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WHAT'S MISSING FROM SEXUAL ASSAULT PREVENTION AND RESPONSE

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Abstract: This article examines the sexual assault prevention and response (SAPR) policy in the military over the last few years. Although focused primarily on the military policy, most of the concerns addressed in this article are equally applicable to how colleges and universities are dealing with SAPR. The article argues that civilian and military leadership have neglected to protect the wrongly accused. There are three sections to this article. The first section explains why we should be concerned about the wrongly accused, using examples of wrongful convictions, false accusations, the reasons they occur, and some research about the frequency of the problem. The next section discusses why we have not done so, demonstrates that false accusations are not rare, and exposes the significant flaws with the research that is driving our unbalanced policy. The last section identifies specific flaws with policy, the justice process, and with SAPR training and offers recommendations for how we can improve prevention and response while simultaneously protecting both victims and the wrongly accused.

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Some people regard rape as so heinous an offense that they would not even regard innocence as a defense.

- Professor Alan Dershowitz²

I. INTRODUCTION

As we³ continue to grapple with the right formula for eliminating sexual assaults from our Armed Services, we are making a critical error: we are glossing over the accused and our obligations to protect the innocent. This paper explores the problem through three primary questions: why we should be concerned with the wrongly accused, why we have not been concerned with the wrongly accused, and what we should do about it. In our admirable desire to solve a societal problem we have relied upon biased groups and faulty science to guide us. We have accepted the myth that false allegations are rare and we have concluded that false accusations are too insignificant to warrant attention.⁴ In doing so, we have developed a policy that focuses entirely on what benefits alleged victims⁵ without regard for the costs to justice. Justice is about getting the right results. We need a policy concerned about getting it right; one that is every bit as concerned about the innocent as it is with those who are victims.

The military is not the only organization drawing criticisms for its sexual assault problem. Our colleges and universities are also in the spotlight and they provide a number of salient examples for this paper. While the military sexual assault response and prevention

² Alan Dershowitz, *New Dangers Are Evident in Rape-Case 'Reforms'*, LOS ANGELES TIMES, Apr. 8, 1985, http://articles.latimes.com/1985-04-08/local/me-18595_1_prior-sexual-activity (last visited Feb. 28, 2015). Dershowitz attributes the actual quote to “one civil-liberties lawyer, who is concerned about the sometimes vigilante attitude toward accused rapists.” He has since been attributed with variations of this quote. See Eliza Gray, *Campus Crackdown, Is Harvard’s new sexual-assault policy fair to the accused*, TIME, at 12, Nov. 3, 2014.

³ Occasionally, the author uses “we” in this paper, rather than the typical third-person language favored in legal research, for strategic effect. First, using “we” instead of “policy-makers,” “the Department of Defense,” “the military,” “colleges and universities,” or other such terms demonstrates the issue is broader than any single institution. Second, using “we” reflects a unified approach to solving the problem. With sexual assault response and prevention, it all too often seems that you are either for victims or for rapists. See *infra* Part II.A. On the contrary, you can be for victim, for the innocent, and still support due process for the offenders; respect of one does not necessarily require neglect for any others in the process. Finally, “we” reflects that the author is not an outsider to the institutions targeted in this paper and, therefore, is not a foreigner recommending changes but rather one of “us” fighting to get this right.

⁴ Cathy Young, *Crying Rape*, SLATE, Sep. 18, 2014, http://www.slate.com/articles/double_x/doublex/2014/09/false Rape accusations why must be pretend they never happen.html (last visited on Mar. 16, 2015). Cathy Young discusses the problem of false allegations in the context of solving the problem of sexual assaults. She concludes stating, “But seeking justice for female victims should make us more sensitive, not less, to justice for unfairly accused men. In practical terms, that means finding ways to show support for victims of sexual violence without equating accusations and guilt, and recognizing the wrongly accused are real victims too. It means not assuming that only a conviction is a fair outcome for an alleged sex crime. It means, finally, rejecting laws and policies rooted in the assumption that wrongful accusations are so vanishingly rare that they needn’t be a cause for concern. To put it simply, we need to stop presuming guilt.”

⁵ Although the author uses both “victim” and “alleged victim” terms, he does not use them interchangeably. “Alleged victim” refers to unverified pre-verdict allegations or post-verdict acquittals. “Victim” refers to actual victims under the law, whether confirmed through a conviction or presumed for purposes of a particular point.

(SAPR) policy is the primary focus, the concerns addressed in this paper are largely applicable to ongoing SAPR efforts in colleges and universities as well.

While there are positive aspects to the current SAPR program, such as the development of special victims counsel (SVC),⁶ the current policy for sexual assault prevention and response is problematic. It goes something like this: There are too many reports of sexual assault and many more unreported sexual assaults. We know they are sexual assaults because false allegations are rare. Too many victims are not getting justice and too many offenders are not being held accountable. To get justice, we have to change the system because it is too skewed in favor of an accused. Then victims will have more confidence reporting, offenders will be held accountable, and we can reduce sexual assaults.⁷

There are two related fatal flaws in this argument: first, the notion that false allegations are rare. Second, whatever number of false allegations there are, they are too insignificant to be concerned about them. Collectively, these principles have led to major changes in the Manual for Courts-Martial that effectively turn sexual assault allegations away from a search for justice, and instead into a search for convictions. While the position is politically popular, it is the result of intellectually dishonest science and flawed logic.

The first section of this paper demonstrates how devastating false accusations can be and why we should be concerned with protecting the wrongly accused. The section begins by discussing the dangerous mob mentality that has stymied meaningful discussion and fostered unbalanced changes. This article then turns to the victim we have ignored: the wrongly convicted. Anecdotes are driving policy. The only ones being told, however, are of alleged sexual assault victims. When an innocent person is convicted, we undermine the very core of our Constitution and create victims. Their stories need to be told to appreciate the costs of the

⁶ The author has been a big supporter of SVCs. In September 2011, he had a one-on-one discussion with then-Judge Advocate General Lieutenant General (Lt Gen) Richard G. Harding, when Lt Gen Harding was at Ramstein Air Base, Germany. In his personal capacity, and at odds with many of his colleagues, he offered a number of suggestions for improving military justice from the training of prosecutors to the creation of victims counsel. He opined that the primary reason convicted Airmen complain about the performance of trial defense counsel on appeal was the failure of trial defense counsel to engage in sufficient communication with the accused throughout the process. It was much like medical malpractice in the civilian world; it is not the brightest doctors who avoid lawsuits but rather the ones who have the best bedside manner. He noted that a fair amount of alleged victims have historically sought defense counsel for their own collateral misconduct and these alleged victims appeared far less dissatisfied with the trial process regardless of the outcome because they had someone in their corner helping them understand the process better. Drawing on these experiences, he advised that meaningful communications with alleged victims will make them much more comfortable with the trial process and give them a voice because just being a *witness* is, quite frankly, awful; an SVC program would make a world of difference in giving a voice to alleged victims and communicating the often misunderstood legal process. Subsequently, he was asked by Lt Gen Harding to provide additional thoughts about, for example, what the program might look like, how it might be structured, what may authorize the program, and how SVCs might fit in the trial process. A few months into the next year, presumably after speaking with many more people and getting many more opinions, Lt Gen Harding initiated the SVC program that has now expanded into each of the armed services.

⁷ There are countless sources for this policy. From statements by the President and Secretary of Defense to DOD strategic policy, directives, instructions and service regulations, to senior leader statements to the press, senior leader interviews with the author, training materials, and sexual assault policy training and briefings. This statement is a paraphrasing of the overarching DOD strategy for dealing with sexual assaults.

course we are on. This article tells the short stories of six individuals (out of more than 460) who served years in jail for sexual assaults they did not commit before they were finally proven innocent. This paper then discusses the most common reasons for wrongful convictions and examines a statewide study in Virginia that found the rate of wrongful convictions was approximately 15 percent, meaning that there are likely thousands upon thousands who have suffered convictions for sex offenses they did not commit. The wrongly convicted, however, are the worst-case scenarios for a criminal justice system that should protect the wrongly accused and weed out false accusations before trial, but that is not happening. This article then discusses five cases of false accusations that drew significant media attention including the Hofstra case, the University of Virginia case, and the Duke lacrosse case. This paper then discusses a few brief examples of false accusations that led to the murder of the falsely accused. In each case, the wrongly accused suffered very real and irreversible harms, demonstrating they are real victims who are being ignored.

In the next section, this article discusses why we have ignored the wrongly accused. The innocent has been neglected because of the myth that false accusations are rare. This section discusses the significant flaws in research that have misled well-intentioned policy-makers. The problems are extensive beginning with the surveys used in research and to assess policy concerns. These surveys fail to accurately define what constitutes a sexual assault, they misstate or omit important legal concepts that are integral to determining whether there was a crime, and they fail to validate the information provided by alleged victims. The way researchers define a false allegation is also fraught with numerous problems. They have treated every allegation as true unless the alleged victim convincingly admits it is false or the evidence proves it to be knowingly false beyond a reasonable doubt. Their definitions ignore the cases that are more likely false than true, probably false, or do not constitute a crime under the law. Building on these issues, this paper then outlines the research on false allegations, discusses four of the main ones in detail, and demonstrates how researchers have perpetuated intellectually dishonest assessments about the true rate of false allegations. The author then discusses the four primary reasons for false allegations along with examples of each: creating a cover story or alibi, to obtain revenge or retribution for a perceived harm, to gain sympathy or attention, and extortion. Next, the author demonstrates how the rate of false allegations is not rare even using conservative numbers.

The paper then discusses two root problems with research and SAPR policy. The first root problem is conflating principles for treatment with principles of justice. From a treatment standpoint, it is perfectly appropriate to presume every sexual assault allegation is true unless proven false; which is the position taken by researchers. This presumption, however, is incompatible with judicial standards, which require a presumption of no crime unless it is proven beyond a reasonable doubt. The second root problem is that the foundational research on victim behavior is significantly flawed. In what the author calls the “Circle of Self-Validation,” nearly all of the research on victim behavior relies upon the un-tested assertions of the alleged victims. Simply stated, the answer to the question, “How do we know this is true?” is almost always traced back to, “because the alleged victim said so.”

The last section addresses specific areas of concern and includes 25 recommendations for change. The section begins with the results of a survey of Air Force trial judges designed to

identify what aspects of SAPR are most problematic from a justice standpoint. The survey shows that judges overwhelmingly instruct jurors to disregard all SAPR training and statements from senior leaders; that judges are especially concerned about inaccurate statements of the law, false reporting statistics, and training to “believe the victim”; and that judges believe that military members do not seem to be paying attention to training anymore.

The 25 recommendations for change consist of 11 DOD-level recommendations, four UCMJ proposals, and 10 SAPR training suggestions. The recommendations include: make protection of the wrongly accused a specific goal of SAPR policy; separate treatment considerations from justice considerations; create a conviction integrity unit office; establish defense investigators; expand a victim’s ability to elect a restricted report; initiate a formal review of law enforcement investigation policies and practices; increase jury minimums and modify what may be considered in selecting or excluding jurors; make pretrial hearing recommendations not to proceed binding on convening authorities; expand Article 46 to ensure an accused has equal access to witnesses who otherwise only want to cooperate with the prosecution; eliminate several terms from policy and training; and fundamentally change our training to focus primarily on prevention, teach precaution to potential victims, and teach risk management to potential offenders.

II. FALSE ALLEGATIONS ARE SIGNIFICANT

Fax machines were invented and became obsolete while I was in prison... I wish it was a nightmare because nightmares you wake up from.

- Kenneth Ireland, exonerated of rape and murder after 21 years in prison⁸

When an innocent person is convicted of a sexual assault, there has been a tremendous injustice. Some victim advocates assert, however, that it is an acceptable byproduct of seeking greater justice for victims of sexual assault.⁹ The position is fundamentally flawed. There is no justice for sexual assault victims when a wrongly accused is convicted for a crime he did not

⁸ David Owens, *Wrongly Convicted, Ireland Makes Case for Compensation*, HARTFORD COURANT, Jul. 29, 2014, available at http://articles.courant.com/2014-07-29/news/hc-kenneth-ireland-wrongful-imprisonment-hearing-0-20140729_1_barbara-pelkey-kenneth-ireland-prison-overcrowding (last visited Apr. 6, 2015).

⁹ One example comes from Harvard College professor, former federal judge, and renowned feminist Laura Gertner, who once represented a student on appeal, whom she believed had been wrongfully convicted. She won the appeal and was picketed by a women’s rights group following the reversal with a sign that read, “so-called women’s rights attorney.” After explaining why she represented the student and that she believed he was innocent, the demonstrator told her “That is irrelevant!” See Nancy Gertner, *Sex, Lies and Justice*, AMERICAN PROSPECT, Winter 2015, available at <http://prospect.org/article/sex-lies-and-justice> (last visited Feb. 26, 2015). See also, Jonathan Taylor, *10 Reasons False Rape Accusations are Common*, A VOICE FOR MALE STUDENTS, Jul. 22, 2014, <http://www.avoicformalestudents.com/avfms-mega-post-10-reasons-false-rape-accusations-are-common/> (last visited Mar. 16, 2015) (quoting professors and students who are unconcerned with convicting the innocent and who state, for example, that “it’s obviously one of the big side effects [of lowering the burden of proof in university hearings], if it could result in an innocent person being found guilty. But I think sexual assault is such a big issue that it’s worth the risk.”).

commit nor is there justice when victims help convict the wrong person. The goal must be getting it right, not getting more convictions. This section will examine what happens when we get it wrong and the consequences of rushing to judgments. The first critical requirement is to foster open dialogue between all interests, not just pro-victim positions. We cannot get it right if we are not open to logical debate. The remaining portions of this section demonstrate the tragedies of the falsely accused and why we must consider them if we are going to get sexual assault policy right.

Before discussing false allegations it is important to define what constitutes a false allegation.¹⁰ In the simplest form, a false allegation is a sexual assault claim made against an innocent person. This includes three basic categories: 1) claims that do not meet the legal definition for a sexual assault; 2) claims that are materially false; and 3) claims made against the wrong person, whether intentional or by mistake. To be sure, the last category includes legitimate victims of sexual assault. Such a case still perverts justice, however, because the wrong person is accused and victimized by an allegation falsely lodged against him or her.

Another important note before proceeding is the importance of anecdotes. To be sure, factual data is always preferable in policy-making because it results in informed decision making whereas anecdotes tend to facilitate emotional decision-making on non-representational bases. That being said, the area of sexual assaults does not easily lend itself to reliable scientific data as will be discussed more in part III of this paper. With science rarely able to provide reliable data, sexual assault discourse necessarily resorts to anecdotes. As a culture, we are moved by individual stories. We like books and movies that inspire us, even if they are embellished for effect. It is the story of a student carrying her 50-pound mattress through campus as a statement about her victimization, even if evidence increasingly demonstrates she¹¹ is not credible about her purported victimization, that gets her invited to the State of the Union address and makes her a poster-child for reform.¹² It is anecdotes like those in the *Invisible War*¹³ and the *Wilkerson*¹⁴

¹⁰ As will be discussed in a later section, definitions may be the most significant flaw in research on false allegations. Another significant flaw of research in this area is the methodology for determining whether an allegation is false.

¹¹ The author refers generally to alleged victims as female and alleged offenders as male throughout this paper for strategic purposes. Although not the subject of this paper, there is a significant gender disparity issue within the sexual assault problem. In short, although surveys suggest men are victims of sexual assault in greater overall numbers, reporting and prosecution rates are abysmal for male reports of sexual assault. Male victims account for an extraordinarily small percentage of courts-martial cases. Male victims are also rarely the focus in research; they are the forgotten victims. Until the disparity is rectified, the risk of wrongful convictions and false accusations comes predominately from female accusers and male accuseds. The author's terminology, therefore, is a concerted effort to reflect the reality of our current environment and a significant deficiency in our efforts.

¹² Cathy Young, *Columbia Student: I Didn't Rape Her*, DAILY BEAST, Feb. 3, 2015, <http://www.thedailybeast.com/articles/2015/02/03/columbia-student-i-didn-t-rape-her.html> (last visited Apr. 4, 2015).

¹³ "The Invisible War" is a 2012 documentary feature on sexual assaults in the military. It is a pro-victim account of the military's purported failure to hold alleged sex offenders accountable through prosecution. See, e.g., Alyssa Rosenberg, *'The Invisible War': How Oscar's Military Rape Documentary Might Change Everything*, DAILY BEAST, Feb. 7, 2013, <http://www.thedailybeast.com/articles/2013/02/07/the-invisible-war-how-oscar-s-military-rape-documentary-might-change-everything.html> (last visited Apr. 7, 2015); Alyssa Bereznak, *Documentary The Invisible War on How Winning an Oscar Could Help Change Military Policies*, VANITY FAIR, Feb. 15, 2013, <http://www.vanityfair.com/culture/2013/02/invisible-war-oscar-nominated-documentary> (last visited Apr. 7, 2015).

case that have motivated Congress and military leadership to make SAPR a priority. They are not a substitute for science, and we should use them cautiously, but anecdotes fill the gaps in reliable science and inform us of what effect our laws and policies are having on real people.

A. REJECT THE MOB MENTALITY / BIAS

Hysteria over a rape culture sheds no light and produces no solutions. Panic breeds chaos and mob justice. It claims innocent victims, undermines social trust, and distracts from genuine cases of abuse.

- Christina Hoff Summers, DAILY BEAST¹⁵

SAPR has been a subject of intense focus over the past few years.¹⁶ Within this focus, in the military and in society in general, speech is increasingly biased and intolerant of opposing views. One journalist, Megan McArdle, characterized it as moral panic, defined as:

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.¹⁷

With moral panic, an accusation itself is sufficient to trigger a severe response. This is the current environment for sexual assaults. Questioning any part of SAPR policy or processes is

¹⁴ Lieutenant Colonel James H. Wilkerson, III, was convicted by a jury of five officers of sexually assaulting a female civilian houseguest in Italy in 2012. His conviction was dismissed in February 2012 by then-Lieutenant General (Lt Gen) Craig Franklin, pursuant to his authority under then-Article 60, Uniform Code of Military Justice (UCMJ). Congress has since removed the ability of commanders to modify sexual assault convictions. Lt Gen Franklin subsequently retired as a Major General under pressure from his leadership. See, e.g., Claire McCaskill, Op-Ed., *Their day in court*, ST. LOUIS POST-DISPATCH, Mar. 12, 2013, http://www.stltoday.com/news/opinion/columns/their-day-in-court/article_ced54e14-5dca-5c53-a038-4b9de9ccb9a9.html (last visited Apr. 7, 2015)(discussing the case and her reaction as a Senator who has since spearheaded changes to military justice).

¹⁵ Christina Hoff Summers, *The Media is Making College Rape Culture Worse*, DAILY BEAST, Jan. 23, 2015, <http://www.thedailybeast.com/articles/2015/01/23/the-media-is-making-college-rape-culture-worse.html> (last visited Feb. 26, 2015).

¹⁶ In the military, SAPR is the regular subject of annual training and “stand-down days” where our normal duties cease for a day so the entire base can devote a full day to lectures, small-group discussions, videos, and other awareness activities. No other subject has received anywhere near the same level of attention.

¹⁷ Megan McArdle, *Moral panic won't help end campus rape*, BLOOMBERG VIEW, Jan. 28, 2015, available at <http://www.bloombergview.com/articles/2015-01-28/moral-panics-won-t-end-campus-rape> (last visited Feb. 26, 2015). SAPR is not the only current example of characterizing opposing views as heresy. Major General James Post, vice commander of Air Combat Command, is under investigation for telling officers, “If anyone accuses me of saying this, I will deny it...anyone who is passing information to Congress about A-10 capabilities is committing treason.” Travis J. Tritten, *General's A-10 treason comment sparks concerns over protected speech*, STARS AND STRIPES, Jan. 23, 2015, available at <http://www.stripes.com/news/general-s-a-10-treason-comment-sparks-concerns-over-protected-speech-1.325471> (last visited Feb. 26, 2015).

not viewed as logical debate but as somehow defending sexual assault.¹⁸ “People who write that they think an accused murderer is innocent rarely feel compelled to affirm that, yes, they sure do believe murder happens, and boy, are they against that,” but this type of disclaimer has become expected in the sexual assault panic we have today.¹⁹

The examples are plentiful. Those who questioned the allegation in the recent University of Virginia case were accused of “rape denial” and being “truthers.”²⁰ Professors protesting the sexual assault complaint resolution process at the University of Pennsylvania²¹ were denounced by students as completely unsupportive of “those of us who have been and will be sexually assaulted” and for masquerading law to “cover [their] sexist policy preferences.”²² Students who have turned to courts to challenge unfair university disciplinary procedures for sexual assault allegations have been chastised as showing “an incredible display of entitlement, the same entitlement that drove them to rape.”²³ Even after the *Rolling Stone*’s U-VA story²⁴ was refuted, advocates continued to defend the accuser and call anyone concerned about the mountain of contradictory evidence “rape denialists.”²⁵

To be clear, this article is not a defense of sexual assault, rather it is a call to uphold our obligations to protect the innocent. Victims should join in this cause because no one should be victimized and their position is not improved by the victimization of the innocent. On the contrary, false accusers detract from the legitimacy of real victims and make true justice more difficult. A more reliable system creates more reliable outcomes.

B. INNOCENCE PROJECT

The Innocence Project is a non-profit legal clinic affiliated with the Benjamin N. Cardozo School of Law at Yeshiva University founded in 1992 and dedicated to exonerating wrongfully convicted people through DNA testing and reforming the criminal justice system to prevent

¹⁸ In this regard, the author wishes to thank Major General Gina Grosso, Director of the Air Force Sexual Assault Prevention and Response Office, who graciously agreed to support this research paper in recognition that open dialogue may lead to better ideas in the military efforts to stamp out sexual assault.

¹⁹ McArdle, *supra* note 17.

²⁰ *Id.*

²¹ Eugene Volokh, *Open letter from 16 Penn Law School professors about Title IX and sexual assault complaints*, WASHINGTON POST, Feb. 19, 2015, <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/19/open-letter-from-16-penn-law-school-professors-about-title-ix-and-sexual-assault-complaints/> (last visited Feb. 26, 2015).

²² Matt Mantica, *Response to Open Letter from Members of the Penn Law School Faculty*, SCRIBD, undated, <https://www.scribd.com/doc/256866445/Response-to-Open-Letter-from-Members-of-the-Penn-Law-School-Faculty> (last visited Feb. 26, 2015).

²³ Emily Yoffe, *The College Rape Overcorrection*, SLATE, Dec. 7, 2014, http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html (last visited Apr. 3, 2015). According to a database maintained by A Voice For Male Students, there are at least 63 pending lawsuits by young men who claim they were railroaded by unfair university disciplinary proceedings involving sexual assault allegations. See <http://www.avoiceformalestudents.com/list-of-lawsuits-against-colleges-and-universities-alleging-due-process-violations-in-adjudicating-sexual-assault/> (last visited Apr. 4, 2015).

²⁴ See *infra* Part II.E.3.

²⁵ Summers, *supra* note 15. The quote comes from Laura Dunn, who runs an advocacy group for survivors and whose own reported rape has been thoroughly refuted through recent investigative journalism. *Id.*

future injustices.²⁶ The Innocence Project is part of the Innocence Network, which links together numerous justice and innocence projects throughout the United States and in eleven foreign countries.²⁷ Their success stories, the tragedies of the wrongly convicted, are now documented in detail by the National Registry of Exonerations, which was created in 2012 through the University of Michigan Law School in conjunction with the Center on Wrongful Convictions at Northwestern University School of Law.²⁸ Through the work of these organizations, 1,551 people, who were convicted for crimes they did not commit, have been exonerated.²⁹ Approximately 468 of these individuals were wrongfully convicted of sexual assaults against adults.³⁰ Of the 1,551 exonerations, 111 were for individuals sentenced to death; 40 were sentenced to death in part for a sexual assault they did not commit.³¹

Initially, most were exonerated through DNA evidence.³² In recent years, exonerations are less often the results of subsequent DNA testing; DNA evidence accounted for only 18% of the total exonerations recorded in 2014.³³ Biological evidence remains significant for sex assault (and homicide) cases in particular and, consequently, DNA evidence continues to account for a majority of sex assault exonerations (56% overall; 264 of the 468 exonerations).³⁴

²⁶ *About the Innocence Project*, INNOCENCE PROJECT, <http://www.innocenceproject.org/about/> (last visited Feb. 18, 2015).

²⁷ INNOCENCE NETWORK, <http://www.innocencenetwork.org> (last visited Feb. 18, 2015). Although not every state has an official “Innocence Project” associated with the Innocent Network, every state has an organization that works to assist the wrongly convicted from that state. See, e.g., *National and State Innocence Projects*, MARTYANGELO.COM, http://www.martyangelo.com/innocence_projects.htm (last visited 18 Feb. 2015). There is no specific organization that assists individuals wrongly convicted in military courts.

²⁸ *About the Registry*, NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/About-Us.aspx> (last visited Feb. 18, 2015).

²⁹ *Detailed Case View*, NATIONAL REGISTRY OF EXONERATIONS, as of Feb. 18, 2015, <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx>.

³⁰ The exoneration registry lists only the most serious offense the individual was convicted of on the exoneration spreadsheet. The full list of offenses can be found in the detailed record for each case or you can filter the results with a term such as “sex assault.” Many of the cases involve murder charges where the incident included a sexual assault. The number of exonerations has risen in recent years to a record 125 in 2014. *Exonerations in 2014*, NATIONAL REGISTRY OF EXONERATIONS, Jan. 27, 2015, at 1, http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2014_report.pdf. The increase in exonerations is attributable in large part to an increase in Conviction Integrity Units (CIUs). *Id.* CIUs are typically prosecutors reinvestigating convictions. *Id.* Prosecutors and investigators have been instrumental in exposing wrongful convictions; 54% of the exonerations in 2014 were at the initiative or with the cooperation of law enforcement and 70% of those were the work of CIUs. *Id.* at 4-5. There is no such entity or effort in the military to review and re-investigate wrongful convictions in military courts.

³¹ This information comes from the national registry database, *supra* note 29, using filter terms or simply counting the relevant records in the database.

³² SAMUEL R. GROSS & MICHAEL SHAFFER, EXONERATIONS IN THE UNITED STATES, 1989 – 2012, 22-24 (National Registry of Exonerations, 2012), available at http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf (last visited Feb. 19, 2015). Through the advancement of forensics in the last 20 years, it is now possible to reliably identify individuals through biological evidence. As a result of these advancements, several individuals have been proven innocent of the crimes for which they were convicted.

³³ *Exonerations in 2014*, *supra* note 30.

³⁴ GROSS, *supra* note 32 at 22-24; *Detailed Case View*, *supra* note 29. The National Registry of Exonerations has a spreadsheet with a column tracking which exonerations came as a result of DNA testing. Searching the entire list

Identifying the wrongfully convicted is not without significant challenges and limitations. First, organizations like the Innocence Project have limited resources and they must be selective about which cases they invest in. A review of the registry shows relatively few cases with light sentences and approximately three-fourths of the recorded exonerations are for homicide and sex cases.³⁵ This is largely because the Innocence Project and its progeny have historically prioritized resources towards the most significant cases, namely, homicide and sex cases. The Center for Wrongful Convictions, for example, told prisoners not to ask for assistance unless they had 10 years *remaining* on their sentences because the organization was so overloaded with cases.³⁶ Prisoners who have already been paroled, released, or even died before their cases were taken for review will rarely see exonerations because they fall off the priority list. Aside from limited resources, “most innocent defendants with short sentences probably never try to clear their names,” rather they “serve their time and do what they can to put the past behind them.”³⁷ Given they were convicted despite their innocence and their appeals all failed, it is understandable they might be cynical of the justice system and just give up.

Second, our system of justice is largely designed to preserve the finality of trial. It is quite difficult to get relief on appeal. It is not enough that you show error at trial, rather the error must *materially* prejudice the results.³⁸ The standard for legal sufficiency, for example, is whether, viewing evidence in the light most favorable to the prosecution, a reasonable factfinder could have convicted the defendant.³⁹ That is, it need not be the most reasonable conclusion, most judges and spectators could strongly disagree, but if a rational jury could have convicted, then the conviction will stand.⁴⁰ Consequently, the overwhelming majority of the more than 1,500 exonerations around the country came after their appeals were completely exhausted.

Third, innocent people sometimes accept a plea deal to avoid the risk of substantial prison terms, which ultimately makes exonerations much more challenging. Several of the exonerations in the registry were from people who pled guilty or even confessed to the crime they did not actually commit. This may seem counterintuitive but consider the Brian Banks example below; it is not altogether unreasonable for a young man facing a minimum of 41 years

for “sex assault” returns 468 cases. You can then apply a filter to the DNA column, which shows 264 cases where DNA testing proved the wrong person was convicted.

³⁵ *Exonerations in 2014*, *supra* note 30, at 3; *Detailed Case View*, *supra* note 29. In recent years, with the growth of non-DNA exonerations and CIUs, the non-homicide and non-sex exonerations are rising. In 2013, homicide and sex cases accounted for 67% of the exonerations that year but dropped to only 52% of the exonerations in 2014.

Exonerations in 2014, *supra* note 30, at 3.

³⁶ GROSS, *supra* note 32, at p.4.

³⁷ *Id.*

³⁸ Article 59, UCMJ; 10 U.S.C. § 859. See also, e.g., *United States v. Frey*, 73 M.J. 245 (C.A.A.F. 2014) (where the military’s highest court concluded trial counsel improperly inflamed the passions of the jury by improperly suggesting the appellant would commit future acts of child molestation despite there being no such evidence in trial, the military judge failed to issue curative instructions, and the actual recidivism rates for child molesters are not within the common knowledge of lay persons but the Court did not grant any relief because the appellant could not prove the jury, whose deliberations are privileged, relied upon the improper argument in reaching their sentence.)

³⁹ *United States v. Green*, 68 M.J. 266, 268 (C.A.A.F. 2010).

⁴⁰ Where a defendant has elected to be tried by a jury there is a great paradox in having appellate judges determine whether the error would have mattered to a jury of non-lawyers. While it may be necessary from a judicial efficiency standpoint, it substitutes judges for jurors and significantly undermines the jury system in perception, if not also occasionally in result.

in prison to take a deal on the poor advice of counsel for just a few years rather than gamble with the rest of his life. These cases are especially difficult ones in which to win exonerations. The chances of an innocence project taking up the case are slim, and the chances there is sufficient evidence to overcome the guilty plea are even slimmer.⁴¹

Lastly, and perhaps more importantly, exoneration of the wrongly accused requires a tremendous amount of luck; something these individuals did not have when they were wrongly convicted in the first instance. Consider a case of mistaken identification. Proof of innocence requires the victim to have made a report almost immediately in order for biological evidence to be reasonably available; the real rapist must have left fingerprints or semen or blood evidence; such evidence must remain intact until investigators search the scene or until a rape kit is conducted; investigators must be thorough and careful enough to identify and collect this evidence; investigators must have collected sufficient reference samples from the victim and possibly her spouse or boyfriend to develop DNA profiles to compare with the crime scene evidence or they must all be alive today to collect such samples; the evidence for all of these individuals must have been preserved decades after the trial in order to be retested with the advancements in DNA testing; and there must be sufficient case file information to make the DNA test incontrovertible proof of the attacker. To be clear, it is often not enough that DNA evidence does not match the person convicted of the crime. Semen that does not match, for example, may be from a spouse or another lover and not necessarily be proof of innocence. Fingerprints belonging to someone else may only mean an innocent friend or acquaintance happened upon the same place sometime before the investigators lifted the evidence. In other words, the forensic evidence must be proof in conjunction with the other evidence, that the owner of that evidence was the true criminal. Only then will DNA testing be able to prove who actually committed the crime and that the person convicted is innocent. Given it takes a minor miracle of circumstances to prove a wrongful conviction, there are likely countless others wrongfully convicted for who exoneration is beyond reach.

The next section discusses six individuals who were wrongfully convicted of sex crimes they did not commit. There are more than 460 similar stories in the National Registry of Exonerations.⁴² The purpose of these stories is to show why convictions of the innocent represent the greatest threat to justice, to show they are truly victims, and demonstrate some of the reasons people have been wrongfully convicted. Civilian examples are used because the military does not have any comparable program, an issue addressed in the recommendation section.⁴³

⁴¹ In the military, a guilty plea “is based not only on the accused’s understanding and recitation of the factual history of the crime, but also on an understanding of how the law relates to those facts.” *United States v. Moon*, 73 M.J. 382, 386 (C.A.A.F. 2014)(citations omitted). This colloquy, known as the *Care* inquiry, is not necessarily required in civilian guilty pleas and it provides some measure of protection against wrongful convictions in the military. *United States v. Care*, 18 C.M.A. 535, 538-39 (C.M.A. 1969). That being said, innocent military members may also be drawn to plead guilty to avoid the risk of significant jail time for the same reasons as with Brian Banks, only they are under oath during the *Care* inquiry and would, therefore, have to assert they perjured themselves if they are going to seek a reversal of their sexual assault convictions.

⁴² *Detailed Case View*, *supra* note 29.

⁴³ *See infra*, Part IV.B. (Recommendation 3).

C. WRONGFUL CONVICTION EXAMPLES⁴⁴

The risk of wrongful convictions is highest when there's public outcry.

- Prof. Mark A. Godsey, Director Ohio Innocence Project⁴⁵

1. *Kenneth Ireland*

The case of Kenneth Ireland represents a case of mistaken identification. He is the first example because the facts are simple and he articulates well the tragic impact of being wrongly convicted. In 1989, 20-year-old Kenneth Ireland was convicted of the murder and rape of Barbara Pelkey, a 30-year-old mother of four killed in Connecticut in 1986.⁴⁶ It all began when detectives visited his mother's house, lied about why they wanted to question him stating they wanted to ask him questions about the drowning of his friend a year earlier, and they lied during the video-taped interrogation when they told Ireland they had all kinds of evidence against him. In fact, there was no physical evidence linking him to the crime.⁴⁷ He has always asserted his innocence. He was convicted by a jury based on the testimony of two witnesses who sought a cash reward the state offered for information leading to the arrest of Pelkey's killer. He was subsequently sentenced to 50 years in jail and chastised by the judge for not accepting responsibility for "his" crimes. His subsequent appeals all failed.⁴⁸

Years later, the Connecticut Innocence Project looked at his case. With new lawyers, the new advancement of DNA and a new generation of police officers and detectives, they began to collect evidence. Fortunately for Ireland, they found a slide at the medical examiner's office with enough DNA to test. On July 31, 2009, his lawyers delivered the good news; the DNA tests fully exonerated him and identified the actual killer and rapist.⁴⁹ The following week, August 5, 2009, the Superior Court Judge ordered his immediate release. On March 23, 2012, Kevin Benefield was sentenced to 60 years in prison for the rape and murder of Ms. Pelkey.⁵⁰

Ireland spent more than 21 years in prison for a rape and murder he did not commit. He was surrounded by violent criminals and constant violence. "Not one minute in my 21 years was

⁴⁴ The examples that follow were selected to highlight various causes for wrongful convictions and to emphasize some specific concerns with our current focus. These are, by no means, the worst cases; none of them involve people sentenced to death and none of them represent those who served the longest sentences before they were finally exonerated.

⁴⁵ Manisha Pande, *Mark A Godsey scripts a return to innocence*, DNA INDIA, Mar. 24, 2013, <http://www.dnaindia.com/india/report-mark-a-godsey-scripts-a-return-to-innocence-1814986> (last visited Feb. 26, 2015). The Ohio Innocence Project is run through the University of Cincinnati College of Law. See www.law.uc.edu

⁴⁶ Owens, *supra* note 8.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

I not afraid,” said Ireland.⁵¹ He had to be on constant alert, not knowing whether other inmates had a mental illness that might cause them to lash out or whether they were sociopaths who could explode into a rage and challenge him to a fight for something as trivial as how he responded to their request to trade ice cream flavors in the prison cafeteria.⁵² A peaceful situation could turn quickly into a gang fight with 20 or 30 inmates brandishing sharpened pieces of steel. And for Ireland, he had to be especially watchful because he had been convicted of sexual assault. “If you’re convicted of a sexual offense against a woman, or even worse, against a child...you become an immediate target.”⁵³

Ireland missed the prime years of his life, from 20-41 years old. When others were going to college, establishing a career, and starting a family, he was in prison for a horrible crime he did not commit. As he stated, “Fax machines were invented and became obsolete while I was in prison.” He was stripped of 21 years of freedom. Imagine all of the birthday celebrations, family gatherings, trips, special occasions, and funerals in the last 21 years that you would have missed if wrongly imprisoned. What if the examiner’s office had not saved the slide with biological evidence? What if there was no such thing as DNA testing? All it took was a terrible crime and two witnesses motivated by a cash reward to convict an innocent man. The appellate system did not correct the gross injustice. It took luck and a major advancement in science. In an effort to avenge one victim, the system created many more victims.⁵⁴

2. *Brian Banks*

The case of Brian Banks represents a tragic reversal of fortunes where the wrongly accused’s dream was shattered and his false accuser substantially rewarded for her lie. This case also exemplifies the single most common reason for false allegations, i.e., it is a cover story for an event the accuser believes will be viewed negatively by friends or family.⁵⁵

On July 8, 2002, Brian Banks was a 6-foot-3, 225-pound 16-year old linebacker for Long Beach Poly High School in California. He was a heavily recruited star football player; the University of Southern California had verbally offered him a full scholarship. He had never been in trouble with the police before.⁵⁶

Just before noon, Banks was on his way to the school office to discuss his college applications when he ran into 15-year old sophomore classmate Wanetta Gibson. They had known each other since middle school. Though not in a relationship, they decided to make out in a secluded alcove at the school. They kissed and touched each other but never had sex. Gibson

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Consider his parents, for example. They missed 21 years of time with their son. Family and friends are also stripped of companionship, advice, assistance, and all of the things we enjoy with our friends and siblings. He was the one in prison but his family and friends were victims as well and deprived of his companionship.

⁵⁵ See *infra* Part III.D.1.

⁵⁶ ‘Bygones Be Bygones’: *The Unspeakable Injustice to Brian Banks*, COMMUNITY OF THE WRONGLY ACCUSED, Dec. 28, 2012 (updated Apr. 4, 2013), www.cotwa.info/2012/06/bygones-be-bygones-unspeakable.html (last visited on Sep. 26, 2014).

did not want her family to know she was sexually active so she reported that Banks raped her that same day.⁵⁷

Gibson told police she left history class to use the restroom at 11:45 a.m. and passed Banks on the way. When she left the bathroom, she claimed Banks grabbed her, pushed her into an elevator, went up one floor, dragged her down a hallway, and then dragged her down a flight of stairs and into an alcove where he raped her for 15 to 20 minutes. She claimed Banks ejaculated inside her.⁵⁸ Banks was subsequently charged. The school quickly put out a statement declaring that Banks would not be coming back to the school regardless of the outcome of any judicial proceedings.⁵⁹

The case was primarily her story against his. Not a single student or teacher heard or noticed anything as she was supposedly dragged passed numerous classes in session. A rape kit was performed but there was no evidence whatsoever of Banks' DNA anywhere inside or outside her vagina. Gibson claimed she wiped it all off with a paper towel.⁶⁰

Not unsurprisingly, the media jumped all over the case and sought out Gibson's mother, who professed anger over the lack of school security, "It's got me to the point where I don't want to let the kids go to school at all... There's nowhere for them to really be safe. You would think school would be pretty safe, but it didn't turn out that way."⁶¹ She sued to school district over this lack of security. The school settled and Gibson was awarded \$1.5 million (half went to her attorney). Gibson later claimed she wanted to come clean about the false allegation but her attorney purportedly told her not to say anything, "Let [the prosecutors] do what they gonna do."⁶²

By comparison, Banks languished in jail waiting over a year for trial while his mother was forced to sell their home and borrow money just to pay for an attorney. Despite the questionable evidence in the case, his attorney urged him to accept a plea deal because, "If [you] go into that courtroom, the jury is automatically going to see a big, black teenager and automatically assume [you are] guilty."⁶³ Under the original charges, Banks was facing 41 years to life in prison. The deal his attorney was pushing for him to take required Banks to plead no contest to rape and kidnapping charges. She told him he would likely serve only 18 months more than the year he had already served if he took the deal. He had ten minutes to decide.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* Based on the author's numerous experiences consulting with and cross-examining both Sexual Assault Nurse Examiners and forensic DNA experts, it is highly improbable that there would be no DNA evidence whatsoever from Banks. She reported before leaving school and would have had the rape kit the same day as the encounter. Ejaculation can produce millions of sperm, each with Banks' DNA. Moreover, he can transfer DNA in seminal fluid and from the surface contact of his penis with the numerous internal and external parts of her vagina and cervix. Even if she wiped her vaginal area, it is not going to remove DNA from her vaginal canal or cervix. Urinating may wash away some evidence externally, but it would not affect internal evidence. To be clear, it is possible there could be no DNA evidence, but it is highly improbable under these circumstances.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

Eighteen months looked way better than 41 years. He took the deal and was sentenced to six years in jail followed by five years of probation and lifetime sex offender registration. He was not allowed to live within 2,000 feet of a school or park, he had a midnight curfew, could not leave the country without permission, and could not leave California under any circumstances.

Banks spent five years and two months in jail for a crime he did not commit; five years during the prime of his life. He could have been playing collegiate and professional football. Rather than his mom selling their house and borrowing money, he could have bought her a wonderful new house. Instead, he struggled to find a job. Up until his exoneration in 2012, he had just one real job, working in a warehouse. He had to stay with family and friends just to get by. Banks contacted the Innocence Project and sought their assistance with clearing his name.

In March 2011, something changed dramatically. Gibson contacted Banks out of the blue on Facebook and wrote, “I figured you and I should let bygones be bygones. I was immature then but I’m much more mature now.”⁶⁴ She wanted to reconcile. Banks was stunned.

Banks agreed to meet with Gibson and he brought along a private investigator to record the encounter.⁶⁵ Gibson was completely oblivious to what she had done to Banks. He explained all that had happened to him as a result of her lie and she tried to match what he said by relating what she had been through. Gibson was specifically asked if Banks raped her. She said, “No, he did not rape me.”⁶⁶ She was hesitant to assist him with clearing his name, however, out of fear she might have to pay back the money she received. She told Banks, “I will go through with helping you but it’s like at the same time all that money they gave us, I mean gave me, I don’t want to have to pay it back.”⁶⁷

With the help of the Innocence Project, Banks convinced the district attorney to re-investigate the case. The district attorney subsequently took the case to the same judge who presided over the original case, and requested he reverse Banks’ conviction. On May 24, 2012, after seeing the evidence, the judge agreed and he reversed his conviction. Gibson was never prosecuted for her lie nor did the school seek recoupment of the money she received.⁶⁸

The justice system failed Brian Banks and rewarded his false accuser. What enabled an innocent man to have his life so unjustly derailed: the reluctance to question an accuser and acceptance of vile stereotypes and prejudices.⁶⁹ It was not until eight years after her accusation

⁶⁴ *Id.*

⁶⁵ Though not clear from the article, it appears Banks’ counsel recommended he bring a private investigator both for his protection and to assist with documenting Gibson’s recantation, if she made one. The investigator recorded the conversation with a camera rigged to a pen.

