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The Innocence Standard: Supreme Court Nominees and Sexual Misconduct

Lisa Avalos

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The Innocence Standard: Supreme Court Nominees and Sexual Misconduct

LISA AVALOS

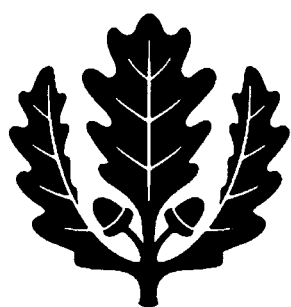
Should the United States Senate allow judicial nominees who have been credibly accused of sexual misconduct to be seated on the Supreme Court? How should we handle these allegations when they arise during the vetting process? Despite the importance of these questions, lawmakers have failed to address them.

The contentious Clarence Thomas hearings in 1991 featured testimony from Professor Anita Hill and did much to raise Americans' awareness about the prevalence of sexual misconduct in the workplace. Although Professor Hill subsequently called for the Senate to implement a process for addressing future sexual misconduct allegations against Supreme Court nominees, her calls have gone unheeded. Twenty-seven years later, Brett Kavanaugh's confirmation hearings again placed the issue of sexual misconduct squarely before the Senate. Despite these fraught events, we are still waiting for the Senate to embrace Professor Hill's challenge to create a suitable process for addressing sexual misconduct allegations made against Supreme Court nominees.

This Article uses the Thomas and Kavanaugh hearings to explore what the absence of such a process has cost us and why reform is necessary. The Article offers a model for reform based upon sexual assault investigation best practices. It also proposes a standard for use in evaluating sexual misconduct allegations against Supreme Court nominees—what I term the Innocence Standard. Under this standard, successful SCOTUS nominees must be innocent beyond a reasonable doubt of any sexual misconduct.

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The Innocence Standard: Supreme Court Nominees and Sexual Misconduct

LISA AVALOS*

INTRODUCTION

Should the United States Senate allow judicial nominees who have been credibly accused of sexual misconduct to be seated on the Supreme Court? How should we handle these allegations when they arise during the vetting process? Despite the importance of these questions, lawmakers have failed to address them.

The contentious Clarence Thomas hearings in 1991 featured testimony from Professor Anita Hill about her experience of sexual harassment in the workplace and did much to raise Americans' awareness about the prevalence of this problem. Although Professor Hill subsequently called for the Senate to implement a process for addressing future sexual misconduct allegations against Supreme Court nominees,¹ her calls have gone unheeded. Twenty-seven years later, Brett Kavanaugh's confirmation hearings again placed the issue of sexual misconduct squarely before the Senate.² Despite these fraught events, we are still waiting for the Senate to embrace Professor Hill's challenge to create a suitable process for addressing sexual misconduct allegations made against Supreme Court nominees.

This Article uses the Thomas and Kavanaugh hearings to explore what the absence of such a process has cost us and why reform is necessary. It also offers a model for reform based upon sexual assault investigation best practices. I then propose a standard for use in evaluating sexual misconduct allegations against Supreme Court nominees—what I term the Innocence Standard. Under this standard, successful nominees to the Supreme Court of the United States (SCOTUS) must be innocent beyond a reasonable doubt of any sexual misconduct.

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¹ Terry Gross, *Anita Hill Started a Conversation About Sexual Harassment. She's Not Done Yet*, NAT'L PUB. RADIO (Sept. 28, 2021, 9:39 AM), <https://www.npr.org/2021/09/28/1040911313/anita-hill-belonging-sexual-harassment-conversation>.

² Christine Hauser, *The Women Who Have Accused Brett Kavanaugh*, N.Y. TIMES (Sept. 26, 2018), <https://www.nytimes.com/2018/09/26/us/politics/brett-kavanaugh-accusers-women.html>.

Part One argues for reform in how sexual misconduct allegations involving nominees are handled, taking the position that sexual misconduct is disqualifying for service on the country's highest Court. It also argues that the Senate's handling of such allegations is critical because the Senate response has an important signaling effect on the general public when it comes to sexual misconduct in both public and private life.

Parts Two through Four then set out key components of a process for handling sexual misconduct allegations. Each component is supported by an analysis of what went wrong in the Thomas and Kavanaugh hearings and what benefit that component would provide in future hearings. Part Two addresses the need for a clear structure for addressing sexual misconduct allegations, including clear reporting mechanisms and confidentiality protections for complainants and witnesses. Part Three argues that senators require uniform education about sexual assault; they cannot simply rely on common sense because sexual assault is a complex topic and misconceptions about it abound. This Part addresses these misconceptions head-on and sets out the type of education decision-makers need, as well as the need for expert testimony.

Part Four argues that the Senate must commit to fully investigating all sexual misconduct allegations involving Supreme Court nominees; such investigations must be thorough, evidence-based, and properly resourced. Part Five addresses the harm in senators importing the criminal law standard of guilty beyond a reasonable doubt into the nomination process. Instead, the paper proposes a heightened process incorporating the Innocence Standard, in which SCOTUS nominees must be innocent beyond a reasonable doubt of any sexual misconduct. The Article concludes by providing several justifications for the Innocence Standard and addressing potential objections.

I. WHY IS REFORM NEEDED IN SENATE CONFIRMATION HEARINGS OF SUPREME COURT JUSTICES?

The United States Constitution states that Supreme Court Justices are to be appointed by the President, upon the advice and consent of the Senate.³ Scholars have long debated exactly what the Senate's "advice and consent" role entails, with some arguing that the procedures the Senate follows for investigating and questioning nominees are inadequate for this important role.⁴ Against this backdrop, the Supreme Court nomination process has

³ U.S. CONST. art. II, § 2 ("The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . .").

⁴ See Gary J. Simson, *Taking the Court Seriously: A Proposed Approach to Senate Confirmation of Supreme Court Nominees*, 7 CONST. COMMENT. 283, 287 (1990) (arguing that the Senate is an "equal partner" in the appointment process along with the President and has an obligation to undertake a "searching inquiry into the nominee's basic fitness for the task"); A. Mitchell McConnell, Jr.,

been thrown into chaos twice over sexual misconduct. This first occurred in 1991 when allegations emerged that Clarence Thomas had sexually harassed one of his subordinates when he worked as Chairman of the Equal Employment Opportunity Commission (EEOC).⁵ It happened again in 2018 when evidence came to light suggesting that Brett Kavanaugh had engaged in sexual misconduct against other students while in high school and college.⁶ In both cases, the Senate Judiciary Committee (SJC) was poorly equipped to address the allegations in a constructive and nonpartisan manner. The fraught handling of the Thomas and Kavanaugh hearings was an indicator of senators' lack of preparation for this role. This problem stemmed from institutional blindness to the seriousness of such conduct and what should be its disqualifying nature.

Nothing illustrates institutional blindness toward sexual misconduct better than the fact that both Thomas and Kavanaugh were nominated by presidents who themselves have been credibly accused of sexual harassment and assault—George H.W. Bush by at least eight women,⁷ and Donald Trump by at least eighteen.⁸ Bush's and Trump's own actions demonstrate that those who have committed sexual misconduct are likely to minimize and trivialize its seriousness. For instance, Bush admitted to assaulting women by grabbing their buttocks, but then downplayed his actions by stating that "he has patted women's rears in what he intended to be a good-natured manner," and that he would never "intentionally cause anyone distress."⁹ This statement illustrates Bush's blindness to the offensiveness of his conduct through its assumption that there is a good-natured way to grab

Haynsworth and Carswell: A New Senate Standard of Excellence, 59 KY. L.J. 7, 13 (1970) (arguing that "the advice and consent responsibility of the Senate should mean an inquiry into qualifications and not politics or ideology"); LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* 96, 107, 132 (1985) (arguing that the Senate is an "equal partner" in the appointment process and may reject a nominee if it finds his or her views of a "just society" to be incompatible with the Senate's views, or if the nominee "would upset the Court's equilibrium or exacerbate" an existing bias). See generally Russell L. Weaver, "Advice and Consent" in *Historical Perspective*, 64 DUKE L.J. 1717 (2015). Simson has also argued that senators "are not well-suited in three respects to do the questioning in confirmation hearings" and that the questioning should be done by outside professionals. Simson's three points of concern are that (1) senators are not typically well-versed in constitutional law to ask appropriately probing follow-up questions; (2) their cross-examination skills "tend to be rather limited"; and (3) they are too politically vulnerable "to be counted on to ask the tough questions whenever they are needed." Gary J. Simson, *Thomas's Supreme Unfitness—A Letter to the Senate on Advise and Consent*, 78 CORNELL L. REV. 619, 657–58 (1993) [hereinafter Simson, *Thomas's Supreme Unfitness*].

⁵ Gross, *supra* note 1.

⁶ Hauser, *supra* note 2.

⁷ Laura McGann, 8 *Women Say George H.W. Bush Groped Them. Their Claims Deserve to Be Remembered as We Assess His Legacy*, VOX (Dec. 1, 2018, 1:55 PM), <https://www.vox.com/2018/12/1/17274466/eight-women-george-hw-bush-touching-inappropriately-metoo-legacy>.

⁸ Meghan Keneally, *List of Trump's Accusers and Their Allegations of Sexual Misconduct*, ABC NEWS (Sept. 18, 2020, 5:41 PM), <https://abcnews.go.com/Politics/list-trumps-accusers-allegations-sexual-misconduct/story?id=51956410>.

⁹ Lisa Respers France, *George H.W. Bush Responds After Actress Accuses Him of Sexual Assault*, CNN (Oct. 26, 2017, 8:47 AM), <https://www.cnn.com/2017/10/25/entertainment/heather-lind-george-bush-harassment/index.html>.

a woman's buttocks that does *not* cause distress. Trump's own words demonstrate a similar set of assumptions, that as a "star," he can "[j]ust kiss" women or "[g]rab 'em by the pussy."¹⁰ Leaders who espouse such views are unlikely to take sexual misconduct into account when appointing others to positions of authority. Rather, their actions normalize such conduct and imply that it is not any sort of serious problem.¹¹

With these types of attitudes driving the actions of our top elected leaders, it is no surprise that the executive and legislative branches of our government have been slow to recognize the critical importance of establishing a process for vetting allegations of sexual misconduct against SCOTUS nominees.

Although there are many reasons to reform the hearing process for SCOTUS nominees—after all, inadequate investigation and vetting of nominees relate to a range of issues—sexual misconduct is an obvious starting point for two reasons. First, sexual misconduct should be disqualifying. Second, senators' behaviors during confirmation hearings have an important signaling effect on the general public when it comes to attitudes about sexual violence.

A. *Sexual Misconduct is Disqualifying*

"If that's sexual harassment, half the senators on Capitol Hill could be accused."

Senator Howard Metzenbaum (D-OH)¹²

Sexual misconduct—both sexual harassment and sexual assault—is of great relevance when judging the fitness of a SCOTUS nominee.¹³ A person's willingness to engage in sexual misconduct raises fundamental doubts about his or her character. Engaging in such misconduct signals a lack of respect and empathy for other people, particularly given the distress and trauma that result for victims.¹⁴ Perpetrators' lack of respect and

¹⁰ *Transcript: Donald Trump's Taped Comments About Women*, N.Y. TIMES (Oct. 8, 2016), <https://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html>.

¹¹ In fact, Donald Trump has frequently expressed sympathy for men credibly accused of sexual assault and domestic violence. Anne Gearan & Katie Zezima, *Trump Decries Lack of 'Due Process' for Men Accused of Sexual Harassment, Abuse*, WASH. POST (Feb. 10, 2018, 7:39 PM), https://www.washingtonpost.com/politics/trump-decries-lack-of-due-process-for-men-accused-of-sexual-harassment-abuse/2018/02/10/fb6f7e08-0e89-11e8-95a5-c396801049ef_story.html; Meghan Keneally, *6 Men Trump Has Defended Amid Accusations of Assault or Misconduct*, ABC NEWS (Sept. 22, 2018, 12:19 PM), <https://abcnews.go.com/US/men-trump-defended-amid-assault-accusations/story?id=53045851>.

¹² David A. Graham, *The Clarence Thomas Exception*, THE ATLANTIC (Dec. 20, 2017), <https://www.theatlantic.com/politics/archive/2017/12/clarence-thomas-anita-hill-me-too/548624/>.

¹³ The terms "sexual harassment" and "sexual assault" are defined *infra*. See notes 22, 31, and accompanying text.

¹⁴ A note on terminology: throughout, I use the terms "victim" and "survivor" to describe a person reporting or experiencing sexual misconduct. Although the term "survivor" is preferred by many victims, I do not use that term consistently here because "victim" better distinguishes the person reporting from

empathy are frequently accompanied by a lack of integrity, because those who commit sexual misconduct frequently lie about their actions in order to avoid the inevitable reputational harm that follows an admission of guilt.¹⁵

Sexual misconduct is extremely harmful to victims and it is also unfortunately very widespread.¹⁶ Because of this, the Senate must establish a process for handling allegations of sexual misconduct. The process must be respectful to all parties, must include a thorough investigation and the gathering of all evidence before arriving at any conclusions, and must be governed by an expectation that nominees cooperate and conduct themselves professionally throughout. The Senate has a constitutional duty to address sexual misconduct during confirmation hearings and must be prepared to disqualify those nominees who have been credibly accused.¹⁷

the perpetrator, and therefore, is the more accurate term in many contexts. In addition, not all victims of sexual misconduct survive the experience. Some rape victims are murdered, and victims of sexual assault have higher rates of suicide than the general population. On the link between suicide and sexual assault, see *Victims of Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/victims-sexual-violence> (last visited Aug. 30, 2023) (reporting that the incidence of “suicidal or depressive thoughts increases after sexual violence,” “33% of women who are raped contemplate suicide,” and “13% of women who are raped attempt suicide”). See also *Suicide Prevention: Facts About Suicide*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/suicide/facts/> (last visited Aug. 30, 2023) (explaining that those who “have experienced . . . sexual violence have a higher suicide risk”).

¹⁵ Examples of perpetrators who lie about their culpability abound. For instance, Harvey Weinstein has maintained that he is not guilty of rape and sexual assault despite convictions in two courts on multiple counts of these crimes; he is currently serving a twenty-three-year prison sentence in New York, to be followed by a sixteen-year sentence in California. Jan Ransom, *Harvey Weinstein’s Stunning Downfall: 23 Years in Prison*, N.Y. TIMES (June 15, 2021), <https://www.nytimes.com/2020/03/11/nyregion/harvey-weinstein-sentencing.html>; Lois Beckett, *Harvey Weinstein Sentenced to 16 Additional Years for LA Rape Conviction*, THE GUARDIAN (Feb. 23, 2023, 7:37 PM), <https://www.theguardian.com/world/2023/feb/23/harvey-weinstein-los-angeles-rape-conviction-sentencing> (“In his own statement in court on Thursday, Weinstein admitted no guilt, and called the woman he was convicted of raping an ‘actress’ who can ‘turn the tears on’ and the rape a ‘made-up story’”). Pastor Ted Haggard, who publicly spoke against the LGBTQ lifestyle, vigorously denied that he engaged in a same-sex relationship while married to his wife until his denials became untenable and he was forced to resign. Debbie Kelley, *Powerhouse Preacher Ted Haggard Faces New Allegations of Illicit Behavior*, THE GAZETTE (July 23, 2022), https://gazette.com/news/crime/powerhouse-preacher-ted-haggard-faces-new-allegations-of-illicit-behavior/article_e7637edc-0aab-11ed-ac8c-c31007228c88.html. Donald Trump has repeatedly denied engaging in sexual misconduct despite numerous accusers and a court finding him guilty of sexual abuse in a civil claim brought by E. Jean Carroll. See Benjamin Weiser, Lola Fadulu & Kate Christobek, *Donald Trump Sexually Abused and Defamed E. Jean Carroll, Jury Finds*, N.Y. TIMES (May 9, 2023), <https://www.nytimes.com/2023/05/09/nyregion/trump-carroll-trial-sexual-abuse-defamation.html>.

¹⁶ See notes 13–29 and accompanying text. For a survey of the widespread nature of sexual assault, see generally Lisa Avalos, *Reversing the Decriminalization of Sexual Violence*, 21 NEV. L.J. 1, 2 (2020) [hereinafter Avalos, *Reversing the Decriminalization*] (arguing that “the societal response to sexual violence is largely inadequate . . . because we fully appreciate neither the extent and severity of such violence, nor the woefully deficient law enforcement response.”).

¹⁷ U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and Inferior Courts, shall hold their Offices during good Behaviour . . .”). For an interpretation of what “good behaviour” means, see Ruth Bader Ginsburg, *Reflections on the Independence, Good Behavior and Workload of Federal Judges*, 55 U. COLO. L. REV. 1, 5 (1983) (stating that “[c]harges against judges that have led to congressional inquiry span a wide range; some of them warrant the label ‘high [c]rime,’ others do not fit comfortably under that heading. They include: financial misdeeds or irregularities (for example, borrowing from the court’s till); ‘intemperate use of ardent spirits’ (sometimes described more bluntly as ‘habitual drunkenness’); tyrannous treatment of counsel; income tax evasion; and fabrication of per diem expenses.”). Although

Acknowledging the disqualifying nature of such conduct signifies respect for all people, particularly women, who are disproportionately affected by sexual misconduct.¹⁸

These guiding principles were not on the radar in 1991, if Senator Metzenbaum's comment above is any indication. Disregard for women's ubiquitous experiences of sexual harassment shaped the landscape at the time of Justice Thomas's confirmation, and today it is widely acknowledged that Anita Hill's testimony played a hugely influential role in catapulting the issue of sexual harassment into public consciousness.¹⁹ Additionally, the #MeToo movement has created public awareness that powerful men are engaging in sexual harassment and assault.²⁰

Anita Hill's experience was the tip of a very large iceberg. Workplace sexual harassment is very common in the United States, with studies indicating that forty to seventy-five percent of women and thirteen to thirty-one percent of men experience it.²¹ Sexual harassment includes "unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature."²² The consequences of sexual harassment are serious and affect individuals regardless of socioeconomic status, age, level of education, and vocation.²³ Large-scale studies have demonstrated that "sexual workplace aggression significantly diminishes overall job satisfaction."²⁴ Sexual harassment is significantly related to job withdrawal behaviors including quitting and choosing to be laid off.²⁵ A 2018 poll found that nearly half of harassed women leave their jobs or switch careers because of it.²⁶ But when victims do not have the financial resources to leave a position where they are being harassed, they may engage in work withdrawal behaviors such as task avoidance, absenteeism, taking excessive sick leave,

the framers of the Constitution never addressed sexual misconduct directly, the Senate's decision to conduct hearings on this issue in relation to Clarence Thomas and Brett Kavanaugh indicate a contemporary view that sexual misconduct is disqualifying and is not "good [b]ehaviour."

¹⁸ Chelsea R. Willness, Piers Steel & Kibeom Lee, *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60 PERS. PSYCH. 127, 128 (2007).

¹⁹ See, e.g., Erin Mulvaney, *Anita Hill Cut Path to #MeToo as Barriers Persist 30 Years Later*, BLOOMBERG L. NEWS (Oct. 22, 2021, 4:46 AM), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XDAR34C400000?bna_news_filter=us-law-week#jcite (stating that Anita Hill's testimony "inspired more women to come forward, and resulted in some federal policy changes"). Anita Hill was named "Woman of the Year" for 1991 by Time Magazine. *100 Women of the Year*, TIME (Mar. 5, 2020, 7:09 AM), <https://time.com/5793719/anita-hill-100-women-of-the-year/>.

²⁰ Audrey Carlsen, Maya Salam, Claire Cain Miller, Denise Lu, Ash Ngu, Jugal K. Patel & Zach Wichter, *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html>.

²¹ Willness et al., *supra* note 18, at 128.

²² *Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/sexual-harassment> (last visited Sept. 5, 2023). Moreover, "harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted)." *Id.*

²³ Willness et al., *supra* note 18, at 128.

²⁴ *Id.* at 135.

²⁵ *Id.* at 136.

²⁶ ANITA HILL, BELIEVING: OUR THIRTY-YEAR JOURNEY TO END GENDER VIOLENCE 68 (2021).

and even engaging in purposeful sabotage—conduct which results in costs to employers.²⁷

Workplace sexual harassment has a negative effect on victims' physical and mental health and can even result in symptoms of post-traumatic stress disorder.²⁸ As such, workplace sexual harassment has significant costs for employers, including loss of productivity and increased employee turnover.²⁹ Despite all this, survivors of harassment often do not complain and “remain civil” because, in Professor Hill's words, “we know that the powerful ones often hold our future in their hands and can be vindictive if we don't.”³⁰

Like sexual harassment, sexual assault is also much more prevalent and ubiquitous than most people realize. Although definitions of sexual assault vary by state, the term generally refers to “sexual contact or behavior that occurs without explicit consent of the victim,” including, *inter alia*, “[a]ttempted rape, [f]ondling or unwanted sexual touching, [f]orcing a victim to perform sexual acts,” and “[p]enetrat[ing] the victim's body.”³¹

Sexual assault is a public health issue.³² According to the 2015 National Intimate Partner and Sexual Violence survey, around forty-three percent of American women and around twenty-four percent of American men have experienced some form of sexual violence in their lifetimes.³³ It has long-lasting consequences for victims' physical and mental health, and the economic costs can be severe.³⁴ Psychological trauma from sexual assault, such as anxiety, depression, and post-traumatic stress disorder,³⁵ leads to adverse economic consequences including inability to concentrate, diminished job performance, job loss, and the inability to find another job.³⁶ In fact, the lifetime economic cost of rape is estimated to be approximately \$122,000 per victim.³⁷

Given the prevalence of sexual misconduct and the growing awareness of the personal and professional harm it causes, the SCOTUS nomination process must be governed by a clear commitment to the position that sexual misconduct is unacceptable and disqualifies Supreme Court nominees.

