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## National, Military, and College Reports on Prosecution of Sexual Assaults and Victims' Rights: Is the Military Actually Safer than Civilian Society?

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NATIONAL, MILITARY, AND COLLEGE REPORTS ON  
PROSECUTION OF SEXUAL ASSAULTS AND VICTIMS'  
RIGHTS: IS THE MILITARY ACTUALLY SAFER THAN  
CIVILIAN SOCIETY?

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## ABSTRACT

*In response to recent calls for major reforms to the American military justice system, which are apparently based on continuing congressional concerns about sexual assaults in the military, the authors present statistical data on sexual assaults from a number of sources: national crime statistics; military crime statistics; crime statistics from several states; and statistics from a university. The authors also present information on the tremendous strides that have been made in recent years to protect the rights of military victims of sexual assault, noting that some of those rights are not found in federal or state criminal justice systems. Finally, the authors conclude that the rate of sexual assaults in the military is lower than civilian jurisdictions. Military victims report offenses at a higher rate than the jurisdictions examined. The military conviction rate for founded or cleared offenses available for prosecution is higher than in the jurisdictions examined. The military prosecutes a higher percentage of sexual assault crimes as compared to the total number of crimes than civilian jurisdictions. The authors recommend that Congress take careful and very deliberative steps in deciding what, if any, major changes to make to the American military justice system.*

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## INTRODUCTION

The last decade has been marked with repeated calls to make major changes to the military justice system.<sup>1</sup> Commentators have observed that some of those calls for reform are perennial.<sup>2</sup> Although not always directly stated, it appears the impetus of those proposed reforms rests, at least in part, on concerns about the military's ability or inability to resolve the problem of sexual assaults in the military.<sup>3</sup> Critics of the military justice system often suggest that military accused who commit sexual assaults upon other military personnel are reported and prosecuted at lower rates than other sectors in United States society, such as colleges.<sup>4</sup> Thus, they advocate for fundamental change to the military justice system including ending the chain of command responsibility for referral of charges and referral of sexual assault cases to courts-martial, and they argue that transfer of that responsibility to lawyers outside the chain of command will increase military prosecutions and convictions.<sup>5</sup>

Anonymous respondent written sexual assault surveys of the general public, colleges, and the military have resulted in huge extrapolated numbers of people reporting they were sexual assault victims. The various surveys use different questions, methodologies, and target different age and gender populations, so precise comparisons of survey results are impossible; however, rates of victimization of military personnel in such surveys are lower than for college undergraduates and the general population.<sup>6</sup> Two surveys comparing sexual assaults for college-age military and undergraduate women indicate a freshman

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1. See 1 DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 1-1(D), at 15–17 (10th ed. 2018) [hereinafter SCHLUETER, *MILITARY CRIMINAL JUSTICE*] (discussing calls for reform to the military justice system).

2. See, e.g., Chris Jenks & Geoffrey S. Corn, *The Military Justice "Improvement" Act of 2020* CAA FLOG 1 (July 15, 2020), [https://www.caaflog.org/uploads/1/3/2/3/132385649/caaflog\\_mjia.pdf](https://www.caaflog.org/uploads/1/3/2/3/132385649/caaflog_mjia.pdf) (noting the repeated efforts to remove the commander from the system and stating that "[t]his dysfunctional cycle should stop").

3. See *id.* at 4.

4. See, e.g., Dave Philipps, *'This Is Unacceptable,' Military Reports a Surge of Sexual Assaults in the Ranks*, N.Y. TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/us/military-sexual-assault.html>.

5. See DAVID A. SCHLUETER & LISA M. SCHENCK, *A WHITE PAPER ON AMERICAN MILITARY JUSTICE: RETAINING THE COMMANDER'S AUTHORITY TO ENFORCE DISCIPLINE AND JUSTICE* 2–4 (2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3644621](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3644621) (responding to calls for reform).

6. See *infra* Section I.D.

woman in college has a 51% greater risk of being sexually assaulted than a woman between seventeen and twenty-four years of age serving in the military.<sup>7</sup>

The Federal Bureau of Investigation (FBI) collects crime statistics from law enforcement agencies throughout the United States on the number of rape victims, reports of arrests of perpetrators, and case clearances (police determinations that a case is solved).<sup>8</sup> The FBI crime statistics do not include separate categories for colleges or the military; however, colleges must provide annual Clery Reports to the Department of Education, which include sexual assault information,<sup>9</sup> and the military generates an annual report of sex offenses.<sup>10</sup> Surveys, police reports to the FBI, college surveys, and military reports reveal that a higher percentage of military victims actually report to law enforcement that they were victims of rape or sexual assault than civilian victims from the four largest states and colleges.<sup>11</sup> At the University of Texas at Austin, for example, less than 4% of undergraduate sexual assault victims reported their victimization to law enforcement, and about 25% to 30% of military sexual assault victims report their victimization to law enforcement.<sup>12</sup> The reason military victims report sexual assaults to law enforcement and the command at a much higher rate than similar reports at universities may be in large part due to the comprehensive military programs supporting victims, including medical care, mental health counseling, a confidential reporting option, and the availability upon the victim's request of a unit transfer, and in the event that a victim seeks justice, the right to an attorney, and access and involvement at all levels of the military justice process.<sup>13</sup>

Comprehensive data regarding the number of sexual assault perpetrators in colleges and in the general population that are prosecuted and convicted could not be obtained.<sup>14</sup> The four states with the largest populations are California,

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7. *See infra* note 45 and accompanying text.

8. *See infra* Section I.B.

9. *The Clery Act*, EROC, <https://endrapeoncampus.org/the-clery-act> (last visited Jan. 18, 2021).

10. *See, e.g.*, Press Release, Department of Defense, Department of Defense Releases Fiscal Year 2019 Annual Report on Sexual Assault in the Military (Apr. 30, 2020), <https://www.defense.gov/Newsroom/Releases/Release/Article/2170913/departments-of-defense-releases-fiscal-year-2019-annual-report-on-sexual-assault/>.

11. *See infra* Part II.

12. *See infra* Section II.C.

13. *See infra* Part IV.

14. *See infra* Table 40.



New York, Texas, and Florida.<sup>15</sup> Two of those states, Texas and New York, publish comprehensive rates for sexual assault reports to police and convictions.<sup>16</sup> The military has a conviction rate for cases with sufficient evidence to support the commander's action (roughly equivalent to police clearance rates) that is more than twice the conviction rate for cleared cases for New York and 28% higher than for Texas.<sup>17</sup> The military rate per thousand of felony-level sexual assault or rape convictions for the population is seventeen times the rate per thousand of Texas and twenty-five times the rate per thousand of New York.<sup>18</sup> The adjudication outcomes for felony rape defendants in forty large urban counties with a total population of about sixty million people show a substantially lower conviction rate for rape than in the military justice system for sexual assault.<sup>19</sup>

## I. SURVEYS SEEKING SEXUAL ASSAULT INFORMATION

### A. *College Undergraduates*

In 2019, a large-scale survey of 181,752 students including 108,221 undergraduate respondents and 73,531 graduate and professional school respondents from thirty-three colleges and universities with a sample size of 830,936,<sup>20</sup> concluded “[t]he overall rate of nonconsensual sexual contact by physical force or inability to consent since the student enrolled at the school was 13.0 percent.”<sup>21</sup> Female undergraduates experienced sexual assault at a rate of 25.9% and male undergraduates said they were sexually assaulted at a rate of 6.8%.<sup>22</sup> “For the 21 schools that participated in both the 2015 and 2019 surveys, the rate of nonconsensual sexual contact by physical force or inability to consent increased from 2015 to 2019 by 3.0 percentage points (to 26.4 percent) for undergraduate women.”<sup>23</sup> More than 16% of freshman students surveyed

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15. See Press Release, U.S. Census Bureau, 2019 U.S. Population Estimates Continue to Show the Nation's Growth Is Slowing (Dec. 30, 2019), <https://www.census.gov/newsroom/press-releases/2019/popest-nation.html>.

16. See *infra* Sections III.C, III.E.1.

17. See *infra* Table 41.

18. See *infra* Part VI.

19. See *infra* Part VIII.

20. DAVID CANTOR ET AL., REPORT OF THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT, at vii (2020), <https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019> [hereinafter 2019 AAU REPORT].

21. *Id.*

22. *Id.* at ix.

23. *Id.* at xi.

reported they were sexually assaulted versus about 11% of students in their fourth year or above.<sup>24</sup> The cumulative victimization for female undergraduates over four years was freshman (16.5%); sophomore (22.7%); junior (27.2%); and senior (32.8%).<sup>25</sup> Another study estimated “20% - 25% of college women and 15% of college men are victims of forced sex during their time in college.”<sup>26</sup>

### B. *Nationwide Surveys and Reports to Police*

The United States Bureau of Justice Statistics’ (of the Department of Justice) annual National Crime Victimization Survey (NCVS) is a self-reported survey “administered to persons age 12 or older from a nationally representative sample of households.”<sup>27</sup> “Annual NCVS estimates are based on the number and characteristics of crimes respondents experienced during the prior 6 months, not including the month in which they were interviewed.”<sup>28</sup> The NCVS estimates of rape or sexual assault are typically “lower than estimates derived from other federal and private surveys. However, the NCVS methodology and definitions of rape or sexual assault differ from many of these surveys in important ways that contribute to the variation in estimates of the prevalence and incidence of these victimizations.”<sup>29</sup> A key difference is the way the NCVS is conducted. The NCVS is based on interviews with the respondents about the incident, rather than relying on written questionnaires, and then follow-up questionnaires or incident forms that “capture[] detailed information about the incident, including the type of injury, presence of a weapon, offender characteristics, and reporting to police.”<sup>30</sup> “The NCVS uses in-person and telephone interviews to collect data and has an 88% [in-]person and 74% overall response rate. The 2011 [National Intimate Partner and Sexual Violence Survey (NISVS)] uses random-digit

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24. *Id.* at xiii.

25. *Id.* at A7-14 tbl. 14.

26. Katherine V. Norton, *From Court Martial to College Campus: Incorporating the Military’s Innovative Approaches to Sexual Violence into the University Setting*, 55 CAL. W. L. REV. 465, 475 (2019) (quoting *Sexual Assault in the United States*, NSVRC, <https://www.nsvrc.org/statistics> (last visited May 1, 2019)).

27. BUREAU OF JUST. STATISTICS, U.S. DEP’T OF JUST., NCJ 253043, CRIMINAL VICTIMIZATION, 2018, at 2 (2019) [hereinafter 2018 NCVS REPORT].

28. *Id.*

29. BUREAU OF JUST. STATISTICS, U.S. DEP’T OF JUST., NCJ 252472, CRIMINAL VICTIMIZATION, 2017, at 21 (2018) [hereinafter 2017 NCVS REPORT].

30. BUREAU OF JUST. STATISTICS, U.S. DEP’T OF JUST., NCJ 248471, SPECIAL REPORT RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013, at 2 (2014), <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf> [hereinafter 2014 SPECIAL REPORT].

dialing with a 33% to 43% response rate.”<sup>31</sup> A 2014 Special Report by the U.S. Department of Justice acknowledged that the NISVS survey found a “substantially higher” rate of sexual assault victimization than the NCVS survey concluding that “2% of all females experienced unwanted sexual contact during the prior 12 months,” compared with the NCVS estimation “show[ing] that 1% of females age 12 or older experienced one of more sexual assaults in the prior year.”<sup>32</sup>

“The 2010 Centers for Disease Control and Prevention (CDC) NISVS provides national survey extrapolations for rape and sexual violence other than rape victimization on an annual and lifetime basis, and state-by-state victimization numbers for rape and sexual violence other than rape on a lifetime basis, which are used to determine the annual state victimization for rape and sexual violence other than rape . . . .”<sup>33</sup> The following two tables provide the 2010 CDC NISVS estimates of victims of sexual offenses for the United States as a whole and for California, New York, Florida, and Texas.<sup>34</sup>

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31. *Id.*

32. *Id.* at 2.

33. 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. 579, 631 (2014) (citing MICHELE C. BLACK ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 18–19, 68–71 (2011)).

34. *Id.* at 631–632.

The annual numbers for California, Texas and Florida are assumed to be at the same rates as the national numbers . . . . The term ‘NSS’ in the table stands for not statistically significant. The term ‘sexual violence’ is defined as completed forced penetration, attempted forced penetration, completed alcohol or drug-facilitated penetration, being made to penetrate someone else, sexual coercion, and other unwanted sexual contact experiences.

*Id.* at 631 n.231.

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Table 1 2010 CDC NISVS Survey—National Totals				
	Rape (Lifetime)	Other Sexual Violence (Lifetime)	Rape (Annual)	Other Sexual Violence (Annual)
National Total for U.S. (women)	21,840,000	53,174,000	1,270,000	6,646,000
National Total for U.S. (men)	1,581,000	25,130,000	NSS	6,027,000
National Total for U.S. (men and women)	23,421,000	78,304,000	1,270,000	12,673,000

Table 2 2010 CDC NISVS Survey—Four Largest States by Population				
	Rape (Lifetime)	Other Sexual Violence (Lifetime)	Rape (Annual)	Other Sexual Violence (Annual)
California (women)	2,024,000	5,634,000	121,000	676,000
New York (women)	1,398,000	3,798,000	84,000	456,000
Florida (women)	1,266,000	3,111,000	76,000	373,000
Texas (women)	1,963,000	4,201,000	118,000	504,000
California (men)	NSS	3,015,000	NSS	724,000
New York (men)	NSS	2,328,000	NSS	559,000
Florida (men)	NSS	1,437,000	NSS	345,000
Texas (men)	NSS	1,463,000	NSS	351,000
California (women and men)	2,024,000	8,649,000	121,000	1,400,000
New York (women and men)	1,398,000	6,529,000	84,000	1,015,000
Florida (women and men)	1,266,000	4,548,000	76,000	718,000
Texas (women and men)	1,963,000	5,261,000	118,000	855,000
Total for Four States	6,651,000	24,987,000	399,000	3,988,000

The 2011 NISVS found that 19.3% of women (23,305,000) and 1.7% of men (1,971,000) were raped during their lifetime, and that 43.9% of women

(52,958,000) and 23.4% of men (26,590,000) were the victims of other sexual violence during their lifetimes.<sup>35</sup> The CDC indicates one in three women and one in four men experienced sexual violence by an intimate partner during their lifetimes.<sup>36</sup> The CDC estimates “1 in 5 women have experienced completed or attempted rape” in their lifetime and “1 in 14 men were made to penetrate someone else” in their lifetime.<sup>37</sup>

The police provide the reports of rape to the Federal Bureau of Investigation (FBI), and in turn, the FBI generates Uniform Crime Reports (UCR) for all persons regardless of age.<sup>38</sup> Under UCR procedures, the police can clear or close offenses in one of two ways: by arrest or by exceptional means. Cleared by arrest requires that at least one person has been:

- Arrested;
- Charged with the commission of the offense; or
- Turned over to the court for prosecution (whether following arrest, court summons, or police notice).<sup>39</sup>

In its clearance calculations, the UCR Program counts the number of offenses that are cleared—in addition to the number of persons arrested. The

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35. Matthew J. Breiding et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization — National Intimate Partner and Sexual Violence Survey, United States, 2011*, MMWR SURVEILLANCE SUMMARIES (CDC, Atlanta, Ga.), Sept. 5, 2014, at 1, 5 tbl. 1. Rape in the NISVS is defined as follows:

[A]ny completed or attempted unwanted vaginal (for women), oral, or anal penetration through the use of physical force (such as being pinned or held down, or by the use of violence) or threats to physically harm and includes times when the victim was drunk, high, drugged, or passed out and unable to consent. Rape is separated into three types, completed forced penetration, attempted forced penetration, and completed alcohol or drug facilitated penetration.

MICHELE C. BLACK ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 18–19, 68–71 (2011), [http://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf) [hereinafter 2010 CDC NISVS SUMMARY REPORT].

36. 2010 CDC NISVS SUMMARY REPORT, *supra* note 35, at 2

37. SHARON G. SMITH ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF 11 (2011), <https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf>.

38. 2017 NCVS Report, *supra* note 29, at 5.

39. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., CRIMINAL JUSTICE INFORMATION SERVICES (CJIS) DIVISION UNIFORM CRIME REPORTING (UCR) PROGRAM SUMMARY REPORTING SYSTEM (SRS) USER MANUAL 18 (2013), <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=1229> [hereinafter SRS USER MANUAL].

arrest of one person may clear several crimes, and the arrest of many persons may clear only one offense.<sup>40</sup> In addition, some clearances that an agency records in a particular calendar year, may pertain to offenses that occurred in previous years.<sup>41</sup> The UCR term “cleared by exceptional means” in some situations indicates that elements beyond law enforcement’s control prevent the agency from arresting and formally charging the offender. When this occurs, the agency can clear the offense exceptionally.<sup>42</sup> Law enforcement agencies must meet the following four conditions to clear an offense by exceptional means. The agency must have:

- Identified the offender;
- Gathered enough evidence to support an arrest, make a charge, and turn over the offender to the court for prosecution;
- Identified the offender’s exact location so that the suspect could be taken into custody immediately;
- Encountered a circumstance outside the control of law enforcement that prohibits the agency from arresting, charging, and prosecuting the offender.<sup>43</sup>

Examples of exceptional clearances include, but are not limited to, the death of the offender (e.g., suicide or justifiably killed by police or citizen); the victim’s refusal to cooperate with the prosecution after the offender has been identified; or the denial of extradition because the offender committed a crime in another jurisdiction and is being prosecuted for that offense.<sup>44</sup>

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40. *Id.* at 112–13.

