

Book Review

Missoula: Rape and the Justice System in a College Town¹

Reviewed by Major Michelle E. Borgnino*

“You better prepare for the hardest, nastiest fight of your life”²

I. Introduction

Passion for a cause is often born of personal experience. Judge advocates who try “he said–she said” sexual assault cases, either as prosecution or defense, understandably have a passion for the issue. But author Jon Krakauer,³ “admits to having known or cared virtually nothing about [non-stranger rape]”⁴ until a close family friend revealed she had been assaulted by not one, but two men she knew.⁵ He wrote *Missoula* as an outgrowth of his quest to learn more about the phenomenon.⁶ The “rash of [alleged] sexual assaults”⁷ which occurred in Missoula, Montana, from 2010 to 2012, followed by the dismal police work and complete lack of prosecution in those cases prompted the Department of Justice to conduct an investigation of 350 reported sexual assaults in Missoula.⁸ With this background in mind, *Missoula* provides judge advocates with the framework for an affecting discussion of the poor investigation of and reluctance to prosecute sexual assault cases, the consequences of cutting victims out of the process, and serves as a reminder of the contentious and personal nature of a sexual assault trial.

To illustrate these themes, Krakauer tells of five women who were sexually assaulted while attending or visiting the University of Montana in Missoula (University) and charts the path each took (or did not take) through the criminal justice system. No two handled it the same. Each woman reported their assault to the Missoula Police Department, and two of the five also reported to the University.⁹ Only two offenders were ever prosecuted.¹⁰ Yet these five women

share one commonality—they were each attacked by someone they knew.

II. Poor Police Investigations and a Reluctance to Prosecute

If those charged with discovering the facts behind an alleged sexual assault fail to complete a thorough and impartial investigation, there is little to no chance that the case will ever see the inside of a courtroom. Three of the cases discussed in *Missoula* illustrate the lack of police initiative and professionalism that can doom a case from the outset.

Kelsey Belnap was gang raped by four members of the University of Montana football team after having consumed between eight and eleven shots of liquor in forty-five minutes.¹¹ Approximately two hours after the attack, Kelsey was admitted to the hospital with a blood alcohol concentration (BAC) of 0.219.¹² But when the police questioned her attackers all four students claimed the sex was consensual and that Kelsey was moaning.¹³ The police took her attackers at their word and promptly disregarded her BAC.¹⁴ To make matters worse, two male officers interviewed her with no victim advocate present.¹⁵ The officers asked her if she thought the men who raped her would have believed the sex was consensual—she thought they might—because she had been too intoxicated to verbalize that she wanted them to stop.¹⁶ She also told police that she had a

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¹ JON KRAKAUER, *MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN* (2015).

² Krakauer, *supra* note 1, at 31.

³ Jon Krakauer is the national bestselling author of *Where Men Win Glory*, *Into Thin Air*, *Into the Wild* and *Under the Banner of Heaven*. Books, JON KRAKAUER, <http://www.jonkrakauer.com/books> (last visited July 14, 2016).

⁴ *Review: Jon Krakauer's 'Missoula' Looks at Date Rape in a College Town*, N.Y. TIMES, http://www.nytimes.com/2015/04/20/books/review-jon-krakauer-missoula-looks-at-date-rape-in-a-college-town.html?_r=0 (last visited July 14, 2016).

⁵ KRAKAUER, *supra* note 1, at 348.

⁶ *Id.*

⁷ *Id.* at xiv.

⁸ Letter from Jocelyn Samuels, Acting Assistant U.S. Attorney General, Civil Rights Division, & Michael W. Cotter, U.S. Attorney, District of Montana, to Fred Van Valkenburg, County Attorney (Feb. 14, 2014)

[hereinafter *Missoula Letter*], https://www.justice.gov/sites/default/files/crt/legacy/2014/02/19/missoula_itr_2-14-14.pdf.

⁹ KRAKAUER, *supra* note 1, at 4, 38, 51, 67, 133.

¹⁰ *Id.* at 159, 229.

¹¹ *Id.* at 36.

¹² *Id.* at 37.

¹³ *Id.* at 42. Montana criminalizes rape as sexual intercourse without consent. The individual committing the act must know that there is not consent. MONT. CODE ANN. § 45-5-503 (West 2015). The definition of without consent allows that a victim may be incapable of consent because they are “mentally . . . incapacitated.” MONT. CODE ANN. § 45-5-501 (West 2015).

