DEFENDING THE INDEFENSIBLE?
THE INCREASINGLY DIFFICULT JOB OF DEFENDING SOLDIERS ACCUSED OF SEXUAL ASSAULT

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This is a working draft subject to modification

I. United States v. Goldstein[1]

Captain (CPT) Saul Syme, a Trial Defense Counsel (TDC) at the local United States Army Trial Defense Service (TDS) field office, takes a deep breath and collects his thoughts. He sits next to his client, CPT Emmanuel Goldstein, who is charged with multiple specifications of sexual assault. They are at a pretrial motion hearing which is about to begin.

The primary purpose of this hearing is twofold: to determine whether, the defense may cross-examine MAJ Julia O'Brien, the alleged victim and CPT Goldstein's former paramour, about previous infidelities to her husband, CPT Winston Smith, and to determine if the defense can introduce evidence about her previous allegations that other men sexually assaulted her. Captain Syme believes these other allegations of sexual assault, just like the ones against CPT Goldstein, were also false complaints.

Captain Syme also filed motions with the court to order MAJ O'Brien to disclose the records of her psychological counseling. He believes these records will indicate she has borderline

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[1] This fact pattern is not based on any actual case and any resemblance to any particular person or case is coincidental. Yet everything described in it has happened in actual courts-martial I have tried, supervised defense counsel in, read about in reported cases, or discussed with other defense attorneys. This includes cases of alleged victims: who were intoxicated, who were committing adultery with their alleged perpetrator, who made delayed reports—often only after some event occurred for which they could have gotten in trouble—such as getting caught by a spouse or boyfriend, who had prior consensual sexual relationships with the alleged perpetrator, who had psychological disorders, and who had dubious claims about other people having previously sexually assaulted them. The names of the characters come from the famous book, *1984*. *See* GEORGE ORWELL, 1984 (1949). Emmanuel Goldstein, the book's villain, was a character the ruling party used (and may have itself created) as a convenient enemy of the state to keep its population focused on and distracted. *Id.* Syme was colleague of the book's main character, Winston Smith. Smith described Syme as "[T]oo intelligent. He sees too clearly and speaks too plainly. The Party does not like such people. One day he will disappear." *Id.* at 47.

personality disorder. Captain Syme has asked the court to order a forensic examination of MAJ O'Brien's cellular phone, so he can discover if exculpatory text messages she sent to CPT Goldstein still exist. In these messages, MAJ O'Brien exclaims her love for CPT Goldstein and thanks him for the great sex they had. Finally, CPT Syme wants the military judge to order the Commanding General (CG) to testify about whether the CG's superiors may have exerted unlawful command influence (UCI) to cause him to refer CPT Goldstein's charges to trial.

The Government's counsel opposes all of the defense motions. Major O'Brien's Special Victims Counsel (SVC) also opposes them. Both have also moved to preclude the defense from referring to any evidence of MAJ O'Brien's history of "rough sex" with her other partners. The defense considers MAJ O'Brien's sexual history relevant because the fact-finder might not otherwise believe the defense theory that the extremely rough conduct at issue in the case occurred consensually.

Major O'Brien sits in the first row of the courtroom, directly behind the prosecution's table. Next to her is her SVC. Her Unit Victim Advocate (UVA) sits on her other side. Next to the UVA is the Victim/Witness Liaison. Sitting behind MAJ O'Brien is her previous unit's company commander. His officer evaluation report now grades his "performance in fostering a climate of dignity and respect and adhering to the requirements of the Sexual Harassment/Assault Response and Prevention (SHARP) Program."[2] At the prosecution's table sits a seasoned Special Victim Prosecutor (SVP). Next to him are the Trial Counsel and an Assistant Trial Counsel. A reporter from *Stars & Stripes* sits in the back of the courtroom with a notepad in hand. The court-martial has garnered interest from the media.

This case began for CPT Syme several months earlier, when he received an email from the SVC, informing him he represented MAJ O'Brien, a victim of sexual assault, and that no one could talk to her unless they first went through him. The SVC identified CPT Goldstein as the suspect. That got CPT Syme's attention, because Emmanuel Goldstein happened to be an otherwise well-known officer. He was a famous professional athlete who gave up a successful sports career and joined the Army. He had also recently deployed to Afghanistan, where he was awarded for bravery during a pivotal battle against the Taliban.

Several weeks after the SVC sent his email, CPT Goldstein came to the TDS office for assistance and met with CPT Syme. He came to see TDS right after a special agent from the Army Criminal Investigation Command (CID) Special Victims Unit (SVU) interviewed him.

Captain Goldstein was shocked. He told CPT Syme, just like he told CID, that he had an affair with MAJ O'Brien in Afghanistan, and that the two had an on-and-off again sexual relationship since they returned. He would accept responsibility for those poor decisions, realizing what he had done might end his career. But he could not believe MAJ O'Brien was now alleging that he had raped and sodomized her on multiple occasions, including times when she claims she was too intoxicated to consent.

[2] *See* U.S. DEP'T OF ARMY, REG. 623-3, EVALUATING REPORTING SYSTEM para 2-12(j) (31 Mar. 2014) [hereinafter AR 623-3].

The two had a lot of "rough sex," which is what MAJ O'Brien wanted. She loved the book *Fifty Shades of Grey*.[3] She asked CPT Goldstein to tie her up, dominate her, and call her by disgusting names. Sometimes he did, both when they were in Afghanistan, and back at home. When her husband was deployed, MAJ O'Brien would go to CPT Goldstein's home for long romantic dinners. They would grill bison steaks, drink red wine, listen to Neil Diamond, and have rough sex afterwards. Major O'Brien told CPT Goldstein she always enjoyed rough sex, and her husband was not capable of satisfying her in this way.

During their first meeting, CPT Goldstein asked what CPT Syme could do for him. No one had preferred any charges against him. He wanted to know if he could at least get a copy of the three-hour-long interview he had just gave CID or the written statement he provided them. CID refused to hand these over since there was still an ongoing investigation. There was not much CPT Syme could do for him.

After weeks of asking CPT Syme about his case every day—sometimes several times a day—CPT Goldstein's commander summoned him to his office. The commander preferred numerous specifications against him on the Thursday before the four-day Memorial Day Weekend. Captain Goldstein immediately came to the TDS office and showed CPT Syme a memorandum from the Preliminary Hearing Officer (PHO), which informed him there was an Article 32 Hearing scheduled for the following Tuesday at 0800 hours.

Captain Syme scrambled and talked to the SVC before he left for the training holiday, and requested to interview MAJ O'Brien before the hearing on Tuesday. The SVC told him that MAJ O'Brien demanded and was granted a permanent change of station (PCS) to Hawaii following her report of sexual assault. Any interview would have to be done telephonically, assuming MAJ O'Brien agreed to it.[4] The SVC also wanted to see his questions in advance, so he could review them to ensure the questions did not embarrass, degrade, harass or otherwise insinuate MAJ O'Brien was to blame for what happened. A few hours later, the SVC informed CPT Syme that MAJ O'Brien would not speak to him before the Article 32 hearing.

Captain Syme succeeded in getting the Article 32 hearing delayed for 14 days and MAJ O'Brien returned from Hawaii to attend it. However, just as she refused to speak to him before the hearing, she also refused to testify during the hearing. The PHO was legally required to declare her "unavailable,"[5] even though she remained in the conference room and observed the entire hearing. Although the PHO had a copy of her four-page written statement to review, he was unable to consider the long interview on which it was based. Unlike CPT Goldstein, CID did not record her interview because she asked them not to.

At the Article 32 hearing, CPT Syme attempted to provide the PHO with evidence of MAJ O'Brien's motive to fabricate the allegations and to her poor credibility. He had hoped to "kill" the case at the preliminary hearing by demonstrating it was absurd on its face. He sought to

[3] E.L. JAMES, FIFTY SHADES OF GREY (2012).
[4] National Defense Authorization Act For Fiscal Year 2012, Pub. L. No. 112-181, § 582, 125 Stat. 1431 (2011) [hereinafter FY12 NDAA] (permitting the immediate "expedited transfer" for alleged victims of sexual assault)
[5] 10 U.S.C.S. § 832 (d)(3) (2015) ("A victim may not be required to testify at the preliminary hearing. A victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing.").

introduce evidence of MAJ O'Brien's previous infidelities and previous rape allegations he believed she made falsely. He argued these gave her an obvious reason to fabricate the allegations against CPT Goldstein and affected her overall credibility. He also tried to admit evidence that, contrary to MAJ O'Brien's claims that CPT Goldstein had forced her to have "rough sex" with him, that was the precise behavior she had engaged in consensually with her other sexual partners.

Finally, CPT Syme tried to introduce evidence that MAJ O'Brien had cheated on her husband, CPT Smith, multiple times. The last time this happened, CPT Smith had told her, in no uncertain terms, he would divorce her if she ever did it again. In fact, CPT Syme had evidence that the day her husband returned from a deployment he had found lurid emails CPT Goldstein had sent MAJ O'Brien. When CPT Smith questioned her about them, MAJ O'Brien became frantic. She exclaimed that she had sex CPT Goldstein only one time, and it was when he raped her.[6]

Before CPT Syme could finish his request for the PHO to consider any of this evidence, the SVP objected, telling the PHO those issues were off limits, violated Military Rule of Evidence (MRE) 412,[7] and had no relevance to determining whether probable cause existed. The SVC then reiterated the same objections. The Trial Counsel also spoke up to say the TDC's attempts to embarrass a victim of sexual assault were irrelevant and that the purpose of the hearing was not to provide discovery. The PHO did not allow CPT Syme to introduce any of the evidence during the hearing.

The PHO released his report several weeks after the hearing. Surprisingly, he actually recommended dismissing the charges. Although CPT Goldstein was elated, CPT Syme told him not to celebrate yet. He had been down this road before and had a good idea of what was coming. He also knew the new CG, who had just been promoted to lieutenant general, had recently attended a weeklong "SHARP Summit" with other general officers led by the Secretary of the Army and Army Chief of Staff. That was the same time when the Goldstein/O'Brien saga became a public story and the Secretary of Defense spoke about it on CNN.

A well-known United States Senator recently spoke to the new CG after she met with MAJ O'Brien and other "survivors" from across the installation during Sexual Assault Awareness Month. Captain Syme's concern for his client grew when he heard that the CG had told the Senator that he took the sexual assault epidemic seriously, and that he would root out and "crush" all sexual predators on the installation. Captain Goldstein's past heroism meant nothing at this point,[8] because the newly minted CG, CPT Syme feared, was not going to set the conditions for a disgruntled MAJ O'Brien to appear on CNN, or possibly see her as the senator's

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[6] She later told CID that CPT Goldstein had actually raped her several times. During yet another interview, she also admitted she did have an affair with CPT Goldstein, but it only continued as long as it did because after CPT Goldstein raped her the first time she felt trapped, brainwashed, and forced to stay in the relationship with him, despite her marriage to CPT Smith.

[7] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 412 (2012) [hereinafter 2012 MCM].

[8] The 2014 National Defense Authorization Act struck the language from Rule for Court-Martial 306 that allowed for a commander to consider an accused's character and military service when initially determining how to dispose of a case. National Defense Authorization for Fiscal Year 2014, Pub. L. No. 113-66, § 1708, 127 Stat. 672 (2013) [hereinafter FY14 NDAA].

guest at the next State of the Union address.[9] Plus, CPT Syme surmised that the CG knew if he didn't "take this issue seriously," he could forget about another star, or ever getting a good job after he retired.[10] He may end up not retiring at his new rank given what had happened to general officers involved in similar cases.[11]

Reflecting on the history of this case, the current contours of the military justice system, and the challenges he faces, CPT Syme feels grave concern at that moment about CPT Goldstein's fate. Sitting in the courtroom, waiting for the military judge to enter and for the Article 39(a) session to begin,[12] he hopes the madness will end soon.

"All rise!" announces the trial counsel. Captain Goldstein looks around at the platoon of advocates positioned against him and then tells CPT Syme with no sense of irony: "Saul, they weren't lying when they said, '*The United States* versus CPT Emmanuel Goldstein!'"

II. The Visible War

Soldiers accused of sexual assault and other sexually-based offenses now face a system which is stacked unfairly against them.[13] Recent reforms to military law and practice have focused

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[9] K.C. Johnson, *Shame on Gillibrand*, MINDING THE CAMPUS (Jan. 22, 2015), http://www.mindingthecampus.org/2015/01/shame-on-gillibrand/. Dr. Robert David "KC" Johnson is a history professor at Brooklyn College who has written extensively about campus political issues, including a book about the Duke Lacrosse Team rape hoax. In this article, he criticizes United States Senator Kirsten Gillibrand for inviting Emma Sulkowicz as her special guest to the President's State of the Union address. Ms. Sulkowicz, a Columbia University student at the time, had alleged another student had sexually assaulted her. A Columbia University disciplinary panel found her alleged assailant not responsible for this offense under a preponderance of the evidence standard. He was never charged or prosecuted by criminal authorities. Afterwards, Ms. Sulkowicz began carrying her dormitory room mattress around campus as part of a performance art project for class credit which gained her international publicity. Her stated goal was to do this until the university expelled her "rapist." Senator Gillibrand praised Ms. Sulkowicz' campaign and referred to her alleged assailant as a serial rapist, even though he was never prosecuted, convicted, or even found responsible by the university under its preponderance standard); *See* David French, *Kirsten Gillibrand's Campus-Rape Mendacity*, NATIONAL REV. (June 11, 2015, 3:59 PM), http://www.nationalreview.com/article/419646/kirsten-gillibrands-campus-rape-mendacity.

[10] Senator Claire McCaskill prevented the promotion of Air Force Lieutenant General Susan Helms for taking a similar action in granting clemency to an Air Force officer convicted of sexual assault. David Alexander, *Female U.S. General Who Overturned Sex-Assault Ruling to Retir*e, REUTERS (Nov. 8, 2013, 7:22 PM), http://www.reuters.com/article/2013/11/09/us-usa-defense-sexualassault-idUSBRE9A800A20131109; U.S. COMMISSION ON CIVIL RIGHTS, SEXUAL ASSAULT IN THE MILITARY 179 (Sep. 2013), http://www.usccr.gov/pubs/09242013_Statutory_Enforcement_Report_Sexual_Assault_in_the_Military.pdf [hereinafter U.S. COMMISSION ON CIVIL RIGHTS] ("Senator McCaskill nevertheless put the nomination on 'permanent hold,' arguing that Helms has 'sent a damaging message to survivors of sexual assault who are seeking justice in the military justice system.' It is doubtful that ambitious members of the military will fail to take note of Helms' fate.").

[11] Kristin Davis, *Lt. Gen. Franklin Will Retire as a 2-star,* AIR FORCE TIMES (Jan. 9, 2014), http://www.airforcetimes.com/apps/pbcs.dll/article?AID=/201401091322/ NEWS/301090021 (Due to political pressure, Lieutenant General Craig Franklin ended up retiring before he had the requisite time in grade to retire at the three start level.)

[12] Pursuant to Military Rule of Evidence 412, everyone in the courtroom other than counsel, the military judge, court reporter, the accused, and the alleged victim would have to leave the courtroom once the hearing commences.

[13] For the sake of convenience, I use the term "Soldier" or "Soldiers" in this article to refer to any servicemember. Also, because the reported victims of most military sexual assaults are female and the reported suspects are male, I

entirely on making it easier to convict Soldiers and providing comfort to the alleged victims of sexual assault, rather than ensuring impartial justice prevails. These reforms have abrogated the rights of the accused too far.[14] Since the pendulum of justice does not seem likely to swing the opposite direction in the foreseeable future, this article offers some practical suggestions which can lead to more just outcomes for law enforcement officers, prosecutors, and others.[15]

If the men and women serving in military law enforcement and prosecutorial roles better understand the unique perspective defense counsel have and the challenges they face,[16] it may help them focus more on doing justice rather than succumbing to the temptation to just win cases. If they take extra precaution to remain neutral and open-minded at *every* stage of a case, practice their profession as transparently as possible, and avoid gamesmanship, potential miscarriages of justice are much less likely to occur.

After describing some of the factors that created the perceived military sexual assault epidemic, I will elaborate on the top issues military defense counsel now confront when defending sexual assault cases.[17] Finally, I will suggest some ways to ensure Soldiers accused of sexual assault are treated fairly that do not require major overhauls to the military justice system.[18]

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typically use the male and female pronouns to designate those parties in this article. Unless I state otherwise, however, I intend that the sexes are interchangeable.

[14] These issues have also concerned the leaders of military defense counsel organization. In November 2013, these senior judge advocates from all branches of the service (and several experienced civilian criminal defense attorneys) testified before the Response Systems to Adult Sexual Crimes Panel (RSP) about the concerns of the defense bar. *See* Transcript of Response Systems to Adult Sexual Assault Crimes Panel: The Role of the Commander in the Military Justice System: Perspectives of the Military Defense Bar 291-396 (Nov. 8, 2013) [hereinafter RSP Transcript], http://responsesystemspanel.whs.mil/meetings/meetings-panel-sessions/20131107-08, https://www.dvidshub.net/video/310232/sexual-assault-hearings (video of the hearing). In 2012, Congress created the RSP "to provide recommendations on how to improve the effectiveness of the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses." National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 576, 126 Stat. 1632, 1758–60 (2012). The Judicial Proceedings Panel (JPP) succeeded the RSP. *See* Charter of the JPP, http://jpp.whs.mil/index.php/meetings/2014-06-11-20-28-9/2014-06-11-20-28-7/20140807. The JPP met first on August 7, 2014 and has met numerous times since then in full committee and in subcommittees. *Id*.

[15] Shortly after I began my current assignment, Mr. Russell Strand, the Chief of the Behavioral Sciences Education and Training Division at the United States Army Military Police School (USAMPS), invited me teach a block of instruction to the Special Victims Capability Course (SVCC) on the defense counsel's perspective on military sexual assault cases. *See* Major Mason S. Weiss, *A Defense Perspective on Sexual Assault* (Aug. 5, 2015) (unpublished PowerPoint presentation) (on file with author). Mr. Strand is a retired Army Criminal Investigation Command (CID) Special Agent who has served as a civilian employee at USAMPS since 1996. He is a subject matter expert on military sexual assault and often lectures on the topic. Interview with Mr. Russell Strand, Chief, Behavioral Sciences Education and Training Division, USAMPS, in Fort Leonard Wood, Mo. (Dec. 1, 2015). Mr. Strand created the SVCC to better train criminal investigators, prosecutors, special victim prosecutors (SVPs), special victim counsel (SVCs), and others on how to properly investigate sexual assault cases, and when appropriate, how to successfully prosecute them. *Id.* The SVCC is held ten times a year at Fort Leonard Wood and some other locations. I have written this to share the information I present at the SVCC with a wider audience.

[16] Although I no longer serve as a defense counsel and my views do not represent any agency's position, I present the perspective I believe those who have recently represented Soldiers accused of sexual assault have on the issue.

[17] This article focuses on the impact on defense counsel. It does not purport to provide a fully comprehensive and objective analysis regarding all of the issues of sexual assault and military justice.

[18] To correct the imbalances created by the recent changes to the UCMJ and to actually reduce the number of sexual assaults that occur will require another major overhaul to both the UCMJ and to institutional practices that are

III. The "Military Sexual Assault Epidemic"

> [T]he framing of the military sexual assault problem—the "crisis" meme currently dominating the discourse—invokes a powerful logical fallacy: *argumentum ad populum*, wherein if something is believed by many or *appears* to be believed by many, it must be true. The case need not necessarily be strong, only visible.[19]

Defending Soldiers accused of sexual assault did not use to be significantly different than defending Soldiers accused of any other crime. But over the last decade, lawmakers started making significant changes to the military justice system in reaction to a perceived sexual assault crisis.[20] They did so even though it was questionable whether such a crisis or epidemic ever actually existed.[21] Because this crisis notion caused drastic changes to military law affecting the rights of the accused, it is worth questioning the accuracy of that narrative and understand how it led to the current state of military justice.[22]

Ironically, in an era where most people claim to "support the troops," insinuating the military had or continues having a sexual assault epidemic maligns these same troops.[23] Similarly,

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beyond the scope of this article. I agree, however, with the proposals that fellow judge advocates, Majors Robert Murdough and Reggie Yager, recommend. *See generally* Major Robert E. Murdough, *Barracks, Dormitories, And Capitol Hill: Finding Justice in the Divergent Politics of Military and College Sexual Assault*, 223 MIL. L. REV. 233, 306-10 (2015); Major Reggie D. Yager, *What's Missing from Sexual Assault Prevention and Response* 81-118 (Apr. 22, 2015) (unpublished thesis), http://ssrn.com/abstract=2697788.

[19] Major Matthew Burris, *Thinking Slow About Sexual Assault in the Military*, 22 BUFF. J. GENDER, L., & SOC. POL'Y 21, 50 (2014-2015), http://ssrn.com/abstract=2414494.

[20] National Defense Authorization Act For Fiscal Year 2005, Pub. L. No. 108-375, § 577, 118 Stat. 1811, 1924–26 (2005) (explain how the 2005 NDAA did this); *See* Lisa M. Schenck, *Sex Offenses Under Military Law: Will the Recent Changes in the Uniform Code of Military Justice (UCMJ) Re-traumatize Sexual Assault Survivors in the Courtroom?*, 11 OHIO ST. J. CRIM. L. 439, 442-45 (2014).

