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The Role of Military Law and Systemic Issues in the Military's Handling of Sexual Assault Cases

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Allegations of sexual assault and sexual harassment by prominent entertainment and media figures and politicians in the United States have brought renewed attention to a political debate that earlier had been focused on universities and the military: the apparent failure of institutions to address and punish cases of sexual assault by their members. In light of this debate, we consider how cases fare in an institution that is perennially accused of gender bias and of tolerating rape: the US military. Through the analysis of 585 sexual assault report summaries from the US military bases in Japan, we find that the military often tries to punish cases of sexual assault. However, many cases do not have sufficient evidence for prosecution as sexual assault cases. Low conviction rates at court-martial for reported sexual assaults may indicate systemic problems with the nature of the cases themselves and the circumstances in which the cases arise. Low conviction rates may also reflect the military's legal mandate to prioritize mission, and its legal system's multiple options for addressing crime outside of trial procedures. Case characteristics interact with the primary concerns of command authority and complainants, within a highly institutionalized, closed context, to affect the military's handling and disposition of reported sexual assault cases.

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Allegations of sexual assault and sexual harassment by prominent entertainment and media figures such as Harvey Weinstein and Matt Lauer, politicians such as Al Franken and Roy Moore, and judges such as Brett Kavanaugh in the United States brought renewed attention to the apparent failure of institutions such as universities and religious organizations to address and punish cases of sexual assault by their members. This article considers how cases fare in an institution that is perennially noted for gender bias and accused of "tolerating rape": the US military (Katzenstein and Reppy 1999; Morris 1996; Stiehm 1989; Wood and Toppelberg 2017). Indeed, in the aftermath of allegations of sexual assault and harassment by Navy and Marine service members at the annual Tailhook conference in 1991, only six of the 140 junior officers initially referred for investigation faced a court-martial; charges against the six were later dropped. None of the twenty-nine admirals implicated faced charges. Observers denounced the Navy's apparent official tolerance of sexual assault and harassment (Rich 1994). After numerous Congressional hearings and media investigations of military sexual assault in the years since Tailhook, the latest data from the military look little better. Of 6,053 reported cases of sexual assault in 2018, in only 10 percent did alleged perpetrators face court-martial (SAPRO 2018: 8, 18). The institution's unwillingness to prosecute sexual assaults appears obvious. US Senator Kirsten Gillibrand has decried a "failing military justice system," and US Representative Jackie Speier has called for "severe and immediate punishments" of alleged perpetrators (Gillibrand 2017: 9; Speier 2017).

Furthering criticism, an assessment of hundreds of sexual assault cases found that the military's handling of them was "chaotic" (Kageyama and Gardner 2014); another found that 62 percent of victims who reported unwanted sexual contact to military authorities have experienced retaliation (Judicial Proceedings Panel 2016a: 11). US Senator Martha McSally revealed in 2019 that she had been raped by a superior officer while serving in the Air Force and that she had felt pressured to remain silent (US Senate Committee on Armed Services 2019: 11). Many have questioned the military's commitment to addressing sexual assault, implying that the military could get more convictions if it wanted to (Rhode 2016). Similar comments have been made about other prominent institutions' handling of cases (Weaver 2017). Few systematic studies explore this issue in the military. Using a set of 585 case reports from the US military bases in Japan, we ask, how does the military process sexual assault cases? What are the reasons the military handles cases in the way that it does, and do those contribute to the discrepancy between reported

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cases of sexual assault and actual conviction rates? Do biased views about gender and rape affect case handling, and if so, how?

The question of why sexual assault cases in general and in the military in particular seldom result in convictions for the alleged crimes is larger than any one paper can address. One important step is to see what such cases look like and what aspects of them seem to lead to fewer convictions for sexual assault. The media, Congress, and scholars have mostly focused on scandals, such as Tailhook or the Lackland Air Force Base sexual assaults of trainees. That more narrow view may exclude how sexual assault cases in the military typically are handled. Rather than inferring from aggregate statistics or a handful of egregious cases that the military does not prosecute sexual assaults, we analyze almost 600 case reports from US bases between 2005 and 2013, to investigate whether the military tries to, and why it might not in many cases.

To preview our conclusions, the US military often tries to adjudicate and punish reported cases of sexual assault. However, similar to civilian cases, many cases are deemed as lacking in grounds for prosecution as sexual assault cases. The reasons for that are multiple and raise systemic issues, some of which are gendered, and some less so. While thorough information on the military's handling of sexual assault cases is limited, the case reports indicate that, first, just as much of the literature on sexual assault would expect, aspects of what is often termed "rape culture," such as victim blaming, skepticism about the victim's claims, and a view that sexual aggression is normal, can affect proceedings. Second, a nonnegligiable percentage of cases turn out not to be within the military's jurisdiction. Third, court-martial proceedings have high standards of evidence and must hold to strict rules protecting due process. Ambiguities or lack of evidence and lack of witnesses in many cases appear to preclude formal prosecution. Fourth, the military has alternative disposition options that enable punishment outside a formal trial procedure, and can be used when evidence is insufficient for a court-martial. Fifth, both typical prosecutorial concerns about quality of evidence, severity of the crime, and impact on the community (Steffensmeier et al. 1998: 766–8; Spohn & Tellis 2019) and military-specific concerns about "good military character" and mission readiness are formalized as requirements in the military's legal system itself. This can lead to fewer trial prosecutions. In addition, the Uniform Code of Military Justice (UCMJ) has been changed several times in less than a decade, leading to varying charging decisions. Our military case data indicate that the problem is less that of the military largely ignoring reported sexual assaults than that sexual assault in any context, including the military, is difficult to prosecute. It is exacerbated by the military's closed structure and the focal concerns

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institutionalized in its criminal justice system. To say this is not to excuse the military from its responsibility to prevent as much as possible sexual assaults and prosecute those that occur.

The paper's examination of how the military handles cases that have been formally reported sheds light on one important aspect of sexual assault in the military, and in institutions more generally. Until now, scholars have not had substantial empirical evidence of where the problems lie in the military's system. This article provides that, and is a necessary first step in a long-term research agenda. Other issues, such as consequences for the victim's health and career, and the military's actions to prevent assaults and to encourage more reporting, are beyond the scope of this article. By examining how the military handled reported cases of sexual assault over approximately ten years, this article documents the constraints inhering in the military justice system in getting convictions for sexual assault, and illuminates possible biases embedded in military law. It underscores the prominent role the sociolegal context has on case disposition. It advances knowledge of the impact of focal concerns by highlighting the likely "downstream orientation" not just of those with investigative or prosecutorial authority but also of victims. Given the paucity of knowledge about the military's criminal justice system, the paper contributes to a better understanding of the system's particular features, as well as some similarities to civilian systems (Breen and Johnson 2018).

The article proceeds as follows. We first provide background to our research questions. We then describe our research methods and some basic features of military law. The third section presents the quantitative data on the cases, classifying them according to how they were disposed of. The fourth section presents the main factors that seem to affect case disposition; the fifth discusses the issues, gendered and other, that are raised by those factors, such as victim withdrawal from participating in the investigation and/or prosecution, or alcohol use obfuscating memories of events. Since some of those issues are shared by civilian systems, we also discuss what aspects of the military might be unique or might heighten effects. In the conclusion, we present some thoughts on the challenges to prosecution and conviction, particularly in the military but also generally, that sexual assault cases present, and how sexual assault in the military, and in other institutions, might be better understood and addressed by scholars, the media and public, and Congress.

1. Background

Sociolegal approaches to the study of criminal justice systems draw attention to the socioeconomic and/or political context of the

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system and the roles of those within it (Black 1989; Saguy 2018). Research in this vein has investigated the impact of the broader social context on legal systems and it has investigated the impact of legal systems on societal outcomes, such as the mass incarceration of men of color, or how workplace antidiscrimination and harassment laws merely seem to perpetuate the problems they were intended to solve (Berrey et al. 2017; Friedman 2005; López 2010;). It has less often been extended to study institutions with their own internal criminal justice systems, such as the US military (Breen and Johnson 2018; Warner 2019). In these systems, the structure and mission of the institution within which the criminal justice system operates affect what are termed the "focal concerns" of those with prosecutorial authority. What the criminal justice personnel see as prominent in a case, their focal concerns, are influenced by "their specific roles and responsibilities in the system" (Campbell and Fehler-Cabral 2018).

