

Sexual Assault: Naming the *Unnamed Conspirator* ©

Examining myth and incorporating truth into the investigative and
prosecutorial process

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Having spent the last twenty years as a prosecutor and educator in the area of sexual assault and domestic violence, I have been both saddened and privileged to come face to face with hundreds of victims of these crimes. I have also been fortunate to work with criminal justice system workers, both civilian and military, who respond to the victims and the offenders. I am influenced by the same media, culture and ideas that influence our society and over time shape the way we see the world. Having grown up in an Air Force family I have also been influenced by military culture in important ways that have shaped my world view and instilled respect for the justice system and the Air Force. It has also fueled my commitment to obtaining justice for crime victims and holding offenders accountable for their criminal acts.

When I first began prosecuting cases, I believed that crimes of interpersonal violence and specifically sexual assault, necessarily involved two parties, the victim and the offender. That justice would be determined based on what transpired between these two individuals. In cases that involved more than two people, I believed that justice would be determined based on whatever it was that transpired between the involved parties. What I began to notice, however, was that there was an additional, *unnamed conspirator* who played a vital role in every sexual assault case. This *unnamed conspirator* was not listed on the police reports or on the charging documents, and one never saw their name in the crime reports. Still, they were there, behind the scenes, strongly embedded in the fabric of the case and often claiming the lion's share of influence over the case outcome. This *unnamed conspirator* served as a great frustration, since I was charged with seeking justice and assisting victims of the offenses; it seemed that no matter what, the *unnamed conspirator* worked against the victims, against achieving justice, and made my job more challenging than I had ever imagined it would be.

As a prosecutor, the strong influence of the *unnamed conspirator* is seen in the sentiments reflected in jury verdicts and in comments made by jurors and judges who are charged with determining the underlying facts of sexual assault cases. It is common knowledge that obtaining convictions in sexual assault cases is challenging. Examining how jurors make these decisions gives us an important perspective on the *unnamed conspirator's* influence on sexual assault cases. Studies compiled by the National Judicial Education Program indicate the juror decision making process is unique and is subject to societal myths that drive decisions in these cases. A look at these studies shows that holding offenders accountable is very challenging. The focus of sexual assault verdicts, per the wishes of the *unnamed conspirator*, often focuses on *victim* behavior rather than on the *criminal* behavior of the offenders. This has been true historically as seen in studies of juror decision making that have been conducted over the years.

Harry Kalven and Hans Zeisil conducted the first large-scale jury research of this kind in the mid 1960's. They contacted 3,500 judges, of whom 550 cooperated with their study. They looked at juror decision making in numerous cases, but most interesting was what they learned in sexual assault cases. There were 42 cases of "simple rape" meaning there was only one perpetrator, one victim, they knew each other, there were no weapons involved and there was no physical injury inflicted during the rape. There were only 3 convictions of in 42 cases, a .07% conviction rate. In studying the juror decision making process in these "simple rape" cases, it became clear that jurors define rape in terms of "assumption of risk". Therefore, if a victim engaged in actions historically characterized as "risky behavior" and was subsequently raped, jurors used this as a reason to exonerate the defendant. Such behaviors included going to a bar, drinking alcohol, and going to the defendant's apartment. If she did some or all of these things, jurors decided that she assumed the risk of being raped. (Kalven and Zeisil, 1966)

Later, in the early 1980's Gary LaFree, a sociology professor from the University of New Mexico, conducted a major study of SA cases in Indianapolis. (LaFree, 1989) Ultimately, his researchers conducted face to face in-depth 90-minute interviews with 331 jurors who sat on rape cases. He found that not much had changed since the earlier study; jurors made their decisions based on the *victim's* character and lifestyle. This was true even when the evidence included the use of weapons and victims who sustained injuries. The jurors were more concerned, it seemed, with making a moral judgment about the victims than with examining the actions of the offenders. They were also less likely to hold the offenders accountable when the victim drank or used drugs, was acquainted with the defendant or engaged in sex outside marriage.

