

A WHITE PAPER

ON

**NATIONAL, MILITARY, AND
COLLEGE REPORTS ON
PROSECUTION OF SEXUAL ASSAULTS AND
VICTIMS' RIGHTS**

David A. Schlueter
Hardy Chair Emeritus and Professor of Law
St. Mary's University School of Law

Lisa M. Schenck
Associate Dean & Director of the National Security Law Programs
George Washington University Law School

July 20, 2020

**A WHITE PAPER ON
NATIONAL, MILITARY, AND COLLEGE REPORTS
ON PROSECUTION OF SEXUAL ASSAULTS AND VICTIMS' RIGHTS**

David A. Schlueter*
Hardy Chair Emeritus and Professor of Law
St. Mary's University School of Law

Lisa M. Schenck**
Associate Dean & Director of the National Security Law Programs
George Washington University Law School

Contents

I. Abstract.....	2
II. Introduction.....	2
III. Surveys Seeking Sexual Assault Information.....	3
A. College Undergraduates.....	3
B. Nationwide Surveys and Reports to Police.....	4
C. DOD Military Surveys.....	9
D. Comparison of Survey Results.....	11
IV. Sexual Assault Reports to Police.....	11
A. Undergraduate Sexual Assault Reports.....	11
B. Military Sexual Assault Reports.....	11
C. Comparison of Reporting Rates.....	13
V. Sexual Assault Prosecutions and Convictions.....	13
A. In General.....	13
B. California Reports, Prosecutions, and Convictions.....	14
C. New York Reports, Prosecutions, and Convictions.....	16
D. Florida Reports, Prosecutions, and Convictions.....	17
E. Texas Reports, Prosecutions, and Convictions.....	19

* Currently a law professor at St. Mary's University School of Law in San Antonio, Texas, with over 48 years of experience with the military justice system as an active duty and reserve, and now retired, member of the Army Judge Advocate General's Corps. While on active duty from 1972 to 1981, Professor Schlueter served as an appellate counsel, a prosecutor, and an instructor at the Army's Judge Advocate General Legal Center and School. He has also served as member of the Department of Defense UCMJ Code Committee. He has authored or co-authored four treatises on military crimes, procedures, and evidence and frequently speaks to military lawyers and judges on those topics. This paper does not reflect St. Mary's University School of Law, the University, or the Department of Defense.

** Currently Associate Dean for Academic Affairs at George Washington University Law School, teaching military justice as a professorial lecturer in law, with over 30 years of experience with the military justice system, including as an active duty Army judge advocate serving as an appellate judge, prosecutor, special assistant U.S. attorney, and assistant professor at the United States Military Academy, West Point. She has served on numerous Departments of Defense, Army, Navy, and Air Force panels tasked with studying the military justice system, including the Department of Defense UCMJ Code Committee. This paper does not reflect George Washington University Law School, George Washington University, or the Department of Defense.

(1) Statewide Reports	19
(2) Case Study-University of Texas at Austin.....	20
VI. Military Victim's Rights and Benefits.....	23
VII. Military Reports, Prosecutions, and Convictions.....	28
VIII. Summary Comparison of Sexual Assault Jurisdictions.....	35
IX. Alcohol Consumption and Sexual Assault Prosecutions.....	36
X. Conclusion.....	39
XI. Contact Information.....	42

I. 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 and the prosecution of those offenses is not out of line with the experiences of other civilian jurisdictions. They recommend that Congress take careful and very deliberative steps in deciding what, if any, major changes to make to the American military justice system.

II. Introduction.

The last decade has been marked with repeated calls to make major changes to the military justice system.¹ Commentators have observed that some of those calls for reform are “perennial.”² Although not always directly stated, it appears that the impetus of those proposed reforms rests, at least in part, on concerns about the military’s ability or lack of ability to resolve the problem of sexual assaults in the military. 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. Thus, they advocate for fundamental change to the military justice system including ending the chain of command responsibility for preferral 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.³

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.

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

² See Chris Jenks & Geoffrey S. Corn, *The Military Justice “Improvement” Act of 2020* (noting the repeated efforts to remove the commander from the system and stating that “[t]his dysfunctional cycle should stop”), available at <https://www.caaflog.org/home/archives/07-2020> (last visited Jul. 15, 2020).

³ For a response to those calls for reform, see David A. Schlueter & Lisa M. Schenck, *A White Paper On American Military Justice: Retaining The Commander’s Authority To Enforce Discipline And Justice*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3644621 (last visited Jul. 15, 2020).

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. Two surveys comparing sexual assaults for college age military and undergraduate women indicate a freshman woman in college has a 51% greater risk of being sexually assaulted than a woman between 17 and 24 years of age serving in the military.⁴

The Federal Bureau of Investigation (FBI) collects crime statistics from law enforcement agencies throughout the United States of the number of rape victims, reports of arrests of perpetrators, and case clearances (police determinations that a case is solved). 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, and the military generates an annual report of sex offenses. 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 information from the four largest states and colleges. At the University of Texas at Austin, for example, less than 1% of undergraduate sexual assault victims reported their victimization to law enforcement, and about 30% of military sexual assault victims report their victimization to law enforcement (30 times as many). *See page 13 infra*. 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 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. *See pages 23-28, infra*.

The number of undergraduate and in the general population, of sexual assault perpetrators prosecuted and convicted is data that is largely unavailable. The four states with the largest populations are California, New York, Texas, and Florida. Two of those states, Texas and New York, publish comprehensive rates for sexual assault reports to police and convictions. 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 Texas. *See pages 32 and 36 infra*. The military rate per thousand of felony-level sexual assault or rape convictions for the population is 17 times the rate per thousand of Texas and 25 times the rate per thousand of New York. *See page 36, infra*.

III. 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 33 colleges and universities with a sample

⁴ *See n. 39 infra* and accompanying text.

size of 830,936,⁵ 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.”⁶ 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%.⁷ “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.”⁸ More than 16 percent of freshman students surveyed reported they were sexually assaulted versus about 11 percent of students in their fourth year or above.⁹ The cumulative victimization for female undergraduates over four years was: freshman (16.5%); sophomore (22.7%); junior (27.2%); and senior (32.8%).¹⁰ In 2019, another study estimated “20% - 25% of college women and 15% of college men are victims of forced sex during their time in college.”¹¹

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 that includes all persons in households age 12 or older.¹² “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.”¹³ 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.”¹⁴ 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.”¹⁵ “The NCVS uses in-person and telephone interviews

⁵ Report of the AAU (Association of American Universities), Campus Climate Survey on Sexual Assault and Misconduct (Rev. Jan. 17, 2020) [hereinafter 2019 AAU Report] at viii, xi, available at <https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019> (last visited at Jul. 15, 2020).

⁶ *Id.* at vii.

⁷ *Id.* at ix.

⁸ *Id.* at xi.

⁹ *Id.* at xii; A7-14.

¹⁰ *Id.* at Table 14, A7-14.

¹¹ Katherine V. Norton, *From Court Martial to College Campus: Incorporating the Military’s Innovative Approaches to Sexual Violence into the University Setting*, 55 CAL. WESTERN L. REV. 465, 475 (2019) (quoting Nat’l Sexual Violence Resource Ctr., Sexual Assault in the United States [hereinafter NSVRC Report], available at <https://www.nsvrc.org/statistics>); AAU Report, *supra* n. 5 at viii (stating first year at school (16.1%), second year (13.8%), third year (11.5%), and fourth year (11.3%)).

¹² U.S. Department of Justice (DOJ), Office of Justice Programs (OJP), Bureau of Justice Statistics (BJS), NCJ 253043 Criminal Victimization, 2018 (Sept. 2019) [hereinafter 2018 NCVS Report] at 2, available at <https://www.bjs.gov/content/pub/pdf/cv18.pdf> (last visited on Jul. 17, 2020).

¹³ *Id.* at 2, 20.

¹⁴ DOJ, OJP, BJS, NCJ 252472, Criminal Victimization, 2017 (Dec. 2018) [hereinafter 2017 NCVS Report] at 21, available at <https://www.bjs.gov/content/pub/pdf/cv17.pdf> (last visited on Jul. 17, 2020).

¹⁵ DOJ, OJP, BJS, Special Report NCJ 248471, Rape and Sexual Assault Victimization Among College-Age Females, 1995–2013 (Dec. 2014) [hereinafter 2014 BJS Report], at 2, available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKewixhMHmwrvg>

to collect data and has an 88% person and 74% overall response rate. The 2010 [National Intimate Partner and Sexual Violence Survey] NISVS uses random-digit dialing with a 33% response rate.”¹⁶ A December 2014 NCVS report acknowledged that the 2011 NISVS found a “substantially higher” rate of sexual assault victimization concluding that “2% of all females experienced unwanted sexual contact during the prior 12 months,” compared with the NCVS estimation “[f]or the period 2007–13, the NCVS victimization rate was 4.7 per 1,000 for females ages 18 to 24 who were enrolled in post-secondary schools. . . .”¹⁷

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. 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, Florida, and Texas.¹⁸

Table 1				
2010 CDC NISVS Survey				
	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

[AhXuhHIEHcviCHwQFjACegQIBRAB&url=https%3A%2F%2Fwww.bjs.gov%2Fcontent%2Fpub%2Fpdf%2Frsavcaf9513.pdf&usg=AOvVaw3WCpXVEsIQq0W5-9nKYA9v](https://www.bjs.gov/content/pub/pdf/frsavcaf9513.pdf&usg=AOvVaw3WCpXVEsIQq0W5-9nKYA9v) (last visited on Jul. 17, 2020).

¹⁶ *Id.*

¹⁷ *Id.* at 2 (citing Breiding, M.J., Smith, S.G., Basile, K.C., Walters, M.L., Chen, J., & Merrick, M.T. (2014). Prevalence and characteristics of sexual violence, stalking, and intimate partner violence victimization — National Intimate Partner and Sexual Violence Survey, United States, 2011. *Morbidity and Mortality Weekly Report, Surveillance Summaries*, 63(8), 1–18. Retrieved from http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6308a1.htm?s_cid=ss6308a1_e#Table1) (last visited Jul. 19, 2020).

¹⁸ Lisa M. Schenck, *Informing the Debate About Sexual Assault in the Military Services: Is the Department of Defense its Own Worst Enemy?*, 11 OHIO STATE J. CRIM. LAW, 579, 631 (2014) (citing National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* (Nov. 2011) [hereinafter 2010 CDC NISVS] at 18–19, 68–71, available at http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf) (last visited on Jul. 17, 2020). 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.”

Table 2
2010 CDC NISVS Survey (Continued)

	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 2010 NISVS found that 19.3% of women (23,305,000) and that 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.¹⁹ The CDC indicates “1 in 3 women and 1 in 4 men experienced sexual violence involving physical contact during their lifetimes. Nearly 1 in 5 women and 1 in 38 men have experienced completed or attempted rape and 1 in 14 men was made to penetrate someone (completed or attempted) during his lifetime.”²⁰

¹⁹ Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization — National Intimate Partner and Sexual Violence Survey, United States, 2011, Surveillance Summaries, Reporting Period: Jan. to Dec., 2011 (Sept. 5, 2014) (2011 NISVS), Morbidity and Mortality Weekly Report, at Tbl. 1, available at http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6308a1.htm?s_cid=ss6308a1e#Table1 (last visited on Jul. 17, 2020). 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.