⁶⁶ *Id.*

⁶⁷ *Id.* Gibson later claimed this video-recorded recantation was itself a lie and that she said it because Banks offered her a \$10,000 bribe.

⁶⁸ Gibson had already spent all of the money and had no income to speak of. Even if the school won a judgment for recoupment, she no longer had any money to pay it back.

⁶⁹ The most significant stereotypes in this case dealt with race and a quick report. The important note here is that prejudices and stereotypes can also be factors in the wrongful conviction of innocent men and women, not just acquittals of alleged offenders.

that her story received meaningful scrutiny and only then because she opened that door with her Facebook attempt at reconciliation. What if she never came back into the picture? If her story had been questioned in the beginning, Banks may never have been stripped of his prime years and athletic potential. His mom would likely still have her house. The school would have \$1.5 million more for books and teachers. There were victims in this case; Gibson was not one. The reasons this injustice was permitted to occur remain stronger today than ever before, especially in the military and in colleges and universities.

3. *Timothy B. Cole*

The case of Timothy B. Cole represents how a legitimate defense may be no match for public out-cries over a horrendous assault. The case also shows how the trial and appellate system can fail the wrongly accused. Perhaps more significantly, this case also shows how victims and policy-makers can learn from these cases and work together to improve our justice system.

In 1985, a 20-year-old white Texas Tech student, Michele Murray, was in her car in a church parking lot when she was approached by an African-American man who asked her for jumper cables to help start his car.⁷⁰ He then reached in the car and unlocked the door as she bit his thumb. He held a knife to her throat and forced her to lie down in the car as he drove them to a vacant field outside of town, forced her to perform oral sex, and then raped her. Murray called the police and reported the attack. She noted the man kept smoking cigarettes during the attack. Murray agreed to a rape kit.⁷¹

Two weeks later, Murray was shown six photographs of young African-American men; five were black and white side views and one was a color frontal shot of Timothy Cole, 26. She picked Cole, who was a student at Texas Tech and became a suspect because he talked to a detective near where the abduction took place. Murray identified Cole again the following day in a live line-up and she testified against him at trial.⁷²

Cole presented an alibi defense. His brother and several friends testified that he was at home studying at the time of the crime. Cole also presented evidence that he had severe asthma and did not smoke cigarettes. His attorney repeatedly tried to enter evidence that similar attacks continued to occur in the months following his arrest and that fingerprints from a very similar attack a month prior did not match Cole's fingerprints. The judge did not allow this evidence. After six hours of deliberation, the jury convicted Cole. He was sentenced to 25 years in prison and his appeals were denied.⁷³

⁷⁰ Maurice Possley, *Timothy B. Cole*, NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3114> (last visited Feb. 18, 2015).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

In 1995, after the statute of limitations⁷⁴ ran for the 1985 rape, Jerry Wayne Johnson, a Texas prisoner serving a 99-year sentence for two rapes with similar characteristics to Murray's, wrote to Lubbock County police and prosecutors confessing to Murray's rape. His letters were ignored. Cole died of an asthma attack in prison in 1999.⁷⁵

In 2000, Johnson wrote another letter to a supervising judge confessing his rape of Murray. This letter was moved to a different judge and summarily rejected. In May 2007, one of his letters reached the Innocence Project of Texas and Cole's family. With the cooperation of prosecutors, posthumous DNA testing was conducted on the semen from the crime scene. Cole was not the source of the DNA, Johnson was. Cole was finally exonerated in 2009, ten years after his death. Governor Rick Perry pardoned Cole in 2010.⁷⁶ Cole spent the last 13 years of his life in prison for a crime he did not commit even after the real killer confessed.

In response to Cole's case, the state of Texas passed the Timothy Cole Act, increasing compensation to exonerees to \$80,000 per year served, expanding services offered to exonerees after their release, and adding compensation to the family of an exoneree cleared after death. Texas also created the Timothy Cole Advisory Panel on Wrongful Convictions to study prevention of wrongful convictions across the state. The victim in the case, now married, speaks and writes about the case to raise awareness about misidentifications. "I was positive at the time that it was him," she said in a speech at Georgetown University Law Center, "I was shocked when I found out it wasn't him. I joined Tim's family in working to exonerate him because it was the right thing to do. Timothy didn't deserve what he got."⁷⁷

4. *Walter Dedge*

The case of Walter Dedge represents how forensic evidence can be false or misleading, witnesses may be motivated to provide false testimony, and the prosecution is not always interested in justice. On December 8, 1981, a woman in Florida was attacked in her home. She was changing clothes when she heard a sound, turned around, and found a man armed with a blade. This man then cut off her clothes and raped her vaginally and anally. She was cut all over her body during the rape. After the attacker left, the victim contacted her boyfriend. He took her to the emergency room, where her clothes were collected and a rape kit was conducted.⁷⁸

The prosecution's case consisted of the victim's identification of Dedge, microscopic hair comparison, snitch testimony, and dog sniffing evidence.⁷⁹ The jailhouse snitch claimed that Dedge confessed to the crime while they were being transported together in a prison van. In

⁷⁴ A statute of limitations provides a period after which someone can no longer be held accountable for a crime. It provides a set period for investigators to work within, for any victims to report offenses, and provides potential offenders with a set period for closure. In the military, the statute of limitations is five years for most crimes but longer for the most serious offenses. See Article 43, UCMJ; 10 U.S.C. § 843.

⁷⁵ Possley, *supra* note 70.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Wilton Dedge, NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3167> (last visited on Feb. 16, 2015).

⁷⁹ *Id.*

exchange for his testimony, the snitch received a drastic reduction in his sentence.⁸⁰ The prosecution also offered evidence that a dog alerted the owner to Dedge's presence at the victim's house after sniffing an item with Dedge's scent on it. The dog was subsequently discredited by several prosecutors and inspectors after Dedge's trial.⁸¹

Dedge maintained his innocence from the moment of his arrest. His mother and brother testified that he had not even been in town when the crime occurred. Several other alibi witnesses also testified on his behalf. He was nevertheless convicted and sentenced to two concurrent life sentences in prison.⁸²

In 1996, 14 years after his conviction, Dedge was one of the first Florida inmates to seek post-conviction DNA testing. He finally won DNA testing in 2000, which showed the pubic hair evidence did not come from Dedge.⁸³ His results, however, preceded state law governing post-conviction DNA testing. When the Innocence Project sought a new trial, the State argued that Dedge won testing too early and he could not benefit from new laws that would permit him to get that evidence into court. For three years, the State opposed his motions on procedural grounds, at one point stating they would oppose his release even if they knew he was absolutely innocent. In 2004, the appellate courts ordered DNA testing of the semen found on the anal swab from the rape kit (but never tested or used in the first trial). Dedge was excluded as the source of semen and officially exonerated in 2004, eight years after he requested DNA testing. The State was not interested in justice; his innocence did not matter and he was wrongly stripped of 14 years of freedom.⁸⁴

5. *Kevin Baruxes*

The case of Kevin Baruxes represents how important investigating an alleged victim can be to exposing some cases of false allegations and how an accused's character may overshadow evidence of innocence. On February 15, 1996, a 20-year-old woman reported that several skinheads followed her to her home in California, they threatened her with a knife, and then raped her. The alleged victim identified 18-year-old Baruxes in a photographic line-up. He lived in the same apartment complex that she did, and he had the word "skinhead" tattooed on his back.⁸⁵

The prosecution's case consisted of the alleged victim's identification of Baruxes. He presented several family members who testified he was home with them at the time of the crime. A jury nevertheless convicted him of rape and felony assault in June 1996 and he was sentenced to 18 years to life in prison.⁸⁶

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Maurice Possley, *Kevin Baruxes*, NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3014> (last visited on Feb. 16, 2015).

⁸⁶ *Id.* The sentenced was elevated because the crimes were adjudged to be racially motivated, i.e., hate crimes. *Id.*

Five years later, the prosecution and defense received evidence that the alleged victim admitted the wrong man may have been convicted and the crime may never have occurred. Upon further investigation, they learned the alleged victim had a history of deceit, manipulation and gross lies.⁸⁷ They found, for instance, that she lied about having cancer; faked epileptic seizures; claimed her child died in utero during the eighth month of pregnancy but that doctor's forced her to carry it full term and then she and her husband buried the child on the beach. She also claimed later to have been sodomized by Baruxes, which was inconsistent with the evidence but consistent with her pattern of escalating the details each time she was questioned. Additionally, she acknowledged being fairly sure Baruxes was the wrong man.⁸⁸ Baruxes was exonerated in 2003 after seven years of wrongful incarceration.⁸⁹

6. *Robert Britton*

The case of Robert Britton represents the impact of poor representation and how important mental health records can be in proving a false allegation. In 1996, 38-year-old Robert Britton was wrongfully convicted of sexually assaulting an 18-year-old woman with cerebral palsy.⁹⁰ His trial defense counsel was addicted to cocaine and suffering serious adverse effects from AIDS, syphilis, and dementia at the time of Britton's trial. His attorney never even investigated the alleged victim's psychiatric history or cross-examined her on it; he did not even know she was taking several anti-psychotic and anti-anxiety medications at the time of trial. His attorney was later suspended from practicing law but not until after Britton was sentenced to 50 years in prison.⁹¹

Britton's new defense counsel uncovered critical mental health evidence that resulted in a new trial and subsequent acquittal after more than 19 years in jail.⁹² The alleged victim had a history of auditory hallucinations (hearing voices) and delusions (false beliefs). She had, for example, claimed she saw a nurse throwing a baby out of a window; she believed her parents "flew" into camp to see her; and she believed someone had duplicated her clothes. She also suffered from a personality disorder that caused her to suddenly, and for no reason, falsely conclude that other people were out to harm her. She suffered from severe depression with psychotic episodes and auditory hallucinations just 12 days before she accused Britton of rape.⁹³

7. *Causes of Wrongful Convictions and Ramifications*

A silver lining in these tragic stories is that they provide lessons about where and how our justice system has failed. The National Registry of Exonerations has identified six primary bases for wrongful convictions: mistaken identification, perjury or false accusations, false confessions,

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Maurice Possley, *Robert Britton*, NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4547> (last visited on Feb. 16, 2015).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

false or misleading evidence, official misconduct, and inadequate legal defense.⁹⁴ While these categories are good indicators of where errors have been made, it is not possible to truly determine with any accuracy how significant they are in total or to particular types of cases because the true number of wrongful convictions is an unknown number and some categories are much harder than others to prove innocence. Perjury, for example, is perhaps the most underestimated category for wrongful convictions because “we often have no way of knowing if a witness has lied in testimony, and we’re even less likely to know if she lied to the authorities outside of court... If it’s not caught, misconduct goes unnoticed.”⁹⁵ None of the changes we have made in recent years protect against the most serious causes for wrongful convictions; in fact, many of the efforts only exacerbate the risk of wrongful convictions because change, thus far, has not been balanced.⁹⁶

As of June 2012, 10 innocent men have been exonerated after death, even though it is highly unusual to reconsider cases of accused that are dead.⁹⁷ Many others have left prison with disabling injuries or diseases and many others have died within a year or two of their release from prison, sometimes by their own hand.⁹⁸ Each of the cases above, as well as the 462 other exonerees in the National Registry of Exonerations suffered terrible tragedies on account of prosecutors, judges, and juries with good intentions but incorrect judgment. They all lost huge portions of their lives be it “their youth, childhood of their children, the last years of their parents’ lives, their careers, their marriages” or their prime years to begin a family and make their mark on this world.⁹⁹ We ought to learn from their tragedies and turn them into positives as Texas did in the case of Timothy Cole.¹⁰⁰

D. VIRGINIA DNA STUDY & RATE OF WRONGFUL CONVICTIONS

A natural response to these tragic stories would be to wonder how rare or common these cases might be.¹⁰¹ The most methodologically sound study in this area was completed in 2012.¹⁰² The authors determined wrongful convictions in sexual assault cases in Virginia between 1973 and 1987 occurred at a rate of 8 or 15 percent, depending on which category you

⁹⁴ See *Learn More*, NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/learnmore.aspx> (last visited Apr. 6, 2015); GROSS, *supra* note 32. The frequency with which these factors have contributed to wrongful convictions is largely related to the availability of data. GROSS, *supra* note 32, at 41. There is more data, for example, on mistaken identity because it is the one area where science can be instrumental. Other categories are more challenging and data is not easily obtained.

⁹⁵ *Id.* at 41-42.

⁹⁶ See *infra* Part IV.A.(Recommendation 1), B. (Recommendations 6, 10, 11, 12-16, 21, 24).

⁹⁷ GROSS, *supra* note 32, at 2.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See *supra* Part II.C.3

¹⁰¹ Another natural response would be to ask how these cases inform our policies on sexual assault prevention and response. The answer is: they do not. Our policies have not considered the wrongly accused. Further, how does the rate of wrongful convictions relate to false allegations? This question will be addressed in section IV of this article.

¹⁰² Frank Green, *Va. DNA data support innocence of 33 convicted of sex crimes, study concludes*, RICHMOND TIMES-DISPATCH, Jun. 18, 2012, http://www.richmond.com/news/article_40c23216-0e9e-5424-adc2-68142fb095be.html (last visited Feb. 26, 2015).

used for the denominator.¹⁰³ Understanding the study, it is clear the 15 percent rate is more logical, probably the *minimum* rate, and that the true rate could be as high as 22 percent.

In 2001, Virginia passed a law permitting persons convicted of a crime to have evidence tested that was either newly discovered or previously untested for DNA.¹⁰⁴ When the first few tests resulted in exonerations of previously convicted persons, the Governor, in 2005, ordered testing of all eligible convictions. An “eligible conviction” consisted of one which: 1) had physical evidence retained that could be tested, 2) had a known suspect with a felony conviction, and 3) the conviction was for sexual assault, homicide, or non-negligent manslaughter.¹⁰⁵ There were 3,000 cases with physical evidence that could be tested, only 2,100 of which had a known suspect, only 740 of which were for a felony conviction, and only 634 of which were for a qualifying felony conviction.¹⁰⁶ This final group represented the most serious cases in Virginia for which DNA testing was possible. Importantly, there was no sampling in this case; it was a “test-them-all” approach that assessed every case in the state of Virginia for arguably the three most serious categories of offenses on the books.¹⁰⁷ Of the 634 cases, 422 were sexual assault convictions.¹⁰⁸

Researchers found 33 cases where DNA evidence supported exoneration.¹⁰⁹ In order to classify a result as supporting exoneration, researchers required: 1) the physical evidence actually produced a DNA profile; 2) the profile was from questioned evidence; 3) there was a profile from the person convicted to compare it with; 4) there was a profile from the victim to compare it with also; 5) the profile did not match just the victim; 6) the profile did not match the person convicted; and 7) there was either no other person present or the facts of the case suggest the results were conclusive evidence of innocence.¹¹⁰ It was not enough, therefore, that the DNA evidence did not include the person convicted if there was insufficient evidence to rule out the profile matching the victim, someone else present at the scene, or a boyfriend or husband who may have engaged in sexual relations in the days prior to the sexual assault. Only 227 of the 422 cases had sufficient information with which to draw conclusive opinions.¹¹¹ In other words, there were numerous cases (beyond the 33 suggesting exoneration) in which the person convicted was excluded as the source of DNA but researchers did not have all seven of the requirements above to conclusively interpret the result. The fact that the DNA did not include the person convicted is troubling and there is a fair probability at least some of them are innocent, there just was not sufficient information to prove it.

¹⁰³ JOHN ROMAN ET AL., POST-CONVICTION DNA TESTING AND WRONGFUL CONVICTION, URBAN INSTITUTE (2012), available at <http://www.urban.org/url.cfm?ID=412589> (last visited 26 Feb. 2015).

¹⁰⁴ *Id.* at 58.

¹⁰⁵ *Id.* at 12.

¹⁰⁶ *Id.* The 634 cases represented 715 convicted persons because some cases had more than one attacker. *Id.*

¹⁰⁷ *Id.* at 11.

¹⁰⁸ *Id.* at 27. Of the 422, 11 percent had murders as the most serious charge but the murder included a sexual assault offense making it a dual category case.

¹⁰⁹ *Id.* at 5-6, 16.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 15-16, 55-58.

Researchers concluded the rate of wrongful convictions was 8 or 15 percent. The most logical rate is the 15 percent figure. This rate compares the number of cases supporting exoneration (33) with the number of cases that had conclusive results (227).¹¹² The 8 percent figure is a comparison of the cases supporting exoneration (33) with the total number of cases that produced some DNA evidence (422) even if that evidence could not conclusively establish guilt or innocence.¹¹³ The 8 percent figure, therefore, includes cases suggestive of innocence but without sufficient information to say one way or another. Put differently, 78 percent of the DNA results confirmed the person convicted; 22 percent of the DNA results for sex assault cases did not contain the DNA of the person convicted for the crime. It is possible they are all innocent and the rate of wrongful convictions, therefore, could be as high as 22 percent. To this end, researchers acknowledged the rate could be higher than the 15 percent. By the same token, there is also a chance the number could be lower than 15 percent because the final group may disproportionately represent stranger-rape cases.¹¹⁴ In short, there is some margin of error to the study but researchers were content to stick with the firm rate rather than speculate about how inconclusive results may have changed the rate or how the rate may apply to other non-DNA cases.¹¹⁵

To answer the question at the start of this section – how rare are wrongful convictions – the best study on this matter indicates about 15 percent of sexual assault convictions may be erroneous. This suggests there are thousands of wrongfully convicted persons still in prison, thousands more who have been released, and untold numbers of innocent persons who have died in prison.¹¹⁶ It is why, since the first one started in 1992, that nearly every state now has an innocence project to assist the wrongly convicted.

Importantly, the fact that we can test for DNA today does not substantially change the approximate percentage of errors. These cases were tried without DNA evidence because it was not available. In that sense, these cases were no different than ones where the victim did not report right away and, consequently, there is little to no DNA evidence available for use. Delayed reporting is a common occurrence today. Accordingly, a lot of our cases today are very much like it was between 1973 and 1987; they are tried without DNA evidence. The difference is, with advancements in science we now have a window into the past to determine if the jury got those cases right. If 15 percent of cases tried without forensics in the 70s and 80s were incorrect, that should be a fair assessment of how many cases tried today without DNA evidence are also erroneous.¹¹⁷ Moreover, the primary causes for wrongful convictions have not gone away.¹¹⁸

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 57-58.

¹¹⁵ The main limitation for this study is the fact that they did not have sufficient resources to review the entire case files at the respective courthouses for each case. Researchers did have the forensic case files so they were not operating in a complete vacuum. Further, they were exceedingly cautious in drawing conclusions making it improbable additional case file evidence would have changed the significance of the DNA results.

¹¹⁶ This is one reason there are so many Innocence Project organizations and why they continue to suffer from insufficient resources.

¹¹⁷ The number may be a little lower now since cases with DNA evidence are less likely to be mistakes today. However, there have been no new studies and the 15 percent rate still represents the best information available.

¹¹⁸ See *supra* Part II.C.7 (discussing the most frequent causes of wrongful convictions).

E. FALSE ALLEGATION EXAMPLES

Although it may not be 'politically correct' to question the veracity of a women's complaint of rape, failing to consider the accuser may be intentionally lying effectively eradicates the presumption of innocence.

- Bruce Gross, PhD, JD, MBA¹¹⁹

A false allegation of rape can have dreadful consequences on the innocent person who has committed no crime whatsoever.

- U.K. Judge, when sentencing false accuser¹²⁰

The wrongly convicted represent the worst-case scenarios for a justice system that is supposed to zealously protect our fundamental right to liberty and the pursuit of happiness. They are not, however, the only victims of an unbalanced policy. The falsely accused are also victims, particularly when they are presumed guilty and accusers are believed without question as advocated by SAPR. What follows are five cases of false accusations that received international media attention, followed by a few cases of fatal accusations, where the wrongly accused was murdered in response to the false accusation. These cases demonstrate that the wrongly accused is also a victim that deserves protection starting the moment the accusation is made.

1. *Lisa Jayne-Samuels*

In February 2015, Lisa Jayne-Samuels, 29, a mother of four, was sentenced to 20 months in prison in the United Kingdom for a false rape allegation she concocted to earn favor with her mother. The lie began on October 10, 2012, when she called police to report having been raped.¹²¹ She claimed she was drinking with friends at a pub when she met a man she knew from a night shelter. This man, for whom she provided a detailed description, then spiked her drink, took her to the cliffs, and attacked her.¹²² She identified Terry Brown as her rapist, someone she had met in 2008 at a night shelter but who had not seen her since.¹²³

Brown was arrested and later released without charges when police uncovered inconsistencies in Samuel's story. CCTV showed Samuels was not at the pub she claimed to have been at, and the friends she had spoken to did not exist.¹²⁴ Samuels confessed to making

¹¹⁹ Bruce Gross, *False Rape Allegations: An Assault on Justice*, FORENSIC EXAMINER, Spring 2009, available at <http://www.theforensicexaminer.com/archive/spring09/15/> (last visited Feb. 17, 2015).

¹²⁰ Steve Robson, *Mum who lied about being raped because she wanted family to feel sorry for her jailed*, MIRROR, Feb. 23, 2015, <http://www.mirror.co.uk/news/uk-news/mum-who-lied-being-raped-5213709> (last visited Feb. 26, 2015).

¹²¹ *Id.*

¹²² *Id.*

¹²³ Andrew Levy, *Mother jailed for false rape claim*, IOL NEWS, Feb. 24, 2015, <http://www.iol.co.za/news/world/mother-jailed-for-false-rape-claim-1.1822913#.VO9ySUtgPeI> (last visited Feb. 26, 2015).

¹²⁴ Robson, *supra* note 120.

the whole story up to try and get her mother to feel sorry for her. She thought her mother would then take her back and rebuild their broken relationship.¹²⁵

The effects of her lie were devastating for the innocent man she accused. Terry Brown had “dirty, scummy, racist” painted on his house; he was attacked by a vigilante gang with a large piece of wood causing severe injuries such that he could not even speak for a couple of days; his pregnant wife lost their baby at 10 weeks when she tripped trying to escape from a mob; he was prevented from seeing his children; he was so scared he had to move away from the area for his and his family’s safety; he has been unable to find work; and he has been forced to take antidepressants just to maintain some semblance of normalcy.¹²⁶

Terry Brown was not her first victim. During sentencing, it came to light that Samuels had falsely cried rape twice before. She made a false rape allegation in 2002, at age 16, because she did not want her mother to know she had sex with a Kosovan man, and she made another false rape claim against the same man later that year.¹²⁷

2. *Hofstra University*

On September 13, 2009, Danmell Ndonge, then an 18-year-old student at Hofstra University, lied about being gang raped in a Hofstra dormitory bathroom.¹²⁸ The media frenzy smeared the five men accused and criticized the “rape culture” that permitted such a heinous crime. The allegation was treated as fact; the accused were treated as guilty. Consistent with SAPR training to “start by believing the victim,” the media, investigators, and university all expressed outrage at the story and sympathy for the alleged victim. They could not have been more mistaken.

According to Ndonge, she was dancing at an Alpha Kappa Alpha sorority mixer on campus on September 12, 2009 when she was approached by Jesus Ortiz. Mr. Ortiz took her phone and left the building with it. She followed Ortiz and his four friends out of the building, over to her dorm, where she rode the elevator with them up to the eleventh floor. Mr. Stalin Felipe made advances on her, which she resisted, and then one of the men lured her to the bathroom. Once inside, they tied her to a stall with rope and then took turns raping her. Mr. Bedward was the only one of the five men who did not rape her. When they were done, they

¹²⁵ Philip Jones, *Woman is jailed over false rape allegation*, ECHO, Feb. 23, 2015, http://www.echo-news.co.uk/news/11811073.Woman_is_jailed_over_false_rape_allegation/ (last visited Feb. 26, 2015).

¹²⁶ *Id.*; Levy, *supra* note 123.

¹²⁷ Levy, *supra* note 123.

¹²⁸ *Lambs to the Slaughter: The Hofstra Rape Case*, COMMUNITY OF THE WRONGLY ACCUSED, <http://www.cotwa.info/p/lambs-to-slaughter-hofstra-false-rape.html> (last visited Feb. 16, 2015). This article is a composite of multiple reports about the incident. See also, Keiran Crowley, *Twisted motive behind rape story*, NEW YORK POST, Sep. 18, 2009, <http://nypost.com/2009/09/18/twisted-motive-behind-rape-story/> (last visited Feb. 17, 2015); Frank Eltmann, *Danmell Ndonge: Hofstra Rape Accuser Dropped Claim After Hearing of Video Recording*, HUFFINGTON POST, Nov. 17, 2009, http://www.huffingtonpost.com/2009/09/17/danmell-ndonge-hofstra-rape_n_290484.html (last visited on Feb. 17, 2015).

asked her to come with them. When police searched the crime scene later, they never found a rope but they did find used condoms.¹²⁹

During the encounter, her boyfriend, who had been dancing with her at the sorority mixer earlier but somehow got separated from her, tried to call her eight times.¹³⁰ Worried that he could not reach her, he went to her seventh-floor dorm room but did not find her. “As I was about to leave, she comes up and she has no shoes on, she is holding them in her hands. She looked like she just finished hot sex. I said, ‘where were you? What were you doing?’ She told me, ‘Nothing.’ I said, ‘What do you mean, nothing?’ I said, ‘Don’t lie to me, what’s going on?’ And she said, ‘Oh, I just got raped.’” He told her she needed to call public safety. She hesitated and it seemed like she did not want to. She said, “Oh, you know, no, it’s OK.”¹³¹ She made a report and four of the five men were arrested on Sunday, September 13, 2009. They were charged with five counts of rape in the first degree and bail was set at \$500,000 bond or \$350,000 cash. They each faced 25 years in jail, if convicted.¹³²

As for the guys, their mugshots were plastered across newspaper headlines. The television news reported the incident as if there was no doubt such a heinous crime had actually occurred. One of the guys was a student at Hofstra. He was immediately suspended and banned from campus. Another was immediately fired from his job. They received death threats. Jail guards badgered, pushed, and shoved them. Their families were harassed.¹³³

Ndonye seemed like the “perfect victim” if there was such a thing.¹³⁴ According to a neighbor, “The girl was genius-like. She wanted to be a physicist...She’s a nice, innocent, well-bred, shy girl.”¹³⁵ Another neighbor called her “brilliant, scary brilliant” and recalled how she “would read the New York Times when she was 3.”¹³⁶ By all accounts, she seemed like a model

¹²⁹ *Lambs to the Slaughter: The Hofstra Rape Case*, *supra* note 128.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Some victim advocates have complained that the ‘rape culture’ appears to demand a perfect victim in order to believe a victim. Andrea Grimes, *The Patriarchy’s Perfect Weapon: ‘But What If She’s Lying?’*, RH REALITY CHECK, Feb. 5, 2015, <http://rhrealitycheck.org/article/2015/02/05/patriarchys-perfect-weapon-shes-lying/> (last visited Apr. 10, 2015); Nina Bahadur, *When It Comes to Sexual Assault, #TheresNoPerfectVictim*, HUFFINGTON POST, Feb. 4, 2015, http://www.huffingtonpost.com/2015/02/04/no-such-thing-as-perfect-rape-victim_n_6614392.html (last visited Apr. 10, 2015). Observing trials, it is apparent one need not be a perfect victim to secure a conviction. The standard, after all, is not proof beyond all doubt but rather proof beyond a reasonable doubt. Delayed reporting and inconsistencies, for example, can often be easily and reasonably explained. However, there reaches a point for alleged victims, just as there is for an accused, where you are asking a judge or jury to stretch too far to believe the story. Perhaps you can believe the student’s computer crashed and that is why his paper is late, but it becomes unbelievable if he then purportedly had his car breakdown and got pulled over by a cop and got a flat tire, and so on. To be sure, in the current environment where victim advocates are dominating the discussion and fueling the mob mentality, the reverse question must be asked: is there a perfect accused? What must an accused look like to be believed? *The sexual grievance industry’s rape lie du jour*, Community of the Wrongly Accused, Feb. 6, 2015, <http://www.cotwa.info/2015/02/the-feminist-rape-lie-du-jour.html>.

¹³⁵ *Lambs to the Slaughter: The Hofstra Rape Case*, *supra* note 128.

¹³⁶ *Id.*

witness who reported right away with a story so outrageous that it just had to be true. Only it was not.

What really happened is that Ndonye and her boyfriend were dancing together at the mixer but got separated when a fight broke out. Ndonye started dancing with Mr. Ortiz and they began making out. She then asked him if he wanted to go back to her dorm room. Mr. Ortiz said, “I have friends here with me.” Ndonye replied, “Bring ‘em along. It’ll be hot.” They followed her to the dormitory bathroom where Mr. Felipe asked her, “Are you sure about this?” She said, “Yeah, sure, I want to.” Several of the men used condoms and had sex with her. Her phone rang eight times from her boyfriend trying to reach her. The men asked why she did not want to answer her phone but she simply said that it was okay. She then ran into her boyfriend as she headed back to her dorm room. Rather than admit what just happened, she told him she was raped but that it was okay, and she did not need to report it.¹³⁷ When she did, the lie took off.

Fortunately for the men, one of them recorded the incident on his cell phone. It was the fifth guy, Arvin Rivera, the one the police had not located yet.¹³⁸ He contacted the police through his lawyer. The video showed the encounter was consensual. It showed there was no rope, no bruising, and no screaming; just consensual sex.¹³⁹ The prosecutor decided to confront Ndonye about her report. He said to her, “If there is a video, and I get that video, it’s going to show me that what you’re saying is true?” Ndonye sat silent for several long moments and then admitted the incident was entirely consensual; she made up the rape because she did not want her schoolmates and her boyfriend to think she was “easy.”¹⁴⁰ Within hours, the men were released from jail.

Unfortunately, it took a few days for there to be any meaningful scrutiny of Ndonye’s twisted tale. Her word alone was enough to send four men to jail despite the innocent men telling consistent stories about what really happened. No one appeared to question the lack of any bruises or any physical evidence to support that she had been tied down against her will. No one questioned why these vicious animals would take the rope with them but leave condoms with biological evidence. No one questioned why she would be so nonchalant in telling her boyfriend she was raped and then tell him it was okay that she was raped and she did not want to report it. Once investigators began to question her account, they found additional evidence showing the men were innocent. They found security video footage from Hofstra that contradicted Ndonye’s report.¹⁴¹ They also found out that another of the men had still photos on his cell phone showing the incident was consensual.¹⁴²

The media suddenly grew quiet. With the newfound evidence, some pundits concluded “we’ll never know what really happened”¹⁴³ even though we do know what happened. The four

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

men told consistent stories; stories consistent with the photos, cell phone video, campus security video, the actual evidence in the case, and Ndonge's subsequent admission that she lied. Some wrote the five men got the "good scare they deserved" and that "[t]hey should stop their whimpering and apologize for acting like mutts."¹⁴⁴ They were chastised on the Steve Wilkos show.¹⁴⁵ Though they were innocent, they were blamed for what happened to them.¹⁴⁶ "In school, they are calling my daughter the sister of the raper," said Mr. Taveras' father, "Unfortunately, everything doesn't stop because the DA says go home and drops the charges."¹⁴⁷

The media continued to protect her name while repeating the names of the wrongly accused. The district attorney made a short announcement, also protecting her name: "The young woman admitted all of the encounters with the young men were consensual. A crime did not happen last Sunday at Hofstra."¹⁴⁸ That was not completely true, however. A crime did occur; Ndonge falsely reported a rape and these men were the victims of her lie.¹⁴⁹ Prosecutors released her name several days later but she was never charged. Instead, she accepted a deferred prosecution agreement whereby she avoided a misdemeanor charge in exchange for doing 250 hours of community service and paying for and undergoing one year of psychiatric counseling.¹⁵⁰ On her account alone, four of the five men spent time in jail and all five were smeared repeatedly and publicly. Their mugshots are forever accessible through Google to any future employer, girlfriend, or associate. She will have no criminal record and has remained largely anonymous.

3. University of Virginia

On November 19, 2014, *Rolling Stone* reported on a horrific gang rape at the University of Virginia on September 28, 2012.¹⁵¹ It is a compelling narrative about the purported rape culture and apathetic response to victims of sexual assault. The article spawned protests and vandalism, and the university suspended all Greek system activities until the next semester.¹⁵² The fraternity accused was vandalized; freelance jurors threw bricks through the windows forcing students to move into hotels.¹⁵³ The story received international attention and then considerable scrutiny. It now stands as a lesson in irresponsible journalism and it serves as a

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ This is an example of "victim blaming" working the opposite direction.

¹⁴⁷ Crowely, *supra* note 128.

¹⁴⁸ *Lambs to the Slaughter: The Hofstra Rape Case*, *supra* note 128.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Sabrina Rubin Erdely, *A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA*, ROLLING STONE, Nov. 19, 2014 (subsequently updated with an apology at the beginning by the Managing Editor), <http://www.rollingstone.com/culture/features/a-rape-on-campus-20141119> (last visited Feb. 24, 2015). The original apology included the phrase, "we have come to the conclusion that our trust in her was misplaced."

¹⁵² *Id.*; T. Reese Shapiro, *Key elements of Rolling Stone's U-Va. Gang rape allegations in doubt*, WASHINGTON POST, Dec. 5 2014, http://www.washingtonpost.com/local/education/u-va-fraternity-to-rebut-claims-of-gang-rape-in-rolling-stone/2014/12/05/5fa5f7d2-7c91-11e4-84d4-7c896b90abdc_story.html (last visited Feb. 24, 2015).

¹⁵³ McArdle, *supra* note 17.

public example of why there must be meaningful scrutiny of allegations if justice is the goal.¹⁵⁴ This case is also a good example of how first impressions may be incorrect and how a compelling story can ultimately be exceedingly short on credibility.

According to Jackie, the alleged victim, she went on a date on September 28, 2012 with a member of Phi Kappa Psi.¹⁵⁵ Her date parked in front of the fraternity house, told her he had to go up to his room, invited her to join him, and she agreed.¹⁵⁶ She was led into a dark room where she was ambushed, thrown down on a thick rug, breaking a low glass table in the process and cutting the back of her arm. She was then raped in succession over the course of three hours by seven men, who were “rushing” the fraternity, while two others stood by and watched.¹⁵⁷ She was sober.¹⁵⁸

When she came to at about 3 a.m., the party was still going on. As she ran from the room, no one noticed the “barefoot, disheveled girl hurrying down a side staircase, face beaten, [and] dress spattered with blood.”¹⁵⁹ A “disoriented” Jackie then burst out a door and dialed a friend screaming, “Something bad happened. I need you to come and find me!”¹⁶⁰ A few moments later her three friends arrived, “Randall”, “Andy,” and “Cindy.”¹⁶¹ They rushed over to meet her; the fraternity house loomed in the background.¹⁶² She claimed her friends, Cindy and Andy, began debating the “social price” of reporting and they discouraged her from going to the police saying, “She’s gonna be the girl who cried ‘rape,’ and we’ll never be allowed into any frat party again.”¹⁶³

The evidence simply does not support her emotional story. There was no date function or social event at all the whole weekend she is certain she was attacked at the house she is certain she was attacked.¹⁶⁴ No member of the house matches the description she provided of her attacker.¹⁶⁵ The fraternity does not have pledges during the fall semester.¹⁶⁶ No one by the name

¹⁵⁴ Regrettably, the SAPR training and handouts do not speak about justice and are entirely void of any discussion whatsoever about getting the right result in a case. Instead, SAPR materials operate from the standpoint that every allegation is a sexual assault and a conviction should be obtained.

¹⁵⁵ *Id.*; T. Reese Shapiro, *U-Va. students challenge Rolling Stone account of alleged sexual assault*, WASHINGTON POST, Dec. 10, 2014, http://www.washingtonpost.com/local/education/u-va-students-challenge-rolling-stone-account-of-attack/2014/12/10/ef345e42-7fcb-11e4-81fd-8c4814dfa9d7_story.html (last visited Feb. 24, 2015).

¹⁵⁶ Sara Ganim & Ray Sanchez, *Friends accounts differ significantly from victim in UVA rape story*, CNN, Dec. 17, 2014, <http://www.cnn.com/2014/12/16/us/uva-rape/> (last visited Feb. 24, 2015).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Erdely, *supra* note 151.

¹⁶⁰ *Id.*

¹⁶¹ The *Rolling Stone* and *Washington Post* both refer to her friends by aliases to protect their identities. CNN, however, interviewed her friends and either follows a different policy or received permission to use their real names. CNN reports her friends’ names as follows: “Randall” is actually Ryan Duffin; “Andy” is actually Alex Stock; and “Cindy” is actually Kathryn Hendley. Duffin is the student Jackie had a crush on. Jackie’s real name has not been released in the media. See Ganim, *supra* note 156; Erdely, *supra* note 151; Shapiro, *supra* note 152; and Shapiro, *supra* note 155.

¹⁶² Erdely, *supra* note 151.

¹⁶³ *Id.*

¹⁶⁴ Shapiro, *supra* note 152.

¹⁶⁵ *Id.*

she provided has ever been a member of the fraternity she accused.¹⁶⁷ She claims to have been bloodied, barefoot, and physically injured but the friends who saw her that night did not observe any blood, lack of shoes, or physical injuries of any kind.¹⁶⁸ She told her friends that night she was forced to perform oral sex on five men; she never said anything about any other sex, nor did she say anything about oral sex to *Rolling Stone*, and her current story has changed from five men, to seven rushes with two others watching.¹⁶⁹ Additionally, she claims her friends counseled her not to report and they cautioned her about the social ramifications of being the girl who cried rape. Her friends all say the polar opposite; they urged her repeatedly to report but she was adamant she did not want to report and only wanted to go to her dorm.¹⁷⁰ Moreover, she attributes much of this social debate to Cindy, whom all three friends agree was not part of the discussion that night; Cindy was about 25 feet away because Jackie did not want her to know what happened.¹⁷¹

Investigation of her alleged attacker has proven even more shocking. In the weeks before September 28, 2012, Jackie started talking about a junior from her chemistry class, “Haven Monahan,” who had a crush on her and was asking her out. Intrigued, her friends asked for Haven’s phone number and they began exchanging texts with him.¹⁷² These texts, along with the photo of her date that night were provided to the *Washington Post*. Among the texts, Haven wrote, “Get this she said she likes some other 1st year guy who doesn’t like her and turned her down but she wont date me cause she likes him.” Randall said it is apparent to him the “1st year student” referred to in the texts is him because he had rebuffed Jackie’s advances.¹⁷³

Jackie told her friends she finally accepted a date with Haven on September 28, 2012. Her friends tried to find Haven on the U-Va database and on social media but were unsuccessful. Jackie claims Haven dropped out of the university after the alleged assault but U-Va officials said no one by the name she provided has ever attended U-Va.¹⁷⁴ Haven also sent her friends photographs of himself. The person in the photo does not match the name she gave her friends.¹⁷⁵ Her “date” was actually a high school classmate, now a junior at a university in a different state, who confirmed those were photographs of him.¹⁷⁶ This individual said he barely knew Jackie, “never really spoke to her,” is not in any fraternity, has not been to Charlottesville in at least six years, was in another state that weekend participating in an athletic event, and noted the photos of him appeared to have been pulled from social media websites.¹⁷⁷ The *Washington Post* located an individual with a similar name to the one she recently named as her

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*; Ganim, *supra* note 156.

¹⁷⁰ Shapiro, *supra* note 152.

¹⁷¹ Ganim, *supra* note 156.

¹⁷² Shapiro, *supra* note 155; Ganim, *supra* note 156.

¹⁷³ *Id.*

¹⁷⁴ Shapiro, *supra* note 155.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

main attacker. Although he was a lifeguard at the same time as Jackie, he has never met her in person, never taken her out on a date, and is not a member of Phi Kappa Psi.¹⁷⁸

As Jackie's story unfolded, her friends increasingly came to question whether Haven Monahan was even real.¹⁷⁹ Five days after the purported assault, Haven sent Randall a text message where he wrote, "You should read this, I've never read anything nicer in my life."¹⁸⁰ Attached was an essay Jackie had written about Randall. "[H]ere's somebody who allegedly just led a brutal sexual assault on a friend of mine, and now he's going to email this thing about me?"¹⁸¹ In retrospect, Alex believes "there's a good possibility whoever I was texting was Jackie. There's a definite possibility."¹⁸²

When asked about her decision not to report her alleged assault, Jackie told the *Washington Post*, "I didn't want a trial. I can't imagine getting up on a defense stand and having them tear me apart."¹⁸³ Cross-examination is the ultimate test of reliability and truth.¹⁸⁴ With the evidence uncovered through responsible journalism, there is an ample amount of cross-examination material for sure.¹⁸⁵

4. *Duke University lacrosse case*

On March 13, 2006, a few members of Duke's lacrosse team held a party and hired two strippers from Allure Escort Services. They requested white or Hispanic women but the two strippers who arrived were both black, which allegedly led to a slew of racially charged remarks and actions. A few days later, team members were told that one of the dancers, Crystal Mangum, reported she was gang raped at that party.¹⁸⁶

¹⁷⁸ *Id.*

¹⁷⁹ Shapiro, *supra* note 155; Ganim, *supra* note 156.

¹⁸⁰ Ganim, *supra* note 156.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Shapiro, *supra* note 152.

¹⁸⁴ See *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004) (discussing how the confrontation clause is grounded in the notion that reliability is best determined through the crucible of cross-examination and citing Blackstone for the quote, "This open examination of witnesses...is much more conducive to clearing up truth.").

¹⁸⁵ This case is a good example of how methods for determining false allegations can result in different statistics. Depending on your standard of review – whether it is false beyond a reasonable doubt, probably false, or more likely false than true – people can reach different results. Because Jackie has not admitted she lied and there is no video evidence proving it beyond all doubt, most researchers discussed in Part III of this article would not classify this as a false accusation. However, an objective view of the evidence necessarily indicates this is a false accusation. At best, there is only a *possibility* that *something* happened; it is not likely let alone more likely or probable or beyond a reasonable doubt. On the contrary, every material statement she has made that could be corroborated has been firmly refuted. Her statements are so at odds with the evidence that she could very well be convicted of perverting justice or making false statements.