[21] *See, e.g.*, Lisa M. Schenk, *Informing the Debate About Sexual Assault in the Military Services: Is the Department of Defense Its Own Worst Enemy?*, 11 OHIO ST. J. CRIM. L. 579, 581-82, 599 (2014) (Schenk, an Associate Dean and Professional Lecturer at George Washington University Law School, is a retired Army Colonel and former Army Court of Criminal Appeals judge. Her extensive article compiles and analyzes recent data on military sexual assault. She raises concerns on the reliability statistics on military sexual assault since, unlike the Department of Justice, the military has relied on surveys with imprecise definitions to gather its data. *See also* Burris, *supra* note 18, at 4 n. 14 (citing Rosa Brooks, *Is Sexual Assault Really an 'Epidemic'?* FOREIGN POLICY, Jul. 10, 2013), http://www.foreignpolicy.com/articles/2013/07/10/is_sexual_assault_really_an_epidemic_cancer; *See infra* notes 21-26 (Every survey on the number of sexual assaults in the military relies wholly on information provided by those who respond to the surveys. Answers to the surveys are not made under oath or subject to penalty of perjury. Even assuming for the sake of argument everyone answers them truthfully, given the complexity of alcohol-related sexual assaults, it is not clear that even those who do report they were sexually assaulted necessarily suffered a cognizable offense under the UCMJ; *see* Dr. Carol Tavris: Who's Lying, Who's Self-Justifying? Origins of the He Said/She Said Gap in Sexual Allegations, The Amazing Meeting 2014 (Aug. 6, 2014), https://www.youtube.com/watch?v=TGMi0UtvTIc. Dr. Carol Tavris is a renowned social psychologist who has collaborated with Dr. Elliot Aronson, another renowned social psychologist. Aronson studied under Dr. Leon Festinger, the psychologist/scholar who developed the theory of cognitive dissonance.

[22] U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 10, at 159 ("Radical policy changes should not be based on press-generated, shark-attack mentality. The best available data indicates that there is no sexual assault crisis in the military, nor a lack of attention paid to sexual assault by military leaders.").

[23] "The Marines and sailors defended by the DSO are not attackers, victimizers, assailants, rapists, or any other pejorative brand they have been given, and I'm disturbed by the loose and repeated application of those brands

notions that military leaders have not taken sexual assault seriously,[24] or that they have covered-up sexual assaults are also misplaced.[25]

Because of this perceived epidemic, military lawyers defending those accused of sexual assault now fight on a particularly tough terrain. Their job, which was never popular, now is even less so, and so are their clients. Prior to the attention that brought about these recent reforms, the notion that military justice tilted too favorably towards defendants was precisely the opposite of what much of the public perceived, and for good reason.[26] Unlike the civilian justice system, military justice has always been predicated on both promoting justice *and* maintaining good order and discipline.[27] Maintaining good order and discipline requires, among other things, that commanders have a system allowing them to administer justice swiftly. For the military to accomplish these goals, those subject to its authority must comply with rules, regulations, and policies that civilians would not tolerate in a criminal justice system.

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particularly in advance of a finding of guilty." Testimony of Colonel Joe Perlak, Chief Defense Counsel of the United States Marine Corps & Officer in Charge of the Marine Corps Defense Services Organization, RSP Transcript, *supra* note 14, at 303-04; *See* U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 10 ("I believe the June 4th [2013] hearing of the Senate Armed Services Committee at which some of the military's highest ranking officers were berated about the results of the 2012 *Survey* was a regrettable spectacle—especially since the survey results were probably faulty. A supplicating Army Chief of Staff Gen. Raymond T. Odierno attempted to reassure the panel by testifying."); Jennifer Steinhauser, *Sexual Assaults in Military Raise Alarm in Washington*, N.Y. TIMES (May 7, 2013) ("The report quickly caught fire on Capitol Hill, where women on the Armed Services Committee expressed outrage at two Air Force officers who suggested they were making progress in ending the problem in their branch.").

[24] The military prosecutes cases that civilian district attorneys would likely decline. *See* Dwight H. Sullivan, Testimony at U.S. Commission on Civil Rights (Jan. 11, 2013), http://www.c-spanvideo.org/program/310331-1 ("[I]n 2012, the Air Force tried 15 off-base sex assault cases that the civilian jurisdiction declined to prosecute because they saw the case as unwinnable."); *see also* Nancy Montgomery, *Air Force Strengthens Sex Assault Prosecutions With New Measures*, STARS & STRIPES (Jan. 9, 2013), http:// www.stripes.com/news/air-force-strengthens-sex-assault-prosecutions-with-new-measures-1.203291 (quoting psychologist David Lisak who stated,"it does seem that there are far more cases being taken to trial, including cases you'd never see in civilian court."); *See* Testimony of Ms. Teresa Scalzo, Deputy Director of U.S. Navy Trial Counsel Assistance Program, Transcript of the Judicial Proceedings Panel at 12, 40 (Sept 9, 2014) [hereinafter JPP Transcript], http://jpp.whs.mil/public/docs/05 Transcripts/20140919_Transcript_Final.pdf ("I can tell you that a good deal of the cases prosecuted by the military are not crimes with any state jurisdictions. I know this because of my decade plus of consulting with state and local prosecutors as a specialist in alcohol-facilitated sexual assault. As a result, the military ends up prosecuting cases that are far more difficult to prove than many of our civilian colleagues" . . . . "Most of our cases have very little corroboration, other than the victim's word itself.").

[25] Murdough, *supra* note 18, at 279 n. 212 (In fiscal years 2011, 2012, 2013, and 2014, court-martial charges accounted for 62%, 68%, 71%, and 64%, respectively, of "sexual assault offenses" (including both penetrative and non-penetrative crimes) on which commanders took action. Among thousands of reports across the DoD in those same four fiscal years, commanders disposed of only a handful of penetrative offenses through non-judicial punishment or administratively.)

[26] *See, e.g.*, Edward T. Pound, *Unequal Justice: Why America's Military Courts are Stacked to Convict*, US NEWS AND WORLD REPORT, Dec. 16, 2002 at 21 (explaining the pitfalls of the military justice system); *but see* F. LEE BAILEY, FOR THE DEFENSE 38 (1975) ("The fact is, if I were innocent, I would far prefer to stand trial before a military tribunal governed by the Uniform Code of Military Justice than by an court, state or federal.") Needless to say, Mr. Bailey made this comment long before the military implemented the reforms that this article describes.

[27] 2012 MCM, *supra* note 7, pt. I, ¶ 3 (2012) [hereinafter 2012 MCM] ("The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.").

For instance, no other jurisdiction in the United States allows for a hand-picked jury consisting of as few as five people to convict someone of a felony offense based on a two-thirds vote.[28] No other jurisdiction allows its residents to face a criminal conviction for crimes that a prosecutor can create out of whole cloth.[29] No other jurisdiction criminalizes disrespecting or disobeying your supervisors.[30] The military's trial and appellate judiciaries are structurally under the same leadership responsible for those of its prosecutors and defense attorneys.

The belief that the military justice system is too friendly towards defendants is not based on fact. Rather, it is the result of a recent moral panic about sexual assault and the unfounded belief that too many Soldiers accused of the offense have escaped justice.[31] The hysteria about sexual assault has swept the country, especially with regards to the military and universities.[32] This moral panic has even redefined what the very term *sexual assault* means.[33] While it is terrible that any sexual assault occurs, it is inaccurate and misleading to claim the military has a sexual assault crisis or epidemic.[34]

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[28] UCMJ, art. 25(a)(2)(2012); 2012 MCM, *supra* note 7, R.C.M. 501(a), 503(a), 504, 921(c)(2). An accused in the military is not entitled to a jury of his peers or to cross-representation of the community. United States v. Dowty, 60 M.J. 163, 169 (C.A.A.F. 2004).

[29] UCMJ, arts. 133, 134 (2012) (allowing charges for actions considered "conduct unbecoming an officer and a gentleman" or "conduct that is either prejudicial to good order and discipline in the armed forces or service-discrediting."). "The military is, by necessity, a specialized society separate from civilian society. . . . The military has . . . by necessity, developed laws and traditions of its own during its long history." Parker v. Levy, 417 U.S. 733, 743 (1973) (citations omitted).

[30] *See* UCMJ, arts. 91, 92 (2012).

[31] Scott A. Bonn, *Moral Panic: Who Benefits From Public Fear? Moral panics maintain the status quo*., PSYCHOLOGY TODAY, Jul. 20, 2015, https://www.psychologytoday.com/blog/wicked-deeds/201507/moral-panic-who-benefits-public-fear; *See* Caroline Kitchens, *It's Time to End 'Rape Culture' Hysteria*, TIME, Mar. 20, 2014, http://time.com/30545/its-time-to-end-rape-culture-hysteria/#30545/its-time-to-end-rape-culture-hysteria/;

[32] Christina Hoff Sommers, *The Media is Making College Rape Culture Worse*, THE DAILY BEAST (Jan. 21, 2015 5:45 AM), http://www.thedailybeast.com/articles/2015/01/23/the-media-is-making-college-rape-culture-worse.html# (Hoff Sommers debunks the myth that a sexual assault epidemic exists on college campuses and exposes the faulty statistics that claim one in five women are sexually assaulted in college. She also explains the history behind the National Public Radio (NPR) and the Center for Public Integrity's misleading story about college sexual assault that aired in 2010 which led to the Department of Education implementing policies to make it easier to expel students accused of sexual assault.); *See also* Heather MacDonald, *An Assault on Common Sense: The phony campus rape crisis*, THE WEEKLY STANDARD (Nov. 2, 2015), http://www.weeklystandard.com/an-assault-on-common-sense/article/1051200 (McDonald also critiques the survey methods used to argue campus rapes are prevalent); Glenn Harlan Reynolds, *The Great Campus Rape Hoax: Column*, USA TODAY (Dec. 14, 2014, 9:40 AM), http://www.usatoday.com/story/opinion/2014/12/14/campus-rape-uva-crisis-rolling-stone-politics-column/20397277/ (also debunking the "1 on 5 statistics" of campus rape).

[33] Jeannie Suk, *St. Paul's School and a New Definition of Rape*, THE NEW YORKER (Nov. 3, 2015), http://www.newyorker.com/news/news-desk/st-pauls-school-and-a-new-definition-of-rape ("We are in the midst of a significant cultural shift, in which we are redescribing sex that we vehemently dislike as rape, and sexual attitudes we strongly disapprove of as rape culture.").

[34] *See, e.g.*, Yager, *supra* note 18, at 38-43 (providing a thorough critique of the methods used in all surveys to determine if servicemembers were sexually assaulted); Murdough, *supra* note 18, at 275-80 (addressing the weaknesses in obtaining reliable data in previous surveys); Burris, *supra* note 19, at 4 (explaining that the data from fiscal year 2012 indicate that at least 98% of all servicemembers *were not* sexually assaulted); Schenk, *Informing the Debate About Sexual Assault in the Military Services*, *supra* note 21 at 595-609 (discussing the 2012 DoD Sexual Assault Report); Tricia D'Ambrosio-Woodward, *Military Sexual Assault: a Comparative Legal Analysis of the 2012 Department of Defense Report on Sexual Assault in the Military: What It Tells Us, What It Doesn't Tell Us, and How Inconsistent Statistic Gathering Inhibits Winning the "Invisible War",* 29 WISC. J. OF L. GENDER &

Determining the precise number military personnel sexually assaulted in any given year is a difficult task,[35] but regardless of the data one relies on, the reported figures do not indicate epidemic levels.[36] For instance, in 2014, the Rand Corporation produced the most recent set of widely quoted statistics on the number of servicemembers who were sexually assaulted in the previous year.[37] Rand estimated approximately 20,300 out of 1.3 million servicemembers (10,600 men and 9,600 women) were "sexually assaulted" the previous year.[38] From that figure, 43% of men (4,558) and 35% of women (3,360) experienced "penetrative assaults."[39] In other words, RAND estimates a total of 1.5% of the United States Armed Forces reportedly suffered some type of sexual assault and .06% reportedly suffered what most people would commonly understand as rape or sexual assault (a penetrative act).[40] Assuming, for the sake of argument,

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SOC. 173, 206 (Summer 2014) ("If an attempted rape is classified for reporting purposes as a 'sexual assault' but then not prosecuted as a 'sexual assault' because there was no penetration, this leads to an outcry over the lack of punishment or an abuse of command discretion, when quite simply, as a matter of law, it does not meet the requirements for prosecution."); U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 10, at 148.

> The best evidence available indicates there is no such crisis. Though any sexual assault is an individual tragedy, none of the studies available to the Commission suggests that: (1) the level of such assaults in the military is high relative to comparable civilian populations, (2) the rate of such assaults is increasing, (3) the military is deficient in responding to them (especially compared to civilian authorities), or (4) there is any lack of attention or commitment to the issue.

Id.; Lindsay L. Rodman, *The Pentagon's Bad Math on Sexual Assault*, WALL ST. J., May 20, 2013, at A17 (also critiquing the survey methods used in previous years). Unfortunately, sexual assault, like illegal drug use, is something that the military and every other population will never fully eradicate, and expecting a "zero defect" standard in this area, while admirable to aspire to, is an unrealistic goal.

[35] "Simply asking people to anonymously identify if they have been sexually assaulted is no more accurate than asking an anonymous group of accused how many of them have been falsely accused of sexual assaults." Yager, *supra* note 18, at 43.

[36] *See supra* note 33.

[37] RAND CORP., SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY: VOLUME 2. ESTIMATES FOR DEPARTMENT OF DEFENSE SERVICE MEMBERS FROM THE 2014 RAND MILITARY WORKPLACE STUDY (2014) RR-870/2-OSD, 2015, http://www.rand.org/t/RR870z2 [hereinafter RAND STUDY].

[38] *Id.*, at xviii-xix. I put the term *sexually assaulted* in quotes above because the RAND Study has significant flaws. For instance, it asked those surveyed if they ever experienced "unwanted sexual contact" (which may or may not even constitute an offense) "when you were so drunk, high, or drugged, that you could not understand what was happening or could not show them you were unwilling." *Id.* at 140 (survey question 134). This question sought to discern if the person was "incapacitated." Yet, the question asks for the respondent to subjectively determine this fact, which is something that should be defined objectively. In other words, if a person truly was incapacitated, how could he or she reliably determine that by himself or herself? The surveys also did not ask questions about the potential mistake of fact on the part of the alleged perpetrators, which would have negated any criminal liability on their parts. *See* Yager, *supra* note 18, at 40-42.

[39] RAND STUDY, *supra* note 37, at xix.

[40] To break down the numbers, RAND estimates that 1% of men and 4.9% of women were sexually assaulted in 2014 and that one third of the one percent of men (.033%) and one-half (2.49%) of women, suffered a penetrative assault. RAND STUDY, *supra* note 37, at xviii-xix. In the civilian world, the Department of Justice, which compiles data on this subject most accurately, indicates the rate of sexual assault in the United States from 1995 to 2013 *was less than one percent* for 18-25 year old women (.61 per 100 for female college students and .76 per 100 for non-college students). *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGED FEMALES, 1995-2013, TABLE 1 (2014), http://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf.

the accuracy of such figures, they are still low for any population. And considering the unique nature of the military service, where people have authority over each other in ways unparalleled in civilian society, such figures are especially low.

Furthermore, the vast majority of conduct that gives rise to sexual assault allegations in both the military and civilian environment stem from situations where only the accused and alleged victim are present. As a result, the evidence of consent or non-consent is frequently limited to the competing accounts of the only two people with knowledge of what occurred. The military routinely prosecutes such "he said/she said" cases, including challenging ones which involve intoxicated participants.[41] When these types of cases occur on college campuses, civilian prosecutors typically do not pursue them and the schools handle them through administrative sanctions.[42]

The truth is there is no crisis, epidemic, or cover-up, and conversely, the military prosecutes sexual assault with vigor.[43] Rather than dispute these allegations of complacency,[44] the Pentagon conceded failure. Installation level commanders endorsed this inaccurate epidemic narrative.

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[41] *Infra* notes 50-52, 61-62, 67-69, 143, 166, 171, 184-185, 192, 215, 232.

[42] For the last several years, colleges and universities have employed a quasi-judicial system to expel students accused of sexual assault, with little to no due process. This has generated its own set of considerable problems. *See e.g.*, Stuart Taylor Jr. & K.C. Johnson, *The New Standard for Campus Sexual Assault: Guilty until Proven Innocent*, NATIONAL REV. (Dec. 30, 2015, 4:00 AM), http://www.nationalreview.com/article/428910/campus-rape-courts-republicans-resisting; Ashe Schow, *The anti-campus sex assault movement is elitist*, WASH. EXAMINER (Oct. 15, 2015, 1:00 AM), http://www.washingtonexaminer.com/the-anti-campus-sexual-assault-movement-is-elitist/article/2574000. Expelled students have begun pushing back with lawsuits. *See* Tovia Smith, *For Students Accused of Campus Rape, Legal Victories Win Back Rights*, Morning Edition, NATIONAL PUBLIC RADIO (Oct. 15, 2015, 4:45 AM), http://www.npr.org/2015/10/15/446083439/for-students-accused-of-campus-rape-legal-victories-win-back-rights; Murdough, *supra* note 18, at 263-66 (explaining the dichotomy between Senator Gillibrand and others who want military commanders removed from decisions to prosecute in sexual assault cases but who want college administrators empowered through Title IX and federal law to use administrative sanctions against students accused of sexual assault.).

[43] U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 10, at 175 ("The military services prosecute many types of sexual assault cases that civilian prosecutors chose not to pursue."); Gail Heriot, *Harassing the Military—There is No Sexual Assault Crisis*, THE WEEKLY STANDARD (July 8, 2013), http://www.weeklystandard.com/articles/harassing-military_738058.html.

> Prosecution rate comparisons are difficult, since civilian jurisdictions are not required to publish statistics. Even if they were, they would be of little use, since for service members, reporting a sexual assault to military authorities is as much like reporting it to an employer as it is like reporting it to the police. The statistics would not be comparable. Insofar as there is evidence, however, it suggests that the military is now more aggressive in prosecuting sexual assaults than civilian jurisdictions. For example, when a rape involving military personnel occurs off-post, civilian and military authorities both have jurisdiction. On those occasions in fiscal year 2011 on which the civilian jurisdiction took the lead, prosecution rates were 11 percent. In contrast, the military's prosecution rate was 55 percent.

Id; U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 10, at 148.

[44] Burris, *supra* note 19, at 16-17 ("[T]he voices of those who are reasonably satisfied with the military's response to their sexual assault allegation or believe that justice was done in their case are recorded on the empty pages of the Congressional Record, newspapers and blogs."); U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 10, at 172 ("Good news—especially on a topic like sexual assault is boring.").

For instance, the Army has required some Soldiers to watch the purported documentary *The Invisible War*,[45] a tacit endorsement of mendacious propaganda produced to promote a biased agenda.[46] The *Invisible War* did, however, provide a convenient *Reichstag Fire* for politicians to promote their reforms.[47] Unfortunately, by embracing propaganda such as *The Invisible War*, military leaders have preempted any serious questioning about whether a crisis exists in the first place. That, in turn, has kept people from vocalizing valid concerns about the rights of those accused of sexual assault. After all, if leaders at the highest levels assert that the military has a sexual assault "epidemic," why would more junior officers or any Soldiers want to be thought of as being "on the side of rapists?"[48] This fear has also resulted in questionable cases

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[45] THE INVISIBLE WAR (CHAIN CAMERA PICTURES, 2012). *The Invisible War* does not include interviews with anyone described in the movie who allegedly committed any of the sexual assaults, a prosecutor or defense counsel from any of the cases, or any commanders of those accused or commanders of any of the alleged victims who the alleged victims lambast. Nor does the movie show any nuance. It shows none of the countless cases where a servicemember is convicted and sentenced for sexual assault. It is also questionable if the producers did anything to validate the alleged victims' assertions. *See* Trial testimony of former Marine Lieutenant Ariana Klay, http://www.farajlaw.com/documents/Klay-s-Trial-Testimony.pdf (indicating she had a long term consensual relationship (while she was married) with her alleged attacker, who she reported for sexually assaulting her after their relationship soured); *see* J. Taylor Rusing, *Group of Senators Begin Push to Remove Sex Assault Cases from the Chain of Command*, STARS & STRIPES, Nov. 6, 2013, http://www.stripes.com/news/group-of-senators-begin-push-to-remove-sex-assault-cases-from-chain-of-command-1.1251408; *See also* Dwight Sullivan, *"The Invisible War": uninformed, dishonest, or both?*, CAAFLOG (July 11, 2012), http://www.caaflog.com/2012/07/11/invisible-war-uninformed-dishonest-or-both/.

[46] *See e.g.*, Brittany Carlson, *Documentary Educates in a SHARP Way*, BELVOIR EAGLE (Feb. 22, 2013), http://www.army.mil/article/97020/Documentary_educates_in_a_SHARP_way/; Sergeant Jessica Spradlin, *New Sexual Assault Documentary, "The Invisible War" Required Viewing for all I Corps NCOs and Officers*, NW MILITARY (Apr. 11, 2013), http://www.northwestmilitary.com/news/focus/2013/04/New-sexual-assault-documentary-The-Invisible-War-required-viewing/; Ruth Marcus, "*The Invisible War' Helps Open Eyes to Military's Sexual Assault Problem*, WASH. POST (June 6, 2013), http://www.washingtonpost.com/opinions/invisible-war-helps-open-eyes-to-militarys-sexual-assault-problem/2013/06/06/840cfb78-ced9-11e2-8f6b-67f40e176f03_story.html (noting the Coast Guard Commandant ordered senior leaders to watch the film); Steve Pond, *Military Rape Documentary 'Invisible War' Leads to Policy Changes Before Its Opening*, THE WRAP (June 18, 2012, 6:35 PM), http://www.thewrap.com/movies/column-post/military-rape-documentary-invisible-war-leads-policy-changes-its-opening-44671/. The producers of *The Invisible War* also made the movie *The Hunting Ground*. THE HUNTING GROUND (CHAIN CAMERA PICTURES, 2015). That movie showcased the alleged epidemic of sexual assaults on college campuses and was similarly replete with misinformation. Emily Yoffe, *How The Hunting Ground Blurs the Truth*, SLATE (June 1, 2015, 11:07 AM), http://www.slate.com/articles/news_and_politics/doublex/2015/06/the_hunting_ground_a_closer_look_at_the_influential_documentary_reveals.html?wpsrc=sh_all_dt_fb_bot. The makers of *The Hunting Ground* do not respond to criticism well. They have insinuated that challenging their claims about a supposed college rape epidemic amounts to creating a "hostile environment" for college students which would violate Title IX. Jeannie Suk, *Shutting Down Conversations About Rape at Harvard Law*, THE NEW YORKER (Dec. 11, 2015), http://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school.