2010 CDC NISVS, *supra* n. 18, at 17.

²⁰ Centers for Disease Control and Prevention, Violence Prevention, Preventing Sexual Violence, available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjxhbGg4b7qAhXaknIEHQz7C2QQFjAAegQIARAC&url=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2Fdatasources%2Fnisvs%2Findex.html&usg=AOvVaw3lGsD9Ops7e2FnvtrQopYO> (last visited on Jul. 15, 2020).

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.²¹ 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.
- Turned over to the court for prosecution (whether following arrest, court summons, or police notice).

In its clearance calculations, the UCR Program counts the number of offenses that are cleared—not the number of persons arrested. The arrest of one person may clear several crimes, and the arrest of many persons may clear only one offense. In addition, some clearances that an agency records in a particular calendar year, may pertain to offenses that occurred in previous years. Cleared by exceptional means in certain situations, 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. Law enforcement agencies must meet the following four conditions in order 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.

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.²²

Law enforcement reported an estimated 139,380 rapes (revised definition) for inclusion in the FBI's UCR in 2018. The 2018 UCR estimate for rapes "was 2.7 percent higher than the 2017 estimate and 18.1 percent higher than the 2014 estimate."²³ In 2013, the definition of rape for the UCR was

²¹ 2017 NCVS Report, *supra* n. 14, at 5.

²² Federal Bureau of Investigation (FBI) Uniform Crime Report (UCR), Crime in the United States, 2010, Fact Sheet Offenses Cleared (Sept. 2011), available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiwpNr9z8XqAhVkt98KHS3UCZMQFjAAegQIAhAB&url=https%3A%2F%2Fucr.fbi.gov%2Fcrime-in-the-u.s.%2F2010%2Fcrime-in-the-u.s.-2010%2Fclearances&usq=AOvVaw0NsPPeh9In-oE_0on_YCiA (last visited on Jul. 15, 2020).

²³ FBI, Criminal Justice Information Services Division, UCR Crime in the United States, 2018 [hereinafter 2018 UCR], available at <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/tables/table-1> (last visited Jul. 17, 2020).

revised to include more sexual assaults and attempts, which increased the number of rapes by 38%.²⁴ The 2017 UCR estimate was 2.5 percent higher than the 2016 estimate and 19.4 percent higher than the 2013 estimate.²⁵

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.”²⁶ The following table shows the number of victims of rape or sexual assault and the rate per thousand from the NCVS and the number of victims of rape (revised definition) and rate per thousand reported to police in the UCR.²⁷

Table 3 NCVS Survey and UCR Police Reports					
	2014	2015	2016	2017	2018
Number of Violent Crime Victims in NCVS	284,350	431,840	298,410	393,980	734,630
U.S. Population Age 12 or Older in millions (NCVS Survey Population)	267	270	272	272	275
Rate per 1,000 in NCVS	1.1	1.6	1.1	1.4	2.7
Rapes Reported to Police (Revised) from UCR	118,027	126,134	132,414	135,177	139,380
U.S. Population in millions	319	320	323	325	327
Rapes per 1,000 Reported to Police from UCR	.37	.39	.41	.42	.43
Percentage of NCVS Reports Received by Police	42%	29%	44%	34%	19%

In sum, the number of rapes reported annually in the 2010 CDC NISVS Report (1,270,000 rapes)²⁸ is 6.7 times the number of rapes annually in the 2010 NCVS Report (188,380 rapes).²⁹ This

²⁴ “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.* at Data Declaration for Table 1. 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. *Id.* at Tbl 1, available at <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-1/table-1.xls> <<https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-1/table-1.xls>> (last visited Jul. 17, 2020).

²⁵ FBI, Criminal Justice Information Services Division, Uniform Crime Report Crime in the United States, 2017 [hereinafter 2017 UCR], available at <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/rape> (last visited Jul. 17, 2020).

²⁶ 2014 BJS Report, *supra* n. 15, at 3.

²⁷ 2018 NCVS Report, *supra* n. 12, at 4, 36; 2017 NCVS Report, *supra* n. 14, at 3, 7; 2017 UCR, *supra* n. 25, Tbl. 1, 19; 2018 UCR, Tbl 1, *supra* n. 23.

²⁸ 2011 NISVS, *supra* n. 19, at Tbl. 1.

²⁹ DOJ, OJP, BJS, NCJ 235508, Criminal Victimization, 2010 (Sept. 2011) (2010 NCVS Report) at 2, available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwj3ioH92L7qAhXIIHIEHZ6ADd4QFjAAegQIBRAB&url=https%3A%2F%2Fwww.bjs.gov%2Fcontent%2Fpub%2Fpdf%2Fcv10.pdf&usg=AOvVaw2kmMufaul-EdVgamnd43qx> (last visited on Jul. 15, 2020).

vast difference in statistics is explained by different methodologies and definitions.³⁰ 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).

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.³¹ The NCVS counts individuals and households with victims. The NCVS has an 88% individual rate of response and 74% overall response rate, and the 2010 NISVS had a 33% response rate.³² The response rate is considered a critical criteria in the accuracy of a survey. The WGRA is more comparable to the NISVS than the NCVS because of the absence of in-person and telephone interviews and the 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.³³ 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 WGRA is more useful for determining the year-to-year trends of sexual assaults and the reasons sexual assaults are not reported³⁴ than for assessing the number of sexual assaults occurring because the same methodology is used year after year.

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.³⁵

³⁰ See Robert E. Murch, *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).

³¹ 2018 Workplace and Gender Relations Survey of Active Duty Members (May 2019) [hereinafter 2018 WGRA Survey] at iv, *available at* https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjdg7iQxL3qAhVpoHIEHY1KA_wQFjAAegQIBhAB&url=https%3A%2F%2Fwww.sapr.mil%2Fsites%2Fdefault%2Ffiles%2FAnnex_1_2018_WGRA_Overview_Report_0.pdf&usq=AOvVaw0ghm5_gL1Y0jzx_sLMk80y (last visited on Jul. 15, 2020).

³² 2014 BJS Report, *supra* n. 15, at 2.

³³ See Murch, *supra* n. 30, at 277-78 (discussing response rates, self-selection bias, and definition concerns)

³⁴ The 2018 WGRA Survey said:

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.

2018 WGRA Survey, *supra* n. 31, at 35.

³⁵ Sexual Assault Prevention and Response (SAPR), Department of Defense Fiscal Year 2019 Annual Report on Sexual Assault in the Military [hereinafter 2019 SAPR Report], App. B: Statistical Data on Sexual Assault, at 10, *available at* https://www.sapr.mil/sites/default/files/3_Appendix_B_Statistical_Data_on_Sexual_Assault.pdf (last visited on Jul. 15, 2020).

Table 4 WGRA Survey of Active Duty Military Sexual Assault Victims									
Fiscal Year	2014			2016			2018		
	Male	Female	Total	Male	Female	Total	Male	Female	Total
Survey Results	.9%	4.9%	20,300	.6%	4.3%	14,900	.7%	6.2%	20,500

The following table depicts the rates of sexual assault for age and gender of active duty personnel from the 2018 and 2016 WGRA Surveys:³⁶

Table 5 WGRA Survey of Military Sexual Assault Victims by Age and Gender				
Age	2016		2018	
	Female	Male	Female	Male
17-20	8.6%	.7%	11.9%	.9%
21-24	6.4%	1.0%	9.4%	1.0%
25-30	4.2%	.6%	5.0%	.9%
31-35	1.7%	.5%	3.5%	.5%
Over 36	1.3%	.2%	1.8%	.3%

On June 30, 2018, the active duty personnel strength of the United States Armed Forces was 1,165,781.³⁷ The 2018 WGRA survey indicated that 20,500 military personnel reported that they had been victims of sexual assault in the previous fiscal year. Thus, 1.76% of DOD military personnel reported they were sexually assaulted during the previous year compared to 13.0% of college undergraduates in the previous four years. In order 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 17 to 20 years old serving in the military is 6.6 times more likely to be sexually assaulted than a woman who is over 36 years old and 40 times more likely to be sexually assaulted than a man who is over 36 years old. These age and gender-based ratios are consistent with the results from the 2016 WGRA.

https://www.sapr.mil/sites/default/files/FY18_DOD_Annual_Report_on_Sexual_Assault_in_the_Military.pdf (last visited Jul. 19, 2020); 2018 WGRA Survey, *supra* n. 31, at vi.

³⁶ 2018 WGRA Survey, *supra* n. 31, at 28; 2016 Workplace and Gender Relations Survey of Active Duty Members (May 2019) [hereinafter 2016 WGRA Survey] at 315, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwizqa-Rzr3qAhUToHIEHb51B6sQFjAAegQIBBAB&url=https%3A%2F%2Fwww.sapr.mil%2Fpublic%2Fdocs%2Freports%2FFY17_Annual%2FFY16_Annual_Report_on_Sexual_Assault_in_the_Military_Full_Report_Part2_4.pdf&usq=AOvVaw2UZvSvYBSP_DjtYZRDhThm (last visited on Jul. 15, 2020).

³⁷ Defense Manpower Data Center, Armed Forces Strength Figures for April 30, 2020, available at https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp (last visited Jul. 17, 2020).

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 to 24) nonstudents (7.6 per 1,000) than for college students (6.1 per 1,000).³⁸ For undergraduates, the 2019 Association of American Universities (AAU) Report provides calculations of the number of sexual assaults over a four-year college experience.

In contrast, the average for all military females for the period 2015 to 2018 is 5.37% for each year or 21.5% over four years, which is less than the college female victimization rate of 25.9%. The average for military males for the period 2015 to 2018 is .85% for each year or 3.4% over four years, which is about half of the college male victimization rate of 6.8%.

The age and gender of the victims is a critical factor in making comparisons. The 2019 AAU Report indicated 16% of freshman undergraduates said they were sexually assaulted whereas the 2018 WGRA Report said 11.9% of women ages 17 to 20 and 9.4 % of women ages 21 to 24 said they were sexually assaulted in the previous year.³⁹

IV. 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 age 20 to 24 said their sexual assaults were reported to police whereas 32% of the nonstudents age 20 to 24 said their sexual assaults were reported to police.⁴⁰ The report to police percentage did not include reports to other officials, family members, or friends.⁴¹ The reporting rates to police in the NCVS are dramatically higher than reporting rates to police in other surveys. For example, a study of sexual assault at the University of Texas at Austin (UT-Austin) indicated less than 1% of UT-Austin undergraduates reported their sexual assaults to police.⁴²

B. Military Sexual Assault Reports.

In the Department of Defense, victims can make “restricted” reports to enable them to receive confidential access to care and services. At the victim’s request, the report is not referred for

³⁸ 2014 BJS Report, *supra* n. 15, at 1.

³⁹ *Compare supra* n. 11 and accompanying text *with supra* n. 36. 16% of freshman women said they were sexually assaulted and 10.6% of military women age 27 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% minus 10.6% divided by 10.6% equals 51%.

⁴⁰ 2014 BJS Report, *supra* n. 15, at 1, 9. *See* 2000 NSVRC Report, *supra* n. 11, at 23 (stating “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.”).

