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BARRACKS, DORMITORIES, AND CAPITOL HILL: FINDING JUSTICE IN THE DIVERGENT POLITICS OF MILITARY AND COLLEGE SEXUAL ASSAULT

MAJOR ROBERT E. MURDOUGH*

> *And for those who are in uniform who have experienced sexual assault, I want them to hear directly from their Commander-In-Chief that I've got their backs. I will support them. And we're not going to tolerate this stuff and there will be accountability. If people have engaged in this behavior, they should be prosecuted.*
> —President Barack Obama[1]

> *This is on all of us, every one of us, to fight campus sexual assault. You are not alone, and we have your back, and we are going to organize campus by campus,*

* Judge Advocate, United States Army. Presently assigned as Brigade Judge Advocate, Division Artillery, 25th Infantry Division, Schofield Barracks, Hawaii. J.D. 2011, William and Mary Law School; B.S. 2003, United States Military Academy. Previous assignments include Legal Assistance Attorney, Trial Counsel, and Senior Trial Counsel, 10th Mountain Division (Light Infantry), Fort Drum, New York, 2012-2014; Company Commander and Battalion Operations Officer, 1st Battalion, 46th Infantry, Fort Knox, Kentucky, 2007-2008; Rifle Platoon Leader, Company Executive Officer, and Mortar Platoon Leader, 4th Battalion, 23d Infantry Regiment, 172d Stryker Brigade Combat Team, Fort Richardson, Alaska, 2004-2007. Member of the Bars of New Hampshire and the United States District Court for the Northern District of New York. This article was submitted in partial completion of the Master of Laws requirements of the 63d Judge Advocate Officer Graduate Course. The author thanks Major Shaun Lister, Major Ryan Howard, Major Kenneth Borgnino, and Major Eldon Beck for assistance with editing and providing recommendations to improve this article.

[1] President Barack Obama, Remarks by President Obama and President Park of South Korea in a Joint Press Conference (May 7, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/05/07/remarks-president-obama-and-president-park-south-korea-joint-press-confe.

> *city by city, state by state. This entire country is going to make sure that we understand what this is about, and that we're going to put a stop to it.*
> —President Barack Obama[2]

I. Introduction

She is nineteen years old. She left home six months ago, and this is her first time living on her own. She has made a few new friends and is starting to learn her way around. One Friday night after a particularly stressful week, she and her roommate are invited to a party on the floor below their room. She does not know many of the people there, but she feels comfortable since her roommate will be there as well. When they get there, over twenty people are crammed into a room intended for three. It is hot, loud, and humid. The music is nearly drowned out by the din of conversation.

Someone hands her a red plastic cup filled to the brim with an unfamiliar alcoholic beverage. She has drunk alcohol only once before at her high school graduation party. But not wanting to stand out, she accepts it and begins to drink. She and her roommate lose track of each other in the crowd. The drink helps her to relax, and from somewhere, she gets another one. She sees a guy she recognizes—his job had been to show her around, make sure she knew when and where to be, and introduce her to people so she did not feel isolated. Tonight he is wearing a tight camouflage t-shirt with the word "TAPOUT" across the front in stylized capital letters. He sees her and jerks his chin upward in a wordless nod of recognition. She smiles, glad to see a familiar face. She cannot remember his first name, but thinks he is either twenty-one or twenty-two years old.

He asks if she wants to step into the hallway to "get some air." She agrees, and the hallway is blessedly cooler. He offers her another red cup. Not wanting to be rude, she accepts. By now her head is swimming, the sensation of being drunk is unfamiliar to her. She remembers talking about her hometown. Distantly, as if from underwater, she hears him ask if she has a boyfriend.

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[2] President Barack Obama, Remarks by the President at the "It's On Us" Campaign Rollout (Sept. 19, 2014), *available at* http://www.whitehouse.gov/photos-and-video/video/2014/09/19/president-obama-speaks-launch-it-s-us-campaign.

She wakes up the next morning in physical pain, feeling nauseous. She opens her eyes to see an unfamiliar room decorated with sports and martial-arts posters. She sees her clothes from the night before in a ball on the floor. She is lying underneath a hot blanket on a plastic mattress with no sheets. He enters the room, fully dressed. Questions race through her head. Eventually she asks, in as neutral a tone as she can manage, "Did we have sex last night?" He pauses for a moment and says, "Yeah. You should probably get going."

From that moment, everything that happens—how and by whom that night's events are defined, reported, investigated, and adjudicated—will overwhelmingly depend on one thing. The most important fact will not be his actions, her actions, her blood-alcohol level, or his intentions, but whether she and he are members of the military or students on a college campus.

Military organizations and colleges bear many similarities. Both are organizations of mutual acceptance—an individual must apply to join; the organization may choose to accept. Both communities are relatively insular, have similarly-aged initial entry populations,[3] grapple with the strong nexus between alcohol abuse and sexual assault,[4] and maintain internal disciplinary processes to address misconduct within the

[3] Students between eighteen and twenty-four years old accounted for 58.2 percent of all fall enrollment for both undergraduate and post-baccalaureate programs in 2007, 56.9 percent in 2009, and 56.6 percent in 2011. U.S. DEP'T OF EDUC. INST. OF EDUC. SCI, DIGEST OF EDUCATIONAL STATISTICS tbl. 303.45 (2013), *available at* http://nces.ed.gov/programs/digest/d13/tables/dt13_303.45.asp. Meanwhile, the average age for enlistment in the regular Army for the same years was 21.7, 22, and 21.3, respectively. *Support Army Recruiting: Frequently Asked Questions About Recruiting*, U.S. ARMY RECRUITING COMMAND, http://www.usarec.army.mil/support/faqs.htm (last updated Dec. 4, 2013).

[4] *See* REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 16 (June 2014) [hereinafter RSP REPORT] ("Alcohol use and abuse are major factors in military sexual assault affecting both the victim and the offender."); Alyssa S. Keehan, Senior Risk Management Counsel, *Student Sexual Assault: Weathering the Perfect Storm*, UNITED EDUCATORS 1 (2011), *available at* http://contentz.mkt5031.com/lp/37886/394531/Student%20Sexual%20Assault_Weathering%20the%20Perfect%20Storm.pdf ("Most situations involve acquaintances, no witnesses, and an unclear memory of events due to alcohol abuse."); *see also* Richard Perez-Pena & Kate Taylor, *Fight Against Sexual Assaults Holds Colleges to Account*, N.Y. TIMES, May 3, 2014, http://www.nytimes.com/2014/05/04/us/fight-against-sex-crimes-holds-colleges-to-account.html ("In surveys, a majority of the students who say they have been sexually assaulted say that they were under the influence of alcohol at the time, and often the assailants were, too.").

organization.[5] Both are currently under intense public and political scrutiny concerning how they address sexual assault; the media sensationalizes the issue with terms like "epidemic,"[6] while advocates accuse both institutions of perpetuating a "rape culture."[7] Yet political forces have pushed the military and colleges in opposite directions.

Heavy political pressures influence the systems established to respond to sexual assault in the military and in colleges.[8] Those pressures, frequently from the same actors, have produced very disparate, yet commonly problematic, institutional responses to sexual assault. This divergence provides an opportunity to compare and contrast different approaches—one pressured to maximize criminal prosecutions and skeptical of institutional leaders, the other compelled to internalize the roles of fact finder and adjudicator in a quasi-judicial process.

Where politics produce similarity, the comparisons can highlight shortcomings; where politics produce difference, the contrasts can demonstrate the superiority of one approach. First, the manipulation and misinterpretation of the overbroad, ambiguous definitions of the term "sexual assault," which is common to both the military and colleges, shows the need to clearly define the term, while the shortcomings of amateur college investigations highlight the need for professional law enforcement. Second, the drive toward treating victims and accused[9] as

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[5] *See infra* Part III.

[6] *E.g.* Editorial, *Campus Rape Epidemic Finally Getting Attention*, L.A. DAILY NEWS, Feb. 4, 2014, http://www.dailynews.com/opinion/20140204/campus-rape-epidemic-finally-getting-attention-editorial; Nick Schwellenbach, *Fear of Reprisal: The Quiet Accomplice in the Military's Sexual Assault Epidemic*, TIME (May 9, 2013), http://nation.time.com/2013/05/09/fear-of-reprisal-the-quiet-accomplice-in-the-militarys-sexual-assault-epidemic/.

[7] *E.g.*, Caroline Heldman and Bailee Brown, *Why Colleges Won't (Really) Address Rape Culture*, MS. MAGAZINE BLOG (Oct 8. 2014), http://msmagazine.com/blog/2014/10/08/why-colleges-wont-really-address-rape-culture/; David Crary, *Enduring Macho Culture, Unique Legal System Perpetuate Rape Culture in Military*, TALKING POINTS MEMO (June 3, 2013, 11:40 AM), http://talkingpointsmemo.com/news/enduring-macho-culture-unique-legal-system-perpetuate-rape-culture-in-military.

[8] Unless otherwise stated, the terms "college" and "colleges" refer to any post-secondary educational institution, including colleges, community colleges, universities, graduate, and post-graduate schools.

[9] This article is focused on process and policy, not the merits of individual claims. As such, for the sake of simplicity and consistency, it refers to "alleged victims," "complaining witnesses," "potential victims," and the like as simply "victims" regardless of the procedural status or verifiability of a particular case. Similarly, unless stated

equal parties, particularly acute in colleges, produces an unjustly imbalanced system. This should caution the military and colleges alike that the role of the institution is not simply to back the victim but to seek justice. Third, established procedures should not be manipulated solely to influence the results of sexual assault cases, either by curtailing the rights of the accused or by preventing thorough inquiries into allegations. Lastly, disposition decisions can and should be managed by accountable leaders who have the authority and flexibility to choose how best to address each individual case. These principles together form the framework for a coherent and just institutional response to sexual assaults.[10]

This article begins in Part II by tracing the parallel evolutions of the Uniform Code of Military Justice (UCMJ) and the Title IX framework for college disciplinary proceedings. In these two specific communities, political attention to and influence on the particular issue of sexual assault accelerated dramatically within the last few years. Against this historical backdrop, Part III examines in detail how this political involvement has encouraged very divergent approaches to the same problem. Part III compares how sexual assault is reported, investigated, and adjudicated, and highlights the inconsistencies in the political rhetoric and actions that have shaped these systems. Following from this analysis, Part IV lays out the principles described above for a more just and consistent response framework. Finally, the Appendix offers specific suggestions for both the military and colleges.

II. Sparta and Athens: The Evolution of Martial and Educational Due Process

A. Sparta: Military Justice as a Commander's Tool for Good Order and Discipline

> *The military constitutes a specialized community governed by a separate discipline from that of the civilian.*

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otherwise, it uses the word "accused" in both the legal and literal sense to refer to anyone charged with, suspected of, or accused of committing a sexual assault.

[10] Although prevention and education can be important components of an overall institutional program to address sexual assault, sexual harassment, and misconduct in general, this article focuses only on institutional responses to sexual assaults after they occur, from reporting through disposition.

—Justice Robert Jackson[11]

American jurisprudence has long recognized the military as a "specialized community" in which the maintenance of good order and discipline is essential.[12] Military leaders must maintain discipline while respecting the rights of individual servicemembers. The Uniform Code of Military Justice (UCMJ)[13] seeks to accommodate both interests simultaneously.[14] It allows commanders to address servicemembers' misconduct within established procedural safeguards.

1. A System Born to Ensure Due Process for the Accused

During World War II, there were 1.7 million courts-martial in the American military—one third of all criminal trials during that same period in the entire United States.[15] For the first time in history, large numbers of Americans had firsthand experience with military justice, and they did not like what they saw.[16] In response, Congress enacted the UCMJ in 1950.[17] In addition to standardizing military justice across the newly-created Department of Defense (DoD), Congress also intended to correct the perceived abuses during World War II by commanders

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[11] Orloff v. Willoughby, 345 U.S. 83, 94 (1953).

[12] *Id.*; *see also* Parker v. Levy, 417 U.S. 733, 743 (1974).

[13] The UCMJ is implemented and administered through procedural, evidentiary, and interpretive rules and policies promulgated by the President in the *Manual for Courts-Martial*. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012) [hereinafter MCM].

[14] MCM, *supra* note 13, at I-1 ("The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.").

[15] THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 191 (1993) [hereinafter HISTORY OF THE JAG CORPS].

[16] Substantial numbers of servicemen who had never been in trouble with the law in civilian life served time in military jails, and came home from the war with military records showing court-martial convictions or less than honorable discharges. Senators and Congressmen were flooded with complaints. . . . Most of the stories of unfairness, arbitrariness, misuse of authority and inadequate protection of rights could be boiled down to the criticism that commanders exercised too much control over courts martial procedures from prosecution through review.

Id. at 194.

[17] Act of May 5, 1950, Pub. L. No. 81-506, 64 Stat. 107.

through increased due process protections.[18] Despite this goal, the U.S. Supreme Court initially scorned this new system and, in its first years, heavily curtailed its jurisdiction.[19]

Congress and the executive branch responded. In 1968 Congress enacted a plethora of reforms, notably creating the position of military

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[18] HISTORY OF THE JAG CORPS, *supra* note 15, at 203. The UCMJ assured a statutory "right to remain silent" that was broader, and fifteen years sooner, than the Supreme Court's famous *Miranda* decision. *Compare* UCMJ art. 31 (1950), *with* Miranda v. Arizona, 384 U.S. 436 (1966). It guaranteed the accused at special and general courts-martial representation by a licensed attorney regardless of indigence (a provision which continues to this day). UCMJ art. 27 (1950). It carried over from the 1920 Articles of War the requirement for a "pretrial investigation" prior to referral to a general court-martial to serve as a "bulwark against baseless charges." UCMJ art. 32 (1950); United States v. Samuels, 10 C.M.A. 206, 212 (1959); HISTORY OF THE JAG CORPS, *supra* note 15, at 132, 136. This provision remained substantially unchanged until 2014. *See infra* text accompanying note 63. Court-martial convening authority remained with commanders, but after trial, a convening authority could approve only findings of guilty and sentences that were "correct in law and fact and as he in his discretion determine[d] should be approved." UCMJ arts. 60-64 (1950). This was to be the first of three levels of post-trial review to benefit the accused. HISTORY OF THE JAG CORPS, *supra* note 15, at 206. This provision remained substantially unchanged until 2014. *See infra* note 62 and accompanying text.

[19] *See, e.g.*, United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 17 (1953) ("We find nothing in the history of constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty, or property."); Reid v. Covert, 354 U.S. 1, 37 (1957) ("Notwithstanding the recent [enactment of the UCMJ], military trial does not give an accused the same protection which exists in the civil courts. Looming far above all other deficiencies of the military trial, of course, is the absence of trial by jury before an independent judge after an indictment by a grand jury."). *But see* Burns v. Wilson, 346 U.S. 137, 140-41 (1953) (plurality opinion) (approvingly noting the increased due process protections granted by the newly-enacted UCMJ). The Court's most significant curtailment held that trial by court-martial was unconstitutional unless the charged offenses were "service connected." O'Callahan v. Parker, 395 U.S. 258, 272-73 (1969). In *O'Callahan*, the Court excoriated the system of "so-called military justice." *Id.* at 266 n.7. It decried the fact that "[a] court martial is tried, not by a jury of the defendant's peers which must decide unanimously, but a panel of officers empowered to act by two thirds vote." *Id*. at 263. It alluded to the possibility of command influence on the members of the court, noted that "substantially different rules of evidence and procedure apply in military trials," and condemned the fact that the convening authority appointed the counsel for both sides. *Id*. at 264. The Court concluded "few would deny" that the "system of specialized military courts . . . [is] less favorable to defendants [than civilian courts]." *Id*. at 265. The Court overruled *O'Callahan* in 1987, restoring the statutory subject-matter jurisdiction of the UCMJ. Solorio v. United States, 483 U.S. 435 (1987). Incidentally, both *O'Callahan* and *Solorio* were sexual assault cases. *O'Callahan*, 395 U.S. at 259-60; *Solorio*, 483 U.S. at 436.

judge.[20] By transferring to military judges the authority to rule on questions of law at trial, Congress effectively made the court-martial panel analogous to a civilian jury.[21] In 1980, President Carter promulgated the Military Rules of Evidence, modeled after the Federal Rules of Evidence.[22] In 1983, along with other changes, Congress authorized the service secretaries to remove defense counsel from the supervision of the convening authority[23] and allowed for direct appeal of rulings by the Court of Military Appeals, which was later renamed the Court of Appeals for the Armed Forces (CAAF), to the U.S. Supreme Court.[24] By the 1990s, courts-martial generally resembled civilian criminal trials, and most of the due process protections for the accused equaled or exceeded those of civilian courts.

2. The Focus Shifts

The original Article 120 of the UCMJ, "Rape and Carnal Knowledge," defined rape as "an act of sexual intercourse with a female not [the accused's] wife, by force and without her consent" and added that "penetration, however slight, is sufficient to complete [this] offense."[25] The text of the Article remained substantially unchanged for half a century,[26] until a two-decade series of highly publicized sexual assault allegations catalyzed significant changes to Article 120 and to court-martial procedure.

In October 1991, Naval aviators sexually abused multiple women in Las Vegas during the annual convention of the Tailhook aviators'

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[20] Military Justice Act of 1968, Pub L. No. 90-632, § 2-21, 82 Stat. 1335, 1336–40.

[21] HISTORY OF THE JAG CORPS, *supra* note 15, at 246.

[22] Exec. Order 12,198, 45 Fed. Reg. 16,932 (1980); MCM, *supra* note 13, pt. III; *see also* UCMJ art. 36 (2012) (requiring the president to prescribe rules that generally conform to the rules of evidence and procedure for federal district courts "so far as he considers practicable").

[23] Military Justice Act of 1983, Pub L. No. 98-209, § 3, 98 Stat. 1394, 1394–95 (amending UCMJ art. 27).

[24] *Id.* § 10 (amending UCMJ art. 67 and 28 U.S.C. § 1059).

[25] UCMJ art. 120 (1950), 64 Stat. 140.

[26] In 1992, Congress amended the statute to be gender-neutral. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 1006, 106 Stat. 2315, 2506. In 1996, Congress created the affirmative defense of mistake of fact as to age for "carnal knowledge" (i.e., rape of a child). National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1113, 110 Stat. 186, 462.

association.[27] Amidst the ensuing public scandal, Representative Randy Cunningham sharply criticized the resulting investigation for its aggressiveness, which led to the forced retirement of two admirals and a host of administrative punishments but no court-martial convictions.[28] In 1996, allegations of Army drill instructors sexually abusing trainees made nationwide news.[29] Not all of these instances were "rape by force"; in many cases, instructors used their position of authority to coerce or compel trainees to engage in sexual acts.[30] In the wake of these reports, Senator Barbara Mikulski visited Aberdeen Proving Grounds, Maryland, one of the installations where these abuses occurred.[31] There, she was "not surprised" to learn that all female recruits with whom she privately met "fe[lt] the chain of command works for them [the female recruits]."[32] Nonetheless, she broadly asserted "commanders too often fail to act on complaints" and that victims "are doubly punished, first by the assault, and then by the stunning silence of their commanders. Either the base commanders are out of touch, or they knew and took no action."[33]

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[27] H. G. Reza, *Women Accuse Navy Pilots of Harassment*, L.A. TIMES, Oct. 30, 1991, at B1; Carol J. Castenada, *Naval Officers Accused of Harassment*, USA TODAY, Oct. 31, 1991, at 3A.

[28] Andrea Stone, *Fairness of Intense Tailhook Probe Questioned*, USA TODAY, Aug. 13, 1992, at 3A (noting that Representative Cunningham believed that "[i]nvestigators [were] displaying far more vigor than fairness"); Laurence Jolidon & Andrea Stone, *Tailhook: Two Admirals Ousted*, USA TODAY, Sept. 25, 1992, at 3A; Tim Weiner, *The Navy Decides Not to Appeal Dismissals of Last Tailhook Cases*, N.Y. TIMES, Feb. 12, 1994, at 1-1; *see also* Brian C. Hayes, *Strengthening Article 32 to Prevent Politically Motivated Prosecutions: Moving Military Justice Back to the Cutting Edge*, 19 REGENT U. L. REV. 173, 183-86 (2007) (arguing that media pressure and perceived political considerations led to overly aggressive investigations and referrals of potentially baseless charges to trial, which were ultimately dismissed).

[29] *E.g.*, Michael E. Ruane, *Army Charges 3 with Harassing Women Recruits*, MIAMI HERALD, Nov. 8, 1996, at 3A (Aberdeen Proving Grounds, Maryland); *Three Fort Wood Sergeants Facing Sex Allegations: 7 Others are Hit With Suspension Pending Inquiries*, ST. LOUIS POST-DISPATCH, Nov. 13, 1996, at 1A (Fort Leonard Wood, Missouri); Gilbert A. Lewthwait & Joanna Daemmrich, *Female GIs Describe Drill Sergeant Abuse*, CHI. SUN-TIMES, Nov. 29, 1996, at 24 (Fort Jackson, South Carolina).

[30] *E.g.*, Karen Testa, *Guilty Plea in Army Sex Case; 2 Others Charged at Missouri Base*, CHI. SUN-TIMES, Nov 13, 1996, at 24 (describing the guilty plea of a drill sergeant at Fort Leonard Wood, Missouri, to "failing to obey a general regulation [UCMJ art. 92] by having consensual sex with three female recruits and trying to have sex with another").

[31] Paul W. Valentine & Martin Weil, *General Approves Aberdeen Courts-Martial; Mikulski Urges Joint Chiefs Chairman to End 'Culture of Silence,'* WASH. POST, Nov. 27, 1996, at A12.

[32] *Id.*

[33] *Id.*

In 2003, Senators Wayne Allard and John Warner requested the Secretary of the Air Force investigate allegations by a former Air Force Academy Cadet that she had been raped repeatedly and was subsequently punished for making the report.[34] When the Academy Superintendent referred Cadet Douglas Meester to a court-martial for rape, against the recommendation of the Article 32 Investigating Officer, "Senator Allard immediately hailed the decision."[35] Meester's rape charge was later dismissed in exchange for his guilty plea to conduct unbecoming an officer, dereliction of duty, and the commission of an indecent act.[36]

In 2005, at congressional direction,[37] a subcommittee of the Joint Service Committee on Military Justice produced a massive report proposing six options to "improve the ability of the military justice system to address issues relating to sexual assault."[38] The subcommittee unanimously recommended "no change" to Article 120.[39] But Congress chose an alternative proposal ("Option 5") as the framework for the 2006 comprehensive revision and expansion of Article 120.[40] After CAAF ruled part of the 2006 statute unconstitutional, [41] Congress rewrote

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[34] Mike Soraghan & Erin Emery, *AFA Rape Claim Investigated*, DENVER POST, Feb. 14 2003, at B2. At the time, Article 32 of the UCMJ provided for a "thorough and impartial" investigation into the "truth of the matter set forth in the charges" before trial. UCMJ art. 32 (2000). For more on the history and recent changes to the purpose and scope of Article 32, see *supra* note 18 and accompanying text, *infra* text accompanying note 61, and *infra* note 264 and accompanying text.

[35] Hayes, *supra* note 28, at 192 (citing John Sarche, *Cadet's Court-Martial in Rape Case Hailed as a First Step*, PHILA. INQUIRER, July 4, 2003, at A9).

[36] Erin Emery, *Cadet Cuts Deal; Rape Charges Dropped*, DENVER POST, June 9, 2004, at A1.

[37] Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-75, § 571, 118 Stat. 1811, 1920-21 (2004) (directing the study and report described).

[38] Sex Crimes and the UCMJ: A Report for the Joint Service Committee on Military Justice (2005) [hereinafter JSC Report], *available at* http://www.dod.mil/dodgc/php/docs/subcommittee_reportMarkHarvey1-13-05.doc.

[39] *Id.* at 1. However, the subcommittee acknowledged that the statute posed problems for instances of "date rape" or "acquaintance rape" where the victim and offender know each other and that it lacked definitions of terms like "force" and "consent." *Id.* at 52, 54.

[40] National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 2136, 3257 (2006) (codified at UCMJ art. 120 (2006)); *see also* JSC Report, *supra* note 38, at 1 (recommending "Option 5" to Congress as the best alternative to "no action").

[41] For the offenses of rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact, the 2006 law placed on the accused the initial burden to prove consent or mistake of fact as to consent by a preponderance of the evidence and then required the government to disprove consent or mistake of fact beyond a reasonable doubt. UCMJ art. 120(t)(14–16) (2006). The Court of Appeals for the Armed Forces

Article 120 again in 2011.[42] Each amendment significantly broadened the scope of sexually-based criminal conduct proscribed by the UCMJ, which currently addresses both "penetrative" and "nonpenetrative" sexual offenses.[43]

Meanwhile, the 2012 documentary *The Invisible War* brought unprecedented public attention to military sexual assault and, by extension, military justice.[44] The film juxtaposes personal accounts of military sexual assault victims with critical commentary on the military justice system. Although rife with inaccurate and misleading assertions,[45] the film prompted the Secretary of Defense to elevate the

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(CAAF) found this "burden shift" unconstitutional. United States v. Prather, 69 M.J. 338, 343 (C.A.A.F. 2011) ("In an area of law with many nuances, one principle remains constant—an affirmative defense may not shift the burden of disproving any element of the offense [here, the inability of the victim to consent due to "substantial incapacitation"] to the defense.").

[42] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1298, 1404 (2011) (codified at UCMJ arts. 120, 120b, 120c (2012)).

[43] The 2006 Article 120 covered a spectrum of sexually-based offenses, from forcible rape to "indecent exposure." UCMJ art. 120(a-n) (2006). The current Article 120 addresses only physical contact crimes against adults; Article 120b now addresses sexual offenses against children; and Article 120c addresses other sexual misconduct, e.g., "indecent viewing." UCMJ arts. 120, 120b, 120c (2012). Rape and sexual assault are sometimes referred to as the "penetrative offenses" because they include, as an element, a "sexual act," which is defined as penetration, "however slight" of the vulva, anus, or mouth by the penis, or "by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person." UCMJ art. 120(a), (b), (g)(1) (2012); *see also infra* text accompanying note 179 (defining nonpenetrative "sexual contact" offenses).

