
WISCONSIN JOURNAL OF LAW, GENDER & SOCIETY

VOLUME XXIX, NUMBER 3

FALL 2014

ARTICLES

BREAKING THE CHAIN OF COMMAND CULTURE: A CALL FOR AN INDEPENDENT AND IMPARTIAL INVESTIGATIVE BODY TO CURB SEXUAL ASSAULTS IN THE MILITARY

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To pass a law in the real world means nothing; to enforce the law means
everything.¹

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1. *Prohibition: A Nation of Scofflaws* (PBS Oct. 3 2011) (interview by Ken Burns and Lynn Novick with Noah Feldman, Prof. of Law, Harvard Law School).

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INTRODUCTION

The Department of Defense (DOD) recently published data that suggests that the occurrence rate of sexual assaults in the U.S. military is alarmingly high.² Sex crimes committed by servicemembers against other servicemembers, often dubbed “military-on-military,” are especially concerning.³ A recent survey estimates that about 26,000 servicemembers (6.1 percent of female servicemembers and 1.2 percent of male servicemembers) experienced at least one incident of unwanted sexual contact in the twelve months prior to being surveyed.⁴ Data also suggests that only a small minority of victims—about 16 percent—report the assaults.⁵ In 2012 servicemembers filed only 3,374 reports: 2,558 unrestricted reports and 816 restricted reports, namely reports that because of the victim’s request remain confidential, therefore barring investigation.⁶

Military-on-military sexual assault not only poses serious risks to the servicemembers’ well-being, morale, and their trust in the military justice system, but also potentially jeopardizes recruitment, mainly of female servicemembers.⁷ Acknowledging these dangers, the military justice system has taken extensive steps to address the problem in recent years. These steps include both substantive changes in the definition of sex crimes in the Uniform

2. 1 DEP’T. OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY 2, 12 (2012) [hereinafter DOD Report] (recognizing that sexual assaults in the military are still a persistent problem and much work needs to be done in preventing it), available at http://www.sapr.mil/public/docs/reports/FY12_DOD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf.

3. See Elizabeth L. Hillman, *Front and Center: Sexual Violence in U.S. Military Law*, 37 POL. & SOC’Y 101, 102 (2009).

4. DOD Report, *supra* note 2, at 2, 12.

5. DOD Report, *supra* note 2, at 52-53 (noting that about 16 percent of military sexual assault victims report the crime).

6. DOD Report, *supra* note 2, at 57.

7. See Hillman, *supra* note 3, at 101.

Code of Military Justice (UCMJ), as well as a series of procedural reforms, aimed to improve the reporting and investigation of these crimes.⁸

Substantive law reform included the 2007 revision of UCMJ Article 120, which expanded the historic prohibition against rape to include other types of sexual assault.⁹ The amended provision expands the definition of sex crimes to fourteen different crimes, including a new offense titled aggravated sexual assault, defined as “enga[ging] in a sexual act by threatening or placing another person in fear.”¹⁰ The provision criminalizes “a threat [. . .] through the use or abuse of military position, rank or authority, to affect or threaten to affect, either positively or negatively, the military career of some person.”¹¹ This legislative reform reflects a contemporary understanding of the harms of sexual assault, criminalizing various forms of sexual misconduct above and beyond criminal codes in most civilian jurisdictions.¹²

Despite extensive reform in the military’s treatment of sexual assaults of servicemembers, recent data suggests that the problem persists at disturbing rates. Successful investigation, prosecution, and conviction of offenders remain significantly low.¹³ While the Pentagon is not ignoring the problem, the above changes not only failed to reduce the incident rate of sexual assault but also brought little progress in holding offenders criminally liable.¹⁴

Following several highly publicized sexual assault cases and a media buzz, the problem received close scrutiny from legislators.¹⁵ Congress considered various amendments that would improve the military justice system’s treatment of sexual assaults.¹⁶ For example, Senator Gillibrand’s bill called for stripping commanders of their prosecutorial discretion in deciding

8. Hillman, *supra* note 3, at 102 (noting that the military criminal code has been “overhauled” and “the policies that set the tone for the investigation and prosecution of rape have been rewritten”).

9. See National Defense Authorization Act, Pub. L. No. 109-163, § 552, 119 Stat. 3136 (codified as amended at 10 U.S.C. § 920 (2006)) (amending UCMJ art. 120 by criminalizing additional forms of sexual misconduct beyond rape, including aggravated sexual assault).

10. 10 U.S.C. § 920(c)(1)(A) (2006).

11. 10 U.S.C. § 920(r)(7)(B)(ii)(III) (2006).

12. See Major Jennifer S. Knies, *Two Steps Forward One Step Back: Why the New UCMJ’s Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put It Back on Target*, ARMY LAW, Aug. 2007, at 1, 21-25 (discussing the innovative approach of the amended Article 120).

13. See *Briefing re 2013 Statutory Report: Sexual Assault in the Military Before the U.S. Comm’n on Civil Rights*, 113th Cong. (2013) (statement of Elizabeth L. Hillman, Professor of Law, Univ. of Cal. Hastings Coll. of the Law), available at <http://www.eusccr.com/Hillman%20statement.pdf>.

14. See *infra* Part II.

15. See Helene Cooper, *Two Cases, One Conclusion on Military Justice*, N.Y. TIMES at 3, Mar. 21, 2014, available at <http://www.nytimes.com/2014/03/22/us/two-cases-one-conclusion-on-military-justice.html>.

16. See *Id.*; see also Amanda Marcotte, *What Happened to the Military Sexual Assault Bill in the Senate on Thursday, Military Sexual Assault Bills: Claire McCaskill Defeats Kirsten Gillibrand*, SLATE (Mar. 7, 2014).

whether to prosecute sexual assault cases.¹⁷ Instead, the bill proposed to vest this authority in JAG officers.¹⁸ Following the Pentagon's strong opposition to removing commanders' prosecutorial discretion, the Senate rejected the bill in March 2014.¹⁹ Instead, the Senate adopted a compromise bill advocated by Senator McCaskill.²⁰ This bill proposed that a civilian review would examine the sexual assault case if the commander and the military prosecutor disagreed over whether to prosecute.²¹

Given the failure of previous reforms to foster change, the question remains: would the above statutory reform provide sufficient measures to improve the treatment of military sexual assault? In particular, what concerns remain unresolved, thus hindering successful prosecution of these crimes? Without minimizing the accomplishments of reforms that have already taken place, I contend that existing measures are significantly lacking because they fail to address the military's criminal investigation of sexual assault cases, a key component that is responsible for the problem. This feature has largely gone unnoticed, making the proposed bill an insufficient measure to solve the problem. This omission is understandable given that the vast majority of political scrutiny and academic literature focuses on concerns regarding prosecutorial discretion, namely the commander's decision whether to pursue court martial charges after the investigation.²² But this approach mistakenly relies on the assumption that a comprehensive investigation has indeed been conducted. An examination of our existing military justice system reveals that an extensive criminal investigation is often lacking, which results in the military justice system's inability to successfully prosecute perpetrators.

To fill this gap, this Article focuses on the preliminary stages of the military's criminal process and its treatment of sexual assault complaints. These include the military's reporting and investigation mechanisms, specifically the official report of the incident and the ensuing criminal investigation of the case. This Article makes the simple, yet crucial point: comprehensive investigations of sexual assault cases are necessary for successful prosecutions. Put differently, without an exhaustive investigation that gathers sufficient evidence against the perpetrator, criminal prosecutions cannot be pursued.

A significant part of the problem stems from the current institutional structure of the military's reporting and investigation mechanisms. First, the reporting and investigative power lies with the military commander, who

17. Military Justice Improvement Act, S. 1752, 113th Cong. (2013), available at <http://www.gillibrand.senate.gov/mjia>.

18. *Id.* See Cooper, *supra* note 15.

19. See Marcotte, *supra* note 16..

20. Victims Protection Act, S. 1917, 113th Cong. (2014), available at <https://beta.congress.gov/bill/113th-congress/senate-bill/1917>.

21. *Id.*

22. See David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline*, 215 MIL. L. REV. 1, 55-56 (2013) (describing the commander's broad prosecutorial discretion).

enjoys an unprecedented authority in deciding if and how to proceed with a complaint involving military sexual assault.²³ Commanders currently have the authority to kill sexual assault complaints by preventing them from evolving into official reports, which commanders would be required to transfer to the military police for investigation.²⁴ Second, a major problem rests with the nature and quality of criminal investigations of military sexual assaults. Military investigative agencies use investigative tactics and techniques that adversely affect the future of a significant number of sexual assault complaints.²⁵ The path to successful reform lies in challenging these investigative practices, along with the prevailing military culture, myths and stereotypes that undergird them. These practices not only result in notable underreporting of military sexual assault but also often impede their prosecution.

While this Article focuses on critique of the military's reporting and investigation of sexual assault cases, along the way I aim to situate the problem in a broader context, one that goes above and beyond military sexual assaults. First, a main goal of this Article is to connect the problems concerning reporting and investigation of military sexual assaults with broader issues pertaining to general rape law reform in the civilian system. When considering sexual assaults in the military, it is crucial to frame the discussion within the broader framework of how the civilian justice system addresses sexual assaults. This Article stresses that a significant number of the problems that characterize the military justice system also characterize its civilian counterpart.²⁶

Second, the Article identifies one example of a broader problem concerning the relationship between substantive changes in law and prevailing enforcement practices. Attempts to change the law by passing innovative statutes and new policies fail to foster actual change if they are not accompanied by the necessary overhaul of investigative practices.²⁷ Put differently, changes in substantive law become meaningless in the real world if enforcement practices and the prevailing misconceptions underpinning them are not adapted to reflect these changes.

Third, this Article identifies an example of a phenomenon that has not received sufficient scholarly attention, underenforcement.²⁸ In recent years,

23. *Id.* at 9 (describing the commander's broad discretion in treating the complaint).

24. *See infra* Part III.

25. *See infra* Part IV.

26. *See* Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305, 307 (1998) (noting that the same problems that characterize the civilian justice system concerning sex crimes are exacerbated in the military setting).

27. *See generally* Donald A. Dripps, *The Substance-Procedure Relationship in Criminal Law*, in PHIL. FOUND. CRIM. L. 409, 415 (R.A. Duff & Stuart P. Green eds., 2011) (discussing various aspects of the relationship between substantive criminal law and criminal procedures).

28. *See* Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1717 (2006) (suggesting that some areas are characterized by underenforcement and discussing categories of crimes that represent this phenomenon).

criminal law literature has mainly focused on critiquing various aspects of the overcriminalization phenomenon.²⁹ Ample scholarship describes the ways in which too many behaviors are now criminalized without sufficient justification.³⁰ In contrast, this Article focuses on an opposite problem by contending that sexual assaults, military ones among them, still remain significantly underenforced.