⁴¹ *See supra* n. 38 at 1.

⁴² *See* n. 80 *infra*, and accompanying text.

investigation and to command authorities (i.e., a restricted report).⁴³ 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.⁴⁴ 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.⁴⁵

Table 6					
Reports of Sexual Assaults of Military Victims while in Service					
	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
Unrestricted Reports	4,020	4,591	5,110	5,768	5,699
Number of Unrestricted Reports with Service Member Subject and Service Member Victim and Percentage of Total Unrestricted Reports	2,412 (60%)	2,617 (57%)	2,913 (57%)	3,403 (59%)	3,533 (62%)

The following table shows the number of unrestricted reports of sexual assaults of service members for the years 2015 to 2019:⁴⁶

Table 7					
Unrestricted Reports of Military Sexual Assault that Occurred while Subject or Victim was in the Service					
	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%

⁴³ 2019 DOD SAPR Report, App. B: Statistical Data on Sexual Assault, *supra* n. 35, at 5-6.

⁴⁴ *Id.*

⁴⁵ *Id.* at 9; Department of Defense Fiscal Year 2015 Annual Report on Sexual Assault in the Military (2015 DOD Sexual Assault Report), App. B: Statistical Data on Sexual Assault (2015 DOD SAPR Report) at 11-12, *available at* https://www.sapr.mil/public/docs/reports/FY15_Annual/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf (last visited on Jul. 15, 2020). See table *supra* page 30.

⁴⁶ 2019 DOD SAPR Report, App. B: Statistical Data on Sexual Assault, *supra* n. 35, at 9-12; 2015 DOD SAPR Report, App. B: Statistical Data on Sexual Assault, *supra* n. 45, at 11-12.

C. Comparison of Reporting Rates.

In 2018, 6,053 military victims of sexual assault reported the previous occurrence of a sexual assault during their military service. The 2018 WGRA Survey indicated 20,500 victims reported they were sexually assaulted by someone in the previous year. Logically, a high percentage of victims report the sexual assault within one year of its occurrence to obtain medical assistance, counseling and/or justice. In 2018, about 30% of military victims ($6,053 \div 20,500 = .295$) reported the sexual assault, about 30 times higher than 1% of college undergraduate victims in the UT-Austin study and 50% higher than the 20% in the NCVS whose sexual assaults in the NCVS to police. Military unrestricted reports of sexual assault result in criminal investigations and unrestricted reports constitute about 28% of military victims ($5,768 \div 20,500 = .28$).

V. 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 12 arrests, and 4 convictions; however, only 1 of the convictions resulted from a student-on-student attack.⁴⁷ The University of Notre Dame had 34 reported sex crimes resulting in 4 arrests and no convictions; Northwestern University had 21 reported cases with no arrests or convictions at its main campus in Evanston; and Indiana University had 69 sexual assault reports to police which resulted in 1 conviction.⁴⁸ Of the 171 reported sex crimes reported to police, only 2.3% (4 cases) resulted in convictions.

The following table shows the most Uniform Crime Reporting (UCR) data for police rape reports to the FBI for the four largest states: California, New York, Florida, and Texas.⁴⁹

⁴⁷ T. Lighty, S. St. Clair and J. S. Cohen, Chicago Tribune, *Few arrests, convictions in campus sex assault cases* (June 16, 2011), available at <http://www.chicagotribune.com/news/ct-xpm-2011-06-16-ct-met-campus-sexual-assaults-0617-20110616-story.html> (last visited Jul. 17, 2020).

⁴⁸ *Id.*

⁴⁹ FBI, UCR Statistics, Table 4, available at <https://www.ucrdatatool.gov/index.cfm#> (last visited Jul. 17, 2020).

Table 8
UCR Rapes Reported to Police in 2017 and 2018

	2017	2018
Nationally and Rates Per 1,000	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.⁵⁰ One person can commit multiple offenses, and multiple persons can commit one offense. In 2018, for clearance by arrest or exceptional means, 62.3% of murder and manslaughter offenses and 33.4% of rape offenses were cleared.⁵¹ 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.⁵²

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 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.⁵³

⁵⁰ FBI, UCR, Crime in the United States, 2018 Clearances, available at <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/clearances.pdf> (last visited Jul. 17, 2020).

⁵¹ *Id.*

⁵² 2010 CDC NISVS, *supra* n. 18, at 18-19, 68-71.

⁵³ California Dept. of Justice, California Justice Information Services Division, Bureau of Criminal Investigation and Investigative Services, Criminal Justice Statistics Center, 2018 Crime in California (Released July 2, 2019) (2018 California Crime Report) at 53-54, available at <https://data-openjustice.doj.ca.gov/sites/default/files/2019-07/Crime%20In%20CA%202018%2020190701.pdf> (last visited Jul. 17, 2020).

Table 10 Disposition of Arrests 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 (81.3%)	196,190 (80.9%)	163,376 (78.9%)	171,208 (80.9%)	168,660 (81.5%)
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 (.1%)	565 (.2%)	487 (.2%)	491 (.2%)	511 (.2%)
Court Dispositions-Convicted and Percent of Court Dispositions Convicted	217,688 (68.5%)	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.⁵⁴ The following table depicts the number and rate per 1,000 of California rapes, reported, cleared, resulting in arrests, prosecutions, and convictions:⁵⁵

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 ⁵⁶ and Percent of Clearances Compared to Total Rapes	3,921 (41.7%)	5,304 (41.5%)	5,585 (40.8%)	5,427 (36.9%)	5,329 (34.4%)
Number of 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%)

⁵⁴ *Id.* at 55.

⁵⁵ 2018 California Crime Report, *supra* n. 53, at 9-10, 15, 19, 24, 69.

⁵⁶ Clearance essentially means law enforcement has solved the crime and identified the perpetrator of the offense and the perpetrator's location. See UCR, Crime in the United States, 2017, Offenses Cleared, available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjMk-Si4cDqAhVfhHIEHY0kBxMQFjALegQIBhAB&url=https%3A%2F%2Fucr.fbi.gov%2Fcrime-in-the-u.s.%2F2017%2Fcrime-in-the-u.s.-2017%2Ftopic-pages%2Fclearances&usg=AOvVaw3500gN7OcsyXYAbldIDj1o> (last visited Jul. 17, 2020).

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.⁵⁷ In 2018, California had 215,283 felony level arrests resulting in 141,506 convictions for a rate of 66%.

b. 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.⁵⁸

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 sexual violence to be 1,015,000

New York crimes statistics are depicted in the following table:⁵⁹

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.⁶⁰ New York Penal Law (P.L.) covers a variety of sex

⁵⁷ See Schenck, *supra* n. 18 at 634. An Internet search on July 11, 2020 was unable to locate sex crime statistics in California showing prosecutions or convictions.

⁵⁸ 2010 CDC NISVS, *supra* n. 18, at 18-19, 68-71.

⁵⁹ N.Y. State Div. of Crim. Just. Serv., Office of Justice Research & Performance, Crime in New York State 2018 Final Data (Sept. 2019) at 6, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjz9ZL1u8XqAhWITd8KHa85C-4QFjABegQICxAE&url=https%3A%2F%2Fwww.criminaljustice.ny.gov%2Fcrimnet%2Ffojsa%2FCrime-in-NYS-2018.pdf&usg=AOvVaw2xA_x6nnB78WbEJlZR96-3 (last visited Jul. 17, 2020).

⁶⁰ The New York state 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. N.Y. State Div. of Crim. Just. Serv., Office of Justice Research & Performance, Criminal Justice Processing Report, Crime in New York State 2018 Final Data (Sept. 2019) at 6, available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiG7MqP_M_qAhXIIHIEHZPHAS4QFjAAegQIARAB&url=http%3A%2F%2Fwww.criminaljustice.ny.gov%2Fcrimnet%2Fpubs.htm&usg=AOvVaw322G-5t803sj0S6gWTPeY7 (last visited Jul. 17, 2020).

offenses. The following table indicates sex offense arrests (includes rapes and other sex crimes) in 2018 and 2019.⁶¹

Table 14 New York Dispositions of Sex Offenses		
	2018	2019
Felony Sex Offense Arrests	2,709	2,597
Misdemeanor Sex Offense Arrests	2,069	2,077
Total	4,778	4,674

New York criminal law indicates the offenses of “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”⁶² and “sexual misconduct,” which is committed when someone “engages in sexual intercourse with another person without such person's consent”⁶³ are misdemeanors. New York disposition information is depicted in the following table.⁶⁴

Table 15 New York State P.L. 130 Dispositions in 2019			
	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

C. Florida Reports, Prosecutions, and Convictions.

From December 2015 to December 2018, Alachua County, Florida prosecutors in Alachua County, Florida closed 236 sexual battery cases, including 92 cases were guilty pleas, 115 cases were

⁶¹ N.Y. State Div. of Crim. Just. Serv., Office of Justice Research & Performance, Criminal Just Case Processing Arrest through Disposition New York States January – December 2019 (July 2020) (2019 NY Dispositions), at 3-4, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjn9t2X-M_qAhXYgnIEHSidA7sQFjAAegQIAxAB&url=https%3A%2F%2Fwww.criminaljustice.ny.gov%2Fcrimnet%2Fojsa%2Fdar%2FDAR-4Q-2019-NewYorkState.pdf&usg=AOvVaw0Wfd3PoOR0DtgFDvUswKhr (last visited Jul. 17, 2020).

⁶² New York Penal Law Section 130.52.

⁶³ New York Penal Law Section 130.20.

⁶⁴ 2019 NY Dispositions, *supra* n. 61, at 21.

dismissed “mostly due to insufficient evidence to sustain conviction.”⁶⁵ Only 3 percent—or seven cases—made it to trial, a rate significantly lower than the national average of 7 percent.⁶⁶

The 2010 CDC NISVS estimates of annual rapes and sexual violence in Florida are depicted in the following table.⁶⁷

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 sexual violence to be 718,000

In Florida, from 2014 to 2018 the reported forcible sexual offenses ranged from 10,236 (2014) to 11,907 (2018) as depicted in the following table:⁶⁸

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	.52	.54	.52	.54	.57	.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%

⁶⁵ Molly Minta, *The Appeal*, In A North Florida County, Prosecutors Drop Nearly 50 Percent of Sexual Battery Cases (June 24, 2019) available at <https://theappeal.org/in-a-north-florida-county-prosecutors-drop-nearly-50-percent-of-sexual-battery-cases/> (last visited Jul. 19, 2020).

⁶⁶ *Id.*

⁶⁷ 2010 CDC NISVS, *supra* n. 18, at 18-19, 68-71.

⁶⁸ Florida Dept. of Public Safety, UCR Offense Data, available at <http://www.fdle.state.fl.us/FSAC/Data-Statistics/UCR-Offense-Data> (last visited Jul. 17, 2020); Florida Dept. of Public Safety, Forcible Sex Offense (Rape), available at [https://www.fdle.state.fl.us/FSAC/Crime-Data/Forcible-Sex-Offenses/Rape-\(1\)](https://www.fdle.state.fl.us/FSAC/Crime-Data/Forcible-Sex-Offenses/Rape-(1)) (last visited Jul. 17, 2020).