[44] THE INVISIBLE WAR (Chain Camera Pictures 2012).

[45] For example, Marine Corps Captain Ben Klay (the husband of one of the victims portrayed) describes the military as "an organization that gives commanders an unbelievable amount of power . . . . You appoint the prosecution, you appoint the defense, you appoint the investigator, you're in charge of the police force, you're in charge of the community, you're in charge of everything. You are judge, you are jury, you are executioner." THE INVISIBLE WAR, *supra* note 44, at 0:51:58. Defense attorneys have not been appointed by commanders since 1983. *See supra* text accompanying note 23. Internal command-appointed investigations into sexual assault allegations are prohibited, s*ee infra* note 106 and accompanying text (the Article 32 hearing, conducted by a command-appointed officer, was formerly known as an "investigation," *see infra* text accompanying note 63, but this occurs only after the initial investigation or inquiry is complete and criminal charges are filed with a view toward a general court-martial, *see* MCM, *supra* note 13, R.C.M. 303, 306, 405). Commanders are the sole adjudicators only for "minor offenses" addressed through nonjudicial punishment. *See* UCMJ art. 15. No convening authority may be a judge or be part of the panel ("jury") that determines guilt or innocence and imposes a sentence. *See* MCM, *supra* note 13, R.C.M. 902(b)(2), 912 (f)(1). Later in the film, attorney Susan Burke discusses statistics published by the

initial disposition authority for rape and sexual assault to commanders in the grade of O-6,[46] many commanders required their subordinate leaders

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Department of Defense (DoD): "when you look at prosecution rates in the 2010 department of defense reports, you begin with 2,410 unrestricted reports, and 748 restricted reports. What that means is *they've already funneled* 748 sexual assault victims into a system that has absolutely no adjudication whatsoever." THE INVISIBLE WAR, *supra* note 44, at 0:54:25 (emphasis added). Burke implies that the military forces victims unwillingly into restricted reporting to avoid adjudication; that is patently untrue. Restricted reports can only be made to a select number of people, all outside the chain of command, and are only restricted at the victim's request so she can obtain medical help and assistance without being compelled to endure the criminal justice process. U.S. DEP'T OF DEF., DIR. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM encl. 3, para 1.6.2 (6 Oct. 2005) (C1 7 Nov. 2008) [hereinafter DoDD 6495.01] (cancelled and reissued by DoDD 6495.01 (23 Jan. 2012) (C1 30 Apr. 2013)). Burke goes on, "They have identified 3,223 perpetrators. Now what happens once you send a perpetrator over to command? . . . First off, they drop 910, they just don't do anything." THE INVISIBLE WAR, *supra* note 44, at 0:54:25. Burke does not mention, and the film does not add, that the same page of the DoD report that she cites indicates that only 2,554 of the identified "perpetrators" were within military jurisdiction and further explains that the 910 cases in which no action was taken was as a result of "a variety of reasons, including, but not limited to, *insufficient evidence* that an offense occurred, the *victim declined to participate* in the military justice process, or there was probable cause for a nonsexual assault offense only." U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2010, at 10 (Mar. 2011) [hereinafter FY10 REPORT] (emphasis added). The last part of the film shows a lawsuit by several victims, including some portrayed in the film, represented by Burke, against high-level DoD officials. THE INVISIBLE WAR, *supra* note 44. The district court dismissed the suit, and the circuit court affirmed. Cioca v. Rumsfeld, 720 F.3d. 505, 507 (4th Cir. 2013). The crux of the complaint was that senior political leadership of the Department of Defense "alleged[ly] fail[ed] with regard to oversight and policy setting within the military disciplinary structure," and the court dismissed the claim because "[t]his is precisely the forum in which the Supreme Court has counseled against the exercise of judicial authority." *Id.* at 508 (quoting lower court's opinion). Yet on-screen text at the end of the film reads: "In December 2011, the Court dismissed the survivors' lawsuit [*Cioca*] ruling that rape is an occupational hazard of military service." THE INVISIBLE WAR, *supra* note 44, at 1:29:50. This "occupational hazard" language does not appear in either court's opinion, nor was it the basis for the ruling. *See Cioca*, 720 F.3d at 508; Cioca V. Rumsfeld, No. 1:11-cv-151-LO-TCB (E.D. Va. Dec. 9, 2011) (Order Dismissing Complaint); *see also* Dwight Sullivan, *"The Invisible War": uninformed, dishonest, or both?*, CAAFLOG (July 11, 2012), http://www.caaflog.com/2012/07/11/invisible-war-uninformed-dishonest-or-both/ (discussing many of the same inaccuracies as this footnote); *infra* note 46 and accompanying text, text accompanying notes 103–106.

[46] Memorandum from Sec'y of Def. to Sec'ys of Military Dep'ts et al., subject: Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (20 Apr. 2012); *see also* Steve Pond, *Military Rape Documentary 'Invisible War' Leads to Policy Changes Before Its Opening*, THE WRAP (June 18, 2012 6:35 PM), http://www.thewrap.com/movies/column-post/military-rape-documentary-invisible-war-leads-policy-changes-its-opening-44671/. The epilogue of

to watch the film,[47] and Senator Kirsten Gillibrand would later credit the film with spurring the sweeping legislation that followed.[48] At the end of 2012, Congress created the Response Systems to Adult Sexual Crimes Panel (RSP) to "provide recommendations on how to improve the effectiveness of the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses."[49]

The release of *The Invisible War* roughly coincided with public reports of Air Force drill instructors sexually abusing trainees at Joint Base San Antonio-Lackland.[50] Similar to the Army cases of the 1990s, the allegations included a mix of forcible rapes and coerced or compelled sexual acts, leading to charges against 33 instructors, including one woman.[51] Months later, Air Force Lieutenant General (Lt Gen) Craig Franklin used his authority under Article 60 of the UCMJ to disapprove the findings of guilty in a sexual assault case.[52] In the wake of the

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The Invisible War incorrectly states that "[o]n April 14, 2012, Secretary of Defense Leon Panetta watched this film. Two days later, he took the decision to prosecute away from unit commanders." THE INVISIBLE WAR, *supra* note 44, at 1:33:56.

[47] *See, e.g.*, Brittany Carlson, *Documentary Educates in a SHARP Way*, BELVOIR EAGLE, Feb. 22, 2013, http://www.army.mil/article/97020/Documentary_educates_in_a_SHARP_way/; Sergeant Jessica Spradlin, *New Sexual Assault Documentary, 'The Invisible War,' Required Viewing for all I Corps NCOs and Officers*, NW. MILITARY (Apr. 11, 2013), http://www.northwestmilitary.com/news/focus/2013/04/New-sexual-assault-documentary-The-Invisible-War-required-viewing/; Ruth Marcus, *'The Invisible War' Helps Open Eyes to Military's Sexual Assault Problem*, WASH. POST, June 6, 2013, http://www.washingtonpost.com/opinions/invisible-war-helps-open-eyes-to-militarys-sexual-assault-problem/2013/06/06/840cfb78-ced9-11e2-8f6b-67f40e176f03_story.html (noting the Coast Guard Commandant ordered senior leaders to watch the film).

[48] Rebecca Huval, *Sen. Gillibrand Credits the Invisible War with Shaping New Bill*, PBS (May 10, 2013), http://www.pbs.org/independentlens/blog/sen-gillibrand-credits-the-invisible-war-in-shaping-new-bill; *see also infra* note 59 and accompanying text (listing some of the legislation to which Senator Gillibrand referred).

[49] National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 576, 126 Stat. 1632, 1758–60 (2012). Congress specifically tasked the Response Systems Panel (RSP) to examine, *inter alia*, "strengths and weaknesses of proposed legislative initiatives to modify the current role of commanders in the administration of military justice and the investigation, prosecution, and adjudication of adult sexual assault crimes." *Id.* § 576(d)(1)(A).

[50] Chris Lawrence, *31 Victims Identified in Widening Air Force Sex Scandal*, CNN (June 29, 2012), http://www.cnn.com/2012/06/28/justice/texas-air-force-scandal/.

[51] Sig Christenson, *Female Trainer Guilty in Lackland Scandal*, SAN ANTONIO EXPRESS-NEWS, May 2, 2013, at A1; James Dao, *Instructor for Air Force is Convicted in Sex Assaults*, N.Y. TIMES, July 21, 2012, at A9.

[52] Letter from Lieutenant General Craig Franklin to Michael B. Donley, U.S. Sec'y of the Air Force (Mar. 12, 2013), *available at*

Lackland incidents and with the publicity generated by *The Invisible War*, congressional reaction to Lt Gen Franklin's act was swift and furious.[53] The next year, as one of his first acts as Secretary of Defense, Charles Hagel proposed eliminating convening authorities' Article 60 discretion.[54] Meanwhile, military sexual assault allegations continued skyrocketing in the national attention.[55] In the spring of 2013, a midshipman at the United States Naval Academy accused three other midshipmen of sexual assault.[56] During the Article 32 investigation,

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http://www.foia.af.mil/shared/media/document/AFD-130403-022.pdf.; *see also supra* note 18 and accompanying text (discussing the history and intent of Article 60).

[53] Senators Barbara Boxer and Jeanne Shaheen sent a letter to the Secretary of Defense describing Lieutenant General (Lt Gen) Franklin's actions as "unacceptable." Letter from Sens. Boxer and Shaheen to Charles T. Hagel, U.S. Sec'y of Def. (Mar. 5. 2013), *available at* http://www.stripes.com/news/full-text-of-sens-boxer-and-shaheen-s-letter-to-hagel-1.210550. Representative Jackie Speier called it a "mockery of the UCMJ." Nancy Montgomery, *Air Force Pilots Sex Assault Dismissal Sparks Cries for Reform*, STARS & STRIPES, Mar. 3, 2013, http://www.stripes.com/news/air-force-pilot-s-sex-assault-dismissal-sparks-cries-for-reform-1.210371. ABC News later quoted Representative Speier describing the UCMJ as "primitive" and a "broken system" because of this authority. Matthew Larotanda, *Overturned Sexual Assault Case Spurs Bill to Limit Commanders' Tribunal Powers*, ABC NEWS (Mar. 12, 2013, 7:14 PM), http://abcnews.go.com/blogs/politics/ 2013/03/overturned-sexual-assault-case-spurs-bill-to-limit-commanders-tribunal-powers/. Senator Claire McCaskill said that Lt Gen Franklin's decision "violates every sense of justice and fairness that we expect in America." Sen. Claire McCaskill, *Their Day in Court*, ST. LOUIS POST-DISPATCH, Mar. 12, 2013, at A13. Senator McCaskill later prevented the promotion of Air Force Lt Gen Susan Helms for taking a similar action. David Alexander, *Female U.S. General Who Overturned Sex-Assault Ruling to Retir*e, REUTERS (Nov. 8, 2013, 7:22 PM), http://www.reuters.com/article/2013/11/09/us-usa-defense-sexualassault-idUSBRE9A800A20131109. Within weeks, the Personnel Subcommittee of the Senate Armed Services Committee held a hearing at which senators and advocates alike strongly criticized Lt Gen Franklin's action. *Hearing to Receive Testimony on Sexual Assaults in the Military Before the S. Subcomm. on Personnel, Comm. on Armed Services*, 113th Cong. 3, 6, 14, 20, 22, 55-56, 64 (2013) [hereinafter Subcommittee Hearing] (statements of, respectively, Sen. Kirsten Gillibrand, Sen. Barbara Boxer, Mr. Brian K. Lewis, Ms. Anu Baghwati, Sen. Richard Blumenthal, Sen. Gillibrand again, and Sen. Claire McCaskill).

[54] Press Release, U.S. Dep't of Def., Statement from Secretary Hagel on Sexual Assault Prevention and Response (Apr. 8, 2014).

[55] *See, e.g.*, Sens. Patty Murray & Kelly Ayotte, *A Strategy to Combat Military Sexual Assaults*, POLITICO (May 22, 2013, 9:33 PM), http://www.politico.com/story/2013/05/a-strategy-to-combat-military-sexual-assaults-91770.html ("Twice in two weeks, the very people in the military who are responsible for protecting victims of sexual assault have been accused of committing these crimes."); Sig Christenson, *GI's life Unraveled in Wake of Assault; Woman Was Attacked in Fort Hood Barracks*, SAN ANTONIO EXPRESS-NEWS, May 25, 2013, at A1.

[56] James Risen, *Maryland: Midshipmen Face Sexual Assault Charges*, N.Y. TIMES, June 20, 2013, at A13.

cross examination of the victim by all three defense attorneys lasted five days,[57] drawing pointed congressional condemnation.[58]

The intense congressional focus on military sexual assault generated an avalanche of legislation.[59] Without waiting for the RSP to finish its report, Congress enacted many diverse proposals as part of the 2014 National Defense Authorization Act (NDAA).[60] The 2015 NDAA made further changes.[61] Unlike the major amendments in 1968 and 1983, almost every change to the UCMJ would serve to work against accused servicemembers, limiting both pre-trial and post-trial opportunities for defense, mitigation, and clemency.[62] Congress completely rewrote

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[57] Lyndsey Layton, *Accuser Testifies for a Fifth Day*, WASH. POST, Sept. 2, 2013, at B-1.

[58] *E.g.*, Ali Weinberg, *Naval Academy Rape Case Could Prompt Changes to Military Hearings*, NBC NEWS (Dec. 12, 12:21 pm), http://www.nbcnews.com/news/other/naval-academy-rape-case-could-prompt-changes-military-hearings-f2D11732125 (criticism by Attorney Susan Burke and Rep. Jackie Speier); Tom Vanden Brook, *Military Sex-Assault Hearings Under Fire; Bill Would Protect Alleged Victims from Intrusive Questions*, USA TODAY, Nov. 6, 2013, at 5A (criticism by Sen. Barbara Boxer and Sen. Lindsey Graham).

[59] *E.g.*, Protect Our Military Trainees Act, H.R. 430, 113th Cong. (2013); Military Sexual Assault Prevention Act of 2013, S. 548, 113th Cong. (2013); H.R. 1864, 113th Cong. (requiring inspector general reviews of retaliatory actions taken against those who made protected communications regarding sexual assault); S. 964, 113th Cong. (2012) (requiring "comprehensive review of the adequacy of the training, qualifications, and experience of the Department of Defense personnel responsible for sexual assault prevention and response"); Better Enforcement for Sexual Assault Free Environments Act of 2013, H.R. 1867, 113th Cong; Better Enforcement for Sexual Assault Free Environments Act of 2013, S. 1032, 113th Cong.; Combating Military Sexual Assault Act of 2013, H.R. 2002, 113th Cong; Combating Military Sexual Assault Act of 2013, S. 871, 113th Cong.; Military Justice Improvement Act of 2013, H.R. 2016, 113th Cong.; Military Justice Improvement Act of 2013, S. 967, 113th Cong.; S. 992, 113th Cong. (2013) (requiring creation of sexual assault prevention and response offices at the chief of staff level for each service); Military Crime Victims Rights Act of 2013, S. 1041, 113th Cong. (2013); Stop Pay for Violent Offenders Act, H.R. 2777, 113th Cong. (2013); Article 32 Reform Act, H.R. 3459, 113th Cong. (2013); Article 32 Reform Act, S. 1644, 113th Cong. (2013); H.R. 3360, 113th Cong. (2013) (amending UCMJ art. 32); Victims Protection Act of 2013, S. 1775, 113th Cong. (2013); S. 538, 113th Cong. (2013) (containing an earlier version of the amendments to UCMJ art. 60 reintroduced in S. 1775).

[60] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, tit. XVII, 127 Stat. 672, 950 (2013) [hereinafter FY14 NDAA].

[61] Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, §§ 531-47, 128 Stat. 3292 (2014) [hereinafter FY15 NDAA].

[62] *E.g.*, National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702(b), 127 Stat. 672 (2013) (codified at UCMJ art. 60(c) (2014)) (eliminating convening authorities' ability to disapprove findings of guilty except for certain minor

Article 32, converting the "thorough and impartial investigation" before trial into to a "preliminary hearing" limited to determining "whether probable cause exists to believe an offense has been committed and the accused committed the offense," restricted the scope of defense cross-examinations at that newly restricted hearing, and gave any victim an absolute prerogative to refuse to testify thereat.[63] From 1950 to 2014, Congress's perception of and focus on military justice had decidedly shifted to the detriment of the accused.

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offenses, greatly curtailing their ability to reduce sentences, and requiring written explanations of such actions to be included in the record of trial); *id.* § 1704 (codified at UCMJ art. 46(b) (2014)) (prohibiting, for "sex-related offenses," defense counsel interview of victims without submitting such a request through the trial counsel; requiring defense counsel to allow victims to be accompanied in such interviews by the trial counsel, victim's counsel, or victim advocate), *amended by* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 531(b), 128 Stat. 3292 (2014) (amending the statute to require requests for victim interviews to be submitted through the victim's counsel, if applicable, and making other technical changes); National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1705, 127 Stat. 672 (2013) (codified at UCMJ arts. 56(b) and 18(c) (2014)) (mandating a dishonorable discharge for penetrative offenses and limiting jurisdiction over such charges to general courts-martial); *id.* § 1708 (requiring MCM, *supra* note 13, R.C.M. 306 discussion to be amended to prohibit commanders from considering "character and military service of the accused" when deciding how to dispose of offenses); *id.* § 1713 (codified at 10 U.S.C. § 674(b) (2014)) (providing authority for temporary administrative reassignment of servicemembers accused or suspected of committing sex offenses); *id.* § 1744 (requiring any convening authority who chooses not to refer to court-martial a charge for a penetrative offense to submit his decision to either the next higher commander, if his staff judge advocate agrees with the decision, or directly to the service secretary, if the staff judge advocate believes referral is warranted; discussed *infra* text accompanying note 152), *amended by* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 541, 128 Stat. 3292 (2014) (giving each service's "chief prosecutor" the authority to force secretarial review "in response to a request by the detailed counsel for the Government"); Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 536, 128 Stat. 3292 (2014) (banning the use of "good military character" evidence for select offenses); *id.* § 537(2) (eliminating the "constitutionally required" exception to Mil. R. Evid. 513(d); discussed *infra* notes 263, 276 and accompanying text).

[63] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702(a), 127 Stat. 672 (2013) (codified at UCMJ art. 32 (2014)). *Compare* UCMJ art. 32 (2012), *with* UCMJ art. 32 (2014). Notably, Congress removed the words "thorough" and "truth" from the statute. *Id.*

B. Athens: Using Title IX as a Weapon

> *School discipline, like parental discipline, is an integral and important part of training our children to be good citizens – to be better citizens.*
> —Justice Hugo Black[64]

After World War II, the notion of colleges standing in *loco parentis* with generally unfettered discretion in student disciplinary matters began to erode.[65] During the social upheavals of the postwar civil rights era, federal courts began intervening in school discipline, finding public schools to be state actors bound by the Due Process clause of the Fourteenth Amendment to the U.S. Constitution.[66] In 1975, the Supreme Court ruled that, because a state-granted education created protected property and liberty interests, public-school students "must be given *some* kind of notice and afforded *some* kind of hearing" before expulsion or lengthy suspension.[67] Since then, "[c]ourts, colleges, and student personnel administrators seem to have wrestled with every aspect of the due process issue."[68]

Meanwhile, Congress accelerated gender integration in 1972 when it passed what came to be known as "Title IX."[69] Title IX's substance is brief but broad:

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[64] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 524 (1969) (Black, J., dissenting).

[65] Nicholas Trott Long, *The Standard of Proof in Student Disciplinary Cases*, 12 J.C. & U.L. 71, 71 (1985).

[66] *Id.* at 71-72. An early example is *Dixon v. Alabama State Board of Education*. 294 F.2d 150 (5th Cir. 1961). Students at Alabama State College had been summarily expelled without notice, a hearing, or an opportunity to appeal for participating in a "sit in" protest at a courthouse. *Id.* at 152-54. The Fifth Circuit held that, once given, the state could not revoke the "privilege" of education without due process; at the very least the college must give some form of prior notice and hearing. *Id.* at 156-57.

[67] Goss v. Lopez, 419 U.S. 565, 574–75, 579–82 (1975). Though the *Goss* ruling applied only to elementary and secondary schools, lower federal courts have applied the Court's holding to public colleges as well. Lavinia M. Wenzel, Note, *The Process That is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1622 n.49 (2012).

[68] Long, *supra* note 65, at 72.

[69] Education Amendments of 1972, Pub. L. No. 92-318, tit. IX, 86 Stat. 235, 373-75 (codified as amended at 20 U.S.C. §§ 1681–88 (2012)).

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.[70]

Congress backed this terse mandate with a very broad grant of regulatory authority to the executive branch.[71] The Department of Education (DOE), which controls the bulk of federal education funds, promulgates and administers Title IX regulations through its Office for Civil Rights (OCR).[72] As part of these rules, OCR requires all schools to establish internal "grievance procedures" through which schools must "prompt[ly] and equitab[ly]" resolve allegations of sex discrimination.[73]

Although courts had intervened in student discipline decades earlier, Congress did not take an active oversight role until 1990. That year, amid reports of increased violent crime in colleges, Congress required all colleges receiving federal funding to publish campus crime statistics and security policies.[74] This became known as the "Clery Act."[75] The fact that Congress mandated no change to the schools' internal disciplinary process and its emphasis on reporting and security policies seem to indicate that, at the time, Congress expected serious crimes would continue to be investigated and prosecuted by off-campus authorities.

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[70] 20 U.S.C. § 1681(a) (2012). There are limited exceptions, primarily regarding admissions standards, for traditional single-sex schools, and military and merchant marine training, etc. *Id.*

[71] *Id.* § 1682 (giving every "Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity" the authority to promulgate and enforce rules and to withdraw federal funding as penalty for violations thereof).

[72] *About OCR*, U.S. DEP'T OF EDUC. (May 29, 2012), http://www2.ed.gov/about/offices/list/ocr/aboutocr.html; *see generally* 34 C.F.R. § 106 (2014) (containing regulations promulgated by the Office for Civil Rights (OCR) to enforce Title IX).

[73] 34 C.F.R. § 106.8 (2014).

[74] Crime Awareness and Campus Security Act of 1990, Pub. L. No. 101-542, § 204, 104 Stat. 2381, 2385–87 (codified as amended at 20 U.S.C.S. § 1092(f) (Lexis 2014)). The Act also amended existing privacy laws to permit disclosure of the outcomes of student disciplinary proceedings to crime victims. *Id.* § 203 (codified as amended at 20 U.S.C. § 1232g(b)(6) (2012)).

[75] Higher Education Amendments of 1998, Pub. L. No. 105-244, § 486(e)(7), 112 Stat. 1581, 1745 (formally titling 20 U.S.C. § 1092(f) the "Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act").

The idea that internal campus tribunals could or should address crimes like rape and sexual assault had not yet taken hold.

But beginning in the 1990s, plaintiffs in federal court relied heavily on Title IX to address sexual harassment of students, both by school employees and other students.[76] When courts limited direct legal actions by students against schools,[77] OCR announced that it would use its Title IX authority to define and ensure an effective response to sexual harassment through Title IX's "administrative enforcement" procedures.[78] Requiring schools to use the Title IX grievance process to internally adjudicate sexual harassment allegations gave students another forum, likely more favorable than the courts, to bring their claims.[79]

Then in the 2000s, a growing number of students filed Title IX grievances with their colleges alleging sexual assault by other students, in many cases after local authorities refused to investigate or prosecute their claims.[80] Many expressed frustration with the procedural

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[76] *See, e.g.*, Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 75 (1992) (holding that sexual harassment is sex-based discrimination under Title IX); Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999) ("[S]tudent-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute."); Morse v. Regents of Univ. of Colo., 154 F.3d 1124 (10th Cir. 1998).

[77] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998) (holding that a school district could be liable under Title IX for its employee's sexual harassment of a student only if district officials had actual notice of and were "deliberately indifferent" to the misconduct); *Davis*, 526 U.S. at 642-44 (similar holding with regard to student-on-student harassment).

[78] OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES iii (2001) (citing *Gebser*, 524 U.S. at 292, for the proposition that OCR can take administrative action against schools even when the action of school officials does not amount to the "deliberate indifference" required by *Davis* to sustain a lawsuit). In its guidance, OCR states that "sufficiently serious" sexual harassment could create a "hostile environment" such that it would "deny or limit a student's ability to participate in or benefit from the school's program based on sex," thus triggering the school's responsibilities under Title IX. *Id.* at 5.

[79] *Id.* at 19 (stating that although "Title IX does not require a school to . . . provide separate grievance procedures [specifically] for sexual harassment," failure to establish some form of grievance procedures that comply with Title IX would itself violate Title IX); *see also supra* text accompanying note 73.

[80] *E.g.*, Kristen Lombardi, *Sexual Assault on Campus Shrouded in Secrecy*, CTR. FOR PUB. INTEGRITY (Dec. 1, 2009, 12:01 AM, updated May 19, 2014, 12:19 PM), http://www.publicintegrity.org/2009/12/01/9047/sexual-assault-campus-shrouded-secrecy; Joseph Shapiro, *Failed Justice Leaves Rape Victim Nowhere to Turn*, NAT'L PUB. RADIO (Feb. 25, 2010, 12:01 PM), http://www.npr.org/templates/story/story.php?storyId=124052847; *College of Holy Cross*

informality and light punishments typical of college disciplinary proceedings.[81] In 2011, OCR suddenly published a "Dear Colleague Letter" (DCL) to all educational institutions that receive federal funding.[82] The DCL extrapolates dicta from several federal cases for the proposition that "a single instance of rape is sufficiently severe to create a hostile environment" *per se*, thus bringing rape and crimes of "sexual violence" within the definition of "sexual harassment"—and within the purview of OCR's authority.[83]

Under the DCL, OCR requires colleges to use their Title IX grievance procedures for all allegations of sexual assault, even if local law enforcement authorities conduct their own investigation and prosecution, and colleges may not wait for the outcome of any pending criminal adjudication.[84] The DCL states that the accused should not be allowed to present character witnesses unless the complainant may do so, may not have an attorney or advisor present unless the complainant may, may not appeal the findings or punishment unless the complainant may, and "strongly discourages" cross-examination of either the accused or the complainant.[85] Congress reinforced OCR in 2013 with the Sexual Violence Elimination (SaVE) Act, amending the Clery Act to statutorily require (for the first time in history) that colleges use administrative disciplinary procedures specifically for adjudicating "domestic violence, dating violence, sexual assault, and stalking."[86]

Responds to Sexual Assault, NAT'L PUB. RADIO (Mar. 10, 2010, 12:00 PM), http://www.npr.org/templates/story/story.php?storyId=124199190.