²⁷ Willness et al., *supra* note 18, at 137.

²⁸ *Id.* at 149.

²⁹ *Id.* at 136–37.

³⁰ HILL, *supra* note 26, at 38.

³¹ *Sexual Assault*, RAINN, <https://www.rainn.org/articles/sexual-assault> (last visited Nov. 5, 2023).

³² See Alena Allen, *Rape Messaging*, 87 *FORDHAM L. REV.* 1033, 1039–41 (2018) (discussing health consequences of rape).

³³ SHARON G. SMITH, XINJIAN ZHANG, KATHLEEN C. BASILE, MELISSA T. MERRICK, JING WANG, MARCIE-JO KRESNOW & JIERU CHEN, *THE NATIONAL INTIMATE PARTNER & SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF—UPDATED RELEASE*, *CTRS. FOR DISEASE CONTROL & PREVENTION* 2, 3 (Nov. 2018), <https://www.nsvrc.org/sites/default/files/2021-04/2015data-brief508.pdf>.

³⁴ Allen, *supra* note 32, at 1040–42.

³⁵ Fiona Mason & Zoe Lodrick, *Psychological Consequences of Sexual Assault*, 27 *BEST PRAC. & RSCH. CLINICAL OBSTETRICS & GYNECOLOGY* 27, 31 (2013).

³⁶ Allen, *supra* note 32, at 1041–42.

³⁷ *Id.* at 1041.

Conduct that causes so much harm to so many people cannot be accepted among those who serve on the nation's highest court. Failure to implement significant, rigorous reform sends the message to future nominees—and to everyone else—that sexual misconduct is a trivial concern and can be ignored. In fact, anything short of a commitment to adopt an Innocence Standard may leave accusers wholly unprotected and the judiciary worse for it.

B. *Senate Behavior During Confirmation Hearings Has an Important Signaling Effect on the General Public When It Comes to Attitudes About Gender Violence*

Senators signal approval or disapproval of sexual misconduct by the way that they respond to survivors and witnesses who come forward. If senators react dismissively or with hostility to survivors and witnesses, their actions send a message to the general public that sexual misconduct is unimportant and that those who come forward are wasting the Senate's time. The signaling effect of senators' reactions can have severe repercussions for those who come forward, including implications for their safety and security. For Anita Hill and Professor Christine Blasey Ford, the aftermath of giving testimony was harrowing because of the signals sent by senators to the general public about them.³⁸

Senators' disdain for Hill served as a model for others who wanted to express hostility toward her. Senator Howard Heflin (R-AL) accused Hill of being a "scorned woman" and of having a "martyr complex."³⁹ Senator Orrin Hatch (R-UT) set out to discredit her by having four of his staff attorneys comb all available sources for any negative information that they could use against her.⁴⁰ Senators Hank Brown (R-CO) and Alan Simpson (R-WY) had aides work overtime to look for proof of an unsubstantiated claim that Hill had inserted pubic hairs into exam papers that she had returned to law students at Oral Roberts University.⁴¹ Senator John Danforth (R-MO)

³⁸ Tim Mak, *Kavanaugh Accuser Christine Blasey Ford Continues Receiving Threats, Lawyers Say*, NAT'L PUB. RADIO (Nov. 8, 2018, 9:00 AM), <https://www.npr.org/2018/11/08/665407589/kavanaugh-accuser-christine-blasey-ford-continues-receiving-threats-lawyers-say>; Elise Viebeck, *Christine Blasey Ford is About to Testify Against a Supreme Court Nominee. Here is What Happened When Anita Hill Did in 1991*, WASH. POST (Sept. 27, 2018, 6:00 AM), https://www.washingtonpost.com/politics/christine-blasey-ford-is-about-to-testify-against-a-supreme-court-nominee-here-is-what-happened-when-anita-hill-did-in-1991/2018/09/26/c431bbc8-c1ca-11e8-b338-a3289f6cb742_story.html.

³⁹ Grace Segers, *Here Are Some of the Questions Anita Hill Answered in 1991*, CBS NEWS (Sept. 19, 2018, 12:46 PM), <https://www.cbsnews.com/news/here-are-some-of-the-questions-anita-hill-fielded-in-1991/>.

⁴⁰ Dan Feserman, *Hatch, Specter Staff Members Went to Work Quickly in Effort to Discredit Hill THOMAS HEARINGS*, BALT. SUN (Oct. 13, 1991, 12:00 AM), <https://www.baltimoresun.com/news/bs-xpm-1991-10-13-1991286064-story.html>. One of the speculative arguments they came up with was that Hill had found a reference to "Long Dong Silver" in prior caselaw and had then attributed that remark to Thomas. *Id.*

⁴¹ JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* 310-14 (1994).

accused Hill of “erotomania” and tried, unsuccessfully, to get a psychiatrist to testify about this condition at the hearings.⁴²

The disrespect paid to Anita Hill by senators during the hearings placed her in harm’s way once she returned home to Oklahoma. Hill received death threats, numerous letters and phone calls expressing hate, and excrement that was sent through the mail.⁴³ On one occasion when her elderly mother and some very young children were visiting her, the dean of the law school alerted her to a bomb threat made against her home.⁴⁴

Ford’s experience was similarly calamitous. About one week after she testified before the SJC, then-President Donald Trump mocked her testimony, particularly her memory difficulties, during a rally in Southaven, Mississippi.⁴⁵ He then implied that she was lying, telling the crowd that men unfairly accused of sexual harassment would be fired from their jobs.⁴⁶ He called Kavanaugh’s accusers “really evil people,” and told the crowd to “[t]hink of your husbands. Think of your sons.”⁴⁷

Prior to Trump’s comments, Ford had already been receiving death threats and had been unable to return to her home in California as a result.⁴⁸ Her email had also been hacked and she had been impersonated online.⁴⁹ After Trump’s comments, Ford’s lawyer stated that “[it was] going to be quite some time before [Ford and her family were] able to live at home. The threats have been unending. It’s deplorable.”⁵⁰ Ford and her family had to hire a security team and spent months living in hotels and in a rental home to ensure their safety.⁵¹ A GoFundMe page set up for Ford raised over \$647,000, much of which she and her family used to pay for their unexpected security and housing costs.⁵²

These experiences beg the question: to what extent were those who threatened and harassed Hill and Ford motivated by the disrespectful treatment that these women received during the process of coming forward?

⁴² *Id.* at 306–07, 309–10.

⁴³ Gross, *supra* note 1 (quoting Hill as saying: “[W]here is the process that we need to be in place that will fully vet judges and Supreme Court justice nominees? . . . [A]n effective process, would have clear guidelines about where an individual should go if they have information about a nominee. That didn’t exist in 1991, and it doesn’t exist now”); HILL, *supra* note 26, at 2–3.

⁴⁴ Gross, *supra* note 1.

⁴⁵ Josh Dawsey & Felicia Sonmez, *Trump Mocks Kavanaugh Accuser Christine Blasey Ford*, WASH. POST (Oct. 2, 2018, 10:15 PM), https://www.washingtonpost.com/politics/trump-mocks-kavanaugh-accuser-christine-blasey-ford/2018/10/02/25f6f8aa-c662-11e8-9b1c-a90f1daae309_story.html.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Letter from Debra S. Katz & Lisa J. Banks of Katz, Marshall & Banks, LLP, Dr. Christine Blasey Ford’s Lawyers, to Charles E. Grassley, Chairman, U.S. Senate Judiciary Comm. (Sept. 18, 2018) (on file with Katz, Marshall & Banks, LLP).

⁴⁹ *Id.*

⁵⁰ Emily Birnbaum, *Christine Blasey Ford Still Unable to Live at Home Due to Death Threats, Lawyers Say*, THE HILL (Oct. 7, 2018, 8:17 PM), <https://thehill.com/homenews/senate/410340-christine-blasey-ford-still-unable-to-live-at-home-due-to-death-threats/>.

⁵¹ Mak, *supra* note 38.

⁵² *Help Christine Blasey Ford*, GOFUNDME (Sept. 18, 2018), <https://www.gofundme.com/f/help-christine-blasey-ford>.

Senators' efforts against Hill likely emboldened others to attempt to harm her. The death threats Ford received were most likely exacerbated by Trump describing her as a "really evil" person and mocking her testimony.⁵³ The comments by men in positions of leadership undoubtedly endangered Hill and Ford. Leaders should set an example for the rest of the country, and when they actively show disdain and disrespect to victims and witnesses who come forward out of a sense of civic duty, they place those individuals in great danger.

Public threats may extend beyond the victims themselves. Witnesses who can support accusers' accounts have faced similar threats. Joel Paul, a friend of Hill's who was a law professor up for tenure at the time of the Clarence Thomas hearings, received anonymous calls pejoratively referencing his homosexuality.⁵⁴ One caller stated that he would like to go out with Paul to "slit [his] throat," while another said he hoped that Paul would "die of AIDS."⁵⁵ The dean of Paul's law school received a call from someone who asked whether he knew that he had a "militant homosexual teaching on [his] staff."⁵⁶ Additionally, there may be witnesses with relevant information about a nominee who fear that being publicly named as a witness might harm their careers or personal life in some way, particularly if they serve in a nonpartisan role.⁵⁷

The Senate must take the lead in responding constructively to sexual misconduct allegations the next time they arise in the SCOTUS nomination process. Senators can do so by making a commitment to the position that sexual misconduct is disqualifying, and that victims and witnesses should be fully heard so that the SJC can conduct a full investigation. The SJC and all elected officials should be prepared to treat all victims and witnesses with respect, modeling appropriate conduct both because it is the right thing to do, and also to ensure victims' and witnesses' safety after they disclose information. Vetting sexual misconduct allegations need not be a partisan battle—it only becomes one if partisan commitment to a particular nominee becomes more important than thorough scrutiny of that nominee's background.

II. ESTABLISHING A STRUCTURE FOR ADDRESSING SEXUAL MISCONDUCT ALLEGATIONS WITHIN THE SCOTUS NOMINATION PROCESS

The Senate should establish a clear and transparent process so that the general public will know how to report allegations of sexual misconduct of

⁵³ Dawsey & Sonmez, *supra* note 45; Lisa Bonos, *Trump Asks Why Christine Blasey Ford Didn't Report her Allegation Sooner. Survivors Answer with #WhyIDidntReport*, WASH. POST (Sept. 24, 2018, 11:00 AM), <https://www.washingtonpost.com/news/soloish/wp/2018/09/21/trump-asks-why-christine-blasey-ford-didnt-report-her-allegation-sooner-survivors-answer-with-whyididntreport/>.

⁵⁴ MAYER & ABRAMSON, *supra* note 41, at 266.

⁵⁵ *Id.*

⁵⁶ *Id.* at 266–67.

⁵⁷ One example is Max Stier, see *infra* note 247.

SCOTUS nominees and the Senate will know exactly how to handle these reports. This process must include mechanisms for reporting and for ensuring confidentiality, and it must also establish a process for investigating such allegations—what I term an Investigatory Practices Model.

A. *Clear Reporting Mechanisms & Confidentiality*

Clear reporting mechanisms for those with relevant information about a nominee's past sexual misconduct are crucial. Absent a clear process, people with important information will not know where and how to report, and senators will not know how to respond. The result, in both 1991 and 2018, was that senators invented the process as they went along, relying on their own judgment rather than best practices.⁵⁸ It is not surprising that conflict ensued among senators on how to proceed.⁵⁹

Anita Hill, upon learning of Thomas's nomination, initially decided to stay silent, coming forward only when aides to Senators Metzenbaum and Kennedy learned of her allegations through third parties and reached out to her.⁶⁰ The fact that there was no process in place for reporting sexual harassment may have been a factor in Hill's decision not to speak out initially.

Christine Blasey Ford testified that she believed it was "very important" to get her information to the SJC but "did not know how to do it while there was still a short list of candidates."⁶¹ She thus tried a variety of methods, reaching out to her local member of Congress, Anna Eshoo, on July 5, 2018, and sending a tip to the Washington Post's tip line the next day.⁶² Ford did not hear back from Eshoo's office until Trump "narrow[ed] in" on Kavanaugh as the nominee.⁶³ At Eshoo's suggestion, Ford wrote a letter detailing the allegation to Senator Dianne Feinstein (D-CA), who followed up with Ford but kept the letter confidential for several weeks, at Ford's request.⁶⁴ The result was that Ford's letter was not disclosed to the rest of

⁵⁸ Kevin Breuninger, *Kavanaugh Sexual Assault Hearing Begins with Political Sniping Between Grassley and Feinstein*, CNBC (Sept. 27, 2018, 11:39 AM), <https://www.cnbc.com/2018/09/27/kavanaugh-sexual-assault-hearing-begins-with-political-sniping-between-grassley-feinstein.html>.

⁵⁹ Clare Foran, *Grassley Interrupts Feinstein During Her Opening Statement at Kavanaugh Hearing*, CNN (Sept. 27, 2018), <https://www.cnn.com/2018/09/27/politics/grassley-feinstein-christine-blasey-ford-kavanaugh/index.html>; Breuninger, *supra* note 58 (noting that Senator Charles Grassley (R-IA) criticized Senator Diane Feinstein (D-CA) for not immediately sharing the letter she received from Christine Blasey Ford with the rest of the SJC).

⁶⁰ MAYER & ABRAMSON, *supra* note 41, at 221, 224–28, 231–34.

⁶¹ *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States*, 115th Cong. 661 (2020) [hereinafter *Kavanaugh Tr.*] (statement of Christine Blasey Ford).

⁶² RUTH MARCUS, *SUPREME AMBITION: BRETT KAVANAUGH AND THE CONSERVATIVE TAKEOVER* 224 (2019).

⁶³ *Id.*

⁶⁴ *Id.* at 229–31.

the SJC until early to mid-September when word of its existence leaked out.⁶⁵

After Ford's allegations were reported in the Washington Post on September 17, 2018, a second sexual misconduct incident involving Kavanaugh emerged.⁶⁶ Two of his former Yale classmates reached out to veteran New Yorker reporters Jane Mayer and Ronan Farrow to say that Kavanaugh had pushed his penis into classmate Deborah Ramirez's face at a party.⁶⁷ Ramirez did not take the initiative of going to the press or reaching out to the SJC; Mayer and Farrow spoke to at least three of Ramirez's classmates about the incident before contacting her.⁶⁸

Feinstein devised a response on an ad hoc basis and decided not to share Ford's letter with the rest of the SJC because Ford wanted confidentiality.⁶⁹ This lack of established process was behind the conflict when Senator Grassley criticized Feinstein for withholding information.⁷⁰ In fact, Feinstein and Grassley were both trying to do their best in the absence of any formal process to guide them. Similarly, Hill, Ford, and Ramirez's classmates had to fumble in the dark as they tried to determine whether and how to share what they knew.

We have learned from both sets of hearings that clear reporting mechanisms are essential so that people know how to get relevant information to the SJC, and senators know how to proceed. Failing to establish such a process, and continuing to address allegations on an ad hoc basis, sends the message that accusers are disruptive, annoying, and blameworthy. These responses diminish the seriousness of sexual misconduct and subtly convey the message that accusers should keep silent and not be disruptive—something harassment victims have been told for centuries.⁷¹

A concern with not wanting to be portrayed in these negative ways can discourage individuals from coming forward, and may help explain why Hill, Ford, and Ramirez all agonized about doing so. In short, the absence of

⁶⁵ *Id.* at 242–44.

⁶⁶ *Id.* at 271.

⁶⁷ MARCUS, *supra* note 62, at 270 (stating that Mark Krasberg reached out to Mayer); JACKIE CALMES, *DISSENT: THE RADICALIZATION OF THE REPUBLICAN PARTY AND ITS CAPTURE OF THE COURT* 260, 334 (2021) (stating that Richard Oh contacted Mayer). See also Ronan Farrow & Jane Mayer, *Senate Democrats Investigate a New Allegation of Sexual Misconduct, from Brett Kavanaugh's College Years*, NEW YORKER (Sept. 23, 2018), <https://www.newyorker.com/news/news-desk/senate-democrats-investigate-a-new-allegation-of-sexual-misconduct-from-the-supreme-court-nominee-brett-kavanaughs-college-years-deborah-ramirez> (summarizing allegations against Kavanaugh from his college years).

⁶⁸ MARCUS, *supra* note 62, at 270 (stating that Mark Krasberg reached out to Mayer); CALMES, *supra* note 67, at 253, 260 (explaining that Farrow heard about the incident from Kenneth Appold and Richard Oh).

⁶⁹ Breuninger, *supra* note 58.

⁷⁰ *Id.*

⁷¹ See generally Jamillah Bowman Williams, Lisa Singh & Naomi Mezey, *#MeToo as Catalyst: A Glimpse into 21st Century Activism*, U. CHI. LEGAL F. 371, 373 (2019) (“[R]eporting [sexual assault] remains either ineffective or entails costs that are too high for victims.”).

a reporting process encourages people to keep silent, enables sexual misconduct, and creates space for negative reactions against those who do come forward.

Reforming the Senate's approach to sexual misconduct allegations also requires thoughtfulness about confidentiality. Although confidentiality cannot necessarily be guaranteed, there is value in treating information confidentially whenever possible, both for the nominee and for victims and witnesses who come forward. Establishing a clear process with confidentiality protections has the potential to reduce the combative and polarizing responses we have seen to the public airing of sexual misconduct allegations against nominees. Individuals with information to share will likely come forward earlier if they know how to report, with the result that sexual misconduct allegations can be addressed earlier in the vetting process, in a more private setting.⁷² This will allow the President to move on from problematic nominees before publicly announcing a nominee and then having the process derailed.

Although many people would rather avoid talking about sexual misconduct, we cannot expect to end such misconduct without open dialogue about it. A clear reporting process with confidentiality protections can encourage such dialogue. But the lack of a clear process has a chilling effect on needed discourse about sexual assault and enables perpetrators to continue to offend and to serve in positions of authority.

B. *Appointing an Investigatory Task Force*

Who is best positioned to investigate allegations of sexual misconduct against SCOTUS nominees? Because of senators' advice and consent role in the nomination process, they need specialized knowledge about the complex nature of sexual misconduct, particularly in light of the prevalence of rape myths and stereotypes.⁷³ Appropriate training is also important because sexual assault victims are likely to be under-represented in the Senate, leading to an empathy deficit.⁷⁴ The Senate is disproportionately Caucasian, seventy-six percent male, and older than the general public, with an average age of sixty-four.⁷⁵ This demographic also has a significantly

⁷² Bonos, *supra* note 53.

⁷³ See Part III, *infra*.

⁷⁴ Very large numbers of sexual assault victims come from demographic groups that are poorly represented in the Senate. Young people aged twelve to thirty-four are at the highest risk of sexual violence, whereas adults aged sixty-five and older are ninety-two percent less likely than the former group to become victims of sexual assault. *Victims of Sexual Violence: Statistics*, *supra* note 14.

⁷⁵ At present, twenty-five percent of senators are female. *Women in Elective Office 2023*, RUTGERS EAGLETON INST. POL.: CTR. FOR AM. WOMEN & POL., <https://cawp.rutgers.edu/facts/current-numbers/women-elective-office-2023> (last visited Oct. 13, 2023). In early 2021, eighty-nine percent of senators were non-Hispanic white, but whites made up only seventy-six percent of the United States population. Stef W. Kight, *The Racial Breakdown of the Senate*, AXIOS (Feb. 23, 2021), <https://www.axios.com/2021/02/24/diversity-in-senate>; *Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/>

lower percentage of sexual assault victims, especially when compared to other groups.⁷⁶ In addition, sexual assault investigation, when done properly, is very time-consuming and requires a high level of expertise.⁷⁷ These points lead us to consider whether the SJC is the correct body to assess sexual misconduct allegations against SCOTUS nominees.

Given the complexity of sexual misconduct cases and the specialized training required to investigate them,⁷⁸ the Senate could best fulfill its advice and consent role by appointing a special task force to undertake the work of investigating allegations of sexual misconduct and then reporting their findings to the SJC. A team of experts can be assembled from practitioners who investigate and prosecute sexual assault and who train police to do so. End Violence Against Women International's Cadre of Experts—a group of approximately twenty-six criminal justice experts and other consultants who regularly provide training to law enforcement agencies in relation to sexual assault investigation best practices—would be an excellent place to start assembling this team.⁷⁹ Experts such as these would be very well equipped to conduct necessary investigations for the SJC and then explain their findings. Senators simply do not have the time and expertise to carry out this important work themselves.

