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## **THINKING SLOW ABOUT SEXUAL ASSAULT IN THE MILITARY**

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*This article examines the current public discourse on sexual assault in the military through the complementary lenses of behavioral economics and the law. The article evaluates the “crisis” narrative central to this discourse and suggests it is not supportable by the best available data. Moreover, the article suggests that in driving potentially counterproductive public policy initiatives, this narrative is harmful to victims of sexual assault. The article recommends several practical steps the Department of Defense (DoD) might take in the near-term to expose and rebut this harmful narrative and forestall these potentially counterproductive public policy initiatives. These steps include a reappraisal of the rhetoric senior DoD officials employ when speaking publically about the very real problem of sexual assault in the military, as well as advocating for a “whole of government” approach to gathering data on sexual assault and its victims. The article suggests the evidence-based prevention and response solutions impelled by these data hold out the best hope for reducing the incidence of sexual assault in the military.*

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## I. INTRODUCTION

*The problem of sexual assault is of such scope and magnitude that it has become a stain on our military.*<sup>1</sup>

—Carl Levin, *United States Senator, Michigan*

*We know this crisis is staggering....*<sup>2</sup>

—Barbara Boxer, *United States Senator, California*

*We are often confident even when we are wrong.*<sup>3</sup>

—Daniel Kahneman, *Professor of Psychology and Public Affairs Emeritus at the Woodrow Wilson School, Princeton University*

When media reports indicate that an estimated 26,000 people in the military experienced some form of unwanted sexual contact during fiscal year 2012, what is the impact on those who consume this information? The number, standing alone, is unquestionably alarming—as are its implications. And while Americans generally hold U.S. service members in high esteem and express a strong and enduring confidence in the military as an institution,<sup>4</sup> the narrative that sexual assault is rampant within the ranks feeds into impressions and intuitions that *feel* archetypally right.<sup>5</sup> Indeed, traits that appear well suited to expeditionary combat—physicality, aggressiveness, the capacity for violence, and intense loyalty—appear equally ill suited to the domestic strictures of an increasingly pluralistic society.<sup>6</sup> A sudden proliferation of headline-grabbing cases lends credence to this feeling: “Head of Air Force Sexual Assault Prevention

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<sup>1</sup> *Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military. Hearing before the S. Comm. on Armed Services, 113th Cong. 2 (2013) [hereinafter June 2013 Senate Oversight Hearing].*

<sup>2</sup> *Hearing to Receive Testimony on Sexual Assaults in the Military. Hearing before the S. Subcomm. on Personnel of the S. Comm. on Armed Services, 113th Cong. 6 (2013) [hereinafter March 2013 Senate Oversight Hearing].*

<sup>3</sup> DANIEL KAHNEMAN, THINKING FAST AND SLOW 4 (Farrar, Straus, and Giroux 2011).

<sup>4</sup> “[M]ore than three-quarters of U.S. adults (78%) saying that members of the armed services contribute ‘a lot’ to society’s well-being.” Pew Research, *Public Esteem for the Military Still High* (Jul. 11, 2013), <http://www.pewforum.org/2013/07/11/public-esteem-for-military-still-high/> (last visited Jan. 29, 2014); “Americans are most confident in the military, at 76%, and least confident in Congress, at 10%.” Gallup, *Americans Have the Most Confidence in the Military, Least in Congress* (Jun. 14, 2013), <http://www.gallup.com/video/163076/americans-confidence-military-least-congress.aspx> (last visited Jan. 29, 2014).

<sup>5</sup> Ariel Levy, *Trial By Twitter*, THE NEW YORKER, Aug. 5, 2013, at 43 (In the infamous Steubenville rape case, for example, Internet commentators relied on “collaboration by deduction” and “the story they produced felt archetypally right.” However, that story did not align with the evidence gathered by the police or the case ultimately presented by the prosecutor. In other words, the story that felt “archetypally right” was an illusion).

<sup>6</sup> This intuition is reflected in the commentary of Frank Bruni of *The New York Times*: “The armed forces are a special challenge because they’re all about aggression, summoning and cultivating Attila the Hun and then asking him to play Sir Walter Raleigh as well.” Frank Bruni, *Tackling the Roots of Rape*, N.Y. Times, Aug. 12, 2013, available at [http://www.nytimes.com/2013/08/13/opinion/bruni-tackling-the-roots-of-rape.html?\\_r=0](http://www.nytimes.com/2013/08/13/opinion/bruni-tackling-the-roots-of-rape.html?_r=0).

Charged with Sexual Battery;”<sup>7</sup> “Woman at Center of Alleged Naval Academy Gang Rape Testifies for First Time;”<sup>8</sup> “General admits failure in Lackland sex scandal; 32 alleged culprits.”<sup>9</sup> One might reasonably intuit from all of this that the military does, in fact, suffer from an “entrenched culture of sexual violence,”<sup>10</sup> and that members of the military—increasingly strangers to the nation’s citizenry and reportedly wracked by the ill-effects of repeated deployments—might well be capable of perpetrating sexual violence on an alarming scale.<sup>11</sup>

Similarly, it *feels* archetypally right to remove the long-standing statutory authority of senior military commanders to decide whether or not to criminally prosecute those in their charge suspected of committing sexual assault.<sup>12</sup> Certainly, these commanders are not lawyers and the crime of sexual assault offers no obvious nexus between its commission and the maintenance of military good order and discipline, particularly when juxtaposed with offenses for which that nexus is obvious, *e.g.*: desertion, aiding the enemy, willfully disobeying an order, or malingering. In such a context, the approach *feels* outmoded—borne of past necessities that shouldn’t constrain a technologically advanced and globally mobile armed force. It also appears to insulate the military from modernity and accountability—representing perhaps the last vestige of a tight-knit, predominantly male fraternity that privileges organizational and individual fealty above all else. The timely appearance of a widely publicized case in which an Air Force fighter pilot appeared to demonstrate this fealty by overturning a subordinate fighter pilot’s criminal conviction for sexual assault would seem to support the need for this “common sense” legislative reform.<sup>13</sup>

Yet stories that *feel* archetypally right—even those supported by gripping anecdotes—might also grossly misrepresent reality. Such is the case with the military’s so-called “sexual assault crisis”: the intuitively compelling narrative advanced by the media, some members of

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<sup>7</sup> Morgan Whitaker, *Head of Air Force sexual assault prevention charged with sexual battery*, MSNBC, May 6, 2013 (updated Oct. 2, 2013), <http://www.msnbc.com/politicsnation/head-air-force-sexual-assault-prevention-c>.

<sup>8</sup> Ali Weinberg, *Woman at center of alleged Naval Academy gang rape testifies for first time*, NBC News, Aug. 28, 2013, [http://usnews.nbcnews.com/\\_news/2013/08/28/20237247-woman-at-center-of-alleged-naval-academy-gang-rape-testifies-for-first-time?lite](http://usnews.nbcnews.com/_news/2013/08/28/20237247-woman-at-center-of-alleged-naval-academy-gang-rape-testifies-for-first-time?lite).

<sup>9</sup> Molly Hennessy-Fiske, *General admits failure in Lackland sex scandal; 32 alleged culprits*, L.A. Times, Jan. 23, 2013, available at <http://articles.latimes.com/2013/jan/23/nation/la-na-nn-lackland-scandal-hearing-20130123>.

<sup>10</sup> Editorial Board, *The Military’s Sexual Assault Crisis*, N.Y. Times, May 7, 2013, available at [http://www.nytimes.com/2013/05/08/opinion/the-pentagons-sexual-assault-crisis.html?\\_r=0](http://www.nytimes.com/2013/05/08/opinion/the-pentagons-sexual-assault-crisis.html?_r=0).

<sup>11</sup> *E.g.*, ANDREW BACEVICH, *BREACH OF TRUST: HOW AMERICAN FAILED THEIR SOLDIERS AND THEIR COUNTRY* (Metropolitan Books 2013). The increasing distance between citizen and soldier arguably plays into people’s “preexisting rape scripts,” wherein the roots of the male stranger motif run very deep. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. Rev. 826, 829 (2013).

<sup>12</sup> Senator Kirsten Gillibrand’s *Military Justice Improvement Act* (MJIA) S.1752, “[would move] the decision whether to prosecute any crime punishable by one year or more in confinement to independent, trained, professional military prosecutors, with the exception of crimes that are uniquely military in nature...” Senator Gillibrand Webpage, <http://www.gillibrand.senate.gov/mjia> (last visited Jan. 29, 2014). Current jurisdictional limitations on courts-martial and the authority to convene courts-martial may be found in 10 U.S.C. §817-§824 (2012) (Articles 17-24 of the Uniform Code of Military Justice).

<sup>13</sup> Craig Whitlock, *Air Force general’s reversal of pilot’s conviction for sexual assault angers lawmakers*, Wash. Post, Mar. 8, 2013, available at [http://articles.washingtonpost.com/2013-03-08/world/37569846\\_1\\_sexual-assault-sexual-misconduct-fighter-pilot](http://articles.washingtonpost.com/2013-03-08/world/37569846_1_sexual-assault-sexual-misconduct-fighter-pilot).

Congress, victim advocacy groups, and others is not empirically supportable.<sup>14</sup> While there is no logical proof for what does or does not constitute a crisis, at the very least, a crisis moniker suggests a widespread problem—and one that is growing and generally out of control.<sup>15</sup> The best available data, however, suggest this is simply not the case.

As discussed in detail below, the data instead suggest that: (1) an estimated 98% of service members, or 1.324 million, experienced no form of unwanted sexual contact during fiscal year 2012;<sup>16</sup> (2) between fiscal years 2010 and 2012, only two of the four Armed Services showed a statistically significant increase in the number of estimated victims of unwanted sexual contact and overall numbers are down from fiscal year 2006; (3) the prevalence of sexual assault in the military is comparable to demographically similar civilian populations; (4) senior military commanders are more aggressive in exercising their prosecutorial discretion in sexual assault cases than are licensed attorneys; (5) overturning the results of courts-martial are exceptionally rare events, particularly in the case of serious offenses like sexual assault; and (6) removing senior commanders' authority to make prosecutorial decisions will not improve extant conditions. If this is what the data suggest, then the crisis narrative was arguably borne of something other than data. To be sure, it appears to have been borne largely of a disparate group of concerned and well-intentioned individuals *thinking fast* about a problem that cries out for *thinking slow*.<sup>17</sup>

#### A. *Thinking Fast and Slow*

The phrase *thinking fast and slow* was coined by Nobel laureate Daniel Kahneman and reflects the groundbreaking work that he and his research partner Amos Tversky conducted in the field of behavioral economics. *Thinking slow* about sexual assault in the military means marshaling the discoveries of Kahneman and Tversky, and what is known about the workings of the mind, in order to avoid systemic errors (*i.e.*, biases) of judgment and reason. It means privileging “a slower, more deliberative and effortful form of thinking” fueled by empirical evidence and critical self-examination over a faster, intuitive and effortless form thinking fueled

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<sup>14</sup> The “crisis” descriptor is hardly the only, or the most hyperbolic, within the discourse on military sexual assault. The descriptors “Scandal,” “epidemic,” and “scourge” are also employed. Rosa Brooks, *Is Sexual Assault Really an ‘Epidemic’?*, FOREIGN POLICY, Jul. 10, 2013 available at [http://www.foreignpolicy.com/articles/2013/07/10/is\\_sexual\\_assault\\_really\\_an\\_epidemic](http://www.foreignpolicy.com/articles/2013/07/10/is_sexual_assault_really_an_epidemic) cancer. At a March 2013 Senate hearing, military sexual assault was described as a problem that is, “the equivalent of an IED in every unit in the Armed Force.” *March 2013 Senate Oversight Hearing*, *supra* note 2 at 56.

<sup>15</sup> JOEL BEST, DAMNED LIES AND STATISTICS: UNTANGLING NUMBERS FROM THE MEDIA, POLITICIANS, AND ACTIVISTS 98 (University of California Press 2012) (2001).

<sup>16</sup> “Unwanted sexual contact” could include everything from an attempt to pat a co-worker on the buttocks to rape. DEPT. OF DEFENSE, 2012 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS 1 (2013), available at <http://www.sapr.mil/index.php/annual-reports> [hereinafter 2012 WGRA].

<sup>17</sup> I reject the more cynical explanations advanced by some, namely that: “it is the job of activists to create the perception of a crisis if none really exists, which seems to explain the multi-year goal to convince opinion leaders and policy makers that there is a sexual assault crisis in the military.” U.S. COMM. ON CIVIL RIGHTS, SEXUAL ASSAULT IN THE MILITARY 150 (2013), available at [http://www.usccr.gov/pubs/09242013\\_Statutory\\_Enforcement\\_Report\\_Sexual\\_Assault\\_in\\_the\\_Military.pdf](http://www.usccr.gov/pubs/09242013_Statutory_Enforcement_Report_Sexual_Assault_in_the_Military.pdf) [hereinafter U.S. COMM. ON CIVIL RIGHTS]. One benefit of examining this issue through the lens of behavioral economics is that it allows for all points of view to be explored without questioning the conscious intentions of the proponents of those views.

by non-statistical anecdotes and overconfidence.<sup>18</sup> *Thinking fast* can lead to simplistic or incomplete analyses that create misleading perceptions. Avoiding the systemic errors associated with *thinking fast* is therefore critical to problem framing, which is critical to identifying meaningful solutions.<sup>19</sup> In this regard, even marginally better thinking on the problem of sexual assault could “lead to much more than marginally better results.”<sup>20</sup>

This is an important point: to abjure a crisis is not to abjure the existence of a problem. Sexual assault is a problem in the military, as it is a problem in our society,<sup>21</sup> as it is a problem in *all* societies. It is an especially wicked problem at that.<sup>22</sup> The core argument here is that a recent increase in media and congressional scrutiny of the military’s sexual assault prevention and response efforts does not *ipso facto* transform a broader societal problem into an institutionally specific crisis.<sup>23</sup> To be clear, this is not an argument for the status quo or for the infeasibility of the military justice system; neither is it an academic argument or a case of lexical quibbling. Rather, abjuring a crisis and the prevailing crisis narrative seeks to: (1) reduce the impetus for potentially counterproductive reform;<sup>24</sup> (2) avoid the serious moral hazard associated with over-prosecution, which could result from the military’s efforts at self-correction;<sup>25</sup> and (3) avoid the

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<sup>18</sup> KAHNEMAN, *supra* note 3 at 13 (As will become evident, these errors are manifest on all sides of the debate and are committed both by those with passing and expert knowledge).

<sup>19</sup> “In many scientific problems, the difficulty is to state the question rightly; once that is done, it may almost answer itself.” JACOB BRONOWSKI, *THE COMMON SENSE OF SCIENCE* 1, CHAPTER 5 (Faber & Faber 1978).

<sup>20</sup> RICHARD E. NEUSTADT AND ERNEST R. MAY, *THINKING IN TIME: THE USES OF HISTORY FOR DECISION MAKERS* 31 (Free Press 1986).

<sup>21</sup> White House Council on Women and Girls, *Rape and Sexual Assault: A Renewed Call to Action* (2014), available at [http://www.whitehouse.gov/sites/default/files/docs/sexual\\_assault\\_report\\_1-21-14.pdf](http://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf) (“nearly 1 in 5 women—or nearly 22 million—have been raped in their lifetimes... 1 in 71 men—or almost 1.6 million—have been raped during their lives.”)

<sup>22</sup> “Wicked problems” have been described thusly: “It is hard to say what the problem is, to define it clearly, or to tell where it stops and starts. There is no ‘right’ way to view the problem, no definitive formulation. The way it’s framed will change what the solution appears to be. Someone can always say that the problem is just a symptom of another problem, and that someone will not be wrong. There are many stakeholders, all with their own frames, which they tend to see as exclusively correct. Ask what the problem is and you will get a different answer from each. The problem is interconnected to a lot of other problems; pulling them apart is almost impossible.” Jay Rosen, *Wicked Problems*, in *THIS WILL MAKE YOU SMARTER* 203 (John Brockman ed. 2012).

<sup>23</sup> Instead, the data suggest something that is as true for the DoD as it is for other institutions and society *writ large*, namely: “the [DoD] has a persistent problem and much more work to do in preventing sexual assault in the Armed Forces.” DEPARTMENT OF DEFENSE, *DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY* 13 (2012), available at <http://www.sapr.mil/index.php/annual-reports> [hereinafter *ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY*].

<sup>24</sup> Military officials have indicated Senator Kirsten Gillibrand’s proposal to create an independent office of military lawyers to handle certain offenses, to include sexual assault, would cost, “about \$113 million a year, including the salaries for about 600 attorneys and support staff.” Lolita C. Baldor, *Head of Army warns of cost of military sexual assault plan*, *Military.com*, Nov. 14, 2013, <http://www.military.com/daily-news/2013/11/14/head-of-army-warns-of-cost-of-sexual-assault-plan.html>; Retired Major General Charles Dunlap Jr., former Deputy Judge Advocate General of the Air Force, has also argued, quite persuasively, that Senator Gillibrand’s proposal not only will not work, but may exacerbate the problem. Charles Dunlap Jr., *Top Ten Reasons Sen. Gillibrand’s Bill is the Wrong Solution to Military Sexual Assault* 4 (Nov. 21, 2013) (unpublished comment), available at [http://scholarship.law.duke.edu/faculty\\_scholarship/3153/](http://scholarship.law.duke.edu/faculty_scholarship/3153/).