[81] *E.g.*, Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, CTR. FOR PUB. INTEGRITY (Feb. 24 2010, 12:00 PM, updated July 4, 2014, 4:50 PM), http://www.publicintegrity.org/2010/02/24/4360/lack-consequences-sexual-assault; *Rape Victims Find Little Help on College Campuses*, NAT'L PUB. RADIO (Feb. 27, 2010, 10:53 AM), http://www.npr.org/templates/story/story.php?storyId=124148857.

[82] OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER (Apr. 4, 2011) [hereinafter DCL].

[83] *Id.* at 3 (citing, *inter alia*, Jennings v. Univ. of N.C., 444 F.3d 255, 268, 274 n.12 (4th Cir. 2006); Vance v. Spencer Cnty. Pub. Sch. Dist, 231 F.3d 253, 259 n.4 (6th Cir. 2000)).

[84] *Id.* at 10 ("[A] criminal investigation into allegations of sexual violence does not relieve the school of its duty under Title IX to resolve complaints promptly and equitably . . . a school should not delay conducting its own investigation . . . because it wants to see whether the alleged perpetrator will be found guilty of a crime.").

[85] *Id.* at 11-12.

[86] Congress slightly amended the original Campus Sexual Violence Elimination (SaVE) Act, S. 128, 113th Cong. (2013), and incorporated it into the Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, § 304(a)(5), 127 Stat. 54, 89 (codified at 20 U.S.C.S. § 1092(f)(8) (Lexis 2014)). The amended Clery Act now requires colleges to establish institutional disciplinary procedures for "domestic violence, dating violence,

After issuing the DCL, OCR quickly demonstrated its willingness to enforce its mandates. The University of Montana was the first college to come under federal scrutiny for sexual assault.[87] The Departments of Education and Justice jointly published findings criticizing almost every aspect of the University's procedures, and the University entered into a "resolution agreement" to make federally-directed changes to its systems.[88] In 2013, OCR fined Yale University $165,000 and fined the University of Texas $82,500 for Clery Act violations, two of the heaviest such fines in history.[89] The DOE has since threatened the "nuclear option" of withholding federal funding, on which almost every college relies, for failure to comply with the policies set forth in the DCL.[90]

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sexual assault, [and] stalking" to be conducted by "officials who receive annual training on the issues related to [those offenses, and] how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability," and it directs that "the accuser and the accused are entitled to the same opportunities to have others present" at such a proceeding. 20 U.S.C.S. §1092(f)(8)(A)(iv) (Lexis 2014).

[87] Eliza Gray, *Sexual Assault on Campus*, TIME, May 26, 2014, at 20, 24 ("It was clear that, sooner or later, a college would find itself in the federal crosshairs. That school turned out to be Montana.").

[88] Letter from Anurima Bhargava, Chief, Civil Rights Div., U.S. Dep't of Justice, Educational Opportunities Section, & Gary Jackson, Reg'l Dir., U.S. Dep't of Educ., Office for Civil Rights, Seattle Office, to Royce Engstrom, President, Univ. of Mont., & Lucy France, Univ. Counsel, Univ. of Mont. (May 9, 2013), *available at* http://www2.ed.gov/documents/press-releases/montana-missoula-letter.pdf.

[89] Libby Sander, *Yale U. Is Fined $165,000 Under Crime-Reporting Law*, CHRON. OF HIGHER EDUC., May 16, 2013, http://chronicle.com/article/Yale-U-Is-Fined-165000/139343/.

[90] Tovia Smith, *How Campus Sexual Assaults Came to Command New Attention*, NAT'L PUB. RADIO (Aug. 12, 2014, 5:53 PM), http://www.npr.org/2014/08/12/339822696/how-campus-sexual-assaults-came-to-command-new-attention (quoting Catherine Lhamon, U.S. Ass't Sec'y of Educ. for Human Rights) ("I will go to enforcement, and I am prepared to withhold federal funds."). By using federal funds as leverage, OCR can influence private colleges, which, unlike public colleges, are not "state actors" bound by the Due Process clause of the 14th Amendment. *See generally supra* text accompanying notes 66–67. The Office for Civil Rights maintains that, despite the numerous specific requirements newly imputed to Title IX, the Dear Colleage Letter (DCL) "does not add requirements to existing law" and, therefore, OCR does not need to comply with the procedural requirements for promulgating new federal regulations. DCL, *supra* note 82, at 1 n.1. This position, while controversial, has not been challenged in court. *See* Hans Bader, *Education Department Illegally Ordered Colleges to Reduce Due-Process Safeguards*, EXAMINER (Sept. 21, 2012, 6:49 PM), http://www.examiner.com/article/education-department-illegally-ordered-colleges-to-reduce-due-process-safeguards (arguing that OCR's position violates the Federal Administrative Procedures Act).

In 2014, President Obama created the White House Task Force to Protect Students from Sexual Assault (White House Task Force), endorsing and supporting the policies OCR first announced in the DCL.[91] In addition, many of the senators who were at the forefront of the changes to military law sponsored the Campus Accountability and Safety Act (CASA) to reinforce and expand the requirements imposed by OCR.[92] In mid-2014, OCR publicly listed over four dozen colleges under investigation "for possible violation of federal law over the handling of sexual violence and harassment complaints."[93] By then the legislative and executive branches clearly expected college officials to adjudicate potential sex crimes, to do so swiftly and harshly, and that due process would be of secondary concern.[94] Under threat of a crippling loss of funds, colleges across the country have rushed to comply.[95]

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[91] President Barack Obama, Weekly Address: Taking Action to End Sexual Assault (Jan. 25, 2014), http://www.whitehouse.gov/the-press-office/2014/01/25/weekly-address-taking-action-end-sexual-assault; WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, CHECKLIST FOR CAMPUS SEXUAL MISCONDUCT POLICIES, *available at* https://www.notalone.gov/assets/checklist-for-campus-sexual-misconduct-policies.pdf (endorsing most of OCR's policies, including preponderance of the evidence standard, limitations on cross-examination, and the requirement to extend to the complainant any procedural rights given to the accused).

[92] S. 2692, 113th Cong. § 6 (2013); *see also* Tyler Kingkade, *Senators Turn Attention to College Sexual Assault Reform After Military Reform Battles*, HUFFINGTON POST (Apr. 16, 2014, 5:36 PM, updated Apr. 16, 2014, 10:59 PM), http://www.huffingtonpost.com/2014/04/16/legislation-college-sexual-assault_n_5161355.html.

[93] Press Release, U.S. Dep't of Educ., U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014).

[94] *See, e.g.*, 20 U.S.C.S. § 1092(f)(8)(A)(iv)(I)(bb) (Lexis 2014) (requiring college disciplinary officials to be trained in "how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability"; the statutory text makes no mention of preserving due process for the accused); DCL, *supra* note 82, at 12 ("Public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant."); *see also* Patricia McGuire, *College Presidents Must Lead on Sexual Assault*, HUFFINGTON POST (Sept. 1, 2014, 11:16 AM, updated Nov. 1, 2014, 5:59 AM) http://www.huffingtonpost.com/patricia-mcguire/college-presidents-must-l_b_5744646.html ("Due process does not have to mean undue delays in getting perpetrators off campus and into jail.").

[95] Smith, *supra* note 90.

III. Two Roads Diverge: The Politics of Sexual Assault

Through legislation, regulation, and public pressure, political forces have transformed the military and college sexual assault response processes. Both institutions face the same criticisms—that sexual assaults are underreported, victims face retaliation for reporting, and sexual assaults are ignored or "swept under the rug" by institutional leaders.[96] Yet within less than a decade, political influences, sometimes from the same actors, have produced diametrically opposite approaches to reporting, disposition, and adjudication. At the same time, these divergent approaches share some common attributes, notably a predilection for broad and ambiguous definitions of the term "sexual assault" and a generally dim view of due process protections, which is discussed later in Part IV.

A. How Sexual Assault is Reported and Investigated

> *[I]f there was a rape in your office in the Senate and somebody upstairs yelled and screamed and you went up there as a Senator, what would you do? Would you decide whether the case ought to be prosecuted or would you call the police?*

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[96] *Compare, e.g.*, Mary Beth Marklein, *Colleges Under Pressure to Stem Sexual Assault*, USA TODAY, Aug. 11, 2014, http://www.usatoday.com/story/news/nation/2014/08/11/campuses-prepare-for-new-sexual-assault-regulations/13091139/ (quoting Ms. Annie Clark, co-founder of End Rape on Campus) ("The institutional betrayal that these students face is sometimes worse than the assault itself."); Melinda Hennenberger, *Awareness Must Lead to Action Against Sex Assaults on Campus*, WASH. POST, May 21, 2014, at A2 ("[T]he campus where no or few victims are reporting is a campus where they do not feel safe doing that."), *and* Smith, *supra* note 90 (quoting an anonymous federal official) ("Schools are still blaming victims and failing to punish perpetrators."), *with* Jesse Ellison, *Will the Military Finally Confront its Rape Epidemic?*, THE DAILY BEAST (Nov. 19, 2011), http://www.thedailybeast.com/articles/2011/11/19/will-the-military-finally-confront-its-rape-epidemic.html ("Victims who report their assaults report being further victimized by the military's handling of their complaints."), *and* Ruth Marcus, *Breaking the Chain*, WASH. POST, Mar. 19, 2014, at A15 ("Commanding officers invested with the power to decide whether to pursue prosecutions may be inclined to sweep their buddies' wrongdoing under the rug [or] to view the victims as culpable."), *and* Meredith Clark, *Landmark Year for Military Sex Assault Reform Ends With Spike in Reports*, MSNBC (Dec. 28, 2013, 3:30 PM, updated Jan. 12, 2014, 12:54 PM), http://www.msnbc.com/melissa-harris-perry/big-jump-reports-military-sex-assault (quoting Nancy Parrish, president of Protect Our Defenders) ("One thing we do know is that 62% of those that do report state that they were retaliated against.").

—Senator Barbara Boxer[97]

Perhaps the most frequent accounts of systemic failures in both the military and colleges allege that the organizations mishandle initial reports. *The Invisible War* presents many accounts of victims who either believed they could only report to their commander and were afraid to do so, or who did report and whose commander did nothing against the accused.[98] In 2013, the commanding general of U.S. Army-Japan failed to investigate a sexual harassment allegation and failed to report an alleged sexual assault by the same officer to law enforcement, ultimately leading to his relief from command.[99] Before and after OCR published the DCL, many college victims reported that college officials took no meaningful action and discouraged further reporting.[100] One victim reported that an official specifically told her not to go to law enforcement.[101] In 2014, *Rolling Stone* published a sensational story about an alleged gang rape at the University of Virginia in which the magazine reported that other students and university officials alike worked to suppress the victim's account.[102] Despite these similar

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[97] 160 CONG. REC. S1340 (daily ed. Mar 6, 2014).

[98] THE INVISIBLE WAR, *supra* note 44 (describing the experiences of former Airman Jessica Hinves whose commander stopped the prosecution of her accused assailant, former Coast Guardsman Kori Cioca whose chain of command refused to take any action despite repeated protests, Marine Lieutenant Elle Helmer whose commander closed the investigation into her allegations and then investigated her for public intoxication, and presenting an onscreen graphic stating that four of five Marines interviewed, "who were each assaulted by an officer while serving at Marine Barracks Washington . . . were investigated or punished after they reported.").

[99] Jennifer Hlad, *Probe of Army General Calls Insular Military Culture Into Question*, STARS & STRIPES, Apr. 24, 2014, http://www.stripes.com/news/probe-of-army-general-calls-insular-military-culture-into-question-1.279762.

[100] *E.g.*, Kristen Jones, *Barriers Curb Reporting on Campus Sex Assault*, CTR. FOR PUB. INTEGRITY (Dec. 2, 2009, 11:02 AM, updated May 19, 2014, 12:19 PM) http://www.publicintegrity.org/2009/12/02/9046/barriers-curb-reporting-campus-sexual-assault (describing how one college's failure to investigate an alleged rape in 2006 led to the victim's suicide); Jason Felch, *Pressure on Berkeley Grows; in Federal Complaints, 31 Women Allege the School Botched Sexual Assault Investigations*, L.A. TIMES, Feb. 24, 2014, at AA1 ("The complaints allege that officials for years have discouraged victims from reporting assaults, failed to inform them of their rights and led a biased judicial process that favored assailants' rights over those of their victims.").

[101] Eliza Gray, *Why Victims of Rape in College Don't Report to the Police*, TIME (June 23, 2014), http://time.com/2905637/campus-rape-assault-prosecution/ ("Alexandra Brodsky, a student at Yale law school . . . said: 'When I reported violence to my school, I was told not to go to police. But I never would have told [the school] if I knew I was going to be forced into that option.'") (bracketed alteration in original).

[102] Sabrina Rubin Erdely, *A Rape on Campus: a Brutal Assault and Struggle for Justice at UVA*, ROLLING STONE, Dec. 4, 2014, at 68, 70-77. In April 2015, after extensive

criticisms and potential system failures, the political responses have been almost diametrically opposite.

The Invisible War alleges that all military sexual assault victims must report sexual assaults to their commanding officers and implies that they may not go to law enforcement or anyone else.[103] This is untrue; the military provides a wide range of reporting options, and these have been standardized across the DoD since at least 2005.[104] Military criminal investigative organizations (MCIOs) use specially trained investigators for sexual assault cases.[105] Since at least 2005, commanders have been prohibited from conducting their own investigations into sexual assault allegations and are required to report to their MCIO "[w]hen information about a sexual assault comes to any commander's attention."[106] Yet as part of the 2014 NDAA, Congress took the superfluous step of requiring

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reporting by *The Washington Post* and an external investigation revealed factual inaccuracies and journalistic failures, *Rolling Stone* retracted this article. Will Dana, Managing Editor et al., *Rolling Stone and UVA: The Columbia University Graduate School of Journalism Report,* ROLLING STONE, Apr. 5, 2015, http://www.rollingstone.com/culture/features/a-rape-on-campus-what-went-wrong-20150405.

[103] THE INVISIBLE WAR, *supra* note 44, at 0:52:53 (statement of Attorney Susan Burke) ("If you're a civilian and you're raped, you can call the police and then you have prosecutors . . . . The problem with the military is that instead they have to go to their chain of command.").

[104] *See* DoDD 6495.01 (6 Oct. 2005), *supra* note 45, encl. 3, para 1.6.1.

[105] U.S. DEP'T OF DEF., INSTR. 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE encl. 2, para 6 (25 Jan. 2013) (C1, 1 May 2013) (listing all training requirements for MCIO sexual assault investigators); *see also* U.S. ARMY CRIM. INVESTIGATION DIV., REG. 195-1, USACID OPERATIONAL POLICY para. 15.7 (1 Oct 2014) (requiring all sexual assault investigators to have at least three years' investigatory experience, attend a specialized two-week training course, and meet other criteria).

[106] DoDD 6495.01 (6 Oct. 2005), *supra* note 45, para 1.11. All unrestricted reports, regardless of to whom made, are forwarded to law enforcement. *Id.* encl. 2, para 2.1; *accord* DoDD 6595.01 (23 Jan. 2012), *supra* note 45, at 18; U.S. COAST GUARD, COMMANDANT INSTR. 1754.10B encl. 1 (2 Apr. 2004); *accord* U.S. COAST GUARD, COMMANDANT INSTR. 1754.10D ch. 5, para. B (19 Apr. 2012); *see also* U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES app. B, tbl. B-1 (15 May 2009) (giving the Army Criminal Investigation Command (CID) exclusive responsibility for investigating all sexual assault and sexual contact crimes and prohibiting unit or command investigations into sexual assault); *accord* U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES app. B tbl., B-1 (9 June 2014); U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 5430.107, MISSION AND FUNCTIONS OF THE NAVAL CRIMINAL INVESTIGATIVE SERVICE para. 6(b)(1)(A) (28 Dec. 2005) (giving the same exclusive authority to the Naval Criminal Investigative Service).

commanders to forward all sexual assault allegations within their units to the appropriate MCIO.[107]

In contrast with the military, oversight of all sexual assault proceedings within a college is consolidated in a Title IX officer, who need not be a law enforcement official or attorney.[108] Law enforcement investigations are not required by any federal policy, though some colleges refer certain investigations to local law enforcement agencies.[109] Even if off-campus law enforcement investigates the allegations, colleges must conduct their own independent investigations.[110] Unlike military sexual assaults, campus sexual assaults may be investigated by anyone designated by the college.[111]

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[107] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1742, 127 Stat. 672 (2013).

[108] 34 C.F.R. § 106.8(a) (2014); DCL, *supra* note 82, at 7. The University of New Hampshire designates the director of its Affirmative Action and Equity Office as the Title IX coordinator. UNIV. OF N.H., DISCRIMINATION AND DISCRIMINATORY HARASSMENT POLICY 6 (2014), *available at* http://www.unh.edu/sites/www.unh.edu/files/departments/affirmative_action_and_equity_office/discrimination_and_discriminatory_ harassment_policy_booklet_july_2014.pdf. The University of Virginia designates its Dean of Students as its Title IX coordinator. UNIV. OF VA., POLICY AND PROCEDURES FOR STUDENT SEXUAL MISCONDUCT COMPLAINTS 1 (2011) [hereinafter UVA POLICY], *available at* http://www.virginia.edu/sexualviolence/documents/ sexual_misconduct_policy070811.pdf.

[109] The University of Montana refers all investigations into "felony crimes against persons and felony drug crimes" to local law enforcement. Memorandum of Understanding between the Univ. of Mont. Office of Pub. Safety, Missoula Police Dep't, and Missoula Cnty. Sheriff's Office 14 (June 30, 2013) (on file with author). Consistent with state law, all employees of the University of New Hampshire (other than confidential counselors and similar service providers) must report sexual violence to the university police. Memorandum from Donna Marie Sorrentino, Dir. and Title IX Coordinator, Affirmative Action and Equity Office, Univ. of N.H., to Faculty and Staff, Univ. of N.H., subject: Reporting Sexual Harassment (Including Sexual Violence) Incidents (Oct. 2014) (on file with author).

[110] *See* DCL, *supra* note 82, at 10.

[111] *See* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 25 (Apr. 29, 2014) [hereinafter QUESTIONS AND ANSWERS], *available at* http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf ("[N]either Title IX nor the DCL specifies who should conduct the investigation."). The University of Virginia uses a team of investigators, typically including an attorney and mental health professional. UVA Policy, *supra* note 108, at 10. At Duke University, the Office of Student Conduct conducts the investigation, "which may include the use of an independent investigator." DUKE UNIV., STUDENT SEXUAL MISCONDUCT POLICY 7 (2010), *available at* http://studentaffairs.duke.edu/sites/default/files/u122/Student%20Sexual%20Misconduct%20Policy.pdf.

Civil libertarians and victims' advocates alike disparage these amateur investigations.[112] Yet while some senators continued to lambast the military with the erroneous claim that sexual assaults are solely reported to and investigated by commanders,[113] the legislative and executive branches doubled-down on internal college investigations, proposing to improve their quality through increased training in lieu of encouraging or even permitting deferral to law enforcement.[114] The

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[112] *See, e.g.*, Froma Harrop, *Victims of Campus Rape Should Be Dialing 911*, REAL CLEAR POLITICS (May 8, 2014), http://www.realclearpolitics.com/articles/2014/05/08/victims_of_campus_rape_should_be_dialing_ 911_122575.html; Heather MacDonald, *The Obama Administration's Deserving Victims*, NAT'L REVIEW ONLINE (May 8, 2014, 4:00 AM), http://www.nationalreview.com/article/377492/obama-administrations-deserving-victims-heather-mac-donald; Gabrielle Glaser, *Flunking on Sexual Assault*, L.A. TIMES, May 23, 2014, at A19 ("[T]hough the crimes at issue are considered among the most serious in the criminal code, the accusations are typically handled by campus administrators who are unlikely to have the sensitivity, forensic training or expertise required to investigate a possible sex crime."); Peter Berkowitz, *U.S. Colleges' Sexual Assault Crusade*, REAL CLEAR POLITICS (Sept. 5, 2014) http://www.realclearpolitics.com/articles/2014/09/05/us_colleges_sexual_assault_crusade_123851.html ("If an undergraduate were accused of committing murder, no one in charge of a U.S. college or university would think of convening a committee of students, professors, and administrators to gather and analyze evidence, prosecute, adjudicate, and mete out punishment."); Letter from Scott Berkowitz, President of Rape, Abuse, and Incest Nat'l Network, to the White House Task Force to Protect Students from Sexual Assault (Feb. 28, 2014) [hereinafter RAINN letter], *available at* https://rainn.org/images/03-2014/WH-Task-Force-RAINN-Recommendations.pdf ("[U]ntil we find a way to engage and partner with law enforcement, to bring these crimes out of the shadows of dorm rooms and administrators' offices, and to treat them as the felonies that they are, we will not make the progress we hope.").

[113] *See, e.g.*, 160 CONG. REC. S1339 (daily ed. Mar 6, 2014) (statement of Sen. Rand Paul) ("To me, it's as simple as this: Should you have to report sexual assault to your boss?"), S1340 (statement of Sen. Barbara Boxer) ("Would you decide whether the case should be prosecuted or would you call the police?").

[114] A section of the CASA would require all college personnel "with authority to redress sexual harassment or who [have] the duty to report incidents of sexual harassment or other misconduct" to receive training in certain areas, including victim interview techniques and "the effects of trauma, including neurobiological change." S. 2692, 113th Cong. § 6 (2013). The CASA further would provide federal funding to train campus personnel to conduct forensic interviews. *Id.* § 7. The White House Task Force advises that "anyone . . . involved in responding to, investigating, or adjudicating sexual misconduct must receive adequate training" (but does not further define "adequate training"). WHITE HOUSE TASK FORCE, *supra* note 91, at 7. During the rulemaking process to implement the SaVE Act, the DOE's negotiated rulemaking committee proposed an "annual training document" that would require "identifying and becoming skilled in the [Department of Justice's Office of Violence Against Women]'s core competencies" and "training on how to conduct an investigation and hearing process-This [sic] must be training done by the university/institution." *Prevention/Training*

Crime and Terrorism Subcommittee of the Senate Judiciary Committee held the first hearing on the role of law enforcement in campus sexual assaults in December 2014, three years after OCR released the DCL.[115] The strongest legislative endorsements of law enforcement involvement are a SaVE Act provision, which directs colleges to ensure victims know that law enforcement reporting is an option,[116] and a CASA provision that would require colleges to enter a "memorandum of understanding" with local law enforcement.[117] These tepid gestures sharply contrast with the military's statutory and regulatory obligation to refer all allegations of sexual assault to law enforcement.[118]

B. Disposition: The Choice and Who Chooses

> *I think what we need so urgently is transparency, and accountability, and an objective review of facts by someone who knows what they're doing, who is trained to be a prosecutor, who understand[s] prosecutorial discretion. And these cases on a good day for any prosecutor in America to get right is [sic] difficult. So why would we be giving it to someone who doesn't have a law degree, who knows nothing about sexual assault*

Subcommittee Annual Training Document, U.S. DEP'T OF EDUC. (2014), *available at* http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-rulesannualtrng.pdf. These requirements were not ultimately part of the publicly proposed regulation because "it was the general feeling of the negotiated rulemaking committee that . . . the level of detail went beyond the scope of the Department's rulemaking authority." 79 Fed. Reg. 35,446 (June 20, 2014).

[115] *Campus Sexual Assault: the Roles and Responsibilities of Law Enforcement, Hearing before the Subcomm. on Crime and Terrorism, S. Comm. on the Judiciary*, 113th Cong. (Dec. 9, 2014) [hereinafter SJC Hearing], *available at* http://www.judiciary.senate.gov/meetings/campus-sexual-assault-the-roles-and-responsibilities-of-law-enforcement (embedded video). In opening remarks, two senators suggested that college sexual assault should be investigated by law enforcement, not administrative bodies. *Id.* at 0:21:51 (statement of Sen. Sheldon Whitehouse), 0:26:22 (statement of Sen. Charles Grassley). *But see infra* text accompanying note 173.

[116] 20 U.S.C.S. § 1092(f)(8)(B)(iii)(III) (Lexis 2014).

[117] S. 2692, 113th Cong. §§ 3(a), 4(a) (2013). The White House Task Force also recommends this practice. WHITE HOUSE TASK FORCE, *supra* note 91, at 6.

[118] The one, narrow exception to this requirement is if a victim chooses to make a restricted report in which case the chain of command will never know the particulars of the allegation and law enforcement will not be notified. *See* DoDD 6495.01, *supra* note 45, encl. 3, para 1.6.2.

> *. . . who may know the perpetrator, who may know the victim?*
> —Senator Kirsten Gillibrand[119]

In the military justice system, once a potential crime is reported and investigated, commanders have the "initial disposition authority" to decide what to do with the case.[120] A commander has five options—take no action, take administrative action, pursue nonjudicial punishment under UCMJ Article 15, pursue trial by court-martial, or forward the case to the next higher commander.[121] Commanders at certain levels are "convening authorities," who may convene and refer cases to courts-martial; the most serious punishments, for crimes akin to felonies, are reserved for general courts-martial (which, as the term indicates, are normally convened by a general or admiral).[122] A military court-martial generally resembles a civilian criminal trial from arraignment to verdict,[123] applies rules of evidence similar to those found in federal court,[124] and allows attorneys to represent the accused, government, and,

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[119] SEN. KIRSTEN GILLIBRAND, TESTIMONY BEFORE THE RESPONSE SYSTEMS TO ADULT SEXUAL CRIMES PANEL 312–13 (Sept. 24, 2014), *available at* http://140.185.104.231/public/docs/meetings/20130924/24_Sep_13_Day1_ Final.pdf.