Interestingly, if we look at how victims of *other* crimes are treated, we see a very different picture. Take, for example, a robbery victim. Picture if you will a well-dressed man in an expensive car who pulls over to an ATM in order to get some cash. He steps from his car, and reaches for his wallet to retrieve his ATM card. There is a second man using the other ATM machine, he is dressed in blue jeans, and drives a beat up sedan. From another location, a robber appears. He leaves the guy in jeans alone, and robs the well-dressed man. Do we blame the robbery victim for the crime? Do we tell him that he assumed the risk of being robbed by wearing the clothes that he wore? Do we examine his personal history to determine whether he is, for example, a philanthropist who is in the habit of gifting money to others, thereby making him a witness who has lost all credibility?

A slight variation on this example shows how the *unnamed conspirator* applies a double standard to crime victims who drink alcohol. Let's assume this robber has now walked across town, intent on committing another robbery. He looks down an alley and sees two men, one on the left and one on the right. The one on the left is on the ground, bottle in hand and clearly inebriated. The one on the right is sober. Which man do you think he will choose as his victim? The drunk man, of course. He is an easier target, may be unable to resist, will be less likely to report, may not be believed, and will have problems with his memory. We certainly can understand why, under circumstances such as these, the offender would consciously target a victim who is drunk. But if we change the crime

from robbery to sexual assault, we see the analysis change. Adding alcohol to the sexual assault scenario often causes the focus to change to the victim in a way that questions, criticizes and condemns them. Contrarily, sexual offenders who drink are not subject to this kind of scrutiny, and in fact are often excused, in whole or in part, because they were drinking. This double standard is truly one of the favorites of the *unnamed conspirator*.

What does the *unnamed conspirator* have to say about a victim who is sexually assaulted after consenting to some level of sexual contact before the assault? It is fair to say that victims in this circumstance may be on the receiving end of sentiments such as, “What did she think was going to happen?”, “She asked for it!”, or “She consented as soon as she went to his apartment”. Consider the following example by way of comparison.

Picture two people who know one another and who share some level of familiarity and trust. Person A asks person B if they can borrow fifty dollars. Person B is willing to give them twenty five dollars, and hands them that amount of money with an explanation that twenty five dollars is all they are willing to give. If Person A takes fifty dollars, rather than the twenty five that was offered, it would be a crime, would it not? But if we draw this analogy in the arena of sexual assault, we far too often discover a different reaction. If person A consents to kissing or touching but clearly says no to more advanced forms of sexual contact, how is that different? If person B takes more, is it a crime? The *unnamed conspirator* argues that it is not, but logic and fairness tell us otherwise.

The *unnamed conspirator* has trained us to habitually focus on victim behavior rather than offender behavior when analyzing the crime of sexual assault. The results show us how poor our response is in addressing this crime. As you have undoubtedly guessed, the *unnamed conspirator* is societal attitude. It is you and it is me. Anyone who works with sexual assault cases should be made aware of how the *unnamed conspirator* might be influencing their view. This will allow us to more adequately and accurately address this societal misperception. In my estimation, it is the single most inhibiting influence on a fair and just response to the crime of sexual assault.

Sexual assault: What we know

In order to set a framework for this complicated problem, it is important to first review what we know about victims, offenders, reports, dynamics and system response. Based on this information, we can build a model for “best practices” so the Air Force will continue to lead in the field of sexual assault prevention, risk reduction and response.

Victims: How big is the problem?

How many people experience sexual assault? Many studies have been conducted, and depending on the population surveyed, results suggest that between 13% and 24% of American women are victims of sexual assault or attempted sexual assault at some point in their lifetimes. One study surveyed both men and women and found that as many as 1 out of 6 American women (18%) will be the victims of a completed or attempted sexual assault at some point during their lives and

approximately 1 in 33 American men (3%) will be the victims of completed or attempted sexual assault at some point during their lives. (Tjaden & Thoennes, 2000) An estimated 91% of victims of rape are female, 9% are male and 99% of offenders are male. (Bureau of Justice Statistics 1999) In 2003, 27% of surveyed veteran women indicated they had experienced a rape or attempted rape during their military service. (Laurier, 2004) A Pentagon study found that 9 percent of the reported victims of sexual assault in the armed forces in 2002 and 2003 were men who had been assaulted by fellow servicemen. (Jacobs, S. 2004)

Reporting: How many cases of sexual assault are reported?