Creating structures for addressing sexual misconduct allegations against Supreme Court nominees sends several important messages. It names and identifies sexual misconduct as a problem, alerts everyone to the fact that it is on the Senate's radar, and indicates that such conduct by nominees will not be tolerated and is disqualifying. It also signals that the Senate is prepared to receive such allegations and ensure that they are thoroughly investigated by competent professionals. Having a clear process in place is therefore the first step in treating those who have information to report with respect and dignity. Although some individuals—such as nominees who have, in fact, committed sexual misconduct—may not want victims of sexual misconduct to come forward, the integrity of our institutions requires that we make it easier for them to do so.

quickfacts/fact/table/US/PST045219 (last visited Oct. 13, 2023); Roxanne Roberts, *This Senate is the Oldest in American History. Should We do Anything About It?*, WASH. POST (June 2, 2021, 6:00 AM), <https://www.washingtonpost.com/lifestyle/2021/06/02/senate-age-term-limits/>.

⁷⁶ See Jameta Nicole Barlow, *Black Women, the Forgotten Survivors of Sexual Assault*, AM. PSYCH. ASS'N (Feb. 1, 2020), <https://www.apa.org/topics/sexual-assault-harassment/black-women-sexual-violence> (showing that young Black women face disproportionate risks of sexual assault).

⁷⁷ See James Markey, Thomas Scott, Crystal Daye & Kevin Strom, *Sexual Assault Investigations and the Factors that Contribute to a Suspect's Arrest*, 44 POLICING: AN INT'L J. 591, 591–611 (2021), <https://www.rti.org/publication/sexual-assault-investigations-and-factors-contribute-suspects-arrest/fulltext.pdf> (providing an overview of the complexity of sexual assault investigations).

⁷⁸ *Id.*

⁷⁹ *Trainers and Consultants*, END VIOLENCE AGAINST WOMEN INT'L, <https://evawintl.org/trainers/> (last visited Oct. 13, 2023). End Violence Against Women International (EVAWI) is a professional training organization whose goal is to improve the criminal justice response to sexual assault. For more information, see *infra* notes 272–274 and accompanying text.

Establishing institutionalized mechanisms for addressing sexual misconduct allegations is a key starting point. The next step is to educate senators about the realistic dynamics of sexual assault and the accompanying common misconceptions.

III. ADDRESSING COMMON MISCONCEPTIONS ABOUT SEXUAL ASSAULT: THE NEED FOR EXPERT TESTIMONY

Although sexual harassment and sexual assault are widespread, they are complex phenomena to understand and investigate. In part, this is because of the difficulty that many victims have discussing these sensitive topics. But in addition, investigators require specialized knowledge because of trauma's effect on human memory, which can cause victims to react to sexual harassment and assault in ways that may not make sense to others without the requisite training.⁸⁰

The partisan nature of the Thomas and Kavanaugh hearings made it difficult for all senators to consider critical, specialized information about the realistic dynamics of sexual assault. It is easier for people to embrace new information about sensitive topics in a neutral context.⁸¹ But in both hearings, the sexual misconduct allegations arose after many senators were already prepared to support the nominee, giving rise to two concerns.⁸²

First, when sexual assault allegations interfere with a pre-existing agenda of any kind, there is a temptation to trivialize the sexual misconduct in order to avoid derailing the original objective. Once the misconduct is trivialized, those with responsibility for investigating it are unlikely to value information that will help them understand the fuller picture, unless they already have an established interest in taking sexual misconduct seriously.

Second, the pre-existing commitment to each nominee means that those supporting him were not open to adverse information about him, nor were they open to the necessary specialized knowledge about sexual harassment and assault. It is easier for people to embrace this information in a

⁸⁰ KIMBERLY A. LONSWAY, JIM HOPPER & JOANNE ARCHAMBAULT, BECOMING TRAUMA INFORMED: LEARNING AND APPROPRIATELY APPLYING THE NEUROBIOLOGY OF TRAUMA TO VICTIM INTERVIEWS, END VIOLENCE AGAINST WOMEN INT'L 1, 5–10 (Dec. 2022), https://evawintl.org/wp-content/uploads/2019-12_TB-Becoming-Trauma-Informed-Trauma-to-Victim-Interviews.pdf.

⁸¹ Laurel Rosenhall, *Politicians Accused of Sexual Harassment Are Being Ousted by Peer Pressure*, CAL MATTERS (June 23, 2020), <https://calmatters.org/politics/2017/12/politicians-accused-sexual-harassment-ousted-peer-pressure/> (considering the amount of “peer pressure” in the Senate).

⁸² Lindsey Graham stated, once a decision had been made to hear from Ford, “I’ll listen to the lady, but we’re going to bring this to a close,” clearly implying that listening to Ford would not change his vote. MARCUS, *supra* note 62, at 259–60. Similarly, Mike Davis, the Republicans’ chief nominations counsel, around this time also tweeted “Unfazed and determined. We will confirm Judge Kavanaugh.” CALMES, *supra* note 67, at 241. Davis later deleted the tweet. William Cummings, *‘Unfazed and Determined’: Top Grassley Aide Vows to Affirm Kavanaugh Despite Allegations*, USA TODAY (Sept. 20, 2018, 4:18 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2018/09/20/brett-kavanaugh-confirmation-furor-over-mike-davis-tweets/1366391002/>.

nonpartisan environment where they are not learning it for the first time in relation to a nominee that they want to see confirmed.⁸³

Senators' questioning of accusers in both the Thomas and Kavanaugh hearings demonstrated that many relied on common misconceptions about sexual assault. Victims often engage in behaviors that are misunderstood and may be viewed as counterintuitive by those who are unfamiliar with the realistic dynamics of sexual assault.⁸⁴ If factfinders do not understand these dynamics, they may misinterpret behaviors that are actually very typical reactions to sexual assault and make an unwarranted adverse credibility determination against the sexual assault survivor.

Expert testimony on these matters is crucial. Senators and their constituents alike need experts who can adequately explain the realistic dynamics of sexual assault. The use of such experts can ensure that senators are fulfilling their advice and consent role by weighing accurate information and not relying on rape myths and stereotypes. Writing shortly after the Clarence Thomas hearings, Professor Gary Simson observed that some aspects of Anita Hill's behavior:

[A]re much easier to understand if you listen to what experts on sexual harassment have to say. In fact, if the Committee had allowed such experts to testify, it would have been obvious to everyone that, far from being atypical for a victim of sexual harassment, Anita Hill's behavior during her years with Thomas and after was so typical as to be virtually a textbook case.⁸⁵

Expert testimony educates the general public as well as journalists—stakeholders who can then help to hold their elected representatives accountable for using this knowledge responsibly.

This Part will address four key ways in which sexual assault is commonly misunderstood, leading to skepticism and disbelief of victims. These include: (A) the ways in which the traumatic nature of sexual assault impairs normal memory function, making it difficult for victims to articulate their experience; (B) why inconsistencies are common in survivors' accounts of sexual assault; (C) why survivors often delay reporting sexual assault or fail to disclose altogether; and (D) misconceptions about the prevalence of false allegations. The use of expert testimony can demystify each of these areas.

⁸³ This has ties to the “peer pressure” argument above. Rosenhall, *supra* note 81. It can also be attributed to “confirmation bias.” See Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 175 (1998) (explaining the tendency of “interpreting . . . evidence in ways that are partial to existing beliefs . . .”).

⁸⁴ See *infra* Part II and accompanying text; Jennifer Gentile Long, *Explaining Counterintuitive Victim Behavior in Domestic Violence and Sexual Assault Cases*, 1 THE VOICE (2006), <https://dokumen.tips/documents/behavior-in-domestic-violence-and-sexual-assault-counterintuitive-victim-behaviorpdf.html?page=1>.

⁸⁵ Simson, *Thomas's Supreme Unfitness*, *supra* note 4, at 634 (citation omitted).

A. *How Sexual Assault Trauma Impairs Normal Memory Function*

“How did you get home? I don’t remember. How’d you get there? I don’t remember. Where is the place? I don’t remember. How many years ago was it? I don’t know.”

Donald Trump, Southaven, Mississippi Rally⁸⁶

One of the things that stood out in Ford’s testimony was the nature of her memories—she had very vivid memories of some aspects of the sexual assault experience, but an utter lack of recollection of others. When asked what her strongest memory of the incident was, she replied: “[i]ndelible in the hippocampus is the laughter, the uproarious laughter between [Kavanaugh and Mark Judge] and their having fun at my expense.”⁸⁷ And yet she was unable to recall the location of the home where the incident occurred or how she got home that night.⁸⁸ Some people used her fragmented memories against her, citing them as a reason to doubt her experience or questioning why no one came forward who could fill in some of the gaps, such as who gave her a ride home.⁸⁹ When Trump ridiculed the state of Ford’s memory at the Southaven, Mississippi rally, his remarks “were met with laughter and applause from the crowd.”⁹⁰

It is very common for those experiencing a traumatic event to have fragmented memories, remembering some aspects of a traumatic experience in great detail while exhibiting little or no recollection of other aspects of that same event.⁹¹ This contrast is a recognized phenomenon that can be explained as a neurobiological response to trauma, having to do with how one part of the brain, the hippocampus, encodes memory during and after trauma.⁹²

Research shows that “the hippocampus goes through two distinct stages during a traumatic event.”⁹³ During the first stage, it goes into overdrive

⁸⁶ Allie Malloy, Kate Sullivan & Jeff Zeleny, *Trump Mocks Christine Blasey Ford’s Testimony, Tells People to ‘Think of Your Son,’* CNN (Oct. 3, 2018, 7:47 AM), <https://www.cnn.com/2018/10/02/politics/trump-mocks-christine-blasey-ford-kavanaugh-supreme-court/index.html>.

⁸⁷ Kavanaugh Tr., *supra* note 61, at 645.

⁸⁸ *Id.* at 635, 648.

⁸⁹ Press Release, Susan Collins, Senator Collins Announces She Will Vote to Confirm Judge Kavanaugh (Oct. 5, 2018) <https://www.collins.senate.gov/newsroom/senator-collins-announces-she-will-vote-confirm-judge-kavanaugh> [hereinafter Collins Press Release].

⁹⁰ Malloy et al., *supra* note 86.

⁹¹ CHRISTOPHER WILSON, KIMBERLY A. LONSWAY & JOANNE ARCHAMBAULT, UNDERSTANDING THE NEUROBIOLOGY OF TRAUMA AND IMPLICATIONS FOR INTERVIEWING VICTIMS, END VIOLENCE AGAINST WOMEN INT’L 24–29 (Aug. 2023), https://evawintl.org/wp-content/uploads/2016-11_TB_Neurobiology1.pdf; LONSWAY ET AL., *supra* note 80, at 13; LORI HASKELL & MELANIE RANDALL, THE IMPACT OF TRAUMA ON ADULT SEXUAL ASSAULT VICTIMS, DEP’T. JUST. CAN. 20–21 (2019).

⁹² WILSON ET AL., *supra* note 91, at 28–29.

⁹³ *Id.* at 29; accord LONSWAY ET AL., *supra* note 80, at 13 (detailing the two stages the hippocampus undergoes during traumatic events).

mode and encodes as much data as it can.⁹⁴ This data often includes the first moments of a traumatic event as well as a memory “buffer” of about thirty seconds worth of information already encoded into short-term memory.⁹⁵ This first stage of hippocampus activity “explains why victims will often have a high level of detail in their account of the initial moments of a sexual assault”⁹⁶ Some researchers call this a “flashbulb memory.”⁹⁷ It explains why Ford described her assailants’ laughter as indelibly seared into her hippocampus.

During the second stage of hippocampus activity, the brain shifts to “consolidating everything that was absorbed and was already being consolidated during that initial flashbulb phase.”⁹⁸ At this point, “the hippocampus goes into a *fragmented* or *refractory mode* where it has fewer resources available for encoding new information, especially more complex information associated with context and time sequence.”⁹⁹ This explains why Ford had no recollection of how she got home after the assault. Her brain was still consolidating her memories from the traumatic assault; it may never have encoded the details of the process of getting home afterwards into her long-term memory, particularly if that process was unremarkable relative to the trauma she experienced.¹⁰⁰

These two stages of hippocampus activity have consequences for how the brain handles the “central” and “peripheral” details of a traumatic event. When experiencing trauma, a person loses the capacity to control the focus of his or her attention.¹⁰¹ Instead, the person’s biological defense circuitry typically focuses her attention on one of two things: (1) those helping her to *survive* the threat, or (2) those helping her to *cope* with the threat.¹⁰² Researchers call details that the person focuses on the *central* details; all others are the *peripheral* details.¹⁰³ A person typically has difficulty encoding peripheral details into long-term memory after a traumatic event because the brain, in survival mode, is focused on processing the central details—those that the brain deems core to survival.¹⁰⁴ In Ford’s case, the boys’ laughter was a central detail embedded into her hippocampus, and that may have been because the laughter was a signal to her of how much danger

⁹⁴ WILSON ET AL., *supra* note 91, at 29.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* (emphasis omitted).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See generally Jim Hopper, *Why Can’t Christine Blasey Ford Remember How She Got Home?*, SCI. AM. (Oct. 5, 2018), <https://blogs.scientificamerican.com/observations/why-cant-christine-blasey-ford-remember-how-she-got-home/> (discussing the “[t]ime-dependent effects of stress on the hippocampus and memory—and why they matter”).

¹⁰¹ WILSON ET AL., *supra* note 91, at 25–26; LONSWAY ET AL., *supra* note 80, at 9–10.

¹⁰² WILSON ET AL., *supra* note 91, at 25.

¹⁰³ *Id.*; LONSWAY ET AL., *supra* note 80, at 11–12. See Hopper, *supra* note 100 (discussing the distinction between central and peripheral details).

¹⁰⁴ WILSON ET AL., *supra* note 91, at 25–27.

she was in; she had to make note of the laughter in order to respond to the danger and survive. Ford testified:

I believed he was going to rape me. I tried to yell for help. When I did, Brett put his hand over my mouth to stop me from yelling. This is what terrified me the most, and this had the most lasting impact on my life. It was hard for me to breathe, and I thought that Brett was accidentally going to kill me.¹⁰⁵

In contrast to this moment when Ford believed her life was in danger, how she got home afterwards was a peripheral detail which was likely never stored in her memory at all.¹⁰⁶ Rachel Mitchell, a sex-crimes prosecutor hired by the SJC's Republican members to question Ford, placed a great deal of emphasis on Ford's inability to remember how she got home on the night of the assault. In her September 30, 2018 memo to Republican Senators, she called Ford's lack of recollection "important[]" and a detail that "raises significant questions."¹⁰⁷ Trauma expert Jim Hopper has rebutted Mitchell's argument, pointing out that how Ford got home was a peripheral detail that did not make it into her long-term memory.¹⁰⁸ He noted that Ford stated "I remember being on the street and feeling an enormous sense of relief that I had escaped from the house and that Brett and Mark were not coming after me."¹⁰⁹ Hopper then concluded: "[H]er relief at having escaped and her fear that someone might realize she'd just been attacked—those would be two highly significant central details, among the last to get in before her hippocampus, entering its own self-protective mode, lost its ability to store indelibly any of what came next."¹¹⁰

It is impossible to predict which details will be central and which will be peripheral to a specific individual; it depends on what the person was paying attention to during the traumatic event.¹¹¹ Although other people—including friends, investigators, or even senators—may think that a certain detail would have to be memorable, "that does not mean it was a central detail for the survivor's brain at the time."¹¹² This can be frustrating for investigators or fact-finders, because details that they believe *should* be central to a victim might end up being peripheral to that particular survivor.¹¹³ For instance, in one rape investigation, investigators identified a

¹⁰⁵ Kavanaugh Tr., *supra* note 61, at 635.

¹⁰⁶ Hopper, *supra* note 100.

¹⁰⁷ Memorandum from Rachel Mitchell, Nominations Investigative Couns., U.S. Senate Comm. on the Judiciary, to All Republican Senators 3 (Sept. 30, 2018) [hereinafter Mitchell Memo].

¹⁰⁸ Hopper, *supra* note 100.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Jim Hopper, *How Reliable Are the Memories of Sexual Assault Victims?*, SCI. AM. (Sept. 27, 2018), <https://blogs.scientificamerican.com/observations/how-reliable-are-the-memories-of-sexual-assault-victims/>.

¹¹² *Id.*

¹¹³ WILSON ET AL., *supra* note 91, at 26.

suspect who had a very prominent Yankees tattoo on his face, but the victim had never mentioned such a tattoo to investigators.¹¹⁴ How could she have missed it? Further investigation revealed that the correct suspect had been identified, but the victim's brain had simply not recorded the prominent tattoo as a central detail because it was not essential to her survival.¹¹⁵

Trump's comments about Ford at the Mississippi rally imply that anyone who is violently assaulted should remember how many years ago it occurred, where they were assaulted, and how they got home afterwards. The reality of how memory works shows that things are not that simple. Survivors' accounts are often fragmented, with certain details seared sharply in the brain while others are entirely missing.¹¹⁶ Gaps in memory are typically not a sign of deception, but rather indicate that the survivor failed to encode details that were not essential to survival.

It is not enough for senators to rely on common sense when evaluating information about survivors' reactions to sexual assault; they need guidance regarding how brain functions are impaired by trauma, resulting in consequences that may seem counterintuitive to the layperson. Unfortunately, careless comments from public officials can spread misunderstanding of survivors and how they respond to sexual assault. The result is a failure to hold perpetrators accountable and contributes to survivors' reluctance to come forward.

B. *Why Inconsistencies in a Survivor's Account of Sexual Assault are Normal*

"[T]here are a lot of things that just don't make sense to me about Anita Hill's testimony. Some of it just doesn't square with what I think is basic reality and common sense."

Senator Orrin Hatch (R-UT)¹¹⁷

One of the most common errors in rape investigations occurs when investigators attempt to discredit a victim on the basis of inconsistencies in her account or because the victim includes, in a later account of the assault, details that she omitted earlier on.¹¹⁸ Senators need guidance on why inconsistencies should not be used in this way. Rather than jumping to conclusions based on inconsistencies, investigators should conduct a

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ HASKELL & RANDALL, *supra* note 91, at 20–21.

¹¹⁷ Fesperman, *supra* note 40.

¹¹⁸ INT'L ASS'N OF CHIEFS OF POLICE, NAT'L. L. ENF'T POL'Y CTR., INVESTIGATING SEXUAL ASSAULTS: CONCEPTS AND ISSUES PAPER 13 (2005) [hereinafter INVESTIGATING SEXUAL ASSAULTS]; Kimberly A. Lonsway, Joanne Archambault & David Lisak, *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, 3 THE VOICE 4 (2009).

thorough investigation and reach conclusions only after all of the evidence has been gathered.¹¹⁹

Inconsistencies in an accuser's account are quite common and do not mean the account is false.¹²⁰ They most commonly result from another poor practice—subjecting the victim to repeated interviews about the traumatic event by numerous different investigators.¹²¹ It is natural for a credible person's account of an event to vary somewhat from one telling to the next. Indeed, a person giving an account that never varies can easily be accused of fabricating a *perfect* account. Inconsistencies can also be police-created, such as when the interviewer records the victim's words carelessly or inaccurately.¹²² In order to reduce these problems, as well as minimize the re-traumatization that can occur when a victim is asked to explain the event repeatedly, End Violence Against Women International (EVAWI) and the International Association of Chiefs of Police (IACP) recommend that investigators plan to conduct one in-depth interview with the victim after she has had the opportunity to complete one or two full sleep cycles and attend to her other physical needs.¹²³ Planning the interview carefully and eliminating repeated renditions of the victim's account eliminates many process-created inconsistencies.

It is also important to note that it is quite common for victims to omit uncomfortable details during their initial sexual assault disclosure.¹²⁴ They may fear embarrassment or ridicule, or they may not feel safe disclosing certain information to a particular investigator. For instance, a first-year college student may be afraid that if he admits that he was drunk, he could be prosecuted for underage drinking.¹²⁵ But such omissions, and even lies, do not indicate that the victim was not sexually assaulted. Stated differently, an accuser can give an *inconsistent* account of a *real* sexual assault. If the goal is to successfully investigate and prosecute sexual assault and to hold perpetrators accountable, then investigators and senators alike must understand these complex dynamics around sexual assault disclosure and not use such dynamics against victims. For all of these reasons, it is not appropriate to attempt to discredit an accuser over inconsistencies; only a full investigation can establish the strength of an accuser's account.

¹¹⁹ INVESTIGATING SEXUAL ASSAULTS, *supra* note 118, at 12–13.

¹²⁰ *Id.* at 13 (noting that discrepancies in a victim's account are not a reason to label a sexual assault report false); Lonsway et al., *supra* note 118, at 5 (noting that victims might give inconsistent information for reasons including trauma, disorganization, confusion, or discomfort).

¹²¹ Lonsway et al., *supra* note 118, at 6–7.

¹²² *Id.* at 1.

¹²³ INVESTIGATING SEXUAL ASSAULTS, *supra* note 118, at 6–7, 9 (contrasting the preliminary interview with the in-depth follow-up interview); 725 ILL. COMP. STAT. ANN. 203/5 (LexisNexis 2017) (recommending that interviews occur after two full sleep cycles).