<sup>25</sup> *E.g.*, Memorandum from the Response systems to Adult Sexual Assault Crimes Panel Role of the Commander Subcommittee, *Initial Assessment of Whether Senior Commanders Should Retain Authority to Refer Cases of Sexual Assault to Courts-Martial* 16 (Jan. 29, 2014), available at <http://www.mccaskill.senate.gov/01302014RSPMemo.pdf>. (“In [fiscal year 2012], courts-martial charges were

insidious harm the crisis narrative causes sexual assault victims, as well as the military's sexual assault prevention and response efforts.

Indeed, it is difficult to imagine a more effective advertisement against the efficacy of the military justice system or the DoD's sexual assault prevention and response program than the "sexual assault crisis" narrative. As Senator Kirsten Gillibrand, a leading proponent of military justice reform, indicated at a hearing in June 2013, "There is no accountability...[b]ecause the trust that any justice will be served has been irreparably broken under the current system, where commanders hold all the cards over whether a case moves forward to prosecution."<sup>26</sup> To the extent this narrative pervades and is believed, sexual assault victims may be left with the decidedly false impression that the system is so irretrievably broken that there is nothing to be gained (as well as much to be lost) by participating in it. Artificially depressed reporting, already a serious problem in the realm of sexual assault, may result.<sup>27</sup> If victims do not report, they are unlikely to receive the care and support they need, and the alleged perpetrators will not be held to account if, in fact, they committed a justiciable offense. In fueling this vicious cycle, crisis' proponents paradoxically harm the victims they seek to protect by undermining the efforts of the thousands of uniformed and civilian professionals dedicated to victim care and a fair and transparent military justice process. *Thinking slow* about sexual assault in the military endeavors to avoid this unnecessary and self-defeating cycle.

It also counsels an appreciation for a difficult reality. There is not, nor will there ever be, an "acceptable level" of sexual assault in the military. At the same time, the notion that any institution, however powerful and centralized, has the singular capability to eradicate a class of crimes that have plagued humanity throughout history appears as implausible as it is ahistorical. Affirmation of this reality is by no means a call to surrender. If the military is given the political and temporal space needed to *think slow* about the problem—as it is currently attempting, on a scale unmatched by any other institution in the United States and perhaps the world—it might just get at a set of evidence-based solutions that produce truly meaningful reductions in the incidence of sexual assault within its ranks.<sup>28</sup> To the extent the fallaciousness of the crisis

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preferred in 68 percent of cases under military jurisdiction where sexual assault allegation were substantiated by investigators, up from 30 percent in [fiscal year 2007]"); U.S. COMM. ON CIVIL RIGHTS, *supra* note 17 at 180 ("Department of Justice figures indicate that military commanders convened about 70% more courts martial for rape or aggravated sexual assault allegations in 2010 than they did in 2009"). These statistics do not necessarily evidence over-prosecution, but do indicate a need to be mindful of it.

<sup>26</sup> Jennifer Steinhauer, *Reports of Military Sexual Assault Rise Sharply*, N.Y. Times, Dec. 7, 2013, *available at* [http://www.nytimes.com/2013/11/07/us/reports-of-military-sexual-assault-rise-sharply.html?\\_r=0](http://www.nytimes.com/2013/11/07/us/reports-of-military-sexual-assault-rise-sharply.html?_r=0).

<sup>27</sup> According to the National Crime Victimization Survey, between 2005-2010, only 36% of rapes or sexual assaults were reported to the police. DEPT. OF JUSTICE, FEMALE VICTIMS OF SEXUAL VIOLENCE 7 (2013), *available at* <http://www.bjs.gov/content/pub/pdf/fvsv9410.pdf>; Gallop, Findings From the 2010 Prevalence/Incidence Survey of Sexual Assault in the Air Force 36-38 (2010), *available at* <http://www.afpc.af.mil/shared/media/document/AFD-110317-008.pdf>.

<sup>28</sup> *E.g.*, DEPT. OF DEFENSE, SEXUAL ASSAULT PREVENTION AND RESPONSE STRATEGIC PLAN (2013), *available at* [http://www.sapr.mil/public/docs/reports/SecDef\\_SAPR\\_Memo\\_Strategy\\_Atch\\_06052013.pdf](http://www.sapr.mil/public/docs/reports/SecDef_SAPR_Memo_Strategy_Atch_06052013.pdf); DEPT. OF DEFENSE, SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM FOUNDATION & INITIATIVES (2013), *available at* [http://sapr.mil/public/docs/news/20131201\\_DoD\\_SAPR\\_Program\\_Foundation\\_and\\_Initiatives.pdf](http://sapr.mil/public/docs/news/20131201_DoD_SAPR_Program_Foundation_and_Initiatives.pdf) (details 16 new initiatives implemented by the Department); David Lisak, Confronting the Reality of Sexual Violence on College Campus, Keynote Address for Emory University's 2013 Women's History Month (Mar. 28, 2013), *available at* [http://www.youtube.com/watch?v=\\_iZCWfYZ9IU](http://www.youtube.com/watch?v=_iZCWfYZ9IU) ("Everybody perceives the military to have this extreme problem—they do have a very bad problem—but you know what, they're also doing a lot more in the area of sexual

narrative is not effectively exposed and rebutted, the potentially counterproductive changes called for by some advocates of military justice reform—whose public outrage will be fueled by the next (and there will be a next) headline-grabbing case seeming to offer facially-dispositive evidence of the military’s failure to address this issue—appear well positioned for passage in the fiscal year 2015 National Defense Authorization Act, if not before.<sup>29</sup> Even in the absence of Congressional reform, the President’s announced deadline of December 1, 2014 for the DoD to show “substantial improvements” in the realm of sexual assault prevention and response and the military justice system, indicates the need to reify the narrative—to move away from the *feeling* of a crisis, toward the *facts* of the problem.<sup>30</sup>

## II. THE AVAILABILITY HEURISTIC

*I wish my experience was unique, but in the last few years of working these issues, and in the hundreds of cases we handle each year on SWAN’s helpline, I have discovered that rape, sexual assault, and sexual harassment are pervasive throughout the military.*<sup>31</sup>

—Anu Bhagwati, *Executive Director,  
Service Women’s Action Network*

*The plural of anecdote is not data, and the plural of opinion is not facts. Quality peer-reviewed scientific evidence accumulates into knowledge. People’s stories are stories, and fiction keeps us going. But science should settle policy.*<sup>32</sup>

—Susan Fisk, *Eugene Higgins Professor of  
Psychology, Princeton University*

The availability heuristic is a mental shortcut in which, “instances of a class will be retrieved from memory, and if retrieval is easy and fluent, the category will be judged to be large.”<sup>33</sup> This mental shortcut, critical to our evolution and survival as a species, continues to impact our individual and collective perceptions of risk. Is it safe to go in the water? Are our children safe at school? Is this produce safe to eat? For those without expert knowledge (which is to say, most of us), the answer to these questions will very likely depend on how easily relevant examples evidencing the danger of the ocean, schools, or produce are brought to mind—“and this is largely determined by the media.”<sup>34</sup> A series of highly publicized shark attacks, school

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assault prevention, and a lot more in terms of training investigators and training their JAG Corps and so forth, than is happening anywhere else, frankly in the world. And there are ways that they are way ahead of us in academia.”)

<sup>29</sup> In the Senate, these military justice reform efforts may have to overcome the 60 vote filibuster threshold in order to move forward to debate. Michael McAuliff, *Claire McCaskill Vows to Filibuster Kirsten Gillibrand’s Military Sexual Assault Bill*, Huffington Post, Feb. 6, 2014, available at

[http://www.huffingtonpost.com/2014/02/06/mccaskill-gillibrand-military-sexual-assault\\_n\\_4739870.html](http://www.huffingtonpost.com/2014/02/06/mccaskill-gillibrand-military-sexual-assault_n_4739870.html).

<sup>30</sup> President Barack Obama, Statement by the President on Eliminating Sexual Assault in the Armed Force, Dec. 20, 2013, <http://www.whitehouse.gov/the-press-office/2013/12/20/statement-president-eliminating-sexual-assault-armed-forces>.

<sup>31</sup> *March 2013 Senate Oversight Hearing*, *supra* note 2 at 9.

<sup>32</sup> Susan Fisk, *An Assertion is Often an Empirical Question, Settled by Collecting Evidence*, in *THIS WILL MAKE YOU SMARTER* 267 (John Brockman ed. 2012).

<sup>33</sup> KAHNEMAN, *supra* note 3 at 129.

<sup>34</sup> *Id.* at 8.

shootings, or outbreaks of foodborne disease color our perception of risk by influencing our beliefs about the prevalence of these risks.<sup>35</sup> The problem with these perceptions is that they may not be supported by objective scientific data.<sup>36</sup> Such data is oftentimes hard to come by and, more problematically, difficult to understand for those not trained to reason carefully from statistics. Even when comprehended, data is rarely as salient to consumers of media or as profitable to its producers as the headlines accompanying the visual of a swimmer with a severed arm, the grieving family of a slain child, or the hospitalized consumer of tainted produce.<sup>37</sup>

In the summer of 2001, for example, the cover of *Time* magazine depicted the gaping jaws of a shark—its razor-sharp teeth trained on the reader—above the headline “Summer of the Shark.”<sup>38</sup> While there had been a number of gruesome attacks on swimmers along the east coast that summer, the perception of a dramatic rise in the incidence of shark attacks nonetheless confounded scientists. As reported in *The New York Times*, “‘It’s been crazy,’ said George H. Burgess, a biologist at the University of Florida who runs the International Shark Attack File of the Florida Museum of Natural History. ‘The basic perception that we’re having an exceptionally sharky year is wrong.’”<sup>39</sup> John Allen Paulos, a math professor at Temple University further indicated that, “vivid television images were overpowering small statistics to produce a false nightmare.”<sup>40</sup> The military’s “sexual assault crisis,” so labeled during the Spring of 2013, is the empirical equivalent to *Time*’s “Year of the Shark”: a false nightmare borne of compelling anecdotes and a decided lack of objectively analyzed scientific data.<sup>41</sup>

The most salient anecdotes tend to be those that are the most facially absurd.<sup>42</sup> In this respect, the case of Air Force Lieutenant Colonel Jeffrey Krusinski could not have been more

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<sup>35</sup> See Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 *Stan. L. Rev.* 683, 685 (1999) (Kuran and Sunstein note, “Cognitive psychologists consider the availability heuristic to be a key determinant of individual judgment and perception. They have demonstrated that the probability assessments we make as individuals are frequently based on the ease with which we can think of relevant examples.”).

<sup>36</sup> According to the Centers for Disease Control and Prevention (CDC), Less than 2% of all homicides among school-age children happen on school grounds or on the way to and from school. Thus, the vast majority of students will never experience lethal violence at school. CENTERS FOR DISEASE CONTROL AND PREVENTION, INDICATORS OF SCHOOL CRIME AND SAFETY: 2012 6 (2013), available at <http://nces.ed.gov/pubs2013/2013036.pdf>. Similarly, our food supply may be safer now than in years past, despite repeated nation-wide recalls of produce linked to illness and death. Andrew Martin and Gardiner Harris, *Outbreaks Put Worry on the Table*, *N.Y. Times*, May 10, 2009, available at <http://www.nytimes.com/2009/05/11/health/11food.html?pagewanted=all> (most public health experts “believe the nation’s food supply is markedly safer now than it was 100 years ago, and probably safer than a decade ago.”).

<sup>37</sup> BARRY GLASSNER, *THE CULTURE OF FEAR, WHY AMERICANS ARE AFRAID OF THE WRONG THINGS: CRIME, DRUGS, MINORITIES, TEEN MOMS, KILLER KIDS, MUTANT MICROBES, PLANE CRASHES, & SO MUCH MORE* 208 (Basic Books 2009) (1999) (“The use of poignant anecdotes in place of scientific evidence” and “the christening of isolated incidents as trends” are indicative of the irrational culture of fear by which some profit.).

<sup>38</sup> *Summer of the Shark*, *TIME*, Jul. 30, 2001, available at <http://content.time.com/time/specials/packages/0,28757,1996186,00.html>.

<sup>39</sup> William J. Broad, *Scientists Say Frenzy Over Shark Attacks Is Unwarranted*, *N.Y. Times*, Sep. 5, 2001, available at <http://www.nytimes.com/2001/09/05/us/scientists-say-frenzy-over-shark-attacks-is-unwarranted.html>.

<sup>40</sup> *Id.*

<sup>41</sup> U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 17 at 157 (“anecdotes are substituted for objective data”).

<sup>42</sup> The most salient cases, whether atypical or not, are often seized on by advocates of reform. Indeed, “they pick these cases because they are not typical, but are especially dramatic and arouse our shock, horror, anger, or outrage.... However, advocates may talk about these cases as though they are somehow typical, representative of a larger problem.” BEST, *supra* note 15 at 56.

salient or poorly timed.<sup>43</sup> Krusinski, who was assigned to the Pentagon and reported to be head of the Air Force's sexual assault prevention branch, was alleged to have sexually assaulted a woman by grabbing her breasts and buttocks outside a bar in Arlington, Virginia in May of 2013.<sup>44</sup> His arrest came just two days before the release of the DoD's Annual Report on Sexual Assault in the Military to Congress, which noted an overall increase in the estimated number of victims of unwanted sexual contact between fiscal years 2010 and 2012.<sup>45</sup> An Arlington jury ultimately acquitted Krusinski on a reduced charge of simple assault.<sup>46</sup> At the time of his arrest, however, the case garnered national media attention and became a matter of congressional committee scrutiny. The chairman of the Senate Armed Services Committee said of the arrest, "[it] speaks volumes about the status and effectiveness of the department's efforts to address the plague of sexual assaults in the military."<sup>47</sup> Without question, it is difficult to imagine a factual scenario that, by all outward appearances, so thoroughly de-legitimizes the DoD's efforts at sexual assault prevention and response. Certainly, if those charged with preventing sexual assault in the military are they themselves accused of committing it, then how acute must the problem be? It follows that the attention and scrutiny the case garnered is not at all surprising.

The same might be said for the case against Air Force Lieutenant Colonel James H. Wilkerson III. In the Fall of 2012, at a court-martial convened at Aviano Air Base, Italy, a panel of members (akin to a civilian jury) found Wilkerson guilty of, *inter alia*: sexual assault (digital penetration of the victim's vagina while she was substantially incapable of appraising the nature of the sexual act) and abusive sexual contact (fondling the victim's breasts while she was substantially incapable of appraising the nature of the sexual contact).<sup>48</sup> He was sentenced to a dismissal from the service and confinement for one year.<sup>49</sup> The attention and scrutiny the case garnered sprang from what happened next: in February 2013, Lieutenant General Craig A. Franklin, who as the Third Air Force Commander had convened Wilkerson's court-martial, disapproved the findings of guilt and the sentence.<sup>50</sup> As a result, Wilkerson was released from

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<sup>43</sup> Like the ubiquitous "strategic corporal" discussed in all professional military education settings, the impolitic acts of one individual can have a strategic (that is, disproportionate) impacts on domestic political-military relations and, in some instances, foreign relations.

<sup>44</sup> Matthew Barakat, *Sexual Battery Charge Dropped for Jeffrey Krusinski, Leader of Military Sexual Response Unit*, The Huffington Post, Jul. 18, 2013, available at [http://www.huffingtonpost.com/2013/07/18/jeffrey-krusinski-charge-dropped\\_n\\_3618658.html](http://www.huffingtonpost.com/2013/07/18/jeffrey-krusinski-charge-dropped_n_3618658.html).

<sup>45</sup> Chris Good, *Air Force Lt. Col. Jeffrey Krusinski Mum After Court on Sexual Battery Case*, ABC News, May 9, 2013, <http://abcnews.go.com/blogs/politics/2013/05/air-force-lt-col-jeffrey-krusinski-mum-after-court-on-sexual-battery-case/>.

<sup>46</sup> Rachel Weiner and Matt Zaposky, *Air Force colonel acquitted in sexual assault case*, Wash. Post, Nov. 13, 2013, available at [http://www.washingtonpost.com/local/crime/jeffrey-krusinski-air-force-colonel-accused-of-assault-goes-on-trial-in-arlington/2013/11/13/04aa0dfa-4c9f-11e3-ac54-aa84301ced81\\_story.html](http://www.washingtonpost.com/local/crime/jeffrey-krusinski-air-force-colonel-accused-of-assault-goes-on-trial-in-arlington/2013/11/13/04aa0dfa-4c9f-11e3-ac54-aa84301ced81_story.html). Note, civilian authorities had jurisdiction in the case because the alleged offense occurred "off-installation." The Air Force requested jurisdiction, but Arlington County declined the request and pushed forward with its own prosecution. This is not an uncommon occurrence. Indeed, "[i]n a number of cases each year, a civilian authority or host nation will assert its legal authority over a Service member. This typically occurs when Service members are accused of sexually assaulting a civilian or foreign national." ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, *supra* note 23 at 53.