The Article proceeds in five parts. Section I describes the distinct features that characterize the military setting and exacerbate the problem of sexual assaults in this specific context. Section II discusses the problem of underreporting of military sexual assaults by elaborating on the gap between the number of official reports and the actual incident rate of sexual assaults. Section III argues that the commander's discretion in disposing of a sexual assault report, which discourages complainants from filing reports, partly explains the gap discussed in Section II. Section IV focuses on the link between often-incomprehensive criminal investigations and the tiny fraction of cases that are prosecuted. In this section I explain how the military police's prevailing practices and investigative tactics result in underreporting and underprosecution. Finally, Section V outlines my proposal for reforming the existing structure of reporting and investigating of military sexual assault.

I. THE UNIQUE FEATURES OF THE MILITARY SETTING

Understanding what distinguishes the military setting from most civilian settings explains why the problem of sexual assault is further exacerbated in the military. Before delving into the military justice system's treatment of sexual assault, it is thus useful to pause to consider the military setting's distinct features.

While this Article postulates that sexual assaults in the military are a pressing problem, others might contend that data suggests military sexual assaults are not a greater problem than sexual assaults in civilian society.³¹ A prevailing argument is that sexual assaults in the military are no more prevalent than their equivalent in the civilian system.³² For example, statistics concerning sexual assaults on college campuses suggest that the occurrence rates of sexual assaults in these settings are equally alarming. One in four female students endure at least one incident of unwanted sexual contact while in college, and

29. See Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 713-19 (2005) (discussing the features of the overcriminalization phenomenon).

30. See Sara Sun Beale, *The Many Faces of Over-criminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 753-56 (2005) (discussing the over federalization of criminal law).

31. See DOD Report, *supra* note 2, at 52-53 (describing the low reporting of civilian sexual assaults).

32. See Christopher J. Goewert & Andrew R. Norton, *Sexual Assault: Four Commonly Held Beliefs*, 40 REPORTER 24 (2013) (noting that the prevalence of sexual assaults in the military settings is not higher than the equivalent civilian population).

the vast majority of these incidents remain unreported.³³ However, the college setting analogy is somewhat misleading. On its face, the military shares some common features with college campuses. Both are close settings where young men and women spend most of their time together, sharing residences, hanging out in their free time, and often excessively using alcohol. This statement does not need any citation, it's considered common knowledge. These settings are strikingly different, however, when considering the problem of sexual assault. The following features that characterize the military setting are notably absent in comparable civilian settings, outweighing the settings' apparent similarities and calling for a different legal treatment of sexual assault.

A. *Abuse of Power and Authority*

A main feature characterizing the military setting is the power imbalance between commanders and subordinates.³⁴ Power disparities often result in sexual abuses when the power-holder exerts undue pressure on the subordinate to coerce their submission to the power-holder's sexual demands.³⁵ This Article does not elaborate on the general aspects of sexual assaults as a form of abuse of power and authority, although I have examined the problem elsewhere.³⁶ The problem of sexual abuse of power is not limited to the military setting.³⁷ People in various positions of power, such as supervisors and employers in the workplace, professors in academia, prison and jail guards in correctional facilities, often abuse their authority to coerce sexual acts on individuals in subordinate positions.³⁸ Vulnerable individuals often unwillingly acquiesce to

33. See Kay Hartwell Hunnicutt, *Women and Violence on Campus*, in *VIOLENCE ON CAMPUS* 149, 152 (Allan M. Hoffman et al. eds., 1998).

34. See Michael E. Pfau and Eugene R. Milhizer, *The Military Death Penalty and the Constitution: There Is Life After Furman*, 97 *MIL. L. REV.* 35, 57 (1982). Cf. RANA SAMPSON, U.S. DEP'T. OF JUSTICE, *PROBLEM-ORIENTED GUIDES FOR POLICE* 17, 4 (2002) (Acquaintance Rape of College Students) (noting that most offenders in college are neither confronted nor prosecuted and colleges are left in the dark about the extent of the problem); cf. Michelle Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement and Cautionary Instructions on Campus Sexual Assaults*, 84 *B.U.L. REV.* 945, 951 (2004) (discussing universities practices that deter students' reporting of rapes).

35. See Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 *MICH. J. GENDER & L.* 144, 216 (2011) [hereinafter: *The Failure of Consent*] (describing power disparities leading to coerced submission to unwanted sexual demands.)

36. *Id.*; Michal Buchhandler-Raphael, *Criminalizing Coerced Submission in the Workplace and in the Academy*, 19 *COLUM. J. GENDER & L.* 409 (2010) [hereinafter *Coerced Submission*]; see also Michal Buchhandler-Raphael, *Sexual Abuse of Power*, 21 *U. FLA. J. LAW & PUB. POL'Y* 77 (2010).

37. See STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF THE LAW* 17-82 (1998) (elaborating on the various forms of abuse of power in different settings).

38. See, e.g., Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 *YALE L. & POL'Y REV.* 1, 23-25 (2010) (discussing various forms of sexual abuse in the prison setting); Ann Carey Juliano, *Harassing Women With Power: The Case*

sexual demands in response to continuous pressures and threats that place them in fear of various types of harm, including retaliation.³⁹ The military setting further exacerbates these features due to the military's chain of command and the nature of the relationship between military commanders and subordinates.

The military provides the paradigm of a hierarchical organization in which subordinates are legally required to obey their commanders.⁴⁰ Perpetrators of sexual assaults often exercise their official power under the military chain of command to require their subordinates' obedience.⁴¹ One implication of this institutional structure is that any insubordination is highly problematic for the individuals involved and the military as a whole.⁴² The military is based on adhering to discipline and on obeying the chain of command.⁴³ In contrast with typical civilian employment relationships, a military subordinate who disobeys commands may face severe punishment, including deprivation of liberty.⁴⁴ A victim's fear of retaliation for reporting the sexual assault is one main feature characterizing the military setting.⁴⁵ In addition, a servicemember who endures military sexual assault often has no immediate way out and must stay in the same unit with his or her attacker.⁴⁶ In contrast to the civilian world, where victims of sexual assaults may leave and avoid any further contact with their attacker, military sexual assault victims cannot leave their unit without facing disciplinary actions.⁴⁷

Recent data confirms these concerns, suggesting that most sexual assaults are committed against enlisted servicemembers by their superiors.⁴⁸ The DOD Report notes that 73 percent of victims were grades E1-E4, meaning that the vast majority of the victims were either training or in their initial assignment.⁴⁹

For Including Contra-Power Harassment Within Title VII, 87 B.U. L. REV. 491, 492, (2007) (observing that sexual harassment has always been viewed as abuse of power).

39. See *The Failure of Consent*, *supra* note 35, at 206-07 (defining sexual abuses of power).

40. UNIFORM CODE OF MILITARY JUSTICE (UCMJ), art. 90-92 (2012) [hereinafter *UCJM*]; see Pfau and Milhizer, *supra* note 34, at 57 (stating servicemembers' duty to obey orders).

41. See *The Failure of Consent*, *supra* note 35, at 222-23 (discussing the military justice system's treatment of sexual abuse of power).

42. See Schlueter, *supra* note 22, at 21-23 (describing the role of discipline in the military).

43. *Id.* at 22.

44. *Id.* at 22, at 52-53 (describing military offenses such as disobedience of orders).

45. See Amended Complaint at 4, *Cioca v. Rumsfeld*, No. 1:11-cv-00151 (E.D. Va. Sept. 6, 2011) [hereinafter *Cioca Complaint*], available at <http://timemilitary.files.wordpress.com/2011/12/cioca-et-al-first-amended-complaint.pdf>; see also DOD Report, *supra* note 2, at 27 (noting that many servicemembers did not report the crime for fear of retaliation); Bennett Capers, *Real Rape Too*, 99 CAL. L. REV. 1259, 1261 (2011) (describing the reluctance to report rape in the prison setting).

46. See *Cioca Complaint*, *supra* note 45, at 11, ¶ 46 (stating that after SGT Harvilla was raped by her supervisor she had to face her rapist and went into shock as a result).

47. UCMJ art. 85; see also *Cioca Complaint*, *supra* note 45, at 49, ¶ 310.

48. See DOD Report, *supra* note 2, at 82-84.

49. *Id.* at 82.

The DOD Report further notes that 51 percent of perpetrators also were grades E1-E4 and that 28 percent of perpetrators were sergeant level or higher.⁵⁰ This data reveals that junior enlisted army personnel (corporal/specialist and below) dominated both victim and perpetrator categories and that the typical sexual assault incident involves a junior female enlistee assaulted by a more senior service member.⁵¹ New recruits are expected to report any misconduct directly to their chain of command, but reporting a sexual assault to the direct commander is often not a viable option if this commander is also the perpetrator of the sexual assault.⁵²

The notion that sexual assault is one of many forms of abuse of power, rather than a sexually motivated crime, is further buttressed by the fact that male servicemembers often fall prey to military sexual assaults.⁵³ Indeed, sexual assault cases often demonstrate that these crimes have nothing to do with sex and everything to do with power and various ways of abusing it.⁵⁴ While female servicemembers comprise the vast majority of victims, sexual abuse of power is a problem that cuts across gender lines.⁵⁵ Studies suggest that about 10 percent of servicemen experienced various forms of sexual assault during military service.⁵⁶ Although the percentage of male service members who were sexually assaulted by other male servicemembers may be lower compared to the percentage of female servicemembers sexually assaulted by male service members, the actual number of males who were subjected to sexual assaults may be higher, as men comprise about 85 percent of servicemembers.⁵⁷

B. A Hyper-Masculine Culture

Studies suggest that a significant percentage of sexual assaults occur in hyper masculine environments, such as college fraternities and men sports

50. *Id.* at 84.

51. *Id.* at p. 81-84.

52. See Dana Michael Hollywood, *Creating a True Army of One: Four Proposals to Combat Sexual Harassment in Today's Army*, 30 HARV. J.L. & GENDER 151, 197 (2007) (describing the flaws of a military justice system requiring that the victim report to the her direct commander).

53. See DOD Report, *supra* note 2, at 81 (data suggesting that 12% of victims were male); see also Chamallas, *supra* note 26, at 372-73 (contending that sexual abuse of military men is kept invisible).

54. *Id.* at 308 (noting that the key problem in military sex crimes is abuse of power).

55. See Capers, *supra* note 45, at 1297-98 (discussing various aspects of male victimization).

56. See DEP'T. OF DEF., REPORT OF THE DEFENSE TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVICES, 35-36 (2009).

57. See Margaret E. Bell & Annemarie Reardon, *Working With Survivors of Sexual Harassment and Sexual Assault in the Military*, in ADVANCES IN SOCIAL WORK PRACTICE WITH THE MILITARY 72, 74 (Joan Beder ed., 2012) (noting that about 27% of men were severely sexually harassed during military service).

teams.⁵⁸ By encouraging male aggression, such settings are more prone to sexual violence.⁵⁹ Hypermasculinity is exacerbated in the military setting. Physical aggression is deeply embedded in the military's main function of fighting or preparing to fight wars.⁶⁰ Given that exercising various forms of aggression is the military's quintessential role, it is hardly surprising that new military recruits are prone to violence. A recent study conducted by the Navy found that between 13 percent and 15 percent of new recruits self-reported perpetrating or attempting rape, more than three times the amount estimated for the general population.⁶¹ Another study based in a clinic that serves Navy and Marine Corps men found significant male sexual victimization in the military setting.⁶² A third study found a 6.7 percent victimization rate among male U.S. Army members.⁶³ Some studies suggest that the military setting attracts recruits who are more prone to sexual aggression. For example, a Naval study suggests that 13 percent of newly enlisted Navy recruits perpetrated rape or attempted rape between age fourteen and the end of the first year of their military service.⁶⁴

The closed military setting provides a rich environment for sexual predators. Sexual assaults in this setting stem from perpetrators taking advantage of victims' vulnerabilities, especially when perpetrators are familiar with their victims.⁶⁵ The military's hyper-masculine culture also explains why some servicemembers are reluctant to report their sexual assault. Filing a sexual assault report is perceived as admitting vulnerability, which is often construed as an inherent character weakness.⁶⁶ Instead of acknowledging that they have been victims of sexual assault and reporting the crime, sexual assault victims

58. See Francis X. Shen, *How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform*, 22 COLUM. J. GENDER & L. 1, 65-68 (2011) (discussing studies that examine types in hyper-masculine settings).

