Rationalizing Rape: How Military Appellate Courts Get to Yes

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Abstract: This study examines how military appellate courts rationalize overturning sexual assault convictions through qualitative analysis of opinions finding factual insufficiency. Drawing from cases between 2017–2020, concerning patterns are identified in judicial reasoning that reflect persistent rape myth acceptance despite decades of statutory reform. The analysis reveals that courts frequently question victim credibility based on delayed reporting, counterintuitive victim behavior, and continued contact with perpetrators - factors that trauma research has shown to be common among sexual assault survivors. Of particular concern is courts' treatment of incapacitation cases, where judges often acknowledge significant victim impairment yet find ways to question consent capacity. The findings suggest that recent statutory changes limiting appellate courts' factual sufficiency review authority may be insufficient to address underlying attitudinal barriers to fair adjudication of sexual assault cases. We propose reforms to judicial selection, education, and oversight processes, while acknowledging significant practical and legal challenges to implementation. The study contributes to growing literature on institutional responses to sexual assault by illuminating how rape myths manifest in appellate reasoning. These findings have important implications for military justice reform and broader understanding of how gender bias influences judicial decision-making. Future research comparing military and civilian appellate approaches could provide valuable insights for both systems.

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> [Offender's statement to law enforcement:] After [the victim] fell back to sleep, I started again to have sex with [the victim] for another 3-5 minutes. . . .
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> [Appellate Court's conclusions of law:] Examining all of the evidence, we do not find it supports the appellant's guilt beyond a reasonable doubt on the offense of conviction . . . [and w]ithout evidence to show the appellant specifically intended every element of the offense, we cannot affirm a finding of guilt to the lesser included offense of attempted sexual assault.[1]

I. INTRODUCTION

The military justice system plays a critical role in addressing sexual assault cases within the armed forces. However, questions persist about the fairness and consistency of case outcomes, particularly at the appellate level.[2] Building on quantitative research showing decisions of military courts overturning rape convictions are influenced by rape myths,[3] this study examines cases where military appellate courts overturned sexual assault convictions on

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[1] United States v. Washington, No. 201700242, 2019 CCA LEXIS 47, at *18, *22, *25 (N-M. Ct. Crim. App. Feb. 8, 2019).

[2] DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, & DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES, REPORT ON INVESTIGATIVE CASE FILE REVIEWS FOR MILITARY ADULT PENETRATIVE SEXUAL OFFENSE CASES CLOSED IN FISCAL YEAR 2017 1–10 (2020) [hereinafter DAC-IPAD CASE FILE REVIEW]; Lisa M. Schenck, *"Just the Facts, Ma'Am": How Military Appellate Courts Rely on Factual Sufficiency Review to Overturn Sexual Assault Cases When Victims Are "Incapacitated"*, 45 SW. L. REV. 523, 524–25 (2016).

[3] Chris Cox, *Empirically Testing the "Unbiased Fact Finder,"* 49 S. ILL. U. L. J. 237, 266–71 (2025) [hereinafter *Empirically Testing*].

grounds of factual insufficiency, focusing on factors that correlate with these reversals. By conducting an in-depth qualitative examination of cases overturned for factual insufficiency, this study aims to illuminate patterns in judicial reasoning and potential biases that may influence case outcomes. The findings have important implications for training, policy development, and efforts to ensure justice for both victims and defendants in the military justice system.

Recent changes to the Uniform Code of Military Justice have shifted prosecutorial discretion in sexual assault cases from commanders to military lawyers.[4] This major shift was implemented without a robust empirical foundation comparing decision-making between these two groups.[5] As the military adapts to this new paradigm, it is crucial to understand how legal professionals, particularly appellate judges, approach sexual assault cases.

II. STATUTORY FRAMEWORK

The prevalence and handling of sexual assault within the United States military have been subjects of intense scrutiny and debate over the past several decades.[6] To fully comprehend the complexities surrounding this issue, it is essential to understand the legal framework that governs sexual assault cases in the military context. This section provides an overview of the key statutes and recent reforms that shape the military's approach to sexual assault, serving as a foundation for the broader discussion of sexual assault incidents and their impact on military personnel and operations. At the core of military law lies the Uniform Code of Military Justice (UCMJ), enacted by Congress in 1950 to establish a standardized system of military justice across all branches of the armed forces.[7] Article 120 of the UCMJ specifically addresses sexual assault offenses,[8] and its evolution over time reflects

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[4] *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 531, 135 Stat. 1541, 1708 (2021).

[5] *See* Eric R. Carpenter, *An Empirical Look at Commander Bias in Sexual Assault Cases*, 22 BERKELEY J. CRIM. L. 45, 81 (2017) [hereinafter *Empirical Look*].

[6] *See generally* Schenck, *supra* note 2 (critiquing standards of review in military sexual assault cases); Esther E. Acolatse, *Culture of War, Violence, and Sexual Assault in the Military: An Ethic of Compromise?*, 24 J. PASTORAL THEOLOGY 4-1 (2014) (analyzing sexual assault in the military and potential solutions from a theological perspective); Michelle L. Bourgeois & Brian P. Marx, *Military Sexual Assault*, *in* HANDBOOK OF SEXUAL ASSAULT AND SEXUAL ASSAULT PREVENTION 709 (William T. O'Donohue & Paul A. Schewe eds., 2019) (discussing military sexual assault as a distinct subcategory); Jordain Carney & Alex Brown, *Defense Bill Nears Finish Line as Senators Renew Fight for Military Sexual-Assault Reform*, THE ATLANTIC (Dec. 2, 2014), https://www.theatlantic.com/politics/archive/2014/12/defense-bill-nears-finish-line-as-senators-renew-fight-for-military-sexual-assault-reform/441219 [https://perma.cc/JL49-4VTY] (discussing the tension amongst senators of Congress concerning the transfer of prosecutorial discretion from commanders to lawyers).

[7] Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950).

[8] Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920.

changing societal attitudes and a growing recognition of the need for evolving standards to address the crime of sexual assault.

The most recent significant overhauls of Article 120 occurred in 2007, with further major changes in 2012 and 2019.[9] These revisions sought to align military law more closely with civilian criminal codes while addressing the unique challenges posed by the military environment. Key provisions of the current Article 120 include a comprehensive definition of consent, emphasizing that it must be freely given and cannot be inferred from silence or lack of resistance.[10] Article 120, UCMJ, also delineates various degrees of sexual assault, including rape, sexual assault, aggravated sexual contact, and abusive sexual contact.[11]

Despite these reforms, concerns persisted about the efficacy of the military justice system in addressing sexual assault cases.[12] Critics argued that the traditional chain of command structure, which granted commanding officers significant discretion in the handling of such cases, led to conflicts of interest and underreporting.[13] In response to these concerns, Congress passed the National Defense Authorization Act for Fiscal Year 2022, introducing sweeping changes to the military's handling of sexual assault cases.[14] One of the most significant reforms in this legislation was removing the chain of command's decision-making authority to prosecute sexual assault and related crimes.[15] Instead, these decisions are now made by independent military prosecutors, a change aimed at reducing potential bias

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[9] Article 120, UCMJ, 10 U.S.C. § 920 (2007) (amended by Pub. L. No. 112-81, § 541(a), 125 Stat. 1298, 1404–07 (2011) and Pub. L. No. 116-92, § 532(a), 133 Stat. 1198, 1358–60 (2019)).

[10] Under Article 120(g)(7)(A) of the UCMJ, consent is defined as: "[a] freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent." 10 U.S.C. § 920(g)(7)(A).

[11] Article 120, UCMJ, 10 U.S.C. § 920(a)–(c).

