

## WHEN COMMANDERS DECIDE: MILITARY PROSECUTORIAL DECISION-MAKING IN SEXUAL ASSAULT CASES

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### ABSTRACT

Congress enacted legislation that went into effect in 2023, which transferred prosecutorial decision-making for serious cases, including sexual assault, from Commanders to military lawyers. While there is some research on the military's criminal justice system that supports shifting the decision-making to military lawyers, there is a large body of research that suggests lawyers, too, suffer from similar impediments when handling decision-making for sexual assault cases. In the wake of this new amendment, it is important to continue assessing how the change will impact case processing, by first clearly understanding what was happening when Commanders had complete authority. This article explores a sample of sexual offense cases by analyzing the variables that increased the likelihood that a Commander would criminally charge a sexual assault case. The results support the conclusion that Commanders charged cases based on the Seriousness of the Offense, the Strength of the Evidence, and the Victim's<sup>1</sup> Preference. However, the findings also reveal that Commanders

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incorporate Blame and Believability on the part of the victim when assessing whether to fire a servicemember; accused servicemembers are less likely to face separation when victim blame factors increase and believability factors decrease.

## I. INTRODUCTION

Over the past decade, the United States Congress has enacted significant modifications to the Uniform Code of Military Justice, particularly in the context of military sexual assault case adjudication. Among the most recent changes is the transfer of prosecutorial decision-making authority from military Commanders to legal professionals within the military.<sup>2</sup> Notably, these adjustments were implemented without an extensive body of research scrutinizing the processing of sexual assault cases within the military context. The present study serves two principal objectives: first, to underscore the imperative need for further comprehensive research in prosecutorial decision-making in sexual assault cases; and second, to elucidate the dearth of empirical substantiation in favor of the assertion that legal professionals are inherently superior to Commanders who, in practice, consult with legal experts in their decision-making processes.

The reporting of incidents of sexual assault incidents remains alarmingly low, and when such incidents are reported the pivotal determination of whether a criminal trial ensues typically falls under the purview of state prosecutors, who are legal professionals. Nevertheless, when the alleged perpetrator is an active-duty military servicemember, state and military jurisdictions can assert authority over the case. In select instances, the jurisdiction extends across state, federal, and military legal systems. While

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<sup>1</sup> I use the term “victim” to remain consistent with the language in the current laws regulating the military, while acknowledging use of the term “survivor” is often preferred.

<sup>2</sup> See National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, §§ 531, 135 Stat. 1541, 1692 (2021).

input from the victim regarding the desired jurisdiction is solicited, the ultimate decision-making authority remains with state prosecutors and military Commanders. Thus, the most basic question is: What factors influence the decision to pursue charges in either jurisdiction?

A considerable body of research has diligently scrutinized the variables impacting charging decisions within civilian legal jurisdictions.<sup>3</sup> Consequently, legislators possess valuable insights when contemplating potential legislative amendments affecting the processing of sexual assault cases in state jurisdictions. This extensive research largely corroborates the notion that prosecutors seek to anticipate the potential considerations of other decision-makers within the legal process, most notably the jurors, should they be required to adjudicate the case.<sup>4</sup> It is evident from this expansive body of research that juror decision-making can be susceptible to the influence of Rape Myth Acceptance Attitudes and prejudicial biases, including racial bias. Prosecutors are inclined to factor in these biases when determining whether to file charges, under the presumption that jurors will take them into account during their deliberations. In the civilian legal realm, legislators are better equipped to comprehend the intricacies of prosecutorial dynamics due to the extensive existing research, thereby facilitating informed legislative adjustments.

Conversely, the Military Criminal Justice System (MCJS) is conspicuously underexamined, with limited research available concerning the determinants of charging decisions by the military. The limited existing knowledge concerning military case processing does not convincingly

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<sup>3</sup> Beichner & Spohn, *Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit*, 16 CRIM. JUST. POL'Y REV. 461 (2005); Dawn Beichner & Cassia Spohn, *Modeling the Effects of Victim Behavior and Moral Character on Prosecutors' Charging Decisions in Sexual Assault Cases*, VIOLENCE VICT. (2012); Brie Diamond, Kendra Bowen & Ronald Burns, *Factors Affecting Sexual Assault Case Processing: Charging Through Sentencing in a Large Southern County*, 37 J. INTERPERS. VIOLENCE NP11605 (2022).

<sup>4</sup> Anna Offit, *Prosecuting in the Shadow of the Jury*, 113 NW. UNIV. L. REV. 1071 (2019).

demonstrate that legal professionals are inherently more adept than military Commanders in making prosecutorial determinations. Consequently, there is an inherent need for further research to ascertain the generalizability of existing findings. This paucity of data regarding military case processing raises pertinent questions about the prudence of enacting amendments without conducting additional research. It is plausible to hypothesize that military legal professionals may approach charging decisions in a manner analogous to their civilian counterparts; however, this hypothesis is laden with issues. First, the military system, historically, has never delegated prosecutorial decision-making authority to legal professionals, thus rendering this theory devoid of empirical substantiation. Second, and arguably more significantly, if military legal professionals do indeed exhibit a similar decision-making paradigm to their civilian counterparts, it raises questions regarding the wisdom of Congress' decision to confer such authority upon them. The extant civilian research indicates that civilian prosecutors frequently incorporate problematic biases into their charging decisions, particularly in the realm of sexual assault. It remains dubious whether Congress intends for military prosecutions to be guided by similarly flawed stereotypes.

The present study endeavors to comprehensively examine the determinants of charging decisions made by military Commanders within the MCJS. Part I establishes the theoretical framework underpinning this study, drawing upon a substantial body of research elucidating the flawed decision-making processes of civilian prosecutors. Part II harnesses this theoretical foundation to formulate several hypotheses based on predictions derived from civilian literature. Part III details the theoretical underpinnings of selected dependent and independent variables. Part IV outlines the analytical methodology, employing binomial and multinomial logistic regression techniques. Parts V and VI encompass the presentation of the results and ensuing discussion, respectively. Part VII offers salient

recommendations for lawmakers and underscores the requisite avenue for future research initiatives.

## II. THEORETICAL UNDERPINNINGS

In the examination of societal attitudes and responses toward sexual assault, various theoretical frameworks have emerged to provide insightful perspectives on the underlying factors influencing the ways in which the phenomenon is perceived by legal actors.<sup>5</sup> This study delves into five key theoretical lenses—Focal Concerns Theory, Rape Myth Acceptance Attitudes, Liberation Hypothesis, Sexual Stratification Hypothesis, and Military Case Processing—to unravel the complex dynamics surrounding prosecutorial decision-making in sexual assault cases. These theories collectively contribute to the collective understanding of the intricate interplay between cultural norms, individual beliefs, and institutional responses, shedding light on the nuanced factors that shape attitudes towards sexual violence. By exploring these theories, this study aims to inform legislative responses to sexual assault by bridging the gap in the collective comprehension of the multifaceted dimensions inherent in responses to sexual assault cases.

When applied to sexual assault case processing, Focal Concerns Theory posits that legal actors decide cases based on three major categories, including “seriousness of the offense, the degree of harm to the victim, and the culpability of the suspect.”<sup>6</sup> The Rape Myth Acceptance Attitudes lens, on the other hand, scrutinizes prevalent misconceptions and beliefs surrounding sexual violence, unveiling the impact of societal norms on the

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<sup>5</sup> Ashley K. Fansher & Bethany Welsh, *A Decade of Decision Making: Prosecutorial Decision Making in Sexual Assault Cases*, 12 SOC. SCI. 348 (2023).

<sup>6</sup> Cassia Spohn, Dawn Beichner & Erika Davis-Frenzel, *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the “Gateway to Justice,”* 48 SOC. PROBL. 206 (2001).

perpetuation of harmful stereotypes. The Liberation Hypothesis posits there is a connection between the Strength of the Evidence in a case and legal actors' reliance on Rape Myth Acceptance Attitudes. The Sexual Stratification Hypothesis posits that cases will be prosecuted based, in part, on the races of the victim and offender. Additionally, the present study draws on military sexual assault case processing research to scrutinize the specific challenges and nuances within the military context, offering valuable insights into the complexities of addressing sexual assault within a highly regulated and hierarchical institution. By incorporating these theories, this research endeavors to provide a comprehensive and nuanced understanding of sexual assault dynamics in order to formulate the research hypothesis contained in Part II.

#### *A. Focal Concerns Theory*

In the civilian legal system, several factors play a pivotal role in prosecutors' assessments of which sexual assault cases warrant charges. Prosecutors gauge the convictability of a case by considering anticipated defense arguments and judge and juror responses to case evidence.<sup>7</sup> As such, cases are pursued when prosecutors are confident in the likelihood of success downstream in the legal process. This prosecutorial decision-making considers not only the organizational context, such as relationships between legal actors, but also case-specific features that extend beyond organizational parameters.<sup>8</sup> The focal concerns of the prosecutor (e.g., anticipated juror responses to the intricacies of a case) influence whether the prosecutor files charges.

In the initial application to criminological inquiries, the concept of "focal concerns" arose in the context of lower-class street-corner groups,

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<sup>7</sup> Lisa Frohmann, *Complaint-Filing Interviews and the Constitution of the Organizational Structure: Understanding the Limitations of Rape Reform*, 8 HASTINGS WOMENS L. J. 365, 379 (1997).

<sup>8</sup> Frohmann, *supra* note 7.

uncovering overarching themes that guided these groups in their daily lives.<sup>9</sup> Subsequently, the framework of Focal Concerns Theory was extended to investigate how judges incorporated gender-related considerations into their sentencing decisions for a wide variety of crimes.<sup>10</sup> This theory primarily revolves around two principal categories: “offender blameworthiness and practical considerations.”<sup>11</sup> Blameworthiness factors encompass the presence of prior criminal records and the nature of the offender’s involvement in the criminal act.<sup>12</sup> Meanwhile, practical considerations in the context of female offenders, as opposed to male offenders, encompassed concerns such as the societal impact of incarcerating mothers and resource constraints within female prison facilities.<sup>13</sup> Furthermore, the paradigm was expanded to encompass the following focal concerns: offender culpability, victim harm, societal protection, and sentencing impact.”<sup>14</sup>

Subsequently, application of Focal Concerns Theory was broadened to encompass civilian police and prosecutor decision-making processes in sexual assault cases.<sup>15</sup> Research findings indicated that prosecutors similarly prioritized offender blameworthiness and practical considerations, albeit with distinct nuances compared to judges. However, similar to judges, prosecutors operated within the confines of the interorganizational context but were additionally attuned to the concept of “case

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<sup>9</sup> Walter B. Miller, *Lower Class Culture as a Generating Milieu of Gang Delinquency*, 14 J. SOC. ISSUES 5 (1958).

<sup>10</sup> Darrell Steffensmeier, John Kramer & Cathy Streifel, *Gender and Imprisonment Decisions*, 31 CRIMINOL. (1993).

<sup>11</sup> *Id.* at 438.

<sup>12</sup> Steffensmeier, Kramer, and Streifel, *supra* note 10.

<sup>13</sup> *Id.*

<sup>14</sup> Darrell Steffensmeier, Jeffery Ulmer & John Kramer, *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOL. 763 (1998).

<sup>15</sup> Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUST. Q. 651 (2001).

convictability,” denoted as “downstream orientation.”<sup>16</sup> This orientation toward judges and jurors<sup>17</sup> led prosecutors to “develop a perceptual shorthand that incorporates stereotypes of real crimes and genuine victims.”<sup>18</sup> Notably, the research illuminated that prosecutors’ decision-making processes were influenced not only by considerations of Blame and Believability<sup>19</sup> but also by other factors, including characteristics of the offense<sup>20</sup> and the victim, as well as the type of offense.<sup>21</sup> These multifaceted factors collectively constituted the “focal concerns” shaping prosecutors’ determinations regarding whether to pursue charges.<sup>22</sup>

Traditionally, scholars have categorized case variables into two distinct classes—legal and extralegal. Legal variables are those deemed by scholars as factors that should influence case processing (e.g., factors that help establish an element of the offense), while extralegal variables are factors that scholars deem should not influence case processing.<sup>23</sup> In practice, however, this legal-extralegal dichotomy has been shown to be overly simplistic, as certain “legally irrelevant” factors may have a legal basis to affect case outcomes.<sup>24</sup> Consequently, scholars have demonstrated that the distinction between legal and extralegal variables is a false dichotomy.<sup>25</sup>

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<sup>16</sup> Frohmann, *supra* note 7; Spohn and Holleran, *supra* note 15.

<sup>17</sup> Frohmann, *supra* note 7.

<sup>18</sup> David Holleran, Dawn Beichner & Cassia Spohn, *Examining Charging Agreement Between Police and Prosecutors in Rape Cases*, 56 CRIME DELINQ. 385 (2010).

<sup>19</sup> Lisa Frohmann, *Discrediting Victims’ Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, 38 SOC. PROBL. 213 (1991); Spohn and Holleran, *supra* note 15.

<sup>20</sup> Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 UNIV. CHI. L. REV. 246 (1980).

<sup>21</sup> Travis W. Franklin, *The Intersection of Defendants’ Race, Gender, and Age in Prosecutorial Decision Making*, 38 J. CRIM. JUST. 185 (2010).

<sup>22</sup> Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Judge’s Sentencing Decisions: Hispanic-Black-White Comparisons*, 39 CRIMINOL. 145 (2001); Holleran, Beichner, and Spohn, *supra* note 18.

<sup>23</sup> Cassia Spohn & Julie Horney, *Rape Law Reform and the Effect of Victim Characteristics on Case Processing*, 9 J. QUANT. CRIMINOL. 383 (1993).

<sup>24</sup> *Id.*; Hearsay and fresh complaints are a classic example. Whether a victim immediately outcried is not dispositive that a crime occurred. Yet certain outcries of



Within the realm of prosecutorial decision-making, the concept of “focal concerns” assumes significance, encompassing elements such as the severity of the offense, the extent of harm to the victim, and the culpability of the suspect.<sup>26</sup> Embedded within these concerns is the critical evaluation of case convictability,<sup>27</sup> gauging the likelihood of a guilty verdict at trial.<sup>28</sup> This perspective is underpinned by the premise that prosecutors are primarily preoccupied with anticipating the jury’s disposition toward the case.<sup>29</sup>

Moreover, prosecutors’ assessments of “downstream orientation” serve as a guiding principle in determining whether to initiate charges.<sup>30</sup> Prosecutors draw upon their historical knowledge of jury verdicts and their broader cultural understanding of societal norms and attitudes related to sexuality, heterosexual relations, and violence.<sup>31</sup> Early in their careers, prosecutors undergo “organizational socialization,” learning that an

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victims are admissible as evidence (under a hearsay exception) to prove the crime of sexual assault.

<sup>25</sup> Cassia Spohn, John Gruhl & Susan Welch, *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIMINOL. 175 (1987).

<sup>26</sup> Cassia Spohn, Dawn Beichner & Erika Davis-Frenzel, *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the “Gateway to Justice,”* 48 SOC. PROBS. 206, 208 (2001).

<sup>27</sup> *Id.*

<sup>28</sup> Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 L. SOC. REV. 531, 532 (1997).

<sup>29</sup> Celesta A. Albonetti, *Prosecutorial Discretion: The Effects of Uncertainty*, 21 L. SOC. REV. 291 (1987); Frohmann, *supra* note 19; Wayne A. Kerstetter, *Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults against Women*, 81 J. CRIM. L. CRIMINOL. 1973- 267 (1990); Gary LaFree, *Variables Affecting Guilty Pleas and Convictions in Rape Cases: Toward a Social Theory of Rape Processing*, 58 SOC. FORCES 833 (1980); Jeffrey Spears & Cassia Spohn, *The Genuine Victim*, 20 AM. J. CRIM. JUST. 183 (1996); Spohn, Beichner, and Davis-Frenzel, *supra* note 6.

<sup>30</sup> Frohmann, *supra* note 28, at 535.

<sup>31</sup> *Id.* at 536.

incredulous victim is synonymous with a weak case.<sup>32</sup> Race, class, and gender ideologies are embedded within the prosecutor's speculation as to the credibility assessments of victims.<sup>33</sup> While not specifically acknowledging race as a factor in decision-making, prosecutors will point to proxies for race and class, such as the locus of the crime, as a basis for not prosecuting a case.<sup>34</sup> Furthermore, prosecutors also consider the potential for appellate review, especially in cases that could result in convictions.<sup>35</sup> Notably, the military has witnessed a substantial number of sexual assault cases overturned on grounds of "factual sufficiency,"<sup>36</sup> a phenomenon that has come to the attention of military prosecutors.<sup>37</sup> Factual sufficiency reviews allow appellate courts to overturn cases when the appellate court disagrees with the finder of fact that a crime occurred. Appellate courts overturning conviction cases serves as yet another concern for prosecutors when deciding to decline prosecuting a case.

In accordance with Focal Concerns Theory, prosecutors in the civilian system weigh legally relevant variables, including the gravity of the offense and the Strength of the Evidence, when making charging determinations. One study revealed that cases were significantly less likely to be prosecuted

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<sup>32</sup> Elizabeth Anne Stanko, *The Impact of Victim Assessment on Prosecutors' Screening Decisions: The Case of the New York County District Attorney's Office*, 16 L. SOC. REV. 225, 228 (1981). Organizational socialization is the process where new attorneys are trained to process sexual assault cases considering the desires of those in their organizational setting.

<sup>33</sup> Frohmann, *supra* note 28.

<sup>34</sup> *Id.*

<sup>35</sup> Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, UNIV. PA. L. REV. 959 (2009).

<sup>36</sup> Lisa 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).

<sup>37</sup> This phenomenon is not unique to military courts; See Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS CLARK L. REV. (2009).

in the presence of exculpatory evidence.<sup>38</sup> Conversely, the presence of physical and corroborative evidence individually increased the likelihood of prosecution, as did having multiple witnesses to the crime.<sup>39</sup> Lastly, stranger-related cases were significantly more likely to be prosecuted compared to cases involving acquaintances.<sup>40</sup>

### *B. Rape Myth Acceptance Attitudes*

Embedded within prosecutorial decision-making are certain case attributes pertaining to both victims and offenders that arguably should not exert influence on charging determinations.<sup>41</sup> These factors encompass both risk-taking behavior and considerations of the moral character or reputation of the victim. Risk-taking behavior considerations encompass whether the victim had consumed alcohol or drugs, solicited rides from strangers, invited the offender into their home or vice versa,<sup>42</sup> or engaged in behaviors such as walking alone late at night, hitchhiking, or being in a bar alone.<sup>43</sup> Moral character considerations encompass information related to the victim's sexual predisposition, criminal history, occupation (e.g., involvement in sex work or working as a dancer at an adult cabaret), and

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<sup>38</sup> Albonetti, *supra* note 29. (Albonetti describes exculpatory evidence as “evidence [that] challenges the factual guilt of the defendant and thus increases the uncertainty of conviction.”).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Cassia Spohn & Julie Horney, *The Impact of Rape Law Reform on the Processing of Simple and Aggravated Rape Cases*, 86 J. CRIM. L. CRIMINOL. 861 (1996).