¹⁸⁶ See Jeffrey Rosen, *Wrongly Accused*, NEW YORK TIMES, Sep. 16, 2007, <http://www.nytimes.com/2007/09/16/books/review/Rosen-t.html> (last visited Feb. 17, 2015); Lulu Chang, *The Duke Lacrosse Rape Scandal Was 8 Years Ago, So Where Are The Accused Now?*, BUSTLE, May 29, 2014, <http://www.bustle.com/articles/26053-the-duke-lacrosse-rape-scandal-was-8-years-ago-so-where-are-the-accused-now> (last visited Feb. 17, 2015).

The District Attorney, Mike Nifong, “painted the Duke lacrosse team as a privileged group of young white men, who had never faced hardship, and felt entitled not only to their already luxurious lifestyles, but also to the bodies of women.”¹⁸⁷ Nifong suggested the rape was a hate crime.¹⁸⁸ He referred to her as “my victim” and never even interviewed her.¹⁸⁹ When DNA of as many as four men was found on her, none of them Duke students, he refused to turn over this exculpatory evidence.¹⁹⁰ When defense attorneys asked to meet with him to consider conclusive digital evidence showing the lacrosse players were innocent, Nifong refused.¹⁹¹ He was subsequently charged by the North Carolina Bar Association for “making misleading and inflammatory comments to the media,” withholding evidence, and perjury.¹⁹² He was disbarred and disgraced for his role in this case.¹⁹³

Mangum’s report changed repeatedly. “She recanted and then re-recanted, offering contradictory claims to having been raped by 20, five, four, three, and two players, before finally settling on three, none of whom she could confidently identify” and none of whom matched the DNA found on her that evening.¹⁹⁴ Her fellow stripper called her story a “crock.”¹⁹⁵ Upon further review, she only made the claim of rape when threatened with confinement in a mental health center for other issues.¹⁹⁶ She is currently in jail, having been convicted in 2013 of murdering her boyfriend in April 2011.¹⁹⁷

The whole lacrosse team was punished for the alleged rape, which was later proven to be a false accusation. The President of Duke University fired the lacrosse coach, canceled the season, and condemned the team members for more than eight months.¹⁹⁸ Perhaps worse than that, 88 professors signed an inflammatory letter encouraging student protesters to rush to judgment, even as the protesters plastered campus with wanted posters of the lacrosse team and waved banners declaring “Castrate.”

¹⁸⁷ Chang, *supra* note 186.

¹⁸⁸ *Id.*

¹⁸⁹ Rosen, *supra* note 186.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* The evidence consisted of cellphone calls, A.T.M. deposits, and time-stamped photos showing the lacrosse players could not have committed the alleged crime.

¹⁹² Chang, *supra* note 186.

¹⁹³ Rosen, *supra* note 186.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Crystal Mangum, *Duke Lacrosse Rape Accuser, Found Guilty in Boyfriend’s Murder*, HUFFINGTON POST, Nov. 23, 2013, http://www.huffingtonpost.com/2013/11/23/crystal-mangum-duke-rape-murder_n_4329191.html (last visited Feb. 17, 2015).

¹⁹⁸ Rosen, *supra* note 186.

5. *Catherine Armstrong Bell*¹⁹⁹

Not just men are falsely accused. Catherine Armstrong Bell, 34, was an assistant principal at Pelham High School in Shelby County, Alabama when she was fired and arrested in December 2013 for allegedly having sexual intercourse with one of the students. What started as rumors turned into accusations and then criminal charges. The student said they had intercourse on three occasions.

A year later, her case was thrown out. DNA and electronic evidence came back negative indicating there was no intercourse. The student then acknowledged the events never occurred. The District Attorney agreed with the dismissal and the judge entered an order granting Bell “full, complete, and absolute release from all civil and criminal liability stemming directly or indirectly” from the case.²⁰⁰

Catherine dedicated her whole life to teaching only to wake up one day and find it had been taken away by a false allegation. She lost her job, had to sell her home and move in with her mom, and she could not get work. She did nothing wrong and found her life turned upside down. It took a year to be vindicated but it still does not make her whole; she cannot go back in time and be back to where she was. She is a victim.

6. *Cases with Fatal Consequences*

Sadly there are also numerous examples where a false rape allegation resulted in the murder of the wrongly accused. In Fairbanks, Alaska, Dominique Vasquez, 31, had been smoking methamphetamine and drinking alcohol with Wesley Lord, 37, and two other men in a hotel room.²⁰¹ Vasquez had consensual sex with Lord, after which her boyfriend, Abraham Stine, 39, showed up. Stine has a history of assaulting people and suspected she was cheating on him. Not wanting to get in trouble, she told Stine that Lord raped her and she convinced the two other men in the room to go along with the story. Stine proceeded to beat Lord to death and he continued to beat Lord for five to ten minutes after Lord stopped moving. Vasquez placed her hand over Lord’s mouth during the beating to silence him. Vasquez admitted to police that she lied and the sex was consensual; the two other men in the room corroborated everything. Vasquez and Stine are both currently charged with second-degree murder.²⁰²

¹⁹⁹ Mia De Graaf & Wills Robinson, *Principal sobs as she reveals how pupil’s false affair claims ended her career and turned ‘everyone against her’ before judge laughed them out of court*, MAIL ONLINE, Dec. 12, 2014, <http://www.dailymail.co.uk/news/article-2872314/Teary-assistant-principal-falsely-accused-having-sex-teenage-student-forced-sell-home-couldn-t-work-revealed-turned-allegations-surfaced.html> (last visited Apr. 7, 2015).

²⁰⁰ *Id.*

²⁰¹ *Woman’s rape lie leads to lover’s death: the false accuser placed her hand over his mouth to silence him while her boyfriend punched him to death*, COMMUNITY OF THE WRONGLY ACCUSED, Jan. 9, 2015, <http://www.cotwa.info/2015/01/womans-rape-lie-leads-lovers-death-she.html> (last visited Feb. 18, 2015). See also, Jerzy Shedlock, *Charges: Murder in Fairbanks result of false rape accusation*, ALASKA DISPATCH NEWS, Jan. 8, 2015, <https://www.adn.com/article/20150108/charges-murder-fairbanks-result-false-rape-accusation> (last visited Feb. 18, 2015); Dorothy Chomicz, *Troopers: False rape accusation led to killing in Fairbanks*, NEWSMINER.COM, Jan. 8, 2015, http://www.newsminer.com/news/local_news/troopers-false-rape-accusation-led-to-killing-in-fairbanks/article_e0b76ac0-97af-11e4-b892-f70eaafe23ab.html (last visited Feb. 18, 2015).

²⁰² *Id.*

In Arlington, Texas in December 2006, Tracy Roberson had a two-month consensual affair with Devin LaSalle, 37, a father of three, when her husband interrupted them in the middle of a tryst in LaSalle's truck.²⁰³ She tried to cover up the affair by claiming rape. Her husband, Darrell Roberson, 37, shot LaSalle dead. A grand jury declined to indict her husband. Tracy Roberson, however, was tried and convicted of involuntary manslaughter and sentenced to five years in prison on account that her false report caused LaSalle's death.²⁰⁴

In Canada, Clifford Martin, 19, pled guilty to manslaughter and was sentenced to seven years in prison for beating Cory Headen, 19, to death with an aluminum baseball bat as he lay sleeping in his bed in September 2008.²⁰⁵ A 13-year-old girl told Martin that Headen raped her. Later that night, Martin broke into Headen's home with the girl and beat Headen to death. The rape claim was later proven untrue. During sentencing, the judge openly wondered why Martin had accepted her words without question.²⁰⁶

In Dublin, an innocent schoolboy was shot to death after a false rape claim.²⁰⁷ Carol Craig, 18, told her boyfriend, Joseph Sullivan, 26, that she was raped by Sumbo Owoiya, 18, in the apartment where Owoiya lived with his family. Sullivan then contacted a third party, picked up the armed man, drove to Owoiya's apartment, and the gunman shot Owoiya as he appeared to be looking through the peep hole. The rape claim was false. One of Craig's friends was dating one of Owoiya's friends, which is how she knew where he lived. Sullivan was convicted of manslaughter and sentenced to seven years in prison. Craig received a three-and-a-half year sentence that was suspended because she tried to dissuade Sullivan and did not know there was a gun involved until she was already in the car on the way to Owoiya's apartment.²⁰⁸

In San Antonio, Melissa Ann Ramos lied about being raped to cover up that she was two-timing her boyfriend, James "Clay" Kelly, while he was in prison.²⁰⁹ Ramos had been in a

²⁰³ Nathaniel Jones, *Arlington mom who cried rape gets five years in slaying*, STAR-TELEGRAM, May 5, 2008 (updated Sep. 18, 2009), <http://www.star-telegram.com/incoming/article3822650.html> (last visited Feb. 18, 2015). See also, *Woman whose false 'rape' cry led to lover's death sentenced to 5 years in prison*, FALSE RAPE SOCIETY, COMMUNITY OF THE WRONGLY ACCUSED, May 6, 2008, <http://falserapecommunity.blogspot.com/2008/05/woman-whose-false-rape-cry-led-to.html> (last visited Feb. 18, 2015).

²⁰⁴ *Id.*

²⁰⁵ *Courtenay man gets 7 years for vigilante killing*, CBC NEWS, Aug. 25, 2009, <http://www.cbc.ca/news/canada/british-columbia/courtenay-man-gets-7-years-for-vigilante-killing-1.859939> (last visited Feb. 18, 2015); *Manslaughter plea leads to 7-year jail term*, VANCOUVER SUN, Aug. 27, 2009, http://www.canada.com/story.html?id=034a2f42-5003-455b-a617-1c109b22614b#_federated=1 (last visited Feb. 18, 2015).

²⁰⁶ *Id.*

²⁰⁷ Jane Last, *Innocent schoolboy was shot dead after girl (15) made a false rape claim*, HERALD.IE, Feb. 6, 2009, <http://www.herald.ie/news/courts/innocent-schoolboy-was-shot-dead-after-girl-15-made-a-false-rape-claim-27900793.html> (last visited Feb. 18, 2015).

²⁰⁸ *Woman handed suspended sentence after pleading guilty to manslaughter*, WEXFORD PEOPLE.IE, <http://www.wexfordpeople.ie/news/woman-handed-suspended-sentence-after-pleading-guilty-to-manslaughter-27702140.html> (last visited Feb. 18, 2015).

²⁰⁹ Craig Kapitan, *Plea deal ends charge stemming from false rape accusation*, MY SAN ANTONIO, Nov. 16, 2011, http://www.mysanantonio.com/news/local_news/article/Plea-deal-ends-charge-stemming-from-false-rape-2273163.php (last visited Feb. 18, 2015).

consensual relationship with Nathan Ramirez, 20, when she falsely told her boyfriend that Ramirez raped her. Kelly was convicted and sentenced to 40 years in prison for instigating the shooting. John McBurnett, the triggerman and a friend of Kelly's, was also sentenced to 40 years in prison. Co-defendant, John "Bubba" Rodriguez agreed to a 15-year sentence for providing the gun. Ramos accepted a plea deal to robbery; she faces eight years for her role in Ramirez' death.²¹⁰

F. SUMMARY

These examples demonstrate the significant consequences of false accusations and wrongful convictions. They are all victims and their plight was made worse by giving unchecked power to the accusers. Justice for true victims cannot be laid at the feet of the innocent. Getting it right means working harder to know the difference between true and false allegations and separating treatment considerations from our constitutional requirements of proof. Protecting the innocent must be part of the goal; it is a bedrock principle of the United States of America and it must be part of our policy if liberty is to have any meaning.

III. MYTH: FALSE ALLEGATIONS ARE RARE

I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value of our society that it is far worse to convict an innocent man than to let a guilty man go free.

– Justice Harlan, *In re Winship* (1970)²¹¹

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, professor at Harvard Law School and retired federal judge²¹²

The tragedies of wrongly accused are extensive. It begs the question, how has a false accuser been given so much power to create so much harm with just an accusation? For one, sexual assault is one of the most serious crimes that can be committed. That alone accounts for the strong reaction an accusation can generate. The mob mentality in recent years has only made matters worse.²¹³ Fueling the fire, advocates repeatedly assert that false allegations are so rare as to warrant no discussion.²¹⁴ Indeed, the risk of false allegations receives no discussion at all in

²¹⁰ Additional examples, not all fatal but all involving serious beatings or stabbings, can be found at "*Woman's rape lie leads to lover's death*," *supra* note 201.

²¹¹ *In re Winship*, 397 U.S. 358, 372 (1970)(Harlan, J., concurring).

²¹² Gertner, *supra* note 9.

²¹³ See *supra* Part II.A.

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 (see note 16 for an explanation of stand-down days), where he made multiple references to the rarity of false allegations. One minute and 20 seconds into the briefing he talked about false

senior leader statements, policy documents, or training materials. The implication is that protections for the accused only impede accountability.²¹⁵ The notion that false allegations are rare is a myth grounded in flawed science and defective analysis.

As noted earlier, science is limited in how it can help solve the problem of sexual assault. While science can be corroborative or exculpatory, it cannot tell truth from lie and it cannot tell us what the actual rate of convictions or acquittals should be. It cannot tell us exactly how many people have been wrongly convicted or falsely accused and it cannot tell us any reliable information about unreported allegations.²¹⁶ To make matters worse, science is limited by sexual assault laws that are notoriously complicated.²¹⁷ Add to that historical biases against women, biases against men, patriarchal views that women are weak and must be protected, a mob mentality, a culture of blaming someone for every problem,²¹⁸ and it is easy to see how objective assessments are difficult to find. Moreover, people tend to have strong feelings about sexual assault, sexuality, or relationships in general. Removing bias is, consequently, a significant challenge to developing truly scientific data upon which to build robust policy.

This section will discuss the science that has driven the training and policy agenda thus far. Before discussing the research, however, we must first talk about problems with surveys, which have been integral to studies in this area. Surveys have skewed research data because they

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.” The public affairs office had a copy of the video and it was posted on the base website but it was removed after a trial judge expressed concerns about these and other statements in the briefing. Further details are available with the author upon request.

²¹⁵ As noted in several of the recommendations in section IV below, few, if any, changes in military justice over the last several years have benefitted the wrongly accused; they are almost exclusively to ease the burdens on alleged victims and prosecutors in sexual assault cases. In fact, several rights that have existed for decades have recently been reversed. The DOD Report to the President in 2014 characterized these changes as the “most sweeping revisions since 1968” which make the military justice system “better able to investigate and try sexual assault cases in a fair and just manner, while better protecting victims’ privacy interests.” REPORT TO THE PRESIDENT OF THE UNITED STATES ON SEXUAL ASSAULT PREVENTION AND RESPONSE, 23, DEPARTMENT OF DEFENSE (2014) [hereinafter, 2014 SAPR REPORT], available at http://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_SAPRO_Report.pdf. See also, *Id.* at 78 (discussing the accountability line of effort and how the recent changes in military justice are progress towards greater accountability for offenders; there is no mention anywhere in the report about protecting the wrongly accused).

²¹⁶ Unreported allegations, by definition, are untested and limited in details. It is not possible to validate anonymous claims from surveys, particularly when the author volunteers only the information he or she wants you to know.

²¹⁷ Sexual assault laws may be complicated because relationships are complicated. “Genuine ambivalence and ambiguous signals seem almost inherent in courtship and sexuality, especially in first encounters.” Gertner, *supra* note 9. A criminal law professor at Yale Law School stated, “the redefinition of consent...encourages people to think of themselves as sexual assault victims when there was no assault” and that “[p]eople can and frequently do have fully voluntary sex without communicating unambiguously.” Jed Rubenfeld, *Mishandling Rape*, NEW YORK TIMES, Nov. 15, 2014, available at: <http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html> (last visited Apr. 3, 2015).

²¹⁸ See Ofer Zur, *Rethinking ‘Don’t Blame the Victim’: The Psychology of Victimhood*, ZUR INSTITUTE, <http://www.zurinstitute.com/victimhood.html> (last visited February 28, 2015) (discussing the blame mentality of U.S. culture).

include inaccurate and incomplete definitions, they misstate or omit important legal concepts integral to determining whether there was a crime, and they fail to validate the information provided by alleged victims. The way researchers define a false allegation also skews the validity of their analyses. The standard used by researchers has not been a measure of how often allegations are in fact false, but rather how often they are maliciously made up beyond a reasonable doubt. This is akin to saying an allegation is only true if someone is convicted. This section then outlines what researchers have concluded about false allegations and goes in depth on four of the most commonly cited studies. The actual data demonstrates that, based on a proper definition and a preponderance of the evidence, the rate of false allegations is around 40 percent. The author then discusses the most common reasons for false allegations along with examples of each. Next, the author demonstrates the rate of false allegations is not rare and how, in FY2014, there was statistically more than one provably false allegation for every provably true sexual assault allegation.

This paper then discusses two root problems with research and SAPR policy. The first root problem is conflating treatment principles with justice principles. The second root problem is that the foundational research on victim behavior is flawed which skews researchers' analysis of false allegations. Simply put, victim behavior research does not weed out false victims, which results in nearly every behavior being considered consistent with true victims, which has led researchers to conclude nearly every allegation is consistent with truth, which has caused researchers to characterize false reports as rare, which then seemingly validates the starting position of presuming every allegation is true. This is akin to relying upon interviews with people accused of sexual assault to determine how often people are falsely accused of sexual assault and then using those answers as proof accusations are rarely true.

A. THE FLAWS WITH SURVEYS

Surveys are a core issue in sexual assault policy.²¹⁹ Surveys are used to assess how many victims there are, what their cases look like, how victims behave, and their opinions and perceptions on a host of policy concerns. Surveys are also used extensively in research on false allegations. Advocates then use the “data” from these surveys and research to inform policy and justify changes.²²⁰ This is a big problem because the surveys use flawed and incomplete

²¹⁹ See 2014 SAPR REPORT, *supra* note 215 (discussing survey results as indicative of the depth of the problem and in assessing our effectiveness thus far in dealing with the problem).

²²⁰ A good example of this is the frequently reported but patently false statistic that one in five women will be sexually assaulted in college. The statistic has been a driving force in the President's “It's on us” campaign. Heather Wilhem, *The ‘Rape Culture’ Lie*, COMMENTARY, Mar. 1, 2015, <https://www.commentarymagazine.com/article/the-rape-culture-lie/> (last visited Mar. 10, 2015). The statistic, however, has been “repeatedly and resoundingly discredited.” *Id.*; Yoffe, *supra* note 23 (debunking the statistics and noting the authors, of the report from which this statistic comes, do not even believe the statistic is representational for the nation); Ariel Cohen, *Debunking the Mystery of THE Sexual Assault Statistic*, DAILY CALLER, Jun. 27, 2014, <http://dailycaller.com/2014/06/27/debunking-the-mystery-of-the-sexual-assault-statistic/> (last visited Apr. 4, 2015)(debunking the statistic and referencing a similar survey from the Government around the same time found the rate to be one in 40 rather than one in five). The actual rate according to research from the Department of Justice in December 2014 is approximately 1 in 52. See LYNN LANGTON & SOFI SINOZICH, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995-2013 (Department of Justice, 2014), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5176> (last visited Apr. 9, 2015)(discussing the actual rates of sexual

definitions, and the survey data is not validated. Consequently, surveys are grossly over-relied upon.

1. *The Surveys*

The primary source for criminal justice statistics in the United States is the Bureau of Justice Statistics (BJS) from the Department of Justice (DOJ).²²¹ The BJS uses the National Crime Victimization Survey (NCVS) to collect data on violent crimes.²²² The Department of Defense (DOD), by comparison, uses the biennial Workplace and Gender Relations Survey of Active Duty Members (WGRA) and the Workplace and Gender Relations Survey of Reserve Component Members (WGRR).²²³ In 2014, DOD started using a new and more in-depth survey, the 2014 RAND Military Workplace Survey (RMWS).²²⁴ The studies used by researchers on victim behavior and on false allegations often mirror these official surveys and, therefore, suffer from the same infirmities discussed below.

2. *Inaccurate and Incomplete Definitions*

There are several flaws in these surveys with the definitions of sexual assaults and the omission of important considerations. First, each of these surveys ask respondents if they experienced “unwanted sexual contact” (USC).²²⁵ Affirmative responses are then characterized as incidences of sexual assault.²²⁶ USC, however, is *not* synonymous with non-consensual sexual contact. There is a significant distinction between an internal thought (i.e., USC) and the external communication of that thought (i.e., consent or lack of consent). Put differently, the fact we do not want to do things does not mean we are coerced into doing them against our will. On

assaults for college women is 6.1 per 1,000 students as opposed to 7.6 per 1,000 for nonstudents); Callie Marie Rennison, Op-ed, *Privilege, Among Rape Victims*, New York Times, Dec. 21, 2014, available at: http://www.nytimes.com/2014/12/22/opinion/who-suffers-most-from-rape-and-sexual-assault-in-america.html?_r=0 (last visited Apr. 9, 2015) (discussing her recent analysis with a colleague that estimated the rate of sexual assault of college students was 6.1 per 1,000 and significantly lower than the rate experienced by women who did not attend college); Mark J. Perry, *New Justice Department study reveals that about 1 in 52 college women have been victims of rape/sexual assault*, American Enterprise Institute, Dec. 12, 2014, <http://www.aei.org/publication/new-justice-department-study-reveals-1-52-6-college-women-victims-rape-sexual-assault/> (last visited Apr. 9, 2015) (calculating the rate of sexual assaults in college, based on the BJS report, to be one in 52 students as opposed to one in five). Despite the Government’s official source of criminal violence statistics reporting the rate of college sexual assaults to be less than two percent, there continue to be commercials and pamphlets from the administration asserting the one in five statistics.

²²¹ *About the Bureau of Justice Statistics*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=abu> (last visited Apr. 8, 2015).

²²² *Data Collection: National Crime Victimization Survey (NCVS)*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=dcdetail&iid=245> (last visited Apr. 8, 2015).

²²³ DESIGN OF THE 2014 RAND MILITARY WORKPLACE STUDY, 8, (Andrew R. Morral et al. eds., RAND, 2014), available at http://www.rand.org/content/dam/rand/pubs/research_reports/RR800/RR870z1/RAND_RR870z1.pdf (last visited Apr. 8, 2015).

²²⁴ *Id.* at 37-55 (discussing the new survey), and 109-75 (listing the questions for the RMWS). Although the RMWS is an improvement on the NCVS, WGRA and WGRR, it is still significantly flawed in how it defines sexual assault.

²²⁵ *Id.* at 13-18, 37-55, 109-201.

²²⁶ The 2012 WGRA is the source of the estimated 26,000 sexual assaults figure that served as an impetus for change in the military.

the contrary, we often do things we do not want to do because it is a better option in our minds than the alternative. In sexual relationships, for example, one person may want intimacy while the other person just wants to read or watch television. Although the latter person does not “want” sexual contact, he or she may nevertheless consent to sexual activity for a variety of reasons such as: he or she promised sexual activity earlier, feels obligated for some reason, or does not want the fight that may ensue later about not meeting his or her partner’s needs. Surveys do not capture the distinction and will, therefore, present inaccurate data.

Second, the surveys fail to accurately define how intoxicated one must be to be incapable of consent. Being drunk is not the same as being incapacitated. Incapacitation is often defined as being incapable of (a) appraising the nature of the sexual act, (b) declining participation in the sexual act, or (b) communicating unwillingness to engage in the sexual act.²²⁷ The key is the ability to make decisions, whether or not they are good or regrettable. Someone could be held down or significantly drunk and still be capable of declining participation, communicating desires, and understanding the sexual activity.²²⁸ In toxicology research, for instance, there is evidence of an individual with a 0.894 blood alcohol level, nearly twice the level generally accepted as fatal, who was still capable of accurately understanding and answering questions about his medical history.²²⁹ Incapacitation is a high threshold. We remain responsible for our decisions until we reach the point of incapacitation. Without sufficient definitions, these surveys are prone to capturing numerous incidents of drunk, but not criminal, sex.

Third, incapacitation is an objective fact not a subjective perception. Consider drunk driving for example. It does not matter whether the driver believes he is sober or drunk; whether there was an offense is based on the objective blood alcohol level in relation to the legal limit for driving. The RMWS asks respondents if they experienced USC “when you were so drunk, high, or drugged that you could not understand what was happening or could not show them you were unwilling.”²³⁰ This question solicits a subjective assessment for an objective determination. This is highly problematic. To begin with, people who are drunk are not necessarily reliable in assessing how drunk they were. Additionally, someone who is incapacitated is, by definition, incapable of appraising the nature of events and incapable of rational thought. A victim in this

²²⁷ *Manual for Courts-Martial (MCM)*, Part IV, ¶ 45.a.(c)(2) (2008 ed.). When Congress changed Article 120, UCMJ from prohibiting sexual activity with someone “substantially” incapacitated to prohibiting sexual activity with someone who is “incapable of consenting,” they did not carry forth the definitions accompanying this footnote. *MCM*, Part IV, ¶ 45.a.(b)(3) (2012 ed.). In the absence of a clear definition of what it means to be incapable of consent, many judges are continuing to use the definitions from the 2007 version of Article 120.

²²⁸ See, e.g., *United States v. Jones*, ACM 38434, 2015 CCA Lexis 86 (A.F. Ct. Crim. App. Mar 13, 2015) (unpub. op.), available at http://afcca.law.af.mil/content/afcca_opinions/cp/jones-38434.u.pdf (last visited Apr. 8, 2015) (finding a sexual assault charge legally insufficient where the appellant was charged 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 in fact declined or consented).

²²⁹ A. D. Redmond, Letter to the Editor, *Blood Alcohol Concentration and Conscious Level*, 18 ALCOHOL & ALCOHOLISM, No. 1, 89 (1983). The actual BAC level could have been somewhat higher or lower. The analysis was conducted on plasma, which reduces the level slightly. On the other hand, the study notes that the blood may have been collected up to four hours after the individual’s last drink. *Id.* Due to the body’s elimination of alcohol over time, the longer the delay the higher the individual’s peak BAC level would have been, meaning the actual BAC may have been even higher.

²³⁰ DESIGN OF THE 2014 RAND MILITARY WORKPLACE STUDY, *supra* note 223, at 140 (question 134).

position typically has to rely on someone else's determination.²³¹ Additionally, black outs are a common source of legally false allegations. In a black out, a person is capable of consenting and making decisions but they are not recording the memory. These individuals may not remember, for example, how they got home. The inability to remember causes many alleged victims to assume they were incapacitated despite objective evidence proving they were not. For these reasons, surveys overestimate sexual assaults due to incapacitation.

Fourth, there are several aspects of sexual assault law that look at the alleged offender's state of mind as opposed to the alleged victim's perception of his state of mind. The RMWS, for example, asks respondents if the USC was "intended to be abusive or humiliating" or "was intended for sexual gratification."²³² The intent of the alleged offender is determined by looking at the actions and statements of the alleged offender, not by speculation from the biased perspective of the alleged victim. Similarly, these surveys invariably ask about attempted sexual assaults.²³³ The crime of attempt requires the alleged offender to have specifically intended the sexual assault.²³⁴ By way of example, consider the situation where the male inadvertently presses his penis to the anus of his female partner. If she did not want anal sex, she would invariably have experienced USC and answered that survey question accordingly. Whether he was intending to engage in anal sex or made the contact by accident is a critical question of whether there was an offense, which is determined by assessing his statements or actions, not her impression of his actions.

Fifth, it matters *when* she did not want the sexual act or contact. It is not enough to say to a date in the beginning, "We are not going to have sex later." She has the right to change her mind and he has the right to ask later if she would like to have sex. Lack of consent must be at the time of the sexual act or contact, not long before or after.²³⁵ Along these lines, if she "went to bed with a 10 and woke up with a 2" as Katy Perry sings in her song, "This Is How We Do,"²³⁶ then she may have wanted the sexual contact when it happened, but not wanted it the next morning; commonly referred to as regret sex. Without establishing when the sexual activity was unwanted, the surveys fail to sufficiently exclude lawful acts from potentially criminal ones.

Lastly, missing from all surveys is the affirmative defense of mistake of fact. Mistake of fact as to consent is, and has been, a complete defense to sexual assaults in the military for a long

²³¹ One other possibility is where the respondent believes he or she was asleep or passed out, which is a different theory of sexual assault and no longer included under the "incapable of consent" statutory theory. See *MCM*, Part IV, ¶ 45.a.(b)(2) (2012 ed.). Lay persons often confuse passing out, which is synonymous with being unconscious, with blacking out, which includes fragmentary memory of events that occurred while conscious and capable of decision-making but which were not completely recorded in memory.

²³² DESIGN OF THE 2014 RAND MILITARY WORKPLACE STUDY, *supra* note 223, at 47 and 138 (questions 124-25).

²³³ See, e.g., *Id.* at 138 (questions 122-23).

²³⁴ *MCM*, Part IV ¶ 4.a.(a) (2012 ed.); 10 U.S.C. § 880.

²³⁵ See *United States v. Tunstall*, ACM 37592, 2012 CCA Lexis 107, 112-17 (A.F. Ct. Crim. App. Mar. 28, 2012), *rev'd in part on other grounds*, 72 M.J. 191 (C.A.A.F. 2013) (reviewing a case where the victim expressed a specific desire to have sex with appellant but vomited due to intoxication before the evening concluded and before appellant had sex with her, and finding the trial judge was correct in instructing jurors that consent must exist at the time of the sexual act).

²³⁶ See <http://www.azlyrics.com/lyrics/katyperry/thisishowwedo.html>.

time.²³⁷ Mistake of fact provides there is no crime when “an accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented.”²³⁸ In order for the defense to apply, the accused must have believed it and it must be objectively reasonable.²³⁹ “To be reasonable the ignorance or mistake must have been based on information, or lack of it, which would indicate to a reasonable person that the other person consented.”²⁴⁰ The mistake cannot be based on the negligent failure to discover the true facts and an accused’s state of intoxication is irrelevant.²⁴¹ “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.”²⁴² The critical point here is that there is no crime if there is an affirmative defense. Moreover, an alleged offender cannot create a reasonable mistake of fact as to consent; the alleged victim does that.²⁴³

Mistake of fact is a means of protecting honestly and reasonably mistaken people. By way of example, imagine the young man who enjoyed a wonderful first date. Reasonably believing the date went well he moves in for a good night kiss. As it turns out, she did not feel the same way and was trying to be polite in not expressing her distaste for him. Simply asking her if she did not want the kiss fails to account for conditions where the kiss was a reasonable mistake. She may have experienced unwanted sexual contact²⁴⁴ and she may genuinely believe she was a victim but she is not under the law. None of the surveys, however, ask the respondent if she thinks it is possible the alleged offender misunderstood her actions or behavior as indicating consent.²⁴⁵ While this may not be a politically popular question to ask, it a critical distinction between what is and is not a crime.²⁴⁶

²³⁷ See Zachary D. Spilman, *Spilman on Consent and Mistake of Fact as to Consent*, 2014 EMERGING ISSUES 7227 (Matthew Bender & Co. 2014), available at: <https://advance.lexis.com/api/permalink/7cceba84-6420-41ff-ba2a-f7d3da52b21c/?context=1000516> (describing mistake of fact in the military and the difference between a defense and an affirmative defense).

²³⁸ *MCM*, Part II, Rules for Courts-Martial (R.C.M.) 916(j)(3) (2012 ed.).

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Consent is defined in part as the “freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent.” *MCM*, Part IV, ¶ 45.a.(g)(8) (2012 ed.). Determination of consent or mistake of fact as to consent, therefore, necessarily looks at the words and actions of the alleged victim; only she can create a condition whereby a reasonable person could believe there was consent.

²⁴⁴ The definition of a sexual act includes “the penetration, however slight, of the...mouth of another by any part of the body or by any object with the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.” *MCM*, Part IV, ¶ 45.a.(g)(1)(B) (2012 ed.). If the young man’s lips or tongue pierced her lips, however slight, he could be convicted of a sexual assault absent a reasonable mistake of fact.

²⁴⁵ Given that the RMWS, for example, attempts to address all of the elements of an offense by asking her about his intentions, it is puzzling the survey would not also ask her about a critical defense for which she alone is responsible. If the goal is to get the best information possible for fair estimates of the frequency of sexual assaults, this is a significant omission that is inconsistent with that goal.

²⁴⁶ It is not a politically popular question because SAPR admonishes people not to question or blame a victim and this type of question would be perceived as victim blaming.

3. *Non-validated Results*

A major concern discussed below in the research on false allegations and victim behavior is the total absence of any validation. Simply asking people to anonymously identify if they have been sexually assaulted is no more accurate than asking an anonymous group of accuseds how many of them have been falsely accused of sexual assaults. The most assured means of reliability is to survey victims of convicted offenses. Psychologists have long rejected this position because it would exclude the unreported victims and those who were victims but for whom there was insufficient evidence to prove it.²⁴⁷ Using untested data, however, substantially inflates statistics by including all of the types of cases exemplified in Part II of this paper; it includes the maliciously false allegations, the much larger group of unintentionally false allegations, as well as those that are probably false, likely false, or inconclusive one way or another.

Along these lines, it is important to note that SAPR has inflated statistics as well through incorrect training on legal principles.²⁴⁸ Airmen, for example, have been incorrectly trained for years that women cannot consent to sexual acts after having one drink of alcohol. At a trial in Germany in October 2013, *every* lay witness (four friends, two *investigators*, the alleged victim, and the accused) believed there was a sexual assault because the alleged victim had some alcohol and could not, therefore, consent to any sexual activity.²⁴⁹ Military members continue to recall this training.²⁵⁰ By providing grossly inaccurate definitions of incapacitation in training and failing to correct it in surveys, we have caused inflated statistics and caused many people to believe they are victims when in fact they are not.²⁵¹

B. DEFINITIONS OF FALSE ALLEGATIONS

Another fundamental issue with research on false allegations is the standard used to determine whether an allegation is true or false; it impacts the entire thrust of a researcher's conclusions. The author begins with a fundamental notion of what it means to be false and how researchers are using an ultra-narrow definition that grossly mischaracterizes the rate of false allegations. The author discusses the different standards known under the law and how the rate of false allegations is directly related to the rate of true accusations. Building on this analysis, the author demonstrates in the subsequent section how research data actually indicates about 8-10 percent of sexual assault allegations are false beyond a reasonable doubt and approximately 40 percent are probably false, more likely false than true, or do not actually constitute a crime.

²⁴⁷ See, e.g., SEDELLE KATZ & MARY ANN MAZUR, UNDERSTANDING THE RAPE VICTIM, xii (Irving B. Weiner ed., 1979) (noting that studies of victims from convicted offenders “represent a very biased sample of the total number of sex offenders.”).

²⁴⁸ See *infra* part IV.A. (discussing judge survey results and how their most consistent concern with SAPR has been incorrect training on the law).

²⁴⁹ The trial was *United States v. Guillory*, which resulted in an acquittal.

²⁵⁰ According to one lawyer the author spoke with who handles justice matters for basic trainees, Airmen continue to hear this incorrect statement of the law. See also *infra* Part IV.A. (where judges indicate they still hear this incorrect statement of the law in *voir dire*).

²⁵¹ See *infra* Part IV.D. (Recommendation 25, suggesting we specifically correct mistakes like this in future training).

At the most basic level a false allegation is any allegation made against an innocent person. This includes three basic categories: 1) claims that do not meet the legal definition for a sexual assault; 2) claims that are materially false; and 3) claims made against the wrong person, whether intentional or by mistake. In each circumstance, someone has been accused of a sexual assault when there was no such crime. This is not, however, the standard used by researchers.

Researchers have often used a much narrower definition of a false allegation. One researcher suggested an allegation should only be classified as false when complainant *knows* the event never actually occurred.²⁵² The Home Office in England, which is responsible for several research studies, has instructed police to record an allegation as “no crime” only when “the complainant retracts the allegation *and* admits to fabrication.”²⁵³ Another researcher only considered an allegation false when the complainant admitted it was false.²⁵⁴ And yet another research only considered an allegation false if “there was evidence that a thorough investigation was pursued and that the investigation yielded evidence that the reported sexual assault had in fact not occurred.”²⁵⁵ He relied upon guidance from the International Association of Chiefs of Police (IACP), which provides:

The determination that a report of sexual assault is false can be made only if the evidence establishes that no crime was committed or attempted. *This determination can be made only after a thorough investigation.* This should not be confused with an investigation that fails to prove a sexual assault occurred. In that case the investigation would be labeled unsubstantiated. *The determination that a report is false must be supported by evidence that the assault did not happen.*²⁵⁶

The requirement for a “thorough investigation,” while noble, serves to pervert statistics. Consider a complainant who made a knowingly false report directly or through a third party. Police begin investigating and find significant evidence contradicting the claim. Not wanting to incriminate herself or admit the allegation was false, she refuses to cooperate or withdraws the complaint. Despite strong evidence of fabrication, the claim would not be considered false because the investigation was cut short by the false accuser.

²⁵² Philip Rumney, *False allegations of rape*, 65 CAMBRIDGE LAW JOURNAL, No. 1, 130 (2006), available at <http://eprints.uwe.ac.uk/6478/1/Download.pdf> (last visited Mar. 3, 2015) (emphasis added). Rumney reviewed numerous studies on false allegations, analyzed them, and offered his opinion about how a false allegation should be defined. See *infra* Part III.C.2.

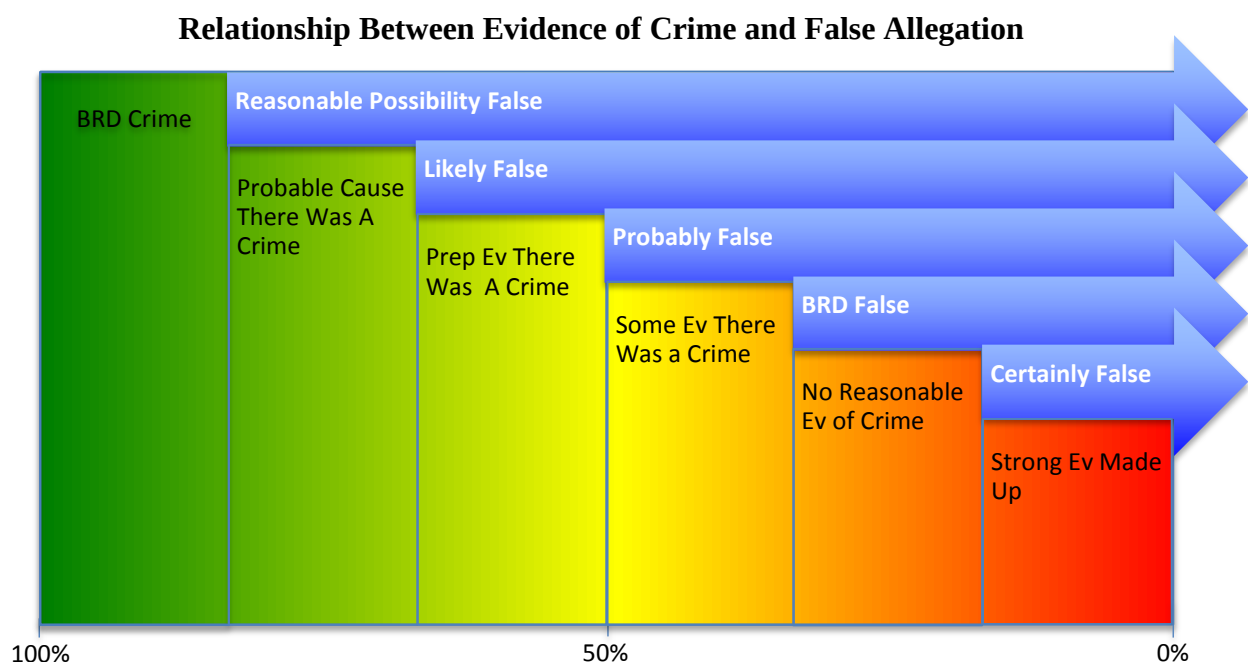
²⁵³ *Id.* at 131. Because the Home Office is responsible for several of the studies identified by Rumney, its ultra-conservative definition affects the reliability of each of these studies. Reviewing multiple studies that suffer from the same infirmities would be cumulative. Accordingly, the author limited his in-depth review to four commonly cited studies.

²⁵⁴ See *infra* Part III.C.6 (discussing this particular study in detail).

²⁵⁵ See *infra* Part III.C.4 (discussing this particular study in detail).

²⁵⁶ 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), available at <http://www.icdv.idaho.gov/conference/handouts/False-Allegations.pdf> (last visited Mar. 6, 2015) (emphasis in original). See *infra* Part III.C.5 (discussing this particular study in detail).

Which is the right definition to use for justice policy? Not the researchers' definitions. Their definitions more accurately represent the percentage of accusers that could be convicted for lying about sexual assaults, based on an investigation of the accused.²⁵⁷ The following graphic may be helpful in clarifying this point. What this graph shows, using various standards of proof known in the law, is that the confidence level of guilt is directly proportional to the confidence level that the accusation is false.²⁵⁸ Under criminal standards, a person is not guilty of an alleged crime unless the evidence proves guilt beyond a reasonable doubt, the far left column in the graphic. There are several lower levels of evidence known in law. If the evidence demonstrates the person accused is probably guilty, then there is still a reasonable possibility the accusation is false and a jury must find him not guilty. Conversely, if the evidence indicates the accusation is probably false, there is still a reasonable possibility the accused is guilty but it substantially outweighed by compelling evidence that the accusation is false. In the middle is preponderance of the evidence, which means the evidence supports both positions, that the allegation could be false or it could be true, but one option is more likely than the other. All of these standards are higher than what researchers are using to characterize a case as false.



²⁵⁷ Because the accuser is not the subject of the investigation, there is an inherent weakness in using someone else's investigation as an investigation of the accuser. Investigators typically interview a subject's family and friends but they would rarely, if ever, do that for the accuser who is not also being separately investigated. Similarly, while investigators often contact an accused's old love interests to find out if there is a pattern of sexual aggressiveness or prior sexual assaults, they virtually never contact the accuser's prior love interests to see if there is a history of false allegations or lack of credibility. Put differently, a thorough investigation of an accused to determine whether he committed a crime is not a substitute for a thorough investigation of the accuser to determine if she lied.

²⁵⁸ The percentages on the graphic are for illustrative purposes and are not intended to be representational. No one knows the actual percentage of cases that fall into each category, especially since a number of cases are not reported and, consequently, there can be no meaningful assessment of their merits. Research suggests, however, that 10% of reported cases fall into the far right category, approximately the same percentage of reports end in conviction (the far left column), and the rest of cases probably fall fairly equally into the remaining columns.