[120] MCM, *supra* note 13, R.C.M. 306.

[121] *Id.* R.C.M. 306(c). Depending on the level of the commander, pursuing trial by court-martial may include preferring (filing) charges, referring charges to a summary, special, or general court-martial, directing a preliminary hearing, or forwarding charges to a commander with greater authority. *See id.* R.C.M. 307, 401–06, 601. Administrative action can include involuntarily discharging the accused from the military. *See infra* text accompanying notes 165–169.

[122] UCMJ arts. 22–24 (2012); MCM, *supra* note 13, R.C.M. 601 (a) ("Referral is the order of a convening authority that charges against an accused will be tried by a specified court-martial."). Note that, except for summary courts-martial, the convening authority may not be the same person who initially prefers charges against the accused. MCM, *supra* note 13, R.C.M. 601(c).

[123] *See generally* MCM, *supra* note 13, R.C.M. 901–24. One significant difference is that, unlike civilian juries, court-martial panels for non-capital cases may consist of as few as five members for a general-court martial or three for a special court-martial. UCMJ art. 25a (2012). Unanimity is not required and hung juries are impossible; if two thirds vote for a finding of guilty, the accused is found guilty, otherwise the finding is of not guilty. MCM, *supra* note 13, R.C.M. 921(c). Also, military sentencing procedures are considerably different from their civilian counterparts. *Compare id.* R.C.M. 1001-03 (providing for an adversarial presentencing phase of trial beginning immediately after an accused is found guilty and for sentencing by the same authority, be it judge or court members), *with, e.g.*, Fed. R. Crim. P. 35 (providing for sentencing in U.S. District Court by a judge, at least seven days after the completion of a presentencing report by a probation officer).

[124] *See* UCMJ art. 36 (2012); MCM, *supra* note 13, pt. III.

in certain cases, victims.[125] Any superior commander may withhold disposition authority for specific cases, categories of offenses, categories of offender, or in general.[126]

In 2013 and 2014, the most contentious issue for the Senate was military commanders' plenary disposition authority, specifically their exclusive discretion to refer cases to courts-martial. Senator Gillibrand introduced the Military Justice Improvement Act (MJIA) four times; this Act would have given independent military attorneys in the grade of O-6 the sole authority to decide whether to refer certain charges, notably including sexual assault, to special or general courts-martial.[127] Senator Claire McCaskill, favoring commanders' retention of their convening authority, vigorously opposed her.[128] Both argued that their approach would better protect sexual assault victims and promote increased sexual assault reporting.[129] The Senate divided sharply over this issue, crossing gender and party lines.[130]

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[125] UCMJ art. 27 (2012) (providing for detailing of trial and defense counsel who are certified attorneys); 10 U.S.C. § 1044e (2014) (providing for special victims counsel); L.R.M. v. Kastenberg, 72 M.J. 364 (C.A.A.F. 2013) (holding that victims have limited standing and right to be represented by counsel in certain evidentiary hearings). Note that most of this description of courts-martial (text accompanying *supra* notes 123-125) does not apply to summary courts-martial. *See generally* MCM, *supra* note 13, R.C.M. 1301-1306. A summary court-martial is not a "criminal proceeding" within the meanings of the Fifth or Sixth Amendments. Middendorf v. Henry, 425 U.S. 25, 34–37 (1976).

[126] MCM, *supra* note 13, R.C.M. 306(a). In April 2012, the Secretary of Defense withheld initial disposition authority for penetrative sex offenses (rape and sexual assault) to commanders in the grade of O-6 of higher. Memorandum from Sec'y of Def., *supra* note 46. The U.S. Coast Guard followed suit in June 2012. U.S. COAST GUARD, COMMANDANT INSTR. 1620, WITHHOLDING INITIAL DISPOSITION AUTHORITY UNDER UCMJ IN CERTAIN SEXUAL ASSAULT CASES (27 June 2012).

[127] S. 967, 113th Cong. (2013); S. 1752, 113th Cong. (2013); S. 2970, 113th Cong. (2014); S. 2992, 113th Cong. (2014). Representative Dan Benishek introduced the House version of the Military Justice Improvement Act (MJIA). H.R. 2016, 113th Cong. (2013).

[128] Sen. Claire McCaskill, *An Evidence Based Approach to Military Justice Reform*, TIME, Mar. 15, 2014, http://time.com/26081/claire-mccaskill-military-sexual-assault-bill/#26081/claire-mccaskill-military-sexual-assault-bill/.

[129] Erika Eichelberger, *The Fight Over How to Stop Military Sexual Assault, Explained*, MOTHER JONES (Nov. 20, 2013, 9:57 AM) http://www.motherjones.com/politics/2013/11/mccaskill-gillibrand-military-sexual-assault.

[130] *See* 160 CONG. REC. S1335–49 (daily ed. Mar. 6, 2014) (floor debate on the Military Justice Improvement Act of 2013, culminating in an unsuccessful 55-45 cloture vote).

Repeatedly, Senator Gillibrand stated that only "independent," "trained," and "experienced" prosecutors should make disposition decisions regarding sexual assault cases in the military.[131] The MJIA would require the proposed independent reviewing authority to have "significant experience in trials by general or special court-martial."[132] However, in early 2013, Senator Gillibrand cosponsored the SaVE Act amendments to the Clery Act, which for the first time statutorily required college officials to investigate and dispose of sexual assault allegations through internal procedures.[133] Arguing in support of the MJIA, Senator Barbara Boxer referred favorably to the 2013 Violence Against Women Reauthorization Act, stating that it:

> sends a clear and unequivocal message that wherever a sexual assault occurs . . . whether on a college campus or on an Indian reservation or in a religious setting or in our military, yes, the offender must be punished. Sexual assault is a heinous and violent crime and it must be treated as such. *It is not an internal matter.*[134]

Yet the Act to which she referred included the SaVE provisions that she cosponsored[135] expressly requiring internal adjudication of college sexual assault.[136] Of the other nine senators who sponsored or cosponsored the SaVE Act, eight also supported the MJIA.[137] Private

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[131] *See, e.g.*, *Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military Before the S. Comm. on Armed Services*, 113th Cong. 50 (2013) [hereinafter SASC Hearing], *available at* http://www.armed-services.senate.gov/imo/media/doc/13-44%20-%206-4-13.pdf. ("JAG military trained prosecutor"); *Comprehensive Resource Center for the Military Justice Improvement Act*, KIRSTEN GILLIBRAND–U.S. SENATOR FROM NEW YORK, http://www.gillibrand.senate.gov/mjia (last visited May 11, 2015) ("independent, trained, professional military prosecutors"); Press Release, Sen. Kirsten Gillibrand, Ahead of Sexual Assault Vote Expected on Senate Floor Next Week, Bipartisan Group of Senators, Survivors, advocates Continue Push for Independent Military Justice System (Feb. 6, 2014) ("experienced trial counsel with prosecutorial experience"); Subcommittee Hearing, *supra* note 53, at 3 ("trained prosecutor").

[132] S. 967, § 2(a)(3)(A)(ii); *accord* S. 1752, § 2(a)(4)(A)(ii); S. 2970, § 2(a)(4)(A)(ii); S. 2992, § 2(a)(4)(A)(ii).

[133] 159 CONG. REC. S470 (daily ed. Feb. 4, 2013); *see also supra* text accompanying note 86.

[134] Subcommittee Hearing, *supra* note 53, at 6 (emphasis added).

[135] 159 CONG. REC. S284 (daily ed. Jan. 14, 2013).

[136] *See supra* notes 92, 137, and accompanying text.

[137] Senator Robert Casey introduced SaVE, and his cosponsors included Senators Mark Begich, Michael Bennet, and Barbara Mikulski. 159 CONG. REC. S284 (daily ed. Jan. 14, 2013). All five cosponsored the MJIA. *Id.* S3569 (daily ed. May 16, 2013), S3956 (daily

organizations have taken similarly inconsistent positions, arguing that military commanders are incapable of making disposition decisions yet insisting that college administrators shoulder similar responsibility.[138]

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ed. June 4, 2013), S5908 (daily ed. July 24, 2013). Senators Patty Murray, Amy Kloubchar, Debbie Stabenow, and Christopher Coons also cosponsored SaVE. *Id.* S284 (daily ed. Jan. 14, 2013), S329–30 (daily ed. Jan 28, 2013). All four voted for the (unsuccessful) cloture motion to allow a vote on the MJIA in 2014. 160 CONG. REC. S1349 (daily ed. Mar. 6, 2014).

[138] The National Organization for Women (NOW) claimed the MJIA would create an "independent, objective, and unbiased military justice system to better respond to the epidemic of sexual assault." *Will Military Sexual Assault Survivors Find Justice?*, NAT'L ORG. FOR WOMEN (Mar. 19, 2014), http://now.org/resource/will-military-sexual-assault-survivors-find-justice-issue-advisory. Yet NOW endorsed and supported the recommendations of the White House Task Force, which in turn endorsed OCR-mandated internal investigations and adjudications, as a way to "hold rapists accountable for their crimes." Terry O'Neill, *NOW Applauds Efforts by White House Task Force to Prevent Campus Sexual Assault*, NAT'L ORG. FOR WOMEN (Apr. 29, 2014), http://now.org/media-center/press-release/now-applauds-efforts-by-white-house-task-force-to-prevent-campus-sexual-assault. The National Women's Law Center expressed "strong support" for the MJIA and for "giving these decisions to trained, experienced prosecutors." Letter from Nancy Duff Campbell, Co-President, Nat'l Women's Law Ctr. to the U.S. Senate (Nov. 13, 2013), *available at* http://www.nwlc.org/resource/letter-senate-support-military-justice-improvement-act. But after asserting that "reports of assaults and schools' failure to address them are widespread," the Center praised OCR's edict to use internal administrative hearings as "crucial to tackling the problem of sexual violence" in colleges. Letter from Fatima Goss Graves, Vice Pres. of Educ. and Employment, Nat'l Women's Law Ctr., et al., to Catherine Lhamon, U.S. Ass't Sec'y of Educ. for Human Rights 2–3 (Nov. 21, 2013), *available at* http://www.nwlc.org/sites/default/files/pdfs/letter_to_ocr_re_sexual_harassment_and_violence.pdf. The editorial board of the *New York Times*, incensed at the Senate's refusal to pass the MJIA, alleged that "the commander-centric structure of the current military justice system . . . deters victims from reporting attacks, helps result in an abysmally low prosecution rate, and . . . inspires little confidence in the integrity of the decision making process." Editorial, *A Broken Military Justice System*, N.Y. TIMES, Mar. 18, 2014, at A22. Three months later the board wrote, "[G]iven that student victims often don't want to go through the ordeal of filing a criminal complaint with the police . . . the reality is that college administrators can't avoid involvement in these cases" and noted, without criticism, that under OCR's mandates, "colleges will still have the ability to determine the nature of disciplinary actions for themselves." Editorial, *New Rules to Address Campus Rape*, N.Y. TIMES, June 30, 2014, at A18. The Washington Post endorsed the MJIA, believing "the authority to investigate and prosecute cases [should] be made by impartial military prosecutors instead of senior officers with no legal training but inherent conflicts of interest." Editorial, *Serving Victims Better*, Wash. Post, Sept. 8, 2013, at A14. Per the same editorial board:

> The he-said, she-said nature of the cases, with alcohol a factor and memories sometimes faulty, make local prosecutors wary . . . That's why the role of college administrators in providing a safe education environment – cooperating with local law enforcement, promulgating

Neither Title IX, the Clery Act (including the SaVE Act amendments), nor any implementing regulations require that the individuals who investigate, dispose of, or adjudicate college sexual assault allegations have legal degrees, licenses, or experience.[139] Furthermore, within the Title IX/SaVE Act framework, significant determinations, such as whether probable cause warrants further proceedings, whether to refer the case to a disciplinary hearing, or even whether the accused is responsible are made by college officials (who may be the same people who investigate the allegations).[140] Yet the (incorrect) notion of commanders conducting their own investigations,[141] the authority of commanders to refer cases to trial,[142] and the ability to set aside findings and apply clemency to sentences,[143] all drew furious condemnation and significant legislative action.

Supporters of the MJIA believe that underreporting, retaliation, and institutional indifference are symptomatic of how the military currently addresses sexual assault.[144] Many MJIA supporters likewise allege that

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> and enforcing student codes of conduct, and offering support and services to students who have been assaulted without trampling on the rights of the accused – is critical.

Editorial, *Raped on Campus*, WASH. POST, May 4, 2014, at A20.

[139] The words "lawyer," "attorney" (other than references to the Attorney General), or "prosecutor" do not appear in 20 U.S.C. §§ 1681–88, 34 C.F.R. § 106, or 20 U.S.C. § 1092(f).

[140] *See, e.g.*, QUESTIONS AND ANSWERS, *supra* note 111, at 39–40 ("[T]he Title IX coordinator . . . is likely to be in a better position than are other employees to evaluate whether an incident of sexual harassment or sexual violence creates a hostile environment and how the school should respond."); UNIV. OF MICH., POLICY ON SEXUAL MISCONDUCT BY STUDENTS 7 (Aug. 19, 2013), *available at* http://studentsexualmisconductpolicy.umich.edu/content/university-michigan-policy-sexual-misconduct ("The Investigator's report and findings must be reviewed and approved by the Title IX coordinator."); UNIV. OF MONT., DISCRIMINATION GRIEVANCE PROCEDURES 5 (Sept. 23, 2013), *available at* http://www.umt.edu/eo/documents/discriminationprocedures.docx ("[The Equal Opportunity & Affirmative Action Office] conducts or oversees the conducting of a fair and impartial investigation . . . [and] determines whether there is a preponderance of the evidence to believe that an individual engaged in a Policy Violation."); UVA Policy, *supra* note 108, at 10 ("The Investigators will determine whether or not there is good cause to grant a hearing.").

[141] *See supra* text accompanying notes 103–107.

[142] *See supra* text accompanying notes 127–130.

[143] *See supra* text accompanying notes 52–53; *supra* note 62 and accompanying text.

[144] *E.g.*, 160 CONG. REC. S1337 (daily ed. Mar. 6, 2014) (statement of Sen. Susan Collins) ("Ensuring that survivors do not think twice about reporting an assault for fear of retaliation or damage to their careers is still not part of the military culture."); *id.* S1338

college sexual assaults are "swept under the rug."[145] Under Title IX's framework, "[t]he lodging of the functions of investigation, prosecution, fact-finding, and appellate review in one office[,] . . . itself a Title IX compliance office rather than an entity that could be considered structurally impartial,"[146] is acceptable, yet MJIA supporters routinely argue that commanders have a "conflict of interest" and cannot be trusted to impartially exercise disposition authority.[147] None have offered any explanation for why these concerns dictate that military leaders must be stripped of disposition discretion while college leaders must be empowered and duty-bound to wield a similar kind of authority.

C. Adjudicative Procedure

> *I've used a single yardstick to measure each idea on the table: will it better protect victims, and lead to more prosecutions?*
> —Senator Claire McCaskill[148]

(statement of Sen. Charles Grassley) ("[T]he current structure of the military justice system is having a deterrent effect on the reporting of these cases.").

[145] *E.g.*, Sen. Kirsten Gillibrand, *We Will Not Allow These Crimes to be Swept Under the Rug Any Longer*, TIME (May 15, 2014), http://time.com/100144/kirsten-gillibrand-campus-sexual-assault/; Press Release, Sen. Charles Grassley, The Scoop: Denying Sexual Assault is a Serious Crime (Sept. 19, 2014) ("[College] victims have a right to know that they will be treated with respect, and sexual assault will be treated like the crime it is, not swept under the rug."); O'Neill, *supra* note 138 ("For too long, colleges across the country have been brushing this issue under the rug, and not offering enough support for sexual assault victims."); Allie Bidwell, *Senators Seek Crackdown on College Sexual Assaults*, U.S. NEWS (July 30, 2014), http://www.usnews.com/news/articles/2014/07/30/senators-seek-crackdown-on-college-sexual-assaults (quoting Sen. Richard Blumenthal) ("The prevalence of sexual abuse on campuses around the country is staggering, and stunningly underreported.").

[146] Prof. Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOSTON GLOBE, Oct. 15, 2014, at A11 (criticizing Harvard University's new sexual misconduct policy that meets or exceeds all OCR requirements).

[147] *E.g.*, Gillibrand, *supra* note 119, at 303 ("[T]hese improvements [the MJIA] will remove the inherent conflict of interest."); SASC Hearing, *supra* note 131, at 130 (statement of Ms. Nancy Parrish, President, Protect Our Defenders) ("You must remove the bias and conflict of interest. . . . It is not going to change until you fundamentally reform the system, until you have professional prosecutors looking at these cases."); Campbell, *supra* note 138, at 1 ("Nowhere else in our system of justice does one individual – particularly one with an inherent conflict of interest – have this authority.").

[148] Sen. Claire McCaskill, *Sexual Assaults in the Military—The Policy Matters*, HUFFINGTON POST (Nov. 18, 2013, 2:05 PM, updated Jan. 23, 2014, 6:58 PM), http://www.huffingtonpost.com/claire-mccaskill/sexual-assaults-in-the-mi_b_4297449.html.

The 2014 NDAA contains two provisions regarding disposition of sexual assault. The first expresses a congressional preference for trials by court-martial of charges of rape, sexual assault, forcible sodomy, or attempts to commit the same and that nonjudicial punishment and administrative action are inappropriate dispositions for those crimes.[149] The second expresses a congressional belief that "the Armed Forces should be exceedingly sparing" in granting a request for discharge or resignation in lieu of court-martial (an administrative process sometimes known as a "RILO") for servicemembers charged with those same offenses.[150] This language first originated in Senator Claire McCaskill's Victim Protection Act of 2013.[151] The 2014 and 2015 NDAAs also require any convening authority who chooses not to refer a charge for a penetrative offense to submit his decision for review to either the next higher commander, if his staff judge advocate agrees with the decision, or directly to the service secretary, if the staff judge advocate or the service's "chief prosecutor" believes referral is warranted.[152]

These provisions followed months of criticism comparing the numbers of reported and estimated sexual assaults to the number of courts-martial and disparaging alternative dispositions, including RILOs, as examples of how military sexual assaults are "swept under the rug."[153]

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[149] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1752(a), 127 Stat. 672 (2013).

[150] *Id.* § 1753.

[151] S. 1775, 113th Cong. §§ 208–09 (2013).

[152] § 1744, *amended by* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 541, 128 Stat. 3292 (2014). Senator McCaskill would have gone further; the Victim's Protection Act would have required the case to be directly forwarded to the service secretary any time the "senior trial counsel detailed to the case" believes referral is warranted. S. 1775, 113th Cong. § 202(c). The FY15 NDAA allows the detailed trial counsel to request the "chief prosecutor," a term previously absent from the UCMJ, to force such secretarial review. Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 541, 128 Stat. 3292 (2014).

[153] *E.g.*, Karisa King, *Twice Betrayed; Systematic Injustice: Sex Assault Convictions are Rare in the Military*, SAN ANTONIO EXPRESS-NEWS, May 20, 2013, at A1 ("Meanwhile, 286 offenders received nonjudicial or administrative punishment or discharges, allowing them to dodge a criminal mark on their record. In 70 cases, suspects slated for possible courts-martial were allowed to quit their jobs to avoid charges."); Briefing Paper, Servicewomen's Action Network, Department of Defense (DoD) Annual Report on Sexual Assault in the Military, Fiscal Year 2011, at 5 (Apr. 17, 2012), *available at* http://servicewomen.org/wp-content/uploads/2012/04/SAPRO-briefing-report-4_17_12.pdf ("[T]he DoD cannot abdicate its judicial responsibilities and continue to allow 10% of perpetrators to RILO [resign in lieu of court-martial] and avoid prosecution

Meanwhile, MJIA opponents argued that taking referral authority from commanders and giving it to lawyers would undesirably *reduce* the number of sexual assault prosecutions.[154] Overall, Congress's expressed and implied belief is that for military sexual assault, justice can only be achieved by a criminal trial.

On the other hand, the dearth of criminal prosecutions of college sexual assault has fueled a demand for a different adjudicative system, rather than cries for increased criminal trials.[155] Meeting this demand, the SaVE Act and OCR require colleges to use internal administrative procedures for sexual assault.[156] All colleges must create a uniform procedure

> to determine (1) whether or not the conduct occurred; and (2) if the conduct occurred, what actions the school will take to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, which may include imposing sanctions on the perpetrator and providing remedies for the complainant and broader student population.[157]

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simply by quitting their job."); THE INVISIBLE WAR, *supra* note 44, at 0:54:25 (statement of Attorney Susan Burke) ("[W]hen you look at prosecution rates in the 2010 department of defense reports, you begin with 2,410 unrestricted reports . . . then of the 1,025 that they actually take some action, do they court martial them? No. Only half of them, 529 actually got court-martialed. The rest, 256 to [nonjudicial] Article 15 punishments, 109 to administrative discharges and 131 to quote other adverse administrative actions, whatever the heck that means."); Subcommittee Hearing, *supra* note 53, at 3 (statement of Sen. Kirsten Gillibrand) ("Of 2,439 unrestricted reports filed in 2011 for sexual violence, only 240 proceeded to trial . . . . The Defense Department itself puts the real number closer to 19,000. A system where in reality closer to 1 out of 100 alleged perpetrators are faced with *any accountability at all.*") (emphasis added).

[154] *See, e.g.*, 160 CONG. REC. S1342 (statement of Sen. Claire McCaskill) ("[I]t is clear that right now we have more cases going to court-martial over the objections of prosecutors than the objections of commanders."), S1344 (statement of Sen. Kelly Ayotte) ("What about those 93 victims where the commander said: Bring the case forward, even though the JAG lawyer said no. They would not have gotten justice . . . . The evidence shows that actually commanders are bringing cases more frequently than their JAG's lawyers [sic] and over their objections.").

[155] *See supra* text accompanying note 80, WASH. POST, *Raped on Campus*, *supra* note 138; *infra* text accompanying notes 171–176.

[156] 20 U.S.C.S. § 1092(f)(8)(B)(iv) (Lexis 2014); DCL, *supra* note 82, at 10. *Cf.* 34 C.F.R. § 106.8(b) (2014).

[157] QUESTIONS AND ANSWERS, *supra* note 111, at 24.

According to OCR, because "a Title IX investigation will never result in incarceration of an individual . . . the same procedural protections and legal standards [as for a criminal trial] are not required."[158] Under Title IX and the SaVE Act, college disciplinary procedures need not apply formal rules of evidence,[159] they need not allow for an appeal,[160] they need not allow the accused to be represented by an attorney,[161] and they may be conducted by anyone appointed by the college.[162] The DCL directs colleges to use a "preponderance of the evidence" standard for these administrative adjudications.[163] The sanction is not a criminal conviction or sentence; the harshest punishment is expulsion.[164]

These procedures are remarkably similar to the military's administrative separation process (ADSEP). Under these procedures, a servicemember who has committed misconduct may be involuntarily separated from the military, with much fewer due process rights than at a criminal trial.[165] An enlisted servicemember facing an ADSEP who has served at least six years or who could receive an Other than Honorable

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[158] *Id.* at 27.

[159] The Title IX regulations adopt the procedural provisions applicable to Title VI of the Civil Rights Act of 1964. *See* 34 C.F.R. § 106.71. The Title VI regulations apply the Administrative Procedure Act to administrative hearings required prior to termination of federal financial assistance and require that termination decisions [need only] be "supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d).

DCL, *supra* note 82, at 11 (internal parenthetical omitted).

[160] *Id.* at 12; *see also* 20 U.S.C.S. § 1092(f)(8)(B)(iv)(II)(bb) (Lexis 2014).

[161] DCL, *supra* note 82, at 12; *see also* 20 U.S.C.S. § 1092(f)(8)(B)(iv)(II) (Lexis 2014).

[162] *See supra* note 111 and accompanying text.

[163] DCL, *supra* note 82, at 10–11. The original version of the SaVE Act would have statutorily required colleges to use the preponderance of the evidence standard. S. 128, 113th Cong. § 2(a)(5) (2013).

[164] Though it is the most severe option available, many victims and advocates consider expulsion to be the only appropriate punishment. *See, e.g.*, Tyler Kingkade, *Yale Fails to Expel Students of Sexual Assault*, HUFFINGTON POST (Aug. 1, 2013, 9:11 AM, updated Jan. 23, 2014, 6:58 PM), http://www.huffingtonpost.com/ 2013/08/01/yale-sexual-assault-punishment_n_3690100.html; Lombardi, *supra* note 81 (quoting Colby Bruno, Managing Att'y, Victims Rights Law Ctr.) ("I don't understand in what crazy universe rape or sexual assault doesn't warrant expulsion.").

[165] *See* U.S. DEP'T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (27 Jan. 2014) [hereinafter DoDI 1332.14]; U.S. DEP'T OF DEF., INSTR. 1332.30, SEPARATION OF REGULAR AND RESERVE COMMISSIONED OFFICERS (25 Nov. 2013) [hereinafter DoDI 1332.30].

Conditions discharge is entitled to a hearing before a board.[166] The board consists of at least three commissioned, warrant, or noncommissioned officers, none of whom are required to be lawyers.[167] The board is not bound by any rules of evidence other than "reasonable restrictions . . . concerning relevancy and competency of evidence."[168] The board uses a preponderance of the evidence standard.[169]

Eschewing both law enforcement investigation and criminal prosecution, an administrative procedure with no possibility of criminal conviction is the preferred disposition for college sexual assault. At the same time, a nearly identical procedure in the military is "sweeping it under the rug" and "avoiding accountability."[170] These positions cannot be logically reconciled. It appears easy to explain the disparate treatment with the obvious fact that the military has its own criminal justice system, while colleges do not. Yet many advocates praise college administrative hearings as preferable to law enforcement investigations and criminal trials.[171] After the executive director of a victims' advocacy

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[166] DoDI 1332.14, *supra* note 165, encl. 3, para. 10.d, encl. 5, para. 2.a(7); *see also* DoDI 1332.30, encls. 3–5 (board procedures for officer separations). An enlisted servicemember who has served less than six years, or a commissioned officer with less than six years commissioned service, may be separated with an Honorable or General (Under Honorable Conditions) Discharge without the right to any formal board or hearing, and only minimal notice requirements. DoDI 1332.14, *supra* note 165, encl. 5, para. 2.a; DoDI 1332.30, *supra* note 165, encl. 6, para. 1. An Other than Honorable Conditions Discharge is the most severe form of administrative separation available in an ADSEP. DoDI 1332.14, *supra* note 165, encl. 4, para. 3.b(2)(c).