41. *See id.* at 111.

42. *Id.* at 115–16.

43. *Id.* at 115.

44. *Id.* at 116. After law enforcement reports an offense to the FBI, further investigation may indicate no offense occurred. The FBI uses this example to illustrate an unfounded offense: “A woman claimed a man attempted to rape her in his automobile. When law enforcement personnel talked to both individuals, the complainant admitted she had exaggerated and the man did not attempt to rape her.” *Id.* at 111. Under UCR criteria, law enforcement is permitted to subtract the offense from the report. *Id.* at 112. The decision to unfind a case using UCR criteria can only be made by law enforcement personnel and not by prosecutors. Joanne Archambault & Kimberly A. Lonsway, *Clearance Methods for Sexual Assault Cases* 33 EVAWI (Mar. 2020), <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=746>. Refusal of the victim to cooperate and inability to locate or arrest the suspect does not qualify as a basis to unfind the report of a sexual assault. *Id.* at 34. The authors of *Clearance Methods* observe:

[T]he unfinding of a high percentage of sexual assault cases can appear superficially to be beneficial to police agencies – at least in the short term. When

Law enforcement reported an estimated 139,380 rapes (revised definition) in the FBI's UCR in 2018.<sup>45</sup> The 2018 UCR estimate for rapes "was 2.7 percent higher than the 2017 estimate and 18.1 percent higher than the 2014 estimate."<sup>46</sup> In 2013, the UCR's definition of rape was revised to include more sexual assaults and attempts, which increased the number of rapes by 38%.<sup>47</sup> The 2017 UCR estimate was 2.5% higher than the 2016 estimate and 19.4% higher than the 2013 estimate.<sup>48</sup>

The NCVS Survey indicated that in 2013, for example, college-aged females had the highest rate of victimizations for rape and sexual assault "regardless of enrollment status (about 4.3 victimizations per 1,000), while the victimization rate for not college-age (ages 12 to 17 and 25 or older) females was 1.4 victimizations per 1,000."<sup>49</sup> The following table shows the number of victims of rape or sexual assault and the rate per thousand from the NCVS and the number

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sexual assault cases are dropped from an agency's caseload and statistical reporting through the use of unfounding, both their caseloads and statistics on reported crime are reduced. The community's crime rate thus appears to decrease at the same time the agency's clearance rate increases.

*Id.* at 45. Clearance Methods discusses systematic efforts by some law enforcement agencies to avoid reporting sex crimes to the FBI by downgrading the offense to an unreportable offense, keeping unofficial files of reports of sex crimes, and convincing victims to sign releases indicating no sex crime occurred. *Id.* at 54, 61–63.

45. *2018 Crime in the United States: Table 1*, FBI: UCR, at tbl. 1, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/tables/table-1> (last visited Jan. 23, 2021) [hereinafter *2018 UCR: Table 1*].

46. *Id.* at tbl. 1A.

47. *Table 1 Data Declaration*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-1/table-1-data-declaration> (last visited Jan. 23, 2020). "In 2013, the FBI's UCR Program initiated the collection of rape data under a revised definition within the Summary Based Reporting System. The term 'forcible' was removed from the offense name, and the definition was changed to 'penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.'" *Id.* In 2013, under the legacy definition, the number of rapes was 82,109, and under the revised definition, the number of rapes was 113,695. *2018 UCR: Table 1*, *supra* note 45.

48. *2017 Crime in the United States: Rape*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/rape> (last visited Jan. 23, 2021) [hereinafter *2017 UCR*].

49. 2014 SPECIAL REPORT, *supra* note 30, at 3.

of victims of rape (revised definition) and rate per thousand reported to police in the UCR.<sup>50</sup>

	2014	2015	2016	2017	2018
(NCVS) Number of Rape or Sexual Assault Victims	284,350	431,840	298,410	393,980	734,630
(NCVS) U.S. Population Age 12 or Older in millions	267	270	272	272	275
(NCVS) Rate per 1,000	1.1	1.6	1.1	1.4	2.7
(UCR) Rapes Reported to Police (Revised)	118,027	126,134	132,414	135,666	139,380
(UCR) U.S. Population in millions	319	321	323	325	327
(UCR) Rapes per 1,000 Reported to Police	0.37	0.39	0.41	0.42	0.43
Percentage of NCVS Reports Received by Police (UCR Rapes Reported to Police (Revised) divided by NCVS Number of Rape or Sexual Assault Victims)	42%	29%	44%	34%	19%

In sum, the number of rapes reported annually in the 2010 CDC NISVS Report (1,270,000 rapes)<sup>51</sup> is 6.7 times the number of rapes annually in the 2010 NCVS Report (188,380 rapes).<sup>52</sup> This vast difference in statistics is explained by different methodologies and definitions.<sup>53</sup> The number of rapes reported annually in the 2010 NISVS Report (1,270,000 rapes) is 9.1 times the number of rapes reported to the police in the UCR in 2018 (139,380).

50. 2018 NCVS REPORT, *supra* note 27, at 4 tbl.1, 36 tbl. 26; 2017 NCVS REPORT, *supra* note 29, at 3 tbl. 1, 7 tbl. 6; 2017 UCR, *supra* note 48, at tbl. 1; 2018 UCR: Table 1, *supra* note 45.

51. 2010 CDC NISVS SUMMARY REPORT, *supra* note 35, at 18 tbl. 2.1.

52. BUREAU OF JUST. STATISTICS, U.S. DEP'T OF JUST., NCJ 235508, CRIMINAL VICTIMIZATION, 2010, at 2 tbl. 1 (2010) [hereinafter 2010 NCVS REPORT]. <https://www.bjs.gov/content/pub/pdf/cv10.pdf>.

53. Robert E. Murdough, *Barracks, Dormitories, and Capitol Hill: Finding Justice in the Divergent Politics of Military and College Sexual Assault*, 223 MIL. L. REV. 233, 272–75 (2015).



*C. Department of Defense (DOD) Military Surveys*

Various surveys count sexual assault reports differently and utilize different definitions of terms making precise comparisons impossible. The DOD's Workplace and Gender Relations Survey of the Active Duty Members (WGRA) is conducted every two years. A total of 735,645 active duty service members were sampled for the 2018 WGRA, and surveys were completed by 115,884 active duty members, "resulting in a weighted response rate of 18% overall and 17% for the DOD only."<sup>54</sup> The NCVS counts individuals and households with victims.<sup>55</sup> The NCVS has an 88% individual rate of response and 74% overall response rate, and the 2011 NISVS had a 33% response rate.<sup>56</sup> The response rate is considered a critical criterion in the accuracy of a survey.<sup>57</sup> The WGRA is more comparable to the NISVS than the NCVS because it does not include in-person and telephone interviews and has lower response rates, and thus, it should yield significantly higher numbers of sexual assault responses than it would if the NCVS survey methodology was used.<sup>58</sup> One would expect a person who has been sexually assaulted would be more likely to complete the lengthy WGRA written survey than a person who has not been sexually assaulted, which may inflate the number of sexual assault victims. The greater likelihood that victims of sexual assault are more likely to respond to the survey is known as selection bias. Selection bias can significantly affect the reliability of survey results.

The WGRA is more useful for determining the year-to-year trends of sexual assaults and the reasons sexual assaults are not reported<sup>59</sup> than for assessing the number of sexual assaults occurring because the same methodology is used year after year.

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54. RACHEL A. BRESLIN ET AL., U.S. DEP'T OF DEF., OPA REPORT NO. 2019-027, 2018 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS, at ii, iv (2019), [https://www.sapr.mil/sites/default/files/Annex\\_1\\_2018\\_WGRA\\_Overview\\_Report\\_0.pdf](https://www.sapr.mil/sites/default/files/Annex_1_2018_WGRA_Overview_Report_0.pdf) [hereinafter 2018 WGRA SURVEY].

55. 2010 NCVS REPORT, *supra* note 52, at 2.

56. 2014 SPECIAL REPORT, *supra* note 30, at 3.

57. *See, e.g., id.* ("[R]esponse rates can impact data quality").

58. *See supra* Section I.B; *see also* Murdough, *supra* note 53, at 277–78 (discussing response rates, self-selection bias, and definition concerns).

59. *See, e.g.,* 2018 WGRA SURVEY, *supra* note 54, at 35 ("The majority of Service members (63%) cited wanting to forget about the incident as a reason for not reporting, whereas 53% indicated that they did not want people to know. Among [DOD] women, 34% (a significant increase from 20% in 2016) indicated that they did not report because they might get into trouble for something they had done or would get labeled as a troublemaker.")

The following table depicts the extrapolated number of people in the military who indicated in the WGRA that they were sexually assaulted or received an unwanted sexual contact in the previous year.<sup>60</sup>

Fiscal Year	2014			2016			2018		
	Male	Female	Total	Male	Female	Total	Male	Female	Total
Military Assault Victims	0.9%	4.9%	20,300	0.6%	4.3%	14,900	0.7%	6.2%	20,473

In the 2018 WGRA, 7,546 (0.7%) military men and 12,927 (6.2%) military women said they were sexually assaulted in the previous year by a military or civilian perpetrator; of those, 17% of the men (1,283) and 30% of the women (3,878) reported the sexual assault to their commands or law enforcement for an overall reporting rate of about 25% (5,161 men and women).<sup>61</sup> The 2018 WGRA survey also found that for 5,358 (71% of 7,546) military men and 11,505 (89% of 12,927) military women who had been sexually assaulted in the past year, the perpetrator was a military member. A total of 16,863 (82% of 20,500) military personnel said they were sexually assaulted by a military perpetrator.<sup>62</sup> The following table depicts the rates of sexual assault for age and gender of active duty personnel from the 2018 and 2016 WGRA Surveys.<sup>63</sup>

60. *Id.* at vi; LISA DAVIS ET AL., U.S. DEP'T OF DEF., OPA REPORT NO. 2016-050, 2016 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS, at ix (2017), [https://www.sapr.mil/public/docs/reports/FY17\\_Annual/FY16\\_Annual\\_Report\\_on\\_Sexual\\_Assault\\_in\\_the\\_Military\\_Full\\_Report\\_Part2\\_4.pdf](https://www.sapr.mil/public/docs/reports/FY17_Annual/FY16_Annual_Report_on_Sexual_Assault_in_the_Military_Full_Report_Part2_4.pdf) [hereinafter 2016 WGRA SURVEY]; 2 RAND CORP., SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY xviii (Andrew R. Morral et al. eds., 2015), [https://www.rand.org/pubs/research\\_reports/RR870z2-1.readonline.html](https://www.rand.org/pubs/research_reports/RR870z2-1.readonline.html). The WGRA surveyed a sample of the active duty military population and “scientifically weight[ed] the survey data so that findings can be generalized to the full population of active duty members.” 2018 WGRA SURVEY, *supra* note 54, at iv–v.

61. 2018 WGRA SURVEY, *supra* note 54, at vi–vii.

62. *Id.* at vii.

63. *Id.* at 28.

Age	2016		2018	
	Female	Male	Female	Male
17-20	8.6%	0.7%	11.9%	0.9%
21-24	6.4%	1.0%	9.4%	1.0%
25-30	4.2%	0.6%	5.0%	0.9%
31-35	1.7%	0.5%	3.5%	0.5%
Over 36	1.3%	0.2%	1.8%	0.3%

The 2018 WGRA survey showed an active duty military population of 1,327,194.<sup>64</sup> The survey 2018 WGRA survey indicated that approximately 20,500 military personnel said that they had been sexually assaulted in the past twelve months.<sup>65</sup> Thus, 1.55% of DOD active duty military personnel reported they were sexually assaulted during the previous year compared to 13.0% of college undergraduates in the previous four years.<sup>66</sup> To compare undergraduates with military personnel, it is important to compare gender-to-gender and age-to-age categories. According to the 2018 WGRA, a woman age seventeen to twenty years old serving in the military is 6.6 times more likely to be sexually assaulted than a woman who is over thirty-six years old and forty times more likely to be sexually assaulted than a man who is over thirty-six years old. These age- and gender-based ratios are consistent with the results from the 2016 WGRA.

#### D. Comparison of Survey Results

According to an NCVS report published in December 2014, “the rate of rape and sexual assault was 1.2 times higher for [college-aged (18–24)] nonstudents (7.6 per 1,000) than for [college] students (6.1 per 1,000).”<sup>67</sup> For undergraduates, the 2019 Association of American Universities (AAU) Report provides calculations of the number of sexual assaults over a four-year college experience.<sup>68</sup>

In contrast, the average for all military females for the period 2014 to 2018 is 5.13% for each year or 20.52% over four years, which is less than the college

64. See 2018 WGRA SURVEY, *supra* note 54, at 19.

65. *Id.* at 26.

66. See *supra* notes 21-25 and accompanying text.

67. 2014 SPECIAL REPORT, *supra* note 30, at 1.

68. See *supra* Section I.A.

female victimization rate of 25.9%.<sup>69</sup> The average for military males for the period 2015 to 2018 is 0.73% for each year or 2.93% over four years, which is less than half of the college male victimization rate of 6.8%.<sup>70</sup>

The age and gender of the victims is a critical factor in comparing statistics. The 2019 AAU Report indicated 16% of freshman undergraduates reported they were sexually assaulted during the preceding academic year whereas the 2018 WGRA Report said 11.9% of women ages seventeen to twenty and 9.4% of women ages twenty-one to twenty-four said they were sexually assaulted in the previous year.<sup>71</sup>

## II. SEXUAL ASSAULT REPORTS TO POLICE

### A. Undergraduate Sexual Assault Reports

The Bureau of Justice Statistics Special Report, Rape and Sexual Assault Victimization Among College-Age Females, 1995–2013 (Dec. 2014) indicated that 20% of college students ages twenty to twenty-four said they reported their sexual assaults to police whereas 32% of the nonstudents ages twenty to twenty-four said they reported their sexual assaults to police.<sup>72</sup> The report to police percentage did not include reports to other officials, family members, or

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69. See *supra* Table 4 (average annual percentage of military females sexually assaulted during the period 2014 to 2018 is 4.9% + 4.3% + 6.2% divided by three, which equals 5.13%) and note 22 and accompanying text.

70. See *supra* Table 4 (average annual percentage of military males sexually assaulted during the period 2014 to 2018 is 0.9% + 0.6% + 0.7% divided by three, which equals 0.73%) and note 22 and accompanying text.

71. Compare *supra* note 24–25 and accompanying text with *supra* note 64 and accompanying text. More than 16% of freshman women said they were sexually assaulted and on average nearly 11% of military women age 17 to 24 indicated they were sexually assaulted. A freshman woman in college has a 51% greater risk of being sexually assaulted than a female age 17 to 24 serving in the military. This is calculated as follows: 16.5% (rate of sexual assault since entering college for freshman woman) minus 10.65% (average rate for active duty women between 17 to 24) divided by 10.65% equals 54.9%.

72. 2014 SPECIAL REPORT, *supra* note 30, at 1, 9. The 2014 Special Report used information from the NCVS. *Id.* at 1. The number of rapes reported annually in the 2010 CDC NISVS Summary Report (1,270,000 rapes) is 6.7 times the number of rapes annually in the 2010 NCVS Report (188,380 rapes) which may explain the higher reporting rate to the police of 20% in the 2014 Special Report. See *supra* notes 51–52 and accompanying text; see also BONNIE S. FISHER ET AL., U.S. DEP'T OF JUST., NCJ 182369, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 23 (2000) ("Thus, fewer than 5 percent of completed and attempted rapes were reported to law enforcement officials. In about two-thirds of the rape incidents, however, the victim did tell another person about the incidents. Most often this person was a friend, not a family member or college official.").

friends.<sup>73</sup> The reporting rates to police in the NCVS are dramatically higher than reporting rates to police in other surveys. For example, a 2017 study of sexual assault at the University of Texas at Austin (UT-Austin) indicated that of UT-Austin undergraduates who disclosed their sexual assaults, only 3% reported their sexual assaults to police.<sup>74</sup>

### B. *Military Sexual Assault Reports*

In the DOD, victims can make “restricted” reports to enable them to receive confidential access to care and services. These reports are not referred for investigation or disclosed to command authorities (i.e., a restricted report).<sup>75</sup> On the other hand, a victim’s “unrestricted” report of sexual assault is referred for investigation and the command is notified of the alleged incident.<sup>76</sup> The following table depicts the number of military sexual assault victims who reported that they were victims of sexual assaults that occurred during their military service, not just during the prior fiscal year.<sup>77</sup>

	2015	2016	2017	2018	2019
Total Reports	4,736	4,794	5,277	6,053	6,236
Reporting Rate Per 1,000 Service Members	4.0	4.1	4.5	5.1	5.1

The following table shows the number of unrestricted reports of sexual assaults of service members for the years 2015 to 2019.<sup>78</sup>

73. See 2014 SPECIAL REPORT, *supra* note 30, at 9.

74. See UNIV. OF TEX., CULTIVATING LEARNING AND SAFE ENVIRONMENTS: AN EMPIRICAL STUDY OF PREVALENCE AND PERCEPTIONS OF SEXUAL HARASSMENT, STALKING, DATING/DOMESTIC ABUSE AND VIOLENCE, AND UNWANTED SEXUAL CONDUCT 57 (2017), <https://www.utssystem.edu/sites/default/files/sites/clase/files/2017-10/ut-austin-R11-V2.pdf> [hereinafter 2017 CLASE REPORT].