Sexual Assault is a crime that is vastly under reported. On average, from 1992-2000, only 31% of all rapes and sexual victimizations were reported to the police (Hart, Timothy and Rennison, 2000) While this reporting rate seems low, many studies paint an even bleaker picture. One study surveyed more than 6000 college aged women at 32 colleges and universities around the country. Findings showed that approximately 25% had experienced an attempted or completed rape while at college. In addition, the study showed that 42% of the women did not tell *anyone* about being assaulted, and *only 5% reported to the police.* (Warshaw, 1994).

In a similar study, 27% of female college students acknowledged that they had been forced to have sexual intercourse while on a date, but only 3% responded “yes” to being asked if they had “ever been raped”. Similarly, 15% of college aged men admitted to victimizing women while on a date, though less than 1% acknowledged that they had ever raped a woman. (Miller & Marshall, 1987) In the military setting, 14.8% of Naval recruits admitted to perpetrating rape or attempted rape prior to their military service. (Merrill et.al. 1998)

A look at the results of these studies shows us one of the difficult yet important realities of sexual assault. Victims don't see themselves as victims, and offenders don't see themselves as offenders. While studies show that the vast majority of sexual assaults occur between people who know each other, the *unnamed conspirator* has convinced many of us that “real rape” is something that involves strangers, weapons, injuries, and dark alleys. Given this misperception, it is no surprise that victims who acknowledge their experiences still do not see themselves as victims, as the majority of rapes happen under circumstances far different than those suggested by the *unnamed conspirator*. Offenders consciously use this misconception to avoid detection and continue committing their crimes

If victims are not identifying what happened to them as sexual assault, it is no wonder they do not report it. It also explains why so many reports of sexual assault are delayed. Many victims may not understand initially that what they experienced was sexual assault, but with the passage of time, the reality may

settle in. While most will not report the crime, others, given the benefit of time to integrate the experience, may report.

There are additional important reasons why sexual assaults go unreported or the reports may be delayed. First, many victims are ashamed and embarrassed. Second, victims may be in shock or denial, especially if the person who assaulted them is not a stranger and in fact is an acquaintance, friend or intimate partner. It seems much easier to report a rape that occurs under the statistically unlikely scenario of the stranger, who attacks after jumping out of the bushes, than it is to report the person with whom you agreed to go on a date. Third, many are afraid that they will not be believed or fear that their private lives will be made public. Still others do not feel like that they are capable of facing the rigors of a criminal justice system. Rape is a traumatic experience, and adding additional trauma to it can be overwhelming. Finally, victims are often concerned what will happen to them if they participated in “risky” or even prohibited behavior such as underage drinking or drug use, particularly in a military setting.

It is important to acknowledge the difficult challenges faced by male victims of sexual assault, and that reporting rates are even lower. The stigma and perceived lack of support or understanding for a male who is assaulted result in a formidable barrier to disclosure. This prevents most male victims from receiving the much needed help they deserve. It also results in the unintended consequence of their perpetrators going undetected.

Sexual Offenders: Who are they?

Very few sex offenders match the *unnamed conspirator's* stereotype. The majority of sex offenders are rarely strangers to the victim, do not usually cause serious physical harm to their victims, do not carry or use weapons and do not attack their victims outdoors or in alleys. In reality, sex offenders are often well liked, successful, charming, good looking, and popular. They look like anyone and everyone. They are our neighbors, coaches, pastors, friends, partners, peers and co-workers. They come from all ethnic, racial and socio economic backgrounds.

Sexual offenders are also very successful when it comes to committing this offense; studies show they commit their crimes over and over, often without detection or consequence. The chances of being caught for a sexual offense is 3 percent (Abel et al, 1988) Only about 5 percent of all rapists ever spend a day in jail (Saulter, 2003). .8% of rapists of adult females result in the offender's imprisonment for 1 or more years (Rape in America, 1992).