These theoretical perspectives focus our attention on the structure and mission of the military and the responsibilities of those with investigative and prosecutorial authority. The literature on militaries has long pointed out a key feature of militaries in democracies: they are, to use Peter Feaver's term, "armed servants" (Feaver 2003). They are unique among all agencies in democratic governments in their role of deploying organized violence when authorized by political leaders in the name of national defense (Avant 1998; Barany 2012; Weigley 2004). To facilitate that mission, the US military has its own comprehensive legal and penal system intended to balance "the meting out of justice and the performance of military operations," as the then Secretary of Defense James Forrestal explained in 1949 (US House of Representatives 1949: 597). The legal system is intended to be both a tool of justice and a tool of military commanders to ensure operational capability. The focal concerns theory would expect some cases to be closed without conviction for sexual assault due to commander concerns about convictability, severity of the alleged crime, and impact of the crime, its prosecution, and punishment on the commander's unit (Steffensmeier et al. 1998: 766–8; Frohmann 1997: 535).

Congress retains constitutional authority to revise that system; in 1950 it consolidated military law into the Uniform Code of Military Justice (UCMJ), and included new due process of law procedures for courts-martial, to limit summary justice and protect the rights of the accused (Hillman 2005; New York Times 1950). Congress writes and authorizes any changes to the UCMJ. Service members are, with few exceptions, governed by its provisions.

Another contextual feature is that the military is a highly gendered institution. It is a male-dominant institution, with what is often termed a "hyper-masculinized" culture (Belkin 2012; Enloe

2007; Hillman 2005).[1] The research on gender biases in charging decisions in civilian jurisdictions for sexual assaults leads us to expect that commanders would routinely fail to take action on sexual assault cases despite compelling evidence (Spohn et al. 2014; Venema 2016). Officials would view cases through the gendered lens of rape myths (Spohn and Tellis 2012; Venema 2016), with victims revictimized and perpetrators seldom held to account (Campbell and Fehler-Cabral 2018; Shaw et al. 2017; Venema 2019). Research on civilian systems has also found that subtle biases do lead victims to report late and withdraw from the subsequent case investigations (Anders and Christopher 2011).

Gender bias could be insidious. As feminists have argued, "many women's 'ordinary' sexual experiences involve elements of dominance, power and coercion" (Lea & Auburn 2001: 12). The military's sexual assault laws, written by Congress, may perpetuate gendered interpretations of sexual relations that already are likely to be colored by the prevailing societal scripts people use to understand sexual actions between adults (Chappell 2010; Connell 1987: 128; Gavey 2005: 131; Hillman 2009; Muehlenhard et al. 2016).

To study how the military handles sexual assault cases is also to study how a "total institution" handles such cases. The US military, as an institution controlling its members' lives, is what Erving Goffman (1961) called a "total institution," and what others have described as "closed." In such institutions, abuse tends to be easier to perpetuate, institutional loyalties may impede fair adjudication of cases, and victims have no or very limited external recourse (Brenner et al. 2017: 140–3; Brenner and Darcy 2017; Palmer and Feldman 2017). To our knowledge, there has not yet been a systematic study of a large number of case reports in the military to see if its features affect case disposition. In a first-of-its-kind study, we evaluate the military data in light of these findings in the literature on civilian systems.

Turning to the scholarly research that speaks to the question of how the US military handles cases of sexual assault, Wood and Toppelberg (2017) ask why sexual assaults persist in the military despite formal programs to reduce it. Citing estimates from surveys of active duty service members of occurrences of sexual assault of somewhat less than 5 percent for women and about 0.6 percent for men, or about 14,800 out of 1,500,000 active duty service members in a calendar year, and describing four very disturbing cases, they argue that informal socialization processes teach enlisted service members that sexual assaults are acceptable,

[1] Women make up about 15 percent of service personnel, and 17 percent of the officer corps.

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and formal socialization processes of officers encourage gender biases such that officers turn a blind eye to sexual assaults. Even when cases are reported, officers allegedly sweep them under the rug. Josh Cerretti argues that the military is infused with sexual violence against its female members and that women are obligated to accept it, in exchange for acceptance into the fraternity that is the US military (Cerretti 2016). As a result, officers tolerate assaults and dismiss those that are reported.

By contrast, legal scholars using analyses of statistical data and legal codes have argued that the military does a more thorough job of investigating and prosecuting cases than is reflected in media reporting and in Congressional debates (Carpenter 2017; D'Ambrosio-Woodward 2014; Schenck 2014). Research that investigates outcomes once charges are formally leveled ("preferred") against an accused has found relative consistency in convictions and punishments: for instance, penetrative sexual assaults, and attempts to commit them, are punished more severely, on average, than nonpenetrative assaults (Spohn 2016).

The conflicting perspectives in the literature lead us to the question of what the military does once sexual assault cases are reported. Statistical data on military sexual assault that scholars have used in the past do not reveal details of the alleged assault events, nor what happens in the processing of cases. This article presents a systematic analysis of the content of reported cases.

In the military since 2005, cases can be restricted or unrestricted, depending on the reporting preference of the victim, though there are exceptions. A case in which the victim elects to make a restricted report allows the victim to receive medical care, counseling, be assigned a victim coordinator, and have a sexual assault forensic exam, without triggering an investigation. The report collects no details about the assault. The commander is not notified of the victim's identity, only that an assault allegedly occurred. The block on an investigation is meant to preserve the victim's privacy while allowing the victim access to care, and a sexual assault exam. The restricted report limits to whom the victim may speak about the assault, and the reports are not available to the public through Freedom of Information Act (FOIA) requests.[2] The victim may, at any time, convert the report to unrestricted, triggering an investigation. If the commander or military police learns of a suspected assault from others, or if they think there might be a serious threat to unit or individual safety, they must mandate a conversion of the report to unrestricted in order to

[2] http://responsesystemspanel.whs.mil/public/docs/Background_Materials/Requests_For_Information/RFI_Response_Q119.pdf

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investigate. Our data set therefore includes only unrestricted reported cases.

For an unrestricted report, the basic process that applied during the years of our data is that once such a report is made, the unit commanding officer of the accused starts an investigation, conducted by the investigative unit of the service branch involved. When the investigative unit has completed its work, it conveys a report to the commander. The commander, after reviewing the advice of their legal counsel or the lead investigator, decides how to dispose of the case. The commander has a number of options, more so than a public prosecutor, that we describe below. Depending on certain circumstances, the case may go up the chain-of-command (Morris 2010: 53–4). If the qualified commander refers the case to court-martial, the commander becomes the "convening authority" and selects the jury. At the end of a court-martial, and subject to certain conditions, the commander can overturn a guilty verdict of the jury and/or reduce or eliminate the penalty imposed, if there was one.

In deciding whether to go forward with a case to court-martial or make another disposition, commanders are required to take into account possible effects on unit readiness, discipline, order, and accountability (Joint Services Committee on Military Justice 2012, II-25-6). Now subject to certain limitations, the commander may consider the reputation or "military character," of the accused, and military character may be introduced as a defense in a court-martial. Commanders can defer or limit action on "collateral misconduct" of victims, such as underage drinking or fraternization (Response Systems Panel 2014: 129, 126, 102). In prosecuting cases at court-martial, the government (prosecutor) faces the same standards as civil criminal courts in having to prove each element of the case against the accused beyond a reasonable doubt. Military law thus structures commanders' focal concerns.