[12] Stacy Kaper, *For Military Sexual-Assault Survivors, Proposed Reforms Are Only a Start*, THE ATLANTIC (Aug. 12, 2013), https://www.theatlantic.com/national/archive/2013/08/for-military-sexual-assault-survivors-proposed-reforms-are-only-a-start/278578 [https://perma.cc/WV9H-NEMU]; Danielle Rogowski, *Quis Custodiet Ipsos Custodies? The Current State of Sexual Assault Reform Within the U.S. Military and the Need for the Use of a Formal Decisionmaking Process in Further Reform*, 38 SEATTLE UNIV. L. REV. 1139, 1139–41 (2015).

[13] *See Empirical Look*, *supra* note 5 at 45–49; Lindsy Nicole Alleman, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. COMPAR. & INT. LAW 169, 169–75 (2006).

[14] *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 531, 135 Stat. 1541 (2021).

[15] *See* JOINT SERV. COMM. ON MIL. JUST., MANUAL FOR COURTS-MARTIAL UNITED STATES I-1 (2024) (describing the "unprecedented transfer of prosecutorial discretion from commanders to independent, specialized counsel to prosecute certain covered offenses").

and increasing trust in the system. Additionally, the act explicitly criminalized sexual harassment under the UCMJ for the first time, recognizing the often-interlinked nature of harassment and assault.[16] The legislation also mandated enhanced support services for victims, including improved access to Special Victims' Counsel and refined reporting mechanisms. These changes reflect a growing understanding of the need for a victim-centered approach in addressing sexual assault within the military context.

Prior to the Military Justice Act of 2016, Article 66(c) of the UCMJ required Courts of Criminal Appeals (CCAs) to independently weigh the evidence and determine whether the court was convinced of the accused's guilt beyond a reasonable doubt.[17] This unique appellate power, referred to as factual sufficiency review, distinguished military appellate courts from their civilian counterparts by permitting them to make independent factual determinations, weigh credibility, and draw their own inferences.[18] Factual sufficiency review has deep historical roots in American jurisprudence, though its modern application varies significantly across jurisdictions.[19] In the civilian context, courts have long distinguished between legal sufficiency of evidence, which examines whether any rational trier of fact could have found guilt beyond reasonable doubt, and factual sufficiency, which allows reviewing courts to independently weigh evidence and assess witness credibility.[20] While most jurisdictions limit appellate courts to legal sufficiency review,[21] Congress granted military courts broader factual review powers when it enacted the UCMJ in 1950.[22]

The military's unique power of factual review stems from Congress's intent to protect service members by providing an additional layer of due process.[23] Unlike civilian appellate courts that must view evidence in the light most favorable to the prosecution, Courts of Criminal Appeals were

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[16] *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539D, 135 Stat. 1541 (2021) (establishing "sexual harassment . . . as an offense punishable under section 934 of title 10, United States Code").

[17] Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c) (2012) ("[The Court of Criminal Appeals] may affirm only [findings of guilty], and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.").

[18] *See* Elizabeth A. Ryan, Comment, *The 13th Juror: Re-Evaluating the Need for a Factual Sufficiency Review in Criminal Cases*, 37 TEX. TECH L. REV. 1291, 1316–19 (2005) (discussing various jurisdictions and the standards of factual sufficiency).

[19] Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 237–38 (2009).

[20] Tibbs v. Florida, 457 U.S. 31, 42–43 (1982).

[21] Peters, *supra* note 19, at 245.

[22] Christian L. Reismeier, *Awesome, Plenary, and De Novo Appellate Review of Courts-Martial*, 27 FED. SENT'G REP. 143, 143 (2015).

[23] *See id.* at 146–47.

empowered to weigh evidence independently and determine whether they were personally convinced of guilt beyond reasonable doubt.[24] This authority effectively positioned military appellate courts as "thirteenth jurors" who could substitute their own judgment for that of the trial court on questions of credibility and weight of evidence.[25] The rationale was that service members, subject to a separate system of justice with distinct procedures and commanders wielding significant discretion, required heightened appellate protections.[26]

However, this broad review authority has faced mounting criticism.[27] This is particularly relevant in sexual assault cases where credibility determinations are often central. Critics argue that appellate judges, reviewing "cold" trial records, are poorly positioned to assess witness credibility compared to trial judges and panel members who observe testimony firsthand.[28] Others contend factual sufficiency review has strayed from its original purpose of protecting against unlawful command influence, instead becoming a vehicle for appellate courts to substitute their judgment in ways that reflect problematic attitudes about sexual assault.[29] These concerns contributed to Congress's 2016 decision to constrain CCAs' factual review authority.[30]

The Military Justice Act of 2016, which took effect on January 1, 2019, fundamentally altered this historic standard of review.[31] Under the amended Article 66(d), UCMJ, CCAs may no longer independently weigh evidence and determine guilt beyond a reasonable doubt.[32] Instead, the statute now requires the accused to ask for review and show that the evidence failed to prove the crime for which the accused was convicted. Formerly, the statute stated that the CCA reviewed the evidence without a presumption as to guilt or innocence. Under the new statute, the CCA must be "clearly convinced that the finding of guilty was against the weight of the evidence."[33] It is

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[24] *Id.* at 144.

[25] *Tibbs*, 457 U.S. at 42.

[26] *See* Reismeier, *supra* note 22, at 143–45.

[27] Peters, *supra* note 19, at 271.

[28] *Id.*

[29] *See* Reismeier, *supra* note 22, at 147–48 ("the factual review is guided. . . by the personal view of the evidence before the appellate judges and whatever permissible inferences they might draw therefrom.").

[30] *See* Military Justice Act of 2016, Pub. L. No. 114-328, § 5330, 130 Stat. 2000, 2932–35 (2016) (revising the scope of appellate review for the Court of Criminal Appeals).

[31] *Id.*

[32] Article 66(d), Uniform Code of Military Justice, 10 U.S.C. § 866(d) (2019).

[33] *Id.*

believed this shift will significantly constrain the scope of appellate review.[34] This legislative change represents a marked departure from decades of military justice practice and aligns military appellate review more closely with civilian standards. Yet the practical effect of this legislative change has yet to be empirically tested.

Military appellate courts have grappled with interpreting and applying sexual assault legislation to specific factual scenarios, revealing inherent complexities of these cases.[35] One of the most challenging areas has been defining and applying the concept of incapacitation, a key element in many sexual assault cases.[36] The issue of substantial incapacitation often arises in cases involving alcohol consumption, where the courts must determine whether the victim was capable of consenting.[37] For instance, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) has struggled with defining the level of intoxication that constitutes incapacitation.[38] The court noted that while a person need not be completely unconscious to be substantially incapacitated, mere impairment is insufficient to meet this threshold.[39]

Military courts have also struggled to define the parameters of consent in cases involving substantial incapacitation, particularly where victims retain some physical functionality.[40] The Court of Appeals for the Armed Forces (CAAF) established that substantial incapacitation does not require complete unconsciousness or inability to move, rejecting earlier interpretations that required near-total physical incapacity.[41] Instead, courts now focus on whether the alleged victim could make or communicate rational and reasonable judgments about the nature and consequences of sexual acts.[42] In alcohol consumption cases, military courts have developed a nuanced

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[34] *But see* Ryan, *supra* note 18, at 1320–23 (discussing the way in which statutory changes limiting factual sufficiency reviews in Texas failed to have the impact intended by legislators).

[35] *See, e.g.*, United States v. Pease, 75 M.J. 180, 183 (C.A.A.F. 2016) (discussing difficulties that the lower court experienced with fitting facts with an ambiguous statutory term).