<sup>42</sup> Beichner and Spohn, *supra* note 3; Cassia Spohn & Julie Horney, *The Impact of Rape Law Reform on the Processing of Simple and Aggravated Rape Cases*, 86 J. CRIM. L. CRIMINOL. 1973- 861 (1996). “Simple rape” is a term used by scholars to differentiate between types of rapes to show how legal actors treat the two types of rapes differently. (“[S]imple rape [is] a rape by a lone acquaintance with no weapon and no collateral injury to the victim. An aggravated rape, in contrast, involves either an attack by a stranger, multiple assailants, the use of a weapon, or injury to the victim.”). Spohn and Holleran, *supra* note 15 at 656.

<sup>43</sup> Spohn and Horney, *supra* note 23 at 873 (citing SUSAN ESTRICH, REAL RAPE (1987)).

socio-economic status.<sup>44</sup> Empirical researchers explored prosecutorial decision-making patterns and the findings revealed that prosecutors devoted less attention to cases involving “simple rape”<sup>45</sup> within preexisting offender-victim relationships, situations where victims deviated from societal norms regarding sexual roles, and cases lacking a fresh complaint made to the police.<sup>46</sup>

A significant aspect of this context is the prevalence of rape myths, which encompass beliefs that consider the moral character of the victim.<sup>47</sup> Rape myths constitute “beliefs about rape that serve to deny, trivialize, or justify sexual aggression perpetrated by men against women.”<sup>48</sup> Extensive findings strongly substantiate the assertion that Rape Myth Acceptance Attitudes significantly permeate the decision-making process.<sup>49</sup> These attitudes perpetuate the notion of an “ideal victim,” wherein victims whose circumstances of victimization deviate from this ideal framework are often perceived as unworthy of victim status.<sup>50</sup> An “ideal victim” is characterized as an individual who is viewed as “weak, engaged in a respectable activity

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<sup>44</sup> Beichner and Spohn, *supra* note 3.

<sup>45</sup> ESTRICH, *supra* note 43 at 4; HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 252 (1960).

<sup>46</sup> GARY LAFREE, *RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT* 79, 99, 107–08 (1989). (Fresh complaint is the term used to describe a victim’s report to law enforcement temporally close in time to the sexual assault).

<sup>47</sup> ESTRICH, *supra* note 43.

<sup>48</sup> G. Bohner, Frank Siebler & Jurgen Schmelcher, *Social Norms and the Likelihood of Raping: Perceived Rape Myth Acceptance of Others Affects Men’s Rape Proclivity*, 32 *PERS. SOC. PSYCH. BULL.* 286, 286 (2006).

<sup>49</sup> Ronet Bachman, *The Factors Related to Rape Reporting Behavior and Arrest New Evidence from the National Crime Victimization Survey*, 25 *CRIM. JUST. BEHAV.* 8 (1998); A. Dellinger Page, *True Colors: Police Officers and Rape Myth Acceptance*, 5 *FEMINIST CRIMINOL.* 315 (2010); L. Ellison & V. E. Munro, *Reacting to Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility*, 49 *BRITISH J. CRIMINOL.* 202 (2008); F. Eyssel & G. Bohner, *Schema Effects of Rape Myth Acceptance on Judgments of Guilt and Blame in Rape Cases: The Role of Perceived Entitlement to Judge*, 26 *J. INTERPERSONAL VIOLENCE* 1579 (2011).

<sup>50</sup> NILS CHRISTIE, *THE IDEAL VICTIM* 18 (1986).

when the crime occurred, and bears no blame for their location when the crime transpired.”<sup>51</sup>

Moreover, gender ideologies play a pivotal role in the construction of sexual assault cases, particularly concerning the gender of the victim.<sup>52</sup> This construction has highlighted society’s relative indifference to the prevalence of male rape victimization.<sup>53</sup> Rape myths associated with male victimization include beliefs such as “men cannot be raped,” “real men can defend themselves against rape,” “only gay men are victims and/or perpetrators of rape,” “men are not as affected by rape as women,” and “a woman cannot sexually assault a man.”<sup>54</sup> Nonetheless, research contradicts these myths, demonstrating that men, regardless of their sexual orientation, can be victims of rape and experience similar adverse consequences as women.<sup>55</sup> In scenarios where heteronormative concepts of masculinity influence the decision-making process, male-victim sexual assault cases are frequently grouped with other “simple rape” cases.<sup>56</sup> Given the limited number of studies assessing prosecutorial decision-making pertaining to male-victim sexual violence, questions arise regarding whether the same

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<sup>51</sup> Mirka Smolej, *Constructing Ideal Victims? Violence Narratives in Finnish Crime-appeal Programming*, 6 CRIME MEDIA CULTURE 69, 69–70 (2010).

<sup>52</sup> The present study consisted of 40% male victims (Table 5E). See *infra*. Section VI.A.6 for a typification of cases that have female and male victims.

<sup>53</sup> Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259 (2011).

<sup>54</sup> Kristine M Chapleau, Debra L Oswald & Brenda L Russell, *The Role of Gender, Violence, and Sexism*, 23 (2008); Laura Hammond, Maria Ioannou & Martha Fewster, *Perceptions of Male Rape and Sexual Assault in a Male Sample from the United Kingdom: Barriers to Reporting and the Impacts of Victimization*, 14 J. INVESTIGATIVE PSYCH. OFFENDER PROFILING 17, 136 (2016).

<sup>55</sup> THE WILEY HANDBOOK ON THE PSYCHOLOGY OF VIOLENCE, (Carlos A. Cuevas & Callie Marie Rennison eds., 2016); Peter F. Goyer & Henry C. Eddleman, *Same-sex Rape of Nonincarcerated Men*, 141 AM. J. PSYCHIATRY 576 (1984); Kevin M. Ralston, *An Intersectional Approach to Understanding Stigma Associated with Male Sexual Assault Victimization: Intersectional Approach to Understanding Stigma*, 6 SOCIO. COMPASS 283 (2012).

<sup>56</sup> Ralston, *supra* note 55.

framework applicable to female victim cases can be extrapolated to male victim cases.<sup>57</sup>

While prosecutors operate within a framework of focal concerns, as previously elucidated, their charging determinations are also influenced by ancillary considerations. If a prosecutor's evaluation of case convictability constitutes a form of downstream orientation, then the interorganizational context encompasses the broader atmospherics within which this downstream focus operates. These atmospherics can increase either direct influences (similar to case convictability assessments) or indirect influences on charging determinations (e.g., resource constraints limiting case processing). The multifaceted role of a prosecutor within the criminal justice process is one of an administrator, advocate, judge, and legislator, roles which are influenced by organizational considerations.<sup>58</sup> As an administrator, the prosecutor strives for efficiency in case resolution, a factor of paramount importance in plea bargaining.<sup>59</sup> In their role as an advocate, prosecutors seek to advance the government's interests, aiming for a higher number of convictions and longer sentences.<sup>60</sup> In their capacity as a judge, prosecutors consider the defendant's interests and are mindful of justice considerations for each unique case.<sup>61</sup> Finally, prosecutors may, in certain instances, deviate from legislative policy by allowing defendants to plead to lesser offenses than those initially charged due to the perceived excessive severity of the punishment associated with the greater offense.<sup>62</sup>

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<sup>57</sup> Scott M. Walfield, Philip D. McCormack & Kaitlyn Clarke, *Understanding Case Outcomes for Male Victims of Forcible Sexual Assaults*, J. INTERPERS. VIOLENCE (2020).

<sup>58</sup> Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 UNIV. CHI. L. REV. 50 (1968).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

### C. Liberation Hypothesis

The Liberation Hypothesis initially emerged as a theoretical framework elucidating the dynamic interaction of extralegal variables in the decision-making processes of juries when evaluating a case's strength.<sup>63</sup> This hypothesis relates to "simple rape" cases, premised upon the notion that jurors perceive themselves as liberated from the confines of strict legal constraints, thereby allowing extralegal considerations to influence their decisions.<sup>64</sup> In contrast, the influence of such extralegal factors was expected to be less pronounced in aggravated rape cases, which are characterized by elements such as stranger involvement, injury to the victim, weapon usage, or multiple offenders.<sup>65</sup>

Subsequently, this theoretical framework was extended to encompass decision-making in other contexts, including the charging and sentencing phases of criminal proceedings.<sup>66</sup> For instance, in cases characterized by robust evidence or a higher degree of severity due to aggravating circumstances, prosecutorial discretion would be less susceptible to the influence of factors that impact "simple rape" cases to a greater extent.<sup>67</sup> Conversely, in cases with weaker evidentiary support or devoid of

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<sup>63</sup> HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 165 (LITTLE BROWN AND CO. 1966).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> David C. Baldus et al., *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984-2005)*, J. CRIM. L. CRIMINOL. 1227 (2011); Elsa Y. Chen, *The Liberation Hypothesis and Racial and Ethnic Disparities in the Application of California's Three Strikes Law*, 6 J. ETHN. CRIM. JUST. 83 (2008); Cassia Spohn & Jerry Cederblom, *Race and Disparities in Sentencing: A Test of the Liberation Hypothesis*, 8 JUST. Q. 305 (1991); Spohn and Horney, *supra* note 23; Suzanne St. George & Cassia Spohn, *Liberating Discretion: The Effect of Rape Myth Factors on Prosecutors' Decisions to Charge Suspects in Penetrative and Non-Penetrative Sex Offenses*, JUST. Q. 1 (2018); Katharine Tellis & Cassia Spohn, *The Sexual Stratification Hypothesis Revisited: Testing Assumptions about Simple versus Aggravated Rape*, 36 J. CRIM. JUST. 252 (2008).

<sup>67</sup> St. George and Spohn, *supra* note 66.

aggravating factors, the potential for rape myths to affect charging decisions becomes more apparent.<sup>68</sup>

In the context of charging decisions, a specific facet of the Liberation Hypothesis pertains to the divergence in prosecutorial decision-making between penetration and non-penetration cases.<sup>69</sup> Particularly, in non-penetrative cases, the likelihood of charging is notably influenced by extralegal variables, while a similar phenomenon does not manifest in penetration cases.<sup>70</sup> This observation suggests an inherent overlap between the Liberation Hypothesis and Focal Concerns Theory. The latter theory postulates that factors related to Blame and Believability play a pivotal role in case processing, with the Liberation Hypothesis highlighting the differential impact of Blame and Believability factors in penetration and non-penetration cases.

#### *D. Sexual Stratification Hypothesis*

The Sexual Stratification Hypothesis (SSH) posits that when Black men are accused of sexually assaulting white women, they will face more severe treatment within the criminal justice system than any other racial dyad in sexual assault cases.<sup>71</sup> Implicit in this theory, which aligns with conflict theorists' perspectives, is the idea that groups with greater access to resources, in this case, white men, exercise power over other groups, particularly Black men, by enforcing sexual assault laws more harshly on them.<sup>72</sup> This hypothesis has yielded mixed findings through empirical testing.

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<sup>68</sup> *Id.*

<sup>69</sup> Eric R. Carpenter, *An Empirical Look at Commander Bias in Sexual Assault Cases*, 22 BERKELEY J. CRIM. L. 45 (2017); St. George and Spohn, *supra* note 66. (In the military system, the absence of penetration can still be charged as attempted sexual assault, as well as abusive sexual contact among other possible offenses).

<sup>70</sup> St. George and Spohn, *supra* note 66.

<sup>71</sup> LAFREE, *supra* note 46.

<sup>72</sup> *Id.*



Throughout the processing of sexual assault cases, criminal justice actors (e.g., police and prosecutors) have been observed engaging in race-based practices.<sup>73</sup> The Sexual Stratification Hypothesis has found some support through empirical testing, demonstrating the imposition of more punitive measures in cases involving Black offenders and white victims compared to other racial compositions.<sup>74</sup> However, the generalizability of these findings is subject to question due to the study's relatively small sample size, with only 12 cases featuring both white offenders and victims.<sup>75</sup>

Subsequent research has produced results that do not consistently replicate the Sexual Stratification Hypothesis. Instead, these findings suggest that the influence of race on charging decisions is intertwined with other various factors, including the nature of the relationship between the victim and offender, as well as specific victim characteristics such as perceptions of “blame and believability” and assessments of “moral character.”<sup>76</sup>

### *E. Research on Military Sexual Assault Case Processing*

There is a limited body of quantitative research concerning the analysis of charging decisions in sexual assault cases within the military. To date, only three notable studies have been conducted in this domain. One study encompassed over 17,000 Army cases, exploring outcomes involving four potential actions: none, administrative measures, non-judicial punishment, and court-martial.<sup>77</sup> This study revealed disparities in the treatment of

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<sup>73</sup> *Id.*; CASSIA SPOHN & KATHARINE TELLIS, POLICING AND PROSECUTING SEXUAL ASSAULT IN LOS ANGELES CITY AND COUNTY: A COLLABORATIVE STUDY IN PARTNERSHIP WITH THE LOS ANGELES POLICE DEPARTMENT, THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, AND THE LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE (2012).

<sup>74</sup> LAFREE, *supra* note 46.

<sup>75</sup> LaFree, *supra* note 29.

<sup>76</sup> Holleran, Beichner, and Spohn, *supra* note 18; Spears and Spohn, *supra* note 29; Spohn and Holleran, *supra* note 15; SPOHN AND TELLIS, *supra* note 73.

<sup>77</sup> Carpenter, *supra* note 69.

sexual assault cases, particularly when comparing those involving penetration and those that did not.<sup>78</sup> For instance, non-penetrative sexual offenses received more stringent treatment than non-sexual battery offenses. In cases of penetrative sexual offenses, a decision to take no action was more likely compared to other types of cases.<sup>79</sup> It is imperative to acknowledge that the data available for this study was limited, preventing an in-depth analysis of the contributing factors behind these descriptive findings.

Subsequently, the Judicial Proceedings Panel (JPP) analyzed court-martial data from all Department of Defense (DoD) service components for cases completed between 2012 and 2014.<sup>80</sup> Through this dataset, researchers were able to calculate conviction rates and sentence lengths, observing variations in the types of courts-martial based on the type of offense.<sup>81</sup> Penetration offenses, for instance, were more likely to be referred to a general court-martial.<sup>82</sup> Furthermore, differences between service branches were noted, with the Army and Air Force displaying a higher propensity to elevate cases to higher-level courts.<sup>83</sup> The completion year of the case also played a significant role in determining the court to which charges were sent.<sup>84</sup> Over the years 2012–2014, there was a decreasing trend in the percentage of cases sent to general courts-martial, with a corresponding increase in cases referred to special courts-martial.<sup>85</sup>

Notably, the victim’s status as either a civilian or military member had a discernible impact on the outcomes of penetration offenses.<sup>86</sup> Cases

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> CASSIA SPOHN, *Judicial Proceedings Panel: Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses* (2016).

<sup>81</sup> *Id.* at 66.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

involving civilian victims exhibited a higher ratio of charges being filed, as well as higher conviction rates.<sup>87</sup> Sentence lengths were found to correlate with several factors, including the type of charge resulting in a conviction (with penetration offenses resulting in more severe confinement and punitive discharges than contact offenses), victim status (with civilian victim cases having a higher ratio of confinement), the type of court-martial (with general courts-martial resulting in a higher ratio of confinement compared to special courts-martial), and the sentencing authority (with military judges being more likely to impose confinement compared to jury members).<sup>88</sup> It is essential to note the acknowledged limitations in the study, including the absence of crucial information such as the relationship between the victim and accused, risk-taking behavior factors, victim credibility factors, victim injury, victim cooperation with law enforcement, reporting delays, physical evidence, and witnesses.<sup>89</sup> During the presentation of the study results, it was recommended that future research endeavors aim to capture this additional information.<sup>90</sup>

The Defense Advisory Committee on the Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD), formerly known as the JPP, conducted a comprehensive study focusing on sexual assault cases closed during the 2017 fiscal year. This study aimed to assess the factors influencing decision-making within the military's criminal justice process. Several conclusions drawn from this study paralleled findings from civilian research, particularly in terms of charging decisions. DAC-IPAD evaluated the strength of evidence, considering factors such as probable cause<sup>91</sup> and the sufficiency of evidence to secure a conviction.<sup>92</sup>

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Probable cause is a legal standard of evidentiary proof that is less than a preponderance of the evidence but more than an articulable suspicion.

Their findings indicated that Convening Authorities (CAs) exercised discretion appropriately by preferring charges when probable cause existed.<sup>93</sup> However, there was evidence of an abuse of discretion in cases where there was insufficient admissible evidence to secure and sustain a conviction.<sup>94</sup>

While the terminology used by DAC-IPAD differed from civilian research, their findings can be contextualized within the framework established by civilian studies. The study assessed several key factors, including the Strength of the Evidence, Blame and Believability, and Offense Seriousness.<sup>95</sup>

**Strength of the Evidence:** Cases with third-party witnesses, DNA evidence, other physical evidence, and confessions were more likely to result in charges being preferred.<sup>96</sup> Conversely, the presence of exculpatory evidence decreased the likelihood of charges being preferred.<sup>97</sup>

**Blame and Believability:** Cases involving acquaintance relationships and prior sexual relationships had a lower ratio of charges being preferred. No analysis was conducted on physical or verbal resistance of the victim. Reporting within seven days of the incident increased the likelihood of charges being preferred,<sup>98</sup> and victim reporting of impairment also had a positive effect on preferral of charges.<sup>99</sup> The location of the incident (victim or offender's home) was not analyzed. Cases with civilian victims were more likely to result in a conviction, but not preferral of charges.<sup>100</sup>

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<sup>92</sup> The phrase “sufficiency of the evidence to secure a conviction” refers to the amount of admissible evidence available for the finder of fact in deciding on the guilt or innocence of a defendant.

<sup>93</sup> DAC-IPAD, *Report on Investigative Case File Reviews for Military Adult Penetrative Sexual Offense Cases Closed in Fiscal Year 2017*, 1 (2020).

<sup>94</sup> *Id.* at 7.