59. See MARTIN D. SCWARTZ & WALTER S. DEKESEREDY, *SEXUAL ASSAULT ON THE COLLEGE CAMPUS: THE ROLE OF MALE PEER* 2, 32-3 (1997).

60. *Greer v. Spock*, 424 U.S. 828, 837-38 (1976) (noting the "special constitutional function of the military in our national life, a function both explicit and indispensable," emphasizing the military's primary duty is fighting or preparing to fight wars).

61. See Terri J. Rau et al., *Evaluation of a Sexual Assault Education/Prevention Program for Male U.S. Navy Personnel*, 175 MILITARY MED. 429, 429-31 (2010) (the study suggests that one in five participants in the study reported engaging in some coercive behavior).

62. See Peter F. Goyer & Henry C. Eddleman, *Same-Sex Rape of Nonincarcerated Men*, 141 AM. J. PSYCHIATRY 576 (1984).

63. See Lee Martin et al., *Prevalence and Timing of Sexual Assaults in a Sample of Male and Female U.S. Army Soldiers*, 163 MILITARY MED. 213 (1998).

64. See Stephanie K. McWhorter et al., *Reports of Rape Reperpetration by Newly Enlisted Male Navy Personnel*, 24 VIOLENCE & VICTIMS 204 (2009).

65. Buchhandler-Raphael, *Sexual Abuse of Power*, *supra* note 36, at 125-27 (describing victims' vulnerability resulting in their submission to unwanted sexual demands).

66. See Hillman, *supra* note 3, at 104 (noting that the military justice system focuses on victims' vulnerability).

often minimize the assault's gravity by framing it as mere improper behavior.⁶⁷ This is particularly true with respect to male victims who do not want to view themselves as victims of sex crimes with the attached shame and stigma.⁶⁸ These men would rather view themselves as victims of hazing or other rituals that subject individuals to humiliating and disconcerting positions.⁶⁹ Therefore, systemic reform to change the prevailing culture in which sexual assault occurs is a much-needed component for any future change.

C. The Military As a Workplace

Military and workplace are professional settings whereas colleges are a social setting. The military's unique position as an employer further distinguishes the military from social settings such as colleges because of notable power imbalances that characterize professional relationships.⁷⁰ These imbalances call for strict professional norms of conduct and special protection of servicemembers from sexual assault. Professor Susan Estrich has long argued that sexuality should be banned altogether from the workplace.⁷¹ Explaining her position, Estrich wrote:

As things stand now, we protect the right of a few to have "consensual" sex in the workplace (a right most women, according to the studies, do not even want), at the cost of exposing the overwhelming majority to oppression and indignity at work . . . For my part, I would have no objection to rules, which prohibited men and women from sexual relations in the workplace, at least with those who worked directly for them. Men and women could, of course, violate the rule; but the power to complain, once in the hands of the less powerful, might well "chill" sexual relations by evening the balance of power between the two.⁷²

This position draws on the psychological theory called "sex-role spillover," which suggests that sexual harassment occurs because men inappropriately bring with them into the workplace inegalitarian attitudes, actions, and habits of sexual objectification that they learned in the domestic sphere.⁷³

67. See Katharine K. Baker, *Sex, Rape and Shame* 8 DEPAUL J. HEALTH CARE L. 179, 200-01 (2004) (noting that victims often minimize the severity of date rapes).

68. See Capers, *supra* note 45, at 1261 (noting the reluctance to report male rape).

69. See Hillman, *supra* note 3, at 106.

70. See Schulhofer, *supra* note 37, at 170-71.

71. See Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 860 (1991) [hereinafter: *Sex At Work*]. For an opposing position see Vicki Schultz, *The Sanitized Workplace*, 112 YALE L. J. 2061, 2088 (arguing that sanitizing the workplace from all forms of sexual harassment is not the answer to women inequality at work).

72. See Estrich, *supra* note 71, at 860.

73. See BARBARA A. GUTEK, *SEX AND THE WORKPLACE: THE IMPACT OF SEXUAL BEHAVIOR AND HARASSMENT ON WOMEN, MEN AND ORGANIZATIONS* 15-16 (1985).

Moreover, the military is a unique employer because it requires servicemembers to take significant risks, mainly risking their own lives, which exposes them to dangers that civilian employees do not encounter.⁷⁴ The military owes an enhanced duty to protect servicemembers from sexual assaults because servicemembers endure extraordinary risks to human life. Colleges, on the other hand, are different from professional workplaces. Of course, colleges owe students a duty to protect them from sexual assaults, but the features characterizing the college setting also create inherent risks from social encounters between young and often immature students. Colleges provide students not only with an educational experience but also with an environment in which they engage in different social experiences, including socializing with peers. The latter features, which are an integral part of students' college experience, are not considered one of the goals of military service (even though they may sometimes be collateral consequences of military service).

D. The Link Between Sexual Harassment and Rape in the Military

As a unique employer, the military should consider the empirical link between the occurrence rates of sexual harassment and sexual assault.⁷⁵ At a conceptual level, physical sexual assault and verbal sexual harassment are viewed as separate forms of gender-based misconduct.⁷⁶ Sexual harassment is treated as a form of sex-based discrimination under Title VII of the Civil Rights Act.⁷⁷ Viewed through this lens, sexual harassment is subject to various forms of civil remedies, but not criminal prosecution. In sharp contrast, rape is unanimously treated under the law as a criminal offense.⁷⁸ While common law once defined rape as intercourse accomplished by force and against the victim's will, many jurisdictions today define rape as sex without consent.⁷⁹

The military setting is a paradigm for the underappreciated, yet close link between sexual harassment and rape. I have addressed elsewhere the

74. See Lesley Wexler, *The Vietnamization of the Long War on Terror: An Ongoing Lesson in the International Humanitarian Law Non-Compliance*, 30 B. U. INT'L L.J. 575, 585-86 (2012) (noting the unique feature of military service including risk taking).

75. See U.S. COMM'N ON CIVIL RIGHTS, SEXUAL ASSAULT IN THE MILITARY 11 (Sept. 2013) (conceding the link between sexual assault and sexual harassment), available at http://www.usccr.gov/pubs/09242013_Statutory_Enforcement_Report_Sexual_Assault_in_the_Military.pdf.

76. See Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 32-33 (1999) (explaining the rejection of common-law tort remedies for addressing sexual harassment).

77. 42 U.S.C. § 2000e-2(a) (West 2014) (Title VII provides that "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.").

78. See generally 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW, §17.1(a) 605-06 (Thomson West, 2d ed. 2003) (common law definition of rape).

79. See Schulhofer, *supra* note 37, at 171-73 (advocating the adoption of an affirmative consent standard in rape laws).

relationship between these two types of misconduct, arguing that both ought to be viewed as different forms of sexual abuse of power in professional and institutional settings and that some forms of sexual harassment ought to be subject to criminal regulation.⁸⁰ Victims' accounts of their sexual assault in the military support the assertion that rape and sexual harassment in certain institutional and professional settings, such as the military, share many characteristics. Both sexual harassment and rape are forms of sexual violence perpetrated by those in positions of power against those less advantageously situated.⁸¹ Data suggests that sexual harassment, along with an environment of sexual predation, precedes the physical attack in a significant number of military sexual assaults.⁸² The military's tolerance of sexual harassment encourages and ultimately leads to physical sexual assaults. Sexual harassment and rape should be viewed on the same continuum as two closely related manifestations of a sexual abuse of power.

II. THE GAP BETWEEN OFFICIAL REPORTS AND INCIDENT RATES OF SEXUAL ASSAULTS

Given the distinct features that characterize the military setting, the disconcerting numbers regarding the scope of military-on-military sexual violence are hardly a surprise. Despite the DOD's continuous attempts to reduce the scope of the problem, sexual assaults in the military remain prevalent with incidence rates notoriously high and successful prosecutions notably low.⁸³ In response to the public and media's criticism that not enough is being done to address military sexual assaults, in recent years the DOD has collected extensive data on the scope of the problem.⁸⁴ Consequently, we now have mainly two sets of data.

The first set of data consists of the official DOD Annual Report detailing the number of reports that have been filed within a given year.⁸⁵ The DOD Annual Report defines the term "sexual assault" broadly to refer to a host of sexual crimes, including "rape, sexual assault, nonconsensual sodomy, aggravated sexual contact, abusive sexual contact and attempts to commit these offenses."⁸⁶ The number of official reports consists only of cases where victims of military sexual assaults decided to go forward with their complaint by

80. See Buchhandler-Raphael, *supra* note 35, at 200, 215-17.

81. See Buchhandler-Raphael, *Coerced Submission*, *supra* note 36, at 418-19 (noting the similarities between rape and some forms of sexual harassment).

82. See Cioca Complaint *supra*, note 45, at 5-7 (detailing how sexual harassment escalated to rape).

83. See DOD Report, *supra* note 2, at 2, 68 (stating that while 6.1 percent of women servicemembers and 1.2 percent of male servicemembers fell prey to unwanted sexual contact in 2012, court martial charges were preferred only in 594 cases).

84. See *id.* at 56.

85. See *id.*

86. See *id.* at 52.

openly filing a report through the military chain of command.⁸⁷ The DOD Annual Report for 2012 states that 3,374 restricted and unrestricted reports were filed in that year.⁸⁸ Out of the 3,374 reports, 816 reports were restricted.⁸⁹ Restricted reports remain confidential due to the victim's request for anonymity, and so were not and could not have been investigated. Consequently, only 2,558 unrestricted reports could have been investigated.⁹⁰

The second set of data is based on anonymous, confidential surveys, which consist of self-reports by servicemembers of incidents of sexual misconduct.⁹¹ Every other year the DOD conducts this separate survey on sexual assault among the 1.4 million active-duty servicemembers.⁹² The survey found that about 26,000 men and women in the military were sexually assaulted in 2012, up from about 19,000 in 2010.⁹³

These two sets of data demonstrate that the official reports significantly lag behind the data compiled by anonymous surveys. The number of sexual assaults reported to military authorities in no way reflects the number of actual sexual assaults that occurred in a given year because only a fraction of these incidents were actually reported. The DOD Annual Report estimates that over the past six years, fewer than 15 percent of military sexual assault victims reported the matter to a military authority.⁹⁴ This notable gap suggests a serious problem of under-reporting. At least one aspect of the problem of military-on-military sexual assault therefore lies in the initial stage of the criminal process with the phenomenon of underreporting.