[36] *Compare* United States v. Robinson, 77 M.J. 294, 298 (C.A.A.F. 2018) (finding victim was incapable of consenting where she was observed stumbling, slurring speech, and nearly struck a stop sign while driving from party), *with* United States v. Dorr, ARMY 20170172, 2019 CCA LEXIS 229, at *7 (A. Ct. Crim. App. May 22, 2019) (finding evidence factually insufficient to sustain sexual assault conviction despite victim being observed stumbling, swaying, and needing to lean on appellant for support, with court acknowledging she was "without question . . . drunk.").

[37] *See Pease*, 75 M.J. at 180.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] United States v. Bailey, 77 M.J. 11, 14–15 (C.A.A.F. 2017).

[42] United States v. Mendoza, No. 23-0210210, 2024 CAAF LEXIS 590, at *13 (C.A.A.F. Oct. 7, 2024).

framework for evaluating substantial incapacitation. The courts recognize that victims may be capable of walking, talking, or even performing complex motor functions while still lacking the cognitive capacity to consent to sexual activity.[43]

A recent, salient example of the problematic way military appellate courts review sexual assault cases, *United States v. Mendoza*, shows how the Court of Appeals for the Armed Forces (CAAF) struggled with a seemingly straightforward question: does evidence that a victim was incapable of consenting constitute evidence that the victim did not consent?[44] Despite the apparent logical connection between these concepts, both the majority and dissenting opinions engaged in complex statutory interpretation to reach the counterintuitive conclusion that evidence of incapacity cannot prove lack of consent under Article 120(b)(2)(A) of the Uniform Code of Military Justice (UCMJ).[45]

The court's reasoning relied heavily on the canon against surplusage, arguing that if evidence of incapacity could prove lack of consent, it would render Article 120(b)(3)(A)'s separate provision for assault of an incapacitated victim superfluous.[46] While this interpretation maintains distinct theories of liability, it creates the puzzling result that evidence a victim was completely unconscious from intoxication cannot be used to prove they did not consent. The court attempts to resolve this tension by suggesting that evidence of intoxication may be considered as part of the "surrounding circumstances" in determining consent, while simultaneously holding that proof of incapacity cannot establish lack of consent.[47]

This strained interpretation appears driven more by concerns about notice to defendants than logical consistency. The court worried that allowing prosecutors to prove lack of consent through incapacity would let them avoid Article 120(b)(3)(A)'s additional requirement of proving the accused knew or should have known of the victim's condition.[48] While due process rights of an accused are paramount, their application in this context obfuscates the practical import of what the holding means. The court accepts, without

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[43] *Pease*, 75 M.J. at 186.

[44] *Mendoza*, 2024 CAAF LEXIS 590, at *13. While this case did not revolve around a factual sufficiency review, it shows the way in which courts invent ways to overturn sexual assault cases.

[45] *Id.* at *17–18.

[46] *Id.* at *16 ("Under the Government's theory, every sexual act committed upon a victim who is incapable of consenting under subsection (b)(3)(A) would also qualify as a sexual assault under subsection (b)(2)(A) because the victim did not consent.").

[47] *Id.* at *22–23.

[48] *Id.* at *16 ("Rendering subsection (b)(3)(A) as surplusage would be especially problematic because it would allow the Government to circumvent the mens rea requirement that Congress specifically added to the offense of sexual assault of a victim who is incapable of consenting.").

meaningful analysis, the premise that Article 120(b)(2)(A) implicitly requires proof the victim was capable of consenting simply because nothing in the statute explicitly forecloses that interpretation.[49] This reasoning inverts basic principles of statutory construction by reading in an additional element that Congress did not include.[50] The statute's plain language merely requires proof that the sexual act occurred without consent—it contains no requirement regarding the victim's capacity to consent.[51] If Congress intended to limit Article 120(b)(2)(A) to only cases involving cognitively capable victims, it could have easily included such language, just as it explicitly included knowledge requirements in other provisions.[52] The court's interpretation effectively amends the statute to add "when the victim is capable of consenting" as an unstated element, despite no textual basis for this requirement.[53]

Additionally, the CAAF's reasoning in *Mendoza* regarding charging sexual offenses involving incapacitated victims via Article 120(b)(2)(A)[54] creates an internal inconsistency within Article 120's statutory framework extending beyond the immediate holding. The Court's conclusion that charging an incapacitated victim case under the "without the consent" provision would impermissibly subsume the separate incapacitation provision ignores that this same logic would invalidate charging cases involving sleeping victims under the "without the consent" provision, despite the statute's explicit inclusion of sleeping victims in the definition of consent.[55] Moreover, the Court's reasoning creates an even more problematic inconsistency when applied to the broader definition of consent, as the statutory definition explicitly includes elements that parallel other charging theories under Article 120.[56]

Article 120's definition of consent specifically states that a sleeping person cannot consent, yet the statute also contains a separate provision criminalizing sexual acts against sleeping victims.[57] Following *Mendoza*'s reasoning, charging a sleeping victim case under the "without the consent"

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[49] *Id.* at *14 ("But it is also true, as Appellant argues, that nothing in the language of subsection (b)(2)(A)—or in any other part of the article—forecloses Appellant's interpretation that subsection (b)(2)(A) presumes that the victim was capable of consenting.").

[50] *See* United States v. Kelly, 77 M.J. 404, 407 (C.A.A.F. 2018) (discussing principles of statutory interpretation).

[51] 10 U.S.C. § 920(b)(2)(A).

[52] *Compare* 10 U.S.C. § 920(b)(2)(A), *with* 10 U.S.C. § 920(b)(3)(A) (explicitly requiring proof that "that condition is known or reasonably should be known by the person").

[53] *See Mendoza*, 2024 CAAF LEXIS 590, at *41 (Sparks, J., concurring in part and dissenting in part and in the judgment).

[54] *Id.* at 13.

[55] 10 U.S.C. § 920(g)(8)(B).

[56] 10 U.S.C. § 920(g)(8)(A).

[57] 10 U.S.C. § 920(b)(2).

provision would similarly subsume the specific sleeping victim provision, rendering the sleeping person language in the consent definition mere surplusage.[58] This incongruity is further amplified by the fact the consent definition explicitly states consent is not present when submission is gained by force, threat of force, or placing another in fear.[59] Under the Court's logic in *Mendoza*, this would mean prosecutors could never charge a "without the consent" case involving force or threats because doing so would impermissibly subsume the separate provisions criminalizing sexual acts by force or threats.[60]

This contradiction exposes a fundamental flaw in CAAF's reasoning that extends well beyond the incapacitation context.[61] Rather than creating a blanket prohibition against charging under the "without the consent" provision when a more specific provision might apply, courts should examine whether Congress intended to provide prosecutors with multiple charging theories.[62] The explicit inclusion of force, threats, and fear in the consent definition, alongside separate provisions criminalizing these same circumstances, demonstrates Congress's intent to maintain prosecutorial discretion in charging decisions where multiple theories of liability exist.[63] Congress's deliberate choice to define consent in a way that incorporates multiple theories of liability while simultaneously maintaining separate provisions for each theory suggests the statutory scheme was designed to provide prosecutors with flexibility rather than constraint.[64] This same logic should extend to cases involving incapacitated victims, particularly given the similar statutory structure and policy considerations.[65]

From a criminological perspective, what Congress intended is less important than what the CAAF did. The empirical analysis of military appellate jurisprudence presented in this study reveals a discernible pattern wherein courts employ rigid doctrinal formalism as a vehicle to invalidate sexual assault convictions. This suggests a disconnect between the courts' stated commitment to addressing sexual violence and their actual appellate practice. While these decisions are invariably couched in the language of statutory construction and procedural regularity, the frequency and consistency with which such technical grounds are marshaled to overturn

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[58] *See Mendoza*, 2024 CAAF LEXIS 590, at *13–14.