<sup>47</sup> *The Military's Sexual Assault Crisis*, *supra* note 10.

<sup>48</sup> Record of Trial: U.S. v. Wilkerson, General Court-Martial Order No. 10, available at <http://www.foia.af.mil/shared/media/document/AFD-130403-023.pdf>.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

confinement and returned to duty, *status quo ante*. Lieutenant General Franklin was authorized under Article 60 of the Uniform Code of Military Justice (UCMJ) to take this action and reportedly did so because, “after considering all in the entire record of trial, [he held] a genuine and reasonable doubt that Lt Col Wilkerson committed the crime of sexual assault.”<sup>51</sup> Criticism of the decision was swift. Nancy Parrish, president of Protect Our Defenders, said, “It’s a system full of command bias and conflict of interest...[u]ntil you remove inherent bias and conflicts of interest, justice will not be served.”<sup>52</sup> Appearing before a senate subcommittee a few weeks later, Anu Bhagwati, executive director of the Service Member’s Action Network (SWAN) noted, “I mean, you have two pilots. There is the appearance of impropriety even without looking at the facts of the case. That is typical in every unit throughout the armed services.”<sup>53</sup>

The availability heuristic might lead some to believe that there is a “sexual assault crisis” or that the military justice system is “broken” because of how easily these examples and others are brought to mind. Yet this belief draws too much from too little. Just as a rise in media reports of gruesome shark attacks does not evidence a concomitant rise in the risk posed by sharks, neither does an increase in media reports concerning sexual assault in the military evidence a concomitant rise in the risk of sexual predation in the military.<sup>54</sup> Neither does it evidence a broken system. Indeed, *the plural of anecdote is not data*. That reporting on the Krusinski and Wilkerson cases—as well as the Naval Academy “gang rape” case and the Lackland Military Training Instructor cases—was temporally linked to the release of data relating to military sexual assault (*i.e.*, the alarming 26,000 figure) undoubtedly made these anecdotes more salient than they otherwise would have been.<sup>55</sup> But, salience is not synonymous with representativeness. In order to derive broader conclusions from individual cases, each case must be examined in the context of all relevant and available data.<sup>56</sup> Rather than “speaking volumes” or being “typical in every unit throughout the armed services,” these anecdotes are more appropriately viewed as data points within a larger data set.

As the Krusinski case resulted in an acquittal by a civilian jury, it arguably tells us very little about the sexual assault problem. There is certainly no evidence to suggest that those specifically charged with preventing and responding to sexual assault in the military are routinely accused of committing it. It appears instead that this case was highly atypical.<sup>57</sup> The

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<sup>51</sup> Memorandum from Lieutenant General Craig A. Franklin to Secretary of the Air Force Michael B. Donley, Mar. 12, 2013, *available at* <http://www.foia.af.mil/shared/media/document/AFD-130403-022.pdf>.

<sup>52</sup> Nancy Montgomery, *Case dismissed against Aviano IG convicted of sexual assault*, Stars & Stripes, Feb. 27, 2013, *available at* <http://www.stripes.com/news/air-force/case-dismissed-against-aviano-ig-convicted-of-sexual-assault-1.209797>.

<sup>53</sup> *March 2013 Senate Oversight Hearing*, *supra* note 2 at 20.

<sup>54</sup> Indeed, “[t]he world in our heads is not a precise replica of reality; our experience about the frequency of events are distorted by the prevalence and emotional intensity of the message to which we are exposed.” KAHNEMAN, *supra* note 3 at 138.

<sup>55</sup> BEST, *supra* note 15 at 59-61 (This treatment follows a common pattern in media reporting on social statistics: a “big number” is reported along with a few anecdotes. This can be misleading, however, as it generally lacks the analysis that would allow a reader to understand what the “big number” actually means. Indeed, a reader may conclude that the 26,000 number is made up largely of people sexually assaulted by those entrusted to support sexual assault victims or, perhaps, of “gang rape” victims.)

<sup>56</sup> KAHNEMAN, *supra* note 3 at 77.

<sup>57</sup> While atypical, this was not an isolated incident. Tom Vanden Brook, *Suspect in Fort Hood prostitution ring identified*, USA Today, May 16, 2013, *available at*

Wilkerson case too appears to be an outlier. Indeed, there is a growing body of evidence suggesting that senior military commanders prosecute sexual assault cases more aggressively than their civilian counterparts, who *are* attorneys, and thus are bound by a more restrictive set of ethical and prosecutorial standards.<sup>58</sup> As Senator Claire McCaskill and Congresswoman Loretta Sanchez indicated in an August 2013 commentary published in *USA Today*,

[W]e've dug into the hard data surrounding these crimes. Supporters of the proposal to strip commanders of their responsibilities promise that their approach will lead to an increase in reporting and prosecutions. But in just the past two years, we found 93 cases of rape and sexual assault that prosecutors declined to prosecute, which were then referred to court martial by commanders. That's 93 victims who had their day in court because commanders, not prosecutors, had the ability to refer cases for court martial.<sup>59</sup>

Rather than being “soft” on these crimes, this suggests senior military commanders have a bias toward prosecution, rather than against it. Additionally, over the last five years, Air Force commanders like Lieutenant General Franklin have overturned courts-martial convictions in only 40 of 3,713 cases (1.1%)—with more than half of these occurring in cases involving guilty findings on minor offenses alone (*e.g.*, underage drinking, false official statements, dereliction of duty).<sup>60</sup> These facts, among others, undoubtedly influenced the assessment of the independent and bi-partisan Role of the Commander Subcommittee of the Response Systems to Adult Sexual Assault Panel, established by the Secretary of Defense pursuant to the 2013 National Defense Authorization Act.<sup>61</sup> This group of experts, which received testimony from 170 presenters on all sides of the sexual assault issue over 16 days of hearings, held:

Based on all information considered to this point, a strong majority of Subcommittee members agrees the evidence does not support a conclusion that removing authority to convene courts-martial from senior commanders will reduce the incidence of sexual assault or increase reporting of sexual assaults in the Armed Forces. Nor does the evidence indicate it will improve the quality of investigations and prosecutions or increase the conviction rate in these cases. Further, the evidence does not support a conclusion that removing such authority will increase confidence among victims of sexual assault about the fairness of the military justice system or reduce their concerns about possible reprisal for making reports of sexual assault. As a result, the Subcommittee's assessment at this time is that the authority vested in senior commanders to

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<http://www.usatoday.com/story/news/nation/2013/05/15/mcqueen-suspect-fort-hood-prostitution-ring/2163045/> (Sgt. 1st Class Gregory McQueen, a sexual abuse educator at Fort Hood in Texas, allegedly ran a small-time prostitution ring and sexually assaulted another soldier).

<sup>58</sup> *E.g.*, Dunlap, *supra* note 24 at 4; U.S. COMM. ON CIVIL RIGHTS, *supra* note 17 at 175 (“The military services prosecute many types of sexual assault cases that civilian prosecutors chose not to pursue.”).

<sup>59</sup> Claire McCaskill and Loretta Sanchez, *Commanders must fight sexual assault in the military*, USA Today, Aug. 29, 2013, available at <http://www.usatoday.com/story/opinion/2013/08/29/women-congress-sexual-assault-column/2725081/>.

<sup>60</sup> Talking Points, U.S. Air Force, Information relating to the commander's role in securing good order and discipline (undated) (on file with author).

<sup>61</sup> “The Secretary of Defense, as required by Section 576(a)(1) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239) and in accordance with the Federal Advisory Committee Act of 1972 (FACA) (5 U.S.C., Appendix, as amended) and 41 C.F.R. Section 102-3.50(a), established the Response Systems Panel. The Response Systems Panel will conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses, under Section 920 of title 10, U.S.C. (Article 120, Uniform Code of Military Justice), for the purpose of developing recommendations regarding how to improve the effectiveness of such systems.” Response Systems to Adult Sexual Assault Crimes Panel, <http://responsesystemspanel.whs.mil/> (last visited Jan. 31, 2014).

convene courts-martial under the Uniform Code of Military Justice (UCMJ) for sexual assault offenses should not be changed.<sup>62</sup>

Finally, while there is no evidence to suggest that Lieutenant General Franklin knew Wilkerson (though, according to Wilkerson, the two had “flown together” once in Iraq<sup>63</sup>), the notion that perceived fealty through acquaintance is *per se* evidence of bias or a conflict of interest ignores the reality that civilian district attorneys and prosecutors, particularly those in small towns, often know the accused, the accuser, or the witnesses in the criminal actions they pursue.<sup>64</sup> In other words, these critics of the military justice system have identified an institutional condition that is in no way unique to the military, nor perceived to be a problem (much less a “crisis”) in the civilian community. Understanding what anecdotes do and do not represent is the essence of statistical reasoning and the surest means of avoiding systemic errors. But this is not how our mind, prone as it is to leaping to conclusions, tends to interpret these anecdotes.<sup>65</sup>

Data obtained through careful scientific inquiry over time holds out the best hope for getting at the truth of this problem—to include its scope, as well as its dependent and independent variables.<sup>66</sup> This is true irrespective of one’s ideology or position on the issue. So just as the cases involving Lieutenant Colonel Krusinski or Lieutenant Colonel Wilkerson do not, without more, offer the evidentiary antecedents to military justice reform, neither do acquittals or cases calling into question the veracity of the accuser, offer the evidentiary antecedents to maintaining the status quo.<sup>67</sup> The solipsism of competing anecdotes is not simply unhelpful, it is

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<sup>62</sup> Memorandum from the Response systems to Adult Sexual Assault Crimes Panel Role of the Commander Subcommittee, *supra* note 25 at 1.

<sup>63</sup> Matters in Clemency Submitted in U.S. v. Wilkerson 44, *available at* <http://www.foia.af.mil/shared/media/document/AFD-130404-223.pdf> (Lieutenant General Franklin and Wilkerson were both F-16 pilots. The F-16 is, with the exception of one variant, a single seat fighter aircraft. Thus, the phrase “flown together” should not be construed to mean the two were ever in the same aircraft at the same time.)

<sup>64</sup> As the prosecutor in the Steubenville case notes, “It’s not the law that every time I know somebody involved in a case I have to step aside. We’re a very small community. I rarely if ever prosecute a case where I don’t know the defendant, the witnesses, the law enforcement officers.” Levey, *supra* note 5 at 42-3. This is in keeping with the National District Attorneys Association, National Prosecution Standards, which indicate, “The prosecutor should excuse himself or herself from any investigation, prosecution, or other matter where personal interests of the prosecutor would cause a fair-minded, objective observer to conclude that the prosecutor’s neutrality, judgment, or ability to administer the law in an objective manner may be compromised.” NATIONAL PROSECUTION STANDARDS, STANDARD 1-3.3.d. (3rd. Ed.), *available at* <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>. This is clearly a narrower standard than that advanced by Ms. Bhagwati and others, which would require commanders who are court-martial convening authorities to recuse themselves in any case in which the parties are known to him or her.

<sup>65</sup> KAHNEMAN, *supra* note 3 at 85.

<sup>66</sup> “A random event, by definition, does not lend itself to explanation, but collections of random events do behave in a highly regular fashion.” *Id.* at 110. Moreover, “the [DoD] may benefit from greater data collection to better understand trends in sexual assault cases and to implement improvements in future initiatives.” U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 17 at v.

<sup>67</sup> Hope Hodge Seck, *Sex assault and the pressure to prosecute: why some Marines fear justice is no longer blind*, Marine Corps Times, Feb. 17, 2014, *available at* <http://www.marinecorpstimes.com/article/20140217/NEWS/302170007/Sex-assault-pressure-prosecute-why-some-Marines-fear-justice-no-longer-blind> (“Almost two years have passed since Capt. Nicholas Stewart was exonerated by a military appeals court that ruled his rape conviction was unconstitutional, but he’s still fighting the system to regain what he lost.”); While involving military contractors as opposed to uniformed personnel, the case of Jamie Lee Jones, a KBR contractor who alleged (falsely, by all accounts) that she was raped by a fellow contractor in

damaging to victims of sexual assault. As Dr. David Lisek has pointed out, “[i]n the emotionally charged public discourse about sexual violence, it is often the case that assertions are made without reference to research data. Such assertions not only undermine rational discourse but also damage individual victims of sexual violence.”<sup>68</sup> Whether it is a criminal investigator who believes, contrary to evidence, that victims routinely fabricate sexual assault allegations or a victim rights advocate who believes, contrary to evidence, the military justice system is broken, sexual assault victims are the ones made to suffer.

### III. WHAT YOU SEE IS ALL THERE IS (WYSIATI)

*Well, we don't know the numbers, but I can tell you we hear it all the time.*<sup>69</sup>

—Nancy Parrish, *President, Protect Our Defenders*

*...[A]n essential finding of cognitive psychology: as individuals, we are capable of developing and retaining beliefs that are scientifically unjustified and even unjustifiable.*<sup>70</sup>

—Timur Kuran, *Professor of Economics, University of Southern California* and Cass R. Sunstein, *Professor of Law, University of Chicago*

Another curious feature of the mind is that, “it is radically insensitive to both the quality and the quantity of the information that gives rise to impressions and intuitions.”<sup>71</sup> The presentation of one-sided evidence not only has a pronounced effect on our judgments, it actually increases our confidence in those judgments.<sup>72</sup> Kahneman has described this as, “what you see is all there is” (WYSIATI). Who, for example, did not immediately leap to conclusions about the merits of the infamous McDonald’s hot coffee case when reports of the multi-million dollar civil judgment first aired? Based on the one-sided and factually incorrect evidence offered by the media, the suit *appeared* wholly frivolous—and even one of the jurors who ultimately found in favor of the elderly plaintiff admitted that before she heard the evidence, she believed “it was a ridiculous lawsuit.”<sup>73</sup> Similarly, Mai Fernandez, Executive Director of the National Center for

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Baghdad’s Green Zone and later held in a shipping container against her will by company employees, offers a compelling example of how these case do not always resolve as one might have expect. Stephanie Mencimer, *What Happened to Jamie Leigh Jones in Iraq?* WASHINGTON MONTHLY (Nov./Dec. 2013), available at [http://www.washingtonmonthly.com/magazine/november\\_december\\_2013/features/the\\_war\\_of\\_rape047355.php?page=all](http://www.washingtonmonthly.com/magazine/november_december_2013/features/the_war_of_rape047355.php?page=all) (Mencimer, who had covered the Jamie Leigh Jones case for a number of years, in a rare and commendable journalistic *mea culpa*, lamented, “[the case] represented an epic media failure, and one that could have been avoided if reporters—myself included—had heeded some of the early warning signs.” She continued, “The trial record was so at odds with Jones’ public story that I was simply dumbfounded.”).

<sup>68</sup> David Lisek *et al.*, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases* 1331, Symposium on False Allegations of Rape (2010), available at <http://www.icdv.idaho.gov/conference/handouts/False-Allegations.pdf>.

<sup>69</sup> *March 2013 Senate Oversight Hearing*, *supra* note 2 at 135.

<sup>70</sup> Kuran & Sunstein, *supra* note 35 at 704.

<sup>71</sup> KAHNEMAN, *supra* note 3 at 86.

<sup>72</sup> *Id.* at 87.

<sup>73</sup> *Quoted in* Robert A. Prentice, *Behavioral Economics Applied: Loss Causation*, 44 LOY. U. CHI. L.J. 1509, 1558 (2013).

Victims of Crime, originally supported the move to strip senior military commanders of their authority to convene courts-martial in sexual assault cases, but changed her mind upon hearing the evidence, indicating: “I went into this thinking [the legislation] made sense. I’m a prosecutor; I wanted to go with that. But when you hear the facts, it doesn’t hold up.”<sup>74</sup> A de-contextualized conception of reality—or WYSIATI—undoubtedly brings a useful degree of coherence to our thoughts and lives, but it also facilitates uniformed judgments.<sup>75</sup> The 2012 Academy Award-nominated documentary *The Invisible War* offers a vivid example of this phenomenon in action.

The film—which was cited twelve times during a June 2013 Senate hearing<sup>76</sup>—weaves a narrative of institutional indifference and ineptitude through the painfully personal accounts of a number of purported victims of military sexual assault. It also offers a paradox: at once heralded by the staunchest advocates for reform as dispositive evidence of the military’s failure in the realm of sexual assault prevention and response, it has been embraced by the DoD and is repeatedly screened at the Pentagon, at Commander’s Conferences, and military installations around the world.<sup>77</sup> To be sure, *The Invisible War* is a compelling piece of advocacy journalism—which is to say it is not journalism.<sup>78</sup> This is not to suggest that no good can come from it. If the film persuades more victims of sexual assault to come forward and forces the military to “deal more openly with the problem,” it will have produced some positive outcomes.<sup>79</sup> At the same time, it is folly to ignore the film’s broader advocacy agenda and the journalistically imprecise means the filmmakers employed in seeking to achieve it.