[167] DoDI 1332.14, *supra* note 165, encl. 5, para. 3.e(1)(a). The board may also have a nonvoting legal advisor. *Id.*

[168] *Id.* encl. 5, para. 3.e(5).

[169] *Id.* encl. 5, para 3.e(7). The board's findings and recommendations on separation and characterization are forwarded to the separation authority, a high-ranking commander, who may approve or disapprove them, but he may not approve findings and recommendations less favorable to the respondent. *Id.* encl. 5, para 3.f(4).

[170] *See supra* note 153 and accompanying text.

[171] *E.g.*, Jessica Valenti, *Why We Need to Keep Talking About 'Rape Culture'*, WASH. POST, Mar. 30, 2014, at B3 (responding to RAINN Letter, *supra* note 112) ("[Activist Wagatwe] Wanjuki further questions RAINN's criminal justice focus, given that the system can be sexist, racist, and a 'grossly inadequate venue to most survivors.'"); Emma Bolger, *Frustrated by Inaction, Student Reports Sexual Assault to the Police*, COLUMBIA SPECTATOR, May 16, 2014, http://columbiaspectator.com/news/2014/05/16/frustrated-columbias-inaction-student-reports-sexual-assault-police (describing how Ms. Emma Sulkowicz believes, based on her treatment by police when she reported a sexual assault, "Columbia needs to be improving its own adjudication process for sexual assault"); Gray, *supra* note 101 (reporting on comments made at a roundtable discussion hosted by Senator McCaskill) ("For the advocates, doing right by the victim often means respecting her or his wishes not to report the crime to the police and even telling the victim about the

group bluntly told members of the Senate Judiciary Committee that "campus-based adjudication processes don't work,"[172] Senator Richard Blumenthal, an MJIA supporter and CASA co-sponsor, fired back:

> I hope I misread [sic] your testimony because I read it as essentially disapproving those on-campus adjudication processes as to use your words "they don't work." . . . It seems to me the issue you just raised [that expelling offenders without criminal sanctions leaves them free to assault elsewhere] is separate and apart from the existence and integrity and fact finding effectiveness of the on-campus adjudication process and I hope that you will support what's in the bill [CASA], which is to preserve and in fact enhance what we have now in many campuses.[173]

Senator Gillibrand, among others, acknowledged that civilian prosecutors typically refuse alcohol-driven college sexual assault cases, leaving campus hearings as the only option.[174] One college police chief candidly admitted that some campus sexual assault cases could not satisfy the "beyond a reasonable doubt" evidentiary standard of a criminal trial.[175] Some, including Senator McCaskill, indicated that victims may prefer less formal proceedings to the very public, protracted,

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possible downsides of the criminal justice system–which can lead to a months-long process that might threaten a victim's confidentiality.").

[172] SJC Hearing, *supra* note 115, at 01:35:15 (statement of Ms. Peg Lanhammer, Exec. Dir., Day One).

[173] *Id.* at 01:57:42.

[174] *E.g.*, Lombardi, *supra* note 80 ("Most cases involving campus rape allegations come down to he-said-she-said accounts of sexual acts that clearly occurred . . . . At times, alcohol and drugs play such a central role, students can't remember details . . . . A prosecutor says 'I'm not going to take this to a jury.'") (internal quotations and attributions omitted); SJC Hearing, *supra* note 115, at 0:40:52 (statement of Sen. Kirsten Gillibrand) ("Even in cases where survivors have felt supported by their interactions with police, they have been devastated by slipshod investigations, drawn out court proceedings, and the refusal of prosecutors to take their cases."); WASH. POST, *Raped on Campus*, *supra* note 138.

[175] SJC Hearing, *supra* note 115, at 01:26:12 (statement of Ms. Kathy Zoner, Chief, Cornell Univ. Police) ("Survivors and those supporting them become angry and confused when a DA is unable to prosecute cases criminally where a respondent has been found responsible on campus during their proceedings. The lower administrative standard of proof falls short often of the higher beyond a reasonable doubt standard.").

and intense experience of testifying at a criminal trial.[176] Each of these concerns could apply equally to military cases, for which Congress expects nothing short of prosecution.

D. Common ground: The Ambiguous, Overly Inclusive Definitions of Sexual Assault

> *Not every single commander can distinguish between a slap on the ass and a rape because they merge all of these crimes together.*
> —Senator Kirsten Gillibrand[177]

While political forces exacerbate significant differences in the ways in which the military and colleges respond to sexual assault, both approaches start from a common preference for broad and ambiguous definitions of the term "sexual assault." Whether the institutions' use of such broad definitions spawned the political fervor, or the intense political attention compelled the institutions to adopt them, is, for the most part, immaterial. The current definitions and statistics propagated

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[176] *E.g.*, Eliana Dockterman, *The Vanderbilt Rape Case Will Change the Way Victims Feel About the Courts*, TIME (Jan. 29, 2015), http://time.com/3686617/the-vanderbilt-rape-case-will-change-the-way-victims-feel-about-the-courts/ ("Perhaps the most compelling reason students are deterred from reporting a rape to the police is that they think they will spend years going through the criminal judicial process reliving the agony of their attack only to be denied justice."); Gray, *supra* note 101 ("Victims are afraid of going through a public rape trial because of how awful it can be for the victim. [V]ictim's [sic] naturally decide it isn't worth the risk."); Harrop, *supra* note 112 ("[M]any of the aggrieved women prefer going to university authorities for a more cushioned experience. It is believed that a college-based panel investigating charges of 'gender-based sexual misconduct' will be more sympathetic to the woman's narrative."); SJC Hearing, *supra* note 115, at 0:31:25 (statement of Sen. Claire McCaskill) ("Right now because the criminal justice system has been very bad, in fact much worse than the military and much worse than college campuses in terms of addressing victims and supporting victims and pursuing prosecutions, there is almost a default position that victims have taken through advocacy groups that they might be better off just doing the Title IX process."). Senator McCaskill elsewhere stated that she "wants as many cases as possible to be handled in criminal courts." Nick Anderson, *Men Punished in Sexual Misconduct Cases on Colleges* [sic] *Campuses are Fighting Back*, WASH. POST, Aug. 20, 2014, http://www.washingtonpost.com/local/education/men-punished-in-sexual-misconduct-cases-on-colleges-campuses-are-fighting-back/2014/08/20/96bb3c6a-1d72-11e4-ae54-0cfe1f974f8a_story.html. However, the CASA has no provisions to such effect, unlike the analogous "sense of Congress" provisions from her Victims Protection Act. *Compare* S. 2692, 113th Cong. (2013), *with* S. 1775, 113th Cong. § 208 (2013).

[177] SASC Hearing, *supra* note 131, at 49.

by and about both institutions significantly impede accurate debate and informed policies.

1. The Definitional Problem

"Sexual assault," as defined by the UCMJ, refers to one of the two penetrative offenses (rape is the other) that require "penetration, however slight of the vulva or anus or mouth."[178] By definition, it excludes any crime that does not include such penetration. In contrast, the common element of aggravated sexual contact and abusive sexual contact, the "nonpenetrative offenses," is "sexual contact":

> (A) touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or (B) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body.[179]

However, the DoD's Sexual Assault Response and Prevention Policy defines "sexual assault" more broadly as "[i]ntentional sexual contact characterized by use of force, threats, intimidation, or abuse of authority or when the victim does not or cannot consent [including the UCMJ offenses of] rape, sexual assault, aggravated sexual contact, abusive sexual contact, [and] forcible sodomy."[180] The Article 120 definition of "sexual contact" effectively criminalizes the entire spectrum of human bodily contact if matched with the requisite mental state (e.g. "intent to arouse"). Because the policy definition incorporates this term by reference, under DoD policy, "sexual assault" means more than the crime of sexual assault.

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[178] UCMJ art. 120(g)(1) (2012). The UCMJ also criminalizes nonconsensual sodomy, which includes oral and anal penetration by a "sex organ." UCMJ art. 125 (2014).
[179] UCMJ art. 120(g)(2) (2012).
[180] DoDI 6495.01, *supra* note 45, at 17 (23 Jan. 2012).

The law requires colleges to adopt similarly broad definitions of sexual assault. The Clery Act defines "sexual assault" by reference to the Federal Bureau of Investigation's uniform crime reporting system.[181] These offenses range from "forcible rape" to "forcible fondling," defined as "the touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will, or . . . where the victim is incapable of giving consent."[182] The DCL similarly defines "sexual violence" as "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol," broadly including "rape, sexual harassment, sexual battery, and sexual coercion."[183]

These policies generate several problems by including everything from forcible intercourse to a nonconsensual touch on the arm through clothing within the spectrum of "sexual assault." Justice can take a different form for offenses of different severity—nonconsensual intercourse should, and likely would, be dealt with more harshly than a "slap on the ass." To the lay public, "sexual assault" is largely synonymous with the crime of rape.[184] Victims and society expect a certain disposition level for a crime labeled "sexual assault"; this expectation is reinforced when statistics count a report as sexual assault, or a victim is *told* she was sexually assaulted even when the events alleged, though true, do not meet the defined elements of that crime.[185]

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[181] 20 U.S.C. §1092(f)(6)(v) (2012).

[182] 34 C.F.R. § 668, subpt. D, app. A. (2014).

[183] DCL, *supra* note 82, at 1-2.

[184] Consider that journalists and commentators often use the two terms interchangeably. *See, e.g.*, Pond, *supra* note 46; Weinberg, *supra* note 58; Lombardi, *supra* note 80; Ellison, *supra* note 96; Gray, *supra* note 101.

[185] Tricia D'Ambrosio-Woodward, *Military Sexual Assault: a Comparative Legal Analysis of the 2012 Department of Defense Report on Sexual Assault in the Military: What It Tells Us, What It Doesn't Tell Us, and How Inconsistent Statistic Gathering Inhibits Winning the "Invisible War,"* 29 WISC. J. OF L. GENDER, & SOC. 173, 206 (Summer 2014) ("If an attempted rape is classified for reporting purposes as a 'sexual assault' but then not prosecuted as a 'sexual assault' because there was no penetration, this leads to an outcry over the lack of punishment or an abuse of command discretion, when quite simply, as a matter of law, it does not meet the requirements for prosecution."); Jed Rubenfeld, *Overbroad Definitions of Sexual Assault are Deeply Counter-Productive*, TIME (May 15, 2014), http://time.com/99890/campus-sexual-assault-jed-rubenfeld/ ("[Overbroad definitions] conflate violent rape – one of the most serious of all crimes – with objectionable conduct of much lesser gravity."); *see also* supra note 175 and accompanying text.

Broad definitions also generate cynicism about the veracity of reports.[186] Lastly, they unreliably skew data, fueling misinterpretation with significant implications for policymaking.

2. The Statistical Problem

In its 2010 annual report on sexual assault, the DoD extrapolated data from its biannual Workplace and Gender Relations Survey of Active Duty Members (WGRA) and criminal justice statistics to estimate that there were 19,000 "incidents of unwanted sexual contact" in the military during Fiscal Year 2010.[187] The report defines "unwanted sexual contact" as "the survey term for all of the contact sexual crimes against adults proscribed by the [UCMJ]."[188] In its 2012 report, using similar definitions and methodology, the DoD estimated 26,000 victims.[189] Neither report subdivides these extrapolations by offense type. Senator McCaskill and others rightly criticized this conflation.[190] Nonetheless, the media largely reported the 19,000/26,000 figures as the number of

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[186] Marisa Taylor & Chris Adams, *Military Stance Muddies War on Rape: Critics Questioning Push to Prosecute Weak Cases Unlikely to Earn Convictions*, CHI. TRIBUNE, Dec. 26, 2011, at C24 (quoting an anonymous Navy prosecutor) (internal quotation marks omitted) ("There is a pressure to prosecute, prosecute, prosecute . . . . When you get one that's actually real, there's a lot of skepticism. You hear it routinely: Is this a rape case or is this a navy rape case?"); Rubenfeld, *supra* note 185 ("They can generate antipathy for complainants, because the conduct alleged to be rape is often perceived by many not to be rape.").

[187] FY10 REPORT, *supra* note 45, at 97.

[188] *Id.* at 2 n.3. The study used subjective survey questions that asked "[s]ervice members whether someone . . . without their consent or against their will, sexually touched them, had (attempted or completed) sexual intercourse with them, oral sex with them, anal sex with them, or penetrated them with a finger or object," regardless of the criminality of such incident. DEF. MANPOWER DATA CTR., 2010 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS: OVERVIEW REPORT ON SEXUAL ASSAULT, at iii.

[189] U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2012, at 12 (May 2013) [hereinafter FY12 REPORT].

[190] SASC Hearing, supra note 131, at 29 ("We have unwanted sexual contact, 36,000 [sic]. Well, that doesn't tell us whether it is an unhealthy work environment or whether or not you have got criminals."), 45 (statement of Sen. Lindsey Graham) ("I don't want everybody in the country to think that every allegation is of rape."), 113 (statement of Major General (Retired) John Altenberg, Chairman, Amer. Bar Ass'n Standing Comm. on Armed Forces L.) ("[S]urvey responses are extrapolated by mathematicians to reflect 26,000 unwanted sexual contacts but then translated by critics and journalists to be 26,000 actual rapes or sexual assaults."); *see also* Captain Lindsay Rodman, *The Pentagon's Bad Math on Sexual Assault*, WALL ST. J., May 20, 2013, at A17.

"sexual assaults" or "rapes," without nuance or qualification,[191] and Senator Boxer repeatedly employed this misleading figure to advocate for the MJIA and other legislation.[192]

In 2014, following criticism that the WGRA questions did not match the statutory elements of the UCMJ, the DoD hired the RAND Corporation to conduct its biannual survey.[193] Although RAND used questions designed to match the anatomical and somatic elements of the UCMJ, its report inexplicably labeled every completed or attempted sexual contact as "sexual assault,"[194] estimating 19,000 victims for Fiscal Year 2014.[195] Unsurprisingly, many influential media outlets reported this as 19,000 sexual assaults without further explanation or clarification.[196]

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[191] *E.g.*, Melinda Hennenberger, *Military Assault Victims Find their Voice*, WASH. POST, May 9, 2012, at A02 ("The Pentagon estimates that there were 19,000 sexual assaults in our military last year."); Helene Cooper, *Two Cases, One Conclusion on Military Justice*, N.Y. TIMES, Mar. 22, 2014, at A3 ("In 2012 there were an estimated 26,000 sexual assaults on military men and women."); Schwellenbach, *supra* note 6 ("An estimated 26,000 people in the U.S. military were victims of sexual assaults in 2012, a substantial increase from an estimated 19,000 in 2010.").

[192] Subcommittee Hearing, *supra* note 53, at 7 (statement of Sen. Barbara Boxer) ("The Department of Defense estimates that 19,000 sexual assaults occur in the military."); Michael Doyle, *Sen. Boxer Wants to Change How Military Investigates Sexual Assault*, MCCLATCHY DC (Nov. 5, 2013), http://www.mcclatchydc.com/2013/11/05/207582_sen-boxer-wants-to-change-how.html ("'The fact is, there are 26,000 sexual assaults a year,' Boxer said."); 160 CONG. REC. S.1340 (daily ed. Mar. 6 2014) (statement of Sen. Barbara Boxer) ("Here is the deal . . . . There were 26,000 estimated sexual assaults in 2012).

[193] RAND CORP., SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY: TOP-LINE ESTIMATES FOR ACTIVE-DUTY SERVICE MEMBERS FROM THE 2014 RAND MILITARY WORKPLACE STUDY 4–5 (2014) [hereinafter RAND STUDY].

[194] *Id.* at ix (defining "sexual assault" as "three mutually exclusive categories: penetrative, non-penetrative, and attempted penetrative crimes [in which no physical contact occurred]").

[195] *Id.* at 17–19. This estimate used the WGRA methods from prior years. *Id*. Using its own methods, RAND estimated about 20,000 victims. *Id.* at 9. Additionally, RAND opined that the WGRA survey actually underestimated the number of penetrative offenses while it overestimated the number of nonpenetrative offenses that, though potentially qualifying as sexual harassment, did not meet the elements of a crime. *Id.* at 24–25. Still, RAND's methods estimated that penetrative offenses accounted for only 43% of crimes against women and 35% against men. *Id*. at 27.

[196] *E.g.*, Helene Cooper, *Reports of Sexual Assaults in the Military on Rise*, N.Y. TIMES, Dec. 4, 2014, at A19 ("The Pentagon estimated that 19,000 men and women were sexually assaulted in 2014."); Terry Atlas, *Military Sex-Assault Victims See Retaliation as Reports Rise*, BLOOMBERG (Dec. 4, 2014 3:37 PM), http://www.bloomberg.com/news/2014-12-04/military-sex-assault-victims-see-retaliation-as-reporting-rises.html ("The Pentagon estimates that 19,000 military women

For colleges, the most-repeated claim is that "one in five" college women will be the victim of sexual assault.[197] This figure comes from the 2007 Campus Sexual Assault Study (CSA), which reported that "19% of undergraduate women reported experiencing attempted or completed sexual assault since entering college" at "two large public universities."[198] Similar to the WGRA and RAND studies, the CSA broadly defined "sexual assault" as "forced touching of a sexual nature, oral sex, sexual intercourse, anal sex, and/or sexual penetration with a finger or object."[199] Critics have attacked almost every aspect of this study, including its response rate and possible self-selection bias,[200] limited sample size,[201] broad and subjective definitions,[202] and the

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and men were sexually assaulted in fiscal 2014."); Alan Yuhas, *Pentagon: Rape Reports Increase Among 19,000 Estimated Military Victims*, THE GUARDIAN, Dec. 4, 2014, http://www.theguardian.com/us-news/2014/dec/04/pentagon-rape-assault-reports-increase-military. *But see, e.g.*, Tom Vanden Brook, *Some Military Sex Cases Decline; Reports of Unwanted Contact are Down by 27% Since 2012, Records Show*, USA TODAY, Dec. 4, 2014, at 3A.

[197] *See, e.g.*, Tim Mak, *Congress Finally Moves on Campus Sexual Assault*, THE DAILY BEAST (July 30, 2014) http://www.thedailybeast.com/articles/2014/07/30/senators-introduce-new-bill-to-combat-campus-sexual-violence.html; Jake New, *One in Five?* INSIDE HIGHER EDUC. (Dec. 14, 2014), https://www.insidehighered.com/news/2014/12/15/critics-advocates-doubt-oft-cited-campus-sexual-assault-statistic ("If there's a conversation about the prevalence of campus sexual assault in the United States, the phrase 'one in five' is usually within earshot."); Hennenberger, *supra* note 96; WASH. POST, *Raped on Campus*, *supra* note 138.

[198] NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, THE CAMPUS SEXUAL ASSAULT STUDY FINAL REPORT x, 5-3 (Oct. 2007). The report summary uses the much-quoted phrase "one out of five undergraduate women." *Id.* at xviii. *See also* C.P. Krebs et al., *College Women's Experiences with Physically Forced, Alcohol- or Other Drug-Enabled, and Drug-Facilitated Sexual Assault Before and Since Entering College*, 57 J. AM. C. HEALTH 639 (2009) (the study authors' publication of their results).

[199] *Id.* at xi.

[200] Tessa Berenson, *1 in 5: Debating the Most Controversial Sexual Assault Statistic*, TIME (June 27, 2014), http://time.com/2934500/1-in-5%e2%80%82campus-sexual-assault-statistic/.

[201] Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014), http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html ("I asked the lead author of the study, Christopher Krebs, whether the CSA [was representative of all American college women]. His answer was unequivocal: 'We don't think one in five is nationally representative statistic.' It couldn't be, he said, because his team sampled only two schools."); *see also* Krebs, *supra* note 198, at 645 ("[B]ecause this study only examined the sexual assault experiences of women from 2 large public, 4-year universities, it may be that the experiences of these women are not representative of those of all college women, which limits the generalizability of study findings.").

practical implausibility of the 20% statistic.[203] Yet advocates,[204] senators,[205] and Vice President Biden[206] have publicly repeated this figure as nationally representative of college "sexual assaults" without qualification or clarification, usually in support of further regulatory or legislative programs.

Whether the military's 19,000/26,000 extrapolation, the college "one-in-five" formulation, polemics like *The Invisible War*,[207] or unverified accounts like *Rolling Stone*'s story about the University of Virginia,[208] inaccurate and misleading claims pose a significant threat to

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[202] Kevin Williamson, *The Rape Epidemic is a Fiction*, NAT'L REVIEW ONLINE (Sept. 24, 2014, 4:00 AM), http://www.nationalreview.com/article/388502/rape-epidemic-fiction-kevin-d-williamson (quoting NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, SEXUAL ASSAULT ON CAMPUS: MEASURING FREQUENCY (2008)) ("The DoJ hints at this in its criticism of survey questions, some of which define 'sexual assault' so loosely as to include actions that 'are not criminal'. . . . 'More than 35 percent said they did not report the incident because they were unclear as to whether a crime was committed or that harm was intended.'").

[203] Diana Furchtgott-Roth, *Bill to Address Fake Campus-Rape Epidemic Goes Too Far*, ECONOMICS 21 (Aug. 1, 2014), http://www.economics21.org/commentary/bill-address-fake-campus-rape-epidemic-goes-too-far ("If parents really thought that their daughters had a 20% chance of being raped when they went off to college, they would never send them into such danger."); MacDonald, *supra* note 112 ("[D]espite an alleged campus sexual-assault rate that is 400 times greater than Detroit's, female applicants are beating down the doors of selective colleges in record numbers.").

[204] *E.g.*, O'Neill, *supra* note 138 ("With one in five women being sexually assaulted while in college, these efforts are long overdue."); Graves, *supra* note 138 (citing the figure as "19% of undergraduate women."); New, *supra* note 197 (quoting Ms. Lara Dunn) ("I believe in the one in five statistic wholeheartedly because I am a survivor and I remember how many of my friends disclosed that it had happened to them too.").

[205] *E.g.*, Emma Goldberg, *Sitting Down with U.S. Senator Richard Blumenthal*, YALE HERALD (Oct. 3, 2014), http://yaleherald.com/voices/sitting-down-with-u-s-senator-richard-blumenthal/ (quoting Sen. Richard Blumenthal) ("The sad, tragic fact is that one in five women are victims of sexual assault during the four years they're on college campus."); Gillibrand, *supra* note 145 ("[T]he price of a college education should never include a one in five chance of being sexually assaulted."). Senator Gillibrand's office removed references to this statistic from her website on or about December 18, 2014. Caitlin Emma, *Morning Education*, POLITICO (Dec. 19, 2014 10:00 AM) http://www.politico.com/morningeducation/1214/morningeducation16529.html.

[206] Vice President Joseph Biden, Remarks at the Launch of the It's On Us Campaign 05:28 (Apr. 29, 2014), *available at* http://www.whitehouse.gov/photos-and-video/video/2014/04/29/vice-president-biden-speaks-preventing-campus-sexual-assault (downloadable audio) ("One in five of every one of those young women who's dropped off that first day of school before they finish school will be assaulted, will be assaulted in her college years.").

[207] *See supra* note 45 and accompanying text.

[208] Erdely, *supra* note 102.

informed debate and sound policy. Senators have used such claims to assert an urgent need for immediate and drastic policy changes.[209] Popular media have repeated them without question,[210] fueling public misperceptions and possibly public acceptance of otherwise objectionable, even draconian, policies. They facilitate the obscuration of important details that contradict the prevailing narrative—for example, despite accusations to the contrary,[211] courts-martial are overwhelmingly commanders' preferred disposition for sexual contact crimes, especially *actual* (UCMJ-defined) rapes and sexual assaults.[212] Hyperbole impedes objective analysis and informed decision-making.[213]

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[209] *E.g.*, 160 CONG. REC. S1336 (daily ed. Mar. 6, 2014) (statement of Sen. Harry Reid) ("Congress cannot stand idly by while the blight of [military] sexual assault continues."), S1339 (statement of Sen. Rand Paul) ("[F]or the 26,000 people having this happen to them, we need to come up with a solution. [The MJIA] is an idea whose time has come."); SJC Hearing, *supra* note 115, at 35:51 (statement of Sen. Kirsten Gillibrand) ("The fact that according to one study nearly one in five women in college will be victims of sexual assault or attempted assault during their undergraduate careers should shake the conscience of all of us and it demands action."); *supra* text accompanying note 192; *see also* SASC Hearing, *supra* note 131, at 110 (statement of Ms. Anu Baghwati) ("With approximately 26,000 members of the military having experienced some form of sexual assault over the past year alone, this issue calls for immediate attention.").

[210] *See supra* notes 191, 196, 197 and accompanying text.

[211] *See supra* text accompanying notes 149–154.