75. U.S. DEP’T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2019, app. B at 5 (2020), [https://www.sapr.mil/sites/default/files/3\\_Appendix\\_B\\_Statistical\\_Data\\_on\\_Sexual\\_Assault.pdf](https://www.sapr.mil/sites/default/files/3_Appendix_B_Statistical_Data_on_Sexual_Assault.pdf) [hereinafter 2019 DOD SAPR REPORT].

76. *Id.*

77. *Id.* at 9 tbl. 2 & fig. 2, 11 fig. 4.

78. *Id.* at 11 fig. 4.

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	2015	2016	2017	2018	2019
Unrestricted Reports with Either a Service Member Subject or Service Member Victim or Both	4,020	3,981	4,376	4,927	4,700
Service Member Subject/Non-Service Member Victim	19%	19%	19%	18%	19%
Unidentified Subject/Service Member Victim	15%	20%	20%	19%	16%
Non-Service Member Subject/Non-Service Member Victim	5%	4%	5%	4%	4%
Service Member Subject/Service Member Victim	60%	57%	57%	59%	62%

### C. Comparison of Reporting Rates

In 2018, 6,053 military victims of sexual assault made restricted or unrestricted reports of being the victim of sexual assault during their military service, and 2,907 military victims made unrestricted reports in which the command is notified they were victims of military perpetrators.<sup>79</sup> The 2018 WGRA Survey estimated there were 20,500 military victims of sexual assault in the previous year.<sup>80</sup> In the 2018 WGRA Survey, 30% of women and 17% of men said they reported the sexual assault.<sup>81</sup> Logically, a significant percentage of victims report the sexual assault within one year of its occurrence to obtain medical assistance, counseling and/or justice.<sup>82</sup> The 2018 WGRA Survey estimated that 16,810 military victims were sexually assaulted by military perpetrators.<sup>83</sup> In 2018, there were 4,927 unrestricted reports of sexual assaults made to military law enforcement.<sup>84</sup> In 2018, 3,991 (81% of 4,927) of those

79. See *supra* Table 6.

80. See *supra* Table 4.

81. 2018 WGRA SURVEY, *supra* note 54, at vii.

82. The 2016 WGRA states, "For the DoD, 4.3% ( $\pm 0.2$ ) of members indicated experiencing sexual assault in their lifetime. Breaking this out by gender, 15.3% of DoD women and 2.2% of DoD men indicated experiencing sexual assault in their lifetime." 2016 WGRA SURVEY, *supra* note 60, at 40. Lifetime includes pre-military service experiences. *Id.*

83. See *supra* note 62–64 and accompanying text.

84. See *supra* Tables 6, 7.

unrestricted reports were made by military victims alleging sexual assaults, and 2,907 (59% of 4,927) of those reports were made by military victims alleging assaults by military perpetrators.<sup>85</sup> The 2018 WGRA has a 5.8 times higher estimated reporting number for the military victims assaulted by military perpetrators than the actual reporting number of 2,907 even though the 2018 WGRA only asks about sexual assaults for the previous year. The inflated 2018 WGRA number of sexual assaults might be attributed to selection bias.<sup>86</sup>

According to the 2018 WGRA, 25% of military victims reported the sexual assault to the command or law enforcement.<sup>87</sup> When comparing SAPR to WGRA data, in 2018, about 30% of military victims reported they were sexually assaulted while in military service.<sup>88</sup> A comparison of these 2017–2018 reports reveals that military victims reported their victimization at a higher rate, 25–30% of the time, compared to 3% of college undergraduate victims who reported to law enforcement, as reported in the UT-Austin study, and the 20% of college-age students who reported to police, in the NCVS report.

### III. SEXUAL ASSAULT PROSECUTIONS AND CONVICTIONS IN THE STATES

#### A. *In General*

None of the national surveys previously discussed (2019 AAU Report, 2010 CDC NISVS, and annual NCVS) indicated how many victims made allegations that were eventually investigated and resulted in prosecutions of the perpetrators.

A newspaper survey of six universities in Illinois and Indiana found that police investigated 171 reported sex crimes from 2005 to 2011, resulting in twelve arrests, and four convictions; however, only one of the convictions resulted from a student-on-student attack.<sup>89</sup> The University of Notre Dame had thirty-four reported sex crimes resulting in four arrests and no convictions; Northwestern University had twenty-one reported cases with no arrests or convictions at its main campus in Evanston; and Indiana University had sixty-

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85. *See infra* Table 27.

86. *See supra* Section I.C. Calculated by dividing 16,863 by 2,907 = 5.8.

87. 2018 WGRA SURVEY, *supra* note 54, at vi–vii.

88. The 2018 WGRA report estimated 20,500 military victims. *See supra* Table 4. The 2019 DOD SAPR Report found that 6,053 military victims reported that sexual assault occurred during their military service in 2018. *See* Table 6.

89. Todd Lighty et al, *Few Arrests, Convictions in Campus Sex Assault Cases*, CHI. TRIB. (June 16, 2011), <http://www.chicagotribune.com/news/ct-xpm-2011-06-16-ct-met-campus-sexual-assaults-0617-20110616-story.html>.

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nine sexual assault reports to police that resulted in one conviction.<sup>90</sup> Of the 171 reported sex crimes reported to police, only 2.3% (four cases) resulted in convictions.

The following table shows the number of Uniform Crime Reports (UCR) of rapes and the rate per 1,000 for rape reported to the FBI nationally and for the four largest states: California, New York, Florida, and Texas.<sup>91</sup>

	2017	2018
National	135,666 (.42)	139,380 (.43)
California	14,724 (.37)	15,505 (.39)
New York	6,297 (.32)	6,574 (.34)
Texas	14,536 (.51)	14,693 (.51)
Florida	7,936 (.38)	8,438 (.40)

In its clearance calculations, the UCR Program tallies the number of offenses that are cleared, not the number of persons arrested. One person can commit multiple offenses, and multiple persons can commit one offense.<sup>92</sup> In 2018, for clearance by arrest or exceptional means, 62.3% of murder and manslaughter offenses and 33.4% of rape offenses were cleared.<sup>93</sup> The UCR does not include information about the number of arrests or clearances for rape by state.

#### B. California Reports, Prosecutions, and Convictions

The 2010 CDC NISVS estimates of annual rapes and sexual violence in California are depicted in the following table.<sup>94</sup>

90. *Id.*

91. 2018 *Crime in the United States: Table 4*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-4/table-4.xls#overview> (last visited Jan. 25, 2021).

92. 2018 *Crime in the United States: Offenses Cleared*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/clearances> (last visited Jan. 25, 2021).

93. *Id.*

94. 2010 CDC NISVS SUMMARY REPORT, *supra* note 35, at 68–71; *see also supra* Table 2 and note 34.



Table 9 California State 2010 CDC NISVS Estimates
2010 CDC NISVS estimated the annual number of men and women in California who are victims of rape to be 121,000.
2010 CDC NISVS estimated the annual number of men and women in California who are victims of other sexual violence to be 1,400,000.

The following table shows the disposition of arrests of adults for felony-level offenses in California and the dismissal, acquittal, and conviction percentages of the cases that went to court.<sup>95</sup>

Table 10 Disposition of Arrests for Adult Felony-Level Offenses in California					
	2014	2015	2016	2017	2018
Adults Arrested for Felony-Level Crimes	315,782	242,460	207,022	218,933	215,283
Total Court Dispositions and Percent of Arrests Resolved in Court	257,320 (81.5%)	196,190 (80.9%)	163,376 (78.9%)	171,208 (78.2%)	168,660 (78.3%)
Court Dispositions-Dismissed and Percent of Court Dispositions Dismissed	36,953 (11.7%)	30,657 (12.6%)	24,165 (11.7%)	25,381 (11.6%)	26,143 (12.1%)
Court Dispositions-Acquitted and Percent of Court Dispositions Acquitted	385 (0.1%)	565 (0.2%)	487 (0.2%)	491 (0.2%)	511 (0.2%)
Court Dispositions-Convicted and Percent of Court Dispositions Convicted	217,688 (68.9%)	162,282 (66.9%)	137,415 (66.4%)	144,530 (66.0%)	141,506 (65.7%)

The largest category of court dispositions was convictions, followed by dismissals, diversion dismissals, and acquittals.<sup>96</sup> The following table depicts the number and rate per 1,000 of California rapes, reported, cleared, resulting in arrests, prosecutions, and convictions.<sup>97</sup>

95. CAL. DEP'T OF JUST., 2018 CRIME IN CALIFORNIA 53 tbl. 37, 54 tbl. 38A (2019), <https://data-openjustice.doj.ca.gov/sites/default/files/2019-07/Crime%20In%20CA%202018%2020190701.pdf> [hereinafter 2018 CALIFORNIA CRIME REPORT].

96. *Id.* at 54 tbl. 38A.

97. *Id.* at 9–10 tbl. 1, 19 tbl. 15, 24 tbl. 20, 69 tbl. 52.

Table 11 California Rape Statistics					
	2014	2015	2016	2017	2018
Population in Millions	38.5	39.1	39.4	39.6	39.8
Number of Rapes Reported to FBI Based on UCR Criteria	9,397	12,793	13,365	14,724	15,500
Number of Rapes per 1,000 California Residents	.244	.327	.348	.372	.389
Number of Police Clearances <sup>98</sup> and Percent of Clearances Compared to Total Rapes	3,921 (41.7%)	5,304 (41.5%)	5,585 (41.8%)	5,427 (36.9%)	5,329 (34.4%)
Number of Felony Arrests and Percent of Arrests Compared to All Violent Crime Arrests	2,444 (2.3%)	2,467 (2.2%)	2,558 (2.3%)	2,557 (2.3%)	2,541 (2.3%)

In 2018, 15,500 rapes were reported to the police, and 2,541 of those reports resulted in arrests for an arrest rate of 16%. The number of rape arrests is less than 3% of the total violent crime arrests in California, and California does not provide the percentage of rape arrests resulting in a conviction. In 2018, California had 215,283 felony level arrests resulting in 141,506 convictions for a rate of about 66%.

### C. New York Reports, Prosecutions, and Convictions

The 2010 CDC NISVS estimates of annual rapes and sexual violence in New York are depicted in the following table.<sup>99</sup>

98. See *supra* Section I.B for a definition of clearance.

99. 2010 CDC NISVS SUMMARY REPORT, *supra* note 35, at 68–71; see also *supra* Table 2 and note 34.

Table 12 New York State 2010 CDC NISVS Estimates	
2010 CDC NISVS estimated the annual number of men and women in New York who are victims of rape to be 84,000.	
2010 CDC NISVS estimated the annual number of men and women in New York who are victims of other sexual violence to be 1,015,000.	

New York crimes statistics are depicted in the following table.<sup>100</sup>

Table 13 New York State UCR Index Crime Counts and Rates per 1,000 Population						
	2013	2014	2015	2016	2017	2018
Number of Rapes	2,616	2,539	6,151	6,245	6,379	6,708
Number of Rapes per 1,000 Population	.13	.13	.31	.32	.32	.34

New York State implemented the FBI's revised definition of rape in 2015, resulting in the more than doubling of the number of rapes counted.<sup>101</sup> The New York Crime Report reflects the same clearance methodology as the UCR.<sup>102</sup> The following table indicates sex offense arrests (includes rapes and other sex crimes) in 2018 and 2019.<sup>103</sup>

100. OFFICE OF JUST. RSCH. & PERFORMANCE, N.Y. STATE DIV. OF CRIM. JUST. SERV., NEW YORK STATE CRIME REPORT 6 app. 1 (2019), <https://www.criminaljustice.ny.gov/crimnet/pubs.htm>.

101. The New York State Crime Report attributed the substantial increase in reported rapes to the new UCR definition of rape. From 2014 to 2015, the number of New York rape offenses reported under UCR criteria increased from 2,539 to 6,151. *Id.*

102. *See supra* Section I.B for the UCR definition of clearance.

103. OFFICE OF JUST. RSCH. & PERFORMANCE, N.Y. STATE DIV. OF CRIM. JUST. SERV., CRIMINAL JUSTICE CASE PROCESSING ARREST THROUGH DISPOSITION 3 tbl 1A, 4 tbl. 1B (2019), <https://www.criminaljustice.ny.gov/crimnet/ojsa/dar/DAR-4Q-2019-NewYorkState.pdf> [hereinafter 2018 N.Y. DISPOSITION REPORT].

	2018	2019
Felony Sex Offense Arrests	2,709	2,617
Misdemeanor Sex Offense Arrests	2,069	2,077
Total	4,778	4,674

In New York, “forcible touching,” which is committed when someone “forcibly touches the sexual or other intimate parts of another person for the purpose of degrading or abusing such person, or for the purpose of gratifying the actor’s sexual desire”<sup>104</sup> and “sexual misconduct,” which is committed when someone “engages in sexual intercourse with another person without such person’s consent,”<sup>105</sup> are misdemeanors. New York disposition information is depicted in the following table.<sup>106</sup>

	Indictments	Informations	Total
Total	108	171	283
Felony Conviction	50	132	183
Misdemeanor Conviction	29	26	57
Adjudicated-Youthful Offender	3	9	13
Non-Criminal Conviction	8	3	11
Covered by, Consolidated, Superseded	5	0	5
Dismissed-Acquitted	13	1	14

#### D. Florida Reports, Prosecutions, and Convictions

From December 2015 to December 2018, prosecutors in Alachua County, Florida closed 236 sexual battery cases, including ninety-two guilty pleas and 115 cases dismissed “mostly due to insufficient evidence to sustain

104. N.Y. PENAL LAW § 130.52 (Consol. 2020).

105. N.Y. PENAL LAW § 130.20 (Consol. 2020).

106. 2018 N.Y. DISPOSITION REPORT, *supra* note 103, at 21 tbl. 9A.

conviction.”<sup>107</sup> Only three percent—or seven cases—made it to trial, a rate significantly lower than the national average of seven percent.<sup>108</sup>

The 2010 CDC NISVS estimates of annual rapes and sexual violence in Florida are depicted in the following table.<sup>109</sup>

Table 16 Florida State 2010 CDC NISVS Estimates
2010 CDC NISVS estimated the annual number of men and women in Florida who are victims of rape to be 76,000.
2010 CDC NISVS estimated the annual number of men and women in Florida who are victims of other sexual violence to be 718,000.

In Florida, from 2014 to 2018 the reported forcible sexual offenses ranged from 10,236 in 2014 to 11,907 in 2018 as depicted in the following table.<sup>110</sup>

107. Molly Minta, *In a North Florida County, Prosecutors Drop Nearly 50 Percent of Sexual Battery Cases*, APPEAL (June 24, 2019), <https://theappeal.org/in-a-north-florida-county-prosecutors-drop-nearly-50-percent-of-sexual-battery-cases/>.

108. *Id.*

109. 2010 CDC NISVS SUMMARY REPORT, *supra* note 35, at 18–19, 68–71; *see also supra* Table 2 and note 34.

110. Crim. Just. Analytics Bureau, Fla. Dep’t of Law Enforcement, *UCR Offense Data: Florida Index Crime by Jurisdiction 1995-2019*, FLA. DEP’T L. ENFORCEMENT, <http://www.fdle.state.fl.us/FSAC/Data-Statistics/UCR-Offense-Data> (last visited Jan. 26, 2021); Criminal Justice Analytics Bureau, Fla. Dep’t of Law Enforcement, *UCR Offense Data: Sex Offenses by County and Type of Offense*, FLA. DEP’T L. ENFORCEMENT, <http://www.fdle.state.fl.us/FSAC/Data-Statistics/UCR-Offense-Data> (last visited Jan. 26, 2021) [hereinafter *Fla. UCR Offense Data: Sex Offense*].

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Table 17 Florida Reports of Forcible Sexual Offenses						
	2014	2015	2016	2017	2018	2019
Population in Millions	19.5	19.8	20.1	20.5	20.8	21.2
Rape by Force	6,781	7,201	7,275	7,660	8,105	8,130
Attempted Rape	323	336	308	274	331	309
Forcible Fondling	3,132	3,195	2,897	3,240	3,471	3,291
Total Forcible Sexual Offenses	10,236	10,732	10,480	11,174	11,907	11,730
Rate per Thousand of Total Forcible Sexual Offenses	0.52	0.54	0.52	0.54	0.57	0.55
UCR Rape Reports	7,098	7,529	7,583	7,934	8,442	8,439
UCR Rape Reports Cleared by Police	3,664	3,589	3,475	3,558	3,770	3,581
Percentage of Rape Reports Cleared by Police	52%	48%	46%	45%	45%	42%

The following table depicts the total number of Florida arrests for forcible sex offenses or rape.<sup>111</sup> As depicted below, the percentage of forcible sex offenses or rapes has been less than 0.3% of the total arrests for the previous six years.

111. Crim. Just. Analytics Bureau, Fla. Dep't of Law Enforcement, *UCR Arrest Data*, FLA. DEP'T L. ENFORCEMENT, <http://www.fdle.state.fl.us/FSAC/Data-Statistics/UCR-Arrest-Data.aspx> (last visited Jul. 17, 2020); *Fla. UCR Offense Data: Sex Offense*, *supra* note 110. Before 2017, Florida used the term "Forcible Sex Offense," and for 2017 and thereafter, Florida used the UCR term "rape."