*The Invisible War* was produced for the purpose of influencing legislation related to the *Feres* doctrine, which blocks military sexual assault victims from seeking monetary redress in civil courts (note, the DoD does not support reform of the *Feres* doctrine).<sup>80</sup> The filmmakers make no secret of this fact—their motive is implicit throughout the documentary and made

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<sup>74</sup> Patricia Kime, *Panel: Commanders should retain authority in sex assault cases*, Mil. Times, Jan. 30, 2014, available at <http://www.militarytimes.com/article/20140130/NEWS05/301300023/Panel-Commanders-should-retain-authority-sex-assault-cases>.

<sup>75</sup> Lawyers tend to be acutely aware of this cognitive trap and thus a group of distinguished law professors recently called on Congress to seat “more balanced panels” at future hearings on military sexual assault. Richard L. Abel *et al.*, *Law Professors’ Statement on Reform of Military Justice 2*, Jun 7, 2013, available at <http://www.caaflog.com/wp-content/uploads/Law-Professors-Statement.pdf>. To date, those hearings have included both victims and victim support organizations, but excluded the defense bar or anyone speaking on behalf of those accused of sexual assault. Historically, this constituency has played an important role in ensuring both the fairness and efficacy of the military justice system and should not be excluded from the current debate.

<sup>76</sup> *June 2013 Senate Oversight Hearing*, *supra* note 1.

<sup>77</sup> *Id.* at 96, 101.

<sup>78</sup> The film has also been described by one military justice expert as, “[u]niformed, dishonest, or both?” Dwight Sullivan, “*The Invisible War*: uniformed, dishonest, or both?”, CAAFlog, Jul. 11, 2012, <http://www.caaflog.com/2012/07/11/invisible-war-uniformed-dishonest-or-both/>.

<sup>79</sup> James Risen, *Air Force Leaders Testify on Culture That Led to Sexual Assaults of Recruits*, N.Y. Times, Jan. 23, 2013, available at <http://www.nytimes.com/2013/01/24/us/air-force-leaders-testify-on-culture-that-led-to-sexual-assaults-of-recruits.html>.

<sup>80</sup> *Feres v. U.S.*, 340 U.S. 135 (1950); “Support for the *Feres* doctrine is largely confined to the Department of Defense...The Obama Administration has not taken a public position on the issue.” H. Rep. No. 111-466 (2010), available at <http://www.gpo.gov/fdsys/pkg/CRPT-111hrpt466/html/CRPT-111hrpt466.htm>.

explicit at its conclusion.<sup>81</sup> As the film’s director stated during a February 2013 PBS NewsHour interview,

[The Invisible War] was made for two audiences. One was for the filmmaking audience...but it was also made for policymakers in Washington D.C.... Cut by cut we’d be thinking, this will play to an audience, but maybe in this case we want it to play a little bit more to a policymaker because when we were doing these interviews—and they were just devastating—we sort of had this commitment really to make a film that would change this so that men and women in the future wouldn’t be assaulted in our military.<sup>82</sup>

Indeed, the details conveyed and those not conveyed, the camera work, the editing, and the music are all marshaled into a narrative intended to change public policy. It is not surprising then that any fact or perspective that cuts against or otherwise undermines this narrative is absent from the film. What is surprising—and troubling from a public policy perspective—is that this one-sided account of the problem is likely having a more pronounced effect on the judgment of law- and policy-makers than more contextualized accounts. WYSIATI is a powerful political tool—which, in turn, makes *The Invisible War* a powerful political tool. This might help to explain why Senator Gillibrand has reportedly “handed out scores of copies” of it.<sup>83</sup>

None of this is to suggest that the heartrending accounts of sexual assault victims and victim advocacy groups should not remain a focus of both the relevant congressional oversight committees and DoD leadership. It is only to suggest that law- and policy-makers actively seek out a balanced accounting of this complex issue in order to counter the unseen effects of WYSIATI. Indeed, judging the military’s response to sexual assault based solely on the feedback of those seeking the counsel or support of victim’s groups is the empirical equivalent to judging the state of institutional medicine based on the feedback of those who have filed suit for medical malpractice. Just as satisfied patients do not seek the services of a lawyer, neither do those satisfied with the institutional response to their sexual assault allegation seek the services of victim advocacy groups. To the extent one’s views are shaped principally by interactions with these groups and their clients, they are likely to be biased against the institution that purportedly failed these clients. *Thinking slow* simply counsels for recognition and avoidance of this potential cognitive trap.

While the accounts of dissatisfied individuals are unquestionably useful for purposes of restorative justice, as well as for improving underlying conditions, they are also “nonrandom” (*i.e.*, statistically unrepresentative).<sup>84</sup> As a result, they do not necessarily evidence an

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<sup>81</sup> The website for the film also evidences its reform agenda, calling on viewers to “demand change,” “host a screening,” “join the conversation,” or “donate.” The Invisible War Website, <http://www.notinvisible.org/> (last visited Jan. 29, 2014); PBS NewsHour, ‘Invisible War’ Reveals Culture of Military Sexual Assault, Feb. 18, 2013, available at <https://www.youtube.com/watch?v=TYg1dVzEKKg> (The film’s director further stated, “What [the military] absolutely [has] to do is to take the decision to investigate and prosecute these crimes out of the chain of command. The military is fighting very hard on this, but this is something that would actually improve the process of investigation and prosecution and would remove a conflict of interest. That’s really the next step.”)

<sup>82</sup> PBS NewsHour, *supra* note 81.

<sup>83</sup> Jennifer Steinhauer, *2 Democrats Split on Tactics to Fight Military Sex Assaults*, N.Y. Times, Nov. 1, 2013, available at <http://www.nytimes.com/2013/11/02/us/politics/2-democrats-split-on-tactics-to-fight-military-sex-assaults.html>.

<sup>84</sup> BEST, *supra* note 15 at 52-54.

institutional failure, even in aggregate.<sup>85</sup> For example, the stories of the 50 purported victims of military sexual assault interviewed by the producers of *The Invisible War*, some of whom were reportedly victimized decades ago, may not be representative or reflective of current institutional conditions.<sup>86</sup> Rather, and like the anecdotes discussed in the last section, these individual accounts must be examined and measured in the context of all relevant and available data. As in the case of the availability heuristic, salience is not synonymous with representativeness.

Effectuating a full and fair accounting of the military's sexual assault problem presents many challenges. These challenges range from arguments by emotion (*pathos*) to arguments by logic (*logos*).

#### A. Pathos

*I think it's much more of an emotional issue. And people will be drawn into it more and more over time because their constituents demand it.*<sup>87</sup>

—Kirsten Gillibrand, *United States Senator, New York*

*The reason this issue is so hard is because on one side is a very simple narrative, this is victim versus commanders and you should be for the victims. On the other side, it's much more complex...*<sup>88</sup>

—Claire McCaskill, *United States Senator, Missouri*

The emotional and painfully personal accounts of sexual assault victims—their faces, their voices—inscribe on the memory in ways that no countervailing statistic or impersonal account of military leadership can.<sup>89</sup> The dilemma is not unlike that faced by those in the military advocating for the continued relevance of nuclear weaponry. As the strategist Colin Gray has pointed out, “episodes of successful deterrence are recorded in the blank pages of history books.”<sup>90</sup> Similarly, the voices of those who are reasonably satisfied with the military's

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<sup>85</sup> A large sample should not be mistaken for a representative sample. *Id.* at 71.

<sup>86</sup> PBS NewsHour, *supra* note 81.

<sup>87</sup> Anna Palmenr and Darren Samuelsohn, *Sexual Assault issue not resonating politically*, POLITICO, Nov. 10, 2013, available at <http://www.politico.com/story/2013/11/military-sexual-assault-chain-of-command-99644.html>.

<sup>88</sup> Donna Cassata, *The Big Story: Senate showdown over military sexual assault bill*, Associated Press, Nov. 17, 2013, available at <http://bigstory.ap.org/article/senate-showdown-over-military-sexual-assault-bill>.

<sup>89</sup> There are both psychological and physiological aspects to this, though the two are undoubtedly interrelated. On the psychological aspect, Kuran and Sunstein note, “salient or vivid information makes a far greater impression than dry or statistical information.” Kuran & Sunstein, *supra* note 35 at 14. In addition, Kahneman notes, “[t]he dominance of conclusion over arguments is most pronounced where emotions are involved.” KAHNEMAN, *supra* note 3 at 103. On the physiological aspect, Stanford Neuroscientist Robert Sapolsky writes, “[a]s social primates complete with a region of the cortex specialized for face recognition, we find the individual face—whether literal or metaphorical—has special power. But unappealing, unintuitive patterns of statistics and variation generally teach us much more.” Robert Sapolsky, *Anecdotalism*, in THIS WILL MAKE YOU SMARTER 280 (John Brockman ed. 2012).

<sup>90</sup> COLIN S. GRAY, MAINTAINING EFFECTIVE DETERRENCE 1 (U.S. Army War College, Strategic Studies Institute 2003), available at <http://www.strategicstudiesinstitute.army.mil/pdffiles/pub211.pdf>.

response to their sexual assault allegation or believe that justice was done in their case are recorded on the empty pages of the Congressional Record, newspapers, and blogs.<sup>91</sup> Military leaders, in attempting to answer charges of indifference and ineptitude in the realm of sexual assault, are thus resigned to arguing counterfactuals or impersonal statistics.<sup>92</sup> It follows that institutional successes are rarely, if ever, as salient as perceived institutional failures. This presents a formidable challenge to injecting a degree of balance into the discourse. So too does the military's own rhetoric.

More than two millennia ago, the Athenian general Thucydides recorded for posterity the lament of one Diodotus,

[Nations] and individuals alike, are by nature disposed to do wrong, and there is not a law that will ever prevent it, as shown by the fact that men have tried every kind of punishment, constantly adding to the list, in the attempt to find greater security from criminals.... Even with the [death penalty], the laws are still broken. Either, therefore, we must discover some fear more potent than the fear of death, or we must admit that here certainly we have not got an adequate deterrent.<sup>93</sup>

While our modern understanding of nature is undoubtedly more sophisticated than Thucydides, Diodotus, or any of their contemporaries could ever have imagined, the essential truth remains: we have yet to discover an adequate deterrent to crime. The military readily accepts this viewpoint as it pertains to nations and war, recognizing and defining the nature of geopolitics in rather static realist terms;<sup>94</sup> yet it seems to view the nature of individuals and crime as something quite different. This view is evident in the rhetoric of senior leaders, which routinely employs terms like eradication, elimination, zero incidents, and zero tolerance in relation to sexual assault.<sup>95</sup> These are noble and unquestionably well-intentioned goals—reflecting both the

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<sup>91</sup> As one commentator notes, “Good news—especially on a topic like sexual assault—is boring.” U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 17 at 172.

<sup>92</sup> 2012 WGRA, *supra* note 16 at 88 (for example, only 16% of survey respondents were unsatisfied with the quality of sexual assault advocacy services they received). To its great credit, the Response Systems Panel received testimony from those who were satisfied with the manner in which their cases were handled by the military justice system. Memorandum from the Response systems to Adult Sexual Assault Crimes Panel Role of the Commander Subcommittee, *supra* note 25 at 7.

<sup>93</sup> THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR (Rex Warner trans., Penguin Books 1954) 220.

<sup>94</sup> E.g., DEPT. OF DEFENSE, THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA (2011), available at [http://www.jcs.mil/content/files/2011-02/020811084800\\_2011\\_NMS\\_-\\_08\\_FEB\\_2011.pdf](http://www.jcs.mil/content/files/2011-02/020811084800_2011_NMS_-_08_FEB_2011.pdf).

<sup>95</sup> E.g., Jim Garamone, *Report Helps Military Deal with Sexual Assault Problem*, American Forces Press Service, May 7, 2013, available at <http://www.defense.gov/news/newsarticle.aspx?id=119957> (Major General Gary S. Patton, then head of the DoD Sexual Assault Prevention and Response Office, said, “Current programs and training are laying the foundation for the culture change required to eradicate sexual assault from the military”); Statement by Secretary of Defense Chuck Hagel on Sexual Assault Prevention and Response (2013), <http://www.defense.gov/releases/release.aspx?releaseid=16443> (“Eliminating sexual assault in the military is one of the Department of Defense's highest priorities.”); Maria Yager, #SAAM: *Navy Sets Zero Tolerance for Sexual Assault*, Apr. 4, 2012, available at [http://www.navy.mil/submit/display.asp?story\\_id=66278](http://www.navy.mil/submit/display.asp?story_id=66278) (Vice Admiral Scott Van Buskirk, Chief of Naval Personnel said, “We can get this right in our service. We can set the example of what is really acceptable behavior; what is a good professional command climate, how we set the right environment for the right behavior to occur and we can really get to a zero incidence”); Allana Jones, *Goal set at zero for number of sexual assaults*, Apr. 4, 2013, available at <http://www.keesler.af.mil/news/story.asp?id=123343003> (Air Force Chief of Staff General Mark A. Welsh III stated, “The Air Force goal for sexual assault is not simply to lower the number. The goal is zero. It's the only acceptable objective. The impact on every victim, their friends [and] other people in their unit is heart-wrenching. Attacking this cancer is a full-time job, and we are giving it our full attention.”)

military's "can do" attitude and its commitment to combating sexual assault within its ranks. At the same time, if one accepts the Thucydian view on the nature of crime and the current lack of an adequate deterrent, they are not achievable.<sup>96</sup> Setting unachievable goals—that is to say, overestimating our ability to deter crime—assures sub-optimal results and may, in fact, exacerbate the problem.

To this point, another analogy to the nuclear weapons community is instructive. In January 2014, 92 Air Force missileers were decertified and temporarily relieved of their duties as a result of a proficiency exam cheating investigation.<sup>97</sup> In response to the investigation, Air Force Secretary Deborah Lee James stated, "I believe that a very terrible irony in this whole situation is that these missileers didn't cheat to pass, they cheated because they felt driven to get 100 percent."<sup>98</sup> *The New York Times* reported, "she appeared to take military commanders to task for not only insisting on 100 percent test scores, but for using that as a sole basis for promoting missileers."<sup>99</sup> Secretary James further indicated, "The need for perfection has created a climate of undue stress and fear....This is not a healthy environment."<sup>100</sup> This situation encapsulates the concerns of the defense bar, which envisions an equally punitive response by commanders within the increasingly uncompromising realm of sexual assault prevention and response. As one defense attorney offered in testimony before the U.S. Commission on Civil Rights,

The military way is that if the command wants more [sexual assault] reports, they will get those reports, one way or another even if those reports are not accurate. No institution is more single minded in its pursuit of a goal than the armed forces. . . . When those in charge express the "desire" to see something done, it will be done, often without regard for the collateral damage. That is the current approach that we are seeing with regard to sexual assault in the military. Those who would rather not report are being pressured to do so.<sup>101</sup>

In short, the employment of terms like eradication, elimination, zero incidents, and zero tolerance—each of which imply that the standard is perfection—has the potential to create the same type of "unhealthy environment" in the sexual assault prevention and response community that Secretary James identified in the missileer community.<sup>102</sup> To the extent this type of

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<sup>96</sup> That we have yet to identify an adequate deterrent is evident in the sexual assault prevention technique currently showing the most promise in combating sexual assault: bystander intervention training. See Sharyn J. Potter & Jane G. Stapleton, *Translating Sexual Assault Prevention from a College Campus to a United States Military Installation: Piloting the Know-Your-Power Bystander Social Marketing Campaign*, 27(8) J. of Interpers. Violence 1593 (2012), <http://jiv.sagepub.com/content/27/8/1593>. This technique involves "modeling prosocial bystander behaviors to prevent sexual assault [and] safely intervening before a sexual assault..." *Id.* at 1601. It is a project intended, over time, to change rape-supportive attitudes and behaviors community-wide.

<sup>97</sup> Ernesto Londono, *Officials: 92 Air Force officers assigned to nuclear arsenal involved in cheating scandal*, Wash. Post, Jan. 30, 2014, available at [http://www.washingtonpost.com/world/national-security/officials-92-air-force-officers-involved-in-test-cheating-scandal/2014/01/30/ddfd6db2-89d6-11e3-833c-33098f9e5267\\_story.html](http://www.washingtonpost.com/world/national-security/officials-92-air-force-officers-involved-in-test-cheating-scandal/2014/01/30/ddfd6db2-89d6-11e3-833c-33098f9e5267_story.html).

<sup>98</sup> *Id.*

<sup>99</sup> Helene Cooper, *For New Air Force Secretary, a Baptism by Fire*, N.Y. Times, Feb. 13, 2014, available at [http://www.nytimes.com/2014/02/14/us/for-new-air-force-secretary-a-baptism-by-fire.html?\\_r=0](http://www.nytimes.com/2014/02/14/us/for-new-air-force-secretary-a-baptism-by-fire.html?_r=0).

<sup>100</sup> *Id.*

<sup>101</sup> U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 17 at 73.