The primary problem with studies in this area is that researchers are using a notion that only 8-10% could be convicted of false allegations to assert the opposite is true, i.e., that 90% of allegations are true. Such a conclusion is intellectually dishonest. Simply put, researchers are calling every allegation true except the far right column when legal standards only consider the far left column as true. Just as some allegations are not provably true beyond a reasonable doubt, so too are some allegations not provably false beyond a reasonable doubt. It is also intellectually dishonest because many accused are convicted without ever admitting to the crime and yet researchers overwhelmingly will not consider an allegation false unless the accuser admits she knowingly lied. In other words, they demand more evidence of a lie than the law requires to convict an accused of the alleged crime.

C. STUDIES ON FALSE REPORTS

This section discusses the research on the rate of false allegations. For years, advocates have asserted the rate of false allegations was only two percent.²⁵⁹ That figure, however, does not come from an actual report, but rather is an anecdote of an opinion that has been cited over and over again as if it was a widely accepted statistic. Over the years, additional studies have been conducted and their conclusions about the rate of false allegations are provided to show the stark variations in analyses on this topic. The author then discusses four of the most commonly cited studies²⁶⁰ to put context to the flaws in research, how it has misled policy-makers, and to resolve what the data actually says about the rate of false allegations. Below is a brief chart showing what the researchers' concluded in the four studies discussed in this section, compared with what their data actually shows.

Source	Their False Rate	Actual False Range	Actual Truth Range
Jordan ²⁶¹	41%	8-79%	21-91%
Kanin ²⁶²	41%	41-??% ²⁶³	??-59%
Lisak <i>et al.</i> ²⁶⁴	5.9%	5.9-64.7%	35.3-94.1%
Kelly <i>et al.</i> ²⁶⁵	3%	3-93%	7-97%

²⁵⁹ Edward Greer, *The Truth Behind Legal Dominance Feminism's Two Percent False Rape Claim Figure*, 33 Loy. L.A. L. Rev. 947 (2000), <http://digitalcommons.lmu.edu/llr/vol33/iss3/3/> (last visited Mar. 2, 2015)

²⁶⁰ These studies are among the most commonly cited because their sample size, methodology, or conclusions are particularly attractive to advocates for victims or accused in pursuing their respective agendas.

²⁶¹ Jan Jordan, *Beyond Belief? Police, rape and women's credibility*, 4 CRIM. JUST., No. 1, 29 (2004), available at [http://www.hawaii.edu/hivandaids/Beyond Belief Police, Rape and Women s Credibility.pdf](http://www.hawaii.edu/hivandaids/Beyond_Belief_Police_Rape_and_Women_s_Credibility.pdf) (last visited Mar. 6, 2015). See also *infra* Part III.C.3 (discussing this particular study in detail).

²⁶² Eugene J. Kanin, *False Rape Allegations*, 23 ARCHIVES SEXUAL BEHAV. 1, (1994), available at <http://sf-criminaldefense.com/wp-content/uploads/2013/03/KaninFalseRapeAllegations.pdf> (last visited Mar.6, 2015). See also *infra* Part III.C.4 (discussing this particular study in detail).

²⁶³ Kanin did not assess or identify any categories other than those determined to be false. Consequently, the full range of probably false or probably true allegations for his research is unknown. See *infra* part III.C.6.

²⁶⁴ Lisak *et al.*, *supra* note 256. See also *infra* Part III.C.5 (discussing this particular study in detail).

²⁶⁵ LIZ KELLY ET AL., A GAP OR CHASM? ATTRITION IN REPORTED RAPE CASES, HOME OFFICE RESEARCH STUDY 293 (2005), available at <https://www.ncjrs.gov/App/publications/abstract.aspx?ID=232617> (last visited Apr. 9, 2015). See also *infra* Part III.C.6 (discussing this particular study in detail).

This short table demonstrates there are only a small percentage of clearly true and clearly false allegations with a wide range of cases in between that could be true or false depending on the standard of proof used. Reviewing the data in these cases, the conclusions of other researchers in conjunction with how they defined a false allegation, and considering what the definition of a false allegation should be for justice policy, the actual rate of false allegations is *at least* 8-10 percent and approximately 40 percent, when considering the allegations that do not constitute a crime, are probably false, or are more likely false than true given the evidence in the case.

1. *Susan Brownmiller*

The notion that only 2 percent of sexual assault reports are false originates with an anecdote about an opinion. Through a sort of academic archeology, Edward Greer traced backwards through research to find the original source of the 2 percent figure.²⁶⁶ The first reference to 2 percent came from renowned feminist Susan Brownmiller in her famous book, *Against Our Will*, where she wrote “female police officers found that only 2 percent of all rape complaints were false.”²⁶⁷ The source notes from the book indicated the figure came from a speech by Lawrence H Cooke, Appellate Division Justice, Before the Association of the Bar of the City of New York, January 16, 1974.²⁶⁸ Greer contacted Brownmiller and she provided a copy of the speech. The 2 percent figure came from the Commander of New York City’s Rape Analysis Squad, who was offering an opinion about the occurrence of false rape claims.²⁶⁹ Greer contacted the speech author and no one in his office could recall how they arrived at the statistic nor could they recall any formal report on the matter.²⁷⁰ There was no report, no data, no reliable protocol for assessment, and no evidence of accuracy. It suffers from all of the flaws noted in the previous section. It was an anecdote about an opinion and it has been repeated as reliable fact countless times since.

In his research, Greer found that countless reports repeated the same source. Like a pyramid, one author reported a figure and then others reported the same figure citing the first author. New authors reported the figure citing the secondary authors, and they would be cited in turn by another tier of authors and so on. For instance, Professor Morrison Torrey wrote, “Estimates indicate that only 2 percent of all rape reports prove to be false.”²⁷¹ There were three sources for this statement: an article in *The Rape Victim*, a law review article by Roberta J. O’Neale, and another law review article by Margaret Clemens.²⁷² Each of these articles traced back to Susan Brownmiller’s source.²⁷³ Other authors would cite Professor Torrey’s article, and then they would be cited by yet other authors. On its face, research presented a convergence of opinions because many different articles adopted the 2 percent figure. In reality, it was not a mountain of research agreeing on one figure, but rather the shadow of a single opinion recast over and over again.

²⁶⁶ Greer, *supra* note 259.

²⁶⁷ *Id.* at 956.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 956-57.

²⁷¹ *Id.* at 954.

²⁷² *Id.*

²⁷³ *Id.* at 954-55.

2. Rumney (2006)

In 2006, Philip N.S. Rumney conducted the most thorough review to date of academic research on false allegations of sexual assault.²⁷⁴ He found estimates varied widely from 1.5 – 90 percent. To show the wide-variety of ranges, the dates of the analyses, and the estimates of each study, Rumney's table is reprinted below:²⁷⁵

Source	Number	False reporting rate (%)
Theilade and Thomsen (1986) ²⁷⁶	1 out of 56 4 out of 39	1.5% - 10% ²⁷⁷
New York Rape Squad (1974) ²⁷⁸	n/a	2%
Hursch and Selkin (1974) ²⁷⁹	10 out of 545	2%
Kelly et al. (2005) ²⁸⁰	67 out of 2,643	3% ("possible" and "probable" false allegations) 22% (recorded by police as "no-crime")
Geis (1978) ²⁸¹	n/a	3–31% (estimates given by police surgeons)
Smith (1989) ²⁸²	17 out of 447	3.8%
Lisak et al. (2010) ²⁸³	8 out of 136	5.9%

²⁷⁴ Rumney, *supra* note 252.

²⁷⁵ *Id.* at 136-37. The author has added a few relevant reports that have been published since Rumney's 2006 review. There appears to be one additional source that could not be verified. Bruce Gross references a report by Charles P. McDowell in 1985, where he studied 1,218 reports of rape made between 1980 and 1984 on Air Force Bases throughout the world. See Bruce Gross, *supra* note 119 (citing Charles P. McDowell, *False Allegations*, 11 FORENSIC SCIENCE DIGEST, No. 4, 56-76 (1985)). According to Gross, McDowell found 460 of the reports were clearly true, 212 were clearly false, and then determined 27 percent of the remaining 546 cases were false (i.e., 147). *Id.* Altogether, McDowell determined 29.47 percent were false. His study is often cited by men's rights websites but none include a copy of the study. The study is not without substantial criticism. Matt Atkinson, for example, indicates McDowell used a questionable scoring system to determine when a case was false. See Matt Atkinson, *Rape and False Reports*, OKLAHOMA COALITION AGAINST DOMESTIC VIOLENCE & SEXUAL ASSAULT, http://www.ncdsv.org/images/OCADVSA_RapeAndFalseReports_2010.pdf (last visited Mar. 6, 2015). Atkinson and Gross cite the same report but provide very different numbers. Unable to verify the details, the author was uncomfortable adding this report to the table above.

²⁷⁶ Rumney, *supra* note 252, at 136-37.

²⁷⁷ *Id.* (citing P. Theilade & J.L. Thomsen, *False Allegations of Rape*, 30 POLICE SURGEON 17 (1986)).

²⁷⁸ The range reflects the high and low estimates from the five year study. *Id.* at n.50.

²⁷⁹ Rumney, *supra* note 252, at 136-37; See also, *supra* Part III.C.1; Greer, *supra* note 259 (discussing the origin and validity of this figure).

²⁸⁰ Rumney, *supra* note 252, at 136-37 (citing C.J. HURSCH & J. SELKIN, RAPE PREVENTION RESEARCH PROJECT, MIMEOGRAPHED ANNUAL REPORT OF THE VIOLENCE RESEARCH UNIT, DIVISION OF PSYCHIATRIC SERVICE, DEPARTMENT OF HEALTH AND HOSPITALS, (1974), cited in Katz, *supra* note 202, at ch. 13).

²⁸¹ KELLY ET AL., *supra* note 265.

²⁸² Rumney, *supra* note 252, at 136-37 (citations omitted).

²⁸³ *Id.* (citations omitted).

²⁸⁴ Lisak et al., *supra* note 256 (last visited Mar. 6, 2015). Lisak also cites to an unpublished manuscript in providing his own mini-chart of false report percentages. Because it is unpublished, it fails to meet basic requirements to be considered as a valid scientific source. Moreover, his numbers do not match what Rumney reported or what the authors themselves concluded because he re-characterizes many of the statistics to comport with his determination of what constitutes a false report.

U.S. Department of Justice (1997) ²⁸⁴	n/a	8%
Clark and Lewis (1977) ²⁸⁵	12 out of 116	10.3%
Harris and Grace (1999) ²⁸⁶	53 out of 483 123 out of 483	10.9% ("false/malicious" claims) 25% (recorded by police as "no-crime") ²⁸⁷
Lea et al. (2003) ²⁸⁸	42 out of 379	11%
HMCPSP/HMIC (2002) ²⁸⁹	164 out of 1,379	11.8%
McCahill et al. (1979) ²⁹⁰	218 out of 1,198	18.2%
Philadelphia police study (1968) ²⁹¹	74 out of 370	20%
Chambers and Millar (1983) ²⁹²	44 out of 196	22.4%
Grace et al. (1992) ²⁹³	80 out of 335	24%
Jordan (2004) ²⁹⁴	68 out of 164 62 out of 164	41% ("false" claims) 38% (viewed by police as "possibly true/possibly false")
Kanin (1994) ²⁹⁵	45 out of 109	41%
Gregory and Lees (1996) ²⁹⁶	49 out of 109	45%
Maclean (1979) ²⁹⁷	16 out of 34	47%
Stewart (1981) ²⁹⁸	16 out of 18	90%

One undisputed problem with these studies as a whole is that they are primarily of a small sample size and may not be representative of the much larger universe of allegations. Most

²⁸⁴ Rumney, *supra* note 252, at 136-37 (citing L.A. GREENFIELD, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT, 7 (Department of Justice, 1997)).

²⁸⁵ Rumney, *supra* note 252, at 136-37 (citation omitted).

²⁸⁶ *Id.* (citation omitted).

²⁸⁷ Rumney extrapolated these percentages from numbers within the report. *Id.* at nn.61-62.

²⁸⁸ *Id.* (citing S.J. Lea et al., *Attrition in Rape Cases*, 43 BRIT. J. CRIMINOLOGY 583 (2003)). Rumney notes that he calculated the percentage based on statistics provided by the authors. *Id.* at n.63.

²⁸⁹ Rumney, *supra* note 252, at 136-37 (citing A REPORT ON THE JOINT INSPECTION INTO THE INVESTIGATION AND PROSECUTION OF CASES INVOLVING ALLEGATIONS OF RAPE (Her Majesty's Crown Prosecution Service Inspectorate/Her Majesty's Inspectorate of Constabulary, 2002)).

²⁹⁰ Rumney, *supra* note 252, at 136-37 (citation omitted).

²⁹¹ *Id.* (citing *Police Discretion and the Judgment that a Crime Has Been Committed – Rape in Philadelphia*, 117 U. PA. L. REV. 277, 284 (1968)).

²⁹² Rumney, *supra* note 252, at 136-37 (citation omitted).

²⁹³ *Id.* (citation omitted).

²⁹⁴ Jordan, *supra* note 261.

²⁹⁵ Kanin, *supra* note 262.

²⁹⁶ Rumney, *supra* note 252, at 136-37 (citing J. Gregory & S. Lees, *Attrition and Rape in Sexual Assault Cases*, 36 BRIT. J. CRIMINOLOGY 1, 14 (1996)).

²⁹⁷ Rumney, *supra* note 252, at 136-37 (citation omitted).

²⁹⁸ *Id.* (citation omitted).

studies involve less than 200 cases, which is roughly equivalent to studying one major university over the course of a few years. They can hardly be considered indicative of the rest of the country, even if the methodology was sound.

Additionally, many studies suffer from unreliable definitions. One consistent takeaway from the studies above is that police agencies classify cases differently and based on different criteria. The FBI statistics, for example are “almost meaningless, as many of the jurisdictions from which the FBI collects data on crime use different definitions, or criteria, for ‘unfounded.’”²⁹⁹

3. *Jordan (2004)*

Jordan presents a good starting point for explaining all of the issues discussed above. Jordan examined 164 police files in New Zealand involving sexual assault allegations.³⁰⁰ The files were divided into four main categories determined largely by police perceptions of the legitimacy of the complaint.³⁰¹

- a) Genuine cases (34 out of 164; 21%): where an alleged offender was prosecuted (13), where no alleged offender was identified but the complaint was thought to be genuine (5); where an alleged offender was identified, the complaint was thought to be legit, but the prosecutor declined to proceed (3); and where the accuser withdrew the complaint (13);
- b) Possibly true/possibly false (62 out of 164; 38%): where it was impossible to determine if the complainant was telling the truth or whether the reported incident constituted an offense;
- c) Police said false (55 out of 164; 33%); and
- d) Complainant said false (13 out of 164; 8%)

Jordan then reviewed the files to document how often the following factors were distributed among the above four categories: delayed reporting, perceived immorality of the acts, where a complainant was drunk/stoned, had previously engaged in consensual sex with the accused, had previously reported a rape or abuse, had a psychiatric disturbance, was intellectually impaired, made a previous false complaint, or concealed details about the incident.³⁰² No single characteristic was found to be determinative to police in classifying an allegation as false; it was often a combination of factors that determined which category police labeled an accusation.

The first takeaway is that there are different categories to consider in defining a false allegation. Some researchers would only characterize an allegation as false if the alleged victim

²⁹⁹ Gross, *supra* note 119. See also, Rumney, *supra* note 252, at 142 (opining that “police continue to misapply the no-crime or unfounding criteria” and that many of the studies on false allegations have “adopted unreliable or untested methodologies.”).

³⁰⁰ Jordan, *supra* note 261, at 34.

³⁰¹ *Id.* at 34-36.

³⁰² *Id.* at 36.

admits it with a compelling explanation; which in this case is 8 percent, the last category.³⁰³ On the other hand, only 21% were considered genuine meaning that as many as 79% could actually be false. Therefore, based on this study and using the ultra-conservative definition of false, the answer to the question “how often are reports false?” is 8-79%.³⁰⁴ Using the police definitions, which allowed for calling an accusation false when the accuser was unwilling to admit the falsity or where the allegation did not amount to a crime, the answer is that 41-79% of allegations are false. Conversely, based on this study and using the ultra-conservative definition of a false allegation, the answer to the question “how often are sexual assault reports true” is 21-91%, or 21-59% according to the police department.

The second takeaway is there is a huge problem with researchers relying upon alleged victims to establish the reliability of alleged victims. The evidence in this study determined only 21% of reported sexual assaults were more likely true than false; as many as 79% of the reports may have been false. Relying on data that may be as much as 79% false is a major problem. Police believed 41 percent were more likely false than true which is also a huge percentage of erroneous reports to rely upon for research. The data in this study may be non-representational for reports as a whole but the subsequent studies will show that the police figure of 41% is right in the middle of most data ranges. Moreover, 40% is a much closer measure of how many allegations are probably false, or more likely false than true, than the ultra-conservative and presumed-true definitions used by researchers. Accordingly, relying upon alleged victims for research about victims will significantly exaggerate behavioral characteristics of legitimate victims because it will include a substantial set of non-victims in the data.

Some psychologists would undoubtedly argue that just because the evidence is insufficient to prove a crime does not mean there was not a crime and so the numbers in this study are inflated. That is true to an extent but it is also true that an alleged victim may believe she was a victim when she was not under the law, such as where she misunderstands the law, was blacked out, or perceives the event differently than supported by objective facts. Under these scenarios, an alleged victim can certainly feel victimized and even exhibit all of the same signs of being a victim and yet not be a victim under the law. Recall the table illustrating the relationship between evidence of a crime and a false allegation.³⁰⁵ This argument is essentially a question about which columns are bigger. That is, how do we know whether the category of victims for whom the evidence is insufficient to prove a crime is greater than the category of alleged victims who believe they are victims but for whom the evidence demonstrates there was no actual crime as defined under the law? Researchers are relying upon alleged victims to justify why they believe relying on alleged victims will produce more accurate results. It is circular logic. In reality, what matters is that evidence in this study and the others discussed, show a

³⁰³ Some researchers would argue it is less than eight percent because recantations are not reliable.

³⁰⁴ Lisak questions the reliability of Jordan’s rates but he misreads the report. See Lisak, *supra* note 256, at 1323. He asserts the false allegation rate was reported as 38% and challenges it because “that figure is actually the percentage of false reports among cases that had been classified as unfounded.” *Id.* The 38% figure, as noted above, was the rate of possibly true/possibly false cases. See Jordan, *supra* note 261, at 34-36. Also, Lisak incorrectly characterizes all of these reports as unfounded cases. Jordan *requested* unfounded cases but she did not receive only unfounded cases or there would not have been a “genuine” category including cases that were prosecuted.

³⁰⁵ See *supra* Part III.B.

significant number of alleged reports are more likely false than true using legal standards and definitions. Any research relying upon alleged victims without validation, therefore, produces highly questionable data.

A third takeaway is how researchers often misunderstand and misapply the law. Jordan observed that only 20% of accusers who were drunk or stoned during the alleged incident were perceived as genuine victims and she suggested this characteristic unfairly caused police to doubt a complainant's credibility.³⁰⁶ She stated, "within the criminal justice system, as in society at large, alcohol consumption by the victim has long been regarded as a discrediting factor – but only for the victim," that a victim's intoxication "is interpreted as evidence of overall moral turpitude" and that "a drunk woman tends to be viewed as responsible for what happens to her, while a drunk man may be absolved of responsibility for what he does 'while under the influence.'"³⁰⁷ Her analysis makes it clear she believes intoxication absolves alleged offenders from culpability and she believes drunkenness is not a valid credibility concern. Under the law, however, an accused's level of intoxication is rarely relevant; he is viewed from a sober standpoint.³⁰⁸ Further, there is nothing improper about questioning the accuracy of events perceived by an individual intoxicated or on drugs. Intoxication affects a person's behavior, memory and perceptions. Intoxication alone does not mean a report is false, and none of the police called a case false solely because of intoxication, but the intoxication can affect the reliability of any witness, not just an alleged victim.

A final takeaway from this study is how bias often finds its way into conclusions. Upon review of all of the files, Jordan concluded there is a "dominant suspicion underlying police responses to reports of sexual assault."³⁰⁹ While recognizing that police need to walk a fine line between assisting an alleged victim and preserving the rights of an accused, she nevertheless lamented that "many women will refrain from reporting rape while some victims' experiences continue to be erroneously viewed and dismissed as 'beyond belief.'"³¹⁰ Jordan did not attempt to independently determine the validity of each complaint. It remains to be seen how she can know a "genuine" complaint was "erroneously" dismissed, when she did not investigate the allegations or draw her own conclusions about each case, let alone explain how she knows the police got it wrong.

³⁰⁶ Jordan, *supra* note 261, at 37.

³⁰⁷ *Id.* at 38.

³⁰⁸ Intoxication is only relevant for three main reasons: 1) if he is excessively intoxicated, he could theoretically reach a point of incapacitation where he is mentally not responsible or partially responsible; 2) it is rare but possible for an accused to have been involuntarily intoxicated, which would be relevant to his behavior; and 3) when he has made statements, he is just as likely to have his memory or perceptions affected by alcohol as any one else and his credibility may be questioned just like anyone else. See *United States v. Peterson*, 47 M.J. 231, 233-34 (C.A.A.F. 1997)(stating that voluntary intoxication is not a defense to general intent crimes but may be a defense to specific intent crimes only if there is evidence the intoxication was of such severity as to render "the appellant incapable of forming the necessary intent."); *United States v. MacDonald*, 73 M.J. 426 (C.A.A.F. 2014)(discussing the rare defense of involuntary intoxication). With mistake of fact, the rules specifically require the mistake be viewed from the standpoint of an ordinary, prudent, and sober person; the accused's intoxication is irrelevant. *MCM*, Part II, Rules for Courts-Martial (R.C.M.) 916(j)(3) (2012 ed.).

³⁰⁹ Jordan, *supra* note 261, at 50.

³¹⁰ *Id.* at 52-53.

4. Kanin (1994)

In 1994, Eugene Kanin studied one police agency in a small metropolitan area in the Midwestern United States.³¹¹ He chose this police agency for two primary reasons. First, because they were required to investigate every complaint regardless of how suspect they may have believed the complaint to be. Second, they would not declare an allegation false unless the complainant admitted the allegation was false.³¹² Agency policy also required investigators to offer a polygraph examination to both complainants and suspects.³¹³ Kanin followed the all reports of completed rapes made from 1978 to 1987. When a rape allegation was declared false, he received all of the records for that case so he could confidently declare the validity of the declarations.³¹⁴ There were a total of 109 cases; 41% (45 out of 109) were officially declared false over the 9-year period.³¹⁵ Kanin cautioned against generalizing the findings from “a single police agency handing a relatively small number of cases.”³¹⁶

Kanin’s study has been heavily criticized; some warranted and some not.³¹⁷ Lisak argues that Kanin did not articulate what procedures he used to validate the police agency’s classification of false reports. He criticizes Kanin for not having a second, independent researcher assessing his conclusions to remove bias and for getting all of his data from police officers. Lisak strongly rejects use of polygraphs for alleged victims.³¹⁸ He further chastises Kanin for not having a definition of a false report,³¹⁹ for not using a coding system, and for not describing how he scrutinized the agency’s decision-making process.³²⁰

Some of these criticisms are valid and some are not. Just like Lisak’s study, and many others, Kanin had a small sample size, which he expressly acknowledged in his conclusions.³²¹ As for the concerns about validating police classifications, having a second and independent researcher, and getting all of his data from police, these are marginal concerns given the strict definition Kanin used for false allegations. Unlike other studies, which leave the classification of a false report open to some interpretation and proof of fabrication, the procedure here was simple: the alleged victim must credibly admit the report was false. Validation here is not subject to wide interpretations; either there was or was not a credible admission of fabrication by the complainant. Further, Kanin did not need a coding system or an independent researcher’s assessment because he was only concerned with verifying one category of cases. Because he

³¹¹ Kanin, *supra* note 262.

³¹² *Id.* at 83.

³¹³ *Id.*

³¹⁴ *Id.* at 84.

³¹⁵ *Id.*

³¹⁶ *Id.* at 89.

³¹⁷ Criticism has most frequently come from pro-victim organizations and researchers funded by such organizations. Conversely, Kanin is a favorite citation for men’s rights organizations.

³¹⁸ David Lisak, *False Allegations of Rape: A Critique of Kanin*, 11 SEXUAL ASSAULT REPORT, No. 1, 1, at 1, 2, 6, 9 (2007).

³¹⁹ It is not clear what Lisak means about Kanin not having a definition for a false report. Kanin was very clear that a report would only be classified as false if the accuser admitted it was false.

³²⁰ Lisak, *supra* note 256, at 1323.

³²¹ As often as Lisak has criticized Kanin’s 1994 study, it is interesting that Lisak did not also expressly acknowledge the small sample size in his own study, which included 136 reports compared to Kanin’s 109 reports.

was not assessing other categories, there was not a complicated process for which bias could be injected.³²² That being said, his report would have been much more complete if he had actually reviewed and classified the other reports as a means of providing some transparency in how police investigated and to ensure they abided by department policies.³²³ Classifying the other reports may have actually shown additional cases where the evidence demonstrated no crime was committed, or the allegation failed to meet legal definitions for a crime. His study, therefore, is likely to underestimate the rate of false allegations in his sample size. The simple question presented, however, was whether the complainant admitted the report was false. In this regard, relying on police records for proof of the complainant's admission is quite sufficient to establish the single ultra-strict criteria for coding the report as false.³²⁴

The biggest question for Kanin's study, consequently, is whether the means for obtaining that admission were proper and the subsequent admissions legitimate.³²⁵ Kanin answers this question by noting that none of the admissions followed prolonged periods of interrogation, the recantations all confirmed the suspect's versions about what happened, and none of the false accusers retracted their recantation when they were informed, after recanting, that they would be charged with filing a false complaint punishable by a substantial fine and a jail sentence.³²⁶

³²² A second researcher does not necessarily remove bias. If all of the researchers are funded by victim support organizations, or seeking a doctoral degree under the guidance of the main researcher, or any variety of other arrangements, second researchers may be as biased as the first researcher or not truly independent but rather reliant on the more experienced "expert" in the group. For example, having one alleged victim double-check another victim's report is not likely an objective way to remove bias. There must be more independence than that.

³²³ See Rumney, *supra* note 252, at 139-40 (noting that Kanin appears to presume police officers abided by departmental police while other studies have shown police departing from guidelines).

³²⁴ Lisak demonstrates a double-standard here. In his own study, Lisak favorably cites to Heenan and Murray to support his conclusions. Lisak, *supra* note 256, at 1324, 26, 30. Heenan and Murray reviewed a random sample of 850 cases relying exclusively on a computer program populated by police. See M. HEENAN & S. MURRAY, STUDY OF REPORTED RAPES IN VICTORIA, 2000-2003, 14-15, (Office of Women's Policy, Department of Victorian Communities, 2006), http://www.dhs.vic.gov.au/data/assets/pdf_file/0004/644152/StudyofReportedRapes.pdf (last visited on Mar. 10, 2015). The authors noted that the computer system suffered from a number of limitations including incomplete data and no standardized definitions. The authors felt they had a "reasonable level of information in approximately 60 percent of cases" but they had incomplete data for 341 cases and relied principally on "factually oriented accounts contained within [the program] principally reflect[ing] police members' interpretations of the events." *Id.* The 2% figure Lisak cites and the authors report, is based on the whole sample of 850, despite having incomplete records for 341. *Id.* at 32. The authors note police clearly suspected at least another 70 cases as being false but they classified the cases in a different category. Thus, the authors relied entirely on police classifications and did not independently assess them; these are the same issues Lisak takes with Kanin's study and yet he ignores them with respect to the Heenan and Murray study. Lastly, based on the Heenan and Murray's review, it would appear police believed 87 out of 509 cases were false (they didn't have sufficient data on the other 341), which accounts for a 17% rate of false complaints, not including the categories where there was insufficient information to make a conclusion about whether the allegation was true or false. *Id.* at 21, 33. Given Heenan and Murray were relying on police analysis, their data reflects a 17% rate of false allegations rather than 2%.

³²⁵ There seems to be a double-standard in that an accuser admitting a lie is nevertheless treated suspiciously whereas an accused admitting a crime is rarely questioned in the same fashion. The standard advanced by these purportedly objective researchers appears to be: an accuser is to be believed except when she says otherwise, and an accused is never to be believed unless he admits to being a criminal. If the goal is evidence-based decisions, then all witness interviews, the suspect, and the accuser should be on the same footing and held to the same standards of review.

³²⁶ Kanin, *supra* note 262, at 85.

His biggest critic, Lisak, challenges the reliability of these recantations by attacking the offer of a polygraph.³²⁷ Lisak contends that polygraphs should not be used “because of its intimidating impact on victims”³²⁸ and because they are discouraged by the DOJ and the International Association of Chiefs of Police (IACP).³²⁹ Lisak cites IACP guidelines for support, but the first line of those guidelines is “based on the misconception that a significant percentage of sexual assault reports are false, some law enforcement agencies use polygraphs.”³³⁰ The guidelines, therefore, rest on the assertion that false allegations are rare and, by implication, need not be explored. The “misperception” is based on circular logic. The presumption is based on studies that represent false reports are rare, which is based on definitions like this, which is based on the reports that conclude false allegations are rare. Moreover, these studies are based on other studies of victim behavior that rely on alleged victims untested claims that they are legitimate victims and faulty surveys, as previously discussed. The whole area of research is a circle of self-perpetuating validation.³³¹

The issue about a polygraph is misleading for several other reasons. One, there is no evidence that any of the alleged victims recanted out of intimidation. The assertion that victims will do so is based on un-validated reports of alleged victims; not confirmed victims. Second, why would some victims recant if it meant facing charges but so many other victims not do so? Lisak asserts only 2-10% of allegations are false. Putting aside that those numbers are intellectually dishonest, 2-10% means only 2-11 of the cases should have been false and yet 34-43 more alleged victims said they lied. If only 2-10% of allegations are false, then 76-96% of recantations were false recantations? What evidence is there to support that more than three-fourths of alleged victims offered a polygraph, who are not obligated to take it and can refuse it, would instead choose to lie, say they made it all up, and then maintain that lie even if it meant being charged for lying? Such a notion seriously strains logic and is without any valid research to support it. Additionally, Kanin notes they all provided credible recantations that supported the suspect’s version of events, such as:

An unmarried 16-year-old female had sex with her boyfriend and later became concerned that she might be pregnant. She said she had been raped by an

³²⁷ See Lisak, *supra* note 318, at 6; Lisak, *supra* note 256, at 1323.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.* The entire portion he references is: “Based on the misperception that a significant percentage of sexual assault reports are false, some law enforcement agencies use polygraphs or other interrogation techniques (including voice stress analyzers, SCAN) when interviewing victims. Victims often feel confused and ashamed, and experience a great deal of self-blame because of something they did or did not do in relation to the sexual assault. These feelings may compromise the reliability of the results of such interrogation techniques. The use of these interrogation techniques can also compound these feelings and prolong the trauma of a sexual assault. Some states have even enacted law prohibiting the police from offering a polygraph examination to sexual assault victims or from using the results to determine whether criminal charges will be filed. A competent evidence-based investigation will reveal the truth much more effectively than these interrogation tactics. Law enforcement agencies should establish policies to clearly state that officers should not require, offer, or suggest that a victim take a polygraph examination or submit to SCAN or voice stress analysis during the investigation stage.” *Id.* (citing IACP, p. 13).

³³¹ See Circle of Self-Validation, *infra* Part III.G.1.

unknown assailant in hopes that the hospital would give her something to abort the possible pregnancy.³³²

A 37-year-old woman reported having been raped “by some nigger.” She gave conflicting reports of the incident on two occasions and, when confronted with these, she admitted that the entire story was a fabrication. She feared her boyfriend has given her “some sexual disease,” and she wanted to be sent to the hospital to “get checked out.” She wanted a respectable reason, i.e., as an innocent victim of rape, to explain the acquisition of her infection.³³³

An unmarried female, age 17, had been having violent quarrels with her mother who was critical of her laziness and style of life. She reported that she was raped so that her mother would “get off my back and give me a little sympathy.”³³⁴

Lastly, the value of a polygraph is not the technician’s assessment because the polygraph itself is not admissible evidence.³³⁵ The value of a polygraph is the opportunity to test the witness’ statements before and after the polygraph; i.e., why might your version not be correct. Investigators need not have a polygraph to do this, which, combined with the inadmissibility of the actual test, makes polygraphs more risk than reward. Consider the Hofstra example. Once investigators went beyond accepting the alleged victim at her word, the truth came out. They asked the alleged victim if a video would show her story to be truthful, suggesting a video may exist. She then admitted her allegation was a fabrication and the video later confirmed it. Police can accomplish the same thing as a polygraph by asking questions like: “what do you think the rape kit is going to show and why?” or, “did you know there were closed-caption TVs at the bar and outside the hotel you were at, what do you think those will show us when we get them?” Questions like these can provide the same value without the risk of inadmissibility.

Taken as a whole, Kanin’s study provides a strict standard for false allegations. His study could have been more thorough and more reliable and it is not necessarily applicable to a larger pool. It would have been helpful for him to provide better data about how many accusers actually submitted to a polygraph and which percentage recanted before or after. He could have been more thorough in evaluating how police conducted their interviews and it may have been helpful interviewing some or even all of the accusers to help shed light on police processes. He could have documented how many false allegations actually resulted in charges and what the results were. All that being said, the value of Kanin’s study is its simplicity: 41% said they lied even when admitting a lie was threatened with criminal actions. This 41% finding represents a fair median for the actual rate of false allegations discussed above considering the best definition for false allegations.³³⁶ The explanations the alleged victims provided also mirrors the documented reasons why people make false allegations.³³⁷

³³²Kanin, *supra* note 262, at 85.

³³³*Id.* at 86.

³³⁴*Id.* at 87.

³³⁵Mil. R. Ev. 707.

³³⁶*See supra* Part III.C.(the table representing what the data actually shows in these four studies on false allegations).

³³⁷*See infra* Part III.D.

5. *Lisak et al (2010)*

Lisak and his team reviewed case summaries of every sexual assault reported to a major university in the northeastern United States over a 10-year period.³³⁸ They broke into teams of two, reviewed all 136 reported sexual assaults, and preliminarily coded them into one of four categories. After reviewing the case files, they had an opportunity to meet with investigators to ask questions about any of the reports and then made their final coding decisions for each case.³³⁹ The final breakout by category was as follows:³⁴⁰

- a) False report (8 out of 136; 5.9%): “a case was classified as a false report if there was evidence that a thorough investigation was pursued and that the investigation yielded evidence that the reported sexual assault had in fact not occurred.”
- b) Case did not proceed (61 out of 136; 44.9%): used when there was no prosecution or disciplinary action because of insufficient evidence, because the alleged victim withdrew from the process, police were unable to identify the alleged perpetrator, or because the alleged victim mislabeled the incident, meaning her report did not meet legal criteria for a crime.³⁴¹
- c) Case proceeded (48 out of 136; 35.3%): used when the investigation resulted in referral for prosecution or disciplinary action
- d) Insufficient information (19 out of 136; 13.9%): used when there was insufficient information to confidently place the report into one of the other three categories.

Based on this study, and a review of selected other studies, Lisak determined “these findings contradict the still widely promulgated stereotype that false rape allegations are a common occurrence.”³⁴² There are, however, extensive problems with this study and its conclusions.

The first takeaway is that research in this area often cites studies for unsupported propositions. In this study, Lisak cites to Jordan’s 2004 study, discussed earlier in this section,³⁴³ to support the following ideas: a lack of victim cooperation does not mean a report is false; concealing facts is not indicative of a false report because victims may try to hide facts for other reasons; a major reason victims do not report crimes committed against them is because victims believe “his or her report will be met with suspicion or outright disbelief;” and that police officers are biased in classifying cases and improperly apply greater suspicions to cases involving intoxicated victims, ones who have delayed reports, and ones who report assaults by

³³⁸ Lisak, *supra* note 256.

³³⁹ *Id.* at 1327-29.

³⁴⁰ *Id.* at 1328.

³⁴¹ Lisak and his team still call the complainant a “victim” even when they have all agreed the report does not meet elements of a crime.

³⁴² *Id.* at 1331.

³⁴³ *See supra* Part III.C.3.

intimate partners.³⁴⁴ Jordan's study did not establish these purported truths. Jordan's study was a look at how a police station in New Zealand classified sexual assault reports. As previously discussed,³⁴⁵ she asserted police should not be suspicious about certain characteristics of a report but she did not validate any of these claims were in fact true. In order to attest that drunkenness or concealing facts, for instance, are not proper reasons to be suspicious of a report, there should be evidence the reports were true and police suspicions unfounded. There was no evidence any of the cases they classified as false were in fact true reports of a crime. Additionally, Jordan did not assess alleged sexual assaults not reported to police; her study does not provide any evidence for what motivates alleged victims not to report let alone whether those perceptions are valid concerns. At best, Jordan shared these opinions for which Lisak concurs, but her study did not support these opinions.

A second takeaway is how non-legally trained researchers misapply the law they seek to evaluate. In describing what Lisak's team considered to be a false report, he wrote "the conclusion would have been based not on a single interview, or on intuitions about the credibility of the victim, but on a 'preponderance' of evidence gathered over the course of a thorough investigation."³⁴⁶ A "preponderance of the evidence" means "the greater weight of evidence;" it looks at the evidence presented and measures which position is supported more.³⁴⁷ This is not the standard Lisak used. First, the preponderance standard does not depend upon a complete investigation. In a civil trial, for example, where the burden of proof is a preponderance of the evidence, the fact finder has only the evidence presented when it has to decide which side the evidence favors more. Second, if the evidence was insufficient to make a call, then they had a category for that purpose. More importantly, the standard Lisak applied was much higher than the standard in criminal trials. In a criminal trial, an accused does not have to disprove the accusation; he does not have the nearly impossible task of proving the negative, i.e., that it did not happen. This is not a preponderance of the evidence standard. On the contrary, it is completely inapposite to criminal burdens and presumes guilt rather than innocence.

A third takeaway is the inconsistent application of standards. Lisak coded accusations that did not constitute crimes as "case did not proceed."³⁴⁸ By definition, if you accuse someone of sexual assault and there was no sexual assault, then the report was false. Lisak apparently believes these cases should not be held against an alleged victim because the facts may not have been false; rather the alleged victim's understanding of the law was false. It is well known that "ignorance of the law is no excuse" for an accused; it should not be an excuse for an accuser

³⁴⁴ Lisak, *supra* note 256, at 1320-22, 31. Lisak also cites to Jordan and three other studies for support that Kanin's study (*supra* Part III.C.4.), is unreliable because it "is at least 4 times higher than the estimates found by studies that used systematic methods to determine the frequency of false rape allegations." *Id.* at 1324. Jordan's rate of false allegations, however, was exactly the same as Kanin's: 41%. See Jordan, *supra* note 261, at 34-36; *supra* Part III.C.3. Further, one of the other 3 studies cited, "Lonsway & Archambault, 2008," is an unpublished manuscript that has not been peer reviewed for validity and is not readily available to assess. One of the other studies he references, "Heenan & Murray, 2006," suffers the same flaws he criticizes in other research, such as Kanin's study, and he overlooks that the authors acknowledge the rate of false allegations is much higher but they do not say what exactly it should be. HEENAN, *supra* note 324.

³⁴⁵ See *supra* Part III.C.3

³⁴⁶ Lisak, *supra* note 256, at 1328.

³⁴⁷ BLACK'S LAW DICTIONARY (9th ed. 2009)

³⁴⁸ Lisak, *supra* note 256, at 1328.

either. When an innocent person is accused of a crime and there was no crime, it is disingenuous to treat the report as anything other than false. The error is compounded when researchers then say more than 90% of reports are true and that 90% includes these categories like these where the allegation was legally false but it was coded as “case did not proceed.”

A fourth takeaway is that the “case proceeded” category is incomplete. This category appears to presume there was a truthful report if the case was referred for prosecution or disciplinary action. There are three significant problems with this classification. First, Lisak has been critical about other researchers who do not make their own independent assessment of the evidence and rely on police or investigators’ characterizations.³⁴⁹ The definition he provides for “case did not proceed” and “case proceeded” both refer to what action others took upon their review of the evidence; neither category represents an independent assessment of whether this team of researchers reached the same conclusion. Instead, the definition indicates they simply looked at the how police closed the investigation and coded it accordingly. In this regard, this report fails to meet Lisak’s own standards for scientific reliability. Second, there is no standard of proof identified for whether a case should or should not proceed. Recall the table relating evidence of guilt and false allegations.³⁵⁰ The standard of proof changes the reliability that may be associated with the categories and whether they represent a crime was possible, likely, more likely than not, probable, or beyond a reasonable doubt. Third, and more importantly, the initial decision to refer a case for prosecution does not mean the report is true. It incorrectly assumes every case brought to trial equals a guilty defendant. How many of these cases, however, resulted in acquittals or a finding of no crime at the disciplinary board? The decision to refer a case only initiates another more conclusive process about the weight of the evidence.³⁵¹

A fifth, and significant, takeaway is what the actual study represents about false reports. Lisak asserts only 5.9% of reports were false. Ignoring the issues noted above and the small sample size, he incorrectly disregards the other categories. The fact that the evidence does not prove the alleged victim lied does not mean she told the truth either. Based on this study and its flaws, the objective answer to the question “how often are sexual assault reports false?” would be 5.9-64.7%. Conversely, the objective answer to the question “how often are sexual assault reports true?” would be 35.3-94.1%. These figures demonstrate the indisputable fact that there are a large percentage of cases that could be either true or false depending on the standard of proof used.

6. *Kelly et al. (2005)*

One of the studies used by Lisak to bolster his conclusion that false reports are rare³⁵² is Kelly’s study in 2005.³⁵³ Kelly’s study assessed various police agencies in the United Kingdom to determine the attrition rates of sexual assault reports; she was trying to understand why so few

³⁴⁹ Lisak, *supra* note 318.

³⁵⁰ See *supra* Part III.B.

³⁵¹ Although many universities are under scrutiny for the questionable due process afforded an accused in these supplemental disciplinary processes, these processes, however flawed, are still more objective than the initial *ex parte* investigation.

³⁵² Lisak, *supra* note 256, at 1324.

³⁵³ KELLY ET AL., *supra* note 265.

reported sexual assault cases end up at trial and how many cases fall out at each stage of the process. As part of that endeavor, she reviewed how police characterized each reported case. To independently assess the categories, her team used a case-tracking database, forms completed by police officers on case progress and outcomes, and questionnaires from, and interviews with, complainants.³⁵⁴

Kelly's study involved a total of 2,643 cases reported to police.³⁵⁵ Her team did not have information on how each case was classified, which reduced the number of cases they could analyze further. There were three initial categories used by police investigators and one sub-category under "detected" for cases that did not proceed for action:³⁵⁶

- a) No Crime (575 out of 2,244 known outcomes; 26%)
- b) Undetected (882 out of 2,244; 39%): used when no alleged offender was identified.
- c) Detected (787 out of 2,244; 36%): used when an alleged offender was identified (320 out of the 787 were not referred for action; 14% of the 2,244 known outcomes).

