knock warrant used to enter Taylor's home without warning have since been fired. See Doha Madani, *Louisville Police Move to Fire Officers in Breonna Taylor Case who Got Warrant, Fired Fatal Shot*, NBC NEWS (Dec. 29, 2020), <https://www.nbcnews.com/news/nbcblk/louisville-police-move-fire-detective-who-obtained-breonna-taylor-warrant-n1252509> [https://perma.cc/W8DY-Y7MG].

¹⁷ See Marisa Iati, Jennifer Jenkins and Sommer Brugal, *Nearly 250 Women Have Been Fatally Shot by Police Since 2015*, WASH. POST (Sept. 4, 2020) <https://www.washingtonpost.com/graphics/2020/investigations/police-shootings-women/> [https://perma.cc/DA9T-W4AV].

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ See Kimberlé Crenshaw & Andrea Ritchie, *SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN*, AFRICAN AMERICAN POLICY FORUM (2015), https://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/560c068ee4b0af26f72741df/1443628686535/AAPF_SMN_Brief_Full_singles-min.pdf [https://perma.cc/3VE9-W7XY].

²² *Id.* The work is being amplified through inournamesnetwork.org [https://perma.cc/KGR3-BWNW], which created a poster of 100 Black women and girls killed by the police between 1984 and 2019. Breonna Taylor's name is not yet included (poster can be downloaded from the Resource Hub tab).

²³ U.S. CONST. amend. IV, which states: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. See also *Tennessee v. Garner*, 471 U.S. 1 (1985) (holding that use of deadly force to apprehend a fleeing suspect may constitute an unreasonable seizure in violation of the suspect's Fourth Amendment rights); *Torres v. Madrid*, 141 S. Ct. 989 (2021).

²⁴ See, e.g., Nelson Oliveira, *Breonna Taylor's Mother Slams Kentucky Attorney General, Says She Never had Faith in Him 'To Do the Right Thing'*, N.Y. DAILY NEWS (Sept. 25, 2020), <https://www.msn.com/en-us/news/crime/breonna-taylors-mother-slams-kentucky-attorney-general-says-she-never-had-faith-in-him-to-do-the-right-thing/ar-BB19qEqy> [https://perma.cc/E8EX-E84F].

of women who have violent interactions with the police do not die, but survive to carry life-long scars from the interaction. These women are victims of police-perpetrated rape and other unwanted sexually related contacts.²⁵ They do not die as a result of their unwanted police interaction, but the assault strips away their dignity and sense of security.²⁶

This article explores the phenomenon of police sexual misconduct and demonstrates how contemporary police reforms spurred by the Black Lives Matter protests of 2020 can help bring an end to impunity for police sexual violence against Black women. For over twenty years, police sexual misconduct has been regarded as a hidden crime. Part I of the paper will challenge the belief that police sexual misconduct is hidden. This Part will discuss the research defining and documenting police sexual misconduct. In addition, the paper will explore two different databases that were created to track all police misconduct, including sexual misconduct. One database was developed specifically by scholars who study police misconduct. The second database was created by journalists who track police misconduct on their own. Both databases help fill a void created by the lack of an official database maintained by the federal government.

Part II discusses Breonna Taylor's death and the connection it had with police sexual misconduct. There will be a brief exploration of sexual assaults against women in the United States, which will highlight how the sexual assault experiences of Black women are not included within the national framework. The trauma of being sexually assaulted is magnified when the perpetrator is a police officer. Women in vulnerable communities are at risk of being victims of predator police. This Part will discuss the factors that make Black women vulnerable to police predators. Part II will close with examining why Black women do not come forward and report police sexual misconduct to the authorities.

Despite the years of research on police sexual misconduct and the creation of the two types of databases, few states have achieved any degree of success in reducing or eliminating police sexual misconduct. Part III will examine the main obstacles to reform: the blue wall of silence, lack of training, lack of transparency, and lack of accountability of police officers. Police culture contributes to officers' unwillingness to report other officers who engage in criminal conduct generally. This is certainly true in the context of police sexual misconduct. Much of the contemporary discussion about police reform raises the question of whether police are properly trained. Training on the use of force or de-escalation techniques are not adequate to address behaviors that lead to police sexual misconduct. It will be a challenge to convince law enforcement agencies that training on police sexual misconduct is important. Regardless of whether additional training occurs, getting official data on the frequency of police sexual misconduct is vital.

²⁵ See *infra* Section IIE text and notes.

²⁶ *Id.*

The informal databases are a great start, but reliable data that agencies are mandated to supply is critically needed. Unfortunately, police officers have legislative protection that often makes the data inaccessible to the public. The difficulty of circumventing these police protections will be discussed. Finally, police who do commit sexual misconduct are often not held accountable for their offenses. The lack of criminal accountability is combined with tort protections through the doctrine of qualified immunity. Lack of accountability can embolden the police, which further erodes public trust in them.

Part IV urges advocates for police reform to refrain from marginalizing Black women by proposing reform measures that are only male-centered. Scholars and activists who are concerned with police sexual misconduct should seek to broaden the conversation about police reform such that it encapsulates proposals that help protect Black women from the police. This article suggests two recommendations for how the focus of police reform can be expanded. The first provides a community-based solution for women that will avoid police involvement in curing the lack-of-transparency problem. The second recommendation works within current proposals to expand the use of civilian complaint review boards and suggests ways in which the process can be tweaked to provide some solutions for both the transparency and accountability barriers to reducing police sexual violence.

I. POLICE SEXUAL MISCONDUCT

A. *Scholars Force Law Enforcement Groups to Acknowledge Police Sexual Misconduct*

Sexual misconduct by police officers is called a “hidden” crime.²⁷ But labeling it as such is both outdated and inaccurate. Referring to police crimes as “hidden” excuses the reluctance of supervisory personnel within law enforcement agencies from taking more serious action to punish this criminality within their ranks. While it was true that early research of police criminality rarely focused on police misconduct outside of corruption and bribery, the same cannot be said today.²⁸ Over the past twenty years, a small but growing number of scholars have focused on crimes by members of law enforcement that include police sexual misconduct.²⁹ The term “police sexual misconduct” includes the broadest variety of police sexual behaviors and

²⁷ Cara E. Rabe-Hemp and Jeremy Braithwaite, *An Exploration of Recidivism and the Officer Shuffle in Police Sexual Violence*, 16 POLICE Q. 127, 129 (2012).

²⁸ See generally Timothy M. Maher, *Police Sexual Misconduct: Officers' Perceptions of Its Extent and Causality*, 28 CRIM. JUSTICE REV. 355 (2003) (reviewing the early literature looking at only police corruption).

²⁹ In the decade of the nineties alone, at least eight studies were published on police sexual misconduct. See Kristina M. Lopez et al., *Media Coverage of Police Sexual Misconduct in Seven Cities: A Research Note*, 42 AM. J. CRIM. JUSTICE 833, 834 (2017).

will be used for the balance of this article. The definition of Police Sexual Misconduct (PSM) is:

Any behavior by a police officer that takes advantage of the position of the police officer to misuse his/her power and authority to commit a sexual act or to initiate or respond to a sexual act initiated by another person. . . . This includes any behavior, communication, or gestures that would be deemed as lewd, inappropriate, or unsuitable for an officer in his/her position in law enforcement.³⁰

The phrase is now commonly used to indicate the entire spectrum of offending police behaviors. The term police sexual violence is also used to identify a category of sexual misconduct in which physical force was used against the victim.³¹ Although similar to the language for sexual misconduct, police sexual violence can be defined as “sexually degrading, humiliating, violating, damaging or threatening act committed by a police officer through the use of force, fear or intimidation, or police authority.”³² Police sexual violence is studied in the context of police officers who engage in sexual violence on repeat occasions.³³ Research continues to be published exploring the types of sexual misconduct, the frequency of it, and even the financial costs borne by local governments to protect the offending officers.³⁴

The Department of Justice, as well as the International Association of Chiefs of Police (IACP), acknowledged years ago that law enforcement sexual misconduct exists.³⁵ The problem lies not in knowing about it but rather in failing to do anything about it. The IACP’s work identified five barriers to making progress on police sexual misconduct: (1) lack of clearly written policies defining it and prohibiting the behaviors that constitute sexual misconduct;³⁶ (2) lack of effective training to prevent the occurrence of PSM

³⁰ PHILIP M. STINSON ET AL., POLICE SEXUAL MISCONDUCT: ARRESTED OFFICERS AND THEIR VICTIMS 5 (2014), https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?article=1037&context=crim_just_pub [<https://perma.cc/WBK4-6NJL>]; Stinson’s definition is a modified version of what Maher adopted and used in his work. Maher talked about sexually violent acts and wrote that such acts were motivated by the “purpose of personal gratification.” Maher, *supra* note 28, at 357.

³¹ See Maher, *supra* note 28, at 357.

³² Rabe-Hemp & Braithwaite, *supra* note 27, at 130 (citing Peter B. Kraska & Victor E. Kappeler, *To Serve and Pursue: Exploring Police Sexual Violence Against Women*, 12 JUSTICE Q. 85 (1995)).

³³ See Rabe-Hemp & Braithwaite, *supra* note 27, at 130.

³⁴ See Victor Kappeler & Michael Vaughn, *Law Enforcement: When Pursuit Becomes Criminal – Municipal Liability for Police Sexual Violence*, 33 CRIM. L. BULL. 352–376 (1997).

³⁵ See INT’L ASS’N OF CHIEFS OF POLICE, ADDRESSING SEXUAL OFFENSES AND MISCONDUCT BY LAW ENFORCEMENT: EXECUTIVE GUIDE 13 (2011), https://www.nccpsafety.org/assets/files/library/Addressing_Sexual_Offenses_and_Misconduct_by_LE.pdf [<https://perma.cc/LD6D-64JQ>] (hereinafter referred to as IACP, ADDRESSING SEXUAL OFFENSES).

³⁶ See *id.*

within the ranks;³⁷ (3) lack of an official national database that contains the names of officers who have engaged in PSM;³⁸ (4) inadequate systems of accountability, including the availability of decertifying police officers when they commit PSM;³⁹ and finally (5) the “blue wall of silence,” which is the police cultural practice of sticking together and refusing to report or cooperate with harmful information against fellow officers.⁴⁰ Today, all five of these obstacles still exist.

The IACP issued their report in 2011 and included several recommendations for clearly written policies and enhanced training on the issue of PSM.⁴¹ In the course of preparing the report, the IACP noted that police chiefs throughout the nation resisted the idea of having formal policies prohibiting sexual misconduct.⁴² There were two basic reasons: the chiefs either believed it was not a problem in their agencies, or they preferred to handle incidents of PSM on a case-by-case basis.⁴³ Other chiefs embraced a broad policy against sexual harassment but not specifically against PSM. While IACP opposes this strategy, their recommendations are advisory, and no law enforcement agency is required to adopt them.⁴⁴

The federal government also has its fair share of allegations of law enforcement misconduct, including sexual misconduct.⁴⁵ Law enforcement officers are on notice that misconduct is punishable under 18 U.S.C. § 242.⁴⁶ Federal law prohibits sexual conduct with anyone in custody.⁴⁷ While the

³⁷ See *id.* at 8.

³⁸ ASSOCIATED PRESS, *A National Registry of Problem Police Officers Would Require Major Changes by States*, L.A. TIMES (Jun. 26, 2020 5:13 AM), <https://www.latimes.com/world-nation/story/2020-06-26/us-police-registry-would-fail-without-changes-in-states> [https://perma.cc/4A8V-HKEA].

³⁹ See, e.g., Roger L. Goldman & Steve Puro, *Revocation of Police Certification: A Viable Remedy for Police Misconduct*, 45 ST. LOUIS U.L.J. 541, 575 (2001).

⁴⁰ IACP, ADDRESSING SEXUAL OFFENSES, *supra* note 35, at 4, 7; see also Frank Serpico, *Penetrating the Police Brotherhood*, POLITICO MAGAZINE (Oct. 22, 2016), <https://www.politico.com/magazine/story/2016/10/police-apology-minority-communities-214381> [https://perma.cc/UC93-SZCE].

⁴¹ See IACP, ADDRESSING SEXUAL OFFENSES, *supra* note 35, at 7–9. Police sexual misconduct was originally defined by Timothy M. Maher. See Maher, *supra* note 28, at 357. Philip Stinson later refined Maher’s definition to the one currently used today. Police sexual misconduct is “any behavior by a police officer that takes advantage of the position of police officer to misuse his/her power and authority to commit a sexual act or, to initiate or respond to a sexual act initiated by another person.” STINSON ET AL., POLICE SEXUAL MISCONDUCT, *supra* note 30, at 5.

⁴² See IACP, ADDRESSING SEXUAL OFFENSES, *supra* note 35, at 5.

⁴³ See *id.* at 6.

⁴⁴ See *id.* at 5–6.

⁴⁵ See ASSOCIATED PRESS, *FBI Agent Accused of Using Foreign Prostitutes*, CBS NEWS (Sept. 24, 2012, 4:29 PM), <https://www.cbsnews.com/news/fbi-agent-accused-of-using-foreign-prostitutes/> [https://perma.cc/W4TM-PABX].

⁴⁶ 18 U.S.C. §§ 241–242 (2018) provides in pertinent part: “[w]hoever, under color of any law, . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States” shall be guilty of a crime.

⁴⁷ See U.S. DEP’T OF JUSTICE, *Law Enforcement Misconduct* (July 6, 2020), <https://www.justice.gov/crt/law-enforcement-misconduct#sex> [https://perma.cc/4VCR-XMR2]

prohibition protects those who are detained or arrested, it does not include cases where federal law enforcement officers engage in sexual contact with other civilians.⁴⁸ Under former Attorney General Loretta Lynch, however, guidance was issued prohibiting sexual harassment in the workplace and sexual misconduct.⁴⁹ Although the Lynch order did include off-duty behavior, it was limited to behavior that has a nexus to the officer's job.⁵⁰ There was also an order prohibiting "sexual relationships with prostitutes," developed in response to the public embarrassment caused by agents soliciting sex.⁵¹

The federal government, professional police organizations, and state and local law enforcement agencies all know or should know of the existence of police sexual misconduct, but none of these entities has managed to find a way to reduce or eliminate its occurrence.

B. Researchers Create a Database for Police Sexual Misconduct

Scholars and the IACP agree that an official national database is needed to help keep police officers who commit crimes, including PSM, accountable.⁵² However, the lack of an official national database does not mean that there is insufficient data to inform legislators and other policy makers about the extent and danger of PSM.⁵³ Former police officer turned scholar Philip Stinson started building on prior research of police sexual misconduct, and police misconduct in general, in 2015.⁵⁴ Stinson created a system of categorization that organized police crimes into five areas.⁵⁵ He joined a project to collect all media stories of police officers who had been charged with a

("Sexual misconduct includes, but is not limited to, sexual assault without consent (rape), sexual contact procured by force, threat of force or coercion, and unwanted or gratuitous sexual contact such as touching or groping.").

⁴⁸ See *id.*

⁴⁹ See OFF. OF PUBLIC AFFAIRS, *Justice Department Issues Guidance on Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence*, U.S. DEP'T OF JUSTICE (Dec. 15, 2015), <https://www.justice.gov/opa/pr/justice-department-issues-guidance-identifying-and-preventing-gender-bias-law-enforcement> [<https://perma.cc/7X3Y-CK4F>].

⁵⁰ See *id.*

⁵¹ *Id.*

⁵² See WASH., D.C.: OFF. OF CMTY. ORIENTED POLICING SERVS., FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 90 (2015), <https://d3n8a8pro7vhmx.cloudfront.net/nacole/pages/115/attachments/original/1570474092/President-Barack-Obama-Task-Force-on-21st-Century-Policing-Final-Report-min.pdf?1570474092> [<https://perma.cc/4SEN-3DVW>].

⁵³ See PHILIP M. STINSON, POLICE CRIME: THE CRIMINAL BEHAVIOR OF SWORN LAW ENFORCEMENT OFFICERS 6–9 (2015), https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?article=1036&context=crim_just_pub [<https://perma.cc/U2FD-KULX>] (reviewing existing literature about sex-related police crime).

⁵⁴ See *id.* at 3.

⁵⁵ The five areas were: sex-related police crime, alcohol-related police crime, drug-related police crime, violence-related police crime, and profit-motivated police crime. See *id.* at 2.

crime.⁵⁶ From the initial larger group of data, 771 media reports involved police sexual misconduct, and Stinson's team analyzed all of them.⁵⁷ His team's findings greatly added to the understanding of police sexual misconduct. The team's report helped standardize the terminology used to describe police sexual crimes as police sexual misconduct, and it modified the definition put forward by Timothy Maher in 2003.⁵⁸

The findings also highlighted the sheer number of cases involving PSM, demonstrating that sex-related police crimes are not unusual.⁵⁹ The data came from reports throughout the country, from big urban police agencies to small rural ones, and showed that police sexual misconduct can occur in any size agency.⁶⁰ Most disturbingly, the data showed that children were victims of PSM, as many victims were under the age of eighteen.⁶¹ This is an important finding because it challenges the notion that police sexual misconduct is just consensual sex between the officer and a consenting adult.⁶² Adult women were victims of PSM more frequently when the officer was on duty, while children were primarily victims of off-duty conduct.⁶³ The Stinson study reaffirmed prior work that found most PSM involved male patrol officers or "street level" ranks who "operate in a low visibility environment with very little supervision."⁶⁴ A smaller subset of line managers also com-

⁵⁶ STINSON ET AL., POLICE SEXUAL MISCONDUCT, *supra* note 30, at 10 (describing the process by which researchers used Google search and Google alerts to collect stories about 3,403 reports of officers charged with crimes). Stinson's cases differ from those on the USA Today database, as Stinson's database only includes reports of charged officers, whereas *Tarnished Badge* includes allegations as well.

⁵⁷ *See id.* at 3.

⁵⁸ *See* Maher, *supra* note 28, at 357.

⁵⁹ *See* STINSON ET AL., POLICE SEXUAL MISCONDUCT, *supra* note 30, at 29.