[47] Jennifer Steinhauser, *2 Democrats Split on Tactics to Fight Military Sexual Assaults*, N.Y. TIMES (Nov. 1, 2013), http://www.nytimes.com/2013/11/02/us/politics/2-democrats-split-on-tactics-to-fight-military-sex-assaults.html (Senator Gillibrand "handed out scores of copies" of *The Invisible War*.); Rebecca Huval, *Sen. Gillibrand Credits the Invisible War with Shaping New Bill*, PBS (May 10, 2013), http://www.pbs.org/independentlens/blog/sen-gillibrand-credits-the-invisible-war-in-shaping-new-bill. Several "victims" featured from the movie met with Representative Jackie Speier and Senator Claire McCaskill. *Id.*; U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 10, at 151 ("Undermining command authority in the military and inserting civilian control, not just at the top where it properly belongs but at every level of the military, is one of those long-term goals of the political left since the Vietnam War era. Any crisis, real or imagine, may be present a good opportunity to undermine the traditional command authority.").

[48] Burris, *supra* note 19, at 51.

getting sent forward to trial.[49] Doing otherwise in the current climate forces commanders and those judge advocates who advise them to risk being seen as "not taking sexual assault" seriously in an environment where it is *the issue* of concern.[50]

Military leaders now face an unenviable situation. If they prefer charges on weak or questionable cases and send those cases to trial, they open themselves up to accusations of UCI and risk degrading the perception of fairness and integrity of the military justice system.[51] If

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> [I]f nearly everyone appears to believe there is a "sexual assault crisis," then the few who believe otherwise are expected to justify their expressed preferences at length. By contrast, those who endorse the conventional wisdom aligned to a state of crisis are not required to explain themselves. As a result, "skeptics may choose to keep quiet, or even join the dominant chorus, simply to be left alone." Reticence to engage or to challenge prevailing orthodoxies on this issue is also driven by a fear of immediate self-marginalization. The risk of having one's career hopes dashed or of being labeled a "victim blamer" or "rape denier" is palpable and something that most people will actively avoid, even if it involves a degree of self-censorship that discourages or prevents open debate.

Id. (internal citations omitted); *See also* Megan McArdle, *Moral panic won't help end campus rape*, BLOOMBERG VIEW (Jan. 28, 2015), http://www.bloombergview.com/articles/2015-01-28/moral-panics-won-t-end-campus-rape (A moral panic occurs "when a community becomes hysterical about some problem – often, but not always a real one – that becomes defined as an existential threat to public safety and moral order. In such a climate, questioning how big the threat actually is, or contesting any particular example, is not a matter of rational discussion, but of heresy.").

[49] U.S. COMMISSION ON CIVIL RIGHTS, supra note 10, at 75 ("A final concern of military defense attorneys (judge advocates) and their clients is that sexual assault cases are being referred to court-martial even when the evidence is weak. They expressed the view that, rather than looking critically at the evidence, prosecutors presume the accused to be guilty."); Major Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL L. REV. 129, 148-49 (2014); Marisa Taylor & Chris Adams, *Military's Newly Aggressive Rape Prosecution Has Pitfalls*, MCCLATCHY WASHINGTON BUREAU (Nov. 29, 2011), http://www.mcclatchydc.com/2011/11/28/v-print/131523/militarys-newly-aggressive-rape-prosecution-has-pitfalls ("There is a pressure to prosecute, prosecute, prosecute. When you get one that's actually real, there's a lot of skepticism. You hear it routinely: 'Is this a rape case or is this a Navy rape case?'"). This corresponds with my own professional experience and that of virtually every military justice practitioner I know.

[50] Taylor & Adams, *supra* note 49; U.S. COMMISSION ON CIVIL RIGHTS, supra note 10, at 148-149 ("Yet other efforts to respond to political pressure and meet artificial targets may be undermining the justice process: The Commission received persuasive testimony and data that the incidence of unfounded sexual assault reports has increased and the civil liberties of the accused are being undermined by commanders responding to political pressure to 'do more' to respond to 'the crisis.').

[51] *See, e.g.*, United States v. Stewart, 71 M.J. 38 (C.A.A.F. 2012); Marisa Taylor, *Marine's Sex Assault Conviction Tossed as Prosecution Questioned*, MCCLATCHY WASHINGTON BUREAU (Mar. 8, 2012), http://www.mcclatchydc.com/2012/03/08/v-print/141252/marines-sex-assault-conviction; Captain Nicholas Stewart, USMC, *Opinion Analysis: United States v. Stewart, No. 11-0440/MC*, NIMJ-BLOG-CAAFLOG (Mar. 11, 2012, 11:17 PM), http://www.caaflog.com/2012/03/10/opinion-analysis-united-states-v-stewart-no-11-0440mc/#comments; Nancy Montgomery, *Lengthy sexual assault case ends in acquittal*, STARS & STRIPES (Oct. 29, 2015), http://www.stripes.com/news/lengthy-sexual-assault-case-ends-in-acquittal-1.375792 (Describing how a panel acquitted Airman First Class Brandon Wright of all charges and specifications at a general court-martial. Wright's original charges were dismissed, then revived and sent to another convening authority.); Testimony of Elizabeth Hillman, RSP Transcript, *supra* note 14, at 315-16 (Jan. 30, 2014), http://responsesystemspanel.whs.mil/public/docs/meetings/20140130/20140130_Transcript_Final.pdf (testifying about the pressure commanders now feel); Murphy, *supra* note 49 at 152, 178 (discussing the Catch 22 situation commanders now face); U.S. COMMISSION ON CIVIL RIGHTS, supra note 10, at 71-72 ("Some military criminal attorneys believe there is unlawful command influence prejudicing those accused of sexual assault. They believe

they decline to send such cases forward, then they face the wrath of lawmakers and the media.[52] If there is any doubt about what is expected with sexual assault allegations, officers need to look no further than their own evaluation reports, which now must include a rating on their perceived success or failure in this area.[53] Making matters worse, senior leaders, to include the President,[54]seemingly oblivious to the chilling effects their statements create, have called for draconian measures when the military deals with sexual assault cases.[55]

Lawmakers have sent a clear message. They expect every alleged sexual assault prosecuted at court-martial, regardless of the facts or weight of the evidence.[56] That is Congress's "preference."[57] Congress has also made clear it does not want sexual assault allegations disposed of through discharges in lieu of court-martial or resignations.[58] The result is that cases are now going to courts-martial that previously would never have and should never have been adjudicated in that forum.[59] This has happened even though military prosecutors have the same obligations as civilian prosecutors to pursue justice rather than just win cases.[60] This climate sets

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that this, in part, is due to political pressure to increase the number of sexual assault cases referred to court-martial and to increase conviction rates. In some cases, military judges have concurred.").

[52] *See* Michael Doyle and Marisa Taylor, *Bureaucracy has blossomed in military's war on rape,* MCCLATCHY WASHINGTON BUREAU (Nov. 28, 2011), http://www.mcclatchydc.com/2011/11/28/v-print/131524/bureaucracy-has-blossomed-in-military's-war-on-rape ("Military officers began facing new obligations; their promotions could turn, in part, on how well they handled sexual assault issues. Prosecutions have proliferated. No commander, numerous military officers confided on the condition of anonymity, wants to be second-guessed for failing to prosecute even an iffy case.").

[53] AR 623-3, *supra* note 2, paras. 2-10, 2-12, 3-5, 3-7, 3-9, 3-19, 3-25.

[54] President Barack Obama, Address at the Naval Academy Graduation (May 24, 2013) ("I don't want just more speeches or awareness programs or training, but ultimately, folks look the other way. If we find out somebody is engaging in this stuff, they've got to be held accountable—prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged. Period. It's not acceptable."); *See also* Michael D. Shear, *Obama Calls for 'Moral Courage' at Naval Academy Graduation*, N.Y. TIMES (May 24, 2013), http://www.nytimes.com/2013/05/25/us/politics/obama-naval-academy-commencement.html.

[55] Some of these ill-advised statements constituted unlawful command influence. *See* Jennifer Steinhauer, *Remark by Obama Complicates Military Sexual Assault Trials*, N.Y. TIMES (July 13, 2013), http://www.nytimes.com/2013/07/14/us/obama-remark-iscomplicating-military-trials.html?pagewanted=2&_r=1; Michael Doyle, *Tough Talk By Marine Commandant James Amos Complicates Sexual Assault Cases*, MCCLATCHY WASHINGTON BUREAU (Sept. 13, 2012), http://www.mcclatchydc.com/2012/09/13/v-print/168410/tough-talk-by-marine-commandant-james-amos-complicates-sexual-assault-cases. The Secretary of Defense later tried to ameliorate the President's statements. Memorandum from Sec'y of Def. to Sec'ys of the Military Dep'ts, et. al, subject: Integrity of the Military Justice Process (6 Aug. 2013).

[56] Murphy, *supra* note 49, at 163; *See* Testimony of Mr. Edward J. O'Brien, JPP Transcript, *supra* note 24, at 34 (Sept. 19, 2014), http://jpp.whs.mil/public/docs/05-Transcripts/20140919_Transcript_Final.pdf ("My point is that people are being put at risk. We have soldiers – again, I saw many, many sexual assault cases in five years on the trial bench that when I was a Captain would have never gone to trial, where, in my opinion, the hope of conviction was somewhere around zero. And that's what I refer to when I say innocent soldiers are being put at risk.").

[57] *See* FY14 NDAA, *supra* note 8, § 1752(a).

[58] *Id.* § 1753; *See* Murdough, *supra* note 18 at 267 (explaining this language originated in Senator McCaskill's Victim Protection Act of 2013).

[59] Rowan Scarborough, *Aaron Allmon Case Makes Minot Air Force Base Ground Zero Military's New Gender Wars*, WASH. TIMES (Nov. 5, 2015), http://m.washingtontimes.com/news/2015/nov/5/aaron-allmon-case-makes-minot-air-force-base-groun/#!.

[60] Berger v. United States, 295 U.S. 78, 88 (1935).

> [T]he [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to

the background to the theater in which military defense counsel now find themselves performing, and to the hysteria which has started to affect cases and Soldiers' lives.[61]

IV. The Current Playing Field

A. The military justice system has recently abrogated important protections for the accused.

Over the last decade, Congress and the Department of Defense have instituted several changes to the Uniform Code of Military Justice, Rules for Courts-Martial, and rules for practice, in an attempt to make it easier to convict Soldiers of sexual assault, especially for alcohol-related incidents, and harder to defend them.[62] First, Congress, through statute, created new offenses for

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> govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Id.

[61] *See, e.g.*, United States v. Bridenstine, No. 201500041 (N-M. Ct. Crim. App. Oct. 29, 2015) slip. op. at 7-8. Bridenstine is the type of case many military defense counsel now defend regularly. In this case, the court reversed the conviction, finding, while there was evidence the alleged victim was intoxicated, there was no compelling evidence that she was so drunk as to prevent her from expressing her lack of consent to the touching at issue. The court noted that every government witness testified she did not slur her words or stumble that she was engaging in conversation and they had no concerns about her ability to understand what was going on around her. They noted she walked on her own some significant distance to the other side of town. Witnesses testified she was happy, talking, laughing, not slurring her words, and that she had her arm around an accused in an affectionate manner. The evidence indicated her presence in the hotel room with the appellant (and other accused) was both knowing and voluntary. Her testimony indicated she was sufficiently alert to be fully aware of her exact location in the room and that during the sexual activity she was supporting her own weight while balancing in a difficult body position. Further, she stated that during the sexual encounter she was awake, the lights were on, and although she testified the appellant was "making" her perform oral sex, no evidence was presented that she demonstrated to the appellant or the other accused, in any manner, at any time, that she did not consent to any part of the encounter. Moreover, no evidence was presented to indicate she was, through any means, prevented from manifesting her lack of consent or objection to the situation. To the contrary, the NMCCA court noted she spent the remainder of the night with one of her alleged attackers, sleeping with her head on his chest). *See, e.g.*, United States v. Garcia, No. 20130660 (A. Ct. Crim App. 2015) (unpub.) (some findings and sentence set aside because of UCI issues); United States v. Long, No. 20120114 (A. Ct. Crim. App. 2014) (confusion about definitions of "incapable of consenting"); United States v. Torres, No. 201300396 (N.M. Ct. Crim. App. 2014) (noting that Article 120, UCMJ does not define "incapable of consenting"); United States v. Pease, 74 M.J. 763 (N-M Ct. Crim. App. 2015); *See United States v. Jones*, ACM 38434, 2015 CCA Lexis 86 (A.F. Ct. Crim. App. Mar 13, 2015) (unpub. op.) (holding a sexual assault charge legally insufficient where the government charged appellant with engaging in a sexual act while the victim was incapable of declining participation but the evidence showed she was in fact capable of declining participation, and the dispute at trial centered only on whether she had declined or consented). *See* Colonel Timothy Grammel, U.S. Army (Retired), Article 120 Comments and Proposed Amendments, JPP Transcript, *supra* note 24 ("With different and often incorrect information being provided to Soldiers during training on sexual assault in the military, a definition is needed to provide proper guidance for the court members to correctly apply the statute."), http://jpp.whs.mil/index.php/meetings/2014-06-11-20-28-10/2014-06-11-20-28-9/submtg-20150507. Similar confusion exits on the defining the word: "competent", "impairment," "consent", "incapable" and "bodily harm." *See* Testimonies of Ms. Teresa Scalzo, JPP Transcript, *supra* note 24 at, 11-12, Lieutenant Colonel Alex Pickands, at 59; Major Frank Kostik, at 121-22 (Sept. 19, 2014), http://jpp.whs.mil/public/docs/05Transcripts/20140919_Transcript_Final.pdf; U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 10, at 194 ("There is sufficient evidence to warrant a serious investigation into whether the military has been overzealous rather than lackadaisical in its prosecution of sexual assault allegations. The world is funny in that way. All too often things are the opposite of what they appear to be on television. Real people's lives and well-being depend on getting this right.").

[62] Prior to 2007 and its new statutory scheme, the military prosecuted cases where someone had sexual intercourse with an incapacitated person, based on case law. *See, e.g.*, United States v. Mathai, 34 M.J. 33 (C.M.A. 1992)

sexual assault crimes. The first new statute became effective in 2007 and enumerated various offenses under which Soldiers could be charged.[63] That statute specifically prohibited sexual intercourse with "incapacitated victims."[64] The 2007 statute, however, was convoluted and part of it was ultimately found constitutionally infirm.[65] Congress, therefore, enacted another statute in 2012.[66]

The 2012 statutory scheme holds a Soldier criminally responsible for having sex with an intoxicated person. In doing so, however, it applies a simple negligence *mens rea* standard by making an accused liable for sexual assault if he knew "or reasonably should have known" about the victim's incapacity to consent.[67] The accused is judged by the standard of a "reasonably prudent *sober* person."[68] The "reasonably prudent sober person standard" was added to the statute to increase the conviction rates in alcohol related sexual assault cases.[69] Although the statute is gender neutral, in practice, it disproportionately affects male Soldiers.[70]

Second, in 2010, the Army created its SVP program.[71] Since it began, the Army placed experienced trial practitioners in its positions. The SVP program maintains a large budget, extensive resources, and a sanctioned mission to prosecute allegations of sexual assault.[72] The Army's Trial Counsel Assistance Program (TCAP) has also added to its ranks by hiring experienced former civilian prosecutors as Highly Qualified Experts (HQE) to assist with

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(holding that there was sufficient evidence in the record for the trier of fact to find that the victim was unconscious and thus could not consent to sexual intercourse). The 2007 statute made a "sexual act" (penetration) illegal if the victim was "substantially incapacitated" or "substantially incapable of appraising the nature of the act, declining to participate in the act, or communicating unwillingness to engage in the act." MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶45 (2008) [hereinafter 2008 MCM].

[63] The 2007 Article 120 took effect on 1 October 2007 and encompassed sexual misconduct ranging from the most severe offense of rape, to the least severe offense of indecent exposure. *Id.*, app. 28, ¶ 45.

[64] *Id.*

[65] United States v. Prather, 69 M.J. 338, 343 (C.A.A.F. 2011) (Invalidating part of the 2007 statute for having an unconstitutional "double burden" shift.).

[66] FY12 NDAA *supra* note 4, § 573.

[67] 2012 MCM, *supra* note 7, pt. IV, ¶ 45 a(b)(2). A sexual act is criminal if the Soldier knows, or reasonably should know, that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring." *Id.* Section (b)(3) of the 2012 Article 120 also specifically prohibits a person from engaging in a sexual act with another person when the other person is "incapable of consenting to the sexual act" due to "impairment by any drug, intoxicant, or other similar substance, and that condition is known *or reasonably should be known* by the accused." *Id.*, pt. IV, ¶ 45a.(b)(3) (emphasis added).

[68] The accused's state of intoxication, if any, at the time of the offense is not relevant to mistake of fact. 2012 MCM, *supra* note 7, pt. II, R.C.M 916(j)(3). "A mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense." *Id.*

[69] *See* Michael Doyle & Marisa Taylor, *Congress Tries Again to Get Military Sexual Assault Laws Right*, MCCLATCHY WASHINGTON BUREAU (Dec. 13, 2011), http://www.mcclatchydc.com/2011/12/13/133000/congress-tries-again-to-get-military.html.

[70] *See infra* pp. 28, 35-39.

[71] U.S. DEP'T OF ARMY, OFFICE OF THE JUDGE ADVOCATE GENERAL, Policy Memorandum 10-8, subject: Special Victims Prosecutors (29 Jan. 2010).

[72] Lieutenant Colonel Maureen A. Kohn, *Special Victims Unit—Not a Prosecution Program but a Justice Program*, ARMY LAW., Mar. 2010, at 73-74.

prosecuting sex crimes.[73] The Trial Defense Service has not been staffed with the same levels nor has it hired former civilian public defenders with expertise in sexual assault cases."[74]

Finally, Congress has eliminated crucial counter-balances in the military justice system that previously helped ensure fairness to the accused. Important mechanisms originally created to protect the rights of the accused, such as the Article 32 investigation, the convening authority's ability to grant extensive clemency, and the "good Soldier defense" no longer exists because Congress eliminated them. These changes to the UMCJ, which abrogate previously held rights of the accused, resulted ostensibly from the results of one or two controversial cases.[75] Like most cases, they had complicated facts. Lawmakers failed to analyze these few outlier cases before making radical changes based on their dissatisfaction with the results.[76]

1. The Article 32 Investigation

The Article 32 investigation[77] was one important mechanism to protect the accused that Congress eliminated. That important device had served as a "bulwark against baseless charges."[78] Article 32 investigations previously required a "thorough and impartial investigation of all the matters set forth" and an "inquiry as to the truth of the matter set forth in the charges, consideration of the form of the charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline."[79]

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[73] Email from Lieutenant Colonel Kenneth J. Bacso, Chief, Defense Counsel Assistance Program (DCAP), United States Army Trial Defense Service, (Dec. 11, 2015, 11:53 AM) (on file with the author).

[74] *Id.* DCAP currently has one attorney advisor (formerly titled "Highly Qualified Expert") and Trial Counsel Assistance Program (TCAP) has three. DCAP hired a second attorney advisor in January 2016. The disparity in resourcing is a matter of public record.

> The sexual assault prevention legislation has earmarked funds for the prosecution of these offenses, and so we are pumping more money into the prosecution side . . . . And you don't have a mirror image on the defense side, and the whole idea of the military justice system . . . is that there is supposed to be an equality of resources on both sides. And again I think because of the politicization of this issue, you see earmarks going exclusively to the prosecution side. . . . [T]he fact [is] that the defense counsel don't even have investigators. I mean, literally something that would be taken for granted in most public defender's offices . . . military defense counsel don't have.

U.S. COMMISSION ON CIVIL RIGHTS, supra note 10, at 72-73 (citing testimony of Dwight H. Sullivan) .

[75] *See* Ali Weinberg, *Naval Academy Rape Case Could Prompt Changes to Military Hearings*, NBC NEWS (Dec. 12, 12:21 PM), http://www.nbcnews.com/news/other/naval-academy-rape-case-could-prompt-changes-military-hearings-f2D11732125 (Describing the case of an alleged rape of a Naval Academy Midshipmen who was purportedly subjected to an onerous cross-examination by defense counsel at the Article 32 Investigation); Record of Trial: U.S. v. Wilkerson, General Court-Martial Order No. 10, http://www.foia.af.mil/shared/media/document/AFD-130403-023.pdf; Letter from Lt. Gen. General Craig Franklin to Michael B. Donley, U.S. Sec'y of the Air Force (Mar. 12, 2013), http://www.foia.af.mil/shared/media/document/AFD-130403-022.pdf. (Lieutenant General Craig Franklin exercised his clemency powers under then Article 60, UCMJ to completely set aside the findings and sentence in the case of Lieutenant Colonel James Wilkerson. The outcry of that action led to Congress eliminating the ability for convening authorities to take such actions.).