There are two other formal processes through which disciplinary action can be taken (Morris 2010: 148–173). One is Non-Judicial Punishment (NJP), described in Article 15 of the UCMJ. In the Navy, it sometimes is referred to as captain's mast. The other is administrative action. NJP is a powerful tool for cases that are not substantiated enough and/or severe enough to go to court-martial (Branum 2014). For NJP cases in which the accused is found guilty, punishment can include confinement for a short period, as well as numerous other penalties, such as extra duty, and/or loss of pay. Administrative action can include a formal reprimand, mandatory counseling, or involuntary separation from the military, including dishonorable discharge. The military views administrative action as a useful tool for changing behavior, and for providing some discipline when the commander determines

that a case does not warrant or the evidence does not support more severe action. Both formal processes are viewed as consequential for the accused's career in the military and, often, for life as a veteran. For instance, a discharge that is "other than honorable" may jeopardize the individual's access to veteran's benefits, and can be detrimental to finding steady employment (Moulta-Ali 2015: 3–4; Kintzle et al. 2015).

2. Methods of Study

Studying sexual assault in the military has been hindered by a lack of access to case reports that detail what the case was about and what the military's disposition decisions about it were. Our inductive study takes advantage of all 585 case report summaries by the US Department of Defense's Naval Criminal Investigative Service (NCIS) of sexual assault reports from the US military bases in Japan, from 2005 to 2013, that the Associated Press (AP) collected from NCIS through FOIA requests and posted online (Kageyama and Gardner 2014). NCIS is the military entity responsible for the intake and final summary of reports of sexual assault involving service members, in any way, connected to the US military bases in Japan. The case reports are available on the lead author's web pages. [3] We analyze this data set of military sexual assault case report summaries because it was the only one publicly available. Even US Senators have had difficulty getting case report data on sexual assaults from the Department of Defense (Gillibrand 2015: 2).

For convenience, we sometimes refer to the cases as the "Okinawa cases," since most of the US bases in Japan are on the Japanese island of Okinawa. Given the strategic importance of the US bases in Japan, and the well-publicized perception that the US military in Japan sweeps cases of sexual assault under the rug, studying how such cases are handled there is in and of itself worthwhile. Yet our study is not strictly limited by the findings being based on cases from the bases in Japan. While the data are from that particular locale, military officials and representatives in victims' organizations to whom we spoke said there was nothing peculiar about how cases under the jurisdiction of the US bases in Japan are handled, save that most cases would involve the Navy and Marines.

Comparison with data from the entire US military indicates there is nothing unique about the situation or handling of sexual

[3] The 585 case reports are available at https://carolynmwarner.com/military-sexual-assault-case-reports-from-us-bases-on-japan-2005-2013/

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assault by the military in Japan. For the military, between 2005 and 2013, the dates of our data set from NCIS in Japan, there were 22,365 unrestricted reports and 6567 restricted reports of sexual assault (SAPRO 2013: 10). Data by bases/ships/deployments are inconsistently reported by the DoD, so it is not possible to see whether the twenty-three bases in Japan have, on average, more or fewer reports of sexual assault than other bases. Our 585 cases from bases in Japan account for about 2.5 percent of total unrestricted reports of sexual assaults in the military from 2005 to 2013. To reiterate, we have these 585 cases from the US bases in Japan because those were the total unrestricted cases reported to the military involving servicemembers connected to US bases in Japan for the period 2005 to 2013. To give some sense of scale, across that time period, total active duty service members remained fairly constant at around 1,400,000 per year, and total reservists around 1.1 million (Department of Defense 2013: 14, 90). There are approximately 50,000 active duty service members stationed in Japan, or about 3.5 percent of all US service members, with others on ships that may come into a US port there. Some cases involved incidents alleged to have occurred elsewhere but reported later by a service member in Japan. Lacking more precise data, it appears that the proportion of sexual assault reports for the bases in Japan was not worse than for the overall servicemember population. This is not to condone assaults, but to note that the US bases in Japan do not appear unusual compared to the rest of the military. There is frequent rotation and turnover throughout bases and assignments worldwide, making it more likely that policies and procedures reflect those of the military more broadly, rather than that of a particular base culture. Adding to our confidence in the usefulness of the data is the fact that for common categories of case dispositions, the statistical trends found in this study are similar to those found by the Associated Press and in DoD reports (Kageyama and Gardner 2014; SAPRO 2013: 79; SAPRO 2018; Judicial Proceedings Panel 2016b).

Most of the reports are one to two pages long. Individual identifying information is redacted. Military investigators initially classified the cases under the categories of indecent assault, sexual assault, rape, indecent exposure, or special inquiry. Those classifications may vary in specificity and consistency depending on the investigator, their training and experience, and what the victim and/or other witnesses initially said happened. Though the US bases in Japan have mostly been associated in the public's mind with cases of US service members assaulting Japanese civilians (Kovner 2013), the overwhelming majority of our cases are of

service member to service member. The case reports did not always identify whether the victim or perpetrator was a service member, but the available information indicates that at least 70 percent of victims were service members and at least 80 percent of suspects were service members. There is no information on the race or ethnicity of the accused or accuser. It is possible cases involving Japanese civilians are even more underreported than cases involving only service members, due to fear by Japanese civilians that their cases will not be taken seriously (Johnson 2004: 34–47; Kovner 2012: 149–51).

There are limitations to the data set. First, data about the actual universe of cases of sexual assault in any given time period do not exist: not all assaults or suspected assaults are reported. Nevertheless, because of claims the military does not prosecute reported cases, and because perceived failings to do so are given as one reason service members might not report at all, it is important to investigate how the military handles *reported* sexual assault cases. Second, although our analysis does not provide information on how all the service branches handle sexual assault cases, the scenarios and dispositions are not unique to the Navy and Marines. One statistical study found no significant differences in likelihood of conviction for sexual assaults across the four major service branches in 2015; it is unlikely there were differences earlier as the services had not fundamentally changed their processes between 2005 and 2015 (Spohn 2016: 17).

Third, no information is available about the quality of the NCIS investigations. In 2013, a government review of formal investigations of sexual assaults within each service branch found 89 percent met or exceeded DoD standards, while 11 percent had significant deficiencies (Inspector General 2013). Testimony at an independent US federal review panel indicates it is the *defense* counsel that has lacked investigative resources (Judicial Proceedings Panel 2017a).

Fourth, case reports summarize what happened and include some quotes from those interviewed for the case but they do not include full records of case proceedings, such as complete transcripts of victim interviews, witness and accused statements, and trial transcripts. They do not include the investigation reports and disposition recommendations that commanders would have been provided prior to their making decisions on case dispositions. The case reports do not state the rank of the victim and usually do not indicate the rank of the accused, thus we are not able to assess whether the military protects higher-ranking perpetrators at the expense of lower-ranking victims.

Given these limitations and the paucity of past research using case reports, our qualitative and quantitative approach is deliberately

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inductive and descriptive. Though the 585 cases are not a random sample from which we can generalize to all cases of military sexual assault, the data do let us go beyond analyses based on single cases or base-specific scandals that make headlines. The data also enable us to asses the case narratives that underlie reports, yielding more information and insight than do estimates from survey data. With the case reports, we make four significant contributions. First, we identify issues for policy interventions; second, we identify areas for future research that could target a sub-set of cases, conditional on FOIA access; third, we provide a nuanced understanding of how and why the military handles sexual assault cases as it does; and fourth, we contribute to the nascent literature on military justice systems while applying sociolegal, focal concerns approaches to this area.

We use a variety of terms to denote the person who may have been assaulted, such as victim, alleged victim, accuser, and complainant. We recognize that many of those who have suffered a sexual assault prefer the term "survivor" to that of "victim." By using "victim" in the place of "survivor," we use terminology consistent with the case reports and the DoD data.

The 585 cases from the US bases in Japan span two major changes to the punitive articles applicable to sex crimes under the UCMJ. For the descriptive statistics, we use a definition of sex crimes that incorporated the various crimes punishable under the three different versions of Article 120 that applied between 2005 and 2013, and a previous version of Article 134 that punished indecent assault. This definition corresponds to the military's Sexual Assault Prevention and Response Office's (SAPRO) classification of behaviors that it terms "sexual assaults." It includes

> Rape, sexual assault, indecent acts/conduct, indecent assault, indecent exposure, assault with intent to commit rape/sodomy, forcible sodomy, aggravated or abusive sexual contact and attempts to commit these sexual offenses.