Table 18 Florida Arrests Totals and for Forcible Sex Offense or Rape (UCR Standards)						
	2014	2015	2016	2017	2018	2019
Total Arrests	866,939	773,061	726,494	711,831	716,665	679,221
Arrests for Forcible Sex Offense or Rape	1,839	1,803	1,747	1,872	1,937	1,765
Arrests for Rape or Forcible Sex Offense Percentage of Total Arrests	0.21%	0.23%	0.24%	0.26%	0.27%	0.26%
Percentage of Forcible Sexual Offenses Resulting in Arrests	18%	17%	17%	17%	16%	15%

Florida statewide disposition statistics are unavailable.<sup>112</sup>

#### E. Texas Reports, Prosecutions, and Convictions

##### 1. Statewide Reports

In Texas, a 2015 study found that about 40% of “Texas women will experience some form of sexual violence in their lifetime” and “only 9% report it to police.”<sup>113</sup> The 2010 CDC NISVS estimates of annual rapes and sexual violence in Texas are depicted in the following table.<sup>114</sup>

112. See Schenck, *supra* note 33, at 638.

113. KRISTEN LENAU, AUSTIN/TRAVIS CNTY. SEXUAL ASSAULT RESPONSE & RESOURCE TEAM, AUSTIN/TRAVIS COUNTY SEXUAL ASSAULT RESPONSE AND RESOURCE TEAM COMMUNITY NEEDS ASSESSMENT 3 (2018), <https://www.austintexas.gov/edims/document.cfm?id=313945> [hereinafter AUSTIN/TRAVIS CNTY. SARRT REPORT].

114. 2010 CDC NISVS SUMMARY REPORT, *supra* note 35, at 18–19, 68–71; see also *supra* Table 2 and note 34.

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Table 19 Texas State 2010 CDC NISVS Estimates	
2010 CDC NISVS estimated the annual number of men and women in Texas who are victims of rape to be 118,000.	
2010 CDC NISVS estimated the annual number of men and women in Texas who are victims of other sexual violence to be 855,000.	

The 2018 and 2017 Texas state-wide crime in Texas reports from data collected from police and sheriff departments for all sexual assaults is summarized in the following table.<sup>115</sup>

Table 20 Texas Sexual Assault Reports		
	2017	2018
Sexual Assault Incidents	18,112	19,816
Sexual Assault Victims	18,750	20,592
Sexual Assault Offenders	18,774	20,532
UCR Rape Reports	14,332	14,891

Based on the statutory definitions of the charges filed, of the 20,592 sexual assault victims in Texas in 2018, at least 28.8% (5,807 victims) were under the age of fifteen; however, the percentage of minor victims may be higher as some charges do not differentiate based on the age of the victim.<sup>116</sup> The following table depicts the cases filed, cases disposed, convictions and sentences to prison in Texas in 2017, 2018, and 2019 for sexual assault of adults only.<sup>117</sup>

115. TEX. DEP'T OF PUBLIC SAFETY, CRIME IN TEXAS 2018, at 46, 77 (2019), [https://www.dps.texas.gov/administration/crime\\_records/pages/crimestatistics.htm](https://www.dps.texas.gov/administration/crime_records/pages/crimestatistics.htm) [hereinafter 2018 TEXAS CRIME REPORT].

116. *Id.* at 48, 80–82. For example, under the statutory definitions of sexual assault and aggravated sexual assault, the victim can be either a minor or an adult. *Id.* at 80, 82.

117. OFFICE OF COURT ADMIN., STATE OF TEX. JUDICIAL BRANCH, ANNUAL STATISTICAL REPORT FOR TEXAS JUDICIARY FISCAL YEAR 2019, at Detail 10 (2020), <https://www.txcourts.gov/media/1445760/fy-19-annual-statistical-report.pdf> [hereinafter 2019 TEXAS COURT REPORT]; OFFICE OF COURT ADMIN., STATE OF TEX. JUDICIAL BRANCH, ANNUAL STATISTICAL REPORT FOR TEXAS JUDICIARY FISCAL YEAR 2018, at Detail 8 (2019), <https://www.txcourts.gov/media/1443455/2018-ar-statistical-final.pdf> [hereinafter 2018 TEXAS COURT REPORT]; OFFICE OF COURT ADMIN., STATE OF TEX. JUDICIAL BRANCH, ANNUAL STATISTICAL REPORT FOR TEXAS JUDICIARY FISCAL YEAR 2017, at Detail 8 (2018), <https://www.txcourts.gov/media/1441397/ar-fy-17-final.pdf> [hereinafter 2017 TEXAS COURT REPORT].



	2017	2018	2019
Cases Filed	1,486	1,181	1,444
Cases Disposed	1,565	1,330	1,414
Deferred Adjudication	259	211	208
Dismissals	556	475	536
Acquittals	27	25	44
Convictions	475	394	400
Sentenced to Prison	352	295	285

In FY 2017, Texas sexual assault prosecutions constituted only 3% of the total of 280,002 Texas felony-level prosecutions.<sup>118</sup> For contested sexual assault trials, the sexual assault acquittal rate was 29% (twenty-seven cases).<sup>119</sup> In addition, only 113 contested sexual assault prosecutions occurred in Texas in 2017.<sup>120</sup> In FY 2018, sexual assault prosecutions constituted only 3% of the total of 291,426 Texas felony-level prosecutions, and for contested sexual assault trials in FY 2018, the acquittal rate was 26% (twenty-five cases).<sup>121</sup> Again, there were only 109 contested sexual assault felony-level trials in Texas in 2018. The rate of convictions for reported sexual assault for FY 2017 was 2.5% and for FY 2018 was 1.9%.<sup>122</sup> In FY 2019, adult sexual assaults had the highest rate of acquittals for any crime at 38%.<sup>123</sup>

## 2. Case Study—University of Texas at Austin

The fall 2018 enrollment of the University of Texas (UT) at Austin was 40,804 for undergraduate students, 11,028 for graduate school, and 51,832 for total students.<sup>124</sup> The undergraduate student population consisted of 53.0%

118. 2017 TEXAS COURT REPORT, *supra* note 117, at Court-Level 19.

119. *Id.* at Court-Level 21.

120. *See id.* at Detail 8.

121. 2018 TEXAS COURT REPORT, *supra* note 117, at Court-Level 20, 22.

122. In 2017, there were 475 sexual assault convictions and 18,774 sexual assault offenders were reported to police, resulting in a 2% conviction rate for sexual assault offenses reported to the police. In 2018, there were 394 sexual assault convictions and 20,532 sexual assault offenders were reported to police, resulting in a 2% conviction rate for sexual assault offenses reported to the police. *See supra* Tables 20, 21.

123. 2019 TEXAS COURT REPORT, *supra* note 117, at Court-Level 24.

124. *Facts and Figures*, U. TEX., <https://www.utexas.edu/about/facts-and-figures> (last visited Jan. 26, 2021).

women (21,626) and 47.0% men (19,178).<sup>125</sup> In 2017, the University of Texas conducted the Cultivating Learning and Safe Environment (CLASE) Survey, which involved 7,684 student participants for a 17.1% response rate.<sup>126</sup> Twenty-eight percent of female undergraduate students responding reported having experienced unwanted sexual touching since their enrollment at UT-Austin, and 15% of female undergraduate students reported having experienced rape since enrollment at UT-Austin.<sup>127</sup> The number of victims and the percentage of the total UT-Austin undergraduate population in the 2017 CLASE Survey who were victims of rape, attempted rape, or unwanted touching is shown in the following table.<sup>128</sup>

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125. *Id.*

126. 2017 CLASE REPORT, *supra* note 74, at 30.

127. 2017 CLASE REPORT, *supra* note 74, at 49. The 2017 CLASE Report states: "The results of this study are not intended to indicate that Clery Act reportable incidents have been miscounted by the institution or that the institution has otherwise violated the Clery Act." *Id.* at 21. Some observers have noted that the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act) Reports have been incomplete. The American Association of University Women (AAUW) observed:

AAUW's analysis of 2016 data reported under the federal Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), which requires colleges and universities who participate in federal financial aid programs to disclose campus crime statistics and security information, shows that the vast majority (89%) of 11,000 college and university campuses failed to disclose even a single reported incident of rape that year, even though there are numerous studies showing that campus rape is common.

*An Underreported Problem: Campus Sexual Misconduct*, AAUW, <https://www.aauw.org/resources/article/underreported-sexual-misconduct/> (last visited Jan. 21, 2021).

128. 2017 CLASE REPORT, *supra* note 74, at 48. Table 22 only includes percentages by gender of undergraduates who were the victims of rape, attempted rape, and unwanted touching during college. The numbers of victims in the table were obtained by multiplying the percentages by the number of UT-Austin male (19,178) and female (21,626) undergraduates.

	Female %	Number	Male %	Number
Rape	15%	3,244	5%	959
Attempted Rape	12%	2,595	3%	575
Unwanted Sexual Touching	28%	6,055	11%	2110
Total of Sexual Assaults	55%	11,894	19%	3,644

The CLASE Survey indicated that 32% of undergraduate victims said they reported their victimization to someone. Approximately 25.3% of victims disclosed to a close friend other than a roommate, 15.0% disclosed to a roommate, 9.6% disclosed to a romantic partner, 4.5% disclosed to a parent or guardian, 3.5% to a family member other than a parent or guardian, 1.9% to someone at UT-Austin including counselors or medical personnel, 0.32% to UT police, and 0.32% to local police other than the UT-Austin police.<sup>129</sup> The CLASE report estimated 11,894 women and 3,644 men undergraduates for a total of 15,538 undergraduates were sexually assaulted during college.<sup>130</sup> To determine a one-year total of sexual assaults, 15,538 undergraduates were divided by four (years), which equals 3,885.

UT-Austin reported the following sexual misconduct for 2016 to 2018 to the Department of Education as required by the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1990, 20 U.S.C. § 1092(f) (2018) as depicted in the table below.<sup>131</sup>

129. 2017 CLASE Report, *supra* note 74, at 52–53.

130. *See supra* Table 22.

131. UNIV. OF TEX., 2019 ANNUAL SECURITY AND FIRE SAFETY REPORT 34–35 (2019), <https://police.utexas.edu/reports/clery-reports>.

	2016	2017	2018
Rape	29	26	28
Fondling	4	3	2
Statutory Rape	12	0	0
Dating Violence	41	10	7

In 2017, UT-Austin Police Department (UTPD) Chief David Carter said seven incidents of sexual assault at UT-Austin were reported to UTPD in 2016, and in the first three months of 2017, one incident was reported to the UTPD.<sup>132</sup> For the University of Texas at Austin, the percentage of victims in the CLASE report who said they reported the sexual assault to local or UT-Austin police was 0.64%.<sup>133</sup> Multiplying the CLASE total number of victims of 3,885 by 0.64% yields an estimated twenty-five victims at the University of Texas at Austin who reported their sexual assaults to law enforcement. The University of Texas at Austin reported thirty-seven sexual offenses in 2018 in their Clery Report.<sup>134</sup> As noted, the Austin Police Chief said eight sexual offenses were reported to his office from 2016 to the first three months of 2017. It is unknown if any of the eight reports of sexual assault at UT-Austin were referred for prosecution or resulted in a conviction; however, based on Texas state-wide statistics indicating only 2% of reported sexual assault cases resulted in a conviction, it is statistically unlikely that any of the eight sexual assault reports resulted in conviction of the perpetrator.<sup>135</sup>

On July 1, 2019, the population of Travis County, Texas, was about 1,274,000.<sup>136</sup> Austin is the largest city in Travis County with a population on July 1, 2019, of about 979,000.<sup>137</sup> The Travis County District Attorney's Office

132. See Claire Allbright et al., *UT Austin Has Highest Percentage of Rape Among Female Undergraduates, Study Finds*, DAILY TEXAN (Mar. 27, 2017), <https://thedailytexan.com/2017/03/26/ut-austin-has-highest-percentage-of-rape-among-female-undergraduates-study-finds>.

133. See 2017 CLASE Report, *supra* note 74, at 52.

134. See *supra* Table 23.

135. See *supra* Tables 20, 21, notes 115–17, and accompanying text.

136. *Quick Facts: Travis County, Texas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/traviscountytexas> (last visited Jan. 26, 2021).

137. *Quick Facts: Austin City, Texas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/austincitytexas/LND110210> (last visited Jan. 26, 2021).

(TCDAO) handles sexual assault cases for all eleven jurisdictions in the county, including Austin.<sup>138</sup>

From July 1, 2016, to June 30, 2017, the Austin Police Department (APD) investigated 1,161 sexual assault cases, which resulted in ninety-six arrests.<sup>139</sup> In 2017, APD reported 188 sexual assault cases under Uniform Crime Reporting (UCR) standards to the Texas Department of Public Safety, and the total reported for all Travis County jurisdictions was 472 sexual assault cases.<sup>140</sup> The TCDAO received 224 sexual assault cases for prosecution, seventy-seven were accepted for prosecution, and twenty-six were convicted of at least one charge.<sup>141</sup> In sum, 8.3% of sexual assault reports reported to the APD resulted in arrests and 11.6% of cases that TCDAO received for prosecution resulted in convictions.

Assuming that all of the APD cases resulting in arrests were referred to TCDAO for prosecution and the APD cases were prosecuted at the same rate as the other Travis County cases, of the reported cases to APD, about only 1% resulted in convictions. The Austin statistics are roughly consistent with the statistics of Texas state-wide.

#### IV. MILITARY VICTIMS' RIGHTS AND BENEFITS

In the last decade, the military has made tremendous strides in advancing and protecting sexual assault victims' rights in the military justice system. Some of those rights are expressly mentioned in the Uniform Code of Military Justice<sup>142</sup> while others appear in the Manual for Courts-Martial, or in other regulations.

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138. AUSTIN/TRAVIS CNTY. SARRT REPORT, *supra* note 113, at 28.

139. *Id.* at 27.

140. TEX. DEP'T OF PUBLIC SAFETY, CRIME IN TEXAS 2017 ch. 10b (2018), <https://www.dps.texas.gov/crimereports/17/citCh10b.xlsx>.

141. AUSTIN/TRAVIS CNTY. SARRT REPORT, *supra* note 113, at 28.

142. *See, e.g.*, UCMJ art. 6b (2020), 10 U.S.C. § 806b. Article 6b of the UCMJ provides:

(a) A victim of an offense under this chapter has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice . . . .

. . . .

(3) The right not to be excluded from any public hearing or proceeding . . . .

(4) The right to be reasonably heard at any of the following:

(A) A public hearing concerning the continuation of confinement prior to trial of the accused.

(B) A sentencing hearing relating to the offense.

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For example, commanders are required to act on requests for transfer of victims who make an unrestricted report of sexual assault within seventy-two hours.<sup>143</sup> Victims have a right to appeal denial of the request for transfer.<sup>144</sup>

The following table depicts the number of victim's requests for transfers and transfers approved from FY 2012 to FY 2019.<sup>145</sup>

Transfer Type	FY12	FY13	FY14	FY15	FY16	FY17	FY18	FY19
Number of victims requesting a change in Unit/Duty Assignment (Cross-Installation Transfers)	57	99	44	71	62	74	67	89
<i>Number Denied</i>	2	3	0	2	3	5	2	5
Number of victims requesting a change in Installation (Permanent Change of Station)	161	480	615	663	684	760	835	810
<i>Number Denied</i>	0	11	15	12	18	30	30	24
<b>Total Approved</b>	<b>216</b>	<b>565</b>	<b>644</b>	<b>720</b>	<b>725</b>	<b>799</b>	<b>870</b>	<b>870</b>

In comparing the civilian and military criminal justice systems vis-a-vis sexual assault prosecutions, it is important also to consider the rights that sexual assault victims have in the military system that may not always apply in the civilian system. Indeed, one commentator has compared the two systems and argues that there is much for universities and colleges to learn from the military's progressive treatment of victims' rights.<sup>146</sup>

(C) A public proceeding of the service clemency and parole board relating to the offense.

(5) The reasonable right to confer with the counsel representing the Government at any proceeding described in paragraph (2).

(6) The right to receive restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter.

143. See 2019 DOD SAPR REPORT, *supra* note 75, at app. B at 33.

144. *Id.*

145. *Id.*

146. See Norton, *supra* note 26, 483 n.112, 489. Norton argues that the key to reforming reporting systems for sexual violence on college and university campuses may be found in the

Under the Uniform Code of Military Justice (UCMJ), the victim has the right to be protected from the accused.<sup>147</sup> The victim has the right to be “treated with fairness and with respect for the dignity and privacy of the victim of an offense.”<sup>148</sup> The sexual assault victim has a right to file either a restricted or unrestricted report of the offense.<sup>149</sup> The victim has the right to be represented, at no expense to the victim, by Special Victims’ Counsel, who will provide legal advice and assistance.<sup>150</sup>

The victim’s confidential communications are protected by Military Rule of Evidence 514.<sup>151</sup> The victim has a right to the presence of the prosecutor, “counsel for the victim, or if applicable, a victim advocate” at any pretrial interviews.<sup>152</sup> The victim has the right to notice of any investigative subpoenas for the victim’s records.<sup>153</sup> The victim has the right to be notified of a public hearing concerning the continuation of pretrial confinement of the accused.<sup>154</sup> The victim, if under eighteen years of age, must be represented by a “legal guardian[] of the victim or the representatives of the estate of the victim’s estate, family members, or other person designated as suitable by the military

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military justice system. Norton recommends that first, colleges and universities implement a system modeled after the military’s Special Victims Counsel Program, where student victims could have access to pro bono legal representation from the moment they report an assault. *Id.* at 483. Second, she recommends that colleges and universities adopt a two-tiered reporting system for victims, which would ensure that they have access to treatment without automatically initiating an intrusive investigation. *Id.* at 486. Third, she recommends that colleges and universities consider adopting some of the protections provided to sexual assault survivors through the military’s expedited transfer program to aid victims and avoid further victimization during investigation and adjudication procedures. *Id.* at 487.