A couple of observations with respect to underreporting are in order. First, the underreporting problem is not unique to the military. Ample research suggests that rape is one of the most underreported crimes, and that sexual assault victims report a small fraction of civilian sexual assaults as well.⁹⁵ While the underreporting is common in the military and the civilian setting, the phenomenon is further exacerbated in the military due to the distinct features of the military justice system and the underlying military culture.

Second, relying on anonymous surveys asking servicemembers whether they have experienced an event involving unwanted sexual contact is fraught with problems concerning the research methods. These surveys rely on participants' subjective perceptions of incidents they have experienced and on their ability to accurately classify these events into the DOD's definitions of

87. *See id.* at 56 (noting that the data about unrestricted reports is drawn only from official investigations conducted by the MCIOs).

88. *See id.* at 57.

89. *See id.*

90. *See id.* at 58.

91. *See id.* at 11-12.

92. *See id.*

93. *See id.* at 12.

94. *See id.* at 53.

95. *See* DEBORAH L. RHODE, JUSTICE AND GENDER 246-48 (1989) (noting that recent studies suggest that rape is the most underreported of all violent crimes).

sexual assault.⁹⁶ As a result, this data only has limited value. Conceding the limitations of the survey, however, it is clear that a significant number of sexual assaults go unreported and that the reported numbers of complaints are poor measures of actual incident rates.

Carefully interpreting the actual data presented by the DOD, however, demonstrates that the DOD Annual Report's numbers may be misleading. At first glance, the DOD Annual Report implies that *all* sexual assault complaints are in fact being considered by the military police. A closer reading, however, reveals that this is an inaccurate assumption. According to the DOD Annual Report, the Military Criminal Investigation Organization compiles data for the total number of reports from official military police investigations.⁹⁷ As such, these numbers only reflect the military police's own records for the number of cases in which they opened a criminal investigation.

While this number ostensibly suggests that military police investigated *all* sexual assault complaints, an additional piece of information is missing—the number of initial servicemembers' complaints that never reached the military police. The precise number of cases in which servicemembers have not filed official reports remains unknown and cannot be reflected in the DOD Annual Report. There are various ways in which a commander can stop a complaint and prevent it from becoming an official report that must be investigated. The following discussion of the military's institutional structure accounts for the underreporting of sexual assaults and the fact that some complaints are not subjected to the military police's official investigation.

III. COMMANDERS' INVESTIGATIVE AND PROSECUTORIAL ROLES

The unprecedented authority of commanders to dispose of sexual assault complaints is an institutional problem that characterizes the military justice system. To examine this power, it is useful to briefly review the legal framework under which the commander operates. The Manual for Courts Martial (MCM) sets forth this framework, with Part II of the Manual providing the Rules for Courts Martial (RCM).⁹⁸

A. *The Authority to Dispose of Sexual Assault Reports*

The process of handling a sexual assault case begins with a servicemember's allegation that a crime has been committed.⁹⁹ While civilian victims file complaints with police departments, servicemembers often do not

96. Cf. Anthony C. Thomson, *What Happens Behind Locked Doors: The Difficulty of Addressing and Eliminating Rape in Prison*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 119, 128-29 (2009) (discussing self-reporting of prison rapes).

97. See DOD Report, *supra* note 2, at 56.

98. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. 2 (2012), [hereinafter MCM] available at http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf.

99. See Timothy C. MacDonnell, *Prosecuting in the Military*, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 314, 323 (Erik Luna & Marianne Wade eds., 2012).

have the option of directly filing complaints with the military police. Because the military is a hierarchical organization, the process typically begins with a victim complaining to his or her direct military commander.¹⁰⁰ In theory, there may be alternative agencies where a service member may file his or her complaint. The problem is that reaching out to the commander is often the only feasible path a servicemember may take due to practical problems concerning lack of easy access to other agencies. This is especially true for new recruits, who are probably the most vulnerable military members. Drill Sergeants keep very tight control of new recruits' moves, and therefore leaving training to report a complaint to someone other than the commander is often not a practical option.¹⁰¹

Several chapters of the RCM govern the handling of reports of misconduct. Rule 301, titled Report of Offenses, states that the person who receives the initial report "shall forward as soon as practicable the report and any accompanying information to the immediate commander of the subject."¹⁰² In most cases, the immediate commander is a junior officer.¹⁰³ Rule 303, titled Preliminary Inquiry Into Reported Offenses, states that the commander is first required to "make or cause to be made preliminary inquiry into the charges or suspected offenses".¹⁰⁴ It further states that this preliminary inquiry is usually informal, but in some cases a more extensive investigation may be necessary.¹⁰⁵ Importantly, the commander may conduct the investigation personally or with members of the command.¹⁰⁶ However, in serious or complex cases the commander should consider whether to seek the assistance of law enforcement personnel in conducting any inquiry or further investigation.¹⁰⁷ Notably, nowhere in the RCM is the commander obligated to transfer the case to the military police, and he is authorized to make the inquiries or investigate the case without the military police's involvement. As noted earlier, those cases in which the commander makes the inquiries without the military police's assistance will not be reflected in the DOD Annual Report's statistics, which comprise only of official reports that have been forwarded to the military police.¹⁰⁸

The most disconcerting provision of the RCM is Rule 306, titled Initial Disposition.¹⁰⁹ This rule describes who may dispose of complaints of offenses and the options available to such authorities. Each commander in the chain of command has independent, yet overlapping, discretion to dispose of complaints

100. See Cioca Complaint, *supra* note 45, at 7, 13, 15, 17, 23, 25.

101. See Hollywood, *supra* note 52, at 196.

102. MCM, R.C.M 301 (a).

103. See MacDonnell, *supra* note 99, at 323.

104. MCM, R.C.M 303.

105. MCM, R.C.M 303 Discussion at II-19.

106. *Id.*

107. *Id.*

108. See DOD Report, *supra* note 2, at 56.

109. MCM, R.C.M 306.

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of offenses by members of that command.¹¹⁰ The lowest-level official, typically the suspect's immediate commander, ordinarily makes the initial decision of whether to dispose of the complaint.¹¹¹ Further, a decision by a lower commander does not generally bar a different disposition by a superior authority.¹¹² A superior commander may also withhold the authority to dispose of offenses in individual cases or types of cases.¹¹³ In a 2012 memorandum, the Secretary of Defense directed that in certain sexual assault cases the initial disposition authority under the UCMJ be elevated to commanders who possess at least special court-martial convening authority and who are in the 0-6 grade (that is, colonel or Navy captain) or higher.¹¹⁴

Rule 306 demonstrates the commander's enormous discretion by elaborating on the options available for disposing of an offense.¹¹⁵ First, the commander may decide that simply counseling the service member or issuing a reprimand is sufficient under the circumstances and there is no need to forward the case to the military police.¹¹⁶ Second, the commander may decide to begin administrative proceedings to discharge the service member.¹¹⁷ Third, the commander may decide to impose a non-judicial punishment.¹¹⁸ Finally, the commander may decide to initiate court-martial proceedings by formally preferring charges and ordering an Article 32 investigation.¹¹⁹ Most notably, while each military service has its own investigative agency to conduct criminal investigations, none of these agencies has the independent authority to dispose of a criminal charge against a service member.¹²⁰ Only a commander of that servicemember has the authority to dispose of the case, including dismissing the charges.¹²¹

Importantly, commanders at all levels of responsibility do not make disposition decisions by themselves. In practice, almost all commanders obtain legal advice from JAG officers, who are specially trained in military law, before making decisions pertaining to the dispositions of reports.¹²² Even though commanders do not exercise their authority alone, a significant problem remains. The professional legal advice of JAG officers is merely advisory, rather than obligatory. While JAG officer's role is to assist and advise commanders, the commander remains free to disregard their

110. *Id.*

111. MCM, R.C.M 306 Discussion at II-25.

112. *Id.*

113. MCM, R.C.M 306 (a).

114. *See* DOD Report *supra* note 2, at 21.

115. MCM, R.C.M 306.

116. MCM, R.C.M. 306 (b) Discussion at II-26.

117. *Id.*

118. MCM, R.C.M 306(c)(3).

119. *See* Victor Hansen, *Changes In Modern Military Codes And The Role Of The Military Commander: What Should The United States Learn From This Revolution*, 16 TUL. J. INT. & COMP. L. 419, 428-29 (2008).

120. *Id.* at 429.

121. *Id.*

122. *Id.*

recommendations.¹²³ The individual commander has the sole authority to dispose of the complaint even though he or she does not have the necessary training or the legal education to evaluate the evidence in the case.¹²⁴ The commander is authorized to ignore the JAG's legal opinion by making a different decision that is not grounded in a legal analysis but rather in other unknown, opaque considerations.

The risk that non-legal considerations may influence the commander's investigative and prosecutorial decisions raises significant concerns that political pressures may taint these decisions. This risk has in fact materialized in two recent highly publicized military sexual assault prosecutions.¹²⁵ In Brig. General Jeffrey Sinclair's trial, a military judge allowed the defendant a plea agreement on lesser charges after ruling that a senior Army official might have been improperly influenced by political considerations.¹²⁶ The military judge suggested that the commanding general with ultimate authority over the case might have been worried about public fallout from not prosecuting General Sinclair to the fullest.¹²⁷ Joshua Tate's acquittal of sexually assaulting a female classmate at the Naval Academy raises similar concerns that military command succumbed to political pressures to vigorously prosecute sexual assaults by bringing charges in cases in which the probability of conviction is low.¹²⁸

B. *Lack of Impartiality*

Commanders' possible biases are especially concerning given the military justice system's exclusive reliance on their decision regarding the future of a sexual assault complaint. The commander has the sole responsibility and authority to make initial disposition decisions, rather than an autonomous investigative agency equivalent to the civilian police. The RCM merely suggests that a complaint may be forwarded to the military police; it does not require commanders to do so. Commanders are thus authorized to bury a complaint without forwarding it to the military police, preventing the complaint's full investigation.

The problem of undercounting and under-investigation of rape reports is not unique to the military setting. A recent study suggests that civilian police departments often present false or inaccurate rape statistics regarding the prevalence of rapes, substantially undercounting reported rapes.¹²⁹ The study

123. *Id.* (noting that JAG officers merely assist commanders but only commanders are authorized to make the decision).

124. *Id.* (noting that only the commander has the sole authority to dispose of the case); Cioca Complaint, *supra* note 45, at 27, paragraph 157 (noting that the victim's direct commander disposed of the report despite the lack of legal training).

125. *See* Cooper, *supra* note 15.