⁶⁰ *See id.*

⁶¹ *See id.* at 30; *see also* Samuel Walker & Dawn Irlbeck, "Driving While Female": A National Problem in Police Misconduct, UNIV. OF NEBRASKA AT OMAHA: POLICE PROFESSIONALISM INITIATIVE (2002) (documenting 72 cases of police sexual misconduct with teenage girls, half of whom interacted with the police through a national life skills development program known as Explorers); Matthew Glowicki, *Third LMPD Officer Pleads Guilty to Sexual Abuse of a Minor in Explorer Program*, LOUISVILLE COURIER JOURNAL (Nov. 16, 2020, 5:05 PM), <https://www.courier-journal.com/story/news/crime/2020/11/16/3rd-lmpd-officer-admits-he-sexually-abused-explorer-program-member/6312161002/> [<https://perma.cc/DRG8-PLLK>] (describing the scandal of Louisville, Kentucky police having sex with Explorer Scouts); Amy Larson, *Gilroy Police Chief Responds to Department Sex Scandal*, KSBW 8 ACTION NEWS (Aug. 18, 2017, 4:20 PM), <https://www.ksbw.com/article/gilroy-police-department-accused-in-sex-scandal/12028042#> [<https://perma.cc/F4W5-LMA9>] (relating the scandal of California police having sex with Explorer Scouts).

⁶² *See* Maher, *supra* note 28, at 366; Timothy M. Maher, *Police Chiefs' Views on Police Sexual Misconduct*, 9 POLICE PRAC. & RES. 239, 243 (2008) (noting that chiefs believed most serious PSM such as rape was rare).

⁶³ *See* STINSON ET AL., POLICE SEXUAL MISCONDUCT, *supra* note 30, at 20.

⁶⁴ PHILIP M. STINSON ET AL., POLICE INTEGRITY LOST: A STUDY OF LAW ENFORCEMENT OFFICERS ARRESTED 35 (2016), https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?article=1062&context=crim_just_pub [<https://perma.cc/B4AM-4BMR>].

mitted offenses, as did an even smaller group of what Stinson calls managers and executives.⁶⁵

In 2016, additional data was added to the project.⁶⁶ The number of arrests in the dataset doubled to 6,724 arrest cases involving 5,545 officers.⁶⁷ The number of sex-related cases rose to 1,475 arrest cases involving 1,070 officers.⁶⁸ In the updated material, Stinson et al. found that 30% of sex-related offenses involved police sexual *violence*, as opposed to the more generalized police sexual *misconduct*.⁶⁹ The most serious offenses involving police sexual violence were forcible or statutory rape followed by forcible fondling and sodomy.⁷⁰ Children continued to represent almost half of the victims.⁷¹ Another study suggests that there is a subgroup of officers who commit police sexual violence on multiple occasions throughout multiple jurisdictions.⁷² The police officers within this subgroup are repeat offenders, and each has an average of four victims.⁷³ These officers tend to fall into the group that travel from jurisdiction to jurisdiction because they are not decertified after the initial offending incident.⁷⁴

The joint project data now serve as the basis for the Henry A. Wallace Police Crime Database, which catalogs incidents of police misconduct as reported in the media.⁷⁵ It was recently updated to include media stories published through 2015.⁷⁶ Cases of police sexual misconduct from every single state were reported by the media, with the largest number of cases occurring in the southeastern part of the country.⁷⁷ The sex-related crimes category

⁶⁵ *Id.* at 77. Out of the 771 cases, 766 were male officers; 624 were patrol officers; 104 were field supervisors (corporals and lieutenants); and 43 were captains, deputy chiefs, sergeants and lieutenants. *Id.*

⁶⁶ *See id.* at 152.

⁶⁷ *Id.* at 2. The number of officers and the number of cases can be different because an officer may be charged in more than one case. *Id.*

⁶⁸ *Id.* at 22.

⁶⁹ *See id.* at 192–93.

⁷⁰ *See* STINSON ET AL., *POLICE INTEGRITY LOST*, *supra* note 64, at 193. “The study identified a total of 422 forcible or statutory rapes, 352 cases of forcible fondling, and 94 sodomy arrest cases.” *Id.* at 23. The number of cases involving police sexual violence was higher than the researchers expected. *Id.* at 193. They theorized that their expectation was skewed by their methodology of news-based searches—the news only reports the most serious cases. *Id.*

⁷¹ *See id.*

⁷² *See generally* Rabe-Hemp & Braithwaite, *supra* note 27 (finding, in a study of 106 officers in the Midwest whose cases were covered in the news, that some officers who commit police sexual violence are shuffled to other jurisdictions where they become repeat offenders).

⁷³ *Id.* at 140. Almost half of the recidivist officers in the study offended against children. *Id.* at 134.

⁷⁴ *Id.* at 129, 137, 141.

⁷⁵ Philip M. Stinson, *Police Integrity Research for the Common Good*, THE HENRY A. WALLACE POLICE CRIME DATABASE (2020), <https://policecrime.bgsu.edu> [<https://perma.cc/LW4V-PMNP>].

⁷⁶ *See id.*

⁷⁷ The website allows user to search police misconduct on a heat map. When all crime categories except sex-related crimes are eliminated, the map shows every place where a sex-related crime committed by an officer was published in the media. *See* Philip

was divided into twelve sub-groups according to level of severity.⁷⁸ By following the case files of those arrested through to adjudication, the researchers were able to predict the likelihood of an officer having job-related consequences for sexual misconduct. The data show that officers were more likely to be arrested and prosecuted when an outside agency conducted the investigation of the allegations against the officer.⁷⁹ When a child was the victim, the rate of prosecution and conviction dramatically increased.⁸⁰ Prosecution for PSM outside of the forcible rape, statutory rape, and sodomy categories was less certain; those cases may fit better with the sense that officers are not held accountable for PSM.⁸¹

There are limitations to the Police Crime Database, as Stinson himself points out. The cases are only what could be culled from media reports, and they are only cases where officers were actually charged.⁸² The cases represent only the tip of the iceberg because most PSM does not make its way to the news.⁸³ Scholars also point out that police unions negotiate contracts that restrict how much information about a police officer can be released.⁸⁴ Those restrictions prevent the media from reporting a sufficient amount of information or any information at all about the offense, thereby keeping it out of the database.⁸⁵ A lack of official state databases, police culture, and laws protecting the confidentiality of police records all work to inhibit public disclosure of PSM.⁸⁶

Often in media reports for sexual assault, little to no personal information was included about the identity of the victim out of respect for a victim's privacy.⁸⁷ But where a victim self-identified in the media story, the research-

M. Stinson, *Search by Location*, THE HENRY A. WALLACE POLICE CR. DATABASE (2020), <https://policecrime.bgsu.edu/Home/Map> [<https://perma.cc/V6YR-28SY>]. Texas, California and Pennsylvania also had high numbers of reported incidents, with New York following closely behind.

⁷⁸ See Philip M. Stinson, *Glossary*, THE HENRY A. WALLACE POLICE CR. DATABASE (2020), <https://policecrime.bgsu.edu/Home/Glossary> [<https://perma.cc/CB9F-QUKG>]. The twelve subgroups are: assisting or promoting prostitution, forcible fondling, forcible rape, forcible sodomy, incest, indecent exposure, online solicitation of a child, pornography, prostitution, sexual assault with an object, statutory rape, and other sex crime. *Id.*

⁷⁹ See STINSON ET AL., POLICE INTEGRITY LOST, *supra* note 64, at 200.

⁸⁰ See *id.* at 194.

⁸¹ See *id.* at 115–16.

⁸² See *id.* at 20–21.

⁸³ See, e.g., Robert Lewis, et al., *California's Criminal Cops: Who They Are, What They Did, Why Some Are Still Working*, MERCURY NEWS (July 31, 2020, 11:34 A.M.), <https://www.mercurynews.com/2019/11/10/californias-criminal-cops-convicted-but-stay-on-the-job/> [<https://perma.cc/S575-PB2G>] (noting that in an extensive review of past criminal convictions of current California police officers, about half of the convictions were never reported in the media).

⁸⁴ See Rabe-Hemp & Braithwaite, *supra* note 27, at 135.

⁸⁵ See *id.*

⁸⁶ See STINSON ET AL., POLICE SEXUAL MISCONDUCT, *supra* note 30, at 32–33 (highlighting how steps toward transparency and reporting will reduce police sexual misconduct).

⁸⁷ See generally Nigel Duara, *Is It Ever Okay to Name Victims?*, COLUM. JOURNALISM REV. (Oct. 24, 2014), https://archives.cjr.org/minority_reports/domestic_violence_re

ers coded the arrest record for race of victim. Currently, there are thirty-seven PSM cases in the database coded with Black female victims. Thirteen of them related to charges against Daniel Holtzclaw, whose victims were identified as Black during his trial.⁸⁸ However, too few cases contained victim information to meaningfully extrapolate demographic information; therefore, as the database stands now, it is not helpful for identifying how many Black women are being victimized by the police.

C. News Journalists Create Their Own Databases

In recent years numerous investigative journalists have been inspired to write about police sexual misconduct. Reporter Matt Spina reviewed 700 credible cases of police sexual misconduct and found that, “[i]n more than 70 percent of the cases, officers wielded their authority over motorists, crime victims, informants, students and young people in job-shadowing programs.”⁸⁹ The Cato Institute also started a database of credible stories of police criminal conduct. Over half of the reports they received involved police sexual misconduct.⁹⁰ In another series of reports organized under the title of *Protecting the Shield*, reporters from *Asbury Park Press* engaged in a two-year study of police criminality in New Jersey.⁹¹ Each article in the series focused on an aspect of police criminality, including one on police sexual misconduct that provided disturbing details of seven cases where police engaged in sexual activity, often with teenagers.⁹² In 2020, *USA Today* published *Tarnished Brass*, an article that disclosed the results of a year-long

porting.php [https://perma.cc/UM3M-EC9T] (questioning the policy of omitting information in sexual assault and domestic violence cases).

⁸⁸ Sarah Larimer, *Disgraced Ex-Cop Daniel Holtzclaw Sentenced to 263 for On-Duty Rapes, Sexual Assaults*, WASH. POST (Jan. 22, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/01/21/disgraced-ex-officer-daniel-holtzclaw-to-be-sentenced-after-sex-crimes-conviction/?utm_term=.769478d29939 [http://perma.cc/9YXD-Q4ES].

⁸⁹ Matthew Spina, *When a Protector Becomes a Predator*, BUFFALO NEWS (Nov. 22, 2015), <https://s3.amazonaws.com/bncore/projects/abusing-the-law/index.html> [https://perma.cc/CG6F-25RH].

⁹⁰ David Packman, *NPMSRP 2009 Semi-Annual Police Misconduct Statistics Report*, POLICEMISCONDUCT.NET (October 8, 2009), <https://www.policemisconduct.net/npsmrp-2009-semi-annual-police-misconduct-statistics-report> [http://perma.cc/A7JZ-YKX7].

⁹¹ See generally *The Shield*, ASBURY PARK PRESS (2018), <https://www.app.com/series/theshield/> [https://perma.cc/Q5SG-7GAR] (compiling a series of articles called *The Shield* that was written about police criminal conduct in New Jersey).

⁹² See Andrew Ford & Kala Kachmar, *The Hidden Cop Problem: Sex With Teens and Stalking*, ASBURY PARK PRESS (Jan. 22, 2018, 4:00 AM), <https://www.app.com/story/news/investigations/watchdog/shield/2018/01/22/nj-police-sex-abuse/1035075001/> [https://perma.cc/YB7J-8CF4]. The offensive police conduct in the seven cases included falsely accusing a woman of a crime so that the officer could extort sex from her; various charges of having sex with teenage girls, going to a woman’s home and masturbating on her furniture; and inappropriate sexual conversation with a minor. See *id.* This series of reports prompted the Attorney General of New Jersey to institute police reform. See Part IV, *infra*.

study of 200,000 allegations of law enforcement criminal conduct.⁹³ The newsroom ended up identifying 30,000 officers nationwide who had been decertified for criminal conduct.⁹⁴ The reporters teamed up with Invisible Institute in Chicago, which sponsors the Citizens Police Data Project,⁹⁵ and together created a searchable database for the 30,000 officers. In the database under the category of criminal misconduct, there are 3,145 allegations of rape, child molestation, and other sexual misconduct.⁹⁶ Other media posts outside of investigative reporting have also drawn attention to police sexual misconduct.⁹⁷ The investigative reports and the scholars' research demonstrate that PSM is neither uncommon nor hidden.

II. SEXUAL ASSAULT, BLACK WOMEN, AND THE POLICE

A. *Breonna Taylor's Death Opens the Door to Discuss Police Sexual Misconduct*

Police who are accused of brutal violence often have histories of misconduct, evidenced by numerous complaints from civilians.⁹⁸ But it is impossible to tell how many Black women are sexually assaulted by the police since few states maintain comprehensive databases of police who commit any crime, much less sexual assault.⁹⁹ Additionally, the nature of sexual offenses in general makes tracking victims difficult. But it is known that police select the targets of their sexual misconduct primarily from vulnerable com-

⁹³ John Kelly & Mark Nichols, *Tarnished Brass: We Found 85,000 Cops Who've Been Investigated for Misconduct. Now You Can Read Their Records*, USA TODAY (June 11, 2020, 9:48 AM), <https://www.usatoday.com/in-depth/news/investigations/2019/04/24/usa-today-revealing-misconduct-records-police-cops/3223984002/> [<https://perma.cc/CH4L-BBHN>] [hereinafter *Tarnished Brass*].

⁹⁴ *Id.*

⁹⁵ *Citizens Police Data Project*, INVISIBLE INSTITUTE, <https://invisible.institute/police-data> [<https://perma.cc/M53V-5W3J>] (providing a database of disciplinary records of the Chicago Police Department).

⁹⁶ See *Tarnished Brass*, *supra* note 93.

⁹⁷ See, e.g., Andrea J. Ritchie, *How Some Cops Use the Badge to Commit Sex Crimes*, WASH. POST (Jan. 12, 2018, 9:16 AM), https://www.washingtonpost.com/outlook/how-some-cops-use-the-badge-to-commit-sex-crimes/2018/01/11/5606fb26-ef3-11e7-b390-a36dc3fa2842_story.html [<https://perma.cc/EH2J-QY45>].

⁹⁸ See generally Kyle Rozema & Max Schanzenbach, *Good Cop, Bad Cop: Using Civilian Allegations to Predict Police Misconduct*, 11 AM. ECON. J.: ECON. POL'Y 2, 225 (2019) (demonstrating that civilian complaints are predictive of future civil rights litigation).

⁹⁹ The International Association of Directors of Law Enforcement Standards and Training (IADLEST) is a non-profit organization which assists in establishing training standards for law enforcement agencies. See INT'L ASS'N OF DIR'S OF LAW ENFT STANDARDS AND TRAINING, *About Services*, <https://www.iadlest.org/our-services/about> [<https://perma.cc/Z9P4-DKAY>]. They also maintain a database of officers who have been decertified in their jurisdictions. However, states are not required to report officers to IADLEST. Currently, 45 states report information to IADLEST. See INT'L ASS'N OF DIR'S OF LAW ENFT STANDARDS AND TRAINING, *About NDI*, <https://www.iadlest.org/our-services/ndi/about-ndi> [<https://perma.cc/5P3G-FJ5G>].

munities,¹⁰⁰ and Black women are over-represented in vulnerable communities.¹⁰¹ The death of Breonna Taylor shed light on the incidence of police sexual violence. During the period of heightened attention given to her death and the three officers responsible, two women stepped forward and made allegations that Brett Hankison, the lone police officer disciplined for Taylor's death at that time, had sexually assaulted them.¹⁰²

Particularly vulnerable communities include those engaged in commercial sex work and those struggling with drug addiction, mental illness, or homelessness. Researchers often point out that these women are among the most vulnerable to police sexual abuse because they are forced to interact with the police on a more frequent basis.¹⁰³ They often interact with the police in isolated areas where officers are unsupervised.¹⁰⁴ Even if Black women do not fall into one of those four categories, they are still marginalized simply because they are Black. If Black women can be protected from police sexual misconduct, then all women will be safe from police sexual misconduct.¹⁰⁵

As a result of the deaths of Breonna Taylor, George Floyd, Rayshard Brooks, and all the other Black men and women killed this year, the calls for

¹⁰⁰ See IACP, ADDRESSING SEXUAL OFFENSES, *supra* note 35.

¹⁰¹ Black women are disproportionately reflected in vulnerable categories. For example, they are over-represented among those in poverty in the US. See Jessica Semega, *Pay is Up. Poverty is Down. How Women Are Making Strides*, U.S. CENSUS BUREAU (Sept. 10, 2019), <https://www.census.gov/library/stories/2019/09/payday-poverty-and-women.html> [<https://perma.cc/WAC2-RLD7>] (comparing rate of poverty for Black women in 2017 and 2018 to that of white women and Hispanic women); Danette Mitchell, *African American Women are More Susceptible to Homelessness*, THE REPORTER OPINION SECTION (Aug. 11, 2018), <https://www.thereporter.com/2018/08/11/danette-mitchell-african-american-women-are-more-susceptible-to-homelessness/> [<https://perma.cc/3YT2-3JZQ>]; Aleks Kajstura, *Women's Mass Incarceration: The Whole Pie 2019*, PRISON POLICY INITIATIVE (Oct. 29, 2019), <https://www.prisonpolicy.org/reports/pie2019women.html> [<https://perma.cc/ARP6-M5A8>] (noting that Black women are disproportionately over-represented in prisons and jails); Mary C. Curtis, *Powerful Yet Vulnerable Black Women: A Contradiction Rooted In History*, WASH. POST (April 2, 2014), <https://www.washingtonpost.com/blogs/she-the-people/wp/2014/04/02/powerful-yet-vulnerable-black-women-a-contradiction-rooted-in-history/> [<https://perma.cc/MB73-Z3HS>].

¹⁰² See Britni De La Cretaz, *One Officer Who Killed Breonna Taylor Had Been Accused Of Sexual Assault — He's Not Alone*, REFINERY29 (June 12, 2020, 3:36 PM), <https://www.refinery29.com/en-us/2020/06/9862977/breonna-taylor-brett-hankison-sexual-assault-police-problem> [<https://perma.cc/M2LE-66C8>] (describing the situation and noting that both of the women are white).

¹⁰³ See Jasmine Sankofa, *From Margin to Center: Sex Work Decriminalization is a Racial Justice Issue*, AMNESTY INT'L. (Dec. 12, 2016), <https://www.amnestyusa.org/from-margin-to-center-sex-work-decriminalization-is-a-racial-justice-issue/> [<https://perma.cc/SD2Y-MWHB>].