147. 10 U.S.C. § 806b(a)(1).

148. *Id.* § 806b(a)(8).

149. See U.S. DEP’T OF DEF., INSTRUCTION NO. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES (2013) (amended 2020).

150. Special Victims’ Counsel/Victims’ Legal Counsel, U.S. DEP’T OF DEF. SEXUAL ASSAULT PREVENTION & RESPONSE, <https://sapr.mil/svc-vlc> (last visited Jan. 26, 2021). Each service has a special victims’ counsel program. The Army, Air Force, National Guard, and Coast Guard use the term “Special Victims’ Counsel” (“SVC”) to refer to these attorneys. The Navy and Marine Corps label these attorneys as “Victims’ Legal Counsel” (“VLC”). *Id.* Adult and minor dependents may also be eligible for assignment of an SVC or VLC. See, e.g., *AF Special Victims Counsel Program*, MIL. REP. (Dec. 26, 2016), <https://www.military.com/military-report/af-special-victims-counsel-program.html>.

151. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 514(a) (2016) [hereinafter MCM].

152. 10 U.S.C. § 806b(f)(2).

153. MCM, *supra* note 151, R.C.M. 703(g)(3)(C)(ii).

154. 10 U.S.C. § 806b(a)(2)(A).

judge . . . .”<sup>155</sup> Many matters involving victims’ rights can be dealt outside the presence of the court members.<sup>156</sup>

The victim is entitled to reasonable, timely, and accurate notice of an Article 32 preliminary hearing.<sup>157</sup> The victim has the reasonable right to confer with counsel for the government.<sup>158</sup> The victim, who has suffered “a direct physical, emotional, or pecuniary harm,” has the right not to attend the preliminary hearing.<sup>159</sup> The victim has a right to attend the preliminary hearing and cannot be excluded from the hearing unless a similarly situated victim could be excluded from a trial.<sup>160</sup> The victim has the protections of Military Rule of Evidence 412 (rape shield rule) at the preliminary hearing, which excludes evidence of the victim’s prior sexual conduct.<sup>161</sup>

The victim has a right to present additional pre-hearing materials to be considered by the convening authority.<sup>162</sup> The victim has a right to state a preference as to whether the charges against the accused should be tried by court-martial or by a civilian court.<sup>163</sup> The victim has a right to have his or her views considered by the convening authority in any plea bargaining with the accused.<sup>164</sup>

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155. *Id.* § 806b(c) (prohibiting the accused from being appointed as that representative); MCM, *supra* note 151, R.C.M. 801(a)(6)(vi).

156. *See* 10 U.S.C. § 839(a).

157. 10 U.S.C. § 806b(a)(2)(B).

158. MCM, *supra* note 151, R.C.M. 405(g)(2).

159. 10 U.S.C. § 832(d)(3), (h).

160. MCM, *supra* note 151, R.C.M. 405(g)(3).

161. MCM, *supra* note 151, MIL. R. EVID. 412. It is important to note that except for the rules dealing with privileges, the Military Rules of Evidence generally do not apply at the Preliminary Hearing. *Id.* at R.C.M. 405(e) discussion. However, evidence “offered to prove” the victim’s prior sexual behavior or predisposition may be admissible if the evidence would be admissible at a later trial and the evidence is “relevant, not cumulative, and necessary” to determining issues set out in R.C.M. 405(a). *Id.* at R.C.M. 405(i)(2)(A)(i)–(ii).

162. *Id.* at R.C.M. 405(k)(1).

163. Mr. Mark D. Stoup, *What’s New in the Law for Victims*, 43 REPORTER, no. 2, 2016, at 39. This right was created in the Carl Levine and Howard P. ‘Buck’ McKeon National Defense Authorization Act for Fiscal Year 2015. *See* Carl Levine and Howard P. ‘Buck’ McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 539, 128 Stat. 3292, 3367 (2014). R.C.M. 306(e) requires the commander or the convening authority (if charges are preferred) to contact the civilian authority which has jurisdiction over the offense and inform that office of the victim’s preference. MCM, *supra* note 151, R.C.M. 306(e)(3).

164. MCM, *supra* note 151, R.C.M. 705(e)(3)(B).



The victim also has the following rights: to the speedy disposition of the case;<sup>165</sup> to be heard and represented by counsel at hearings on motions;<sup>166</sup> to “reasonable, accurate, and timely notice of . . . a court-martial relating to the offense”;<sup>167</sup> not to be excluded from the court-martial;<sup>168</sup> to confer with the trial counsel during the court-martial;<sup>169</sup> to be heard at presentencing and to make either an unsworn<sup>170</sup> or sworn statement;<sup>171</sup> and to seek extraordinary relief in the Courts of Criminal Appeals for rulings involving the victim’s rights.<sup>172</sup>

After trial, the victim has the right to be provided with the recording of any open sessions of proceedings and access to “any admitted, unsealed exhibits.”<sup>173</sup> The victim has the right to submit written materials to the convening authority.<sup>174</sup> The victim is entitled, upon request, to receive a copy of the judgment in the court-martial.<sup>175</sup> The victim has the right to seek mandamus relief from the Courts of Criminal Appeals and the Court of Appeals for the Armed Forces from rulings on victim’s rights by the military judge or the preliminary hearing officer.<sup>176</sup> The victim has a right to have his or her mandamus petition given priority by the Courts of Criminal Appeals and the Court of Appeals for the Armed Forces.<sup>177</sup> The victim has the right to be present at any public proceeding of the service clemency and parole board relating to the accused’s offense.<sup>178</sup>

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165. 10 U.S.C. § 806b(a)(2)(7).

166. See *LRM v. Kastenberg*, 72 M.J. 364, 370 (C.A.A.F. 2013), *superseded on other grounds by statute*, 10 U.S.C. § 806b(e), as recognized in *Randolph v. HV*, 76 M.J. 27, 29 (C.A.A.F. 2017).

167. 10 U.S.C. § 806b(a)(2)(C).

168. *Id.* § 806b(a)(3); MCM, *supra* note 151, R.C.M. 806(b)(3). However, if the military judge determines by “clear and convincing evidence” that the victim’s testimony “would be materially altered if the victim heard other testimony,” the victim may be excluded from the court-martial. *Id.*

169. 10 U.S.C. § 806b(a)(5); MCM, *supra* note 151, R.C.M. 806(b)(3) discussion.

170. MCM, *supra* note 151, R.C.M. 1001(c)(1), (5)(A).

171. *Id.* at R.C.M. 1001(c)(4).

172. See 10 U.S.C. § 806b(e)(1)–(2).

173. *Id.* § 806b(e)(1)(C).

174. 10 U.S.C. § 860a(e)(1). This provision, which originally appeared in former Article 60 of the UCMJ, was added in the 2014 National Defense Authorization. See National Defense Authorization Act of 2014, Pub. L. 113-66, § 1706, 127 Stat. 627, 960 (2013). The President implemented the changes to Article 60 in E.O. 13669 by adding Rule of Court-Martial 1105A, entitled “Matters submitted by a crime victim.” Exec. Order No. 13669, 79 Fed. Reg. 117, 35007 (June 13, 2014). That Rule is now 1106(a). MCM, *supra* note 151, R.C.M. 1106(a).

175. 10 U.S.C. § 860c(a)(2)(A); MCM, *supra* note 151, R.C.M. 1111(f)(3).

176. 10 U.S.C. § 806b(e); Sean P. Mahoney, *Taking Victims’ Rights to the Next Level: Appellate Rights of Crime Victims Under the Uniform Code of Military Justice*, 225 MIL. L. REV. 682, 684 (2019).

177. 10 U.S.C. § 806b(e)(3)(B), (C).

178. *Id.* § 806b(a)(3).

The victim has the right to notice of “[t]he release or escape of the accused, unless such notice may endanger the safety of any person.”<sup>179</sup> The victim has the right to receive restitution as provided in law.<sup>180</sup>

The foregoing rights generally mirror rights accorded to victims in federal cases<sup>181</sup> and victims in state cases in the civil system.<sup>182</sup> But in some regards, the rights available to a victim in the military justice system are broader. For example, a Special Victims’ Counsel is provided at no charge to the victim.<sup>183</sup> In addition, while a victim in the military is not required to attend the Article 32 Preliminary Hearing,<sup>184</sup> a victim could be subpoenaed to appear before a federal grand jury or a federal preliminary hearing.

#### V. MILITARY REPORTS, PROSECUTIONS, AND CONVICTIONS

Actual reports of sexual assaults from victims provide a more accurate number of sexual assaults than surveys such as the WGRA, which are extrapolations based on surveys that are likely to be inflated by selection bias.<sup>185</sup> The DOD Sexual Assault Response and Prevention Office (SAPRO) collects sexual assault data and generates an annual report based on actual reports from victims and cases involving sexual assault perpetrators.<sup>186</sup> The term “sexual assault” includes “rape, sexual assault, forcible sodomy, aggravated sexual contact, abusive sexual contact, and attempts to commit these offenses,” as defined in Articles 80, 120, and 125 of the Uniform Code of Military Justice (UCMJ), but not sexual contact crimes involving “touching of body parts other than the genitals, inner thighs, breasts, and buttocks and acts such as forcible kissing or nonconsensual touching of other body regions.”<sup>187</sup> SAPRO does not analyze sexual assault allegations involving spouses or intimate partners in the Family Advocacy Program.<sup>188</sup> The following table shows the numbers of restricted and unrestricted reports of sexual assaults by military victims for the years 2015 to 2019.<sup>189</sup>

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179. *Id.* § 806b(a)(2)(E).

180. *Id.* § 806b(a)(6).

181. *See* 18 U.S.C. § 3771.

182. *See* Victims’ Rights Law by States, NCVLI, <https://law.lclark.edu/live/news/23544-victims-rights-law-by-state> (last visited Jan. 27, 2021).

183. 10 U.S.C. § 832(d)(3).

184. MCM, *supra* note 151, R.C.M. 703(e)(2)(A).

185. *See supra* Section I.C.

186. 2019 DOD SAPR REPORT, *supra* note 75, at app. B at 4.

187. *Id.* at app. B at 4 & n.3.

188. *Id.* at 10.

189. U.S. DEP’T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2015, app. B at 8 (2016), [https://sapr.mil/public/docs/reports/FY15\\_Annual](https://sapr.mil/public/docs/reports/FY15_Annual)

Table 25 SAPRO Report: Victim Reports of Sexual Assaults					
Fiscal Year	2015	2016	2017	2018	2019
Total Reports	6,053	6,172	6,769	7,623	7,825
Unrestricted Reports	4,584	4,591	5,110	5,805	5,699
Restricted Reports	1,499	1,581	1,659	1,818	2,126
Military Victims Total Reports During Service	4,736	4,794	5,277	6053	6,236
Military Victims Unrestricted Reports During Service	Unknown	Unknown	Unknown	4,603	4,515
Military Victims Restricted Reports During Service	Unknown	Unknown	Unknown	1,450	1,721

The following table shows why no adverse actions were taken based on victims' unrestricted reports of military assaults for the years 2015 to 2019.<sup>190</sup>

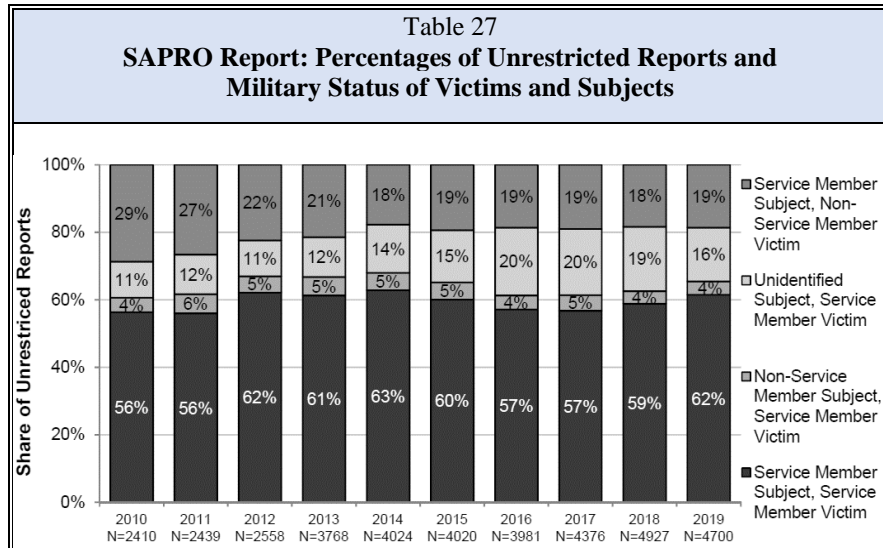
/Appendix\_B\_Statistical\_Data\_on\_Sexual\_Assault.pdf [hereinafter 2015 DOD SAPR Report]; U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2016, app. B at 15 (2017), [https://dacipad.whs.mil/images/Public/10-Reading\\_Room/04\\_Reports/03\\_DoD\\_Reports\\_Regs\\_Surveys/DoD\\_Annual\\_SexAsslt\\_Reports/Appendix\\_B\\_Statistical\\_Section.pdf](https://dacipad.whs.mil/images/Public/10-Reading_Room/04_Reports/03_DoD_Reports_Regs_Surveys/DoD_Annual_SexAsslt_Reports/Appendix_B_Statistical_Section.pdf) [hereinafter 2016 DOD SAPR Report]; U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2017, app. B at 15 (2018), [https://www.sapr.mil/public/docs/reports/FY17\\_Annual/Appendix\\_B\\_Statistical\\_Data\\_on\\_Sexual\\_Assault.pdf](https://www.sapr.mil/public/docs/reports/FY17_Annual/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf) [hereinafter 2017 DOD SAPR REPORT]; U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2018, app. B at 8, [https://www.sapr.mil/sites/default/files/Appendix\\_B\\_Statistical\\_Data\\_on\\_Sexual\\_Assault.pdf](https://www.sapr.mil/sites/default/files/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf) [hereinafter 2018 DOD SAPR REPORT]; 2019 DOD SAPR REPORT, *supra* note 75, at app. B at 8. Hundreds of reports were excluded from the unrestricted report totals because of missing data about the subject or victim: 2019 (966 reports); 2018 (841 reports); 2017 (734 reports); 2016 (610 reports); and 2015 (564 reports). *Id.* at 11. No explanation is given for why SAPRO did not obtain complete information from commands providing the information. For additional details about the military status of subjects and victims in unrestricted reports, *see infra* Tables 27, 28.

190. 2015 DOD SAPR REPORT, *supra* note 189, at app. B at 8, 16; 2016 DOD SAPR REPORT, *supra* note 189, at app. B at 14–16; 2017 DOD SAPR REPORT, *supra* note 189, at app. B at 14–17; 2018 DOD SAPR REPORT, *supra* note 189, at app. B at 13–14, 16; 2019 DOD SAPR REPORT, *supra* note 75, at app. B at 13–15.

**Table 26**  
**SAPRO Report: Reasons for No Military Disciplinary Action Taken in Response to Unrestricted Reports of Military Sexual Assault Cases**

Fiscal Year	2015	2016	2017	2018	2019
Unidentified Perpetrator	418	522	793	900	1,256
Victim Did Not Allege a Criminal Offense or Data on Offense Not Available	145	174	100	253	89
Perpetrator Outside Military Jurisdiction	21	23	34	72	52
Perpetrator is a Civilian or Foreign National	111	175	308	201	261
Civilian or Foreign Authority Exercised Jurisdiction over Perpetrator	62	80	102	38	42

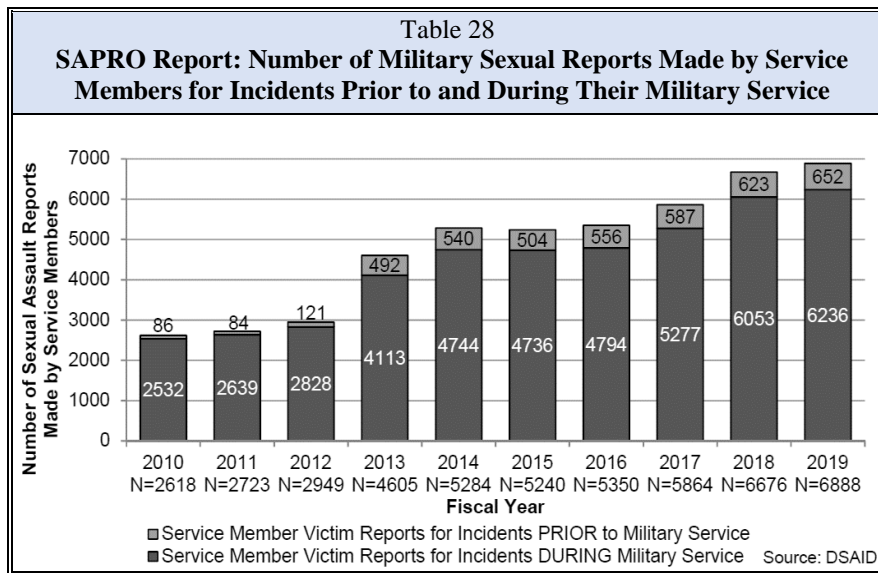
The following table depicts service members' alleged involvement in unrestricted reports of sexual assault with "N" being the total number of unrestricted reports of sexual assaults with a military person being either the subject or the victim in 2019.<sup>191</sup>



191. 2019 DOD SAPR REPORT, *supra* note 75, at app. B at 11.