<sup>95</sup> DAC-IPAD, *supra* note 93.

<sup>96</sup> *Id.* at 109.

<sup>97</sup> DAC-IPAD, *supra* note 93.

<sup>98</sup> *Id.* at 109.

<sup>99</sup> *Id.* at 111.

<sup>100</sup> *Id.* at 108, 114.

Offense Seriousness: The use of force against or injury to the victim increased the likelihood of preferral of charges.<sup>101</sup>

In addition to these quantitative studies on military prosecutions, one qualitative study provided descriptive accounts and quantitative descriptive statistics regarding sexual assault cases in Japan, spanning from 2005 to 2013.<sup>102</sup> The researchers examined the potential influence of gender biases on case processing, utilizing 585 investigative summaries from the Naval Criminal Investigative Service (NCIS).<sup>103</sup> Their study shed light on how the interplay between criminal justice system procedures, such as the beyond a reasonable doubt standard and gender biases, might have contributed to CAs ultimately deciding not to pursue charges. They also observed that many victims discontinued their participation in the process after making initial reports.<sup>104</sup> Although the study did not directly attribute these findings to any specific cause, the authors recommended further research to explore why victims chose to discontinue their involvement after initially reporting the incidents.<sup>105</sup>

### III. RESEARCH HYPOTHESES

A robust body of scholarly research on the civilian criminal justice system reveals that prosecutors' charging decisions are influenced by both legally relevant variables, such as offense severity, and extralegal factors like victim credibility and blameworthiness. This study aims to test three core hypotheses grounded in the extant literature on sexual assault charging in civilian contexts. Although salient differences exist between military and civilian justice systems, human decision-makers operate in both domains.

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<sup>101</sup> *Id.* at 113. The DAC-IPAD did assess MILITARY RULES OF EVIDENCE 404(b) and 413 factors but did not distinguish whether the cases involved more than one victim.

<sup>102</sup> Carolyn M. Warner & Mia A. Armstrong, *The Role of Military Law and Systemic Issues in the Military's Handling of Sexual Assault Cases*, 54 L. SOC. REV. 265 (2020).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

Available evidence suggests that military personnel assess victim credibility and culpability much like their civilian counterparts, perhaps to an even greater degree. As such, this research will examine whether analogous extralegal factors shape military prosecutors' sexual assault charging decisions.

### *A. Hypothesis I*

The Blame and Believability factors found significant in the civilian research show the following factors impact decision-making: acquaintance relationship, physical resistance, fresh complaints, and alcohol use by victim, as well as whether the incident occurred at the victim or offender's home.<sup>106</sup> Therefore, the first hypothesis this study will evaluate is the following:

*H1: An increase in Blame and Believability factors will decrease the likelihood that a case will be charged.*

### *B. Hypothesis II*

As with Blame and Believability factors, it is theorized that military decision-makers will make assumptions about how the fact finder (i.e., judge or jury) will consider the case and then make charging decisions based on those assumptions. The stronger the evidence, the more likely a conviction will result, which motivates the second hypothesis:

*H2: An increase in Strength of the Evidence will increase the likelihood that a case will be charged.*

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<sup>106</sup> Megan A. Alderden & Sarah E. Ullman, *Creating a More Complete and Current Picture Examining Police and Prosecutor Decision-Making When Processing Sexual Assault Cases*, 18 VIOLENCE AGAINST WOMEN 525 (2012); ESTRICH, *supra* note 43; LaFree, *supra* note 29; Spears and Spohn, *supra* note 29; Cassia Spohn, Clair White & Katharine Tellis, *Unfounding Sexual Assault: Examining the Decision to Unfound and Identifying False Reports*, 48 L. SOC. REV. 161 (2014).

### C. Hypothesis III

The basic premise of the third hypothesis is that the use of punitive measures will increase as the seriousness of the offense increases. Offense Seriousness is a composite variable of six other variables, almost all of which have been shown to have an impact on sexual assault case processing in the civilian system: penetration,<sup>107</sup> offender use of a weapon,<sup>108</sup> number of offenders,<sup>109</sup> number of victims,<sup>110</sup> force,<sup>111</sup> and injury.<sup>112</sup> There has been theoretical debate that charging rates increase when the offender is in a supervisory relationship to the victim,<sup>113</sup> and the findings from the 2020 DAC-IPAD report support this theory.<sup>114</sup> Supervisory relationship is a variable contained within the composite variable Offense Seriousness. Therefore, the third hypothesis this study will evaluate is the following:

*H<sub>3</sub>: An increase in Offense Seriousness will increase the likelihood that a case will be charged.*

## IV. METHODS

The objective of the present study is to shed light on the factors that influence charging decisions in the MCJS. The current study builds upon

<sup>107</sup> St. George and Spohn, *supra* note 66.

<sup>108</sup> Albonetti, *supra* note 29; Kerstetter, *supra* note 29; Spohn, Beichner, and Davis-Frenzel, *supra* note 6; Tellis and Spohn, *supra* note 66.

<sup>109</sup> LaFree, *supra* note 29.

<sup>110</sup> SPOHN, *supra* note 80.

<sup>111</sup> Spears & Spohn, *supra* note 29; Jeffrey Spears & Cassia Spohn, *The Effect of Evidence Factors and Victim Characteristics on Prosecutors' Charging Decisions in Sexual Assault Cases*, 14 JUST. Q. 501 (1997); DAC-IPAD, *supra* note 93.

<sup>112</sup> Spohn and Holleran, *supra* note 15; Cassia Spohn & Katharine Tellis, *Sexual Assault Case Outcomes: Disentangling the Overlapping Decisions of Police and Prosecutors*, 36 JUST. Q. 383 (2019).

<sup>113</sup> Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GEND. L. 147 (2011); Jessica L. Cornett, *The U.S. Military Responds to Rape: Will Recent Changes Be Enough Note*, WOMENS RIGHTS L. REPORT. 99 (2007); Colleen Dalton, *The Sexual Assault Crisis in the United States Air Force Academy*, 11 CARDOZO WOMENS L. J. 177 (2004).

<sup>114</sup> DAC-IPAD, *supra* note 93 at Appendix F-55.

work conducted by the JPP and the results from the DAC-IPAD study. The JPP was able to assess prosecutorial decision-making in the military but indicated that the analysis was strained by the absence of theoretically relevant information.<sup>115</sup> While the JPP study utilized cases from every service branch, it consisted only of cases that had already been charged at court-martial, thus preventing comparisons between cases that had and had not been preferred. The DAC-IPAD study built upon Spohn's earlier work and comprehensively assessed cases closed in 2017 from all the service branches, addressing each of the stages in the criminal process. The findings show many of the factors<sup>116</sup> that influence civilian charging also influence military charging. The sample for the study below will focus exclusively on cases processed by the Navy and does not include an analysis of stages post-preferred, but it does include cases from a three-year timeframe.

#### *A. Data*

Most cases in this study originated from two different commands: Recruit Training Command (RTC) Great Lakes and Training Support Center (TSC) Great Lakes. The decision to refer a case to a general court-martial was always made by the Commander, Navy Region Mid-Atlantic. As the cases were spread over three years and Commanders typically rotated every two years, case dispositions (i.e., preferred decisions) were made by different Commanders. Similar to prosecutor offices that handle cases horizontally,<sup>117</sup> when the CA makes the decision to prosecute but is

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<sup>115</sup> SPOHN, *supra* note 80.

<sup>116</sup> See, *supra*, Section II.

<sup>117</sup> Horizontal prosecution refers to the process where one prosecutor screens the case and decides to charge, at which point another prosecutor is responsible for shepherding the case through trial. Horizontal prosecutions are different than vertical prosecutions, where the same prosecutor screens the case and shepherds it through trial.



not responsible for actually prosecuting the case, the result is likely an increase in charged cases.<sup>118</sup>

This study uses information on cases processed approximately between August 2016 and May 2019 by the Region Legal Service Office Midwest (RLSO MW). This sample was chosen based on my service as a prosecutor during this time. At that time, every sexual assault case NCIS investigated was logged in the case management systems (CMS). The same is not true for all cases prior to August 2016. In approximately late 2016 or early 2017, a policy change was made to require tracking of every report of sexual assault. Prior to that policy change, only cases where the prosecutor spent a lot of time analyzing it or where the case proceeded to court-martial were tracked in CMS. Each case file consisted of a Report of Investigation (ROI) from NCIS with all exhibits to evidence electronically stored, any applicable prosecutorial merit memorandum, and where applicable, a charge sheet.

The data consisted of records maintained in accordance with business rules designed specifically for the tracking of cases reviewed by the prosecutors. A legal assistant ensured the accuracy of the data in CMS.<sup>119</sup> A total of 391 records were identified in CMS that involved an allegation the prosecutor screened as a possible violation of Article 120, UCMJ, which is the statute that prohibits most criminal sexual offenses. Category (1) cases did not involve adult<sup>120</sup> sexual assault and category (2) cases involved charges in addition to adult sexual assault, such as child pornography or child sexual assault (n = 271). Both Category (1) and (2) cases were excluded because those cases are significantly different, from a prosecutorial and theoretical perspective, than adult sexual assault. For

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<sup>118</sup> Spohn and Holleran, *supra* note 15.

<sup>119</sup> However, I also personally verified the accuracy of the data contained in this study.

<sup>120</sup> Adult, for purposes of this study, included victims 16 years of age and older. The determination was made based on the legal definitions in Article 120, UCMJ. However, all the victims in this study were 17 years of age and older.

instance, child sexual abuse cases are both harder to prosecute and more egregious, creating dynamics that are substantially different than in adult sexual assault cases. Child pornography cases are easier to prosecute and are egregious, which also creates a dynamic different than adult sexual assault cases. The final analytic sample consisted of 120 adult sexual assault cases.

During the processing of cases, victims were contacted and asked for their input at two decision points: the disposition decision (e.g., preferral) and, for cases charged at court-martial, the choice to accept a plea agreement offered by the accused. Victims were afforded the right to be notified of decision-making and scheduling of any hearings; the Navy audits prosecution unit records to ensure these rights are provided to victims. Finally, victims were offered the opportunity to participate in some hearings<sup>121</sup> and watch all hearings pertaining to them.

### *B. Setting*

The Navy's first and only bootcamp is located in Great Lakes, Illinois. Enlisted sailors transition into the Navy through bootcamp at RTC. The following information applied to the location under study during the relevant timeframe. While attending bootcamp, attendees were referred to as recruits. After completing bootcamp, they were referred to as sailors. Some sailors remained in Great Lakes to complete follow-on training at TSC. Both the recruits at bootcamp and sailors at follow-on training were in the paygrades E-1 through E-3 and were typically between the ages of 18-21, although some individuals promote to E-4 at follow-on training and the Navy accepted enlisted applicants between the ages of 17 and 39. Both RTC and TSC were administratively run by staff members from the

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<sup>121</sup> Hearings where a victim is allowed to participate include those where a right of the victim is implicated. An example would be in a hearing involving the rape shield rule of evidence. Victims also are generally allowed to watch the entirety of other proceedings, absent some basis for excluding them.

paygrades E-3 to O-7, who were generally older than sailors attending bootcamp and follow-on training at TSC.

RTC was unique from any other command in the Navy. It was a shore-based command whose purpose was to transition civilians into Navy life, which took approximately eight weeks. During this time, Recruit Division Commanders (RDCs) lived with and instructed recruits daily. RDCs were the first-line supervisors of recruits and controlled all aspects of their daily lives. Recruits were trained to follow the orders of RDCs through a “total-institution” training regimen.<sup>122</sup> Recruits were confined to “a place of residence and work where a large number of like-situated individuals, cut off from the wider society for an appreciable period of time, together led an enclosed, formally administered round of life.”<sup>123</sup> Within this environment, recruits were transformed into sailors, but the dynamics of this environment made the opportunity for abuse of authority ever-present. The abuse of authority was taken seriously, and violations were generally not tolerated. Yet this atmosphere was similar to that of the Aberdeen Proving Grounds, where the abuse of military authority led to the sexual assault of many victims.<sup>124</sup>

Cases in the civilian system have generally been prosecuted horizontally or vertically.<sup>125</sup> If horizontal, one prosecutor initially reviews the case and determines what to charge. Then another prosecutor is responsible for trying the case in court. This is different than cases tried vertically, in which the same prosecutor both charges and tries the case. The office under examination was a hybrid of these two systems, which was consistent with the rest of the prosecution units in the Navy. Cases were prosecuted vertically because the same prosecutor remained with the case to resolution,

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<sup>122</sup> ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* (1961).

<sup>123</sup> *Id.* at 5.

<sup>124</sup> Elizabeth L. Hillman, *Front and Center: Sexual Violence in U.S. Military Law*, 37 *POLIT. SOC.* 101 (2009).

<sup>125</sup> Spohn and Holleran, *supra* note 15.

with some exceptions.<sup>126</sup> Cases were also processed horizontally because the CA was the one who ultimately decided if the case was referred to trial, and the CA was never the prosecutor on the case. A victim coordinator was assigned to every case and, along with the prosecutor, ensured that victims received information pertaining to victim rights during the processing of cases. Two of those rights required the prosecutor to receive input from the victim and provide it to the CA.

### *C. Variables*

#### **1. Dependent Variable**

Preferred cases are those where the CA made the decision to charge the case. No Action cases consist of those where neither preferred charges nor administrative measures occurred. Administrative Action refers to those cases that resulted in non-judicial Punishment (NJP),<sup>127</sup> administrative separation, or both. Of these outcomes, preferral of charges is the most serious, followed by administrative and no action outcomes. The various outcomes were coded as follows:

Preferred: '1'= yes, '0'= no

Outcome: '1'= Preferred, '2'= Administrative Action, '3'= NoAction

This is consistent with the DAC-IPAD and JPP recommendations for categorization of case outcomes, although, due to the small sample size, this study does not differentiate between all the possible administrative outcomes.

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<sup>126</sup> For instance, in the military, prosecutors are often rotated, typically every two to three years. This occurred with several prosecutors in the office studied. However, I was the senior prosecutor throughout the entire period.

<sup>127</sup> NJP, or Captain's Mast, is a term for the administrative adjudication of offenses by the Commander. (The accused is offered substantially less due process at NJP, but the possible punishments are also less severe (e.g., no confinement may be awarded)).

## 2. Independent Variables

The focus of the current study was to assess whether the variables of Blame and Believability, Strength of the Evidence, and Offense Seriousness influenced case processing in the military. A codebook is included in Appendix B.

Several studies have addressed the theory that prosecutors base decisions to charge cases on the characteristics of victims and offenders.<sup>128</sup> Because sexual assault most often occurs without any third-party witnesses, decision-makers often resort to making assessments about whether the offender and victim fit within the parameters of the decision-maker's beliefs about how offenders and victims look and behave.<sup>129</sup> For instance, if a prosecutor believes a victim is not typically victimized by someone the victim knows—especially an intimate partner—the prosecutor would be more likely to reject an intimate partner case.<sup>130</sup>

When a victim's actions do not conform with the dominant view on gender roles, the victim's account will be discredited.<sup>131</sup> Gender roles typically do not permit certain behaviors by women, such as hitchhiking, willingly going to an offender's house, being in a bar alone, and using drugs or alcohol.<sup>132</sup> These behaviors give prosecutors a basis to conclude the victim is not credible and form the underlying rationale for why prosecutors fail to charge cases.<sup>133</sup> The prosecutor engages in the same behavior when a victim's report is deemed inconsistent when comparing police reports and statements made to the prosecutor.<sup>134</sup> These credibility determinations are

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<sup>128</sup> Beichner and Spohn, *supra* note 3; David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. CRIMINOL. 1973- 1194 (1997); Spears and Spohn, *supra* note 111; Spohn, Beichner, and Davis-Frenzel, *supra* note 6; Spohn and Holleran, *supra* note 15; Spohn and Horney, *supra* note 42.

<sup>129</sup> LaFree, *supra* note 29.

<sup>130</sup> Beichner and Spohn, *supra* note 3.

<sup>131</sup> Frohmann, *supra* note 19.

<sup>132</sup> Spohn and Horney, *supra* note 23.

<sup>133</sup> Spohn, Beichner, and Davis-Frenzel, *supra* note 6; Frohmann, *supra* note 19.

<sup>134</sup> Frohmann, *supra* note 19.

justifications for rejecting sexual assault cases,<sup>135</sup> which are mostly “victim contests.”<sup>136</sup> The police officer’s report about what the victim said is held in high regard, without flaw, and therefore the conclusion is that the victim is not being truthful in the report to the prosecutors.<sup>137</sup>

In the current study, several dichotomous variables were aggregated to form the overarching variable, ‘Blame and Believability’. These dichotomous variables capture the following characteristics: (1) whether the victim and offender were acquaintances; (2) whether the victim and offender had a prior sexual relationship; (3) whether the victim physically resisted the assault; (4) whether the victim verbally resisted the assault; (5) whether the victim made a fresh complaint within 24 hours; (6) whether the victim consumed alcohol; (7) whether the incident occurred at the victim or offender’s home; and (8) whether the victim was a civilian. Missing values were imputed for each of these eight variables prior to summing them. There were two cases requiring imputation, with two variables per case. Using the pooled results from multiple imputation, the binary value for each variable was summed into a total score, which became the coded form of the Blame and Believability variable. The Blame and Believability variable was then transformed in SPSS into a z-score, by using the Descriptive Statistics option under the Analyze drop-down menu.

Strength of the Evidence is considered one of the greatest factors prosecutors assess when making charging decisions.<sup>138</sup> Some variables have been grouped together based on the amount of evidence available to prosecute the case, named Strength of the Evidence.<sup>139</sup> While some research suggests that Strength of the Evidence does not always increase in the

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<sup>135</sup> Spohn and Holleran, *supra* note 15.

<sup>136</sup> Jennifer Dunn, *Accounting for Victimization: Social Constructionist Perspectives*, 2 *SOCIOL. COMPASS* 1601, 1609 (2008).

<sup>137</sup> Frohmann, *supra* note 19.

<sup>138</sup> DAC-IPAD, *supra* note 93.