Before 2017, Florida used the term “Forcible Sex Offense,” and for 2017 and thereafter, Florida used the UCR term “rape.” The percentage of forcible sex offenses or rapes has been less than .3% of the total arrests for the previous six years. The following table depicts the total number of Florida arrests for forcible sex offenses or rape.⁶⁹

Table 18 Florida Arrests Totals and for Forcible Sex Offense or Rape (UCR Standards)						
	2014	2015	2016	2017	2018	2019
Total Arrests	800,065	773,061	726,494	711,831	716,665	679,221
Arrests for Forcible Sex Offense or Rape	1839	1,803	1,747	1872	1937	1,765
Arrests for Rape or Forcible Sex Offense Percentage of Total Arrests	.23%	.23%	.24%	.26%	.27%	.26%
Percentage of Forcible Sexual Offenses Resulting in Arrests	18%	17%	17%	17%	16%	18%

Florida statewide disposition statistics are unavailable.⁷⁰

D. 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.⁷¹ The 2010 CDC NISVS estimates of annual rapes and sexual violence in Texas are depicted in the following table.⁷²

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 sexual violence to be 855,000	

⁶⁹ Florida Dept. of Public Safety, Offense Data, available at <http://www.fdle.state.fl.us/FSAC/Data-Statistics/UCR-Arrest-Data.aspx> (last visited Jul. 17, 2020).

⁷⁰ See Schenck, *supra* n. n. 18, at 638.

⁷¹ K. L. Lenau, *Austin/Travis County Sexual Assault Response and Resource Team Community Needs Assessment* (Travis County Report) at 3, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjzpenJy7vqAhU_hHIEHTYoBzk4ChAWMAI6BAgKEAE&url=https%3A%2F%2Fwww.austintexas.gov%2Fedims%2Fdocument.cfm%3Fid%3D313945&usg=AOvVaw35N9mhFwJjB_sUks5hRYI3 (last visited on Jul. 15, 2020).

⁷² 2010 CDC NISVS, *supra* n. 18, at 18-19, 68-71.

The 2018 Texas state-wide UCR report and 2017 (reports police made to the FBI) and 2018 Texas Court Reports indicate:

Table 20 Texas UCR Sexual Assault Reports ⁷³		
	2017	2018
Incidents	18,112	19,816
Victims	18,750	20,592
Offenders	18,774	20,532

The following table depicts the cases filed, cases disposed, convictions and sentences to prison in Texas in 2017 and 2018.⁷⁴

Table 21 Texas Sexual Assault Prosecutions		
	2017	2018
Cases Filed	1,496	1,181
Cases Disposed	1,565	1,330
Convictions	475	394
Sentenced to Prison	352	295

In FY 2017, Texas sexual assault prosecutions constituted only 3% of the total of 280,002 Texas felony-level prosecutions. For contested sexual assault trials, the sexual assault acquittal rate was 29% (27 cases).⁷⁵ In Texas less than 100 contested sexual assault prosecutions occurred in 2017. 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% (25 cases).⁷⁶ Again, there were less than 100 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%.

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.⁷⁷ The student population consisted

⁷³ Texas Department of Public Safety, Texas Crime Report for 2018, Ch. 7 at 46, available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjnreKM-bvqAhVaknIEHbxTDcwQFjAAegQIBBAB&url=https%3A%2F%2Fwww.dps.texas.gov%2Fcrime-reports%2F&usg=AOvVaw0S2XmzZVRpLidJaIwu4Wf8> (last visited on Jul. 15, 2020).

⁷⁴ Annual Statistical Report for Texas Judiciary for Fiscal Year 2017 (FY 2017 Texas Court Report), at Detail-7 (111 of 168) and Annual Statistical Report for Texas Judiciary for Fiscal Year 2018 (FY 2018 Texas Court Report), at Detail-8 (116 of 175), available at <https://www.txcourts.gov/statistics/annual-statistical-reports/> (last visited on Jul. 15, 2020).

⁷⁵ FY 2017 Texas Court Report, *supra* n. 26, 14, 18, 20.

⁷⁶ FY 2018 Texas Court Report, *supra* n. 26, at 15, 20, 22.

⁷⁷ University of Texas at Austin, Facts and Figures, available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwj9z->

of 53.3% women and 46.7% men.⁷⁸ 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.⁷⁹ 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.⁸⁰ 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:⁸¹

Table 22 University of Texas at Austin 2017 CLASE Survey Responses				
	Female %	Number	Male %	Number
Rape	15%	6,121	5%	2,040
Attempted Rape	12%	4,896	3%	1,224
Unwanted Sexual Touching	28%	11,425	11%	4,488

The CLASE Survey indicated that 32% of undergraduate victims said they reported their victimization to someone, including 25.3% to a close friend other than a roommate, 15.0% to a roommate, 9.6% to a romantic partner, 4.5% to a parent or guardian, 3.5% to a family member other than a parent or guardian, 1.9% to someone at UT including counselors or medical personnel, .32% to UT police, and .32% to local police other than the UT police.⁸²

[qS673qAhWdknIEHTFuAAQQFjADegQIARAC&url=https%3A%2F%2Fwww.utexas.edu%2Fabout%2Ffacts-and-figures&usg=AOvVaw3D6ASMg1JzKpABjU5nOo5C](https://www.utexas.edu/about/facts-and-figures?usg=AOvVaw3D6ASMg1JzKpABjU5nOo5C) (last visited on Jul. 15, 2020).

⁷⁸ *Id.*

⁷⁹ Cultivating Learning and Safe Environments Study, The University of Texas at Austin School of Social Work Institute on Domestic Violence & Sexual Assault (2017) (2017 CLASE Report), 30 available at <https://www.utsystem.edu/sites/default/files/sites/clase/files/2017-10/ut-austin-R11-V2.pdf> (last visited on Jul. 15, 2020).

⁸⁰ 2017 CLASE Report, *supra* n. 79, 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 website, available at <https://www.aauw.org/resources/article/underreported-sexual-misconduct/> (last visited on Jul. 15, 2020).

⁸¹ The 2017 CLASE Report, *supra* n. 79, at 48 is the source for the percentages by gender of undergraduates who were the victims of rape, attempted rape, and unwanted touching. The numbers of victims in the table were obtained by multiplying the percentages in the CLASE Report by the number of UT-Austin undergraduates (40,804).

⁸² 2017 CLASE Report, *supra* n. 79, at 52-53.

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.⁸³

Assuming .32% of rape victims reported the rape to UT police as indicated in the CLASE Survey, 26 reports of rape were made to the police (.32% X 8,161 = 26).

Table 23 University of Texas at Austin Clery Reports of Sexual Misconduct			
	2016	2017	2018
Rape	29	26	28
Fondling	4	3	2
Statutory Rape	1	0	0
Dating Violence	41	10	7

UT-Austin Police Department (UTPD) Chief David Carter said in 2016, 7 incidents of sexual assault at UT-Austin were reported to UTPD, and in the first 3 months of 2017, 1 incident was reported to the UTPD.⁸⁴ It is unknown if any of the 8 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.⁸⁵

On July 1, 2019, the population of Travis County, Texas was about 1,274,000.⁸⁶ Austin is the largest city in Travis County with a population on July 1, 2019, of about 979,000.⁸⁷ The Travis County District Attorney's Office (TCDAO) handles sexual assault cases for all 11 jurisdictions in the county, including Austin.⁸⁸

⁸³ 2019 Annual Security and Fire Safety Report, University of Texas, at 34-35, available at <https://police.utexas.edu/reports/clery-reports> (last visited on Jul. 15, 2020).

⁸⁴ Claire Allbright, Anusha Lalani & Catherine Marfin, *UT Austin has Highest Percentage of Rape Among Female Undergraduates, Study Finds* (Mar. 27, 2017), available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwj_qrum1bvqAhW4gnIEHWGIB7IQFjAEegQIAhAB&url=https%3A%2F%2Fthedailytexan.com%2F2017%2F03%2F26%2Fut-austin-has-highest-percentage-of-rape-among-female-undergraduates-study-finds&usg=AOvVaw0PyP3g0zP4Q7I2nVV37ROx (last visited Jul. 17, 2020).

⁸⁵ In Texas in 2018, there were 394 sexual assault convictions, *see* n. 74 *supra*, and 20,532 sexual assault offenders were reported to police, *see* n. 73 *supra*, resulting in a 2 percent conviction rate for sexual assault offenses reported to the police.

⁸⁶ Quick Facts, Travis County, Texas, available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjIhLuh0rvqAhXYoHIEHeVZCnIQFjACegQIERAB&url=https%3A%2F%2Fwww.census.gov%2Fquickfacts%2Ftraviscountytexas&usg=AOvVaw3h8X625zjeqgFXU2c8TCrf> (last visited Jul. 15, 2020).

⁸⁷ Quick Facts, Austin City, Texas, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiAq_mk07vqAhXkgnIEHd99Cs8QFjANegQIBBAB&url=https%3A%2F%2Fwww.census.gov%2Fquickfacts%2Ffact%2Ftable%2Ffausticitytexas%2FLND110210&usg=AOvVaw20cRAkMkWkxNz-z1-2_LSz (last visited Jul. 15, 2020).

⁸⁸ Travis County Report, *supra* n. 71, at 28.

From July 1, 2016 to June 30, 2017, the Austin Police Department (APD) investigated 1,161 sexual assault cases, which resulted in 96 sexual assault arrests.⁸⁹ 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.⁹⁰ The TCDAO received 224 sexual assault cases for prosecution, 77 were accepted for prosecution, and 26 were convicted of at least one charge.⁹¹ In sum, 8.3% of sexual assault reports reported to the APD resulted in arrests and 12% of cases that TCDAO accepted 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 1% resulted in convictions. The Austin statistics are roughly consistent with the statistics of Texas as a whole.

VI. 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 Justice⁹² while others appear in the Manual for Courts-Martial, or in other regulations.

⁸⁹ *Id.* at 27.

⁹⁰ 2017 Texas Sexual Assault totals by Jurisdiction Spreadsheet, Travis County, *available at* <https://www.dps.texas.gov/crimereports/17/citCh10b.xlsx> (last visited on Jul. 15, 2020).

⁹¹ Travis County Report, *supra* n. 71, at 28.

⁹² *See, e.g.*, Article 6b, UCMJ, which provides:

§806b. Art. 6b. Rights of the Victim of an Offense Under This Chapter

(a) Rights of a Victim of an Offense Under This Chapter.—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 of any of the following:
 - (A) A public hearing concerning the continuation of confinement prior to trial of the accused.
 - (B) A preliminary hearing under section 832 of this title (article 32) relating to the offense.
 - (C) A court-martial relating to the offense.
 - (D) A public proceeding of the service clemency and parole board relating to the offense.
 - (E) The release or escape of the accused, unless such notice may endanger the safety of any person.
- (3) The right not to be excluded from any public hearing or proceeding described in paragraph (2) unless the military judge or preliminary hearing officer, as applicable, after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter would be materially altered if the victim heard other testimony at that 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.
 - (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).