The unrestricted reports category is akin to the unqualified reports of sexual assault to the police that are provided to the FBI for addition in the UCR. The unrestricted report category includes reports of sexual assault from service members *before* they entered the military. The annual military sexual assault reports do not include UCR report information such as cases cleared by arrest or otherwise from police investigations.

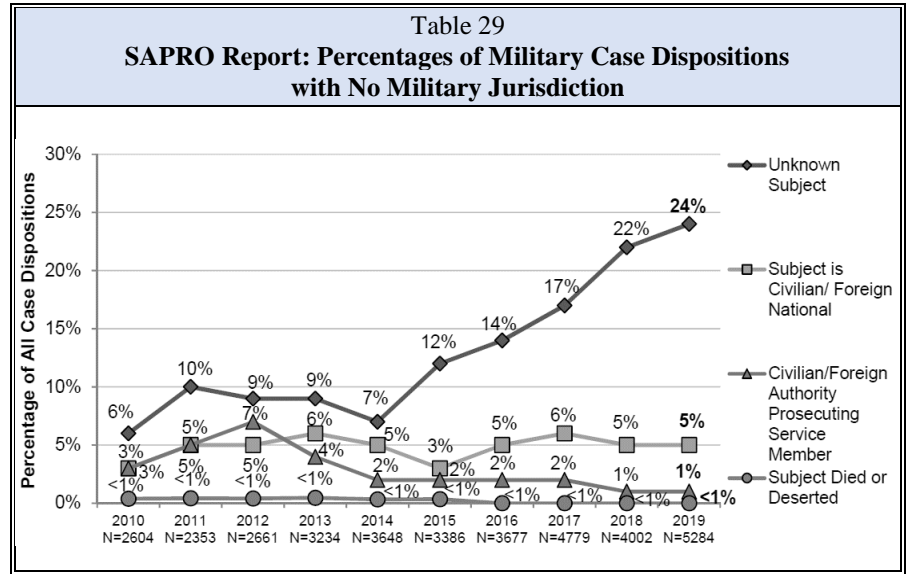
The WGRA survey of active duty military sexual assault victims in Table 4 is an extrapolation or estimate of how many victims were sexually assaulted the previous year. The number of victims may be exaggerated due to selection bias, that is, the victim of a sexual assault is likely to be more willing than a non-victim to complete the lengthy survey.<sup>192</sup> In the SAPRO Report, of the cases not available for UCMJ disposition, the largest category, unknown offender (1,256 in 2019), would not be considered a cleared case under UCR standards. For the last several years, about 10–12% of victim’s reports were for sexual assaults that occurred *before* the victim’s military service. The following table depicts the total number of reported sexual assaults by military victims as indicated by “N” and the sexual assaults before and during military service for the years 2010 to 2019.<sup>193</sup>



192. See *supra* Section I.C.

193. 2019 DOD SAPR REPORT, *supra* note 75, at app. B at 9.

The following table depicts subjects who could not be prosecuted because they were outside legal authority or were prosecuted by civilian or foreign authorities.<sup>194</sup> N is the number of case dispositions in the fiscal year. For example, 5,284 cases were disposed during FY 2019.



In the DOD, the commander has a variety of administrative and disciplinary actions available to hold an accused accountable for a sexual assault.<sup>195</sup> The following table shows the sexual assault case dispositions in FY 2019.<sup>196</sup>

194. *Id.* at 16.

195. See SCHLUETER, MILITARY CRIMINAL JUSTICE, *supra* note 1, at § 1-8, at 52–53.

196. 2019 DOD SAPR REPORT, *supra* note 75, at app. B at 17.

Case Disposition Category	Count of Case Dispositions	Share of Case Dispositions
<b>Sexual Assault Investigations Considered for Possible Action by DOD Commanders</b>	<b>3,716</b>	<b>N/A</b>
<b>Evidence Supported Commander Action</b>	<b>2,339</b>	<b>63%</b>
Sexual Assault Offense Action	1,629	70%
<i>Court-Martial Charge Preferred (Initiated)</i>	795	49%
<i>Nonjudicial Punishment (Article 15, UCMJ)</i>	360	22%
<i>Administrative Discharge</i>	212	13%
<i>Other Adverse Administrative Action</i>	262	16%
Non-Sexual Assault Offense Action	710	30%
<i>Court-Martial Charge Preferred (Initiated)</i>	68	10%
<i>Nonjudicial Punishment (Article 15, UCMJ)</i>	355	50%
<i>Administrative Discharge</i>	125	18%
<i>Other Adverse Administrative Action</i>	162	23%
<b>Unfounded by Command/Legal Review</b>	<b>50</b>	<b>1%</b>
<b>Commander Action Precluded or Respected Victims' Desired Non-Participation</b>	<b>1,327</b>	<b>36%</b>
<i>Victim Died</i>	0	0%
<i>Victim Declined to Participate in the Military Justice Action</i>	284	21%
<i>Insufficient Evidence to Prosecute</i>	1,022	77%
<i>Statute of Limitations Expired</i>	21	2%

The next table depicts the cases available for military disposition and reasons the military did not take disciplinary action against the alleged perpetrator.<sup>197</sup>

	2015	2016	2017	2018	2019
Total Military Cases Available for Disposition Under UCMJ	2,783	2,892	3,567	2,854	3,716
Victim Declined to Participate in Disposition	257	252	514	173	284
Insufficient Evidence for Prosecution	420	670	729	735	1,022
Statute of Limitations	19	33	26	27	21

197. 2015 DOD SAPR REPORT, *supra* note 189, at app. B at 18; 2016 DOD SAPR REPORT, *supra* note 189, at app. B at 18; 2017 DOD SAPR REPORT, *supra* note 189, at app. B at 19; 2018 DOD SAPR REPORT, *supra* note 189, at app. B at 18; 2019 DOD SAPR REPORT, *supra* note 75, at app. B at 17.

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The following table depicts the disposition information for the military sexual assault cases available for disposition under the UCMJ.<sup>198</sup>

	2015	2016	2017	2018	2019
Evidence Supported Commander's Action (Arrest Equivalent) for Any Offense	2,013	1,865	2,218	1,845	2,339
Evidence Support Commander's Action for Sexual Assault	1,437	1,331	1,466	1,211	1,629
Charges Preferred	926	791	774	668	795
Cases Tried	543	389	406	307	363
Convictions	413	261	284	203	264
Percent Convictions of Cases Tried	76%	67%	70%	66%	73%
Confinement Adjudged	331	196	227	157	227
Percent Confinement Adjudged of Cases Tried	61%	50%	56%	51%	63%

In 2019, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) issued a report providing statistics regarding referral of sexual assault crimes to courts-martial.<sup>199</sup> The DAC-IPAD collected information on sexual assault cases in which action was complete for 574 cases from FY 2018 and for 691 cases in FY 2017.<sup>200</sup> The DAC-IPAD did not record cases in which the victim is a child or minor.<sup>201</sup> “Of the 547 cases [collected] in FY 2018, there were 347 cases involved exclusively military victims (60.5%), 207 cases had exclusively

198. 2015 DOD SAPR REPORT, *supra* note 189, at app. B at 18, 22, 24–25; 2016 DOD SAPR REPORT, *supra* note 189, at app. B at 18, 22, 24–25; 2017 DOD SAPR REPORT, *supra* note 189, at app. B at 19, 23, 25–26; 2018 DOD SAPR REPORT, *supra* note 189, at app. B at 18, 24; 2019 DOD SAPR REPORT, *supra* note 75, at app. B at 17, 21, 23.

199. DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, AND DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES, COURT-MARTIAL ADJUDICATION DATA REPORT 1 (2019), [https://dacipad.whs.mil/images/Public/08-Reports/05\\_DACIPAD\\_Data\\_Report\\_20191125\\_Final\\_Web.pdf](https://dacipad.whs.mil/images/Public/08-Reports/05_DACIPAD_Data_Report_20191125_Final_Web.pdf) [hereinafter DAC-IPAD REPORT].

200. *Id.* at 1. The DAC-IPAD collected sexual assault cases with charges of “rape (Art. 120(a)), sexual assault (Art. 120(b)), aggravated sexual contact (Art. 120(c)), abusive sexual contact (Art. 120(d)), forcible sodomy (Art. 125), and attempts to commit these offenses (Art. 80). *Id.* at 1 n.3.

201. *Id.* at 3, 5.



civilian victims (36.1%), and 20 cases had both military and civilian victims. (3.5%).”<sup>202</sup> The DAC-IPAD counted cases completed during the Fiscal Year.<sup>203</sup>

In 2018, 95% of cases involving penetrative offenses were referred to general courts-martial and 43% of contact, non-penetrative offenses were referred to general court-martial. Referral levels for penetrative offenses are depicted in the first table below, and non-penetrative contact offenses are depicted in the next tables.<sup>204</sup>

Table 33 DAC-IPAD Report: Levels of Courts-Martial for Penetrative Sexual Offenses in 2018			
	General Court-Martial	Special Court-Martial	Summary Court-Martial
FY 2018	272 (94.8%)	13 (4.5%)	2 (0.7%)
FY 2017	300 (92.3%)	15 (4.6%)	10 (3.1%)
FY 2016	350 (92.8%)	16 (4.2%)	11 (2.9%)
FY 2015	376 (94.2%)	13 (3.3%)	10 (2.5%)

202. *Id.* at 13.

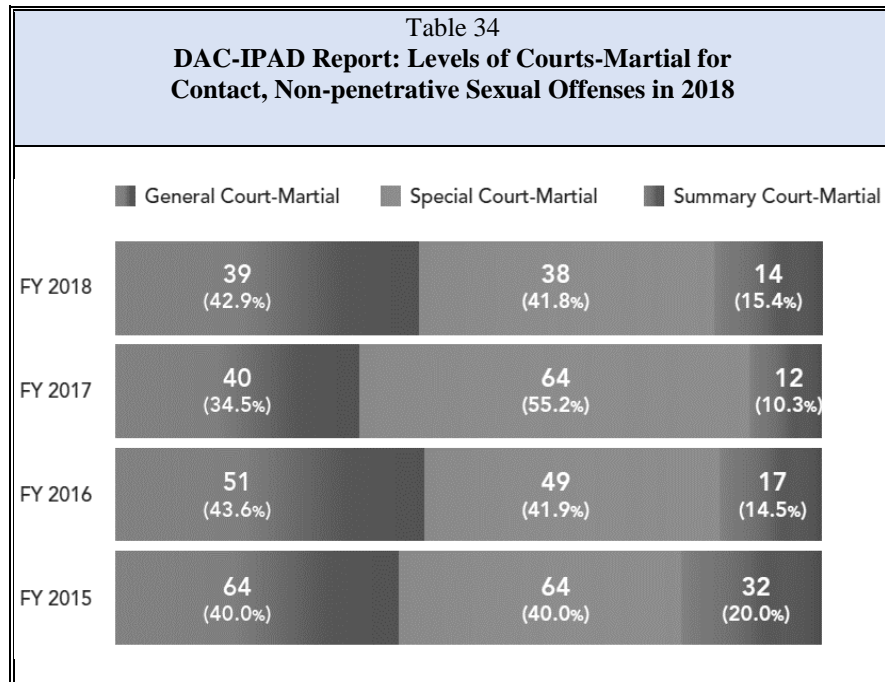
203. The DAC-IPAD defined “‘completed’ case” to be “any case tried to verdict, dismissed without further action, or dismissed and then resolved by non-judicial or administrative proceedings.” *Id.* at 3 n.7.

204. *Id.* at 21.

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The DAC-IPAD Report indicated the following referrals occurred in FY 2018: 378 total sexual assault cases were referred to courts-martial; of these, 311 were referred to general courts-martial (GCM); fifty-one were referred to special courts-martial; and sixteen were referred to summary courts-martial. While 272 penetrative sexual assault cases were referred to GCM (94.8%), fifteen penetrative sexual assault cases were referred to lower-level courts-martial (5.2%). Thirty-nine non-penetrative sexual assault cases were referred to GCM (42.9%) and fifty-two non-penetrative sexual assault cases were referred to lower-level courts-martial (57.1%).<sup>205</sup> The following table represents the dispositions levels of cases for FY 2018.<sup>206</sup>

205. *Id.* at 19, 21.

206. *Id.* at 19. The Clerk of Court for the U.S. Army Court of Criminal Appeals provided the following data for FY 2018 for sexual assault charges involving an adult victim: GCM arraignments (220); GCM trials to verdict (133); GCM convictions of at least one sexual assault charge (51); special courts-martial empowered to adjudge a bad-conduct discharge (BCD-SPCM) arraignments (17); BCD-SPCM trials to verdict (11); and BCD-SPCM convictions of at least one sexual assault charge (2). Data provided for FY 2019 for sexual assault charges involving an adult victim is as follows: GCM arraignments (244); GCM trials to verdict (169); GCM convictions of at least one sexual assault charge (74); BCD-SPCM

Table 35  
**DAC-IPAD Report: Levels of Courts-Martial for Penetrative and Contact, Non-penetrative Sexual Offenses for FY 2018**

	General Court-Martial				Special Court-Martial				Summary Court-Martial			
	Penetrative		Contact		Penetrative		Contact		Penetrative		Contact	
<b>Army</b>	131	78.4%	21	12.6%	0	0.0%	11	6.6%	0	0.0%	4	2.4%
<b>Marine Corps</b>	32	55.2%	6	10.3%	8	13.8%	9	15.5%	0	0.0%	3	5.2%
<b>Navy</b>	40	60.6%	3	4.5%	5	7.6%	11	16.7%	2	3.0%	5	7.6%
<b>Air Force</b>	68	81.9%	9	10.8%	0	0.0%	6	7.2%	0	0.0%	0	0.0%
<b>Coast Guard</b>	1	25.0%	0	0.0%	0	0.0%	1	25.0%	0	0.0%	2	50.0%

In FY 2017, 403 sexual assault cases were referred to courts-martial; of these, 340 sexual assaults were referred to general courts-martial; seventy-nine were referred to special courts-martial; and twenty-two were referred to summary courts-martial.<sup>207</sup> The following table represents the dispositions levels of cases for FY 2017.<sup>208</sup>

arraignments (15); BCD-SPCM trials to verdict (8); and BCD-SPCM convictions of at least one sexual assault charge (1). For Army GCMs, the number of convictions for at least one sexual assault offense increased 45% from FY 2018 to FY 2019 (51 to 74). This paper focuses on FY 2018 because the most recent WGRA is from FY 2018 and the most recent data from the DAC-IPAD is from FY 2018. E-mail from Malcolm H. Squires, Jr., Clerk of Ct., U.S. Army Ct. of Crim. Appeals, to Lisa M. Schenk, Assoc. Dean for Acad. Affs., George Washington Univ. L. School (Aug. 14, 2020) (on file with author).

207. *Id.*

208. *Id.*

**Table 36**  
**DAC-IPAD Report: Levels of Courts-Martial for Penetrative and Contact, Non-penetrative Sexual Offenses for FY 2017**

	General Court-Martial				Special Court-Martial				Summary Court-Martial			
	Penetrative		Contact		Penetrative		Contact		Penetrative		Contact	
<b>Army</b>	143	76.5%	25	13.4%	1	0.5%	10	5.3%	4	2.1%	4	2.1%
<b>Marine Corps</b>	31	49.2%	3	4.8%	10	15.9%	13	20.6%	4	6.3%	2	3.2%
<b>Navy</b>	50	56.2%	5	5.6%	2	2.2%	28	31.5%	2	2.2%	2	2.2%
<b>Air Force</b>	70	81.4%	6	7.0%	0	0.0%	10	11.6%	0	0.0%	0	0.0%
<b>Coast Guard</b>	6	37.5%	1	6.3%	2	12.5%	3	18.8%	0	0.0%	4	25.0%

Of the 287 cases tried with a sexual assault charge, 106 resulted in a sexual assault conviction, 146 resulted in a non-sexual conviction, and 126 resulted in an acquittal.<sup>209</sup> The following table depicts disposition of court-martial charges of penetrative and contact sexual assaults.<sup>210</sup>

209. See *infra* Table 37.

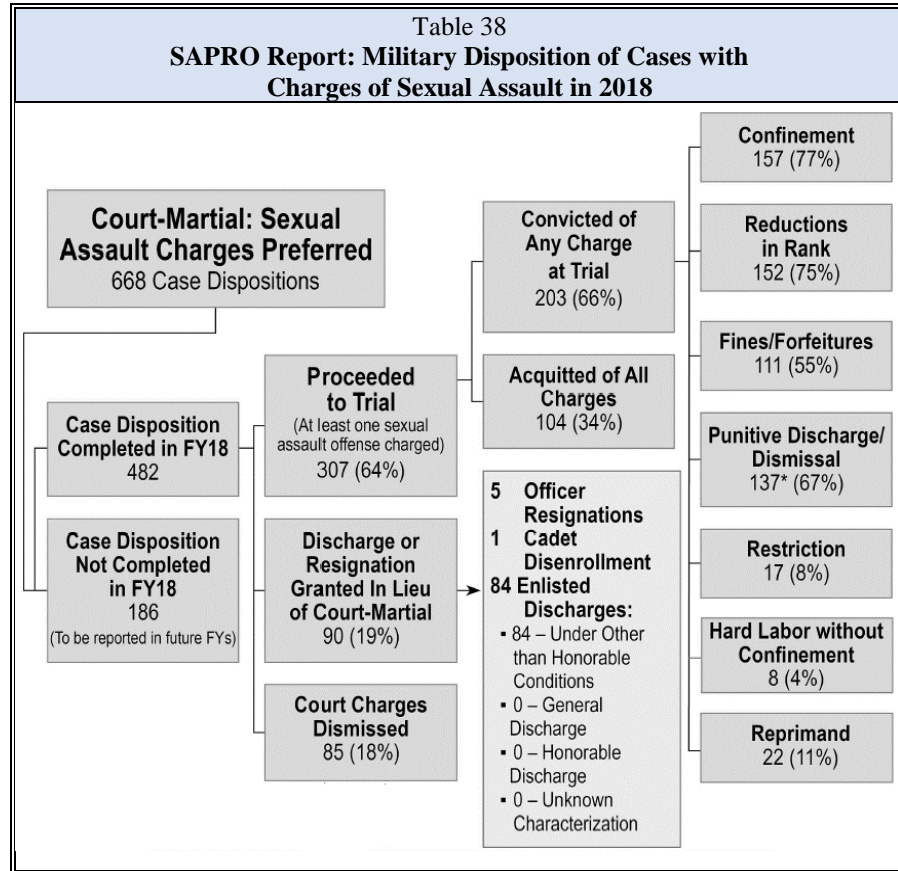
210. DAC-IPAD REPORT, *supra* note 199, at A-12 tbl. 6.