<sup>139</sup> Kerstetter, *supra* note 29.

likelihood of prosecution,<sup>140</sup> some research suggests it does,<sup>141</sup> especially when comparing “simple rape” to aggravated rape cases.<sup>142</sup>

In the current study, several dichotomous variables were aggregated to form the overarching variable, ‘Strength of the Evidence’. These dichotomous variables capture the following characteristics: (1) whether there was a third-party witness to the assault; (2) whether the investigation resulted in DNA evidence; (3) whether the investigation produced other physical evidence showing the offender was culpable for the assault; (4) whether the offender confessed to the assault; (5) whether the victim received a SAFE/ SAMFE examination; and (6) whether there was exculpatory evidence.<sup>143</sup> Missing values were imputed for each of these six variables prior to summing them. There was one case requiring imputation, with five variables missing for that case. Using the pooled results from multiple imputation, the binary value for each variable was summed into a total score, which became the coded form of the Strength of the Evidence variable. The Strength of the Evidence variable was then transformed in SPSS into a z-score, by using the Descriptive Statistics option under the Analyze drop-down menu.

Case characteristics can fairly be described as those aspects of the case that relate directly to the criminal code or in some other way make the offender more culpable for the crime. In the current study, several dichotomous variables were aggregated to form the overarching variable, ‘Offense Seriousness’. These dichotomous variables capture the following characteristics: (1) whether there was penetration; (2) whether there was

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<sup>140</sup> Spears and Spohn, *supra* note 111.

<sup>141</sup> Alderden and Ullman, *supra* note 106.

<sup>142</sup> Spohn and Horney, *supra* note 41.

<sup>143</sup> Defined as: “*Evidence favorable to the defense*. The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to: (A) Negate the guilt of the accused of an offense charged; (B) Reduce the degree of guilt of the accused of an offense charged. . .” MANUAL FOR COURTS-MARTIAL (hereinafter “MCM”), RULES FOR COURTS-MARTIAL (hereinafter “RCM”) 701(a)(6) (2012 ed.).

more than one offender; (3) whether there was more than one victim; (4) whether force was used to commit the assault; (5) whether the victim sustained a physical injury; and (6) whether the offender was a supervisor of the victim. Missing values were imputed for each of these six variables prior to summing them. There were two cases requiring imputation, with two variables for one and one variable for the other. Using the pooled results from multiple imputation, the binary value for each variable was summed into a total score, which became the coded form of the Offense Seriousness variable. The Offense Seriousness variable was then transformed in SPSS into a z-score, by using the Descriptive Statistics option under the Analyze drop-down menu.

### 3. Control Variables

A series of other theoretically relevant factors were used as controls. The results of the DAC-IPAD 2020 report showed a race effect on case processing, and race has been shown in numerous civilian, and a few military, studies to warrant including it as a control variable.<sup>144</sup> In the DAC-IPAD 2020 study, cases with a white victim had a greater likelihood of being preferred.<sup>145</sup> The DAC-IPAD 2020 report showed that rank of the victim and offender and the victim's participation all affected case processing.<sup>146</sup> Cases had a greater likelihood of being preferred when the victim was an officer.

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<sup>144</sup> DAC-IPAD, *supra* note 93 at 108; Franklin, *supra* note 21; Christopher D Maxwell, Amanda L Robinson & Lori A Post, *The Impact of Race on the Adjudication of Sexual Assault and Other Violent Crimes*, 31 J. CRIM. JUST. 523 (2003); Sara Steen, Rodney L. Engen & Randy R. Gainey, *Images of Danger and Culpability: Racial Stereotyping, Case Processing, and Criminal Sentencing.*, 43 CRIMINOL. 435 (2005); Steffensmeier and Demuth, *supra* note 22.

<sup>145</sup> DAC-IPAD, *supra* note 93.

<sup>146</sup> *Id.* at 108, Appendix F-20, F-25, F-55.



There have been numerous civilian studies which have found that race has an effect on criminal justice outcomes.<sup>147</sup> Research on military cases is limited to studies assessing the effect of race on sentencing outcomes,<sup>148</sup> but the recent DAC-IPAD report supports the conclusion that race does not impact military criminal outcomes.<sup>149</sup> Looking at the underlying data used by Protect Our Defenders, available on their website, shows that race potentially plays a role in charging within the military.<sup>150</sup> The data was obtained from a Freedom of Information Act (FOIA) release from the Navy for cases in CMS between 2014 and 2016.<sup>151</sup> Using the Protect Our Defenders underlying data and shows that 39 percent of Navy cases involved a white offender, 47 percent of the cases charged at a court-martial involved a white offender, but only 44 percent of the cases in which a conviction resulted involved a white offender.<sup>152</sup> Comparable results were found for Black, Asian, and Hispanic offenders.<sup>153</sup> The category that saw a benefit during case processing is categorized in the underlying data as “other” for race.<sup>154</sup> Because approximately one-third of the cases were categorized as “other”, it is difficult to assess whether the results of these basic descriptors adequately portrays what actually occurred. Yet the results still present some evidence that race could have an impact on processing, and when coupled with the racial impact found in other aspects of military

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<sup>147</sup> Franklin, *supra* note 21; Maxwell, Robinson, and Post, *supra* note 144; Steen, Engen, and Gainey, *supra* note 144; Steffensmeier and Demuth, *supra* note 22.

<sup>148</sup> Baldus et al., *supra* note 66; Ronald W. Perry, *The Justice System and Sentencing: The Importance of Race in the Military*, 15 CRIMINOL. 225 (1977); Naomi Verdugo, *Crimes and Punishment: Blacks in the Army's Criminal Justice System*, 10(2) MIL. PSYCHOL. 107 (1998).

<sup>149</sup> DAC-IPAD, *supra* note 93 at 114.

<sup>150</sup> DON CHRISTENSEN & YELENA TSILKER, *Racial Disparities in Military Justice: Findings of Substantial and Persistent Racial Disparities Within the United States Military Justice System* (2017).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

justice processing and in civilian literature, it seems prudent to include race as a variable in the current study.

In the present study, due to the relatively small number of non-white offenders, each case was dichotomously coded for white, with '1' being yes and '0' for all others. Where there were multiple victims of different races and one of the victims was white, the case was coded as '1' for white. The theoretical reasoning, based on the DAC-IPAD study and loosely on the Sexual Stratification Hypothesis, is that cases are treated more seriously when there is a white victim. Another variable was coded to assess the Sexual Stratification Hypothesis. Cases where the offender was Black, and the victim was white (or at least one victim was white) were coded as a '1' and '0' if the offender was not Black and no victim was white.

Class, for purposes of the military, is synonymous with pay grade or rank.<sup>155</sup> A military member's pay grade is integral to every aspect of military service. Officers are afforded more privileges than enlisted members (e.g., officers cannot be awarded confinement or a punitive discharge at a special court-martial).<sup>156</sup> The distinction made between officers and enlisted members changes the dynamics of the court-martial, regarding the members panel. Enlisted members cannot serve as members when the defendant is an officer. Additionally, no person junior in grade or rank to the accused can serve on the panel. Therefore, while a senior enlisted member may choose to have enlisted members serve on the panel, the pool of potential jurors is decreased depending on the rank of the defendant. The same is true for officers. An O-6, which is a captain in the Navy and Coast Guard and a colonel in every other branch of service, can only have more senior captains/colonels or admirals/generals serve on the

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<sup>155</sup> Patricia D. Breen, *The Trial Penalty and Jury Sentencing: A Study of Air Force Courts-Martial*, 8 J. EMPIR. LEG. STUD. 206 (2011).

<sup>156</sup> ROBERT J. STEVENSON, ORGANIZATIONAL REACTION TO SOCIAL DEVIANCE: THE MILITARY CASE 5 (2010).

panel.<sup>157</sup> In the present study, there were no officer offenders. Therefore, distinctions on outcomes of cases based on the difference between officers and enlisted was not possible. Offender and victim ranks were continuously coded (see Appendix B for a detailed description of how this variable was coded).

Civilian research shows that gender has significant effects on processing, to include arrest and referral to a prosecutor,<sup>158</sup> dismissal,<sup>159</sup> and sentencing.<sup>160</sup> Given that sexual assault is considered a gendered crime, it makes sense that many of the instances of sexual assault reported to the prosecutor will involve male offenders and this will impact the number of male offenders charged. The sample is consistent with this theory, as it included less than 10 percent of female offenders. Therefore, this variable was not included in any of the analyses. The gender of the victim was coded, as the sample included 48 male victims or 40 percent of the total victims. For victims, a '1' was coded for female and '0' for male.

The age of the offender and victim have both been found to independently influence case processing across several studies. Yet in this study the age of the offender was highly correlated with offender rank and therefore was excluded from the analysis. The DAC-IPAD found that in military sexual assault case processing, the age of the victim did not

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<sup>157</sup> In the military, there is an exception that relates to military exigencies. Military exigencies could dictate that an exception to only having higher-ranking members serve should apply. See MCM pt. II, Rules for Courts-Martial 912(f)(1)(K).

<sup>158</sup> Joseph L. Peterson et al., *Effect of Forensic Evidence on Criminal Justice Case Processing*, 58 J. FORENSIC SCI. S78 (2013).

<sup>159</sup> Kenneth Adams & Charles R. Cutshall, *Refusing to Prosecute Minor Offenses: The Relative Influence of Legal and Extralegal Factors*, 4 JUST. Q. 595 (1987).

<sup>160</sup> Celesta A. Albonetti, *Sentencing under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991–1992*, 31 L. SOC. REV. 789 (1997); Steffensmeier, Kramer, and Streifel, *supra* note 10; Jeffery T. Ulmer, Megan C. Kurlychek & John H. Kramer, *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RES. CRIME DELINQ. 427 (2007).

influence the decision to prefer charges.<sup>161</sup> The DAC-IPAD finding, coupled with the small sample size and desire to achieve parsimony in variable selection, victim age was not included in the analysis.

As proposed by the JPP, variables were coded based on the preference of the victim. DoD policy dictates that ordinarily a victim's unwillingness to participate in a prosecution should be honored.<sup>162</sup> Research demonstrates that victim preference in at least one civilian jurisdiction increases charging, and the DAC-IPAD Report showed victim participation was significant within the military.<sup>163</sup> The variable was dichotomously coded with victim desire for court-martial coded as '1' and desire for an outcome other than court-martial as '0'.

## V. ANALYTIC STRATEGY

### A. *Multiple Imputation*

Multiple imputation was necessary in this study because Offender race was missing in 8 cases (6.7%) and the Black Offender/ white Victim (SSH variable) was missing in 10 cases (8.3%). All other variables were missing less than five percent of the variables (see Table 1). Missing data, to some degree, is present in virtually every study. There are two basic approaches to dealing with missing data. The preferred method, assuming the reason for the data being missing is random (missing completely at random or MCAR), is to drop the cases with missing data from the analysis. Yet where the reason for the missing data is not random or where the amount of missing data exceeds five percent of the sample, the researcher should not simply drop the cases with missing data. If dropping the cases is not advisable from a statistical perspective, another option is to impute data, or fill in the gaps.

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<sup>161</sup> DAC-IPAD, *supra* note 93.

<sup>162</sup> Department of Defense Instruction 6495.02 (2021).

<sup>163</sup> DAC-IPAD, *supra* note 93.

To account for missing information, multiple imputation via SPSS version 24 was used. Multiple imputation is considered a scientifically reliable way of filling in gaps in the data.<sup>164</sup> The three steps for multiple imputation include:

1. Create multiple complete datasets through imputation of missing data from Bayesian distributions that are conditional on the observed data;
2. Conduct statistical analyses on these imputed data to generate multiple sets of results; and
3. Pool the multiple results together to account for uncertainty from missing data imputations for valid probabilistic inference.<sup>165</sup>

While there is some concern over variability in results between SPSS and STATA imputed values, using more imputations reduces sampling error.<sup>166</sup> Research has shown that the pooled data from imputation does not vary in significance between software packages, when five or more imputations are used.<sup>167</sup> In this study, more than five imputations were used.

In SPSS, an analysis of the missing values was conducted under Analyze Patterns. The minimum percentage of missing cases per variable was set to .01, to capture any variable with a missing value. The random number generator was run with the active generator set at SPSS 12 Compatible. The Active Generator Initialization Set Starting Point was set at a fixed value of 2,000,000. Within Impute Missing Data Values, 15 imputations were selected under Variables. Constraints were used for Victim Rank (0-11), based on a scan of the range existing within the data. A sensitivity analysis was not conducted, as the likelihood that the information was missing not at

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<sup>164</sup> Jianjun Wang & Dallas Johnson, *An Examination of Discrepancies in Multiple Imputation Procedures Between SAS® and SPSS®*, 73(1) AM. STATISTICIAN 1, 80 (2019).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

random (MNAR) was “highly improbable and therefore of limited interest.”<sup>168</sup>

### *B. Logistic Regression*

Binary logistic regression is favored in criminological research because many of the variables within the field are dichotomous (e.g., charge vs. no charge/ confinement vs. no confinement).<sup>169</sup> With this type of regression, the dependent variable’s relationship to the independent variable can be easily ascertained through calculating the odds ratio, or the likelihood that the presence of the independent variable will result in the dependent variable.<sup>170</sup> In the present study, the dependent variable was the outcome of the case. Therefore, each of the independent variables was regressed on the dependent variable to assess how likely the independent variable was to influence each outcome.

$$\text{Odds} = \frac{P(Y = 1)}{P(Y = 0)} = \frac{P(Y = 1)}{1 - P(Y = 1)}$$

Odds ratios can also be determined between the outcomes for different cases (i.e., preferral versus no preferral).

$$\text{Odds ratio} = \frac{\left( \frac{P(Y = 1)}{1 - P(Y = 1)} \right)_{\text{group 1}}}{\left( \frac{P(Y = 1)}{1 - P(Y = 1)} \right)_{\text{group 2}}}$$

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<sup>168</sup> STEF VAN BUUREN, FLEXIBLE IMPUTATION OF MISSING DATA 75 (2012).

<sup>169</sup> HANDBOOK OF QUANTITATIVE CRIMINOLOGY, (Alex R. Piquero & David Weisburd eds., 2010). [<https://perma.cc/R8A2-55F6>].

<sup>170</sup> *Id.* at 186.

The coefficients reveal the change in the dependent variable for each unit change in the independent variable while holding other theoretically relevant variables constant<sup>171</sup> by factoring the partial regression coefficient.<sup>172</sup> In the present study, an interaction term was included to see if there were any differences, based on Blame and Believability scores, in penetrative and non-penetrative cases.

Binary logistic regression was used to assess the relationship between the hypothesized explanatory variables and preference of charges. The main explanatory variables consist of composite variables:<sup>173</sup> Blame and Believability (BB), Strength of the Evidence (SE), and Offense Seriousness (OS). To control the effect of other theoretically relevant variables, the model also included variables for victim rank (VR), victim female (VF), victim white (VW), victim desired court-martial (CM), offender white (OW), offender rank (OR), Black Offender/ white Victim (BOWV), and BB multiplied by penetration (BBxP). The equation is:

$$\text{Ln}(\text{odds}(\text{charge}=1)) = a_0 + b_1 (\text{BB}) + b_2 (\text{SE}) + b_3 (\text{OS}) + b_4 (\text{VR}) + b_5 (\text{VF}) + b_6 (\text{VW}) + b_7 (\text{CM}) + b_8 (\text{OW}) + b_9 (\text{OR}) + b_{10} (\text{BOWV}) + b_{11} (\text{BBxP}) + e.$$

The interaction term (BBxP) was used in order to assess the Liberation Hypothesis, which posits that Blame and Believability factors exert differing levels of influence on prosecutors' decision-making in penetration versus non-penetration cases.<sup>174</sup> A significant effect on this interaction term would reveal that Blame and Believability factors influence charging differently for cases where penetration occurred when compared to cases where penetration did not occur. The Sexual Stratification Hypothesis

<sup>171</sup> HANDBOOK OF QUANTITATIVE CRIMINOLOGY, *supra* note 169.

<sup>172</sup> MICHAEL LEWIS-BECK, APPLIED REGRESSION 49 (1980).

<sup>173</sup> See generally Spohn and Tellis, *supra* note 112 at 396 (for a study where composite variables were used).

<sup>174</sup> St. George and Spohn, *supra* note 66.

posits that cases with a Black offender and white victim will be treated more harshly than other cases.<sup>175</sup> A significant effect on this variable would support this theory.

One drawback of binary logistic regression is that the outcome decision in the military's criminal justice system is not entirely binary, as it is in the civilian system. Thus, while binary logistic regression allows for the comparison between preferral and non-preferral of cases, it does not allow for comparison between cases that are selected for an administrative outcome. Multinomial logistic regression was also used to assess the differences between the three different possible outcomes: Preferral, Administrative Outcome, and No Action Outcome.

## VI. RESULTS

### *A. Descriptive Results*

Table 1 displays descriptive statistics for the dependent and control variables prior to imputation. The descriptive statistics for the main explanatory variables—Blame and Believability, Offense Seriousness and Strength of the Evidence—were included after multiple imputation. Table 2 consists of a case outcome comparison using the dependent, independent, and control variables. The results shown in this table are after imputation, and therefore the independent composite variables are included. I summarize the observations drawn from Tables 1 and 2 in the sections that follow.

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<sup>175</sup> LAFREE, *supra* note 46.