¹⁰⁴ See IACP, ADDRESSING SEXUAL OFFENSES, *supra* note 35, at 4.

¹⁰⁵ See generally Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (arguing that critical legal studies should look to the lived experiences of marginalized persons to expand understandings for non-marginalized people); see also Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 457 (1993) (stating that representation of the poor protects the rights of all).

police reform have intensified and taken on greater urgency.¹⁰⁶ Community activists throughout the country are fighting for more transparency and accountability for police misconduct.¹⁰⁷ These protests may provide an opportunity to expand male-centered reform efforts against the use of excessive force to include the needs of Black women struggling against police sexual violence.

It is essential to place Black women solidly at the center of discussions on police reform because police violence affects them just as it affects Black men.¹⁰⁸ When the picture of what is happening to Black women is placed next to that of Black men, it is clear that police violence, including PSM, is not an anomaly but rather a regular aspect of all Black life. Black women are not usually at the center of research on victims of rape, sexual assault, or other sex related crimes.¹⁰⁹ They are both victims and survivors of sexual assault. Their experiences with sexual assault can differ from what white women experience due to cultural factors.¹¹⁰ However, those differences will remain invisible until Black women's experiences become part of the sexual assault discussion.

B. Centering Black Women in the Sexual Assault Literature

It is not possible to understand police sexual misconduct without appreciating American cultural values around the perceived right of men to engage in unwanted sexual contact with women and gender-nonconforming persons. Despite the fact that laws began to reform the definition of rape in the late 1970s,¹¹¹ the twenty-eight years between Anita Hill's testimony and

¹⁰⁶ See Rashawn Ray, *How can we enhance police accountability in the United States?*, POLICY 2020 BROOKINGS (Aug. 25, 2020), <https://www.brookings.edu/policy2020/votervital/how-can-we-enhance-police-accountability-in-the-united-states/> [https://perma.cc/CM3M-VT8P].

¹⁰⁷ See, e.g., Jon Nichols, *For 'Police Accountability With Teeth,' Citizens Demand Elected and Empowered Oversight Boards*, THE NATION (June 18, 2020), <https://www.thenation.com/article/activism/police-accountability-oversight-board/> [https://perma.cc/SXM8-XFZJ].

¹⁰⁸ See Michelle S. Jacobs, *The Violent State: Black Women's Invisible Struggle Against Police Violence*, 24 WM & MARY J. OF WOMEN & L. 39, 41 (2017).

¹⁰⁹ See, e.g., Kathryn Casteel, Julia Wolfe & Mai Nguyen, *What We Know About Victims Of Sexual Assault In America*, FIVETHIRTYEIGHT (Jan. 2, 2018, 10:30 AM) <https://projects.fivethirtyeight.com/sexual-assault-victims/> [https://perma.cc/9Y6N-5EGJ].

¹¹⁰ See Gayle Pollard-Terry, *For African American Rape Victims, A Culture of Silence*, L.A. TIMES (Sept. 15, 2014), <https://www.latimes.com/bv-news-aarapes072004-story.html> [https://perma.cc/66KQ-2KHV].

¹¹¹ At common law, the focus of rape prosecutions was on whether the victim objected to the sexual intercourse. See Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 957 (1999). The law embedded the concept that a woman must engage in "utmost resistance" to prevent being raped. *Id.* Anything short of that was deemed not against her will. *Id.* Special evidentiary rules only used in rape cases were particularly harsh against the complainant. Those included prompt reporting rules, admission of evidence of the complainant's past sexual conduct, and a special jury instruction on credibility of a complainant. See Susan Estrich, *Rape*, 95 YALE L. J. 1087, 1094-95 (1986). As states modernized, they struggled to find formulations of the defini-

Dr. Christine Blasey Ford's show that the cultural needle regarding sexual assault has barely moved.¹¹² American society, including its legal institutions, still defer to protecting a man's reputation rather than holding those who sexually assault accountable for their actions.¹¹³ The treatment women continue to receive when they have the courage to speak out against sexual abuse provides a powerful explanation for why sexual assault remains a vastly under-reported crime.¹¹⁴ And while female victims are viewed as accomplices to their own injury, their male perpetrators are often excused or applauded for their behavior as performances of masculinity.¹¹⁵ Substitute a high school boy "making a mistake" with an armed man who is licensed to kill within the course of a work day and one can appreciate the dilemma experienced by a woman who is a victim of police sexual assault.¹¹⁶ The problem is compounded when the woman who complains about a police officer is Black, due to stereotypes about her sexuality and veracity.¹¹⁷

No woman in America can be assured that her bodily integrity will be respected in the face of a man, particularly a powerful one, who is intent on assaulting her.¹¹⁸ But Black women specifically have been deprived of the

tion of rape to bring it more in line with other crimes where the focus was on the mental state and acts of the accused as opposed to the accuser. See David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 321 (2000). Despite the progress, rape cases are still under-reported and under-prosecuted, particularly for Native American women, Black women and Latinas. See Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 1 (2017); Jacobs, *The Violent State*, *supra* note 108 at 76–79.

¹¹² See MaryAnn Grover, *They Still Just Don't Get it: The Lessons of the #MeToo Movement Through the Lens of Supreme Court Nominations*, 22 RICH. PUB. INT. L. REV. 123, 126 (2019).

¹¹³ See Kathleen Tierney, Comment, *The "Leniency Epidemic": A Study of Leniency Granted to Convicted Rapists in America and Australia*, 6 PENN ST. J. L. & INT'L AFF. 342, 348 (2018) (comparing American leniency in sentencing for sexual assault to Australian practice).

¹¹⁴ See Rape, Abuse, Incest National Network (RAINN), *Criminal Justice System – Statistics*, <https://www.rainn.org/statistics/criminal-justice-system> [<https://perma.cc/W8N3-XG4D>] (highlighting how few women report sexual assault).

¹¹⁵ See Ann C. McGinney, *The Masculinity Mandate: #MeToo, Brett Kavanaugh, and Christine Blasey Ford*, 23 EMPLOYEE RTS. & EMP. POL'Y J. 59, 60 (2019); Noam Shpancer, *Why Do Men Sexually Assault Women*, PSYCHOL. TODAY, (Nov. 3, 2014), <https://www.psychologytoday.com/us/blog/insight-therapy/201411/why-do-men-sexually-assault-women> [<https://perma.cc/YPL9-NUGN>].

¹¹⁶ See, e.g., Jason Nichols, *The Defenses to Brett Kavanaugh's Alleged Sexual Misconduct Expose Double Standards for Whom We Consider a Predator*, NBC NEWS OPINION SECTION (Sept. 25, 2018), <https://www.nbcnews.com/think/opinion/defenses-brett-kavanaugh-s-alleged-sexual-misconduct-expose-double-standards-ncna912691> [<https://perma.cc/L76U-PRLK>].

¹¹⁷ See Jacobs, *The Violent State*, *supra* note 108, at 48–49.

¹¹⁸ See, e.g., Melissa Chan, *Donald Trump in Leaked Audio: I Can 'Do Anything' to Women*, TIME (Oct. 7, 2016, 5:11 PM), <https://time.com/4523526/donald-trump-women-leaked-audio/> [<https://perma.cc/D6LR-LJ8Z>]; see also Jeanine Santucci, *19 Women Have Accused Trump of Sexual Misconduct. Here's What Their Stories Have in Common*, USA TODAY (Oct. 21, 2020, 11:04 AM), <https://www.usatoday.com/in-depth/news/investigations/2020/10/21/trump-sexual-assault-allegations-share-similar-patterns-19-women/5279155002/> [<https://perma.cc/J6GQ-WDKY>].

protection of law for their bodily integrity throughout the history of this country. The use of Black women's wombs to create the base of the economic engine for the development of the south, indeed of the economic backbone of the country, during slavery is well-documented.¹¹⁹ Legal institutions and their players' refusal to provide legal protection to Black women's bodies during slavery and after emancipation is also well-documented.¹²⁰ These failures and refusals are not just historical; they persist into contemporary times and include resistance to bringing criminal charges of sexual assault against perpetrators who rape Black women.¹²¹

The National Crime Victimization Survey (NCVS) provides an overall look at data on the incidence of rape and sexual assault in the US.¹²² The authors noted that violent crime against women is down over previous years, but they still found over 459,000 rapes and/or sexual assaults were committed against 212,000 women in 2019.¹²³ NCVS estimates that one in five women has suffered rape, and over 40% have suffered some unwanted form of sexual contact.¹²⁴ According to the NCVS, the rate of women who reported rapes and sexual assaults to the police rose from one in four in 2018 to one in three in 2019.¹²⁵ Despite the increase in the number of women reporting, significant numbers of women still do not report rapes or sexual assaults to the authorities. While the NCVS does provide a breakdown of the incidence and prevalence of crime for both victims and offenders by race and by population density, it fails to break down the categories of violent crime when

¹¹⁹ See, e.g., Jacobs, *The Violent State*, *supra* note 108, at 44 (citing DOROTHY ROBERTS, *KILLING THE BLACK BODY* 24 (1997)).

¹²⁰ See Jacobs, *The Violent State*, *supra* note 108, at 45 (citing Ruth Thompson Miller & Leslie H. Picca, "There were Rapes!": *Sexual Assaults of African American Women and Children in Jim Crow*, 23 *VIOLENCE AGAINST WOMEN* 934, 935 (2017)); see also Cara E. Trombadore, *Police Officer Sexual Misconduct: An Urgent Call to Action in a Context Disproportionately Threatening Women of Color*, 32 *HARV. J. RACIAL & ETHNIC JUST.* 153, 168 (2016); Jameta Nicole Barlow, *Black Women, The Forgotten Survivors of Sexual Assault*, *AM. PSYCHOL. ASS'N* (Feb. 2020), <https://www.apa.org/pi/about/newsletter/2020/02/Black-women-sexual-assault> [<https://perma.cc/GGB6-FRD5>] (discussing literature that draws a connection between rapes of Black women in the south and the fight for civil rights in the 1950s).

¹²¹ See Jacobs, *The Violent State*, *supra* note 108, at 77–79.

¹²² Rachel E. Morgan & Jennifer L. Truman, *CRIME VICTIMIZATION 2019*, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STAT. (Sept. 2020), <https://www.bjs.gov/content/pub/pdf/cv19.pdf> [<https://perma.cc/B3RN-PW7M>].

¹²³ *Id.* at 3, 20. "Sexual assault includes a range of victimizations and is separate from rape or attempted rape. Sexual assault includes attacks or threatened attacks involving unwanted sexual contact between victim and offender, with or without force; grabbing or fondling; and verbal threats." *Id.* at n.4.

¹²⁴ NAT'L INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, 2010 *Summary Report*, NAT'L CTR. FOR INJURY AND DISEASE CONTROL 20, https://www.cdc.gov/violenceprevention/pdf/NISVS_Report2010-a.pdf [<https://perma.cc/6K3G-XH68>] [hereinafter NIPSVS] (reporting a 22% rate for Black women and 18.8% for non-Hispanic white women); see, e.g., Rebecca C. Thurston et al., *Association of Sexual Harassment and Sexual Assault With Midlife Women's Mental and Physical Health*, 179 *JAMA INTER. MED.* 48 (2019), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2705688> [<https://perma.cc/MS5P-6S6J>].

¹²⁵ Morgan & Truman, *supra* note 122, at 8.

analyzing by race.¹²⁶ Thus, the data show that urban communities experience violent crime, and at a higher rate than suburban and rural communities, but it does not provide information on what percentage of Black women in each of those communities, for example, experience rape or sexual assault.¹²⁷ This failure deprives scholars of a valuable opportunity to access a large quantity of data to determine how Black women specifically are subjected to rapes and sexual assaults. And, depending on how data is collected in large studies, it may not include incidents of rape against women who are homeless, institutionalized, living in group settings, or that lack access to a phone.¹²⁸ Capturing the data around sexual violence against homeless women, for example, is important because homelessness is one of the risk factors that leaves women susceptible to sexual violence, and homeless women are vulnerable to police sexual misconduct.¹²⁹

Fortunately, studies of smaller datasets do provide some information on the prevalence of sexual assault within the Black community. Of all women in the United States, Native American women suffer the highest levels of rape, followed by Black women.¹³⁰ Black women experience the entire spectrum of sexual assaults that researchers study in the population of women as a whole. These acts include child sexual abuse, incest, rape and sexual coer-

¹²⁶ See, e.g., NIPSVS, *supra* note 124, at 20–21 (providing breakdown for each type of victimization based on ethnicity in contrast to the NCVS).

¹²⁷ See *id.* at 16. I have critiqued this failure in BOJ reporting on previous occasions in the context of its failure to distinguish between the types of crimes white women commit compared to Black and Brown women—particularly crimes committed by incarcerated women. See Jacobs, *The Violent State*, *supra* note 108, at 96. Beyond the context of incarceration, Black people make up 36% of people living in urban areas and 39% of people living in suburban areas. See Alana Semuels, *No, Most Black People Don't Live in Poverty—Or Inner Cities*, THE ATLANTIC (Oct. 12, 2016), <https://www.theatlantic.com/business/archive/2016/10/trump-african-american-inner-city/503744/> [<https://perma.cc/F9K9-XVC5>]. Nonetheless, the Census Bureau reported that the majority of Black people live in ten states. See SONYA RASTOGLI, TALLESE D. JOHNSON, ELIZABETH M. HOEFEL, & MALCOLM P. DREWERY, JR., U.S. CENSUS BUREAU, BLACK POPULATION: 2010 9 (Sept. 2011). A break-down of the concentrations of those areas show urban and suburban concentrations. See *id.* at 14. For the purposes of having a full picture of the incidence of sexual assault, it would be helpful if the NCVS broke their data down by race/ethnicity as the NIPSVS does.

¹²⁸ The NIPSVS is conducted by telephone and therefore would not have reached women without access to a phone. See NIPSVS, *supra* note 124, at 9. The survey is also underinclusive because its numbers do not include rapes against children or adolescents. See *id.*

¹²⁹ Socio-economic factors are consistently listed to identify women at risk of sexual assault. These factors include poverty, homelessness, drug addiction, and commercial sex work. For a discussion of homelessness and vulnerability to violence, see generally THE WOMEN'S TASK FORCE OF THE DISTRICT OF COLUMBIA INTERAGENCY COUNCIL ON HOMELESSNESS, 2017 DC WOMEN'S NEEDS ASSESSMENT REPORT (2017), <https://www.calvaryservices.org/wp-content/uploads/2018/01/2017dcwnafullreport.pdf> [<https://perma.cc/GK5E-XJS8>] [hereinafter WOMEN'S NEEDS ASSESSMENT].

¹³⁰ See NIPSVS, *supra* note 124, at 20 (finding that 26.9% of Native American women, 22% of Black women, and 18.8% of white women have experienced rape in their lifetimes).

cion.¹³¹ For every Black woman who reports a rape, *fifteen* do not.¹³² In a Department of Justice study of Black women at historically Black universities, 66.7% of women raped said they did not report to the police.¹³³ The women gave a number of reasons why they did not report: they felt ashamed, thought the police would not help them, or they did not want the perpetrator to get in trouble.¹³⁴

It is said that police officers who commit sexual misconduct target victims because they are vulnerable.¹³⁵ Vulnerable women are often drug addicts, sex workers, mentally ill, immigrants,¹³⁶ or arrested and detained.¹³⁷ There is no doubt that these women are vulnerable, but Black women are

¹³¹ See Carolyn M. West & Kalimah Johnson, *Sexual Violence in the Lives of African American Women*, VAWNET (Mar. 2013), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_SVAAWomenRevised.pdf [<https://perma.cc/NU2P-N2VN>]. A significant percentage of Black women experience sexual assault before the age of 18. This single factor is an indicator that someone is vulnerable to repeat victimization and is consistent with the experiences we find with incarcerated Black women. See *id.* at 5, 14.

¹³² Brooks Axtell, *Black Women, Sexual Assault, and the Art of Resistance*, FORBES (Apr. 25, 2012, 2:15 AM), <https://www.forbes.com/sites/shenegotiates/2012/04/25/black-women-sexual-assault-and-the-art-of-resistance/?sh=28fb75477469> [<https://perma.cc/55GF-SDTL>].

¹³³ See NAT'L INST. OF JUSTICE, THE HISTORICALLY BLACK COLLEGE AND UNIVERSITY CAMPUS SEXUAL ASSAULT (HBCU-CSA) STUDY 72 (2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/233614.pdf> [<https://perma.cc/6JST-NHDR>].

¹³⁴ See Allante Adams, *Why are Black Women Less Likely to Report Rape*, BALTIMORE SUN (June 9, 2015, 12:04 PM), <https://www.baltimoresun.com/citypaper/bcpnews-why-are-black-women-less-likely-to-report-rape-20150609-story.html> [<https://perma.cc/NY2S-UC2Q>]. Many cite cultural factors such as the “desire to shield Black men.” NAT'L CTR. ON VIOLENCE AGAINST WOMEN IN THE BLACK COMMUNITY, BLACK WOMEN AND SEXUAL ASSAULT 2 (2018), <https://ujimacommunity.org/wp-content/uploads/2018/12/Ujima-Womens-Violence-Stats-v7.4-1.pdf> [<https://perma.cc/AA8S-67J5>]; see also *The Barriers That May Prevent Black Women From Reporting Sexual Assault*, BLACKBURN CTR. (Feb. 19, 2020), <https://www.blackburncenter.org/post/2020/02/19/the-barriers-that-may-prevent-black-women-from-reporting-sexual-assault> [<https://perma.cc/JP3H-LPKQ>].

¹³⁵ See IACP, ADDRESSING SEXUAL OFFENSES, *supra* note 35, at 4.

¹³⁶ Immigrant women, including Black immigrants, face constant threat of sexual assault by not only the police but also ICE agents. The treatment of immigrant women is outside of the scope of this paper, but recent articles in major media have covered the large number of sexual assaults taking place in ICE detention facilities. See, e.g., Aris Folley, *Migrant Women Describe Sexual Assault in ICE Facilities: Report*, THE HILL (July 17, 2018, 9:37 AM), <https://thehill.com/blogs/blog-briefing-room/news/397382-migrant-women-describe-being-sexually-assaulted-in-ice> [<https://perma.cc/ZMM9-QRW9>]; see also Matthew Haag, *Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Centers, Report Says*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html> [<https://perma.cc/EAY8-SWK3>].