For example, commanders are required to act on requests for transfer of victims who make an unrestricted report of sexual assault within 72 hours.⁹³ Victims have a right to appeal denial of the request for transfer.⁹⁴

The following table depicts the number of victim's requests for transfers and transfers approved from FY 2012 to FY 2019.⁹⁵

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
Total Approved	216	565	644	720	725	799	870	870

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, which 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 victim's rights.⁹⁶

- (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.

(b) Victim of an Offense Under This Chapter Defined.—In this section, the term “victim of an offense under this chapter” means an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under this chapter.

(c) Appointment of Individuals to Assume Rights for Certain Victims.—In the case of a victim of an offense under this chapter who is under 18 years of age (but who is not a member of the armed forces), incompetent, incapacitated, or deceased, the legal guardians of the victim or the representatives of the victim's estate, family members, or any other person designated as suitable by the military judge, may assume the rights of the victim under this section. However, in no event may the individual so designated be the accused.

⁹³ See 2019 DOD SAPR Report, App. B: Statistical Data on Sexual Assault, *supra* n. 35, at 33.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See Norton, *supra* n. 11 (noting that the key to reforming reporting systems for sexual violence on college and university campuses may be found in the military justice system; she recommends that first, colleges and universities implement a

The following points summarize the rights that victims have in the military justice system.

Protection From the Accused

- The victim has the right to be protected from the accused.⁹⁷

Privacy of Victim

- The victim has the right to be “treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter.”⁹⁸
- The sexual assault victim has a right to file either a restricted or unrestricted report of the offense.⁹⁹

Representation by Legal Counsel

- The victim has the right to be represented, at no expense to the victim, by Special Victim’s Counsel, who will provide legal advice and assistance.¹⁰⁰

Protection of Communications

- The victim’s confidential communications with Military Rule of Evidence 514 are protected by Military Rule of Evidence 514.¹⁰¹

Pretrial Proceedings

Interviews by Defense Counsel

- The victim has a right to the presence of Sexual Assault Victim Advocate, counsel and the prosecutor at any interviews conducted by defense counsel.¹⁰²
- The victim has the right to notice of any investigative subpoenas for the victim’s records.¹⁰³

Pretrial Confinement

- The victim has the right to be notified of a public hearing concerning the continuation

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; second, 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; and third, that colleges and universities consider benefits of adopting a program based on military’s expedited transfer program to aid victims and avoid further victimization during investigation and adjudication procedures).

⁹⁷ Art. 6b(a)(1), UCMJ.

⁹⁸ Art. 6b(a)(8), UCMJ.

⁹⁹ See DOD Instruction 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures (Mar. 28, 2013 Incorporating Change 3, May 24, 2017).

¹⁰⁰ Each service has a Special Victim’s Counsel program. See *Special Victims' Counsel/Victims' Legal Counsel*, U.S. Dep't of Def. Sexual Assault Prevention & Response Office, <https://sapr.mil/svc-vlc> (last visited Jul. 15, 2020). 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 those attorneys as “Victims’ Legal Counsel” (“VLC”). *Id.* Adult and minor dependents may also be eligible for assignment of an SVC or VLC, as the case may be. See, e.g., AF Special Victims Counsel Program, <https://www.military.com/military-report/af-special-victims-counsel-program.html> (last visited Jul. 15, 2020).

¹⁰¹ MIL. R. EVID. 514.

¹⁰² Art. 6b(f), UCMJ.

¹⁰³ R.C.M. 703(g)(3)(C)(ii).

of pretrial confinement of the accused.¹⁰⁴

Pre-Referral Proceedings; Article 30a, UCMJ

- The victim, if under 18 years of age, must be represented by a “legal guardian from among the representatives of the estate of the victim, a family member, or other suitable person to assume the victim’s rights ...”¹⁰⁵ That matter can be dealt with at an Article 30a proceeding.¹⁰⁶

Preliminary Hearing; Article 32, UCMJ

- The victim is entitled to reasonable, timely, and accurate notice of an Article 32 preliminary hearing.¹⁰⁷
- The victim has the reasonable right to confer with counsel for the government.¹⁰⁸
- The victim, who has suffered a “direct physical, emotional, or pecuniary harm, has the right not to attend the preliminary hearing.¹⁰⁹
 - 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.¹¹⁰
 - The victim has the protections of Military Rule of Evidence 412 (rape shield rule) at the preliminary hearing, which excludes evidence of the the victim’s prior sexual conduct.¹¹¹
 - The victim has a right to present additional post-hearing materials to be considered by the convening authority.¹¹²

Charging Decisions

- 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.¹¹³

Plea Bargaining

- The victim has a right to have his or her views considered by the convening authority in any plea bargaining with the accused.¹¹⁴

¹⁰⁴ Art. 6b(a)(2)(A), UCMJ.

¹⁰⁵ Art. 6b(c), UCMJ.; R.C.M. 801(a)(6). The accused may not be appointed as that representative. *Id.*

¹⁰⁶ Art. 30a, UCMJ.

¹⁰⁷ Art. 6b(a)(2)(B), UCMJ.

¹⁰⁸ R.C.M. 405(g)(2).

¹⁰⁹ Art. 6b(h)(2)(A)(iii), UCMJ.

¹¹⁰ R.C.M. 405(g)(2).

¹¹¹ It is important to note that except for the Rules of Evidence dealing with the privilege against self-incrimination and privileges, the Military Rules of Evidence generally do not apply at the Preliminary Hearing. R.C.M. 405(i)(2)(A) provides, however, that evidence of the sexual assaults prior acts may be admissible if that evidence would be admissible at a later trial and the evidence is necessary to determine the issues set out in R.C.M. 405(a).

¹¹² R.C.M. 405(k)(1).

¹¹³ This right was created in the 2016 Military Justice Act, § 534(b), National Defense Authorization Act for FY 2015, [P.L. 113-291](#). 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. *See generally* Stoup, *What’s New in the Law for Victims*, THE REPORTER, Vol. 43, No. 2 at 32 (2016).

¹¹⁴ R.C.M. 705(e)(3)(B)

Trial Rights

- The victim has a right to the speedy disposition of the case.¹¹⁵
- The victim has the right to be heard and represented by counsel at hearings on motions.¹¹⁶
- The victim has the right to “reasonable, accurate, and timely notice” of a court-martial which relates to the offense.¹¹⁷
- The victim has the right not to be excluded from the court-martial.¹¹⁸
- The victim has the right to confer with the trial counsel during the court-martial.¹¹⁹
- The victim, if under 18 years of age, must be represented by a “legal guardian from among the representatives of the estate of the victim, a family member, or other suitable person to assume the victim’s rights ...”¹²⁰
- The victim has the right to be heard at sentencing and may make either an unsworn¹²¹ or sworn statement.¹²²
- The victim may seek extraordinary relief in the Courts of Criminal Appeals for any rulings by the military judge.¹²³

Post-Trial Procedures

- The victim has the right to be served with a copy of the record of trial.¹²⁴
- The victim has the right to submit written materials to the convening authority.¹²⁵
- The victim is entitled, upon request, to receive a copy of the judgment in the court-martial.¹²⁶

Appellate Review

- 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 any ruling by the military judge or the preliminary hearing officer.¹²⁷
- 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.¹²⁸

¹¹⁵ Art. 6b(a)(2)(7), UCMJ.

¹¹⁶ LRM v. Kastenber, 72 M.J. 364 (C.A.A.F. 2013).

¹¹⁷ Art. 6b(a)(2), UCMJ.

¹¹⁸ Art. 6b(a)(3), UCMJ.; R.C.M. 806(b)(3). The military judge may determine, by clear and convincing evidence, that victim’s testimony would be materially altered by hearing other testimony at the court-martial.

¹¹⁹ Art. 6b(a)(5), UCMJ.; R.C.M. 806(b)(3).

¹²⁰ Art. 6b(c), UCMJ.; R.C.M. 801(a)(6). The accused may not be appointed as that representative. *Id.*

¹²¹ R.C.M. 1001(c)(5).

¹²² R.C.M. 1001(c)(4).

¹²³ Art. 6b(e), UCMJ.

¹²⁴ Art. 6b(e), UCMJ.

¹²⁵ Art. 60a(e)(2), UCMJ. This provision, which originally appeared in former Article 60, was added in the National Defense Authorization Act of 2014. Pub. L. 113-66, § 1706. The President implemented the changes to Article 60 in E.O. 13669 (June 13, 2014), by adding a new Rule of Court-Martial 1105A, “Matters submitted by a crime victim.” That Rule is now 1106A.

¹²⁶ Art. 60c(a)(2)(A); R.C.M. 1111(f)(3).

¹²⁷ Art. 6b, UCMJ. *See also* Randolph v. HV, 76 M.J. 27 (C.A.A.F. 2017). Maj. 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 (2019).

¹²⁸ Art. 6b(e)(3)(B), (C), UCMJ.

Post-Appellate Proceedings

- 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.¹²⁹
- The victim has the right to notice of the release or escape of the accused, unless such notice may endanger the safety of any person.¹³⁰
- The victim has the right to receive restitution as provided in law.¹³¹

The foregoing rights generally mirror rights accorded victims in federal cases¹³² and victims in state cases.¹³³ But in some regards, the rights available to a victim in the military justice system are broader. For example, a Special Victim's Counsel is provided at no charge to the victim. And a victim in the military is not required to attend the Article 32 Preliminary Hearing; a victim could be subpoenaed to appear before a federal grand jury or a federal preliminary hearing.

VII. Military Reports, Prosecutions, and Convictions.

Actual reports of sexual assaults from victims is probably a more accurate number of actual sexual assaults. The following table shows unrestricted reports of sexual assaults by military victims for the years 2015 to 2019.

Table 25 Unrestricted Reports of Military Sexual Assaults					
Fiscal Year	2015 ¹³⁴	2016 ¹³⁵	2017 ¹³⁶	2018 ¹³⁷	2019 ¹³⁸
Unrestricted Reports ¹³⁹	4,584	4,591	5,110	5,805	5,699

¹²⁹ Art. 6b(a)(4), UCMJ.

¹³⁰ Art. 6b(a)(2)(E), UCMJ.

¹³¹ Art. 6b(a)(6), UCMJ.

¹³² See The Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771.

¹³³ See <https://law.lclark.edu/live/news/23544-victims-rights-law-by-state> (last visited Jul. 15, 2020).

¹³⁴ 2015 DOD SAPR Report, App. B Statistical Data on Sexual Assault, *supra* n. 45, at 8, 16.

¹³⁵ 2016 DOD SAPR Report, App. B Statistical Data on Sexual Assault at 14, 16, *available at* https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjyK3fycbqAhV5g3IEHVLfArcQFjAEegQIBhAB&url=https%3A%2F%2Fdacipad.whs.mil%2Fimages%2FPublic%2F10-Reading_Room%2F04_Reports%2F03_DoD_Reports_Regs_Surveys%2FDoD_Annual_SexAsslt_Reports%2FAppendix_B_Statistical_Section.pdf&usq=AOvVaw3LImjLUK-uIpdYs0QK9ogM (last visited Jul. 17, 2020).

¹³⁶ 2017 DOD SAPR Report, App. B Statistical Data on Sexual Assault at 15, 17, *available at* https://www.sapr.mil/public/docs/reports/FY17_Annual/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf (last visited Jul. 17, 2020).