[59] 10 U.S.C. § 920(g)(8)(A).

[60] 10 U.S.C. § 920(a)(1)–(2).

[61] *See Mendoza*, 2024 CAAF LEXIS 590, at *13.

[62] *See* United States v. Elespuru, 73 M.J. 326, 329 (C.A.A.F. 2014) (discussing congressional intent in interpreting Article 120).

[63] 10 U.S.C. § 920(g)(8)(A)–(B) (2019).

[64] *See* JOINT SERV. COMM. ON MIL. JUST., MANUAL FOR COURTS-MARTIAL UNITED STATES, pt. IV, ¶ 60.a.(g)(8)(A) (2019).

[65] *Mendoza*, 2024 C.A.A.F. LEXIS 590, at *13–15.

convictions betrays a systematic predisposition that transcends mere legal interpretation. As this study and previous studies show, military appellate courts are biased against sexual assault victims and the phenomenon of sexual assault. It appears that military appellate courts use their positions of power to "get to yes."[66]

III. DECISION-MAKING IN CIVILIAN CASES

Research on sexual assault case processing has consistently revealed the complex interplay of legal and extralegal factors influencing decision-making by court actors throughout the criminal justice system.[67] These studies span various jurisdictions and stages of case progression, from initial reporting to final adjudication, providing a comprehensive view of how sexual assault cases are handled.[68] Multiple research efforts have documented the challenges faced by victims navigating the justice system.[69] Studies have shown significant attrition rates as cases move through the legal process.[70] The cumulative findings suggest a need for systemic reforms to better serve

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[66] "Get to yes" is a term used within military legal circles to describe the practice where judge advocates, rather than simply identifying legal barriers, work to find legally permissible ways to accomplish a commander's intent. While ostensibly reflecting military attorneys' dual role as both legal advisors and staff officers tasked with mission accomplishment, the term often carries a pejorative connotation as the double-entendre does here, suggesting an attorney who chooses the path of least resistance rather than providing robust legal analysis. For additional discussion of "getting to yes," *see generally* Ryan Howard & Katherine F. Mitroka, *Cutting the Gordian Knot*, 2 THE ARMY LAW. (2022).

[67] *See* 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, 667 (2001); Lisa Frohmann, *Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, 38 SOC. PROBS. 213, 213–14 (1991) (examining, among other things, the importance of witness credibility in decisions to prosecute).

[68] *See, e.g.*, 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, 540 (2012).

[69] *See generally* SARAH E. ULLMAN, TALKING ABOUT SEXUAL ASSAULT: SOCIETY'S RESPONSE TO SURVIVORS (1st ed. 2010) (discussing how survivors of sexual assault face negative social reactions).

[70] *See* DAC-IPAD CASE FILE REVIEW, *supra* note 2, at 38; Cassia Spohn et al., *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the "Gateway to Justice,"* 48 SOC. PROBS. 206 (2001); *see* Jeffrey W. Spears & Cassia C. Spohn, *The Effect of Evidence Factors and Victim Characteristics on Prosecutors' Charging Decisions in Sexual Assault Cases*, 14 JUST. Q. 501, 501 (1997) ("Overall the results of this study suggest that Detroit prosecutors regard victim characteristics as relevant to convictability in all types of sexual assault cases."); Cassia Spohn & Katharine Tellis, *Sexual Assault Case Outcomes: Disentangling the Overlapping Decisions of Police and Prosecutors*, 36 JUST. Q. 383, 399 (2019) (finding that cases were "less likely to be cleared by arrest if the case file contained information that raised questions about the victim's reputation or character, the victim had a motive to lie, or the case involved rape rather than attempted rape").

sexual assault survivors as they navigate the legal process.[71] Additional research has emphasized how various institutional barriers can impede justice in these cases at every level.[72]

The role of prosecutors as gatekeepers to the criminal justice process has been extensively studied, with research revealing multiple factors influencing their decision-making.[73] Studies examining prosecutorial choices have shown that while legally relevant factors such as offense seriousness and evidence strength play a crucial role, extralegal factors, such as victim characteristics and victim-offender relationships, frequently impact outcomes.[74]

Studies of specialized prosecution units have produced mixed results regarding their effectiveness. While some research suggests these units increase charging rates, other studies indicate they haven't eliminated bias in decision-making. Multiple investigations have examined how prosecutor caseloads affect their ability to pursue cases effectively, and how office policies and local political contexts shape prosecutorial choices. Furthermore, prosecutorial experience levels can significantly impact case handling, along with resource availability and other forms of evidence.

The evolution of research on rape myths and stereotypes has revealed persistent patterns in how the justice system responds to different types of cases.[75] Studies consistently show cases matching stereotypical notions of "real rape" receive different treatment than those involving acquaintances or lacking physical injury.[76] Research has documented this pattern across multiple jurisdictions and time periods,[77] with these stereotypes affecting

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[71] *See generally* DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, AND DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES, REPORT ON RACIAL AND ETHNIC DATA RELATING TO DISPARITIES IN THE INVESTIGATION, PROSECUTION, AND CONVICTION OF SEXUAL OFFENSES IN THE MILITARY (2020) [hereinafter DAC-IPAD RACIAL AND ETHNIC DATA REPORT] (recommending, among other things, creating a unified system for reporting sexual assault across the entire military).

[72] *See, e.g.*, Gerd Bohner et al., *Social Norms and the Likelihood of Raping: Perceived Rape Myth Acceptance of Others Affects Men's Rape Proclivity*, 32 PERSONALITY & SOC. PSYCH. BULL. 286, 293 (2006); Amy Dellinger Page, *True Colors: Police Officers and Rape Myth Acceptance*, 5 FEMINIST CRIMINOLOGY 315, 328–30 (2010).

[73] *See, e.g.*, Celesta A. Albonetti, *Prosecutorial Discretion: The Effects of Uncertainty*, 21 L. & SOC'Y 291, 293 (1987); Ashley K. Fansher & Bethany Welsh, *A Decade of Decision Making: Prosecutorial Decision Making in Sexual Assault Cases*, 12 SOC. SCIS. 348, 364–66 (2023).

[74] *See* Spohn & Holleran, *supra* note 67, at 667; Fansher & Welsh, *supra* note 74; Jeffrey T. Ulmer et al., *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RSCH. CRIME & DELINQ. 427, 446–51 (2007).

[75] *See* Gerd Bohner et al., *supra* note 73.

[76] *See* SUSAN ESTRICH, REAL RAPE 8–27 (Harv. Univ. Press 1987).