¹³⁷ See, e.g., Katie Benner, *Inmates at N.J. Women's Prison Endured Years of Sex Abuse, Justice Dept. Finds*, N.Y. TIMES (Apr. 13, 2020), <https://www.nytimes.com/2020/04/13/us/politics/prisons-civil-rights-justice-department.html> [<https://perma.cc/2FMJ-Z9XE>]; see also Christina Piccora, *Female Inmates and Sexual Assault*, PRISON LEGAL NEWS (Mar. 28, 2017), <https://www.prisonlegalnews.org/news/2017/mar/28/female-inmates-and-sexual-assault/> [<https://perma.cc/7WHN-MB2D>]; Dylan Cowart, *Transgender Prisoners Face Sexual Assault and Discrimination at Pittsburgh Jail*, ACLU (Nov. 13, 2017, 2:45 PM), <https://www.aclu.org/blog/lgbt-rights/criminal-justice-reform-lgbt-people/transgender-prisoners-face-sexual-assault-and> [<https://perma.cc/KHV7-DE8T>].

vulnerable even when they are not in one of these categories. Black women cannot be free from the threat of police sexual misconduct if they drive a car,¹³⁸ live in or near a poor community, or walk outside.¹³⁹ Black women and girls consistently report that they do not feel safe around the police and that they worry about sexual harassment and rape.¹⁴⁰ Transgender women report that they fear interacting with the police because they may be harassed, charged with a criminal offense, and/or sexually assaulted.¹⁴¹ Transgender people also generally report that the police assume they are sex workers because of their gender identity.¹⁴²

C. *Vulnerabilities: Driving While Black and Female*

As previously stated, Black women are “vulnerable” to law enforcement predators. Poverty, homelessness, mental health issues, drug addiction, and employment as sex workers can all create vulnerability. But Black women can become vulnerable to unwanted police interaction simply by virtue of living their lives as Black women. There is one category of conduct where national attention has focused primarily on Black men’s experiences with law enforcement that also impacts Black women—particularly putting them at risk of police sexual misconduct: driving while Black.

The phenomenon of driving while Black highlights how a traditionally male-centered occurrence should be expanded to include the experiences of Black women. Unlike most men, Black women can be subjected to police sexual misconduct during traffic stops. Driving while Black is a phrase that came to symbolize the risk Black male drivers faced of being stopped while

¹³⁸ “Driving while female” is a term coined by Samuel Walker and Dawn Irlbeck. It was inspired by “driving while Black” and refers to the predatory police behaviors a woman driver is subjected to if a police officer finds her attractive. See Walker & Irlbeck, *supra* note 61. The report was updated in 2003, focusing this time on teenagers who were sexually assaulted by the police. The updated data still found that over 34% of the teenage drivers, mostly female, were assaulted by the police. See Samuel Walker & Dawn Irlbeck, *Police Sexual Abuse of Teenage Girls: A 2003 update on “Driving While Female*, Univ. of Nebraska at Omaha: Police Professionalism Initiative, <https://samuelwalker.net/wp-content/uploads/2010/06/dwf2003.pdf> [<https://perma.cc/2A32-PFU7>] (finding that the majority of girls assaulted and five boys were participating in a life skills development program called Explorers at the time they were assaulted).

¹³⁹ See Jacobs, *The Violent State*, *supra* note 108, at 69–75. Holtzclaw picked the women he targeted because he believed that they were all vulnerable—sex workers or drug addicts—but they weren’t. One woman was a grandmother and one woman was a high school student. The women shared that he found them in a lower socio-economic neighborhood. See *id.*

¹⁴⁰ See Michelle Fine et al., “Anything Can Happen with Police Around”: *Urban Youth Evaluate Strategies of Surveillance in Public Places*, 59 SOC. ISSUES 141, 151 (2003); Rod Brunson & Jody Miller, *Gender, Race, and Urban Policing: The Experience of African American Youths*, 20 GENDER & SOC’Y 531 (2006); SOLUTIONS NOT PUNISHMENT COLLECTIVE, THE MOST DANGEROUS THING OUT HERE IS THE POLICE: TRANS VOICES ON POLICE ABUSE AND PROFILING 4–9 (2016).

¹⁴¹ See SOLUTIONS NOT PUNISHMENT COLLECTIVE, *supra* note 140, at 6 (noting that the Atlanta Police Department is sexually assaulting transgender people of color).

¹⁴² See *id.* at 7.

driving simply because they were Black.¹⁴³ While it may be thought to be a contemporary problem, Black people in America have always had to be careful on the road to keep safe from police and private citizen violence.¹⁴⁴ An entire network of establishments was created to serve Black travelers, and their locations were published in what was called the Negro Motorist's Green Book, which was more commonly known as "the Green Book."¹⁴⁵ Today, the phrase "driving while Black" is associated with the movement to end racial profiling of Black men. But Black women also drive on the roads and are stopped far more frequently than white women.¹⁴⁶ Yet few, if any, of the studies on racial profiling report data on Black women who are stopped while driving. According to the African American Forum:

Even where women and girls are present in the data, narratives framing police profiling and lethal force as exclusively male experiences lead researchers, the media, and advocates to exclude them. For example, although racial profiling data are rarely, if ever, disaggregated by gender and race, when race *and* gender are considered together, researchers find that "for both men and women there is an identical pattern of stops by race/ethnicity."¹⁴⁷

By way of example, the Stanford Open Policing Project collected and analyzed traffic stop data in over 100 million cases obtained from twenty-one state agencies and twenty-nine municipal agencies.¹⁴⁸ The report found significant racial disparities in traffic stops for Black and Hispanic drivers as compared to White drivers.¹⁴⁹ But no chart or analysis referenced Black or Hispanic women.

Traffic stops create opportunities for police officers to engage in sexual misconduct when women are pulled over for "driving while female."¹⁵⁰ Researchers have noted that a traffic stop may start innocently but can quickly escalate through an entire spectrum of unwanted behavior, violence, sexual

¹⁴³ See *Driving While Black: What It is and Why It's Important*, ACLU OF MICHIGAN (last visited Apr. 11, 2021), <https://www.aclumich.org/en/news/driving-while-black-what-it-and-why-its-important> [<https://perma.cc/5VFF-34GA>].

¹⁴⁴ See, e.g., *Green Book Sites: A Historic Guide to Jim Crow America*, NAT'L TRUST FOR HISTORIC PRESERVATION, <https://savingplaces.org/green-book-sites> [<https://perma.cc/B4J4-WW4V>] (exploring and preserving the sites of the Negro Motorist Green Book); see also Sikivu Hutchinson, *Driving While Black, Female, and Fearless*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffpost.com/entry/driving-while-Black-femal_b_7860330 [<https://perma.cc/C64Z-5C9X>].

¹⁴⁵ See GRETCHEN SORIN, *DRIVING WHILE BLACK: AFRICAN AMERICAN TRAVEL ON THE ROAD TO CIVIL RIGHTS* (2020). PBS created a documentary based on the book. *DRIVING WHILE BLACK: RACE, SPACE, AND MOBILITY IN AMERICA*, PBS DOCUMENTARY, <https://www.youtube.com/watch?v=LHZjzJN0sVg> [<https://perma.cc/7EV4-CCAQ>].

¹⁴⁶ See Hutchinson, *supra* note 144.

¹⁴⁷ Crenshaw & Ritchie, *supra* note 21, at 4.

¹⁴⁸ THE STANFORD OPEN POLICING PROJECT (2020), <https://openpolicing.stanford.edu/> [<https://perma.cc/CH2W-X8U6>].

¹⁴⁹ *Id.*

¹⁵⁰ Walker & Irlbeck, *Driving While Female*, *supra* note 61, at 2.

violence, and even death.¹⁵¹ A stop can also lead to an arrest even if the woman has not violated the law. Once under arrest, a Black woman can be subjected to additional violence at the place of detention.¹⁵² Black women who have been stopped by the police are often subjected to humiliation and sexual violence. The two most notorious examples come from Houston and Baltimore, where two women were subjected to public strip searches in or on their vehicles.¹⁵³ The Texas state legislature banned roadside strip searches after the release of a video of Charnesia Corley being subjected to a cavity search for eleven minutes outside of her car.¹⁵⁴ Baltimore's most egregious example was included in the Department of Justice's investigation into excessive use of force by the Baltimore police.¹⁵⁵ In the report, the department refers to a strip search of a woman conducted on the street. Through social media, it became known that the woman in the example was Black.¹⁵⁶

The struggle of the Black Lives Matter movement and the #SayHerName Project is to remind everyone—the Black community, the media, and our legislative bodies—that Black women are also victims of the police. Data collected about driving while Black stops should include Black women, and the PSM data must more clearly capture sexual misconduct offenses committed during stops of those driving while female. Best practices guidelines now suggest law enforcement agencies collect data including race and gender for anyone involved in a traffic stop.¹⁵⁷ The fact that gender was included is significant; however, none of the examples of best practices in-

¹⁵¹ Sandra Bland's interaction with the police started as a traffic stop. She ended up dead in a jail cell. See Ray Sanchez, *What We Know About the Controversy in Sandra Bland's Death*, CNN (July 22, 2015, 10:00 AM), <https://www.cnn.com/2015/07/21/us/texas-sandra-bland-jail-death-explain/index.html> [<https://perma.cc/8C8K-ADRL>].

¹⁵² See *Policing Women: Race and Gender Disparities in Police Stops, Searches, and Use of Force*, PRISON POLICY INITIATIVE (May 14, 2019), <https://www.prisonpolicy.org/blog/2019/05/14/policingwomen/> [<https://perma.cc/AJW3-WANX>].

¹⁵³ See Tom Dart, *Dashcam Video Shows Police Sexually Assaulted Texas Woman, Lawyer Says*, THE GUARDIAN (Aug. 16, 2017, 1:42 PM), <https://www.theguardian.com/us-news/2017/aug/16/charnesia-corley-houston-texas-police-dashcam-video> [<https://perma.cc/TUD6-F7WS>] (describing how a woman handcuffed and naked below the waist was given an eleven minute cavity search by an officer after running a traffic light). Ritchie says this behavior is “par for the course.” *Id.* She stated in the context of the war on drugs that “cavity searches are often justified on the basis of a deeply racialized, ‘sexist, culturally based belief . . . that women are capable of carrying drugs and weapons inside their body cavities, and do so regularly.’” ANDREA J. RITCHIE, *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR* 121 (2017).

¹⁵⁴ Julia Dahl, *Lawsuit: Cops Subjected Woman to 11-Minute Body Cavity Search During Traffic Stop*, CBS NEWS (Aug. 18, 2017, 3:45 PM), <https://www.cbsnews.com/news/lawsuit-cops-subjected-woman-to-11-minute-body-cavity-search-during-traffic-stop/> [<https://perma.cc/PY5N-4KNF>].

¹⁵⁵ CIVIL RIGHTS DIV., U.S. DEPT OF JUSTICE, *INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT* 32 (2016).

¹⁵⁶ See Jacobs, *The Violent State*, *supra* note 108, at 62.

¹⁵⁷ See PRYOR ET AL., *COLLECTING, ANALYZING, AND RESPONDING TO STOP DATA: A GUIDEBOOK FOR LAW ENFORCEMENT AGENCIES, GOVERNMENT, AND COMMUNITIES*, CENTER FOR POLICING EQUITY AND POLICING PROJECT AT NEW YORK UNIVERSITY SCHOOL OF LAW 15 (2020), https://policingequity.org/images/pdfs-doc/COPS-Guidebook_Final_Release_Version_2-compressed.pdf [<https://perma.cc/V2EE-S9Y4>].

cluded a woman driver, nor did the guidelines indicate why collecting data on gender was important. But even small steps towards recognizing the importance of gender and race in the collection of data are positive.

D. Vulnerabilities: Poverty, Homelessness and Sex Work

Researchers have drawn a connection between poverty and sexual violence.¹⁵⁸ The United States Census Bureau reported that the poverty rate for Black people in 2019 was nearly 19%,¹⁵⁹ but for Black female heads of household it was 32%.¹⁶⁰ Nearly one third of Black women who are the heads of their households live in poverty. Poverty is also linked to other factors that lead to the risk of exposure to sexual violence, such as homelessness.¹⁶¹ Poverty also combines with other risk factors such as mental illness, drug dependence, and previous sexual abuse, particularly child sexual abuse, that can lead to repeated victimization.¹⁶² According to the National Sexual Violence Resource Center, “[h]ousing and sexual violence can have a reciprocal relationship —i.e. sexual violence can jeopardize a person’s housing, and lack of housing or inadequate shelter can increase the risk for sexual violence.”¹⁶³ LGBTQ Black women experience homelessness at higher rates than non-Black LGBTQ women.¹⁶⁴ Homeless women are said to be particularly vulnerable to multiple forms of victimization including forced, coerced,

¹⁵⁸ See, e.g., West & Johnson, *supra* note 131, at 4.

¹⁵⁹ John Creamer, *Poverty Rate for Blacks and Hispanics Reached Historic Lows in 2019*, U.S. CENSUS BUREAU (Sept. 15, 2020), <https://www.census.gov/library/stories/2020/09/poverty-rates-for-Blacks-and-hispanics-reached-historic-lows-in-2019.html> [<https://perma.cc/B67G-4XKW>].

¹⁶⁰ John Creamer & Abinash Mohanty, *Poverty Rate for People in Female-Headholder Families Lowest on Record*, U.S. CENSUS BUREAU (Sept. 10, 2019), <https://www.census.gov/library/stories/2019/09/poverty-rate-for-people-in-female-headholder-families-lowest-on-record.html> [<https://perma.cc/6F23-RLCZ>] (compared to 20% for non-Hispanic white women).

¹⁶¹ See *id.* Other factors which increase risk are the geographic location where the woman is homeless and the length of time that she remains homeless. See Ashley Vazquez & Ariel Tu, *Surviving Skid Row: Women’s Stories Of Assault, Fear, And Finding Friendship*, HUFFINGTON POST (Apr. 16, 2018), https://www.huffpost.com/entry/skid-row-homeless-women_n_5acfa9e9e4b0edca2cb7cb57 [<https://perma.cc/S8PU-3HAZ>] (stating one third of Los Angeles homeless population are women and 90% of them have histories of sexual abuse).

¹⁶² *Id.*

¹⁶³ NATIONAL SEXUAL VIOLENCE RESEARCH CENTER, *Statistics*, <https://www.nsvtc.org/statistics> [<https://perma.cc/H9D4-A6LH>] (citing WOMEN’S NEEDS ASSESSMENT, *supra* note 129); see also WILDER RESEARCH, *HOMELESSNESS IN MINNESOTA* (2016) <http://mnhomeless.org/minnesota-homeless-study/reports-and-fact-sheets/2015/2015-homelessness-in-minnesota-11-16.pdf> [<https://perma.cc/US4B-NC8W>] (relating a Minnesota study of 3,672 homeless persons which found 19% of youth reported being physically or sexually assaulted while homeless).

¹⁶⁴ See NAT’L CTR. FOR TRANSGENDER EQUALITY, *2015 U.S. TRANSGENDER SURVEY: REPORT ON THE EXPERIENCES OF BLACK RESPONDENTS 13* (2015), <https://www.transequality.org/sites/default/files/docs/usts/USTS-Black-Respondents-Report.pdf> [<https://perma.cc/4P3J-E8BU>]. The same disparity applies to LBGTQ youth. See HUMAN RIGHTS CAMPAIGN, *2019 BLACK & AFRICAN AMERICAN LBGTQ YOUTH REPORT* 38

or manipulated sexual activity by men.¹⁶⁵ Lack of stable housing can cause women to practice survival strategies, such as tolerating coercive sexual assaults in exchange for a place to stay.¹⁶⁶ The linkage between poverty and homelessness cannot be understated.

PSM can affect homeless women as well, although how it manifests may depend on the age of the victim, with younger homeless women being vulnerable to police sexual predators.¹⁶⁷ Homeless women have reported that they do not feel comfortable interacting with the police.¹⁶⁸ Author and activist Andrea Ritchie documented a case that may not appear to be PSM on the surface, but further investigation suggests otherwise. In that case, the officer did not engage in any forcible sexual conduct, but he did intentionally rip the woman's clothes such that her bare buttocks were exposed to the public, and then he beat her.¹⁶⁹ This case would most likely be categorized as physical violence against a homeless woman, but it includes sexual humiliation, which makes it countable as sexual misconduct as well.

In the research on women and homelessness, much of the focus is on how intimate partner violence contributes to episodic homelessness for women.¹⁷⁰ Intimate partner violence does contribute to homelessness for women and LGBTQ persons, but it does not represent all violence.¹⁷¹ The research available does not seem to include the police among the actors who cause violence outside of the categories of abusers.¹⁷² It would be helpful to have

(2019), https://assets2.hrc.org/files/assets/resources/HRC_2019_Black_and_African_American_LGBTQ_Youth_Report-FINAL-web.pdf [<https://perma.cc/ZD3X-XKF5>].

¹⁶⁵ See Lisa Goodman, Katya Fels, & Catherine Glenn, *No Safe Place: Sexual Assault in the Lives of Homeless Women*, VAWNET (Sept. 2006), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_SAHomelessness.pdf [<https://perma.cc/W4BG-7ZEK>]. The definition of homeless can miss women who are considered "hidden" homeless, because they are not literally homeless but rather may stay with friends or relatives. See *id.* "African American women and female heads of house are at greatest risk of being hidden homeless." *Id.*

¹⁶⁶ For a harrowing story of one woman's descent into homelessness and sexual abuse, see Lori Yearwood, *Homeless women are the sexual assault survivors no one talks about. Here's my story*, WASH. POST (Oct. 26, 2018), <https://www.washingtonpost.com/news/local/wp/2018/10/26/feature/sexual-assault-survivors-include-homeless-women-heres-what-happened-to-me/> [<https://perma.cc/68QF-H5B8>].

¹⁶⁷ See generally Christopher Gavin, *A Lowell police officer repeatedly raped a 16-year-old homeless girl while on duty, prosecutors allege*, BOSTON.COM (June 27, 2019), <https://www.boston.com/news/crime/2019/06/27/lowell-police-officer-allegedly-raped-homeless-teen> [<https://perma.cc/4P7Z-HTPU>].

¹⁶⁸ See Marie Kate Mycek, *Homeless Women Say 'Me Too.' But No One Listens*, HUFFINGTON POST (Mar. 13, 2018), https://www.huffpost.com/entry/opinion-mycek-me-too-homeless_n_5aa6c75ee4b03c9edfae87f1 [<https://perma.cc/V3XQ-GUN8>].