**Table 1. Descriptive Statistics (Variables Included in the Models)**

	N=120	Missing	Mean
Preferred	24	0	0.20
Admin Outcome	59	0	0.49
No Action Outcome	37	0	0.31
<b>Blame and Believability (H<sup>1</sup>)</b>			
Acquaintances	120	0	0.79
Prior Consensual Sex	120	0	0.09
Victim Physical Resistance	120	0	0.34
Victim Verbal Resistance	120	0	0.57
Fresh Complaint < 1 day	119	1	0.30
Victim Alcohol	120	0	0.19
Victim/ Offender's Home	119	1	0.13
Victim Civilian	120	0	0.05
<b>Strength of the Evidence (H<sup>2</sup>)</b>			
Third-Party Witness	119	1	0.44
Physical Evidence- DNA	119	1	0.02
Physical Evidence- Other	119	1	0.20
Confession	119	1	0.08
SAFE Conducted	120	0	0.05
Exculpatory Evidence	119	1	0.50
<b>Offense Seriousness (H<sup>3</sup>)</b>			
Penetration	120	0	0.19
> 1 Victim	119	1	0.18
> 1 offender	120	0	0.05
Force	119	1	0.13
Injury	119	1	0.02
Supervisory Relationship	120	0	0.09
Victim Rank	119	1	1.90
Victim Female	120	0	0.60
Victim White	115	5	0.70
Victim Desires Court-Martial	116	4	0.20
Offender White	118	2	0.49
Offender Rank	120	0	2.50
Black Offender/ White Victim	110	10	0.21

**Table 2. Descriptive Statistics for Variable Differences Between Outcomes**

	Preferred		Admin Action		No Action	
	N= 24		N= 59		N= 37	
	Mean	SD	Mean	SD	Mean	SD
Blame and Believability	0.32	1.18	-0.14	0.90	0.01	0.94
Acquaintances	0.75	0.44	0.73	0.45	0.92	0.28
Prior Consensual Sex	0.21	0.42	0.03	0.18	0.11	0.32
Victim Physical Resistance	0.42	0.50	0.39	0.49	0.22	0.42
Victim Verbal Resistance	0.54	0.51	0.58	0.50	0.57	0.50
Fresh Complaint < 1 day	0.52	0.51	0.25	0.44	0.24	0.44
Victim Alcohol	0.25	0.44	0.14	0.35	0.24	0.44
Victim/ Offender's Home	0.26	0.45	0.08	0.28	0.14	0.35
Victim Civilian	0.04	0.20	0.05	0.22	0.05	0.23
Strength of the Evidence (H <sup>2</sup> )	0.60	1.09	0.07	0.85	-0.51	0.88
Third-Party Witness	0.67	0.48	0.41	0.50	0.33	0.48
Physical Evidence- DNA	0.04	0.20	0.02	0.13	0.00	0.00
Physical Evidence- Other	0.46	0.51	0.14	0.35	0.14	0.35
Confession	0.13	0.34	0.10	0.31	0.03	0.17
SAFE Conducted	0.08	0.28	0.07	0.25	0.00	0.00
Exculpatory Evidence	0.46	0.51	0.63	0.49	0.31	0.47
Offense Seriousness (H <sup>3</sup> )	0.85	1.18	-0.14	0.83	-0.33	0.75
Penetration	0.38	0.50	0.15	0.36	0.14	0.35
> 1 Victim	0.39	0.50	0.19	0.39	0.03	0.16
> 1 offender	0.08	0.28	0.03	0.18	0.05	0.23
Force	0.33	0.48	0.10	0.31	0.03	0.17
Injury	0.04	0.20	0.02	0.13	0.00	0.00
Supervisory Relationship	0.25	0.44	0.03	0.18	0.08	0.28
Victim Rank	2.50	1.29	1.47	0.90	2.50	2.62
Victim Female	0.75	0.44	0.47	0.50	0.70	0.46
Victim White	0.75	0.44	0.63	0.49	0.80	0.41
Victim Desires CM	0.74	0.45	0.03	0.18	0.11	0.32
Offender white	0.46	0.51	0.48	0.50	0.61	0.49
Offender Rank	3.54	2.17	2.05	1.40	2.57	1.83
Black Offender/ White Victim	0.25	0.44	0.08	0.28	0.07	0.25

### *B. Blame and Believability*

As shown in Table 1, approximately 80 percent of the offenders and victims knew each other prior to the sexual assault, which makes most of the sample fall within the category of “simple rape” cases. Yet slightly different than the Estrich-definition of “simple rape” cases, only 19 percent of cases involved a victim who had been drinking alcohol and only 13 percent occurred in the offender or victim’s home. Moreover, 30 percent of victims made a complaint within 24 hours.

Table 2 shows the differences between the variables according to processing type. The results are suggestive of the conclusion that  $H_1$  (Blame and Believability decreases likelihood of charging) will be unsupported by the data in the current study. Overall, cases that resulted in Preferred had a higher average Blame and Believability score (0.324) than cases that resulted in No Action (0.009) or an Administrative Action (-0.138). The only three variables that were greater for No Action than for Preferred were acquaintance cases, cases involving a civilian victim, and those that involved a victim who verbally resisted. For acquaintance cases, No Action (92 percent) had a substantially higher ratio than Preferred (75 percent). The ratio of cases where the victim verbally resisted was slightly higher for No Action (57 percent) than for Preferred (54 percent). Four percent of cases that resulted in Preferred had a civilian victim and five percent of No Action cases had a civilian victim. Otherwise, the ratio was higher for charged cases on the remaining Blame and Believability factors.

The ratio of prior consensual sex cases was higher in charged cases (21 percent) compared to No Action (11 percent). Victim physical resistance was higher in Preferred (42 percent) than in No Action (22 percent). The ratio of fresh complaints was lower in Preferred (52 percent did not have a fresh complaint) than in No Action (24 percent did not have a fresh complaint). While similar, Preferred had a higher percentage (25 percent) of victims who consumed alcohol than did No Action (24 percent). Cases where the incident occurred in the victim or offender’s home were higher in

Preferred (26 percent) than in No Action (14 percent). While only descriptive in nature, these surface-level findings do not support H<sub>1</sub>.

### *C. Offense Seriousness*

Based on the descriptive statistics in Table 2, it appears that H<sub>3</sub> (Offense Seriousness increases likelihood of charging) was supported, as the Offense Seriousness score (0.851) was higher for Preferred than for Administrative Action (OS = -0.141) and No Action (OS = -0.326). Each of the variables for Offense Seriousness was greater for Preferred than No Action: penetration (38 percent vice 14 percent), greater than one victim (39 percent vice 3 percent), greater than one offender (8 percent vice 5 percent), force (33 percent vice 3 percent), injury (4 percent vice 0 percent), and supervisory relationship (25 percent vice 8 percent). Each of the variables for Offense Seriousness was greater for Preferred than Administrative Action: penetration (38 percent vice 15 percent), greater than one victim (39 percent vice 19 percent), greater than one offender (8 percent vice 3 percent), force (33 percent vice 10 percent), injury (4 percent vice 2 percent), and supervisory relationship (25 percent vice 3 percent).

### *D. Strength of the Evidence*

The descriptive statistics in Table 2 provide preliminary support for H<sub>2</sub> (Strength of Evidence increases likelihood of charging), as the Strength of the Evidence score was higher for Preferred (0.601) than for Administrative Action (0.074) and No Action (-0.506). When looking at the individual variables, all but one was higher in Preferred than in the other two categories. The only variable higher in Administrative Action (63 percent) vice Preferred (46 percent) was the lack of exculpatory evidence. Third-party witnesses were twice as prevalent in Preferred (67 percent) as compared to No Action (33 percent), and substantially higher than Administrative Action (41 percent). Physical evidence, DNA, was relatively low in all cases, but higher in preferred: Preferred (4 percent),

Administrative Action (2 percent), and no action (0 percent). Physical evidence-other was substantially higher in charged cases (46 percent) when compared with both Administrative Action (14 percent) and no action cases (14 percent). While the percentage of confession cases was low (8 percent) in all cases, Preferred (13 percent) had a higher percentage than Administrative Action (10 percent) and No Action (3 percent) outcomes. SAFEs were similar in number in Preferred (8 percent) and Administrative Action (7 percent), with zero instances in No Action.

### *E. Offender and Victim Race*

Given the race effect on case processing shown through numerous studies on the civilian and military systems, as well as the race effect found in the DAC-IPAD 2020 report, a table that reports case characteristics by racial category is included in Appendix C. Table 1E contains the descriptive results by racial<sup>176</sup> category (see Appendix C, Table 5E). Due to the relatively few numbers of Asian, Indigenous, and Hispanic people in the sample, those categories were aggregated into one group. The scores for the composite variables for Asian, Indigenous, and Hispanic people were then reported as one group, although the table breaks them out by each individual racial category (i.e., each has the same score). The reason for breaking them out individually is to show the exact numbers by race/ethnicity for each of the variables, but then aggregating the composite scores so that an individual variable does not have a significant impact for the composite score for an individual racial/ethnic category.

Cases with Black offenders represented 42% of charged cases, although they represented 35 percent of total cases. Cases involving Black offenders were less likely to receive Administrative Action (34 percent) or No Action (30 percent) than they were to be charged with a crime. Cases with white

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<sup>176</sup>I use the term racial here to include Hispanic people consistent with prior research, while acknowledging the correct term is ethnic.

offenders represented 46% of charged cases, although they represented 49 percent of cases. Cases involving white offenders were slightly less likely to receive Administrative Action (45 percent) but more likely to receive No Action (58 percent) than they were to face criminal charges.<sup>177</sup> Therefore, on this variable alone, it appears that white offenders received a leniency effect. Furthermore, 69 percent of cases had a white victim. Yet Preferred (75 percent) had a higher rate of white victims, whereas Administrative Action had a lower rate (63 percent), and No Action had a higher rate (80 percent). Therefore, on this variable alone, it appears that white victim cases resulted in more serious consequences concerning charging of cases, but non-white victims were underrepresented in No Action.

#### *F. Victim Preference on Disposition*

Overall, 20 percent of victims desired their case to be charged. The results of this study show that Preferred outcome had a substantially higher percentage of victims who desired their case be charged (74 percent) compared with Administrative Action (3 percent) and no outcome cases (11 percent). As discussed previously, DoD policy impacts case processing because it requires criminal justice actors not to pressure victims to participate in case processing. Therefore, it is the exception to the rule that a case will be charged with a victim unwilling to participate. While victim preference is not dispositive regarding whether a case was charged, on this variable alone, it appears to be correlated with charging. As seen in Table 1E, 20 percent of victims in cases with a Black offender desired court-

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<sup>177</sup> There were six cases with charges preferred where the victim did not indicate a desire for court-martial. Three of those cases had a Black offender and three cases had a white offender. The average scores for Black offender cases with a victim who did not indicate a desire for court-martial were 1.7 Blame and Believability, 1.7 Strength of the Evidence, and 1.7 Offense Seriousness. The average scores for white offender cases with a victim who did not indicate a desire for court-martial were 3.3 Blame and Believability, 2.3 Strength of the Evidence, and 0.7 Offense Seriousness. The average for all cases was 0.4 Blame and Believability, 0.8 Strength of the Evidence, and 0.7 Offense Seriousness.

martial, while just 16 percent of victims in cases with white offenders desired court-martial.<sup>178</sup> With these descriptives (which are only descriptives), one can appreciate how indirect, seemingly benign, race effects *could* occur in processing. If victim participation, in part, drives charging decisions and more victims desire charging where the offender is Black then an indirect bias against Black offenders could occur, regardless of whether criminal justice actors realize or intend this result.

### *G. Offender and Victim Gender*

The gender of offenders was overwhelmingly male (91 percent). The high percentage of male offenders coupled with the desire to achieve parsimony in selected variables led to exclusion of the offender gender variable from the study. The gender of victims was mostly female (60 percent), but there was a substantial number of male victims (40 percent) (see Table 5E). Cases with a female victim had a lower percentage of cases resulting in No Action (47 percent), but there were higher percentages in Administrative Action (75 percent) and Preferred (70 percent) outcomes. Of the cases with a male offender and male victim, 48 (21 percent or 10) resulted in preferred charges. Half of those cases had a victim who desired court-martial. Two of those cases involved penetration. One of the penetration cases occurred at RTC, in the barracks, involving a Black offender and white victim. The offender and victim were in the same division and took showers at the same time. After taking a shower, the victim left the shower area to dry himself and put on clothes. While bending over to pick up something, the offender approached him from behind and inserted his finger into the victim's anus. The victim immediately reported the incident, and the offender made many inculpatory comments to others at

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<sup>178</sup> While the variable under analysis in the regression models used in this study is white/Not-white, descriptive statistics in Table 1E (Appendix C) show the relative breakout for the composition by race of the non-white variable. Therefore, Black, and white percentages regarding victim participation do not sum to 100.

the command. The victim did not undergo a SAFE examination, but he did desire court-martial. In another male-victim case that resulted in preferred charges, the offender touched and groped, sexually, seven other recruits. There was no penetration. The offender had a penchant for pinching and rubbing other men's nipples in the showers and slapping their buttocks, while stating words similar to, "I will f\*\*k you." At other times, he escalated the behavior by finding recruits asleep, or near sleep, in their racks before rubbing on their groin area, legs, and feet, while making sexual comments. With another victim, the accused approached the victim while he was exiting the shower, at which time the offender rubbed the stomach of the victim. After being told to stop his behavior, the offender caressed the victim's buttocks and rubbed his buttocks on the victim. The offender admitted to these instances of touching, although he also expressed a lack of memory for every instance of touching. He confessed that he did not touch the other recruits for sexual gratification, but instead he was seeking to "degrade" and "embarrass" them. Some of the victims desired court-martial.

There were two cases involving a female offender and male victim. One was preferred and the other was not. In the case that was preferred, the offender had groped the genitalia and buttocks of the victim on several occasions. These incidents occurred within the barracks or in public spaces on the base. On one of the occasions, a third-party witness overheard someone state, "Stop touching, [Offender's Name]." The victim told another recruit about what was happening, and that recruit reported the matter to authorities. While the victim did not intend to make a report, he did indicate a desire for court-martial.

Out of the cases that had a female victim (60 percent) 58 percent resulted in preferred charges. Similar to male-victim cases, the facts underlying the sexual conduct varied from case-to-case. One of preferred cases was *United*



*States v. Lamore* (2019),<sup>179</sup> where the offender confessed to dragging his victim into a portable toilet. Once inside, he used his strength to pin her face and body against the side wall. He then removed her clothing to penetrate her vulva with his penis from behind. Another case involved an offender who gave the victim alcohol and drugs, with her consent, and then sexually assaulted her while she was asleep.

#### *H. Regression Results*

Descriptive statistics can illuminate possible differences in outcomes based on individual or composite variables, but they can also be misleading. For instance, a variable may be strongly associated with an outcome, which may lend to the conclusion that the variable has a causal relationship to the outcome. However, regression analysis is a more sophisticated statistical process that incorporates other variables, holding them constant, so that that a change in the variable in question can be analyzed to its relationship to the outcome, independent of other observed variables. Table 3 displays the results of a binomial logistic regression model, where the binary variable indicating preferral of charges served as the dependent variable.<sup>180</sup> Overall,

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<sup>179</sup> For a summary of the case, see the Navy-Marine Corps Court of Criminal Appeals decision (2021), [https://stjcecmstdusgva001.blob.core.usgovcloudapi.net/public/documents/LAMORE\\_2\\_01900315\\_PC.pdf](https://stjcecmstdusgva001.blob.core.usgovcloudapi.net/public/documents/LAMORE_2_01900315_PC.pdf) [<https://perma.cc/B95N-SMYJ>].

<sup>180</sup> Multicollinearity diagnostics were conducted on all the independent variables. Each independent variable was regressed on all other independent variables. Offender rank was highly correlated with offender age. The Variance Inflation Factor (VIF) was 7.6. Upon removing offender age from the analysis, the VIF for offender rank became 1.3. None of the other variables had VIF greater than 5, and the only variables with a VIF greater than 2 were not higher than 2 when regressed on the composite variables. The only Pearson correlation higher than .65 was the variable for victim or offender's home, which was correlated with penetration. The correlation was .652. Penetration is a variable within the composite variable Offense Seriousness, and victim or offender's home is a variable within the composite variable Blame and Believability. Once the composite variables were included, versus the individual variables, no variable had a Pearson correlation higher than .5. Therefore, offender age was the only variable excluded due to multicollinearity. Pearson product-moment correlations are presented in Appendix A.

the model fit was strong, with the model explaining between 39 and 61 percent of the variation in the preferral of charges (10, 55.078,  $p < .001$ ; .39 Cox and Snell Pseudo  $R^2$ ; .61 Nagelkerke Pseudo  $R^2$ ). Results revealed that for every one-unit increase in Offense Seriousness, the odds that charges would be preferred *increased* by a factor of 2.9. The control variable, Victim Desires Court-Martial, *increased* the odds by a factor of 30 that charges would be preferred.

Strength of the Evidence approached significance ( $p=0.094$ ), but no other variables were statistically significant predictors of preferral, including Blame and Believability. Therefore, there was no support for  $H_1$ , weak support for  $H_2$ , and strong support for  $H_3$ . Furthermore, the dummy variable indicating cases with a white victim and Black offender was not statistically significant, suggesting that the Sexual Stratification Hypothesis was not supported by this sample.

Table 4 is the result of a binomial logistic regression analysis, with the sole change being the inclusion of the interaction term: Penetration by Blame and Believability Z-score. The inclusion of this interaction term allows for a comparison of Blame and Believability on preferral of charges in penetration versus non-penetration cases. Although not a stated hypothesis of this study, other studies have shown that Blame and Believability factors are significant in “simple rape” cases versus real rape cases. This is known as the Liberation Hypothesis (*see* St. George & Spohn, 2018). In other words, Blame and Believability has been shown to impact cases that are perceived by prosecutors as less serious than other cases. Here, penetration was used as the predictor given it is one factor that increases the level of punishment for the offense. Yet the statistically insignificant coefficient on the interaction term suggests that Blame and Believability was no more important in predicting the preferral of charges for cases involving penetration than for those cases that did not. The fact that the model fit statistics had a *de minimus* change suggests that adding this interaction term did not contribute to the overall fit of the model.

While binary logistic regression allowed for comparison of cases that were preferred to those that were not, multinomial logistic regression allows for an assessment of differences across three different outcomes: Preferred, Administrative Action, and No Action. A multinomial logistic regression analysis was run with Preferral as the reference group (Table 5). Overall, the model fit was strong (.609 Cox and Snell; .697 Nagelkerke Pseudo R<sup>2</sup>; .453 McFadden). When comparing Preferral to No Action (Table 5), the variables Offense Seriousness, Strength of the Evidence, and Victim Desires Court-Martial were significant. A one-unit increase in Offense Seriousness *decreased* the odds of No Action, rather than Preferred, by a factor of 0.851. Stated differently, every one-unit increase in Offense Seriousness *increased* the odds of Preferral by a factor of 6.7. A one-unit increase in Strength of the Evidence *decreased* the odds of No Action, rather than Preferral, by a factor of 0.689. Stated differently, every one-unit increase in Strength of the Evidence *increased* the odds of Preferral by a factor of 3.2. When the victim desired court-martial, the odds of No Action over Preferral *decreased* by a factor of 0.93. Stated differently, cases had 14.28 times the odds of Preferral where the victim expressed a preference for court-martial. In sum, H<sub>2</sub> and H<sub>3</sub> were supported, but H<sub>1</sub> was not when comparing Preferral to No Action.

When comparing Preferral to Administrative Action, only victim preference was significant; when the victim desired court-martial, the odds of the case being disposed of administratively, rather than preferred, *decreased* by a factor of 0.98. Stated differently, cases had 50 times the odds of Administrative Action when the victim did not express a preference for court-martial. No other variables were significant in the model, including the three explanatory variables. Therefore, there was no support for H<sub>1</sub>, H<sub>2</sub>, or H<sub>3</sub> when comparing Preferral to Administrative Action.