Military audiences are often familiar with the work of Dr. David Lisak, a psychologist and professor from the University of Massachusetts. His research on what he calls the “undetected rapist” has opened the eyes of many, both in and out of this field. His videotaped reenactment of his original interview with a rapist he

calls “Frank” is chilling and educational, and has been shown to military and civilian audiences around the world.

Dr. Lisak has been conducting research on these undetected rapists for decades. In short, his research involves surveys of college men who talk candidly about their sexual habits. The results are startling and provide criminal justice workers with critical information about how to more accurately investigate and respond to this crime. His study assessed 1882 men. One of the questions they were asked on the survey was, “Have you ever had sexual intercourse with an adult when they didn’t want to because you used physical force (twisting their arm, holding them down etc.) if they didn’t cooperate?” A positive answer to this question meets the legal definition of rape anywhere in the country, or in the military. The good news is that the majority of men in his study answered no. The bad news is that of the 1882 men he assessed, he identified 120 rapists. Of the 120 rapists, 80% reported committing rapes of women who were incapacitated by drugs or alcohol. 44 of the 120 rapists admitted to committing one rape, while shockingly the other 76 men admitted to committing an *average of four rapes per rapist* which means they are serial rapists. Even more disturbing was what his research showed about the other crimes these same 76 serial rapists had committed. In all, the 76 men admitted to:

- 439 rapes
- 49 sexual assaults
- 214 acts of battery of partners
- 66 acts of physical abuse of children
- 277 acts of sexual abuse of children
- **1045 total acts of violence**

Sadly, of the 439 rapes his research uncovered, only one was reported, and none was prosecuted. *Lisak, D. & Miller, P. M. (2002)*. How many of the hundreds of people who were victimized by these men never told anyone? How many attempted unsuccessfully to make reports to law enforcement? While we do not have answers to these questions, we can see clearly the challenges to addressing this crime in a meaningful way.

Dr. Lisak also identified some important characteristics of how the crimes are committed. The offenders are highly adept at seeking out victims with whom they would succeed. Most offenders know their victims and manipulate them into positions of vulnerability. The rapes are commonly characterized by a high level of premeditation and planning, and their victims are commonly chosen based on their younger age and naiveté. They are often invited to parties or events where they are encouraged to drink, and then led to isolated rooms where they are sexually assaulted. Alcohol is used intentionally to disarm victims and make them vulnerable to the assaults. It is clearly the weapon of choice.

Dr. Lisak's work reinforces the problem of underreporting and underscores the need to reframe the way we understand offenders. We must take a realistic and honest approach to who they are, how they operate and how we treat them if we are to make any appreciable progress in the appropriate responses to this crime.

False reports: How many are there?

Sexual assault carries with it the misperception that a high number of cases are falsely reported. The validated and well documented studies in this area demonstrate that a low percentage of sexual assault cases are false reports. According to the FBI, 8% of sexual assaults are false allegations. (The Federal Bureau of Investigations (1995).

Interestingly, this same statistical finding is repeated in two other well documented studies. One, published by the British Home Office in 2005, studied 3500 rape reports from multiple jurisdictions. A more recent study conducted by EVAW International analyzed rape cases from eight different jurisdictions across the United States. While the EVAW International data has not yet been published, all three of these studies reach the same result; only 8% of sexual assault reports are false. (Kelley, Lovett & Regan, 2005) (EVAW International, 2007).

In spite of these empirical studies, there is much misunderstanding among law enforcement officials and others in the criminal justice field regarding false reporting. Some investigators decide arbitrarily, often without a full investigation or even an interview of the suspect, that an allegation is false. No case should be characterized as false without a full evidence based investigation of the offender and the crime. False allegations should be distinguished from cases that involve recanting victims, and cases that may involve inconsistencies or where some false information is provided. The presence of these characteristics does not necessarily mean that there was no rape. While this topic is too complex to adequately address within the confines of this paper, guidance can be taken from the International Association of Chiefs of Police in the following except from the publication "Investigating Sexual Assaults".

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

not require, offer, or suggest that a victim take a polygraph examination or submit to SCAN or voice stress analysis during the investigation stage.” (IACP, 2005).