The severity of the crimes falling under this definition varies widely. It includes, for instance, both a gang rape and an attempt of indecent exposure, crimes that are clearly quite different in their severity and in their potential impact on the victim. Nevertheless, each crime is distinguished by the nonconsensual nature of the sex act. The case reports do not provide uniform information about specific charges; sometimes charges are only mentioned when the accused is convicted at court-martial, and other times not at all. Charges are only formally "preferred" to court-martial. Alternative venues for discipline, administrative action and nonjudicial punishment, do not require charges to be preferred. Because this is a first assessment of how the reported cases

were handled, analyzing the collective disposition of the wide range of sex crimes is informative of general processes.

Each report was read by a researcher and classified according to variables that either frequently surfaced during the reading of the cases or that the literature suggested might be significant.[4] Category classifications were revised when further nuances were discovered. We did not classify the alleged crimes themselves. For that, we used the military's initial and final determinations. When, in the report summary, certain factors of a case were disputed, case categorization aimed to reflect the victim's version of events. For example, if the victim claimed he or she was unconscious and the perpetrator claimed the victim was conscious, the case was coded as "victim unconscious." The format of each case report varied because reports were written by different individuals. It is possible that some of the assumptions made about the cases may be incorrect because certain information was omitted by the report's author. A case was only categorized for what was explicitly designated in the case report. It is possible that commanders took discretionary punitive action outside of the formal investigation, and if those actions were not recorded in the report, then they are not reflected in the disposition data. The authors discussed difficult cases and categories in order to facilitate more systematic classification. Those mostly were in determining whether a victim declined to participate in the investigation immediately or whether the victim decided to withdraw later, and whether the victim was unconscious at the time of the alleged act(s).

3. Quantitative Evidence

In this section, we present descriptive statistics about how the military disposed of reported cases of sexual assault. We divide the cases into three broad categories, cases in which action was not possible at all; cases in which some action was theoretically possible but there was no formal disposition; and finally, cases that went through a formal disposition (e.g., a court-martial). Of the latter cases, we quantify the different kinds of punishments they received (if any) and whether the punishment was for a sex crime.

While not the point of the article, we comment briefly on comparing outcomes to civilian systems. Though many issues are similar, the data are not comparable (Judicial Proceedings Panel 2016b: 52–3). For the time period of our data, at the federal level, the FBI's Uniform Crime Reporting only collects reports on

[4] The detailed case coding procedures and case classification spreadsheet are at https://carolynmwarner.com/military-sexual-assault-case-reports-from-us-bases-on-japan-2005-2013/.

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"founded" cases of rape and attempted rape against women (not men); that is, cases that the police services concluded had sufficient evidence to substantiate an allegation that a rape had occurred. The DoD, including our cases from the US bases in Japan, collects data on *all* reported cases of sexual assault, including but not limited to indecent exposure, nonconsensual sodomy, wrongful sexual contact, as well as rape and aggravated sexual assault. Those reports include cases that later are determined to be unfounded or otherwise precluded command action. To our knowledge, there is no comprehensive database on sexual assault reports and prosecutions at the level of the fifty US states or subjurisdictions. Criminal statutes and procedures vary extensively across the states and so too does the point at which a study examines the process (Alderden and Ullman 2012; Spohn et al. 2001; Spohn et al. 2014). Compounding the difficulty of comparing prosecution results between civilian systems and the US military are the existence of Non-Judicial Punishment and Administrative Action in the military justice system. Finally, our goal is not to determine whether the military is doing "better" or "worse" than civilian systems, but to see how and why sexual assault cases are processed as they are within the military. With so little known about how the military handles cases, the article advances the limited research in this area, and extends the application of sociolegal and focal concerns theories to the military criminal justice system.

The case classification material, summarized in the flow chart in Figure 1, shows that *action was not possible* in approximately 19 percent (113) of cases. Cases were in this category for any number of reasons: no suspect could be identified; the case was out of the military's jurisdiction; the report only detailed a limited

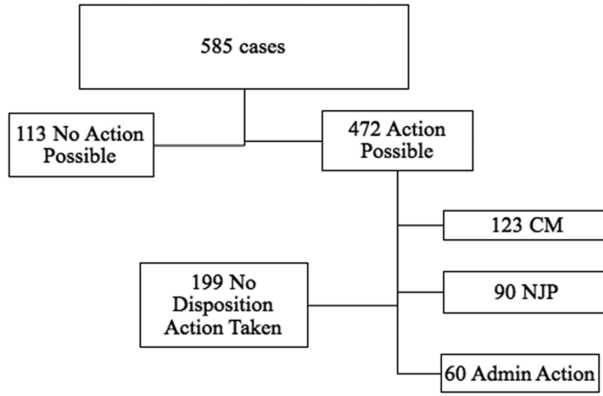

Figure 1. Case Flow Chart. CM: Court-Martial; NJP: Non-Judicial Punishment; Admin Action: Administrative Action.

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request for assistance, the report was originally made by a third party and the alleged victim denied the assault had occurred, or other noted issues. While contributing to the statistics on reports of sexual assault, almost 20 percent could not be acted upon at all, save with an initial investigation which then determined that there was nothing that could be pursued.

Of the 472 cases in which *some action was theoretically possible*, there were 199 cases (34 percent of 585 total reports; 42 percent of 472 actionable) for which there was no documented formal disposition in the form of a court-martial, nonjudicial punishment hearing, or administrative hearing, and thus no documented military punishment. These 199 cases include 17 for which it is explicitly stated there was a preliminary hearing, after which formal charges were not brought ("preferred") against the accused. These statistics, showing that almost half of actionable cases had no formal action taken on them, may seem to lend credence to critics of the military who argue it does not take prosecution of sexual assaults seriously. We return to this point in our qualitative analyses.

Of the remaining cases for which some action was theoretically possible, 273 (47 percent of 585 total reports; 58 percent of 472 actionable) *had some formal disposition*: they went to court-martial, nonjudicial punishment or received some form of administrative hearing or action. The DoD categorizes these cases as those for which a charge was substantiated (SAPRO 2016: 16, 21). As Table 1 shows, of these 273 cases in which there was some formal disposition, 123 went to court-martial, 90 went to nonjudicial punishment and 60 received some form of administrative action. Because it is possible for a case to go to nonjudicial punishment or an administrative hearing and for a commander, after getting more information, to decide to take no action, or for a case to go to court-martial and the accused to be acquitted, 22 of the 273 were not punished by the military.

Of the 273 cases that had a formal disposition, 251 cases *received punishment*. Eighty-six of these cases were punished for a sex crime, 131 were not punished for a sex crime but for something else, such as assault (nonsexual), adultery, underage

Table 1. Formal Dispositions. Percentages of Cases in Different Categories

	% of 273 Cases that Received Disposition	% of 472 Actionable Cases	% of 585 Total Cases
Court-martial (123)	45	26	21
NJP (90)	33	19	15
Administrative Action (60)	22	13	10

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drinking, or failure to obey a lawful order (Table 2). In thirty-four cases, the case report did not state what specifically the punishment was for. Of the eighty-six punished for a sex crime, fifty-two received confinement as part of the penalty.

The form of punishment, regardless of which crime the punishment was for, is listed in Table 3. In many cases, types of punishments were combined, thus the percentage of cases that received a form of punishment totals to well over 100 percent. In other words, an individual might receive a reduction in rank/pay grade as well as extra duty, and be subject to pay forfeiture.

We see that about 13 percent of total reported cases, and about 31 percent of cases with a formal disposition received a prison sentence (confinement) as all or part of their punishment. We also see that of the 251 cases for which there was some sort of punishment, roughly a third were punished for a sex crime (and, out of the 585 reports, they constitute 15 percent of cases).

In summary, about one-fifth of reported cases could not be acted upon at all; about a third of reported cases had no formal disposition and not quite half faced some formal disposition, with all but twenty-two of those cases receiving some sort of punishment, the majority for nonsex crimes. In reviewing these statistics, one can see why the military faces criticisms for its handling of sexual assaults: of 585 reports of sexual assault, there were convictions for sex crimes in only eighty-six of them. That set of figures does not tell us what factors may have led to such a result. The case reports help provide some perspective on these numbers, and we now turn to them.