¹²⁴ Lonsway et al., *supra* note 118, at 5; INVESTIGATING SEXUAL ASSAULTS, *supra* note 118, at 9.

¹²⁵ Lonsway et al., *supra* note 118, at 5–6 (noting that a victim might fail to disclose her own illegal behavior or immigration status due to fear of arrest).

Critics attempted to discredit both Hill and Ford over inconsistencies in their accounts. In Hill's case, accusations that she had changed her story were the result of process-created inconsistencies rather than Hill's actual statements.¹²⁶ When Hill testified in front of the SJC, she shared vivid and lewd details of the harassment she endured—details which two FBI agents later claimed she had omitted from her interview with them.¹²⁷ But this apparent omission was likely the result of the FBI agents doing an inadequate job memorializing Hill's remarks.¹²⁸ An even earlier record of Hill's statements—notes taken by James Brundy, a Democratic staffer assigned to speak with her before the FBI did—demonstrates that Hill *did* disclose these details very early on, suggesting that the FBI agents, and not Hill, were responsible for the statements not appearing in the FBI report.¹²⁹

Even if Hill had failed to disclose certain details in one interview while raising them in another setting, would that matter? People often tailor their comments to the particular interview's context.¹³⁰ A survivor might give an overview of her evidence early on, thinking that she can provide further details in a follow-up interview later. She might get the impression from a particular investigator's rushed demeanor that he only wants the overview and is not open to hearing the whole story yet. Dismissing a survivor's account based on apparent inconsistencies is poor practice; the inconsistencies might be process-created or have an innocent explanation.

It is also important to avoid confusing a survivor's clarifying statements or addition of nuance as tantamount to an inconsistency or a deliberate attempt to change her story. Rachel Mitchell devoted space in her memo to pointing out a perceived inconsistency in Ford's account in relation to what happened shortly after the alleged assault. Mitchell points out that Ford, in her written statement to Feinstein during the summer of 2018, stated that after she escaped and locked herself in the bathroom, her assailants "loudly stumbled down the stairwell, at which point other persons at the house were talking with them."¹³¹ In contrast, Mitchell observed, Ford testified that she could not actually hear the conversation, rather she assumed that "since it was a social gathering, people were

¹²⁶ MAYER & ABRAMSON, *supra* note 41, at 292–93.

¹²⁷ These details included Thomas's comment about a pubic hair being left on his Coca-Cola can and his discussion of "pornographic materials depicting individuals with large penises or large breasts involved in various sex acts." *Id.* at 96, 104. Hill also said that Thomas mentioned a porn star called "Long Dong Silver" and bragged about the size of his penis. *Id.* at 96, 106.

¹²⁸ *Id.* at 292–93.

¹²⁹ *Id.* at 95–96, 292.

¹³⁰ See INT'L ASS'N OF CHIEFS OF POLICE, SUCCESSFUL TRAUMA INFORMED VICTIM INTERVIEWING (June 5, 2020) (describing techniques for interviewing sexual assault survivors, including how to frame questions to enable them to share more information about their assault).

¹³¹ Mitchell Memo, *supra* note 107, at 3–4; *Read the Letter Christine Blasey Ford Sent Accusing Brett Kavanaugh of Sexual Misconduct*, CNN (Sept. 17, 2018, 12:08 PM), <https://www.cnn.com/2018/09/16/politics/blasey-ford-kavanaugh-letter-feinstein/index.html>.

talking.”¹³² Mitchell is splitting hairs on a detail that was clearly peripheral to Ford and that occurred directly after she experienced a traumatic event, when her hippocampus was likely not encoding everything.

A second incident with Ford demonstrates another type of inconsistency used to discredit accusers—differences between the victim’s recollection of events and the recollection of other persons. In Ford’s case, Mitchell asserted that Ford’s account of the assault “has not been corroborated by anyone she identified as having attended.”¹³³ A lack of corroboration does not mean that Ford is lacking in credibility, nor does it mean that the assault did not happen. The rebuttal memo prepared by Senator Feinstein’s office addresses the two relevant points here.¹³⁴

First, it is not surprising that two individuals named by Ford as party attendees “do not recall a party where—unlike Dr. Ford—nothing remarkable happened to them.”¹³⁵ Many people would find it difficult to recall an unremarkable event that occurred over thirty years ago. Research on memory reveals that it is not unusual for a person to have no recollection of long-ago events that were not out of the ordinary in any way.¹³⁶ Thus, it would not be unusual for a person who was sexually assaulted at a gathering to vividly remember key details of the gathering and the assault, while another person who attended, who was neither assaulted nor aware of any assault, might not have any recollection of the evening many years later. Similarly, as Hopper points out, “If the young Ford succeeded at hiding signs of the trauma she had just endured, that would explain why no one remembers picking her up and driving her home.”¹³⁷

Second, according to the Feinstein memo, Mark Judge’s lack of recollection is also not surprising since he “has written several books describing his years of drinking heavily, often to the point of blacking out.”¹³⁸ Ford indicated that Kavanaugh and Judge were extremely inebriated when they arrived at the party.¹³⁹ Thus, it would not be surprising if Judge’s drinking impaired his memory of that evening.

Memory problems and perceived inconsistencies are not a reason to discredit a survivor of sexual assault, and this is one of the major

¹³² Kavanaugh Tr., *supra* note 61, at 647; *accord* Mitchell Memo, *supra* note 107, at 3–4. In a further attempt to discredit Ford, Mitchell points out that Ford remembers “small, distinct details from the party unrelated to the assault.” *Id.* at 3. But Mitchell neglects to point out that these details—the fact that Ford drank only one beer and was not on any medication at the time—would have been much easier for Ford to recall because they were about events that occurred prior to the assault.

¹³³ Mitchell Memo, *supra* note 107, at 3.

¹³⁴ Memorandum from Diane Feinstein in Response to Memo Prepared by Republican Attorney Rachel Mitchell 1 (Oct. 1, 2018) [hereinafter Feinstein Memo].

¹³⁵ *Id.*

¹³⁶ Jim Hopper, *Why Incomplete Sexual Assault Memories Can Be Very Reliable*, PSYCH. TODAY (Sept. 28, 2018), <https://www.psychologytoday.com/us/blog/sexual-assault-and-the-brain/201809/why-incomplete-sexual-assault-memories-can-be-very-reliable>.

¹³⁷ Hopper, *supra* note 100.

¹³⁸ Feinstein Memo, *supra* note 134, at 1.

¹³⁹ Kavanaugh Tr., *supra* note 61, at 644.

misconceptions that investigators must handle. The fact that a survivor has a different recollection of long-ago events than others is also not a reason to dismiss her as not credible. Only a full investigation of all the evidence can reveal what actually happened. Mitchell's misleading and inaccurate claims were picked up and repeated in the press, further fueling public misunderstanding of the realistic dynamics of sexual assault.¹⁴⁰

C. *Why Delayed Reporting and Lack of Disclosure are Common*

"I have no doubt that, if the attack on Dr. Ford was as bad as she says, charges would have been immediately filed with local Law Enforcement Authorities by either her or her loving parents. I ask that she bring those filings forward so that we can learn date, time, and place!"

Donald Trump, Twitter¹⁴¹

The common negative reception that victims get from others as a result of how trauma has affected their memory and how inconsistencies are used against them leads, predictably, to an unwillingness to come forward to report sexual assault. Trump implied that if Ford had truly been assaulted, she would have reported it to police immediately.¹⁴² Such opinions are not informed by the evidence, and senators evaluating sexual assault claims need to understand why delayed reporting and disclosure are common so that they understand that such delays are not a sign of untruthfulness.

Only about twenty percent of all sexual assaults are reported to police, with victims often expressing the concern that police will not believe them and will not investigate their complaints.¹⁴³ The reception that many victims receive after reporting sexual assault corroborates this widespread concern. Women such as Sara Reedy in Pennsylvania and "Marie" in Washington State were charged with false reporting after being disbelieved; their rapists were caught only after committing additional

¹⁴⁰ See, e.g., Rachel del Guidice, *7 Inconsistencies or Gaps Identified by Christine Blasey Ford's Questioner*, DAILY SIGNAL (Oct. 1, 2018), <https://www.dailysignal.com/2018/10/01/7-apparent-inconsistencies-or-gaps-identified-by-christine-blasey-fords-questioner/> (repeating Mitchell's claims); Margot Cleveland, *Christine Blasey Ford's Changing Kavanaugh Assault Story Leaves Her Short on Credibility*, USA TODAY (Oct. 3, 2018, 12:35 PM), <https://www.usatoday.com/story/opinion/2018/10/03/christine-blasey-ford-changing-memories-not-credible-kavanaugh-column/1497661002/> (arguing that Ford's "memories change at her convenience"); Lisa Boothe, *Christine Blasey Ford has a Credibility Problem*, THE HILL (Oct. 3, 2018, 1:15 PM), <https://thehill.com/opinion/judiciary/409651-dr-fords-credibility-problem> (asserting that Ford's testimony is not credible).

¹⁴¹ Bonos, *supra* note 53.

¹⁴² *Id.*

¹⁴³ 725 ILL. COMP. STAT. ANN. 203/5(1) (West 2017) (stating the legislative finding that less than one in five sexual assaults are reported to police); U.S. DEPT. OF JUST., CRIM. VICTIMIZATION, 2016: REVISED 7 (2018), <https://bjs.ojp.gov/content/pub/pdf/cv16.pdf> (showing that approximately seventy-seven percent of sexual assaults went unreported in 2016).

crimes.¹⁴⁴ “Claire” in San Diego only saw her rapists prosecuted after police failed to take action and she took matters into her own hands, investigating the rape and bringing incontrovertible evidence to police.¹⁴⁵ The statistics around sexual harassment are also grim, with many women not reporting out of fear of retaliation and fear that they could lose their jobs.¹⁴⁶

Trump’s claim about Ford is not supported by the evidence. Most teenagers do not report sexual assault, and many people wait decades before reporting.¹⁴⁷ Accounts from Missoula, Montana and Steubenville, Ohio illustrate the difficulties young women face in coming forward and accusing young men in their communities of sexual assault; accusations can divide communities and victims can face hostility as a result.¹⁴⁸ Ford may have faced similar pressures as a young high school student.

Participating in a trial can also exact a great toll on victims. Defense attorneys go to great lengths to discredit survivors, and some survivors have even committed suicide after receiving a hostile criminal justice response to their complaints.¹⁴⁹ Given the potential danger and trauma involved, there are many compelling reasons why a young woman would not report a sexual assault and would just try to get on with her life. Ford testified that

¹⁴⁴ Joanna Walters, *Sara Reedy, the Rape Victim Accused of Lying and Jailed by US Police, Wins \$1.5m Payout*, THE GUARDIAN (Dec. 15, 2012, 7:45 AM), <https://www.theguardian.com/world/2012/dec/15/sara-reedy-rape-victim-wins-police-payout>; T. Christian Miller & Ken Armstrong, *An Unbelievable Story of Rape*, PROPUBLICA (Dec. 16, 2015), <https://www.propublica.org/article/false-rape-accusations-an-unbelievable-story>.

¹⁴⁵ Brandy Zadrozny, *The Pickup Artist Rape Ring*, DAILY BEAST (July 12, 2017, 8:17 PM), <https://www.thedailybeast.com/pickup-artists-preyed-on-drunk-women-brought-them-home-and-raped-them>. See also Avalos, *Reversing the Decriminalization*, *supra* note 16, at 11 (describing “Claire’s” investigation and other evidence leading to her rapist’s conviction).

¹⁴⁶ See Agata Boxe, *Women Still Face Retaliation for Reporting Sexual Harassment at Work*, SCI. AM. (Aug. 1, 2019), <https://www.scientificamerican.com/article/women-still-face-retaliation-for-reporting-sexual-harassment-at-work/> (describing a recent study regarding sexual harassment and workplace repercussions). In 1981 when Hill began working for Clarence Thomas, “42 percent of women said that they had experienced some form of sexual harassment” and yet “fewer than 5 percent of these alleged victims filed lawsuits or lodged official complaints.” MAYER & ABRAMSON, *supra* note 41, at 223–24.

¹⁴⁷ Samantha Schmidt, *Kavanaugh’s Accuser Waited Decades to Tell Her Story. Teenagers of the 1980s Aren’t Surprised*, WASH. POST (Sept. 18, 2018, 6:00 AM), https://www.washingtonpost.com/local/kavanaugh-accuser-waited-decades-to-tell-her-story-teenagers-of-the-1980s-arent-surprised/2018/09/17/2f1ac218-bac8-11e8-9812-a389be6690af_story.html; Bonos, *supra* note 53.

¹⁴⁸ Juliet Macur & Nate Schweber, *Rape Case Unfolds on Web and Splits City*, N.Y. TIMES, Dec. 17, 2012, at D.1; Amy Davidson Sorkin, *Life After Steubenville*, NEW YORKER (Mar. 18, 2013), <https://www.newyorker.com/news/amy-davidson/life-after-steubenville>. See generally JON KRAKAUER, *MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN* (First Anchor Books ed. Jan. 2016) (2015) (investigating campus sexual assaults in Missoula, Montana over a four-year period).

¹⁴⁹ Peter Walker, *Frances Andrade Killed Herself After Being Accused of Lying, Says Husband*, THE GUARDIAN (Feb. 10, 2013, 8:05 PM), <https://www.theguardian.com/uk/2013/feb/10/frances-andrade-killed-herself-lying>; Lisa Avalos, *The Chilling Effect: The Politics of Charging Rape Complainants with False Reporting*, 83 BROOK. L. REV. 807, 840–68 (2018) [hereinafter Avalos, *Chilling Effect*] (discussing the case of Eleanor de Freitas); Katie J.M. Baker, *A College Student Accused a Powerful Man of Rape. Then She Became a Suspect*, BUZZFEED NEWS (June 22, 2017), <https://www.buzzfeednews.com/article/katiejmbaker/how-accusing-a-powerful-man-of-rape-drove-a-college-student>.

“[f]or a very long time, I was too afraid and ashamed to tell anyone these details.”¹⁵⁰

The numerous factors motivating a person to avoid disclosure must be kept in mind when senators consider the reasons for delayed reporting or lack of disclosure about a sexual assault. For example, these factors were relevant when a woman claiming to be Deborah Ramirez’s college best friend submitted an affidavit suggesting that Kavanaugh had not assaulted Ramirez because Ramirez had not mentioned the assault to the affiant at the time. She wrote, “This is a woman I was best friends with We shared intimate details of our lives. And I was never told this story by her, or by anyone else. It never came up.”¹⁵¹

Can anyone speak with authority about whether, and to whom, another person will disclose a sexual assault? The reality is that only the victim can make the choice about when to disclose and to whom; it is simply not correct to assume that an assault did not happen because the victim did not mention it to a close friend. EVAWI’s Start by Believing Campaign grew out of the reality that sexual assault survivors often receive a chilly reception even from people who are generally supportive of them.¹⁵² An early disclosure that Anita Hill made to a friend who “[could not] believe that Clarence Thomas would do [something like that]” was a factor that discouraged her from sharing her experience of sexual harassment very widely.¹⁵³

We must also consider the added burden that survivors take on when they come forward to report an allegation of sexual misconduct against a Supreme Court nominee. As we saw in Part I, both Hill and Ford paid a high price for disclosing sexual misconduct allegations during the SCOTUS confirmation process. Neither woman took this step lightly, but only after careful consideration of the consequences she would likely face, an initial decision not to say anything, and a reassessment after information leaks meant that coming forward was the only way for her to shape the narrative. Each received death threats and other harassment after speaking out.¹⁵⁴ Their experiences could easily discourage other victims from coming forward. Senators and their staff must understand these dynamics and the importance of extending patience and consideration to those who have information to share. They must also take into account that the seriousness of the position of a Supreme Court Justice might prompt survivors or others to come forward when they did not do so earlier in the nominee’s career.

¹⁵⁰ Kavanaugh Tr., *supra* note 61, at 636.

¹⁵¹ MARCUS, *supra* note 62, at 275–76.

¹⁵² *About Start by Believing*, START BY BELIEVING, <https://startbybelieving.org/about/> (last visited Sept. 3, 2023).

¹⁵³ MAYER & ABRAMSON, *supra* note 41, at 114–15.

¹⁵⁴ Gross, *supra* note 1; Letter from Debra S. Katz and Lisa J. Banks, Att’ys for Dr. Christine Blasey Ford, to Honorable Charles E. Grassley, Chairman, Comm. on the Judiciary (Sept. 18, 2018) (on file with Katz, Marshall & Banks LLP).

D. *Misconceptions about the Prevalence of False Allegations*

“Such grotesque and obvious character assassination—if allowed to succeed—will dissuade competent and good people of all political persuasions from serving our country.”

Brett Kavanaugh, Kavanaugh Confirmation Hearings¹⁵⁵

“I think that it’s a very scary time for young men in America when you can be guilty of something that you may not be guilty of.”

Donald Trump, The White House¹⁵⁶

False allegations of sexual assault are infrequent and do not occur more frequently than false allegations of other crimes.¹⁵⁷ The far larger problem is that sexual assault is a vastly under-reported crime and that many survivors do not report because they are afraid of not being believed.¹⁵⁸ Both men and women are much more likely to be sexually assaulted themselves than to be falsely accused of rape.¹⁵⁹ Therefore, the public interest is in helping survivors to feel comfortable coming forward to report.

Senators and their staff must understand this context, and they also must understand some terminology on the issue—the difference between a report of sexual assault that is unsubstantiated versus one that is provably false. A report is unsubstantiated when an investigation fails to prove that a sexual assault occurred, whereas a report can be “deemed false when supported by evidence that the crime was not committed or attempted.”¹⁶⁰ The determination that a report is false can only be made after a thorough investigation.¹⁶¹ It is therefore poor practice to conclude that a report is false after little to no investigation or because an officer does not believe a victim.

¹⁵⁵ Kavanaugh Tr., *supra* note 61, at 740.

¹⁵⁶ Miles Parks, *Trump Mocks Ford’s Testimony at Rally, Beggars Crowd to ‘Think of Your Son,’* NAT’L PUB. RADIO (Oct. 2, 2018, 4:00 PM), <https://www.npr.org/2018/10/02/653699004/trump-it-s-a-very-scary-time-for-young-men-in-america>.

¹⁵⁷ According to one of the most accurate studies on this topic, the rate of false allegations was three percent. LIZ KELLY, JO LOVETT & LINDA REGAN, HOME OFFICE RESEARCH STUDY 293: A GAP OR A CHASM? ATTRITION IN REPORTED RAPE CASES xi, 50–53 (2005). *See also* David Lisak, Lori Gardinier, Sarah C. Nicksa & Ashley M. Cote, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1330 (2010); Lonsway et al., *supra* note 118, at 2.

¹⁵⁸ *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> (last visited Oct. 9, 2023) (listing reasons for why sexual violence crimes may go unreported).

¹⁵⁹ Tyler Kingkade, *Males Are More Likely to Suffer Sexual Assault Than to Be Falsely Accused of It*, HUFFPOST (Oct. 16, 2015), https://www.huffpost.com/entry/false-rape-accusations_n_6290380 (citing various crime victim surveys; twenty-one to forty-seven percent of men have been sexually assaulted and one in six boys).

¹⁶⁰ INT’L ASS’N OF CHIEFS OF POLICE, NAT’L. L. ENF’T POL’Y CTR., SEXUAL ASSAULT RESPONSE POLICY AND TRAINING CONTENT GUIDELINES 6–7 (2011) [hereinafter TRAINING GUIDELINES]; *accord* INVESTIGATING SEXUAL ASSAULTS, *supra* note 118, at 12–13.

¹⁶¹ TRAINING GUIDELINES *supra* note 160, at 6.

Aborting an investigation because an officer is skeptical of a victim is a proven way of enabling perpetrators to continue to reoffend.¹⁶²

In the case of an unsubstantiated report, a lack of evidence does not mean that the victim is lying. Most sexual assaults occur in private spaces and without witnesses,¹⁶³ so investigators do not always succeed in discovering supporting evidence. Victims therefore should not be accused of lying when an investigation fails to produce corroborating evidence; a report may only be labeled false when the evidence establishes that no crime was committed or attempted.¹⁶⁴ It is crucial for senators to become familiar with these key principles so that misinformation about sexual assault and false reporting does not interfere with the fact-finding process.

Senators and their staff should also be aware that the nuances, inconsistencies, and details in an account can be signs of veracity rather than falsity. For instance, if Ford was lying about being sexually assaulted by Kavanaugh, why would she place Mark Judge in the room as a witness?¹⁶⁵ Placing a witness at the scene creates an opportunity for that witness to contradict the victim, so a liar would likely avoid doing this. Similarly, if Ford was lying, why did she not simply claim that she was raped? She instead gave a much more complex and nuanced account, in which her chief source of terror was not unwanted sexual penetration, but the possibility that a drunken Kavanaugh would accidentally kill her.¹⁶⁶ A rape claim could have been more straightforward. The nuance and complexities in Ford's account render it more compelling.