Using the data available, Kelly broke down the cases into more detailed explanations, in the following table:³⁵⁷

Table 4.2: Recalculated Attrition process: 2,284 cases reported to police where research categories known			
n=2,284 ³⁵⁸	No	%	Overall %
Police	1,817	100	80
Insufficient evidence	386	21	
Victim withdrawal	318	17	
Victim declined to complete initial process	315	17	
Offender not identified	239	13	
False allegation	216	12	
No evidence of assault	83	5	
No prospect conviction	37	2	
Not in public interest	20	1	
Other	67	4	
Reason unknown	136	8	
CPS	145	100	6
Caution/final reprimand	9	6	
Discontinued	38	26	
Victim withdrawal	25	17	

³⁵⁴ *Id.* at 36.

³⁵⁵ *Id.* at 9, 38.

³⁵⁶ *Id.* at 37.

³⁵⁷ *Id.*

³⁵⁸ For the initial classification table, Kelly assessed 2,244 cases. For this table, Kelly appears to have additional data to rely on as her team uses 2,284 cases instead. *Id.* at 39-40.

Suspect fled prior to PDH	1	1	
Pending trial	72	50	
Trial	322	100	14
Trial to be rearranged, suspect fled	1	<1	
Victim withdrawal	15	5	
Discontinued/withdrawn at court	19	6	
Acquittal	104	32	
Guilty plea	89	28	
Not clear if guilty plea/conviction	17	5	
Part conviction	11	3	
Conviction	66	20	
Total Convictions	183		8

Kelly found that police were inconsistent with how they categorized cases. The “no crime” category, which she reports as 22%³⁵⁹ (575 out of 2,643) “comprises a complex layering of different kinds of cases and circumstances, many of which are not ‘false’ in the literal meaning of this term.”³⁶⁰ She asserts it should only include cases that were “recorded in error, occurred in another jurisdiction, and where there is credible evidence no crime took place,” which includes false allegations and cases with no evidence of an assault.³⁶¹

The Home Office for police in the United Kingdom defines a false allegation as where the complainant makes a clear and credible retraction or there is “strong evidence” that the report was false.³⁶² As noted in the table above, police categorized 216 out of 2,284 cases (9.45%) as false allegations. Kelly’s team was concerned that police may not be applying the Home Office’s strict definition. Only 144 of those 216 were available for review and her team her team concluded 44 were probably false, 33 possibly false, and 77 were uncertain (her math is off by 10 but it is not clear which category is misrepresented).³⁶³ Combing the possible and probable categories, Kelly concludes the actual rate of false allegations is 3 percent (67 out of 2,643).³⁶⁴

The first takeaway for this study is how some researchers improperly presume absent information should be resolved in favor of truth. Criminal matters presume innocence, not guilt. In the absence of complete and satisfying information, the researchers always presumed guilt. This practice exaggerates what the data actually shows. For instance, while there may have been 2,643 reports, Kelly’s team did not have information about how hundreds of them were or should be classified. The known sample is smaller and yet they continually include the unknown cases as true crimes in calculating percentages. It is intellectually dishonest to assess only 144 cases classified as false allegations when police labeled 216 as false, thereby assuming police were wrong on the missing 72 cases. Likewise, it is intellectually dishonest to report any of those

³⁵⁹ Kelly uses two numbers to represent the no-crime rate, 22% and 26%, depending on whether she uses the total reports or the ones that she had sufficient information to actually review. The 26% rate is more accurate because the 22% rate assumes the 341 cases she does not have complete files on are all true allegations.

³⁶⁰ *Id.* at 36, 39.

³⁶¹ *Id.* at 38.

³⁶² *Id.* at 27 n.26, 50.

³⁶³ *Id.* at 50.

³⁶⁴ *Id.* at 50.

numbers against 2,643 cases when hundreds of case files are missing or substantially incomplete. Of the 359 cases with insufficient details, we do not know how many of them were or should be classified as false allegations and yet the researchers considered them all true in their calculations.

The final and most significant takeaway is what the numbers actually say about true and false reports. Accepting Kelly's finding of 67 probable/possible false complaints, we can objectively say at least 67 out of 2,284 cases were false (the other 149 cases labeled as false by police would become insufficient information cases which could be true or false). If we use the police figures, which are not reliably disputed even using the Home Office's presumption of guilt standard, at least 22% of allegations did not constitute crimes. Additionally, there were 109 acquittals that could be considered false. While they are not false beyond all doubt, they were tested under the law and are now officially recorded as no crime. On the other end, the statistics show 66 convictions and 89 guilty pleas, or 155 out of 2,284 (7%).³⁶⁵ Everything in between could be true or false depending on the standard of proof used. Accordingly the rate of false reports is 3-93% (if you consider only cases categorized as false), 7.48-93% (if you add the acquittals); or 22-93% (if you use the original "no crime" classification by police). The rate of true reports is the opposite: 7-97%, 7-92.52%, or 7-78%.

7. *Virginia DNA Study*

If the wrongful *conviction* rate is approximately 15 percent, then the wrongful accusation rate must be higher. As discussed earlier, a 2012 study of sexual assault cases in Virginia found wrongful convictions in sexual assault cases at a rate of 8 or 15 percent.³⁶⁶ In order for the rate of wrongful convictions to be higher than the rate of false allegations, false allegations would have to make it to trial and result in convictions at a higher rate than legitimate cases of sexual assaults. This is highly implausible. Prosecutors bring the cases with the best evidence to trial. Recall the 20 or so categories from the *Kelly* study;³⁶⁷ most false allegations should fall into categories that never end up at trial, i.e., the alleged victim withdraws from the process or refuses to complete the process, no alleged offender was identified, the accuser recants on her own, the accuser recants after evidence calls her report into question, there is no evidence of the phony assault, or there is no prospect of a conviction. In a robust system of justice, few false allegations should get to trial, let alone result in convictions as often as 15% of the time unless they are not reasonably weeded out and scrutinized at trial. Considering the rate of false allegations must be higher than the rate of wrongful convictions, and what the data on false allegations really show, the true rate of false accusations is more consistent with Kanin's and Jordan's 41% rates (and the median range of the other studies) than the lower rates advanced by some researchers.

³⁶⁵ While there are partial convictions, without more information, it is difficult to determine if the conviction was for a sexual assault or some other related offense.

³⁶⁶ ROMAN ET AL., *supra* note 103; *supra* Part II.D.

³⁶⁷ KELLY ET AL., *supra* note 265; *supra* Part III.C.6.

D. WHY PEOPLE LIE ABOUT SEXUAL ASSAULTS

There are a number of reasons people lie about sexual assaults.³⁶⁸ The most documented examples include: to provide a “cover story” or alibi; for revenge, rage, or retribution; to gain sympathy or attention; and for extortion.³⁶⁹ The false accusations document earlier, including the fatal accusations and serial accusations, all fall into these categories.

1. Cover Story / Alibi

The most frequent reason for false allegations is to provide a cover story or alibi.³⁷⁰ The typical case involves consensual sex with an acquaintance that poses some sort of problem for the false accuser. The problem often leads to feelings of shame or guilt for the accuser, such as concerns about pregnancy or sexually transmitted diseases, and the accuser harbors concerns the incident will be discovered and received negatively by the accuser’s family or friends.³⁷¹ “Research shows that women engage in sex they don’t want for a variety of reasons, including to avoid conflict, because they don’t want to be labeled a tease, and because they feel obligated.”³⁷² The goal is not usually to harm or cause problems for the acquaintance, but rather to protect themselves from what they see as a desperate situation; the false accusation provides an alternate reality in which to escape.³⁷³

An example of this type of false accusation is the law graduate in England who claimed her boyfriend raped her 11 times so she had an excuse for failing her bar exams.³⁷⁴ She even caused injuries to herself to bolster her false claims. She was ultimately convicted of five false rape claims and sentenced to three and a half years in jail.³⁷⁵ Another woman falsely reported she was gang-raped by three people because she did not want her fiancé to know she cheated.³⁷⁶ Like with the Hofstra case discussed previously, her allegation fell apart when video evidence came to light. She was subsequently charged with making false reports to law enforcement.³⁷⁷

³⁶⁸ See Taylor, *supra* note 9 (listing a host of reasons people have made false accusations of sexual assault and providing links for all of the examples provided).

³⁶⁹ Gross, *supra* note 119; Kanin, *supra* note 262, at 85-87; KELLY ET AL, *supra* note 265, at 48-49.

³⁷⁰ Gross, *supra* note 119; Kanin, *supra* note 262, at 85-87.

³⁷¹ *Id.*

³⁷² Wilhem, *supra* note 220 (quoting Robin Wilson of the *Chronicle of Higher Education*).

³⁷³ Gross, *supra* note 119.

³⁷⁴ Tara Brady, *Lying law graduate who claimed boyfriend raped her 11 times so she had a excuse for failing her bar exam faces jail*, DAILYMAIL.COM, Jun. 5, 2014, <http://www.dailymail.co.uk/news/article-2649558/Lying-law-graduate-claimed-boyfriend-raped-11-times-excuse-failing-bar-exams-faces-jail.html> (last visited Mar. 16, 2015).

³⁷⁵ Lucy Crossley, *‘What you did was utterly wicked’: Judge slams lying law graduate who claimed boyfriend raped her so she had an excuse for failing her exams as she is jailed for three and a half years*, DAILYMAIL.COM, Jun. 26, 2014, available at: <http://www.dailymail.co.uk/news/article-2671095/What-did-utterly-wicked-Judge-slams-lying-law-graduate-claimed-boyfriend-raped-excuse-failing-exams-jailed-three-half-years.html> (last visited Mar. 16, 2015).

³⁷⁶ Lauren DiSanto, *Woman Lies About Gang Rape to Cover for Cheating: Police*, NBC10.COM, May 4, 2013, available at: <http://www.nbcphiladelphia.com/news/local/Woman-Lies-About-Gang-Rape-to-Cover-for-Cheating-Police-206048611.html> (last visited Mar. 16, 2015).

³⁷⁷ *Id.*

Other women have lied about sexual assaults in order to get abortions.³⁷⁸ Biurny Peguero also made up a rape allegation against her friend, who was sentenced to 20-years in jail, to explain her injuries from a fight with several women.³⁷⁹ There are, therefore, a wide variety of contexts in which false allegations are made to cover up some negative situation for the false accuser.

2. *Revenge, Rage, or Retribution*

This category involves circumstances where the false victim suffers some real or perceived wrong, rejection, or betrayal by the alleged rapist and a false accusation is made to obtain some measure of payback.³⁸⁰ An example of revenge is:

An 18-yr old woman was having sex with a boarder in her mother's house for a period of 3 months. When the mother learned of her behavior from other boarders, the mother ordered the man to leave. The complainant learned that her lover was packing and she went to his room and told him she would be ready to leave with him in an hour. He responded with "who the hell wants you." She briefly argued with him and then proceeded to the police station to report that he had raped her.³⁸¹

In another case, a 20-year-old spurned lover falsely cried rape twice against her ex-boyfriend claiming in part that he raped her while she was pregnant which caused her to lose a baby.³⁸² She was not actually pregnant, however, and he was somewhere else entirely during the alleged incidents. She asserted he dragged her into the woods where she was beaten unconscious, raped, and threatened with death if she reported the matter. The man she accused proved he was in a DVD store with a new girlfriend when the alleged attacks occurred. The false accuser subsequently pled guilty to perverting the course of justice and was sentenced to an undisclosed amount of jail.³⁸³

³⁷⁸ See Fiona Govan, *Woman faces jail for lying about rape to get abortion in Spain*, TELEGRAPH, Aug. 19, 2009, <http://www.telegraph.co.uk/news/worldnews/europe/spain/6055338/Woman-faces-jail-for-lying-about-rape-to-get-abortion-in-Spain.html> (last visited Mar. 16, 2015); Amanda Marcotte, *One Way to Get a Safe Abortion in Brazil: Pretend You've Been Raped*, SLATE, Apr. 11, 2014, http://www.slate.com/blogs/xx_factor/2014/04/11/abortion_ban_in_brazil_one_way_to_get_the_procedure_is_to_pretend_you_ve.html (last visited Mar. 16, 2015).

³⁷⁹ Young, *supra* note 4. The author of this article appears to be citing a case from the Innocence Project or National Registry of Exonerations.

³⁸⁰ Gross, *supra* note 119; Kanin, *supra* note 262, at 86-87

³⁸¹ Kanin, *supra* note 262, at 87.

³⁸² Alex Ward, *Spurned lover, 20, jailed for falsely crying rape against her ex-boyfriend and claiming the attack made her lose a baby when she was not pregnant*, DAILYMAIL.COM, Dec. 3, 2012, <http://www.dailymail.co.uk/news/article-2242480/Woman-jailed-falsely-crying-rape-ex-boyfriend.html> (last visited Mar. 16, 2015).

³⁸³ *Id.*; see also, *Woman accused of crying rape is jailed*, DAILYMAIL.COM, Nov. 3, 2006, <http://www.dailymail.co.uk/news/article-414332/Woman-accused-crying-rape-jailed.html> (last visited Mar. 16, 2015) (reporting a woman was jailed for making false allegations of sexual assault against her husband).

In a true testament about how petty the cause of a false rape allegations can be one woman falsely accused a man of rape because he forgot her name after a one-night stand.³⁸⁴ She was convicted of perverting justice by a unanimous verdict rendered in less than two hours.³⁸⁵

3. *Gain Sympathy / Attention*

Another common reason for false allegations is for the accuser to gain attention or sympathy. One example was provided earlier in the section discussing Kanin's 1994 study.³⁸⁶ There are other examples. In 2013, a woman falsely accused musician Conor Oberst of sexual assault in order to get attention.³⁸⁷ In Florida, a 22-year-old female told police she made up a story about being attacked and raped in a parking lot on campus "as a lesson to women in the area that an attack could happen to them."³⁸⁸ Similarly, a woman at Princeton falsely accused another student purportedly to "raise awareness for the plight of the campus rape victims," she had never even talked before to the man she accused.³⁸⁹

4. *Extortion*

Although not a common occurrence, false accusations are occasionally made in an effort to extort money from the person accused. In Newport Beach, for example a woman pled guilty to trying to extort \$15,000 from a 37-year-old man she met on a dating site.³⁹⁰

³⁸⁴ Richard Alleyne, *Woman cried rape in revenge for man forgetting her name*, TELEGRAPH, Jan. 27, 2012, <http://www.telegraph.co.uk/news/uknews/crime/9044473/Woman-cried-rape-in-revenge-for-man-forgetting-her-name.html> (last visited Apr. 10, 2015).

³⁸⁵ *Id.*

³⁸⁶ See *supra* Part III.C.4; see also Part IV.B, Recommendation 11 (discussing how efforts to increase reporting have incentivized false victims and made the benefits of being a victim more attractive than the risks).

³⁸⁷ Ella Alexander, *Conor Oberst's rape accuser admits to fabricating claims: 'I made up those lies about him to get attention'*, INDEPENDENT, Jul. 15, 2014, <http://www.independent.co.uk/news/people/conor-obersts-rape-accuser-admits-to-fabricating-claims-i-made-up-those-lies-about-him-to-get-attention-9607313.html> (last visited Mar. 16, 2015).

³⁸⁸ Greg Hamilton, *Police say woman made up story of attack at Campus Lodge apartments*, GAINESVILLE SUN, May 2, 2013, <http://www.gainesville.com/article/20130502/ARTICLES/130509895> (last visited Mar. 16, 2015). Despite her professed reason for the false accusation, it appears more probable she made the false allegation as a cover story to explain to her family why she was not graduating from college that weekend and, in fact, had actually dropped out of school more than a year ago.

³⁸⁹ Eric Owens, *Here are EIGHT Campus Rape Hoaxes Eerily Like The UVA Rape Story*, DAILY CALLER, Dec. 14, 2014, <http://dailycaller.com/2014/12/14/here-are-eight-campus-rape-hoaxes-eerily-like-the-uva-rape-story/> (last visited Mar. 16, 2015).

³⁹⁰ 'Victim' is convicted of trying extortion, DAILYPILOT, Jul. 9, 2009, http://articles.dailypilot.com/2009-07-09/news/dpt-coetzee071009_1_extortion-newport-beach-woman-jail-and-five-years (last visited on Mar. 16, 2015).

E. THE RATE IS NOT RARE

You don't have to believe that there are large numbers of false accusations of sexual assault – I do not – to insist that the process of investigating and adjudicating these claims be fair.

– Nancy Gertner, professor at Harvard Law School and retired federal judge³⁹¹

If only ten percent of rape allegations in FY14 were false, there were 461 false allegations in the military last year alone.³⁹² The actual rate of false allegations, however, is likely much higher as previously discussed. If approximately 40 percent of allegations are probably false or do not constitute a crime even if true, then there were about 1,840 servicemembers accused in FY14 of sexual assaults they did not commit. A rate of 10-40% of false allegations amounts to 1.3 – 5.1 false allegations of sexual assault *every day* in the military; a rate that is neither rare nor insignificant.

The rate of false allegations is substantial. By way of comparison, there were 255 active duty military suicides in 2013³⁹³ and 424 military deaths due to accidents in 2010.³⁹⁴ This is not to compare the effects, but rather to compare the rate of false allegations to other topics that have captured the attention of senior leaders. The Air Force, for example, has only had a few stand-down days in the last few years where everyone stops his or her normal mission to focus on a specific topic of interest. The only topic besides sexual assault to merit full day focus in the last few years was suicides.³⁹⁵ By the most conservative of numbers, there is a greater problem of false allegations than suicides. Perhaps more importantly, sexual assault victims have merited numerous stand-down days and constant attention. The victims of false allegations may look every bit like victims of sexual assault and yet they have warranted no attention at all thus far:

My girlfriend was raped several years ago. I was falsely accused of rape less than a year ago. I contacted her (I had known her before her incident) because I was desperate for someone to talk to who could understand what I was going through. To my great relief, it turned out that we understood each other very well. From the initial stages of suicidal thoughts and not being able to function to the long-term fear, mistrust, and guilt that are facts of our lives, it turns out that her experience of being raped and mine of being falsely accused of rape were very

³⁹¹ Gertner, *supra* note 9.

³⁹² See 2014 SAPR REPORT, *supra* note 215, at Appendix A, 6, 27, available at <http://www.sapr.mil/index.php/annual-reports> (indicating there were 4,608 reports of sexual assault in DOD in FY 2014).

³⁹³ Department of Defense Quarterly Suicide Report Calendar Year 2014, 1st Quarter, DEFENSE SUICIDE PREVENTION OFFICE (DSPO), <http://www.suicideoutreach.org/Docs/Reports/DoD%20Quarterly%20Suicide%20Report%20CY2014%20Q1.pdf> at p2.

³⁹⁴ Defense Casualty Analysis System, DEPARTMENT OF DEFENSE, https://www.dmdc.osd.mil/dcas/pages/report_by_year_manner.xhtml

³⁹⁵ In May 2010, there was a half-day “Wingman” day focusing on suicides. In Jan. 2012, there was a “resiliency” day to address a spike in suicides.

similar... One important difference, though, is that when she was violated, she received a great deal of help (medical, legal, psychological). Apart from my family and friends, I was on my own. My legal and psychological problems had to be dealt with by me at a time when I couldn't eat, sleep, or think (except, of course, about killing myself).³⁹⁶

Viewed from another angle, there were 496 courts and 359 convictions for sexual assaults in FY 2014.³⁹⁷ If only 10% of allegations are false, then there were at least 461 false allegations, meaning there were statistically more provably false allegations of sexual assaults than there were convictions for sexual assaults in all of DOD in FY2014. Put differently, there was roughly one false allegation for every sex case actually tried, regardless of the outcome of the trials.³⁹⁸ It can hardly be said that these numbers are inconsequential.

Additionally, the Chief of Staff for the Air Force has asserted that even one victim of sexual assault is too many.³⁹⁹ If there is truly dignity and respect for all, then one wrongful conviction is also too many and deserves significant attention as well. America sends her sons and daughters to the military and to universities; they deserve equal protection. Commanders and University Presidents have the responsibility to protect the innocent, whatever the gender. It should not matter what the exact number of false accusations is; the responsibility does not depend on numbers. The commitment is more fundamental than numbers; it is a moral and ethical obligation, especially in the military where our foremost commitment is to the constitution and we routinely profess to hold ourselves to higher standards. Our actions must be must be consistent with our words.

³⁹⁶ Emily Bazelon & Rachel Larimore, *How Often Do Women Falsely Cry Rape?*, SLATE, Oct. 1, 2009, http://www.slate.com/articles/news_and_politics/jurisprudence/2009/10/how_often_do_women_falsely_cry_rape.html

³⁹⁷ 2014 SAPR REPORT, *supra* note 215, at Appendix A, 27.

³⁹⁸ *Id.*

³⁹⁹ CSAF's first reference to this point, that the only acceptable number of sexual assaults is zero, was in a press interview on 3 Aug. 2012. (on file with the author). His second public reference appears to have been in a memo sent to all commanders and command chiefs on 14 Nov. 2012 with the subject, "Combating Sexual Assault in the Air Force." (on file with the author). In this memo, he states in the first paragraph:

There will be approximately 700 reported sexual assaults in our Air Force this year...700! You've got to be kidding me!! And we all know the real number of sexual assaults targeting our Airmen is much higher than that. This...is... unacceptable! It's time we all wake up and get mad about it, because the only acceptable number is zero. As a commander or command chief at any level, if you're not aggressively working to eliminate this horrible crime in your unit, and ensuring others are doing the same, then you're part of the problem, not part of the solution.
(emphasis and grammatical alterations in original)

F. CONFLICT BETWEEN TREATMENT AND JUSTICE

One main takeaway from the research on false allegations as a whole is that there is a policy conflict between caring for alleged victims and what constitutes justice.⁴⁰⁰ Fundamentally, most researchers in this area are operating from the standpoint that alleged victims are to be believed unless they can be convicted for lying.⁴⁰¹ Justice presumes an accused is innocent unless the state or government can prove the accusation is true beyond a reasonable doubt. The standards are polar opposites. They each serve a purpose, but not in the same policy realm.

When it comes to taking care of alleged victims, we should err on the side of caution and be more inclusive because the greatest harm to society and our institutions is neglecting an actual victim. A careful balance must be struck between ensuring legitimate victims are supported and avoiding free-riders who would make false claims to reap benefits they are not entitled to while simultaneously causing unwarranted and costly investigations. 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. Relatedly, there are likely some women who were victims but will be hard-pressed to convince any jury beyond a reasonable doubt due to a history of lying or other significantly challenging evidentiary issues. Simply put, the constitutional standards that must be met for punishing people should not be the guide we follow in treating people. The greater harms to be avoided are different.

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.⁴⁰² The presumption of innocence, and requirement that it be afforded to an accused, predates our own criminal justice system.⁴⁰³ The Supreme Court of the United States traced the presumption of innocence from Deuteronomy through the laws of Sparta and Athens, Roman law, English common law, and the common law of the United States.⁴⁰⁴ Our justice system is based on the long-standing principle that “it is better that ten guilty persons escape than one innocent suffer.”⁴⁰⁵ Under this storied history, we are compelled to question an accusation and

⁴⁰⁰ See Daniel H. Higgins & Shad R. Kidd, *Start by Believing – The Accused*, 41 THE REPORTER, No. 2, 17, available at <http://www.afjag.af.mil/shared/media/document/AFD-141126-035.pdf> (stating that the problem with SAPR policy that advocates to “start by believing an alleged victim of sexual assault...is that the message may be intended for commanders to utilize as a prevention and counseling tool, but listeners...may not be differentiating between prevention and counseling on the one hand and administering justice on the other.”)

⁴⁰¹ See *supra* Part III.C, *infra* Part III.G.

⁴⁰² This is a reference to THE DECLARATION OF INDEPENDENCE, available at <http://www.ushistory.org/declaration/document/>.

⁴⁰³ Higgins, *supra* note 400, at 16.

⁴⁰⁴ *Coffin v. United States*, 156 U.S. 432, 453-57 (1895).

⁴⁰⁵ *Id.* (quoting Blackstone, 2 Bl. Com. c.27, margin page 358, ad finem).

give the benefit of reasonable alternatives to an accused. The harm to be avoided in justice is the government causing an innocent person to suffer.

The distinction in purposes, between treatment and justice, creates a distinction in how evidence is viewed. For treatment purposes, a recantation does not necessarily mean the allegation was false and it may not justify denying support to the alleged victim. For justice purposes, by comparison, a recantation is highly consistent with innocence; it is what one might expect a false accuser to say. Because a recantation is highly consistent with an accused's innocence, it often makes innocence a reasonable possibility. Under the law, the benefit of the doubt goes to an accused. A reasonable possibility of innocence means there is not proof beyond a reasonable doubt and the judge or jury must acquit the accused. Researchers want to apply the treatment standards, giving the benefit of the doubt to the alleged victim, to justice standards but they are incompatible.⁴⁰⁶

Lastly, rates of false allegations are generalities that have no place in a justice process. Trials must be assessed on the merits and juries must decide cases based on the evidence introduced in that specific trial. What some victims may do, or how some offenders may behave, is not relevant to the particular alleged victim in a particular case with a particular alleged offender. Courts do not operate on generalities or profiles but rather specific evidence for each case. While generalities may be helpful for treatment purposes, they are not appropriate or admissible for trials.

G. RELIABILITY OF RESEARCH ON VICTIM BEHAVIOR

Look at any research on victim behavior and you will find there is no validation of the alleged crime. Every allegation is treated as true and every self-identified victim is considered a legitimate victim. Researchers, typically not forensically certified,⁴⁰⁷ time and again assert the survey respondents or interviewees for their research met a legal definition for rape, but they often do not provide a copy of the survey or the questions they asked to prove the researchers understood the complex area of sexual assaults, let alone validate that the responses given were accurate. The research, quite simply, consists of a circle of self-validation.

⁴⁰⁶ This is not to say recantations or other similarly problematic evidence are insurmountable. Prosecutors need to explain how the facts of each case demonstrate the recantation is not cause for reasonably doubting the allegation or why a witness can still be believed despite previous credibility problems. It is a case-specific issue. Similarly, it does not matter what percentage of offenders may re-offend; it only matters what evidence exists that this particular offender has poor character for rehabilitation.

⁴⁰⁷ There is a difference between clinical and forensic psychology. "Forensic psychologists focus on 'objective reality, whereas a clinician generally focuses on a patient's subjective reality.'" Higgins, *supra* note 400, at 17 (citation omitted). The law can be complicated, particularly when it comes to sexual assault, and clinical psychologists are far more likely to misunderstand the nuances of the law, which impacts the entire thrust of their findings, than forensic psychologists who have been specially training on legal principles and application. It is the rough equivalent of relying upon a general practitioner in medicine rather than a cardiologist.

1. *Circle of Self-Validation*



Circle of Self-Validation

In every instance, if you asked how researchers know the report is actually a crime as opposed to a false allegation, you would see a circle like that above. Alleged victims (AV) report they were victimized and then researchers take it at face value without any validation and often using flawed surveys as previously discussed.⁴⁰⁸ Researchers then use the information from the alleged victims to define what behavior is typical for actual victims of sexual assault and to define “myths” about victims. This information is then used to criticize police as perpetuating myths because law enforcement is suspicious of behavior that is, according to the researchers, typical for sexual assault victims. The reason they know it is typical behavior all comes back to the starting point: because self-proclaimed victims say so.

There is no validation that any of the reports are actually true, which grossly skews the reliability of the data and their conclusions. For example, when researchers characterize behavior as counterintuitive, meaning certain behavior seems inconsistent with legitimate victims but is in fact consistent with victims, they are in fact relying on data from non-victims in reaching that conclusion. What they see as “counterintuitive” may be the behavior of false victims being erroneously treated as legitimate victims. By presuming every report is true, researchers are not reliably weeding out false data. Additionally, research tends to be based on relatively small sample sizes, meaning it suffers from the same limitation as the false allegation research, and the studies are not necessarily representative to victims in general and yet they are being attributed as representative constantly.

To make the problem worse, citations move in pyramid fashion like with Susan Brownmiller’s assessment that false allegations occur only in two percent of cases. The first unreliable study is then cited by other researchers (and the same authors in later research) and then those subsequent researchers are cited for the same idea and on and on. Eventually, there

⁴⁰⁸ See *supra* Part III.A.

appears to be a wide agreement of support for the conclusions but in reality there are just a few studies using unreliable methodology and being cited over and over again.

2. *Examples in Research*

Some examples are instructive. Heather Littleton evaluated “346 college rape victims” to assess whether victims of rape who do not recognize they are victims of rape, known as unacknowledged victims, are traumatized the same as victims who are aware they are victims, known as acknowledged victims.⁴⁰⁹ She notes that “many women who report experiences that meet a legal definition of rape do not label their experience as such or even as a victimization” and instead “give their experience a much more benign label, such as miscommunication or bad sex, or state that they are unsure how to label their experience.”⁴¹⁰ She recruited women from the psychology department of three southern universities who participated for course credit during two academic semesters.⁴¹¹ Of the 1,744 women who answered an online survey, 353 “responded positively to a screening questionnaire” that would determine if they had a sexual experience “that would meet a legal definition of rape or sexual assault.”⁴¹² The actual screening questions were not provided, but the author indicated respondents were “asked several questions about the circumstances of their ‘experience with unwanted sexual contact,’” which suggests the survey was based on USC.⁴¹³ As noted before, USC is *not* the same as rape or sexual assault.⁴¹⁴ How do we know they were actual victims then? There is nothing in the study that validates that the respondents were victims under the law, that their recollections were accurate, or even that their reports were more likely true than false. In fact, many of the alleged victims in this study did not even believe themselves victims. Researchers took self-proclaimed victims at their word and called others victims, who did not believe themselves victims, using inaccurate legal definitions like USC. Additionally, respondents were encouraged to participate by receiving course credit and free support. The data in such a study exemplifies how unreliable research can be.

The same defect is found in many other studies. Patricia Frazier assessed how victims react to rape and to what they attribute the cause.⁴¹⁵ She sent questionnaires to sexual assault response centers, and noted other researchers who have done the same, to identify 67 victims for her study.⁴¹⁶ There is nothing in the study to validate that what was reported actually met the standard for a crime or that the objective evidence indicated that a crime actually occurred. Elizabeth Ellis and her team at the University of Georgia assessed the long-term reaction of

⁴⁰⁹ Heather Littleton & Craig E. Henderson, *If She Is Not A Victim, Does That Mean She Was Not Traumatized? Evaluation of Predictors of PTSD Symptomatology Among College Rape Victims*, 15 VIOLENCE AGAINST WOMEN, No. 2, 148 (2009) available at <http://vaw.sagepub.com/content/15/2/148.full.pdf+html>.

⁴¹⁰ *Id.* at 149.

⁴¹¹ *Id.* at 152.

⁴¹² *Id.* at 152-53. 7 respondents did not answer all questions and were eliminated from the study leaving 346 in the sample. *Id.*

⁴¹³ *Id.*

⁴¹⁴ See *supra* Part III.A.2.

⁴¹⁵ Patricia A. Frazier, *Victim Attributions and Post-Rape Trauma*, 59 J. PERSONALITY & SOC. PSYCHOL., NO. 2, 298 (1990).

⁴¹⁶ *Id.* at 298-99.

victims to rape.⁴¹⁷ They studied 27 “victims” identified through newspaper ads, rape crisis center counselors, or public speaking by the research staff.⁴¹⁸ Again, there is nothing in the study to validate any of the alleged victims are actual victims relaying accurate information. Mary K. Koss assessed 59 “victims,” who were recruited through a host of methods including crisis centers and surveys, to determine characteristics of self-blame and maladaptive beliefs on psychosocial distress.⁴¹⁹ None of her victims were validated. Susan J. Lea studied the attrition rates in rape cases to identify where and why reports of sexual assault fall out of the system short of trial.⁴²⁰ The subjects of her study came from police reports over a five-year period. A total of 471 cases were identified, each of the accusers were sent questionnaires for more information about the reported crime. Only 379 responses were returned, which constituted the sample for that study.⁴²¹ She considers every reported sexual assault as a bona fide sexual assault and agrees with a fellow researcher who wrote, “given the attrition of rape cases at every stage from the attack onwards, the rapist who receives a stiff fine must consider himself extremely unlucky” because the odds are so against that happening.⁴²² The implication is that every report is a crime and only the unluckiest of rapists end up at trial. She did not validate any of the reports.

Interestingly, none of these studies even account for false allegations or instances where there was no crime at all. Given that approximately 10 percent of sexual assault allegations are so convincingly false that even researchers biased for victims believe the alleged victims could be convicted for knowingly lying, it is surprising that not a single researcher appears to identify them in their research. That is to say, not a single study appears to weed out any portion of allegations as false and subsequently exclude them from the survey. They accept police reports as true without qualifying the data or they conduct surveys using inaccurate definitions like USC and then neglect to further validate the data. It defies all logic that every researcher miraculously gets only valid responses and completely avoids the ones that do not constitute a crime, that are probably false, and that could be conclusively proven false. The failure of researchers to weed out unreliable data substantially skews the value of their research. Further, the fact that most researchers do not even acknowledge the limitations of reliability or in methodology severely undermines credibility of many researchers.

Rebecca Campbell is one of the psychologists most relied upon in current SAPR policy. Her research, however, suffers from the same flaws as other researchers and even more in some cases.⁴²³ In one of her studies, for example, she specifically noted that “rarely have researchers

⁴¹⁷ Elizabeth M. Ellis et al., *An Assessment of Long-Term Reaction to Rape*, 90 J. ABNORMAL PSYCHOL., No. 3, 263 (1981).

⁴¹⁸ *Id.* at 263.

⁴¹⁹ Mary P. Koss & Aurelio Jose Figueredo, *Change in Cognitive Mediators of Rape’s Impact on Psychosocial Health Across 2 Years of Recovery*, 72 J. CONSULTING & CLINICAL PSYCHOL., No. 6, 1063 (2004).

⁴²⁰ Susan J. Lea et al., *Attrition in rape cases: Developing a profile and identifying relevant factors*, 43 BRIT. J. CRIMINOLOGY, No. 3, 583 (2003).

⁴²¹ *Id.* at 586-87.

⁴²² *Id.* at 584 (quoting R. Wright, *A Note on the Attrition of Rape*, 24 BRIT. J. CRIMINOLOGY, No. 24, 399 (1984)).

⁴²³ Lisak used to be the source of most SAPR materials but Campbell has largely replaced him as the single most influential source for SAPR policy and training. Her videos and research are referenced in several of the military stand-down days for use in training military members about victim behavior. She taught about tonic immobility at TJAG’s SAPR conference at Montgomery, Alabama in 2013. It was purportedly the same briefing she presented just a week or two earlier at CSAF’s mandatory conference for all wing commanders. She has also been called to

collected ‘the other side of the story’ to find out what system personnel say did or did not happen” in their interaction with victims.”⁴²⁴ Based on her own research, therefore, she knew studies typically did nothing to validate their sample, let alone get “the other side of the story.” She understood the value in doing so and made it the point of one of her studies. Nevertheless, she still elevated the perceptions of her alleged victims over those of the legal and medical personnel concluding that “police officers and doctors significantly underestimated the impact they were having on survivors” because “victims reported significantly more post-system contact distress than service providers thought they were experiencing.”⁴²⁵ Campbell published two more articles in the next 3 years on “survivor’s” experiences with legal and medical systems.⁴²⁶ In these articles, she repeatedly treats a report as synonymous with an actual sexual assault, makes no effort to validate the purported crimes, and makes no effort to ascertain the accuracy of the information she assessed. She annotates that rape is defined as “an unwanted act” even though that is neither an accurate nor complete definition.⁴²⁷ Her studies are also replete with characterizations of myths and purported flaws with the medical and legal service providers, all of which are grounded in the same reports discussed above that rely on the circle of self-validation.

3. *Misunderstanding the Value of “Rape Shield” Evidence*

Another problem with research on victim behavior, as well as in research on false allegations, is misunderstanding the rules of evidence and how facts are legally relevant to whether there was a crime or not. By way of example, Campbell asserts that victims suffer re-victimization by law enforcement questions that stray “into issues such as what they were wearing, their prior sexual history, and whether they responded sexually to the assault” even though “their legal relevance is minimal at best” because of rape shield laws.⁴²⁸ Her analysis, shared by other researchers and victim advocates, demonstrates a misunderstanding of the law.

First, the “rape shield” rule does not actually say all such evidence is irrelevant or of minimal value.⁴²⁹ What someone was wearing is highly relevant in most cases, not for some notion of promiscuity, but rather for resolution of whether a crime was committed.⁴³⁰ Some

brief for the review panels assessing what changes should be made to how the military handles treatment and prosecution of sexual assault cases. The author sent her an e-mail requesting comment on how she validated victims in her research but she did not respond as of the date of this article.

⁴²⁴ Rebecca Campbell, *What Really Happened? A Validation Study of Rape Survivors’ Help-Seeking Experiences With the Legal and Medical Systems*, 20 VIOLENCE AND VICTIMS, No. 1, 55 (2005).

⁴²⁵ *Id.*

⁴²⁶ Rebecca Campbell, *Rape Survivors’ Experiences With the Legal and Medical Systems*, 12 VIOLENCE AGAINST WOMEN 1, 30 (2006)[hereinafter Campbell, *Rape Survivors*]; Rebecca Campbell, *The Psychological Impact of Rape Victims’ Experiences With the Legal, Medical, and Mental Health Systems*, AMERICAN PSYCHOLOGIST 702, (Nov. 2008)[hereinafter Campbell, *Psychological Impact*]. The second article notes she received the Award for Distinguished Early Career Contributions to Psychology and Public Interest for this article.

⁴²⁷ Campbell, *Psychological Impact*, *supra* note 426, at 703, n.1; see *supra* Part III.A.2.

⁴²⁸ Campbell, *Psychological Impact*, *supra* note 426, at 703-04; Campbell, *Rape Survivors*, *supra* note 426, at 31. In these articles, as in this specific reference, she repeatedly cites to her own studies which are not validated either.

⁴²⁹ Fed. R. Ev. 412, and Mil. R. Ev. 412.

⁴³⁰ Every case is supposed to stand on its own. SAPR training has, however, compelled defense to refute training mis-information because of its tendency to shape decision-making away from legal standards.

examples are instructive. If the allegation is that the alleged victim was too incapacitated to have consented, then what she was wearing is very helpful in establishing whether she was in fact incapacitated and how DNA evidence may be able to resolve conflicting evidence. The fact that an alleged victim may have unzipped her own high heel, thigh-high boots without leaning on anything, is strong evidence she was not so intoxicated as to be incapacitated. If she asserted the alleged offender removed her clothing while holding her down and he asserts she removed the clothing, then knowing what she was wearing is important to determining who is telling the truth. If she was wearing underwear and a skirt, then his DNA should be on both items of clothing if he removed them as she reported. If the bra unsnaps in the back and she asserts he removed his clothes and hers while simultaneously holding her down, logic does not support her version and this evidence helps a judge or jury determine who is most believable. Understanding what a victim was wearing, therefore, is instructive on what must have happened in order for the purported sexual assault to occur and for establishing how forensics may resolve who is telling the truth.

Prior sexual history is relevant for a number of things as well. In a case at Aviano Air Base, Italy, in May 2013, the accused was charged with forced anal sodomy.⁴³¹ The alleged victim reported just a few hours afterwards and testified she had never engaged in anal intercourse before. The prosecution wanted this evidence to show she would not have consented to this act. It was highly relevant to the defense case as well because the Sexual Assault Nurse Examiner had conducted over 1,500 exams and testified it was highly improbable for there to have been nonconsensual first time anal sex without any injuries when a rape kit was conducted just a few hours afterwards. Prior sexual history is also relevant to establishing consent in relationships. Over the course of most relationships, consent changes. Initially, there is a process of learning to communicate with the other individual and asking if doing something is okay. Over time, relationships often evolve to a “you have consent until I tell you that you do not have consent” mentality. Married couples, for example, rarely ask their partner if it is okay to touch his butt or for him to touch her breast or to cuddle in bed. Under legal definitions, these each constitute sexual contact for which there was not necessarily simultaneous express consent. Mistake of fact exists because we do not punish reasonable behavior, but rather knowing or negligent assaults. When people have engaged in prior sexual acts, their communication can change and future acts are informed by prior practice. That does not mean prior consent equals future consent, but rather, it means a relationship evolves and consent does as well, at least with respect to what communication is expected between intimate adults, as determined by their specific personalities and their specific relationship.

How an individual responds to a sexual incident is also relevant in many cases. An alleged victim’s response can be indicative of consent or give rise to a reasonable mistake of fact as to consent. In a case originating out of Al Udeid Air Base, Qatar, the alleged victim reached orgasm due to digital penetration of her vagina despite asserting she did not desire that contact.⁴³² She did not tell the accused “no” until afterwards when she looked at her engagement ring and said they should not be doing this. At trial, she acknowledged not telling him “no” but believed he should have known based on her subtle movement of her legs during the act. Her

⁴³¹ The case was *United States v. Jenkins*, which resulted in an acquittal.

⁴³² The case was *United States v. Smith*, which resulted in an acquittal.

response, however, was perfectly consistent with consent or, at the very least, demonstrated why it was reasonable for him to have mistaken that for consent; he reasonably viewed her moving around not as a nonverbal lack of consent but rather as her natural reaction to pleasure leading to orgasm. Further, actions often speak louder than words. We may say, for instance, that we are religious or spiritual but our behavior may convincingly demonstrate otherwise. A witness' behavior before and after an event is valuable information in determining whether that witness is credible, whether that witness is the alleged victim, the accused, or any other witness.

Another overlooked or misunderstood issue of evidence is that there is a difference between honesty and accuracy. By way of example, in a case in Germany in May 2014, one of the victims asserted the accused attempted to rape him.⁴³³ The jury did not agree and only convicted the accused of assault consummated by battery. During the pretrial hearing, the victim testified he did not suffer any effects from the assault; he had no trouble sleeping or anything and believed the incident actually motivated him to be a better cop, since he realized he acted more fearful than he thought he should have acted. During trial, he said the polar opposite; that he could not sleep and it bothered him constantly. He was impeached heavily and juror feedback indicated he was not credible about anything. The accused was only convicted of that assault because he admitted that a simple assault occurred. The example demonstrates that even when an alleged victim appears honest, that does not mean his or her report is accurate. Even if there was a crime, it does not mean his or her reported behavioral characteristics are accurate. If trauma can cause inconsistencies and memory challenges, then there is an inherent reliability problem with researchers using non-validated self-reporting for data. The blind acceptance of alleged victims' non-validated reports combined with fundamental misunderstandings of the law only exacerbates the sexual assault problem by feeding the panic and mob mentality.