¹⁴ KRAKAUER, *supra* note 1, at 41.

¹⁵ Kelsey was never told that she could ask for a victim advocate to be present with her during her interview. *Id.* at 40.

¹⁶ *Id.* This statement became the center of the police chief’s argument as to why no probable cause was found. *Id.* at 42.

boyfriend, which made them immediately skeptical of her veracity.¹⁷

Kerry Barrett went to the police station and reported being raped by a man she just met the night before.¹⁸ The responding officer told Kerry that “since no one saw you, and you were fooling around before it happened, it’s hard to really prove anything.”¹⁹ He also asked her if she had a boyfriend because, “[S]ometimes girls cheat on their boyfriends, and regret it, and then claim they were raped.”²⁰ The investigating detective assured the accused that the police would “half-ass” his case because they didn’t “really believe this happened.”²¹ Though she understood that it would have been difficult to convince a jury she had been sexually assaulted, Kerry will never know “how strong [her] case really was, because the police wouldn’t even conduct a thorough investigation.”²²

Kaitlynn Kelly, like Kerry Barrett, met her attacker on the night he allegedly raped her.²³ She was assaulted while her roommate and roommate’s boyfriend slept in the same room.²⁴ Kaitlynn underwent a sexual assault examination, but didn’t want to report initially.²⁵ When she did, the police questioned Kaitlynn relentlessly about why she did not scream, because if the attack had actually occurred, she would have screamed to wake up her roommate.²⁶

Even if a more thorough investigation had been done in these cases, based on the track record of the Missoula County Prosecutor’s Office, none of them would have been taken to trial.²⁷ The prosecutors in Missoula County were not trained on how to try complex sexual assault cases and were not encouraged to pursue them.²⁸ Neither Kelsey, Kerry or Kaitlynn ever spoke to a prosecutor.²⁹ Even more shocking, the prosecutor in charge of all sex crimes in Missoula, testified on behalf of Kelsey’s attacker, Calvin Smith,³⁰ at his

University Conduct Board hearing. Even though she refused to speak with Kelsey, she testified at length about how impressive it was that Calvin would make a statement to police, and what a liar Kelsey was.³¹

The experiences of Kelsey, Kaitlynn and Kerry are not confined to the college world. They endured experiences with law enforcement and prosecutors similar to those reported many victims of military sexual assault.³² The military came under heavy fire for how sexual assault cases were handled after the film *The Invisible War* was released in 2012.³³ The parallels are haunting and *Missoula* serves to reemphasize the importance of communication with victims throughout the criminal justice process. Prosecutors must maintain an active role in the investigation of sexual assault cases and never assume that someone else (even a Special Victim’s Counsel) is giving the victim the information she needs about the direction a case is taking.

III. Left to Their Own Devices

When victims do not feel that law enforcement is listening, they often look elsewhere to have their voices heard.³⁴ They speak to the press, they write their Congressman and they turn to each other. After seeing an article in the *Missoulian* about another gang rape allegedly perpetrated by Griz football players, Kelsey told her story to the press;³⁵ hers would become one of many articles published about the seemingly endless series of rapes occurring across Missoula.³⁶ Kerry Barrett also took matters into her own hands in an attempt to ensure that Kaitlynn’s case was actually investigated.³⁷

Military victims who feel mistreated by law enforcement and prosecutors also go to the press;³⁸ and they lobby to

¹⁷ *Id.* at 40.

¹⁸ *Id.* at 51-55.

¹⁹ *Id.* at 54.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 63.

²⁴ *Id.* at 64.

²⁵ *Id.* at 67.

²⁶ *Id.* at 70.

²⁷ *Id.* at 338. See also Missoula Letter, *supra* note 9.

²⁸ Missoula Letter, *supra* note 9.

²⁹ KRAKAUER, *supra* note 1, at 42, 60, 91. Montana law requires that the prosecuting attorney consult with the victim of a felony offense regarding the dismissal of the case. MONT. CODE ANN. § 46-24-104 (West 2015).

³⁰ This name is a pseudonym used by the author. KRAKAUER, *supra* note 1, at 63.

³¹ *Id.* at 91.

³² *Id.*

³³ THE INVISIBLE WAR (Chain Camera Pictures 2012).

³⁴ See *What We Do*, SERVICE WOMEN’S ACTION NETWORK, <http://servicewomen.org/what-we-do/> (last visited Aug. 16, 2016).