Table 37 DAC-IPAD Report: Military Disposition of Cases with Charges of Sexual Assaults in 2018			
	Disposition of Penetrative Sexual Assault Charges	Disposition of Contact Sexual Assault Charges	Totals
Total Cases Reviewed	431	143	574
Convicted of Penetrative Offense	81	n/a	81
Convicted of Contact Offense	12	13	25
Convicted of Non-Sex Offense	87	59	146
Acquitted of All Charges	107	19	126
Total Cases Tried	287	91	378
Alternative Disposition, e.g., Discharge in Lieu of Trial	67	33	100
Dismissed without Judicial Action	77	19	96

The SAPRO uses a different methodology to collect sexual assault disposition information from the DAC-IPAD, which is the source for the information in Tables 33–37. The SAPRO receives data annually from military commands whereas the DAC-IPAD collects the underlying documentation such as charge sheets and reports of investigation from several sources. The DAC-IPAD and SAPRO reports did not indicate they compared disposition information with each other. The SAPRO does not indicate the levels of trial<sup>211</sup> for sexual assault offenses. The SAPRO report indicates 108 military subjects were required to register as sex offenders. State laws require individuals who are convicted of a qualified sex crime to register as sex offenders. The SAPRO 108 sex offender total corresponds closely with the DAC-IPAD total of 106 sexual assault convictions. The SAPRO counts case dispositions based on when law enforcement receives the sexual assault report. Thus, as Table 38 shows, of 668 case dispositions in FY 2018, 482 had results and 186 were not completed in the

211. General courts-martial (GCM) are the military's felony level courts-martial, and special courts-martial (SPCM) are the military's misdemeanor level courts-martial carrying a maximum confinement sentence of one year. See *Military Law Information*, JAG DEF., <https://jagdefense.com/military-law-information/> (last visited Jan. 30, 2021).

measured year.<sup>212</sup> The following table shows the military disposition of cases with sexual assault charges in 2018.<sup>213</sup>



None of the reports reviewed contain the number of military felony-level (general courts-martial) *convictions* for sexual assault offenses; however, there is enough information to reasonably estimate this number. In 2018, the DAC-

212. The DAC-IPAD counts completed case dispositions that occurred in FY 2018. See *supra* notes 199–202 and accompanying text. The number of DAC-IPAD dispositions are significantly higher than the SAPRO conviction reports because the DAC-IPAD includes dispositions for reports of sexual offenses received in previous years, whereas the SAPRO statistic for “Convicted of Any Charge at Trial” in Table 38 is limited to case dispositions from reports in the current year.

213. 2018 DOD SAPR REPORT, *supra* note 189, at app. B at 24.

IPAD concluded that ninety-three penetrative sexual assault courts-martial resulted in eighty-one convictions of a penetrative sexual assault offense, and twelve convictions of a non-penetrative sexual assault offense.<sup>214</sup> Since 94.8% of penetrative sexual assault charges were tried at general court-martial, there were 88 (94.8% of 93 cases) general court-martial convictions for sexual offenses.<sup>215</sup> In 2018, DAC-IPAD also concluded that there were thirty-nine non-penetrative sexual assault charges tried at general courts-martial out of a total of ninety-one non-penetrative sexual assault courts-martial cases.<sup>216</sup> Of the ninety-one non-penetrative sexual assault trials, thirty-nine (42.9%) were by general court-martial.<sup>217</sup> There were thirteen convictions for non-penetrative sexual assault offenses and six (42.9% of thirteen) of the convictions were by general court-martial.<sup>218</sup> The total general courts-martial convictions for sexual assault in 2018 was ninety-four (eighty-eight plus six).

The following table depicts the total number of DOD courts-martial completed in FY 2018.<sup>219</sup>

	Tried	Convicted	Acquitted
General Courts-Martial	833	677	156
BCD Special Courts-Martial	658	591	67
Special Courts-Martial	0	0	0
Summary Courts-Martial	314	304	10
Total Courts-Martial	1805	1572	233

214. *See supra* Table 37.

215. *See supra* Table 33.

216. *See supra* Tables 34, 37.

217. *See supra* Table 34.

218. *See supra* Table 37.

219. JOINT SERV. COMM. ON MIL. JUST., U.S. DEP'T OF DEF., REPORTS OF THE SERVICES ON MILITARY JUSTICE FOR FISCAL YEAR 2018, at Section 1 (Army), app. p. 13, Section 2 (Navy), app. p. 18, Section 3 (Marines), app. p. 9, Section 4 (Air Force), app. p. 17, Section 5 (Coast Guard), p. 2 (2019), <https://jsc.defense.gov/Portals/99/Documents/Article%20146a%20Reports%20-%20FY18%20-%20All%20Services.pdf?ver=2019-09-19-163824-157> (last visited Aug. 30, 2020).

Assuming the ratio of different types of felony-level offenses is about the same for the military and for large urban counties,<sup>220</sup> there is a logical expectation that there would roughly be about the same ratio of sexual assault prosecutions to total prosecutions in each jurisdiction. The SAPRO and the DAC-IPAD reports do not provide the number of general courts-martial cases actually tried (not referrals) and general courts-martial convictions for sexual assault in FY 2018. The DAC-IPAD report indicates there were 378 referrals of sexual assault charges to court-martial with 82% (311 cases) referred to general court-martial and 18% (67) referred to lower levels of court-martial.<sup>221</sup> The SAPRO report shows 307 sexual assault courts-martial.<sup>222</sup> Assuming 82% of the 307 cases tried were prosecuted at the general court-martial level, 252 cases with at least one sexual assault charge were tried at general court-martial.

Of the 833 total DOD general courts-martial in FY 2018,<sup>223</sup> 30% included at least one sexual assault charge. In contrast, less than 1% of the felony-level trials in the forty large urban counties involved a rape charge.<sup>224</sup> In Texas, 3% of criminal prosecutions included a sexual assault charge.<sup>225</sup> A military perpetrator of a sexual assault is far more likely, about thirty times more likely by this measure, to receive a felony-level disposition in the military than in the forty large urban counties and about ten times more likely by this measure than in Texas.

#### VI. SUMMARY COMPARISON OF SEXUAL ASSAULT JURISDICTIONS

California and Florida are not included in the comparison because they do not provide arrest, prosecution, and conviction statistics for rape or sexual assault. The following table provides a comparison of sexual assaults or rapes for four jurisdictions in 2018: New York, Texas, University of Texas at Austin, and the military.

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220. This assumption is made for the sake of discussion. In urban cases, 36% of rape defendants have previous felony convictions, *see infra* Table 40 and accompanying text, whereas military defendants rarely have prior convictions.

221. *See supra* Tables 33–35 and accompanying text.

222. *See supra* Table 33.

223. *See supra* Table 39. Calculated by dividing 252 by 833 = 30%

224. *See infra* note 267 and accompanying text (indicating .84% of the total cases involve rape charges). Rape as defined here is narrower than sexual assault. *See also infra* note 269 and accompanying text.

225. *See supra* note 121 and accompanying text.



	Population <sup>226</sup>	Survey Estimates <sup>227</sup>	Reports to Law Enforcement <sup>228</sup>	Felony Clearances <sup>229</sup>	Felony-Level Convictions <sup>230</sup>
New York	19,542,209	84,000	6,708	2,709	183
Texas	28,701,845	118,000	14,891	4,938	394
Univ. Texas at Austin	40,804	3,885	25	8	Unknown
Military	1,336,535	20,500	3,794	1,211	94

226. The New York and Texas populations are from the FBI's 2018 UCR Report. *2018 Crime in the United States: Table 4*, *supra* note 91. The DOD active duty population is from the Defense Manpower Data Center (DMDC). *See Military and Civilian Personnel by Service/Agency by State/Country: June 2018*, DMDC (June 30, 2018), [https://www.dmdc.osd.mil/appj/dwp/dwp\\_reports.jsp](https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp). The University of Texas at Austin population is from the Fall 2018 undergraduate population. *See Facts and Figures*, *supra* note 124.

227. The NISVS estimates of rapes for one year are 84,000 in New York and 118,000 in Texas. *See supra* Table 2. The CLASE Report found 15,538 undergraduates were sexually assaulted while enrolled at University of Texas at Austin. *See supra* Table 22. The 2017 CLASE Report measured sexual assault since enrollment. Therefore, the University of Texas at Austin survey data is based on a per year estimate (15,538 divided by 4 years equals 3,885 victims per year). The 2018 WGRA estimated 20,500 military victims in the previous year. *See supra* Table 4.

228. The 2018 UCR indicated there were 6,708 New York victim reports of rape. *See supra* Table 13. The 2018 UCR indicated that there were 14,891 Texas victim reports of rape. *See supra* Table 20. We estimate there were about 155 reports to law enforcement of sexual assaults by undergraduates attending the University of Texas at Austin. *See supra* Section V.E.2. In 2018, the SAPRO unrestricted reports with either a military subject or victim or both totaled 4,927, and 59% have a military subject and victim and 18% have a military subject and civilian victim. *See supra* Table 27. Here we are interested in the number of military subjects prosecuted at court-martial ( $77\% \times 4,927 = 3,794$ ).

229. The FBI does not publish the clearance rate for states for rape; the national clearance rate for rapes is 33.4%. *See supra* note 92–93 and accompanying text. In 2018, the number of New York arrests for sex offenses was 2,709. *See supra* Table 14. The Texas and University of Texas at Austin did not publish the clearance or arrest rates for rape or sexual assault. For Texas and University of Texas at Austin, the clearance rate is an estimate based on the national clearance rate of 33.4% and the number of rape or sexual assault reports. If the number of arrests is available and it is higher than the 33.4% clearance rate, as in the case of New York, that number is listed. In 2017, the Austin Police Chief said seven sexual offenses were reported to his office. He did not provide a clearance rate for the seven reports of sexual assaults. For purposes of this comparison, eight is selected because it is 33% of twenty-five. The military report reviewed did not track sexual assault cases by arrests or apprehensions.

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The following table depicts a comparison of the prosecution and conviction percentages in four jurisdictions in 2018.

	Convictions Compared to Survey Reports <sup>231</sup>	Convictions Compared to Reports to Police <sup>232</sup>	Convictions Compared to Reports to Police or Clearances <sup>233</sup>
New York	0.22%	2.73%	6.76%
Texas	0.33%	2.64%	7.98%
Univ. Texas at Austin	Unknown	Unknown	Unknown
Military	0.46%	2.78%	8.67%

The percentage of convictions compared to survey reports and police reports is higher for the military than for New York, Texas, or the University of Texas. Texas with a population of 28,701,845 had 394 felony-level sexual assault of

For the military, we selected the number of cases that supported the commander's action for sexual assault offenses in 2018 of 1,211. *See supra* Table 32.

230. *See supra* Tables 15 and 21. Due to the paucity of information, it is not possible to estimate the number of convictions if any that resulted from the estimate of sixteen undergraduate victims attending the University of Texas at Austin who reported sexual assaults to the police.

231. The percentage of Convictions Compared to Survey Reports is calculated by using the Survey Estimates and Felony-Level Convictions in Table 40. This percentage is calculated as follows: New York ( $183 \div 84,000 \times 100 = .22\%$ ); Texas ( $394 \div 118,000 \times 100 = .33\%$ ); and military ( $94 \div 20,500 \times 100 = .46\%$ ). It is unknown whether any of the estimated sixteen University of Texas at Austin sexual assault victims who reported their sexual assaults to law enforcement resulted in convictions.

232. The percentage of Convictions Compared to Reports to Police is calculated by using the Reports to Law Enforcement and Felony-Level Convictions. This percentage is calculated as follows: New York ( $183 \div 6,708 \times 100 = 2.73\%$ ); Texas ( $394 \div 14,891 \times 100 = 2.65\%$ ) and military ( $94 \div 3,794 \times 100 = 2.57\%$ ).

233. The percentage of Convictions Compared to Reports to Police or Clearances is calculated by using Felony Clearances and Felony-Level Convictions. This percentage is calculated as follows: New York ( $183 \div 2,709 \times 100 = 6.76\%$ ); Texas ( $394 \div 4,938 \times 100 = 7.98\%$ ) and military ( $94 \div 1,211 \times 100 = 7.76\%$ ).

adult convictions (rate per 1,000 of 0.014).<sup>234</sup> New York with a population of 19,542,209 had 183 felony-level rape convictions (rate per 1,000 of 0.009).

In 2018, the military had a population of 1,336,535, and there were 311 sexual assault general court-martial referrals (rate per 1,000 of 0.232). The estimated number of general court-martial convictions for sexual assault in 2018 is ninety-four (rate per 1,000 of 0.070).<sup>235</sup> The military rate per thousand of felony-level sexual assault convictions of 0.070 is five times the rate per thousand of Texas and 7.8 times the rate per thousand of New York.<sup>236</sup>

The military had a conviction rate for cases with sufficient evidence to support the commander's action that is higher than the conviction rates for cleared cases for New York and Texas.

## VII. ALCOHOL CONSUMPTION AND SEXUAL ASSAULT PROSECUTIONS

In 2008, the Department of Justice sponsored a study designed to assess how the historically low reporting and prosecution rates of sexual assaults could be addressed.<sup>237</sup> The study assessed factors that tended to increase or decrease prosecution rates. The study found that victims "between the ages of 18 and 21 (i.e., younger women in the sample) were significantly more likely to have their cases move to higher case disposition outcomes; and alcohol use by the victim prior to assault significantly decreased the likelihood that the case would be prosecuted."<sup>238</sup> "[S]tronger relationship bonds between the victim and offender" and more forensic evidence also increased prosecution rates.<sup>239</sup> "The more delay there was between the assault and when the survivor had the medical forensic

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234. The 2018 Texas Court Report labels the category of offense as "sexual assault of adult" and does not indicate how many of the 394 convictions were for offenses other than sexual assault of adult. 2018 TEXAS COURT REPORT, *supra* note 117, at Detail 8.

235. See *supra* Tables 38–39 and accompanying text.

236. In this calculation, the conviction rate is based on the numbers of convictions for each 1,000 persons in a jurisdiction. The military rate per thousand is .070, and the Texas rate per thousand is .014, and  $.066 \div .014 = 5.0$ . The New York rate per thousand is .009, and  $.070 \div .009 = 7.8$ . This is one of several ways a conviction rate can be calculated. Most prosecution offices determine their conviction rate by dividing the total number of convictions by the total number of trials. In some offices a high percentage of defendants plead guilty, resulting in conviction rates exceeding 90%. See, e.g., 2018 TEXAS COURT REPORT, *supra* note 117, at Court-Level 21 (indicating 94% of cases in Texas were resolved with guilty or no contest pleas).

237. See REBECCA CAMPBELL ET AL., NCJ 226497, SYSTEMS CHANGE ANALYSIS OF SANE PROGRAMS: IDENTIFYING THE MEDIATING MECHANISMS OF CRIMINAL JUSTICE SYSTEM IMPACT, at ii–iii (2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/226497.pdf>.

238. *Id.* at iii.

239. See *id.*

exam, the less likely the case would progress through the system. Positive DNA evidence significantly increased the likelihood of case progression.”<sup>240</sup> Increased physical trauma to the victim also increased the possibility that the offense would be prosecuted.<sup>241</sup>

The victim’s alcohol consumption in undergraduate sexual assault cases is an important factor in the victim’s decision of whether to report the assault and in any subsequent prosecution. The 2019 Association of American Colleges Report indicated:

Most of the victims reported they had been drinking alcohol before the incident occurred. For example, for men 80.1 percent of the penetration incidents and 74.6 percent of the sexual touching incidents occurred when the victim had consumed alcohol. The pattern is similar for women . . . . For incidents involving penetration among women, the range across schools was from a low of 67.0 percent to a high of 90.0 percent . . . .<sup>242</sup>

Students said in 39.7% of the assaults involving sexual touching that the female victim did not report if alcohol was involved, and “54.0 percent of women who reported penetration did not contact a program or resource because alcohol was involved, 49.9 percent because the event began consensually, and 45.1 percent because ‘events like this seem common.’”<sup>243</sup> “In 35.3 percent of incidents involving penetration among women who had consumed alcohol, the victim was passed out or asleep for at least part of the incident.”<sup>244</sup>

Alcohol consumption is also clearly a factor in military cases. In 2018, 62% of subjects or victims or both involved in an incident consumed alcohol.<sup>245</sup> According to the 2018 WGRA Survey of military personnel, “[a]pproximately one-tenth of men (10%) and women (11%) indicated they could not remember what happened the night before due to their alcohol consumption at least once in the past year.”<sup>246</sup> In the 2018 DOD Survey, 48% of victims drank alcohol near the time of the sexual assault.<sup>247</sup> The following table depicts alcohol use of service members near the time of sexual assault.<sup>248</sup>

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240. *Id.*

241. *Id.*

242. 2019 AAU REPORT, *supra* note 20, at 22.