Given the strong emotions that arise around sexual assault and the specter of false allegations, authorities sometimes bring charges against those suspected of false reporting. After Justice Kavanaugh was confirmed, Senator Grassley referred Kavanaugh's accuser Julie Swetnick and her lawyer to the Justice Department for prosecution in relation to a suspected false report, although to date the DOJ has declined to pursue any case against them.¹⁶⁷

¹⁶² Lisa Avalos, *Prosecuting Rape Victims While Rapists Run Free: The Consequences of Police Failure to Investigate Sex Crimes in Britain and the United States*, 23 MICH. J. GENDER & L. 1, 25–30 (2016) [hereinafter Avalos, *Prosecuting Rape Victims*]; Avalos, *Chilling Effect*, *supra* note 149, at 811, 830–31.

¹⁶³ *Scope of the Problem: Statistics*, RAINN, <https://www.rainn.org/statistics/scope-problem> (last visited Oct. 9, 2023) (listing the breakdown of locations where sexual assaults occur); *Know Your Rights: Reporting Sexual Assault*, WOMEN'S JUST. NOW, <https://nownyc.org/womens-justice-now/issues/know-your-rights-reporting-sexual-assault-to-police-or-prosecutors/> (last visited Sept. 10, 2023) (explaining that “[t]here’s almost never a third person in the room during a sexual assault”).

¹⁶⁴ INVESTIGATING SEXUAL ASSAULTS, *supra* note 118, at 12–13.

¹⁶⁵ Kavanaugh Tr., *supra* note 61, at 635.

¹⁶⁶ *Id.*

¹⁶⁷ Julie Swetnick was the third woman to accuse Kavanaugh of sexual misconduct based on conduct she observed at high school parties. Steve Eder, Jim Rutenberg & Rebecca R. Ruiz, *Julie Swetnick is Third Woman to Accuse Brett Kavanaugh of Sexual Misconduct*, N.Y. TIMES (Sept. 26, 2018), <https://www.nytimes.com/2018/09/26/us/politics/julie-swetnick-avenatti-kavanaugh.html>; Letter from Charles E. Grassley, Chairman, S. Comm. on the Judiciary, to Honorable Jeff Sessions, Att’y Gen., U.S.

EVAWI guidance is instructive and should be consulted before the SJC contemplates such referrals in the future. Three points are key. First, in keeping with best practice guidance from EVAWI and the IACP, a report of sexual assault should be assumed to be legitimate unless evidence establishes that no crime was committed or attempted against the victim.¹⁶⁸ Grassley's memo on Swetnick points to inconsistencies in her account and attacks her credibility based on events unrelated to her sexual assault allegations, but it provides no evidence establishing that Swetnick was never a victim of sexual assault and that the events she described—boys standing in line waiting for their turn to rape a drunk woman—did not and could not have happened.¹⁶⁹ As a result, Grassley's memo articulates no valid grounds for prosecuting Swetnick.

Second, authorities considering false reporting charges against those who report sexual assault should consider the public interest. Prosecuting suspected false reports of sexual assault has a chilling effect; it discourages others from coming forward for fear that they too will be disbelieved and prosecuted.¹⁷⁰ As EVAWI notes, "Many law enforcement agencies are working to encourage sexual assault victims to come forward, to increase reporting rates, hold offenders accountable, and enhance community safety. Prosecuting someone for false reporting can be a setback to these efforts, *even if the charges are warranted.*"¹⁷¹ EVAWI further advises investigators to "seek input from other multidisciplinary partners in the community" prior to pursuing such charges.¹⁷² Accordingly, the SJC should establish a panel of sexual assault investigation experts who can provide the committee with

Dept. of Just. (Oct. 25, 2018) (on file with the U.S. S. Comm. on the Judiciary) (referring Swetnick and her attorney, Michael Avenatti, to the Department of Justice for a criminal investigation for allegedly false statements made to the Committee regarding Justice Kavanaugh); Letter from Charles E. Grassley, Ranking Member, S. Comm. on the Judiciary, to Honorable Merrick Garland, Att'y Gen., U.S. Dept. of Justice (Mar. 23, 2021) (on file with Sen. Grassley) (seeking an update on criminal referrals made regarding allegedly false statements made to the Committee regarding Justice Kavanaugh).

¹⁶⁸ JOANNE ARCHAMBAULT, KIMBERLY A. LONSWAY & LISA AVALOS, *RAPED, THEN JAILED: THE RISKS OF PROSECUTION FOR FALSELY REPORTING SEXUAL ASSAULT, END VIOLENCE AGAINST WOMEN INT'L 18, 24 (2022)* [hereinafter *RAPED, THEN JAILED*], https://evawintl.org/wp-content/uploads/2019-5_TB_Raped-Then-Jailed-1.pdf.

¹⁶⁹ Letter from Charles E. Grassley, Chairman, S. Comm. on the Judiciary, to Honorable Jeff Sessions, Att'y Gen., U.S. Dept. of Just. 1, 4–5 (Oct. 25, 2018) (on file with Sen. Grassley) (pointing out inconsistencies and noting that Swetnick is being referred for prosecution because of contradictions in her statements); *id.* at 7–8 (citing a lack of evidence corroborating Swetnick's claims and issues with her credibility unrelated to her allegations). Gang rapes of incapacitated women have been documented many times, so Swetnick's allegations are not beyond belief. *See generally* KRAKAUER, *supra* note 148 (recounting campus rapes over a four-year-period in Missoula); Sorkin, *supra* note 148 (discussing gang rape of a minor at a party in Ohio). Moreover, just a few years after Kavanaugh graduated high school, his school and several others wrote to parents warning them that students were throwing large, unsupervised parties that featured alcohol, violence, and sexual behavior. Carlos Sanchez, *Area Headmasters Warn Parents of Student Parties*, WASH. POST (Feb. 4, 1990), <https://www.washingtonpost.com/archive/local/1990/02/04/area-headmasters-warn-parents-of-student-parties/06927fdb-a9fb-4a1c-89bb-8b004e21825e/>.

¹⁷⁰ *See generally* Avalos, *Chilling Effect*, *supra* note 149.

¹⁷¹ *RAPED, THEN JAILED*, *supra* note 168, at 25–26 (emphasis added).

¹⁷² *Id.* at 26.

guidance in weighing the public interest factors before it recommends charging any future victims with false reporting or related charges.

Third, no potential victim of sexual assault should be punished for choosing a lawyer who is ultimately convicted of crimes or disbarred, as Swetnick's lawyer, Michael Avenatti, has been.¹⁷³ Criminal charges and bar disciplinary proceedings can address professional misconduct by lawyers, but the SJC should take care not to punish victims who are merely "guilty by association" due to hiring such lawyers. If the SJC fails to take this step, they risk harming the public interest by discouraging those with relevant information from coming forward.

In sum, the best way to minimize this risk of false allegations is through a commitment to a thorough, evidence-based investigation. With such a commitment in place, the incentive for anyone to attempt to influence the process through false accusations decreases.

IV. REQUIRING A THOROUGH INVESTIGATION

Another commitment that is necessary in order for senators to fulfill their advice and consent role is to establish a process for conducting a thorough, properly resourced, evidence-based investigation into sexual assault allegations. The principle that investigations must be thorough, with conclusions based on evidence, is at the core of sexual assault investigation best practices.¹⁷⁴ This principle is critical so that investigators do not jump to conclusions or allow their biases to influence the course of an investigation. Despite the importance of this principal, the investigations into the allegations brought by the Thomas and Kavanaugh accusers were far from thorough.

Although the need for a thorough investigation might sound uncontroversial, failures to thoroughly investigate sexual assault are far too common. Law enforcement agencies frequently investigate sexual assault complaints only superficially, disbelieve victims, and fail to interview suspects and witnesses.¹⁷⁵ Sexual misconduct investigations in the SCOTUS

¹⁷³ Colin Moynihan, *Avenatti Gets a 4-Year Sentence for Defrauding Stormy Daniels of \$300,000*, N.Y. TIMES (June 2, 2022), <https://www.nytimes.com/2022/06/02/nyregion/michael-avenatti-sentenced-stormy-daniels.html>. Although Avenatti is currently suspended from the practice of law, his unlawful conduct had nothing to do with Swetnick's claims. *Michael John Avenatti #206929*, STATE BAR OF CAL., <https://apps.calbar.ca.gov/attorney/Licensee/Detail/206929> (last visited Sept. 4, 2023).

¹⁷⁴ INVESTIGATING SEXUAL ASSAULTS, *supra* note 118, at 11–13.

¹⁷⁵ Avalos, *Prosecuting Rape Victims*, *supra* note 162, at 42. *See generally* HUM. RTS. WATCH, CAPITOL OFFENSE: POLICE MISHANDLING OF SEXUAL ASSAULT CASES IN THE DISTRICT OF COLUMBIA (2013) (reporting findings of an investigation into police conduct and the mishandling of sexual assault cases in the District of Columbia); Letter from Michael W. Cotter, U.S. Att'y, Dist. of Mont. & Jocelyn Samuels, Acting Assistant Att'y Gen., Civ. Rts. Div., to Fred Van Valkenburg, Missoula Cnty. Att'y (Feb. 14, 2014) (on file with Department of Justice) (summarizing the evidence found during the investigation into the Missoula County Attorney's office concerning allegations of bias when handling sexual assault cases); U.S. DEP'T OF JUST., CIV. RTS. DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT (2011) [hereinafter INVESTIGATION OF NEW ORLEANS POLICE] (reporting findings

nomination process are likely to experience the same problems, compounded by partisanship, in the absence of a commitment to a thorough investigation.

The Sara Reedy case is one that illustrates the importance of investigators' commitment to undertaking a thorough investigation. When Reedy reported to police that she had been sexually assaulted by a gunman who also robbed the convenience store where she was working the late shift, Detective Frank Evanson quickly decided that he did not believe Reedy.¹⁷⁶ He thought that she had staged the sexual assault and robbery in order to steal money out of the safe herself; in fact, his investigation into Reedy's report of sexual assault and robbery "appears to have focused exclusively on the theory that Reedy was a liar and thief."¹⁷⁷ So committed was Evanson to the idea that Reedy was lying that he failed to connect her sexual assault to another very similar crime that he was also responsible for investigating.¹⁷⁸ Reedy's name was cleared only when her assailant, Wilbur Brown, was caught in relation to another sexual assault and also confessed to raping Reedy.¹⁷⁹ After the Third Circuit found Evanson's actions to be unreasonable, Reedy won a \$1.5 million settlement from his police department.¹⁸⁰

The Reedy case, and the associated settlement, illuminate the serious consequences that can result when an investigator relies on a preconceived notion or hunch and pursues only one theory of the case to the exclusion of other evidence. Reedy's attacker went on to commit another sexual assault after Evanson made no attempt to apprehend him and instead treated Reedy as a criminal.¹⁸¹

It is easy to see how biases or preconceived notions could similarly influence an investigation in a heavily partisan contest around a Supreme Court nominee. Senators' preexisting commitments to a particular nominee can make them unwilling to consider all of the evidence, cause them to selectively pay attention only to the evidence that they consider favorable, and vote along party lines without fully considering evidence. Therefore, the integrity of the judicial nomination process must be protected through a commitment to established best practices.

that there was reasonable cause to believe that New Orleans Police Department had committed constitutional and federal law violations concerning failure to investigate sexual assault reports); U.S. DEP'T OF JUST., CIV. RTS. DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (2016) [hereinafter INVESTIGATION OF BALTIMORE CITY POLICE] (reporting findings that there was reasonable cause to believe that the Baltimore City Police had committed constitutional and federal law violations through gender bias policing in their handling of sexual assault investigations).

¹⁷⁶ Reedy v. Evanson, 615 F.3d 197, 202 (3d Cir. 2010).

¹⁷⁷ *Id.* at 217.

¹⁷⁸ *Id.* at 221–22.

¹⁷⁹ *Id.* at 209.

¹⁸⁰ Walters, *supra* note 144.

¹⁸¹ Reedy, 615 F.3d at 209.

This Part first analyzes the Thomas and Kavanaugh investigations in order to demonstrate how they were problematic and incomplete. It then demonstrates how sexual assault investigation best practices should be used to implement an investigatory model suitable for thoroughly vetting any future allegations brought against SCOTUS nominees.

A. *Political Expediency Versus the Search for Truth*

Partisan commitment to a particular nominee can interfere with a search for truth and impede a thorough investigation unless steps are taken to prevent this result. In both the Thomas and Kavanaugh hearings, senators put effort into shaping a desired narrative rather than insisting on a thorough investigation to establish the truth. As Professor Hill has noted, the public learned in October 1991 that “controlling the facts would mean blocking chances to get to the truth.”¹⁸² This Section will analyze senators’ tactics based on political expediency and show how these tactics prevented a thorough investigation from taking place. The tactics include (1) constructing a false narrative about the complainant, (2) using politics to impede the search for truth, (3) excluding relevant witnesses and evidence from the hearing process, and (4) using the DARVO strategy—deny, attack, and reverse victim and offender.

In both sets of hearings, Republicans engaged in these tactics because each nominee was put forward by a Republican president.¹⁸³ It should be apparent, however, that either political party could use these tactics in the future, depending on whether a Democratic or Republican president nominates someone who has been credibly accused of sexual misconduct. Evidence that Democrats could be equally capable of engaging in such tactics should be apparent from Senate Democrats’ unanimous opposition to removing President Clinton from office in 1999 after he had been impeached by the House for perjury and obstruction of justice in relation to concealing his affair with Monica Lewinsky.¹⁸⁴ Therefore, I do not intend the analysis below to be partisan, but rather to illustrate that senators of any political persuasion can distort an investigation for political gain unless safeguards are built into the process to prevent such action.

¹⁸² HILL, *supra* note 26, at 33.

¹⁸³ *About the Court*, SUP. CT. U.S., <https://www.supremecourt.gov/about/biographies.aspx> (last visited Sept. 13, 2023).

¹⁸⁴ Peter Baker & Helen Dewar, *The Senate Acquits President Clinton*, WASH. POST (Feb. 13, 1999, 12:00 AM), <https://www.washingtonpost.com/politics/clinton-impeachment/senate-acquits-president-clinton/>. Although some would argue that Clinton’s conduct was less serious than Thomas’ or Kavanaugh’s alleged misconduct because Lewinsky was a consenting adult, I would classify the relationship as sexual misconduct because of the extreme power differential between the President of the United States and a twenty-one-year-old White House intern. Lewinsky has since described the relationship as a “gross abuse of power.” Monica Lewinsky, *Monica Lewinsky: Emerging From “the House of Gaslight” in the Age of #MeToo*, VANITY FAIR (Feb. 25, 2018), <https://www.vanityfair.com/news/2018/02/monica-lewinsky-in-the-age-of-metoo>.

1. *Constructing a False Narrative About the Complainant*

One tactic used to discredit an accuser involves constructing a false narrative about the complainant. Jane Mayer and Jill Abramson note that Hill was portrayed as “a political zealot, a sexual fantasist, a scorned woman, possibly a closet lesbian, and a pathological liar who had lifted bizarre details from *The Exorcist* in a desperate effort to destroy Thomas.”¹⁸⁵ Perhaps most disturbingly, Republican senators’ efforts to discredit Hill included attempting to elicit testimony from psychiatrists indicating that Hill suffered from erotomania, a disorder that could cause a person to imagine another person’s sexual interest in her where none existed, but for which Hill did not meet the diagnostic criteria.¹⁸⁶

Senators also worked “overtime to prove that Hill had sprinkled pubic hairs on the term papers” of some of her law students.¹⁸⁷ This theory originated with a group of white, male students who resented that Hill, a Black woman, was their professor at Oral Roberts University School of Law.¹⁸⁸ Senator John Danforth (R-MO) later admitted that getting affidavits from these law students “was [his] obsession . . . I knew that Anita Hill was going to be demolished . . . In my quest for affidavits I was showing no concern at all for fairness to Anita Hill.”¹⁸⁹ Hill publicly stated:

The personal attacks on me without one iota of evidence were particularly reprehensible It was suggested that I had fantasies, that I was a spurned woman, and that I had a martyr complex. I will not dignify those theories except to assure everyone that I am not imagining the conduct to which I testified.¹⁹⁰

None of the efforts to discredit Hill were grounded in truth, but senators and their staffers invested a great deal of effort in attempts to discredit Hill in order to advance Thomas’s nomination.

2. *Using Politics to Impede the Search for Truth*

Although senators in 2018 were eager to avoid a repeat of the terrible treatment Anita Hill endured, partisan politics remained a significant hinderance to the search for truth when sexual misconduct allegations against Kavanaugh arose. Illustrative of the problem is the controversial

¹⁸⁵ MAYER & ABRAMSON, *supra* note 41, at 305.

¹⁸⁶ *Id.* at 306–10. Senator John Danforth (R-MO), in particular, went to great lengths to get information about erotomania introduced into the hearings, to the point that his own aides “protested vehemently” and his legislative director threatened to resign if he persisted. *Id.* at 310.

¹⁸⁷ *Id.* at 310–13.

¹⁸⁸ *Id.* One Oral Roberts student stated that a senate aide was “extraordinarily persistent” in trying to find evidence corroborating this assertion, even calling the student “ten or twelve times.” *Id.* at 312. Another student who was present when the papers were returned called the story “a crock.” *Id.* at 313.

¹⁸⁹ MAYER & ABRAMSON, *supra* note 41, at 314.

¹⁹⁰ *Id.* at 346.

memo written by prosecutor Rachel Mitchell.¹⁹¹ Republicans hired Mitchell to question Ford in order to avoid the optics seen in the Thomas hearings where Hill was questioned by an all-male Judiciary Committee.¹⁹² By 2018, there were female Democratic senators on the Judiciary Committee, but no female Republican senators.¹⁹³

Mitchell released her memo three days after Ford testified and addressed it to “All Republican Senators.”¹⁹⁴ She shared her analysis of Ford’s allegations, summarily dismissing them and calling the case weaker than “he said, she said.”¹⁹⁵ Immediately after the memo became publicly available, prosecutors and victim advocates criticized it for containing inaccuracies and perpetuating rape myths.¹⁹⁶ Senator Feinstein issued a response the following day that rebutted several of Mitchell’s claims.¹⁹⁷

The tension between Mitchell’s memo and Feinstein’s rebuttal illustrates how the public’s poor understanding of sexual assault can be leveraged for partisan purposes. Mitchell noted that there were a number of gaps in Ford’s memory around the sexual assault, but she did not provide the relevant context—that such memory gaps are very common in sexual assault victims because of how traumatic events disrupt normal brain functioning and memory-encoding.¹⁹⁸

¹⁹¹ Mitchell Memo, *supra* note 107.

¹⁹² CALMES, *supra* note 67, at 278 (“[Mitchell was] hired to question Ford so that the eleven male Republican senators [would not] have to. They had caucused after Ford’s story broke and decided that by delegating Ford’s interrogation to an experienced female lawyer, they could avoid the shellacking senators got in 1991 for their treatment of Hill.”). Carol Moseley Braun, a former Illinois senator elected in 1992, after the Thomas hearings, stated “they had to go and rent a person to come and to be the stand-in female to do the questioning.” *FBI Expanding Probe into Kavanaugh: The Beat with Ari Melber*, (MSNBC television broadcast Oct. 1, 2018, 6:00 PM), <https://www.msnbc.com/transcripts/msnbc-live-with-ari-melber/2018-10-01-msnal149806>.

¹⁹³ Republicans did not appoint any women to the SJC until 2019 when Joni Ernst (R-IA) and Marsha Blackburn (R-TN) were added. Sean Sullivan, *For the First Time, GOP Women Join Senate Judiciary Committee*, WASH. POST (Jan. 3, 2019, 8:19 PM), https://www.washingtonpost.com/powerpost/for-the-first-time-gop-women-join-senate-judiciary-committee/2019/01/03/bf0c6aa8-0fae-11e9-8938-5898adc28fa2_story.html.

¹⁹⁴ Mitchell Memo, *supra* note 107, at 1.

¹⁹⁵ *Id.* at 2.

¹⁹⁶ Emma Brown & Seung Min Kim, *Experts Question GOP Prosecutor’s Memo on Christine Blasey Ford*, WASH. POST (Oct. 1, 2018, 8:20 PM), https://www.washingtonpost.com/investigations/experts-question-gop-prosecutors-memo-on-christine-blasey-ford/2018/10/01/85a454c0-c5a2-11e8-b1ed-1d2d65b86d0c_story.html (including a criticism of the memo’s reasoning from former prosecutors and victim advocates); Pema Levy, *Rachel Mitchell’s Former Colleague Slams Her Kavanaugh Memo as “Absolutely Disingenuous”*, MOTHER JONES (Oct. 1, 2018), <https://www.motherjones.com/politics/2018/10/rachel-mitchells-former-colleague-slams-her-kavanaugh-memo-as-absolutely-disingenuous/> (quoting former colleague as stating that Mitchell “would have applied much higher standards in her own office”); Cristian Farias, *Rachel Mitchell’s Kavanaugh Report Just Tells Republicans What They Want to Hear*, N.Y. MAG.: INTELLIGENCER (Oct. 2, 2018), <https://nymag.com/intelligencer/2018/10/rachel-mitchell-kavanaugh-report.html> (“[V]ery little of what [Mitchell] writes is the work product of a serious sex-crimes prosecutor. . . . What Mitchell’s memorandum to Senate Republicans does, more than anything else, is poke holes in Ford’s recollection. But impugning the victim’s truthfulness is not how someone who’s spent a lifetime investigating and prosecuting sex crimes goes about her work.”).