¹⁶⁹ RITCHIE, INVISIBLE NO MORE, *supra* note 153, at 89.

¹⁷⁰ See Goodman, Fels, & Glenn, *supra* note 165.

¹⁷¹ See *id.* The authors list "interpersonal violence and sexual assault at the hands of strangers, acquaintances, pimps, sex traffickers and intimate partners. . ." as types of violent victimization. *Id.*

¹⁷² For example, the police can engage in sexual assaults as strangers, pimps, sex traffickers, or intimate partners, see Jacobs, *The Violent State*, *supra* note 108 at 69 (strangers); at 72 (trafficking); at 80–81 (intimate partner abuse).

data that highlights non-partner sexual violence to determine how much of it is caused by the police.

Poverty and its connection to lack of housing also drive some women to engage in survival sex work or commercial sex work.¹⁷³ These women are more likely to be street walkers, which makes them highly visible to the police. Black women constitute 40% of persons arrested for prostitution.¹⁷⁴ Black and multiracial transgender persons were also 40% of sex workers in the national study.¹⁷⁵

It is not uncommon for police to have sex with women they believe are sex workers.¹⁷⁶ In separate studies, sex workers in New York and Chicago reported that they were harassed and sexually abused by the police.¹⁷⁷ Amnesty International reports that the police were “frequent perpetrator[s] of violence against sex workers.”¹⁷⁸ In many states, no official policy prohibits police from engaging in sexual contact with persons under investigation.¹⁷⁹ Most of police sexual violence against sex workers involves street walkers,

¹⁷³ See THE URBAN JUSTICE CENTER, *REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY* 29 (2003), <https://sexworkersproject.org/downloads/RevolvingDoor.pdf> [<https://perma.cc/ZH89-UDDJ>].

¹⁷⁴ *Id.* The authors admit their total sample size of 35 was small and of that group 33% were Black, but they believe the sample “may reflect systematic phenomena.” *Id.* at 24; see also Sankofa, *supra* note 103.

¹⁷⁵ ERIN FITZGERALD ET AL., *MEANINGFUL WORK: TRANSGENDER EXPERIENCES IN THE SEX TRADE* 4 (2015); see also URBAN JUSTICE CENTER, *supra* note 173, at 14.

¹⁷⁶ See, e.g., Jenavieve Hatch, *Sex Workers In Alaska Say Cops Are Abusing Their Power To Solicit Sex Acts*, HUFFINGTON POST (Aug. 17, 2017, 12:50 PM), https://www.huffpost.com/entry/sex-workers-in-alaska-say-cops-are-abusing-their-power-to-solicit-sex_n_596e1d26e4b010d77673e488 [<https://perma.cc/3WNQ-UDG3>]; see also Matthias Gafni & David Debolt, *Oakland Police Scandal: How Often are Cops Having Sex with Prostitutes?*, MERCURY NEWS (Aug. 11, 2016, 11:20 PM), <https://www.mercurynews.com/2016/07/02/oakland-police-scandal-how-often-are-cops-having-sex-with-prostitutes/> [<https://perma.cc/D85L-6U4W>]; Helen Ubinas & Josh Kovner, *A Prostitute's Tale of Police Abuse*, HARTFORD COURANT (Jan. 24, 1999), <https://www.courant.com/news/connecticut/hc-xpm-1999-01-24-9901251106-story.html> [<https://perma.cc/W7LA-Z3C6>].

¹⁷⁷ See, e.g., JODY RAPHAEL & DEBORAH L. SHAPIRO, *SISTERS SPEAK OUT: THE LIVES AND NEEDS OF PROSTITUTED WOMEN IN CHICAGO* 19–20 (2002); see also THE URBAN JUSTICE CENTER, *supra* note 173, at 30.

¹⁷⁸ Sankofa, *supra* note 103 (describing the different ways officers can engage in unwanted sexual conduct: strip searches, forced and extorted sex); see also Thomas Tracy, *Bronx Cop Accused of Sleeping With 15-Year-Old Prostitute Acquitted of Sex Abuse Charges; Convicted of Tampering with a Witness*, N.Y. DAILY NEWS (Oct. 2, 2019, 1:06 PM), <https://www.nydailynews.com/new-york/nyc-crime/ny-cop-acquitted-of-sex-with-teenage-girl-20191002-7cwx4o2s4jfv3p3cuc7b5azf2i-story.html> [<https://perma.cc/V7A4-FPUP>]; Maggie McNeill, *Alaska Cops Fight For the Right to Sexually Exploit Prostitution Suspects*, REASON (May 25, 2017, 8:30 AM), <https://reason.com/2017/05/25/cops-fight-for-the-right-to-sexually-exp/> [<https://perma.cc/9PXN-TA2T>].

¹⁷⁹ See Albert Samaha, *An 18-Year-Old Said She Was Raped While In Police Custody. The Officers Say She Consented*, BUZZFEED (Feb. 7, 2018, 5:31 AM), <https://www.buzzfeednews.com/article/albertsamaha/this-teenager-accused-two-on-duty-cops-of-rape-she-had-no#byNo2LY36> [<https://perma.cc/6EAY-FKH4>]; Sejal Singh, *Chart of the Day: Does Your State Allow Police to Have Sex with People They Arrest?*, FEMINISTING (Feb. 9, 2018), <http://feministing.com/2018/02/09/chart-of-the-day-does-your-state-allow-police-to-have-sex-with-people-they-arrest/> [<https://perma.cc/WA5G-GMJB>].

who are the most vulnerable and the lowest-paid sex workers. They are disproportionately poor women and women of color.¹⁸⁰

E. Why Don't Women Report Sexual Assault?

There are many barriers to women reporting sexual assault. Individuals can fear reputation loss if they are not believed.¹⁸¹ They may worry about their safety as well as secondary victimization.¹⁸² And for Black women, there is a cultural component that encourages silence when the predator is Black.¹⁸³ Finally, there is also the threat of being subject to physical violence, which has been used to silence victims.¹⁸⁴

When the police are the predators, where can women go for help? Women assaulted by the police face a terrible Hobson's choice. Do they go to the police to report misconduct by the police, thereby risking secondary victimization and even retaliation by the predator and his colleagues? Or do they remain silent, thereby becoming vulnerable to repeat attacks from the police officer predator? Activist and scholar Andrea Ritchie writes that some women may not realize "sexual violence is part of the fabric of police violence."¹⁸⁵ Vulnerable women who are targeted by the police do not come forward because they know no one will believe them if they are engaged in sex work or if they are drug addicts.¹⁸⁶ And they are right. In all likelihood, the women are not believed. This is particularly true for Black women,

¹⁸⁰ See Sankofa, *supra* note 103 (noting that nearly 40% of adults arrested for sex work are Black).

¹⁸¹ See RITCHIE, *INVISIBLE NO MORE*, *supra* note 153, at 107; Maher *supra* note 28 at 358–59. Interestingly, many police chiefs believed police sexual misconduct was at lower levels than earlier periods of time because they stated that if the police victimize a civilian, the civilian would make a complaint. See Timothy M. Maher, *Police Chiefs' Views on Police Sexual Misconduct*, 9 POLICE PRAC. & RES. 239, 243 (2008) (chiefs believed most serious PSM such as rape was rare).

¹⁸² See IACP, *ADDRESSING SEXUAL OFFENSES*, *supra* note 35, at 11.

¹⁸³ See Michelle S. Jacobs, *Loyalty's Reward — A Felony Conviction: Recent Prosecutions of High-Status Female Offenders*, 33 FORDHAM URB. L. J. 843, 868 (2006) (discussing how Black women often put loyalty to their men above their own self-interest); see also Gayle Pollard-Terry, *For African American Rape Victims, A Culture of Silence*, L.A. TIMES (Sep. 15, 2014), <https://www.latimes.com/bv-news-aarapes072004-story.html>.

¹⁸⁴ See *Lawsuit: Paso Robles officer raped and threatened victim*, Cal Coast News (Nov. 8, 2020), <https://calcoastnews.com/2020/11/lawsuit-paso-robles-officer-raped-and-threatened-victim/> [<https://perma.cc/22XY-D9J6>] (describing how officer threatened victim with gun and said her children would be taken from her if she talked); Meg Wagner, *On-duty Florida Cop of The Month Fired for Allegedly Raping Woman on Patrol Car Hood, Threatening Her With Arrest, Death*, N.Y. Daily News (Oct. 31, 2014, 8:07 AM), <https://www.nydailynews.com/news/crime/fla-month-rapes-woman-patrol-car-hood-cops-article-1.1994103> [<https://perma.cc/V6NG-BKSU>].

¹⁸⁵ RITCHIE, *INVISIBLE NO MORE*, *supra* note 153, at 105.

¹⁸⁶ *Id.* at 107. "He identifies a vulnerable society that without exception except one have an attitude for 'What good is it gonna do? He's a police officer. Who's going to believe me?'" Jessica Testa, *How The Police Caught The Cop Who Allegedly Sexually Abused Black Women*, BUZZFEED (Sept. 5, 2014), <https://www.buzzfeednews.com/article/jtes/daniel-holtzclaw-alleged-sexual-assault-oklahoma-city> [<https://perma.cc/39UV-6ZKN>].

whose credibility is routinely questioned in the criminal justice system due to stereotypes about them that developed in slavery and persist in American culture at large and in our legal system in particular.¹⁸⁷ Finally, there is also the threat of physical violence to silence the victim.¹⁸⁸

But against all odds, some Black women spurred by the death of Breonna Taylor are coming forward to speak out about their physical and sexual abuse at the hands of the police.¹⁸⁹ JeAnna Anderson says she knew something was wrong when a Phoenix police officer pulled her over into a dark parking lot.¹⁹⁰ Anderson was not a vulnerable woman in the traditional sense. She was a professional in the healthcare industry, but that did not save her from being a victim of “driving while a Black female,” stopped for allegedly driving on a suspended license. Anderson asked that a witness be present, but the officer, Anthony Armour, would not hear of it. When she tried to take video of the event, he became violent and engaged in forcible fondling.¹⁹¹ Anderson was so afraid that she passed out.¹⁹² She was eventually charged with resisting arrest.¹⁹³ When *The Guardian* investigated sexual misconduct by police officers in Phoenix, Arizona, the paper discovered that Armour had multiple assault and misconduct allegations on his record; including other sexual abuse complaints, but he had only faced a temporary

¹⁸⁷ See Jacobs, *The Violent State*, *supra* note 108, at 76–79; see also Elizabeth Kennedy, *Victim Race and Rape: A Review of Recent Research*, FEMINIST SEXUAL ETHICS PROJECT 5; Roxanne A. Donovan, *To Blame or Not to Blame: Influences of Target Race and Observer Sex on Rape Blame Attribution*, 22 J. INTERPERSONAL VIOLENCE 722, 732–34 (2007); Chelsea Hale & Meghan Matt, *The Intersection of Race and Rape Viewed through the Prism of a Modern-Day Emmett Till*, AM. BAR ASS'N (July 16, 2019), <https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2019/summer2019-intersection-of-race-and-rape/> [<https://perma.cc/W8U3-YBUM>].

¹⁸⁸ See *Lawsuit: Paso Robles Officer Raped and Threatened Victim*, CAL' COAST NEWS (Nov. 8, 2020), <https://calcoastnews.com/2020/11/lawsuit-paso-robles-officer-raped-and-threatened-victim/> [<https://perma.cc/22XY-D9J6>] (describing how officer threatened victim with gun and said her children would be taken from her if she talked); Meg Wagner, *On-Duty Florida Cop of The Month Fired for Allegedly Raping Woman on Patrol Car Hood, Threatening Her With Arrest, Death*, N.Y. DAILY NEWS (Oct. 31, 2014, 8:07 AM), <https://www.nydailynews.com/news/crime/fla-month-rapes-woman-patrol-car-hood-cops-article-1.1994103> [<https://perma.cc/V6NG-BKSU>].

¹⁸⁹ See Sam Levin, *'I'm Still Hurting': Encounter with Phoenix Police Leaves Teenage Girl with Permanent Burn Scars*, THE GUARDIAN (Sept. 1, 2020), <https://www.theguardian.com/weather/2020/sep/01/im-still-hurting-encounter-with-phoenix-police-leaves-teenage-girl-with-permanent-burn-scars> [<https://perma.cc/9F6U-Q6GU>] “Breonna Taylor lost her life. Thank God that wasn't me. But I'm still hurting,” said Trotter after suffering second-degree burns when Phoenix police held her down on the pavement at 113 degrees. *Id.*

¹⁹⁰ See Sam Levin, *“I Didn't Think I'd Survive”: Women Tell of Hidden Sexual Abuse by Phoenix Police*, THE GUARDIAN (Aug. 10, 2020, 8:00 AM), <https://www.theguardian.com/us-news/2020/aug/10/phoenix-police-officers-rape-sexual-assault> [<https://perma.cc/ZM7T-KMDG>].

¹⁹¹ See *id.*

¹⁹² Anderson stated that Sandra Bland's death had recently occurred and that was what she had in her mind. When she awoke and retrieved her possessions from the police station, she realized someone had taken a picture of her on the ground with a police officer standing over her. See *id.*

¹⁹³ See *id.*

suspension for one incident.¹⁹⁴ Armour, who had been on the force since 2006, was not sanctioned for the Anderson incident and was allowed to retire with his pension.¹⁹⁵

Armour was not the only Phoenix officer who sexually assaulted Black women. Erica Reynolds was pulled over as part of a drug investigation.¹⁹⁶ Though no drugs were found, she was taken to the police station and subjected to a rough and aggressive series of body cavity searches.¹⁹⁷ The officers had no warrant to conduct the searches, which is a violation of the law.¹⁹⁸ Reynolds was brave; she went to the hospital and reported that she had been raped.¹⁹⁹ The hospital called the police.²⁰⁰ Despite the fact the doctors recorded that Reynolds suffered sexual assault and rectal bleeding, the police declined to investigate.²⁰¹ No officer was criminally charged, and only one was suspended, for just 40 hours. All officers involved are still on duty.²⁰² Another Phoenix officer named Sean Pena is now facing criminal charges for sexual misconduct against two women.²⁰³ Pena was charged with having sex with a woman in his custody without her consent. In the second case, he was charged with committing sexual acts while out on a welfare check.²⁰⁴ The Tarnished Brass database listed 123 Phoenix police officers who had been decertified for misconduct, more than any other agency in the state.²⁰⁵

¹⁹⁴ See *id.*

¹⁹⁵ See *id.*

¹⁹⁶ See Levin, “I didn’t think I’d survive,” *supra* note 190 (Armour was not involved in the Reynolds assault).

¹⁹⁷ See *id.*

¹⁹⁸ See *id.* Many states have regulations that prohibit body cavity searches without a warrant or, if at the county jail, on the authority of a supervising officer. See, e.g., Tenn. Code § 40-7-121. Body cavity searches are an extreme intrusion and can be a violation of a person’s Fourth Amendment right to be free from unreasonable search and seizure. The officer’s action violated Arizona police policies. See Nicole Valdes, *Documents: Phoenix Police Officer Admits Body-Cavity Search on Woman was Against the Law*, ABC 15 (Aug. 2, 2019, 12:05 AM), <https://www.abc15.com/news/region-phoenix-metro/central-phoenix/documents-phoenix-police-officer-admits-body-cavity-search-on-woman-was-against-the-law> [<https://perma.cc/Q3JQ-V6DW>] (citing Phoenix police policy which states that “physical intrusion will be conducted by virtue of a search warrant, or by consent of the suspect and then only by a medical doctor”).

¹⁹⁹ See Levin, “I Didn’t Think I’d Survive,” *supra* note 190.

²⁰⁰ See *id.*

²⁰¹ See *id.*

²⁰² See *id.*

²⁰³ See Uriel J. Garcia, *Phoenix Police Officer Charged with Sexually Assaulting Handcuffed Woman*, ARIZ. REPUBLIC, (June 24, 2020, 7:07 PM), <https://www.azcentral.com/story/news/local/phoenix/2020/06/24/phoenix-police-officer-sean-pena-charged-sexual-assault-unlawful-sexual-conduct-women-custody/3255072001/> [<https://perma.cc/5GM4-VLE8>].

²⁰⁴ See *id.*

²⁰⁵ Meg O’Connor, *Sex, Crimes, and Lies: Hundreds of Arizona Cops Banned for Misconduct*, PHOENIX NEW TIMES (April 26, 2019, 8:20 AM), <https://www.phoenixnewtimes.com/news/hundreds-of-arizona-cops-decertified-over-misconduct-11276647> [<https://perma.cc/87H4-8T6N>].

Police officers who engage in sexual misconduct such as Armour, Pena, and Daniel Holtzclaw in Oklahoma tend to have more than one victim. In fact, Armour had previously been accused on three other occasions of sexual misconduct and one complaint of assault against women.²⁰⁶ Anderson and Reynolds suffered serious emotional trauma due to their experiences with the police.²⁰⁷ Anderson's life completely unraveled and she ended up temporarily in a women's shelter.²⁰⁸ She eventually left Phoenix.²⁰⁹ Reynolds lives in fear of the police.²¹⁰ The incident impacted her ability to be intimate, and she cannot visit the area where she grew up.²¹¹ These women are living examples of the trauma that never ends when a police officer is a sexual predator.²¹²

III. OBSTACLES TO ELIMINATING PSM

What are the obstacles to eliminating PSM that Black women's advocates need to address in their police reform proposals? Given that data on police sexual misconduct does exist, why is it allowed to continue? Just as there are cultural influences in society that interfere with the willingness of legal actors to fully commit to rape prosecutions, there are also cultural influences that discourage efforts to root out police sexual misconduct. Within law enforcement agencies, two cultural influences are at work: (1) the belief that most police sexual misconduct occurs between consenting adults and does not include serious misconduct,²¹³ and (2) the blue wall of silence. Beyond culture, the three most common obstacles identified are lack of adequate training regarding police sexual misconduct, lack of transparency, and lack of accountability. A closer examination of these three areas sheds light on the hurdles that exist and the difficulties in eliminating them.