126. *Id.*

127. *Id.*

128. *Id.*

129. *See* Corey Rayburn Yung, *How To Lie With Rape Statistics: America's Hidden Rape Crisis*, 99 IOWA L. REV. 1197 (2014) (describing the study that demonstrates police undercounting of rape reports).

found that police departments often eliminated rape complaints from official counts because of cultural hostility to the complaints and to create the illusion of success in fighting violent crime.¹³⁰ Police departments used three methods to remove rape complaints from official records: designating a complaint as “unfounded” with little or no investigation, classifying an incident as a lesser offense, or failing to create a written report that a victim made a rape complaint.¹³¹

The military setting and the unique operation of the military justice system exacerbates the problem of undercounting rape reports. This is mainly due to the commander’s authority to dispose of sexual assault complaints and the commander’s direct interest in case outcomes.¹³² Commanders have a vested interest in having their units free of any sexual scandals. Allegations that a sexual assault occurred within the commander’s unit jeopardize his or her military career because they reflect poorly on his or her abilities as a leader.¹³³ Therefore, commanders may have a professional incentive to prevent an initial complaint from evolving into a formal report. Indeed, servicemembers often claim that commanders and military investigators tried to dissuade them from going forward with their complaints. In these incidences, commanders and military investigators use various persuasive tactics to prevent the servicemembers from criminally pursuing their case.¹³⁴

These features point to the main problem with the commander’s current role in disposing of sexual assault reports: their lack of impartiality.¹³⁵ Impartiality is the cornerstone of all professional norms, governing the operation of every justice system.¹³⁶ Impartiality is often defined as “absence of bias or prejudice in favor or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues”¹³⁷ The risk of bias or prejudice is particularly salient in the military justice system, where the commander has sole discretion in deciding whether to investigate and prosecute servicemembers working directly under his or her command. The only solution to this inherent conflict of interest is if an autonomous body unrelated to the

130. *Id.* at 1201.

131. *Id.* at 1200-03 (describing police departments’ practices in several cities as a mechanism for “paper reducing” violent crime rates).

132. See Eugene Fidell, *Broad Changes Are Needed in Military Justice*, N.Y. TIMES, May 28, 2013, available at <http://www.nytimes.com/roomfordebate/2013/05/28/ensuring-justice-in-the-military/broad-changes-are-needed-in-military-justice>.

133. See Cooper, *supra* note 15 (noting that commanders’ careers are at risk because of the stigma of sexual assault charges within their ranks).

134. See Cioca Complaint, *supra* note 45, at 7, 20, 23-24 (detailing statements made to victims).

135. See Editorial Board, *A Broken Military Justice System*, N.Y. TIMES, Mar. 17, 2014 (noting that the core problem is lack of impartiality), available at http://www.nytimes.com/2014/03/18/opinion/a-broken-military-justice-system.html?hp&trref=opinion&_r=0.

136. ABA MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2011).

137. *Id.* at 6 (Model Code of Judicial Conduct Terminology for Impartial, Impartiality, and Impartially).

alleged offender has the investigative and prosecutorial discretion, rather than the commander.

Moreover, even the appearance of impartiality or potential bias may contribute to the perception that the military justice system cannot provide justice.¹³⁸ Therefore, a necessary component of a criminal justice system is the appearance of impartiality and integrity, in addition to actual impartiality, independence, and integrity. Perceived bias or perceived command influence negatively affect the administration of justice even in cases where actual bias cannot be established.¹³⁹

A military commander's authority to dispose of complaints is directly linked to the problem of under-reporting because it gives the appearance of bias or prejudice in the military justice system. Many servicemembers are reluctant to complain because they simply distrust that the military justice system will provide justice.¹⁴⁰ Many servicemembers believe that justice cannot be served because an offender's commander has the authority to dispose of the report.¹⁴¹ Sarah Plummer, a former Captain in the Marine Corps and a victim of sexual assault in the military, succinctly summarized the essence of this problem in a single sentence. She said, "When you are raped by a fellow service member, it is like being raped by your brother and having your father or mother decide the case."¹⁴² Her statement represents a recurring narrative of many victimized servicemembers. According to an anonymous survey based on self-reporting measures, 66 percent of servicemembers who suffered an incident of sexual assault but did not make a report stated that they did not report because they felt uncomfortable doing so.¹⁴³ This lack of trust springs from servicemembers' concerns that the suspect's commander is unable to act impartially in disposing of the report.

IV. MILITARY INVESTIGATORS' PRACTICES AND INVESTIGATIVE TACTICS

The second key problem in the military justice system's handling of sexual assault cases concerns the criminal investigations conducted by the military police. The 2012 DOD Annual Report is illustrative: out of the 2,558

138. Cf. Hansen, *supra* note 119, at 434-42 (discussing comparative law's treatment of impartiality and independence of the military justice system).

139. Cf. R. v. Généreux, [1992] 1 S.C.R. 259, 286-87 (Can.) (distinguishing between actual impartiality and perceived impartiality).

140. See, e.g., Cioca Complaint, *supra* note 45, at 12 (providing former military investigator's belief that she would not be able to obtain justice after she had witnessed first hand the military police's negative attitude towards rape victims).

141. See, e.g., *id.* at 13 (providing a rape victim's account of being raped by a fellow marine, who was charged merely for "Inappropriate Barracks Conduct" while she was charged with the same offense and was told by command to "respect" her assailant and follow his orders because he outranked her).

142. Alisa Chang & Robert Siegel, *Rival Plans in Senate Aim To Change Military Rape Prosecutions*, NPR (Nov. 20, 2013), <http://www.npr.org/templates/story/story.php?storyId=246409434>.

143. See DOD Report, *supra* note 2, at 18.

investigations opened in 2012, a total of 1,627 were completed by the end of September 2012 and 931 were still pending.¹⁴⁴ The Report also states that the DOD could not take action in 947 cases.¹⁴⁵ The DOD could not take action in 584 cases due to objective legal obstacles, including circumstances where the offender was outside the DOD's jurisdictional authority, the offender's identity was unknown, the offender was a civilian or foreign national, another civilian or foreign authority was already prosecuting the offender, or the offender had died or deserted.¹⁴⁶ Additionally, the DOD could not take action in 363 cases because the allegations were unfounded.¹⁴⁷ Discounting the cases in which the DOD could not take action leaves 1,714 subjects against whom the DOD could take action.¹⁴⁸ The DOD had sufficient evidence in 1,124 cases to substantiate some misconduct.¹⁴⁹ In 880 of these cases the evidence supported sexual assault charges, while in 244 cases the evidence supported other types of misconduct.¹⁵⁰ The DOD initiated court-martial charges in 594 cases.¹⁵¹ A total of 158 cases resolved in non-judicial punishments, while sixty-three cases resolved in administrative discharges and sixty-five cases resolved in what the reports dubs "Other Administrative Actions."¹⁵²

These numbers and their implications are open to different interpretations. The military might contend that prosecuting 594 out of the 880 cases in which the evidence supported sexual assault charges demonstrates that it vigorously enforces sexual assault cases by prosecuting the majority of these cases (about 67 percent). Revisiting these numbers, however, may cast doubt as to whether the DOD's conclusions that in 363 cases allegations were unfounded and in 244 cases the evidence supported non-sexual misconduct were indeed correct and justified. The outcome of these cases allegedly could have been different had the commander or military police conducted a more thorough investigation.

The military's failure to conduct an exhaustive criminal investigation coupled with the current operation of military investigative agencies help explain the gap between the number of official reports filed and the number of cases that resulted in court martial charges. The decision whether to pursue criminal prosecution hinges on the presence of sufficient evidence to establish the suspect's guilt.¹⁵³ Obtaining such evidence requires a comprehensive investigation of the allegations made in the case. Without thorough

144. *Id.* at 65.

145. *Id.* at 66.

146. *Id.*

147. *Id.*

148. *Id.* at 68.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. See CRIMINAL JUSTICE STANDARDS COMM., AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, 70-71 (3d ed. 1993) (stating that a prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction).

investigation, criminal prosecutions are not possible, regardless of the identity of the official making the decision whether to prosecute the case. Therefore, reforms targeted solely at taking the authority to prosecute away from commanders, without additional changes in the military police's handling of sexual assault investigations, would likely fail to result in more prosecutions.

Various aspects of the military police's investigation procedures demonstrate a notable gap between the black letter law of sexual assault and prevailing enforcement practices. The challenges of criminally enforcing sex crimes in the civilian realm illuminate the shortcomings of existing military investigations in this area. Professor David Bryden and Sonja Lengnick's landmark study extensively details the drawbacks of the criminal justice system's treatment of rapes.¹⁵⁴ Their research suggests that the justice system discriminates against rape victims, at every stage of the process, beginning with the investigative stage and culminating in the adjudication of the case.¹⁵⁵ In addition, Professor Susan Estrich has long noted that the distinction between stranger and acquaintance rapes is a main component of the criminal justice system's discriminatory approach towards rape victims.¹⁵⁶ Estrich noted that the criminal justice system has been skeptical of women's reports of sexual assaults by people they knew, often attributing a victim's consent to sexual acts when they gave none.¹⁵⁷ Scholars further note that rape law has fundamentally misconceived the crime of sexual assault by employing a dual requirement of assault and consent, which does not capture the typical rape that an acquaintance commits.¹⁵⁸

Most civilian jurisdictions responded to this critique by reforming their rape laws to eliminate misogynist assumptions and social skepticism about the seriousness of the assault and the veracity of women's accusations.¹⁵⁹ As Aya Gruber explains, "reformers pushed for transformation in two main areas of the law: evidentiary prohibitions . . . and actus reus standards."¹⁶⁰ While a detailed discussion of these reforms exceeds the scope of this Article,¹⁶¹ it suffices to

154. See David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194 (1997).

155. See *id.* at 1216 (noting that studies confirm disparities in prosecutorial treatment of stranger and acquaintance rape cases).

156. Cf. SUSAN ESTRICH, REAL RAPE 9 (1987) (providing a story showing how prosecutors fail to prosecute acquaintance rapes).

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

158. See Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN'S L. REV. 625, 626-28 (2005).

159. Bryden & Lengnick *supra* note 154, at 1198 (discussing states legislative reforms).

160. Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 600-602 (2009) (describing main areas of rape law reforms).

161. For an elaborate discussion of contemporary rape law reforms and legislatures' main goals in adopting them, see generally Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS 119 (1999).

say that these changes included the enactment of rape shield laws and the elimination of the corroboration requirement and the cautionary instruction.¹⁶²

As the first major reform, rape shield laws created specific rules prohibiting the defense from presenting certain evidence. Prohibited evidence includes the complainants' past sexual conduct, any "precipitation" evidence (such as dress), and certain inquiries into the victims' sexual history.¹⁶³ Reformers argued that shield laws would lessen victim discomfort and prevent juror sexism from influencing verdicts.¹⁶⁴ They contended that without shield laws, jurors could acquit because of distaste for the victim's lifestyle, the belief that her behavior entitled the defendant to sex, or a mistaken perception that past consent implies present consent.¹⁶⁵

The second major reform involved modifying actus reus standards for rape.¹⁶⁶ Reformers sought to "reorient the trial from a focus on whether there was force or consent to the question of the victim's language (whether [the victim] said "no" or "yes")."¹⁶⁷ Without such reforms, jurors would be free to choose what kinds and amounts of evidence support an inference of consent or non-consent. Reformers adopted actus reus formulations that would "reduce juror ability to focus on irrelevant and prejudicial evidence as part of the consent inquiry."¹⁶⁸ According to rape law reformers there are two benefits from defining rape as sex without affirmative consent.¹⁶⁹ First, it defines consent as communication and prohibits the jury from considering precipitating evidence or past sexual conduct.¹⁷⁰ Second, it makes the person desiring the sex assume the burden of communication.¹⁷¹ The continual efforts of rape law reformers alleviated questionable investigative tactics that were based mostly on misogynist misperceptions and hindered the successful investigation of sexual assaults.¹⁷²

162. See generally Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763 (1986) (discussing evidentiary considerations in rape cases and rape shield laws).