**Table 3. Estimates from Logistic Regression Predicting Preferral of Charges**

	Preferred		
	B	S.E.	Exp (B)
BB Zscore (H <sup>1</sup> )	-0.068	0.37	0.934
SE Zscore (H <sup>2</sup> )	0.62 <sup>+</sup>	0.37	1.858
OS Zscore (H <sup>3</sup> )	1.067*	0.48	2.906
Victim Rank	0.126	0.22	1.135
Victim Female	-1.27	0.96	0.281
Victim White	-0.023	0.92	0.977
Victim Desires CM	3.404***	0.82	30.097
Offender White	0.275	0.94	1.316
Offender Rank	0.044	0.21	1.045
Offender Black/ Victim White	-0.133	1.11	0.875
Cox and Snell R <sup>2</sup>		0.39	
Nagelkerke R <sup>2</sup>		0.614	
Chi-Squre/df		55.078/10***	
Number of Cases		120	

+ p < 0.1

\* p < .05

\*\* p < .01

\*\*\* p < .001

**Table 4. Estimates from Logistic Regression  
Predicting Preferral of Charges with Interaction**

	Preferred		
	B	S.E.	Exp (B)
BB Zscore (H <sup>1</sup> )	0.355	0.592	1.426
SE Zscore (H <sup>2</sup> )	0.587	0.375	1.799
OS Zscore (H <sup>3</sup> )	1.24*	0.513	3.454
Victim Rank	0.084	0.221	1.088
Victim Female	-1.271	0.962	0.281
Victim White	-0.057	0.95	0.945
Victim Desires CM	3.441***	0.818	31.227
Offender White	0.19	0.954	1.209
Offender Rank	0.068	0.215	1.071
Offender Black/ Victim White	-0.348	1.143	0.706
BB Zscore x Penetration	-0.822	0.867	0.439
Cox and Snell R <sup>2</sup>		0.400	
Nagelkerke R <sup>2</sup>		0.624	
Chi-Square/df		56.269/11***	
Number of Cases		120	

+  $p < .1$

\*  $p < .05$

\*\*  $p < .01$

\*\*\*  $p < .001$

**Table 5. Estimates from Multinomial Logistic Regression Predicting Case Outcomes (Reference: Preferral)**

	Administrative Action			No Action		
	B	S.E.	Exp (B)	B	S.E.	Exp (B)
BB Zscore (H <sup>1</sup> )	-0.229	0.405	0.795	0.56	0.446	1.751
SE Zscore (H <sup>2</sup> )	-0.113	0.412	0.893	-1.168*	0.454	0.311
OS Zscore (H <sup>3</sup> )	-0.689	0.513	0.502	-1.905**	0.628	0.149
Victim Rank	-0.393	0.308	0.675	0.069	0.279	1.072
Victim Female	1.16 <sup>+</sup>	1.01	3.189	1.961	1.086	7.109
Victim White	-0.002	0.968	0.998	0.559	1.036	1.749
Victim Desires CM	-3.929***	1.038	0.02	-2.664**	0.987	0.07
Offender White	-0.72	0.977	0.487	0.294	1.024	1.341
Offender Rank	-0.103	0.242	0.902	-0.094	0.288	0.91
Offender Black/ Victim White	-0.347	1.227	0.707	0.907	1.263	2.478
Intercept	3.116	1.155		-0.429	1.377	
Cox and Snell R <sup>2</sup>		0.609				
Nagelkerke R <sup>2</sup>		0.697				
McFadden		0.453				
Chi-Squre/df		103.356/20***				
Number of Cases		120				

+ p &lt; .1

\* p &lt; .05

\*\* p &lt; .01

\*\*\* p &lt; .001

## VII. DISCUSSION

The principle objective of this investigation was to evaluate whether the determinants influencing charging decisions within the civilian criminal justice system exerted a similar effect on the MCJS. The ensuing discussion encapsulates the outcomes derived from the empirical inquiry. Employing

the Focal Concerns Theory as the analytical framework, it was posited that factors associated with Blame and Believability would inversely affect charging, whereas Offense Seriousness and Strength of the Evidence would exhibit a positive correlation with charging decisions. The primary hypothesis (H1), asserting that Blame and Believability factors would decrease charging, did not find empirical support. Conversely, Hypotheses H2 and H3, postulating that Strength of the Evidence and Offense Seriousness would increase charging, garnered general empirical support. Contrarily, the Liberation and Sexual Stratification Hypotheses failed to obtain empirical validation in the context of this study.

#### *A. Focal Concerns Theory and Research*

Focal Concerns Theory and earlier research<sup>181</sup> was supported in part by this study. The results of multinomial logistic regression showed that Strength of the Evidence made it more likely that a case would be preferred when compared to No Action outcome, which revealed that stronger evidence increased the odds that the case would be charged. This effect was apparent only after excluding Administrative Outcome cases from the equation. But for the use of multinomial logistic regression, the conclusion of the study would have been that Strength of the Evidence does not increase the likelihood of charging. This distinction is likely a result of a byproduct stemming from the differences in the military and civilian criminal justice systems. In the military, CAs do not have a binary choice to charge or not. CAs have a variety of available options. Within the realm of administrative outcomes, CAs have three basic options (i.e., NJP, NJP and administrative separation, or administrative separation). While administrative measures are not criminal consequences, they can have devastating career impacts. Demotion at NJP can result in loss of pay and rank and ultimately separation from the service. Therefore, when a case has

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<sup>181</sup> See, *supra*, Section I.

convincing evidence and is serious and the victim choose to not participate, CAs have more than an all-or-nothing choice (i.e., charge versus no charge), as civilians do. CAs can leverage the several administrative outcomes to hold the offender accountable without having to resort to a drawn-out criminal forum. This is likely why the results show a difference between No Action outcomes and Preferral related to Strength of the Evidence and Offense Seriousness, but without a similar effect between Administrative Outcome and Preferral. The premise of the Judicial Bypass Theory<sup>182</sup> is that Commanders desire some measure of accountability even when victims choose not to participate in a criminal trial, but the likelihood CAs will choose Administrative Action over No Action increases along with Offense Seriousness and Strength of the Evidence factors.

Consistent with H<sub>3</sub>, Offense Seriousness factors made it more likely that charges would be preferred. For every one-unit increase in Offense Seriousness, the odds that charges were preferred, compared the two other

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<sup>182</sup>Rosann Greenspan, *The Transformation of Criminal Due Process in the Administrative State: The Targeted Urban Crime Narcotics Task Force* (1991); Rodney F. Kingsnorth, Randall C. MacIntosh & Sandra Sutherland, *Criminal Charge or Probation Violation? Prosecutorial Discretion and Implications for Research in Criminal Court Processing.*, 40 CRIMINOL. 553 (2002). This theory considers decision-makers' orientation towards the benefits of handling cases administratively. While still maintaining some level of accountability, administrative measures allow for reduced costs and time to process, as well as substantially lower burdens of proof and lack of evidentiary issues.

The overall movement in [court-martial discharges] represents the military's reliance on legal controls whereas the [administrative discharge] rate reflects commander's decisions to bypass the requirements of court-martial. In effect, this is a decision to purge the ranks of certain kinds of deviants in a more expedient manner than would be the case in a formal trial procedure (STEVENSON, *supra* note 153, at. 66).

One could also conceptualize this Administrative Control Theory under the umbrella of Focal Concerns Theory and case convictability. The difference between the application in the civilian context and the military context is simply the addition of another alternative to the all-or-nothing approach. *See also* Brenda V Smith & Jaime M Yarussi, *Prosecuting Sexual Violence in Correctional Settings: Examining Prosecutors' Perspectives*, CRIM. L. BRIEF 3, no. 2, 19–28 (2008) (identifying similar concerns in penal institutions that also have an option between administrative and criminal sanctions).



outcomes, increased by a factor of 2.9. Yet when assessing the difference in Preferral and No Action, the likelihood of charging increased by a factor of 6.7. In the context of military case processing, it is apparent that case characteristics impact case disposition similarly, but to differing degrees.

While it was theorized that Blame and Believability would decrease the likelihood of charging, this hypothesis was based on the scientific use of civilian research without considering what is generally known about the structure of the MCJS, something that has been studied too little. During the timeframe of this study, a stark contrast between the civilian system and the military system was the CA, although the CA concept had some similarities to offices that prosecute horizontally. It is thought that prosecutors in a horizontal charging scheme are less concerned about case outcomes because the person making the initial decision to charge is not the same individual who is ultimately responsible for convincing the judge or jury that the offender is guilty.<sup>183</sup> For this reason, the individual who is responsible for making the initial charging decision is less concerned about the convictability from the judge or jurors' perspectives but is instead oriented to some other motivating factor.<sup>184</sup>

### *B. Liberation Hypothesis*

One application of the Liberation Hypothesis posits that case processing differs between cases that are perceived to be serious and those that are not perceived to be serious, with extralegal features influencing those that are not perceived to be serious. Specifically, the theory is that cases without penetration are more likely to be influenced by Blame and Believability factors than non-penetration cases. The Liberation Hypothesis, as applied to charging decisions, was not supported by the findings of this study, as Blame and Believability factors did not differentially influence charging in

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<sup>183</sup> Spohn and Holleran, *supra* note 15.

<sup>184</sup> *Id.*

penetration and non-penetration cases. This finding is consistent with the findings of this study that supported the Focal Concerns Theory and prior research; CAs are driven by Offense Seriousness and Strength of the Evidence factors, as well as victim preference for court-martial.

### *C. Sexual Stratification Hypothesis*

The Sexual Stratification Hypothesis posits that cases with a Black offender and white victim will be treated more harshly than other offender/victim racial/ethnic dyads. The Sexual Stratification Hypothesis, as applied to charging decisions, was not supported by the findings of this study, as the variable Offender Black/Victim white did not exert a significant effect on the dependent variable Preferral. This finding is consistent with the Focal Concerns Theory and prior research. CAs are driven by the focal concerns of Offense Seriousness and Strength of the Evidence, as well as victim preference for court-martial.

### *D. Victims Preference*

In the binomial logistic regression model, the control variable, Victim Desires Court-Martial, increased the odds by a factor of 30 that charges would be preferred. Comparing this to Administrative Action and No Action adds additional support to the conclusion that variable effects, while similar across outcomes, differ depending on the outcome at issue. For instance, compared to No Action, victim preference increased the likelihood of charging by a factor of 14, whereas compared to Administrative Action the likelihood of Preferral increased by a factor of 50. This finding also supports the Judicial Bypass Theory because the preference of the victim was more influential in cases that were being considered for Administrative Outcome or Preferral. In other words, given the choice between using administrative measures or the judicial process, case features are insignificant to the likelihood that a CA prefers a case. In a highly

politicized context, bypassing the judicial route is advantageous except where the victim prefers otherwise.

### *E. Race, Class, and Gender*

Race, class, and gender were included as control variables given that those factors have been found to influence many actors (e.g., prosecutors, jurors, and judges) within the criminal justice system. The fact that these factors did not have a direct influence on charging decisions in this sample cannot be used to support the conclusion that these factors do not impact the greater MCJS; however, the results do support those found in the DAC-IPAD 2020 Report, which suggest that racial disparities plague the military similar to the civilian sector.<sup>185</sup> This makes sense as the military is simply a microcosm of the greater society. While the members in the military are self-selected, the people in the military were all once civilians. Therefore, the presence of indicators from the descriptive statistics that Black offenders are treated more harshly than their white counterparts is unsurprising, although it is disheartening. Yet the conclusion that the charging decision in the military's criminal justice system was influenced directly by racial effects was not supported by this study.<sup>186</sup> Yet questions concerning greater societal issues that lead to more non-white offenders being investigated for and charged with sexual assault cannot be addressed here.

There is also the possibility that race, class, and gender impacted the processing of cases indirectly, even if not the charging decision. There is the obvious point that race, class, and gender impacted case processing, given that there was a slightly higher share of non-white offenders screened

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<sup>185</sup> DAC-IPAD, *supra* note 93.

<sup>186</sup> Of course, this study does not rule that possibility out either. This study failed to produce significant results on victim race, offender race, and inter-racial cases. Additional work, with larger subsamples with racial/ethnic diversity, is needed to further explore that issue.

for prosecution, most of the offenders were male, and most cases involved victims and offenders of junior enlisted ranks. There are numerous instances of sexual victimization that go unreported; the number of reports seen in the military criminal justice process is merely the tip of the iceberg. If Black offenders are investigated at a higher rate than white offenders, that could be attributable, in theory, to the notion that victims of Black offenders are more likely to report and support prosecution, as was found in this study. If one of the barriers to reporting is that the victim subscribes to rape myths, the question becomes whether that barrier exists when the offender is Black. If victims sometimes choose not to report based on a belief that nobody will believe them, do victims report Black offenders at a higher rate because they think others are more likely to believe them in those instances? In a similar vein, in the sample used in this study, a higher percentage of victims desired court-martial in Black offender cases (33 percent), when compared to white offender cases (21 percent), as shown in Table 1E. Especially this latter case feature, while not directly implicating racial concerns, does support the conclusion that non-racial case features can have a disparate impact on Black offenders. This is an important question left unanswered by this study, which warrants further research.

#### *F. Legal Reforms*

Out of the many legal reforms implemented in the military criminal justice system over the last few years, one set of reforms stands out more prominently than the rest. Many statutory and regulatory changes have been implemented to give victims a greater voice in the process and greater access to services, including legal counsel to advocate on their behalf.<sup>187</sup> The results of this study show that victim preference is considered and has the greatest effect on charging decisions.

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<sup>187</sup>M. Christopher Cox, *How Do You Value a Victim?: Victim Impact Statements in Military Sexual Assault Trials*, 68 NAV. L. REV. 1, 155 (2022).

The influence of Offense Seriousness and Strength of the Evidence on charging decisions shows that legal reforms have made some impact in other ways, but it also shows that reforms have not borne out anticipated outcomes. The change from an all or nothing approach to rape, where the law now penalizes differing grades of criminality, presumably produced some benefits as shown in this study. Cases with penetration had more than double the ratio of cases that resulted in charges compared to cases without penetration (Table 2). Yet the fact that there were cases charged without penetration is an obvious byproduct of the fact that those cases can be charged as sexual offenses, whereas historically, they could not have been.

On the other hand, the Strength of the Evidence factors' influence on decision-making suggests that the reforms relating to removal of the corroboration requirement have done little to influence charging decisions. Prosecutors still rely on the ability to corroborate the victim's allegation with evidence extrinsic to the allegation. This continuing desire to have corroborating evidence is likely directly attributable to the focal concerns of prosecutors regarding case convictability and the evidentiary standard of proof at court-martial—proof beyond any and all reasonable doubt. Put simply, a victim's testimony alone is often not enough to convince a prosecutor to file charges.

The absence of an effect from Blame and Believability factors cannot be directly tied to any specific change in law or policy; there are many variables that could have had an impact on this finding. For instance, military members, including CAs, are required to go through extensive amounts of sexual assault training. Through this training, many of the factors related to rape myths are exposed, thereby educating CAs on the phenomenon of sexual assault. Therefore, they may be less likely to rely on rape myths, as they are more likely to understand that those ideas are myths.

### *G. Commanders and Military Culture*

While the CA's charging decision was the focus of this study, the culture of the military was tangentially related to the hypotheses evaluated. The results show that CAs used factors related to the Seriousness of the Offense and the Strength of the Evidence when choosing to prefer charges versus No Action. The results also show that CA decision-making was not influenced by Blame and Believability factors.

Consistent with the hypothesis that the focal concerns of CAs are mission readiness, justice, and fairness,<sup>188</sup> the results of this study show that CAs consider those measures that scholars generally agree they should (i.e., legally relevant variables). It may be true that CAs harbor rape myths at a higher average rate than civilian decision-makers,<sup>189</sup> but the hypothesis that those Rape Myth Acceptance Attitudes influenced charging decisions was not supported by this study.

Yet if Offense Seriousness and Strength of the Evidence variables are those which Congress and the public desire to influence charging decisions, then there is at least some evidence that the CAs know how to follow orders. The only statistically significant factor that differentiated Administrative Action versus Preferral was the preference of the victim (Table 5). The underlying rationale is simple if one appreciates the procedural limits of both forum outcomes. Victims do not need to participate in an administrative forum but are necessarily required to participate in a criminal one. And given the DoD's policy<sup>190</sup> to not subject

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<sup>188</sup> Warner and Armstrong, *supra* note 102.

<sup>189</sup> Eric Carpenter, *Evidence of the Military's Sexual Assault Blind Spot*, 4 154 (2016) (Yet the studies relied upon in Carpenter's article predated, by at least a decade, the advent of many of the sexual assault reforms in the military, including extensive training about the phenomenon of sexual assault provided to CAs).

<sup>190</sup> DoD Instruction 6495.02, Volume 1, Sexual Assault Prevention and Response: Program Procedures (Mar. 28, 2013) (Incorporating Change 7, Sept. 6, 2022).

victims to what has been described as “rape of the second kind”<sup>191</sup> without the victim’s consent, it makes sense that this variable would have an impact on the CA’s decision-making. Military Commanders are, by regulation, senior officers with approximately two decades of military experience. The results support the conclusion that military Commanders follow orders, as cases in which a victim does not want to participate in court-martial are less likely to result in Preferral versus Administrative Action.

The findings loosely support the theory that CAs are driven by political factors when making prosecutorial decisions.<sup>192</sup> Congress, in recent years, has intensified the scrutiny placed upon Commanders’ decisions regarding the processing of sexual assault cases. Public criticism of the military by outside agencies and victims has likely also influenced the ways in which CAs dispose of cases. The DoD’s guidance that Commanders should honor victim preferences, coupled with the significant effect of that variable in this study, reasonably supports a theory that if a victim desires charges be filed, the Commander would be under political pressure to honor that preference. This finding is consistent with prior research assessing the impact of victim preference on the civilian system.<sup>193</sup> It would be wise to consider why many victims of military sexual assault choose not to participate in the prosecution of offenders and how, if at all, the reasons are similar to or different from the civilian context. In other words, while there is some understanding of why victims in the military choose not to participate in prosecution,<sup>194</sup> refining the understanding of decision-making for victims whose cases were reviewed by prosecutors would be helpful to

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<sup>191</sup> GREGORY M. MATOESIAN, LAW AND THE LANGUAGE OF IDENTITY: DISCOURSE IN THE WILLIAM KENNEDY SMITH RAPE TRIAL 676 (2001) (This phrase is used to describe the harrowing process victims endure throughout the criminal justice process).