[76] *Id.*

[77] UCMJ art. 32 (2012).

[78] United States v. Samuels, 27 C.M.R. 280, 286 (1959).

[79] UCMJ art. 32 (2012).

Discovery was an expressly provided purpose of the Article 32 investigation.[80] Defense counsel could rely on the Article 32 as a means to pursue exculpatory evidence, discover impeachment information, and determine if a complaining witness might have motives to lie or exaggerate. This right to cross-examination helped discourage witnesses from falsely or frivolously accusing Soldiers of wrongdoing. It was also an excellent method for the government to determine if the charges it brought against Soldiers had actual substance to them.

Had the hypothetical CPT Emmanuel Goldstein's case gone before an Article 32 investigation the convening authority may not have referred it to trial. If the convening authority had seen an Article 32 transcript containing a direct and cross-examination of MAJ O'Brien, and seen evidence of her motives to fabricate based on her fear of getting caught again cheating on her husband, it may have produced a different result. The CG could have made a significantly better decision in the interest of justice if the allegations were tested before expending numerous resources and dragging an innocent person through an onerous trial. Also, the transcript of that Article 32 investigation would have created a record on which the convening authority could have relied if people later scrutinized his decision to not refer the case.

Unfortunately, in 2013 Congress eviscerated the Article 32 investigation, even changing its name to "preliminary hearing."[81] The changes to the new Article 32 became effective on December 26, 2014.[82] Lawmakers, either through ignorance or deliberate indifference seem to believe the new Article 32 preliminary hearing compares to a civilian grand jury hearing. [83] Yet neither version of the Article 32 hearing was ever "grand" or a "jury," but was instead a hearing held in front of one person.[84] And unlike a civilian grand jury, the former Article 32 Investigating Officer's and now PHO's recommendation does not bind a convening authority.[85] While in the past, the Article 32 investigation provided the defense an invaluable tool to investigate cases and the government an opportunity to vet them, the new preliminary hearing is

[80] 2012 MCM, *supra* note 7, R.C.M. 405(a) discussion ("The investigation also serves as a means of discovery. The function of the investigation is to ascertain and impartially weigh all available facts in arriving at conclusions and recommendations, not to perfect a case against the accused.").
[81] UCMJ art. 32 (2014); FY14 NDAA *supra* note 8, § 1702. Lawmakers even excised the words "thorough" and "truth" from the statute. 10 U.S.C.S. § 832(a)(2)(A) (2015). The House Armed Services Committee defended these revisions by saying that "[T]o better protect *victims'* rights, the NDAA reforms the Article 32 process to avoid destructive fishing expeditions and properly focus on probable cause." H.R. ARMED SERVICE COMM., *Fact Sheet: FY 14 NDAA Summary Highlights of the National Defense Authorization Act for Fiscal Year 2014* (Dec. 9, 2013) (emphasis added), http://armedservices.house.gov/index.cfm/files/serve?File_id=127E1D4B-DD70-4B69-80DC-A036DA7B3519. What some might call a "destructive fishing expedition" is what defense lawyers would call a search for the truth to ensure that the convening authority does not refer potentially baseless charges to trial. All the defense counsel senior leaders emphasized the paramount importance of the Article 32 investigation when they testified before the RSP in November 2013. RSP Transcript, *supra* note 14, at 291-396. The leader of the U.S. Navy JAGC Defense Service Office submitted a 24 page memorandum to the RSP entitled, "In Defense of the Article 32: Maintaining Fairness and Balance in the Military Justice System." *Id.* at Statement of CAPT Charles Purnell, JAGC, USN, Commanding Officer of Defense Service Office Southeast.
[82] FY14 NDAA, *supra* note 8, § 1702.
[83] Senator Carl Levin proclaimed that the revised Article 32 would "[m]ake the Article 32 process more like a grand jury proceeding." 159 CONG. REC. S8548 (daily ed. Dec. 9, 2013).
[84] 2012 MCM, *supra* note 7, R.C.M. 405(d)(1).
[85] UCMJ art. 32(a)(2012); 2012 MCM, *supra* note 7, R.C.M. 601.

a mere speed bump on the road to trial. These changes indicate lawmakers want accusations of sexual assault going to trial and not challenged beforehand.[86]

2. Clemency

Congress not only eliminated safeguards that an accused had before cases were sent to court-martial, it also eliminated safeguards that existed for an accused after a trial concluded. Congress did so by dismantling the ability convening authorities had to grant meaningful clemency or remedy legal errors.[87] Other than dismissing very minor charges, a convening authority may no longer grant any substantial post-trial relief to a Soldier.[88] Prior to this change, a convening authority could entirely dismiss the findings and sentence of a court-martial after it ended and before it began appellate review.[89] Although convening authorities rarely exercised their authority under this provision to grant that level of relief, it provided an important safety valve in the system.[90]

By removing this power, lawmakers pulled an important thread out of the tapestry of military justice. Since Soldiers do not face judgment from a randomly selected jury of their peers that requires a unanimous verdict to convict them, the mechanism allowing this substantial clemency provided a pivotal piece of integrity to the system. Abrogating this power along with

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[86] *See* U.S. Dep't of Def., Report to President of the United States on Sexual Assault Prevention and Response, Annex 4 at 19 (Nov. 25, 2014), http://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD-_Report_to_POTUS_Annex_4_OGC.pdf) (stating that defense attorneys will no longer be allowed to use the Article 32 hearings "to gather evidence by calling witnesses whom they would question about a broad range of topics.").

[87] FY14 NDAA, *supra* note 8, § 1702(b) (codified at UCMJ art. 60(c) (2014)); *See* Major Brent A. Goodwin, *Congress Offends Eisenhower and Cicero by Annihilating Article 60, UCMJ*, ARMY LAW., July 2014, at 23 (discussing the 2014 modifications to Article 60).

[88] FY14 NDAA, *supra* note 8, § 1702(b). This section of the National Defense Authorization Act amended Article 60, UCMJ by eliminating the ability of a convening authority to disapprove, commute or suspend sentences in courts-martial where the maximum sentence of confinement adjudged exceeds two years, or a punitive discharge and six months confinement. Essentially, it prevents convening authorities from setting aside the findings or sentences in any serious felony case.

[89] UCMJ art. 60 (2012).

[90] John B. Wells, *Commander's Clemency Powers a Needed Safety Valve for Courts-Martial System* (May. 20, 2013, 11:31 AM), http://www.johnwellslaw.com/blog-commanders-clemency-powers-needed-safety-valve-courts-martial-system.html; *see also* David A Schleuter, *American Military Justice: Responding to Siren Songs for Reform*, vol. 73, A.F. L. REV. 193, 228 (2015); Schenk, *supra* note 21, at 653-54 n. 309.

> The Office of the Clerk of Court for the Army Court of Criminal Appeals indicated the convening authority took action in 6,131 general and special court-martial cases between January 1, 2008 and May 23, 2013. The Clerk's Office disclosed that less than one percent of the 6,131 cases involved a significant reduction in the findings of the court-martial. The majority involved resignations in lieu of trial for officers or discharges in lieu of trial for enlisted personnel or dismissals of minor military specific crimes such as being absent without leave or adultery or multiple charges for the same misconduct.

Id. Based on my professional experience, countless Soldiers I represented felt a sense of hope and optimism upon learning that after their court-martial concluded, they might still have the opportunity to have their cases overturned if the convening authority believed a miscarriage of justice occurred. To them, hearing such news, even if they realized it might never happen, made them feel like they served in a military that had a fair system of justice. While convening authorities rarely bestowed such clemency, it kept the system in check and made it better and more progressive than our civilian counterparts.

dismantling the robust Article 32 investigation now handicaps an accused at both ends of the process.

3. The "Good Soldier Defense"

Not only may commanders no longer consider a Soldier's previous characterization of service when deciding how to dispose of a case,[91] Congress also abrogated the right of Soldiers accused of sexual assault to present a defense of good military character.[92] Since September 6, 2014, Soldiers accused of such offenses can no longer assert that their good military character *might* raise a reasonable doubt as to their guilt.[93] Lawmakers made this change despite recommendations against it.[94]

It is troubling that in an era when leaders at every level routinely tell their subordinates that "good Soldiers" do not sexually assault others, a Soldier now accused of sexual assault cannot use his good military character as a defense. Had Captain Emmanuel Goldstein's case gone to trial before these changes, he could have presented a defense of good military character to the panel. He could have called witnesses to testify on that issue, and that evidence *might* have helped raise a reasonable doubt to his guilt. Even if the defense did not succeed, it would have at least been available.

4. Special Victims Counsel (SVC)

The SVC program has introduced another imbalance against the accused in the military justice system. While undoubtedly well-meaning, it disadvantages those accused of sexual assault by limiting or even denying access entirely to witnesses.[95] It also introduces the notion that sexual assault victims are parties to a criminal case, which goes against the principles of both civilian criminal law and military justice. The SVC program already has created issues of UCI in at least one important case involving a general officer prosecuted for sexual assault.[96] It is questionable whether the SVC program needs to exist at all given that a host of other people provide support to reported victims of sexual assault in the military. By creating the SVC apparatus, the military may have created a solution continually in need of a problem to justify its existence.[97]

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[91] FY14 NDAA *supra* note 8, §1708.
[92] Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 536, 128 Stat. 3292 (2014) [hereinafter FY15 NDAA].
[93] *Id.*, § 536.
[94] *See* RSP Transcript, *supra* note 14, Statement of Colonel Peter M. Cullen, Chief, U.S. Army Trial Defense Service, 8 November 2013 ("I am opposed to the elimination of the "Good Soldier Defense." Military service is unique. It would send a mixed signal to demand that a Soldier comport himself in a manner consistent with good character and then turn around and decide that evidence of such behavior is not significant should the Soldier find himself subject to a court-martial.").
[95] *See* 10 U.S.C.S. § 1044e (Lexis 2014).
[96] *See* David Zucchino, *Judge Rules Army Command Interfered in Sinclair Sexual Assault Case*, L.A. TIMES (Mar. 10, 2014), http://www.latimes.com/nation/nationnow/la-na-nnsinclair-judge-rules-military-interfered-0140310,0,1682787.story#axzz2w9ROt3UP (In the court-martial of Brigadier General Jeffrey Sinclair, the military judge found that actions the SVC took created unlawful command influence.).
[97] *Infra* note 164.

Taken together, all these piecemeal changes over the last decade demonstrate that lawmakers took a complex issue requiring thoughtful analysis and treated it instead with no such deliberation.[98] The perceived military sexual assault epidemic led to decisions that only considered the benefits to alleged victims.[99] These reforms have eviscerated the rights of Soldiers accused of sexual assault and by extension, those accused of other offenses.[100] Lawmakers implemented these dramatic changes before even waiting to analyze the very reports and recommendations they ordered.[101] Such a piecemeal approach puts the military justice system off balance by not considering its second and third order effects. It has changed what had been a relatively fair and even paternalistic system in some respects into one no longer guided by the notion of fairness towards the accused.

B. The Constraints of Military Defense Counsel

Lawmakers abrogated the protections Soldiers had without much deliberation on how doing so would affect the people there to defend them. When representing Soldiers accused of sexual assault, defense counsel advocate for the most unpopular and despised people in the Army and do so on an ever increasingly uneven playing field.

If military prosecutors and criminal investigators had a better understanding of how military defense counsel operate, it will allow them to better appreciate how the reforms have made it increasingly difficult for defense counsel and their clients. That understanding may help those on the prosecution side to remain especially vigilant when pursuing justice and to better understand why it is so important to not merely try and "win" cases.[102]

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[98] Lindsay L. Rodman, *Fostering Constructive Dialogue on Military Sexual Assault*, JOINT FORCE Q. 2d Q. 2013 at 25.

[99] Sen. Claire McCaskill, *Sexual Assaults in the Military—The Policy Matters*, HUFFINGTON POST (Nov. 18, 2013, 2:05 PM, updated Jan. 23, 2014, 6:58 PM), http://www.huffingtonpost.com/claire-mccaskill/sexual-assaults-in-themi_b_4297449.html ("I've used a single yardstick to measure each idea on the table: will it better protect victims, and lead to more prosecutions?").

[100] Murdough, *supra* note 18, at 247 n. 62, 291 n. 262-64 (giving numerous examples of how the accused is now disadvantaged by these "improvements" to the UCMJ); *see also* Murphy, *supra* note 49, at 135, 154-59.

[101] *See* Murdough, *supra* note 18, at 247 ("Without waiting for the RSP to conclude its findings, Congress enacted numerous proposals as part of the 2014 NDAA. The 2015 NDAA made further changes." FY15 NDAA, *supra* note 92, §§ 531-547). In fact, many of the proposals they adopted went against what the leaders of every defense service organization recommended in their testimony to the RSP and in their written submissions. *See* RSP Transcript, *supra* note 14, at 291-396, Statement of Colonel Peter M. Cullen, Chief, U.S. Army Trial Defense Service, 8 November 2013; Prepared Submission of CAPT Charles Purnell, JAGC, USN, Commanding Officer, Defense Service Office Southeast; Colonel Daniel J. Higgins, Chief, Trial Defense Services, United States Air Force, Written statement before the Response Systems Panel, 8 November 2013; U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 10, at 148 ("[M]ost politicians chose their career with the aim of effecting fundamental change. They do not, in general, lack confidence regarding their expertise, even if they sometimes should. Once they take a public position on an issue, there is little reason for them to critically examine the evidence opposing that position, absent strong political pressure to do so.").

[102] One could write an entire article about issues military prosecutors or CID agents face making their jobs equally difficult. The purpose here is not to complain or compare suffering, but to educate trial counsel, SVPs, and SVCs who have never served in Trial Defense Service (TDS), and criminal investigators, on the realities of the assignment. Based on my own professional experience, I recall one amusing incident where a seasoned military prosecutor, who had not served as defense counsel before, seemed entirely surprised to learn that TDS provided "suspect rights" counseling to Soldiers. Having an understanding of what one's colleagues do can help avoid needless friction in this profession.

Military defense attorneys take great pride in their duty to represent their clients. Despite their zeal, they lack the same tools or resources their opponents have. A Soldier facing sexual assault charges now has a host of people working against him, to include: a Chief of Military Justice, SVP, Senior Trial Counsel (STC), multiple Trial Counsel, an SVC, numerous paralegal NCOs, CID agents (often in Special Victims Units), and/or other law enforcement officers. While military defense lawyers have never been equally resourced, prior to the recent legislative changes, this imbalance was not so profound. These changes have now tipped the balance too far towards the prosecution side because defense counsel no longer have the ability to access alleged victims directly, use of the Article 32 hearing for any meaningful discovery, or hope for any meaningful clemency afterwards.

Their adversaries may not realize it, but military defense counsel have many responsibilities beyond defending Soldiers at courts-martial.[103] Besides "Priority I Duties," which include representing Soldiers at courts-martial, Article 32 hearings, and counseling pretrial confinees,[104]they also fulfill "Priority II Duties."[105] These duties include: counseling Soldiers who invoke their rights under Article 31 or *Miranda*;[106] representing and/or counseling Soldiers who appear in line-up situations; counseling Soldiers *suspected* of criminal matters when the exercise of military jurisdiction is possible even though jurisdiction has not yet been exercised; counseling Soldiers facing summary courts-martial; counseling Soldiers facing punishment under Article 15, UCMJ; counseling and representing Soldiers facing administrative elimination; representing Soldiers at grade reduction boards; and representing Soldiers in other venues if initial representation began for TDS clients facing violations of the UCMJ.[107]

In addition to representing Soldiers in court, once a court-martial concludes, the defense counsel must represent his client through post-trial and appellate matters.[108] Even preparing for a simple guilty plea is a time consuming task since defense counsel must prepare clients for the providence inquiry, something in which the trial counsel takes no part. Unlike the prosecution team, before a commander prefers charges against a Soldier, a defense counsel is limited in what evidence he can obtain. In one high profile case, defense counsel who acted assertively in trying to represent an officer accused of sexual assault was even admonished and had to seek appellate

[103] U.S. ARMY TRIAL DEFENSE SERVICE, STANDARD OPERATING PROCEDURES, paras. 1-5 (5 Aug. 2013) [hereinafter TDS SOP].
[104] *Id.*
[105] *Id.*
[106] Miranda v. Arizona, 384 U.S. 436 (1966).
[107] TDS SOP, *supra* note 103, para. 1-5. Defense counsel may also have to represent and counsel inmates at sentence vacation hearings pursuant to Article 72, UCMJ, and represent and counsel inmates at disciplinary and adjustment boards. Particularly time consuming are the duties to counsel Soldiers facing Article 15 UCMJ, administrative elimination, and suspect rights. A defense counsel can literally spend an entire work day on those matters without ever having time to work on a court-martial case. Military prosecutors have many similar collateral responsibilities. I explain the defense counsel's routine not to compare who has it better or worse, but to explain to those who have not served as a defense counsel before the realities of the job.
[108] TDS SOP, *supra* note 103, para. 3-9.

relief to continue his efforts.[109] Finally, like everyone else in the Army, defense counsel must attend training and accomplish a myriad of other administrative tasks.[110]

While government counsel have similar collateral responsibilities, they are not hindered equally, because prosecutors (and commanders) generally control the speed at which cases progress. Most importantly, the government decides when to prefer charges. If CID falls behind in investigating a case or commanders are slow to prefer charges, nothing detrimental to their case will usually happen unless a Soldier is placed in pretrial confinement. Unlike the defense, the prosecution can successfully request military or civilian law enforcement to conduct additional investigation for them.

Perhaps most detrimentally, unlike the prosecution, military defense counsel have no investigators to assist them, have no subpoena power, and must submit their witness lists to the government for production of witnesses.[111] Although TDS offices have paralegals, few, if any, have a large amount of criminal law experience, and most will not serve for any longer than 12 to 18 months in the assignment.[112] While they perform admirably, TDS paralegals can only do so much to assist attorneys preparing for sexual assault cases when the paralegals also have to manage the administrative needs of operating a legal office on a military installation.[113] In conclusion, while both sides have challenges, the new legislative changes have further placed the defense at a significant disadvantage. With all the other responsibilities they have, losing the meaningful opportunity for discovery that the Article 32 investigation provided, losing the ability to obtain meaningful relief after a conviction, and losing the ability to present a good Soldier defense for the clients has put the system too far out of balance. Unfortunately, the accused are the ones who bear the brunt of this.

V. The Military Victim Industrial Complex

"[I]f thought corrupts language, language can also corrupt thought."[114]

The hysteria surrounding the purported military sexual assault epidemic has created a unique class of crimes. The military immediately labels those who report sexual assaults as "special victims" or "survivors." This creates particular problems when the military grants those people

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[109] *See* Petition for Extraordinary Writ in the Nature of a Writ of Prohibition, Morse v. Biehl & Agar, Army Misc. 20140294 (A. Ct. Crim. App. 2014), http://www.caaflog.com/wp-content/uploads/LTC-Morse-v.-LTC-Biehl-and-COL-Agar-writ-of-prohibition.pdf (This writ sought to bar enforcing a commander's order, issued to an officer under investigation for an alleged sexual assault, and to his military defense counsel, from questioning witnesses who may have provided potentially exculpatory evidence for the suspect, because, according to the SJA advising the command who had preferred the charges, the military defense counsel's investigation had "upset" the alleged victim.).

[110] TDS SOP, *supra* note 103, para. 5-8.

[111] *Compare* Fed. R. Crim. P. 17 *with* RCM 701.

[112] TDS SOP *supra* note 103, para. 2-1(C); U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 6-4(h)(2) (3 Oct. 2011) [hereinafter AR 27-10].

[113] Beyond the issue of TDS paralegals is the entire structure of the JAGC career model. Put simply, unlike the civilian world, there are no "career public defenders" in the military. The wisdom of how military defense counsel organizations operate and are structured is an issue worth examining but is beyond the scope of this article.

[114] GEORGE ORWELL, *Politics and the English Language*, *in* A COLLECTION OF ESSAYS 167 (1946).

"special" considerations that infringe on the Constitutional rights of an accused, and appear to tilt the goal of the system towards a desired result of winning convictions instead of achieving justice.

How a person, an institution, or a society defines a problem affects how they attempt to solve it. The very words and the language they use actually matter.[115] Language corrupts thought with the issue of sexual assault. It corrupts thinking in an already emotionally and politically charged environment by designating certain people as "special" and as "victims," before anyone should necessarily be afforded either label.

In essence, the term "special victim" puts the cart before the horse. First, the language defines sex crimes as special. This is understandable, given the particularly intrusive nature of sexual assaults. Yet this is only true if a sexual assault *actually* occurred. By immediately employing terms like "special" and "victim," the military designates those who make reports as victims. It creates a problem to designate people as victims before anyone has been charged, much less convicted of anything.[116]

This language and practices advance a narrative that people who have accused someone of sexual assault deserve unique treatment, which in practice comes at the expense of those who are accused of the offenses.[117] This creates a number of problems. First, it effectively casts aside the presumption of innocence, which is the very bedrock of the military justice system. One cannot be a victim, after all, unless someone has victimized them. Once the presumption of

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[115] This use or misuse of language is not merely a question of semantics. Consider, for instance, the result of framing America's problem with people using narcotics as a "War on Drugs" and the policy decisions and effects of that decision.