163. Gruber, *supra* note 160, at 600.

164. *Id.* at 601 (citing other commentators' assertions about the purpose of rape shield laws).

165. See Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461, 1462 (2011) (noting that rape shield laws still allow normative judgments of rape victims' sexuality).

166. See Gruber, *supra* note 160, at 601.

167. *Id.* at 602.

168. *Id.*

169. *Id.* at 602-03.

170. *Id.* at 603.

171. *Id.* But see Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUST. Q. 651, 682 (2001) ("Prosecutors' anticipation of a consent defense [when the victim and suspect were acquaintances, relatives, or intimate partners] and their downstream orientation toward judges and juries apparently lead them to scrutinize the victim's character and behavior more carefully").

172. See Stacy Futter & Walter R. Mebane, Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 BERKELEY WOMEN'S L.J. 72, 105-06 (2001) (noting that a twenty-

The operation of the military justice system suggests that many civilian rape law reforms have failed to take effect in the enforcement of sexual assaults in the military. One of the main problems with the military criminal justice system is that the system still discriminates against victims of acquaintance rapes as compared to victims of stranger rapes, even though its rhetoric suggests that the distinction between stranger and acquaintance rape is abolished. When an unknown perpetrator rapes a servicemember, chances are that the victim's report will be taken very seriously due to an underlying assumption that a person typically does not consent to have sex with complete strangers.¹⁷³ The military justice system treats a sexual assault case in which the victim and the perpetrator serve in the same military unit very differently.¹⁷⁴ In addition, investigators often preconceive that the incident is not a rape when the servicemember behaves in a way that does not fit the investigators' image of a "proper victim."¹⁷⁵ Stereotypically, "proper victims" do not drink heavily, walk alone at night, or spend time alone at night with another servicemember.¹⁷⁶ In these instances, investigators often consider the incident simply a date or a voluntary sexual encounter gone wrong.

Servicemembers' cumulative experiences regarding the military police's investigation of their sexual assaults buttress these concerns about the military police's investigative practices. Victims' narratives repeatedly describe commanders and military investigators as meeting their rape reports with skepticism and hostility.¹⁷⁷ These repeated accounts suggest that military investigative agencies often use unwarranted investigative tactics that directly affect the strength of the evidence against an offender. This leads to the commanders' decision not to prosecute the case based on the conclusion that the evidence does not support the allegations. Questionable investigative practices include performing cursory investigations, blaming the victim, following rape myths and stereotypes, threatening false statement charges, professional retaliation, or demotion, and investigating and prosecuting the victims themselves.

year, multi-jurisdictional study showed that broadened definitions of rape led to an increase in reports of "actual rape," namely rapes that police believe are well-founded).

173. Cf. DOD Report, *supra* note 2, at 66-68 (providing the breakdown of the statistical data concerning servicemembers and non-servicemembers as perpetrators of sexual assault).

174. The military also prohibits "fraternization," consensual sexual relations between people serving in the same unit. See UCMJ § 134; 10 U.S.C. § 934; see also MCM, part IV, ¶ 83 (2012). For the most extensive discussion of fraternization offenses in the military see Chamallas, *supra* note 26, at 350-59.

175. See, e.g., Cioca Complaint, *supra* note 45, at 13 (describing how commanders disregarded a victim's account of her rape by charging both victim and perpetrator with "Improper Barracks Conduct" due to the fact that the victim consumed alcohol).

176. See, e.g., *id.* at 37 (describing Cap. Thatcher's claim that she was told by a JAG officer that she gave mixed signals to the officer she had been dating).

177. See, e.g., *id.* (describing command's skepticism and hostility towards victims' reports of sexual assaults).

A. *Cursory Investigations*

DOD statistics state that military police fully investigated each and every report on sexual assault.¹⁷⁸ Servicemembers' accounts suggest otherwise, casting doubt as to the scope and scale of some of the military police's investigations.¹⁷⁹ There is an enormous difference between technically opening an investigation and actually conducting an exhaustive and thorough investigation. Admittedly, there are many ways to conduct investigations in a less than vigorous manner. Servicemembers' stories suggest that the military police's official investigations are often cursory and incomplete.¹⁸⁰ Victims often claim that commanders dismiss their allegations shortly after they file the report because they have no proof and therefore nothing can be done.¹⁸¹

The military justice system often assumes that prosecutions of sexual assault cases are extremely challenging.¹⁸² Commanders and military police place a premium on the fact that the evidence in the vast majority of cases amounts to "he said, she said" swearing contests.¹⁸³ Consequently, investigators often decide to close a case without further investigation when the case hinges on the veracity of the victim's story and there is no additional proof to support their claim.¹⁸⁴ While the formal corroboration requirement was technically abolished from the black letter law, in practice an investigation is often terminated if there is no corroborative evidence to support the victim's account.¹⁸⁵ This practice ignores the fact that sexual assault cases are almost always based on the victim's testimony without much physical evidence to support the accusation.¹⁸⁶ Barring further investigation due to a lack of corroborating evidence is highly problematic because it hinders the possibility of a future prosecution.

B. *Blaming Victims Tactics*

As a prevailing investigative practice, military police often blame victims for allegedly facilitating or contributing to the sexual assault. Professor Anne

178. See DOD Report, *supra* note 2, at 57.

179. See, e.g., Cioca Complaint, *supra* note 45, at 4.

180. See, e.g., *id.* at 31, 37, 40.

181. See, e.g., *id.* at 37.

182. See Ian Ayres & Katharine Baker, *A Separate Crime of Reckless Sex*, 72 U. CHI. L. REV. 599, 603 (2005) (proposing a new crime of reckless sexual conduct to combat acquaintance rape cases that are simply not winnable under current law).

183. *Id.* (noting that the proposal "represents a way to partially overcome the 'he said/she said' dilemma").

184. See, e.g., Cioca Complaint, *supra* note 45, at 9, 37 (giving instance in which victim was told that nothing could be done in a "he said/she said" situation and instance in which investigation closed after the suspect denied the sexual encounter and the victim's story was not believed).

185. See, e.g., *id.* at 37, 40 (noting that JAG officer had told the victim that the case could not be prosecuted because "no was not enough and because she gave mixed signals" and that her complaint was unfounded).

186. See Bryden & Lengnick, *supra* note 154, at 1321-23.

Coughlin argues that police investigators often use victim-blaming tactics when constructing the narrative of the accused rapist.¹⁸⁷ Coughlin elaborates on the ways in which Fred Inbau's influential interrogation manual explicitly offers these victim-blaming tactics to rape suspect interrogators.¹⁸⁸ Coughlin concludes that these victim-blaming investigative tactics are incompatible with the contemporary goals of rape law and that police investigators should stop incorporating them into rape suspects' narratives.¹⁸⁹

In recent decades, state legislatures have moved to eliminate victim-blaming elements from rape laws and to sharply limit defense attorneys' use of victim-blaming tactics while defending their accused client.¹⁹⁰ The formal definition of rape in contemporary criminal codes forecloses some victim-blaming tactics, while others are forbidden by the reforms embodied in rape shield laws.¹⁹¹ These legislative reforms have expunged some rape victim-blaming from the judicial system.¹⁹²

The reforms embodied in civilian criminal codes have not fully carried over to the investigation of sexual assaults in the military. In practice, military investigations of sexual assaults often use victim-blaming tactics. Placing responsibility on the victim for being sexually assaulted is a theme that cuts across the military's prevention and training programs as well as its investigations once a sexual assault has occurred.¹⁹³ A prominent example of this is requiring servicewomen to refrain from walking alone by demanding they have a "buddy" accompany them.¹⁹⁴ This "risk reduction" theme is especially visible in the military's prevention and training programs. For example, one of the messages states, "sexual assault is preventable," and asks, "are you doing your part?"¹⁹⁵ When a victim is sexually assaulted while unaccompanied by another servicemember, the military police begin their question by inquiring, "[w]hy were you all by yourself? Where was your buddy?"¹⁹⁶ Military police also ask the victim what he or she was doing at the

187. See Anne M. Coughlin, *Interrogation Stories*, 95 VA. L. REV. 1599, 1600 (2009).

188. Coughlin, *supra* note 187, at 1641-51; see also FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, *CRIMINAL INTERROGATION AND CONFESSIONS* 254-57 (4th ed. 2001).

189. Coughlin, *supra* note 187, at 1660.

190. See *id.* at 1607.

191. See *id.*

192. See *id.*

193. See Francine Banner, *Immoral Waiver: Judicial Review of Intra-Military Sexual Assault Claims*, 17 LEWIS & CLARK L. REV. 723, 735-36 (2013) (describing the military's prevention programs).

194. *INVISIBLE WAR* (Chain Camera Pictures 2011) (Interview with Susan Burke, attorney, describing military's prevention programs instructing female servicemembers to be accompanied by a "buddy").

195. *Id.* (describing printed posters used by the military, announcing that "sexual assault is preventable" and asking servicemembers whether they were doing *their* part) (emphasis added).

196. *Id.* (describing the military's use of training videos featured in the documentary that instruct viewers to always have a buddy with them).

place where the assault occurred and interrogate the victim about his or her own behavior, appearance, demeanor, and clothes at the time of the event.¹⁹⁷ Military police wrongly suggest that the victim is contributorily negligent when they question servicemembers about their alleged part leading to their assault. Implying a victim's contributory negligence is in no way a part of contemporary rape law jurisprudence. The idea that all servicemembers need to be on alert and take active steps to avoid being targeted by rapists has no place in a modern justice system. This approach wrongly focuses on the victim rather than the perpetrator, making the victim the target of criticism and inquiry.

The continual use of victim blaming tactics demonstrates yet another aspect of the above-mentioned dichotomy between substantive criminal law and criminal procedure.¹⁹⁸ While substantive criminal law expanded the definition of rape to include additional forms of sexual misconduct, criminal enforcement practices still demonstrate obsolete investigative tactics that should have no place in a contemporary criminal justice system.

C. *The Persistence of Rape Myths and Stereotypes*

Prevailing myths and stereotypes about rape play a significant role in the justice system's failure to successfully enforce sexual assault crimes.¹⁹⁹ Ample research suggests that these rape myths and stereotypes not only affect decision makers' general beliefs and attitudes, but also the actual administration of criminal justice.²⁰⁰ A recent study suggests that one particularly disconcerting rape myth—the mistaken belief that “no does not always mean no”—persists even today.²⁰¹ Legal scholar Dan Kahan and his co-authors conducted a study revealing what they call “cultural cognition,” which is a jury's tendency to be more influenced by their personal worldviews about the meaning of verbal lack of consent than by legal definitions of rape.²⁰² The study shows that jurors with patriarchal and hierarchical worldviews often view rape victims' verbal refusal as ambivalent.²⁰³ Put differently, those who subscribe to traditional gender

197. See, e.g., Cioca Complaint, *supra* note 45, at 32-33 (suggesting the victim had shown her breasts, indicating consent to sex and looked like a “slut”).