4. *Dealing with the Limitation*

The fact that there are limits with what science can determine in the area of sexual assaults does not mean research is without value or that sound studies cannot be conducted. First and foremost, researchers need to understand the distinction between treatment and justice principles. Many of these studies are useful in the treatment context but incompatible with judicial assessments. Researchers must understand the limits of science and its application to justice. Few researchers even acknowledge the limitation. The core problem is a methodological limitation.⁴³⁴ Unlike other areas of psychology, researchers cannot subject study participants to rape or sexual assault and then measure what impact or results occur over time. To conduct studies applicable to criminal justice, researchers need to acknowledge the limitations discussed above and devise a study to overcome the deficiencies. While it may not be easy, researchers could, for instance, use validated victims to compare with non-validated

⁴³³ The case was *United States v. Evans*. The Airman was convicted of a separately charged sexual assault and received a sentence including 20 years of confinement. The case is currently on appeal and awaiting a decision from the Air Force Court of Criminal Appeals.

⁴³⁴ To verify this assessment, the author contacted several forensic psychologists he has worked with and cross-examined over the years. They each agreed that research on victim behavior and false allegations is flawed. One stated, "this [problem] is what I have been saying for 25 years." One psychologist, however, noted it would be political suicide to publicly speak out against the data in this current environment. Consequently, the author has withheld the names of those he consulted in order to protect them from any political consequences.

studies.⁴³⁵ Absent improved validation and methodology, research data should be used very cautiously. Additionally, as long as the political movement discourages dissent and rewards weak research, then the market will continue to incentivize researchers to stay the course. We should demand more reliable research to inform our policy.

H. SUMMARY

Policy is being driven by the myth that false allegations are exceedingly rare. This paper reviewed the research on false allegations, the diverging definitions of what constitutes a false allegation, and the flaws in surveys used to conduct victim research. The reasons for false allegations include providing a cover story for a negative situation, revenge or retribution for a perceived harm, a desire to gain sympathy or attention, and extortion. This section established that researchers have used exceptionally strict criteria for classifying an allegation as false and ignored the substantial percentage of cases where: an innocent person is accused of a crime when there was no crime, where the evidence demonstrates an allegation is probably false, and where the evidence demonstrates the allegation is more likely false than true. Through intellectual dishonesty, researchers have asserted all such allegations are true despite the evidence. They have advocated erring on the side of alleged victims and thereby conflated principles of treatment with the standards of justice. Moreover, they have relied on circles of self-validation whereby they presume allegations are true, draw conclusions about those cases that include significant numbers of false victims, and use those unreliable conclusions to bolster their belief that all cases should be treated as true. Researchers have also entirely failed to validate their data pools or provide any meaningful scrutiny to their samples to weed out false victims and they commonly fail to even acknowledge the limitations in their research. Further, they often misunderstand the nuances of the law in analyzing evidence, which skews the reliability of their conclusions. In fact, the rate of false allegations is at least 8-10 percent and as many as 40 percent of allegations may be more likely false than not. Even using a conservative rate, there were statistically more provably false allegations in the DOD in FY 2014 than there were provably true sexual assaults over the same period.

⁴³⁵ Presumably, researchers have not done so because it is not as easy to track validated victims as it is to use self-reported victims from rape counseling centers and other such facilities. This is a poor reason for accepting unreliable data over reliable data in scientific research. Moreover, the studies noted above in Part III.C. and III.G. are all fairly small sample sizes. If there were over 359 convictions in FY2014 for sexual assault in the military, then there is a larger pool of validated victims each year in the military than most studies use for their non-validated data pool. See 2014 SAPR REPORT, *supra* note 215, at Appendix A, 27 (indicating there were 359 convictions in FY 2014). Victims could easily be contacted about participating in a study through special victims counsel or as part of their feedback surveys on victims counsel. Perhaps more importantly, researchers appear to believe too many victims would be excluded by using only validated victims. See, e.g., KATZ, *supra* note 247. The primary problem with that position is there is no evidence demonstrating that using validated victims would disproportionately represent the victims who do not report their crimes or whose cases did not contain sufficient evidence to support a conviction. Further, using a non-validated data pool necessarily includes a significant percentage of false victims that will substantially skew the results and render most analyses unreliable. See *supra* Part III.C.

IV. SPECIFIC CONCERNS & RECOMMENDATIONS

Having already discussed why we should be considering the wrongly accused and why we have, thus far, ignored him, we turn our attention now to what we need to do about it. The first portion of this section outlines the results of a survey of Air Force trial judges and their views on how SAPR training has affected the judicial process. The survey results demonstrate change is warranted, particularly in SAPR training. The rest of this section consists of 25 recommendations for change broken out into DOD-specific, justice-specific, and training-specific proposals. Each of the recommendations are explained, following the general pattern of identifying what needs to be changed, why it needs to be changed, and what the change should be. In a nutshell, changes are needed at all levels to restore the balance and to protect the wrongly accused, not just alleged victims. Getting the right result must be our goal and protecting the wrongly accused must be a specific component of that policy. Current policy, however, does not even discuss the wrongly accused let alone endeavor to protect him or her. We need to focus far more on prevention than we currently are doing and we need to change our prevention mindset.⁴³⁶ Additionally, we need to correct our incorrect training and speak the truth, including the truth that false allegations are a concern and the wrongly accused matter.

A. JUDGE SURVEYS / RESULTS

Rather than discuss the impact of SAPR training on trials through anecdotes or personal analysis, trial judges were polled for their independent and neutral views on the topic. Below is a description of the survey methodology and subsequent results of his survey.

1. *Methodology*

The author prepared a single-page questionnaire, front and back, and forwarded it to the Chief Trial Judge of the Air Force Trial Judiciary. He forwarded the survey to the trial judges and then provided the completed questionnaires to me by email. The survey was composed primarily of yes or no questions related to how SAPR training affected instructions and voir dire. There was also a background section that gauged how much experience each judge had with sexual assault cases thus far, whether the experience was judge alone cases or jury trials, and it included a request for each judge to provide initials or some type of pseudonym to ensure there were no duplicates. By forwarding their responses to the Chief Trial Judge, the only identification for judges was the pseudonym they chose for themselves.

The instruction questions asked each judge if he or she provides a jury with specific instructions about SAPR training. If so, the judges were asked what triggers that instruction, at what portions of trial do they provide the instruction, and they were asked to provide a copy of the instruction they use to compare and contrast it with the instructions used by other judges.

⁴³⁶ To be clear, SAPR has focused far more on response than on preventing sexual assaults over the past few years. Notions like, “believe the victim,” “don’t question the victim,” do not blame the victim, creation of special victims counsel, providing for restricted reporting, and most of the other developments made in the last few years actually go towards responding to a sexual assault far more than to preventing one in the first instance.

The voir dire section asked if SAPR training has caused judges to be more liberal than normal in excusing jurors, whether they are seeing more busted quorums today than four or more years ago and if so, whether the busted quorums are occurring primarily in sexual assault cases.⁴³⁷ The next question asked “are there areas of SAPR training that particularly concern you, in terms of ensuring a fair panel, that you are more likely to dig into during individual voir dire or more likely to consider as a basis for excusal if the member recalls training specifics?” The question included examples such as: false reporting statistics, believe the victim theme, admonishment not to blame the victim, incorrect law, offenders being characterized as serial rapists, and there is no such things as miscommunication. There was also an option for judges to identify other topics of concern, to provide clarification of concerns, or to provide additional thoughts in voir dire. The last section was a catchall question, “Aside from what has already been asked, are there any other challenges you confront in ensuring a fair trial as a result of SAPR training and the heightened emphasis on SAPR over the past few years?”

There are 19 trial judges in the Air Force plus the Chief Trial Judge, making 20 judges in total. Two trial judges had not yet presided over a sexual assault case so they were not asked by the Chief Trial judge to fill out a survey. The remaining judges (18) all completed the survey.

2. Results

Of the 18 judges, 15 indicated they provide special instructions regarding SAPR training. Of the three judges that did not provide special instructions, all of them have presided over two or less sexual assault trials. Thus, every judge with more than two sexual assault trials provides special instructions on SAPR training. Thirteen of the 18 judges provide the instruction *sua sponte*, i.e., on their own accord and without a specific request for the instruction; four provide it only upon request from the prosecution or defense. Two of the three judges that do not provide special instructions, therefore, were amenable to doing so upon request.

More than half of the judges provided a copy of the instruction they use. Many others simply indicated they use the same instruction used by other judges. There are three main variations of SAPR instructions, the relevant portions of which are:

Variation 1. With regard to sexual assault training and briefings you may have received, you are instructed that the verdict you will be asked to make in this case is to be your own independent decision based only on the evidence and matters properly before you in this case, and applying only the instructions I provide you. What you may have heard in sexual assault training, what may have happened in other cases, or any current policy issues in the Air Force are to have no bearing on your decisions.... You are simply expected to be fair to both sides...and not be

⁴³⁷ Quorum refers to the minimum number of jurors to have a trial. BLACK’S LAW DICTIONARY (9th ed. 2009). Quorum can be busted in two ways. The most common way is for there to be so many excusals of jurors that the number of acceptable jurors falls short of the minimum required for the court-martial. The other way to bust quorum is when an enlisted defendant elects to be tried by enlisted members and the number of enlisted members left after voir dire falls below quorum. See *infra* Part IV.C. (Recommendation 13; discussing the minimum numbers for special and general courts-martial as well as the election for enlisted members).

influenced by any outside factors -- to include conversations, training, briefings, press reports, etc.

Variation 2. Regardless of what you might have heard stated by Congress, the Commander-in-Chief, the chain of command, or anyone else, would each of you agree that the Accused is legally innocent of any wrongdoing until the government proves his guilt by competent evidence beyond a reasonable doubt?

I hereby instruct you that you are not to consider information from outside sources, to include the comments of public officials military and civilian, and to include sexual assault briefings, or other such training. But you are to decide this case based solely upon the evidence properly introduced in Court and upon the instructions I will give you regarding the law. Can you follow this instruction both with regard to the findings portion of the trial and sentencing should that become necessary?

Variation 3. You may have attended sexual assault prevention or other training on sexual assault in the military including a “denim day.” While such training has been determined to be necessary to good order and discipline, the information contained in such training, in particular any legal statements, “victim or perpetrator behavior information,” or statistical information, has no place in this Court-Martial. For the same reasons just noted [about each juror’s higher duty to the Constitution] it is your duty to not permit external influences into your decisional processes. To the extent matters of law were discussed in such training, you must disregard such statements. The only correct statements of the law are the instructions provided to you during this trial.

With respect to voir dire, 17 out of 18 judges indicated there are areas in SAPR training with which they are concerned. Seven of those judges who were concerned with SAPR training did not identify what specifically concerned them. Of the remaining 10 judges who expressed specific concerns, they were most concerned with incorrect statements of the law (10/10), false reporting statistics (8/10), training to “believe the victim” (8/10), admonishments to not blame the victim (5/10), references to perpetrators being serial offenders (5/10), and to training that there are no miscommunications (4/10). Seven judges agreed they are seeing more busted quorums today than just four or more years ago.⁴³⁸

Perhaps most enlightening are the specific responses provided by some of the judges. The single most common response, noted by almost half of the judges is that members are tired of the training and do not appear to be paying attention. A few of the specific responses related to training are:

⁴³⁸ Most general courts-martial begin with about 12 jurors. Through challenges for cause and peremptory challenges, the starting jury is often reduced substantially. If the number of jurors falls below minimum requirements, then voir dire begins again with another group of jurors, added to the original remaining jurors. The process can continue multiple times until enough jurors survive voir dire to constitute a quorum.

My observations are that members are more cynical of Art 120 cases because of the SAPR training, in part, because they seem to know intuitively that some of the training is inaccurate and/or flawed. This may also be the reason why the members don't seem to be paying attention to the SAPR briefings anymore.

Those that do remember any SAPR training generally either misremember what was said, or what they were told and accurately remember is inconsistent with the law (such as definitions, standards, etc.).

The court members do not need repetitive SAPR training; for most training, they are not the target audience. The training is getting old, and is fixing a problem they rarely see. They don't think the AF is doing a bad job dealing with sexual assaults, and they don't see it as a special military problem that needs so very much attention; every community faces it, especially colleges. The panel members that remain after voir dire may be those less likely to believe or internalize what they learned in SAPR training, and therefore can be perceived as more defense-friendly.

Members do not appear to be paying attention to the training...I've also noticed that what people are being taught, or what they may be internalizing from the training, differs greatly. My guess is that efforts to conduct more group discussion have contributed to differing responses from group leaders, which may in turn not fully or accurately articulate the teaching points.

False reporting stats arguably turn the burden of proof on its head...and recollection of the figures always results in excusal if requested. Further, the "any alcohol means no consent," which has been mentioned by at least one member in all [10] of my [Article] 120 cases, requires strong language to overcome the instructions of many high-ranking officers.

One judge noted that members appear to remember more from the mass briefings by commanders than they do from group breakout sessions. The same judge noted that while the "one beer negates consent" does not appear in any of training materials, a juror recently indicated it was briefed in their breakout session. Additionally, a few judges lamented about mass training right before sexual assault trials, which has caused significant challenges with seating a jury. One judge recommended excusing jurors, who are scheduled to sit on upcoming sexual assault courts, from any such training within 30 days of a court, perhaps making up the training after the trial has concluded. Lastly one judge remarked:

From my observations it is law enforcement, commanders, and legal offices who don't press hard enough or critically evaluate the evidence. In a couple of cases, it appeared to me that that they were reluctant to make the decision not to bring a weak case to trial.

In summary, judges are overwhelmingly concerned with SAPR training negatively impacting a fair trial. Every judge with more than two sexual assault cases instructs members to

disregard all SAPR training and statements by leaders on sexual assault; members who cannot do so will not sit on a jury. As a result, it is increasingly difficult to seat the minimum number of jurors in a trial, especially following a mass training day. Those who do not internalize or are not paying attention to SAPR training are the ones most likely to sit on a jury. Some believe this creates more defense friendly panels, which is precisely what several prosecutors have been saying informally over the past few years. Those who remembered training were likely to either misremember what was said or accurately remember incorrect statements of the law. Further, members are saturated with the current training and group sessions are not effective in creating any uniform or lasting impressions.

B. DOD-LEVEL CHANGES

Recommendation 1: *Protecting the wrongly accused must be a specific goal in our policy; we must assess how changes impact our ability to protect the innocent, not just how they help alleged victims.*

There have been numerous changes in the military justice process since 2006. Few, if any, changes have improved the ability of the military justice system to protect the innocent from wrongful accusations or convictions; most changes have the effect, whether intended or not, of relieving burdens on the prosecution.⁴³⁹ The UCMJ, however, was designed to balance the rights of individuals with the needs of the military, and that balance has been lost.

One of the key documents in the development of the UCMJ was the Investigations of the National War Effort in 1946, conducted by the House Committee on Military Affairs.⁴⁴⁰ When Congress passed the UCMJ in 1950, there were questions of whether the Bill of Rights applied to members of the Armed Services.⁴⁴¹ Congress believed military members should still have comparable rights but recognized there was a need to balance those rights with the needs of the military:

The pressure of command on the processes of military justice. In dealing with this phase of military justice we touch one of its most delicate and controversial aspects. While giving attention to the responsibility of the Army in connection with the “basic American rights” of the individual...it would be unfair if recognition is not given at the same time to the responsibility of the Army for order, discipline, and military effectiveness. In a particular situation there may

⁴³⁹ See, e.g., *infra* Parts IV.B (Recommendations 10-11)(discussing administrative changes that have incentivized false accusations), IV.C (Recommendations 14-15)(discussing changes in pretrial hearings that have substantially reduced the primary mechanism for exposing false allegations), and IV.D (Recommendations 21, 22, 24)(discussing training practices that have contradicted legal principles and taught incorrect laws to military members).

⁴⁴⁰ Investigations of the National War Effort, H. Res. 20, 79th Cong., 2d Sess. (1946), available at http://www.loc.gov/r/frd/Military_Law/investigations.html (last visited Apr. 11, 2015). This report was one of the key documents in the Elston Act of 1948, which was a precursor to the UCMJ. See *The Elston Act (1948)*, LIBRARY OF CONGRESS, http://www.loc.gov/r/frd/Military_Law/Elston_act.html.

⁴⁴¹ *United States v. Mizgala*, 61 M.J. 122, 130 (C.A.A.F. 2005) (Crawford, J. dissenting)(noting that Congress passed Articles 10, 27, 31, 44, 46, and 63 because Congress was not certain the Bill of Rights applied to the military).

sometimes seem to be a conflict between those two necessary emphases, yet in a broad way it ought not to be impossible to reconcile justice to the individual citizen serving in the Army with the actual needs of the service.⁴⁴²

In reviewing how military justice had been conducted, the Committee found several causes for concern. Article 32 hearings, for example, were supposed to ensure thorough pretrial investigations for the “purpose of protecting soldiers from unwarranted charges.”⁴⁴³ The Committee found numerous weaknesses and abuses in how these hearings were conducted and they recommended changes to “make it effective for its original purpose.”⁴⁴⁴ Many of those changes lasted for more than 60 years until Congress recently changed the hearing entirely. Article 32 is no longer a thorough investigation to protect an accused from unwarranted charges, but rather it is now a probable cause hearing with many of the previous protections stripped away.⁴⁴⁵

One of the reasons protections were needed is because of the command structure. “What should be a system of impartial justice is tied in with the chain of command – from the investigating officer, the trial judge advocate, the defense counsel, and the members of a court, who may all feel the heavy hand of their commanding officer upon them, up to the Judge Advocate General who reports to the General Staff.”⁴⁴⁶ Even though the presumption of innocence was explicitly part of the manual more than 60 years ago, the reverse was often the case because of the heavy hand of command in the process.⁴⁴⁷ The concern about command involvement triggered several changes to military justice, codified in first UCMJ, such as the prohibition against unlawful command influence.⁴⁴⁸

Sexual assault charges were an especially tragic problem even at the birth of the UCMJ. At that time rape carried a possible death sentence.⁴⁴⁹ The severity of the sentence was apparently intended “to coerce soldiers into good behavior and to increase the respect for our forces in enemy and liberated countries.”⁴⁵⁰ Instead, it became regular practice for foreigners to bring a rape claim to extort money from Americans and it was “believed that *numerous* convictions of innocent soldiers took place because courts too amiably accepted dubious identifications in the interest of discipline in general or in maintaining the good name of the Army among liberated or conquered people.”⁴⁵¹ Tragically, there were many rape cases, particularly in Europe, where death sentences were handed out and not commuted; meaning innocent soldiers were sentenced to death due to insufficient protections.⁴⁵²

⁴⁴² H. Res. 20, *supra* note 440, at 33.

⁴⁴³ *Id.* at 18.

⁴⁴⁴ *Id.*

⁴⁴⁵ National Defense Authorization Act for Fiscal Year 2014 (NDAA 2014), Pub. L. No. 113-66, §1702, 127 Stat 672, 953-57; 10 U.S.C. § 832 (2015).

⁴⁴⁶ H. Res. 20, *supra* note 440, at 12.

⁴⁴⁷ *Id.* at 20. Defense counsel are no longer part of the command chain and neither are judges, however, the rest of the individuals – from the hearing officer to judge advocates and jurors – are still tied to the command chain.

⁴⁴⁸ 10 U.S.C. § 837 (2015).

⁴⁴⁹ H. Res. 20, *supra* note 440, at 40-41.

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.* at 21 (emphasis in original).

⁴⁵² *Id.* at 40.

A famous example of the flaws in protecting the innocent is the story of Second Lieutenant (2LT) Sidney Shapiro.⁴⁵³ A year after completing law school, and in his first year in the Army, he was tasked to serve as defense counsel for a soldier charged with assault with intent to rape.⁴⁵⁴ Convinced his client was innocent and the identification was wrong, he resorted to an unconventional means of proving his case; he substituted the accused in the case with a soldier who had no connection with the case. The imposter was arraigned and then the prosecutrix and two Government witnesses positively identified this imposter under oath as the one who purportedly committed the crime. When the prosecution finished their case, 2LT Shapiro informed the Court of his strategy. A mistrial was declared. When the second trial began, with the true defendant in his proper place, the same witnesses again swore under oath that this person was the one who committed the crime and the accused was convicted and sentenced to five years in jail.⁴⁵⁵ 2LT Shapiro was subsequently charged under the general article, after a 1-day investigation, for wrongfully and willfully effecting a delay and obstructing the orderly administration of justice. The report of investigation was provided to him at 11 a.m., charges were served on him at 12:40 p.m., and trial began on the same day at 2 p.m. Within five hours, “he was charged, arraigned, tried, convicted, and sentenced to a dishonorable dismissal from the service.”⁴⁵⁶

Although leadership did not regularly abuse its power, the Committee observed a need for greater protections. The Committee determined that Congress and the Department of Defense bore the responsibility to ensure “military justice be justice indeed” and that it “conform as closely as possible to the standards of individual rights which are established as part of our civil heritage in a democratic state.”⁴⁵⁷ The responsibility was an enduring one, noted the committee, in that “the rights of citizens in our future forces will have to be protected by a watchful Congress or they may not be protected.”⁴⁵⁸ All of the changes that have been made since 2006 are predominately stripping away the protections of the wrongly accused to improve the process for alleged victims.⁴⁵⁹ Congress and the DOD must step back and re-balance the system. Presently, none of the strategic documents even discuss protecting the wrongly accused; there is no reference whatsoever to getting the result right, rather only serving the alleged victim. This must change.⁴⁶⁰

⁴⁵³ *Id.* at 21-23.

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.* He subsequently was drafted, served as an enlisted man and was honorably discharged. *Id.*

⁴⁵⁷ *Id.* at 1.

⁴⁵⁸ *Id.* at 2.

⁴⁵⁹ See, e.g., NDAA 2014, *supra* note 445, §§ 1701-53; Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (NDAA 2015), Pub. L. No. 113-291, §§ 531-47, 128 Stat. 3292.

⁴⁶⁰ See also, 2014 SAPR REPORT, *supra* note 215, at Annex 4, http://sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_Annex_4_OGC.pdf (last visited Mar. 23, 2015) (where the DOD Office of the General Counsel cautions that “care must be taken when reforming the military justice system to ensure that the reforms are balanced and promote a fair justice system for everyone with a stake in any particular case’s outcome,” and quoting the Response Systems Panel in support of a balanced approach).

Recommendation 2: Include defense experience in any panels of review.

There have been multiple panels established to review military justice or sexual assault matters, for example, the Response Systems Panel (RSP) and the Judicial Proceedings Panel (JPP).⁴⁶¹ None of these panels appear to include any defense experience. They include career prosecutors and victim advocates but no one with meaningful defense experience.⁴⁶² Perceptually, the panel composition suffers from the same defect as our policy and training: it fails to recognize our duty to protect the wrongly accused. While the panels have certainly been open to hearing all sides of the issues they have been tasked to review, there is no assured voice in deliberations to ensure the innocent are represented.

By way of example, consider the recent changes to Mil. R. Ev. 513, which governs the potential release of mental health records.⁴⁶³ From an alleged victim's standpoint, it is an invasion of privacy to allow the prosecution, defense, or a judge to review them. From a judge's perspective, it undoubtedly looks like mental health records are rarely used at trial. From a prosecutor's perspective, it is a pain to have to collect them and deal with them from the discovery standpoint when they are rarely admissible or helpful to the prosecution's case and they appear to be rarely admitted by defense counsel. If those are the only perspectives in the deliberation room, it is easy to see how Mil. R. Ev. 513 would be ripe for restriction.

With defense experience, it would be clear that mental health records are valuable from time to time to ensure justice. Consider some of the wrongful convictions previously discussed; now and then mental health records disclose an individual with delusional tendencies and on medication that significantly affects memory or perceptions.⁴⁶⁴ In a sexual assault case in Europe in 2013, defense counsel received the alleged victim's mental health records just before

⁴⁶¹ There is also the Military Justice Review Group (MJRG) but it is an internal Department of Defense review and not subject to the transparency of the JPP or RSP reviews. While the committee chair and two senior advisors for the MJRG have been announced, the remaining members have not been identified publicly. *DOD Announces Comprehensive Review of Military Justice System*, DOD NEWS RELEASE, Apr. 15, 2014, <http://www.defense.gov/Releases/Release.aspx?ReleaseID=16642> (last visited Mar. 21, 2015).

⁴⁶² There are five members of the JPP. See *Biographies*, JUDICIAL PROCEEDINGS PANEL, <http://jpp.whs.mil/index.php/component/tags/tag/8-biography> (last visited Feb. 23, 2015). The bios indicate the Chairman was a Brooklyn District Attorney who "pioneered new strategies for the prosecution of rape cases" and has never served as a defense counsel; the second member served as a judge for 16 years, "spent more than two decades as a prosecutor" before that, and has never served as a defense counsel; the third member served as general counsel and as a professor but has no defense counsel experience; the fourth member is not an attorney and has not served as a defense counsel; and the fifth member is a "victim's attorney" at the Crime Victims Resource Center who previously worked in DOJ and helped develop the Crime Victim's Rights Act and has never served as a defense counsel. *Id.* Many of these members were also on the RSP. *About Panel Members*, RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL, <http://responsesystemspanel.whs.mil/index.php/home/about/panel>. Only one of the RSP members had any experience as a defense counsel, Vice Admiral (retired) James Houck, but that experience was early in his career, decades ago, and is typically just for a few years. Considering the other members have spent decades as prosecutors and victim advocates, there is no balance on the panels to ensure the wrongly accused has a voice in the recommendations for change. *Id.* To be clear, this does not mean the panels have not endeavored to get all perspectives. The issue is one of perception and of balance in their deliberations; just because they hear from defense does not mean they consider it or it is not drowned out by prosecution- and victim-focused members.

⁴⁶³ NDAA 2015, *supra* note 459, at § 536.

⁴⁶⁴ See, e.g., *supra* Part II.C.5-6.

opening statements and they disclosed the alleged victim had malingering tendencies and monetary motivations; she desperately wanted a conviction so she could claim veteran's benefits after her anticipated discharge and avoid going back to her birthplace.⁴⁶⁵ One of the prosecution's favorite questions is: why would the alleged victim lie? These mental health records provided a very specific motivation in the alleged victim's own words and proved she had a history of fabrication. Further, mental health records help keep an alleged victim honest in her testimony about the events, any diagnosis she may have, and any purported victim impact. An alleged victim's description of how the event impacted her often grows as she gets closer to trial; having the records keeps her honest and permits a defense against exaggerated claims. Similarly, there are occasionally material inconsistencies in mental health records. The actual records need not be introduced in order to present those inconsistencies; simply showing them to the alleged victim in an interview allows her to admit she made those statements without even having to discuss where she made them or opening the door to the rest of the records.

With Mil. R. Ev. 513, the proper analysis should be to what extent does restricting the records balance the desires of an alleged victim with the need to protect the wrongly accused. An accused has the right to silence but if he chooses to speak, then he is not permitted to lie. By comparison, if an alleged victim seeks mental health, she should generally be permitted privacy in that interaction but if those meetings disclose a perversion of justice, why should that be protected? If she suffers from delusions, why should a jury be precluded from considering that in determining the right result? The previous version of Mil. R. Ev. 513 left the matter to the sound discretion of judges. To be sure, alleged victims would certainly prefer no one review their records. Allowing a judge to make the determination of relevance was a fairly minimal "invasion" to ensure getting it right remained the goal and alleged victims could not pervert justice behind treatment doors. Mental health records can be significant in resolving the accusation and they have now been substantially restricted without any meaningful consideration of the cost to justice.

The point of this recommendation is to demonstrate that defense experience adds a needed dimension and perspective to the right level of change. It is a recipe for disaster that victims' counsel and prosecutors have votes on panels with persuasive power for change but there is no defense perspective to ensure protection of the wrongly accused. Policy-makers have made a number of changes in recent years aimed at assisting alleged victims without any consideration how those changes truly impact our ability to get the right results. There needs to be a voice for the wrongly accused in considerations for change if we are to achieve the right balance of change.

⁴⁶⁵ The author has intentionally left details about the case vague to avoid identifying the actual alleged victim or the counsel involved. An anecdote is used here precisely because mental health records are typically not open to the public unless presented in open trial and, even then, they are rarely discussed in news reports out of respect to the witness or alleged victim. The specific details are also not necessary to make the particular point of this reference.

Recommendation 3: *Establish Conviction Integrity Units (CIU) in each service, a joint service CIU, and/or create a partnership with the Innocence Project to review and resolve potentially wrongful convictions*

Conviction Integrity Units are typically law enforcement entities that review cases of potentially wrongful convictions and often work with innocence projects to exonerate innocent persons erroneously convicted.⁴⁶⁶ They have become increasingly helpful in initiating or assisting with exonerations of the wrongly convicted. There are no such entities, CIUs or Innocence Projects, currently in the military or specifically serving military convicts.

All of the common causes for wrongful convictions in the civilian world – mistaken identification, perjury or false accusations, false confessions, false or misleading evidence, official misconduct, and inadequate legal defense – are not unique to civilian litigation; they are all present in courts-martial as well. There is no reason to believe the military is somehow immune from these causes for error. In fact, the military rate of wrongful convictions may even be higher than civilian courts because the military does not require unanimous verdicts, permits smaller juries, and not every military case even gets meaningful appellate review.⁴⁶⁷ Additionally, the changes in the last few years have been making the military more like civilian courts and without the balance initially placed into the UCMJ. Removing protections designed to weed out warrantless cases only increases the likelihood of false accusations making their way through the entire process.

We prosecute our own cases, so we have a responsibility to review our own cases. We should create CIUs that combine prosecutors, defense attorneys, and investigators together to review cases where convictions may have wrongfully occurred. Reviews should be conducted upon request from the convicted person or his counsel, and based on informed research, where we specifically review cases that used science that has since been debunked or forensics that has since been called into question. This could be done in each service or through a joint office. Any offices created should partner with civilian organizations to learn from their experiences.

⁴⁶⁶ See *supra* note 30 (discussing CIUs and how integral they have been in recent years to exonerating wrongly convicted individuals).

⁴⁶⁷ Many defense counsel can point to at least one case where they believe the jury or judge got it wrong. The author has had two such sexual assault cases. In both cases, experts who regularly work for both the prosecution and defense as well as in military and civilian trials, also believed they were miscarriages of justice. One of the cases did not qualify for appellate review due to the low sentence. In this particular case, there was a legitimate issue that deserved appellate review. The most important piece of evidence was the accused's interview with investigators, wherein he answered some questions and then terminated the interview saying he was concerned that investigators would twist his words around. The prosecutor's theme for closing argument, where he spent 90 percent of his time talking about the accused's interview, was "what about consent is so difficult to explain?" The problem is that this argument effectively encouraged jurors to use the accused's lawful refusal to answer questions as an indication of guilt contrary to clear law. The accused was sentenced to only a reduction to E-1 and six months of confinement. He is now a registered sex offender with a material and legitimate appellate issue and yet he did not get appellate review. He asked for clemency but the convening authority was then-Lieutenant General Craig Franklin who was already under significant scrutiny for just having reversed a controversial sexual assault conviction. The only other option for appeal was to request The Judge Advocate General (TJAG) to take action or certify the case for appellate review. 10 U.S.C. § 869(b). This was the same TJAG, however, who certified or granted exactly zero defense requests in his entire four years as TJAG.

Alternatively, we could contract with an Innocence Project to assist military members who may have been wrongfully convicted. We should not leave it entirely to civilians, however, as military affairs and processes are not easily understood by civilians let alone easily navigated. Outsourcing also creates challenges in terms of retrieving access to needed resources, evidence, and records.

Recommendation 4: *Separate treatment policy from justice policy.*

In Sexual Assault Prevention and Response, both treatment and justice are post-event concepts that fall under the “response” prong. Neither training nor policy, however, draws a clear distinction between the conflicting principles of treatment and justice.⁴⁶⁸ DOD Directives mandate that the SAPR program “*shall...focus on the victim and on doing what is necessary and appropriate to support victim recovery.*”⁴⁶⁹ There is no discussion or even consideration that an alleged victim may not be an actual victim; everyone claiming to be a victim is a victim under this policy.⁴⁷⁰ This concept is reinforced by training that directs servicemembers to “start by believing the victim” and that the victim is “never to blame.”⁴⁷¹ The presumption of a victim is at complete odds with the constitutional presumption of innocence. In a treatment context, this is understandable. The DOD SAPR program, however, encompasses five lines-of-effort, two of which serve justice functions: investigation and accountability.⁴⁷² In other words, DOD policy starts with the presumption that every alleged victim is an actual victim and endeavors to support those victims through investigations aimed at ensuring “perpetrators are held accountable.”⁴⁷³ The starting presumption is incompatible with the constitutional principles we are sworn to uphold. Investigations are supposed to find the truth and begin from the presumption of innocence, not guilt. Further, accountability is supposed to be about getting it right; holding those accountable that are in fact accountable. The current construct does not account for the presumption of innocence, the fact that accusations may not be true, or even acknowledge our responsibility to protect the innocent because policy is singularly focused on one-side. That must change.

A separate but related SAPR principle is treating everyone with dignity and respect. If everyone is supposed to be treated with dignity and respect, that should include both alleged victims and alleged offenders; they should both be treated the same, cared for the same, and not

⁴⁶⁸ See *supra* Part III.F.

⁴⁶⁹ Sexual Assault Prevention and Response (SAPR) Program, Department of Defense Directive (DoDD) 6495.01 (Jan. 23, 2012, Incorporating Change 1, Apr. 30, 2013), at 4.c., available at http://sapr.mil/public/docs/instructions/DoDI_649501_20130430.pdf (last visited 23 Mar. 2015).

⁴⁷⁰ The definition of “victim” is “a person who asserts direct physical, emotional, or pecuniary harm as a result of the commission of a sexual assault.” *Id.* at 18 (emphasis added). The mere assertion you are a victim means that you are a victim according to DOD.

⁴⁷¹ See *supra* Part IV.A (discussing the trial judge survey results); *infra* Part IV.D. (Recommendation 21).

⁴⁷² *Sexual Assault Prevention and Response Strategic Plan*, DEPARTMENT OF DEFENSE, Apr. 30, 2014, available at http://sapr.mil/public/docs/reports/SecDef_SAPR_Memo_Strategy_Atch_06052013.pdf (last visited Mar. 23, 2015); 2014-1016 Sexual Assault Prevention Strategy, *Department of Defense*, Apr. 30, 2014, available at http://sapr.mil/public/docs/prevention/DoD_SAPR_Prevention_Strategy_2014-2016.pdf (last visited Mar. 23, 2015).

⁴⁷³ *Id.*

unduly burdened in the resolution of the accusation. DOD policy on sexual assaults, however, focuses exclusively on the alleged victim. Separating the principles of treatment from principles of justice makes it easier to ensure alleged victims and alleged offenders are both treated properly at all stages and consistent with the appropriate presumptions.

If we are going to demand dignity and respect for all, ensure support for victims, protect the wrongly accused, and adhere to the presumption of innocence, we need to clearly distinguish principles of treatment from principles of justice in our policy. Only then can we have a clear and consistent approach that balances our dual responsibilities.

Recommendation 5: *Allow alleged victims to choose restricted/unrestricted regardless of how the first report is made and especially if someone other than the victim makes the first report.*

Under the current restricted report structure, a number of alleged victims who wanted nothing to do with the judicial process, including the investigation of the alleged sexual assault, have been pressured into it. In the typical case, the alleged victim tells a friend or colleague about the incident and that friend or colleague generates the report either directly or through a threat, i.e., “you [the alleged victim] report it or I will.” The justice system is not served well by an alleged victim who is ambivalent or hostile to the justice process. Moreover, it undermines the goal of empowering an alleged victim and instead victimizes the witness.

The reality of an adversarial process is that it is not particularly comfortable for anyone who does not like conflict. Although the focus is on alleged victims, the process is quite awful for just about every witness, not because anyone is particularly disrespectful or mean but rather because of the very nature of an adversarial process with high stakes. To begin with, few people actually enjoy talking with investigators about an unexpected and private matter as serious as a sexual assault allegation; it can be a very uncomfortable process even when you are not the alleged victim or alleged offender. The process is also rarely convenient. Military witnesses can be made available at pretty much any time; personal schedules take a back seat to the logistical challenges of getting several people in one place at the same time. Because hearings can be a little unpredictable, witnesses often sit around for hours or even days⁴⁷⁴ unable to talk about the very event that is so disruptive on their personal life. For many witnesses, their friends are also involved. As witnesses are not permitted to discuss a pending investigation or ongoing proceeding, their social life suffers. For witnesses who know both the alleged victim and the alleged offender, they are involuntarily drawn in between and feel pressure to take sides. Many witnesses are also torn between the need to be as accurate about the event as possible, personal fears about whether they remember the event correctly given the seriousness of the accusations, and not knowing if their version helps or hurts people they care about. Simply put, a trial process is awful for pretty much anyone who does not enjoy conflict. This is not a feature of mistreatment as much as it is the nature of a formalized adversarial process with high stakes.

⁴⁷⁴ If a witness is potentially needed for sentencing, since we do not have a break between findings and sentencing in the military (for expediency purposes), a witness may wait to testify in findings and then have to wait around until a verdict is rendered in order to potentially testify in sentencing.

Given that a trial process can be loathsome for any witness, it is especially so for an alleged victim that did not choose to be part of the process. We have a restricted reporting option to empower alleged victims to have a voice in whether they are part of the process. Under current practice, however, many alleged victims still do not have a say if the first report is to someone other than a SARC or when someone other than the alleged victim initiates the report. This not only strips an alleged victim of a voice in how the report will be handled, but it may create victims where there are none.

In a trial in Germany in October 2013, every witness, including two investigators from the Air Force Office of Special Investigations, believed a woman could not consent after having any drink of alcohol, which is not the law. The alleged victim did not believe there was a sexual assault; she had blacked out before and believed this was just another case of her hooking up and not remembering it. Once she mentioned that to her new boyfriend, he pressured her to report it. Through the lengthy process that ensued, she found counselors and prosecutors trying to convince her she was a victim over and over again. She started to believe she was a victim only for the case to result in an acquittal. The evidence proved she not only had the capacity to consent but she did consent and she simply did not record that memory due to a black out; it was exactly as she first believed. She was made a victim and traumatized not from the incident, but by what happened after the mob mentality took control.

Treatment must be our primary concern for any report but, secondarily, we need alleged victims in the process who want to be in the process after being informed about what to expect. The process is never going to be easy, but informed decision-making only helps the entire process.⁴⁷⁵

Recommendation 6: *Initiate a review of criminal investigation policies and practices to ensure gender equality and balance between supporting victims and protecting the wrongly accused.*

There are problems in the way sexual assault investigations are currently being conducted. Below are anecdotes about gender inequality and skewed investigative practices.⁴⁷⁶ Achieving a “high competence in the investigation of sexual assault” is one of DOD’s specific lines of effort in SAPR and so is assessment of our progress. Because these anecdotes raise questions about the competence and progress of sexual assault investigations, DOD should initiate a review to ensure all investigating agencies are acting in accordance with constitutional and policy expectations.

⁴⁷⁵ In fact, one of prosecutors’ favorite arguments in sex cases is why would a victim endure such a challenging process if she was lying. The easier the process, the less compelling that argument is about why a jury should believe she is telling the truth and the easier it is for false allegations to end up in wrongful convictions.

⁴⁷⁶ The anecdotes were obtained by polling defense counsel about whether they are seeing any such cases, whether they have heard agents repeat the same policies, or whether they have heard otherwise in the course of their cases. Several responded with details about cases they were currently defending.

First, there are issues with gender disparity. By way of example, there are a couple of cases in the Air Force where a female reported she was sexually assaulted by virtue of being too intoxicated to consent but evidence demonstrated her alleged offender was actually more intoxicated than she was. When the alleged offender was interviewed and read his rights, he asked to make a sexual assault report on the grounds that he was more intoxicated, i.e., if there was a victim incapable of consenting, then OSI had the wrong one and needed to investigate the other side. OSI told him they do not take complaints of sexual assault and referred him to the Sexual Assault Response Coordinator. In another similar case, a male Airman went to OSI to report he was sexually assaulted when he was too drunk to remember anything. He was read his rights. When he went to the Special Victims Counsel, they sent him to the defense counsel's office. In another case, a civilian wife accused her military husband of engaging in sexual acts with her while she was asleep but she admitted to investigators in her interview that she would begin sexual acts with her husband when he was asleep to wake him up and entice him into sexual intercourse. She was not read her rights nor was she investigated. She subsequently enlisted in the Air Force. There are multiple stories like these in the Air Force. These stories are all from the last six months or so. It is doubtful only the Air Force is treating male alleged victims differently than female alleged victims.

Similarly, in a case in Europe at the end of 2013 and beginning of 2014, the alleged victim asserted she was incapacitated due to alcohol when the alleged offender engaged in sexual intercourse with her. During a pretrial hearing, the alleged victim testified under oath that, about 15 minutes before her sexual activity with the accused, she "woke up to [her female friend] kissing" her on her mouth. In other words, she testified to sexual contact⁴⁷⁷ while she was sleeping and while the prosecution asserted she was incapable of consenting due to alcohol. Despite having publicly testified under oath that her best friend committed a sexual assault on her while she was asleep or incapacitated due to alcohol, her best friend was not investigated at all. Simply put, an alleged victim told investigators and prosecutors that two people engaged in sexual activity with her on the same night and when she was purportedly incapable of consenting; the African-American male was going to a general court-martial and the white female was not even investigated.⁴⁷⁸

In multiple cases, defense counsel have identified investigators who were grossly unaware of the law they were investigating. One agent testified he believed a woman could not consent after having any alcohol because he learned that in SAPR training. His partner during the interview believed the same. In another case, the agent was completely unaware of the defense of mistake of fact or how intoxicated an individual must be to be incapable of consent.

⁴⁷⁷ See *supra* note 244 (explaining how a kiss may also constitute an sexual act in violation of Article 120, UCMJ).

⁴⁷⁸ The case did not go to court because the alleged victim declined to cooperate after the Article 32 hearing. That being said, there is no way a jury would have believed her beyond a reasonable doubt. Her version of events was starkly contradicted by even the most sober of witnesses, she had a compelling motivation to lie, and she had previously made a false allegation just a few years prior that was quite similar to this accusations and she amazingly professed no recollection of admitting the previous false allegation to police, her mother, and school officials. At the subsequent discharge board, without her participation and with rules similar to university hearings, the accused was nevertheless discharged. At the time of his discharge, the female friend was not investigated and it did not appear there would be any investigation of the alleged sexual assault asserted by the alleged victim and corroborated by her friend under oath (though without rights advisement).