[212] In fiscal years 2011, 2012, 2013, and 2014, court-martial charges accounted for 62%, 68%, 71%, and 64% respectively, of "sexual assault offenses" (including both penetrative and nonpenetrative crimes) on which commanders took action. U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2011, at 41 (Apr. 2012) [hereinafter FY11 REPORT]; FY12 REPORT, *supra* note 189, at 69; U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2013, at 79 (Apr. 2014) [hereinafter FY13 REPORT]; U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2014, app. A, 25 (May 2015) [hereinafter FY14 REPORT]. Among thousands of reports in those same four fiscal years across the DoD, commanders disposed of only a handful of penetrative offenses nonjudicially or administratively. FY11 REPORT, *supra* note 212, at 35 (two cases, nonparticipating victim); FY12 REPORT, *supra* note 212, at 74 (one case, nonconsensual sodomy); FY13 REPORT, *supra* note 212, at 46 (no cases); FY14 REPORT, *supra* note 212, app. B, 27 (dispositions reported by percentages, of a total of 1,262 "command actions" for penetrative offenses, rounded to the nearest percent, three percent were administrative separations and one percent was nonjudicial punishment). Of the "sexual assault offense" court-martial charges resolved in those fiscal years, RILOs accounted for 15%, 16%, 13%, and 11% respectively. FY11 REPORT, *supra* note 212, at 43; FY12 REPORT, *supra* note 212, at 71; FY13 REPORT, *supra* note 212, at 82; FY14 REPORT, *supra* note 212, app. B, 28 .

[213] *Cf.* D'Ambrosio-Woodward, *supra* note 185, at 190 (subsection heading: "Different Numbers Gathered by Different Organizations Utilizing Different Definitions of Terms Creates Chaos, Not Understanding"), 191–92 ("[A] confusing and widely diverse set of

Perhaps most damaging, inflated statistics and false assertions, whether about reports or processes, can counter-productively discourage victims from reporting sexual assaults by leading them to believe that "nothing will be done."[214]

IV. Four Principles for a Just Legal Framework

With two different systems designed to address similar problems, comparisons are inevitable. With military and college sexual assault, the abundant political and public rationales, arguments, and commentary provide further bases for comparison. In some cases, the structural differences between the systems reveals the benefits or shortcomings of one or both—the drive to treat a victim as "party" equal to the accused dominates college adjudications but also demonstrates the fallacy of that philosophy. Also, the military's preference for law enforcement investigations illustrates a way to incorporate professional investigations into institutional adjudication. In others, the common experiences of both institutions provide reinforcing lessons—both have met adverse and unintended consequences from manipulating established procedures solely to influence the results of sexual assault cases. In still others, inconsistent political rhetoric provides strong argument against divergent approaches—the arguments of those who demand college leaders shoulder responsibility for addressing sexual assault undercut the arguments against military commanders wielding the same responsibility. Comparing and contrasting these systems ultimately yields four common principles for both institutions to develop more just responses to sexual assault.

A. Clearly Define the Crime of Sexual Assault, and Investigate it as a Crime

> Sexcrime *covered all sexual misdeeds whatever . . . . There was no need to enumerate them separately, since they were all equally culpable.*
> —George Orwell[215]

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possible incidents that would require a different approach in the eradication, yet all are lumped together and then promulgated as fuel to the media and political frenzy.").

[214] *Cf.* Gray, *supra* note 101; Dockterman, *supra* note 176.

[215] GEORGE ORWELL, NINETEEN EIGHTY-FOUR 251 (Signet Classic ed. 1996) (describing "Sexcrime" as one example of "newspeak," politically manipulated language used in the fictional dystopia depicted in the book).

With the 2006 and 2011 amendments to Article 120 of the UCMJ, Congress created a criminal statute that makes a wide range of activity a sex crime.[216] The DoD sought to capture all of that criminal behavior under the rubric of "sexual assault" in its surveys and statistics,[217] and then senators and advocates were apoplectic when the statistics showed both a high number of "sexual assaults" and a low prosecution rate.[218] Colleges experienced a similar phenomenon with the CSA study, though less dramatic.[219] At the core of many misunderstandings about sexual assault is the failure to consistently define the term and to differentiate it from other criminal (and non-criminal) behavior. Effective procedures to address sexual assault must begin with precise and consistent definitions.

The military is worse than colleges in that its policies and surveys use the term "sexual assault" simultaneously to mean both the actual crime of sexual assault and also other misconduct. As an initial step, one of the two definitions of "sexual assault" needs to give way to the other. This could be accomplished by eliminating the crime of sexual assault, possibly amending the UCMJ to define all penetrative offenses as different degrees of rape. This would leave "sexual assault" as the umbrella term used in policies and surveys to define any sexual contact, criminal or otherwise. But since "sexual assault" is usually synonymous with rape in public discourse, a better solution is to use "sexual assault" to refer exclusively to violations of UCMJ article 120(b), consistently use a different umbrella term like "sexual contact" or even OCR's preferred "sexual violence" in policies and surveys, and *clearly* separate statistics for penetrative and nonpenetrative offenses.[220]

The Clery Act and DCL definitions, though still problematic, at least limit the body parts involved to those that more realistically reflect "sexual" offenses and are less preoccupied with avoiding a focus on "consent."[221] The UCMJ makes almost any bodily contact a potential

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[216] *See supra* note 43 and accompanying text, *supra* Part III.D.1.
[217] *See supra* Part III.D.2.
[218] *See supra* note 153 and accompanying text.
[219] *See supra* Part III.D.2.
[220] The DoD unfortunately tends to put a single overall "bottom line up front" number, like the 19,000/26,000 estimate, prominently near the beginning of its reports, where it is most likely to be seen and repeated by media and politicians, while burying more accurate information distinguishing the types of offenses in the middle. *See, e.g.*, FY10 REPORT, *supra* note 45; FY12 REPORT, *supra* note 189; RAND STUDY, *supra* note 193.
[221] The Clery Act and DCL use simple phrases like "against that person's will" and "incapable of giving consent." *See supra* text accompanying notes 182–183. A

sex crime, while also making almost every sex crime (other than penile penetration) a specific intent offense.[222] Any nonconsensual genital or anal penetration is a sex crime, as is nonconsensual penile penetration of the mouth. Intent to "arouse" or to "abuse, humiliate, or degrade" is superfluous. At the other end of the spectrum, offensively or harmfully touching another person is already proscribed as battery regardless of the specific intent.[223] At most, "sexual contact" is best limited to nonconsensual touching of "private parts" (e.g., genitals, breasts, buttocks).[224] Narrowing the physical act element of sex crimes would eliminate the need for prosecutors to prove specific intent, better reflect the gravity of sexual offenses, better distinguish sexual assault from other criminal conduct like hazing or battery, better allocate investigative resources,[225] and lessen the perceived disparity between allegations and dispositions or punishments.[226]

On the other hand, the military is superior to colleges in its investigation protocols. Senator McCaskill and critics of college

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significant expectation of the 2006 revisions to UCMJ Article 120 was that the new statute would eliminate "lack of consent" as an element of rape or sexual assault, out of a belief that the focus of the trial should be on the accused's actions rather than the victim's behavior. *See* JSC Report, *supra* note 38, at 6, 44. The 2006 version of Article 120 explicitly states that lack of consent is not an element of any offense except for "wrongful sexual contact." UCMJ art. 120(r) (2006). The 2011 version, rather than succinctly saying "without consent" or even "against that person's will," lists a variety of ways in which sexual acts or sexual contact can be accomplished, e.g., "by using force," "threatening or placing that other person in fear," "causing bodily harm," or by administering a drug or intoxicant, or when the accused "knows or reasonably should know" that the victim is asleep, unconscious, or impaired such that the victim cannot consent. UCMJ art. 120(a-d) (2011). All of these are examples of acts perpetrated "without consent." These are all essentially semantic distinctions without substantive difference and, in practice, will not keep the relevant acts, words, and behavior of the victim from being presented at trial. *See* JSC Report, *supra* note 38, at 59–60 ("Elimination of lack of consent as an element will not change what evidence is admissible at trial . . . . Ultimately, it is impossible to completely eliminate the focus on the victim's consent.").

[222] *See supra* note 43 and accompanying text; *supra* Part III.D.1

[223] *See* UCMJ art. 128 (2012).

[224] Some jurisdictions refer to this as "sexual battery." *E.g.*, VA. CODE ANN. § 18.2-67.4 (2014); CAL. PENAL CODE § 243.4 (Deering 2014); s*ee also* DCL, *supra* note 82, at 2. The 2006 version of Article 120 limited the definition of "sexual contact" to the genitalia, anus, groin, breast, inner thigh, or buttocks, though it still included an element of specific intent to "abuse, humiliate, or degrade . . . or to arouse or gratify the sexual desire." UCMJ art. 120 (2006).

[225] Sexual assault cases require specially trained investigators. *See supra* note 105 and accompanying text.

[226] *See supra* notes 153, 164 and accompanying text.

investigations are correct—crimes should be investigated by law enforcement.[227] Colleges should be permitted, even expected, to rely on law enforcement investigations (whether by off-campus agencies or law enforcement organic to the college) in their adjudications without having to reinvestigate the same offenses. The misgivings of victims and officials over relying on law enforcement may stem from the popular association of police with prosecutors, fueling the assumption that making a report to police can only lead to either a criminal trial or nothing at all.[228] The military, by separating investigation from disposition and adjudication, demonstrates a way to allow professional investigations yet still provide multiple avenues once the investigation is complete, be it judicial, administrative, or neither. Similarly, local partnerships between college and off-campus officials can allow law enforcement to conduct investigations into serious crimes (ideally all sex crimes), reserving campus investigations for misconduct of lesser gravity, and then discuss the results with both college officials and prosecutors to decide the appropriate disposition. This would also divide investigative and adjudicative responsibilities between different offices, providing a secondary benefit of further impartiality and procedural integrity.

B. Adjudication Must Remain Institution v. Accused, not Victim v. Accused

> *[T]he highest form of injustice is to appear just without being so.*
> —Plato[229]

Among the multiple criticisms of the DCL, OCR's decree that colleges use the preponderance of the evidence standard to adjudicate sexual assault generated the most controversy.[230] As this standard was

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[227] *See supra* note 112 and accompanying text; Anderson, *supra* note 176.

[228] *See, e.g.*, Gray, *supra* note 101; Bolger, *supra* note 171.

[229] THE REPUBLIC bk. II, at 361:a (Richard W. Sterling & Adam C. Scott trans., 1985, Norton Paperback ed. 1996).

[230] *See, e.g.*, Will Creely, *Why the Office for Civil Rights' April 'Dear Colleague Letter' was 2011's Biggest FIRE Fight*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Jan. 3, 2012), http://www.thefire.org/why-the-office-for-civil-rights-april-dear-colleague-letter-was-2011s-biggest-fire-fight/; Bader, *supra* note 90. The original version of the SaVE Act would have legislatively required all colleges to use this standard; Congress stripped

already common in student disciplinary proceedings,[231] for many colleges this decree would not have a significant practical impact. But more telling is OCR's proffered rationale for its mandate. Asserting that preponderance is the only acceptable standard for "equitable grievance procedures,"[232] OCR explains that this allows "a balanced and fair process that provides the same opportunities to *both parties*."[233] This reflects a philosophy that the accused and victim are equal "parties" before the tribunal.

The Department of Education established Title IX grievance procedures, which were intended to allow students to file complaints against the institution (victimized student v. institution),[234] grafted them onto colleges' already-existing disciplinary procedures (institution v. accused student) through the DCL (buttressed by the SaVE Act), and thereby created a bastardized, quasi-adversarial system in which the victim and accused are treated as if they are on equal footing (victim v. accused). Thus OCR decreed that "both parties" must have equal opportunities to present evidence, equal rights to have a lawyer present, and, most significantly, an equal ability to appeal the findings or punishment.[235] But they are not truly on equal footing; the system still expects the institution to fulfill independent prosecutorial functions as a "party" to the action. The resulting system is unjustly imbalanced.

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this requirement from the final law. *Compare* S. 128, 113th Cong. § 2(a)(5) (2013), *with* 20 U.S.C.S. § 1092(f)(8)(iv)(I) (Lexis 2014).

[231] HEATHER KARJANE ET AL., NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, CAMPUS SEXUAL ASSAULT: HOW AMERICA'S INSTITUTIONS OF HIGHER EDUCATION RESPOND 122 (2002) (noting that 81.4% of those colleges whose published materials specified an evidentiary standard used the preponderance standard but also noting that the majority of colleges surveyed did not specify a standard); MAJORITY STAFF OF S. SUBCOMM. ON FINANCIAL & CONTRACTING OVERSIGHT, 113TH CONG., SEXUAL VIOLENCE ON CAMPUS: HOW TOO MANY INSTITUTIONS OF HIGHER EDUCATION ARE FAILING TO PROTECT STUDENTS 12 (2014), *available at* http://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf (noting that 85% of colleges in the subcommittee's nationwide survey use the preponderance of evidence standard).

[232] DCL, *supra* note 82, at 10.

[233] QUESTIONS AND ANSWERS, *supra* note 111, at 26 (emphasis added).

[234] *See supra* text accompanying note 73.

[235] QUESTIONS AND ANSWERS, *supra* note 111, at 26; *see also* 20 U.S.C. § 1092(f)(8)(B)(iv)(II–III) (requiring "the accuser and accused" to have the same opportunities to have others present at a disciplinary proceeding for sexual assault, simultaneous notice of the results, and simultaneous notice of "the institution's procedures for the accused and the victim to appeal the results of the institutional disciplinary proceeding").

Defenders of the preponderance standard justify its use on the assumption that the danger of an innocent student being punished is equal to the danger of a guilty student being exonerated.[236] This is true in a private legal action (including a civil rights lawsuit) in which the remedy obtained is a *private* remedy, primarily to compensate for the harm suffered.[237] But college adjudications impose *institutional* sanctions (expulsion, suspension, etc.) that, while perhaps providing some vindication for the victim, are principally imposed in recognition of the offense against the college community as a whole.[238]

While an adverse result could be personally traumatic for a victim, a victim is not exposed to any comparable risk of the institution directly depriving her of fundamental liberty or property interests.[239] For private actions, it is appropriate to use a standard of proof that equally allocates the risk of an erroneous decision.[240] If college adjudications were truly adversarial private actions, the victim would have to marshal evidence and bear the burden to show she was assaulted—but this is not the case in a college sexual assault hearing.[241] The college has an independent

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[236] *E.g.*, Nancy Hogshead-Makar & Brett Sokolow, *Setting a Realistic Standard of Proof in Sexual-Misconduct Cases*, CHRON. OF HIGHER EDUC. (Oct. 15, 2012), http://chronicle.com/article/Setting-a-Realistic-Standard/135084/ ("Preponderance presumes a level playing field, one that is not advantageous to either party. But a higher standard, such as clear and convincing evidence, would make it less likely that those who commit sexual misconduct would be held accountable."); Wenzel, *supra* note 67, at 1649–50 ("[A] higher evidentiary standard is more likely to result in too few guilty students being held accountable."), 1652 ("The preponderance of the evidence standard thus best accommodates a school's concern for erroneous findings in either direction because the standard allocates the risk of error equally between the [college and the accused]."); Graves, *supra* note 138, at 9–10 ("Campus sexual violence proceedings can be traumatic [for victims] . . . . Requiring a higher burden of proof would only impose additional burdens on complainants and result in more discrimination going unchecked.").

[237] *See generally* 22 AM. JUR. 2D *Damages* § 28 (2014).

[238] The Office for Civil Rights explicitly acknowledges that college actions to address sexual assault "may include imposing sanctions on the perpetrator and providing remedies for the complainant *and broader student population*." QUESTIONS AND ANSWERS, *supra* note 111, at 24 (emphasis added).

[239] *Cf.* Major Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129, 179 (2014) ("Although a victim might not be vindicated by the process . . . she will never lose basic rights, such as life, liberty, or property. The accused, on the other hand, has everything to lose.").

[240] *See* Long, *supra* note 65, at 73–74; Graves, *supra* note 138, at 8.

[241] *See* Hogshead-Makar & Sokolow, *supra* note 236 (supporting the preponderance standard through a false dilemma: "[p]onder whether it should be harder for a woman to prove that a man raped her than for a man to prove he did not."). *Cf.* Gillibrand, *supra*

obligation to determine the truth of the allegations because deterring, correcting, and removing misconduct is in the interest of the entire college community.[242] Considering the victim and accused as equal parties reflects a false equivalency, and it is unjust to equalize the rights of the accused with those granted to the victim when the responsibility to present a case and the risk of an erroneous decision are so unbalanced.[243]

This false equivalency creates a dangerous paradigm—when sexual assault is framed as victim v. accused, every case can only be black and white, him or her, one is lying and one is telling the truth. It discourages law enforcement, prosecutors, and other officials from questioning victims' accounts because they are supposed to be on "the victim's side."[244] When an accused is acquitted of a crime, it does not

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note 119, at 325 ("I don't want to weigh the scales of justice in favor of the victim. I don't want to weigh the scales of justice in favor of the defendant. I want it to be even.").

[242] *Cf.* QUESTIONS AND ANSWERS, *supra* note 111, at 30 ("Because a school has a Title IX obligation to investigate possible sexual violence, if a hearing is part of the school's Title IX investigation process, the school must not require the complainant to be present at the hearing as a prerequisite to proceed with the hearing.") As argued above, colleges should be permitted to rely on law enforcement investigations and, when appropriate, the criminal justice system, rather than be required to conduct their own parallel proceedings. Either way it is not the victim's responsibility to investigate and prove her own allegations before the tribunal, nor should it be.

[243] This is not to say that the preponderance standard is *per se* unjust. As the DCL correctly states, it is the standard for many civil and administrative proceedings, and it is the standard used by the military for ADSEPs (which is effectively an employment termination/labor law hearing). *See* DCL, *supra* note 82, at 10; *supra* text accompanying note 169. The standard of proof is just one factor in assessing the requirements of due process, and a lower burden of proof could be offset by other procedural safeguards; the point is that institutions must have flexibility to ensure their procedures meet the needs of their particular communities. *See generally* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (citations omitted) (holding that "[d]ue process . . . is not a technical conception with a fixed content unrelated to time, place, and circumstances" but rather "is flexible and calls for such procedural protections as the particular situation demands," by analyzing the nature of the private interest at stake, the risk of error, and the Government's interest, including the administrative burden possible additional procedures would require).

[244] *See, e.g.*, Zerlina Maxwell, *No Matter What Jackie Said, We Should Generally Believe Rape Claims*, WASH. POST, Dec. 6, 2014, http://www.washingtonpost.com/posteverything/wp/2014/12/06/no-matter-what-jackie-said-we-should-automatically-believe-rape-claims/ ("Many people . . . will be tempted to see [the discovery of inaccurate claims in *Rolling Stone*'s story about the University of Virginia, Erdely, *supra* note 102] as a reminder that officials, reporters, and the general public should hear both sides of the story and collect all the evidence. This is what we mean in America when we say someone is 'innocent until proven guilty.' After all, look what happened to the Duke lacrosse players. *In important ways, this is wrong.* We should believe, as a matter of default, what an accuser says." (emphasis added));

automatically mean the victim lied about what events occurred or how she felt about it, while a person who does not expressly say "yes" to intercourse has not necessarily been raped. But the false equivalency does not countenance different perceptions of the same event, let alone different dispositions.

In criminal trials, which are the military's preferred disposition for sexual assault,[245] the victim does not have the same procedural rights as the accused. Still, the same false equivalency undergirding the Title IX/SaVE framework has infiltrated military justice, primarily post-conviction, with proposals for victim unsworn statements during presentencing[246] and victim input during post-trial clemency.[247] This

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Wagatwe Wanjuki, *Believing Victims is the First Step to Stopping Rape*, N.Y. TIMES, Dec. 12, 2014, http://www.nytimes.com/roomfordebate/2014/12/12/justice-and-fairness-in-campus-rape-cases/believing-victims-is-the-first-step-to-stopping-rape. *Cf.* Lizze Crocker, *What the U-VA Rape Case Tells us About a Victim Culture Gone Mad*, THE DAILY BEAST (Dec. 5, 2014), http://www.thedailybeast.com/articles/2014/12/05/what-the-uva-rape-case-tells-us-about-a-victim-culture-gone-mad.html ("We live in a culture that valorizes victims—where to question *one* woman's claim of sexual abuse is to be a 'rape apologist' . . . . Question them, and you are colluding in exacerbating the awful effects of their trauma. Question their actions or motives and you are 'victim shaming' and 'victim blaming.'")

[245] *See* supra note 212 and accompanying text.

[246] *See* 80 Fed. Reg. 6058 (Feb. 4, 2015) (proposing a new Rule for Courts-Martial 1001A allowing victims to make unsworn statements during presentencing, free of cross-examination). In the military, during presentencing procedures, an accused may make an unsworn statement to the court, not subject to cross-examination. MCM, *supra* note 13, R.C.M. 1001(c)(2). Currently a victim may testify about the "financial, social, psychological, or medical impact" of the accused's crime but must do so subject to the normal rules of evidence. *Id.* R.C.M. 1001(b)(4). Some advocate shielding victims from cross-examination during presentencing. *E.g.* RSP REPORT, *supra* note 4, at 30. At this point in a trial, the allegations have already been proven beyond a reasonable doubt; the accused is a convicted criminal and is about to be sentenced. The victim and accused do not have an equal stake in the outcome of the proceeding, and there is no compelling reason to so limit the right of the accused to examine and question the evidence of such impact presented against him before he is sentenced. The RSP argues that unsworn victim statements would align the UCMJ with the federal Crime Victims Rights Act. *Id.* But military trials are bifurcated, with adversarial sentencing procedures rather than guideline-driven judicial determinations assisted by a presentencing report. *See supra* note 123 and accompanying text. And, as the RSP acknowledges, for a variety of reasons guideline-driven sentencing procedures akin to those used in federal district court are not appropriate for courts-martial. RSP REPORT, *supra* note 4, at 52; *accord* MCM, *supra* note 13, app. 21, at A21-72 ("The military does not have—and it is not feasible to create—an independent, judicially supervised probation service to prepare presentence reports.").

[247] *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1706, 127 Stat. 672 (2013) (codified at UCMJ art. 60(d) (2014)) (allowing for victims to

false equivalency also tinges policy debates over military sexual assault. The frenzied comparison of the number of reports to the number of trials and convictions is one prominent example.[248] When "doing justice for victims" means that anything short of prosecution is unacceptable, the inference is that every allegation is always capable of evidentiary proof and only indifference or malfeasance on the part of those administering the justice system can account for the disparity in numbers.

This dovetails with the assertion that convening authorities, who are the commanders of accused servicemembers, cannot do justice because of their perceived conflicting loyalties to the command, to the victim, and to the accused.[249] These arguments ignore the fact that prosecutors have identical obligations; in both civilian and military justice

> the [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.[250]

Perhaps the most insidious danger of the "victim as a party" mentality is that it subtly encourages key actors to forget this.[251]

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submit matters to the convening authority during the post-trial clemency process). Ironically, Congress has so severely curtailed the convening authority's post-trial clemency power, especially in sexual assault cases, as to render this provision essentially moot. *See supra* note 62.

[248] *See supra* note 153 and accompanying text.

[249] *See, e.g.*, 160 CONG. REC. S 1346 (daily ed. Mar. 6 2014) (statement of Sen. Mazie Hirono) ("[The MJIA] would . . . eliminate potential bias and conflicts of interest because unlike the commanding officer, the military lawyer would be unconnected to either the survivor or the accused."); Campbell, *supra* note 138, at 1 ("Commanders . . . may have both the victim and the perpetrator in their command. Nowhere else in our system of justice does one individual – particularly one with an inherent conflict of interest – have this authority."); Murphy, *supra* note 239, at 143–44 ("[C]ommanders cannot properly evaluate cases without their loyalties and duties to the accused and victim conflicting."); *supra* text accompanying note 119.

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

[251] *Cf.* United States v. McDowell, No. 14-5005 (C.A.A.F. Aug. 8, 2014) (denying prosecutors' petition for an extraordinary writ to prevent defense counsel from deposing a victim; discussed *infra* note 277); Petition for Extraordinary Writ in the Nature of a Writ of Prohibition, Morse v. Biehl & Agar, Army Misc. 20140294 (A. Ct. Crim. App. 2014), *available at* http://www.caaflog.com/wp-content/uploads/LTC-Morse-v.-LTC-Biehl-and-COL-Agar-writ-of-prohibition.pdf (seeking to bar enforcement of an order issued to an officer under investigation to "cease and desist" his appointed defense attorneys'

Principally with the advent of the Special Victims Counsel program,[252] the military has increased the "voice" of victims within the judicial process. Although Special Victims Counsel are provided at government expense to victims who qualify for their service, to date the substantive rights given to victims in the military justice system are not significantly different than similar rights afforded in federal civilian court.[253] But it is a disturbingly short step from allowing victims to be accompanied by counsel to permitting that counsel (or even the victim) to sit before the bar of the courtroom with the prosecutor, confer privately on trial strategy, or independently question witnesses and present evidence, in effect "teaming up" on the accused. This phenomenon could easily lead the accused, victims, panel members, the public, and even prosecutors themselves to believe that the role of "the government" is to win the case "for the victim" rather than to do justice. It is terribly unjust if purportedly impartial college adjudicators use this approach, but infinitely worse for the attorney representing the "sovereignty" in a criminal trial to abandon the obligation to "ensure justice is done."[254] This would shatter public confidence in the impartiality of any justice system, civilian or military, and consequently its legitimacy.[255]

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questioning of witnesses because, per the command's staff judge advocate, the defense attorney's investigation had "upset" the victim); United States v. Bowser, 73 M.J. 889 (Af. Ct. Crim. App. 2014) (upholding trial judge's dismissal with prejudice of rape, sodomy, and assault charges, after trial counsel failed to disclose potentially exculpatory information and then refused judge's order to provide witness interview notes for *in camera* review), *aff'd*, No. 15-0289 (C.A.A.F. Mar. 25, 2015).

[252] *See* 10 U.S.C.S. § 1044e (Lexis 2014).

[253] *Compare* UCMJ art. 6b (2015), *with* 18 U.S.C. § 3771 (2012).