77 *See* Page, *supra* note 72, at 315–22.

decision-making at every stage of the legal process.[78] Research has demonstrated the remarkable persistence of these patterns despite increased awareness and training.[79]

The cumulative body of research on sexual assault case processing reveals a justice system grappling with the inherent challenges of these cases.[80] While progress has been made in recognizing the seriousness of sexual assault and implementing reforms, studies consistently show the persistent influence of extralegal factors and potential biases on decision-making.[81] This underscores the ongoing need for education, training, and systemic reforms to ensure fair and equitable treatment of sexual assault cases within the criminal justice system.[82]

IV. DECISION-MAKING IN MILITARY CASES

Research on military appellate courts has revealed significant insights about how factual sufficiency review affects sexual assault convictions, particularly in cases with incapacitated victims.[83] This unique authority granted to military courts allows them to independently evaluate evidence and assess witness credibility in ways civilian courts cannot.[84] Historical analysis shows factual sufficiency review was originally implemented as a protection against unlawful command influence in the military justice system.[85] Research suggests this authority may no longer serve its original purpose due to numerous other protections now in place.[86] Studies examining recent changes to the Uniform Code of Military Justice have

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[78] Rebecca M. Hayes, et al., *Victim Blaming Others: Rape Myth Acceptance and the Just World Belief*, 8 FEMINIST CRIMINOLOGY 202, 204–06 (2013) (discussing the various factors that influence rape victims from reporting to law enforcement); Katharine Tellis & Cassia Spohn, *The Sexual Stratification Hypothesis Revisited: Testing Assumptions about Simple versus Aggravated Rape*, 36 J. CRIM. JUSTICE 252, 258 (2008) (discussing the effect of simple and aggravated rape cases are treated differently by prosecutors while making charging decisions); Amy Grubb & Julie Harrower, *Attribution of Blame in Cases of Rape: An Analysis of Participant Gender, Type of Rape and Perceived Similarity to the Victim*, 13 AGGRESSION AND VIOLENT BEHAV. 396, 402 (2008) (discussing the way in which blame attribution influences juror decision-making).

[79] *See* Emma Sleath & Ray Bull, *Comparing Rape Victim and Perpetrator Blaming in a Police Officer Sample: Differences Between Police Officers With and Without Special Training*, 39 CRIM. JUSTICE BEHAV. 646, 661 (2012) (discussing the studies finding that police officers harbor rape myths and training differences between them did not alter the effect).

[80] *See* Frohmann, *supra* note 67, at 215.

[81] *See* Gregory M. Matoesian, *Language, Law, and Society: Policy Implications of the Kennedy Smith Rape Trial*, 29 LAW & SOC'Y. REV. 669, 683 (1995).

[82] *See* S.J. Creek & Jennifer L. Dunn, *Rethinking Gender and Violence: Agency, Heterogeneity, and Intersectionality: Gender and Violence*, 5 SOCIO. COMPASS 311, 313 (2011).

[83] *See generally*, Schenck, *supra* note 2.

[84] *Id.* at 525–32.

[85] *Id.* at 528.

[86] Ryan, *supra* note 18, at 1319–20.

identified problems with how sexual assault offenses are defined.[87] Of specific concern are the challenges in prosecuting cases where victims were impaired by alcohol.[88] Analysis of court cases demonstrates significant issues with the 2012 revision's lack of clear definitions around incapacitation.[89] Research shows this ambiguity has made convictions more difficult in cases where victims are impaired but not completely unconscious.[90]

Analysis of large-scale data from military sexual assault cases has provided crucial insights into case disposition patterns.[91] Research examining over 17,000 cases has challenged assumptions about commander bias in the military justice system,[92] studies show commanders are actually more likely to act in sexual assault cases compared to other types of cases.[93] Research has documented how factors like victim cooperation, multiple victims, and corroborating evidence significantly increase the likelihood of preferral.[94] Analysis shows these cases face particular challenges in the military justice system. Multiple studies have documented how these patterns align with civilian prosecution patterns.

Recent studies focusing on charging decisions in the military's legal system have produced important findings about decision-making patterns.[95] Research analyzing 120 adult sexual assault cases in the Navy between 2016 and 2019 has shown that offense seriousness significantly influences charging decisions.[96] Analysis has demonstrated victim preferences play a crucial role, with victims' desire for court-martial dramatically increasing the likelihood of

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[87] Eric R. Carpenter, *Evidence of the Military's Sexual Assault Blind Spot*, 4 VA. J. CRIM. L. 154, 158–60 (2016) [hereinafter *Blind Spot*].

[88] Schenck, *supra* note 2, at 525–26.

[89] 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 SOUTHWEST. LAW REV. 523, 558 (2016).

[90] *See id.*

[91] *See generally*, *Empirical Look*, *supra* note 5 (offering commander bias as one explanation for case disposition).

[92] *Id.* at 45, 78 ("This study reveals that commanders treat non-penetrative sexual assaults the same or more seriously than they treat simple assaults.").

[93] *Empirical Look*, *supra* note 5, at 45 ("This study reveals that commanders treat non-penetrative sexual assaults the same or more seriously than they treat simple assaults").

[94] *See* DAC-IPAD CASE FILE REVIEW, *supra* note 2, at 48, 115, F-114 (finding an increase in preferral where the victim underwent a sexual assault forensic examination and where DNA was tested).

[95] *See generally Empirically Testing*, *supra* note 3; *see generally* Chris Cox, *When Commanders Decide: Military Prosecutorial Decision-Making in Sexual Assault Cases*, 22 SEATTLE J. SOC. JUSTICE (2024) [hereinafter *When Commanders Decide*].

[96] *See When Commanders Decide*, *supra* note 102, at 396, 414 ("Offense Seriousness increases likelihood of charging").

charges.[97] Studies have documented how commanders appear to rely more heavily on legally relevant factors than on extralegal considerations. Multiple analyses have shown this pattern challenges assumptions about commander decision-making, suggesting that commanders may be less influenced by rape myths than previously thought.

The most recent empirical research has revealed fascinating comparisons between commander and judicial decision-making in military sexual assault cases.[98] The study analyzed 254 cases and reported unexpected patterns in how different authorities approach these cases. [99] The study showed that commanders, despite lacking formal legal training, often demonstrate stronger adherence to legally relevant factors in their decisions.[100] Analysis showed that lay commanders pay significant attention to offense seriousness and evidence strength.[101] In contrast, the research on appellate judges has revealed concerning patterns regarding the influence of blame and believability factors,[102] possibly reflecting underlying rape myth acceptance. This study revealed a striking concentration of case reversals among a small group of judges.[103]

The military justice system has evolved significantly since the enactment of the Uniform Code of Military Justice in 1950.[104] Unlike most civilian appellate courts, military courts have the authority to review both the legal and factual sufficiency of convictions.[105] This broad scope of review aims to ensure justice within the unique context of military service.[106] Research on decision-making in sexual assault cases has identified various factors that may influence outcomes. These include characteristics of the victim and offender, the nature of their relationship, and the circumstances of the assault.[107]

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[97] *Id.* at 421 ("When the victim desired court-martial, the odds of No Action over Preferral decreased by a factor of 0.93."); *see also,* DAC-IPAD CASE FILE REVIEW, *supra* note 2, at 48 (discussing the relationship between victim participation and preferring charges).

[98] *Empirically Testing*, *supra* note 3, at 285–86.

[99] *Id.* at 267.

[100] *Id.* at 285–86.

[101] *Id.*

[102] *Id.*

[103] *Id.* at 273.

[104] David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 St. Mary's L.J. 1, 11–13 (2017).

[105] Article 66, Uniform Code of Military Jusice (UCMJ), 10 U.S.C. § 866(d)(1)(A).

[106] *See* Mark D. Sameit, *When a Convicted Rape is Not Really a Rape: The Past, Present, and Future Ability of Article 120 Convictions to Withstand Legal and Factual Sufficiency Reviews,* 216 Mil. L. Rev. 77, 78 (2013).

[107] Spohn & Holleran, *supra* note 67, at 654–58; *see also* Alderden & Ullman, *supra* note 68, at 528 (2012).