A. *The Blue Wall of Silence*

Before exploring these three areas, it is important to understand the blue wall of silence. The so-called blue wall of silence is mentioned in almost all of the literature on police sexual misconduct as a contributing factor

²⁰⁶ Two of the incidents of sexual abuse were with women whom he was "investigating," one of whom was a drug addict. *Id.* In some jurisdictions it is not against the law to have sexual contact with someone being investigated. See, e.g., *Hawaii Law Allows Undercover Police Officers to Have Sex With Prostitutes*, FOX NEWS (Nov. 29, 2015), <https://www.foxnews.com/us/hawaii-law-allows-undercover-police-officers-to-have-sex-with-prostitutes> [<https://perma.cc/7YA2-5JJQ>].

²⁰⁷ See Levin, *'I'm Still Hurting,' supra* note 189.

²⁰⁸ See *id.*

²⁰⁹ See *id.*

²¹⁰ See *id.*

²¹¹ See *id.*

²¹² See Samaha, *supra* note 179.

²¹³ STINSON ET AL., POLICE SEXUAL MISCONDUCT, *supra* note 30, at 30 (debunking the myth that most PSM was with consenting adults).

in researchers' inability to obtain a clear picture of the extent of police sexual misconduct because officers who know about colleagues engaged in that conduct will not report them.²¹⁴ The code of silence is said to be the by-product of the culture of policing, which causes law enforcement to perceive themselves in opposition to the public, an "us vs. them" mentality. As such, officers will close ranks to protect each other, even in the face of wrongful or unethical conduct on the part of their colleagues.

The PEW Research center study also explored the code of silence in their study of police officer attitudes.²¹⁵ The survey presented the participants with a scenario wherein one police officer helps to cover up a colleague's wrongful conduct.²¹⁶ The officers were asked whether they believed the cover-up would be reported to superiors. Over half of the respondents believed the cover-up would not be reported.²¹⁷ The protection of officers who engage in wrongdoing extends up the supervisory chain as well. A former police official stated during a Brookings Institute program that frequent cover-ups within the police department take place for officers who habitually violate use of force protocols.²¹⁸

Professor Timothy Maher's research identified the police code of silence as a problem with regard to police sexual misconduct.²¹⁹ In his study of police officer's attitudes to sexual misconduct, he found that many officers indicated that they would not report an incident if they knew of it or even if they witnessed it.²²⁰ In addition to their code of silence, the officers believed that police sexual misconduct usually did not include serious conduct such as rape and sexual assault, but was primarily a question of interaction of a sexual nature between a police officer and a consenting adult female.²²¹ Of course, subsequent research has disproved these beliefs.²²² But police culture creates serious obstacles to change and, like other cultural phenomena, will be difficult to root out of policing systems.

²¹⁴ See generally *Shielded from Justice: Police Brutality and Accountability in the United States, Code of Silence*, HUMAN RIGHTS WATCH (June 1998), <https://www.hrw.org/legacy/reports98/police/usp027.htm> [<https://perma.cc/883M-5HBG>] (citing LA's Christopher Commission which wrote that "an officer does not provide adverse information against another officer" about the LAPD's culture).

²¹⁵ See Rich Morin et al., *Behind the Badge*, PEW RES. CENTER 33 (Jan. 11, 2017), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2017/01/Police-Report_FINAL_web.pdf [<https://perma.cc/KEJ2-3QWP>].

²¹⁶ See *id.*

²¹⁷ See *id.*

²¹⁸ See Jane Miller & Rashawn Ray, *Highlights: Improving police culture in America*, BROOKINGS INST. (Nov. 4, 2019), <https://www.brookings.edu/blog/up-front/2019/11/04/highlights-improving-police-culture-in-america/> [<https://perma.cc/VE9D-KJPH>].

²¹⁹ Maher, *supra* note 28, at 372.

²²⁰ See *id.*

²²¹ See *id.* at 366.

²²² See Part III.A, *infra*.

B. Police Training

Recommendations for additional police training figures prominently in police reform proposals to address cop killings.²²³ There are also calls for additional training to address PSM. Law enforcement agencies in most states have the power to set the standards under which police officers will be certified. The process is undertaken by Police Officer Standards and Training Boards (POSTs), which are locally established.²²⁴ If a state does not offer certification, it will still have a POST or there may be multiple POSTs within the state. The minimum educational requirement set for law enforcement officers in various regions can vary, sometimes wildly.²²⁵ The International Association of Directors of Law Enforcement Standards and Training (IADLEST), a nonprofit organization, can also assist with training by certifying courses offered by POSTs and providing a collection of best practices for law enforcement agencies.²²⁶

The IACP recommends training for all law enforcement on laws prohibiting sexual misconduct both on duty as well as off.²²⁷ Despite its recommendation, there are no standard requirements for what must be included in police training.²²⁸ Each commission or board is free to set the standards for

²²³ See, e.g., OFF. OF CMTY. ORIENTED POLICING SERVS., *supra* note 52, at 51–60.

²²⁴ See INT'L ASSN. OF DIRS. OF LAW ENF'T STANDARDS AND TRAINING, FACT SHEET (March 2021), https://www.iadlest.org/Portals/0/IADLEST%20Fact%20Sheet%205-11-20_1.pdf?ver=ACWVhUR66V36RadIPplxNA%3d%3d [https://perma.cc/93ED-FE8C].

²²⁵ In the aftermath of the George Floyd killing, CBS News queried police departments throughout the nation to ask about reforms implemented that add racial bias training. See *We Asked 155 Police Departments About Their Racial Bias Training. Here's What They Told Us*, CBS NEWS (Aug. 7, 2019, 7:32 AM), <https://www.cbsnews.com/news/racial-bias-training-de-escalation-training-policing-in-america/> [https://perma.cc/4FKC-RCDZ]. 69% of participating agencies said they have implicit bias training and 59% said they don't know how to measure it to see if it is effective. *Id.* But when the officers were asked, they said they did not value the new classes, nor did they think that this changed how they viewed their work. See *How Effective Are Police Reforms? 'We're Totally Fooling Ourselves,' Expert Says*, CBS NEWS (June 3, 2020, 12:59 PM), <https://www.cbsnews.com/news/police-reform-training-george-floyd-death-effectiveness/> [https://perma.cc/9EMB-XF6U] (noting that some police officers even thought that racial bias training hurt police morale).

²²⁶ IADLEST states that their mission “is to support the innovative development of professional standards in public safety through research, development, collaboration and sharing of information, to assist states and international partners with establishing effective and defensible standards for the employment and training of public safety personnel.” *About Us*, INT'L ASSN. OF DIRS. OF LAW ENF'T STANDARDS & TRAINING (last visited Mar. 26, 2021), <https://www.iadlest.org/about-us/about> [https://perma.cc/9V2X-FN4Q]. This assistance is offered through two programs: The National Law Enforcement Academy Resource Network and the National Certification Program. *IADLEST Fact Sheet*, INT'L ASSN. OF DIRS. OF LAW ENF'T STANDARDS & TRAINING (May 2020), <https://www.iadlest.org/Portals/0/IADLEST%20Fact%20Sheet%205-11-20.pdf> [https://perma.cc/9ZMA-S9U7].

²²⁷ See IACP, *supra* note 35, at 8–9.

²²⁸ See *id.*

what must be included in a law enforcement officer's basic training.²²⁹ While many police agencies have training on sexual harassment, it is not as clear if they have focused training on sexual misconduct. The amount of training an officer receives also reflects the value his or her agency places on the subject matter. Failure to include any training on PSM may signal to the officers in an agency that the subject is not important. On the other hand, including police sexual offenses in the training without prioritizing the subject can also send a signal that it is not important.

Florida and California can be used as two examples of how training is handled. The California Basic Course training requires 664 hours.²³⁰ The actual training manuals are not available online, but the training units are.²³¹ California requires training on sexual harassment in the workplace and sexual assault investigative procedures.²³² The unit on diversity does include sexual harassment, but it is unclear whether it is only focused on educating the officer in training on what harassment is for the purposes of understanding victim complaints.²³³ The IACP noted the ineffectiveness of using sexual harassment policies in place of policies specifically addressing sexual misconduct involving the public.²³⁴ Florida, on the other hand, explicitly includes examples of police sexual misconduct under two sections in the instructor's manual.²³⁵ The unit on values and ethics includes discussion of a case where an officer rapes a female crime victim.²³⁶ Additionally, in the unit on sexual harassment, examples are given of harassment of fellow officers, staff, and civilians.²³⁷ Yet even with specific references to PSM, Florida only allots a total of 40 out of 770 hours of training to the unit that covers de-escalation, cultural diversity, and sexual harassment together.²³⁸ If police sexual misconduct is a serious subject that new officers need to learn about, an increase in training is necessary.

²²⁹ Basic training can either be the minimum that is required before one can be hired as a police officer or what a new hire must complete before being certified. See U.S. DEP'T. OF JUSTICE, *Community Relations Services Toolkit for Policing*, POLICING 101 3, <https://www.justice.gov/crs/file/836401/download> [https://perma.cc/F3XM-Q8ZX].

²³⁰ Peace Officer Basic Training, POST COMM'N ON PEACE OFFICER STANDARDS & TRAINING (Aug. 14, 2020, 1:51 PM), <https://post.ca.gov/peace-officer-basic-training> [https://perma.cc/A3W7-M5CL].

²³¹ See *Regular Basic Course Training Specifications*, POST COMM'N ON PEACE OFFICER STANDARDS & TRAINING (Dec. 4, 2020, 10:05 AM), <https://post.ca.gov/regular-basic-course-training-specifications> [https://perma.cc/5Q3M-HW3K].

²³² See *Legislative Mandated Training*, POST COMMISSION ON PEACE OFFICER STANDARDS & TRAINING (last visited Apr. 15, 2021), <https://post.ca.gov/Legislative-Mandated-Training> [https://perma.cc/4PB9-XPL4].

²³³ See *id.*

²³⁴ IACP, *supra* note 35, at 5–6.

²³⁵ FLA. DEP'T OF LAW ENF'T CRIM. JUSTICE STANDARDS & TRAINING COMM'N, *Law Enforcement Instructor's Guide*, FLA. LAW ENF'T ACAD. (July 1, 2019).

²³⁶ See *id.* at 11.

²³⁷ See *id.* at 14–15.

²³⁸ See *id.* at ii (providing hours allotted to each unit including "Interactions in a Diverse Community").

The PEW organization also surveyed police officers on training recommendations suggested after the wave of protests following the police killing of Michael Brown in 2014.²³⁹ The survey did not include information on sexual misconduct.²⁴⁰ However, questions were included on the subject of training in de-escalation and police shootings.²⁴¹ Half of the officers surveyed reported they had at least four hours of training on shoot-don't shoot scenarios.²⁴² But 15% of officers said they had received no training in the same area or any training on how to de-escalate a conflict.²⁴³ The officers' responses highlight the difficulty of (or leadership's unwillingness towards) incorporating corrective training into the police educational system in a way that is meaningful.

Law enforcement personnel who participated in President Obama's Task Force for Policing in the 21st Century supported the idea of more training for police officers to help reduce the epidemic levels of violence the country was witnessing.²⁴⁴ After the push for police reform intensified in 2020 with calls to reallocate police budgets, or "defund" the police, additional law enforcement officials have come out in support of change.²⁴⁵ Few of them seem comfortable with supporting the concept of reallocating a portion of police resources to other parts of the communities they serve, but many support more training.²⁴⁶

Training is an essential component of any profession. Strong initial training can create the basis upon which a professional can build and strengthen his or her skills throughout the duration of their career. Training alone, however, has not proven to be effective in the case of excessive use of force by the police or in reducing racial bias among the police. The Minneapolis police force, the agency responsible for the death of George Floyd, serves as a cautionary counternarrative to the claim that more training is what is needed. The Minneapolis Police Department is no stranger to murdering Black men; this is the same agency that was responsible for the

²³⁹ See Morin et al., *supra* note 215, at 60.

²⁴⁰ See *id.* at 2.

²⁴¹ *Id.* at 70.

²⁴² *Id.* at 71.

²⁴³ *Id.* at 70.

²⁴⁴ Ronald L. Davis et al., *There Is a Playbook for Police Reform*, N.Y. TIMES (June 4, 2020), <https://www.nytimes.com/2020/06/04/opinion/police-reform-obama-task-force.html> [<https://perma.cc/XM78-67PT>].

²⁴⁵ Richard Beary, *Strengthening the Foundation: How New Trends in Training Can Improve Officers' Safety and Effectiveness*, POLICE CHIEF ONLINE (Nov. 7, 2018), <https://www.policechiefmagazine.org/strengthening-the-foundation-new-trends-training/> [<https://perma.cc/V7HK-SSEZ>]; Don Thompson, *California Police Groups Back Reform Plan to Require College Courses for Recruits*, NBC L.A. (Nov. 20, 2020, 6:58 AM), <https://www.nbclsanangeles.com/news/california-news/california-police-groups-back-reform-plan-to-require-college-classes-for-recruits/2467219/> [<https://perma.cc/QK3M-3VKA>].

²⁴⁶ See, e.g., *Ways to Reallocating Funding Instead of Defunding Police*, NAT'L POLICE SUPPORT FUND (Aug. 6, 2020), <https://nationalpolicesupportfund.com/ways-to-reallocating-funding-instead-of-defunding-police/> [<https://perma.cc/T722-LKN4>] (advocating reallocation of funding only to increase funding for additional training).

deaths of Philando Castile and Jamar Clark.²⁴⁷ The community in Minneapolis has demanded police reform for years.²⁴⁸ Elected officials have eked out change in bits and pieces dressed up as police reform. Part of this “reform” required the police to receive implicit bias training.²⁴⁹ They were taught de-escalation techniques and now have a mandatory intervention policy.²⁵⁰ Any police officer who observes a fellow officer engaged in unlawful conduct has an affirmative obligation to intervene.²⁵¹ And yet three officers watched while Derek Chauvin squeezed the life out of George Floyd.²⁵² They were trained, but that training did not override the cultural ease of killing a Black man on the street. Training is a step, but it did not and cannot overcome the power of police culture.

Similarly, the weak advances of the #MeToo movement demonstrate that excusing male sexual violence is deeply engrained in American culture.²⁵³ The combination of the violence of police culture and the culture of male sexual violence creates a dangerous environment for marginalized wo-

²⁴⁷ See Gordon Severson, *A History of Fatal Police Encounters in Minneapolis, 11 Cases Since 2010*, KARE 11 NEWS (May 26, 2020), <https://www.kare11.com/article/news/local/minneapolis-police-fatal-encounters/89-660b1880-fd20-4bcf-adbc-85144d9c33e4> [https://perma.cc/KG9M-5WXY]; see also Jamiles Lartey & Simone Weichselbaum, *Before George Floyd's Death, Minneapolis Police Failed to Adopt Reforms, Remove Bad Officers*, THE MARSHALL PROJECT (May 28, 2020, 9:40 PM), <https://www.themarshallproject.org/2020/05/28/before-george-floyd-s-death-minneapolis-police-failed-to-adopt-reforms-remove-bad-officers> [https://perma.cc/ZKF7-XTPN].

²⁴⁸ See Holly Bailey & Mark Berman, *Minneapolis Struggled with Police Violence and Adopted Reforms, 'And Yet, George Floyd is Still Dead,'* WASH. POST (May 29, 2020), https://www.washingtonpost.com/national/minneapolis-struggled-with-police-violence-and-adopted-reforms-and-yet-george-floyd-is-still-dead/2020/05/29/fe3ba110-a1e0-11ea-9590-1858a893bd59_story.html [https://perma.cc/US56-42BU].

²⁴⁹ Alice Sperti et al., *The George Floyd Killing in Minneapolis Exposes the Failures of Police Reform*, INTERCEPT (May 29, 2020, 4:59 PM), <https://theintercept.com/2020/05/29/george-floyd-minneapolis-police-reform/> [https://perma.cc/6DLL-9JYL] (describing the difficulties of getting the police in Minneapolis to reform despite their participation in a model program developed in response to the Obama National Initiative for Building Community Trust and Justice).

²⁵⁰ See *id.*

²⁵¹ See MINNEAPOLIS POLICE DEPT. 2018: FOCUSING ON PROCEDURAL JUSTICE INTERNALLY AND EXTERNALLY 3 (2018), <https://www.insidempd.com/focusing-on-procedural-justice/> [https://perma.cc/Q5UN-68AM]. The Duty to Intervene policy states: “It shall be the duty of every sworn employee present at any scene where physical force is being applied to either stop or attempt to stop another sworn employee when force is being inappropriately applied or is no longer required.” *Id.*

²⁵² See Bill Chappell, *Chauvin And 3 Former Officers Face New Charges Over George Floyd's Death*, WUSF PUBLIC MEDIA (June 3, 2020, 3:24 PM), <https://wusfnews.wusf.usf.edu/2020-06-03/chauvin-and-3-former-officers-face-new-charges-over-george-floyds-death> [https://perma.cc/Q6UB-WT8T]. Interestingly, Chauvin's lawyer argued that Floyd's death could be attributed to the failure of the three other officers to de-escalate the situation. See Jacob Sullum, *Derek Chauvin Blames His Former Colleagues for George Floyd's Death*, REASON (Sept. 14, 2020, 1:15 PM), <https://reason.com/2020/09/14/derek-chauvin-blames-his-former-colleagues-for-george-floyds-death/> [https://perma.cc/RW6W-T25Y].

²⁵³ See Grover, *supra* note 112.

men. It would not be wise to believe that training alone can make a significant impact on the incidence of PSM.

C. Lack of Transparency and Accountability

Lack of transparency regarding the frequency of the rate of PSM inhibits the public's ability to assess the full extent of PSM. Legislation known as the Law Enforcement Officers' Bill of Rights (LEOBOR) often restricts what information can be released about a police officer.²⁵⁴ The LEOBOR statutes establish extra due process rights for law enforcement officers who are being investigated.²⁵⁵ Fourteen states have adopted LEOBOR legislation and other states incorporate portions of the legislation in law enforcement union contracts.²⁵⁶ The statutes were developed beginning in the 1960s and 1970s to protect the police from activists' demands for police accountability.²⁵⁷ The statutes normally contain provisions that limit the ability of police agencies to question officers who have been accused of misconduct.²⁵⁸ The limitations can include a ban on questioning the officer before a certain time has passed, requiring special treatment for the officer during questioning, sometimes providing the officer with copies of incriminating evidence against them before they are questioned, and, most importantly, mandating that the officer's personnel files including disciplinary action be held confidential.²⁵⁹ In some cases, not even prosecutors have access to these records.²⁶⁰

²⁵⁴ See, e.g., Public Safety Officers Procedural Bill of Rights Act, Cal. Govt. Code, Ch. 9.7 §§ 3300 [finish the inclusive section; pursuant to R.3.3(b) the bluebook instructs "do not use 'et seq.'"]