243. *Id.* at 31.

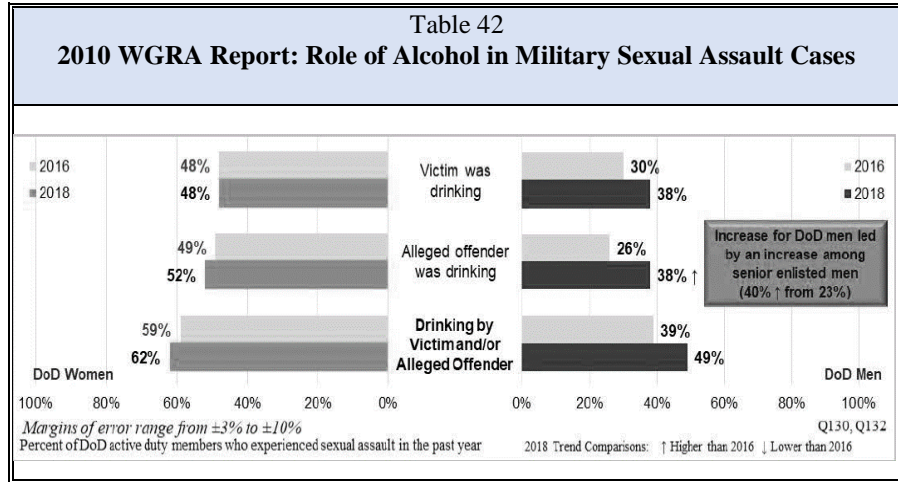
244. *Id.* at 78.

245. *See infra* Table 42.

246. 2018 WGRA SURVEY, *supra* note 54, at Annex 1 at xi.

247. *Id.* at 34 fig. 19.

248. *Id.*



A significant percentage of victims have their perceptions impaired by alcohol, making them more vulnerable to assault and damaging their credibility before juries. During an alcohol-related blackout, a person

is still fully conscious. They’re moving around, acting, engaging, talking, dancing, driving, engaging in all kinds of behavior, but because of alcohol’s inhibition of the transfer of information from short-term memory to long-term memory, they simply will be unable to remember those decisions or actions they made while in the black-out.<sup>249</sup>

After consuming enough alcohol to black-out, a person may still “engage in voluntary behavior and thought processes. ‘They might make decisions, for example, to drive home from a bar, or [engage in other] . . . activities which require complex cognitive abilities, but the individual might not remember the

249. *United States v. Pease*, 74 M.J. 763, 769 (N-M Ct. Crim. App. 2015); *see also United States v. Collins*, No. 201000020, 2011 CCA LEXIS 22, at \*4–\*7 (N-M. Ct. Crim. App. 2011) (testimony of prosecution toxicology expert Jon Jemiomek). In *United States v. Pease*, the Navy-Marine Court of Criminal Appeals was confronted with a case involving convictions for nonconsensual and consensual offenses, and a six-year sentence to confinement. *Pease*, 74 M.J. at 764. The victims were intoxicated at the time of the sexual offenses. The court found the nonconsensual sexual offenses were not proven and set them aside and ordered a new sentencing hearing. *Id.* at 770–771. An expert on the effects of alcohol intoxication, Dr. Kim Fromme, Ph.D., described the levels of alcohol intoxication and the impact on human behavior, cognitive abilities, and memory. *Id.* at 769.

next day and might, in fact, might regret it.”<sup>250</sup> A person who consumes alcohol to a blacked-out state may not remember how much alcohol they consumed or they may engage in conduct that could cause another to reasonably believe consent exists for sexual intercourse, and afterwards he or she would have no recollection of their conduct.<sup>251</sup>

The highest percentage of victims are under the age of twenty-one.<sup>252</sup> When an underage victim (under twenty-one years of age) consumes alcohol, he or she may be worried about reporting because of concern about being punished for committing the misdemeanor offense of underage possession or use of alcohol and may not report the offense.

#### CONCLUSION

There does not appear to be any federal or state jurisdiction that compares extrapolated estimates of victims from surveys with UCR results, arrests, prosecutions, or convictions to determine arrest, prosecution, or conviction rates.<sup>253</sup> Surveys utilize different methods and have different response rates, and these differences affect the results. The study reporting the highest rates of victimization is for undergraduates in the 2019 AAU Report.<sup>254</sup>

In one study, two authors explored the question of sexual assault prosecutions in the military, using 585 case files for cases on military bases in Japan between 2005 and 2013. They concluded:

[T]he military often does try to punish sexual assault. As with civilian cases, the circumstances surrounding cases of military sexual assault are complex. The cases often involve ambiguous and difficult-to-prosecute circumstances, such as unavailable witnesses, disputes over consent, a lack of physical evidence, time lags in reporting, questions of military jurisdiction, alcohol use, and complainants who do not remember or are

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250. *Pease*, 74 M.J. at 769; *see also* United States v. Clark, NMCCA 201400232, 2015 CCA LEXIS 287, at \*12–\*17, \*22, \*23. (N-M Ct. Crim. App. July 14, 2015) (referencing statements of Dr. Stafford Henry, M.D., and Dr. Thomas Grieger, M.D).

251. *See* Lisa M. Schenck, “*Just the Facts, Ma’am*”: *How Military Appellate Courts Rely on Factual Sufficiency Review to Overturn Sexual Assault Cases When Victims are “Incapacitated,”* 45 SW. L. REV. 523, 543–554 (2016) (discussing *Pease* and other military cases where the victims were intoxicated).

252. In 2018, service members aged 17 to 20 years old had the highest estimated rate of sexual assault at 11.9% of any of the age military groups surveyed. 2018 WGRA SURVEY, *supra* note 54, at Annex 1 at 27–28.

253. *See* Schenck, *supra* note 33, at 597.

254. *See supra* notes 2–8 and accompanying text.

unwilling to testify about their assault. Other cases turn out not to have been sexual assaults at all.<sup>255</sup>

They suggest that the low conviction rates for sexual assaults in the military might be explained by systemic problems and the nature of the allegations and the facts surrounding the alleged acts; furthermore, the low conviction rates may reflect the military's focus on mission and the number of options available to the command for addressing criminal activity outside of a court-martial setting.<sup>256</sup>

Another reason prosecutors are reluctant to prosecute some sexual assault cases is the "consent" defense, which is not available for offenses such as murder, distribution of illegal narcotics, and larceny. There are three basic defenses to rape: it never happened; it was not me; and the alleged victim consented.<sup>257</sup> Typically, there are "only two witnesses to the crime—the victim and the defendant" and the burden is on the government to prove guilt beyond a reasonable doubt.<sup>258</sup> Because of DNA evidence, and the forensic ability to establish the identity of the perpetrator, the most common defense is consent.<sup>259</sup> One experienced civilian sexual assault prosecutor said, "I've never won an acquaintance rape jury trial . . . because of skeptical jurists."<sup>260</sup> Prosecution rates are lower for sexual assaults because of the defenses of consent and the accused's mistake of fact as to consent. Sexual assault victims may not timely report a sexual assault and forensic evidence may be unavailable making identity a serious problem. The victim's failure to timely report a sexual assault may be used to attack the victim's credibility. Victims may be impaired by alcohol during the sexual assault causing perception issues. In "one-on-one" contested trials that turn on the issue of consent, any blemish on the victim or accused's credibility may be decisive.

Victims of sexual assaults are less likely than victims of other violent crimes to report their assaults; however, military victims have a much greater rate of reporting their victimization than college undergraduates or the general public.

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255. Carolyn M. Warner & Mia A. Armstrong, *The Role of Military Law and Systemic Issues in the Military's Handling of Sexual Assault Cases*, 54 L. & SOC'Y REV. 265, 293–94 (2020).

256. *Id.* at 265.

257. Evan R. Seamone, *Sex Crimes Litigation as Hazardous Duty: Practical Tools for Trauma-Exposed Prosecutors, Defense Counsel, and Paralegals*, 11 OHIO ST. J. CRIM. L. 487, 541 n.309 (2014) (citing ALICE VACHSS, *SEX CRIMES: TEN YEARS ON THE FRONT LINES PROSECUTING RAPISTS AND CONFRONTING THEIR COLLABORATORS* 110 (1993)); see Mary Wood, *City Attorney Shares Reality of Prosecuting Sexual Assault Cases*, UNIV. OF VA. SCH. OF L., [https://www.law.virginia.edu/news/2001\\_02/zug.htm](https://www.law.virginia.edu/news/2001_02/zug.htm) (last visited Jan. 30, 2021).

258. Wood, *supra* note 257.

259. *See id.*

260. *Id.*

This is probably due to the comprehensive measures the military has developed to help victims.

Prior criminal history is an important aspect in a prosecutor's decision to prosecute. Military personnel accused of sexual assault have a high probability of being first-time offenders because the DOD screens recruits and does not permit enlistment of a recruit with a felony sexual assault or rape conviction.<sup>261</sup> "Service members convicted of a sexual assault who do not receive a punitive discharge at court-martial must be processed by the Services for an administrative discharge."<sup>262</sup> In the civilian sector, rape defendants of a representative sample of forty of the seventy-five largest urban counties with a total population of about 60,000,000 had the following criminal histories: 7% were on parole; 9% were on probation; and 36% had a prior violent felony conviction.<sup>263</sup> Additional prior criminal history information for rape defendants is depicted in the following table.<sup>264</sup>

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261. 32 CFR § 66.6(b)(8)(iii). This provision prohibits any person from enlistment, appointment, or induction into the Department of Defense if the person "[h]as a State or federal conviction, or a finding of guilty in a juvenile adjudication, for a felony crime of rape, sexual abuse, sexual assault, incest, any other sexual offense, or when the disposition requires the person to register as a sex offender." *Id.* No waivers are authorized. *Id.*

262. 2019 DOD SAPR REPORT, *supra* note 75, at app. B at 21.

263. BUREAU OF JUST. STATISTICS, U.S. DEP'T OF JUST., NCJ 243777, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 - STATISTICAL TABLES 10 tbl. 8, 11 tbl. 8 (2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf> [hereinafter URBAN COUNTY REPORT]. The population of the forty largest counties in 2009 was about 60,000,000. *Id.* at 36 tbl. 29. The methodology for the Urban County Report indicated:

The 2009 [State Court Processing Statistics] (SCPS) collected data for 16,694 defendants charged with a felony offense during May 2009 in 39 large counties. These cases were part of a sample that was representative of the estimated 56,083 felony defendants whose cases were processed in the nation's 75 largest counties during that month. Defendants charged with murder were tracked for up to 2 years and all other defendants were followed for up to 1 year.

*Id.* at 34. The term "rape" in the SCPS includes "forcible intercourse, sodomy, or penetration with a foreign object [but not] statutory rape or nonforcible acts with a minor or someone unable to give legal consent, nonviolent sexual offenses, or commercialized sex offenses." *Id.* One of the forty selected counties did not provide the requested data and was excluded from the report. *Id.* at 33. The study used a weighted multiplier to estimate the missing data. *Id.*

264. *Id.* at 11 tbl. 8, 13 tbl. 10.



Table 43 BJS Report: Prior Criminal Histories of Rape Defendants in Seventy-Five Large Urban Counties					
	One	Two to Four	Five to Nine	Ten or More	Total
Prior Felony Rape Arrests	9%	23%	13%	10%	55%
Prior Felony Rape Convictions	14%	12%	8%	2%	36%

Other percentages for rape defendants in these forty large urban counties are as follows: 52% received pretrial release; 19% committed pretrial misconduct while on pretrial release; and the probability of conviction was 35%.<sup>265</sup> “Among cases that were adjudicated within the 1-year study period, 66% resulted in a conviction. Just over half (54%) of defendants were convicted of a felony and 12% were convicted of a misdemeanor. Nearly all convictions were the result of a guilty plea rather than a trial.”<sup>266</sup> The adjudication outcomes during a twelve-month period for the seventy-five largest counties by most serious arrest charge of rape in 2009 (the most recent information in the report) are indicated in the following table.<sup>267</sup>

265. *Id.* at 15, 20 tbl. 17, 22.

266. *Id.* at 22.

267. *Id.* at 24 tbl. 21. The total number of urban-county defendants in a one-month period was 48,939, and the total number of rape defendants in a one-month period was 412. *Id.* The number in each column from table 21 of the Urban County Report was multiplied by twelve to obtain annual estimated totals. Rape defendants are .84 % of the total number of defendants in the report. The felony-rape defendants in the seventy-five largest counties, by most serious conviction offense for one month in 2009 was 153 or 1,836 on an annual basis. *Id.* at 25, tbl 22. The population of the urban counties is forty-five times the military population the number of rape convictions of the urban counties is six times the number of military rape convictions, and  $45 \div 6 = 7.5$ .

Table 44 BJS Report: Annual Adjudication Outcomes for Arrests of Rape Defendants in Seventy-Five Large Urban Counties								
Felony Convictions			Misdemeanor Convictions			Not Convicted		
Guilty Plea	Contested Trial	Total	Guilty Plea	Contested Trial	Total	Dismissed	Acquitted	Other Outcome
600	84	684	120	12	132	288	36	60
The total outcomes for 1,140 adjudicated arrest cases indicated 816 convictions. The annual number of felony rape defendants by most serious conviction offense was 1,836.								

The population in the Urban County Report of 60,000,000 is about forty-five times greater than the military active duty population of 1,336,535. The Urban County Report shows 684 felony convictions for rape; while the military had 94 felony-level sexual assault convictions.<sup>268</sup> As a rough measure, the military rate of felony-level sexual assault convictions compared to population is about six times the rate for large urban counties.<sup>269</sup>

The best measure of comparison of prosecution rates is clearance rates in the civilian sector and military cases with sufficient evidence for disciplinary action. The military has a conviction rate for cases with sufficient evidence to support the commander's action that is more than twice the conviction rates for cleared cases for New York and 28% higher than for Texas.<sup>270</sup> The states of New York and Texas have substantially more rape outcomes per capita than the seventy-five largest counties.

268. See *supra* Table 40.

269. There are limitations in the comparison of the DAC Data Report showing 311 military sexual assault general courts-martial referrals with the 2013 Urban County Report, showing 1,836 rape convictions in 2009. The Urban County Report's definition of rape is narrower from the military definition for sexual assault. The Urban County Report data is from May 2009 and is extrapolated to reach an annual count of rape convictions. The DAC-IPAD Report data is from 2018 and the data is a precise count of cases; however, not all cases may have been provided to the DAC-IPAD.

270. This paper should not be interpreted to criticize investigations and prosecutions in large urban counties, Texas, or New York. We laud the decisions to be transparent in their release of conviction rates for rapes. The FBI cautions that UCR statistics should not be used to rank different jurisdictions because "[t]hese rankings lead to simplistic and/or incomplete analyses that often create misleading perceptions adversely affecting cities and counties, along with their residents." *Crime in the United States: Caution Against Ranking*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/caution-against-ranking> (last visited Jan. 21, 2021).

Notwithstanding the fact that there is no uniform reporting system across the jurisdictions discussed in this paper for prosecutions of sexual assault, it is clear that the military prosecutes more felony-level sexual assaults per capita and based on reporting levels than Texas, New York, or forty large representative counties containing about sixty million people. The available data suggests that the DOD should report sexual assault cases to the FBI using UCR criteria if it has not already done so,<sup>271</sup> and that summaries of these reports be included in the annual SAPR reports for purposes of transparency.

Thus, significant changes to the military justice system are not justified at this point. Specifically, the data presented in this paper suggests that Congress should *not* revamp the roles of the commanders or armed forces lawyers—who act in the highest customs and professionalism demanded of officers in the United States military.

We recommend that any further changes to the system await the implementation of the provisions of the 2016 Military Justice Act, which will result in the establishment of a special review panel that will be charged with reporting on the operation of the military justice system following that Act. Also, that Act will result in more detailed data on cases processed in the system. The report of the special review panel and more detailed data are critical pieces of information that will enable Congress to better assess the need, if any, to make any major, long-lasting, changes to the American military justice system.

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271. See U.S. DEP'T OF DEF. INSPECTOR GEN., DODDIG-2015-11, EVALUATION OF THE DEFENSE CRIMINAL INVESTIGATIVE ORGANIZATIONS' DEFENSE INCIDENT-BASED REPORTING SYSTEM REPORTING AND REPORTING ACCURACY, at iv, 6 (2014) (noting that "Uniform Federal Crime Reporting Act of 1988 and DoD Directive 7730.47" requires DoD to submit crime incident data to the FBI), <https://media.defense.gov/2014/Oct/29/2001713419/-1/-1/1/DODIG-2015-011.pdf>.