4. Case Studies

A closer look at what happens in cases reveals some of the problems in prosecuting sexual assault in the military. Those readers familiar with sexual assault cases in civilian legal systems will recognize many of the issues. We present some of the factors that appeared to complicate prosecutions, and in Section 5 discuss

Table 2. Sex Crime Punishment, Percentages of Cases in Different Categories

	% of 251 Cases that Received Punishment	% of 472 Actionable Cases	% of 585 Total Cases
Punishment for Sex Crime (86)	34	18	15
Punishment for Nonsex Crime (131)	52	28	22
Crime Corresponding to Punishment Not Stated (34)	14	7	6

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Table 3. Forms of Punishment, Numbers, and Percentages of Cases

Form of Punishment	Number of Cases	% of 251 Cases that Received the Form of Punishment	% of 585 Total Cases
Reduction in Rank/Pay Grade	143	57	24
Reprimand/Counseling/ Nonpunitive or Punitive Letter/Training/Probation	50	20	9
Restriction/Community Service/ Extra Duty/Suspension/Hard Labor	82	33	14
Confinement	77	31	13
Administrative Separation/ Dismissal/Discharge	86	34	15
Fine/Pay Forfeiture	135	54	23

the broader issues these factors raise about sexual assault in the military and what they may indicate about the nature of sexual assault. We elaborate below on the different paths of cases and case characteristics. We stress that there is no archetypal case for each disposition or for each type of issue that we saw in the full collection of cases. Those presented are merely illustrative of major issues. We invite readers to access the case reports.[5] Individual case reports are denoted in the text, and locatable in the data set, by their military-assigned case number and the PDF file number they are in. For instance, a case identified as 736017 PDF1 refers to a case report summary the military labeled 736017 on intake, and which was in the PDF document number 1 that the Associated Press received from NCIS.

4.1 Action Was Not Possible

The case files show that some cases are not actionable. Such cases are often characterized by a delay in the reporting of the alleged sexual assault, by the person to whom the alleged event happened declining from the start to participate in the investigation, by the lack of a suspect, and/or by the alleged victim denying outright that they had been sexually assaulted (e.g., C85780 PDF2; 602061 PDF4). It sometimes happened that even with rapid reporting and victim participation, investigators were not able to specify ("develop") a suspect (e.g., 200799 PDF1). In other cases, the time lag may have affected the military's ability to take action. For instance, in one case the complainant reported that she had the impression she had been sexually assaulted three months earlier. She could not remember where or when the assault may have happened, who might have been the

[5] The 585 case reports are available at https://carolynmwarner.com/military-sexual-assault-case-reports-from-us-bases-on-japan-2005-2013/

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perpetrator, or whether there were any witnesses. The complainant then stated she did not want to participate in the investigation. As the case summary stated, "Due to the lack of information into the identities of the alleged suspect, witnesses, and location, there are no logical leads to pursue" (198387 PDF7, 2). The time lag in reporting, the inability to identify any of the elements investigators would need to pursue the case, and the victim's decision, after first reporting the incident, not to participate in an investigation combine to result in a reported case that is not prosecuted—because it cannot be.

Other cases are out of the military's jurisdiction to prosecute. One example was a case reported in 2010 of an alleged rape in 2008. When NCIS determined that the suspect was not, in 2008, in the military, they could only refer the case to local police, who declined to proceed further (205176 PDF2). In another case, in which a service member reported having been assaulted by four or five "local nationals," it was determined that jurisdiction lay with the local Japanese police department (C44063 PDF4). NCIS assisted with the investigation but the military could not take formal action.

What the 113 case reports (19 percent of the 585 cases) in this category show is that within the statistics on sexual assault in the military are reported cases that cannot be acted upon. This is not to deny that there may be gender dynamics creating the situations that led to the cases, and that the military needs to improve prevention efforts. The case reports do not enable us to assess those factors. What they do show is that not every report of sexual assault is actionable by the military.

4.2 Action Theoretically Possible but No Formal Disposition

Cases placed in this category included those in which action was theoretically possible but there was no court-martial, nonjudicial punishment, or administrative action taken. About 34 percent of the 585 total were in this category (Figure 1). Cases in this category reveal a number of issues. One is, again, the time-lag in reporting, which limits the type and quality of evidence that can be obtained. An example is a case from 2005, in which a service member waited five months before reporting an alleged assault of sodomy (244294 PDF1). It was not possible to conduct a sexual assault exam nor was other physical evidence available. During the investigation, the suspect stated that the action had been consensual. The case was closed for lack of evidence. Sometimes the time lag in reporting is compounded by other aspects of the case.

Even when a case is reported immediately and a sexual assault exam is done, and in which there is an identified suspect, physical

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evidence may not corroborate an accusation. In one case, a service member reported she believed she was sexually assaulted after going to several off-base nightclubs where she became intoxicated (479413 PDF, 4). The complainant later visited an on-base Enlisted Club. The next thing she remembered was waking up in the morning naked in the bath tub in her barracks room. She underwent a sexual assault exam. Evidence, including DNA, was collected from an identified suspect but the DNA did not match. The report states that the command took no action "due to a lack of physical evidence and inconclusive testimony."

Third, even with physical evidence of sexual penetration, the interpretation of what the sex act constituted often depends on whether the complainant's account can be corroborated (Schenck 2016: 543). There are seldom witnesses to an alleged assault. In one such case, a DNA test confirmed the sex act in dispute between two individuals. The accused and accuser had different descriptions of the event. With different versions of meaning of the sex act, and no other evidence, it appears the military had no way to determine which account was valid. After a preliminary investigative hearing (Article 32), the case was closed (565033 PDF1). Cases also may be closed with no further action when difficulty in interpretation of the sexual act is compounded by a complainant admitting they deliberately provided false information about aspects of the events (181454 PDF1). With cases having to meet the "beyond a reasonable doubt" criterion for conviction at court-martial, many cannot be prosecuted, and may lack sufficient evidence for other dispositions.

A fourth factor that seems to contribute to many cases not being prosecuted is victim withdrawal from a case: the alleged victim reports a sexual assault, then decides not to continue cooperating with the investigation. Of 199 cases with no formal disposition though action was theoretically possible, eighty-three involved the complainant withdrawing cooperation and four refusing to participate from the start (e.g., C111476 PDF2; 814649 PDF7; 336800 PDF6). Without the key witness, such cases can be difficult to prosecute as sexual assaults.

Sometimes the person who reports having been assaulted recants. In most instances, that means there is insufficient evidence to warrant any formal disposition. Of the 199 cases in which action theoretically was possible but there was no formal disposition, in 32 (16 percent), the complainant recanted their accusations. For instance, in one case that was compounded by a three month time-lag in reporting, a service woman said she "might have been raped." During a follow-up interview with NCIS, she revealed she instead had agreed to have sex with a sailor, assuming they would become a couple in a romantic

relationship. When the man "subsequently informed her he was not interested" in that, she said she "felt taken advantage of." There were no bases for criminal charges, so the case was closed (460393 PDF 7; see also 986372 PDF7; 569109 PDF7). In another, a woman admitted to fabricating a rape claim in order to cover up her infidelity to her husband (384944 PDF7). In some of these recantation cases, the complainant was investigated and punished for making false statements to investigators (e.g., 26112 PDF4; 067542 PDF6).

Alcohol affected many of the cases in a variety of ways. Of the cases with no formal disposition, 93, or 47 percent, clearly involved alcohol. One example is a case from 2007, in which the complainant reported eight months after the incident allegedly occurred that she had been raped by a fellow service member after a night of heavy drinking by both (197671 PDF2). The complainant could not remember whether the accused actually had penetrated her or had done other sex acts to her. The suspect stated sex had been consensual; the victim ultimately withdrew her participation in the case. The commander took no action due to the inability to establish whether a crime may have occurred. Alcohol appears to have been a primary contributor to the ambiguity of the case and the inability of investigators to substantiate claims. The late reporting and victim withdrawal also likely undermined the case.