¹⁹⁷ Feinstein Memo, *supra* note 134. For a discussion of the inaccuracies in Mitchell’s memo, see *supra* note 196, particularly Brown & Min Kim and Farias.

¹⁹⁸ Levy, *supra* note 196.

Feinstein's memo rebutted this point, giving a basic lesson in how trauma affects memory to any interested senators:

[W]hile [Ford] also testified that she does not "remember all of the details," according to experts, it is common for survivors to remember central details of a traumatic experience—those to which they paid attention or that were emotionally salient—while forgetting peripheral details.

The fact that Dr. Ford does not remember such peripheral details as how she heard about or got to the gathering—a small, spur-of-the-moment high school summer get-together after a typical day at the country club—is not surprising. Nor does it take anything away from her recollection of the central details of her assault, which has been clear and consistent.¹⁹⁹

Prosecutors regularly encounter and overcome victims' memory difficulties in the course of their duties, as Mitchell herself knew but did not acknowledge in her communications with senators.²⁰⁰ Matthew Long, a former prosecutor trained by Mitchell, told the press:

The spotty memory Ms. Mitchell talks about, as if that's an indication [the assault] didn't happen, is just absurd . . . I was trained by Ms. Mitchell about how trauma explicitly does prevent memory from happening . . . I was trained explicitly by Ms. Mitchell to identify [memory gaps] . . . as corroborating that someone has been victimized and experienced trauma . . . Ms. Mitchell knows better than that.²⁰¹

If Long's assertions are accurate, Mitchell knowingly distorted knowledge about sexual assault and spread confusion to the senators, and subsequently to the general public, through press coverage. The result was the leveraging of misinformation for partisan gain.²⁰² Mitchell's claims about Ford's memory allowed Republican senators to believe that Ford's account of the assault was not credible, even though Mitchell had actually trained young prosecutors to embrace the opposite principle—that a spotty memory of peripheral details is actually corroborative of a valid sexual assault claim.²⁰³

¹⁹⁹ Feinstein Memo, *supra* note 134, at 3.

²⁰⁰ Levy, *supra* note 196 (quoting former colleague as stating that Mitchell "would have applied much higher standards in her own office").

²⁰¹ *Id.*

²⁰² The memo made four key claims that deviated from well-known standards and practice for investigating and prosecuting sexual assault cases: (1) how it dealt with Ford's ability to recall certain events, (2) the weight it put on Ford's recall of the timeframe involved, (3) how much weight it put on statements from potential witnesses, and (4) the fact that it drew conclusions about the strength of the case without a full investigation into all of the evidence. Mitchell Memo, *supra* note 107.

²⁰³ Levy, *supra* note 196; Mitchell Memo, *supra* note 107.

Mitchell's memo and Feinstein's rebuttal demonstrate the difficulty of introducing highly complex information about sexual assault into a partisan confirmation process. Feinstein attempted to correct Mitchell's inaccuracies, but the partisan nature of the process meant that the Republicans ignored or mistrusted the information that she and other Democratic senators offered.²⁰⁴

Counterintuitive responses to sexual assault are complex and can be challenging to understand. Information on this sensitive topic can be difficult to accept if one has a vested interest in believing something else.²⁰⁵ The result is that a person unschooled in matters of sexual assault and who is receiving information according to party lines might not know what to believe and would, predictably, vote along party lines rather than attempt to discern the truth. The muddying of waters that results is extremely harmful to the task of understanding victims and getting at the truth of what happened. Senators urgently need a process that includes accurate information about sexual assault delivered in a bipartisan manner, separate and apart from any specific nomination process.

The Senate does not function effectively in its advice and consent role when senators put scoring a victory for their side above the search for truth, and above ensuring that only persons of the highest character are nominated to the highest court. An emphasis on partisan winning is harmful to the Court and to the perception that the American people have of the Court.

3. *Excluding Relevant Witnesses and Evidence from the Hearings*

Events subsequent to the Thomas and Kavanaugh hearings have shown us that when the Senate fails to take SCOTUS nominees' sexual misconduct seriously, abdicating their responsibility of advice and consent, journalists will take on the responsibility of thoroughly investigating nominees and will share their results with the American people. Perhaps the most harmful repercussions for the reputations of the Supreme Court and of the Senate as a result of the Thomas and Kavanaugh nomination hearings are the incontrovertible proof that the sexual misconduct allegations against each nominee were not thoroughly vetted and investigated prior to the Senate's vote. We know this due to the hard work of numerous investigative journalists, including six prominent female journalists who wrote book-length treatments of the hearings and carried out the investigations that were

²⁰⁴ Chris Coons also offered information about the effect of trauma on memory at the Kavanaugh hearings. Kavanaugh Tr., *supra* note 61, at 662 (Coons for Ford: "[E]xperts have written about how it is common for sexual assault survivors to remember some facts about the experience very sharply and very clearly but not others, and that has to do with the survival mode that we go into in experiencing trauma. Is that your experience and is that something you can help the lay person understand?" Ford confirmed that it was.).

²⁰⁵ See generally Rebecca R. Ortiz & Andrea M. Smith, *A Social Identity Threat Perspective on Why Partisans May Engage in Greater Victim Blaming and Sexual Assault Myth Acceptance in the #MeToo Era*, 28 VIOLENCE AGAINST WOMEN 1302 (2022) (examining how "U.S. partisans . . . may engage in greater victim blaming and sexual assault myth acceptance to defend their political identities in the #MeToo era.").

not completed before each nominee was confirmed.²⁰⁶ The results are both revealing and very disturbing. This Section examines the evidence that was brushed aside at both the Clarence Thomas and Brett Kavanaugh hearings.

i. Excluding Evidence from the Thomas Hearings

At the same time that senators were working hard to discredit Hill, they also did not pursue numerous investigatory leads that could have produced evidence corroborating Hill's allegations.²⁰⁷ In fact, there was a rush to confirm Thomas before such evidence became publicly known.²⁰⁸ Thomas was sworn in eight days ahead of schedule, which, according to investigative journalists Jane Mayer and Jill Abramson, was because Thomas "was still vulnerable to any last-minute revelations," and any negative information about him would be far less newsworthy once he was a member of the Court and no longer subject to the vetting process.²⁰⁹ Mayer and Abramson concluded that the "White House acted none too soon," because on the day of Thomas's confirmation, three *Washington Post* reporters "burst into the newsroom . . . with information confirming that Thomas's involvement with pornography far exceeded what the public had been led to believe."²¹⁰

Mayer and Abramson interviewed many relevant informants, none of whom testified at the hearings.²¹¹ According to their account, at least six of Thomas's college and law school classmates recall Thomas's interest in and

²⁰⁶ See generally MAYER & ABRAMSON, *supra* note 41; MARCUS, *supra* note 62; CALMES, *supra* note 67; ROBIN POGREBIN & KATE KELLY, *THE EDUCATION OF BRETT KAVANAUGH: AN INVESTIGATION* 3, 16, 111 (2019); Emma Brown, *California Professor, Writer of Confidential Brett Kavanaugh Letter, Speaks Out About Her Allegation of Sexual Assault*, WASH. POST (Sept. 16, 2018, 10:28 PM), https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b_story.html#; Mayer & Farrow, *supra* note 67. Jane Mayer has been a staff writer at *The New Yorker* since 1995. *Jane Mayer*, NEW YORKER, <https://www.newyorker.com/contributors/jane-mayer> (last visited Sept. 11, 2023). She has written several books, including two that were finalists for the National Book Award: *Strange Justice* and *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals*. *Id.* Her 2016 book, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right*, was named by *The New York Times* as one of the best books of that year. *Id.* She has received numerous awards for her work. *Id.* Jill Abramson worked for *The New York Times* for seventeen years in senior editorial positions before leaving in 2014. *Jill Abramson*, N.Y. TIMES, <https://www.nytimes.com/by/jill-abramson> (last visited Sept. 11, 2023). Prior to that, she spent nine years at the *Wall Street Journal*. *Id.* She is currently a creative writing professor at Harvard University. *Jill Abramson @JillAbramson*, TWITTER/X, <https://twitter.com/jillabramson?lang=en> (last visited Sept. 10, 2023).

²⁰⁷ See Julia Jacobs, *Anita Hill's Testimony and Other Key Moments from the Clarence Thomas Hearings*, N.Y. TIMES (Sept. 20, 2018), <https://www.nytimes.com/2018/09/20/us/politics/anita-hill-testimony-clarence-thomas.html> (stating that Democratic lawmakers called the process rushed); Florence George Graves, *The Other Woman*, WASH. POST, Oct. 9, 1994, at F1 (stating that Senator Arlen Specter (R-PA) wanted to extend the hearings). Florence George Graves is the founding director of The Schuster Institute for Investigative Journalism at Brandeis University. *Florence George Graves*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, <https://www.icij.org/journalists/florence-george-graves/> (last visited Sept. 10, 2023).

²⁰⁸ MAYER & ABRAMSON, *supra* note 41, at 349–50.

²⁰⁹ *Id.* at 350.

²¹⁰ *Id.*

²¹¹ *Id.* at 55–58, 99, 104–09.

discussion of pornography.²¹² What stood out to several of them was how much he liked to talk about pornography, giving graphic and detailed descriptions of what he had seen; Hill's allegations rang true to them because of what they had observed.²¹³ One former law school classmate described Thomas as "one of the crudest people [he had] ever met. He was one of those people who can sound dignified in a courtroom But when you get him with friends, he's crude[,] . . . profane, scatological, and graphic."²¹⁴ Making the link to Hill, this classmate continued, "when Anita Hill started talking, [he] knew the man was guilty [He was] certain she was telling the truth, because the examples she gave sounded too much like him for it not to have been Clarence."²¹⁵

Mayer and Abramson provided evidence that "Thomas was an avid consumer of sexually explicit magazines while Hill was working for him at the [Equal Employment Opportunity Commission]."²¹⁶ They spoke to a White House appointee who had observed pornographic magazines and posters in Thomas's apartment, a Washington lawyer who observed Thomas renting a pornographic film at a video store, and the owner of the video store, who told them that Thomas "was a regular customer of adult movies."²¹⁷ The store owner also confirmed another critically relevant fact—that his store stocked a series of adult films featuring an actor called "Long Dong Silver."²¹⁸ Hill stated in her testimony that Thomas had mentioned a pornographic actor by this name to her.²¹⁹

In all, Mayer and Abramson spoke to at least twelve people with information that lent much credibility to Hill's allegations.²²⁰ All of these people provide evidence that Thomas's personal habits may have bled over into the workplace in the form of comments that created a hostile environment for Hill. By rushing through the vote and declining to conduct a thorough investigation, the SJC never spoke with any of them and thus missed much evidence corroborating Hill's testimony.

Perhaps most disturbingly, the SJC did not call witness Angela Wright, despite having subpoenaed her.²²¹ Wright would have testified that while working at the EEOC, Thomas asked her what size her breasts were, made

²¹² These classmates include Edward P. Jones, Gordon Davis, Henry Terry, Clarence Martin, and two that Mayer and Abramson do not identify by name—a Black female graduate student and the wife of a Black congressional aide. *Id.* at 55–57.

²¹³ *Id.* at 55–58.

²¹⁴ *Id.* at 57.

²¹⁵ *Id.*

²¹⁶ *Id.* at 108.

²¹⁷ *Id.* at 107–08.

²¹⁸ *Id.* at 107.

²¹⁹ Jacobs, *supra* note 207.

²²⁰ MAYER & ABRAMSON, *supra* note 41, at 55–58, 99, 104–09. The twelve included EEOC attorneys Marguerite Donnelly, Allan Danoff, and Michael Middleton, Middleton's wife, who recalled hearing about the coke can incident from her husband, Hill's friend Ellen Wells, White House appointee Kaye Savage, and six former Thomas classmates. *Id.* at 104–09.

²²¹ Graves, *supra* note 207.

sexually inappropriate remarks, offered frequent remarks about women's anatomy, and pressured her to date him.²²² The FBI also interviewed another witness, Rose Jourdain, who confirmed that Wright contemporaneously shared details about Thomas's inappropriate conduct at the time those events occurred.²²³

A few years later, multiple senators admitted that the power of Wright's testimony to corroborate Hill's account could have changed the outcome of the hearings.²²⁴ Then-Senator Joseph Biden (D-DE) stated in 1994 that Wright's testimony "would have derailed the nomination."²²⁵ Senator Paul Simon (D-IL) similarly stated that the combination of Hill's and Wright's testimony, and Jourdain's corroboration of Wright's, "could have toppled Thomas," and that had he realized what Wright had to say, he would have insisted that she be called.²²⁶ Senator Arlen Specter (R-PA) agreed, retrospectively, that Wright should have been called.²²⁷ Specter further stated, "My feeling is we rushed to judgment. . . . We should have taken more time" to investigate the allegations Hill brought forward.²²⁸

Polls administered after the Thomas vote and then again one year later suggest that Americans paid attention to the revelations that emerged. In October 1991, only twenty-four percent of those surveyed believed Hill while forty-seven percent believed Thomas.²²⁹ But a year later, in October 1992, a Wall Street Journal/NBC News poll found that forty-four percent of those surveyed believed Hill, while only thirty-four percent still believed Thomas.²³⁰

The SJC erred in rushing to confirm Thomas and did a disservice to the American people and the Court as a result. That error was exposed by the diligent and detail-oriented work of journalists who demonstrated that the SJC's investigation into Clarence Thomas fell far short of the sort of investigation warranted by the circumstances.

ii. Kavanaugh: A Limited FBI Probe

After Christine Blasey Ford testified before the Judiciary Committee on September 27, 2018, the White House agreed to order an FBI probe into the sexual misconduct allegations against Kavanaugh after a bipartisan request was made to resolve the issue prior to the vote.²³¹ From the outset, this investigation was not designed to be thorough; in fact it was so

²²² *Id.* Instead, the SJC accepted into the written hearing record a transcript of the interview she gave to eight Senate staffers and a court reporter, which included details about these events. *Id.*

²²³ *Id.*; MAYER & ABRAMSON, *supra* note 41, at 340–42.

²²⁴ Graves, *supra* note 207.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ MAYER & ABRAMSON, *supra* note 41, at 352.

²³⁰ *Id.*

²³¹ CALMES, *supra* note 67, at 317.

circumscribed as to be nearly meaningless.²³² The Office of White House Counsel instructed the FBI to carry out “limited inquiries” as part of a supplemental background investigation into Kavanaugh.²³³ Investigators were given only a week to complete it, and they interviewed only ten witnesses.²³⁴ The probe was limited to what the Committee thought was necessary to satisfy the three Republican senators—Jeff Flake, Lisa Murkowski, and Susan Collins—who appeared to be undecided about supporting Kavanaugh.²³⁵ In other words, the purpose was to give the impression of a thorough vetting without actually doing it.

As with Thomas, numerous investigative journalists picked up where the FBI left off and have exposed the shortcomings in the SJC’s and FBI’s work in vetting Kavanaugh’s candidacy. They have demonstrated that dozens of witnesses with relevant information reached out to the FBI but were ignored.²³⁶ These witnesses included people who could have corroborated Ford’s allegation, people who could have corroborated the allegations that Kavanaugh may have committed sexual misconduct during his undergraduate years at Yale, and former classmates of Kavanaugh who asserted that Kavanaugh lied under oath about his drinking when he claimed that he had never blacked out.²³⁷

The latter category of assertions is significant both because lying under oath should be disqualifying and because a person who blacks out while drinking may have no recollection of things that he or she did while in a blacked-out state. That, in turn, explains how a person could commit sexual misconduct and later have no memory of doing so.²³⁸ At least six of Kavanaugh’s former classmates at Yale confirmed that he drank excessively

²³² Kate Kelly, *Details on FBI Inquiry into Kavanaugh Draw Fire from Democrats*, N.Y. TIMES (July 22, 2021, 6:58 PM), <https://www.nytimes.com/2021/07/22/us/politics/kavanaugh-fbi-investigation.html>. See also Michael D. Shear, Michael S. Schmidt & Adam Goldman, *F.B.I. Review of Kavanaugh Was Limited from the Start*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/us/politics/trump-kavanaugh-fbi.html> (criticizing the FBI’s review of Kavanaugh).

²³³ Letter from Jill C. Tyson, Asst. Director, FBI, to Senators Sheldon Whitehouse (D-RI) and Christopher A. Coons (D-DE) (June 30, 2021) (on file with FBI).

²³⁴ Shear et al., *supra* note 232. An eleventh potential witness refused to cooperate. *Id.*

²³⁵ CALMES, *supra* note 67, at 317.

²³⁶ *Id.* at 325–40.

²³⁷ See *supra* notes 207–15 and accompanying text. Kavanaugh told the Committee, “Sometimes I had too many beers. . . . But I do not drink beer to the point of blacking out, and I never sexually assaulted anyone.” Kavanaugh Tr., *supra* note 61, at 687.

²³⁸ Glenn Kessler, *Brett Kavanaugh and Alcohol: Two Dueling Narratives*, WASH. POST (Oct. 2, 2018, 3:00 AM), <https://www.washingtonpost.com/politics/2018/10/02/brett-kavanaugh-alcohol-two-dueling-narratives/>.

and to the point of blacking out.²³⁹ None of these people was ever interviewed by the FBI.²⁴⁰ Chad Ludington's statement is representative:

I have become deeply troubled by what has been a blatant mischaracterization by Brett himself of his drinking at Yale. . . . Brett was a frequent drinker, and a heavy drinker. . . . On many occasions I heard Brett slur his words and saw him staggering from alcohol consumption When Brett got drunk, he was often belligerent and aggressive. . . .

I can unequivocally say that in denying the possibility that he ever blacked out from drinking, and in downplaying the degree and frequency of his drinking, Brett has not told the truth.²⁴¹

Nor did the FBI interview any of the fourteen people identified by journalist Jackie Calmes as being able to corroborate Ford's account of her sexual assault,²⁴² or any of the twenty-two people who could corroborate Deborah Ramirez's account of her sexual assault.²⁴³ SJC Republicans refused to grant Deborah Ramirez a hearing, despite the fact that the journalists had learned, from three witnesses, about the incident at Yale where Kavanaugh allegedly pushed his penis into Ramirez's face.²⁴⁴ Feinstein criticized those senators, stating that their strategy "is no longer attack the victim, it is ignore the victim."²⁴⁵ After Kavanaugh was confirmed, the press revealed that the FBI had ignored dozens of witnesses, prompting Senator Sheldon Whitehouse (D-RI) to call the investigation "a sham" and the FBI's tip line a "tip dump."²⁴⁶ Among the dozens of ignored witnesses was Max Stier, who reportedly witnessed a second incident

²³⁹ James Roche, Kavanaugh's freshman year roommate at Yale, publicly stated that Kavanaugh "lied under oath. He claimed that he occasionally drank too much but never enough to forget details of the night before, never enough to 'black out.' He did, regularly." James Roche, *I Was Brett Kavanaugh's College Roommate*, SLATE (Oct. 3, 2018, 7:45 PM), <https://slate.com/news-and-politics/2018/10/brett-kavanaugh-college-roommate-jamie-roche.html>. For additional Yale classmates making similar comments, see CALMES, *supra* note 67, at 329–31; Mike McIntire, Linda Qiu, Steve Eder & Kate Kelly, *At Times, Kavanaugh's Defense Misleads or Veers Off Point*, N.Y. TIMES (Sept. 28, 2018), <https://www.nytimes.com/2018/09/28/us/politics/brett-kavanaugh-fact-check.html>; and Kessler, *supra* note 238.

²⁴⁰ CALMES, *supra* note 67, at 330–36.

²⁴¹ *Chad Ludington's Statement on Kavanaugh's Drinking and Senate Testimony*, N.Y. TIMES (Sept. 30, 2018), <https://www.nytimes.com/2018/09/30/us/politics/chad-ludington-statement-brett-kavanaugh.html>.

²⁴² Calmes lists all fourteen people and provides brief descriptions of the information they had to offer the FBI. CALMES, *supra* note 67, at 327–30.

²⁴³ Calmes lists twenty individuals and provides brief descriptions of the information they had to offer the FBI, and then provides more detailed accounts of two additional individuals—Kerry Berchem and Max Stier. *Id.* at 330–42. As one example, Kavanaugh's suitemate Kenneth Appold reached out to the FBI to provide them with information about the Ramirez incident shortly after Kavanaugh was nominated and at least two months before the allegation concerning Ramirez became publicly known. *Id.* at 332. Appold did not know Ramirez in college. *Id.*

²⁴⁴ *Id.* at 267–68, 280.

²⁴⁵ *Id.* at 311.