When asked where he got his knowledge of the law he was investigating, he replied, “SAPR training like everyone else, except maybe lawyers.” That is, he learned from the same SAPR training judges overwhelmingly believe is incorrect on the law.

Investigative policy also appears to jeopardize the accuracy of investigations. Multiple investigators throughout the Air Force have acknowledged they are not permitted to “confront” or question an alleged victim’s account without getting approval from higher headquarters or regional offices. They are also not permitted to conduct a follow-up interview on an alleged victim without the same approval.⁴⁷⁹ More importantly, several agents have also acknowledged they are now trained to “corroborate the alleged victim.” That is, they are no longer interested in the truth or even protecting the wrongly accused from false accusations, rather they are supposed to build a case for alleged victims. This makes investigators appear quite biased before jurors. Whether this is a misunderstanding of certain agents, a local policy, or a broader OSI policy, it evinces a complete disregard for the presumption of innocence wherever it occurs. Under this policy, agents are not engaging in highly competent or accurate investigations but rather they are presuming guilt and trying to back it up with corroboration but only in sexual assault cases. How can they seek justice if they are not interested in all evidence, including that which contradicts the accusation? To make matters worse, the author contacted the Air Force Office of Special Investigations to look into this policy. He expressed concern about the policy and noted it would be helpful to know whether there was a valid but not readily apparent reason behind this policy, whether it was in fact official OSI policy, or whether it may be the result of well-intentioned but misguided local leadership. OSI was not willing to discuss policy as long as the author was looking to publish his research. Consequently, they did not provide any cooperation in this research project on any of the areas discussed. This is a bit curious considering DOD previously published a review of sexual assault investigations, including policy changes recommended by the Inspector General.⁴⁸⁰

Additionally, SAPR policy and training has caused some well-intentioned but misguided investigators to try and convince people they are victims when they are not by their own accounts.⁴⁸¹ Current practice is for investigators to scour an accused’s past relationships looking for any other cases of potential sexual assaults. By way of example, in one particular case they found a past girlfriend who said she would sometimes give in to having sex with the accused even when she did not want to because she felt guilty; she was his girlfriend, he asked for sex all the time, and she felt obligated to submit occasionally when she did not want to have sex. Recall the discussion on USC; this may qualify as “unwanted sexual contact” but she specifically said it was a consensual decision.⁴⁸² Nevertheless, OSI tried to convince her she was a victim, she was brave for coming forward, and she subsequently reported a sexual assault.

⁴⁷⁹ These policies appear to be grounded in research on victim behavior. *See supra* Part III.G.

⁴⁸⁰ Allie Bidwell, *DOD: Military Sexual Assault Investigations Are Inefficient*, US NEWS & WORLD REPORT, Jul. 16, 2013, <http://www.usnews.com/news/newsgram/articles/2013/07/16/dod-military-sexual-assault-investigations-are-inefficient> (last visited Mar. 22, 2015).

⁴⁸¹ With respect to the military at large, SAPR training has significantly misrepresented the law and tasked commanders with leading that charge. The training principles questioned in this article have misled members to believe an incident is sexual assault when it is not a sexual assault under the law. We have compounded the problem by, for example, admonishing members not to question a rape allegation.

⁴⁸² *See supra* Part III.A.2.

In summary, there are valid questions about whether the military investigative services are acting appropriately in sexual assault investigations. It is time for another review of how sexual assault investigations are being conducted to ensure male and female reports are treated equally, investigators are in fact unbiased in their investigations, and that the goal is truth not merely choosing a particular side to corroborate.

Recommendation 7: *Establish defense investigators.*

Under the current construct, all of the investigators belong to the Government. Prosecutors have specially trained investigators to develop the case; defense attorneys have to investigate matters themselves or with the aid of their paralegals. It would be valuable to the justice process, to getting it right, to place some criminal investigators with the defense community. First, there is a need for defense investigators in cases, especially homicide and sexual assault cases. Witnesses and forensics are particularly important in these cases and criminal investigators are specially trained in these areas. Second, defense experience is especially valuable in professional development; it develops and enhances key skillsets for highly effective leaders. In litigation, the best senior prosecutors are those who have worked as defense counsel previously. The same could be true for investigators. Spending just a few years seeing the other side of justice would foster objectivity and provide investigators with tremendous experience to build upon. Establishing defense investigators would, therefore, improve the determination of truth while simultaneously growing investigators more skilled in understanding and catching bad guys.

Recommendation 8: *Stop referring to alcohol as a weapon; it misrepresents the law and the cases we have.*

In recent years, SAPR policy and training sometimes refer to alcohol as a weapon used to commit sexual assault. For example, the 2014-2016 Sexual Assault Prevention Strategy for the Department of Defense states, “while some sexual assaults are perpetrated by strangers in attacks that leave the victim visibly injured, most crimes are perpetrated between people who know each other, often facilitated by alcohol (weapon of choice) and limited to few visible injuries.”⁴⁸³ This is a statement repeated in training, most often when discussing the profile of an offender and the purported myths of an offender.

These statements misrepresent the law and facts of the cases we have. There is nothing illegal about buying a drink for another person. There is nothing criminal about consuming a drink purchased by another person. What is a crime is “administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or similar substance and thereby substantially impairing the ability of that person to appraise or control conduct.”⁴⁸⁴ In other words, if she can consent and does consent, there is no alcoholic

⁴⁸³ 2014-2016 Sexual Assault Prevention Strategy, *supra* note 472, at 3.

⁴⁸⁴ 10 U.S.C. § 920.(a)(5) (2015).

weapon. If it is forced upon her or placed in her drink without her knowledge and she is rendered substantially incapable of consenting as a result, then it is a crime under the UCMJ. These are not the types of cases we have in the military. Since 2007, when this provision was added to the UCMJ, we have only charged this offense seven times in the Air Force and only once was anyone convicted.⁴⁸⁵ The vast majority of cases do not involve a military member forcing alcohol on a victim. On the contrary, they involve consensual drinking where the alcohol is often not even provided by the alleged offender. We need to stop mischaracterizing sexual assaults. We can handle the truth.

Recommendation 9: *Resist the fundamental attribution error; do not overreact to survey “perceptions”.*

The fundamental attribution error is the tendency to ignore the situational forces that shape people’s behavior.⁴⁸⁶ An example is when we watch shows like Supernanny. For many, we make a fundamental attribution error and conclude the children shown at the beginning of the show are bad and wonder how anyone is going to change them. In comes the Supernanny and magically it seems that the kids are groomed into well-behaving children. The truth is that the nanny did not change the kids, rather the nanny changed the situational factors that led to the poor behavior. When it comes to SAPR, we need to look beyond labels and surveys and see the situational forces at play if we are to make changes in the right places.

An example of where we make a fundamental attribution error is in interpreting surveys. One of DOD’s recurring concerns about alleged victims, based on surveys, is victim retaliation. According to the FY2012 Workplace and Gender Relations Survey, 62% of women who claimed to have experienced “unwanted sexual contact” *perceived* some form of retaliation as a result of reporting the situation.⁴⁸⁷ Of those women, 31% *perceived* only social retaliation, and 26% *perceived* a combination of professional, social, or administrative retaliation.⁴⁸⁸ RAND’s 2014 survey found 62% of women who claimed to experience a sexual assault *perceived* some form of retaliation; 53% *perceived* social retaliation, 32 % *perceived* professional retaliation, and 35% *perceived* administrative retaliation.⁴⁸⁹ In 2014, DOD also circulated a Survivor Experience Survey (SES) to obtain feedback from alleged victims who reported sexual assaults. Of those who responded to the survey, 59% of those who made unrestricted reports indicated they *perceived* social retaliation and 40% indicated they *perceived* professional retaliation since making their report.⁴⁹⁰ Examples of social retaliation, provided in the survey, included being ignored by coworkers and being blamed for the situation. Examples of professional retaliation

⁴⁸⁵ The military justice headquarters, JAJM, provided these statistics. It is not clear from the record whether the conviction involved alcohol or another drug, such as a date-rape drug, as the means of rendering the victim substantially incapable of consent. The record is on file with the author.

⁴⁸⁶ CHIP HEATH & DAN HEATH, SWITCH, HOW TO CHANGE THINGS WHEN CHANGE IS HARD, 180 (Broadway Books, 2010).

⁴⁸⁷ 2014 SAPR REPORT, *supra* note 215, at 116-17.

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.* The percentages add up to more than 62% because survey respondents were permitted to select multiple answers.

⁴⁹⁰ *Id.* at 118.

included loss of privileges and being transferred to a less favorable job.⁴⁹¹ DOD acknowledged there is no way to determine if the perceived behavior is in fact directly related to the reporting of a sexual assault but “these results indicate that even though the Department has taken specific action to assess and address this problem, more must be done to prevent retaliation.”⁴⁹²

DOD is unreasonably accepting perceptions as proof that commanders and colleagues are retaliating. This is an example of the fundamental attribution error because DOD is assuming bad actors rather than seeing the situational forces at play that account for the perception issue. First of all, as previously discussed, these surveys do not accurately measure whether there was actually a crime at all. Recall the previous discussion of the research on false allegations; there is a substantial percentage of alleged victims who are not likely victims at all: some percentage are knowingly false, some are unintentionally false (thinking one drink means they cannot consent), some do not actually constitute a crime, and many are more likely false than true based on objective evidence. Without validating any of the respondents were actual victims, DOD is interpreting perceptions of retaliation based on unverified perceptions of a crime. This is very important because there is no “retaliation” when commanders take action against a false accuser. Likewise, it is not truly “retaliation” if a false accuser suffers some social hostility for violating the core value of integrity. On the contrary, there *should* be social and professional repercussions for those who make false accusations. Without validation, DOD is erroneously asserting commanders and peers are acting inappropriately when they may very well be lawfully addressing those service members who have falsely accused others of serious offenses like sexual assault.

Second, DOD seems to presume retaliation is unique to the military environment and tied to the chain of command. On the contrary, the single greatest reason civilians do not report alleged sexual assaults, based on the same type of survey, is fear of reprisal.⁴⁹³ In civilian communities, when the alleged offender was involved in an intimate relationship with the alleged victim, which appears to be the most common type of sexual assault allegation in the military, 38% of alleged victims did not report the incident because of fear of reprisal or not wanting to get the offender in trouble.⁴⁹⁴ Additionally, the survey used for the civilian community only permitted respondents to pick the single greatest reason for not reporting.⁴⁹⁵ If they were allowed to pick multiple reasons for not reporting, as they were in the military survey, the civilian numbers would likely be higher and nearly the same.⁴⁹⁶ There is no chain of command in the civilian community. The fact that alleged victims in the military were concerned with retaliation at very similar rates as civilian alleged victims, indicates that retaliation perceptions are tied to situational factors other than the chain of command.

⁴⁹¹ *Id.*

⁴⁹² *Id.* at 117.

⁴⁹³ LYNN LANGTON ET AL., VICTIMIZATIONS NOT REPORTED TO POLICE, 2006-2010, 4-7 (Department of Justice, 2012). A close second reason was that the alleged victim dealt with the incident in another way or considered it a personal matter.

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.*

⁴⁹⁶ 2014 SAPR REPORT, *supra* note 215, at 116-17, indicating military members were permitted to select multiple reasons.

Third, retaliation is a crime in the military. If alleged victims believe they are being retaliated against, then there should be data to reflect that as truth, rather than relying on surveys. If such data was available, then it should have been included in the DOD report to the president as substantiation of retaliation concerns. Moreover, we should expect any victim who has counsel to be well informed on how to formally address concerns of retaliation. Surveys should not be the benchmark for assessing retaliation; substantiated claims of retaliation should be the basis for assessment. There is, however, no evidence of significant numbers of retaliation claims let alone substantiated claims. If we expect defense counsel to complain if an accused is being treated improperly, then we should expect the same from alleged victims and their counsel and not put too much emphasis in overly broad and unsubstantiated surveys.

Lastly, perceptions must be understood in context of situational factors. If a victim is experiencing trauma, a commander has an obligation to consider her stability and ability to perform her job the same as, for example, others who suffer post-traumatic stress from combat and may not be suited for regular duties. An alleged victim may feel like she is being punished when moved to a desk position but that does not mean there was any retaliation when she needs to be available for the investigation to move quicker, to be around for trial proceedings, and she may not be well-suited at the moment for a preferred but more mentally and physically demanding position. Alleged victims are in a similar but usually better situation than the accused. Most accused facing trial are pulled from their jobs and relegated to “base beautification duties,” whereby they pick up trash on base, or bay orderly duties where they clean the dorms until the investigation is resolved. The fact that nearly every accused feels like he is presumed guilty and being punished before trial does not mean commanders or peers are acting inappropriately or in retaliation. On the contrary, commanders have to take administrative actions that *seem* like punishment for alleged victims and alleged offenders but which are actually prudent decisions calculated to ensure mission success, reduce risk of failure, preserve good order and discipline, and enable a speedy resolution. Further, what may seem like social retaliation may actually be a consequence of the investigative process. Witnesses are not permitted to talk about the incident and understandably want to distance themselves from it to reduce tension in their lives. Many are also drawn into picking a side, the alleged victim or the alleged offender, because there is too much stress trying to deal with both simultaneously and it is difficult to remain friends with both without being perceived as disloyal by one or both. This is not unique to the military and it may not be unique to sexual assault offenses.

In summary, there are a number of reasons the survey data about *perceived* retaliation, or any other perceived concerns, may not reflect a problem at all as much as it reflects situational factors. We need to avoid attributing non-validated perceptions to bad commanders or bad military members and instead recognize the tensions these situations create. More importantly, we need to acknowledge the legitimate reasons alleged victims will perceive retaliation, just as innocent accused perceive presumptions of guilt from pre-trial administrative actions, but which do not actually constitute retaliation. Instead of chastising commanders for seemingly failing to create environments free from retaliation we need to trust those who we have chosen for command and for whom there are no substantiated retaliation investigations.

Recommendation 10: *Reconsider the reassignment of an accused, especially in training.*

In 2011, DOD initiated a process for alleged victims to request and receive an expedited transfer to another duty location.⁴⁹⁷ In 2014, Congress provided DOD with authorization to alternatively transfer anyone accused of a sexual assault “not as a punitive measure, but solely for the purpose of maintaining good order and discipline within the member's unit.”⁴⁹⁸ DOD sought the authorization as a means of reducing the potential contact between alleged victims and alleged offenders.⁴⁹⁹ Congress’ authorization does not require a commander to transfer an accused but in practice, the alleged victim decides if she or her alleged offender will be transferred. Although well-intentioned, this process poses problems that should be revisited.

First, transfer of an alleged offender in training status severely disrupts the presumed innocent servicemembers’ career. In many cases, career training only occurs at one location. If the alleged offender is transferred before completing the training, then he cannot progress in his career and will typically be forced to cross-train into another career field or face discharge. Prior to an adjudication of the matter, this can serve to fundamentally alter the life of those who are innocent and presumed so under the law. One day the accused is in a career field he enjoys and the next day he is forced to finish his remaining service in another career altogether because it is more convenient for the alleged victim. A transfer should be the exception, not the rule in these cases.

Additionally, transferring an alleged offender can be detrimental to good order and discipline for the accused and his support network. Recall the individual who described his experience of being falsely accused as mirroring the suicidal thoughts, inability to function, long-term fear and mistrust that his ex-girlfriend, who had been raped, experienced.⁵⁰⁰ Whereas she received all sorts of support, he was alone to handle his challenges. Being accused of a sexual assault is no picnic for an accused. He needs support and, just like many alleged victims, has built a support network around himself. Uprooting the alleged offender can severely disrupt his support network and cause issues for good order and discipline.

Lastly, where an alleged offender has already established an attorney-client relationship with local defense counsel, reassignment can hamper his preparation and confidence in the

⁴⁹⁷ Expedited Transfer of Military Service Members Who File Unrestricted Reports of Sexual Assault, Directive-Type Memorandum (DTM) 11-063 (Dec. 16, 2011, Incorporating Change 1, Jun. 6, 2012), <http://www.sapr.mil/public/docs/policy/DTM-11-063.pdf> (last visited Mar. 23, 2015). The process has been continued in Directive 6495.01, “Sexual Assault Prevention and Response (SAPR) Program,” Jan. 23, 2012, Incorporating Change 1, Apr. 30, 2013, available at http://sapr.mil/public/docs/instructions/DoDI_649501_20130430.pdf, and in Sexual Assault Prevention and Response (SAPR) Program Procedures, DoD Instruction 6495.02 (Mar. 28, 2013), <http://www.sapr.mil/public/docs/directives/649502p.pdf>.

⁴⁹⁸ NDAA 2014, *supra* note 445, at § 1713.

⁴⁹⁹ Andrew Tilghman, *DoD to allow transfer, reassignment of troops accused of sexual assault*, ARMY TIMES, Aug. 15, 2013, <http://archive.armytimes.com/article/20130815/NEWS05/308150018/DoD-allow-transfer-reassignment-troops-accused-sexual-assault> (last visited Mar. 23, 2015).

⁵⁰⁰ See *supra* Part III.E.

system. Most people who seek representation, whether from legal assistance, defense counsel, or special victims' counsel, prefer face-to-face dialogue. While it is possible to engage counsel from a distance, the further away the individual is transferred the more problematic meaningful consultation can be. An alleged offender moved from Texas to Korea, for example, may suffer constructive severance of his defense counsel relationship. The issue here is that both an alleged victim and alleged offender deserve equal consideration; an alleged victim should not control the decision and commanders must exercise extreme caution before transferring an alleged offender over his objection.⁵⁰¹

We are the military, capable of conducting complex precision operations anywhere in the world and in multiple domains; surely we can manage to separate opposing parties in an adversarial process without severely jeopardizing their respective mental or physical health. Policy should reflect the balance between an alleged victim and alleged offender and make a transfer of an alleged offender permissible over his objection only in exceptional circumstances.

Recommendation 11: *Resist further incentivizing false accusers and balance out efforts aimed at increasing reporting.*

In an admirable effort to increase reports of sexual assaults, policy-makers have increased incentives to make false reports. Recall that one of the primary motivations for making a false allegation is to deflect feelings of shame or responsibility.⁵⁰² Facing a choice between accepting personal responsibility for feelings of guilt and blaming someone else for those feelings, it should not be surprising that many will prefer to deflect responsibility. As one author put it, “When you have a large, mysterious, and oppressive culture to blame for your dysfunction, it removes a great deal of psychological pressure. As a concept, rape culture also offers a highly useful mechanism for shooing away troublesome, sexually laden emotional issues – as well as any sense of responsibility – and sending them off into the wilderness.”⁵⁰³

The incentive to deflect responsibility was not our creation but we have improved upon it. By emphasizing that we should start by believing all victims and never questioning victims, we have created a shelter for those who have personal responsibility but would prefer to blame someone else. Beginning with the investigation, a false accuser no longer has to worry that they will be questioned about inconsistencies, contradictions, and illogical statements because investigators are not permitted to confront victims without higher approval,⁵⁰⁴ peers are admonished to not question victims, and commanders are under a microscope with how they handle allegations of sexual assaults.⁵⁰⁵ Commanders are not assessed on how they treat the

⁵⁰¹ In the Air Force, regulations do not indicate an alleged offender is even permitted to object to the transfer, let alone have his concerns considered, rather he is permitted consultation with a defense counsel prior to submitting his location preferences and documentation of any family members who may be enrolled in the Exceptional Family Member Program. Assignments, Air Force Instruction 36-2110 (Sep. 22, 2009, as modified by Air Force Guidance Memorandum 2014-01, Feb. 4, 2014), at A.26.4

⁵⁰² See *supra* Part III.D.1.

⁵⁰³ Wilhelm, *supra* note 220.

⁵⁰⁴ See *supra* Part IV.B. (Recommendation 6).

⁵⁰⁵ 2014 SAPR REPORT, *supra* note 215, at 21-22.

wrongly accused; on the contrary, they are incentivized to favor accusers over the presumed innocent because the accuser can sink the commander's career whereas a wrongly accused has no such power.⁵⁰⁶ Moreover, commanders and peers may be charged with retaliation against alleged victims if they respond unfavorably.⁵⁰⁷

The shelter for false accusers does not end with charges. Under recent amendments to Article 32, UCMJ, a false accuser can refuse to participate in pretrial hearings to determine if there is probable cause for a trial.⁵⁰⁸ The rules for depositions have also been changed making it nearly impossible for defense counsel to compel an interview prior to trial.⁵⁰⁹ A false accuser is also protected from having to answer legally relevant and admissible questions about her sexual behavior prior to trial,⁵¹⁰ and she is almost guaranteed her mental health records will not be disclosed even if she admitted her lie to mental health providers.⁵¹¹ In short, SAPR training and recent changes to military justice make it easier for false accusations to get through the system and to result in wrongful convictions.⁵¹²

Some might argue that being a victim is difficult, so much so that many do not report their victimizations. That is not the case for the false accusers, who have no real trauma to contend with, rather only the fear of being exposed or having to accept personal responsibility. In fact, false accusers often need to report in order to serve the purpose of the false accusation; there can be no revenge or deflection of responsibility or sympathy or attention if no one knows about the accusation.⁵¹³ Once the report is made, a false accuser only needs to worry about

⁵⁰⁶ *Id.* Commanders are evaluated now in part based on climate assessments, which poll members of their unit to analyze whether commanders are perceived as fostering or prohibiting sexual assault behavior. Nothing in the assessment measures the perception of commanders to protect the wrongly accused, rather it echoes the singularly one-sided perspective of SAPR policy to focus on alleged victims.

⁵⁰⁷ NDAA 2014, *supra* note 445, at § 1709; 127 Stat. at 961.

⁵⁰⁸ *Id.* at § 1702; 127 Stat. at 953-57; 10 U.S.C. § 832 (2015).

⁵⁰⁹ NDAA 2015, *supra* note 459, at § 532.

⁵¹⁰ See Zachary D. Spilman, *Service Secretaries issue implementation guidance for Article 32 preliminary hearings*, NIMJ BLOG-CAAFLOG, Feb. 27, 2015, <http://www.caaflog.com/2015/02/27/service-secretaries-issue-implementation-guidance-for-article-32-preliminary-hearings/> (last visited Apr. 4, 2015) (noting that in the absence of promulgated rules for the new Article 32 hearing, each of the military services have provided guidance eliminating the “constitutionally required” prong of Mil. R. Ev. 412 from such hearings, and providing links to the relevant documents for each service). To be clear, irrelevant material was always inadmissible at pretrial hearings. The constitutionally required exception is what permitted significant evidence for mistake of fact as to consent and certain motives to fabricate to come into trial. This exception, for example, is how defense is permitted to introduce the fact that the alleged victim had a boyfriend, was concerned about getting pregnant, and made the false allegation as a cover story for her infidelity. This type of evidence is particularly important at trial in exposing false accusers. Under the new rules, pretrial hearing officers and convening authorities would be left in the dark about such information.

⁵¹¹ NDAA 2015, *supra* note 459, at § 539.

⁵¹² See also, Megan McArdle, *How Many Rape Reports Are False?*, BloombergView, Sep. 19, 2014, <http://www.bloombergview.com/articles/2014-09-19/how-many-rape-reports-are-false> (last visited Apr. 11, 2015) (stating that feminists want society to treat “rape accusations are presumptively true, making it easier for victims to come forward. That’s understandable. But there’s a risk that this makes it easier for false accusations to get through the system, resulting in destroyed lives for men such as Brian Banks.”).

⁵¹³ Taylor, *supra* note 9. The risk is even more pronounced where the accusation is resolved short of trial. If you wanted to make a false accusation and minimize personal risk, you would probably be more likely to report the allegation to friends or university administrators than to police.

getting caught. Based on the way police and researchers have defined false allegations,⁵¹⁴ there are no ramifications for the false accuser unless she confesses; just stick by the story and you reap the benefits of being a victim without any corresponding risks. For those who do confess, charges are rare, as exemplified by the false accuser in the Hofstra case discussed previously.⁵¹⁵ When charges are pursued, the overwhelming majority of states treat it as a misdemeanor offense punishable by less than a year in jail.⁵¹⁶

Additionally, victimhood is being made a privileged status.⁵¹⁷ As one female commentator noted online:

[T]here is now a pervasive culture of victim worship. Someone who has been the victim of a crime, especially if that someone is female, is “brave” or “determined” or “a survivor.” Radio or talk shows often have a daily or weekly slot dedicated to some noble victim. So our culture turns these noble victims into minor celebrities, and of course, what young girl doesn’t want to be a celebrity?

Just look at that young girl carrying her mattress around campus.⁵¹⁸ Anyone seriously think that she’s not enjoying the attention? Victims are the new heroes, and being a hero / celebrity is extremely attractive and quite easy to achieve – just accuse someone of rape, go into damsel mode and enjoy the waves of sympathy and admiration.⁵¹⁹

⁵¹⁴ See *supra* Part III.B.

⁵¹⁵ See *supra* Part II.E.2

⁵¹⁶ See *State Penalties for False Reporting of a Crime*, NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN, undated, http://www.missingkids.com/en_US/archive/documents/FalseReporting.pdf (last visited Apr. 11, 2015). With respect to the military, victim advocates support inaction out of concern that charging false accusers *may* discourage further sexual assault reports. The logic is flawed. The liar and the legitimate victim are no more related than the wrongly accused and the rightfully convicted. The actual victim is not a liar; they are not the same. There is no logical reason to believe a real victim will actually change her mind and decide not to report because someone else who lied was punished for lying and there is no reliable research that supports this concern either. On the contrary, the liars harm actual victims. False reports only make people more skeptical of legitimate reports, more cautious of being duped by the cunning manipulators. Just as a few questionable cases of police brutality can sully the reputation of countless professionals in law enforcement, so too can liars set back the cause of victims everywhere. There is a harsh stigma associated with simply being accused of a sex crime but until there are ramifications for lying about these crimes, there is little disincentive for the liars to stop lying. Additionally, the failure to hold liars accountable encourages them to keep claiming the benefits of being a victim. The reasons serial accusers are permitted to victimize people over and over again is because they have never been held accountable. Punishing the false accuser not only deters the liar from doing it again but it arms future victims with evidence that this person has a history of making up serious accusations. The absence of punishment allows false accusers to get better at it until they succeed at punishing the innocent.

⁵¹⁷ George Will, *Colleges become the victims of progressivism*, WASHINGTON POST, Jun. 6, 2014, http://www.washingtonpost.com/opinions/george-will-college-become-the-victims-of-progressivism/2014/06/06/e90e73b4-eb50-11e3-9f5c-9075d5508f0a_story.html (last visited Apr. 4, 2015). See also, Cohen, *supra* note 220 (noting that George Will was removed from various newspapers for this opinion column).

⁵¹⁸ See Young, *supra* note 12 (presenting a compelling case that the mattress-toting art student may be a false accuser who has been made a minor celebrity and invited to the State of the Union address).

⁵¹⁹ See *20 attorneys send stunning letter to US Senators regarding due process handling of campus sexual assault allegations*, A VOICE FOR MEN, Oct. 2, 2014, comments section, commentator “Lana Voreskova” in response to “drewchadwick” six months ago, <http://www.avoicemen.com/feminism/government-tyranny/20-attorneys-send->

A noted psychologist characterized it as follows:

In claiming the status of victim and by assigning all blame to others, a person can achieve moral superiority while simultaneously disowning any responsibility for one's behavior and its outcome. The victims 'merely' seek justice and fairness. If they become violent, it is only as a last resort, in self-defense. The victim stance is a powerful one. The victim is always morally right, neither responsible nor accountable, and forever entitled to sympathy.⁵²⁰

By way of example, there were two trials in Europe in June 2014, where two Air Force officers engaged in sexual activity with a civilian female while on leave in a hotel room in Texas.⁵²¹ Police declined to prosecute and initially listed it as no crime. She contested their decision because it denied her counseling benefits. The police changed their classification so it was recorded as a crime and she obtained benefits; the change did not reflect a change in their opinion of the case and they continued to believe there was no crime and the local prosecutor still had no interest in taking the case. Both military officers were tried and both were acquitted in consecutive weeks. The first was fully acquitted by a jury. The following week the second officer was acquitted in about 45 minutes by a judge. The alleged victim was found during the second trial to have attempted to obstruct justice by instructing an exculpatory witness to hide in the alleged victim's room, to not answer her phone, and to not come to the courtroom to testify as a defense witness. The alleged victim had a history of ignoring court orders in Texas but ended up only being excused from the courtroom; despite her history and bullet-proof obstruction of justice, she did not receive so much as a reprimand. On the contrary, her story was implausible and unbelievable by judge and jury and yet she has been compensated for it. The military is currently contemplating financial restitution for victims. If enacted, false accusers would now have an additional incentive, a financial gain, for reporting a false accusation. Such a policy would logically make these types of cases more common.

Reporting a sexual assault has other benefits as well. The alleged victim is now permitted an expedited transfer.⁵²² Anecdotally, most victims appear to go to their base of preference, usually near their home of residence. The false victim, therefore, practically gets to pick which base she wants to be assigned to, which is a particularly attractive benefit for those in less desirable locations. The false victim gets a victim advocate and a special victim's counsel as well. Because of the intense push to believe victims and be sympathetic to their cause, alleged victims are also rarely disciplined for any misconduct from the alleged sexual assault, such as adultery or underage drinking or even their own sexual assaults on that evening, and they are shielded from subsequent transgressions as well. The alleged victim, for example, who subsequently performs poorly at work or repeatedly arrives late often receives little to no punishment. A commander who punishes such transgressions will be attacked as creating a

[stunning-letter-to-us-senators-regarding-due-process-in-handling-of-campus-sexual-assault-allegations/](#) (last visited Apr. 4, 2015).

⁵²⁰ Zur, *supra* note 218.

⁵²¹ The cases were *United States v. Stevens* and *United States v. Morris*, both of which resulted in full acquittals. Media was present but there was no news report on the details of either case.

⁵²² See *supra* note 497.

climate the permits sexual assaults, as retaliating against victims of sexual assault, or for being unsympathetic to the trauma that victims suffer. The false victim, therefore, receives a grand shield from past and future misconduct, lots of sympathy and attention, advocates and her own lawyer, a torpedo to sink her commander's career, and she has no obligation to cooperate or be challenged up until trial.

If we are going to incentivize reporting to such a grand extent, there must be more balance to ensure false accusations are exposed early and often. Under the current environment, how is that possible when the allegations are to be believed and not tested? "Cross-examination has long been considered as perhaps the most important procedure in reaching a fair and reliable determination of disputed facts."⁵²³ Historically, objective investigators challenged evidence and pretrial hearings sought to weed out weak and false accusations through thorough investigations and cross-examination. Those barriers do not truly exist anymore. We have to do something to restore balance by reversing some of these changes, reducing incentives, or enacting new protections for the wrongly accused.⁵²⁴

Lastly, the author does not recommend making restitution part of military justice. It is a civil action. If restitution is going to be made available to alleged victims, then there must be an offset to ensure false accusations are weeded out.⁵²⁵ Further, there is presently no restitution for those falsely accused or wrongly convicted. Restitution for victims of sexual assault but not victims of false accusations is not justice.⁵²⁶

⁵²³ Volokh, *supra* note 21.

⁵²⁴ For some people, it is so easy and there are so few consequences to false allegations that they keep making them time and time again. The Community of the Wrongly Accused compiled a list of known serial accusers in 2013. *Woman jailed after 11th false rape claim in a decade*, COMMUNITY OF THE WRONGLY ACCUSED, Feb. 26, 2013, www.cotwa.info/2013/02/woman-jailed-after-11-false-rape-claims.html (last visited Feb. 3, 2015). Among them is Elizabeth Jones, 22, who made 11 false accusations in fewer than 10 years before she was finally sentenced to 16 months in prison. She made her first complaint when she was 13 and made eight more between 2005 and 2007, one in 2009, and another in 2012, for which she was finally held accountable. *Id.* Jayne Stuart has made eight known false claims, the last of which prompted the judge to lament there was no anonymity for the falsely accused. *Id.* Emily Riker made four false allegations, three in 2010 alone. *Id.* Heather Brenner falsely accused several men including her husband. The list is long and the reasons diverse but the lesson is the same: unchecked accusations create more victims and undermine the cause for true victims.

⁵²⁵ See Mike Navarre, *Judicial Proceedings Panel Meeting on Mar. 13, 2005*, NIMJBLOG-CAAFLOG, Feb. 24, 2015, <http://www.caflog.com/2015/02/24/judicial-proceedings-panel-meeting-on-mar-13-2015/> (discussing how the JPP is reviewing whether victims should be provided restitution and how the agenda for the hearing suggests the answer is yes).

⁵²⁶ Restitution is a proposed change to military justice. This paper has focused on current practice. Responding to proposed changes is beyond the scope of this paper. The proposal is mentioned only because it relates to an issue with current policy.

C. JUSTICE PROCESS CHANGES

Recommendation 12: *All cases should get appellate review.*

Under current practice, cases must receive a certain level of sentence to qualify for appellate review.⁵²⁷ This creates some perverse results. A guilty plea drug case, for example, may get appellate review and yet an Airman who contests a sexual assault or child pornography charge could end up convicted without the same appellate review.⁵²⁸ The need for appellate review is driven by questions of law that may arise in any case; it is not exactly relative to the sentence adjudged, which currently drives the right to appeals in the military.⁵²⁹ Under the current system, prosecutors have the ability to seek a pretrial agreement below the appellate threshold to avoid review of legal issues in a case. Similarly, a judge in a judge alone case can render a sentence below the threshold to preclude any meaningful scrutiny of legal decisions. While most individuals retain the moral courage not to be enticed by these possibilities, the opportunity exists and may be particularly attractive in cases with legal issues where any sentence is better than no sentence.⁵³⁰ Moreover, “if appellate courts are in part intended to provide a uniform standard to the application of the [UCMJ]” as well as providing civilian oversight of the court-martial system, then these functions are best served by appellate review of all cases, not just some cases.⁵³¹

This recommendation is not new but it continues to be ignored while protections for an accused continue to be stripped away.⁵³² Clemency has always been an Airman’s best hope for relief from harsh and even erroneous results.⁵³³ The unfettered right for convening authorities to reduce findings or sentences existed for more than 60 years and was championed by historical figures like General Dwight D. Eisenhower and Marcus Tullius Cicero.⁵³⁴ One of the principle

⁵²⁷ See 10 U.S.C. § 866(b) (providing that cases “in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, confinement for one year or more” may be reviewed by the service Courts of Criminal Appeals); and 10 U.S.C. 867 (providing the authority review by the Court of Appeals for the Armed Forces).

⁵²⁸ See 10 U.S.C. §§ 64, 69 (authorizing a limited post-trial review by service lawyers, as opposed to a review by appellate judges, for cases that do not qualify for review by appellate courts).

⁵²⁹ James E. Baker, *Is Military Justice Sentencing on the March? Should it be? And if so, Where should it Head? Court-Martial Sentencing Process, Practice, and Issues*, 27 FED. SENT’G REP. 72-87, at 76 (2014-2015), available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2480&context=facpub> (last visited Mar. 22, 2015).

⁵³⁰ The author has seen a few cases where it appeared the appellate threshold might have come into play in judge sentencing and in pretrial agreements; it is generally more of an appearance issue, however, than an actual issue in the Air Force.

⁵³¹ *Id.*

⁵³² See MILITARY JUSTICE COMMISSION REPORT 2009 (A.K.A. COX COMMISSION REPORT II), 6 (*National Institute of Military Justice and Military Justice Committee, Criminal Justice Section of the American Bar Association*, 2009), available at http://responsesystemspanel.whs.mil/public/docs/meetings/20140130/Materials_To_Members/24_CoxCommissionReport_2009.pdf (last visited Mar. 22, 2015) (recommending appellate review be extended as a matter of right in every contested trial).

⁵³³ *United States v. Rosenthal*, 62 M.J. 261, 262 (C.A.A.F. 2005).

⁵³⁴ Brent A. Goodwin, *Congress Offends Eisenhower and Cicero by Annihilating Article 60, UCMJ*, ARMY LAWYER, Jul. 2014, available at

reasons Congress stripped away Article 60 with concurrence of the Department of Defense, was because of the “robust appellate process” available to accused today.⁵³⁵ That process is not available for everyone or even for every general court-martial because meaningful appellate review in the military is based on the sentence, not the offense or the legal issues involved. Consequently, a convicted servicemember has lost his best hope for relief but he continues to have no guarantee of a “robust appellate process.”

Lastly, there is no significant cost to services or the courts if appellate access is expanded. In approximately 2010, the chief of the Air Force appellate defense division looked into this recommendation. He believed strongly that appellate review should be expanded; he reviewed the impact on his division, and concluded there would be a minimal increase needed to handle the additional cases.⁵³⁶ Further, the Chief Judge of the Court of Appeals of the Armed Forces has also recently stated that the “Court’s docket is sufficiently flexible to handle the additional cases that a lower sentence threshold would bring.”⁵³⁷ Expanding appellate access is a low-cost means of providing some balance to the military justice process and demonstrating we truly do care about getting the results right.

Recommendation 13: *Increase jury minimums, require three-fourths majority, add diversity to Article 25 criteria, and consider whether other changes are now appropriate.*

Unlike civilian jurisdictions, a military accused can be convicted on a vote of as few as two court members. That is to say, an Airman, Soldier, Sailor, or Marine⁵³⁸ who has sworn to defend this country and sacrifice his life, if necessary, to ensure our constitutional promises are not jeopardized at home or abroad, can be imprisoned for a felony offense and be subject to sex offender registration on the mere vote of two out of three jurors.⁵³⁹ Sexual assault allegations can be sent to a special court-martial (SPCM) or a general court-martial (GCM).⁵⁴⁰ A SPCM must consist of a minimum of three jurors; a GCM must consist of at least five jurors.⁵⁴¹ A guilty verdict in either forum requires a two-thirds majority vote.⁵⁴² Additionally, the convening

[https://www.jagcnet.army.mil/DOCLIBS/ARMYLAWYER.NSF/0/d366d1bd93aae94d85257d260066fbd4/\\$FILE/By%20Major%20Brent%20A.%20Goodwin.pdf](https://www.jagcnet.army.mil/DOCLIBS/ARMYLAWYER.NSF/0/d366d1bd93aae94d85257d260066fbd4/$FILE/By%20Major%20Brent%20A.%20Goodwin.pdf) (last visited Mar. 22, 2015).

⁵³⁵ Hagel reviewing appeal to change UCMJ’s Article 60, AIR FORCE TIMES, Mar. 31, 2013, available at <http://archive.airforcetimes.com/article/20130331/NEWS/303310005/Hagel-reviewing-appeal-change-UCMJ-s-Article-60> (last visited Mar. 22, 2015).

⁵³⁶ There was no formal report prepared or presented publicly, rather it was an informal push through senior leadership to expand appellate review particularly for sex offender cases and any case with contested charges.

⁵³⁷ Baker, *supra* note 529.

⁵³⁸ Coast Guard is included under the term “sailor.” Although they reside now under the Department of Homeland Security rather than the Department of Defense, they are still subject to the Uniform Code of Military justice and the Manual for Courts-Martial, which governs courts-martial practice.

⁵³⁹ Technically, there are no juries in the military, rather there are court-martial panels composed of court members. As people are generally more familiar with the terms “jury” and “jurors,” the author uses them interchangeably.

⁵⁴⁰ See MCM, R.C.M. 201(f) (2012 ed.) (listing the types of courts-martial), *but see* NDAA 2014, *supra* note 445, § 1705 (requiring some sexual offenses now be referred to a general court-martial).

⁵⁴¹ MCM, R.C.M. 501(a) (2012 ed.)

⁵⁴² MCM, R.C.M. 921((c)(2) (2012 ed.). Capital cases require unanimous verdicts by a jury of 12 members. *Id.*

authority, who decides to convene a court-martial, picks the jurors who will render the verdict.⁵⁴³ Trial and defense counsel are permitted unlimited challenges for cause but only one peremptory challenge.⁵⁴⁴ An accused is not entitled to a jury of his peers or to a cross-representation of the community.⁵⁴⁵ An enlisted member can request enlisted members but all court members must be senior in rank to the person on trial.⁵⁴⁶

By comparison, civilian juries may be less than 12 members but must be at least six members.⁵⁴⁷ A jury comprised of six members must be unanimous.⁵⁴⁸ A jury of 12 may be less than unanimous; 10-2 and 9-3 verdicts are constitutionally acceptable.⁵⁴⁹ The purpose of a jury trial “is to prevent oppression by the Government.”⁵⁵⁰ The right to a jury of peers “gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”⁵⁵¹ A six-member jury is the minimum necessary to provide a representative cross-section of the community.⁵⁵²

The sixth amendment right to a jury trial does not apply to the military.⁵⁵³ If the goal is getting it right, however, then the reasons why civilian jurisdictions must have at least six unanimous jurors are instructive for why the military is long overdue for change. In *Ballew v. Georgia*, the United States Supreme Court reviewed numerous studies on jury sizes and observed that “progressively smaller juries are less likely to foster effective group deliberation” which “leads to inaccurate factfinding and incorrect application of the common sense of the community to the facts.”⁵⁵⁴ The Court found that “the smaller the group, the less likely it is to overcome the biases of its members to obtain an accurate result” and that larger groups “performed better because prejudices of individuals were frequently counterbalanced, and objectivity resulted.”⁵⁵⁵ Further, larger groups “exhibited increased motivation and self-criticism.”⁵⁵⁶ Importantly, “the risk of convicting an innocent person . . . rises as the size of the jury diminishes.”⁵⁵⁷ The smaller the jury the greater the variance in verdicts, which “amounts to an imbalance to the detriment of one side, the defense.”⁵⁵⁸

⁵⁴³ MCM, R.C.M. 503(a), 504 (2012 ed.)

⁵⁴⁴ MCM, R.C.M. 912(f), (g) (2012 ed.)

⁵⁴⁵ *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004).

⁵⁴⁶ MCM, R.C.M. 503(a)(2) (2012 ed.).

⁵⁴⁷ *Burch v. Louisiana*, 441 U.S. 130, 137 (1979).

⁵⁴⁸ *Id.* at 138.

⁵⁴⁹ See *Apodaca v. Oregon*, 406 U.S. 404 (1972) (affirming a conviction of 10 guilty votes to 2 not guilty votes) and *Johnson v. Louisiana*, 406 U.S. 356 (1972) (affirming a conviction of 9 guilty votes to 3 not guilty votes).

⁵⁵⁰ *Ballew v. Georgia*, 435 U.S. 223, 229 (1979) (citing *Williams v. Florida*, 399 U.S. 78, 100 (1970)).

⁵⁵¹ *Id.*

⁵⁵² *Id.* at 230.

⁵⁵³ *United States v. Allen*, 31 M.J. 572, 637 (N.M.C.M.R. 1990).