Gendered biases about sexual interaction between men and women seem to have affected some case dispositions. In one, along with the victim telling investigators she did not want the accused prosecuted for, according to her, repeatedly raping her over a few years, the accused stated that he did not really believe her when she said "no" to his repeated efforts at "making love" to her. The report states that "he thought she didn't really mean 'no'" (594245 PDF1). Despite the fact that the accused had forced himself on the woman, as he admitted in saying that he heard her say "no" but kept going, the commander took no action. Cases sometimes combined late reporting, victim withdrawal, alcohol, and ambiguity or absence of evidence, leading to closure with no formal disposition (e.g., 584071 PDF1; 463043 PDF7). With court-martial cases having to meet the "beyond a reasonable doubt" criterion for conviction, many are not be prosecuted, and lack sufficient evidence for other dispositions. We address the larger issues these factors raise in Section 5.

4.3 Cases with Some Formal Disposition

Cases in which the military took some formal action, in the form of a court-martial, nonjudicial punishment hearing, or an adverse administrative action, shared some of the same problems as cases

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with no formal disposition, but many appeared to have more evidence on which to arrive at some formal disposition.

The reports provide clues as to why punishments for sex crimes constitute only about 34 percent of the cases that have a formal disposition with the remainder being punished for some other crime or an infraction. Some of those latter types of cases were characterized by time-lags in reporting and by heavy alcohol consumption, as well as issues with consent. One such case illustrates how a report that starts as a rape report turns into a punishment for "lack of judgment" (e.g., 141655 PDF4). In 2009, the complainant stated she went to a "gentlemen's club" with two fellow Marines where she drank heavily. They then took a taxi back to the base. The alleged victim met the suspect outside where she performed oral sex on him. She stated they then walked to a playground and had penetrative sex, during which she told the suspect it hurt, but did not try to resist or tell him to stop. The suspect continued the act. When questioned, the suspect maintained that the alleged victim had been coherent and had consented. The event occurred in May, the victim reported in September. The suspect received formal written counseling for "lack of judgment." The alcohol consumption may have clouded memories or affected consent. Because military law did not require active consent when the perpetrator did not use force or threats, the victim not having pushed the accused away nor having told him to stop meant the accused's actions were not legally criminal (UCMJ 2012, A28-4/14). The time-lag between the event and the reporting of it may have contributed to a lack of evidence for more serious charges.

Events and physical evidence are often ambiguous, complicating prosecution efforts. In another case from 2009, the alleged victim reported she was raped in her barracks room, after her boyfriend, also in the military, first reported it without her knowledge. She refused to allow a forensic examination of her barracks room, though agreed to a sexual assault examination. Three DNA profiles were found. DNA was collected from the alleged perpetrator, and the boyfriend. The suspect denied any sexual contact, and the boyfriend's DNA was described as a "possible contributor" (171964 PDF4, 1). The case went to court-martial, where the suspect was found not guilty. In other cases, when evidence of a sexual assault was not conclusive, the suspect was convicted and punished for adultery or attempted adultery (e.g., C60900 PDF4; 663195 PDF2).

Evidence may be completely absent in some cases. This can prevent a case from being brought to court-martial or punished as a sexual assault, though the suspect may be punished for something else. In one such case, a third party reported that a woman had been raped. The alleged victim did not "complete a sexual assault exam" and declined to sign a sworn statement attesting to

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the alleged assault. Investigators seem to have gotten some information from witnesses, such that the accused was punished for failure to obey an order (184756 PDF4; also 497020 PDF6; 773381 PDF5).

Intoxication or heavy drinking is not always an impediment to punishment. Alcohol was involved in at least 45 percent of the cases for which there was a formal disposition, including almost half of those punished for sex crimes (forty-one out of eighty-six). In one case, from 2008, the victim reported two months after the events that he had been sexually assaulted on two occasions when he was incapacitated by alcohol (11154 PDF1). The suspect ultimately admitted to performing oral sex on the victim while the victim was unconscious. The accused was convicted at court-martial of abusive sexual contact and sentenced to seven months confinement, a Bad Conduct Discharge, reduction in rank to the lowest level, and forfeiture of all pay and allowances. He was also required to register as a sex offender. The difference in this case and some others seems to be that the suspect admitted the crime, the victim participated fully in the investigation, and wiretap evidence corroborated the accuser's account.

As the above case showed, the military does prosecute and convict some cases on formal charges of rape or sexual assault. In a case from 2007, the accused admitted the victim was too intoxicated to consent and that he continued anyway, even while she repeatedly tried to get away. She reported the events the next day. The accused was sentenced to 90 months confinement, a dishonorable discharge, reduction in rank, and sex offender registration; due to a plea agreement, confinement was reduced to 60 months (485843 PDF2; see also 29803 PDF4). Convictions can be made and punishments can be severe, provided several conditions obtain: the victim reports in time for a sexual assault exam, remains cooperative, and physical evidence links the suspect directly to the crime (e.g., 809125 PDF4; C106466 PDF4; 090196 PDF4; 29803 PDF4). These conditions seldom present in cases. We consider the issues involved in the next section.

Overall, the percentage of alleged victims who withdrew from cases that had a formal disposition was much lower than for cases in which there was no formal disposition: only 13 percent as opposed to 46 percent for the latter, and only 3 percent recantations, as opposed to 17 percent in the cases that had no formal disposition. These differences also indicate that victim cooperation is a significant factor in reaching a formal disposition for a case.

While we have noted issues that may complicate prosecutions or explain why cases that are reported as rape can wind up as cases of failure to obey an order, there are also cases that appear counter to the military's official stance that it takes rape and

sexual assault seriously. For instance, in a case handled in 2007, the alleged victim reported five days after the incident, remained cooperative, and the suspect appears to have admitted that he knew the victim was so intoxicated she could not consent to having sex with him. The suspect was only charged and found guilty of not following orders and making false statements and he was not punished for anything (494426 PDF4; see also 817559 PDF4).

5. Discussion of Broader Issues

In this section, we return to a sociolegal and focal concerns perspective to sort through the issues raised in our survey of the evidence. We have looked at evidence bearing on the argument that the military, as an institution, does not take sexual assault seriously, and so protects, rather than prosecutes, the perpetrator. As the case reports show, many reported cases are not prosecutable, or not prosecutable as sex crimes due to lack of evidence to prove a sexual assault. General trends in the three types of dispositions we have reviewed seem to bear this out: with 19 percent of cases outside formal jurisdiction or completely lacking in evidence and a discernable crime, to 34 percent of cases with slightly more substantiation but the military deciding they lacked sufficient evidence for formal disposition, to 47 percent being more substantiated resulting in some formal disposition and a third of those being convicted for sex crimes. Certainly there are exceptions in each of these categories, and the lack of formal dispositions in some cases, or the lack of punishment for a sex crime in others, appears haphazard, indeed, disturbing. This will sound familiar to scholars of the civilian criminal justice systems' responses to reported sexual assault cases. While the paper reinforces this scholarship, it also indicates it is critical to take into account the specificities of military law and the mission of the military. Case characteristics interact with focal concerns of military commanders and complainants, within a closed or "total" institutional context with a wide repertoire of formal actions to address sexual assault, to affect the military's disposition of reported sexual assault cases.

While the low conviction rate for sex crimes does not necessarily mean that commanders systematically tolerate sexual assault, there are obvious areas for concern. Many cases are not prosecuted because the complainant reports late or declines to continue participating in proceedings, and/or because of difficulty ascertaining consent. These same factors may lead to cases with formal dispositions not being punished as sex crimes. The time lag in reporting and withdrawal of cooperation may be symptoms of systemic gendered problems having to do with the nature of

sexual assault (Jordan 2011; Lazarus-Black 2007: 119–38) and compounded by the closed structure of the military.