²⁴⁶ Kelly, *supra* note 232; Sheldon Whitehouse (@SenWhitehouse), TWITTER/X (July 22, 2021, 12:06 PM), <https://twitter.com/SenWhitehouse/status/1418241010795175940>.

involving Kavanaugh displaying his penis to an intoxicated woman at Yale—an allegation that surely deserved thorough investigation.²⁴⁷

Senators also defeated a motion to have Mark Judge testify before the SJC. Judge was the witness that Ford placed in the room at the time that she was assaulted by Kavanaugh.²⁴⁸ Rather than have Judge testify under oath, SJC chair Chuck Grassley was content to rely on Judge’s written statement, given that Judge said he suffered from leukemia, anxiety, and feared speaking in public.²⁴⁹

Taken together, the evidence gathered by investigative journalists powerfully makes the case that the Kavanaugh confirmation process required a much more comprehensive investigation, prior to the confirmation vote, than was actually accomplished.

4. *Using the DARVO Strategy*

In addition to discrediting complainants and ignoring or failing to collect evidence, Thomas, Kavanaugh, and their Senate supporters used a fourth tactic to distract from a careful assessment of sexual misconduct allegations: the DARVO framework. DARVO stands for “Deny, Attack, and Reverse Victim and Offender.”²⁵⁰ DARVO is a concept developed by psychologists in the late 1990s to describe a reaction that “perpetrators of wrong doing [sic], particularly sex offenders, may display in response to being held accountable for their behavior.”²⁵¹ The term has since been widely adopted

²⁴⁷ Stier’s account is described in all three books on the Kavanaugh hearings, although Stier himself declined to grant interviews to the authors. CALMES, *supra* note 67, at 340–42; MARCUS, *supra* note 62, at 334–35; POGREBIN & KELLY, *supra* note 206, at 111. According to friends familiar with his account, Stier was walking past a dormitory suite one night at Yale when he observed Kavanaugh with his pants down and penis exposed while a highly intoxicated woman was led over to him by two male classmates who made her touch his penis. CALMES, *supra* note 67, at 340–41; MARCUS, *supra* note 62, at 335. The woman, whom Stier identified as Tracy Harmon, stated that she has no recollection of the incident and has refused to speak to the press. MARCUS, *supra* note 62, at 335. Stier is the president and CEO of the Partnership for Public Service. Michael Kranish, Seung Min Kim & Lisa Rein, *He Wanted Nonpartisan Federal Solutions. Now His Kavanaugh Tip Has Thrust Him into a Partisan Brawl.*, WASH. POST (Sept. 19, 2019, 6:00 AM), https://www.washingtonpost.com/politics/he-wanted-nonpartisan-federal-solutions-now-his-kavanaugh-tip-has-thrust-him-into-a-partisan-brawl/2019/09/18/a17141d0-da1f-11e9-a688-303693fb4b0b_story.html. According to Stier’s associates, he was hoping that the FBI could investigate his tip while allowing him to remain anonymous in order to avoid harming the nonpartisan mission of his organization. *Id.*

²⁴⁸ Tucker Higgins, *Republican Senators Defeat Motion to Subpoena Mark Judge to Testify About Blasey Ford’s Sexual Misconduct Allegation Against Brett Kavanaugh*, CNBC (Sept. 28, 2018, 11:19 AM), <https://www.cnbc.com/2018/09/28/republican-senators-vote-down-motion-to-subpoena-mark-judge-to-testify.html>.

²⁴⁹ *Id.*; CALMES, *supra* note 67, at 309.

²⁵⁰ Jennifer J. Freyd, *What is DARVO?*, UNIV. OR., <https://dynamic.uoregon.edu/jjf/defineDARVO.html> (last visited Sept. 8, 2023).

²⁵¹ *Id.* See also Jennifer J. Freyd, *Violations of Power, Adaptive Blindness and Betrayal Trauma Theory*, 7 FEMINISM & PSYCH. 22, 29–30 (1997) (explaining the concept of DARVO).

by organizations specializing in understanding and treating sexual violence.²⁵²

DARVO is commonly used by those accused of sexual assault to shift blame to the victim and to claim victim status for themselves.²⁵³ Research has demonstrated that the use of DARVO is effective in generating sympathy for the accused and generating skepticism toward the victim, but that educating onlookers about DARVO can also reduce some of its power.²⁵⁴ Thomas invoked DARVO when he decried the hearings as a “lynching” and attacked the integrity of the process.²⁵⁵ Senators did nothing to refute this characterization, leaving that to Black female scholars to do later.²⁵⁶ The Committee’s decision to hear from Hill was clearly not a lynching. They were a formal proceeding designed to allow for a fair and impartial airing of Hill’s experience with Thomas.²⁵⁷ There was nothing extrajudicial about this.

Thomas’s use of a racialized metaphor implied that white men should know better than to give any credence to a Black woman complaining of sexual harassment. In this way, Thomas employed stereotypes of Black women as hypersexual and promiscuous, unrapeable, and prone to lying.²⁵⁸ He claimed victim status while ignoring Black women’s experiences of victimization at the hands of both white and Black men. Invoking racism

²⁵² See, e.g., Maggie Haberman & Jesse McKinley, *How Cuomo’s Team Tried to Tarnish One of His Accusers*, N.Y. TIMES (Aug. 10, 2021), <https://www.nytimes.com/2021/03/16/nyregion/cuomo-lindsey-boylan.html> (describing the tactics used in response to allegations of sexual harassment against Governor Andrew Cuomo); *South Park: It’s Called DARVO* (Comedy Central television broadcast Nov. 7, 2019); *What is DARVO?*, BLACKBURN CTR. (Sept. 15, 2021), <https://www.blackburncenter.org/what-is-darvo>.

²⁵³ See Sarah Harsey & Jennifer J. Freyd, *Deny, Attack, and Reverse Victim and Offender (DARVO): What Is the Influence on Perceived Perpetrator and Victim Credibility?*, 29 J. AGGRESSION, MALTREATMENT & TRAUMA 897, 898 (2020) (explaining the different tactics that “perpetrators might use to temper reactions to their wrongdoings”).

²⁵⁴ See *id.* at 907, 913 (finding that “DARVO-educated individuals rated the perpetrator as less believable and more abusive”); Sarah J. Harsey, Eileen L. Zurbriggen & Jennifer J. Freyd, *Perpetrator Responses to Victim Confrontation: DARVO and Victim Self-Blame*, 26 J. AGGRESSION, MALTREATMENT & TRAUMA 644, 647, 659 (2017).

²⁵⁵ Michael S. Rosenwald, *‘A High-Tech Lynching’: How Brett Kavanaugh Took a Page from the Clarence Thomas Playbook*, WASH. POST (Sept. 27, 2018, 4:54 PM), <https://www.washingtonpost.com/history/2018/09/25/high-tech-lynching-how-clarence-thomass-fury-saved-his-supreme-court-nomination/>.

²⁵⁶ MAYER & ABRAMSON, *supra* note 41, at 304 (“Cowed by Thomas’s cries of racism . . . the Democrats resisted any tough questioning of Thomas during his two days of testimony.”). See generally AFRICAN AMERICAN WOMEN SPEAK OUT ON ANITA HILL—CLARENCE THOMAS (Geneva Smitherman ed., 1995) (including a collection of stories from African American female writers about the Clarence Thomas hearings).

²⁵⁷ In reality, the hearings were not impartial at all. Mayer and Abramson note that Biden had “told his staff that he believed the Democrats should assume a neutral fact-finding position in the hearings,” but that this was in contrast to the Republicans, who were “rehearsing with Thomas.” MAYER & ABRAMSON, *supra* note 41, at 218, 304.

²⁵⁸ For a discussion of these entrenched stereotypes, see Michelle S. Jacobs, *The Violent State: Black Women’s Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39, 46–50 (2017). See also Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1469–70 (1992) (discussing the ways “Black women are silenced between the rocks and the hard places of racism and sexism”).

against Black men, in this context, was an attempt to build an impenetrable wall between Thomas and the gendered accusation levied against him.²⁵⁹ Thomas's objective was to avoid having sexism taken seriously by the SJC. Thomas went on the attack to discredit not only his accuser, but also the process designed to give consideration to her assertions.²⁶⁰ Any senator who accepted Thomas's argument was left with no space to consider Hill's experience and her credibility.

Similarly, Brett Kavanaugh invoked the DARVO framework during the hearings by broadly claiming that Democrats had orchestrated a character-assassination campaign to block his nomination. He stated:

Over the past few days, other false and uncorroborated accusations have been aired. There has been a frenzy to come up with something—anything, no matter how far-fetched or odious—that will block a vote on my nomination. These are last-minute smears, pure and simple. They debase our public discourse. And the consequences extend beyond any one nomination. Such grotesque and obvious character assassination—if allowed to succeed—will dissuade competent and good people of all political persuasions from serving our country.²⁶¹

Kavanaugh cast a wide net of blame, calling the hearings “a calculated and orchestrated political hit fueled with apparent pent-up anger about President Trump and the 2016 election . . . revenge on behalf of the Clintons, and millions of dollars in money from outside left-wing opposition groups.”²⁶² He expressed anger that he might not ever be able to coach or to teach law again saying, “thanks to what some of you on this side of the Committee have unleashed.”²⁶³

Kavanaugh also had difficulty walking a fine line between condemning sexual assault and endorsing the need to take allegations seriously while claiming victim status for himself. He repeatedly stated that allegations of sexual assault should be taken seriously²⁶⁴ while also claiming, “[I]f the mere allegation, the mere assertion of an allegation, a refuted allegation from 36 years ago, is enough to destroy a person's life and career, we will have abandoned the basic principles of fairness and due process that define our legal system and our country.”²⁶⁵ In this statement, he incorrectly called

²⁵⁹ For more analysis of Thomas's lynching claim, see Angela Y. Davis, *Clarence Thomas as Lynching Victim: Reflections on Anita Hill's Role in the Thomas Confirmation Hearings*, in *AFRICAN AMERICAN WOMEN SPEAK OUT ON ANITA HILL-CLARENCE THOMAS* 178–81 (Geneva Smitherman ed., 1995).

²⁶⁰ Rosenwald, *supra* note 255.

²⁶¹ Kavanaugh Tr., *supra* note 61, at 740.

²⁶² *Id.* at 683.

²⁶³ *Id.* at 690.

²⁶⁴ *Id.* at 683, 690, 725, 740.

²⁶⁵ *Id.* at 690.

Ford's allegation "refuted,"²⁶⁶ and he ignored the fact that the very process that he was a part of was designed not to destroy his career, but rather to carefully probe the accusations against him and treat both him and his accusers with respect. Kavanaugh's protests about his treatment occurred before that process was even close to completion.²⁶⁷

In both cases, the nominees' arguments that they were the true victims were a distraction that impeded the search for truth and undercut the need, emphasized by Kavanaugh himself, to take allegations of sexual assault seriously. Accusations must be vetted, and the best way to do so is through a thorough and evidence-based investigation. Nominees impede this process when they claim that they are the victims, express anger at having to wait while the allegations are heard, and imply that having a hearing over such allegations is somehow unfair, improper, and a waste of everyone's time.

In conducting the Thomas and Kavanaugh hearings, the Senate may have been operating under an assumption that a thorough investigation of misconduct allegations was unnecessary because public concern would disappear once each justice was seated on the Court. They likely did not anticipate how the Thomas hearings would indelibly contribute to and elevate, in the public consciousness, the conversation around sexual harassment. Nor did they realize that Professor Hill would become a very significant and public voice on the issue for decades to come, or that investigative journalists would expose the deficiencies in vetting Thomas's background.²⁶⁸ Had they realized these things, they might have handled the Thomas hearings more carefully.

By 2018, some senators took a much more serious view of sexual misconduct.²⁶⁹ But they were not joined by many of their counterparts, whose actions reflected a belief that the allegations against Kavanaugh would be forgotten once he was confirmed.²⁷⁰ But time has betrayed that

²⁶⁶ See CALMES, *supra* note 67, at 260, 334 (discussing various individuals who corroborated the allegations against Kavanaugh).

²⁶⁷ Kavanaugh had an angry outburst while testifying before the SJC on September 27, 2018, the same date that Ford testified and before the FBI had begun their limited investigation. Sheryl Gay Stolberg & Nicholas Fandos, *Brett Kavanaugh and Christine Blasey Ford Duel with Tears and Fury*, N.Y. TIMES (Sept. 27, 2018), <https://www.nytimes.com/2018/09/27/us/politics/brett-kavanaugh-confirmation-hearings.html>.

²⁶⁸ See, e.g., Jill Abramson, *Do You Believe Her Now?*, N.Y. MAG.: INTELLIGENCER (Feb. 19, 2018), <https://nymag.com/intelligencer/2018/02/the-case-for-impeaching-clarence-thomas.html> ("Many individuals . . . who knew about Thomas's habitual, erotically charged talk in the workplace were never contacted by the Senate Judiciary Committee or called as witnesses.").

²⁶⁹ See Joleen Traynor, *Supreme Court Justice Brett Kavanaugh and Accusations of Sexual Assault in the Media*, 20 POL. ANALYSIS 46, 56 (2019) (explaining how the moral question of whether to vote to confirm Kavanaugh became "deeply personal" for a number of senators who "often seemed conflicted on how they planned on voting").

²⁷⁰ See Ann C. McGinley, *The Masculinity Mandate: #MeToo, Brett Kavanaugh, and Christine Blasey Ford*, 23 EMP. RTS. & EMP. POL'Y J. 59, 70 (discussing the role of gender, race, and class in the hearings and how "Republican senators (all white men)" discounted and condemned the process). For example, Senator Orrin Hatch (R-UT) labeled the hearings a "national disgrace" and Senator Lindsey Graham (R-SC) declared "the process 'crap'" and a "charade." *Id.*

view and has proven that public concern with sexual misconduct has grown. Both sets of hearings have also demonstrated that an investigation left unfinished by the Senate will be picked up and completed by investigative journalists, who have exposed numerous gaps in the vetting process around both nominees that have left significant and palpable shadows over each man.

Senators should be aware that if they fail to undertake a thorough investigation of sexual misconduct allegations in the future, investigative journalists wait in the wings to do this important work and bring the results to the public after the fact. But an after-the-fact investigation does not adequately protect the interests of the American people. The reputation of the Court and the Senate hinges on the Senate taking full responsibility for conducting thorough investigations of sexual misconduct allegations, knowing that if they abdicate this responsibility, their conduct will be exposed.

A highly partisan environment where a nominee has already been named is not the time to introduce a new process for vetting sexual misconduct allegations. The sensitive nature of the issues, and the need for senators in an advice and consent role to be well-informed, means that the type of process necessary is best established in a planned, systematic fashion before it is needed again. In a highly charged, politicized environment, it is too easy for those with partisan motivations to ignore process concerns and simply do everything necessary to get the nominee confirmed.

B. *Institutionalizing a Thorough and Properly Resourced Investigation*

In making a commitment to ensure that all allegations of sexual misconduct against SCOTUS nominees are thoroughly investigated, the SJC need not reinvent the wheel. As we have seen, they can appoint a special task force with suitable experts to complete the work and report back to the Senate.²⁷¹ Senators and investigators alike should rely on best practices in sexual assault investigation that have been established by organizations such as EVAWI and the IACP. EVAWI is a professional training organization whose goal is to improve the criminal justice response to sexual assault.²⁷² Since its founding in 2003, EVAWI has offered annual and regional conferences, as well as many resources available on demand including an Online Training Institute, training bulletins, and webinars.²⁷³ Many of these resources are available free of charge and are utilized by thousands of

²⁷¹ See *supra* Section II.B (recommending an investigatory task force).

²⁷² END VIOLENCE AGAINST WOMEN INT'L, 2018 ANNUAL REPORT 1 (2018), <https://evawintl.org/wp-content/uploads/2018-Annual-Report.pdf>.

²⁷³ *Best Practice Resources*, END VIOLENCE AGAINST WOMEN INT'L, <https://evawintl.org/best-practices/resources/> (last visited Oct. 11, 2023) (showing a range of online training, training bulletins, and other resources on best practices for sexual assault investigation).

professionals annually.²⁷⁴ EVAWI's influence is growing rapidly in the field of sexual assault investigation.²⁷⁵

The International Association of Chiefs of Police “is the world’s largest and most influential professional association for police leaders[,] [w]ith more than 33,000 members in over 170 countries.”²⁷⁶ The IACP provides resources on the Police Response to Violence Against Women, including guidance on best practices for investigating sexual assault.²⁷⁷

Making use of established best practices is of critical importance because the weakest link in the failure to investigate and prosecute sex crimes typically occurs at the level of the law enforcement investigation, and the SJC replicated these problems when it conducted rushed and superficial investigations of sexual misconduct in 1991 and 2018.²⁷⁸ It is common for law enforcement agencies to investigate sexual assault complaints only superficially, if at all, to disbelieve victims, and to generally fail to progress investigations.²⁷⁹ The integrity of the judicial nomination process can therefore be best protected through a commitment to established best practices.

The resources produced by these organizations have been highly influential, and together they reveal a consensus around certain key factors that are essential components to sexual assault investigations. In particular, sexual assault investigations should be thorough and evidence-based, use trauma-informed protocols, employ victim-centered and offender-focused practices, and follow a multi-agency approach including the use of sexual assault response teams.²⁸⁰

A thorough and evidence-based investigation is one that pursues and examines *all* of the evidence and bases its conclusions on that evidence.²⁸¹ This stands in contrast to what happened in the Thomas and Kavanaugh investigations, where a great deal of evidence was disregarded—witnesses were not spoken to and leads were ignored.²⁸² Investigators then reached

²⁷⁴ *Id.*

²⁷⁵ Just prior to the COVID-19 pandemic, over two thousand people attended EVAWI's 2018 annual conference, including 892 victim advocates, 549 criminal justice and legal professionals, and 206 health care professionals. END VIOLENCE AGAINST WOMEN INT'L, *supra* note 272, at 9.

²⁷⁶ *About IACP*, INT'L ASS'N OF CHIEFS OF POLICE, <https://www.theiacp.org/about-iacp> (last visited Oct. 18, 2023).

²⁷⁷ *Police Response to Violence Against Women—VAW*, INT'L ASS'N OF CHIEFS OF POLICE, <https://www.theiacp.org/projects/police-response-to-violence-against-women-vaw> (last visited Oct. 18, 2023).

²⁷⁸ Avalos, *Prosecuting Rape Victims*, *supra* note 162, at 7, 42.

²⁷⁹ *Id.* at 42. See generally HUM. RTS. WATCH, *supra* note 175 (summarizing the police mishandling of sexual assault cases in the District of Columbia); Letter from Michael W. Cotter, *supra* note 175; INVESTIGATION OF NEW ORLEANS POLICE, *supra* note 175; INVESTIGATION OF BALTIMORE CITY POLICE, *supra* note 175.

²⁸⁰ RAPED, THEN JAILED, *supra* note 168, at 24–25; 725 ILL. COMP. STAT. ANN. § 203/5(1)–(7) (West 2017); Avalos, *Reversing the Decriminalization*, *supra* note 16, at 42–55.

²⁸¹ INVESTIGATING SEXUAL ASSAULTS, *supra* note 118.

²⁸² See *supra* notes 182–95, 200–216 and accompanying text (explaining the leads that were ignored and the witnesses that were not spoken to).

conclusions that were supported by only *some* of the evidence, while evidence that contradicted those conclusions was ignored.

The use of trauma-informed protocols means approaching sexual assault victims with the understanding that the trauma of sexual assault has likely had an adverse effect on their ability to recall events.²⁸³ Various interview strategies that help to maximize the person's ability to supply accurate information can then be used.²⁸⁴ A trauma-informed approach also means understanding that a person's inability to recall certain events, such as how she got home, can be the result of the brain coping with trauma and is not a sign of dishonesty. Victims should not be discredited when they cannot remember details of an assault, even when others think they *should* be able to remember those details.

Investigatory practices that are victim-centered anticipate the victim's needs as a trauma survivor and take measures to avoid re-traumatization during the interview process.²⁸⁵ This can include avoiding victim-blaming questions that cause trauma without adding value; questions such as "why did you wear that dress?" or "why didn't you just leave?" are examples. An offender-focused investigation is one that investigates the actions of the offender and seeks evidence corroborating or disproving the offender's actions.²⁸⁶ This contrasts with the too-common approach of focusing scrutiny on the victim while ignoring the offender's conduct.

The value of implementing a multi-agency approach, including sexual assault response teams, is in ensuring that those responsible for investigating sexual assault have adequate levels of training in relation to these difficult and complex crimes.²⁸⁷ The team approach also allows law enforcement members to receive support from their colleagues in other fields and also remain accountable to those individuals.²⁸⁸ Team responsibility reduces the

²⁸³ See LONSWAY ET AL., *supra* note 80 (summarizing the neurobiology of stress and trauma); WILSON ET AL., *supra* note 91 (summarizing the neurobiology of trauma when it concerns interviewing victims).

²⁸⁴ For instance, it is not good practice to ask victims to estimate the passage of time because time-sequence information is often poorly stored or encoded by the brain during a traumatic event. But it *is* good practice to ask for sensory memories—what they recall smelling or hearing—because the brain will often tie memories of the event to these sensory experiences. WILSON ET AL., *supra* note 91 at 31–33; LONSWAY ET AL., *supra* note 80, at 7, 11, 12, 18.