However, studies specifically examining military sexual assault cases remain limited.[108]

Recent analyses have highlighted potential disparities in how sexual assault cases are handled based on factors such as the victim's military status and race.[109] These findings raise questions about the role of bias in military justice processes. Intersectionality theory provides a valuable lens for examining how various identity factors—such as race, class, and gender—interact to shape individuals' experiences of violence and their treatment within the justice system.[110] This approach is particularly relevant in the military context, where rank and duty status introduce additional layers of complexity.[111] Previous research has found that factors such as victim alcohol use, delayed reporting, and lack of physical injuries may negatively impact case outcomes.[112] However, these same factors may be influenced by a victim's social position and access to resources.[113] Understanding how appellate judges weigh these factors in their factual sufficiency reviews is crucial for assessing the fairness of the military justice system.

V. JUDICIAL DECISION-MAKING

A. Civilian Judges

Recent empirical research on judicial decision-making reveals that judges, like everyone else, tend to rely heavily on intuitive cognitive processes when making judgments.[114] Although judges often attempt to reach decisions through deliberate, analytical reasoning, their intuitive responses can

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[108] *Blind Spot*, *supra* note 94, at 154 ("This article is the first to empirically test [the assertion that military justice in sexual assault cases is systemically sexist].").

[109] *See generally* DAC-IPAD RACIAL AND ETHNIC DATA REPORT, *supra* note 2. (examining sexual offense cases to determine whether military status, race, and other characteristics impacted the case disposition).

[110] *See generally* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991) (outlining intersectionality theory); *see* generally Beth E. Richie, *A Black Feminist Reflection on the Antiviolence Movement*, 25 SIGNS: J. WOMEN CULTURE, & SOC'Y 1133, 1133 (2000) (commenting on the "particular challenges and concerns for Black feminist activists" in the antiviolence movement).

[111] Patricia D. Breen & Brian D. Johnson, *Military Justice: Case Processing and Sentencing Decisions in America's "Other" Criminal Courts*, 35 JUST. Q. 639, 644 (2018).

[112] *See, e.g.*, 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 143 (2012) (listing factors which make a victim less likely to experience good case outcomes).

[113] Creek & Dunn, *supra* note 89, at 318.

[114] Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 2–3 (2007); Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. LAW SOC. SCI. 203, 204 (2017).

influence and sometimes override their deliberative analysis.[115] Psychological research shows that human judgment involves two distinct ways of thinking-—an intuitive "System 1" that operates quickly and automatically with little conscious awareness, and a deliberative "System 2" that engages in slower, more effortful analysis.[116] Studies of judges demonstrate that they commonly make decisions using intuitive System 1 processes rather than engaging in more systematic System 2 deliberation.[117] For example, when evaluating statistical evidence, assigning damages, or predicting appellate outcomes, judges frequently rely on cognitive shortcuts and gut reactions that can lead to errors.[118]

This reliance on intuition is concerning because judges face cognitive limitations and biases similar to other decision makers. Research shows that judges are susceptible to anchoring effects from irrelevant numbers, base rate neglect when evaluating probabilities, and hindsight bias in assessing past events.[119] While intuition can sometimes lead to accurate decisions, judges' intuitive judgments are often flawed in predictable ways.[120] However, judges can and sometimes do override their intuitive reactions with deliberative reasoning.[121]

The influence of demographic characteristics like gender appears to manifest primarily in cases where such characteristics are salient to the legal issues being decided. For instance, studies have found female judges are more likely than male judges to find for plaintiffs in employment discrimination and sexual harassment cases, but gender has little effect on decisions in other types of cases.[122] Notably, the presence of even a single female judge on an appellate panel increases the likelihood that male judges will support plaintiffs in gender discrimination cases, suggesting that diversity on the bench can help counteract potential biases.[123] Similar patterns emerge with other demographic variables – judges' personal characteristics tend to influence their decisions primarily in cases where those characteristics are relevant to the legal questions at hand.

Studies comparing judicial decision-making to that of other professionals and laypeople have yielded mixed results regarding judges' relative

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[115] Guthrie et al., *supra* note 121, at 7–8.

[116] *Id.* at 6–9; Rachlinski & Wistrich, *supra* note 121, at 206–07.

[117] Guthrie et al., *supra* note 121, at 13–17; Rachlinski & Wistrich, *supra* note 121 at 213–18.

[118] Rachlinski & Wistrich, *supra* note 121, at 219–27.

[119] *Id.*; Guthrie et al., *supra* note 121, at 19–29.

[120] Guthrie et al., *supra* note 121, at 29–33; Rachlinski & Wistrich, *supra* note 121, at 231–32.

[121] Guthrie et al., *supra* note 121, at 27–28; Rachlinski & Wistrich, *supra* note 121, at 221–22.

[122] Rachlinski & Wistrich, *supra* note 121, at 207–09.

[123] *Id.* at 208.

susceptibility to cognitive biases. While judges generally performed similarly to other well-educated adults on tests of cognitive reflection, they demonstrated superior resistance to certain biases in legal contexts.[124] For example, judges were better able than law students or practicing lawyers to disregard inadmissible evidence when making legal judgments.[125] This indicates that judicial experience and expertise may confer some debiasing advantages, even if it does not eliminate cognitive biases entirely. The specialized nature of judicial decision-making, with its emphasis on impartiality and adherence to legal rules, appears to help judges overcome some common judgment errors.

Individual differences among judges in cognitive style and decision-making approach may help explain variations in susceptibility to bias. Research has found that some judges consistently demonstrate more deliberative decision-making tendencies, while others rely more heavily on intuition.[126] These individual differences suggest that judicial selection processes should include consideration of cognitive style as one relevant factor. Additionally, the research indicates that various situational factors—such as time pressure, docket load, and the clarity of legal rules—can influence whether judges engage in more intuitive versus deliberative decision-making.[127] This highlights the importance of structural reforms that facilitate more deliberative judicial decision-making, such as reduced caseloads, clear legal frameworks, and requirements for written opinions explaining the reasoning behind decisions.

B. Military Judges

The military justice system operates under a distinct legal framework. Military judges share fundamental similarities with civilian judges despite some key differences. Understanding these similarities and differences is crucial for contextualizing the decision-making processes in military sexual assault cases. Military judges, like those in bankruptcy or tax courts, are Article I judges rather than Article III. This designation stems from Congress's constitutional authority to regulate the armed forces, resulting in a separate system of military courts.[128]

While Article I judges lack the life tenure and salary protections afforded to Article III judges, they maintain judicial independence within the military context, much like their civilian counterparts. The fundamental principles of judicial decision-making, including the evaluation of evidence, application of

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[124] Guthrie et al., *supra* note 121, at 13–14.

[125] Rachlinski & Wistrich, *supra* note 121, at 213–14.

[126] Inmaculada Otero et al., *Sex Differences in Cognitive Reflection: A Meta-Analysis*, 12 J. INTEL. 39, 2–3 (2024) (discussing the differences between men and women in cognitive reflection).

[127] *Id.* at 3–4.

[128] U.S. CONST. art. I, § 8, cl. 14.

precedent, and commitment to impartial justice, are shared across both military and civilian contexts. Research on judicial decision-making in civilian courts, particularly regarding factors that influence judgment and the impact of experience on decision-making, can therefore provide valuable insights into military judicial behavior.

One notable characteristic of military trial judges is their typically extensive trial experience. Before ascending to the bench, most military judges have served as both prosecutors and defense counsel in courts-martial. This diverse background provides them with a comprehensive understanding of military law and court-martial procedures from multiple perspectives, similar to how civilian judges often bring varied legal experience to their roles.