<sup>102</sup> See Seck, *supra* note 67 ("Eugene Fidell, a former Coast Guard judge advocate who teaches military law at Yale University, said it is inconceivable that political pressure surrounding the issue of sex assault did not influence a commander's decision to prosecute a case, particularly in light of high-profile incidents in which senior commanders faced career repercussions directly tied to their treatment of sex assault cases." Fidell continued, "...you'd have to believe in the tooth fairy to not think these things affect the climate in which these decisions are ultimately made.")

environment incentivizes the sexual assault prevention and response community to strive for perfection without regard for collateral damage, it will be as harmful to victims of sexual assault as it will be for those accused of it.

The political ramifications of this rhetorical tack were made evident during a June 2013 Senate hearing, in which the following question was posed to the assembled uniformed military leadership: “After each of these instances, Department of Defense leaders all said ‘never again’ or used phrases like ‘zero tolerance.’ So I guess I would ask what is different this time? If we have a history of this repeating itself and nothing ever being done, what is different now?”<sup>103</sup> The assertion that nothing has been done is highly debatable, but to the extent the metric of ultimate success is eradication, elimination, zero incidents, or zero tolerance, then the push for ever more aggressive reforms will not cease. Again, this is not to suggest that any or all reforms are counterproductive—that is decidedly not the case.<sup>104</sup> At the same time, some in Congress have proposed reforms that the military strenuously opposes.<sup>105</sup> It will become increasingly difficult to ward off these reforms or to walk-back unfulfilled promises if the military’s rhetoric is not toned down to reflect a more realistic view of the nature of crime and our ability to deter it. In this regard, *reducing* the incidence of sexual assault involving military members, be they victims or perpetrators, should be the ultimate goal.<sup>106</sup>

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<sup>103</sup> June 2013 Senate Oversight Hearing, *supra* note 1 at 38.

<sup>104</sup> *E.g.*, §1702(b) of the National Defense Authorization Act for Fiscal Year 2014, which limits a convening authority’s ability to modify either the findings or the sentence of a court-martial under Article 60(c) of the UCMJ for certain offenses. *Contra* Andrew S. Williams, Safeguarding the Commander’s Authority to Review the Findings of a Court-Martial (undated) (unpublished comment), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2275078](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2275078) (Arguing the differences between the civilian and military justice systems indicate a need for convening authorities to maintain their prerogatives under Article 60, UCMJ).

<sup>105</sup> *E.g.*, Senator Kirsten Gillibrand’s *Military Justice Improvement Act* (MJIA), *supra* note 12.

<sup>106</sup> That “elimination” is an unachievable goal was noted by Nancy Parrish, President of Protect Our Defenders, during a June 2013 Senate oversight hearing: “You won’t ever get rid of rapes or assault, but you can punish the perpetrators, and you can stop the retaliation.” *Supra* note 1 at 134. Secretary of Defense Hagel was asked about the elimination metric during a May 2013 press conference:

Q: Mr. Secretary, ...In your statement, you mentioned some of the goals of [ultimately] eliminating the problem of sexual assault...I’m wondering, how possible do you think that is, considering the societal problems?

SEC. HAGEL: Well...we’re going to stay focused on every aspect of this problem. And ultimately eliminating sexual harassment, sexual assault should be our goal. Of course it’s our goal. Is it going to be difficult to attain that? Of course it is. But if we don’t have that as the goal setting out, or if we have halfway measures or we’ll—we’ll accept 80 percent, that’s not good enough. We recognize what’s ahead. And as I’ve already explained—and I think pretty honestly and pretty clearly and pretty directly—this is a cultural issue. It is a leadership issue. It is a command issue. So we’re not unaware of the challenges. And it isn’t, as you note—as I’ve said, it’s not just isolated in the military. It is—it is a cultural issue.

Department of Defense Press Briefing with Secretary Hagel and Maj. Gen. Patton on the Department of Defense Sexual Assault Prevention and Response Strategy from the Pentagon (2013), *available at* <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5233>.

Moreover, the metric by which success is judged should be the military's ability to reduce the incidence of sexual assault vis-à-vis comparable civilian populations. To the extent the military is able to realize and maintain lower incidence rates than these populations, then it will have achieved something important (as discussed below, the data suggests these rates are currently comparable). For many, this is a thoroughly unappealing metric of success. Indeed, the military aspires to a higher standard. Yet these aspirations do not change the objective reality that members of the military are products of society. While donning the uniform can be transformative to some, this is not always the case. The uncomfortable truth is that criminals join the military and criminals exist within the military. As the U.S. Supreme Court noted in 1961, "In the Armed Forces, as everywhere else, there are good men and rascals, courageous men and cowards, honest men and cheats."<sup>107</sup> Indeed, all societal problems—whether relating to finances, addiction, relationships, or crime—are evident in the military. To disclaim comparisons to the rest of society may be rhetorically appealing,<sup>108</sup> but there is simply no better gauge of the military's effectiveness at combating societal problems than as it relates to the society from which its constituents came and continue to be a part. To hold otherwise is to succumb to a ubiquity of responsibility fallacy whereby the military takes full ownership of society's problems. This, as it were, is a bridge too far. The military should, in all instances, take ownership of the *response* to the crime. This necessarily includes: peerless victim care; combating all forms of institutional and individual retaliation directed at victims; and vigorous prosecution of criminal behavior. However, for the military to take ownership of the crime in all instances, arguably represents an unnecessary and ultimately self-defeating overreach.

## B. Logos

Another challenge to presenting a full and fair accounting of the military's sexual assault problem is the quantity and complexity of the data it reports to Congress.<sup>109</sup> Despite all that has been said thus far, data is not a panacea: it can either further knowledge or fuel misperceptions

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<sup>107</sup> Bell v. U.S. 366 U.S. 393, 401 (1961).

<sup>108</sup> In May 2013, Pentagon Press Secretary George Little indicated, "It is, in my opinion, and I believe the secretary's position, not good enough to compare us to the rest of society. This is the United States military and Department of Defense. It really doesn't matter if our rates are similar to the rest of society, quite frankly. We must hold ourselves to a higher standard and that's what the American people demand." Micah Zenko & Amelia Wolf, *Our Military, Ourselves: Why American are to blame for the Pentagon's outrageous sex scandals*, FOREIGN POLICY, May 21, 2013, available at [http://www.foreignpolicy.com/articles/2013/05/21/our\\_military\\_ourselves](http://www.foreignpolicy.com/articles/2013/05/21/our_military_ourselves).

<sup>109</sup> Dept. of Defense, Sexual Assault Prevention and Response, Reports to Congress, <http://www.sapr.mil/index.php/annual-reports>. When the DoD released the fiscal year 2012 WGRA it was included in the 2012 DoD Annual Report on Sexual Assault in the Military. In total, the documents ran to 1494 pages. A short news release accompanied the report. DOD Releases Sexual Assault Prevention and Response Strategy (2013), <http://www.defense.gov/Releases/Release.aspx?ReleaseID=15984>. Secretary Hagel and Major General Patton, then head of the DoD Sexual Assault and Response Program, also held a press conference to announce the release. Department of Defense Press Briefing, *supra* note 106. The DoD should consider streamlining its sexual assault reporting to Congress (while adhering to the statutory requirements levied by Congress) and making more robust its rollout plan for reports likely to generate confusion or controversy. To the latter, for example, it might be worthwhile to seat a panel of DoD subject matter experts at future press conferences—*e.g.*, a statistician, a lawyer, a sexual assault response coordinator, a psychologist, an investigator, a commander, *etc.* The point being that if the proper context for the data is not provided (and reported by the media) on day one, then errors and misperceptions can quickly spiral out of control. The period between May 7, 2013 (the day the 2012 WGRA was released) and June 4, 2013 (the day of the Senate oversight hearing), which culminated in the declaration of a "crisis," offers a particularly compelling example of how this can happen.

(hence the aphorism: lies, damned lies, and statistics!) depending on how it is gathered, interpreted, and reported. A review of the current public discourse on sexual assault in the military indicates, fairly or unfairly, these reports, and perhaps the DoD's analytical repository more broadly, are fueling misperceptions.

The most prominent misperception relates to the estimated number of victims of unwanted sexual contact during fiscal year 2012—a data point pulled from the 2012 Workplace and Gender Relations Survey of Active Duty Members (2012 WGRA) contained in the aforementioned DoD Annual Report issued two days after Lieutenant Colonel Krusinski's arrest. The number seized on is an estimated 26,000 victims.<sup>110</sup> The crisis narrative has been fueled by an increase in the number of victims between the fiscal year 2010 WGRA (19,000) and the fiscal year 2012 WGRA (26,000). Several commentators have attempted to explain why this 26,000 figure (and, by extension, the 19,000 figure) is misleading. Their entreaties can be batched into two broad categories: “bad math” and conflating disagreeable behavior and criminal behavior. Both appear unfounded.

### 1. “Bad Math”

Weeks after the release of the fiscal year 2012 WGRA, a Marine Captain and Judge Advocate noted in a *Wall Street Journal* opinion piece, “[t]he truth is that the 26,000 figure is such bad math—derived from an unscientific sample set and extrapolated military-wide—that no conclusions can be drawn from it.”<sup>111</sup> The Captain earlier advanced the same argument with regard to the findings of the fiscal year 2010 WGRA in the pages of *Joint Forces Quarterly*.<sup>112</sup> Her principal critique appears to be the means by which this number was reached, namely: by extrapolating from the voluntary responses of 22,792 active duty survey respondents, who were among a sample active duty population of 108,478 selected to participate in the survey, onto the entire active duty population of approximately 1,350,000.<sup>113</sup> In other words, the responses of a small number of *seemingly* unrepresentative respondents were extrapolated onto the entire population.

The point of error and potential to produce misleading statistics also *seem* readily apparent: in a voluntary survey, who is more likely to respond, “people who feel strongly about something or have had something unusual [or traumatic] happen to them,” or people who do not feel strongly or have *not* had something unusual or traumatic happen to them?<sup>114</sup> It follows that, to victims of sexual assault, the chance to tell their story—even in the form of an anonymous survey or, perhaps, *especially* in the form of an anonymous survey—might resonate more strongly than for those who do not self-identify as victims. This divide, along with the degree of non-response (*e.g.*, for fiscal year 2012, approximately four out of five surveyed did not

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<sup>110</sup> *E.g.*, *The Military's Sexual Assault Crisis*, *supra* note 10.

<sup>111</sup> Lindsay L. Rodman, *The Pentagon's Bad Math on Sexual Assault*, *Wall St. J.*, May 20, 2013, A.17.

<sup>112</sup> Lindsay L. Rodman, *Fostering Constructive Dialogue on Military Sexual Assault*, *JOINT FORCES QUARTERLY*, 2nd Q. 2013, at 25 (While Captain Rodman's treatment of statistical data is misguided, the remainder of her article arguably constitutes the most thoughtful treatment of the military sexual assault problem within the discourse).

<sup>113</sup> 2012 WGRA, *supra* note 16 at 6.

<sup>114</sup> Megan McArdle, *How Not to Measure Sexual Harassment*, *Bloomberg*, Dec. 4, 2013, available at <http://www.bloomberg.com/news/2013-12-04/how-not-to-measure-sexual-harassment.html>.

respond), indicates possible bias and calls into question the application of the experience of those choosing to respond to the experience of the broader population.<sup>115</sup>

This line of argument, as intuitively compelling as it is, is also something that no statistician would stipulate to. Probability sampling and weighting are firmly grounded in scientific theory and allow statisticians to extrapolate from smaller, representative populations onto larger ones.<sup>116</sup> That the military maintains extensive data bases on service members (*i.e.*, that it knows so much about the demographics of this population) allows DoD statisticians to be even more precise in their weighting than civilian research institutions.<sup>117</sup> Moreover, the methodology behind the 2012 WGRA was representative of the best practices of government and industry. The methodology is “used by all federal statistical agencies (*e.g.*, the Census Bureau, Bureau of Labor Statistics), private survey organizations (*e.g.*, RAND, WESTAT, and RTI), and well-known polling organizations (*e.g.*, Gallup, Pew, and Roper).”<sup>118</sup> Moreover, it “aligns with Office of Management and Budget’s (OMB) ‘Standards and Guidelines for Statistical Surveys,’ the American Association of Public Opinion Research’s (AAPOR) Best Practices, and White House Directive on surveys.”<sup>119</sup>

As counterintuitive as the concepts of probability sampling and weighting within the realm of statistical reasoning might be, extrapolation is not synonymous with bias. As indicated in the 2012 WGRA, “[b]ecause the results of comparisons are based on a weighted, representative sample, the reader can infer that the results generalize to the active duty force, within the margin of error.”<sup>120</sup>

## 2. *Conflating Disagreeable Behavior and Criminal Behavior*

A second argument against the validity of the 26,000 figure is the apparent conflation of disagreeable behavior and criminal behavior. It stems from the fact that the 2012 WGRA measured “unwanted sexual contact” as opposed to “sexual assault,” as defined by DoD Instruction 6495.02, or the various sexual offenses enumerated in Article 120 of the UCMJ.<sup>121</sup> The following excerpt from a June 2013 Senate hearing is illustrative:

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<sup>115</sup> Rodman, *supra* note 111.

<sup>116</sup> E-mail from Dr. Elise Van Winkle, Deputy Branch Chief, Survey Design, Analysis, & Operations Branch, Defense Manpower Data Center (DMDC) (Jan. 3, 2014, 1713EDT) (on file with the author).

<sup>117</sup> *Id.*

<sup>118</sup> E-mail from Dr. Lauren Boyatzi, Operations Research Analyst, HQ Air Force Sexual Assault Prevention & Response (HQ USAF/CVS) (Jan. 3, 2014, 1237EDT) (on file with the author).

<sup>119</sup> *Id.*

<sup>120</sup> 2012 WGRA, *supra* note 16 at 6.

<sup>121</sup> Irrespective of how these measurements are taken, there are inherent limitations on the survey format in assessing the prevalence of criminal sexual behavior. Aristotle said that, “to seek for justice is to seek for neutral authority; and law is neutral authority.” Surveys are not a neutral authority—they reveal the subjective beliefs of those surveyed. These subjective beliefs may relate back to a justiciable criminal offense or they may not. On its face, this argument appears callous and pejorative. But it nonetheless reflects the reality that the law, not the subjective beliefs of any one individual, is society’s chosen mechanism for distinguishing criminal behavior from non-criminal behavior. Indeed, in the case of sexual crimes there is by necessity another party who may have perceived the encounter quite differently. Neither are this person’s subjective beliefs dispositive of the absence of a crime. And while plain meaning may attach to words used in crime surveys like “intentional,” “consent,” and “attempted,” these are legal terms of art that have a very precise meaning under the law. To ascribe, with certainty and in all instances, the commission of a cognizable sexual assault based on a survey response, is to make the lay respondent a lawyer

I want to start with I think the way you are reporting has this backwards because you are mushing them together in the reporting. Unwanted sexual contact is everything from somebody looking at you sideways when they shouldn't to someone pushing you up against the wall and brutally raping you. You have got to, in your surveys, delineate the two problems because until you do, we will have no idea whether or not you are getting your hands around this. We need to know how many women and men are being raped and sexually assaulted on an annual basis, and we have no idea right now because all we know is we have had 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.<sup>122</sup>

This sentiment—that sexual assault is not a shorthand abstraction for a range of behaviors that may or may not be criminal—was echoed by other Senators as well.<sup>123</sup> So too did the author of the aforementioned *Wall Street Journal* opinion piece express concerns about the employment of unwanted sexual contact in her critique of the 2012 WGRA:

The term 'sexual assault' was not used in the WGRA survey. Instead, the survey refers to 'unwanted sexual contact,' which includes touching the buttocks and attempted touching. All of that behavior is wrongful, but it doesn't comport with the conventional definition of sexual assault or with the legal definition of sexual assault in the Uniform Code of Military Justice, as enacted by Congress.<sup>124</sup>

While conflation errors and lexical challenges abound in this debate, this is not an instance in which either is apparent.<sup>125</sup> As indicated in the diagram below, the definition of unwanted sexual contact in the 2012 WGRA includes the essential elements of a criminal sexual offense and is clearly not inclusive of such behaviors as “looking at you sideways.” Moreover, and contrary to the above excerpted assertion, touching of the buttocks is a cognizable offense under Article 120 (Abusive Sexual Contact) of the UCMJ, as is attempted touching of the buttocks under Article 80 (Attempts) of the UCMJ. Certainly, had the WGRA employed a narrower definition, say for example, the UCMJ definition for rape (completed), the estimated number of victims would have been significantly lower than 26,000.<sup>126</sup> This is a conundrum that all social statisticians face: is it better to employ a broad definition or a narrow one? That the DoD chose to employ a broad definition is arguably indicative of just how seriously it takes this problem. Indeed, “broad

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and the surveyors a judge. In short, surveys are not a pure substitute for the Aristotelian “neutral authority” the blindfolded Themis represents.

<sup>122</sup> *June 2013 Senate Oversight Hearing*, *supra* note 1 at 29.