[116] If this concern sounds hyperbolic, consider that under the new laws Congress enacted, only "special victims" receive the assistance of whereas those alleged victims of domestic violence (or any other crime do not). And as the hypothetical scenario with CPT Emmanuel Goldstein demonstrates, those who report a Soldier sexually assaulted them are immediately detailed an attorney who can begin intervening on their behalf whereas a Soldier accused of sexual assault will not be detailed counsel until charges are preferred against him. 2012 MCM, *supra* note 7, R.C.M. 506; AR 27-10, *supra* note 111, para. 5-7.

[117] Others have recognized the danger this language presents.

> Sitting here for the past two days, I didn't keep track, but I'd be willing to bet that if you checked the record, the word "victim" was said probably 2,000 times. Maybe only 1,500. I don't recall more than half a dozen times that I heard the words "alleged victim." That, to me, is a problem. What we're doing and what is being proposed is that as soon as a report is made, that person who makes the report—male, female, doesn't matter—is being immediately granted the crown of truth. That person is a victim. We say that word. We have a special victim counsel. We have special victim investigators. We have special victim prosecutors. Can't we just have special prosecutors? Why must it be that we immediately identify the person to be a victim? I've been in numerous courts martial where the prosecutor has used that word in opening statement and been stopped by the judge, saying, "Counsel, that's not been established yet. Please say alleged, because the panel otherwise will get the wrong conclusion." Words are important, extremely important.

Testimony of Mr. David Court, RSP Transcript, *supra* note 14, at 321-22.

innocence is degraded, it begins to affect all aspects of the judicial system from discovery and MRE 412 motions to other areas.[118]

Second, most allegations of sexual assault are not black and white situations. Not everyone who has an uncomfortable or even what they would consider a traumatic sexual experience necessarily suffered a criminal assault.[119] Immediately referring to people as victims may induce them to believe that is actually what they are, even if the evidence ultimately shows otherwise.[120] Once people self-identify as victims and become emotionally invested in the status, it may become difficult for them to revise that belief.[121]

Finally, although victims have rights and interests, they are not the adverse party to a court-martial—the United States is. Victims do not stand to lose their life, liberty, or property if the person who allegedly committed a crime against them is acquitted. The accused, on the other hand, stands to lose everything.[122]

While this false equivalency between special victims and accused Soldiers has not yet completely infected the military justice system, its impact is undeniable.[123] The constant drumbeat over the number of sexual assaults that allegedly occur and the number of convictions that ultimately result has influenced policy makers.[124] This corruption of language and political

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[118] The origin of the concepts of "innocent until proven guilty" and "proof beyond a reasonable doubt" is detailed at length in the Supreme Court opinion, Coffin v. United States, 156 U.S. 432 (1895). The idea stems from Latin maxims that mean "the necessity of proof lies with he who complains and "the burden of proof rests on who asserts, not on who denies." 156 U.S. at 455. The Court quoted a dialogue from ancient Roman history where someone asked the emperor, "[I]f it is sufficient to deny, what hereafter will become of the guilty?" to which the Caesar replied, "[I]f it suffices to accuse, what will become of the innocent?" *Id.* (citations omitted). It is important to understand the distinction between providing emotional support and treatment to people who report they were sexually assaulted, and "taking their side" in a criminal case against the person accused.

[119] Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html?_r=0 (Mr. Rubenfeld teaches criminal law at Yale Law School. In this article on sexual assault on college campuses, he noted that "the redefinition of consent" (as redefined by colleges) "encourages people to think of themselves as sexual assault victims when there was no sexual assault" and that "[p]eople can and frequently do have voluntary sex without communicating unambiguously.").

[120] *See* Ofer Zur, *Culture of Victims: Reflections on a Culture of Victims & How Psychotherapy Fuels the Victim Industry*, ZUR INSTITUTE, http://www.zurinstitute.com/victim_psychology.html ("The victim's basic stance is that he or she: is not responsible for what happened; is always morally right; is not accountable; is forever entitled to sympathy; is justified in feeling moral indignation for being wronged.").

[121] *See infra* pp. 39-41 (discussing cognitive dissonance).

[122] *See* Murphy, *supra* note 49, at 179.

[123] Murdough, *supra* note 18, at 287 n. 247 (discussing unsworn statements for victims at sentencing and victim input when accused seek clemency).

[124] *Id.*, at 288 ("When 'doing justice for victims' means that anything short of prosecution is unacceptable, the inference is that every allegation is always capable of evidentiary proof and only indifference or malfeasance on the part of those administering the justice system can account for the disparity in numbers."). *See Supra* note 118 and accompanying text: lawmakers who measure eradicating sexual assault in the military by how many Soldiers get convicted ignore these maxims and principles of justice. *See* Major Meridith Marshall, *Perfect Storm: How Recent Congressional Interest And Influence Has Affected Sexual Assault Law And Policy In The Armed Services* 69 (May 2013) (unpublished thesis) (on file with author).

hysteria can potentially influence criminal investigators, prosecutors, and others to focus on satisfying victims at the expense of pursuing justice.[125]

A. Are sexual assault crimes special?

A typical argument of why sexual assaults are "special" is because the offenses put a unique burden on victims to prove their lack of consent whereas typical crimes do not center on the consent or lack thereof of the victim.[126] Even if that is true, the notion that sexual assault is special because of that issue of consent cuts both ways. It is with good reason that the law analyzes—or should analyze—sexual assault cases differently. A few scenarios can help illustrate this point.

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[125] *See* Murdough, *supra* note 18, at 288 n. 251. The military should consider renaming "Special Victims Prosecutors" to "Sexual Violence Prosecutors" or "Sexual Violence Investigation Unit." Even the "Special Victims Counsel" could get renamed to something like, "Sexual Violence Assistance Counsel." At the very least, the military should adopt what Russell Strand suggests, which is to employ the terms *reported* victim or *reported* subject instead of "victim" or "subject" when dealing with these cases. Interview with Mr. Russell Strand, *supra* note 15. *See also* Yager, *supra* note 18 at 68.

> When it comes to treatment, we have to recognize that some false victims will truly believe they are victims, and suffer the same trauma as actual victims, even though they are not victims under the law. A woman who was intoxicated, for example, but still capable of consenting, may very well believe she was a victim even though the law says otherwise. . . .When it comes to justice, our standards for treating the sick or hurt cannot be permitted to diminish our founding principles to zealously guard our rights to freedom absent proof beyond a reasonable doubt. Our constitution does not guarantee retribution for anyone who has been harmed, rather it guarantees an accusation must be supported by proof beyond a reasonable doubt before a state or federal entity can strip any of us of the blessings of liberty endowed by our Creator.

Id.

[126] *See* Major Jennifer Knies, *Two Steps Forward, One Step Back: Why the UCMJ's Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put It Back on Target*, ARMY LAW., Aug. 2007, at 2 ("The current legal approach to rape and sexual assault is unique among contemporary jurisprudence. Nowhere else in the law is the victim shouldered with the burden of proving they did not consent. Only in rape law is the victim expected to resist an attacker before the act becomes a crime. Last, rape is the only crime in which the victim's silence is construed as consent.") (internal citations omitted) (The author goes on to note that there are both "historical and practical reasons for the special treatment of the crime of rape and that "sexual interaction is, by its very nature, a private and complex issue."); *See also* Carol E. Tracy, et. al., *Rape and Sexual Assault in the Legal System*, WOMEN'S LAW PROJECT & AEQUITAS, at 5 (2013), http://www.womenslawproject.org/resources/Rape%20and%20Sexual%20Assault%20in%20the%20Legal%20System%20FINAL.pdf.

> The legal system's hostile treatment of rape cases and rape victims was unique and in marked contrast to its response to other assault crimes. With respect to rape, the legal system emphasized the victim's character, behavior, and words in order to ascertain whether the victim consented. For other assault crimes, however, the legal system focuses only on the actions of the accused to establish criminal activity. For example, the crime of battery (e.g. a punch) is established based solely on the perpetrator's actions and/or intent and the victim's response to being punched is irrelevant.

Id.

1. Muggings and Rapes

Sometimes people assert sexual assault victims are treated in a suspicious manner whereas mugging victims, for instance, are not. [127] That is, after someone reports being mugged, the person does not face a barrage of vigorous questioning about what he or she might have worn, said, or did beforehand.[128] This contrast is meant to insinuate that people who report sexual assaults are unfairly questioned and presumed to be liars or to have somehow deserved to have been victimized.[129]

This comparison and criticism of how law enforcement or others treat people who report sexual assault, although superficially appealing, is fallacious. We know that human nature does not lend itself to people giving out money to strangers in the middle of the night. Therefore, if MAJ or Ms. Julia O'Brien reported she was mugged, police would not seriously consider she might have just decided on the spur of the moment to give money to a new found friend. Human nature and experience informs us sexual encounters are different.

Regardless of culture, religion, rules of decorum, or anything else, the sexual drive is uniquely powerful and uniquely irrational. For good or bad, people will have sex with other people they hardly know, or with people they do know, but with whom they realize they should not have sex.

People will have sex with others, though they would never loan them money. If someone reports that a person she just met at a party, or perhaps someone she was in relationship with, sexually assaulted her, it is not "victim blaming" to question her vigorously about the underlying circumstances of what happened. Sex is an otherwise lawful activity that people engage in with some frequency. It is only the lack of consent that turns this otherwise lawful activity into a crime. Determining whether someone who alleges a sexual assault actually consented to having sex is the pivotal question in any sexual assault accusation. Whereas people may not usually give spontaneous gifts of money to others, people routinely engage in sexual activity. It is natural and in fact critical, therefore, to determine the underlying facts of the relationship or encounter.

Also, people do not engage in sex the same way they engage in other mutual activities. Sexual intercourse and the interaction preceding it usually happen because one person acts assertively and the other responds.[130] Often this happens with non-verbal cues and signals and consent is implied from the circumstances. It makes no sense, therefore, to bemoan that

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[127] *See* Nina Bahadur, *If Reporting a Robbery Was Like Reporting a Rape*, HUFFINGTON POST (Feb. 25, 2015, 12:59 PM), http://www.huffingtonpost.com/2015/02/25/rape-report-robbery-victim-blaming_n_6751560.html

[128] *Id*.

[129] In my own professional experience, I have sat through several presentations that used this hypothetical rape victim vs. mugging victim scenario. A Highly Qualified Expert also used this analogy when addressing the TDS Sexual Assault Leadership Training conference at Fort Belvoir in August 2012.

[130] *See* Robert S. McCain, *Moving the Goalposts: What Feminist 'Rape Culture' Discourse is About*, THE OTHER MCCAIN (Oct. 11, 2015), http://theothermccain.com/2015/10/11/moving-the-goalposts-what-feminist-rape-culture-discourse-is-about/ (discussing the fallacies of "affirmative consent" and the notion that normative heterosexual behavior has become considered "rape" in radical feminist discourse).

mugging victims do not get questioned or treated the same way as sexual assault victims because the two activities are not analogous.[131]

2. The Poor Drunk Man and the Wealthy Drunk Woman

Consider the following the scenario: An inebriated man, Mr. Emmanuel Goldstein, sits with an empty cup on the street, begging for money. Ms. Julia O'Brien walks out of a bar where she has spent the evening with friends. She sees Mr. Goldstein and begins conversing with him. Neither of them remembers the conversation afterwards due to their intoxicated states. During this conversation, Mr. Goldstein asks her for money, and Ms. O'Brien voluntarily gives him the $500.00 she has in her purse.

The next morning, Mr. Goldstein wakes up and sees, to his surprise, that his cup has $500.00 in it. Ms. O'Brien wakes up, her head splitting from a hangover, and discovers all of her money is gone. She vaguely remembers a homeless man and knows she would never have given her money to him had she been sober. She goes to the police to report what happened.

The police subsequently apprehend Mr. Goldstein. Feeling ashamed of the situation, he offers to return her money. The police explain that this is not enough. They tell him the district attorney has decided to charge him with larceny. He is a thief. He stole her money. How so? Because he "took" it from her when she was too intoxicated to consent. They inform him that under the criminal code, he was responsible not only for his behavior when he was drunk, but for hers also.[132]

With a few changes, the above scenario captures many allegations of sexual assault in the military. The reality is that people drink, people have sex, and sometimes they do not expressly communicate their consent or the lack thereof.[133] While few would think of prosecuting Mr. Goldstein for larceny in this situation, many Soldiers have faced prosecution for sexual assault under the same scenario.

3. A Brawl after the Dining Out

Consider what would happen if Specialist (SPC) Julia O'Brien and SPC Emmanuel Goldstein started drinking heavily at their unit's dining out. Perhaps they each became intoxicated to the

[131] If one waited months or even years to report a robbery or mugging, law enforcement officers would naturally feel suspicious and would not likely be swayed with arguments about counter-intuitive victim behavior or how trauma prevented the person from coming forward.

[132] This analogy is imprecise because larceny is a specific intent crime, and voluntary intoxication could serve as a defense, whereas, voluntary intoxication is not a defense to rape charges or useful for supporting a defense of mistake of fact as to consent. "The accused's state of intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense." 2012 MCM, *supra* note 6, pt. II, R.C.M. 916(j)(3). *But see* Commonwealth v. Blache, 450 Mass. 583, 589, 880 N.E.2d 736 (2008); Commonwealth v. Mountry, 463 Mass. 80, 81, 942 N.E.2d 438 (2012). Another distinction is that money taken in this situation can be returned, unlike a sexual violation against someone, which cannot be made whole. The underlying issue, however, is the same: Why are two equally drunk people who make unwise decisions considered equally responsible for their conduct in some situations but not in others?

[133] Tavris, *supra* note 21.

point where neither could make any type of wise decision on important matters about what to do with their bodies. Then they decided to fight each other like gladiators in the parking lot, and no one happened to witness the event until after it ended. When the two were questioned after they became sober, neither could remember that they each "consented" to the fight when they engaged in it.

Did a crime occur? If so, then each should be charged with assault. Specialist O'Brien would not get to say she was the "victim" because she could not consent and SPC Goldstein knew or should have known that she was too intoxicated. Both got drunk and did something harmful to each other. Neither's voluntarily intoxication would serve as a defense to one assaulting the other.

Now change these facts to them having sex with each other rather than battering each other. What would the likely outcome be, especially when the situation involves a male and female Soldier? Would each Soldier be charged with sexually assaulting the other? In most scenarios, the first to report the incident, especially if the first Soldier is female, would be designated as the victim. The other would be designated as the perpetrator. The perpetrator's voluntary intoxication would not work as a defense, but the victim's voluntary intoxication would give her sanctuary.[134]

Sexual assault is a "special" offense in some sense. It impacts its victims in a unique and particularly invasive manner. Criminal investigators, prosecutors, and others involved in the military justice system should understand that *sex* is what makes sexual assault special, and sex causes people to act in ways, sometimes which are irrational. That means that those investigating and prosecuting sexual assault cases must examine these cases with the understanding that they elicit unique facets of human behavior. When working on a sexual assault case, not everything is necessarily as it appears at first glance and rules of common sense might not necessarily apply.

B. Shouldn't we believe victims?

> It is a near-religious teaching among many people today that if you are against sexual assault, then you must always believe individuals who say they have been assaulted. Questioning in a particular instance whether a sexual assault occurred violates that principle. Examining evidence and concluding that a particular accuser is not indeed a survivor, or a particular accused is not an assailant, is a sin that reveals that one is a rape denier, or biased in favor of perpetrators.[135]

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[134] *See* Marshall, *supra* note 124.

[135] Jeannie Suk, *Shutting Down Conversations About Rape at Harvard Law*, THE NEW YORKER (Dec. 11, 2015), http://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school (Jeannie Suk is a Professor at Harvard Law School.); *See also* Nancy Gertner, *Sex, Lies and Justice*, AMERICAN PROSPECT, Winter 2015, http://prospect.org/article/sex-lies-and-justice ("Just because the legal system has moved away from the view that all rape accusations are contrived does not mean it must move to the view that none are."). Nancy Gertner is also a Professor at Harvard Law School and is a retired federal judge. Harvard Law School Faculty Profile, http://hls.harvard.edu/faculty/directory/10303/Gertner.

Defending sexual assault cases in the military has also become difficult because the military is not receptive to the notion that people ever lie about sexual assault.[136] Some outside of the military even compare the idea of "denying" sexual assault to denying the Holocaust.[137] Yet refusing to scrutinize the claims of reported sexual assault victims is as ill-advised as refusing to scrutinize the claims of Holocaust survivors. For instance, consider the ordeal of Binjamin Wilkomirski.[138] Mr. Wilkomirski wrote a best-selling book describing the atrocities he suffered as a young Jewish boy from Latvia who survived several Nazi death camps.[139]

The Holocaust is a historical fact. It is beyond dispute that the Nazis exterminated countless men, women, and children, including an estimated six million Jews. It is also well known that some children managed to survive its horrors. And some wrote about the experiences they endured. One would think it would take an especially cynical person to challenge the veracity of the claims of any Holocaust survivor. People could argue that after suffering such trauma, a man like Mr. Wilkomirski "deserved" to have people believe him, and failing to do so belittled his dignity and the suffering he endured. Also, questioning him too much on the details would "re-traumatize him." Similarly, some argue that rape victims deserve the same treatment.[140]

When people claim they are victims, however, they do not deserve anything, other than to have someone listen to them carefully. Among other reasons, not everyone actually is who they claim they are or suffered through what they say they did. This includes Binjamin Wilkomirski, who, as people later discovered, was not from Latvia, was not Jewish, was not a Holocaust survivor, and was not even really named Binjamin Wilkomirski.[141]

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[136] *See* Yager, *supra* note 18, at 36-37 n. 214.

> By way of example, in 2013 an Air Force wing commander in Europe held a mandatory briefing for the base as part of a SAPR stand-down day where he made multiple references to the rarity of false allegations. One minute and 20 seconds into the briefing he talked about false reports, saying, 'We have done studies on [false allegations] and what we have found is that false reporting only exists in about 2-8 percent of cases, a very small percentage. DO NOT argue the numbers. DO NOT go there. That is what they are.' He specifically emphasized 'do not' in a stern tone and he did it again in his closing remarks just over thirty minutes later when he said, 'DON'T ARGUE THE NUMBERS [of false allegations], okay? The numbers are the numbers; it is what it is. Accept it and move on.'

Id. The Wing Commander, a general officer, committed UCI, in my opinion. He did everything but put an image of an Airman recently convicted of sexual assault on a screen for everyone in the audience to look at and then lead them in a reenactment of the "two minutes of hate." *See* ORWELL, *supra* note 1 at 10-14.

[137] Chuck Ross, *Liberal Writer Compares 'Rape Denial' to 'Holocaust Denial'*, THE DAILY CALLER (Dec. 4, 2014, 3:36 PM), http://dailycaller.com/2014/12/04/liberal-writer-compares-rape-denial-to-holocaust-denial. (Discussing the claim by feminist writer Amanda Marcotte, that investigating and challenging the validity of the alleged sexual assault actress Lena Dunham claimed she suffered in college was akin to Holocaust denial.).

[138] BINJAMIN WILKOMIRSKI, FRAGMENTS: MEMORIES OF A WARTIME CHILDHOOD (1995).

[139] *Id.*

[140] *See, e.g.*, Zerlina Maxwell, *No Matter What Jackie Said, We Should Generally Believe Rape Claims*, WASH. POST (Dec. 6, 2014), http://www.washingtonpost.com/posteverything/wp/2014/12/06/no-matter-what-jackie-said-we-should-automatically-believe-rape-claims/

[141] CAROL TAVRIS & ELLIOT ARONSON, MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS 82-88 (2008).

From an era where women who reported sexual assaults were routinely met with disbelief, the pendulum has now swung in the opposite direction. We have replaced the myth of the lying victim with the myth that victims never lie.[142] If one accepts (erroneously) as fact that a sexual assault epidemic exists in the military, just like if one accepts that the Holocaust happened, the notion that society must believe all victims requires very little additional effort. Yet it is a trap one should not walk into.

Just because the Holocaust occurred does not mean that someone claiming to have been a Holocaust survivor is telling the truth. Similarly, just because some sexual assaults happen in the military does not mean that any one particular person who alleges a sexual assault is necessarily telling the truth.[143] Moreover, the purpose of the criminal justice system is not to provide a venue for victims, alleged or otherwise, where they are "believed" or validated. While this may be useful in a psychotherapeutic environment, the adversarial nature of the criminal justice system is not designed for such results.[144] After all, "a victim cannot demand that an institution punish and label someone as a sex offender without any scrutiny of the allegation."[145]

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[142] Christina Hoff-Sommers, *Sexual Assault Myths Part I*, The Factual Feminist, American Enterprise Institute, (Jan. 21, 2015), https://www.youtube.com/watch?v=TZrzCAuiw7w.

[143] The Wilkomirski example is also interesting because it is not entirely clear that Bruno Dössekker (the real name of 'Binjamin Wilkomirski') knowingly and purposefully lied. *See* TAVRIS & ARONSON, *supra* note 141, at 83-88. Rather, it appears he may have unwittingly convinced himself through self-delusion that he was in fact, a Jewish Holocaust survivor. *Id.* As a defense counsel, one worries that a person who has an uncomfortable sexual experience while intoxicated, may, after enough meetings with an SVC, SVP, SHARP/EO counselor, Unit Victim Advocate (UVA), or mandatory viewings of *The Invisible War*, come to honestly but mistakenly believe she was sexually assaulted. *See* U.S. COMMISSION ON CIVIL RIGHTS, supra note 10, at 10 ("Those who would rather not report are being pressured to do so. A junior enlisted woman is lectured by a senior noncommissioned officer that the events of the drunken party were a rape regardless of the misgivings of the woman."). *See also* McCain, *supra* note 130.

> In the UVA case, evidence suggests that the student "Jackie" so desired to be accepted as a member of the sexual assault "survivor" community on campus that she created the character "Haven Monahan" from whole cloth, and made up a tale about a gang rape that never happened, an imaginative tale perhaps inspired by narratives of previous assaults she had heard about through her involvement in anti-rape activism.