³⁵ KRAKAUER, *supra* note 1, at 34. A search of the *Missoulian* did not uncover the original article by Gwen Florio, but an article regarding the 60 Minutes interview police chief Mark Muir gave discussing the case was discovered. Martin Kidston, 60 Minutes Sports Looks at Allegations of Rape, Cover-Up at UM, MISSOULIAN (Nov. 5, 2014), http://missoulian.com/helena/news/local/minutes-sports-looks-at-allegations-of-rape-cover-up-at/article_edf50-1fd4-57bc-a746-55561a2f760d.html.

³⁶ A search of the *Missoulian* archives using the term “UM Rape” showed well over 100 articles regarding the rape crisis in Missoula during 2010-2012. Search Result for “UM Rape,” GOOGLE NEWS, <https://www.google.com/search?q=%22UM+Rape%22&ie=utf-8&oe=utf-8#q=%22UM+Rape%22&tbm=nws> (last visited Aug. 16, 2016).

³⁷ Kerry found security camera footage of Kaitlynn and her attacker entering her dorm and him leaving holding a pair of pants in his hands. KRAKAUER, *supra* note 1, at 66.

³⁸ See Tom Vanden Brook, *Insults to Injury: Military Sexual-Assault Victims Endure Retaliation*, USA TODAY (May 18, 2015),

Congress through advocacy groups.³⁹ This desperate outcry, which began with *The Invisible War* continues to bring scrutiny upon the military justice system.⁴⁰ Even with due care and attention, not every victim will be satisfied by how his or her case is handled, however one victim who is unduly ignored, and speaks out about it, can have repercussions which will be felt across the services.

IV. The Trials

Readers see through the stories of Allison Huguet and Celia Washburn⁴¹ how critical the interactions between the prosecutor and the victim truly are. The trials of their attackers make up the majority of the book.

Allison was raped by Beau Donaldson a member of the Griz football team. She had known Beau since she was five; they grew up together and she considered him her brother.⁴²

Beau's guilty plea proceedings show the importance of maintaining contact with a victim throughout negotiations and of acknowledging that even though her wishes may not be the only consideration when it comes to a proposed sentence, they are an important consideration. The prosecutor assured Allison that he would seek a harsh sentence,⁴³ yet it is clear the prosecutor put too much stock in "the environment in Missoula," meaning the fact that Beau's status as a member of the Griz football team had to be taken into consideration.⁴⁴ Throughout the negotiation process Allison felt like she was "pushed in the direction [the prosecution] wanted to go. [She] felt like [she] continually had to push back to try to get the prosecutor's office to do the right thing."⁴⁵

Beau Donaldson's trial is also interesting because he requested review of his sentence by Sentence Review Division.⁴⁶ This process appears similar to the review

conducted by a General Court Martial Convening authority under Article 60 of the Uniform Code of Military Justice (UCMJ). In Montana, though, there are three members of a panel who conduct an in-person hearing and they can actually increase the sentence, whereas commanders review written matters and can only affirm or reduce the sentence.⁴⁷

Celia Washburn alleged that the star quarterback of the Grizzlies, whom she had known for a while and dated casually, assaulted her in December of 2011.⁴⁸ Mr. Krakauer describes the trial of Jordan Johnson in harsh and vivid detail, providing numerous transcript excerpts, and discussing at length the testimony of prosecution expert Dr. David Lisak,⁴⁹ and the defense's strategy of the case which revolved around a vicious attack of Celia's character. After a three-week trial, the jury deliberated for only two hours before rendering a verdict of not guilty.⁵⁰ This painstaking rendition provides prosecutors with one idea of how to approach a sexual assault trial: Each reader can come to her own conclusion about whether the tactics used were ideal for this set of facts. It also shows some of the lengths defense counsel will go to in order to defend their client.⁵¹

V. University Adjudication

Though Kaitlynn Kelly's⁵² case, like so many cases, never saw the inside of a courtroom, she also reported the assault to the campus police and therefore the Dean of Students conducted his own investigation in compliance with the requirements of Title IX of the Education Amendments of 1972.⁵³ Why Krakauer chose the rape scandal at the University of Montana is unclear, but it is a fortunate coincidence for judge advocates, as the University's conduct adjudications are strikingly similar to an enlisted separation board or a Show Cause proceeding:⁵⁴ The dean conducted

<http://www.usatoday.com/story/news/nation/2015/05/18/military-sexual-assault-retaliation/27395845/>.