In contrast to trial judges, military appellate panels often include judges with varying levels of trial experience, particularly in sexual assault litigation. While some appellate judges have extensive courtroom experience prosecuting and defending sexual assault cases, others may have focused their careers on operational law, fiscal law, or administrative law. This variation raises concerns about judges' preparation for evaluating sexual assault cases, which present unique challenges in terms of understanding trauma responses, victim behavior patterns, and the dynamics of sexual violence.[129]

Research suggests that legal professionals without specific training in sexual assault cases may be more likely to harbor rape myth acceptance attitudes, though the extent of this problem among military appellate judges remains understudied.[130] Even judges with substantial legal experience may hold problematic attitudes about sexual assault, but those without specific training in this area lack exposure to critical education about trauma-informed approaches and common misconceptions about victim behavior.[131] While operational law experience provides valuable insight into military contexts, it may not prepare judges for the complex credibility assessments required in sexual assault cases.

The military justice system's acceptance of judges without specific sexual assault litigation experience on appellate panels reflects an institutional assumption that general legal expertise is sufficient for reviewing these cases. However, this assumption has not been empirically tested.[132] Understanding how different judicial backgrounds influence sexual assault case reviews is crucial, particularly given the courts' role in shaping military justice through

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[129] ULLMAN, *supra* note 69, at 45–47.

[130] *See* Guthrie et al., *supra* note 121, at 219–29.

[131] *See Empirically Testing*, *supra* note 3, at 285.

[132] *See e.g.*, Creek & Dunn, *supra* note 89, at 313–15 (emphasizing the complex social meaning of sexual violence and the importance of an intersectional approach - aspects of the issue which the judiciary is often not trained to understand).

precedential decisions. This study represents an initial step toward examining how judicial experience and training may affect appellate review of sexual assault cases.

VI. METHODS

Data for the present study was collected from two sets of data, appellate opinions and prosecutor files. Appellate opinions for this study were selected using the LexisNexis features for researching military cases. The search criteria began with a search for "factual pre/1 sufficiency" to include all cases reviewed by a military appellate court regarding a claim of factual insufficiency. This process resulted in the selection of 3,038 cases. The timeframe for the cases was narrowed to cases decided between January 1, 2017 and May 20, 2020, resulting in 313 cases.

Cases were then reviewed to assess whether the court did a factual sufficiency review, versus simply referring to the factual sufficiency review process (e.g., cases discussing the prior history of the case where a factual sufficiency review was completed). All decisions where the court did not conduct a factual sufficiency review were removed. Cases were removed if they involved a factual sufficiency review, but for offenses other than adult sexual offense.

This included the removal of child sexual offense cases. The rationale is that child offense cases are qualitatively different than adult cases. For instance, the issue of consent is markedly different between the two.[133] For certain classes of children, consent is not possible.[134] While the same may be true for certain adult sexual offense cases, such as cases involving incapacitation due to alcohol consumption, the difference is the child has no choice, and therefore no possible blame, for their incapacitation. The resulting number of cases was 134.

Coding of cases took place in three steps. Using a prior quantitative analysis of these cases,[135] variables significantly related to a decision of factual insufficiency were chosen for additional exploration: previous relationship, victim verbal resistance, timing of complaint, incapacitation of the victim, if the victim was active duty, and whether the offender used force. During stage one, authors critically read the 19 cases overturned for factual insufficiency, highlighting where judicial opinions were based on one of the six variables of interest. This was done independently to allow for a more liberal interpretation of where the variables presented themselves. Background facts

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[133] Compare Article 120(g)(7)(A) of the UCMJ, which states that in adult victim cases consent is "[a] freely given agreement to the conduct at issue by a competent person" and 120b(a)(g), stating that in child cases ". . . consent is not an element and need not be proven in any prosecution under this section."

[134] *See id.*

[135] *Empirically Testing*, *supra* note 3, at 267–68.

were only highlighted when the variable was present but not explicitly mentioned in the judicial opinion (e.g., victim military status was often only in the presentation of facts).

In stage two, authors independently reviewed only the highlighted opinion segments, separated by variables, to extract general themes. Themes were discussed and agreed upon. Third, the authors independently coded each opinion excerpt into one of the chosen themes. Phrases from the opinion could not be coded into multiple themes to prevent over-coding. However, the entirety of the opinion, which contained many phrases, could have multiple themes present. The authors met to discuss discrepancies in coding and reach a final decision on which theme was most appropriate. Before the final coding meeting, the authors fully agreed on 56.7% or partially agreed (had at least one of the same things) in 28.4%. Final themes and descriptive statistics can be seen in Table 1.

VII. QUALITATIVE RESULTS

A. Prior Relationship

Four of the nineteen cases overturned for factual insufficiency noted a prior relationship between the victim and appellant in the judicial opinion. Only one opinion specifically highlighted a prior intimate relationship, while the other three were more subjective, for example, the appellant staying in the victim's room on a prior occasion or being "close friends" with the victim. None of the four opinions that mentioned prior relationships appeared to imply that the sexual activity in the current case was akin to consent; this is most seen in the following excerpt:

> [Victim] and the appellant had communicated electronically for six weeks before they met in person, and this conversation reflected the existence of a relationship. To be clear, we do not believe the existence of this relationship formed a basis for consent to sexual activity.[136]

B. Verbal Resistance

Ten of the opinions noted *verbal* resistance by the victim. In five opinions, the court acknowledged that the victim did explicitly say "no" or otherwise articulate non-consent; however, in each of these cases, the judicial opinion also highlighted an issue with why this verbal resistance was either not sufficient by the court's views or lacked credibility. In the following excerpt, the opinion acknowledges that the victim verbally resisted multiple times, but they found flaws with her testimony: "[t]o the extent we have concerns about [victim]'s credibility, they stem from the record. During the

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[136] United States v. Brown, No. 201700003, 2018 CCA LEXIS 316, at *22 (N-M. Ct. Crim. App. July 2, 2018).

phone call, [victim] told the appellant she said "no like 20 or 30 times." By the time of trial, she testified that she said no "30 to 40 times."[137]

In this same opinion, the court noted that the appellant did indeed continue to engage in sexual activity, despite verbal resistance of the victim, but seemed to give more weight and credibility to the appellant's testimony:

> [Victim] tenaciously held to her position that her utterances of "no" communicated her lack of consent to sex. "An expression of lack of consent through words or conduct means there is no consent." The appellant countered that [victim]'s non-verbal behavior undermined her words and communicated her consent.[138]

The dissent in this case specifically noted that the appellant "unequivocally acknowledged at least 17 times during [a recorded] conversation that the victim had objected—at least verbally—to his sexual advances that night prior to him engaging in sexual intercourse with her."[139] Despite this clear lack of consent and a confession by the appellant, this case was overturned for factual insufficiency.

In six opinions, the court seemingly believed the victim did not engage in the appropriate level of resistance to make lack of consent apparent, as seen in this excerpt:

> [The victim] felt nauseous and could not tell Appellant "no." However, [the victim] testified that just before this sex act, she had shaken her head "no" when Appellant tried to "cuddle" her, moved onto her back, and removed her hand when he put it on his penis.[140]

Lastly, in one opinion, the court highlighted that the appellant stopped his assault following verbal resistance by the victim. However, the courts seem to consider consent to any physical activity to be grounds for consent up until the point where a victim explicitly says "no." The following opinion notes that the appellant was under a "mistake of fact as to consent," that excused his behavior up until the point where the victim told him to stop:

Since she actually consented to the kissing by the offender on her mouth, it was reasonable for the offender to believe that the other contemporaneous sexual touching, his genitalia to her genitalia, was at least perceived as consensual up until the point when she asked the appellant "not to do it."

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[137] *Id.* at 30–31.

[138] *Id.* at 31(arguing, i.e., her mouth was saying, "No," but her body was saying, "Yes").

[139] *Id.* at *44. (Woodard, J., dissenting).