Id. Based on my professional experience, in the current era one could probably expect if "Jackie" enlisted in the Army and later accused someone of sexually assaulting her, the prosecution and her Special Victims Counsel (SVC) would seek, without any intentional malice, to exclude her prior false rape complaint under MRE 412 since it would undermine their case.

[144] *See supra* note 117 and accompanying text.

[145] Murdough, *supra* note 18, at 292; Megan McCardle, *You Can't Just Accuse People of Rape*, BLOOMBERG (Dec. 9, 2014, 9:00 AM), http://www.bloombergview.com/articles/2014-12-09/you-cant-just-accuse-people-of-rape. Failure to scrutinize sexual assault allegations can also have horrific consequences for the person who alleged the assault. For instance, in one recent case where a Soldier in Columbus, Georgia was wrongfully (and possibly falsely) accused of sexual assault, the police failing to carefully scrutinize the allegation led them to arrest and try to prosecute him even though he was innocent. Meanwhile, the actual culprit (the victim's mother's boyfriend) got away with the sexual assault and later murdered the victim. Had the police scrutinized her allegation better from the beginning, the actual rapist would not have gotten away with it and would probably not have been able to murder her. *See How "Start by Believing" and "Don't Victimize the Victim" Can Get a Victim Murdered,* COMMUNITY OF THE WRONGFULLY ACCUSED (Dec. 4, 2015), http://www.cotwa.info/2015/12/how-mantra-of-start-by-believingdont.html.

Sexual assaults occur and people falsely accuse others of sexual assault. Unfortunately, these facts are not mutually exclusive.[146] Attempting to generalize about how often people lie about sexual assault posits the wrong question. Individuals make choices, good and bad, for various reasons at different times. In the United States v. Goldstein hypothetical, for instance, MAJ O'Brien had a clear motive to fabricate sexual assault: to explain to her husband why she had sex with CPT Goldstein; to prevent him from divorcing her, and to ensure she did not get in trouble herself for adultery.

Regrettably, one does not have to look hard to find instances where people falsely accused others of sexual assault for a variety of reasons.[147] The infamous Scottsboro Boys,[148] Tawana Brawley,[149] and the Duke Lacrosse players are notorious examples.[150] The reported gang rape of Hofstra University student Danmell Ndonye is another.[151] The sexual assault allegedly committed by high school football player Brian Banks against his classmate Wanetta Gibson is a particularly horrific case of a false accusation which resulted in an innocent man spending years in prison.[152] The alleged gang rape of Jamie Leigh Jones by her Haliburton colleagues in Baghdad in 2004, is another.[153] Morgan Triplett, a college student in California who claimed she

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[146] Attempting to reliably conclude how often this happens is difficult and statistics on it vary tremendously. *See, e.g.*, David Lisak et. al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN No. 12, 1318, 1319 (2010), http://www.icdv.iadho.gov/conference/handouts/false-allegations.pdf (asserting that only 2 – 10 % of sexual assault allegations are falsely made, but explaining that such a "false claim" is only one that has been determined false after a thorough investigation, which of course, might deflate the actual figure since someone who makes a false claim might not cooperate with a "full investigation" of such an allegation); *but see* Jonathan Taylor, *10 Reasons False Rape Accusations are Common*, A VOICE FOR MALE STUDENTS (Jul. 22, 2014), http://www.avoiceformalestudents.com/avfms-mega-post-10-reasons-false-rape-accusations-are-common. In his outstanding and comprehensive article, Air Force Judge Advocate then-Major Reggie Yager asserts that "research data actually indicates about 8-10 % of sexual assault allegations are false beyond a reasonable doubt and approximately 40% are probably false, more likely false than true, or do not constitute an actual crime." Yager, *supra note* 18, at 43. Yager goes on to present and analyze every major study conducted on false rape allegations (including Lisak's). *Id.* at 44-62. To put it charitably, the data on false reports is difficult to assess. Those with a political agenda wanting the number of false reports to be low can point to the particular data or study of their choice, and dismiss the data and studies they do not like. As a thought experiment, when teaching students who attend the SVCC, I ask them to contemplate if between the years 1860 and 1960 (I chose these years randomly) they believe only 2% to 10% of Caucasian women who claimed that Black men raped them lied about it.

[147] I believe abundant anecdotal evidence exists of false allegations of sexual assault in the military. No one has systematically categorized these cases and I do not believe there is any motive in the current climate to attempt to do so. Out of privacy concerns, I refrain from sharing anecdotes from my own professional experience or those of countless others with whom I have spoken on the subject.

[148] JAMES A. MILLER, REMEMBERING SCOTTSBORO: THE LEGACY OF AN INFAMOUS TRIAL (2009).

[149] ROBERT D. MCFADDEN, OUTRAGE: THE STORY BEHIND THE TAWANA BRAWLEY HOAX (1990).

[150] STUART TAYLOR & K.C. JOHNSON, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE (2008).

[151] Eric Owens, *Here Are EIGHT Campus Rape Hoaxes Eerily Like The UVA Rape Story*, THE DAILY CALLER (Dec. 14, 2014, 10:27 PM), http://dailycaller.com/2014/12/14/here-are-eight-campus-rape-hoaxes-eerily-like-the-uva-rape-story/.

[152] 60 Minutes*: Blindsided: The Exoneration of Brian Banks, Has Brian Banks' dream of an NFL career been delayed or even destroyed by a false charge of rape and five years in prison?* (CBS television broadcast Mar. 24, 2013), http://www.cbsnews.com/news/blindsided-the-exoneration-of-brian-banks/.

[153] Stephanie Mencimer, *The War of Rape: What Happened to Jamie Leigh Jones in Iraq?*, WASH. MONTHLY (Nov./Dec. 2013), http://www.washingtonmonthly.com/magazine/november_december_2013/features/the_war_of_rape047355.php?

was raped on a jogging trail before going to an LGBT pride event,[154] and "Jackie," a college freshman at the University of Virginia who was allegedly sadistically gang-raped at a fraternity house and abandoned by her friends afterwards are yet more examples of false allegations of sexual assault .[155]

More interesting than the allegations themselves is how many people first accepted these reports uncritically.[156] For instance, in the case of the Duke Lacrosse Team, eighty-eight professors at Duke University joined to publicly condemn the players before any charges were brought against them.[157] The television personality and former prosecutor Nancy Grace also

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[154] Tyler Haden, *UCSB Student Sentenced for Fake Rape Report: Morgan Triplett Ordered to 60 Days in Jail and Three Years of Probation*, SANTA BARBARA INDEPENDENT (July 26, 2013), http://www.independent.com/news/2013/jul/26/ucsb-student-sentenced-fake-rape-report/

[155] Sabrina Rubin Erdely, *A Rape on Campus: a Brutal Assault and Struggle for Justice at UVA*, ROLLING STONE, Dec. 4, 2014, 68 at, 70-77. In April 2015, *Rolling Stone* retracted its article. Will Dana, Managing Editor et al., *Rolling Stone and UVA: The Columbia University Graduate School of Journalism Report*, ROLLING STONE (Apr. 5, 2015), http://www.rollingstone.com/culture/features/a-rape-on-campus-what-went-wrong-20150405. This occurred only after *The Washington Post* reported extensively on the article and Columbia University Journalism School investigated the entire matter, revealing numerous factual inaccuracies and journalistic failures. *Id.* In yet another strange twist, the disgraced writer, Sabrina Rubin-Erdely, had also previously written an article for *Rolling Stone* about the alleged rape of a female sailor named Rebecca Blumer. Sabrina Rubin-Erdely, *The Rape of Petty Officer Blumer: Inside the military's culture of sex abuse, denial and cover-up*, ROLLING STONE (Feb. 14. 2013), http://www.rollingstone.com/politics/news/the-rape-of-petty-officer-blumer-20130214; *but see* Leon H. Wolf, *Sabrina Rubin Erdely's OTHER Possibly Fake Rape Story*, RED STATE (Apr. 7, 2015, 4:30 PM), http://www.redstate.com/2015/04/07/sabrina-rubin-erdelys-possibly-fake-rape-story/ . Blumer alleged that several Soldiers had sexually assaulted her and the Navy had covered up the case. Blumer reported the sexual assault after civilian police arrested her for driving while intoxicated. *Id.*

> The narrative in each case is used to advance the theory that the institution in question (college administrators in the UVA case, military command in the Blumer case) is indifferent to the problem of systemic sexual assault occurring right under their noses. In both cases, the stories read suspiciously as though Ms. Erdely arrived at her conclusion before writing her story, and simply set out to find the first person who would constitute a credible vehicle for the narrative she wanted to create, without regard to the factual accuracy of her story.

Id. Even more curious is that attorney Susan Burke named Blumer as a plaintiff in a lawsuit she filed against the Secretary of Defense. Jury Demand, Klay v. Panetta, no. 1:11cv00151, (E.D. Va. Mar. 6, 2012) (dismissed), http://msnbcmedia.msn.com/i/TODAY/Sections/Today%20People/2012/03%20-%20March/Klay%20complaint.pdf. Other co-plaintiffs in the lawsuit included several alleged victims portrayed in *The Invisible War*. *Id.*

[156] Some still accept them uncritically, including the president of the National Organization for Women (NOW). She admonished a dean at the University of Virginia for suing *Rolling Stone* magazine for defamation and called on the University's president to stop the suit. The president of NOW, despite irrefutable evidence to the contrary, still believes that "Jackie," the perpetrator of the UVA rape hoax, is a victim. *See* Dean Seal, *NOW Says UVa Dean's Strategy in Lawsuit 'Undermines' Sexual Assault Victims*, ROANOAKE TIMES (Jan. 8, 2016, 9:08 PM), http://www.roanoke.com/news/virginia/now-says-uva-dean-s-strategy-in-lawsuit-undermines-sexual/article_082e5f35-2ed0-5167-8a96-344df51092dc.html. NOW seems to ascribe to the adage that, "Some people regard rape as so heinous an offense that they would not even regard innocence as a defense." Alan Dershowitz, *New Dangers Are Evident in Rape-Case 'Reforms'*, LOS ANGELES TIMES (Apr. 8, 1985), http://articles.lattimes.com/1985-04-08/local/me-18595_1_prior-sexual-activity.

[157] K.C. Johnson, *Whatever Happened to the Group of 88?*, MINDING THE CAMPUS (May 23, 2010), http://www.mindingthecampus.org/2010/05/what_ever_happened_to_the/.

vilified them.[158] In the case of the *Rolling Stone* rape allegation, people vandalized the fraternity house where "Jackie" was allegedly brutally gang-raped. The young men who lived there had to relocate for their personal safety.[159] In the case of Jamie Leigh Jones, Senator Al Franken and the television host Rachel Maddow lionized her, accepted her rape claims uncritically, and later refused to retract their misplaced faith in the story in spite of overwhelming evidence she concocted the allegations.[160]

In the current environment, the military has charged investigators, prosecutors, and others to eliminate sexual assault. It grades them on their success. As with all Soldiers, it tells them they are in the midst of an epidemic. These individuals may come to believe they are in the front lines, battling this crisis. Defense counsel fear lawmakers and leaders constantly agitating about a sexual assault epidemic will cause people who should know better, to begin believing that every complaining witness coming forward is an actual victim, or at least to believe such people probably are victims. Worse yet, they may remain blind to or deliberately avoid evidence that proves otherwise.[161]

The government has invested significant time and $257 million dollars for the 2015 fiscal year into defeating sexual assault in the armed forces.[162] The military has created an entire apparatus to accomplish that mission. What happens if the people tasked to root out this epidemic find there is a shortage of actual victims?[163] One can validly worry that "institutions will try to preserve the problem to which they are the solution."[164] This does not imply anyone will act unethically, deliberately or otherwise. But, when the military unleashes a large and deadly weapon system against a grossly over-exaggerated enemy, collateral damage may result.[165]

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[158] Nancy Grace's Early Obnoxious Duke Lacrosse Statements, (Sept. 18, 2013), https://www.youtube.com/watch?v=6s2m1OML6I8

[159] Tyler Kingkade, *Phi Kappa Psi Fraternity Vandalized, Students Protest at UVA After Rolling Stone Article*, THE HUFFINGTON POST (Nov. 20, 2014, 5:05 PM), http://www.huffingtonpost.com/2014/11/20/phi-kappa-psi-uva-vandalized_n_6194870.html.

[160] *See* Mencimer, *supra* note 153.

[161] U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 10, at 74 ("Mr. Cave provided the Commission with an example of a situation where he believed military prosecutors disregarded evidence that allegations were false."); *See also* United States v. Stellato, 74 M.J. 473 (C.A.A.F. 2015) (Trial Counsel seemed to advise the mother of an alleged child sexual abuse victim not to give him a box of evidence, some of which ended up having items of exculpatory value, because if she did so he would have to review it all and turn it over to the defense).

[162] Ed O'Keefe, *What's in the Spending Bill? We Skim it So You Don't Have to*, WASH. POST (Dec. 10, 2014), https://www.washingtonpost.com/news/post-politics/wp/2014/12/09/whats-in-the-spending-bill-we-skim-it-so-you-dont-have-to/.

[163] *See* Robert S. McCain, *Campus Feminists and the Rape Shortage*, THE OTHER MCCAIN (Oct. 12, 2015), http://theothermccain.com/2015/10/12/campus-feminists-and-the-rape-shortage/. (Carol Stenger, the Director of Advocacy Center for Sexual Assault at SUNY Albany, New York, was bewildered that only 28 cases of sexual assault were reported at the university, of which almost all were not even clear cut, when according to "statistics" that show one in five college women are sexually assaulted, thousands of cases should have existed. According to Ms. Stenger, "We know the national statistics. It's happening everywhere.").

[164] Barbara Kay, quoting Clay Shirky, *Rape culture and the problem with numbers*, NATIONAL POST (Nov. 26, 2015, 9:26 PM), http://news.nationalpost.com/full-comment/barbara-kay-rape-culture-and-the-problem-with-numbers.

[165] Gertner, *supra* note 135 ("You don't have to believe that there are large numbers of false accusations of sexual assault . . . to insist that the process of investigating and adjudicating these claims be fair.").

C. Just because intoxicated Soldiers have sex does not mean a crime occurred.

Just how intoxicated someone must be to transform him or her from a willing participant into a sexual assault victim is a fact-specific and often complicated question. Yet, getting the answer right to that pivotal question is the linchpin of the typical military "drunk sex" case.[166] Unfortunately for the Soldiers accused of sexual assault and for the attorneys who defend them, it seems as if a simple math formula that allows for little nuance, now exists:

Alcohol + Sex (+ accusation) = Sexual Assault.

This leads to the proverbial elephant in the room with military sexual assault cases: alcohol use.[167] Unquestionably, and unfortunately, some situations occur when a Soldier gets someone else intoxicated, the person becomes incapable of consenting to sex, and the Soldier then has sex with the person anyway. Similarly, a Soldier may find an already unconscious stranger, crawl into bed with him or her, and have sex with the person. Those are clear cases of sexual assault.[168] If those were the fact patterns of every military sexual assault case or even most of them, no controversy would exist.

More often, someone consumes alcohol and then has sex with someone he or she would not have had sex with if sober. Afterwards, whether immediately, or in some cases much later, the person then alleges sexual assault. People may report such an encounter as a sexual assault for a number of reasons other than because it was in fact one.[169] Getting drunk and making unwise

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[166] Jim Clark, *Analysis of Crimes and Defenses 2012 UCMJ Article 120, effective 28 June 2012*, 2012 EMERGING ISSUES 6423, http://www.lexisnexis.com/documents/pef/20120705060050_large.pdf.

[167] *See* RSP REPORT 16 (June 2014) ("Alcohol use and abuse are major factors in military sexual assault affecting both the victim and the offender."); DEPT. OF DEFENSE, 2012 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS at 52 (2013), http://www.sapr.mil/index.php/annual-reports (Forty seven percent of female respondents indicated that either she or the offender had been drinking alcohol before the incident. This data is consistent with the civilian population, also around 50%, citing Teresa P. Scalzo, *Prosecuting Alcohol-Facilitated Sexual Assault 9* (2007)), http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf; *See* DEF. TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVICES, REPORT OF THE DEFENSE TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVICES 54-55 (2011), http://www.sapr.mil/index.php/annual-reports (reporting that more than half of sexual assaults in the military in fiscal year 2011 involved alcohol).

[168] In such a situation, the person getting assaulted would be "passed out" from alcohol rather than "blacked out." The distinction between being "passed out" and "blacked out" is critical, because unlike someone who is unconscious, an observer could be unable to recognize another individual is experiencing a blackout and could mistakenly believe such a person is cognizant and consenting to sex. Aaron M. White, et. al., *Prevalence and Correlates of Alcohol Induced Blackouts Among College Students: Results of an E-Mail Survey*, 51 J. AM. C. HEALTH 117 (2000).

[169] *Cf.* Mona Charen, *What the Left and Right Don't Get About Campus Rape*, THE FEDERALIST (Aug. 31, 2015), http://thefederalist.com/2015/08/31/what-the-left-and-right-dont-get-about-campus-rape. There are also a multitude of reasons someone might lie about sexual assault, to include: needing an alibi, revenge, rage, retribution, sympathy, extortion, or just because someone is mentally imbalanced and does not understand the consequence of making such an allegation. *See* Yager, *supra* note 18, at 63; Taylor, *supra* note 146. *See* U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 10, at 182 ("Why would a victim lie? One possible motivation is that in the military adultery can be a criminal offense. A useful way to avoid being punished is to claim that one was raped rather than a willing participant in an illicit affair."). Also, someone may give "honest false testimony" about a sexual assault or misperceive an uncomfortable encounter as criminal assault when it was not one. *See* Tavris, *supra* note 21. And, there also some "drunk sex" scenarios which are both legally and morally sexual assaults, and for which the reported victim is not lying at all.

choices, including having ill-advised sex, should not by itself make the other person a criminal.[170] Yet, in the current moral panic it is difficult to rebut the presumption that if a Soldier has sex with an intoxicated person, a crime has occurred, particularly if either participant cannot precisely remember the events.

Once a person reports a sexual assault, the military views the notion that this pre-designated "victim" is somehow responsible for her behavior as irrelevant at best and shaming at worst.[171] And practically speaking, if a drunken man and drunken woman engage in sexual intercourse and the following day the woman either does not remember it, or regrets it, then she, not the man, is the victim.[172] This is highly problematic because it is certainly possible for either a man or a woman to consent to sex while intoxicated, but not clearly remember doing so afterwards. It is also possible in such situations for the man to have been taken advantage of or victimized.

Both men and women use alcohol as a social lubricant and neither men nor women necessarily communicate openly and honestly about sex.[173] Studies have shown that when women become intoxicated from alcohol, it heightens their self-reported sexual arousal.[174] Also, men are more likely to "over-infer the degree of sexual attraction portrayed in ambiguous signals from women."[175] These factors, along with the simple negligence standard that Article 120 imports,[176] and the reality that people can behave coherently in blacked out states, present disaster for male Soldiers.[177] When accused of sexual assault, the military justice system holds men responsible for their female partner's capacity to consent.[178]

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[170] Whereas we would never think that a person who gets in a car and drives while intoxicated is not responsible for their own behavior, we now seek to absolve *some* people of the decisions they make while intoxicated in matters of sexual choices. For instance, another hypothetical to consider is what would happen if a drunk man and drunk woman, driving in separate cars after leaving separate establishments, collided into each other while driving drunk. Would one be the victim and the other the assailant? Or are both responsible for the unwise decisions they made while driving under the influence? Since it takes two people to have sexual intercourse, if both parties are equally intoxicated, who is responsible for "crossing the line" in such a situation? Marshall, *supra* note 126 at 70.

[171] U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 10, at 180 (quoting the Written Testimony of [defense attorney] Bridget J. Wilson at 2 (Jan. 11, 2013) "When one tries to address the huge problem of binge drinking in the military as a contributing factor to sexual assaults, they are accused of trying to blame the victim.").

[172] *Id.* at 71. Based on my own professional experience and the anecdotes of many judge advocates I have spoken with, I am not aware of any case where a female Soldier was prosecuted in such a situation and the male Soldier was designated as the victim.

[173] *See* Tavris, *supra* note 21. Also, human nature is human nature. While it is laudable that the military tells its members to only have sex while sober and to communicate one's sexual desires, preferences, and boundaries, such efforts are not going to stop the inevitable misunderstandings, confusion and chaos that ensue when people have sex.

[174] *See* William H. George, et al, *Women's Sexual Arousal: Effects of High Alcohol Dosages And Self Control Instructions*, 59 HORMONES & BEHAVIOR 730 (2011); Sheila B. Blume, *Sexuality and Stigma: The Alcoholic Woman*, 15 ALCOHOL HEALTH & RES. WORLD 139 (1991).

[175] April Bleske-Rechek, Et Al, *Benefit or Burden? Attraction in Cross-Sex Friendship*, 29 J. OF SOC. & PERS. RELATIONSHIPS 569, 575-81 (2012); *see also* Antonio Abbey, et. al, *Alcohol and Dating Risk Factors for Sexual Assault Among College Women*, 20 PSYCHOL. WOMEN Q. 147, 148-49 (1996) (finding "[r]esearch with college students has consistently found that men perceive women as behaving more sexually and being more interested in having sex with them than women actually are.").

[176] *Supra* note 67.

[177] White, *supra* note 168.