[254] One cautionary example is the infamous "Duke Lacrosse Case" in which, amidst intense public furor, three Duke University students faced criminal charges for rape. *Duke Lacrosse Incident: Looking Back at the Duke Lacrosse Case*, DUKE UNIV. (last updated May 2007), http://today.duke.edu/showcase/lacrosseincident/. The local district attorney deliberately withheld exculpatory evidence while stoking the public outcry. *Id.* He resigned pending disbarment, the state Attorney General exonerated the three accused, and the University paid each accused a financial settlement for its employees' role in fomenting public antipathy. *Id.*

[255] *See generally* United States v. Rosser, 6 M.J. 267, 271 (C.M.A. 1979) ("[W]e believe it incumbent upon the military judge to . . . establish[ ] the confidence of the general public in the fairness of the court-martial proceedings."). Additionally, the varied criticisms of college adjudications often share a common theme, namely, that whether due to ideology or political pressure, colleges are bent on ensuring accused are punished rather than fairly and impartially deciding cases on their merits, which serves as a strong caution for the military justice system. *See, e.g.*, Peter Berkowitz, *supra* note 112;

C. Do Not Manipulate Procedures Solely to Influence the Results of Sexual Assault Cases

> *The road to Hell is paved with good intentions.*
> —Unknown[256]

Despite the divergent political rhetoric and mandates imposed on the military and colleges, they originate from common philosophies, which are underscored by an apparent belief that previously-established systems are inadequate to address sexual assault. Most of the recent sexual assault policy changes fit within one of three philosophical themes. The first, already discussed, is the proclivity for broad definitions of "sexual assault" that maximize the potential for prosecution. The second is a well-intentioned desire to minimize the scrutiny of victims. One example in the college setting is the discouragement of cross-examination;[257] the CASA's proposed "amnesty" for related misconduct (such as underage drinking) for any student who reports sexual violence "in good faith" would be another.[258] Military examples include the ability of a victim to refuse to testify at an Article 32 hearing and restrictions on pretrial access of defense counsel to victims.[259]

The third theme is a less-benevolent drive to limit the accused's ability to participate in or to end-run the process, a notion likely based on a belief that dismissals, acquittals, or light punishments result from the machinations of those accused and their lawyers as much as from insufficient evidence. This third trend in particular reflects the "victim as a party" philosophy, which rationalizes curtailment of the accused's rights as merely leveling the playing field.[260] College examples include the unwavering requirement to use a lower standard of proof and conditioning several rights of the accused on providing the same rights to

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MacDonald *supra* note 112; Bartholet, *supra* note 146; Williamson, *supra* note 202; Furchtgott-Roth, *supra* note 203.

[256] HENRY G. BOHN, A HAND-BOOK OF PROVERBS 514 (1899).

[257] DCL, *supra* note 82, at 12.

[258] S. 2692, 113th Cong. § 125 (2014).

[259] *See supra* note 62 and accompanying text; text accompanying note 63; *infra* note 277 and accompanying text. Another indirect example is the mostly semantic focus on removing "lack of consent" as an element of the crime. *See supra* note 221 and accompanying text.

[260] *See supra* note 236 and accompanying text.

victims.[261] Military examples include the sharp reduction in post-trial clemency, requirements for higher-level reviews of decisions not to refer cases to trial, restrictions on considering military character in disposition decisions and as evidence at trial,[262] elimination of the "constitutionally required" exception to Military Rule of Evidence 513,[263] and the reduction in the scope of Article 32 (while still leaving it as a purely advisory hearing).[264]

The SaVE Act expects that college sexual assault hearings will accomplish the dual goals of "protect[ing] . . . victims and promot[ing] accountability,"[265] while Senator McCaskill seeks proposals for the

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[261] *See supra* text accompanying notes 230 and 235. The DCL/SaVE Act treatment of accused students' appellate rights is particularly troubling—either an accused has no way to correct an unjust result (short of a lawsuit) or an accused is always at the risk of a victim demanding a "do-over." Again, this would not be problematic if the process was truly private and adversarial, but the institution, which controls the structure, funding, and staffing of the process should not be allowed to keep trying until a panel expels the accused.

[262] *See supra* note 62 and accompanying text.

[263] Military Rule of Evidence 513 prohibits disclosure of or admission into evidence any confidential communications between a patient and psychotherapist. MCM, *supra* note 13, Mil. R. Evid. 513. It currently provides eight exceptions to that prohibition, the last of which permits disclosure or admission when "constitutionally required." *Id.* Mil. R. Evid. 513(d)(8). The FY15 NDAA directs this exception be removed by June 17, 2015. Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537(2), 128 Stat. 3292 (2014); *see also* 80 Fed. Reg. 6058 (Feb. 4, 2015) (proposing an executive order amending Mil. R. Evid. 513 to comply with the NDAA).

[264] *See supra* text accompanying note 63. Senator Carl Levin proclaimed that the revised Article 32 would "[m]ake the Article 32 process more like a grand jury proceeding." 159 CONG. REC. S8548 (daily ed. Dec. 9, 2013). A grand jury indictment is a prerequisite to trial for any felony offense in federal civilian court but not in a military court. U.S. CONST. amend. V (exempting the armed forces from the Constitution's grand jury requirement); Fed. R. Crim. P. 7(a). Despite dozens of changes to the UCMJ in the last two years, an Article 32 hearing officer's findings are still entirely advisory. *Compare* UCMJ art. 32 (1950), *with* UCMJ art. 32 (2014). Even if the Article 32 hearing officer determines no probable cause exists, the case can still proceed to trial. Under the new statutory regime, the judge advocate who conducts a preliminary hearing could find no probable cause to warrant prosecution of a sexual assault case, the convening authority and staff judge advocate could agree that prosecution is not warranted, and yet the case must *still* be forwarded to the next higher convening authority, who could nonetheless refer the case to a court-martial. *See* UCMJ art. 32 (2014); National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1744, 127 Stat. 672 (2013); *see also* Hayes, *supra* note 28, at 174 ("Congress should revise Article 32 to require the independent establishment of probable cause before a convening authority may refer charges to court-martial").

[265] 20 U.S.C.S. §1092(f)(8)(A)(iv) (Lexis 2014).

military that "better protect victims and lead to more prosecutions."[266] But these goals conflict. Protecting victims in the aftermath of trauma is an obviously important and commendable purpose. However, the only way to ensure total protection of a victim is to forego recourse to any disciplinary system. Without pursuing any action against the accused, the victim is never disbelieved or challenged, and is able to obtain assistance and rehabilitation without further hardship. Conversely, efforts to "promote accountability" by punishing those responsible will necessarily require victims to recount, often in explicit detail, the events they allege and subject them to scrutiny. In the starkest terms, a victim cannot demand that an institution punish and label someone as a sex offender without any scrutiny of the allegation.

Being questioned by investigators or at tribunals is intimidating, even terrifying, but vital to guard against unjust results. Because of the intimate subject matter, sexual assault victims demonstrate uniquely special courage when they testify about their experiences. Nonetheless, that same reason makes due process essential; the ability of adjudicators to distinguish between a felony and "an act that goes on hundreds of times every day, almost always consensually" depends on an assessment of facts and credibility.[267] And due process dictates that the level of permissible scrutiny of the allegation is directly proportionate to the harshness of the possible punishment.[268]

Even with the best intentions, it is inappropriate to create new procedures or unique exceptions to established procedures solely for sexual assault. From a practical standpoint, they can quickly backfire in the courts. Referring to college procedures, Senator McCaskill said, "I don't think we are anywhere near a tipping point where the people being accused of this are somehow being treated unfairly."[269] However, lawsuits by students found "responsible" for sexual assault by OCR-

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[266] McCaskill, *supra* note 148.

[267] Megan McCardle, *You Can't Just Accuse People of Rape*, BLOOMBERG (Dec. 9, 2014, 9:00 AM), http://www.bloombergview.com/articles/2014-12-09/you-cant-just-accuse-people-of-rape.

[268] *See generally* In re Winship, 397 U.S. 358 (1970) (holding that an accused may not be convicted of a crime, or subject to the consequences of a criminal conviction, unless the state proves every element of the crime beyond a reasonable doubt); Mathews v. Eldridge, 424 U.S. 319, 334-45 (1976) (discussed *supra* note 243 and accompanying text); Crawford v. Washington, 541 U.S. 36, 61 (2004) (holding that the reliability of witness testimony in a criminal trial must be tested "in the crucible of cross examination.")

[269] Anderson, *supra* note 176.

compliant campus tribunals have met with enough success that colleges spend significant resources to defend against them or settle the claims.[270] Even before the DCL, the insurance group United Educators lost $36 million in 262 sexual assault-related claims filed against member colleges from 2006-2010, with nearly 3 out of 4 claims paid to accused students rather than "accusers."[271] Colleges are bearing the harsh consequences of the policies forced upon them and are caught between liability to aggrieved students and OCR's financial Sword of Damocles.

So too is the military suffering from the policies imposed upon it, largely from the law of unintended consequences. After CAAF invalidated part of the 2006 version of Article 120, Congress rewrote the entire statute.[272] In 2007, President Bush modified the military's "rape shield" rule of evidence (Rule 412) to permit a military judge to admit

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[270] *See, e.g.*, Order Granting Preliminary Injunction, King v. Depauw Univ., No. 2:14-cv-70-WTL-DKL, 2014 U.S. Dist. LEXIS 117075 (S.D. Ind. Aug. 22, 2014) (enjoining college from suspending a student found responsible for sexual misconduct and sexual harassment, finding that he was likely to succeed in showing the college's action was "illegal, arbitrary, or capricious"); I.F. v. Adm'rs of the Tulane Educ. Fund, 131 So. 3d 491, 498-500 (La. 2013) (reversing and remanding to trial court due to an incomplete evidentiary record, finding that Tulane University failed to meet "minimal due process" and that the student's "due process rights were ill-defined, ambiguously applied, and as such, presumptively violated."); Berge v. Univ. of Minn., 2010 WL 3632518 (Minn. Ct. App. 2010) (ordering a new college disciplinary hearing for suspended student because the first arbitrarily and capriciously excluded evidence); Ashe Scow, *Due Process Win: Swarthmore College Settles Lawsuit with Accused Student*, WASH. EXAMINER (Nov. 21, 2014 3:47 PM), http://www.washingtonexaminer.com/due-process-win-swarthmore-college-settles-lawsuit-with-accused-student/article/2556518; Susan Kruth, *Saint Joseph's Settles Title IX Lawsuit Brought by Expelled Student*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Jan. 6, 2015), http://www.thefire.org/saint-josephs-settles-title-ix-lawsuit-brought-expelled-student/ (describing how the college settled with student after the trial court denied the college's motion to dismiss). *But see, e.g.*, Bleiler v. College of the Holy Cross, No. 11011541-DJC, 2013 WL4174340 (D. Mass. Aug. 26, 2013) (granting college's motion for summary judgment, finding that the college had complied with Title IX and the plaintiff student had not been expelled arbitrarily or capriciously); Opinion and Order Granting Defendant's Motion for Summary Judgment, Yu v. Vassar College, No. 1:13-cv-4373 (S.D.N.Y. Mar. 31, 2015) (finding that expelled student's claim alleging he was dismissed arbitrarily and capriciously, and in violation of Title IX, to be without merit).

[271] Keehan, *supra* note 4, at 1.

[272] *See supra* note 41 and accompanying text. Senator Deb Fischer used this as a cautionary example to her Senate Colleagues when arguing against hasty enactment of the MJIA. 160 CONG. REC. S1345 (daily ed. Mar. 6 2014) ("That was the case in 2007 [sic], when Congress, armed with the best of intentions, modified the rape statute. Those hasty changes disrupted the judicial process and compelled Congress to rewrite the language. Do you know what happened? It delayed justice.").

"constitutionally required" evidence of a victim's prior sexual behavior or predisposition only if its probative value outweighed the "danger of unfair prejudice to the alleged victim's privacy," a condition not found in its federal counterpart.[273] In 2011, CAAF noted that this could violate an accused's constitutional rights[274] and, later that year, reversed a rape conviction in just such a case, with a sweeping opinion broadly defining the scope of "constitutionally required" evidence.[275]

The most recent battery of legislative changes have not yet reached the appellate courts, but two likely targets for judicial scorn are the removal of the "constitutionally required" exception to Military Rule of Evidence 513[276] and attempts to curtail pre-trial questioning of victims,

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[273] Exec. Order 13,447, 72 Fed. Reg. 56,179, 56,184–86 (2007). *Compare* MCM, *supra* note 13, Mil. R. Evid. 412, *with* Fed. R. Evid. 412 (requiring a balance of the probative value against "danger of harm to any victim and of unfair prejudice to any party" only in civil cases).

[274] United States v. Gaddis, 70 M.J. 248, 253 (2011).

[275] United States v. Ellerbrock, 70 M.J. 314 (2011). *Ellerbrock* broadly held that evidence of a victim's sexual behavior or sexual predisposition is "constitutionally required" whenever "the evidence is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice." *Id.* at 318.

[276] *See supra* note 263 and accompanying text. As CAAF noted in *Gaddis*, Congress and the President "cannot limit the introduction of evidence that is required to be admitted by the Constitution." *Gaddis*, 70 M.J. at 253 (citing Dickerson v. United States, 520 U.S. 428, 437, 444 (2000)). The legislative history of this change to Rule 513 is scant, but it appears to be in reaction to the 2013 Naval Academy case. *See supra* text accompanying notes 56–58. The military judge in that case ordered production of the victim's mental health records; and she sought an extraordinary writ from the Naval-Marine Corps Court of Criminal Appeals and CAAF to prevent this disclosure. Proposed Brief of Protect Our Defenders as Amicus Curiae, L.C. v. Daugherty, No. 14-8010 (C.A.A.F. Feb. 13, 2014), *available at* http://protectourdefenders.com/downloads/CAAF_Amicus_Brief-LC_v_Daugherty-Protect_Our_Defenders_2-13-2014.pdf. Protect Our Defenders, an advocacy group, argued that military judges regularly and erroneously use the "constitutionally required" exception to "routinely disclose victims' records . . . . with complete confidence that their orders will never be reversed" because a ruling favorable to the defense (i.e., ordering disclosure of a victim's mental health records) could never be appealed by the prosecution or victims. *Id.* at 5. The House of Representatives version of the FY15 NDAA included a provision that would have mirrored the federal Crime Victims Rights Act, allowing victims to petition the service Court of Criminal Appeals for review of such judicial orders within seventy-two hours and writs of mandamus to block an improperly ordered disclosure, limiting any trial delay to at most five days. *Compare* H.R. 4435, 113th Cong. § 535 (2014), *with* 18 U.S.C. § 3771(d)(3) (2012). The Senate version directed that Rule 513 "shall be modified . . . to clarify or eliminate the current exception to the privilege when the admission or disclosure of a communication is constitutionally required." S. 2410, 113th Cong. § 542 (2014). When the final legislation emerged, it included the writ of mandamus provision (but eliminated, without explanation, the seventy-two hour and five day time limits) and an order that the

whether at a preliminary hearing, deposition, or interview.[277] Furthermore, the Supreme Court could return to its mid-century outlook[278] if it finds that the military has reverted to such a "rough form of justice"[279] that it violates due process. Any of these could produce a string of reversed convictions years after trial, in cases where the allegations are not only true but proven, leaving victims feeling betrayed by the very system that had been altered supposedly for their benefit. Lastly, increased prosecutions will certainly not guarantee increased convictions.[280] A reduced conviction rate would only fuel further outcry

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"constitutionally required" exception be eliminated within 180 days of passage. Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537(2), 128 Stat. 3292 (2014). The version of the NDAA for Fiscal Year 2016 introduced in the Senate on May 19, 2015, using the term "interlocutory appeal" rather than "writ of mandamus," would institute the seventy-two hour and five day limits, and would expand the rights of victims to seek reversal of rulings by an Article 32 hearing officer as well those of a military judge. National Defense Authorization Act for Fiscal Year 2016, S. 1376, 114th. Cong. § 549 (2015).

[277] In 2014, CAAF summarily denied a government petition for an extraordinary writ to stop a judge-ordered deposition of a victim in a sexual assault case. United States v. McDowell, No. 14-5005 (C.A.A.F. Aug. 8, 2014). Chief Judge Baker, taking the unusual step of writing a concurrence to summary disposition, hinted that the "continuing trend toward affording alleged crime victims protections throughout the criminal justice process, particularly in sexual assault cases" will lead to further litigation over "how Article 6(b) and the new Article 32 interplay with an accused's rights." *Id.* (Baker, C.J., concurring). Possibly in response to this case, the Department of Defense gave notice of a proposed executive order amending the Rules for Courts Martial to provide that "[a] victim's declination to testify at a preliminary hearing or a victim's declination to submit to pretrial interviews shall not, by themselves, be considered [justifications to order a deposition of a victim]" and further that depositions of victims may only be ordered if "the victim will not be available to testify at court-martial." 80 Fed. Reg. 6058 (Feb. 4, 2015). The Senate version of the NDAA for Fiscal Year 2016 would allow victims (but no other categories of witnesses) to seek orders from the service Courts of Criminal Appeals to quash deposition orders. National Defense Authorization Act for Fiscal Year 2016, S. 1376, 114th. Cong. § 549 (2015). Denying all pretrial access to victims probably violates an accused's Constitutional rights. *See* United States v. Aycock, 35 C.M.R. 130, 161–62 (C.M.A. 1964) (citations omitted) ("[T]o deny [the accused] any access to the witness until the trial . . . makes such entitlement [to compulsory process to obtain witnesses] 'in most part an empty and high-sounding phrase.'").

[278] *See supra* note 19 and accompanying text.

[279] Reid v. Covert, 354 U.S. 1, 35 (1957) (plurality op.), *cited in* Denedo v. United States, 556 U.S. 904, 918 (2009) (Roberts, C.J., dissenting). The absence of any analogue to a grand jury requirement was one of the Court's earliest criticisms. *Reid*, 354 U.S. at 37. That deficiency, perceived or actual, persists today, and it has only been exacerbated by recent changes to Article 32. *See supra* note 264 and accompanying text.

[280] The RSP advised against the provisions of the 2014 and 2015 NDAAs requiring higher level review of decisions not to refer certain cases to trial, *see supra* text accompanying note 152, believing that these provisions create undue pressure to prosecute cases even "in situations where referral does not serve the interests of the

and entrench the belief among victims that prosecution "isn't worth the risk."[281]

In addition to judicial censure, there is a more subtle concern. A justice system serves many goals—exoneration, punishment, deterrence, protection, rehabilitation, etc.[282] But though a victim may feel vindicated by a conviction, catharsis is not a purpose of any justice system. Paradoxically, this is why many college victims and advocates, frustrated by the criminal justice system, have stoked the demand for colleges to create an entirely separate, quasi-judicial process to better "protect victims."[283] The heavy criticisms of the legitimacy of this resulting system[284] and the many successful attacks against it[285] serve as a strong caution against similarly manipulating military justice. The UCMJ is designed to achieve justice and maintain discipline while protecting the rights of the accused.[286] When it fails to do the latter, it will fail at the former.

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victim or of justice." RSP REPORT, *supra* note 4, at 23. *Cf.* Taylor & Adams, *supra* note 186 ("Last year, military commanders sent about 70 percent more cases to courts-martial that started as rape or aggravated sexual assault allegations than they did in 2009. However, only 27 percent of the defendants were convicted of those offenses or other serious crimes . . . . When factoring in convictions for lesser offenses such as adultery, which is illegal in the military, or perjury, about half the cases ended in convictions. The military's conviction rate for all crimes exceeds 90 percent, according to a 2010 report to Congress by the Pentagon.").

[281] Gray, *supra* note 101; *see also* Dockterman, *supra* note 176.

[282] *See generally* 18 U.S.C. § 3553(a)(2) (2012); *accord* MCM, *supra note* 13, R.C.M. 1001(g).

[283] *See* Alexandra Brodsky & Elizabeth Deutsch, *No, We Can't Just Leave College Sexual Assault to the Police*, POLITICO (Dec. 3, 2014), http://www.politico.com/magazine/story/2014/12/uva-sexual-assault-campus-113294.htm; Gray, *supra* note 101; Valenti, *supra* note 171; Bolger, *supra* note 171.

[284] *See supra* note 255 and accompanying text.

[285] *See supra* text accompanying notes 270–271.

[286] *See supra* note 14 and accompanying text.

D. Institutional Leaders Should be in Charge, Empowered, and Accountable

> *The [infantry] take care of their own—no matter what. Dillinger belonged to us, he was still on our rolls. Even though we didn't want him, even though we never should have had him, even though we would have been happy to disclaim him, he was a member of our regiment. We couldn't brush him off and let a sheriff a thousand miles away handle it . . . . The regimental records said that Dillinger was ours, so taking care of him was our duty.*
> —Robert Heinlein[287]

At the press conference announcing the introduction of the CASA, Senator Richard Blumenthal stated "campus sexual assault must command attention at the top administrative rung of all universities."[288] At the same press conference, Senator Gillibrand stated, "we are going to lift the burden of solving this problem off the shoulders of our survivors and placing [sic] it firmly on those of our colleges and universities."[289] The language about college sexual assault used by these two prominent MJIA supporters is remarkably similar to the arguments of other senators against the MJIA.[290] Senator Charles Grassley asserted, "Sexual assault is a law enforcement matter, not a military one."[291] He similarly declared, "Sexual assault [in colleges] is not some mere code of conduct violation. It is a major criminal offense"—in support of the bill that

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[287] STARSHIP TROOPERS 140 (Ace Premium Ed. 2010).

[288] Press Release, Sen. Richard Blumenthal, Bipartisan Bill Takes Aim at Sexual Assault on Campuses, Protecting Students, Boosting Accountability and Transparency at Colleges (July 30, 2014).

[289] Tovia Smith, *New Bill Aims to Hold Colleges Accountable for Campus Sex Crimes*, NAT'L PUB. RADIO (July 31, 2014), http://www.wbur.org/npr/336766002/new-bill-aims-to-hold-colleges-accountable-for-campus-sex-crimes.

[290] *See, e.g.*, 160 CONG. REC. S1342 (statement of Sen. Lindsey Graham) ("[W]e have a rape in the barracks. The worst thing that could happen in a unit is for the commander to say, this is no longer my problem. It is the commander's problem."), S1341 (statement of Sen. Carl Levin) ("[T]he strongest, most effective approach we can take to reduce sexual assault is to hold commanders accountable for establishing and maintaining a command climate that does not tolerate sexual assault."), S1344 (statement of Sen. Kelly Ayotte) ("I want to hold commanders more accountable for not only how they handle these crimes but also for that zero tolerance policy within their units.").

[291] *Id.* S1338 (daily ed. Mar. 6, 2014).

would require "campus disciplinary proceedings related to any claims of sexual violence."[292]

The inconsistent positions of those who endorse both the Title IX/SaVE/CASA paradigm and the MJIA[293] make a surprisingly cogent argument against the MJIA. Supporters of CASA and MJIA opponents alike (for that matter, all those who expect the military and colleges to address sexual assault) acknowledge, in deed if not word, the fundamental principle that leaders are responsible for their organizations and the safety of their people. Nowhere is this truer than in the military—military commanders are singularly responsible for every facet of their commands to a degree unparalleled in civilian life.[294]

Lost amidst the focus on statistics, confounded by the obsessive drive toward uniformity, and exacerbated by the problem of overbroad definitions is the idea that each case is different and must be handled differently. Some cases warrant a criminal trial, some warrant administrative disposition, and some warrant no adverse action but simply support for the victim. The ability, and requirement, to assess each case and determine the best disposition is ultimately a function of *leadership*. College leaders, when they are not hamstrung by draconian mandates designed to maximize "accountability," can oversee an effective, fair, and impartial disciplinary process. Colleges should have the structural flexibility to defer to law enforcement for investigations, to discuss with local prosecutors whether criminal prosecution is an appropriate disposition, and to choose whether to pursue administrative discipline, perhaps concurrent with or dependent upon the outcome of the judicial process—with input from legal advisors, victims, advocates, and the like as appropriate.[295]

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[292] Campus Accountability and Safety Act, S. 2692, 113th Cong. § 6 (2013); Press Release, Sen. Richard Blumenthal, *supra* note 288.

[293] *See supra* text accompanying notes 131 –147.

[294] *See* U.S. DEP'T OF ARMY. REG. 600-20, ARMY COMMAND POLICY para. 2-1(b) (6 Nov 2014) ("Commanders are responsible for everything their command does or fails to do.").

[295] This relates back to the need for consistent and precise definitions of "sexual assault." Senator McCaskill and critics of college hearings are correct in that the penetrative crimes of rape and sexual assault are normally best dealt with criminally. *See* Peter Berkowitz, *supra* note 112; MacDonald *supra* note 112; *supra* text accompanying notes 149-151; Anderson, *supra* note 176. But there can be individual exceptions for any number of legitimate legal and practical reasons that do not amount to "sweeping it under the rug" (not the least of which could be a victim's adamant refusal to participate in a criminal trial). Lesser sexual offenses could be disposed of through either criminal or

Such a disposition decision requires more than just an algorithmic evaluation of evidence, which MJIA supporters fail to acknowledge.[296] The very term "prosecutorial discretion" acknowledges that prosecutors are *expected* to consider not just the evidentiary strength of a case but also time, cost, priority, and the interests of the community.[297] These concerns are as much political as they are legal. As the Title IX/SaVE framework plausibly demonstrates, a law license is not a requirement to make these decisions. Yet MJIA supporters aver that commanders, trained in warfighting rather than law, cannot make these assessments.[298] With more charitable phrasing, some argue relieving commanders of responsibility to convene courts-martial would "free them" to focus on their combat mission.[299] But this is a false dilemma. First, the maintenance of good order and discipline is crucial to the services'

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administrative proceedings. This is analogous to ordinary assault and battery, which can be both a crime and a civil tort. The appropriate venue(s) for disposition will vary with each case depending on factors so profuse and varied that they cannot be universally, algorithmically analyzed. Statutorily compelling a uniform disposition for every case is neither effective nor appropriate.

[296] *See, e.g.*, Rep. Jamie Herrera Beutler, *Bill Would Change Military for Better*, THE DAILY NEWS ONLINE, Jan. 5, 2014, http://tdn.com/news/opinion/guest-column-bill-would-change-military-for-better/article_847652fe-74d2-11e3-b0dc-001a4bcf887a.html ("The bill would mean that evidence of a sexual assault case would be evaluated by independent, trained prosecutors who would decide if proceedings should move forward based on the facts of the case."); Sen. Kirsten Gillibrand, *Sexual Assaults and American Betrayal*, N.Y. DAILY NEWS, Mar. 14, 2014, http://www.nydailynews.com/opinion/sexual-assaults-american-betrayal-article-1.1721007 ("We need every case to move forward based solely on the evidence and judged solely on the merits, not political pressure or other non-legal considerations.").