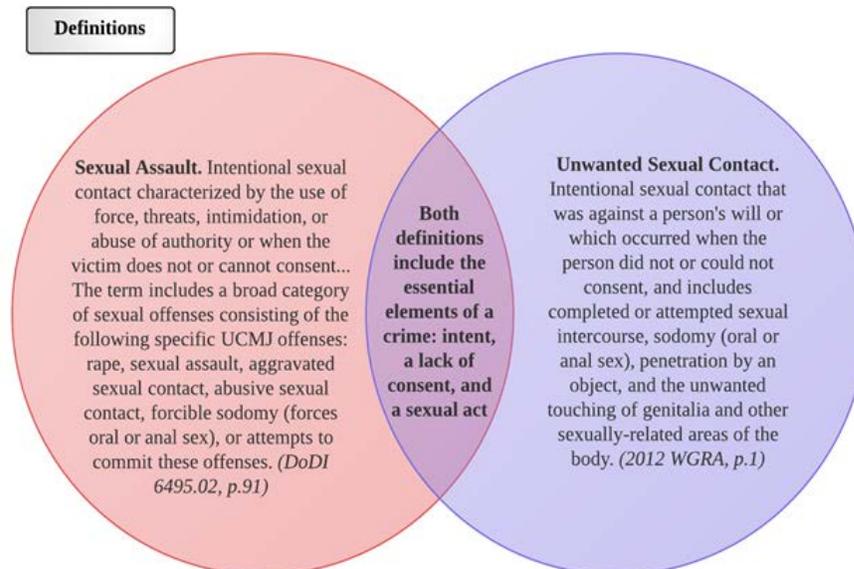
<sup>123</sup> *Id.* at 45, 47.

<sup>124</sup> Rodman, *supra* note 111.

<sup>125</sup> For example, the public health response and criminal justice response of a sexual assault accusation are often conflated. Whether an accuser's account or experience meets the legal definition of sexual assault is entirely immaterial in terms of the public health response, to include victim care. It is material, however, to any criminal investigation or trial resulting from the accusation. So, while we should not deny the accuser care simply because his or her case cannot be proved under the applicable legal standard for a given forum (*e.g.*, beyond a reasonable doubt at trial), we should decline to prosecute in cases where there is no reasonable prospect of obtaining a conviction. Related to this, is the conflating of “unfounded” and “false allegations.” Lisek, *supra* note 68 at 1321. Indeed, just because an allegation cannot be proved does not mean it is false, hence the maxim: *absence of evidence is not evidence of absence*. To essentially label the accuser a liar in the absence of overwhelming evidence of the claim's falsity, is to compound the very real trauma he or she may have experienced as a result of the incident.

<sup>126</sup> Of the 6.1% of women who reported unwanted sexual contact in the 2012 WGRA, 31% indicated experiencing completed sexual intercourse, anal or oral sex; of the 1.2% of men who reported unwanted sexual contact, 10% indicated experiencing completed sexual intercourse, anal or oral sex. 2012 WGRA, *supra* note 16 at 23, 24.

definitions support much larger estimates of a problem’s size” and, with these larger estimates, increased scrutiny.<sup>127</sup>



Regardless, the conflation argument is a red herring, as the 2012 WGRA distinguishes among the types of unwanted sexual contact experienced by respondents. For example, among women who experienced unwanted sexual contact, 32% experienced unwanted sexual touching; 26% experienced attempted sexual intercourse, anal or oral sex; 31% experienced completed sexual intercourse, anal or oral sex; 10% experienced behaviors not specified.<sup>128</sup> Thus, the notion that the DoD “mushed” all of this reporting together is demonstrably false—irrespective of the relative broadness of the definition for unwanted sexual contact. In addition to measuring unwanted sexual contact, the 2012 WGRA also measured “unwanted gender-related behaviors,” which were meant to encompass sexual harassment and other sexist behaviors that might, though not necessarily, fall short of criminal conduct (*e.g.*, “looking at you sideways”).<sup>129</sup> These data were gathered and reported separately from the data relating to unwanted sexual contact. Therefore, it does not follow that the 2012 WGRA inappropriately conflated disagreeable behavior and criminal behavior.

That the two principal criticisms of the 2012 WGRA are unfounded is not to suggest that the 26,000 figure is not potentially misleading if the data underlying it are not contextualized.

### 3. The “Big Number”

While an estimated 26,000 people in the military may indeed have experienced some form of unwanted sexual contact during fiscal year 2012, that figure actually tells us very little about the true nature or scope of the problem. Consider first the denominator situated below the

<sup>127</sup> BEST, *supra* note 15 at 40.

<sup>128</sup> 2012 WGRA, *supra* note 16 at 23.

<sup>129</sup> *Id.* at 159-176.

numerator 26,000, namely: an active duty population of some 1.35 million.<sup>130</sup> This means that approximately 2 service members (1.9%) out of 100 experienced some form of unwanted sexual contact during fiscal year 2012. It follows that approximately 98 service members (98% or 1.324 million) out of 100 experienced no form of unwanted sexual contact during the same period. While this still tells us very little, it does provide some perspective on the otherwise alarming 26,000 figure. For further perspective, consider that in 2012, people age 12 and older in the United States were victimized by violent crime at a rate of 2.6 people per 100, or 2.6%.<sup>131</sup> That equates to 6,842,590 victims of violent crime—an unquestionably alarming figure.<sup>132</sup> And yet, given a denominator of 261,996,320 (total population age 12 or older), should it be?<sup>133</sup> What makes “big numbers” like 26,000 and 6,842,590 problematic is that the figures have no intrinsic meaning on their own and yet are often reported in isolation. In the absence of the context offered by a denominator, many will assume the problem is big simply because the number is big.<sup>134</sup>

Consider next how the data underlying the 26,000 figure compare to DoD reporting in previous years. Here, the overall number of estimated victims has increased since 2010, but is lower than estimates from 2006.<sup>135</sup> The nuance lost if one only considers the overall figures is that the increase reached statistical significance in just two of the four services (Navy and Marine Corps), and only among active duty women.<sup>136</sup> In 2010, 4.4% of Navy women and 6.6% of Marine Corps women experienced unwanted sexual contact; those numbers rose to 7.2% and 10.1% respectively in 2012.<sup>137</sup> During the same period, Army and Air Force women did not experience a statistically significant increase in the number of unwanted sexual contacts.<sup>138</sup> Moreover, Air Force women were approximately three times less likely than their Marine Corps counterparts to experience unwanted sexual contact (2.3% for Air Force women in 2010 versus 6.6% for Marine Corps women; 3.1% for Air Force women in 2012 versus 10.1% for Marine Corps women).<sup>139</sup> While it is no doubt easier to leap to conclusions upon seeing the 26,000 figure and broad-brush the Armed Services *writ large* as suffering from an “entrenched culture of sexual violence,” would it not be more productive to attempt to ascertain why Marine Corps women are experiencing unwanted sexual contact at rates three times that of their Air Force

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<sup>130</sup> Frequently Asked Questions: 2012 Workplace and Gender Relations Survey of Active Duty Members, Defense Manpower Data Center (DMDC) (undated),

<https://www.dmdc.osd.mil/appj/dwp/reports.do?category=reports&subCat=pubs>.

<sup>131</sup> DEPT. OF JUSTICE, CRIMINAL VICTIMIZATION, 2012 (NCVS) 2 (2013), *available at*

<http://www.bjs.gov/content/pub/pdf/cv12.pdf>.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* Everyone would obviously prefer that the numerator were zero, but that is not realistic given the nature of crime and our limited ability to deter it.

<sup>134</sup> “The idea of denominator neglect helps explain why different ways of communicating risks vary so much in their effects.” KAHNEMAN, *supra* note 3 at 329.

<sup>135</sup> In 2006, an estimated 34,000 service members experienced unwanted sexual contact; that number dropped to an estimated 19,000 in 2010. ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, *supra* note 23 at 13. In 2006, 6.8% of women reported experiencing some form of unwanted sexual contact; that number dropped to 4.4% in 2006 and rose to 6.1% in 2012. *Id.* at 2.

<sup>136</sup> Van Winkle, *supra* note 116.; 2012 WGRA, *supra* note 16 at 2.

<sup>137</sup> DEPT. OF DEFENSE, 2010 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS 11 (2011), [http://www.sapr.mil/public/docs/research/DMDC\\_2010\\_WGRA\\_Overview\\_Report\\_of\\_Sexual\\_Assault.pdf](http://www.sapr.mil/public/docs/research/DMDC_2010_WGRA_Overview_Report_of_Sexual_Assault.pdf); 2012; WGRA, *supra* note 16 at 12.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

counterparts? Simple demographics may offer a partial explanation—the Marine Corps has a higher percentage of officer and enlisted personnel under 25 years of age, which correlates to a higher incidence of unwanted sexual contact.<sup>140</sup> More complicated demographics may be at play as well. Marine Corps women, for example, report experiencing more unwanted sexual contact prior to entering the service than their counterparts in the other services.<sup>141</sup> Given the correlation between prior victimization and future victimization, it follows that rates of experienced unwanted sexual contact would be higher in the Marine Corps.<sup>142</sup>

Of course, these statistics do not reveal causes. But, a nuanced analysis of the data may reveal trends that point toward the effectiveness or ineffectiveness of the sexual assault prevention and response efforts implemented by the individual Services. Isolating spikes or dips among certain cohorts or cases with similar dependent and independent variables will help to isolate the problem. Isolating the problem will, in turn, assist in allocating or massing finite resources in the areas where those resources are most needed—with a goal of reducing, to the greatest extent possible, the incidence of sexual assault in the military. All of this nuance and, by extension, all of the potential value in this data is lost if the focus is strictly on the “big number.”

#### 4. Apples and Oranges

Consider next how the data underlying the 26,000 figure compare to demographically similar populations outside the military. Here, commentators from across the political spectrum have indicated the best available data do not suggest the prevalence rate of sexual assault in the military is high relative to comparable civilian populations—and, in fact, the military’s numbers may be lower.<sup>143</sup> These commentaries range from serious, well-intentioned attempts to compare demographically similar data to counterproductive polemics—as when the rate of sexual assault in the military is judged in relation to the rate in nursing homes.<sup>144</sup> An article by Georgetown law professor Rosa Brooks, which appeared in *Foreign Policy*, falls into the serious, well-intentioned category, but also illustrates the danger of comparing statistics that belie comparison.<sup>145</sup> Brooks rightly acknowledges that, “[t]o evaluate levels of sexual assault in the military, we need some points of comparison.”<sup>146</sup> But, she continues, “[i]t’s virtually impossible to get apples to apples

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<sup>140</sup> 15.8% of Marine Officers are under 25 years of age as compared to 13.7% of Air Force Officers; 68.5% of Marine Corps Enlisted are under 25 years of age versus 44.2% of Air Force Enlisted. DEPARTMENT OF DEFENSE, 2011 DEMOGRAPHICS PROFILE OF THE MILITARY COMMUNITY, UPDATED NOVEMBER 2012, *available at* [http://www.militaryonesource.mil/12038/MOS/Reports/2011\\_Demographics\\_Report.pdf](http://www.militaryonesource.mil/12038/MOS/Reports/2011_Demographics_Report.pdf). “18- to 24-year-olds are at maximum risk for sexual assault. Thus, any community or institution, like the military or any college, that brings together high concentrations of young people is arguably likely to have higher rates of sexual assault than the general population.” U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 17 at 8. DoD data support this assertion, indicating “the vast majority of victims in investigations tend to be female, under the age of 25, and of junior enlisted grades, respectively.” ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, *supra* note 23 at 80-82.

<sup>141</sup> 35% in the Marine Corps versus 31% for the Army; 30 Percent for the Navy; and 27% for the Air Force. 2012 WGRA, *supra* note 16 at 136.

<sup>142</sup> “There is evidence that sexual assault victims have an increased risk of revictimization.” Margaret C. Harrell *et al.*, A Compendium of Sexual Assault Research 146 (2009), *available at* [http://www.rand.org/content/dam/rand/pubs/technical\\_reports/2009/RAND\\_TR617.pdf](http://www.rand.org/content/dam/rand/pubs/technical_reports/2009/RAND_TR617.pdf).

<sup>143</sup> *E.g.*, U.S. COMM. ON CIVIL RIGHTS, *supra* note 17 at 148; Brooks, *supra* note 14; Zenko & Wolf, *supra* note 108.

<sup>144</sup> U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 17 at 167.

<sup>145</sup> Brooks, *supra* note 14.

<sup>146</sup> *Id.*

comparisons.”<sup>147</sup> Rather than stopping there, however, Brooks proceeds with the comparisons, concluding *inter alia*: “rates of sexual assault in the military in fact appear to be substantially lower than rates of sexual assault in comparable civilian populations.”<sup>148</sup>

There is a seductive appeal to this approach. After all, the majority of the studies cited in the discourse (and all those in Brooks’ article) have been carried out or funded by the U.S. government and ostensibly look at the same problem, that is: sexual assault. Why then can’t a Department of Justice study on the prevalence of sexual assault on college campuses be compared with a DoD study on the prevalence of sexual assault in the military? The reason is that the methodologies employed by these studies differ radically.<sup>149</sup> This is not to suggest that any one study is somehow more valid than another, it is only to say that their differences make comparisons between and among the findings scientifically dubious. These differences include: the means by which survey responses were gathered; the questions posed to respondents; the definitions employed (recall the importance of “broad” versus “narrow” definitions); and the applicable time periods for which respondents were to report.<sup>150</sup> Suffice it to say, “[g]ood comparisons involve comparable items; they pair apples with apples, and oranges with oranges. Comparable statistics count the same thing the same ways. Comparisons among statistics that are not comparable confuse and distort.”<sup>151</sup>

Brooks cites one study that did look at military, military spouse, and civilian populations in a manner that allows for direct “apples to apples” comparison. It was conducted by the Centers for Disease Control and Prevention (CDC) and examined the prevalence of intimate partner violence, stalking, and sexual violence among active duty women and wives of active duty men as compared with women in the U.S. general population.<sup>152</sup> The report concluded, *inter alia*,

Approximately 40% of women in the general population aged 18 to 59 years have experienced lifetime contact sexual violence. Similarly, 36.3% of active duty women and 32.8% of wives of active duty men have experienced lifetime contact sexual violence... There were no significant differences in the lifetime, three- year, or one-year prevalence of contact sexual violence between women from the general population and either active duty women or wives of active duty men.<sup>153</sup>

To say that prevalence rates for sexual violence are not significantly dissimilar among these cohorts of women is quite different than saying, as Brooks did, “rates of sexual assault in the military in fact appear to be substantially lower than rates of sexual assault in comparable

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Lisa M. Schenck, *Informing the Debate About Sexual Assault in the Military Services: Is the Department of Defense Its Own Worst Enemy?*, 11 OHIO ST. J. CRIM. L. \_\_\_\_ (forthcoming Spring, 2014) (manuscript at 22-23), [http://responsesystemspanel.whs.mil/public/docs/Background\\_Materials/InformDebateAboutSexAsslt\\_Schenck220140115\\_DRAFT.pdf](http://responsesystemspanel.whs.mil/public/docs/Background_Materials/InformDebateAboutSexAsslt_Schenck220140115_DRAFT.pdf).

<sup>150</sup> *See Id.*

<sup>151</sup> BEST, *supra* note 15 at 97-98.

<sup>152</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, PREVALENCE OF INTIMATE PARTNER VIOLENCE, STALKING, AND SEXUAL VIOLENCE AMONG ACTIVE DUTY WOMEN AND WIVES OF ACTIVE DUTY MEN—COMPARISONS WITH WOMEN IN THE U.S. GENERAL POPULATION (2010), *available at* [http://www.sapr.mil/public/docs/reports/FY12\\_DoD\\_SAPRO\\_Annual\\_Report\\_on\\_Sexual\\_Assault-VOLUME\\_TWO.pdf](http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_TWO.pdf)

<sup>153</sup> *Id.* at 1.

civilian populations.”<sup>154</sup> Brooks’ more sweeping conclusion simply cannot be reached without comparing apples to oranges.<sup>155</sup>

And yet lack of comparable data begs these types of scientifically dubious comparisons. A better approach then would be for those charged with gathering, compiling, and reporting sexual assault data within the U.S. government (whether the CDC, the Department of Justice, the Department of Defense, the National Institutes for Health, the Department of Education, or otherwise) to do so in a way that facilitates apples to apples comparisons. This “whole of government” approach would, again, aid in isolating the problem and, in turn, assist in the allocation and massing of finite resources in the areas where those resources are needed most. The current “stove-piped” approach is not entirely unhelpful—it does routinely reinforce that sexual assault is a persistent societal problem—but it could be improved upon and certainly be made more efficient. Synchronizing the methodology by which U.S. government departments and agencies collect data on sexual assault is not an intractable problem, but would undoubtedly unleash parochial interests in both the interagency and relevant congressional oversight committees. *Thinking slow* about the problem, however, could go a long way toward counteracting these antibodies to change.

#### IV. AVAILABILITY CASCADES AND THE “CRISIS” MEME

*One of the things that really has made a huge impact over the last 2 years is the constant media attention around these issues.*<sup>156</sup>

—Rebekah Havrilla, *Outreach and Education*  
Coordinator for SWAN

*Availability cascades that spread empirically baseless information create formidable political pressures in support of wasteful and counterproductive regulations.*<sup>157</sup>

—Timur Kuran, *Professor of Economics, University of Southern California* and Cass R. Sunstein, *Professor of Law, University of Chicago*

In 1999, economics professor Timur Kuran and law professor Cass Sunstein employed the insights of Kahneman and Tversky to analyze how we, as a society, perceive and respond to risk. This cross-disciplinary collaboration resulted in an influential paper published in the *Stanford Law Review* entitled, “Availability Cascades and Risk Regulation.”<sup>158</sup> In it, Kuran and Sunstein examined three situations in which the miscalculation of risk resulted in wasteful or

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<sup>154</sup> Brooks, *supra* note 14.