³⁹ See, e.g., *About*, SERVICE WOMEN'S ACTION NETWORK, <http://www.servicewomen.org/who-we-are/#about> (last visited Aug. 16, 2016).

⁴⁰ See Jenna McLaughlin, *The US Military's Sexual-Assault Problem Is So Bad the UN is Getting Involved*, MOTHER JONES (May 14, 2015), <http://www.motherjones.com/politics/2015/05/un-human-rights-council-us-military-do-better-victims-sexual-violence>.

⁴¹ This name is a pseudonym used by the author. KRAKAUER, *supra* note 1, at 133.

⁴² *Id.* at 5.

⁴³ *Id.* at 159.

⁴⁴ *Id.* at 164.

⁴⁵ *Id.* at 165.

⁴⁶ MONT. CODE ANN § 46-18-901 (West 2015). A Defendant who has received a sentence of incarceration for a term of one year or more in the Montana State Prison or to the custody of the Montana Department of Corrections, has a right to apply to the Sentence Review Division for a review of his district court sentence. The Division may order a different sentence imposed if it is clearly inadequate or clearly excessive (increase,

decrease or modify) or may affirm the imposed sentence. MONTANA COURTS, http://courts.mt.gov/supreme/boards/sentence_review (last visited July 14, 2016).

⁴⁷ UCMJ art. 60 (2012).

⁴⁸ KRAKAUER, *supra* note 1, at 133.

⁴⁹ Dr. Lisak is a nationally recognized forensic consultant, trainer and lecturer. His research and forensic work focuses on non-stranger rape and he works closely with the military, serving as an expert witness. DAVID LISAK, <http://www.davidlisak.com> (last visited July 14, 2016).

⁵⁰ KRAKAUER, *supra* note 1, at 299.

⁵¹ *Id.* at 258, 268-73, 246-51.

⁵² Celia Washburn also reported her assault to campus police and Jordan Johnson faced an adjudication that mirrors that of Calvin Smith. On his final appeal however, the decision to expel Johnson was overturned and he was allowed to return to the school and to play football. *Id.* at 187, 301.

⁵³ *Id.* at 79-101.

⁵⁴ See U.S. DEP'T OF ARMY REG. 635-200, ACTIVE DUTY ENLISTED SEPARATIONS (6 June 2005); see also U.S. DEP'T OF ARMY REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr 2006) (RAR 13 Sept. 2011). Though Title IX was intended to protect students from sexual harassment and violence it also required that educational institutions

personal interviews and then a hearing was held before a three-person panel who found Calvin guilty, by a preponderance of the evidence, of a violation of Student Conduct Code Section V.A. 18 which prohibits rape⁵⁵, and ruled that he should be expelled from the University.⁵⁶ Calvin was allowed to appeal.⁵⁷

IV. A Grain of Salt

Anyone reading *Missoula* should go into it understanding its limitations. This book is written only from the perspective of the victims. The issues and practical considerations that prosecutors may face in handling sexual assault cases are never acknowledged and would likely be dismissed as excuses if raised to the author. Defense counsel and their clients are vilified: the idea that a defense attorney has a professional responsibility to defend her client is completely tossed aside. Everything is viewed in terms of how it will impact the victim.

However, the book appears to be a well-researched venting of the author's rage. While he provides some closure to the reader by detailing the DOJ investigation of the Missoula Police Department and County Prosecutor's Office,⁵⁸ whether he believes the measures emplaced by DOJ are appropriate or will have the desired effect is absent. At the end the reader is left with one idea: Rape is bad and law enforcement should treat victims better.

V. Conclusions

Despite its limitations, *Missoula* is a well written, accessible book and is a must read for any judge advocate preparing for a position in military justice. It provides an overview of a sexual assault case for those who have never tried one and is a great refresher for those who have been out of the game for a while. Most importantly, *Missoula* reminds the reader that sexual assault cases at every stage are significant emotional events, not only for the victim and the accused, but for all those involved in their investigation and prosecution.

establish a system for handling sexual assault complaints.
20 U.S.C.A. § 11211 (West 2015).

⁵⁵ KRAKAUER, *supra* note 1, at 176.

⁵⁶ *Id.*

⁵⁷ *Id.* at 79-101. His expulsion was upheld. *Id.*

⁵⁸ *Id.* at 338-40.