198. See *supra* Introduction.

199. See generally Rebecca Campbell & Sharon M. Wasco, *Understanding Rape and Sexual Assault: 20 Years of Progress and Future Directions*, 20 J. INTERPERSONAL VIOLENCE 127, 127-31 (2005) (reviewing research that details blame attribution and rape myths); see also Mary P. Koss, *Empirically Enhanced Reflections on 20 Years of Rape Research*, 20 J. INTERPERSONAL VIOLENCE 100, 102-07 (2005).

200. See Gary D. LaFree, Barbara F. Reskin, & Christy A. Visher, *Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROBS. 389, 393 (1985) (noting that some variables such as the victim's sexual activity, affected jurors' judgments).

201. See Dan M. Kahan, *Culture, Cognition and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 732 (2010) (describing the study's main findings concerning the meaning of “no”).

202. *Id.* at 753-56.

203. *Id.* at 794-96.

norms believe that women say “no” but mean, “yes” as a strategy to evade the stigma placed on women who engage in casual sex.²⁰⁴

Scholars have long noted the ways in which societal and cultural misperceptions often undermine rape victims’ accounts of their sexual assault.²⁰⁵ The late professor Andrew Taslitz, who extensively prosecuted rape cases, examined the numerous ways the criminal justice system invalidates rape narratives, particularly in acquaintance rapes.²⁰⁶ Similarly, Professor Stephen Schulhofer elaborates on the effect cultural norms have on shaping society’s perceptions and understanding of rape.²⁰⁷ He suggests that, “[s]ocial attitudes are tenacious, and they can easily nullify the theories and doctrines found in the law books. The story of failed [rape law] reforms is in part a story about the overriding importance of culture, about the seeming irrelevance of law.”²⁰⁸

The persistent debate about the actual meaning of a verbal refusal to have sex also pervades military sexual assault investigations. The case of Tobey Thatcher’s rape is illustrative. While serving in the Air Force, another servicemember raped Captain Thatcher after a date.²⁰⁹ Thatcher reported the rape and contacted a JAG officer to follow up on the status of the case after the investigation.²¹⁰ The JAG officer told her that the military would not prosecute the case because it anticipated a defense claiming that “no” was not enough and that she gave mixed signals.²¹¹ Servicemembers’ stories further suggest that investigators are less likely to find that a rape occurred when the accuser’s behavior does not comport with how investigators believe rape victims should act.²¹² For example, if a servicemember is raped after drinking and walking alone at night investigators are more likely to conclude that he or she was not “really” raped.²¹³

Some of these myths and stereotypes consist of patriarchal perceptions about women’s role in the military.²¹⁴ Even though women have long been integrated into the armed forces, prevailing patriarchal stories continue to

204. *Id.* at 734.

205. See Susan Estrich, *supra* note 157, at 1090 (exposing various rape myths); see also Susan Estrich, *Palm Beach Stories*, 11 LAW & PHIL. 5, 11 (1992) (describing prevailing rape myths).

206. See ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 6-9 (1999).

207. See Schulhofer, *supra* note 37, at 17.

208. See *id.* at 17.

209. Cioca Complaint, *supra* note 45, at 37.

210. *Id.* at 37.

211. *Id.* at 37.

212. See, e.g., *id.* at 40 (giving victim’s statement that she was told that she did not act like a rape victim).

213. See, e.g., Complaint at 8-9, *Klay v. Panetta*, 924 F. Supp. 2d 8 (D.D.C. 2013) [hereinafter *Klay Complaint*] (describing a military culture of excessive drinking that included forcing the victim to become intoxicated after which her superior raped her when she left the bar).

214. See Chamallas, *supra* note 26, at 367-68 (explaining how the assumption that women introduce the element of sexuality into the military setting ultimately leads to segregating women in the military).

inform military investigators' understanding of when and why sexual assaults happen and between whom.²¹⁵ These patriarchal perceptions shape investigators' assumptions about the sexes' differences and weaknesses and the role of women in the military, a historically male dominated setting.²¹⁶ These hyper-masculine beliefs demonstrate yet again how the military falls behind civilian institutions in genuinely accepting female servicemembers as equals in the workplace. Female servicemembers' stories often portray how a hyper-masculine ethos still pervades the military, with some male officers still viewing female servicemembers as mere sexual objects.²¹⁷

D. Threatening Servicemembers with False Statement Charges

No empirical data suggests that false reports of rape are more prevalent than false reports of other crimes.²¹⁸ Nonetheless, military investigators often suspect victim servicemembers of lying about their sexual assault.²¹⁹ Both commanders and military police are often highly skeptical and suspicious of servicemembers who claim to have been raped by fellow servicemembers.²²⁰ Notably, one study suggests that police officers believed one third of rape complainants made false reports.²²¹ The misplaced assumption that sexual assault victims lie about their assault extends beyond the investigators themselves. Myla Haider, a former military investigator who was raped by a fellow servicemember, stated that her commander ordered her to advise sexual assault victims of their rights as suspects of false statement charges, even though there was no evidentiary basis for suspecting these victims of lying.²²²

E. Threatening Victims with Professional Retaliation and Demotion

Victims often claim that they were threatened with repercussions concerning their future military career when reporting their sexual assault. Victims have been told that they would lose their rank if they chose to file a report and their allegations turned out to be false.²²³ Thirty-six plaintiffs in the class action lawsuits *Cioca v. Rumsfeld* and *Klay v. Panetta* claim that they

215. See Hillman, *supra* note 3, at 119 (describing the prevailing perception of females as weak and vulnerable and males as overpowering).

216. See *id.* at 119.

217. See, e.g., Klay Complaint, *supra* note 213, at 7 (giving Lt. Helner's statement that she was told that command wanted a good-looking female officer to serve at the Marine Barracks Command as a poster child).

218. See Anderson, *supra* note 34, at 953 (noting that there is no solid data suggesting that there are more false reports of rapes compared to other crimes).

219. See, e.g., Cioca Complaint, *supra* note 45, at 7, 21, 25, 31, 39, 41 (giving victims' statements that they were told that they lied about the rape).

220. See, e.g., *id.* at 7 (stating that Cioca's command told her that if she reported the rape she would be court-martialed for lying).

221. See Jan Jordan, *Beyond Belief?: Police, Rape and Women's Credibility*, 4 CRIM. JUST. 29, 34-35 (2004) (discussing police officers' attitudes to rape reports in New Zealand).

222. THE INVISIBLE WAR, *supra* note 194 (interview with Myla Haider).

223. See, e.g., Cioca Complaint, *supra* note 45, at 22-26.

experienced various forms of retaliation as a result of reporting their sexual assaults.²²⁴ The Pentagon acknowledged this problem and recently adopted a legislative reform making it a crime to retaliate against servicemembers who report their sexual assaults.²²⁵

F. Investigating and Prosecuting Victimized Servicemembers

One particularly troubling investigative tactic includes opening an investigation against the complaining servicemember for his or her alleged part in the sexual assault.²²⁶ Under the UCMJ, commanders exercise vast discretion in charging servicemembers with a host of military offenses stemming from the sexual incident at issue.²²⁷ Most notably, the UCMJ criminalizes the act of fraternization as one form of improper sexual conduct.²²⁸ Criminal fraternization consists of consensual sexual relations between two servicemembers when one individual is an officer and the other is enlisted.²²⁹ Commanders have great discretion over the military offense of fraternization. Various circumstances inform the commander's decision of whether criminal fraternization occurred, including whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale.²³⁰ One common investigative practice includes investigating the victim as a suspect for committing fraternization or adultery, which are criminalized and widely enforced in the military.²³¹ Information Specialist Amy Lockhart's case is illustrative.²³² While serving in the Navy, Lockhart was raped by a fellow Navy Captain after passing out following a party.²³³ At a disciplinary review, Lockhart's commander told her that he knew about her history of behavior and threatened to charge her with fraternization for having sex with a co-worker.²³⁴ When Lockhart denied the charges, her commander told her that he had a

224. Cioca Complaint, *supra* note 45, at 1-3; Klay Complaint, *supra* note 213, at 2.

225. See Cooper, *supra* note 15 (describing the compromise bill that would criminalize retaliation for reporting sexual assaults).

226. See Anderson, *supra* note 34, at 951 (describing military practices that include prosecuting the victim).

227. See UCMJ, *supra* note 174, at § 134; see also MCM, *supra* note 174, at part IV, ¶ 60-113 (listing the offenses that may be charged under UCMJ Article 134).

228. UCMJ, *supra* note 47, at § 134; MCM, *supra* note 98, at part IV, ¶ 83 (2012); see generally Chamallas, *supra* note 26, at 350-59 (discussing fraternization offenses in the military).

229. MCM, *supra* note 98, at part IV, ¶ 83; Chamallas, *supra* note 26, at 350-51.

230. See Chamallas, *supra* note 26, at 351-53, n. 182 (noting the elements of proof for the offense).

231. See C. Quince Hopkins, *Rank Matters But Should Marriage?: Adultery, Fraternization, and Honor in the Military*, 9 UCLA WOMEN'S L.J. 177, 180, 201-02, 211, 234 (1999) (arguing that adultery should not be illegal and adultery in the military is commonplace).

232. Cioca Complaint, *supra* note 45, at 31-33.

233. *Id.* at 32.

234. *Id.* at 32.

signed statement from her rapist admitting to having sex with her.²³⁵ The commander later told her that if she pressed forward with the case, she would be charged with adultery.²³⁶

Another unwarranted but common investigative practice includes investigating and prosecuting the victim under non-sexual military offenses such as conduct unbecoming or public intoxication.²³⁷ Excessive alcohol use often precedes sexual assaults, both in the military and in the civilian setting.²³⁸ The military justice system's response often includes charging victims of sexual assault with charges related to intoxication.²³⁹ Servicemembers' accounts suggest that often the victim is the only one investigated or punished after reporting a sexual assault, whereas the perpetrator is never punished for the alleged assault.²⁴⁰ This investigative practice is unwarranted because it equates perpetrators' and victims' roles in the sexual assault and directly places blame on victims for being assaulted.

V. A PROPOSAL FOR REFORM

The military justice system's current treatment of sexual assault cases requires a two-pronged solution. The DOD must adopt several key components to change the military's reporting and investigation of sexual assaults. Comprehensive work remains necessary to accomplish such change and this Article can only begin to provide a proposed framework for reform. First, the DOD must strip military commanders of their authority to dispose of sexual assault complaints. Second, this authority should rest with an independent and impartial body after the military police conduct a comprehensive investigation.

The commander's need to operate in combat and discipline servicemembers who disobey orders has historically justified their ability to dispose of complaints against servicemembers for misconduct.²⁴¹ The military has long opposed proposals to strip commanders of their authority to dispose of cases, contending that military commanders must retain sole responsibility and authority to exercise investigative and prosecutorial discretion.²⁴² The military argues that maintaining a well-disciplined fighting force pertains to all aspects

235. *Id.* at 32.