²⁵⁵ See Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 B.U. PUB. INT. L. J. 185, 185 (2005).

²⁵⁶ See *id.*

²⁵⁷ Eli Hager, *Blue Shield*, THE MARSHALL PROJECT (Oct. 27, 2015), <https://www.themarshallproject.org/2015/04/27/blue-shield> [<https://perma.cc/5JAP-UUH6>].

²⁵⁸ See Stephen Rushin & Atticus DeProspero, *Interrogating Police Officers*, 87 GEO. WASH. L. REV. 646, 677 (2019).

²⁵⁹ See *id.*

²⁶⁰ In some states, such as California, the inability to disclose created tension between the officers' right to confidentiality and the United States Supreme Court's holding in *Brady v. Maryland*, 373 U.S. 83 (1963), which requires the prosecutor to disclose all exculpatory evidence to the defense. To avoid a conflict with *Brady*, some states have created lists of police officers who have violated the law. See *Tarnished Brass*, *supra* note 93 (examining the problem of prosecutors, lying cops and the so-called *Brady* lists). These lists can be shared with the prosecutor, who may then disclose the names of the officers he or she may use in a particular trial. *Id.* But in some states, like California, the prosecutor cannot see the lists, and in others, there are procedural steps that must be taken before disclosure can be made to a prosecutor. See *Association of Los Angeles Deputy Sheriffs v. The Superior Court of Los Angeles*, 447 P. 3d 234, 251 Cal. Rptr. 3d 32 (2019) (noting that after Los Angeles deputy sheriffs sued to prevent the county sheriff from turning the *Brady* list over to the County prosecutor, the California Supreme Court allowed the disclosure of the list). Recently, the Massachusetts Supreme Judicial Court

LEOBOR statutes interfere with current efforts to enact police reform. Where LEOBOR statutes exist, police unions vigorously resist efforts to disclose misconduct on the part of their members.²⁶¹ Police union representatives typically state that the overwhelming majority of officers are good, hardworking individuals and that offenses are committed by a “few bad apples.”²⁶² The vigorous effort to fight against certification and disclosure of those bad apples seems contradictory. It is true that not all police officers are criminals, but as the data show, there are a significant number who are.²⁶³ And, more importantly, the officers who think they comply with the law tolerate and shield the ones who do not, too often turning a blind eye to their colleagues’ misconduct.

Accountability, or lack of it, is the final troublesome factor in understanding and controlling PSM. The inability to decertify police who have engaged in sexual misconduct has already been identified as a barrier to reducing the prevalence of this misconduct.²⁶⁴ As stated earlier, there are presently five states that do not certify law enforcement.²⁶⁵ Neither of the two states with the largest numbers of law enforcement officers, California and New York, have a system of certification, nor do they report to the

also ruled that prosecutors must disclose *Brady* lists to satisfy a defendant’s constitutional right to a fair trial. *Matter of Grand Jury Investigation*, 152 N.E.3d 65 (Mass. 2020).

²⁶¹ See Jill McCorkel, *Police Unions Are One of The Biggest Obstacles to Transforming Policing*, CIV. BEAT (July 30, 2020), <https://www.civilbeat.org/2020/07/police-unions-are-one-of-the-biggest-obstacles-to-transforming-policing> [<https://perma.cc/RKW7-VGDJ>].

²⁶² Sean Illing, *Why the Policing Problem Isn’t About a “Few Bad Apples.”* VOX MEDIA (June 6, 2020), <https://www.vox.com/identities/2020/6/2/21276799/george-floyd-protest-criminal-justice-paul-butler> [<https://perma.cc/G2CZ-WTN5>].

²⁶³ See Christopher Robbins et al., *Analyzing 323,911 Newly-Released Records of NYPD Misconduct*, GOTHAMIST (Aug. 27, 2020, 12:02 PM), <https://gothamist.com/news/analyzing-323911-newly-released-records-nypd-misconduct/> [<https://perma.cc/Z4DT-K5M7>]. There were 19,833 officers who had 5 or more complaints sustained against them, but only 12 lost their jobs. See *id.*; see also Mark Morales, *Thousands of NYPD Discipline Records Published by New York Civil Liberties Union After Court Order is Lifted*, CNN (Aug. 20, 2020, 12:41 PM), <https://www.cnn.com/2020/08/20/us/nypd-police-discipline-records/index.html> [<https://perma.cc/H4DC-4V2A>].

²⁶⁴ See Roger L. Goldman, *NDI: Tracking Interstate Movement of Decertified Police Officers*, POLICE CHIEF ONLINE (Sept. 12, 2018), <https://www.policchiefmagazine.org/ndi-tracking-decertified-police-officers/> [<https://perma.cc/3Z4L-CG7C>]; see also Clarence Harmon, *De-Certification: Achieving Interstate Reciprocity*, 22 ST. LOUIS U. PUB. L. REV. 167 (2003); Goldman & Puro, *supra* note 39.

²⁶⁵ The number of states that do not decertify varies depending on the source. Some sources count 44 states and include New York as a state that does not decertify and therefore does not submit names to the NDI. See, e.g., ASSOC. PRESS, *A 50-State Look at Police Officer Decertification for Sex Incidents*, MERCURY NEWS (Nov. 3, 2015, 4:45 AM), <https://www.mercurynews.com/2015/11/03/a-50-state-look-at-police-officer-decertification-for-sex-incidents/> [<https://perma.cc/9ZYZ-2QAX>]. Goldman counts 46 states, not including New York and reporting that Hawaii enacted legislation to become effective in 2019. See Goldman, *supra* note 264. However, as of 2020, Hawaii still did not have a decertification process, nor do California, Rhode Island, and New Jersey. See Tatiana Follett et al., *Law Enforcement Certification and Discipline*, NAT’L CONF. OF ST. LEGIS. (Aug. 17, 2020), <https://www.ncsl.org/research/labor-and-employment/policing-oversight-and-new-legislation.aspx> [<https://perma.cc/DCY8-MTS4>].

National Decertification Index (NDI), a searchable database of decertified officers run by IADLEST.²⁶⁶ A sixth state, Georgia, certifies police officers but does not report the names of decertified officers to the NDI.²⁶⁷ Even in states that have a decertification process, the mechanism for achieving decertification may be weak.²⁶⁸ Some states only permit decertification if the police officer has been convicted of a felony.²⁶⁹ Others only permit decertification after an administrative proceeding has been finalized.²⁷⁰ Still other states will allow a police officer to quit or can terminate an officer without a disciplinary hearing, thereby obviating the need to begin a decertification process.²⁷¹ If a disciplinary process has not gone forward, the final results will not be reported to NDI.²⁷² When a police officer is not decertified, he is free to go to a different jurisdiction and be hired as law enforcement in a process known as “officer shuffle” or the “wandering officer,” which has

²⁶⁶ See BRIAN A. REAVES, BUREAU OF JUSTICE STAT., CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES 14 (2008). New York is listed as the state with the largest number of sworn officers, but by adding up the various California divisions, California has a net higher number. See *id.*

²⁶⁷ See INT'L ASS'N OF DIR'S OF LAW ENF'T STANDARDS & TRAINING, *supra* note 99.

²⁶⁸ See Candice Norwood, *Can States Tackle Police Misconduct With Certification Systems?*, ATLANTIC (Apr. 9, 2017), <https://www.theatlantic.com/politics/archive/2017/04/police-misconduct-decertification/522246/> [<https://perma.cc/UYM9-DD7H>] (relating that in an interview with Roger Goldman discussing state decertification processes, Goldman identified Maryland as a state that has a weak decertification process). In response to an *Associated Press* inquiry as to the number of officers decertified in the past year, Maryland indicated that only one officer was decertified. See Crime and Justice News, *State Action Needed to Spot Problem Police Officers*, THE CRIME REP. (June 26, 2020), <https://thecrimereport.org/2020/06/26/state-action-needed-to-spot-problem-police-officers/> [<https://perma.cc/ZT3J-WZAC>]. But see Ben Gonzalez, *The Legislative Legacies of the George Floyd and Breonna Taylor Protests*, S. MD CHRON. (Dec. 20, 2020), <https://southernmarylandchronicle.com/2020/12/14/the-legislative-legacies-of-the-george-floyd-and-breonna-taylor-protests/> [<https://perma.cc/RU3P-V87Y>] (noting revived attempt to modify LEOBOR inspired by police reform movement following death of George Floyd).

²⁶⁹ See Raymon Troncoso, *Lawmakers, AG Seek Tougher Decertification Standards for Law Enforcement*, HERALD & REV. (Nov. 11, 2020), https://herald-review.com/news/local/govt-and-politics/lawmakers-ag-seek-tougher-decertification-standards-for-law-enforcement/article_c00ca635-b727-5c08-918e-046ee07a1f40.html [<https://perma.cc/43RP-P84X>] (explaining the revived attempt to modify LEOBOR inspired by police reform movement following death of George Floyd).

²⁷⁰ See *id.*

²⁷¹ See, e.g., ASSOCIATED PRESS, *Five Officers Still Certified Despite Misconduct*, EVERETT HERALD, (June 19, 2011, 12:01 AM), <https://www.heraldnet.com/news/five-of-officers-still-certified-despite-misconduct/> [<https://perma.cc/8JLY-EJLG>].

²⁷² See Denise LaVoie, *Virginia Lawmakers Push to Expand Police Decertification Law*, ABC NEWS (Sept. 11, 2020, 11:46 AM), <https://abcnews.go.com/US/wireStory/virginia-lawmakers-push-expand-police-decertification-law-72952231> [<https://perma.cc/UCF4-PURP>] (reporting on the bill changing Virginia's loophole allowing an officer to resign and be rehired in another jurisdiction). “This is a fast-track mechanism to really prevent bad officers —bad actors—in our profession from going from place to place to place and continuing to have poor performance,” said Ashland Police Chief Doug Goodman. *Id.*

been studied specifically in the context of sexual misconduct.²⁷³ The effort toward creating systems of certification and accountability in those states that currently do not have a process may give insight into the feasibility of creating a meaningful network of state-level systems to hold sexually violent officers accountable.²⁷⁴

In addition to the lack of accountability in the criminal setting, police officers on the civil litigation side often enjoy qualified immunity, which shields the officer from liability in a tort action.²⁷⁵ Since the Floyd demonstrations, police reform proposals have attacked qualified immunity and have attempted to remove the immunity from officers who have committed crimes.²⁷⁶ Combining police reform with the elimination of qualified immunity is problematic in some states, where police unions have been successful in lobbying for the defeat of reform bills.²⁷⁷

²⁷³ See Ben Grunwald & John Rappaport, *The Wandering Officer*, 129 *YALE L. J.* 1676 (2020); see also Rabe-Hemp & Braithwaite, *supra* note 27 (establishing that there is a set of police officers who repeatedly engage in sexual misconduct in every location in which they are hired and finding, in a study of 106 officers in the Midwest whose cases were covered in the news, that some officers who commit police sexual violence are shuffled to other jurisdictions where they become repeat offenders). Officer shuffle occurs outside of PSM as well. See Michelle Mark, *A Police Officer Charged with Assaulting Black Youths Has Worked for 9 Different Police Departments, Collecting Use-of-Force Incidents and Complaints Along the Way*, *INSIDER* (June 24, 2020, 3:34 PM), <https://www.insider.com/new-jersey-police-ryan-dubiell-pepper-spray-nine-departments-2020-6> [<https://perma.cc/LL4K-MGVU>].

²⁷⁴ See Roger Goldman, *Importance of State Law in Police Reform*, 60 *ST. LOUIS U. L. J.* 363, 381–83 (2016).

²⁷⁵ See generally Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 *YALE L. J.* 2 (2017).

²⁷⁶ See Nick Sibilla, *New Bill Would Abolish Qualified Immunity, Make It Easier To Sue Cops Who Violate Civil Rights*, *FORBES* (June 3, 2020, 2:20 PM), <https://www.forbes.com/sites/nicksibilla/2020/06/03/new-bill-would-abolish-qualified-immunity-make-it-easier-to-sue-cops-who-violate-civil-rights/?sh=36cd04f66fbc/> [<https://perma.cc/8J5F-XDX5>].

²⁷⁷ Both California and Massachusetts had major police objections to the reform legislation that combined certification with the elimination of qualified immunity. See CNN, *California Lawmakers Failed to Pass Meaningful Police Reform, Activists Say*, *CBS SACRAMENTO* (Sept. 11, 2020, 12:14 PM), <https://sacramento.cbslocal.com/2020/09/11/california-police-reform-bills-fail/> [<https://perma.cc/YDT7-RYJJ>]. Both the Massachusetts House and Senate passed a reform bill, but both were hung up in committee until the end of November 2020. See Chris Lisinski & Sam Doran, *Beacon Hill Reaches Policing Bill Compromise*, *WBUR NEWS* (Nov. 30, 2020), <https://www.wbur.org/news/2020/11/30/massachusetts-police-reform-bill> [<https://perma.cc/MA3P-MVLL>]. A bill made it out of committee with the qualified immunity language tied to decertification. *Id.* However, a commission was also established to study the issue of qualified immunity. *Id.* The compromise bill has not yet had a vote. *Id.*

IV. SUGGESTIONS FOR REFORM

A. *Centering Black Women in Police Reform Proposals*

Despite COVID-19 lockdown orders in place throughout the country, cities erupted in protest and civil unrest during the summer of 2020 in response to the deaths of George Floyd, Breonna Taylor, and others.²⁷⁸ Arguments can be made over whether pent-up frustrations from quarantine helped fuel the discontent, but there is no question that the nation was dramatically moved after watching Derek Chauvin execute a Black man on a public street. Black Lives Matter-led protests were joined by people of all races and faiths. Protests of that scale have not been seen in this country since the Civil Rights Movement and the war against Vietnam.²⁷⁹ The United States may be poised to experience a fundamental shift in the way our society views police violence against Black people. Once again, Black people have galvanized the country to stand up and fight injustice. Black women are consistently at the forefront of the struggle and are the backbone of the fight for justice. It did not matter whether the fight was to end slavery,²⁸⁰ to end lynching,²⁸¹ to gain the right to vote,²⁸² to end desegregation,²⁸³ or to end voter suppression.²⁸⁴ Reform can happen, but whether it will be substantial and long-lasting remains unknown. Even if the steps are incremental, they are happening. During this critical time, efforts to accomplish police reform must not push Black women's needs to the margin to focus exclusively on police violence against Black men. Solutions for police violence must also prioritize the protection of Black women not just from death, but also from police sexual

²⁷⁸ See Jack Healy & Kim Barker, *Other Protests Flare and Fade. Why This Movement Already Seems Different*, N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/2020/06/07/us/unrest-protests-minneapolis-ending.html> [<https://perma.cc/CL88-YVX5>].

²⁷⁹ See *id.*

²⁸⁰ See Debra Michals, *Sojourner Truth* (1797-1883), NAT'L WOMEN'S HIST. MUSEUM (2015), <https://www.womenshistory.org/education-resources/biographies/sojourner-truth> [<https://perma.cc/QE7J-EMAN>]; Debra Michals, *Harriet Tubman* (1820-1913), NAT'L WOMEN'S HIST. MUSEUM (2015), <https://www.womenshistory.org/education-resources/biographies/harriet-tubman> [<https://perma.cc/U23Y-55XP>].

²⁸¹ See, e.g., *Ida B. Wells*, NAT'L PARK SERV. (Dec. 30, 2020), <https://www.nps.gov/people/idadawells.htm> [<https://perma.cc/5FMD-T36J>].

²⁸² Meghan Smith, *5 Essential Black Figures In The Women's Suffrage Movement*, GBH (June 26, 2020), <https://www.wgbh.org/programs/2020/06/26/5-essential-black-figures-in-the-womens-suffrage-movement> [<https://perma.cc/AX9X-293W>].

²⁸³ See, e.g., Patricia A. Broussard, *Unbowed, Unbroken, and Unsung: The Unrecognized Contributions of African American Women in Social Movements, Politics, and the Maintenance of Democracy*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 631 (2019).

²⁸⁴ See, e.g., Sharon Austin, *How New Voters and Black Women Transformed Georgia's Politics*, CONVERSATION (Jan. 26, 2021, 8:28 AM), <https://theconversation.com/how-new-voters-and-black-women-transformed-georgias-politics-152741> [<https://perma.cc/2YDA-9SDK>].

violence.²⁸⁵ The nation cannot afford to allow this opportunity to pass as they have in the past.

Despite the fact that three Black women co-founded the movement, men and the media slowly began to erase their presence and to ignore that, from its inception, Black Lives Matter included a demand to protect the lives of Black women and the Black transgender community.²⁸⁶ The drive to marginalize Black women is strong, both within our community as well as outside of it. Projects such as Professor Kimberlé Crenshaw and Andrea Ritchie's #SayHerName were created to pull attention to the fact that Black women were also victims of police violence and to argue that their faces and stories deserved to be heard also.²⁸⁷ It has been a slow push forward, but progress toward elevating the stories of Black women is being made. A banner protesting Breonna Taylor's death flew over the Kentucky Derby as thousands marched outside,²⁸⁸ and WNBA players wore her name on their uniforms for the 2020 season.²⁸⁹ Her death continues to receive more attention, nationally and internationally, than that of any other Black woman killed by the police. Black women who are victims of police sexual misconduct will not achieve that level of notoriety; however, the progress made in elevating the issue of police violence towards Black women can be used to help direct reform attention to police sexual misconduct.

Reform proposals that are shaped primarily around the killings of Black men share some commonalities with reform needed to protect Black women from police sexual violence. Police culture of silence is a problem for both.²⁹⁰ Transparency is also an issue, as there is still no comprehensive

²⁸⁵ See Courtland Milloy, *Black Women's Lives Matter Too, Say the Women Behind the Iconic Hashtag*, WASH. POST (May 19, 2015), https://www.washingtonpost.com/local/Black-womens-lives-matter-too-say-the-women-behind-the-iconic-hashtag/2015/05/19/61d57798-fe4c-11e4-8b6c-0dce21e223d_story.html [<https://perma.cc/ZE7D-555Y>].