Recommendations for investigators and prosecutors:

Sexual assault is a crime with devastating consequences for victims, and far too often, with few or no consequences for perpetrators. Responding to this crime requires extensive education in foundational blocks of understanding and practice. It is the *unnamed conspirator* who sets the stage of success for the perpetrators of this crime, and in order to change the tide that holds almost none of them accountable, we must begin by shifting the focus off of victim behavior and on to suspect behavior. Assuming the victim is a female and the offender a male, the inquiry should not sound like, “what did she, what was she, why did she?” This habitual response keeps us from focusing on the crime, and excuses the criminal.

Meeting the “Consent” Defense

The defense in most sexual assault cases is *consent*. How do we conduct investigations and prosecutions that can successfully meet this defense with the goal of holding offenders of this crime accountable? By knowing:

1. Unrestricted reports of sexual assault may be immediate, but more likely will be made after some delay. Delayed reports are normal, understandable, and explainable and should not be viewed with unfair scrutiny. Investigators should always approach a case with an open mind and without forming conclusions, especially based on a delayed report. Victims should be treated with understanding and respect, and should be offered available support during the process. Great care should be taken to make sure the victim is not re-victimized.
2. Many victims who experience sexual assault are traumatized, and their ability to perceive, remember or participate in the investigation and prosecution can be affected. The chances that a woman will develop post-traumatic stress disorder (PTSD) after being raped are between 50% and 95%. (Population Information Program, 1999) It is common for victims to experience difficulty reporting the details of a crime in a nice, neat, narrative fashion. Victims should be afforded the opportunity to rest before they are asked to provide statements or evidence whenever possible. Even so, common traumatic response often affects memory, and it is NOT uncommon for reports to be inconsistent and incomplete. The quality of the information available to a trained investigator, and thus the investigation will improve when victims are not taxed with a task they are not capable of performing adequately as a result of being traumatized.
3. Investigators and prosecutors should actively seek information and training on traumatic response to sexual assault in order to understand how it will affect the reporting process and subsequent prosecution. Psychological trauma often accompanies a non consensual sexual act, and often manifests itself in the life

of the victim *during and following* the assault. Is a delayed or inconsistent report the result of psychological trauma? What did the victim experience during the assault? What did she see, hear, smell, touch, feel, or otherwise experience? Are there factors that corroborate her experience? Is she experiencing changes in her sleep patterns, thought patterns, interpersonal relationships? Does she avoid reminders of the assault? Did the victim change her routines after the assault? Is she having trouble performing up to her normal standards? What do her friends and family notice about changes to her appearance, habits, demeanor and life? Is she experiencing symptoms consistent with PTSD? These examples often provide additional evidence when documented, and can be explained at a court hearing with the assistance of a psychological expert witness. It is critical that investigators and prosecutors not pre-judge victims based on common, yet misunderstood, behavior that is germane to being victimized by a sexual assault.

4. Investigations of cases that involve alcohol or drugs should reflect a sophisticated understanding of how alcohol is used intentionally to disarm victims and render them vulnerable to the crime. The presence of alcohol should not be used to *excuse* offender conduct, nor should it be used to *judge* victims. A close examination of how alcohol was introduced to the scenario, an analysis of who was in control of the scene and in control of their own faculties etc. is necessary to understand the role of alcohol. A victim who is passed out is incapable of consenting to anything. Many victims who are not passed out may still lack the ability to give consent due to incapacitation.
5. Investigations should be *evidence based* and thorough. No decisions about whether to recommend charges or action should be made until this is accomplished. Focus should be placed on the suspect and should take into account what we know from all the research about the repetitive nature of this crime. *The majority of sex offenders are serial rapists, AND most are not caught.* Looking for similar acts, potential other crimes and victims is crucial for an accurate picture of the incident at hand. All witnesses to events before and after should be contacted for statements to assist in corroborating the incident. The suspect's social circles and criminal contacts should be fully explored. Cases should be evaluated for the usefulness of search warrants to collect evidence from suspects that may include biological evidence as well as other evidence to corroborate the crime. The usefulness of pretext phone calls should be considered.
6. Suspects should be required to present themselves for questioning. It makes no sense to investigate a potential crime without talking with the person alleged to have committed it. The interrogation should reflect the best practices in the field.
7. Understand that sex offenders are masters of manipulation, and are skilled at evading responsibility for their crimes. Only three percent of sex offenders are arrested. Their manipulation is not limited to their victims. Part of their grooming behavior is directed at others, including law enforcement. Most sex offenders will not have the characteristics of other criminal groups. (McAllister, 2007) Consider the following excerpt from a convicted sex

offender from Colorado who was in treatment following his conviction and required to speak candidly about how he was able to successfully commit his crimes.