[297] *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL para. 9-27 (2014) ("Principles of Federal Prosecution"); Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 6, 8 (2012).

[298] *E.g.*, Murphy, *supra* note 239, at 167 ("Military justice attorneys are the best equipped to make all decisions regarding a criminal case because they are the subject matter experts."), 169 ("The MJIA allows for the subject matter experts to perform their legal duties directly."). *Cf.* MAJOR ROBERT K. FRICKE, I'LL DECIDE WHAT CASES TO PROSECUTE AND YOU DECIDE WHAT INFANTRY TACTICS TO EMPLOY—A PROPOSAL TO ELIMINATE THE COMMANDER'S POWER TO REFER CHARGES TO TRIAL BY COURT-MARTIAL—ANOTHER STEP TOWARD DISASSOCIATING THE WORD "MILITARY" FROM "JUSTICE" 109-13 (1999).

[299] *E.g.*, MAJOR GENERAL (RETIRED) MARTHA RAINVILLE, TESTIMONY BEFORE THE RESPONSE SYSTEMS TO ADULT SEXUAL CRIMES PANEL 12-13 (Jan. 30, 2014) ("[The MJIA] would allow those commanders to focus their efforts on command business . . . on the warfighting abilities of their units . . . to let commanders lead."); FRICKE, *supra* note 298, at 114 (arguing that transferring convening authority would "free[ ] up the commander to fight").

combat mission. Second, commanders regularly make, and are held accountable for, decisions in areas only tenuously connected to warfighting.[300]

Commanders' accountability, ironically, leads some to believe that "independent prosecutors" are necessary to protect accused from politically-motivated prosecutions by commanders who "are fearful to make the unpopular decision to not refer a sexual assault case."[301] Occasionally, MJIA supporters make statements to this effect as well[302] (even though they are arguably a primary cause of such trepidation). Major Elizabeth Murphy, an Army judge advocate who proposes entirely removing convening authority from commanders, argues that that "the potential effect [of the political pressures to prosecute] is that commanders may be sending cases forward when they should not."[303] She cites two anonymous Army brigade commanders:

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[300] For example, commanders, even without advanced training in finance or accounting, are expected to ensure the appropriate allocation of funds from different fiscal appropriations and can be held accountable for drawing from improper appropriations. *See* U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION, vol. 14, ch. 5, para. 050302 (Nov. 2010). Commanders without legal training must still synthesize international law with operational needs when developing rules of engagement. *See* CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULSE OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES app. A, para. 6.a (13 June 2005). Relevant to sexual assault, commanders are statutorily required to investigate and respond to all sexual *harassment* complaints, 10 U.S.C. § 1561 (2012), demonstrating congressional acknowledgment of the responsibility and capability of commanders to address a very similar concern even though it is relatively independent of their combat mission.

[301] Murphy, *supra* note 239, at 149. This is not a new concept; in the late 1940s, the American Bar Association and numerous state bar organizations repeatedly asked Congress to completely remove military justice from command control in order to protect the accused. HISTORY OF THE JAG CORPS, *supra* note 15, at 199.

[302] *E.g.*, Subcommittee hearing, *supra* note 53, at 28 (statement of Ms. Anu Baghwati) ("[P]utting legal experts in charge of the process serves everyone better. It creates a fairer and more impartial trial for the accused as well."); N.Y. TIMES, *A Broken Military Justice System*, *supra* note 138 (quoting Sen. Kirsten Gillibrand) ("I'm not interested in an innocent soldier going to jail any more than I'm interested in a guilty perpetrator going free. . . . We need an objective trained prosecutor making these decisions about whether a case should go forward, not politics."). Despite this rhetoric about the need for lawyers to review cases to protect the accused, none have proposed amending Article 32 to prohibit referral if the impartial, trained, and experienced lawyer who conducts the preliminary hearing finds no probable cause to warrant prosecution. *See supra* note 264 and accompanying text.

[303] Murphy, *supra* note 239, at 148.

> [O]ne stated that if a sexual assault or sexual harassment case comes across his desk, even if he thinks it is not a good case, he feels he should send it forward, err on the side of the victim, and hope that justice is served in the end. He stated that there is "indirect [unlawful command influence] from the top right now." The second brigade commander contended that the hard part is when he is told by someone that there is no case, but everyone looks to him to make the decision, and he will be scrutinized for not seeming to take the matter seriously enough if he does not opt for a court-martial. He stated that there is a lot of indirect pressure, and his concern is that a statistic will show that he did not send enough cases forward, that his name will be out there as "someone who doesn't get it."[304]

Put bluntly, if a commander is willing to court-martial one of his Soldiers over his own misgivings in order to protect his own career and promotion potential, he is unfit for command and should be relieved—likewise for one who suppresses allegations in order to protect a favored subordinate or to avoid scrutiny of his command. Commanders can order troops into battle fully knowing that some of them may die. Soldiers trust their commanders to make the right decisions, fully knowing that the "right decisions" will sometimes put their lives at risk. That a commander would violate that trust and sacrifice a subordinate to political pressure in order to safeguard his own career represents an existential threat to military discipline and national security. The solution is to demand commanders with moral courage, not to absolve them of the obligation to use it.

Considerable debate focused on the MJIA's potential impact on military discipline; opponents argued it would degrade discipline while

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[304] *Id.* at 149 (citing Interview with Anonymous Person, Charlottesville, Va. (Nov. 7, 2013)). "Unlawful command influence" typically refers to the statutory, regulatory, and judicially-imposed prohibitions against superior commanders influencing their subordinates' participation in, administration of, and independent discretion regarding, the military justice system. *See generally* UCMJ art. 37 (2012); MCM, *supra* note 13, R.C.M. 104; United States v. Allen, 33 M.J. 209, 212 (C.M.A. 1991) ("There is no doubt that the appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial."); United States v. Gore, 60 M.J. 178, 178 (C.A.A.F. 2004) (quoting United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986)) ("Unlawful command influence is recognized as the 'mortal enemy of military justice.'").

its supporters maintained that it would not have adverse effects.[305] But its effect, or lack thereof, on discipline is less important than its dilution of command responsibility. Its supporters take pains to point out that commanders would still have convening authority for crimes that are "uniquely military in nature."[306] They at least tacitly acknowledge that commanders, wholly responsible for the performance of their organizations, sometimes must impose significant penalties either as punishment for or deterrence of misconduct.

This is why "willfully disobey[ing] the lawful command of [a] superior commissioned officer," a meaningless notion in civilian life, is a potential capital crime in the military.[307] This is why categories of misconduct broadly defined as "unbecoming of an officer and gentlemen," "to the prejudice of good order and discipline in the armed forces," or "of a nature to bring discredit upon the armed forces" are punishable as crimes.[308] This is why a disinterested prosecutor may view a $100 barracks larceny as insignificant[309] while the commander sees it as an egregious breach of trust. Commanders are unequivocally accountable for the performance of their commands and must have all the educational, corrective, and disciplinary authorities necessary to fulfill that responsibility. In turn, the UCMJ exists to guard against their

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[305] *See* 160 CONG. REC. S1335–49 (daily ed. Mar. 6, 2014) (Senate debate on the Military Justice Improvement Act of 2013).

[306] *Comprehensive Resource Center for the Military Justice Improvement Act*, KIRSTEN GILLIBRAND – U.S. SENATOR FROM N.Y, http://www.gillibrand.senate.gov/mjia (last visited May 11, 2015). Senator Gillibrand publicly reassured the Joint Chiefs of Staff that convening authority for "crimes of mission" would remain with commanders. SASC Hearing, *supra* note 131, at 49 ("[Senator Gillibrand speaking:] We have chosen to keep all crimes of mission—going [absent without leave], not showing up on time, not charging up the hill when you command your servicemember to do so."), 50 ("[General James Amos, Commandant, U.S. Marine Corps, speaking:] So that would be things like failure to obey orders and regulations . . . . [Senator Gillibrand's reply:] No, that is excluded under our bill. Any crime of mission is excluded."). At the time Senator Gillibrand made these assertions, the version of the MJIA then before the Senate would have removed UCMJ Article 92, "Failure to Obey Order or Regulation," from commanders' convening authority. S. 967, 113th Cong. § 2(a)(2) (2013). The next version changed this. S. 1752, 113th Cong. §2(a)(3) (2013).

[307] UCMJ art. 90 (2012).

[308] UCMJ art. 133, 134 (2012); *see also* Parker v. Levy, 417 U.S. 733, 743–44 (1974) (upholding the constitutionality of Articles 133 and 134 due to the specialized nature of military society).

[309] *See* UCMJ art. 121 (2012); MCM, *supra* note 13, pt. IV, ¶ 47.e(1)(b) (limiting a sentence of confinement for larceny of nonmilitary property of a value less than $500 to at most six months).

abusive or arbitrary use.[310] Focusing on discipline rather than accountability puts the proverbial cart before the horse.

The MJIA further fails to maintain accountability in a more ominous, latent fashion. In order for republican government to function properly, the military must be subordinate to, and accountable to, civilian leadership, and by extension the broader public.[311] That accountability is achieved through the chain of command, beginning with the democratically elected president.[312] Likewise, those who wield the prosecutorial authority of the state must be close to the public in accountability. Thus every United States Attorney is directly appointed by the President,[313] while principal state prosecutors are elected or directly appointed.[314]

The MJIA would create an independent prosecutorial authority, deliberately unmoored from the chain of command and by extension any real public accountability. Not only does "prosecutorial discretion" require more than just legal acumen,[315] it is also almost completely

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[310] Thus the argument that "a servicemember should not face the possibility of a federal conviction for minor offenses, especially those that are military in nature," Murphy, *supra* note 239, at 173, misses the point. What may be minor in civilian life is potentially major in military life. Major Murphy argues that only serious crimes with analogous statutes in federal civilian law are worthy of courts-martial. *Id.* at 170-72, 179-80. But to take one example, the only companion statute she proposes to Article 90, "Assaulting or Willfully Disobeying Superior Commissioned Officer," is 18 U.S.C. § 111, Assault. *Id.* at 183. She identifies no equivalent to Article 92, "Failure to Obey Order or Regulation." *Id.* Some violations of military authority are so significant (literally matters of life and death) that they require significant penalties. Potentially significant, felony-level penalties require corresponding due process safeguards. "Civilianizing" the military criminal code the way she proposes would undercut the entire justification for martial law.

[311] *See generally* SAMUEL HUNTINGTON, THE SOLDIER AND THE STATE 14-15, 81 (1957).

[312] *See* U.S. CONST. art. II, § 2.

[313] 28 U.S.C. § 541 (2012). The Senate must advise and consent to these nominations. *Id.*

[314] *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2007 - STATISTICAL TABLES 1 (2011) ("The chief prosecutor, also referred to as the district attorney, county attorney, commonwealth attorney, or state's attorney, represents the state in criminal cases and is answerable to the public as an elected or appointed public official."); *accord* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2001, at 2 (2002) (noting that "chief prosecutors," as defined above, were elected in 47 of 50 states).

[315] *See supra* text accompanying note 297.

unfettered.[316] The principal check is public accountability. The MJIA would bury prosecutors inside the military hierarchy, unresponsive to the needs of command and largely unaccountable to the public, with opaque, exclusive, and unfettered power to seek punishment for the most serious crimes—or not.[317] This is anathema to the principles of unity of command and military discipline, to the need for military subordination to public authority, and to any democratic system of justice.

V. Conclusion

> *Make us to choose the harder right instead of the easier wrong, and never to be content with a half truth when the whole can be won. Endow us with courage that is born of loyalty to all that is noble and worthy, that scorns to compromise with vice and injustice and knows no fear when truth and right are in jeopardy.*
> —Cadet Prayer[318]

Sixty years after Congress created the UCMJ to protect accused servicemembers from abusive and arbitrary punishment, a significant faction in Congress now believes it must be almost completely dismantled and restructured because is is not being used aggressively enough. Multiple federal organizations and a fair number of outside parties consider the notion of due process in student disciplinary hearings, the result of courage in the civil rights era, as an obstacle to be overcome or circumvented in the name of "accountability." The federal government has used its formidable authority to shape institutional responses to sexual assault, but the aggressive rush to "fix" the problem subordinates notions of due process, truth-seeking, and even the presumption of innocence. Fueled by an underlying assumption that too few perpetrators are sufficiently punished, the poignant and emotionally-

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316 *See* Krauss, *supra* note 297 (citing, *inter alia*, Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978), Wayte v. United States, 470 U.S. 598, 607 (1985), Wade v. United States, 504 U.S. 181, 186 (1992); United States v. Armstrong, 517 U.S. 456, 464 (1996)).

317 *Cf.* Hon. Elizabeth Holtzman, Statement to the Response Systems to Adult Sexual Crimes Panel 268 (Jan. 30, 2014) ("Here we have a command structure where we know who's held accountable . . . . When it's turned over to a faceless, nameless organization[,] who's making that charging decision? Who do I complain to? Who do I hold accountable? These are very serious questions.")

318 U.S. MILITARY ACADEMY, OFFICE OF CHAPLAINS, http://www.usma.edu/chaplain/SitePages/ Cadet%20Prayer.aspx (last visited May 11, 2015).

charged environment of sexual assault threatens otherwise broadly accepted principles of justice. And in that setting, it is difficult for anyone in a position of both power and publicity to argue for policies that will be seen as making it harder to punish rapists. Nonetheless, the "obligation to govern impartially is as compelling as [the] obligation to govern at all."[319]

The prolific inconsistencies produced by the divergent politics of military and college sexual assault are difficult to explain. However, they illuminate the need for institutional and political leaders with moral courage to enact and support better, more just responses to sexual assault. Unintentionally, the proponents of aggressive military and college responses provide a collection of cautionary examples, useful comparisons, and forceful arguments against many of the severe policies they endorse. Comparing the two systems demonstrates the need for precise definitions, professional investigations, fair adjudications, and empowered institutional leaders. Far from a conflict of interest, balancing obligations to society, to accused, and to victims is a fundamental function of governance. Political, military, and educational leaders alike bear this responsibility. Every servicemember and every student accused of sexual assault is their constituent for whom these leaders are obligated "to ensure justice is done."[320]

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[319] Berger v. United States, 295 U.S. 78, 88 (1935).
[320] *Id.*

Appendix

Military Justice Proposals

In the spirit of "do not bring up problems without proposing solutions," this Appendix summarizes, restates, and expands upon specific legislative and policy proposals discussed in varying depths throughout this article to better align military justice with the four principles outlined:

A. Clearly define the crime of sexual assault and investigate it as a crime.

B. Adjudication must remain institution v. accused, not victim v. accused.

C. Do not manipulate procedures just to influence the results of sexual assault cases.

D. Institutional leaders should be in charge, empowered, and accountable.

1. Extend the requirement imposed by § 1774 of the FY14 NDAA that any convening authority who chooses not to refer a charge for a penetrative offense to court-martial to submit his decision to the next higher convening authority to charges for ANY offense, and repeal the provisions for secretary-level review. In the alternative, repeal it entirely. (Principles C, D). Any higher commander can withhold authority to act on a case.[321] This implies that the higher commander must have knowledge of the case to make that decision. Extending this requirement to all courts-martial charges would allow higher convening authorities to exercise this withholding ability and would also make higher review a matter of routine rather than implicitly pressuring on commanders to refer sexual assault cases. If Congress solely intended to pressure commanders to increase sexual assault prosecutions, that is unjust and warrants repeal.[322] The provisions for secretary-level review, especially the one allowing any detailed trial counsel to request that the "chief prosecutor" force secretarial review, should be repealed regardless. These provisions openly encourage

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[321] *See supra* text accompanying note 126.
[322] *See also* RSP REPORT, *supra* note 4, at 23 (recommending Congress repeal § 1744).

circumvention of the chain of command.[323] If both the convening authority and staff judge advocate believe referral is unwarranted, and the assigned trial counsel cannot persuade them otherwise, the trial counsel should not be allowed to circumvent both his senior supervising attorney and commanding officer by going straight to the service secretary via the "chief prosecutor."

2. Prohibit referral if the Article 32 officer finds there is no probable cause. (Principles C, D). It is plausible that the original wide-ranging Article 32 is no longer necessary in military justice, with modern law enforcement, a military trial judiciary, and more sophisticated rules of discovery. But considering the rhetoric over the need for "trained, experienced" lawyers to review cases,[324] this would be a simple way to preserve the "bulwark against baseless charges"[325] and potentially forestall attacks on the overall constitutionality of the revised military justice system.[326]

3. Repeal the amendment to Article 32 allowing any victim to choose not to testify. Also, or in the alternative, eliminate the system of barriers which would effectively deny defense counsel any pretrial access to victims. (Principles A, B, C). By reducing the scope of Article 32 to a preliminary hearing, Congress adequately addressed the abuses it intended to prevent. But it is inconceivable that the preliminary hearing, which is designed to assess whether probable cause exists, should not be allowed to evaluate the credibility of the most significant witness. More importantly, denying defense counsel all pre-trial access to victims is likely unconstitutional (it will almost certainly generate significant appellate litigation).[327]

4. Allow witness subpoenas for Article 32. (Principles A, C, D). This relates to number 3, above. Currently, civilian witnesses cannot be compelled to testify at an Article 32 (though they can be subpoenaed for a deposition).[328] Providing process to compel witness attendance (even by remote means) at an Article 32 would eliminate any inequality

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[323] *Cf. supra* text accompanying notes 311–317.
[324] *See supra* note 302 and accompanying text.
[325] United States v. Samuels, 10 C.M.A. 206, 212 (1959) (discussed *supra* note 18 and accompanying text).
[326] *See supra* note 279 and accompanying text.
[327] *See supra* note 277 and accompanying text.
[328] UCMJ art. 47 (2012).

between civilian victims and military victims, who unlike civilians could be ordered to testify at an Article 32 prior to the new statute.[329]

5. Amend Article 60 to either eliminate ALL ability to disapprove findings and modify sentences, or return the previous discretionary standard. Concurrently, amend Article 66 to allow any convicted servicemember to petition for discretionary review by the Court of Criminal Appeals, regardless of sentence, without prior Article 69 review by the Judge Advocate General. (Principles B, C, D). Either review by the convening authority is a necessary level of post-trial review,[330] or it is not. The specific charges are immaterial to this analysis. If it is not, or no longer, necessary, its removal can be offset by allowing for discretionary appellate review of all cases, not just the automatic review of cases where the sentence includes more than one year of confinement or a punitive discharge.[331]

6. Amend Article 120 to (1) define a "sexual act" as genital penetration, anal penetration, or oral-penile penetration without a

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[329] Congress considered, and rejected, a proposal to do this in 2011. Major Chris W. Person, *The* Subpoena Duces Tecum *and the Article 32 Investigation: A Military Practitioner's Guide to Navigating the Uncharted Waters of Pre-Referral Compulsory Process*, ARMY LAW., Feb 2014, at 9–10. Congress, concerned about the uncertain avenues for challenging a subpoena pre-referral, compromised and allowed for subpoenas of documentary evidence but not personal testimony. *Id.* at 10; *see also* UCMJ art. 47 (2012). Adding compulsory process to compel witness attendance would require clarification of these issues; witnesses could raise challenges to subpoenas with some combination of the convening authority, a military magistrate, military judge, or U.S. District Court.

[330] *See supra* note 18 and accompanying text (discussing the history and purpose of Article 60).

[331] Currently the Courts of Criminal Appeals may only review cases in which the sentence includes death, a punitive discharge or dismissal, or confinement of at least a year. UCMJ art. 66(b)(1) (2012). The service Judge Advocates General may also ask the Courts of Criminal Appeals to review cases that do not meet that threshold. UCMJ art. 69(d). The current post-trial structure creates a gap in post-trial review. A convening authority may not reduce any sentence if the *maximum* sentence exceeds two years' confinement, UCMJ art. 60(c)(3) (2014), but there is no avenue for direct judicial review if the *actual* sentence does not include death, punitive discharge or dismissal, or confinement of at least a year. UCMJ art. 66(b)(1) (2012). For example, a servicemember convicted of violating Article 107, False Official Statement (which is punishable by up to 5 years' confinement, MCM, *supra* note 13, pt. IV, ¶ 31.e), but sentenced to only 5 months' confinement without a punitive discharge cannot correct errors of law in his trial quickly through the convening authority nor can he have his case judicially reviewed by a Court of Criminal Appeals without referral by the Judge Advocate General.

specific intent requirement, (2) restrict the definition of "sexual contact" to nonconsensual contact with genitals, breasts, and buttocks, and (3) eliminate "intent to arouse" and at least, "intent to abuse, humiliate, or degrade" from sexual contact crimes. (Principles A, C). Proscribing any form of human contact as a specific intent sex crime is unwieldy and overbroad.[332]

7. Amend DoD and service policies to be consistent with the statutory terms used in Article 120 (Principles A, C). Use "sexual contact," "sexual violence," or another umbrella term as a policy term, rather than "sexual assault." Do not aggregate penetrative and nonpenetrative offenses in statistics.[333]

8. Amend the provisions of the FY15 NDAA affecting Article 6(b) and Military Rule of Evidence 513 to (1) reinstate the "constitutionally required" exception to the exclusionary rule, and (2) add the 72-hour and 5-day time limits of the federal Crime Victims Rights Act to the writ of mandamus provisions. (Principles B, C). The possibility of appellate review addresses the concern over military judges routinely ordering production of mental health records because they have had no disincentive.[334] Also, this will create, likely in short order, the body of case-law to guide judges that has to date been missing. Eliminating the "constitutionally required" provision is overkill that will lead to more litigation and likely a string of reversed convictions, requiring retrials that are difficult for victims and commands alike. But at the same time it is likely that victims will request writs of mandamus in nearly every case in which a military judge orders production or admission of mental health records. Victims should not be able to indefinitely delay every proceeding; adding the 72-hour and 5-day time limits already found in federal law[335] will allow for vindication of their rights without undue delay.

9. Do not enact: (1) the Military Justice Improvement Act, (2) the proposed Rule for Courts-Martial 1001A (allowing victims to make unsworn statements during presentencing), (3) the proposed modifications to Rule for Courts-Martial 702 (restricting depositions

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[332] *See supra* text accompanying notes 221–226.
[333] *See supra* text accompanying note 220.
[334] *See supra* note 276 and accompanying text.
[335] *See supra* note 276 and accompanying text. *Cf.* UCMJ art. 36 (2012) (requiring court-martial rules of procedure and evidence to generally conform to their federal counterparts, "so far as [the president] considers practicable").

of victims). (Principles B, C, D). The MJIA would undercut the purpose and intent of military law, reduce commanders' accountability for the performance of their commands, undermine commanders' authority, and create an unaccountable prosecutorial authority.[336] The proposal for victim unsworn statements assumes an equality that does not exist between victims and accused, and is not appropriate in an adversarial sentencing proceeding.[337] And, as discussed above, the government's denial of all pre-trial access to victims is likely unconstitutional (it will almost certainly generate significant appellate litigation).[338]

Specific Proposals for Colleges

Because due process is less stringent for administrative law than criminal law, and because colleges vary widely in size, composition, and culture, colleges need flexibility to design their own procedures. Therefore most of the recommendations here focus on eliminating, rather than modifying or creating, nationwide policies.

1. Permit, even encourage, any sexual offense defined as a felony by state law, if not every sex crime, to be investigated by law enforcement in lieu of internal administrative investigations. (Principles A, C). This could be law enforcement organic to the college or local off-campus law enforcement, or colleges could pool resources to share investigative services. But the *investigation* (as distinct from adjudication) of these crimes should be done by trained professionals.[339]

2. Broadly, separate the functions of investigation and adjudication. (Principles A, B, C). This relates to number 1, above. The DCL uses "investigation" to refer to the entire process;[340] a single individual can theoretically be responsible for the entire process.[341] Dividing these responsibilities provides greater structural protection against arbitrary and capricious actions, and guards against actual or perceived conflicts of interest.

3. If local prosecutors pursue criminal charges, allow colleges to defer any adverse action until the completion of the criminal

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[336] *See supra* parts III.B and IV.D.
[337] *See supra* note 246 and accompanying text.
[338] *See supra* note 277 and accompanying text.
[339] *See supra* text accompanying notes 227–228.
[340] DCL, *supra* note 82, at 9–13.
[341] *See supra* text accompanying notes 108, 111, 140, and 146.

proceeding. (Principles A, B, D). This does not preclude temporary measures designed to ensure safety, like reassignment of living areas, stay-away orders of protection, rescheduling classes, etc. Colleges could choose whether to pursue immediate disposition or else wait for the criminal process to complete itself.[342]

4. If a criminal proceeding ends in a dismissal or acquittal, allow colleges to choose not to pursue any further adverse action. (Principles A, B, C, D). Right now, colleges must conduct their own procedures regardless of whether criminal proceedings are pending or even concluded.[343] College leaders should be allowed, based on the facts of the case, to choose to allow the criminal justice system to run its course. If the case ends without conviction, colleges should be permitted to rely on the determination of civil authorities or the judicial system that the accused is not responsible.

5. Do not condition the rights of the accused on the rights of the victim. (Principles B, C). The two are not equally situated in the process.[344] Most significantly, an accused should be able to appeal an adverse result, but it is not fair to expose him to repeated risks by allowing victim appeals if the institution, which designs, staffs, and funds the adjudicative process, fails to meet the burden of proof it has set for itself.

6. Eliminate the requirement to use the preponderance of evidence standard. (Principles B, C). This relates to number 5, above. College adjudications are not victim v. accused private actions.[345] The standard of proof is one element of due process, and a higher standard may be warranted depending on the overall structure of the process.[346]

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[342] *See supra* text accompanying notes 227–228, parts IV.A, IV.D. *Cf. supra* text accompanying note 242.
[343] *See supra* text accompanying notes 84, 110.
[344] *See supra* part IV.B.
[345] *See supra* text accompanying notes 231–243.
[346] *See supra* text accompanying note 243.