[178] Marshall, *supra* note 124, at 80 ("Though on its face gender neutral, the 2012 Article 120 is, in effect, making a male liable for behavior that he could have avoided if sober—a risk of having sex with a woman who acquiesces to sex because of or in spite of intoxication. But the 2012 Article 120 will not say the same about a woman. It will not

Ironically, the traditionally male-dominated military, which has gone to great lengths to integrate women and treat them as equals, imports a Victorian age notion of benevolent sexism in this area.[179] It presumes women cannot responsibly consume alcohol, and if a woman drinks alcohol and becomes intoxicated then she cannot consent to sex. Such a paternalistic stance discounts that in today's world, women are as equally capable as men of *deciding* to get intoxicated and then deciding to have sex afterwards.[180] Perpetuating the idea that women regularly become too drunk to know what they are doing, while men invariably stay sober and in control, allows women to abdicate responsibility for their roles in "drunken sex."[181]

Seeking to explain every drunken sex case as sexual assault conditions women to see themselves as victims rather than autonomous individuals who exercise their own sexual agency.[182] This perpetuates the stereotype of women as weak, something they have fought to overcome in their struggle to be seen as equals in the military. It is also counterproductive because it may cause men to become hyper-vigilant around their female colleagues.[183]

Certainly not everyone behaves maturely when pursuing sexual partners and engaging in sexual intercourse. However, a Soldier who conducts himself in a distasteful or even immoral manner has not necessarily committed a sexual assault offense.[184] Just because a person feels

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say that she puts herself at risk for liability for behavior she could have avoided if sober—a risk of giving intoxicated consent.").

[179] Benevolent sexism is a "belief that women should be adored and idealized while at the same time believing they are weak and need to be protected." Jessica A. Turchik & Susan M. Wilson, *Sexual Assault in the U.S. Military: A Review of the Literature and Recommendations for the Future*, 15 AGGRESSION & VIOLENT BEHAVIOR 267, 274 (2010).

[180] *See* Hanna Rosin, *Boys on the Side*, THE ATLANTIC, Sept. 2012; Laura Sessions Stepp, *A New Kind of Date Rape*, COSMOPOLITAN (Sept. 2007), http://www.cosmopolitan.com/sex-love/tips-moves/new-kind-of-date-rape ("Today's hookup culture: lots of partying and flirting, plenty of alcohol, and ironically, the idea that women can be just as bold and adventurous about sex as men are."). It also discounts that alcohol serves as a social lubricant for this hook-up culture. *See In Groups, Alcohol a Social Lubricant*, UNITED PRESS INT'L (Jun. 30, 2012, 7:11 PM), http://www.upi.com/Health_News/2012/06/30/In-groups-alcohol-a-social-lubricant/UPI-97281341097907/?spt=hs&or=hn.

[181] Marshall, *supra* note 124, at 84.

[182] *Id.*, at 81.

[183] Kayce Hagen, *One Airman's View: Open Letter to the SARC* (May 14, 2015), http://www.jqpublicblog.com/one-airmans-view-open-letter-to-the-sarc/; U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 10, at 149.

> The Commission received persuasive testimony and data that the incidence of unfounded sexual assault reports has increased and the civil liberties of the accused are being undermined by commanders responding to political pressure to 'do more' to respond to 'the crisis.' The damage to military morale of such a trend, *and its negative effect on the integration of women into the military ranks, should give everyone pause*.

Id. (emphasis added).

[184] Burris, *supra* note 19, at 55-56 (citing UCMJ art. 120(b)(3) and 120(g)(8) (2014) [10 U.S.C. §920(b)(3) and §920(g)(8)).

> Indeed, not only is it possible for someone who has been drinking . . . .to consent to sexual contact, it is also possible for one to lawfully ply another with alcohol with the sole aim of engaging in sexual acts or intercourse with them. This is not, as conventional wisdom holds, sexual assault or rape *per se*. The legal test is not whether one intended to, and did, in fact, lower the inhibitions or defenses of the other party with the aim of taking

another person took advantage of her does not necessarily mean she was sexually assaulted.[185] Nor does it mean someone was sexually assaulted merely because she did something unwise while under the influence of alcohol that she would not do when sober.[186] No one should be absolved from personal responsibility and considered a victim *merely* for making foolish decisions while in an intoxicated state—unless the person was truly so intoxicated as to not be able to meaningfully consent.[187] Ironically, in almost every other category of crime *other* than sexual assault, the law holds people accountable for the actions they take while intoxicated.[188]

In the *United States v. Goldstein* hypothetical, CPT Goldstein might have also been a victim of sexual assault if both he and MAJ O'Brien were both too intoxicated on any of the occasions when they had sex for either to have consented. Yet, he would face charges if she was first to report she was too drunk to consent. Meanwhile, military judges would likely rule inadmissible any evidence that CPT Goldstein was unable to judge MAJ O'Brien's ability to consent or her level of impairment due to his own intoxication. His level of intoxication would be irrelevant with regard to his accountability and decision-making, whereas her intoxication would be the key to finding him accountable for what happened.

Defense counsel fear that Soldiers who did not commit criminal offenses are getting shoe-horned into the military justice system for unwise and immature decisions they made while drinking.[189] More problematic, the law is unclear on the very issue of how intoxicated people can

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> advantage of them sexually, but whether the other party was incapable of consenting or did not, contemporaneous with the sexual contact, consent.

Id. Evidence the alleged victim consented to the sexual act is relevant to whether the prosecution proved the elements of the case beyond a reasonable doubt. United States v. Neal, 68 MJ 289, 302 (C.A.A.F. 2010). An analogous situation might be if a mugger intends to force someone to give him his money, but when the mugger first approaches, he pretends to be a stranger in need of help, and the other person willingly hands the money over in a charitable act, not appreciating the dangerous situation that is occurring and what might happen if he did not comply. Under such facts, the *mens rea* of the mugger is not enough to establish the elements of the criminal offense.

[185] *See* Burris, *supra* note 19, at 54-56 (detailing the types of gray area sexual encounters that military members may erroneously conclude are criminal acts); Yager, *supra* note 18, at 68 ("When it comes to treatment, we have to recognize that some false victims will truly believe they are victims, and suffer the same trauma as actual victims, even though they are not victims under the law. A woman who was intoxicated, for example, but still capable of consenting, may very well believe she was a victim even though the law says otherwise.").

[186] Ashe Schow, *Ever had drunk sex? That's rape, according to this university*, WASH. EXAMINER (Jul. 22, 2015 11:54 AM), www.washingtonexaminer.com/ever-had-drunk-sex-thats-rape-according-to-this-university/article/2568742 (A poster at Coastal Carolina University says "Jake was drunk - Josie was drunk. Jake and Josie Hooked Up. Josie could NOT consent. The next day JAKE was charged with RAPE. A woman who is intoxicated cannot give her legal consent for sex, so proceeding under these circumstances is a crime. It only takes a single day to ruin your life. Think About it! Be responsible."); Cathy Young, *Consent: It's a Piece of Cake*, SP!KED (Nov. 2, 2015), http://www.spiked-online.com/newsite/article/consent-its-a-piece-of-cake/17594#.VjqQCY6yo1H.facebook.

[187] *See* Tavris, *supra* note 21.

[188] *See* Hypotheticals, *supra* pp. 23-26.

[189] U.S. COMMISSION ON CIVIL RIGHTS, supra note 10, at 74 ("Professor Sullivan argued that "[p]oliticization of the issue of sexual assault in the military threatens [the] goal [of] . . . fairly and accurately distinguish[ing] those Service members [sic] who are innocent from those who are guilty. Mr. Cave, argued, "Over the last five to seven years it has been increasingly apparent to an accused going into a sexual assault case that he is presumed guilty and must prove his innocence, and that background politics play an important role in how the case is to be resolved.").

be and still retain the ability to consent to having sex.[190] Recent appellate court decisions have recognized this issue and noted that the ambiguous state of the law has confused panel members. Added to this conundrum is that the military uses overbroad terminology when discussing this matter in the SHARP context.[191] For example, SHARP representatives have routinely misinformed Soldiers that if they have one alcoholic drink they cannot consent to sex.[192]

In the current political environment, an allegation of sexual assault will likely result in a commander preferring charges, the convening authority referring the charges regardless of a PHO's recommendation, and a military judge or panel having to sort out what happened.[193] The same members of Congress who realize prosecuting gray area cases in the civilian world is

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[190] *See* United States v. Pease, 74 M.J. 763 (NM. Ct. Crim. App. 2015); United States v. Long (A. Ct. Crim. App. 2014).

[191] Murdough, *supra* note 18, at 273 (citing U.S. DEP'T OF DEF., DIR. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM encl. 3, para 1.6.2 (6 Oct. 2005) (C1 7 Nov. 2008) [hereinafter DoDD 6495.01] (cancelled and reissued by DoDD 6495.01 (23 Jan. 2012) (C1 30 Apr. 2013)) and explaining that DoD's SAPR policy defines "sexual assault" more broadly than Article 120, UCMJ does); Jed Rubenfeld, *Overbroad Definitions of Sexual Assault are Deeply Counter-Productive*, TIME (May 15, 2014), http://time.com/99890/campus-sexual-assault-jed-rubenfeld/.

[192] Email from Mr. Robert M. Lewis, Fort Leonard Wood, MO, SHARP Trainer (July 2, 2015, 3:55 PM), on file with author) (describing the "one drink" fallacy that other Sexual Harassment/Assault Response & Prevention (SHARP) leaders have been admonished for incorrectly providing during training).

> As one criminal defense lawyer specializing in military law and former judge advocate testified, "We speak to those who are told in sexual assault training that if a woman has had a single drink she cannot consent to sex. We have seen commands that fear that if they do not forward every allegation, no matter how dubious, for prosecution that will cost them their careers . . . researchers describing a sexual assault prevention campaign at an Army installation in Europe: "In a fourth image, a soldier, whose face is not identifiable in the image, is bragging to two men and women at a dining facility table on how easy it was for him to have sex with a woman in his barracks. One of the men at the table then confirms that the soldier had sex with a woman who was drunk. The third man labels his friend's behavior as rape. The tag line on this image states 'Speak up when you hear stories that glorify sexual violence. Your responses can make a difference.'" This oversimplification—that drunkenness and the ability to consent to sexual contact are mutually exclusive—could lead to misperceptions about what constitutes a criminal sexual offense.

Burris, *supra* note 19, at 34 n. 192 (internal citations omitted). Recently, a current Staff Judge Advocate (SJA) shared with me his concern that a representative of the Provost Marshal perpetuated the idea that "one drink equates to an inability to consent." This occurred when the SJA attended his in-processing briefing at a major installation. While the SJA made an on-the-spot correction, he subsequently found that prospective panel members during *voir dire* espoused the same concept, sometimes resulting in challenges for cause. Email from Anonymous Person (Dec. 13, 2015, 4:46 PM) (on file with author). This anecdote replicates the data that then-Maj. Yager discovered from polling the Air Force trial judiciary. Nearly every military judge in the Air Force has had to give remedial instructions to prospective panel members because they have also been routinely misinformed on the law. *See* Yager, *supra* note 18, at 78-81.

[193] In 2014, Congress passed a law requiring the next level of the chain of command to review sexual assault cases in situations where both the SJA and convening authority agree that a case *should not* be referred to trial. In situations where an SJA advises a convening authority to refer a case and the convening authority declines to refer, the service secretary must review the case. *See* FY14 NDAA, *supra* note 8, § 1744. This may create situations where leaders will choose "moral cowardice" over doing the right thing for fear that they will be second-guessed if they refuse to send a case forward. Murphy, *supra* note 49, at 163 (quoting an interview the author conducted with Major General Anthony Cucolo III).

unfeasible expect the military to prosecute them, and to prosecute them successfully.[194] In reality, this means that defense counsel can expect any male Soldier who had a drunken sexual encounter his partner came to regret afterwards or did not remember well is a potential new client.

D. Cognitive dissonance, confirmation bias, and the need to judge each case on its own merit.

People have a difficult time changing their minds once they invest themselves in their positions. This can lead to negative consequences. For example, in 1952, a group of men and women joined a cult led by a woman who prophesied that the world would come to an end soon.[195] Many members of this cult gave away their possessions and quit their jobs.[196] A social psychologist named Leon Festinger learned about the group and postulated a theory based on his understanding of human psychology.[197] Festinger predicted that after the prophecy inevitably failed, the members of the group would react by becoming even more committed to it, rather than abandoning it.[198] That is in fact what happened.[199] Festinger wrote a book about it and coined the term "cognitive dissonance" to explain this phenomenon.[200]

The theory of cognitive dissonance asserts that human beings feel tension and discomfort when they hold two beliefs that are psychologically inconsistent.[201] To reduce such discomfort, people will resort to sometimes ingenious or self-deluding measures.[202] For instance, the belief that someone is intelligent and rational conflicts with the idea that he or she wasted time, resources, and his or her livelihood to join an absurd cult whose leader said the world was coming to an end.[203]

To resolve such dissonance, one has a choice of admitting one's foolishness—or doubling down and becoming even more committed to the absurd cause. In the case of this doomsday cult, it was not a close call. The members resolved their dissonance by coming to believe they had committed themselves to a virtuous endeavor.[204] One does not have to join an end of the world cult, however, to suffer from cognitive dissonance. It is an all-too-human phenomenon

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[194] Murdough, *supra* note 18, at 271-72 (noting that Senators Gillibrand and McCaskill have both explained publicly that they understand why civilian prosecutors are reluctant to move forward on alcohol-driven sexual assault cases); K.C. Johnson, *Two Lawmakers Vote No to Safe Campus Act*, MINDING THE CAMPUS (Nov. 2, 2015), http://www.mindingthecampus.org/2015/11/two-lawmakers-vote-against-the-safe-campus-act/ (explaining that both Senators Gillibrand and McCaskill *oppose* a bill which would mandate college students report sexual assaults to the police so that the police and prosecutors can pursue them, instead preferring for such matters to be dealt with through college administrative disciplinary hearings).

[195] TAVRIS & ARONSON, *supra* note 141, at 12.

[196] *Id.*

[197] *Id.*, at 12-13.

[198] *Id.*

[199] *Id.*

[200] LEON FESTINGER, WHEN PROPHECY FAILS: A SOCIAL AND PSYCHOLOGICAL STUDY OF A MODERN GROUP THAT PREDICTED THE DESTRUCTION OF THE WORLD (1956).

[201] TAVRIS & ARONSON, *supra* note 141, at 13.

[202] *Id.*, at 24-26.

[203] *Id.*, at 12.

[204] *Id.*, at 30. Experiments demonstrating the power of cognitive dissonance have been conducted thousands of times. *Id.*, at 14, 16-17.

that affects everyone. In the criminal justice context, it is a dangerous condition to leave unaddressed.

Similar to cognitive dissonance is the theory of confirmation bias. This principle is perhaps best expressed with a quote from the British politician Lord Molson, who said, "I will look at any additional evidence to confirm the opinion to which I have already come."[205] It seems that part of the human condition is to look for evidence to confirm the truth of things people *already* believe, or that people want to believe.[206] In doing so, people avoid looking at things that may disconfirm their beliefs, so they do not suffer the ensuing cognitive dissonance such new evidence would cause them to have.[207]

In their effort to "win" cases and "do justice for victims," criminal investigators, prosecutors, and panel members can easily succumb to these twin perils. Cognitive dissonance and confirmation bias may lead otherwise ethical and honest criminal investigators, prosecutors, and panel members to unintentionally, inadvertently, or unconsciously tune out evidence that exculpates Soldiers accused of committing sexual assault.[208]

After all, a normal person would not want to live with himself knowing he tried to convict or did convict an innocent person. One can resolve that dissonance of convicting a potentially innocent person, however, by becoming convinced of the person's guilt by selectively

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[205] *Id.*, at 17.

[206] *See Rolling Stone and UVA: The Columbia University Graduate School of Journalism Report,* ROLLING STONE, *supra,* note 155.

> The problem of confirmation bias – the tendency of people to be trapped by pre-existing assumptions and to select facts that support their own views while overlooking contradictory ones – is a well-established finding of social science. It seems to have been a factor here. Erdely believed the university was obstructing justice. She felt she had been blocked. Like many other universities, UVA had a flawed record of managing sexual assault cases. Jackie's experience seemed to confirm this larger pattern. Her story seemed well established on campus, repeated and accepted.

Id. Realizing no one is immune from cognitive dissonance or confirmation bias, I sent drafts of this article to a number of current and former SVPs and other military prosecutors for their input. I purposely included people I believed would disagree vehemently with me. Based on some their feedback, I substantially revised parts of it.

[207] "Counter-intuitive" behavior is one such example of the perils of confirmation bias. *Meet Counterintuitive Victim Behavior Expert Dr. Veronique Valliere*, COMMUNITY OF THE WRONGFULLY ACCUSED, (Jan. 12, 2016), www.cotwa.info/2012/06/bygones-be-bygones-unspeakable.html (critiquing a psychologist the Army routinely employs (and pays well) as a "blind" prosecution expert-witness in courts-martial.). Counter-intuitive behavior, the notion that sexual assault victims may act in manners people might find strange, such as continuing to have sex with the person who assaulted them, or waiting years to report, is a non-falsifiable theory. It can explain away anything and everything a "victim" does after an alleged sexual assault. It exemplifies the fallacy of trying to make the evidence fit the theory, because whatever a victim does, her action can be made to fit the theory that she was a victim, because the theory assumes the person is a victim to begin from the start. *See* Yager, *supra* note 18, at 69-73 (Explaining the research fallacies on victim behavior. "The reason [those who purport to research victim behavior] know it is typical behavior all comes back to the starting point: because self-proclaimed victims say so."). Moreover, just about anything a "victim" does that one could argue demonstrates counter-intuitive behavior—is precisely how one might be expected to act if she was not a victim, but had consensual sex or a consensual relationship with an accused.

[208] *See e.g.* United States v. Stellato, 74 M.J. 473 (C.A.A.F. 2015).

considering only certain facts. The danger with prosecutors (and investigators) is that "precisely because [they] believe they are pursuing the truth . . . they do not torpedo their own cases when they need to; because thanks to self-justification, they rarely think they need to."[209]

The phenomena of cognitive dissonance and confirmation bias may explain how countless innocent people have been convicted of crimes they did not commit.[210] And these phenomena may also explain how one may end up unintentionally cutting ethical corners. If investigators and prosecutors become convinced that a sexual assault epidemic exists in the military, they may unwittingly only seek out information that confirms this pre-established truth. Moreover, the greater confidence prosecutors or investigators have in their cases, the greater the dissonance they will feel when confronted with evidence they are wrong. They will then feel a greater need to reject that evidence.[211] All of this may happen without any deliberate malice.

Cognitive dissonance may also affect both participants in a sexual assault allegation. It can explain why people may erroneously, but honestly, believe they suffered a sexual assault even if they did not.[212] Someone who regrets having sex with another person under questionable circumstances and/or who has guilt or shame about having sex and who feels they are not "the type of person" to act in such a manner, may honestly but mistakenly interpret or re-interpret such an encounter afterwards as a nonconsensual event. [213] This seems all the more likely when someone has ingested a large amount of alcohol and can rightly or wrongly ascribe their choices to having been intoxicated.[214] It is also likely to happen if their sexual partner treats them with disrespect, or disregards their feelings or humanity, and if the person's friends and co-workers

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[209] TAVRIS & ARONSON, *supra* note 141, at 132.

[210] *Id.* at 127-57; Radley Balko, *When Public Officials Can't be Bothered with Innocence*, WASH. POST (Oct. 6, 2015), https://www.washingtonpost.com/news/the-watch/wp/2015/10/06/when-public-officials-cant-be-bothered-with-innocence/.

[211] TAVRIS & ARONSON, *supra* note 141, at 141.

[212] Tavris, *supra* note 21; *See* Katie Roiphie, THE MORNING AFTER, SEX, FEAR, AND FEMINISM 82 (1993).

> As far as I'm concerned, you can change your mind before, or even during, but just not after sex. The reason this joke is funny, and the reason it's also too serious to be funny, is that in the current atmosphere, you can change your mind afterward. Regret can signify rape. A night that was a blur, a night you wish hadn't happened, can be rape. Since verbal coercion and manipulation are ambiguous, it's too easy to decide afterwards that he manipulated you.

Id. Of course, someone who sexually assaults another person may also suffer from cognitive dissonance and confirmation bias, and become unable to admit to himself, herself, or others that he or she committed a crime. I can think of at least several cases from my own professional experience where the overwhelming evidence resulted in a Soldier being properly convicted of sexual assault, yet the Soldier refused to see himself as having done anything wrong. Instead, he denied, rationalized, minimized, or did anything possible to interpret the event in a manner that made him culpable of nothing except perhaps "bad judgment."

[213] Tavris, *supra* note 21 (explaining the nuances and disconnect between how men and women perceive sexual encounters). *See also* BRUCE D. PERRY AND MAIA SZALAVITZ, THE BOY WHO WAS RAISED AS A DOG AND OTHER STORIES FROM A CHILD PSYCHIATRIST'S NOTEBOOK 155 (2006) ("[N]arrative memory is not simply a videotape of experiences that can be replaced with photographic accuracy. We make memories, but memories make us, too, and it is a dynamic, constantly changing process subject to bias and influence from many sources other than the actual event we are 'storing.'").

[214] Tavris, *supra* note 21.

make them feel judged or humiliated about the episode. Unfortunately, such situations likely happen every week at a typical military barracks.[215]

If the military wants to treat sexual assault as "special," it should also appreciate that investigating and prosecuting such crimes merit particular scrutiny and special caution. The sometimes volatile nature of sexual relationships, the potential for miscommunication, and the effects of alcohol often make accusations of sexual assault difficult to fit into neat proverbial boxes. Investigators and prosecutors must remain especially cognizant of the need to judge each case on its own merit and avoid viewing similar cases as patterns where they can jump to conclusions based on past experience. The danger of seeking evidence to confirm one's bias, burying one's head in the sand to avoid evidence that might be exculpatory, and the natural human empathy one has to want to help people who *may* have been victimized is rife with potential for error.