<sup>192</sup> Dave Lai, *Decades of Military Failures Against Sex Crimes Earned America’s Distrust and Congressional Imposition: The Judge Advocate General’s Corps’s Newest, Most Important Mission*, ARMY LAWYER 57 (2015).

<sup>193</sup> Spohn and Tellis, *supra* note 112.

<sup>194</sup> Michelle A. Mengeling et al., *Reporting Sexual Assault in the Military*, 47 AM. J. PREV. MED. 17, 24 (2014).

potentially address those issues. It would also be prudent to assess the reasons why victims choose to participate, something considered in the DAC-IPAD Report.<sup>195</sup>

The influence of political pressure on CAs in decision-making is also supported by the factors that increased Administrative Action when compared to No Action (see Tables 3E and 4E).<sup>196</sup> While not a stated hypothesis of this study, the results show that CAs do take into account Blame and Believability factors when faced with the choice between Administrative Action and No Action (i.e., less serious cases).<sup>197</sup> The results show that the influence of Offense Seriousness and Strength of the Evidence, while significant, have a decreased effect between Administrative Action and No Action as compared to the effect these two variables have on Preferral when compared to Administrative Action. Blame and Believability influences the decision to take No Action vice Administrative Action.

#### *H. Limitations*

There are several limitations to the study that must be mentioned. First, the location studied is not representative of the entire Navy nor of the military. By assessing only one office in one military branch, generalizability regarding the organization as a whole is limited. For instance, cases prosecuted overseas have unique logistical issues such as the lack of ability to subpoena civilian witnesses that impact charging decisions. The data here consisted only of sexual assault cases. It is

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<sup>195</sup> DAC-IPAD, *supra* note 93.

<sup>196</sup> Table 2E represents the results of a multinomial logistic regression, as shown in Table 5, but with No Action as the reference group. Omitted from this table is the result from the output of the multinomial logistic regression model for Preferral, as that information is contained in Table 5. Table 4E is the same model with the inclusion of the additional variable, No Probable Cause.

<sup>197</sup> See Table 2 averages for Offense Seriousness between the three outcome types and Table III.E.



axiomatic, especially given the extant literature, that sexual assault cases are different and provide complexities that other cases do not. By using quantitative data, the results do not provide substantive information for how prosecutorial decisions occur. While a variable may be significant for purposes of case outcome, the way in which that variable operates on the decision-making process cannot be illuminated without qualitative data. As previously stated, there are factors beyond quantitative case specifics that inform decision-making, such as publicization of adverse consequences on CAs who choose to exercise their professional judgment contrary to mainstream discourse.

The small sample size can be problematic if too many independent variables are used. Here, there were three (3) explanatory variables and seven (7) control variables. There should be at least “10 observations per parameter”, which would require a sample of at least 110 cases.<sup>198</sup> The current sample had 120 cases, large enough to allow for the regression analyses used here.<sup>199</sup> Yet these analyses were truncated (e.g., by using composite variables)<sup>200</sup> to fit within the statistical limits of regression analysis. More cases would have allowed assessment of individual variable effects on case outcomes.

The grouping of variables was necessary given the sample size. However, the grouping of variables is problematic, to some degree, because it treats all variables equally. Yet some variables are likely to have a stronger effect on charging than others. For instance, a confession is generally considered one of the strongest forms of proof. And while DNA

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<sup>198</sup> St. George and Spohn, *supra* note 66 at 26.

<sup>199</sup> In Table 4, twelve variables were used, given the interaction term statistically counts for three variables (one of which was already included in the analysis, Blame and Believability). The results show that saturation did not impact the significance of the variables from Table 3. Therefore, the use of twelve variables in this model was statistically sound.

<sup>200</sup> Using composite variables is consistent with other research study methodologies; see Spohn and Tellis, *supra* note 112.

evidence has a strong scientific foundation, in a consent case it is less meaningful than in cases where the issue of whether the sexual act occurred is disputed (i.e., offender tells law enforcement that a sexual act never happened). The impact of the gender of the offender could not be assessed given the small number of female offenders. And while any difference in treatment of male versus female offenders could not be assessed with the small sample size, the data is consistent with the greater body of research showing that males are the main perpetrators of sexual assault. Given the small sample size, this study merely looked at initial charging decisions. Therefore, there is still much to be studied related to the continued processing of cases after preferral. The various stages—referral, findings, and sentencing—should be studied to assess if these later stages are influenced by the variables that have been shown to influence civilian actors throughout the civilian criminal justice process. This study also did not encompass any review of the administrative handling of cases after they were selected for administrative outcome. There is a lot less emphasis on quality assurance for administrative measures, such as nonjudicial punishment and administrative separation boards. It is important to know whether race, class, and gender, as well as other salient variables contained in this study, influence the outcomes of administrative measures. As the results show, Blame and Believability influenced Administrative Action and No Action when those two outcomes were compared.

Another limitation from the small sample size was the inability to assess differences in treatment between officer and enlisted members. As discussed previously, Congress has codified different treatments between officer and enlisted members (e.g., officers cannot be awarded a discharge or confinement at a special court-martial).<sup>201</sup> Yet it is also theorized that because officers are convening authorities, lawyers, and judges, the likelihood that they will treat other officers more leniently than enlisted

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<sup>201</sup> RCM 1003(c)(2).

members is greater.<sup>202</sup> There might also be an intersectional dimension related to the processing of Black and Hispanic officers<sup>203</sup> that would require a substantially larger data set than the one used in this study. It may prove problematic to find enough cases to conduct such a study given the sparse number of officer cases prosecuted.<sup>204</sup> The same issue arises when theorizing about issues related to intersectionality on class and gender within the military, especially in the officer ranks.<sup>205</sup> Officers, quite simply, are in a different class than enlisted members<sup>206</sup> and the treatment of these differences related to sexual assault is important in order to understand whether officer offenders and victims are treated differently than enlisted offenders and victims.

Some of the explanatory variables are problematic from a coding perspective. While a victim undergoing a sexual assault forensic examination (SAFE) was always coded as a 1 for that variable, and all instances of receiving a SAFE were treated equally, the same is not true for that variable in the prosecution of cases. While a SAFE examination may speak to the credibility of the victim in each case—under the rationale that only a true victim would undergo an examination this invasive and extensive—it does not always strengthen the evidence.<sup>207</sup> The coding of exculpatory evidence and third-party witnesses, when coded 1 if there is at least one instance in the report, does not account for the greater significance that many exculpatory pieces of evidence or third-party witnesses may be given in an individual case.

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<sup>202</sup> Elizabeth L. Hillman, *Gentlemen under Fire: The U.S. Military and Conduct Unbecoming*, 26 LAW INEQUAL. J. THEORY PRACT. 1 (2008).

<sup>203</sup> *Id.*

<sup>204</sup> Herein lies another indirect racial effect. If fewer Black people are selected to be officers, then fewer Black offenders will receive leniency based on officer status.

<sup>205</sup> Hillman, *supra* note 202.

<sup>206</sup> STEVENSON, *supra* note 156.

<sup>207</sup> Margaret J. McGregor, Janice Du Mont & Terri L. Myhr, *Sexual Assault Forensic Medical Examination: Is Evidence Related to Successful Prosecution?*, 39 ANN. EMERG. MED. 639 (2002).

This study furthers the research related to sexual assault cases in the field of prosecutorial decision-making in the military. The results show that charging decisions are guided by “legal factors,” even though administrative outcomes are influenced by Blame and Believability factors. Given the limitations of this study, more research should be conducted to replicate it across services and with more cases. Additionally, qualitative research should be conducted on CAs and former CAs to assess what factors influence their decision-making.

### VIII. RECOMMENDATIONS

This study suggests, primarily, that additional research is necessary to determine whether the results of this study can be reproduced in other Navy offices and other military branches, as well as to better understand prosecutorial decision-making in sexual assault cases in the military. While there are some studies on prosecutorial decision-making in the military,<sup>208</sup> they are extremely limited in number and substance of the research. The civilian research suggests that prosecutors often rely on factors, such as race and victim-blaming characteristics, that should have no bearing on case outcomes when deciding whether to charge a case. The military should incorporate the type of critical self-assessment necessary to ensure that cases are being charged based on appropriate considerations. Regardless of what that expectation is, without research there is no way to know how well the MCJS is performing. Waiting for Congress to force the military to engage in this critical self-assessment is untenable.

Additional studies should use qualitative interviewing of CAs, judges, and attorneys to elucidate those external factors that influence decision-making but are not easily accounted for by quantitative analysis. Research also needs to assess the impact of improvements to the systems, such as specialized prosecution units, to see whether these measures have changed

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<sup>208</sup> See, *supra*, Section I.

the factors affecting charging.<sup>209</sup> These studies, and others like the one conducted here, are integral to the ability of policymakers in determining what changes should be made to the processing of cases. For instance, members of Congress consistently considered whether to replace the CA concept with a civilian-driven prosecution system. Congress adopted legislative changes that went into effect in December 2023 that gave military lawyers authority over prosecutorial decision-making.<sup>210</sup> The question answered in part by this study is whether the CA is charging cases for the reasons acceptable to Congress. While this researcher does not even attempt to answer such a lofty question, the findings are consistent with what the extant civilian literature (i.e., Strength of Evidence and Offense Seriousness) and the DoD policy (i.e., victim preference) state should drive decisions on case processing. If those considerations are deemed to be the appropriate factors, then it appears the CAs in this jurisdiction upheld those expectations. The one caveat relates to the administrative processing of cases.

#### *A. Administrative Outcomes*

The current study, while informative, sheds little light on the processing of cases that are managed at the Commander level. The findings here do support the Judicial Bypass Theory, which is different than the zero-sum game in many civilian jurisdictions. There is currently no system in place to keep an accounting of cases that result in an Administrative Outcome for researchers to investigate whether race and other factors influence decision-making in administrative forums, especially sexual offense cases. Therefore, the military should increase efforts to track and assess the

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<sup>209</sup> As Schlueter recommends, it is advisable to stop making changes to the system prior to determining whether and to what extent the system is doing what is desired of it. David A Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 ST MARYS L. J. 1 (2017).

<sup>210</sup> Pub. L. No. 117–81, 135 Stat. 1542 (2021).

various theoretical concerns, addressed here and in the extant literature, as they apply to the decision to dispose of a case via administrative processes.

This study did not assess administrative boards and the factors that influence decision-making by board members. Understanding the way in which cases are processed through administrative boards and the possible effects on decisions made there is a necessary component for providing a full picture of the Navy's response to sexual assault. At present, the Navy is unable to perceive what occurs through administrative processes. The Government Accountability Office (GAO) has been directed to assess whether collecting data on these processes is possible.<sup>211</sup> Yet while this oversight is commendable in the sense that it encourages introspection and highlights the necessity to understand what is happening in the MCJS, the collection of minimal amounts of data, coded in problematic ways, can lead to severely misleading results. In other words, without including the theoretically relevant variables in the equation, the ultimate output of the collected data for the few variables requested will not provide an accurate picture of what is driving processes.<sup>212</sup>

The problem of ill-conceived methodological planning is further exacerbated by the requirement to code race in a way that masks the race category of many offenders. Creating an "other" category for race obfuscates race effects because there is no such thing as the race "other." Even "mixed-race" as a category is problematic. Assessing the current sample in the same way as the GAO assessed their data shows there was a race effect in the number of Black offenders at the investigative and preferral stages (see Table 1E). Yet when the variables—Offense Seriousness, Strength of the Evidence, and Victim Preference—are added to the equation, the race effect, as it relates to the criminal justice process, evaporates. There is clearly some other race effect occurring at earlier

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<sup>211</sup> *Id.*

<sup>212</sup> BRENDA FARRELL, *DOD and the Coast Guard Need to Improve Their Capabilities to Assess Racial Disparities*, (2019).

stages and could be influencing non-military justice actors throughout the criminal justice process (e.g., a victim who wants prosecution, in part, based on racial motives). But this impact, without proper analysis, cannot be said to be emanating from criminal justice actors.

### *B. Transparency*

The creation of the DAC-IPAD is a great achievement for giving access to the public information necessary to appreciate the way in which sexual assault cases are processed in the armed forces. Efforts to increase transparency should be celebrated, but further innovated efforts should seek to increase transparency in the military's criminal justice process. The services should capitalize on this momentum and continue to increase efforts to make information more accessible to the public. Specifically, the services should incorporate into their practices databases that are open source,<sup>213</sup> as compared to relying on members of the DAC-IPAD to review unredacted information. Lack of transparency of military processes is not a new phenomenon, but one that continues to pervade the military system. The current goal for transparency in the criminal justice system is to reach some amorphous level of transparency by 2025.<sup>214</sup> The Department of Defense should loosen control over military criminal justice information to allow researchers access to information necessary to adequately assess how the military is performing its military justice mission. While there are privacy concerns in having civilians gain access to sensitive data, there are countless individuals who are provided similar access each year to the same

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<sup>213</sup> There has been some movement on this front with recent legislation, but it only requires transparency in cases that result in a finding after a court-martial. Moreover, the miniscule transparency provided does not provide enough meaningful information for analysis, as much of the case information is either redacted or excluded from disclosure. See *Navy-Marine Corps Court Filings & Records*, NAVY JAG CORPS, <https://www.jag.navy.mil/military-justice/filings-records/> [https://perma.cc/TKE5-7MR6].

<sup>214</sup> See JAG Corps Strategic Plan 2025.

data for different purposes (e.g., civilian interns working in a Navy legal services office).<sup>215</sup> Some civilians have access to classified material. Giving civilian researchers access to sensitive information is consistent with the current practices of the federal government and military. The DAC-IPAD, which is comprised of several civilians, already does this. Therefore, the processes to make this information more accessible already exist.

If the military does not increase its transparency efforts and allow more access to researchers, then the military should keep better statistics as recommended by the GAO in 2019.<sup>216</sup> However, contrary to the GAO's recommendation,<sup>217</sup> the military should not use "other" for the race of an offender, as recommended by the GAO. This unnecessarily limits the later use of the data, making it wholly unreliable. Historically, the Navy categorized race using five racial categories. If an individual was mixed-race (e.g., white and Black) then that person was grouped in the 'other' racial category. In effect, the military's use of "other" as a racial category completely skews the data and effectively prevents a researcher from relying on it in the future; use of the racial category, 'other', which is a non-category, renders the data useless. Looking at the data from one report where 38 percent of the offenders were in the "other" category illustrates the point.<sup>218</sup> What race are these "other" offenders? If an offender in this category is of multiple races, how would someone know which races made up the composition? Assuming *arguendo* that individuals coded as "other" were all both Black and white, would that make a difference when making conclusions about the overall picture? It is not to say that the conclusions of the authors were right or wrong; rather, the data could show a problem and the lack of the complete picture obfuscated how large the problem was. The data simply cannot allow for any scientific conclusions.

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<sup>215</sup> See Department of Defense Instruction 1100.21.

<sup>216</sup> FARRELL, *supra* note 212.

<sup>217</sup> *Id.*

<sup>218</sup> CHRISTENSEN AND TSILKER, *supra* note 150.



Another problem with the current model of recording information is that Navy prosecutors, or their assistants, are asked to track and code social science information without a good sense of how that information is used. To prosecute a criminal case, prosecutors simply do not need to code race data.<sup>219</sup> Military lawyers and their assistants are not the people best suited to make policies on the collection of data nor are they the best people suited to collect the data. Coding data is a science; it requires some level of training from someone who understands the way in which the data is going to be used, and then follow-up oversight of that collection process by a social scientist. Unfortunately, the average lawyer merely has a surface-level understanding of the underlying theoretical problems inherent in coding data without proper training. The policymakers identifying what should be coded and how it should be coded are not the same individuals who are doing the actual coding, which further exacerbates an already problematic situation because the individual coders have no idea why they are coding certain variables and how important each coding decision is. Consistency is another issue given that there is no rubric to guide the coding process. But having consistency through a framework that exempts out whole swaths of individuals (i.e., mixed-race individuals) does not solve the problem. It masks and obfuscates it.

The military should not conduct social science research unless it is going to dedicate the resources to taking the venture seriously. The recommendations of the DAC-IPAD, to increase the amount of information recorded by the services,<sup>220</sup> inevitably falls on individuals prosecuting the cases. This administrative burden is overwhelming and likely leads to incomplete or inaccurate information, as previously discussed. Leveraging

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<sup>219</sup> One might also question the propriety of highlighting to prosecutors the race of the victim and offender. It is difficult to know if this will increase or decrease susceptibility to rape myths based on race.

<sup>220</sup> DAC-IPAD, *Report on Racial and Ethnic Data Relating to Disparities in the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military* (2020).

civilian partners is the better approach because the resources already exist to do this type of work; the military already has a framework to allow civilians access to do this type of work, and it shows the public that the military is being transparent.<sup>221</sup> Additionally, there are numerous civilian researchers who would enjoy the opportunity to have access to this information and would do the bulk of the work. The Navy would gain transparency and reduce the administrative burden in doing so, thus allowing everyone to benefit.

### *C. Male Victimization*

This study supported the belief that men are at risk of sexual victimization; 40 percent of the victims in this study were male. More research should be conducted focusing on male victimization to assess whether Blame and Believability factors operate differently on decision-making when the victim is male. Specifically, similar to the interaction term for Blame and Believability/penetration (i.e., the Liberation Hypothesis), future studies should assess an interaction term<sup>222</sup> for Blame and Believability/male victim. As this ratio is distinct from civilian research showing the risk for men is much lower, it is worth investigating further why men were at a higher risk than expected in this study.<sup>223</sup> One theory for the disparity in the male-female ratio of victimization could be a byproduct of the ratio of men to women in the Navy.<sup>224</sup> Another possibility could be that the training environment where servicemembers are kept in close quarters with one another provided more opportunities of which offenders

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<sup>221</sup> DAC-IPAD, *supra* note 93.

<sup>222</sup> *See, supra*, Section IVB.

<sup>223</sup> *See* Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1261–1262 (2011).

<sup>224</sup> The Navy is comprised of 15% women and 85% men. Navy by Gender, Race and Ethnicity, Office of Diversity Management and Equal Opportunity (2017), accessible at <https://diversity.defense.gov/Portals/51/Documents/Presidential%20Memorandum/20161018%20Abbreviated%20US%20Navy%20by%20Gender,%20Race,%20and%20Ethnicity%20v1.0.pdf?ver=2017-01-04-135118-310>.

could take advantage. More research into why the proportion of male victimization, or the increased rate of male victim reporting, is so high within this area should be conducted. The percentage of men were higher than the percentage of women in the military during the relevant timeframe;<sup>225</sup> and when coupled with the potential of a toxically masculine culture the result could be explained in these terms.