¹³⁷ 2018 DOD SAPR Report, App. B Statistical Data on Sexual Assault at 14, 16, *available at* https://www.sapr.mil/sites/default/files/Appendix_B_Statistical_Data_on_Sexual_Assault.pdf (last visited Jul. 17, 2020).

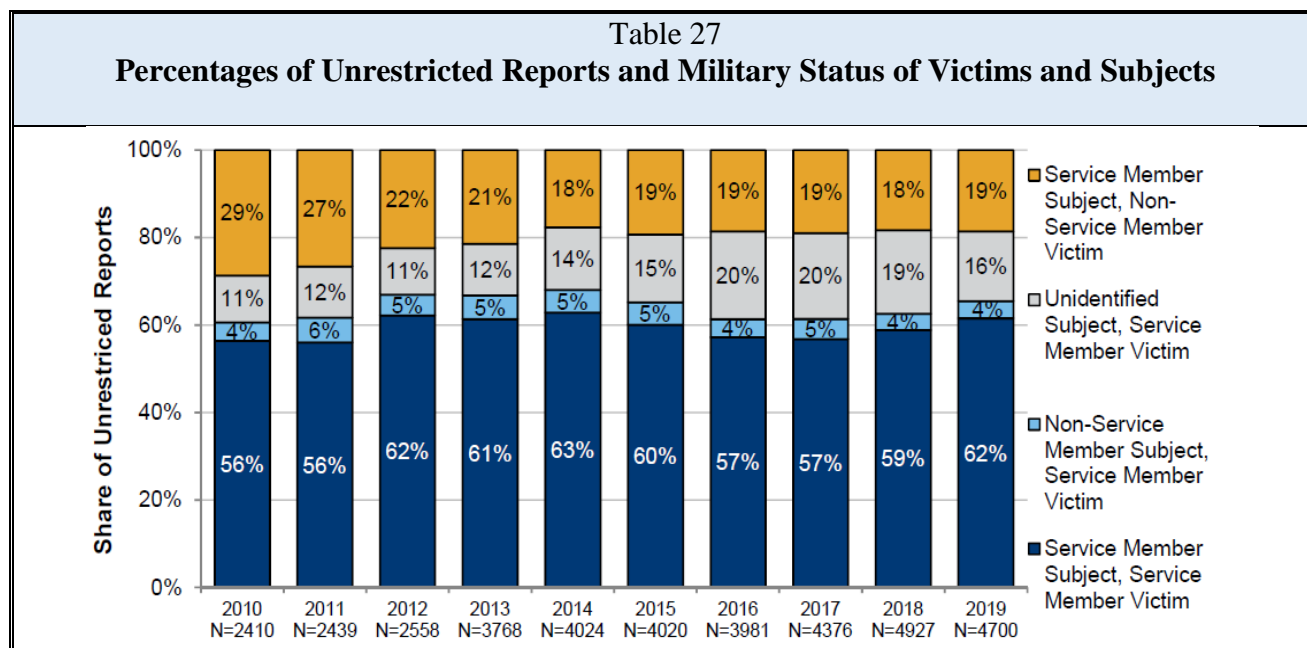
¹³⁸ See 2019 DOD SAPR Report, App. B: Statistical Data on Sexual Assault, *supra* n. 35, at 14-15.

¹³⁹ Restricted reports are confidential, protected communications and unrestricted reports of sexual assault are referred for investigation to a military criminal investigative organization, and the command is notified of the alleged incident. *Id.* at 5. Victims make a restricted report to Sexual Assault Response Coordinators, Victim Advocates, and/or healthcare providers to obtain confidential access to care and services. *Id.*

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

Table 26 Reasons for No Military Disciplinary Action Taken in Response to Unrestricted Reports of Military Sexual Assault Cases					
Fiscal Year	2015 ¹⁴⁰	2016 ¹⁴¹	2017 ¹⁴²	2018 ¹⁴³	2019 ¹⁴⁴
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.¹⁴⁵



¹⁴⁰ 2015 DOD SAPR Report, App. B Statistical Data on Sexual Assault, *supra* n. 45, at 8, 16.

¹⁴¹ 2016 DOD SAPR Report, App. B Statistical Data on Sexual Assault at 14, 16, *supra* n. 135, at 14, 16.

¹⁴² 2017 DOD SAPR Report, App. B Statistical Data on Sexual Assault, *supra* n. 136, at 15, 17.

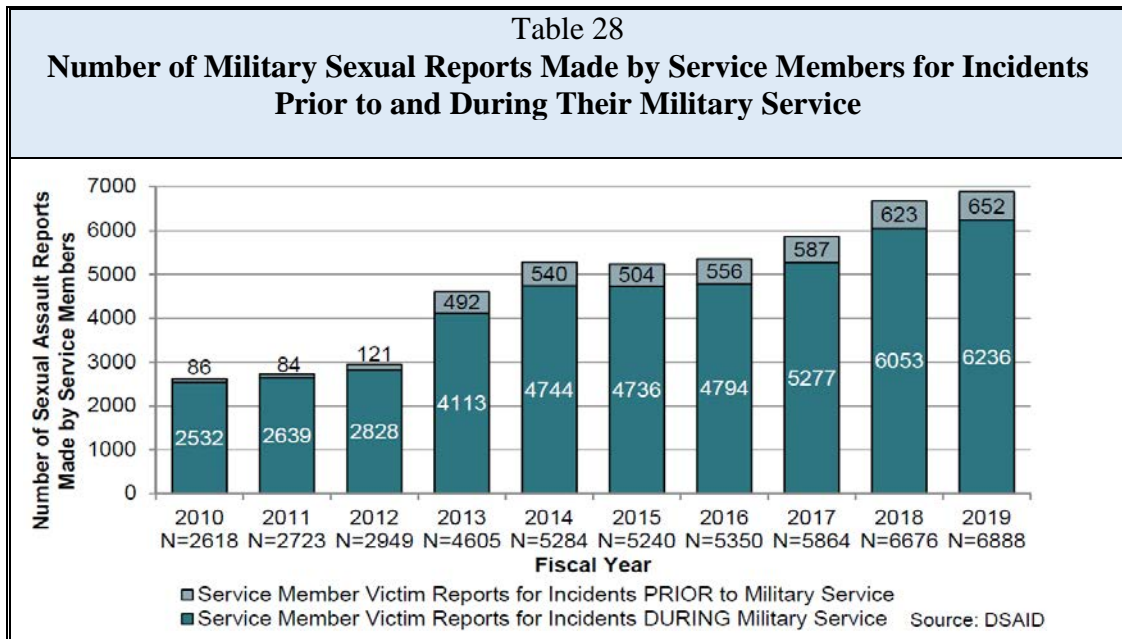
¹⁴³ 2018 DOD SAPR Report, App. B Statistical Data on Sexual Assault, *supra* n. 137, at 14, 16.

¹⁴⁴ See 2019 DOD SAPR Report, App. B: Statistical Data on Sexual Assault, *supra* n. 35, at 14-15.

¹⁴⁵ *Id.* 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 in the categories of cases cleared by arrest or otherwise from police investigations.

The WGRA survey of active duty military sexual assault victims, *supra* Table 4 at page 10, 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. 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% to 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 as indicated by "N" and the sexual assaults before and during military service for the years 2010 to 2019.¹⁴⁶

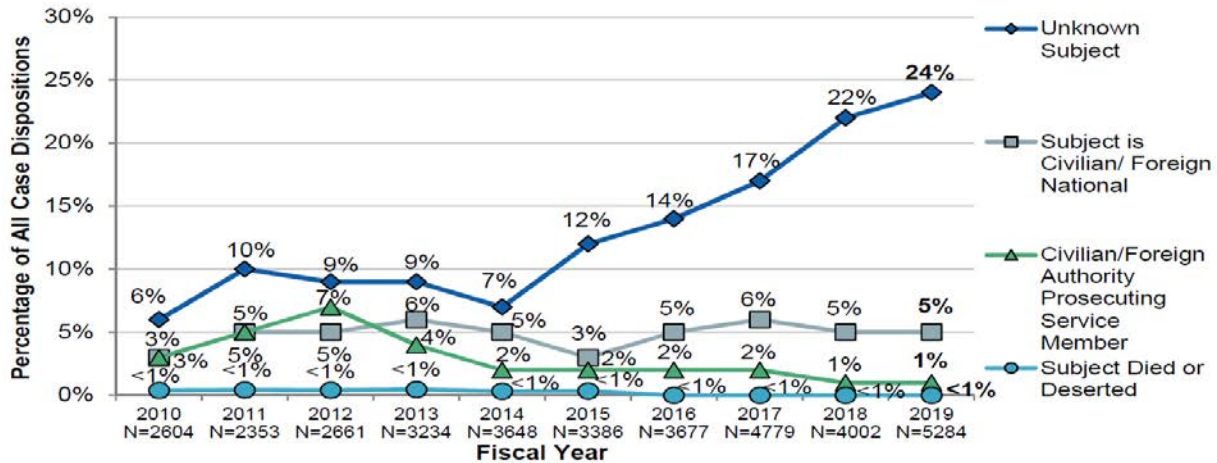


The following table depicts subjects who could not be prosecuted because they were outside legal authority or were prosecuted by civilian or foreign authorities.¹⁴⁷ N is the number of case dispositions in the fiscal year, e.g. 5,284 cases were disposed during FY 2019.

¹⁴⁶ 2019 DOD SAPR Report, App. B: Statistical Data on Sexual Assault, *supra* n. 35, at 9.

¹⁴⁷ *Id.* at 16.

Table 29
Percentages of All Case Disposition with No Military Jurisdiction



In the DOD, the commander has a variety of administrative and disciplinary actions available to hold an accused accountable for a sexual assault.¹⁴⁸ The following table shows the sexual assault case dispositions in FY 2019.¹⁴⁹

Table 30
Military Case Dispositions

Case Disposition Category	Count of Case Dispositions	Share of Case Dispositions
Sexual Assault Investigations Considered for Possible Action by DOD Commanders	3,716	N/A
Evidence Supported Commander Action	2,339	63%
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%
Unfounded by Command/Legal Review	50	1%
Commander Action Precluded or Respected Victims' Desired Non-Participation	1,327	36%
<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%

¹⁴⁸ See Schlueter, MILITARY CRIMINAL JUSTICE, *supra* n. 1, at § 1-8.

¹⁴⁹ 2019 DOD SAPR Report, App. B: Statistical Data on Sexual Assault, *supra* n. 35, at 17.