⁵⁵⁴ *Ballew*, *supra* at 232-33.

⁵⁵⁵ *Id.*

⁵⁵⁶ *Id.*

⁵⁵⁷ *Id.* at 234. Omitted from the quote is the reference to the type of errors. A Type I error is where the jury convicts an innocent person. A Type II error is where a guilty person is not convicted. Jury research look considers both errors in evaluating which jury construct provides the most accurate results, as discussed by the Court in its analysis of *Ballew*.

⁵⁵⁸ *Id.* at 235.

Of the more than 1,550 people who have been exonerated through the Innocence Project and related organizations, most were convicted by unanimous juries. Military prosecutors do not have the heavy burden of convincing all jurors, let alone 12 unless it is a capital case; their burden is much less than civilian prosecutors and, consequently, can result in more wrongful convictions. Convicting the innocent, however, is only part of the equation. The United States Supreme Court noted that larger juries are better at overcoming prejudices, biases, and applying common sense to the law. If senior leaders are concerned that members may adhere to outdated myths and stereotypes in sexual assault cases, then larger juries are more likely to overcome these myths and reach the right results. Larger juries are simply more accurate for both accused and the accusers in getting it right. The time has come to get the military in line with civilian communities in this regard. The author recommends GCMs require a minimum of 10 jurors, SPCMs have a minimum of 8 jurors and both require three-fourths majority for a conviction. This would increase the accuracy of verdicts while still balancing the military's interest in finality and avoiding hung juries.

Additionally, the military has come to agree that diversity is important in progress. We encourage diversity in promotions and operations but we do not yet officially encourage it in selection of jurors. Congress should add diversity into Article 25, UCMJ. In the meantime, the President can, through executive order, add it into the Rules for Courts-Martial.⁵⁵⁹

Other changes may also be appropriate in the jury construct. Law enforcement rarely serves on juries because of their alignment with the prosecution and common bias against suspects. Chaplains regularly do not serve because judgment is generally contradictory to their faith or because determining a punishment is potentially in conflict with their religious beliefs. Lawyers and paralegals often do not sit because of their experience in the process and knowledge of comparative cases. Victim advocates regularly do not serve and neither do sexual assault response coordinators because of their alignment with victims in sexual assault cases. Perhaps it is time to amend Article 25 to preclude more categories of individuals from service, who are often excused for actual or implied biases already, and to save valuable time and resources in the voir dire process. Further, perhaps we should consider creating procedures for alternates and whether there should be exemptions or a change in jury constructs in a deployed environment.

⁵⁵⁹ Under Article 36, UCMJ, Congress has authorized the President to promulgate rules for courts-martial provided they are not contrary to or inconsistent with statutes enacted by Congress. 10 U.S.C. § 836 (2015). Adding diversity into the criteria for consideration of a jury is neither inconsistent nor contrary to statutes and is, in fact, consistent with judicial interpretation of the statutes. See *United States v. Gooch*, 69 M.J. 353, 357-58 (C.A.A.F. 2011) (discussing the permissible criteria for excluding members and noting it will be deferential to good-faith efforts to require representativeness). Until diversity is listed in Article 25, UCMJ or in the Rules for Courts-martial, convening authorities will continue to consider only the criteria they are expressly permitted to consider. 10 U.S.C. § 825 (2015).

Recommendation 14: *Article 32 recommendation not to proceed should be binding on convening authority.*

Article 32 was established in 1920 as an “investigating procedure prior to trial” with a purpose “of protecting soldiers from unwarranted charges.”⁵⁶⁰ Following World War II, Congress identified numerous “miscarriages of justice” that “owe[d] their origin to faulty investigation procedure.”⁵⁶¹ Although a thorough and impartial investigation was required by statute, the procedures were “inadequate, or prejudiced, or even nonexistent” and failed to “protect the accused against” the likelihood of injustice.⁵⁶² Balancing the needs of the military with the need to protect individuals, Congress bolstered the pretrial investigation procedures in creating the UCMJ “to make [the pretrial investigation] effective for its original purpose.”⁵⁶³

For more than 90 years, Article 32 promised a pretrial investigation in order to protect an accused against warrantless charges. With the outrage over one particular sexual assault case, Congress swept away those protections and changed Article 32 to a probable cause hearing, not just for sexual assaults but for all general courts-martial.⁵⁶⁴ Further, Congress has now exempted alleged victims from testifying in pretrial hearings regardless of whether they are available to do so.⁵⁶⁵ There has been no explanation why an accused no longer needs the protections they have been afforded for so long. There must be more balance, especially now when there is so much emphasis on sexual assaults, so much more pressure on commanders to send cases to trial, and so much less money available due to sequestration.

In changing Article 32, Congress has made military pretrial hearings more like grand jury proceedings. Unlike civilian prosecutors, however, who cannot proceed to trial unless the grand jury returns an indictment, convening authorities can proceed to trial even if the hearing officer does not find probable cause. The Government should be bound by a finding of no probable cause. There are reasons a convening authority might reasonably choose not to proceed to trial even with probable cause, such as with a plea agreement or discharge in lieu of trial due to unforeseen evidentiary issues; convening authorities, therefore, should retain the ability to reject a recommendation to proceed to trial just as civilian prosecutors can. Prohibiting a trial absent probable cause, however, would restore some balance and require prosecutors to take hearings seriously.

Recommendation 15: *Article 32 changes should be offset with Article 46 guarantees.*

Adopting the preceding recommendation would not completely restore balance and protect wrongly accused against warrantless charges. Because alleged victims are now exempt

⁵⁶⁰ H. Res. 20, *supra* note 440, at 18.

⁵⁶¹ *Id.* at 31.

⁵⁶² *Id.*

⁵⁶³ *Id.* at 18.

⁵⁶⁴ NDAA 2014, *supra* note 445, at § 1702: 10 U.S.C. § 832 (2015).

⁵⁶⁵ *Id.*

from testifying and depositions have been amended to make them practically useless as opportunities to interview an alleged victim before trial,⁵⁶⁶ a wrongly accused is significantly disadvantaged compared with the Government in preparing for trial. The protections that used to weed out most false accusation before trial no longer exist. Article 46, however, continues to require equal access to witnesses.⁵⁶⁷ If an alleged victim has opted for an unrestricted report, desires to proceed to trial and has agreed to interviews with prosecutors, then defense counsel should have an equal opportunity to prepare for trial and be guaranteed a pretrial interview. Article 46 currently requires equal access but the UCMJ does not provide for it.

It is important to note that the Innocence Project identified inadequate defense as a significant cause of wrongful convictions. A review of exonerations between 1989 and 2012 showed 104 cases where there was clear evidence of inadequate defense.⁵⁶⁸ As much as a “clear majority” of the individuals “would not have been convicted in the first instance if their lawyers had done good work.”⁵⁶⁹ “The failures of defense counsel are overwhelmingly sins of omission, especially the failure to investigate. Unless those failures are actually litigated, they are likely to go unmentioned.”⁵⁷⁰ With Congress removing the pretrial investigation that has existed for more than 90 years, and Military Rules of Evidence 412 and 513 being substantially restricted in pretrial discovery, wrongly accused are restricted more now than ever before in their ability to expose false accusers. The risk of wrongful convictions will increase not because of defense ineptitude but because of unequal access in pretrial discovery unless balance is restored.

The author proposes amending Article 46, and corresponding rules for courts-martial to affirm an accused is entitled to equal opportunity to pretrial access with alleged victims and providing for abatement or other appropriate relief where the alleged victim has: 1) opted not to testify at the Article 32 hearing and 2) refused reasonable requests by defense counsel for equal access, i.e., pretrial interviews.

D. TRAINING RECOMMENDATIONS

Recommendation 16: *Emphasize treatment, withholding judgment, and let the adjudication process work.*

The best way to deal with the conflict between treatment and justice policies is to focus training on treatment and prevention. There is a separate process for judgment of an accusation and there are a small select few who are responsible for making decisions about the merits of an allegation. The overwhelming majority of military members are not the target audience for military justice decisions.

Military members need to be trained to withhold judgment and let the separate processes work. Training should emphasize that some allegations are true and some are false, but the truth

⁵⁶⁶ NDAA 2015, *supra* note 459, at § 532.

⁵⁶⁷ 10 U.S.C. § 846 (2015).

⁵⁶⁸ GROSS, *supra* note 32, at 42.

⁵⁶⁹ *Id.*

⁵⁷⁰ *Id.*

is not always apparent on its face.⁵⁷¹ We need to withhold judgment unless called upon to decide a case. The message could be best advanced with some anecdotal evidence. Simply poll investigators and prosecutors for cases that looked terrible at first and turned out to be genuine. Similarly, there are many cases where the evidence seemed pretty damning at first but once it was exposed to sunlight, it was unquestionably not an offense. Polling prosecutors, defenders, or judges about such cases should provide a good example or two that could be used for training purposes.

We need Airmen and Commanders to withhold judgment and take care of the accuser and accused only if required to render a judgment according to that separate process. We need to build confidence in the adjudication process and preaching “believe the victim,” and other principles that are inconsistent with the law, only serve to create conflict and discontent. We should focus training on prevention and try to stop sexual assaults in the first place. The “response” piece of SAPR should be addressed exclusively at senior levels where such decisions are made.

Recommendation 17: *Be more specific in desired behavior.*

It is not enough to generically say step up and step in, or don’t be a bystander. We need specific guidance on what the behavior should be and what to look for in stepping in. Authors Chip and Dan Heath described it best in their best-selling book, *Switch, How to Change Things When Change is Hard*.⁵⁷² They described three key pieces to accomplishing change: our logical element, our emotional element, and our guide map. They compared it to an elephant and a rider on a path. The elephant represents our emotional side. The rider represents the logical side. Neither the rider nor the elephant are in complete control. If the elephant does not want to cross a river, it does not matter that the rider thinks it the best course of action. Without the rider, however, the elephant may be lost and make poor decisions that jeopardize its health. Even when they are in agreement, however, they need accurate directions. That is what our training currently lacks. We have tried to appeal to our rider about the reasons why we need to change our culture, and we have tried to appeal to our elephants through efforts to motivate us to act to change our culture. But the direction provided falls short.

In order for change to work, the directions must be crystal-clear. Chip and Dan Heath used health as an example. Simply telling people to “be healthier” does not work. The rider gets lost because there are so many ways to interpret that message; does it mean working out more, how much more, aerobic or weights, or perhaps eat more grains and less fat, or take more vitamins, etc. As for the elephant, the message of being healthier does not motivate the elephant to change diet or behave differently and too much change is likely to cause resistance or exhaust the will power to change, which is why many motivated dieters end up falling off their diet plan. Instead, researchers found that advocating drinking 1 percent milk worked tremendously better than advocating to “be healthier.” It was simple. The campaign showed how a glass of whole

⁵⁷¹ See *supra* note 436 (discussing how training has focused primarily on response, not prevention, over the last few years).

⁵⁷² See HEATH, *supra* note 486.

milk was equivalent in saturated fat to five strips of bacon. They showed local reporters a tube of fat that was the equivalent of a half-gallon of whole milk, which caused the elephant to feel “Oh, gross!” and be motivated to change. Telling people to pick up 1 percent milk the next time they went shopping was easy, clear, doable, and effective at getting people to be healthier.

With SAPR, our message is not crystal clear on what behavior should be. We talk about bystander intervention but we do not provide clear direction on what that means. When should friends step in? The “that guy” campaign suggests friends should step in when the guy won’t leave her alone or won’t take no for an answer. These lone examples of specific direction in SAPR training are terrible because sexual assault cases rarely happen this way. The more common cases are when people are drinking too much and end up going home together or one intoxicated person engages in sexual behavior with another more intoxicated person who is asleep or unconscious, often resting in a separate room at a party. Bystander intervention would be far more effective if it provided guidance for what friends should do in these occasions. Friends are conflicted. They want to respect their friend’s right to make decisions and to drink alcohol but when exactly do they intervene? We need guidance for when bros should take another bro home even if he protests or wants to hang longer with a lady he just met, and vice-versa for ladies. Training steers clear of realistic scenarios and meaningful guidance because such training may be perceived as blaming a victim, an oxymoron already discussed that is an impediment to progress. Until SAPR provides specific guidance for how friends should behave in these challenging situations, SAPR will continue to miss the mark.

In short, we need crystal clear guidance for our young Airman on how they should behave to prevent sexual assaults in realistic scenarios. A good starting point would be reviewing sexual assault cases, especially those that have been validated through trial, to find realistic guidance to educate our servicemen and women on how specifically we can prevent violence. Most cases involve parties or bars with alcohol consumption. Find two or three case studies and provide examples of how people should respond. Annual counterterrorism training, for example, teaches about warning signs of actual cases and how they could have been prevented and what to do if you find yourself in such a scenario. Use the same concept but with more common situations. We should not wait, for example, for an individual to be unconscious before we intervene. Our message needs to be that we respect each other when we do not risk injury to each other.⁵⁷³

⁵⁷³ Consistent with the recommendation for separating treatment from justice, we need to separate prevention from the law as well. What is a good idea is not always what the law requires. Weapons training, for example, often teaches us to treat every weapon as if it is loaded and to not aim it at anything unless you plan to fire. These are time-tested prevention principles but violating these principles does not mean you have violated the law. Prevention is about good practice but it does not create new laws. Prevention does, however, over time alter the acceptable standards of behavior and may increase sexual assault convictions by objectively changing what behavior is reasonable for alleged offenders, thereby, reducing what actions may be viewed as reasonable mistakes of fact.

Recommendation 18: *Teach prevention and risk management to potential victims.*

SAPR training does a poor job of teaching men and women how they can minimize the risk of being a victim or how to communicate better. This is primarily because we admonish people not to blame the victim.⁵⁷⁴ The “victim blaming” rebuke, however, is an oxymoron that is inconsistent with the law, personal responsibility, and it is an impediment to progress. As a matter of law, a jury must assess an alleged victim’s behavior to determine whether there was consent, a lack of consent, a mistake of fact as to consent, whether she was objectively incapacitated or demonstrating decision-making, or whether he was reasonably mistaken that she was capable of consenting.⁵⁷⁵ We misrepresent the law when we avoid the subject of personal decision-making. In reality, we are responsible for our behavior until we are not. Until we are incapacitated and unable to make decisions, we are still responsible for any good or bad decisions we make, from stealing Mike Tyson’s tiger, to getting a face tattoo, to getting married in Las Vegas.⁵⁷⁶

We should teach prevention for the same reason we do it in other capacities. Anyone, for example, can be a victim of a terrorist attack and yet we still teach antiterrorism, provide country warnings, and publicly note when the terrorism level is increased or decreased due to intelligence. We should be able to walk around free at any time of the night, down any street or alley, or attend any marathon without fear of being mugged, attacked, or bombed but no one calls training on how to minimize the risk of being a terrorism target victim blaming. On the contrary, it is prudent to teach prevention because no amount of treatment can undo a sexual assault or the harm caused by a terrorist attack.

Without question, anyone can be a victim of a sexual assault. There are things we can do to minimize our risk. Looking at validated cases of sexual assault, for example, we see alcohol intake is a common issue. Consider this paradox, the more intoxicated an individual is, the less reliable his or her recollection of the event will be. Being incapacitated by its very nature means you cannot appreciate the events at hand or weigh courses of action. That is a message that should be taught. If you drink so much that you are unconscious or incapacitated, you have a right not to be sexually assaulted but you are extremely vulnerable to predators and, due to intoxication, it is often difficult to prove their crime; it is like trying to identify an assailant in complete darkness.

SAPR should teach that there are always people out there who would take advantage of our situation, from loan-sharks to sexual predators. Not everything is a crime but that does not mean we won’t feel manipulated, broke, or hurt the next day. We are responsible for our

⁵⁷⁴ See, e.g., Yoffe, *supra* note 23 (noting that SAPR has neglected to discuss how alcohol has made women more vulnerable to sexual assaults because DOJ “didn’t want any emphasis on ‘changing victim behavior.’”)

⁵⁷⁵ See *supra* pp. 41-42 (discussing mistake of fact and the definition of consent and how they necessarily require assessment of an alleged victim’s behavior to determine if there was a crime).

⁵⁷⁶ These are references to the *Hangover* movie trilogy. Incapacitation is a much higher hurdle than many non-lawyers seem to realize. See Redmond, *supra* note 229 and accompanying text; Rubinfeld, *supra* note 217 (stating that “students need to be told clearly that if they are voluntarily under the influence (but not incapacitated), they remain responsible for their sexual choices.”).

behavior until we are not and we need to protect each other and ourselves. If we are going to drink, we should adhere to the 0-0-1-3 plan⁵⁷⁷ and have a designated driver. Additionally, we need specific guidance on when to intervene. If your friend is slurring her words or stumbling around, step in and get her home. Do not let her go home with another guy; if they are interested in each other, wait until they are sober or for another occasion when she is not drunk. Simply put, look at real cases and teach ways sexual assaults may have been prevented on the victim-side. By failing to teach personal prevention, we fail our service men and women; it is irresponsible that we teach and train to reduce our vulnerabilities to terrorism or being robbed, but we ignore personal risk management to reduce sexual assault vulnerabilities.

Additionally, we have to emphasize the need to communicate. It is easy to blame others, especially when we are making it increasingly easy and rewarding for doing so.⁵⁷⁸ But we bear responsibility for our actions until and unless we become incapacitated. Social psychologist and feminist, Carol Tavris, noted the danger in conflating rape, unwanted sex (where one party agrees to sex not out of desire but to please or placate the partner), and the kinds of consensual sex where both parties were intoxicated but capable of decisions and one of them later regrets it.⁵⁷⁹

Calling all of these kinds of sexual encounters ‘rape’ or ‘sexual assault’ doesn’t teach young women how to learn what they want sexually, let alone how to communicate what they want, or don’t want. It doesn’t teach them to take responsibility for their decisions, for their reluctance to speak up. Sexual communication is really hard...It’s so much easier to be a victim than to admit culpability, admit your own involvement, admit that you made a mistake. It’s much easier to say it’s all his fault. Look, sometimes it is all his fault. That’s called rape. But ambiguities and unexpected decisions are part of many encounters, especially sexual ones.

SAPR training needs to emphasize the importance of clear communication. Ambiguities favor an accused because the law requires an accused receive the benefit of a reasonable doubt. Clear communication will reduce ambiguities, reduce legitimate mistakes of fact, and increase prosecution rates of legitimate offenders.

⁵⁷⁷ 0-0-1-3 was a campaign developed at F.E. Warren Air Force Base, Wyoming representing what is acceptable when it comes to alcohol consumption. The goals were zero (0) incidents of underage drinking, zero (0) arrests for DUI, only one (1) alcoholic drink per hour, and a maximum of three (3) drinks per night. Arian Ponder, *What is 0-0-1-3?*, Holloman Air Force Base, Aug. 3., 2006, <http://www.holloman.af.mil/news/story.asp?id=123024532> (last visited Apr. 11, 2015).

⁵⁷⁸ See *supra* Part IV.B. (Recommendation 11).

⁵⁷⁹ Yoffe, *supra* note 23. (The definitions for these categories are the psychologist’s paraphrased definitions, not the author’s).

Recommendation 19: *Teach precaution to potential offenders, using the DUI model of risk management and forethought.*

A significant flaw in SAPR training is that it relies upon victim advocates for assistance with how to get through to potential offenders. To get through to potential offenders, you have to know potential offenders. Psychologists primarily work with victims. The few who have endeavored to research offenders are not unbiased nor is their work representative. If you polled defense counsel across the military or even civilian communities, you would find that most accused do not believe they are rapists. They do not view themselves as rapists and cannot conceive of what they did as constituting rape. Our SAPR training, however, calls it a myth that the sexual incident was a “miscommunication,” that the incident was “unpremeditated,” and that it “will never happen again.”⁵⁸⁰ What happens then is the training never reaches the target audience because it falsely assumes that every accused knows he is committing a crime; just stop doing it. Most that end up accused of sexual assault do not think of themselves as rapists, and genuinely do not want to be viewed as rapists, but falsely think certain specific behaviors are okay. They do not plan to have sex against someone’s will that evening and the training, therefore, does not speak to them. To get through to those who might end up accused, we really need perspective of those who work with those accused. Until we do, we will not change offending behavior.

We should teach potential offenders risk management the same way we advocate against DUI. To be sure, we have not eliminated DUIs by any means but we have meaningfully changed culture by teaching specific identifiable means of avoiding issues.⁵⁸¹ With DUIs, we have emphasized being proactive about what you are going to do and how you will do it safely. You do not, for example, designate a driver after you go out drinking; you do it before you go out. With sexual assault, we need to teach that the law is a murky area and it can be easy to end up in the gray area with your future in jeopardy, sitting at the accused table, facing decades of jail and lifelong label of sex offender. Training should focus on planning ahead; do not wait until you are intoxicated to think about what you should do. We need to focus on specific identifiable traits that should prompt intervention. When a female is stumbling or slurring her speech, vomits, or when she is acting in a way her friends think is way out of character, these are not good times to pursue a sexual relationship. We need bystanders to pull him away, tell him to get her number and catch up with her another time when she’s more sober. While it is possible she may be still capable of consent, there is a good chance she is not and you owe yourself, her, and your service the respect of waiting until another day.

Men and women need to know they will be judged from the standpoint of a sober person looking at the situation; it is not an excuse that you were drunk and did not realize it. If you plan on drinking for the night, then you should know and plan that you will not make out with or engage in any sexual contact with someone exhibiting signs of being drunk and you should enlist

⁵⁸⁰ These slides are used across the Air Force and these topics are often expounded upon in group discussions or during commander briefings. Examples are on file with the author.

⁵⁸¹ Realistically we are just as unlikely to eliminate sexual assault altogether as we are unlikely to eliminate DUIs. Nevertheless, the goal for both is to eliminate the offenses and protect our communities through specific behavior patterns and responsible planning.

your wingmen to keep you from doing so. Just as you should plan on a designated driver, having enough money for a cab or food, getting home safe, and getting up for work the next day, you should plan to protect yourself from making poor decisions when intoxicated that could severely alter the rest of your life. It is not always the violent stalking predator that ends up convicted; it is often the nice guy who drank too much and took advantage of an opportunity to take sex when it was not consensual. That is a message the targets those who end up in trial. The sooner our young service men and women understand this and the dangers of being in the gray area, the sooner we will see a decrease in sexual assaults.

Recommendation 20: *Adopt new training themes like “See something, say something.”*

A common theme among judges, and anecdotally from prosecutors and defense counsel, is that training has lost its effect on members. We cannot make progress without changing our themes and approach. In New York City, for example, the NYPD uses the theme, “See something, say something.” This is a catchy phrase for counterterrorism concerns but it aligns well with the notions of encouraging reporting of potential sexual assaults, encouraging bystander intervention, and being a wingman. To be effective, the marketing needs to include salient examples.

Consideration should also be given to a theme that promotes why a victim should report. The theme should focus on personal benefits rather than the interests of the DOD or the common good. The reasons alleged victims do not report in the military and in society in general are very personal;⁵⁸² encouraging reporting must demonstrate the benefits to the alleged victim for reporting outweigh the concerns. For example, while it might be best for society to know about a particular offender, it is not the community that has to go through the extensive process to do so; the individual must see benefits that outweigh the potential struggle that publicity brings. Given the high levels of satisfaction with victims’ counsel, it may be valuable to use stories from willing participants, both those who had convictions and those who had acquittals, who recount how happy they are for having decided to make a report. The theme should reflect that reporting is a good thing. Discussing the need for reporting, a policeman said, “If victims don’t go to the police, the conviction rate is zero!”⁵⁸³ Although it is a catchy phrase, I do not recommend this theme because it focuses on convictions as the measure of success and it should emphasize the value to the victim more than the value to the community. With a better theme to motivate the rider and elephant,⁵⁸⁴ we can improve unrestricted reports of sexual assaults.

⁵⁸² See Langton, *supra* note 493.

⁵⁸³ Yoffe, *supra* note 23.

⁵⁸⁴ See *supra* Part IV.D (Recommendation 17).

Recommendation 21: *Stop teaching “start by believing,” “believe the victim,” “never question the victim,” “no victim blaming,” the purported myths of an offender, and purported science.*

Consistent with Recommendation 4,⁵⁸⁵ we need to openly distinguish between treatment principles and justice principles. The principles of “start by believing,” “believe the victim,” “never question the victim,” and “no victim blaming” contradict the presumption of innocence and the law on sexual assaults. As previously discussed, “victim blaming,” for example, is an oxymoron. In determining whether there was a crime, the law requires a judge or jury to scrutinize her words and actions before and after an alleged sexual assault.⁵⁸⁶ If scrutiny determines she was not a victim, then there is no victim blaming because she was not a victim. If she was a victim under the law, then there is no blame because she was not responsible.

In short, every witness who testifies is subject to the same scrutiny of whether their actions are consistent with their testimony. A jury is supposed to question every witness to determine the truth. No witness is supposed to be held to a different standard. “Believing the victim” compromises the equal playing field and equal scrutiny a jury is supposed to apply to every witness. Anyone who internalizes this teaching cannot perform the functions of a juror and should not sit as a juror. Similarly, commanders are required to oversee a fair justice process. Commanders who internalize these concepts cannot fairly administer justice. Instead, we need to clearly delineate between treatment and justice not only in policy but also in training.

Additionally, effective training does not have to blur the law and inject purported science. Training about purported myths about offenders or the likelihood of an offender may be a serial offender encourage pre-judgment against the accused. We need to focus instead on prevention and teach people to withhold judgment.⁵⁸⁷ Ensuring respect and taking care of alleged victims does not require unmitigated belief of the accusation. On the contrary, it only requires respect for each other and respect for the separate process of judging the merits of a claim.

Recommendation 22: *Use neutral terminology; stop equating to murder or referring to alleged victims as “survivors.”*

Commanders are responsible simultaneously for military justice and SAPR.⁵⁸⁸ They are tasked with defending the Constitution as well as ensuring discipline for those who violate standards. To administer justice fairly, and protect both victims and wrongly accused, they need to be neutral and objective in truth and in perception. Commanders need to be the model of what

⁵⁸⁵ See *supra* Part IV.B (Recommendation 4).

⁵⁸⁶ See *supra* pp. 41-42, 110-111 (Recommendation 18) (discussing mistake of fact and how victim blaming rebuke is inconsistent with the law).

⁵⁸⁷ See *supra* Part IV.D. (Recommendation 16).

⁵⁸⁸ See, e.g., REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL, Annex B at 63 (2014), available at: http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Annex_Final_20140627.pdf (last visited Apr. 3, 2015).

they ask service men and women to be; to withhold judgment and treat all with respect. Some of the terminology being used in the last few years, however, betrays that neutrality and portrays commanders as victim advocates rather than stewards of the Constitution.⁵⁸⁹

One example is equating sexual assault to murder. The author first heard the comparison in December 2013 at a SAPR conference in Alabama. A two-star general said that when sexual assaults occur the offender has murdered the victim, who will never be the same again. The comparison is fairly common now. It is a mistake to equate sexual assault to murder. Rape used to be punishable by death. The United States Supreme Court concluded in 1977 that death “is an excessive penalty for the rapist who...does not take human life.”⁵⁹⁰ In reaching its decision, the Court recognized the seriousness of rape as a crime, that it is “highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim,” and that it is “without doubt deserving of serious punishment.”⁵⁹¹ Nevertheless, the Court concluded rape “does not compare with murder” because it “does not include the death or even the serious injury to another person;” whereas “life is over for the victim of the murderer...it is not over and normally is not beyond repair” for the rape victim.⁵⁹²

Historically, rape had been punishable by death because women were considered property and rape violated the man’s interest in his property.⁵⁹³ The true victim was not the woman herself but the man whose property had been defiled.⁵⁹⁴ Death was an appropriate punishment because rape was the ultimate violation of another man’s most precious belonging. Grounded in the notion that rape soiled a woman’s purity for life, the death penalty reflected a patriarchal belief that women needed men’s protection, and men needed all of the resources available to them to protect women.⁵⁹⁵ Equating rape to death only perpetuates gender stereotypes. A woman’s life is not over because she has been sexually assaulted. Women are worth more than their genitals and so are men. We do not help victims, indeed their treatment is hindered, by any notion that they are as good a dead if they have been sexually assaulted.⁵⁹⁶ Accordingly, we need to cease comparing sexual assault to murder.

⁵⁸⁹ See also, *Reporters need to start treating rape allegations as actual rapes, says the sexual grievance industry*, COMMUNITY OF THE WRONGLY ACCUSED, Feb. 6, 2015, <http://www.cotwa.info/2015/02/reporters-need-to-start-treating-rape.html> (last visited Apr. 3, 2015) (providing links to websites and articles attempting to coach journalists on the proper terms to use in reporting on sexual assault allegations).

⁵⁹⁰ *Coker v. Georgia*, 433 U.S. 584, 597 (1977). The Court made a similar conclusion with respect to rape of a child, finding the death penalty unconstitutional for one who raped a child but did not kill the child and did not assist another in killing a child. *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

⁵⁹¹ *Id.* at 597-98

⁵⁹² *Id.*

⁵⁹³ Melissa Murray, *Inequality’s Frontiers*, YALE L. J. ONLINE, Feb. 21, 2013, <http://www.yalelawjournal.org/forum/inequalitys-frontiers> (last visited Apr. 3, 2015). Writing as a friend of the court on behalf of the Women’s Rights Project, Justice Ruth Bader Ginsburg, then-Yale Law School professor and renown feminist advocate, argued the Court should reject the death penalty for rape of an adult woman because it was a vestige of an ancient patriarchal system in which women were viewed as the property of men and entitled to “chivalric protection.”

⁵⁹⁴ *Id.*

⁵⁹⁵ *Id.*

⁵⁹⁶ An *amicus* brief in *Kennedy v. Louisiana*, filed by various social worker organizations, advocated against the death penalty for child victims in part because of this rationale. They wrote, “by equating the two crimes [rape and murder], child victims may come to believe that they, like murder victims, are irreparably harmed. That result

Additionally, leadership needs to stop referring to alleged victims as survivors. The recent 2014 SAPR Report to the President, for example, repeatedly refers to victims as survivors.⁵⁹⁷ DOD also initiated the first “Survivor Experience Survey” in 2014 for those who reported a sexual assault.⁵⁹⁸ In fact, the first footnote of this Report to the President states “many advocates prefer to use the term ‘survivor’ to describe an individual who has been sexually assaulted.”⁵⁹⁹ Why is it appropriate for the DOD to adopt the position of advocates? DOD is responsible for justice, which includes protecting the wrongly accused. Would it not be equally inappropriate for DOD to call defendants “the falsely accused?” This is particularly true where allegations have not been validated through the disinfectant of sunlight that is trial. Until a victim is validated, it is in fact an untested allegation against a constitutionally presumed innocent individual. We owe allegiance to the Constitution we swore to protect above any partisan interests.

Journalists and policy-makers have used the term “victim” for years “out of respect for the allegations of the accuser, regardless of what a court may later find.”⁶⁰⁰ Terminology has changed all the way up to the President, however, who referred to “survivors” in his “It’s on us” campaign that aired during the NBA all-star game.⁶⁰¹ “It is the role of media to fight against the replacement of their own neutral terms by special interests with a clear agenda.”⁶⁰² So too should military leadership and policy be above special interest groups, particularly when leadership is responsible for protecting the innocent, not just prosecuting the guilty. The increasing use of the term “survivor” by journalists and policy leaders without regard to facts, or a verdict, or consideration of the presumed innocent, demonstrates victim advocates have defined the storyline and objectivity has been lost.⁶⁰³

Additionally, the term “survivor” by definition suggests someone’s life was at risk during an assault.⁶⁰⁴ That may be true in some cases but it is the rare case that involves threats to the victim’s life.⁶⁰⁵ In a profession that sees peers surviving chemical attacks, rocket-propelled grenades, improvised explosive devices, and other unquestionable life-threatening situations,

would undermine victims’ ability to heal.” Brief of the National Association of Social Workers et al., as Amici Curiae Supporting Petitioner, *Kennedy v. Louisiana*, *supra*, No. 07-343, available at: http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_07_343_PetitionerAmCu2SocWkr5AntiSexassltOrgs.authcheckdam.pdf (last visited Apr. 3, 2015).

⁵⁹⁷ 2014 SAPR REPORT, *supra* note 215.

⁵⁹⁸ *Id.*

⁵⁹⁹ *Id.* at 4, n.1.

⁶⁰⁰ Greg Piper, *Sexual-Assault ‘Momentum’ Is Trampling Due Process, Lawyers Tell Senators*, COLLEGE FIX, Oct. 3, 2014, <http://www.thecollegefix.com/post/19583/> (last visited Feb. 28, 2015).

⁶⁰¹ The term “survivor” has also infiltrated the Department of Education. See Gertner, *supra* note 9. (noting that the Department of Education “no longer refer[s] antiseptically to a complainant and an accused but rather to victims or survivors, and perpetrators.”).

⁶⁰² Piper, *supra* note 600.

⁶⁰³ *Id.*

⁶⁰⁴ *Id.*

⁶⁰⁵ The Bureau of Justice Statistics reports that from 2005-2010 only 11 percent of sexual assaults included an offender armed with a gun, knife or other weapon. MICHAEL PLANTY ET AL., *FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010*, 1 (Department of Justice, 2013), available at: <http://www.bjs.gov/content/pub/pdf/fvsv9410.pdf> (last visited Apr. 3, 2015).

calling all alleged victims “survivors” diminishes the heroism of those who truly gave their all for their country. The term “survivor” should be left to special interest groups and confirmed victims of life-threatening sexual assaults, not all alleged victims including false victims and those who may have suffered such minimal assaults as an unwanted butt touch.

Recommendation 23: *Rewrite training guides and policy.*

Policy and training materials need to be updated to reflect concerns presented in this article. For example, science should not be prominent, terminology should be neutral, we should be concerned about victims and wrongly accused, we should advocate treatment and prevention, and we should discourage judgment on the merits except and unless called upon to render judgment in the adjudication process.

Recommendation 24: *Stop teaching about rates of false allegations.*

For far too long we have talked about false allegations being rare. We need to stop pretending they do not exist or that every report is true. What is important is that we foster respect for all: respect for the accuser, respect for the accused, respect for the command, and respect for the process to resolve the dispute. Accepting that there are false reports ensures an accusation does not suffice for evidence. It establishes credibility instead of partiality. “Feminism can handle the truth.”⁶⁰⁶ Moreover, accepting that there are false reports can be a powerful prevention principle to encourage responsibility among servicemen and women who continue to block out training thinking, “this does not apply to me because I am not a rapist.”⁶⁰⁷ The fear of false accusations, for instance, has caused many leaders to prudently ensure there are witnesses present whenever rendering discipline to a subordinate. Fear of false accusations may also be the driving factor behind some doctors having a third party present when evaluating any member of the opposite sex. The real possibility of false accusation encourages people to take situations seriously that could result in false accusations; it prompts caution and forethought, which is precisely the behavior needed to prevent sexual assaults.⁶⁰⁸

Discussing what constitutes sexual assault does not need to be super-technical on the legal front. Training should be up front and honest about the fact that there is a big murky area in the realm of sexual assaults; which is where most cases fall. Preventive training should accept there is a difference between what is prudent to do and what the law may require but get people

⁶⁰⁶ McArdle, *supra* note 17.

⁶⁰⁷ See Frost, *The Truth About False Rape Accusations That All Men Should Know*, RETURN OF KINGS, <http://www.returnofkings.com/22079/the-truth-about-false-rape-accusations-that-all-men-should-know> (last visited Feb. 26, 2015) (discussing why men need to be more cautious about sexual encounters and can easily end up facing rape allegations if they are careless).

⁶⁰⁸ Some victim advocates argue the opposite. A journalist for Vox, acknowledging that harsh policies would punish the innocent, said men “need to feel the cold spike of fear when they begin a sexual encounter.” Summers, *supra* note 15. Putting aside whether men should experience fear when beginning a sexual encounter, we do not need to accept or permit wrongful convictions in order to solve the sexual assault problem. Moreover, it turns centuries of justice upside down to advocate punishment of the innocent to ensure the guilty are not set free.

thinking about the risk. Why put yourself in the position to be questioned when it is easy to avoid that situation altogether with more forethought and more communication? This is the message that will appeal to the population most likely to face accusations.

Recommendation 25: *Fix mistakes in training.*

It is insufficient to simply change training without correcting some errors. The “one drink negates consent” training from years ago continues to linger throughout the Air Force. Eliminating the purported rates of false allegations from training will also not fix the misrepresentation of the frequency of false accusations. The training materials for the last SAPR stand-down day in 2014, for example, did not specifically reference any statistics on false allegations but the Wing Commander in Europe specifically discussed statistics and so did the facilitator for the legal office’s group discussions. We can handle the truth. Be honest about mistakes and put them to rest. Be up front that the law is murky, that being drunk does not mean you are incapable of consent or that you are not responsible for your behavior, and there are false allegations but the merits of a case are to be dealt with through a separate process, not through a court of public opinion. Advocate that we have not gotten everything right but we are working hard to get it right and we need people to speak up and take care of each other.

V. CONCLUSION

As military members, we swear to protect and defend the constitution of the United States against all enemies foreign and domestic. The wrongly accused are not our enemies; they are the people we are sworn to protect. In our effort to resolve a societal problem that traces back centuries, we have completely omitted our duty to protect the innocent from our sexual assault prevention and response policy. We clearly want to take care of victims, and we clearly want to ensure justice for those who have been sexually assaulted. We are completely silent, however, on the importance of getting the right result.

This article set out to break down barriers to balance and restore dialogue. Discussion has, consistent with policy, been one-sided. In order to demonstrate the need for a balanced policy, this paper set out to address what is missing from SAPR, namely, protection of the wrongly accused. Americans love to hear stories, especially criminal dramas. Anecdotes have been driving policy but the only ones we hear are the stories of alleged victims. To balance the scales, this paper began by discussing the wrongly convicted; the young men and women who have had their lives irreversibly altered by false accusations. Although the true number of wrongful convictions is unknown, DNA advancements have given us a window into the past and demonstrated that we have convicted innocent people in about 15 percent of sexual assault cases.

The wrongly convicted are the worst-case scenarios for a system that is supposed to protect the innocent. They are not, however, the only victims; the wrongly accused are true victims as well. This paper discussed several examples of where false accusations motivated the press, universities, and the mob to condemn the wrongly accused. The false accusers were exalted and revered while the innocent were persecuted and victimized by those who regard the

mere accusation as sufficient evidence of guilt. In some cases, the public outcry over a false accusation tragically resulted in the murder of the falsely accused. These injustices are supposed to help us find our center; to resist prejudging the accuser or the accused and to rely upon facts to make determinations. We have missed the lessons of these cases, however, and made the situation worse by unbalanced change.

In our admirable efforts to help victims, we have relied too heavily on biased research and biased advocacy. We turned to “experts” to craft surveys and tell us where we need to focus. The surveys, however, do not capture the nuances of sexual assault law. Surveys overwhelmingly fail to accurately define sexual assaults, they rely upon perceptions of the alleged victim to determine the intent of the person she has accused, they mistake what it takes to be incapacitated, they completely ignore mistake of fact, and they do nothing to validate whether the details of the allegation are accurate. Moreover, research suffers from completely circular analysis and is in complete contradiction to centuries of legal jurisprudence. Researchers routinely presume every allegation is true unless you can prove it is not. Since Roman and Spartan law, however, an accused has been presumed innocent unless and until proven guilty. By assuming every allegation is true, researchers have defined victim behavior and characteristics based upon both true and false victims. This unreliable data is then used to define purported myths, which may not be myths if the false data was actually removed. The question, “how do you know this is true?” almost always comes back to the starting point, “because the alleged victim said so.”

To bolster researchers’ starting presumption, that allegations should be treated as true, many researchers have endeavored to prove false allegations are rare. They have defined a false allegation as where the accuser knowingly makes up an event that never happened and she admits it was false. In other words, the answer to the question, “how do we know it is false?” comes back to the same starting point, “because the alleged victim said so.” This is a more demanding standard than is required to convict an offender; offenders are often convicted who never admitted to the offense. The ultra-strict standard used by researchers has, therefore, led to intellectually dishonest assessments that false allegations are rare. Researchers have stated only 2-10 percent are false. On the contrary, by their definitions, roughly 2 percent are false beyond all doubt and about 10 percent are false beyond a reasonable doubt. They have ignored the number of allegations that do not constitute a crime, that are probably false, or that are more likely false than true. The data suggests about 40 percent may be more likely false than true or do not constitute an actual crime. This higher rate is supported by the fact that wrongful convictions have occurred in approximately 15 percent of sexual assault cases. Whatever the actual rate of false allegations, they are certainly not rare. If just ten percent are provably false beyond a reasonable doubt, then there were more provably false allegations of sexual assault in FY 2014 than there were provably true sexual assault allegations over the same time period.

The causes of these wrongful convictions continue to exist, especially in the military where the only changes we have made in recent years have served to remove barriers to convictions and incentivize false accusers. Congress established the UCMJ to provide balance; to protect the mission while also ensuring justice for those accused of crimes. Protections that existed for more than 90 years have now been removed and without any offset to protect the wrongly accused. The four main reasons for false accusations are: to provide an alibi or cover

story for accusers, to obtain revenge or retribution for a perceived harm, to gain sympathy or attention, and extortion. By removing barriers to reporting, increasing the incentives to reporting, treating victims with a protected status, and removing purported obstacles to convictions, we have made it easier and more rewarding than ever for false accusations to come forward and to make it all the way to trial. Once at trial, we have modified rules which make it more difficult to expose false accusers and we continue to have smaller jurors than permitted by the constitution for civilian courts. We do not guarantee appellate review for all cases, nor do we even have an innocence project or equivalent to help reverse injustices. We have, effectively, stripped off our gear and run into a minefield. We need to restore balance.

This article was not intended to answer every question on how to effectively deal with sexual assaults. The problem is complex. The goal was to open dialogue by demonstrating the risk of continuing to neglect our duty to protect the innocent, to explain why we have neglected thus far to do so, and to provide recommendations of how we can achieve a proper balance. By broadening our aperture we can enact changes that look beyond supporting victims to ensuring we get it right. There are undoubtedly other good recommendations out there but the mob mentality only suppresses valuable ideas. Leadership needs to eliminate the mob mentality, open the dialogue, restore balance to the justice process, and take a new approach for SAPR. Members have grown tired of the ineffective training and judges have grown tired of the incorrect training. We need to do more than preach dignity for all; we need to back it up in practice. We need to protect not just America's daughters, but her sons as well. We will never make everyone happy but we must separate treatment from policy and guard against the worst outcomes in each case. We can substantially improve our processes and take great steps forward in eliminating sexual assault without doing so at the expense of the innocent. We can handle the truth; lead with it.