236. *Id.* at 32.

237. *See, e.g.*, Cioca Complaint, *supra* note 45, at 31-32.

238. *See, e.g.*, DOD Report, *supra* note 2, at 211, 213, 215, 216-21, 223-25, 227, 229-30, 232, 237-39, 245, 248, 250-53, 263-64, 267, 515, 519-20, 559, 562 (noting the contribution of alcohol consumption to sexual assaults); *see also* Sarah E. Ullman, George Karabatsos, & Mary P. Koss, *Alcohol and Sexual Assault in National Sample of College Women*, 14 J. INTERPERSONAL VIOLENCE 603, 603 (1999) (discussing civilian system).

239. *See, e.g.*, Cioca Complaint, *supra* note 45, at 13.

240. *See, e.g.*, Klay Complaint, *supra* note 213, at 8-9 (contending that Lt. Helmer was forced to drink alcohol and was later investigated for that while her assailant was not prosecuted).

241. *See* Schlueter, *supra* note 22, at 20-23 (describing the role of discipline in the military justice system).

242. *See* Hansen, *supra* note 119, at 448-52 (discussing various proposals for reforming the military justice system).

of servicemembers' conduct, including the disposition of sexual misconduct allegations.²⁴³ I do not contest the need for complete deference to the commander's judgment in professional matters, such as military operations or related management and discipline of servicemembers in military operations. But, deferring to commanders' discretion for disposing of sexual assault cases is unjustified. Handling these cases does not affect the commander's key responsibilities, including his or her ability to maintain discipline in the unit. Taking this authority away from commanders will not jeopardize military operations or the commander's ability to maintain good order and discipline in their unit.

The second prong of the solution calls for identifying an alternative body better able to investigate and exercise prosecutorial authority in military sexual assaults. Civilianization of the military justice system may result in better treatment of these cases. From a theoretical standpoint, civilianizing the military justice system by creating one centralized autonomous investigative agency, akin to civilian agencies like the FBI, may be the optimal solution. The data suggests that the military's efforts to improve their treatment of sexual assaults have not been successful enough.²⁴⁴ Some form of external intervention is therefore necessary. Other militaries in Western democracies have already taken steps in this direction. For example, Canada and the United Kingdom have moved towards placing civilians in authoritative positions in their military justice systems.²⁴⁵

There are many advantages to creating an independent civilian body to investigate sexual assault cases. The most important advantage is impartiality, a feature that is notably lacking in current investigations. Every future reform must include removing the risk, or perceived risk, of unlawful command influence on criminal investigations. Unlike military commanders, whose objectivity is often questionable and who might have a professional incentive to avoid any sexual scandals in their units, an autonomous investigative body would be neutral and detached from both the complainant and the alleged perpetrator with no vested interest in the outcome of the case.

The independence that should underlie the operation of an investigative body is a related advantage. Police misconduct is a comparable context that offers an important insight into an autonomous investigative body's significance. Civilian allegations of police misconduct are traditionally investigated by the Internal Affairs Divisions of the suspect officer's police department.²⁴⁶ Many jurisdictions have recently adopted different forms of civilian oversight in light of growing concerns that Internal Affairs Divisions

243. See MacDonnell, *supra* note 99, at 330 (noting the necessary role of the commander in the military justice system).

244. See Hillman, *supra* note 3 (addressing U.S. Military record of ineffectiveness and its inability to solve the problem on its own).

245. See *id.* at 432-441 (describing reforms in Canada and the United Kingdom).

246. See Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 534-35 (1994) (discussing investigations of police misconduct by Internal Affairs Divisions).

cannot impartially investigate allegations against police officers.²⁴⁷ These measures included the creation of external civilian agencies whose mission is to investigate or oversee the investigations of police misconduct.²⁴⁸ For example, the city of Chicago created an independent investigative agency, the Independent Police Review Authority (IPRA), to investigate police misconduct allegations.²⁴⁹ The premise behind the creation of such agencies is that no organization can impartially investigate the misconduct of its own members. Similarly, the military cannot effectively investigate its own servicemembers' misconduct. Therefore, an independent agency unrelated to the military chain of command should oversee the investigations to ensure they are exhaustive enough to allow effective prosecution.

Another advantage of this proposal would be the independent agency's specialization in investigating sexual assaults. Investigating sexual assaults raises distinct challenges. Under this proposal, only investigators who specialize in these crimes would conduct their criminal investigation.²⁵⁰ The military justice system has only partially begun to use special investigators and prosecutors specifically trained in sexual assault cases.²⁵¹ The 2013 National Defense Authorization Act requires the Pentagon to establish special victims units specially tailored to investigating and prosecuting sexual assault cases in the military.²⁵² Such units already partially exist. For example, the Army maintains twenty-one special victim investigators and nineteen special victim prosecutors who focus almost exclusively on sexual assault cases at major army installations.²⁵³ These specialized investigative units should be expanded to include all investigations of sex crimes in the military.

Centralization is another advantage of the proposal. The current system is decentralized because it gives individual commanders the authority to control investigations. There is a lack of unified policy because investigations are dispersed among the many military units. This decentralization also means the military justice system remains opaque. Placing the investigative authority in one centralized office would lead to unified policies and more transparency.

247. See SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 22-24 (2005); see also Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 504-05 (2004) (explaining why the flawed internal affairs are responsible for ineffective investigations).

248. See Joanna C. Schwartz, *What Police Learn From Lawsuits*, 33 CARDOZO L. REV. 841, 849-52 (2012) (discussing various police departments and the mechanisms they employ to investigate police misconduct).

249. *About IPRA*, CITY CHI. INDEP. POLICE REV. AUTH., <http://www.iprachicago.org/about.html> (last updated 2007).

250. See Brenda V. Smith & Jaime M. Yarussi, *Prosecuting Sexual Violence in Correctional Settings: Examining Prosecutors' Perceptions*, CRIM. L. BRIEF, Spring 2008 at 19, 21-25 (2008) (recommending the creation of special prosecution units to curb prison rapes).

251. See DOD Report, *supra* note 2, at 34.

252. National Defense Authorization Act for Fiscal Year 2013 (NDAA), Pub. L. No. 112-239, §§ 573, 576, 126 Stat. 1632, 1755-56, 1758-62 (2013).

253. See DOD Report, *supra* note 2, at 22.

Despite the apparent advantages of creating a civilian investigative agency, a full-fledged civilianization of the military justice system is not feasible. Two main reasons explain why the idea of complete civilianization is bound to fail. The first concerns budgetary constraints. The military must be deployable, but deploying a significant number of civilian criminal investigators would be an extremely expensive overhaul of the system. The second concerns the lack of support in Congress for civilianizing the military justice system, which makes the proposal not politically feasible.

Given that creating a civilian agency to investigate military sexual assaults is not a viable option, I propose a more moderate alternative. Under this solution, the chain of command is still divested of their power to dispose of cases. Instead, that power would rest with the military police and JAG officers, who would both have the authority to act independently of the chain of command. This would accomplish the key advantages mentioned above, mainly impartiality, autonomy, specialization, and centralization, while avoiding the costs and practical obstacles of complete civilianization. Establishing a professional body of investigators and attorneys who operate independently from the chain of command would ensure that the dispositional decisions of sexual assault cases are completely free from the command's external influences.

The Pentagon would probably respond that no further changes are needed because the military already has such a body, each military branch's own investigative agency. The key problem with existing military investigative agencies, however, is their lack of autonomy and their relationship with the chain of command. Investigative agencies send their findings back to the chain of command, at which time the commander decides how to proceed with the case.²⁵⁴ An investigative agency can never be truly independent and impartial when there is such interdependence between commanders and criminal investigators. Under this alternative proposal, servicemembers would file their sexual assault complaints directly with the military police. Then the military police's investigative findings would be directly forwarded to the independent JAG officers, instead of to the commander. Commanders would have no discretion over complaints under this proposal, first because servicemembers would not file their complaints with commanders and second because commanders would not receive the military police's investigative findings.

In addition, the military must provide better sexual assault investigation training for its investigators in order to foster successful reform in the criminal investigation of military sexual assault. Criminal investigations of sexual assaults are extremely difficult investigations that require special expertise. Only investigators specialized in sexual assault cases should investigate these crimes given their unique features and challenges. The military has already taken important steps in this direction, providing specialized sexual

254. See Hansen, *supra* note 119, at 429 (noting that none of the investigative agencies has the independent authority to dispose of the case, an authority which is reserved solely to the commander).

investigators in several units.²⁵⁵ This trend should continue to encompass all investigations of sexual assaults in all the military's branches.

CONCLUSION

While in recent years the DOD has taken measures to address the problem of military-on-military sexual assaults, a chasm still remains in the military justice system between the black letter law and how it is applied. This Article has demonstrated a significant gap between the military criminal law of sexual assault and its practical implementation. A host of non-legal factors are responsible for this disparity. These largely include societal attitudes toward sexual assaults, mainly prevailing stereotypes, misconceptions, and myths about acquaintance rapes. However, the military justice system's institutional structure, particularly the commander's unique role in disposing of reports, also accounts for the military justice system's failure to successfully curb military-on-military sexual assaults.

The Article has further focused on the ways in which the absence of a comprehensive criminal investigation thwarts the prosecution of military sexual assaults. Existing reporting and investigation mechanisms, which rest heavily with the chain of command, exacerbate both the problem of low reporting rates of sexual assaults as well as the problem of prosecuting only a small fraction of these crimes. To address these drawbacks, commanders should no longer hold the investigative and prosecutorial discretion in sexual assault cases. Instead, autonomous, impartial investigative and prosecutorial agencies should alone hold this power.

While recent changes adopted in Congress are one step in the right direction, they failed to overhaul the military justice system and did not remedy the structural problems related to the commander's authority to dispose of a sexual assault case.²⁵⁶ Professor Eugene Fidell correctly likens these changes to "piling Band-Aids on a badly broken 18th-century museum piece."²⁵⁷

Finally, the use of criminal measures to accomplish fundamental change provides only one piece of the puzzle. Criminal prosecution of offenders is merely one possible response to reduce the devastating harms of military sexual assaults. A host of non-criminal measures may more effectively foster change and offer remedies to injured victims. These options include better training and education of servicemembers and more broadly, adopting preventive measures to reduce the risks of sexual assaults in the military. Lastly, these criminal and non-criminal responses are not mutually exclusive. Conceding the significance of these alternative measures does not undermine the need to improve the

255. See DOD Report, *supra* note 2, at 34.

256. See National Defense Authorization Act for Fiscal Year 2014 (NDAA), Pub. L. No. 113-66, § 1702, 127 Stat. 672, 954-58 (2013) (reforming Article 32 and Article 60 of the Uniform Code of Military Justice by eliminating commanders' ability to modify sentences and by creating a process to determine the existence of probable cause against a servicemember).

257. A Broken Military Justice System, *supra* note 135 (quoting Eugene Fidell).

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existing reporting, investigation, and prosecution systems for sexual assaults in the military.