The next table depicts the cases available for military disposition and reasons the military did not take disciplinary action against the alleged perpetrator.¹⁵⁰

Table 31 Reasons for No Adverse Action Taken Against Alleged Perpetrator					
	2015	2016	2017	2018	2019
Total Military Cases Available for Disposition Under UCMJ	2783	2,892	2,339	2,854	3,716
Victim Declined to Participate in Disposition	257	252	514	173	1,327
Insufficient Evidence for Prosecution	420	670	729	735	1,022
Statute of Limitations	19	33	26	27	21

The following table depicts the disposition information for the military cases available for disposition under the UCMJ.¹⁵¹

Table 32 Disposition of Military Cases					
	2015	2016	2017	2018	2019
Evidence Supported Commander's Action (Arrest Equivalent)	2,013	1,865	2,218	1,845	2,339
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%

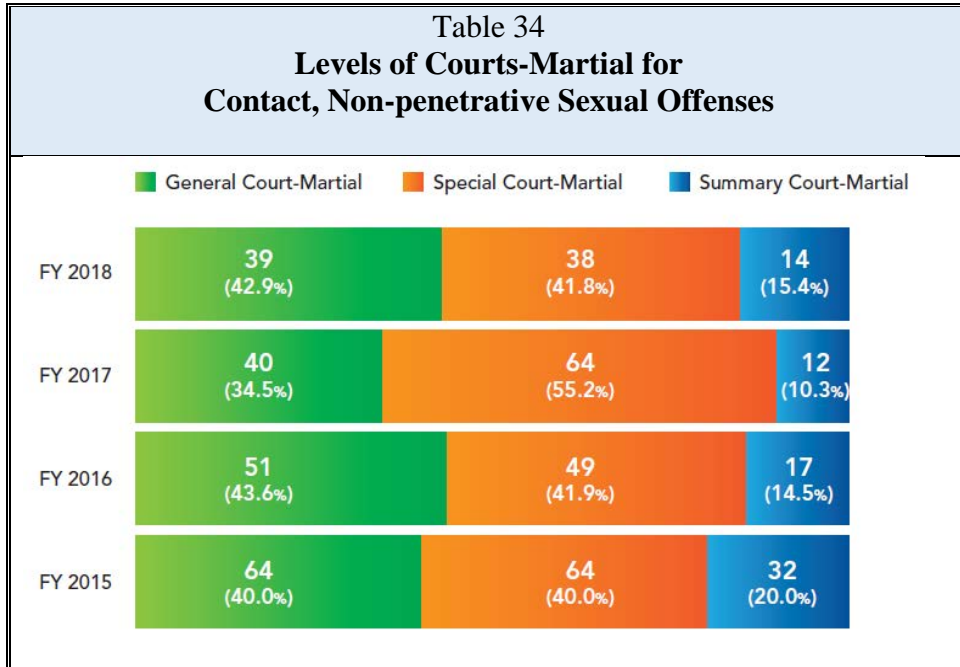
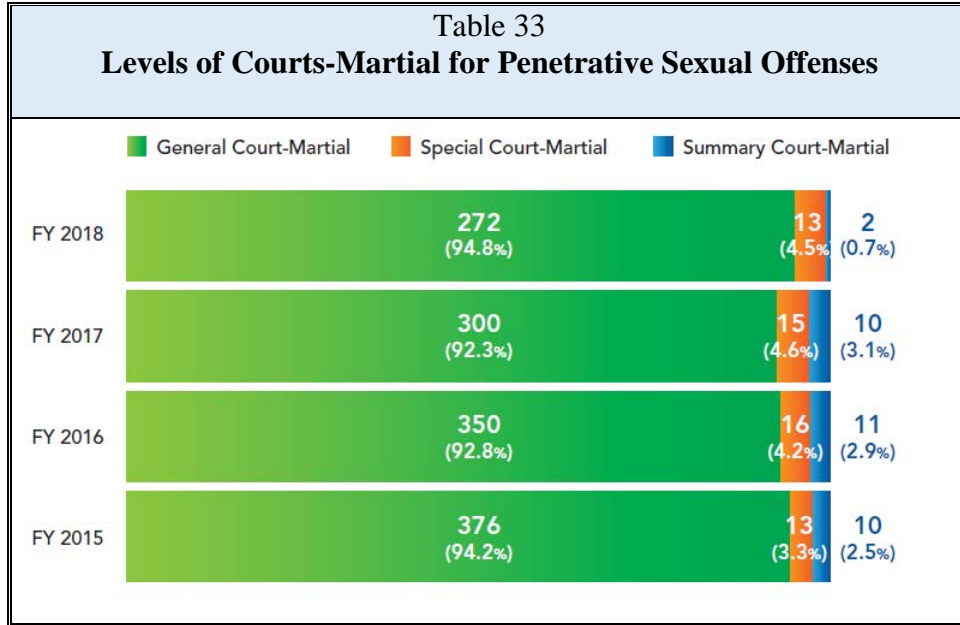
In 2019, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces issued a report providing statistics regarding referral of sexual assault crimes to courts-martial.¹⁵² In 2018, 95% of cases involving penetrative offenses were referred to general court-martial, 43% of contact, non-penetrative offenses were referred to general court-martial.

¹⁵⁰ 2015 DOD SAPR Report, *supra* n. 45, at 18, 24; 2016 DOD SAPR Report, *supra* n. 141, at 18, 24; 2017 DOD SAPR Report, *supra* n. 142, at 19, 25; 2018 DOD SAPR Report, *supra* n. 143, at 18, 24; 2019 DOD SAPR Report, *supra* n. 93, at 17, 23.

¹⁵¹ 2019 DOD SAPR Report, App. B: Statistical Data on Sexual Assault, *supra* n. 35, at 15, 18; 2017 DOD SAPR Report, App. B Statistical Data on Sexual Assault, *supra* n. 142, at 22, 25; 2016 DOD SAPR Report, App. B Statistical Data on Sexual Assault, *supra* n. 141, at 24;

¹⁵² Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, Court-Martial Adjudication Data Report (Nov. 2019), available at https://dacipad.whs.mil/images/Public/08-Reports/05_DACIPAD_Data_Report_20191125_Final_Web.pdf (last visited Jul. 17, 2020).

Referral levels for penetrative offenses are depicted in the first table below, and non-penetrative contact offenses are depicted in the next tables.¹⁵³



¹⁵³ *Id.* at 21.

In FY 2018, 378 sexual assault cases were referred to courts-martial: 311 to general courts-martial; 51 to special courts-martial; and 16 to summary courts-martial.¹⁵⁴ The following table represents the dispositions of cases for FY 2018.¹⁵⁵

Table 35
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	
Army	131	78.4%	21	12.6%	0	0.0%	11	6.6%	0	0.0%	4	2.4%
Marine Corps	32	55.2%	6	10.3%	8	13.8%	9	15.5%	0	0.0%	3	5.2%
Navy	40	60.6%	3	4.5%	5	7.6%	11	16.7%	2	3.0%	5	7.6%
Air Force	68	81.9%	9	10.8%	0	0.0%	6	7.2%	0	0.0%	0	0.0%
Coast Guard	1	25.0%	0	0.0%	0	0.0%	1	25.0%	0	0.0%	2	50.0%

In FY 2017, 403 cases were referred to courts-martial: 300 sexual assaults to general courts-martial; 79 to special courts-martial; and 24 to summary courts-martial.¹⁵⁶ The following table represents the dispositions of cases for FY 2017.¹⁵⁷

Table 36
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	
Army	143	76.5%	25	13.4%	1	0.5%	10	5.3%	4	2.1%	4	2.1%
Marine Corps	31	49.2%	3	4.8%	10	15.9%	13	20.6%	4	6.3%	2	3.2%
Navy	50	56.2%	5	5.6%	2	2.2%	28	31.5%	2	2.2%	2	2.2%
Air Force	70	81.4%	6	7.0%	0	0.0%	10	11.6%	0	0.0%	0	0.0%
Coast Guard	6	37.5%	1	6.3%	2	12.5%	3	18.8%	0	0.0%	4	25.0%

¹⁵⁴ *Id.* at 19.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

VIII. 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.

Table 37 Comparison of Sexual Assaults in 2018 in Four Jurisdictions (Numbers)					
	Population ¹⁵⁸	Survey Reports	Reports of Police to FBI	Felony Clearances ¹⁵⁹	Felony-Level Convictions
New York	19,542,209	84,000 (NISVS-Rape)	6,574 (2018 UCR)	2,597 (Arrests)	183
Texas	28,701,845	118,000 (NISVS-Rape)	14,693 (2018 UCR)	4,898 (2018 Cases Filed)	394
Univ. Texas at Austin	40,804 (undergraduates)	11,425 ¹⁶⁰ (CLASE-Sexual Assault)	73 ¹⁶¹	24 ¹⁶²	Unknown ¹⁶³
Military	1,336,535 (active duty)	20,500 (WGRA-Sexual Assault)	5,805 (Unrestricted Reports)	1,845 ¹⁶⁴	311 (general courts-martial)

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

¹⁵⁸ The populations for New York and Texas are from the FBI, Criminal Justice Information Services Division, 2018 Crime in the United States, Violent Crime, Rape, available at <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/rape> (last visited Jul. 17, 2020). The DOD active duty population is from the Defense Manpower Data Center (DMDC), DoD Personnel, Workforce Reports & Publications, (June 30, 2018), available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwip9aTwssjqAhWPIHIEHaFuAKoQFjAAegQIBRAB&url=https%3A%2F%2Fwww.dmdc.osd.mil%2Fappj%2Fdwp%2Fdwp_reports.jsp&usq=AOvVaw3RMkiPKNm20qXvAwGtyeF5 (last visited Jul. 17, 2020).

¹⁵⁹ The FBI does not publish the clearance rate for states for rape; the national clearance rate for rapes is 33.4%, see *supra* n. 50-51 and accompanying text. The clearance rate for rape is not published for Texas, New York, or the University of Texas at Austin. It is calculated by multiplying .33 times the number of rape reports made to the FBI by the police. If the number of arrests is available and it is higher than the 33% clearance rate, as in the case of New York, that number is listed.

¹⁶⁰ 28% (number sexually assaulted) of 40,804 (total of undergraduates) is 11,425 (victims).

¹⁶¹ .64% (number of victims who said they reported assault to police) of 11,425 (number of victims) is 73 (victims). The University of Texas at Austin reported 37 sexual offenses in 2018. In 2017, the Austin Police Chief said 7 sexual offenses were reported to his office. For purposes of this comparison, 73 is selected.

¹⁶² In 2017, the Austin Police Chief said 7 sexual offenses were reported to his office. For purposes of this comparison, 24 is selected because it is 33% of 73.

¹⁶³ Due to the paucity of information, it is not possible to estimate the number of convictions if any that resulted from the sexual assault reported to the police.

¹⁶⁴ The military does not track sexual assault cases by arrests. In 2018, there was sufficient evidence to support the commander's action in 1,845 cases.

Table 38 Comparison of Sexual Assaults in 2018 in Four Jurisdictions (Percentages)			
	Convictions/ Survey Reports	Convictions/ Reports to Police	Convictions/Clearances
New York	.22% (NISVS-Rape)	2.8% (2018 UCR)	.07
Texas	.33% (NISVS-Rape)	2.7% (2018 UCR)	.08
Univ. Texas at Austin	.026% (CLASE-Sexual Assault)	4.1%	Unknown
Military	1.52%	5.36%	.17

The percentage of convictions compared to survey reports and police reports is much 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 rape convictions (rate per 1,000 of .014). New York with a population of 19,542,209 had 183 felony-level rape convictions (rate per 1,000 of .009).

The military with a population of 1,336,535 had 311 felony-level sexual assault convictions (rate per 1,000 of .232). The military rate per thousand of felony-level sexual assault or rape convictions for population is 17 times the rate per thousand of Texas and 25 times the rate per thousand of New York.

The military had 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 Texas.