The 2018 Workplace and Gender Relations Survey of Active-Duty Members showed there were differences between men and women when it came to reporting, although it also showed many similarities.<sup>226</sup> While the findings of this study did not show a significant difference between the processing of cases based on gender, the research methods were primarily based on gendered studies (i.e., those centering on female-victimization).<sup>227</sup> Research should attempt to assess rape myths associated with male-victimization, those that differ from female-victimization, to assess whether there are any differences in treatment during processing. In addition, research should also include, where practicable, methods to address the differences in processing when the victim is an LGBTQ+ member.

#### *D. Education and Victim Reporting*

While this study did not address the reasons why victims chose to make an unrestricted report of sexual assault, the seemingly unusual finding of a high ratio of male victimization raises many questions. These questions, in part, center on the circumstances surrounding the atmosphere and location wherein the incidents occurred, but also how that atmosphere could have influenced the number of male victims who did report. As mentioned

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<sup>225</sup> The DoD is comprised of 16% women and 84% men; See Amanda Barroso, *The Changing Profile of the U.S. Military: Smaller in Size, More Diverse, More Women in Leadership*, PEW RSCH. CTR., <https://www.pewresearch.org/short-reads/2019/09/10/the-changing-profile-of-the-u-s-military/>.

<sup>226</sup> OFF. OF PEOPLE'S ANALYTICS, OPA REP. NO. 2019-027, 2018 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS (2019).

<sup>227</sup> See, *supra*, Section I.

previously, not every victim makes a report, and there are many reasons that men choose not to report their victimization, some of which are different than the reasons why women choose not to report.<sup>228</sup> Therefore, a logical theory is that the location studied is different than other places in the Navy and the civilian community, which created less barriers for male victims of sexual assault to report.

What is known about the atmosphere of the location is that, at least during the timeframe studied, there was a heavy emphasis on sexual assault. Not only were staff, students, and recruits educated about sexual assault, but there was a greater emphasis on ensuring that reports of sexual assault were investigated. It is also true that in the greater naval community there was an emphasis on investigating sexual assaults, but the sense of emphasis was more pronounced at Recruit Training Command and Training Support Center Great Lakes, rivalled only by the U.S. Naval Academy.

This study coupled with a general understanding of the location studied supports a theory that victims are more likely to report if there is an emphasis on educating communities regarding the phenomenon of sexual assault and the rights of victims when reporting. Education is a critical component to facilitating victim reporting because the emphasis informs victims as to what constitutes sexual assault, how to report it, and what will happen when it is reported.

When court actors are educated about the phenomenon of sexual assault, they, too, can make informed decisions regarding case dispositions. This is especially true when considering the differences in Rape Myth Acceptance Attitudes regarding female versus male victimization. If the education centers only on rape myths associated with female victimization, then those myths related to male victimization only might still be embedded in decision-making. Education is not a panacea for the issues raised by this

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<sup>228</sup> Kathy Doherty & Irina Anderson, *Making Sense of Male Rape: Constructions of Gender, Sexuality and Experience of Rape Victims*, 14 J. COMTY APPL. SOC. PSYCHOL. 85 (2004).

study and others, but, if done effectively, it should improve decision-making.

## IX. CONCLUSION

This study addresses existing gaps in research pertaining to the determinants of charging decisions in sexual assault cases, with a particular focus on the Navy context. Drawing on established theories such as the Focal Concerns Theory, Liberation Hypothesis, and Sexual Stratification Hypothesis, in conjunction with empirical evidence supporting these theoretical frameworks, an analysis of cases was conducted to discern the factors influencing charging decisions within the specific Navy office under investigation.

The factors traditionally endorsed by society as pertinent to charging decisions indeed played a pivotal role within the sample under scrutiny. This study thus contributes valuable insights into the Navy's procedural mechanisms for handling sexual assault cases. The evidence presented herein suggests that the concept of command authority leads to processing decisions that align with the directives given to Commanders. In compliance with the military's legal framework governing these matters, Commanders are obliged to weigh the gravity of the offenses and the strength of available evidence when making charging determinations. Moreover, they are mandated to incorporate the input of victims into the final decision-making process regarding charges.

Diverging from civilian research, which has indicated that considerations of Blame and Believability significantly influence charging decisions, the examination of military cases within this study did not reveal a similar impact. However, these findings should be approached with caution due to several limitations inherent in this research. Foremost among these limitations is the question of whether the results can be generalized to the broader MCJS.

Future research endeavors should be undertaken, both within the Navy and across other branches of the military, to ascertain the replicability of the findings from this study. Additionally, further exploration into the application of the Judicial Bypass Theory to the processing of military criminal justice cases is warranted. Although Blame and Believability factors were not observed to increase the likelihood of preferral, they did appear to elevate the likelihood of No Action outcomes when compared to Administrative Action. As such, research endeavors should be made to refine our understanding of the factors shaping prosecutorial decision-making, particularly in relation to Administrative Action and No Action outcomes.

## X. APPENDICES

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Appendix A

Person Product-Moment Correlations

	x1	x2	x3	x4	x5	x6	x7	x8	x9	x10
core(SE) x1										
core(OS) x2	0.177									
core(BB) x3	0.117	.399**								
ctim Desires CM	.230*	.404**	.219*							
fender Male x5	-0.09	0.162	0.022	0.015						
nk x6	.185*	.414**	.296**	.324**	.188*					
fender White x7	-0.077	-0.158	-0.042	-0.096	0.088	-0.139				
ctim Female x8	-0.035	.356**	.255**	.282**	-0.141	.386**	-0.099			
ctim Age x9	0.102	0.156	0.072	-0.038	0.102	.188*	0.005	0.121		
ctim Rank x10	0.143	0.129	.211*	0.155	0.065	.461**	0.029	.270**	0.158	
ctim White x11	0.061	0.08	0.022	0.065	0.147	0.084	0.112	0.079	0.047	0.126

\*  $p < .05$

Appendix B

<b>Dependent variables</b>		
Preferral	Preferred charges	0 = No preferred charges 1 = Preferred charges
Administrative	Administrative action outcome	No action outcome; Administrative action outcome
No Action		Administrative action outcome; 1 = No action outcome
	Blame believability	<i>Blame and believability</i> [Acquaintances]+[Prior consensual sex]+[No Victim Resistance- physical]+[Victim Resistance verbal]+[No F complaint under day]+[Victim Alcohol]+[Not on A



		<i>Shield evidence]</i>
<i>Acquaintance</i>	<i>Victim and Offender Acquaintances</i>	<i>0 = Strangers; 1 = Acquaintance</i>
<i>Prior Sexual Relationship</i>	<i>Victim and Offender had prior sexual relationship</i>	<i>0 = No prior sexual relationship; 1 = Prior sexual relationship</i>
<i>Physical Resistance</i>	<i>Victim physically resisted</i>	<i>1 = No physical resistance; 0 = Physical resistance</i>
<i>Verbal Resistance</i>	<i>Victim verbally resisted</i>	<i>1 = No verbal resistance; 0 = Verbal resistance</i>
<i>Fresh Complaint</i>	<i>Fresh complaint within one day</i>	<i>1 = No fresh complaint; 0 = Fresh complaint</i>
<i>Victim Alcohol</i>	<i>Alcohol Consumption</i>	<i>0 = No alcohol; 1 = Alcohol</i>
<i>Victim or Offender's Home</i>	<i>Occurred at Victim or Offender's Home</i>	<i>0 = Not at Victim or Offender's Home; 1 = At Victim or Offender's Home</i>
<i>Victim Active Duty</i>	<i>Active Duty</i>	<i>1 = Civilian; 0 = Active Duty</i>
<b>Offense Seriousness</b>	<b>Offense seriousness (continuous)</b>	<b>Offense seriousness = [Penetration]+[More than 1 victim]+[More than one offender]+[Force]+[Injury] + [supervisory relationship]</b>

<i>Penetration</i>	<i>Penetration</i>	<i>0 = No penetration; 1 = Penetration</i>
<i>More_than_One_Victim</i>	<i>More than one victim</i>	<i>0 = One victim; 1 = Two or more victims</i>
<i>More_than_One_Offender</i>	<i>More than one offender</i>	<i>0 = One offender; 1 = Two or more offenders</i>
<i>Force</i>	<i>Offender use of force</i>	<i>0 = No use of force; 1 = Use of force</i>
<i>Physical_Injury</i>	<i>Victim Physical Injury</i>	<i>0 = No physical injury; 1 = Physical injury</i>
<i>Supervisory_Relationship</i>	<i>Supervisory relationship</i>	<i>0 = No supervisory relationship; 1 = Supervisory relationship</i>
<b>Strength_of_the_Evidence</b>	Strength of the evidence (continuous)	Strength of the evidence = [Third party witness-favoring government]+[Physical Evidence- DNA]+[Physical Evidence- Other]+[Confession]+[SAFE Exam Conducted]+[Exculpatory Evidence]
<i>Third_Party_Witness</i>	<i>Third Party Witnesses</i>	<i>0 = No Third-Party Witness; 1 = Third-Party Witness</i>
<i>Physical_Evidence_DNA</i>	<i>Physical Evidence, DNA</i>	<i>0 = No DNA; 1 = DNA</i>

<i>Physical_Evidence_Other</i>	<i>Physical evidence, other</i>	<i>0 = No physical evidence, other; 1 = Physical evidence, other</i>
<i>Confession</i>	<i>Accused confessed</i>	<i>0 = No confession; 1 = Confession</i>
<i>SAFE_Examination</i>	<i>Sexual Assault Forensic Examination</i>	<i>0 = No SAFE exam; 1 = SAFE exam</i>
<i>Exculpatory_Evidence</i>	<i>Exculpatory Evidence</i>	<i>1 = No exculpatory evidence; 0 = Exculpatory evidence</i>
<b>Control variables</b>		
<i>Victim_Rank</i>	Rank	0 = Civilian; 1 = E-1; 2 = E-2; 3= E-3; 4 = E-4; 5 = E-5; 6 = E-6; 7 = E-7; 8 = E-8; 9 = E-9; 10 = MIDN/ O-1; 11 = O-2; 12 = O-3; 13 = O-4; 14 = O-5; 15 = O-6
<i>Victim_Female</i>	Victim is a female	0 = Male; 1 = Female
<i>Victim_white</i>	Victim is white	0 = Victim Non-white; 1 = Victim white
<i>Victim_Desires_Court_Martial</i>	Victim desires court-martial	0 = Victim does not desire court-martial; 1 = Victim desires court-martial
<i>Offender_white</i>	Offender is white	0 = Offender Non-white; 1 = Offender white
<i>Offender_Rank</i>	Rank	0 = Civilian; 1 = E-1; 2 = E-2; 3= E-3; 4 = E-4; 5 = E-

	5; 6 = E-6; 7 = E-7; 8 = E-8; 9 = E-9; 10 = MIDN/ O-1; 11 = O-2; 12 = O-3; 13 = O-4; 14 = O-5; 15 = O-6
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Appendix C

**Table IE. Descriptive Statistics for Variable Differences by Racial Category of Offender<sup>a</sup>**

	Asian	Black	Hispanic	Native Am.	White	Total
Total	6	41	10	3	58	118
Preferred	1	10	2	0	11	24
Admin Action	4	20	6	2	26	58
No Action	1	11	2	1	21	36
Blame and Believability	0.176	-0.058	0.176	0.176	-0.018	
Acquaintances	6	33	6	3	46	94
Prior Consensual Sex	1	3	2	0	5	11
Victim Physical Resistance	3	12	3	1	21	40
Victim Verbal Resistance	4	21	6	3	34	68
Fresh Complaint < 1 day	2	12	3	2	17	36
Victim Alcohol	2	10	3	0	8	23
Victim/ Offender's Home	1	6	1	0	8	16
Victim Civilian	1	1	1	0	3	6
	Asian	Black	Hispanic	Native Am.	White	Total
Offense Seriousness	0.069	0.176	0.069	0.069	-0.147	
Penetration	1	9	3	0	10	23
> 1 Victim	1	8	1	1	9	20
> 1 offender	0	4	0	0	2	6
Force	1	7	2	0	5	15
Injury	1	0	1	0	0	2
Supervisory Relationship	0	6	2	0	3	11
	Asian	Black	Hispanic	Native Am.	White	Total
Strength of the Evidence	0.038	0.1	0.038	0.038	-0.083	
Third-Party Witness	3	20	3	3	23	52
Physical Evidence- DNA	0	2	0	0	0	2
Physical Evidence- Other	0	8	3	1	12	24
Confession	1	4	1	0	4	10
SAFE Conducted	1	3	1	0	1	6
Exculpatory Evidence	1	20	6	2	29	58
	Asian	Black	Hispanic	Native Am.	White	Total
Victim White	4	24	8	2	42	80
Victim Rank (Average)	1.16	2.02	1.88	2.33	2.06	
Victim Female	3	27	7	1	32	70
Victim White	3	27	7	1	32	70
Offender Rank (Average)	3	2.7	2.9	2.3	2.3	
Victim Desires CM	1	8	3	2	9	23

<sup>a</sup> The median scores for Blame and Believability, Offense Seriousness and Strength of the Evidence are reported collectively for Asian, Hispanic, and Native American cases, given the small number of each individual set of cases.

**Table IIE. Estimates from Logistic Regression Predicting Preferral of Charges**

	Preferred		
	B	S.E.	Exp (B)
BB Zscore (H <sup>1</sup> )	-0.01	0.384	0.99
SE Zscore (H <sup>2</sup> )	0.542	0.392	1.72
OS Zscore (H <sup>3</sup> )	1.074*	0.482	2.929
Victim Rank	0.152	0.231	1.164
Victim Female	-1.379	1.006	0.252
Victim White	-0.222	0.918	0.801
Victim Desires CM	3.37***	0.836	29.08
Offender White	0.513	0.946	1.671
Offender Rank	0.063	0.217	1.065
Offender Black/ Victim White	-0.083	1.187	0.92
No Probable Cause	-0.675	0.809	0.509
Cox and Snell R <sup>2</sup>		.0378	
Nagelkerke R <sup>2</sup>		0.587	
Chi-Square/df		53.708/11***	
Number of Cases		120	

+ p < 0.1

\* p < .05

\*\* p < .01

\*\*\* p < .001

**Table III.E. Estimates from Multinomial Logistic Regression Predicting Case Outcomes (Reference: No Action)**

	Administrative Action		
	B	S.E.	Exp (B)
BB Zscore (H <sup>1</sup> )	-0.787*	0.320	0.455
SE Zscore (H <sup>2</sup> )	0.984**	0.319	2.674
OS Zscore (H <sup>3</sup> )	1.200**	0.468	3.320
Victim Rank	-0.452	0.261	0.636
Victim Female	-0.911	0.597	0.402
Victim White	-0.512	0.761	0.599
Victim Desires CM	-1.194	1.015	0.303
Offender White	-0.962	0.740	0.382
Offender Rank	0.022	0.232	1.022
Offender Black/ Victim White	-1.151	1.088	0.316
Intercept	3.412	1.056	
Cox and Snell R <sup>2</sup>		0.609	
Nagelkerke R <sup>2</sup>		0.697	
McFadden		0.453	
Chi-Square/df	103.356/20***		
Number of Cases	120		

\*  $p < .05$ .

\*\*  $p < .01$ .

\*\*\*  $p < .001$

**Table IVE. Estimates from Multinomial Logistic Regression Predicting Case Outcomes (Reference: No Action)**

	Administrative Action		
	B	S.E.	Exp (B)
BB Zscore (H <sup>1</sup> )	-0.687*	0.336	0.503
SE Zscore (H <sup>2</sup> )	0.981*	0.377	2.667
OS Zscore (H <sup>3</sup> )	1.118*	0.483	3.059
Victim Rank	-0.423	0.274	0.655
Victim Female	-0.772	0.621	0.462
Victim White	-0.56	0.725	0.571
Victim Desires CM	-1.538	1.142	0.215
Offender White	-1.006	0.814	0.366
Offender Rank	0.054	0.238	1.055
Offender Black/ Victim White	-1.233	1.14	0.291
No Probable Cause	-0.903	0.569	0.405
Intercept	3.739	1.078	
Cox and Snell R <sup>2</sup>		0.642	
Nagelkerke R <sup>2</sup>		0.737	
McFadden		0.502	
Chi-Square/df	109.794/22***		
Number of Cases	120		

\* p < .05.

\*\* p < .01.

\*\*\* p < .001



**Table VE. Descriptive Statistics for Variable Differences Between Victim Gender**

	Female		Male	
	N= 72		N= 48	
	Mean	SD	Mean	SD
Blame and Believability	0.67	3.78	-1.01	2.05
Acquaintances	0.81	0.40	0.77	0.43
Prior Consensual Sex	0.15	0.36	0.00	0.00
Victim Physical Resistance	0.42	0.50	0.77	0.43
Victim Verbal Resistance	0.56	0.50	0.42	0.50
Fresh Complaint < 1 day	0.28	0.45	0.34	0.48
Victim Alcohol	0.32	0.47	0.00	0.00
Victim/ Offender's Home	0.18	0.39	0.06	0.25
Victim Civilian	0.08	0.28	0.00	0.00
Strength of the Evidence (H <sup>2</sup> )	0.91	3.71	-0.14	1.86
Third-Party Witness	0.39	0.49	0.51	0.51
Physical Evidence- DNA	0.03	0.17	0.00	0.00
Physical Evidence- Other	0.29	0.46	0.06	0.25
Confession	0.07	0.26	0.11	0.31
SAFE Conducted	0.07	0.26	0.02	0.14
Exculpatory Evidence	0.42	0.50	0.62	0.49
Offense Seriousness (H <sup>3</sup> )	0.09	3.08	-1.37	1.13
Penetration	0.26	0.44	0.08	0.28
> 1 Victim	0.21	0.41	0.13	0.34
> 1 offender	0.08	0.28	0.00	0.00
Force	0.21	0.41	0.00	0.00
Injury	0.03	0.17	0.00	0.00
Supervisory Relationship	0.14	0.35	0.02	0.14
Victim Rank	2.38	2.07	1.42	0.82
Offender Male	0.88	0.33	0.96	0.20
Victim White	0.73	0.45	0.66	0.48
Victim Desires CM	0.29	0.46	0.06	0.25
Offender White	0.46	0.50	0.54	0.50
Offender Rank	3.07	1.94	1.67	1.10
Black Offender/ White Victim	0.26	0.44	0.14	0.35