²⁸⁶ See *Herstory*, BLACK LIVES MATTER, <https://blacklivesmatter.com/herstory/> [<https://perma.cc/55QD-2WG2>] (noting that the founders of #BlackLivesMatter stated that the movements for liberation should not marginalize women and queer and trans people).

²⁸⁷ Alisha Haridasani Gupta, *Why Aren't We All Talking About Breonna Taylor?*, N.Y. TIMES (Oct. 30, 2020), <https://www.nytimes.com/2020/06/04/us/breonna-taylor-black-lives-matter-women.html> [<https://perma.cc/3N7J-ABFL>]. Andrea Ritchie commented that, even the hashtag SayHerName "has been turned into #SayHisName." *Id.* This serves as an example of the seemingly inextricable drive to push women to the margins, even in their own stories.

²⁸⁸ See ASSOCIATED PRESS, *Thousands Protest Outside Kentucky Derby over Killing of Breonna Taylor*, CBS NEWS, (Sept. 5, 2020, 11:20 PM), <https://www.cbsnews.com/news/thousands-protest-the-police-killing-of-breonna-taylor-outside-kentucky-derby/> [<https://perma.cc/8ZEL-RNU4>].

²⁸⁹ See David Close & Brian Ries, *WNBA Players Will Wear Breonna Taylor's Name on Their Uniforms to Honor Women Lost to Racial Violence*, CNN (July 7, 2020), <https://edition.cnn.com/2020/07/06/us/wnba-uniforms-say-her-name-spt-trnd/index.html> [<https://perma.cc/Q98D-DTPB>].

²⁹⁰ See Andy Grimm & Sam Charles, *Fellow Officers May Have Lied, Conspired for Months to Cover for Jason Van Dyke*, CHI. SUN-TIMES (Oct. 4, 2018), <https://chicago.suntimes.com/2018/10/4/18394282/fellow-officers-may-have-lied-conspired-for-months-to-cover-for-jason-van-dyke> [<https://perma.cc/KJN9-Z8L2>] (discussing the way

database that tracks police killings.²⁹¹ Accountability is a common difficulty, as police are generally not held accountable for killing Black and Brown people. But if reform proposals stay male-centered, solutions may not be sufficiently nuanced to provide relief to women who are victims of police sexual misconduct. For example, victims of sexual assault will be concerned with how data about police misconduct will be kept and who will be responsible for collecting it. A letter written on behalf of thirty-seven women's organizations and over fifty women who are scholars, lawyers, and community leaders that was submitted to the President's Task Force on 21st Century Policing illustrates this problem.²⁹² The letter pointed out that women of color suffer from police profiling, excessive use of force, and sexual assault.²⁹³ The recommendations in the letter concerning sexual assault and harassment fall squarely within the tenor of current requests for police reform in the area of PSM as recommended by IACP.²⁹⁴ And they encouraged the federal government to take a more aggressive role in making sure lock-up procedures were followed to help eliminate sexual harassment or assault when a person is detained.²⁹⁵ It also included a recommendation to "condition federal funding to local law enforcement agencies on adoption of policies aimed at documenting, preventing, and addressing sexual harassment, abuse, and assault by local law enforcement agents consistent with the recommendations of the IACP."²⁹⁶ This was similar to the scholarly proposal that law enforcement unions' tax-exempt status be conditioned on every agency having sufficient accountability measures.²⁹⁷

However, the women's advocates also raised an issue that creates tension between what is needed for more general police accountability and the sensitivity of data collection in cases of police sexual misconduct. Almost all police reform calls for better data collection,²⁹⁸ as did the women's letter.

the Chicago police tried to cover up evidence that one of their officers murdered Laquan McDonald, an unarmed Black teenager, in Chicago in 2014).

²⁹¹ See Aaron C. Davis & Wesley Lowery, *FBI Call Lack of Data on Police Shootings 'Ridiculous,' 'Embarrassing,'* WASH. POST (Oct. 7, 2015), https://www.washingtonpost.com/national/fbi-director-calls-lack-of-data-on-police-shootings-ridiculous-embarrassing/2015/10/07/c0ebaf7a-6d16-11e5-b31c-d80d62b53e28_story.html [<https://perma.cc/4P8G-52F6>].

²⁹² See Submission from Andrea J. Ritchie, Soros Justice Fellow, to President's Task Force on 21st Century Policing, U.S. Dep't of Justice (Jan. 28, 2015), *Policy and Oversight: Women of Color's Experiences of Policing* 5 https://b81b38ed-3626-4dfb-806d-bee93cc1ddcc.filesusr.com/ugd/04cb5a_64cf0544dd1f448096c4d421b2b23f45.pdf [<https://perma.cc/XV67-6FD4>].

²⁹³ See *id.*

²⁹⁴ See *id.* at 3–4.

²⁹⁵ See *id.* at 4.

²⁹⁶ *Id.* at 3.

²⁹⁷ See Brian Mogck, *A Proposal for Police Reform: Require Effective Accountability Measures in Police Union Contracts as a Condition of Tax-Exempt Status*, CHI. L. REV. ONLINE (Aug. 7, 2020), <https://lawreviewblog.uchicago.edu/2020/08/07/police-unions-mogck/> [<https://perma.cc/NS3F-9QY7>].

²⁹⁸ See, e.g., Vera Bergengruen, 'We Continue to Spin in Circles.' *Inside the Decades-Long Effort to Create A National Police Use-of-Force Database*, TIME MAG. (June 30,

They recommended that questions on PSM be included on the Bureau of Justice Statistics Police Contact Survey and on the Office of Victims of Crime National Intimate Partner and Sexual Violence Survey.²⁹⁹ In addition, data should be collected from events involving stops, use of force, profiling, and violence against women, but the women's groups also recommended that *no* law enforcement agent should be charged with collecting the data.³⁰⁰ Certainly data on sexual assault is much more sensitive than traffic-stop data, even if the stop data does include gender. There is a risk of secondary victimization for a woman who has been sexually assaulted by the police if the police themselves are charged with collecting her complaints. As was discussed earlier, even when women go straight to the hospital, the hospital may call the police and place women at risk of either secondary victimization or being ignored.³⁰¹ Sensitive data must be collected to help provide a clear picture of what the violent interactions with officers entail and how frequently they occur. And the data must have a measure of credibility such that legislatures and governmental units can feel confident relying on it. The difficult knot to unravel is how to create a reporting system that keeps women safe but also allows for the collection of reliable data. Fortunately, there may be ways to create such a system.

B. Building Community-Based Data Collection Points

As noted earlier, transparency and accountability are two of the most problematic areas in reducing PSM. In the context of police sexual misconduct, it may be necessary to prioritize collection of data for transparency purposes over accountability for individual offenders. Transparency over individual accountability can still create broader accountability measures, but they may need to take place at the supervisory level of a law enforcement agency. When PSM occurs, women and children who may be victimized need, in the first instance, somewhere they can go to safely receive treatment without the police being involved. Ideally, this would be a known and trusted community-based location where data could be collected about the violation, such as where and when it occurred. If possible, a forensic nursing staff capable of collecting evidence of rape or other sexual assault would be available. The framework for such treatment already exists in organizations that help trafficked persons.³⁰² The primary function of the organizations is

2020), <https://time.com/5861953/police-reform-use-of-force-database/> [<https://perma.cc/27TU-9Z52>].

²⁹⁹ See Ritchie, *supra* note 292, at 5.

³⁰⁰ See *id.*

³⁰¹ See Levin, "I Didn't Think I'd Survive," *supra* note 190.

³⁰² See, e.g., *Human Trafficking Services*, CTR. FOR FAM. SERVS. (last visited Mar. 18, 2021), <https://www.centerffs.org/serv/human-trafficking-services> [<https://perma.cc/X9XJ-AJDZ>] (noting that the Center for Family Services runs programs for marginalized communities, including persons who have been trafficked, and their "Services Empowering Rights of Victims" programs provide assistance to both international and domestic

to keep victims safe and also provide services to them.³⁰³ Their data on the numbers of persons they serve is considered reliable.³⁰⁴ Such services for women who are victims of PSM would allow the women to receive treatment for their injuries, get counseling for trauma, and preserve evidence of the assault until the women wish to go forward with a complaint. A delay in a decision to go forward with a complaint would not prevent collection of the data on types and frequency of violations occurring within the serviced population.

Bifurcating the collection of data from the need to seek individual accountability could still help promote institutional accountability. Hard data provided by nonprofit service providers to administrators in law enforcement agencies would be difficult to ignore. The data could be used to establish an accountability system for senior-level police supervisors tasked with monitoring whether PSM was occurring and developing mechanisms to identify at-risk offenders.³⁰⁵ Such an approach would be consistent with the IACP recommendation to establish an early warning system for officers who may be at risk of engaging in PSM.³⁰⁶

C. Civilian Complaint Review Boards

It is also possible to envision a system that continues to link transparency and accountability through the use of civilian review boards.³⁰⁷ There are many difficulties associated with this approach, although, if it worked successfully, there would be accountability for individual offending officers. Discussions about expanding the use of complaint boards are happening more frequently as part of police reform proposals.³⁰⁸ However, as of

human trafficking victims); *Services for Survivors and Victims of Abuse*, YWCA OF KALAMAZOO (last visited Mar. 18, 2021), <https://www.ywcakalamazoo.org/what-we-do/caring-for-victims-of-abuse/services-for-survivors-victims-of-abuse> [<https://perma.cc/2B48-EQ55>].

³⁰³ See *Human Trafficking Services*, *supra* note 302; *Services for Survivors and Victims of Abuse*, *supra* note 302.

³⁰⁴ My thanks to Yasmin Vafa, the Executive Director of Rights4Girls, a nonprofit focused on advocating on behalf of girls who are trafficked, for helping me on this point.

³⁰⁵ See Peter Verniero & Paul H. Zoubek, N.J. OFF. OF THE ATT'Y GEN., INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 90-91 (1999), https://www.state.nj.us/lps/intm_419.pdf [<https://perma.cc/8N69-RF6E>] (relating that after a shooting incident following a traffic stop on the New Jersey Turnpike, the Attorney General proposed a system of accountability for supervisory personnel; such personnel were tasked with setting up early warning systems for problem officers, providing training and counseling, and taking disciplinary action where required).

³⁰⁶ See IACP, ADDRESSING SEXUAL OFFENSES, *supra* note 35, at 9.

³⁰⁷ In 2009, Andrea Ritchie urged the NYC CCRB to establish a mechanism that would include a public awareness campaign for victims and an infrastructure that would allow for the collection of data. See RITCHIE, INVISIBLE NO MORE, *supra* note 153, at 123. No such action was taken at the time.

³⁰⁸ See *Mission Vision and Values*, NAT'L ASSN. OF CIVILIAN OVERSIGHT OF LAW ENFT (last visited Mar. 18, 2021), <https://www.nacole.org/mission> [<https://perma.cc/Z7KR-RRCW>]. The National Association of Civilian Oversight of Law Enforcement

2019, there were only 200 civilian review boards operating nationally.³⁰⁹ Even where civilian review boards exist, they are not always independent of the police agency.³¹⁰ The National Association of Civilian Oversight for Law Enforcement (NACOLE) advises that civilian oversight boards must be independent from law enforcement agencies and political entities in order to be effective.³¹¹ The review boards must also have sufficient decision-making authority to perform their work.³¹² Recently, New York City's Civilian Complaint Review Board (CCRB) attempted to include complaints about PSM within their caseload.³¹³ The police unions objected immediately, arguing that the CCRB did not have authority to review PSM complaints.³¹⁴ However, after a litigating the issue, the CCRB re-initiated the process after seeking public comment on the new order extending jurisdiction over PSM complaints.³¹⁵ Even if a civilian review board is independent and has jurisdictional authority to investigate, it can still be rendered ineffective if the police agency has the final say on disposition of a complaint.³¹⁶ If a civilian

(NACOLE) is a nonprofit with the following goal: "The National Association for Civilian Oversight of Law Enforcement elevates and advances high professional and ethical standards for and promotes the independence and authority of all entities charged with civilian oversight." *Id.*

³⁰⁹ See Andrew Denney, *Civilian Oversight Is a Solution to Police Misconduct. But is it Effective?*, FREETHINK (Apr. 15, 2019, 10:00 AM), <https://www.freethink.com/articles/civilian-oversight-of-police-seems-like-a-commonsense-solution-to-police-misconduct-but-is-it-effective> [https://perma.cc/4DEL-2QV4] (quoting Liana Perez, director of operations for NACOLE, stating that the number was only "a small sliver of the roughly 18,000 law enforcement agencies operating around the country")

³¹⁰ See Olugbenga Ajilore, *How Civilian Review Boards Can Further Police Accountability and Improve Community Relations*, SCHOLARS STRATEGY NETWORK (June 25, 2018), <https://scholars.org/brief/how-civilian-review-boards-can-further-police-accountability-and-improve-community-relations> [https://perma.cc/5QU9-XJA9] (discussing ineffectiveness of Chicago's review board due to lack of independence from Chicago Police Department).

³¹¹ See *Community Oversight Paves the Road to Police Accountability*, NAT'L ASSN. FOR CIVILIAN OVERSIGHT OF LAW ENFT (last visited Mar. 18, 2020), https://www.nacole.org/community_oversight_paves_the_road_to_police_accountability [https://perma.cc/LA9R-2ABW].

³¹² See *id.*

³¹³ Al Baker & Benjamin Mueller, *Police Complaint Board to Investigate Charges of Sexual Misconduct*, N.Y. TIMES (Feb. 14, 2018), <https://www.nytimes.com/2018/02/14/nyregion/ccrb-sexual-misconduct-police.html> [https://perma.cc/YHZ6-Z6AB].

³¹⁴ See Sydney Pereira & Josefa Velásquez, *NYPD's Oversight Agency Launches Do-Over On Police Sexual Misconduct Investigations*, GOTHAMIST (Nov. 10, 2020, 5:00 AM), <https://gothamist.com/news/nypds-oversight-agency-launches-do-over-police-sexual-misconduct-investigations> [https://perma.cc/2NCV-5WM5].

³¹⁵ See *id.*

³¹⁶ This is a known problem with the New York City CCRB. Its final determinations are advisory, and the New York City Police Commissioner routinely ignores them, rendering the complaint review process toothless. The New York City Council recently proposed legislation that will terminate the Police Commissioner's ability to be the final arbiter on discipline, and it has also proposed eliminating qualified immunity. See Christopher Robbins & Yasmeen Khan, *City Council Aims To "Reduce The NYPD's Footprint" With Sweeping New Police Reforms*, GOTHAMIST (Jan. 30, 2021, 9:28 AM), <https://gothamist.com/news/city-council-aims-reduce-nypds-footprint-sweeping-new-police-reforms> [https://perma.cc/ERS9-LD6Z].

review board cannot establish that it can be successful in investigating police misconduct and in holding the police accountable, women may not feel safe enough to report PSM to them.

Assuming an independent civilian review board was created with sufficient jurisdictional scope to handle a complaint about police sexual misconduct, documentation of injuries or other associated trauma would be critically important. This circles back to the problem of where and how victims report offenses. Would a review board require evidence of medical treatment or would the victim's narrative be sufficient to support a complaint? A complaint presented to a civilian review board can lead to disciplinary action, therefore probable documentation of a more specific nature might be required. Again, the safety of the victims would have to be carefully thought through and alternative avenues for obtaining medical documentation should be explored. Potentially, a sexual assault support group might partner with the civilian review board for the purposes of obtaining forensic evidence.³¹⁷ Alternatively, reallocation of a portion of the police budget could conceivably be used to create a medical office within the civilian review board where forensic services would be available to assist with the collection of evidence. The civilian review board approach does present challenges, but these challenges are not insurmountable. Advocates for Black women should be alert to any police reform proposals that contain recommendations for the establishment of a civilian review board. If there is interest in using it as a vehicle for handling PSM complaints, it is critical for advocates to participate in the process of shaping the board as early as possible to help ensure that obstacles to effective handling of PSM complaints are not baked into the structure of the board.

Inclusion of Black women's needs in the struggle for police reform will not happen magically. Politicians must be specifically educated on the issue of police sexual misconduct and the need for transparency on police records. A politician who considers themselves to be liberal may not fully understand the complexity of addressing police sexual misconduct. Last year, the entire Democratic caucus of the House of Representatives, including its progressive members, were prepared to vote for a bill that widely expanded bargaining powers for police unions.³¹⁸ Joaquin Castro was the lone representative who tried to alert the House to the dangers of the bill.³¹⁹ It was not until George Floyd was killed that House members largely withdrew their support

³¹⁷ Andrea Ritchie raised a potential problem with using sexual assault support networks, as they typically refer a victim to the police and thus expose the victim of PSM to secondary victimization. Telephone Interview with Andrea Ritchie (Feb. 18, 2021). In her opinion, sexual assault support groups may need to receive training to differentiate the process of reporting when the perpetrator is a police officer. *Id.*

³¹⁸ See Laura Barrón-López, *Democrats' Coming Civil War Over Police Unions*, POLITICO (Oct. 14, 2020, 7:55 PM), <https://www.politico.com/news/magazine/2020/10/14/police-reform-police-unions-qualified-immunity-democratic-party-420122> [https://perma.cc/X3WD-CDSZ].

³¹⁹ See *id.*

for the bill.³²⁰ President Joseph Biden has stated that he supports police reform,³²¹ yet while he was a Senator, he proposed a federal version of the Law Enforcement Officers Bill of Rights.³²² Police reform is complicated and nuanced, and even more so when police violence against women is included. It is incumbent upon all legislative bodies contemplating police reform to review whatever proposals may be on the table and ask whether women of color are being protected from police sexual violence and misconduct - because Black women don't always die, but they still need the protection of the law.

³²⁰ *See id.*

³²¹ *See generally* Mark Berman & Tom Jackman, *Biden, a longtime ally of police, will enter White House pushing for reform*, WASH. POST (Jan. 11, 2021, 8:00 AM), <https://www.washingtonpost.com/politics/2021/01/11/biden-police-reform/> [<https://perma.cc/824E-GDJM>].

³²² *See* Nathan McDermott & Em Steck, *Biden repeatedly pushed bill in Senate that critics said would have made investigating police officers for misconduct more difficult*, CNN (June 10, 2020, 6:48 PM), <https://www.cnn.com/2020/06/10/politics/biden-senate-police-officers-kfile/index.html> [<https://perma.cc/N7UY-B2G7>].