²⁸⁵ *Human Trafficking Task Force e-Guide*, OFF. FOR VICTIMS OF CRIME, <https://www.ovcttac.gov/taskforceguide/eguide/> (last visited Oct. 11, 2023); YOU HAVE OPTIONS PROGRAM, 20 ELEMENTS OF A VICTIM-CENTERED AND OFFENDER-FOCUSED YOU HAVE OPTIONS LAW ENFORCEMENT RESPONSE [hereinafter 20 ELEMENTS], <https://evawintl.org/wp-content/uploads/you-have-options-program-20-elements.pdf> (last visited Oct. 20, 2023).

²⁸⁶ 20 ELEMENTS, *supra* note 285.

²⁸⁷ See generally KIMBERLY A. LONSWAY, JOANNE ARCHAMBAULT & KRISTIN LITTEL, SUSTAINING A COORDINATED COMMUNITY RESPONSE: SEXUAL ASSAULT RESPONSE AND RESOURCE TEAMS (SARRT), END VIOLENCE AGAINST WOMEN INT'L 11 (July 2021), https://evawintl.org/wp-content/uploads/Module-15_SARRT.pdf.

²⁸⁸ *Id.* at 13.

possibility that a sexual assault investigation will be handled poorly due to the inexperience or insensitivity of just one or two people.²⁸⁹

The SJC can use these best practices to establish protocols for investigating allegations of sexual misconduct against judicial nominees. Whether future investigations are carried out directly by senators or by a special task force appointed for this purpose, they must be conducted by individuals with robust training in sexual assault investigation and who have a commitment to thoroughly investigating and collecting all available evidence. A team approach involving a range of experts is desirable so that the overall investigation benefits from the strengths of the various team members and their ability to hold one another accountable to the group's mission. If the FBI is to be involved, it should be instructed by the bipartisan SJC and not from the executive branch to ensure impartiality.

V. THE INNOCENCE STANDARD

"[We] should go through a process, because there shouldn't even be a little doubt There shouldn't be a doubt."

Donald Trump, Press Conference, 9/18/2018²⁹⁰

"Up or down, yes or no, however this vote goes, I am confident in saying that it will forever be steeped in doubt. This doubt is the only thing of which I am confident in this process."

Senator Jeff Flake (R-AZ), 9/26/2018²⁹¹

Doubt is not good enough when our society attempts to resolve whether a Supreme Court nominee has ever committed sexual misconduct. As Donald Trump pointed out just before Christine Blasey Ford spoke to the SJC, we must know, without any reasonable doubt, that a person appointed to SCOTUS has not committed sexual misconduct.²⁹² If we cannot reach that level of comfort, the nomination should not move forward. I call this the Innocence Standard. In this Part, I describe this standard, address potential objections, and explain the inadequacy of other standards.

A. *Defining the Innocence Standard*

The Innocence Standard stands at the other end of the spectrum from the familiar criminal due process standard of guilt beyond a reasonable doubt.

²⁸⁹ *Id.* at 14.

²⁹⁰ Ian Schwartz, *Trump on Kavanaugh: "There Should Be Not Even a Little Doubt," "I Feel So Badly for Him,"* REALCLEAR POL. (Sept. 18, 2018), https://www.realclearpolitics.com/video/2018/09/18/trump_on_kavanaugh_republicans_should_go_through_a_process_shouldnt_even_be_a_little_doubt.html.

²⁹¹ Jeff Flake, *Jeff Flake: We Can't Forget Ford and Kavanaugh are Human Beings*, DESERET NEWS (Sept. 26, 2018, 2:09 PM), <https://www.deseret.com/2018/9/26/20654457/jeff-flake-we-can-t-forget-ford-and-kavanaugh-are-human-beings>.

²⁹² Schwartz, *supra* note 290.

While the latter standard must be met before a person can be deprived of his or her liberty, it is not a suitable standard for assessing a Supreme Court nominee's past conduct. Proof of guilt beyond a reasonable doubt is the standard of proof required by our criminal justice system.²⁹³ In a criminal trial, a defendant's liberty—and sometimes her or his life—is at stake.²⁹⁴ For that reason, the presumption of innocence is a critical component of due process.²⁹⁵ But the judicial confirmation process is a job interview, not a criminal trial.²⁹⁶ None of the nominee's fundamental rights are at stake. Participation is voluntary, and thorough scrutiny of the nominee is critical to the integrity of the Court. For these reasons, the due process standard of guilty beyond a reasonable doubt is not suitable. As Professor Simson put it, in an open letter to the Senate in 1992:

The idea that the benefit of the doubt goes to the nominee has no place in confirmation proceedings. It should be abandoned by those of you who hold it, because it gives disproportionate weight to the President's judgment about the nominee. . . . Rather than giving the nominee the benefit of the doubt, you should be asking yourselves (1) how much doubt exists about a particular matter and (2) how acceptable [that level of doubt is]. . . . [E]ven a moderate amount of doubt about a nominee's personal integrity probably should be counted heavily against him or her.²⁹⁷

The SCOTUS nomination process is about protecting the integrity of the Court. A seat on the Supreme Court is one of the most consequential and powerful positions in our society. Justices enjoy a lifetime appointment and cannot be impeached except in rare circumstances.²⁹⁸ They must be individuals who can meet standards of ethical conduct that are more stringent than those required of most other people. The Court's integrity and reputation require "beyond a reasonable doubt" certainty that justices have not engaged in sexual misconduct.

²⁹³ *In re Winship*, 397 U.S. 358, 361–64 (1970).

²⁹⁴ *Id.* at 363–64.

²⁹⁵ The "dire consequence" of the deprivation of liberty "is our legal system's primary reason for choosing reasonable doubt" as the standard of proof in criminal cases. MARTHA C. NUSSBAUM, *CITADELS OF PRIDE: SEXUAL ASSAULT, ACCOUNTABILITY, AND RECONCILIATION* 117 (2021).

²⁹⁶ Caprice Roberts, *Kavanaugh's Senate Hearing isn't a Trial. The Standard isn't 'Reasonable Doubt.'* WASH. POST (Sept. 21, 2018, 6:00 AM), https://www.washingtonpost.com/outlook/kavanaugh-senate-hearing-isnt-a-trial-the-standard-isnt-reasonable-doubt/2018/09/20/1eb1ee34-bd15-11e8-b7d2-0773aa1e33da_story.html ("The confirmation process, including sexual assault allegations, is a job interview.")

²⁹⁷ Simson, *Thomas's Supreme Unfitness*, *supra* note 4, at 653.

²⁹⁸ Only one Supreme Court Justice, Samuel Chase, has ever been impeached by the House. He was acquitted by the Senate. Douglas Keith, *Impeachment and Removal of Judges: An Explainer*, BRENNAN CTR. FOR JUST. (May 6, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/impeachment-and-removal-judges-explainer>.

Allowing a person to serve on the Court when there are unresolved sexual misconduct allegations leaves open the possibility that a sitting Supreme Court Justice has in fact committed sexual misconduct. For the Court's integrity, we should expect Supreme Court nominees to meet the Innocence Standard—there should be no reasonable doubt as to whether the nominee has committed sexual misconduct.

Under the Innocence Standard, the nominee has the burden of demonstrating his or her innocence beyond a reasonable doubt. If he or she cannot overcome the doubt created by a credible accuser, the President and SJC should move on to another candidate. The Innocence Standard would only allow the nomination to go forward if there is no credible allegation of sexual misconduct.

This standard is exacting, but experience demonstrates that numerous nominees have met it. Since the Thomas hearings in 1991, sexual misconduct has only arisen in Kavanaugh's case and not at all in relation to the nominations of Ruth Bader Ginsburg, Stephen Breyer, John Roberts, Harriet Miers, Samuel Alito, Sonia Sotomayor, Elena Kagan, Merrick Garland, Neil Gorsuch, Amy Coney Barrett, and Ketanji Brown Jackson.²⁹⁹

The Innocence Standard is also consistent with American values. Sixty-seven percent of persons surveyed in 1991 stated that Hill's allegations, if true, should be enough to bar Thomas from serving on the Supreme Court.³⁰⁰ In 2018, sixty-nine percent of persons surveyed agreed that Ford's allegations, if true, were adequate to bar Kavanaugh from the Court.³⁰¹ And yet, as Professor Hill pointed out in 2021, "polls suggest that at least half of the population believe that two out of the nine judges currently on the Court have engaged in sexual misconduct."³⁰² In the minds of many Americans, there is reasonable doubt as to whether two Supreme Court Justices have committed sexual misconduct.

The disconnect shown in these figures—that most Americans do not want people seated on the Court who have engaged in sexual misconduct, and yet they believe that two of the nine justices currently seated on the bench have done so—suggests palpable reputational harm to the Court. The disconnect may explain why Americans' approval rating of the Supreme Court sank to a new low of forty percent in September 2021.³⁰³ Adopting the

²⁹⁹ A list of all nominees to the Supreme Court can be found at *Supreme Court Nominations (1789-Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> (last visited Sept. 9, 2023).

³⁰⁰ Dylan Matthews, *Exclusive: We Re-Ran Polls from 1991 About Anita Hill, This Time About Christine Blasey Ford*, VOX (Oct. 4, 2018, 5:00 AM), <https://www.vox.com/policy-and-politics/2018/10/4/17924900/poll-anita-hill-clarence-thomas-christine-blasey-ford-brett-kavanaugh>.

³⁰¹ *Id.* Neither poll asked respondents what should be done if uncertainty around the nominee remained.

³⁰² HILL, *supra* note 26, at 61.

³⁰³ Jeffrey M. Jones, *Approval of U.S. Supreme Court Down to 40%, a New Low*, GALLUP (Sept. 23, 2021), <https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx>.

Innocence Standard is an important step in bringing the vetting process in line with American values.

In a country with over 1.3 million lawyers and only nine Supreme Court Justices at any given moment, there should never be a shortage of qualified candidates who have never been credibly accused of sexual misconduct.³⁰⁴ The only question is whether we will make it a priority to hold future nominees to this standard. Doing so requires the President and the Senate to take sexual misconduct into account early in the nomination process and be willing to withdraw a nomination should a concern emerge, rather than bury the sexual misconduct issue because of a nominee's other qualities.

B. *The Inadequacy of Other Standards*

Certain senators improperly relied on the criminal due process standard in supporting the Kavanaugh and Thomas nominations. When Arizona Senator Jeff Flake issued a statement announcing his support for Brett Kavanaugh, he cited the presumption of innocence that our justice system affords the accused.³⁰⁵ In taking this approach, Flake echoed an approach taken by Senator Alan Dixon (D-IL) in the vote on Clarence Thomas in 1991. According to Dixon's former speech writer, Stephen Rodrick, Dixon justified his vote for Thomas as follows:

If Judge Thomas had been credible, and Professor Hill had not, the Senate's choice would be equally clear. Since both were credible, however, and since it is impossible to get to the bottom of this matter, I think we have to fall back on our legal system and its presumption of innocence for those accused.³⁰⁶

In both cases, senators acknowledged that women had made credible allegations of sexual harassment or assault against the nominees, but ultimately decided to support the nominee by resolving any doubt in the nominee's favor. The problem with this rationale, as Rodrick pointed out years after crafting that speech, is that the presumption of innocence is a standard that applies to criminal defendants who face penal sanctions if they are found guilty.³⁰⁷ Flake and Dixon transposed a standard used in criminal proceedings to a civil context where that standard is inappropriate. Flake

³⁰⁴ Debra Cassens Weiss, *Lawyer Population 15% Higher than 10 Years Ago, New ABA Data Shows*, AM. BAR ASS'N J. (May 3, 2018, 2:31 PM), https://www.abajournal.com/news/article/lawyer_population_15_higher_than_10_years_ago_new_aba_data_shows.

³⁰⁵ Ella Nilsen, *Sen. Jeff Flake Will Vote to Confirm Brett Kavanaugh to the Supreme Court*, VOX (Sept. 28, 2018, 10:30 AM), <https://www.vox.com/2018/9/28/17913660/jeff-flake-confirmation-vote-brett-kavanaugh-supreme-court>.

³⁰⁶ Stephen Rodrick, *I Helped Write a Speech Defending a Vote for Clarence Thomas. I Regret it Still*, WASH. POST (Sept. 21, 2018, 9:45 AM), https://www.washingtonpost.com/outlook/i-helped-write-a-speech-defending-a-vote-for-clarence-thomas-i-regret-it-still/2018/09/21/d60b3300-bcee-11e8-8792-78719177250f_story.html.

³⁰⁷ *Id.*

admitted that he was plagued with doubts.³⁰⁸ Upholding the integrity of the Court is better served by voting against a nominee where doubts about past sexual misconduct remain.

Similarly, Senator Susan Collins (R-ME) referenced the presumption of innocence six times in her statement announcing her support for Kavanaugh.³⁰⁹ She noted that the presumption of innocence was a fundamental legal principle that she could not abandon and that is “ingrained in our American consciousness.”³¹⁰ Her comments illustrate why the context around this principle is so important. A criminal defendant’s presumption of innocence has no place in the SCOTUS hearing process.

Although Collins expressed a concern that departing from the presumption of innocence “could lead to a lack of public faith in the judiciary and would be hugely damaging to the confirmation process moving forward,”³¹¹ the opposite is true. Awarding a judicial nominee a presumption of innocence—the benefit of the doubt—gives the American people doubt where they require certainty. Because the Court’s integrity is the priority, the benefit of the doubt must reside with the Court rather than with the nominee. It is only by taking this approach that we ensure Americans’ continued public faith in the judiciary. The American public must know, beyond a reasonable doubt, that justices have not committed sexual misconduct.

C. *Objections to the Innocence Standard*

As with most proposals to reform how we view sexual misconduct, there will be objections about the proposal’s scope. I will address four of those here. These objections raise important concerns, but none are compelling enough to negate the value of the Innocence Standard.

One objection to the Innocence Standard is the argument that it may be impossible to ever determine what happened when allegations are decades old. I have three responses. First, it is not necessarily true that we cannot get to the bottom of old allegations. A thorough, evidence-based, properly resourced investigation is the best way to do so. If we fail to properly resource an investigation, interview all relevant witnesses, and follow best practices in gathering evidence, we might not get past “he said, she said.” Investigations into sexual assault require effort and dedication. The Thomas and Kavanaugh hearings are a poor example of this because in neither case

³⁰⁸ Michael D. Shear, Nicholas Fandos & Michael S. Schmidt, *A Tumultuous 24 Hours: How Jeff Flake Delayed a Vote on Kavanaugh*, N.Y. TIMES (Sept. 28, 2018), <https://www.nytimes.com/2018/09/28/us/politics/jeff-flake-kavanaugh-confirmation.html>.

³⁰⁹ Collins Press Release, *supra* note 89. See Roberts, *supra* note 296 (pointing out that the confirmation process is a job interview and should not involve the “beyond a reasonable doubt” standard used in criminal proceedings).

³¹⁰ Collins Press Release, *supra* note 89.

³¹¹ *Id.*

was a properly resourced investigation conducted prior to the vote. But the past need not determine the future, and we must do better.

Second, sometimes this particular objection is a proxy for a different fear, namely, that a thorough investigation will in fact uncover evidence unfavorable to the accused. The motive here is to discredit the investigation before it begins. As we have seen, the work of numerous investigative journalists after the Thomas and Kavanaugh hearings produced quite a lot of evidence unfavorable to each nominee and very little evidence unfavorable to the accusers.³¹² The only answer to this concern is that we must allow a thorough, evidence-based investigation to direct us to the truth as much as possible, regardless of which party the truth favors.

Third, the Innocence Standard recognizes that in some cases, it might indeed be impossible to determine exactly what happened many years after alleged sexual misconduct, even with a thorough investigation. But unlike criminal proceedings, the nomination process does not require that allegations be fully resolved, because the nominee is not on trial. Therefore, if the situation cannot be resolved in the nominee's favor—if any doubt remains—the President should withdraw the nomination.

A second objection to the Innocence Standard may be the notion that it is not fair to the nominee if unresolved allegations remain and prevent the nominee from moving forward in the process. This could occur if the nominee is innocent of sexual misconduct, but a reasonable doubt remains. Certainly, the best way to resolve allegations is through a thorough and evidence-based investigation, but it is possible that even after such an investigation, a reasonable doubt will remain about an innocent nominee.

This scenario is likely to be extremely rare, but it is preferable that we live with this possibility rather than the reverse—allowing someone to serve on the Court who has in fact committed sexual misconduct. Because the SCOTUS nomination process is a job interview, and not a criminal proceeding, the standards and purpose are different. The purpose of the vetting process is to protect the integrity of the Court, so the best interests of the Court must drive the process, not the interests of the nominee.

At any stage in the selection process, one nominee may be passed over in favor of another with no explanation; this is how appointment to most employment opportunities works. And no one is entitled to a position as a justice. It is therefore reasonable to expect anyone who advances to an appointment to the Court to be clear of sexual misconduct allegations, beyond any doubt. If a thorough investigation uncovers allegations that

³¹² See e.g., Terry Gross, *Reporters Dig into Justice Kavanaugh's Past, Allegations of Misconduct Against Him*, NAT'L PUB. RADIO (Sept. 16, 2019, 3:29 PM) <https://www.npr.org/2019/09/16/761191576/reporters-dig-into-justice-kavanaughs-past-allegations-of-misconduct-against-him>; Robin Pogrebin & Kate Kelly, *Brett Kavanaugh Fit in with the Privileged Kids. She Did Not*, N.Y. TIMES (Sept. 14, 2019), <https://www.nytimes.com/2019/09/14/sunday-review/brett-kavanaugh-deborah-ramirez-yale.html>. See also *supra* Section IV.A.3

cannot be resolved, the nominee is free to return to his or her previous life and position.³¹³

A third objection might be that false allegations could be invented by those with a political agenda seeking to undermine a particular nominee. This fear is largely a by-product of the widely popular myth that women frequently lie about being raped.³¹⁴ The reality is that false allegations of sexual assault are extremely rare, although numerous studies have demonstrated that police often bring a culture of suspicion to sexual assault investigation and that they, as well as the general public, greatly overestimate the number of sexual assault allegations that are false.³¹⁵ Additionally, sexual assault is the most serious underreported crime that there is, and those survivors who come forward to report often do so at tremendous personal cost, as Christine Ford's experience demonstrates. The personal costs to coming forward are enough to discourage many survivors, let alone someone who is making it all up. Once we understand these facts, it should be evident that the actual risk that someone will fabricate a false allegation of sexual assault in order to derail a SCOTUS nomination is not nearly as high as some people may think.³¹⁶

Moreover, the solution to this concern is an iron-clad commitment to carry out a thorough and well-resourced investigation of *every* allegation that arises. Politically motivated false allegations, to the extent that they exist, can best be deterred when the SJC sends the clear message that *all* allegations will be thoroughly investigated. A thorough investigation can effectively distinguish credible allegations from any that are not.

A fourth objection might be that the proposal does not go far enough, because I have restricted it to SCOTUS nominees. Reforming the SCOTUS nomination process is the place to start because of the prominence of the highest Court and the attention its confirmation hearings receive. Victims of sexual misconduct may be more likely to come forward when someone who harmed them is recommended for SCOTUS than for a lower court. In addition, the resources that would be needed to implement the process I recommend for all Article III judges would be far more extensive than would be necessary for just the Supreme Court. For these reasons, reform should

³¹³ This often means the nominee returns to a lifetime judicial appointment, which would not be compensated by participation in the SCOTUS nomination process.

³¹⁴ Avalos, *Prosecuting Rape Victims*, *supra* note 162, at 7–10.

³¹⁵ *Id.*; MARTIN D. SCHWARTZ, NATIONAL INSTITUTE OF JUSTICE VISITING FELLOWSHIP: POLICE INVESTIGATION OF RAPE—ROADBLOCKS AND SOLUTIONS 5–6 (2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/232667.pdf>; Amy Dellinger Page, *Gateway to Reform? Policy Implications of Police Officers' Attitudes Toward Rape*, 33 AM. J. CRIM. JUST. 44, 55 (2008); Lonsway et al., *supra* note 118.

³¹⁶ We should also be careful not to underestimate how difficult it is to manufacture such false allegations due to practical considerations. For instance, the pool of people who knew a particular nominee at a particular point in time and who could conceivably be in a position to fabricate an allegation is limited. An allegation invented out of thin air by a person who never had contact with the nominee is not likely to be credible.

begin with the Supreme Court and extend to other courts as resources become available.

CONCLUSION

We urgently need a robust process for vetting sexual misconduct allegations against Supreme Court nominees. Past failures demonstrate why we need such a process, and current best practices in sexual assault investigation point the way forward. Senators must gain familiarity with these best practices if they are to function effectively in their advice and consent role. A commitment to certain principles should govern. We must embrace the principle that past sexual misconduct is disqualifying for SCOTUS nominees. We must establish clear reporting mechanisms and confidentiality protections for witnesses, and we must allocate resources to a thorough investigation of all such allegations.

There is a need for clarity around the standard of proof that should be used to vet sexual misconduct allegations. The Innocence Standard is an attainable standard and is the standard that best upholds the integrity of the Court. Although many senators have borrowed the notion of the presumption of innocence from the criminal law, this is a harmful way to approach sexual misconduct because it is the Court and the American people, not the nominee, who deserve the benefit of the doubt. We need to know, beyond a reasonable doubt, that Supreme Court Justices have not committed sexual misconduct.