As has been found in research on sexual assault cases in civilian systems (Anders & Christopher 2011; Alderden & Long 2016), complainants likely have strong downstream concerns about the consequences of reporting or participating in the case. This may affect the timeliness of their reporting and their participation in the case and may be magnified in the military due to its structure and mission. The brief case reports, as summaries of case disposition, seldom contain information about why victims reported late or withdrew participation in a case. Drawing upon the literature about sexual assaults in civilian contexts, we can surmise that victims initially may doubt that what happened to them would be considered an assault, particularly if they knew the perpetrator (Felson and Paré 2007). They may fear a biased system if they do report. Reporting after a delay might be the result of a victim's growing sense that the incident was nonconsensual (Muehlenhard et al. 2016: 463–4). Revealing to others that one thinks one was a victim of a sexual assault and being subject to the investigative procedures necessary to substantiate a case are typically embarrassing invasions of what is usually private, and questioning techniques may lead to a sense of revictimization (Spohn et al. 2001: 231; Greeson & Campbell 2011). In a closed institution such as the military, the fact that news of the case is likely to spread through one's unit may discourage prompt reporting and continued cooperation with the case. Indeed, most, if not all, investigations require trying to interview witnesses, so other service members in the same unit, and possibly in other units, will find out about the case.

The sociolegal context creates other downstream focal concerns for victims. They may fear that if they report, they will face retaliation. Perceiving and/or being the victim of social retaliation in the military appears to be fairly common (e.g., 494426 PDF4; 430110 PDF7; Morral et al. 2015: 28–9, 93). Because intragroup loyalty is an essential element of the military's functioning, reporting on another in the unit may have social costs. Appearing weak to peers or to one's command, by being known to have been or claimed to have been the victim of an assault, could also be a concern, even more so for male victims. Some victims may fear direct retaliation from the perpetrator, so either hesitate to report, and then report late, or withdraw after reporting (Lea et al. 2003: 596; Sleath and Smith 2017). The accused may have threatened the victim's career or life, or the victim otherwise realizes they are trapped in a relationship, and so refuses to continue with the investigation. Some might not trust the process (Smith and Freyd 2014). The reports do not contain information enabling us to assess these factors. Even with a variety of options for reporting

outside of one's command, and for separating the accused and accuser, there may be considerable social and psychological barriers to reporting; hence victims delay, or withdraw after reporting. And in certain deployments, such as in a submarine, reporting options are inherently more limited.

Complainant concern about punishment for minor-related offenses, such as underage drinking, could contribute to late reporting or withdrawal from cases. Though the case reports do not provide direct evidence of this, we get hints of this concern from several cases (841813 PDF4; 494426 PDF4; 307306 PDF7). Such concerns are seen in civilian assault cases (Saunders 2012: 1161–4). The worry may be heightened in the military. For the purposes of creating a culture of discipline and obedience to authority, commanders are required to act upon such infractions and can do so through means unavailable to civilian prosecutors. Thus, the threat of punishment for collateral infractions may be more of a reporting deterrent in the military than in civilian systems. We caution we have no comparative evidence to support this conjecture.

Some complainants may withdraw because they were transferred as part of their normal career and did not want to go through the inconvenience of going back for more interviews or for a trial (e.g., 589122 PDF4). The difficulty that complainants' and other witnesses' transfers create for the ability of prosecutors to develop a case has been documented (Judicial Proceedings Panel 2017b: 12). Others may withdraw from a sense of wanting to get on with their lives (e.g., C44063 PDF4). Some may withdraw cooperation or recant allegations when confronted with egregious inconsistencies in their accounts, when a third party reports and the initial investigation reveals infidelity to a partner, or when they find that reporting did not get them what they wanted (money, a relationship, retaliation, or cover for infidelity or fraternization).[6] The consequence of complainant withdrawal of participation is similar to that in civilian systems: prosecution for the alleged sex crime seldom goes forward.

There are other issues affecting case dispositions, including determining consent. Our review found many ambiguous cases for which consent could not be determined on the basis of available evidence. What is in dispute is not whether there was a sex act but whether it constituted some form of sexual assault. First, sexual interactions may not be clear-cut (Gilson 2016: 90; Muehlenhard et al. 2016). Consent may be understood differently by the victim and the perpetrator—and needs to meet different standards depending on the legal system that interprets it. Some

[6] E.g. 424013 PDF7; 436627 PDF7; C8893 PDF7; 986372 PDF7; 226486 PDF7; C111476 PDF2; 572433 PDF5.

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cases are indicative of powerful gendered sex scripts in which women feel compelled to have sex (e.g., 181454 PDF1; 141655 PDF4; 154723 PDF2; Basile 1999; Gavey 2005). However, absent coercion that places the victim "in fear" of significant consequences or one of several other conditions, such cases do not meet the UCMJ legal criteria of sexual assault (Joint Service Committee on Military Justice 2012: IV-68-9, Appendix 27–28). Second, many of the cases present as what legal scholars term "a swearing contest," with the victim saying the sex was not consensual and the accused saying it was (Bryden and Lengnick 1997: 1382). With the burden of proof having to be beyond a reasonable doubt, this ambiguity is another hindrance to convicting for an alleged assault. Third, a power dynamic due to differences in rank could be influential, with consent being granted even though the victim felt coerced. Because the case reports do not identify ranks of those involved, we cannot assess this plausible scenario.

In addition, alcohol appears to have undermined the possibility of substantiating the facts of many cases, with parties to the case often not remembering what happened or when. Alcohol also may have affected the sex behavior of the parties involved (Wetherill and Fromme 2016; Lippy and DeGue 2016: 27; Abbey 2011: 484). This, of course, does not justify nonconsensual acts. It does indicate the complications inextricable from many of these cases.

The focal concerns of commanders, which are stipulated in military law, about the quality of evidence and convictability, may be contributing to high case attrition in light of the case characteristics we identified. We now turn to the question of whether there are features of the military justice system itself that affect case outcomes.

5.1 Possible Biases and the Particularities of the Military Justice System

As a sociolegal perspective would expect, core institutional features of the military affect the handling of reported sexual assaults. A key difference with civilian justice systems in the United States is in the military's emphasis on command authority, and on individualized responses to situations and to the accused, all the while requiring that the rights of the accused are protected and that due process is upheld more generally (Morris 2010: 4–6, 51–3, 100–1). The system has to function in remote and battlefield locations, as well as in permanent bases in the United States and other countries, and on ships deployed at sea. The US military justice system stresses the authority of the commander, and a chain of command structure, as a means of creating a military force that obeys lawful orders and has clear lines of authority.[7]

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This is viewed as critical to the military being able to carry out the missions with which it is tasked. In balancing justice with operational readiness, the military justice system relies heavily on the commander's sense of responsibility to do the right thing for their unit, and for the institution. The commander, in making a decision on case disposition, is to consider the impact on unit, including concerns about justice and fairness, and mission readiness. The concern about mission readiness balanced with justice and fairness largely defines a commander's focal concerns about prosecution. While in a civilian system a prosecutor might consider the impact on the local jurisdiction, commanders are responsible for their units and the UCMJ gives them a range of disposition options. Since the 1980s and the all-volunteer service, the military has also emphasized efforts to rehabilitate wrongdoers. Charges and punishments are to take that into account as well (Morris 2010: 171–2). The consequence is that case dispositions may be heavily conditioned by particular circumstances in a unit and by the commander's judgment of those circumstances, after assessing the advice of legal counsel and investigators.

Commander discretion, combined with the inconclusiveness of evidence in many cases, may allow gendered biases about sexual relations to affect some case dispositions. There are cases in which it appears the commander gave the accused a free pass despite what seemed to be convincing evidence of an assault (e.g., 138365 PDF1; 594245 PDF1). To the extent that commanders and others in the investigative and judicial process see sexual aggressiveness by males as normal, or are influenced by "rape myths," they may, for instance, more readily accept the accused's explanation of why the accused thought the victim had consented (Bryden and Lengnick 1997: 1195–8; Carpenter 2016; Herman 1984), or not view the assault as a serious crime. The difficulty of determining consent, the ambiguities or lack of evidence, and the complications alcohol present could provide entry for gendered biases. These factors can also undermine the ability of investigators, commanders, and military juries to determine the guilt of the accused. A large-scale statistical study comparing sexual assault and other physically violent cases for which command action was taken found that commanders were *not* introducing bias into the system when handling sexual assault cases (Carpenter 2017). The data from the US bases in Japan are not

[7] Commanders are, however, barred from exercising "unlawful command influence;" the justice system has a variety of features meant to prevent it, and evidence of it can be used to overturn or reduce convictions on appeal (Fidell et al. 2007: 117–119; Rustico 2016).

detailed enough to allow us to reach a conclusive judgment on the existence and impact of gender bias on case disposition.