IX. 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.¹⁶⁵ The study assessed factors which 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.”¹⁶⁶ “[S]tronger relationship bonds between the victim and offender” and more forensic evidence also increased prosecution rates.¹⁶⁷ “The more delay there was between the assault and when the survivor had the medical forensic exam, the less likely the case would progress through the system. Positive DNA evidence significantly increased the likelihood of

¹⁶⁵ The source for the information in this paragraph is A Systems Change Analysis of SANE (Sexual Assault Nurse Examiner) SANE Programs: Identifying the Mediating Mechanisms of Criminal Justice System Impact (Jan. 23, 2009) at ii-iii, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/226497.pdf> (last visited on Jul. 15, 2020).

¹⁶⁶ *Id.* at iii.

¹⁶⁷ *Id.*

case progression.”¹⁶⁸ Increased physical trauma to the victim increased the possibility that the offense would be prosecuted.¹⁶⁹

The victim’s alcohol consumption in undergraduate sexual assault cases is an important factor in the victim’s decision to whether to report 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 percent¹⁷⁰

Students said in 39.7% of the assaults involving sexual touching, that the 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.’”¹⁷¹ “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.”¹⁷²

Alcohol consumption is clearly a factor in military cases. In 2018, 62% of subjects or victims or both involved in an incident consumed alcohol. *See* next table, *infra*. 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.”¹⁷³ In the 2018 DOD Survey, 48% of victims were drinking alcohol near the time of the sexual assault.¹⁷⁴ The following table depicts alcohol use of service members near the time of sexual assault.¹⁷⁵

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ 2019 AAU Report, *supra* n. 5, at 22.

¹⁷¹ 2019 AAU Report, *supra* n. 5, at 31.

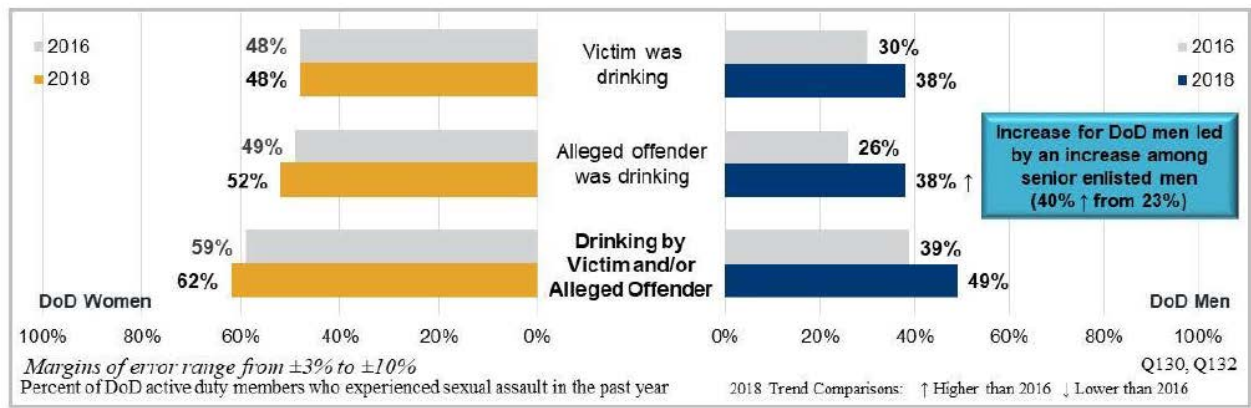
¹⁷² 2019 AAU Report, *supra* n. 5, at 78.

¹⁷³ 2018 WGRA Survey, Annex 1: *supra* n. 31, at xi.

¹⁷⁴ *Id.* at 34.

¹⁷⁵ *Id.*

Table 39
 Role of Alcohol in Military Sexual Assault Cases



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 blackout.¹⁷⁶

A person who is in a blacked-out state 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 next day and might, in fact, might regret it.’”¹⁷⁷ 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.¹⁷⁸

¹⁷⁶ In *United States v. Pease*, 74 M.J. 763, 769 (N.M.Ct.Crim.App. 2015) 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. 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. In *Pease*, 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. See also *United States v. Collins*, No. 201000020, 2011 CCA LEXIS 22 at *4-*8. (NM.Ct.Crim.App. 2011) (unpub.) (testimony of prosecution toxicology expert, Jon Jemiomek).

¹⁷⁷ *Pease*, 74 M.J. at 769. See also *United States v. Clark*, NMCCA 201400232 at *13-*17, *22-*23. (NMCCCA Jul. 14, 2015) (statements of Dr. Stafford Henry, M.D. and Dr. Thomas Grieger, M.D.).

¹⁷⁸ 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 (2016) (discussing *Pease* and other military cases where the victims were intoxicated).

The highest percentage of victims are under the age of 21.¹⁷⁹ When an underage victim (under 21 years of age) consumes alcohol, he or she may be worried about reporting because of concern about receiving adverse action for committing the misdemeanor offense of underage possession or use of alcohol and may not report the offense.

X. 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.¹⁸⁰ 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. *See* n. 2-8 *supra* and accompanying text.

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 unwilling to testify about their assault. Other cases turn out not to have been sexual assaults at all.¹⁸¹

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.¹⁸²

There are three basic defenses to rape: it never happened; it was not me; and the alleged victim consented.¹⁸³ 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.¹⁸⁴ Because of DNA evidence, and the forensic ability to establish the identity of the perpetrator, the most common defense is

¹⁷⁹ In 2018, service members ages of 17 to 20 had the highest estimated rate of sexual assault at 11.9% of any of the age military groups surveyed. 2018 WGRA Survey, Overview Report, *supra* n. 27, at 27-28.

¹⁸⁰ *See* Schenck, *supra* n. 57, at 597.

¹⁸¹ Warner & Armstrong, *Military's Handling of Sexual Assault Cases*, 54 LAW & SOC'Y REV. 265, 293-94 (2020).

¹⁸² *Id.* at 265.

¹⁸³ Evan R. Seamone, *Sexual Assault: Military Justice, Culture, and Expectations: 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*, University of Virginia School of Law, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwj13Y6FoMrqAhUFXIEHSgmBMQQFjADegQIAhAB&url=https%3A%2F%2Fwww.law.virginia.edu%2Fnews%2F2001_02%2Fzug.htm&usq=AOvVaw0ov5RbLoPdFLFOEMgkqpsO (last visited Jul. 15, 2020).

¹⁸⁴ *Id.*

consent.¹⁸⁵ One experienced sexual assault prosecutor said, “I’ve never won an acquaintance rape jury trial . . . because of skeptical jurists.”¹⁸⁶ 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 make a timely report of 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 sexual assaults; however, military victims have a much greater rate of reporting their victimization than college undergraduates or the general public. 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.¹⁸⁷ “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.”¹⁸⁸ In the civilian sector, rape defendants of a representative sample of 40 of the 75 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 13% had a prior violent felony conviction.¹⁸⁹ Additional prior criminal history information for rape defendants is depicted in the following table.¹⁹⁰

Table 40 Prior Criminal Histories of Rape Defendants in 75 Large Urban Counties					
	One	Two to Four	Five to Nine	Ten or More	Total
Prior Felony Arrests	9%	23%	14%	10%	56%
Prior Felony Convictions	14%	12%	8%	2%	36%

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ 32 CFR § 66.6(b)(8)(iii) states that if someone seeks enlistment, appointment, or induction into the Department of Defense such enlistment appointment or induction is prohibited. No waivers are allowed, if the person “[ha]s 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.”

¹⁸⁸ 2019 DOD SAPR Report, App. B: Statistical Data on Sexual Assault, *supra* n. 35, at 21.

¹⁸⁹ DOJ, Office of Justice Programs, Bureau of Justice Statistics, State Court Processing Statistics, Felony Defendants in Large Urban Counties, 2009 - Statistical Tables, NCJ 243777, at 8, 11 (Dec. 2013), *available at* <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjIhbnkqMvqAhXQIXIEHQkUB5cQFjABegQIAxAB&url=https%3A%2F%2Fwww.bjs.gov%2Fcontent%2Fpub%2Fpdf%2Fdluc09.pdf&usg=AOvVaw1zg3ZtSRLGxibkseSRmDRn> (last visited Jul. 15, 2020). The population of the 40 largest counties in 2009 was about 60,000,000. *Id.* at 36.

¹⁹⁰ *Id.* at 12-13.

Other percentages for rape defendants in 75 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%.¹⁹¹ “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.”¹⁹² The adjudication outcomes during a 12-month period for the 75 largest counties by most serious arrest charge of rape are indicated in the following table.¹⁹³

Table 41 Adjudication Outcomes for Felony Rape Defendants in 75 Large Urban Counties								
Felony Convictions			Misdemeanor Convictions			Not Convicted		
Guilty Plea	Contested Trial	Total	Guilty Plea	Contested Trial	Total	Dismissed	Acquitted	Other Outcome
50	7	57	10	1	11	24	3	5
The total of rape cases pending disposition was 412, and total outcomes for 95 cases indicated 68 convictions.								

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 Texas.¹⁹⁴ The states of New York and Texas have substantially more rape outcomes per capita than the 75 largest counties.

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 40 large representative counties containing about 60 million people. The available data suggests that DOD report sexual assault cases to the FBI using UCR criteria if it has not already done so,¹⁹⁵ and that summaries of these reports be included in the annual SAPR reports for purposes of transparency.

¹⁹¹ *Id.* at 15, 20, 22.

¹⁹² *Id.* at 22.

¹⁹³ *Id.* at 24.

¹⁹⁴ This paper should not be interpreted to criticize investigations and prosecutions in 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 “these rankings lead to simplistic and/or incomplete analyses that often create misleading perceptions adversely affecting cities and counties, along with their residents.” DOJ, FBI, Uniform Crime Reporting Statistics, UCR Topics, Caution Against Ranking, *available at* <https://www.ucrdatatool.gov/abouttheucr.cfm#> (last visited Jul. 17, 2020).

¹⁹⁵ See Department of Defense Inspector General Report No. 2015-11, Evaluation of the Defense Criminal Investigative Organizations’ Defense Incident-Based Reporting System Reporting and Reporting Accuracy (Oct. 29, 2014) at 6 (noting that statutes and Department of Defense Manual 7730.47-M (December 7, 2010) require UCR reports to the FBI; however, the reports were not submitted or if submitted were not accepted by the FBI), *available at* <https://media.defense.gov/2014/Oct/29/2001713419/-1/-1/1/DODIG-2015-011.pdf> (last visited Jul. 17, 2020).

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 nor 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, which 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 case processed in the system.

Both of those critical pieces of information will permit Congress to better assess the need, if any, to make any major, long-lasting, changes to the American military justice system.

XI. Contact Information

If we can provide any additional assistance, please feel free to contact us at the following addresses:

Professor David A. Schlueter
Hardy Chair Emeritus & Professor of Law
St. Mary's University School of Law
San Antonio, Texas 78228-8603
dschlueter@stmarytx.edu

Lisa M. Schenck
Associate Dean for Academic Affairs
Director of the National Security & U.S. Foreign Relations Law LL.M. Program,
Director of the National Security & Cybersecurity Law LL.M. Program,
& Professorial Lecturer in Law
The George Washington University Law School
2000 H Street, N.W.
Washington, D.C. 20052
lschenck@law.gwu.edu