VI. Suggested Best Practices

The legal landscape is unlikely to change anytime soon to level the playing field for the accused. The course of military justice seems set for the near future and is not likely to return to its previous model.[216] Given that situation, criminal investigators and prosecutors can take a few steps to mitigate these imbalances, since justice includes safeguarding the rights of the accused. Broadly speaking, two basic measures they can take are to develop and maintain healthy and professional relationships with defense counsel and to remain neutral throughout the investigative and adjudicative process.

A. Professionalism

Although the criminal justice system is adversarial, relationships between prosecutors, investigators, and defense counsel need not be. Serving in these roles is stressful work and litigating allegations of sexual assault is emotionally charged and draining. It can become easy to internalize the struggles one has while advocating for his or her respective side. When professional relationships deteriorate, however, it can hinder a search for justice. Instead of exposing the truth about a case, it can become a personal battle between advocates and an opportunity to embarrass or harass the opposing party.

For instance, issues about access to witnesses or discovery might arise from a simple misunderstanding.[217] Rather resolving such situations professionally, attorneys can quickly

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[215] Testimony of Lieutenant Colonel Julie Pitrovec, JPP Transcript, *supra* note 24, at 274-75, ("girl talks to her friend and said . . . Yes, I guess we had sex and then the next thing, she's like, well, you were drinking last night, you couldn't consent, you were raped. That's the next thing. And the thing is—and this is the biggest problem, is that someone honestly and reasonably believes they were raped, whether they were told by a friend or they were told by somebody else, they are going to act the exact same way as someone who was actually the victim of rape.").

[216] U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 10, at 148 ("Once [politicians] take a public position on an issue, there is little reason for them to critically examine the evidence opposing that position, absent strong political pressure to do so.").

[217] Based on my own professional experience, I recall several instances where a witness misunderstood or failed to properly explain something that an attorney told him or her. Like the children's game of telephone, when the opposing counsel questioned that person, the misunderstanding took on a life of its own. Soon enough, each side

escalate them into toxic and personal battles against each other. This, in turn, can compound problems by poisoning the well and negatively affect future cases and clients.[218]

Each side should remember they might know things adversaries might not know. Remembering this should help each side realize that situations which might appear confounding, nefarious, or ethically questionable may be nothing of the sort. For instance, this often happens with discovery, where the defense gets some piece of evidence served on them at the last minute, or perhaps only after multiple requests, and only after ordered by a military judge. Without understanding the full background, one can easily conclude that an adversary has conspired against him or acted maliciously. Similarly, unless one has had to prepare a client for a providence inquiry, a trial counsel may not understand how a plea agreement or stipulation of fact can fall through at the last moment because a client is unable or unwilling to admit to certain points.

Instead of assuming bad faith, adversaries should first make a simple phone call or meet in person to discuss questionable situations. Also, in an age of email and blackberries, when one can respond immediately without always having all the facts, it can help to slow down before alleging someone acted in an untoward manner and jumping to unwarranted conclusions. Although this sense of professionalism applies to both sides, since the job of the prosecutor is to do justice, it is imperative for prosecutors and government agents to avoid gamesmanship at all costs. If they do otherwise, it can become very difficult for a defense attorney to keep his client from concluding that the other side is "out to get him."

B. Staying neutral

"The right to search for the truth implies also a duty; one must not conceal any part of what one has recognized to be the truth."[219]

To avoid the dangers of confirmation bias and cognitive dissonance, law enforcement agents and prosecutors should remain neutral. They should follow the evidence wherever it leads and not fear having to change their minds at *any* point.[220] As the philosopher Plato explained, it is

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would accuse the other of something untoward; almost always which was not actually what had happened. And once someone came to dislike an adversary, it became very difficult for that person to revise his or her beliefs afterwards.

[218] Based on my own professional experience, I also witnessed a number of unfortunate instances while serving as SDC and Chief of Military Justice where an adversary lost credibility with their opponents, which regrettably later may have served to the detriment of subsequent clients who had done nothing to deserve it. These types of situations can also cause a continued animosity among colleagues, some of whom will inevitably have to serve together in future assignments. I am not immune from this problem. My own zealousness and behavior over the years may have caused some of my professional relationships (and friendships) with others to deteriorate. Professionalism is a two-ways street and a good defense counsel should act zealously but must still maintain proper decorum in all circumstances.

[219] Albert Einstein, http://www.goodreads.com/quotes/141255-the-right-to-search-for-the-truth-implies-also-a (last visited Dec. 14, 2015)

[220] The Federal Prosecutor, 24 J. AM. JUDICATURE SOC'Y 18 (1940) (Address delivered at the Second Annual Conference of United States Attorneys, Apr. 1, 1940).

more virtuous when someone refutes you than it is when you refute someone else.[221] Revising one's beliefs when confronted with new evidence demonstrates virtue, not weakness.[222]

Moreover, the prosecutor's role is to do *justice*, not to "win." That should mean that if the evidence should begin to point in another direction, justice demands following the evidence wherever it leads, rather than obstructing the path where it is leading. Prosecutors should not seek to preclude the fact-finder from seeing potentially exculpatory evidence because doing so will weaken the government's theory of the case and make it harder for them to "win." No case is worth wrongfully convicting someone or sending an innocent person to prison.[223]

At all stages of the criminal justice process, those tasked with doing justice would do well to keep asking the following types of questions: (1) How/why might my theory be wrong?; (2) *What would it take to change my mind or demonstrate my beliefs or theory about this case are wrong?*; (3) What evidence, testimony, or witnesses, could exist or materialize that would refute the notion that the Soldier accused of this crime is guilty?; (4) Why should I believe (or not believe) this witness?; (5) What evidence should exist to prove this is what happened (or this is not what happened)? Then, investigators and lawyers should try to discover if such evidence exists.[224] If it does, then they will have done justice by helping to exonerate an innocent person. If it does not, then they will only have done a better job of preparing their case.[225]

> The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.

Id.

[221] PLATO, GORGIAS (Hamilton and Emlyn-Jones trans., Penguin Classics Revised ed. 2004).

> I am one of those who is very willing to be refuted if I say anything which is not true, and very willing to refute anyone else who says what is not true, and quite as ready to be refuted as to refute-for I hold that this is the greater gain of the two, just as the gain is greater of being cured of a very great evil than of curing another.

Id.

[222] Peter Boghossian: *Authenticity*, The Amazing Meeting 2013 (Oct. 25, 2013), https://www.youtube.com/watch?v=OGaj4j_az98. (Dr. Peter Boghossian is a philosopher professor at Portland State University. In this lecture, he discusses the important virtues of speaking plainly and truthfully, admitting ignorance when one does not know something, and revising one's beliefs about something when the evidence shows one's beliefs are incorrect or mistaken).

[223] *See, e.g.*, 60 *Minutes: 30 Years on Death Row* (CBS television broadcast Oct. 11, 2015), http://www.cbs.com/shows/60_minutes/video/6Ud7lebOqULnsEPqC_edxm5TIPoPNURF/30-years-on-death-row/. Also, no case where a sexual assault actually occurred is worth allowing the actual perpetrator to escape justice. *See supra* note 145.

[224] These are the precise type of questions defense attorneys ask themselves *or should* ask themselves when preparing their cases. These are the types of questions that create potential questions for cross-examination that exposes unreliable testimony, holes in the case, and biases in witnesses. The more thorough the investigation, using these questions, the less false cases that should go forward and more prepared the government will be to prosecute those who are in fact guilty.

[225] This notion comes from the idea of "The Devil's Advocate," a device the Roman Catholic Church used when investigating whether or not to select a person for sainthood. Valeri R. Helterbran, EXPLORING IDIOMS 40 (2008). Created in 1587 by Pope Sixtus V, the Devil's Advocate, also called the "Promoter of the Faith" was a canon lawyer appointed to argue *against* the proposal for sainthood. *Id.* Having that opposing point of view, presumably, would

C. Presumptions

Criminal investigators have rightly come to realize that, in cases where someone alleges they were sexually assaulted, he or she may have trouble remembering the experience, or at least remembering it in any linear fashion. Previously, this led to discounting what someone reported about a sexual assault, simply because the person failed to articulate the experience in a coherently linear fashion.

Agents now receive training on how to interview people who make these reports to ensure that they do so in a manner that will produce a more reliable account.[226] Prosecutors will now argue that one should not assume a sexual assault victim is lying just because he or she does not remember details of the incident with specificity. Perhaps he or she cannot recall the chronology of events, or he or she made inconsistent statements on the details of the sexual encounter he or she now alleges was an assault. Expert witnesses get called to explain how trauma may affect memory.

It would help, however, if the same courtesy was extended to those accused of committing these offenses.[227] Instead of immediately assuming Soldiers who cannot remember a night of drunken sex with specificity are lying and declaring them presumptive rapists, perhaps it would

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help ensure the church arrived at a proper decision. I believe such a Devil's Advocate should exist in every CID or military justice office.

[226] Russell W. Strand, United States Army Military Police School, *The Forensic Experiential Trauma Interview*, http://www.mncasa.org/assets/PDFs/Forensic%20Trauma%20Interviewing%20Techniques-%20Russell%20Strand.pdf; U.S. DEP'T OF ARMY, ARMY TECHNIQUES PUBLICATION 3.39.12, LAW ENFORCEMENT INVESTIGATIONS Appendix C Forensic Experiential Trauma Interview (19 Aug. 2013) [hereinafter ATP 3-39.12]. Russell Strand created the Forensic Experiential Trauma Interview (FETI) as a method to obtain accurate information from reported crime victims who endured trauma. Interview with Russell Strand, *supra* note 15. He developed the technique by blending what he had learned from conducting forensic interviews of children and from debriefing first responders who witnessed traumatic events. *Id.* Those experiences, along with an understanding of the latest neuroscience, indicated that people who suffer traumatic events may not necessarily remember what happened to them in a chronological or linear fashion. *Id.* A FETI interview asks open-ended questions which seek to elicit accurate details from an interviewee without questioning them about specific elements of an offense or questioning them in a chronological order about what happened. *Id.* By asking open-ended questions about what a person can remember, and what specific sensations they can recall (sight, smell, taste, sound), it aims to produce a more reliable account than the traditional, "who, what, when, where, why" questions asked in a traditional interview. *Id.*

[227] Mr. Strand recommends using the FETI with subject with subject interviews and has always opposed using stressful or deceptive interrogation practices. Interview with Russell Strand, *supra* note 15. He recognizes that when criminal investigators interview a suspect, the suspect will be in a highly stressful environment. *Id.* He believes using the FETI on subjects will produce a more reliable result. *Id.* He has offered, anecdotally, that using the FETI on both reported victims and reported suspects may lead to exonerating a wrongly accused person or to discovering a reported victim is lying about an event. *Id.* "The FETI is nonconfrontational, and different from what an accused expects. This style may disarm defensiveness and lead to disclosure." ATP 3-39.12, *supra* note 226, para. 3-38. No one has yet conducted any scientific studies on FETI which have validated data to compare against a control group. Yet, I feel confident based on anecdotal evidence and my own professional experience that this method is superior to traditional interview techniques for both subjects, victims, and any other witness.

do everyone well to give them some benefit of the doubt also.[228] Our system is built, after all, on the presumption that one accused of a crime is innocent.[229]

Also, while law enforcement officers may lie and use deceptive interrogation techniques, the military does not recommend that course of action.[230] Yet, old ways of thinking and practices die hard, and interrogators continue to use these habits.[231] Given that the line between consent and non-consent in cases involving alcohol can be difficult to discern, a skilled interrogator may easily manipulate an unsuspecting Soldier into confessing to a crime, when all he or she meant to do was accept responsibility for using bad judgment or treating another person shabbily.[232]

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[228] If, for no other reason, an agent who interviews a Soldier accused of sexual assault uses a kind tone and a Socratic method, it might encourage a truthful statement. If such a truthful statement inculpates the Soldier, while certainly not ideal for his defense, it at least minimizes the chance of obtaining a false confession. *See* Laura Miller, *There is no justice: What cops and courts get wrong about the human brain*, SALON (June 6, 2015), http://www.salon.com/2015/06/06/there_is_no_justice_what_cops_and_courts_get_wrong_about_the_human_brain/

[229] If this sounds too generous, then just consider how well anyone remembers the sequence of events that transpired during his or her last sexual encounter. Who kissed whom first? Who took whose pants off first? Who got on top of whom first? How long did it last? Now, imagine trying to recall a particular sexual experience from 10 months ago. What about trying to recall one specific sexual encounter with a person one had sex with numerous times. What if on this or other occasions the sexual encounters occurred after each person had ingested some amount of alcohol? Most importantly, what if the person questioning you was a well-trained law enforcement agent and this this questioning occurred in a custodial environment, where you were not free to leave and after the agent read you your rights, informing you someone had accused you of sexual assault? Consider how those factors might that add to your nervousness? Furthermore, consider your reaction if, during this interview, the person who questioned you lied to you about what happened and tried to trick you into admitting things that you did not do?

[230] ATP 3-39.12, *supra* note 226, para. 3-92.

> The use of trickery, deceit, ploys, and lying is legally permissible during the course of an interrogation. However, although it is legally permissible to employ deceitful tactics when conducting interrogations, it is not advised or recommended for several reasons including—The perpetrator knows more about the crime than the investigator. It can be relatively easy for a perpetrator to catch the investigator in a lie if the investigator uses a deceit tactic. Once caught in a lie by the suspect, the investigator loses all credibility. Juries and judges do not like to place their trust and confidence in police officers who appear to manipulate case facts by using deceit. Although lying rarely results in a confession being thrown out, it is frequently a factor used in a deliberation for panel members and judges who are considering evidence from an investigator who has proven that he can be a convincing liar and possibly untrustworthy. This can result in reduced sentences and occasional acquittals. Defense attorneys have become very adept at bringing out lies told during interrogations in courtroom settings and at turning these lies into credibility issues for the panel.

Id.

[231] Interview with Russell Strand, *supra* note 15.

[232] This is especially important in an era when Soldiers constantly receive SHARP training about the perils of drinking and having sex, much of which is inaccurate when describing the law. Testimony of Colonel Terri Zimmerman to Judicial Proceedings Subcommittee Meeting, JPP Transcript, *supra* note 24, at 273 (May 7, 2015), http://jpp.whs.mil/public/docs/04-Meetings/sub-20150507/20150507_Transcript_Final.pdf. ("I have seen with my own eyes marines confess to rape after being told by the NCIS agent, well, were you aware that she had a beer earlier that night? Oh God, now that you mention it, yes, I knew she was drinking. I guess she couldn't consent. I guess I did rape her. I've seen that with my own eyes."). My own professional experience leads me to the same conclusion. I recently served as an Article 32 PHO on case where, among other things, a Soldier "confessed" to sexual assault after the CID agent [mis]informed him that having sex with an "intoxicated" person was sexual assault. The CID agent even specifically referenced what the Soldier had learned in command briefings and SHARP training about not having sex with people who had been drinking. Although I recommended dismissal of charges

When teaching at the SVCC, Mr. Strand emphasizes that when someone reports a sexual assault, law enforcement officials should entertain three hypotheses.[233] One hypothesis is that "it happened." Another hypothesis is that "it didn't happen."[234] And the third is that "something happened, but not what the person necessarily described, and whatever happened might or might not necessarily have been a crime."[235] This is an admirable example of open-mindedness.

Law enforcement officers and prosecutors should also apply these same three hypotheses when evaluating the version of events from a reported suspect. Unless others witnessed the event or someone recorded a video of the incident, no one may ever fully know what happened in such a situation, especially if both parties were intoxicated. Therefore, staying open minded to all possibilities, including the one that the accused provides, is the best practice.

Also, a simple technique that criminal investigators might employ when interviewing subjects is to ask a rather simple but sincere question: "Who would you like me to speak to or what evidence would you like me to consider that would help me see your side of the story?" The answer to that question could lead to evidence that vindicates someone falsely, wrongly, or mistakenly accused. It might also lead to further incriminating evidence if the Soldier actually is guilty. Either way, it is evidence that those who care about justice should want to find.

Criminal investigators should seek to corroborate or refute a complaining witness's version of events just as they would with a suspect. They should collect the cellular phone from someone who reports a sexual assault to look for photographs, text messages, or other evidence. While this may present challenges, especially in the era of SVCs getting involved early on and privacy concerns, it is important regardless. Any text messages, emails, or phone conversations that alleged victims have with a Soldier they have accused of sexual assault are highly relevant to discovering what happened. Similarly, communications an alleged victim had with friends or family members afterwards is relevant also. Such data is hard evidence about the mental state each party had after the incident. Such information on electronic media may indicate an assault occurred. It also may indicate the person alleging the sexual assault may have had a motive to fabricate the claims.

Agents should also interview the roommates, friends, and family members whom the alleged victim may have spoken to after the alleged assault. At the very least, law enforcement officers should video-record all interviews with alleged sexual assault victims and with those accused. Law enforcement officers should feel confident if and when a defense counsel cross-examines them at trial, that they can testify truthfully that they turned over every proverbial rock in search of the truth.[236]

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because of what the CID agent had said and many other factors, the convening authority referred it to a general court-martial. The Soldier was ultimately acquitted of all the charges.

[233] Interview with Mr. Russell Strand, *supra* note 15.

[234] *Id.*

[235] *Id.*

[236] As a matter of practice, I recommend to all CID agents I teach at USAMPS, that in every case they investigate, they should contact the defense counsel after a Soldier is charged. The CID agent should introduce himself or herself, invite the defense counsel to review the CID file, and ask the defense counsel if he or he has any leads or evidence the agent should follow up on that her or she might have overlooked. Based on my own professional

Finally, although not necessarily helpful to the defense if a Soldier actually committed a sexual assault, the government should consider using pretext phone calls. If done properly, having the reported victim of a sexual assault call or send text messages to the suspect asking him or her open-ended questions may help discover the truth.[237]

VII. Conclusion

Until new legislation corrects the imbalances recent changes to the UCMJ have created, Soldiers accused of sexual assault and related offenses will find themselves in an exceedingly precarious situation. Once accused, the wheels of justice are now rigged towards preferring charges and referring charges to trial. There, a Soldier can be convicted by as few as four out of five individuals, all handpicked, all of whom are rated on their support for SHARP initiatives and who have heard mountains of messaging that an epidemic exists. Soldiers deserve better.

Presently, the only good news is that military judges seem immune from political pressure and will adjudicate cases in a just manner.[238] Every acquittal that occurs, however, may have a counter-productive effect by triggering more congressional reaction to the "crisis" of "perpetrators not being held accountable." Just acquittals on weak cases or cases that look more like a regretted sexual encounter may perversely damage real victims of sexual assault. Panel members may become jaded with seeing prosecutors repeatedly bringing forward weak and implausible cases, and they may eventually begin acquitting those they should convict.[239]

The seemingly unwritten policy of bringing forward any case, regardless of the holes in it, because of the fear of Congressional scrutiny, may also deter real victims from coming forward. If those who are truly victims of sexual assault believe their cases will only result in acquittals, they may decide to not report in the first place. It is ironic, therefore, that lawmakers insistence that sexual assault allegations must go to trial may, like the boy who cried wolf, end up backfiring.

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experience, I have seen countless cases where acquittals occurred, from what I could gather, because the defense put CID "on trial" for its lack of diligence and willingness to follow other leads, etc.

[237] I cannot overemphasize the importance of conducting such pretext phone calls or conversations in an ethical manner. It may be easy to manipulate a Soldier suspected of sexual assault into "confessing" when all he or she meant to do was apologize for boorish behavior. I know of at least one case, however, where a pretext phone call resulted in clearing a suspect. In that case, a NCO's spouse alleged he had raped her. She agreed to do a pretext phone call, the result of which conclusively demonstrated the suspect had not done anything wrong. Afterwards, the spouse recanted and admitted to the SVP she had fabricated the accusation.

[238] In a close case where reasonable doubt exists, that doubt must be resolved in favor of the accused. U.S. DEP'T OF ARMY, PAM 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK § 2-5-12 (1 Mar. 2015); *See* Testimony of Lieutenant Colonel Chris Thielemann, JPP Transcript, *supra* note 24, at 65 ("You can legislate a definition of consent all you want. I think no matter what they may be, the members, as they sit back there as the trier of fact often will use, and pardon my language here, a colloquialism, but for the grace of God go I, in deciding whether or not that person should be held accountable for engaging in non-consensual sexual activity.").

[239] Taylor & Adams, *supra* note 49 ("Even some prosecutors say the strategy has backfired, making it more difficult to crack down on the crime in general. Because there is this spin-up of, we have to take cases seriously even though they're crap, it creates a kind of a climate of blase attitudes,' said one Navy prosecutor, who asked to remain anonymous because she feared retaliation for speaking out.").

In the meantime, all those who carry the mantle of pursuing justice should, at the very least, ponder if they would feel confident in today's military justice system if someone wrongfully accused them of such an offense. Do they think the system would presume them innocent? Do they think the person who accused them would be presumed truthful and designated an actual victim from the initial report? Do they think criminal investigators or prosecutors would seek to determine if exculpatory evidence exists? Do they think their defense counsel would be able to effectively advocate for them? Do they think they could present information at an Article 32 hearing that might result in dismissal of charges? Do they think, if their case was referred to court-martial, it would be a fair trial?

If the answer to any of these questions is no, then the people now investigating and prosecuting these cases should do everything in their power to ensure the Soldiers whose names appear on the other side of "United States v." feel how they would want to feel if they stood in their shoes.