Another notable difference with civilian systems is that the range of disposition and punishment avenues for the military is far more extensive than those in the civilian system. This range has at least two consequences for how it appears the military handles reported sexual assault cases. First, it may seem the military is being inconsistent in the punishments it levels for the same crime. The military argues that the variety of disposition and punishment options available to commanders makes the military justice system more flexible and effective. Also undermining consistency is that for the time period of our data, Congress made numerous revisions to the Uniform Code of Military Justice, including a convoluted change such that between 2007 and 2012 there were fourteen categories for sexual assault. These changes undoubtedly complicated charging decisions and aggravated the appearance of inconsistency. Second, the military may seem to be showing leniency by disposing of a case through a Non-Judicial Punishment or administrative action. However, many of the cases we analyzed that were not prosecuted in the military likely would not or could not have been prosecuted by civilian prosecutors either (Alderden and Ullman 2012). The difference is that some cases in which the accused probably would not have been prosecuted and punished in the civilian system were punished in the military through nonjudicial or administrative hearings. Even when evidence for prosecuting a sexual assault was weak, commanders sometimes punished for other infractions. In the civilian court system, the accused would walk away; in the military system, the accused might face a nonjudicial proceeding or administrative action.

Military law itself creates biases against prosecution and conviction for sexual assault (Hillman 2009). This bias is perhaps most obvious in the UCMJ definition of rape, which is distinct from the UCMJ definition of sexual assault. In the UCMJ, for a crime to be considered *rape* it must have been committed with unlawful force or force that caused or threatened to cause "grievous bodily harm," kidnapping or death to the victim (Joint Service Committee on Military Justice 2012: A2/30–31, A27/1–6, A28/1–6). The relevant article of the Code, 120, is explicit that a broken nose, black eye, or other such "minor" injury, to say nothing of the penetrative act itself, does not constitute grievous bodily harm. If the perpetrator assaults a victim who is unconscious, asleep, or incapable of consenting, and thus also incapable of resisting, the perpetrator can only be found guilty of sexual assault, which carries a lesser maximum sentence. This differentiation in criminal status may reflect and codify a gendered notion

that a sexual crime in which the victim resists is worse than one committed against a victim who is unable to resist. Clearly, in order to reduce gender biases, these problematic criteria for rape and sexual assault should be addressed through Congressional revision to the UCMJ.

The gendered effects of military law can also apply to male assault victims, a topic for which little research exists.[8] An important example of gendered effects on men in the military is the crime of "consensual sodomy" (Gray 2006).[9] It effectively criminalized homosexual conduct in the military, and made it very risky for a male service member to say he had been sexually assaulted by another male (689618 PDF4; 504085 PDF4; 689566 PDF4).

6. Conclusion

Recent events in the US politics and society have put the topic of institutional responses to sexual assault in the limelight. Since the Tailhook scandal that broke in 1991–2, alarmist headlines and Congressional hearings brought much-needed, if erratic, attention to the issue of sexual assaults in the military and the military's handling of them. We have used available case reports from the US bases in Japan to conduct an original assessment of how and why the US military has handled reported cases in the way it has. Our findings are limited by the abbreviated nature of the case reports, and raise many questions about military policies, legal and social biases, and circumstances surrounding the cases. This overview invites deeper attention to numerous issues identified. Public and Congressional debates have been bifurcated between those who argue the military turns a blind eye toward sexual assault and those who argue it is doing all it can (US Senate Committee on Armed Services 2019). The Okinawa cases suggest the issue is more complicated. The article makes several substantial contributions to the understanding of sexual assault in the military, and illustrates the utility of taking a sociolegal and focal concerns perspective on criminal justice responses to crime more generally.

First, the 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

[8] Sixty-five (11 percent) of the Okinawa cases involved a male victim, with two additional reports noting victims from both genders, and eighteen (3 percent) reports without information on the victim's gender.

[9] Section 1707 of the National Defense Authorization Act, https://www.congress.gov/bill/113th-congress/house-bill/3304/text

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. The literature on civilian criminal justice responses to sexual assault cautions that the biases prosecutorial personnel have about rape may condition their focal concerns such that they too quickly drop cases for apparent lack of evidence, doubts about victim credibility or perpetrator convictability. Future research should obtain detailed case records corresponding to the case summaries we have analyzed, in order to assess biases in investigations and disposition decisions.

Second, institutional context influences the focal concerns of both prosecutors and victims. Military law requires commanders to take account of how the case and its disposition will affect operational readiness while adhering to rules of due process and requirements that the disposition be "just" for all involved. To facilitate command authority and operational readiness, the justice system formally gives commanders wide discretion in case disposition. Commanders thus are focused on the broad consequences of case disposition for their unit, while balancing the procedural and substantive requirements of justice. While our cases did not provide direct evidence, it is likely that in the context of the military's tight, closed institutional structure, due to downstream consequences victims may be more reluctant to come forward or remain involved in a case, further complicating investigation and prosecution efforts. The military's mission, and organizational structures meant to help fulfill it, may be in tension with the mantra of zero tolerance of sexual assault.

Third, just as in civilian systems, the institutionalization of due process and "beyond a reasonable doubt" comes with the cost of being a very high bar for sexual assault cases. When Congress codified military law in 1950, it was partly responding to a concern that military justice was lacking in procedural safeguards guaranteeing due process rights for the accused (Hillman 2005: 22–25). Since then, commanders must have reasonable grounds for discipline and punishment of any sort. Criminal cases considered for court-martial are held to strict rules of due process and charges must be proven "beyond a reasonable doubt." Given the issues enumerated in this article about sexual assault, and because defendants are allowed the right to have their case decided on the basis of evidence, with cross-examination of the complainant and witnesses, and with a high evidentiary bar, due process in cases of sexual assault may limit the military's ability to obtain convictions for sexual assault. This would come as no surprise to some feminist legal scholars, who see the adversarial, evidentiary and procedure-based, ostensibly objective legal system as "the institutionalization of the male point of view" (Connell

1987, 128; MacKinnon 1987, 88-9; see also Matoesian 1993; McGlynn 2011; Lonsway & Archambault 2012).

Fourth, military law, written over the years by a male-dominated Congress, appears to have gendered elements in its definition of rape and in its specification of the role of victim consciousness during an assault. Further complicating case disposition, the military's legal code is frequently being revised by Congress in a piecemeal way with little follow-through to assess the efficacy of reforms.

We have analyzed what happens to cases once reported. Clearly, preventing assaults and increasing reporting of those that occur also should be priorities. Numerous new programs and policies address these issues in the military but little is known about their effectiveness. To increase reporting and cooperation with investigations, improve the quality of evidence, and reduce the frequency of assaults in the first place, the analysis of the case reports from the US bases in Japan shows that there needs to be more focus on mitigating the reasons victims report late and/or withdraw from cases or recant their accusations, on changing the culture of alcohol consumption, and more attention to gender biases in interpreting what constitutes consent or evidence.

This article's focus on how the US military handles reported sexual assault cases indicates that commanders' focal concerns are derived from the UCMJ and institutional mandates of the military. It also indicates that victims' downstream concerns about reporting and whether to participate in the case after reporting appear to be affected by the closed structure of the military, in addition to the concerns any victim of sexual assault would have about reporting their case. The findings reinforce theories of criminal justice that emphasize the role of the sociolegal context, particularly that of the institutions within which those with investigative and prosecutorial authority make decisions about cases, and its influence on focal concerns of prosecutors and victims.

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