<sup>155</sup> As RAND researchers have indicated, “It is currently unknown whether sexual assault is more or less common among servicemembers than among civilians, although the demographic profile of servicemembers may put them at increased risk (e.g., younger age).” Coreen Farris *et al.*, *Physical and Psychological Health Following Military Sexual Assault 2* (2013), available at [http://www.rand.org/content/dam/rand/pubs/occasional\\_papers/OP300/OP382/RAND\\_OP382.pdf](http://www.rand.org/content/dam/rand/pubs/occasional_papers/OP300/OP382/RAND_OP382.pdf).

<sup>156</sup> *March 2013 Senate Oversight Hearing*, *supra* note 2 at 36.

<sup>157</sup> Kuran & Sunstein, *supra* note 35 at 761.

<sup>158</sup> *Id.*

counterproductive regulation, namely: the environmental contamination of the Love Canal waterway; the use of the pesticide Alar on apples; and the crash of TWA flight 800.<sup>159</sup> In each instance, Kuran and Sunstein identified a gap between the available empirical data and how the risks related to each situation were perceived by the public and policy makers, and the regulatory response each situation garnered. They concluded that the interaction of the availability heuristic (the cognitive shortcut discussed above) and social mechanisms (media coverage, word of mouth, memes) can fuel misperceptions about risk through a cascade of misinformation.<sup>160</sup> The resultant “availability cascade” has two identifiable components: an informational cascade and a reputational cascade.

### A. Informational Cascades

“An informational cascade occurs when people with incomplete personal information on a particular matter base their own beliefs on the apparent beliefs of others.”<sup>161</sup> In this respect, an informational cascade represents a form of tyranny. What makes this tyranny particularly acute in the realm of military sexual assault, is that all are subject to it to one degree or another: from the casual outside observer who follows defense-related issues in the news; to those in the military charged with sexual assault prevention and response; to the legislators charged with providing military oversight; to the outside organizations that seek to influence those legislators. This issue operates in multiple expert domains simultaneously—criminology, sociology, anthropology, psychology, mathematics, law, military philosophy, and public policy, to name a few—and thus, incomplete personal information as to one or more of these domains is a virtual certainty.<sup>162</sup> *Thinking slow* counsels an appreciation for these information gaps and the formidable influence informational cascades can have on the military sexual assault debate.

Indeed, the framing of the military sexual assault problem—the “crisis” meme currently dominating the discourse—invokes a powerful logical fallacy: *argumentum ad populum*, wherein if something is believed by many or *appears* to be believed by many, it must be true. The case need not necessarily be strong, only visible. Here, a careful and considered examination of the evidence does not solidify one’s beliefs, but rather social influences. Interestingly, “[t]hat a belief is a product of social influences does not mean that it is weakly held, or superficial from the standpoint of its holder; on the contrary, it may run very deep.”<sup>163</sup> This presents a real challenge to refuting the conventional wisdom the crisis meme represents. Coupled with the more widely understood phenomenon of confirmation bias (*i.e.*, that we tend to seek out information that confirms what we already believe)—and the cognitive satisfaction it tends to produce—it is easy to see how informational cascades not only inform people’s perceptions of risk, but also the perceived urgency with which *something* must be done about it. Again, it is axiomatic that a risk misperceived may lead to misguided solutions.

### B. Reputational Cascades

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 685.

<sup>161</sup> *Id.* at 685-6.

<sup>162</sup> “A key precondition for an erroneous informational cascade is...that most citizens have little reliable information of their own about the claim in question.” *Id.* at 721.

<sup>163</sup> *Id.* at 718.

With reputational cascades, “the motivation is simply to earn social approval and avoid disapproval.”<sup>164</sup> Thus, “[i]n seeking to achieve their reputational objectives, people take to speaking and acting as if they share, or at least do not reject, what they view as the dominant belief.”<sup>165</sup> As illustrated by the following excerpt from *The New York Times*, the importance of reputational cascades to the issue of military sexual assault cannot be understated: “Many male senators in both parties appear extremely reluctant to take a position on such an emotionally charged and complex legal issue. ‘I come down on the side that is against sexual assault,’ Senator John Barrasso, Republican of Wyoming, said as he raced away from a reporter.”<sup>166</sup> Here, the Senator was simply being asked which of two competing Senate proposals for military justice reform, neither of which supported the status quo, he supported.<sup>167</sup> If this is the reaction to a question about legislative proposals that enjoyed near equal (and bi-partisan) support in the Senate Chamber, imagine the reaction to a more foundational question like: is the “crisis” driving the current debate real and, if so, what empirical data support the need for these pieces of competing legislation?

One by-product of this phenomenon is a subtle shifting of the burden of proof. Indeed, if nearly everyone appears to believe there is a “sexual assault crisis,” then the few who believe otherwise are expected to justify their expressed preferences at length.<sup>168</sup> By contrast, those who endorse the conventional wisdom aligned to a state of crisis are not required to explain themselves. As a result, “skeptics may choose to keep quiet, or even join the dominant chorus, simply to be left alone.”<sup>169</sup> Reticence to engage or to challenge prevailing orthodoxies on this issue is also driven by a fear of immediate self-marginalization. The risk of having one’s career hopes dashed or of being labeled a “victim blamer” or “rape denier” is palpable and something that most people will actively avoid, even if it involves a degree of self-censorship that discourages or prevents open debate. The most precarious points of this debate appear to revolve around the issue of culture.

### C. On Culture

*So how do we bridge the gap between what we know and what we can only argue about?*<sup>170</sup>

—John Lewis Gaddis, *Robert A. Lovett Professor of Military & Naval History, Yale University*

Discussions about culture as it relates to a social problem are really discussions about causation and correlation—that is, the causal or correlative relationship between a bad act and the degree to which the actor appears to have internalized certain cultural phenomena. For example, why do people, typically young men, go on shooting sprees? *Violent video games? Bad*

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<sup>164</sup> *Id.* at 686

<sup>165</sup> *Id.* at 686-687.

<sup>166</sup> Steinhauer, *supra* note 83.

<sup>167</sup> *Id.*

<sup>168</sup> Kuran & Sunstein, *supra* note 35 at 724-725.

<sup>169</sup> *Id.* at 725.

<sup>170</sup> JOHN LEWIS GADDIS, *THE LANDSCAPE OF HISTORY* 125 (Oxford University Press 2002).

*parenting? Bullying? Mental illness?*<sup>171</sup> *Guns?* That this litany is invoked nearly every time one of these shootings occur indicates a possible correlative relationship between these cultural phenomena and the actor. However, it also indicates that we generally struggle to pinpoint any one cause.<sup>172</sup> These are what social scientists call “overdetermined events,” that is, events that are inadequately explained and have multiple causes.<sup>173</sup> To admit this is not to throw up our hands, it is simply to acknowledge gaps in our understanding where these gaps exist.

Gaps exist because human actors and their individual motivations are inherently complex. These motivations are often unknown even to the actor, much less an extemporaneous or post-hoc external observer. Neither are these motivations necessarily rational. Indeed,

Neurological observations indicate that instinctive areas of the brain are active most of the time. Our nervous system is constantly at the mercy of neurotransmitters and hormones that determine levels of emotional responses. Observations from experimental psychology and behavioral economics show that people do not always try to maximize present and future profits. Rational expectations, once thought of as the main characteristics of [humans], are not neurologically sustainable anymore. Sometimes people want only to satisfy a desire right here, right now, no matter what.<sup>174</sup>

To the extent we can neither rely on the parsimony of single causes in the case of overdetermined events nor on the rationality of the actor, where does that leave us in terms of solving social problems like shooting sprees? It necessarily leaves us arguing about the correlative factors—be they violent video games, bullying, guns, or something else. Worse yet, it sometimes leads us to mistake correlation for causation.

With this in mind, let’s reframe the question: Why do people, typically men,<sup>175</sup> commit sexual assault? Here, social science suggests that culture is either at the root of or, at the very least, contributes to this crime.<sup>176</sup> This includes a social climate that fosters and, in some instances, condones sexual violence—sometimes referred to as “rape culture.”<sup>177</sup> Data indicate

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<sup>171</sup> Mental illness is especially tricky because it is a physiological phenomenon, but also freighted with cultural baggage.

<sup>172</sup> Indeed, “The proof that you truly understand a pattern of behavior is that you know how to reverse it.”

KAHNEMAN, *supra* note 3 at 133.

<sup>173</sup> GADDIS, *supra* note 170 at 105.

<sup>174</sup> Eduardo Salcedo-Albaran, *Homo Sensus Sapiens: The Animal that Feels and Reasons*, in THIS WILL MAKE YOU SMARTER 346 (John Brockman ed. 2012).

<sup>175</sup> White House Council on Women and Girls, *supra* note 21 at 1 (“The vast majority (nearly 98%) of perpetrators are male.”).

<sup>176</sup> E.g., “Although there are correlations between rape-supportive attitudes and sexually aggressive behavior (Koss & Leonard, 1984), they are just one determinant of sexually assaultive behavior and are not yet established as a predictor of rape-related behaviors (Bachar & Koss, 2001; Schewe & O’Donohue, 1993).” Shannon Morrison *et al.*, *An Evidence-Based Review of Sexual Assault Preventive Intervention Programs 14-15* (2004), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/207262.pdf>.

<sup>177</sup> Megan N. Schmid, *Combating a Different Enemy: Proposals to Change the Culture of Sexual Assault in the Military*, 55 Vill. L. Rev. 475, 490-505 (2010). The military largely acknowledges this cultural phenomenon and has vowed to attack it head on. Its April 2013 *Sexual Assault Prevention and Response Strategic Plan* indicates, “Underpinning our efforts is the need for enduring cultural change—requiring leaders at all levels to foster a command climate where sexist behaviors, sexual harassment, and sexual assault are not tolerated, condoned, or ignored; a climate where dignity and respect are core values we must all live by and define how we treat one another; where bystanders are trained and motivated to intervene and prevent unsafe behaviors; where victims’

that alcohol is involved (either the victim, the offender, or both had been drinking) in as many as half of sexual assault cases and that the victim, more often than not, knows their attacker.<sup>178</sup> These data, and the arguments they generate, reveal why “no other violent crime is so fraught with controversy, so enmeshed in the politics of gender and sexuality.”<sup>179</sup> Indeed, to invoke the use of alcohol by a victim is to risk being labeled a “victim blamer;” to invoke the relationship between the victim and the offender (which data suggests is often a dating relationship—hence the illiberal phrases “date rape” or “gray rape”) is to risk being labeled a “rape denier.”<sup>180</sup> These pejorative labels properly attach in some instances—as when someone suggests a causal relationship between a victim’s drinking and their assault or that consent is somehow implied in certain situations, or somehow enduring once garnered—but not all. However, to entirely disavow the correlation between these data and sexual assault is to deny potential solutions—imperfect as they may be—to this problem.<sup>181</sup>

To suggest, for example, that sexual assault prevention strategies aimed at curbing binge drinking (which can lead to fragmentary or en bloc blackouts and a resultant loss of agency)<sup>182</sup> perpetuate rape culture by improperly focusing attention on victims rather than on offenders, is to: (1) deny would-be victims a tool for identifying and (potentially) avoiding sexual predation;

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reports are taken seriously, their privacy is respected and they are treated with sensitivity; and finally, a climate where offenders will be held appropriately accountable for their actions.” *Supra* note 28 at 7.

<sup>178</sup> 2012 WGRA, *supra* note 16 at 52 (47% of female respondents indicated that either she or the offender had been drinking alcohol before the incident. This data is consistent with data in the civilian population, which also hovers at around 50%. Teresa P. Scalzo, *Prosecuting Alcohol-Facilitated Sexual Assault 9* (2007), *available at* [http://www.ndaa.org/pdf/pub\\_prosecuting\\_alcohol\\_facilitated\\_sexual\\_assault.pdf](http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf).

<sup>179</sup> Lisek *supra* note 68 at 1318.

<sup>180</sup> Scalzo, *supra* note 178 at 27 (“eighty percent of all sexual assaults occur during social interaction, typically on a date.”). While the precise nature of these relationships is not tracked in the military, only 10% of women and 13% of men reported that the offender was “unknown” to them. 2012 WGRA, *supra* note 16 at 45. Sewell Chan, ‘*Gray Rape*’: A New Form of Date Rape? N.Y. Times, Oct. 4, 2007, *available at* [http://cityroom.blogs.nytimes.com/2007/10/15/gray-rape-a-new-form-of-date-rape/?\\_php=true&\\_type=blogs&\\_r=0](http://cityroom.blogs.nytimes.com/2007/10/15/gray-rape-a-new-form-of-date-rape/?_php=true&_type=blogs&_r=0) (describing “gray rape” as, “sex that falls somewhere between consent and denial and is even more confusing than date rape because often both parties are unsure of who wanted what.”).

<sup>181</sup> For example, given the correlation between alcohol and sexual assault, and given the fact that 67% of women and 73% of men who reported unwanted sexual contact in the fiscal year 2012 WGRA indicated the incident occurred on a military installation, I would suggest banning the sale or possession of alcohol on military installations. 2012 WGRA, *supra* note 16 at 22-23. Regardless of the availability of alcohol off-installation, what stronger deterrence message could DoD leadership send to those serving that they will neither stand for nor be complicit (in any manner) in the commission of these alcohol-fueled crimes? The constituency opposing any such a ban would be as immense as it would be diverse. And the arguments against it—which could very easily be poached from the United States’ failed experiment with prohibition in the early 20th century—would undoubtedly be compelling. Given these dual realities, a proposed DoD-wide ban would certainly fail. Instead, a small but representative selection of military installations could serve as a test bed for the efficacy of the hypothesis that removing alcohol from military installations and at official functions might meaningfully reduce the incidence of sexual assault. If this hypothesis is proved correct—in that these test bed installations see a statistically significant decrease in the incidence of sexual assault among assigned personnel—then a more compelling evidence-based argument could be made in support of a broader ban.

<sup>182</sup> “Fragmentary blackouts occur when people may recall portions of the episode after the incident when cues for events are provided. En bloc blackouts have ‘definitive starting points, contain amnesia for all events within a discrete period, end with a sense of lost time, and require a high blood alcohol concentration.’ The en bloc blackout is not a ‘process of forgetting, but rather one of not remembering.’ ‘In contrast, fragmentary blackouts involve a more transient, perhaps forgetful memory loss for which aspects of experience are recalled via provision of pertinent cues. Thus, memory traces form but require facilitation to be accessed.’” Scalzo, *supra* note 178 at 23.

and (2) deny the nature of crime and our lack of an adequate deterrent. For crimes not so “enmeshed in the politics of gender and sexuality,” this is accepted without question—it is why we have locks on doors, car alarms, security cameras, and computer passwords; why we have police departments, district attorneys, and prisons; why some own firearms or take self-defense classes; why we counsel our friends and loved ones to avoid proverbial “dark alleys” and why we consciously or unconsciously avoid them ourselves. We take steps every day to avoid being victimized by crime.<sup>183</sup> If someone believes this logic applies to sexual assault, does that make him or her a “victim blamer?” Some believe it does.<sup>184</sup>

Similarly, allegations arising from nonstranger sexual assault do not adhere to a strict orthodoxy, to wit: “Rape and assault are violent, traumatic crimes, not mistakes...Rape is about power, control or intimidation;”<sup>185</sup> “[i]t is not a matter of partying and the wrong thing happened;”<sup>186</sup> or “rape has nothing to do with sexual gratification.”<sup>187</sup> “Nonstranger rape cases...are marked by complexities and challenges unseen in any other type of violent crime.”<sup>188</sup> These challenges and complexities undermine many of our assumptions about sexual assault. Indeed, “[s]exual violence is no longer primarily located in a dark alley. Instead, it is seen as occurring in the very same places where sex between intimates and acquaintances takes place. Just as sexual violation occurs in the setting of relationships, so, too, does wanted sex.”<sup>189</sup>

Among these complexities and challenges is the often unrecognized distinction between non-consensual sex, which is a crime, and “unwanted sex,” which is not. Here unwanted sex is described in terms of heterosexual women and girls:

Married or not, [this group consents] to a good bit of unwanted sex with men that they patently don’t desire, from hook-ups to dates to boyfriends to cohabitators...Women and girls do so from motives of self-aggrandizement, from an instinct for survival, out of concern for their children, from simple altruism, for friendship or love, or because they have been taught to do so. But whatever the reason, some women and girls have a good bit of sex a good bit of the time that they patently do not desire.<sup>190</sup>

As one Ivy League student explained to *The New York Times*, her freshman and sophomore year hookups often ended with fellatio because, “by the time she got back to a guy’s room, she was starting to sober up and didn’t want to be there anymore, and giving the guy oral sex was an easy

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<sup>183</sup> Though we likely overestimate the risk of becoming a victim due to the availability heuristic, WYSIATI, and availability cascades.