“My intentions were not to rape her at first. Once we were at the restaurant and she made it clear she was not there for sex, I raped her. I used the factual basis of what happened to make it look as though she was lying. Like almost all sex offenders, I had a “pretend normal” that was almost flawless. At work, I was fair, level headed and a hard worker. I presented myself as a dedicated, loyal kind person and never lost my temper with employees...Underneath that was a selfish and self centered person who was only setting the stage for others to see what I wanted them to see. I was honest and admitted that we met in the bar and, in fact, she followed me back to the restaurant in her car. She had several drinks with me at the restaurant and she walked away of her own free will-or so I said. I took all the truths and turned them on her. Used personal information that she had shared to build a story in my defense. I “wove” a story that was not only believable but probable. When friends and employees were questioned, I had already “groomed” them and manipulated them into making me out to be the “nice guy” and victim of this “barfly”, that is was she who was ashamed because she had a boyfriend and was only trying to cover up that she had slept with somebody. I was very willing to talk with police and investigators and to take a polygraph. I was questioned the following day, but was not arrested and charged for eight months.” (Colorado Department of Corrections, 2000).

Recommendations for Commanders:

1. Educate yourself about the nuances of this crime. At a minimum, you should be familiar with the following material:
 - Accurate incidence and prevalence statistics
 - Sexual assault dynamics with a focus on non-stranger crimes
 - Typical reporting patterns focusing on the most common, delayed reports
 - Offender dynamics and behavior, especially their capacity to manipulate others, their ability to fit in, to appear ‘normal’, charming and cooperative.
 - Offender victim selection patterns
 - *Unnamed conspirator* dynamics
 - Typical victim behavior including, trauma reactions and how these impact the investigation process
 - Information about the most effective ways of investigating and prosecuting non stranger sexual assaults (McAllister, 2007)

The men and women of the Air Force deserve commanders who make informed decisions based on accurate knowledge.

2. Ask questions about the investigation process when there are things that bother you. Expect people to be able to fully explain the appropriateness of their recommendations ensuring that they are not based in beliefs driven by the *unnamed conspirator*.

3. Ensure that the people who respond to sexual assaults under your command (OSI, JA and SARC) are trained in current, sexual assault specific investigation, prosecution and victim advocacy
4. Carefully weigh the question of collateral misconduct. Clearly it plays into the hand of the rapist if our response to his crime is to let him off the hook and punish instead, the victim for things more easily proved, such as drinking or fraternization to which the victim admitted in the course of the investigation while reporting the sexual assault. Weigh the gravity of the offense of sexual assault against more minor infractions, and if you are serious about holding sex offenders accountable for their crimes, consider providing immunity to victims for collateral misconduct, or holding punitive action involving the victim in abeyance until the much more serious crime committed against them can be addressed.

The Air Force has *truly* taken a leadership role by stepping up and addressing providing support to victims of sexual assault in a meaningful and forthright way. They have done more in three years than many civilian communities have done in thirty. Providing victims with services and options for reporting, encouraging them to come forward and report the crimes committed against them and educating the ranks about the dynamics of sexual assault are ground breaking steps of progress. It is the truest application of the Air Force core values of excellence, service and integrity. The parents who trust their sons and daughters to the Air Force have the right to rely on the Air Force to take the best possible care of their children, knowing that if a sexual assault is committed against their son or daughter, they are in the best possible hands. As the Air Force makes progress towards identifying sex offenders and holding them accountable, providing victims with the support and resources they require to participate in the legal process, the world can rest assured that once again, the Air Force is leading the way in shaping our culture for the better.