<sup>184</sup> “When one tries to address the huge problem of binge drinking in the military as a contributing factor to sexual assaults, they are accused of trying to blame the victim.” U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 17 at 179; Anne M. Coughlin *et al.*, *Young Women, Drinking and Rape*, N.Y. Times, Oct. 24, 2013, available at <http://www.nytimes.com/roomfordebate/2013/10/23/young-women-drinking-and-rape>; Ruth Marcus, *Denouncing binge drinking is not victim blaming*, Wash. Post, Oct. 24, 2013, available at [http://www.washingtonpost.com/opinions/ruth-marcus-missing-the-point-on-binge-drinking/2013/10/24/56c8a70a-3ce0-11e3-a94f-b58017bfee6c\\_story.html](http://www.washingtonpost.com/opinions/ruth-marcus-missing-the-point-on-binge-drinking/2013/10/24/56c8a70a-3ce0-11e3-a94f-b58017bfee6c_story.html).

<sup>185</sup> *March 2013 Senate Oversight Hearing*, *supra* note 2 at 9.

<sup>186</sup> *Id.* at 25.

<sup>187</sup> *Id.* at 28.

<sup>188</sup> U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 17 at 45.

<sup>189</sup> Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 Minn. L. Rev. \_\_ (forthcoming 2014) (manuscript at 16), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2009541](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009541).

<sup>190</sup> *Id.* at 32.

way to wrap things up and leave.”<sup>191</sup> By all appearances, this sexual contact was unwanted in that it was performed simply as a pretext to leave, but it was also a consensual act performed by a competent person. This begs the question: how many well-intentioned people within the military upon hearing this fact pattern—that unwanted fellatio was performed in order to leave a guy’s room after a night of underage drinking—would believe it to be sexual assault and encourage the young Airman, Soldier, Sailor, or Marine to report the incident to the authorities as such? To the extent these well-intentioned people believe the canard that, “if a woman has had a single drink she cannot consent to [sexual contact],” this outcome appears likely.<sup>192</sup>

Indeed, not only is it possible for someone who has been drinking—whether of age or underage—to consent to sexual contact, it is also possible for one to lawfully ply another with alcohol with the sole aim of engaging in sexual acts or intercourse with them. This is not, as conventional wisdom holds, sexual assault or rape *per se*. The legal test is not whether one intended to, and did, in fact, lower the inhibitions or defenses of the other party with the aim of taking advantage of them sexually, but whether the other party was *incapable of consenting or did not, contemporaneous with the sexual contact, consent*.<sup>193</sup> And here, “[t]here is no bright line legal test that defines precisely how much alcohol...result[s] in a person’s inability to consent to sex.”<sup>194</sup> Add to this the fact that sexual acts for which consent is obtained through deception or coercion are generally not criminalized.<sup>195</sup> This may come as a surprise to many, since “in virtually every legal arena outside of rape law, a ‘yes’ obtained through deception is routinely (and correctly) rejected as an expression of true consent.”<sup>196</sup> Deception or coercion of this variety may be morally reprehensible—as, for example, when the promise of some future relationship that never develops is predicated on the performance of certain sexual acts or intercourse—but it is not, without more, sexual assault or rape.

This is not to suggest that these types of behavior could not or should not be criminalized, it is only to say that they are not currently criminalized (note, this is in no way unique to military law). To be sure, one may behave *awfully* in the sexual realm—with utter disregard for the

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<sup>191</sup> Kate Taylor, *Sex on Campus: She Can Play That Game Too*, N.Y. Times, Jul 12, 2013, available at <http://www.nytimes.com/2013/07/14/fashion/sex-on-campus-she-can-play-that-game-too.html?pagewanted=all>.

<sup>192</sup> U.S. COMM. ON CIVIL RIGHTS, *supra* note 17 at 180 (As one criminal defense lawyer specializing in military law and former judge advocate testified, “We speak to those who are told in sexual assault training that if a woman has had a single drink she cannot consent to sex. We have seen commands that fear that if they do not forward every allegation, no matter how dubious, for prosecution that will cost them their careers.”); Potter & Stapleton, *supra* note 96 at (researchers describing a sexual assault prevention campaign at an Army installation in Europe: “In a fourth image, a soldier, whose face is not identifiable in the image, is bragging to two men and women at a dining facility table on how easy it was for him to have sex with a woman in his barracks. One of the men at the table then confirms that the soldier had sex with a woman who was drunk. The third man labels his friend’s behavior as rape. The tag line on this image states ‘Speak up when you hear stories that glorify sexual violence. Your responses can make a difference.’” This oversimplification—that drunkenness and the ability to consent to sexual contact are mutually exclusive—could lead to misperceptions about what constitutes a criminal sexual offense.)

<sup>193</sup> UCMJ art. 120(b)(3) and 120(g)(8) (2014) [10 U.S.C. §920(b)(3) and §920(g)(8)]; Evidence the alleged victim consented to the sexual act is relevant to whether the prosecution proved the elements of the case beyond a reasonable doubt. *U.S. v. Neal*, 68 MJ 289, 302 (CAAF 2010).

<sup>194</sup> Scalzo, *supra* note 178 at 14.

<sup>195</sup> The narrow exception in military law is when the accused induces a belief by artifice, pretense, or concealment that the accused was another person. UCMJ art. 120 (2014) [10 U.S.C. §920(b)(1)(D)].

<sup>196</sup> Jeb Rubinfeld, *Rape-By-Deception—A Response*, 123 YALE L.J. ONLINE 389 (2013).

physical and emotional wellbeing of others<sup>197</sup>—but that behavior is not necessarily criminal. This begs the question: how many people, both within the military and without, confuse or conflate this type of morally reprehensible behavior with criminal behavior? Moreover, what is the impact of this confusion or conflation on peoples’ perceptions of the efficacy of the military justice system?

Whether involving wanted or unwanted sex, the idea of a pervasive hook-up culture among college-age women is widely recognized and celebrated in feminist literature and impacts the same military demographic most likely to report unwanted sexual contact (*i.e.*, E1-E4 women).<sup>198</sup> To acknowledge that this hook-up culture or changing sexual mores more generally are worthy of some discussion in relation to sexual assault prevention is not to pass judgment on that culture or those mores;<sup>199</sup> nor is it to unfairly shift the focus of attention to the victim or to deny the existence of sexual predators. Rather, it is to acknowledge the possibility that two people, who are most likely young, who may not know each other very well, who may be intoxicated, who are “hooking up,” who almost certainly did not discuss consent or boundary setting, may drift or be navigated toward a more serious sexual encounter that one of them, whether at the time or upon reflection, deems a crime—and may, in fact, be a crime. Is the victim in this situation in any way unworthy of protection under the law? Absolutely not. Should the public health response (*i.e.*, victim care) be robust regardless of whether a justiciable crime has been committed?<sup>200</sup> Absolutely. Is the offender in this situation a habitual sexual predator motivated by power, control, and intimidation? The data indicate he most likely is, but that possibility does not absolutely forestall all other possibilities.<sup>201</sup> To the extent we allow for the

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<sup>197</sup> White House Council on Women and Girls, *supra* note 21 at 2 (“Rape and sexual assault survivors often suffer from a wide range of physical and mental health problems that can follow them for life—including depression, chronic pain, diabetes, anxiety, eating disorders, and post-traumatic stress disorder. They are also more likely than non-victims to attempt or consider suicide.”). The notion that only victims of a justiciable sexual crime experience these physical and psychological impacts is both illogical and wrong.

<sup>198</sup> *Id.* at 33. “[R]esearchers say that young women are becoming equal partners in the hookup culture, often just as willing as young men to venture into sexual relationships without emotional ties.” Natalie Kitroeff, *In Hookups, Inequality Still Reigns*, N.Y. Times, Nov. 11, 2013, available at [http://well.blogs.nytimes.com/2013/11/11/women-find-orgasms-elusive-in-hookups/?\\_php=true&\\_type=blogs&\\_r=0](http://well.blogs.nytimes.com/2013/11/11/women-find-orgasms-elusive-in-hookups/?_php=true&_type=blogs&_r=0). “Women said universally that hookups could not exist without alcohol, because they were for the most part too uncomfortable to pair off with men they did not know well without being drunk...The close relationship between hooking up and drinking leads to confusion and disagreement about the line between a ‘bad hookup’ and assault.” Taylor, *supra* note 191.

<sup>199</sup> “[A] hookup culture implies that an increasing number of people expect to engage in casual sexual activity. If that is true, individuals who do not want to hook up are more likely to be confronted and potentially assaulted. This in no way excuses terrible behavior, but it does start to explain at least some of it.” Roger Brady, *Telling truths about sexual assault is risky*, A.F. Times, May 21, 2013, available at <http://www.airforcetimes.com/article/20130521/NEWS01/305210036/Commentary-Telling-truths-about-sexual-assault-risky>.

<sup>200</sup> “The disconnect between a victim’s trauma resulting from a sexual experience and the inability to obtain a conviction is a large contributor to the perception of a ‘sexual assault problem’ in the military.” Rodman, *supra* note 112 at 30.

<sup>201</sup> While predators do exist, not all those accused of or admitting to acts of sexual violence are habitual predators. David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 *Violence and Victims* No. 1 78 (2002) (Of the 120 rapists identified in a study of 1882 men, “76 (63.3%) reported committing repeat rapes, either against multiple victims, or more than once against the same victim. In total, the 120 rapists admitted to 483 rapes, or 4.0 rapes each. However, this average is somewhat misleading. Since 44 of the 120 rapists admitted to only a single rape, the 76 repeat rapists actually accounted for 439 of the rapes, averaging 5.8 each..., significantly more than the single-act rapists....”).

possibility that the offender may not be an archetypal predator, but may instead have missed or “ignor[ed] the victim’s efforts to communicate”<sup>202</sup> in pursuit of sex or sexual gratification—then might that offender (and by extension, that victim) have benefitted from a candid sexual assault prevention and response program that educates military members on the professional and legal perils associated with “hooking up” without discussing consent and boundary setting? Isn’t this type of offender more reachable and, therefore, more likely to be deterred from engaging in risky sexual behavior than the archetypal predator? Perhaps this type of education would only impact a small percentage of cases, but does the desire to open a dialogue on this prospect really make one a “rape denier?”

The result of all of this—of the reputational cascade and the sensitive cultural corollaries to sexual assault—is a circumscribed discourse: an echo chamber in which thoughtful counterpoints are all but non-existent and, perhaps, presumed not to exist. The complex issues surrounding sexual assault in the military necessitate a chorus of viewpoints—a full and fair debate—wherein opprobrium is reserved not for those whose views simply depart from conventional wisdom, but for those whose views truly are countermodern.

## V. CONCLUSION

“The normal state of your mind is that you have intuitive feelings and opinions about almost everything that comes your way.”<sup>203</sup> *Thinking slow* counsels an appreciation for the fact that the mind can be “a machine for jumping to conclusions,” but with some effort can also overcome this tendency. In the emotional realm of sexual assault, the effort required is arguably Herculean.<sup>204</sup> But again, even marginally better thinking on the problem of sexual assault “can lead to much more than marginally better results.”<sup>205</sup>

This includes a recognition by military leaders (and others) of the nature of crime and our lack of an adequate deterrent. As decidedly unappealing as the prospect is, incidents of sexual assault will continue to occur in the military irrespective of the actions taken by military leadership or the Congress. This is not to suggest there is some “acceptable level” of sexual assault in the military, it is only to say that wholesale eradication of these crimes is at once unachievable and ahistorical. A realist’s view in this regard should redound to the rhetoric of these leaders, which ought to focus on reducing the incidence of military sexual assault vis-à-vis comparable civilian populations. To the extent eradication remains the metric by which success is judged and the only bulwark against unceasing reform efforts, then the tumult experienced by the military in 2013 will continue until, as Diodotus lamented, “we discover some fear more potent than the fear of death.” Worse yet, this unceasing reform effort, which amounts to

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<sup>202</sup> “Most assaults are a result of ignoring the victim’s efforts to communicate, though many are also taking place while the victim is asleep or unconscious, or after the use or forced use of drugs or other intoxicants. Assaults occurring by force are less common, but not rare.” “The prosecutor must look carefully at all the facts of the case to determine whether the defendant is a predator or just a drunk guy who did not intentionally rape anyone...The more predatory the defendant’s behavior, the easier it is to prove that he is a rapist.” Scalzo, *supra* note 178 at 19.

<sup>203</sup> KAHNEMAN, *supra* note 3 at 98.

<sup>204</sup> As philosopher Hans-Georg Gadamer noted, “[a researcher] cannot separate in advance the productive prejudices that enable understanding from the prejudices that hinder it.” Michael Suk-Young Chwe, *Scientific Pride and Prejudice*, N.Y. Times, Feb. 2, 2014, SR.12.

<sup>205</sup> NEUSTADT & MAY, *supra* note 20 at 31.

changing multiple variables without assessing the efficacy of previously implemented solutions, is grossly unscientific. One could argue, quite reasonably, that rhetorical tacking at this point is politically infeasible. However, if military leaders truly believe that sexual assault victims are more likely to receive both the justice they deserve and the care they need under the current commander-led system, then infeasible or not, they should change tack.

This also includes a plea to synchronize methodologies—to begin gathering and reporting data on sexual assault in a manner that facilitates “apples to apples” comparisons across similar demographic groups (*e.g.*, use the same survey techniques, questions, definitions, and time periods for reporting). A “whole of government” approach could isolate the problem and, in turn, assist in the allocation and massing of resources in the areas where those resources are needed most. This synchronization would not only make the data more useful to law- and policy-makers, it might also make it easier for the media and, by extension, the public to understand its implications. For example, a parent who is concerned about his or her son or daughter entering the military for fear of sexual predation, may be interested in knowing whether the risks of victimization are empirically higher in a college dorm on campus than in a military dorm on base.<sup>206</sup>

Finally, and most importantly, this includes an appreciation for how our mind catalogues and interprets the information it receives. The focus here is on adding to one’s cognitive toolbox in order to recognize and avoid systemic errors that lead to flawed thinking about complex problems like sexual assault in the military. It means looking to experts and empirical data (while maintaining a healthy skepticism as to what those data represent); it means viewing anomalous anecdotes, like the Krusinski and Wilkerson cases, in the proper context; it means recognizing the counterintuitive and politically powerful phenomena, WYSIATI; it means recognizing that just because something is believed by many, it is not necessarily true; it means that the full and fair discourse can be stymied when peoples’ reputations are at stake; finally, it means that avoiding the confusion of correlation and causation in cultural debates about social problems requires constant vigilance.

In the abstract, sexual assault is a readily solvable problem. Simply change the culture, or focus on the alleged perpetrators, or increase prosecution and conviction rates, or remove senior military commanders’ disposition authority, *et cetera*. Like all wicked problems, however, sexual assault defies simple solutions. Similarly, in the abstract, sexual assault cases are easy and any result other than conviction at court-martial and incarceration of the alleged perpetrator represents both an institutional failure and a travesty of justice. In reality, however, these cases are often extremely difficult to prove—in particular the non-stranger variety that constitute the majority of military cases.<sup>207</sup>

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<sup>206</sup> White House Council on Women and Girls, *supra* note 21 at 1 (“1 in 5 women has been sexually assaulted while in college.”)

<sup>207</sup> 2012 WGRA, *supra* note 16 at 45. At the risk of falling prey to anecdotalism, and as a self-referential aside, I do not believe that anyone can truly appreciate just how complex and bewildering these cases can be until they have dealt with them—from allegation through adjudication. In the approximately 50 sexual assault cases that I have personally dealt with—as either a prosecutor, defense attorney, independent investigator, or in an oversight role—a relative few have presented clear-cut facts and evidence (from a demonstrably false allegation in one instance, to demonstrably violent, non-consensual attacks in other instances). Most fell into a very challenging gray area in between. While law- and policy-makers and commentators certainly does not forfeit the right to opine on the

Opinions will no doubt continue to differ on this emotionally charged topic. These differences relate to the facts marshaled in support of given arguments; the interests those arguments represent—whether tilting toward victims of sexual assault, those accused of sexual assault, or some balanced accounting in between; as well as the root causes of the problem. Indeed,

Our pragmatic, essentially lawyerly society supposes that if people differ they have either different facts or different interests. If the one, the solution is research; if the other, arbitration or compromise. Most Americans find it hard to accommodate the alternative possibility that differences may be due to differences in concepts of causation at a level beyond tests of evidence or of “getting to yes” conciliation.<sup>208</sup>

While a *modus vivendi* among these competing camps appears unlikely, *thinking slow* about the problem is the surest means of achieving the best possible outcome for victims of sexual assault in the military. And that end should never be far from the minds of those engaging on this issue.

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disposition of these cases, even in the absence of experience or direct knowledge of the facts, the relative certitude with which they express their opinions, appears to me directly related to their understanding of, or appreciation for, these complexities.

<sup>208</sup> NEUSTADT & MAY, *supra* note 20 at 204.