[140] United States v. Lewis, No. 201900049, 2020 CCA LEXIS 199, at *3333 (N-M. Ct. Crim. App. June 8, 2020).

It appears in these opinions that an offender's behavior is excused, so long as he stops himself from engaging in full penetrative non-consensual sexual activity. Additionally, verbal resistance by a victim must be clear, repetitive, and forceful, but even that might not be enough to support evidence of sexual assault beyond a reasonable doubt. These opinions are directly contrary to the "affirmative consent" framework that has been promoted in the past decade.[141]

C. Timing of Complaint

Delayed reporting was common in this sample of cases. For the coding of this theme, the focus was on issues that the court expressed with the delayed complaint, with notes of how much time elapsed between the incident and the complaint. Misperceptions of victim behavior, found in seven opinions, focuses on how judges view victim behavior following an incident. As will be discussed below, there is no standard response to experiencing a traumatic event, and oftentimes, it is not what is expected. When a victim acts contrary to beliefs about what a "true victim" would say or do, it can seem difficult to believe the victim's story. For example, in the excerpt below, the court did not appear concerned with the delayed reporting, but more about the victim's behaviors following the assault:

> While [victim]'s actions might cause one to question her motive for reporting the June 2015 rape in August 2015, they do not undermine the credibility of the report . . . . [Victim] did not tell anybody about the incident and did not discuss it with Appellant . . . . She did not tell anybody about the incident and continued to share the bedroom with Appellant until he returned to Korea.[142]

There are myriad reasons victims do not report or even discuss their sexual assault.[143] Additionally, the opinion, nor the facts of the case, attempts to explore why the victim continued to live with appellant (e.g., financial difficulties, fear, and/ or shame). The misperceptions category was riddled with similar examples of the court explicitly noting that the victim did not report to friends or others until a later time point, suggesting that for one to

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[141] Rachel E. VanLandingham, *Sex and Consent in the Military*, LAWFARE (Sept. 4, 2024, 8:00 A.M.), https://www.lawfaremedia.org/article/sex-and-consent-in-the-military [https://perma.cc/Q5VK-53MZ] (discussing the reforms to the definition of consent in the military sexual assault statutes). While the new definition of consent states that lack of verbal resistance does not constitute consent, any minimally competent litigator could drive the proverbial RMA Mack Truck through this definition under a theory of mistake of fact as to consent.

[142] United States v. Gonzales, No. ACM 39220, 2019 CCA LEXIS 58, *27—34 (A.F. Ct. Crim. App. Feb. 14, 2019).

[143] *See generally* ULLMAN, *supra* note 69 (discussing society's treatment of survivors of sexual violence).

be a "true victim," they must immediately disclose their experience to their closest confidant or superior.

Additionally, concerns about victim inconsistencies were discussed in four opinions.[144] Examples included the victim telling multiple people different versions of their assault following the incident[145] or submitting medical records of an exam that took place before the alleged assault.[146] In four opinions with delayed reporting, the court opined on the motives for the victim to lie about the assault.[147] These included a victim testing positive for a sexually transmitted infection[148] and the appellant's alleged unwillingness to be in or continue a committed relationship with the victim.[149]

D. Incapacitation

Fifteen opinions in the current sample involved some form of incapacitation. This variable seemed to result in the most legal/liability issues. As covered above, when presenting a case revolving around incapacitation, the government does not always commit to one theory of liability. Issues arise when the court believes the government failed to prove their chosen theory and did not present the theory of liability that the appeals court supports. This debate can be seen in the following excerpts from one opinion:

> We are led to this conclusion for a simple reason—the evidence fails to establish beyond a reasonable doubt that [victim] was incapable of consenting *due to impairment by an intoxicant*. As the government concedes in its brief, shortly after the initial physical contact by appellant, [victim] was aware of what was happening and able to communicate and make decisions . . . . Significant to our decision is the use of the terms "drunk" and "asleep" throughout the trial, as if the two are interchangeable. They are not. They are separate and distinct theories of criminality . . . . While the evidence

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144 *See* United States v. Edmonds, 81 M.J. 559, at 563–66 (N-M. Ct. Crim. App. 2021); United States v. Masa, No. 201800314, 2020 CCA LEXIS 4, at 22–27 (N-M. Ct. Crim. App. Jan. 13, 2020); United States v. Washington, No. 201700242, 2019 CCA LEXIS 47, at *15–22 (N-M. Ct. Crim. App. Feb. 8, 2019); United States v. Williams, No. ACM 39142, 2018 CCA LEXIS 119, at *5–6 (A.F. Ct. Crim. App. Mar. 6, 2018) ("In the days following the get-together, A1C ACM relayed various versions of what took place to a number of people.").

145 *Williams*, 2018 CCA LEXIS, at *5.

146 *Id.*

147 *Edmonds*, 81 M.J. 559, at 568 *see* United States v. Allen, No. ACM 39001, 2017 CCA LEXIS 549, at 9–10 (A.F. Ct. Crim. App. Aug. 11, 2017); *see* United States v. Gilpin, No. 201900033, 2019 CCA LEXIS 515 at *24 (N-M. Ct. Crim. App. Dec. 30, 2019); United States v. Gonzalez, No. ARMY 20150080, 2017 CCA LEXIS 62, at *3 (A. Ct. Crim. App. Jan. 31, 2017).

148 *Gilpin*, 2019 CCA LEXIS at *3.

149 *Allen*, 2017 CCA LEXIS at *9–10.

> establishes that the initial touching of [victim] by appellant was while she was incapable of consenting, *it is not clear whether this was because she was asleep or intoxicated.*[150]

Opinions discussing incapacitation included lengthy coverage of expert testimony over the likely effects of alcohol and prescription medication on memory. A contentious issue in one opinion was the ability of a person to consent, even while experiencing an alcohol-induced blackout:

> [Victim]'s testimony is consistent with a fragmentary blackout. The Defense expert testified that it is common for persons experiencing a blackout to believe that they fell asleep or were unconscious when in fact they simply lack memory for the event. He also testified that "people don't remember falling asleep." Based on this testimony, we do not interpret, beyond a reasonable doubt, [victim]'s feeling of being "in and out" to mean she was actually asleep or losing consciousness.[151]

Despite the court's acknowledgment of this state, the court felt that the victim in this case "had the cognitive ability to appreciate what sexual act or contact Appellant sought or began, at the time they were happening."[152] In 13 of the 15 opinions mentioning incapacitation, the court acknowledged the victim being in an alcohol-induced state, including vomiting, being unable to walk on her own, etc. In these instances, the court found reason to believe that the victim was capable of "understanding" or "appreciating" the sexual activity, indicating an ability to consent freely:

> [Victim], as she testified at trial, remembers little or nothing that occurred at the second bar, and later, in appellant's room. That lack of memory, however, does not equate with an inability to consent.[153]

Even when an appellant seemed to confess to engaging in sexual assault with an incapacitated victim, as seen here: "All told, the appellant described five points in time just before and during the sexual act when [victim] was awake," the court was not convinced of an inability to consent.[154]

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[150] *Gonzalez*, 2017 CCA LEXIS, at *6–7 (second emphasis added) (footnote omitted).

[151] United States v. Lewis, No. 201900049, 2020 CCA LEXIS 199, at *33—34 (N-M. Ct. Crim. App. June 8, 2020) (citations omitted).

[152] *Id.* at *35.

[153] United States v. Dorr, ARMY 20170172, 2019 CCA LEXIS 229, at *8 (A. Ct. Crim. App. May 22, 2019).

[154] United States v. Washington, No. 201700242, 2019 CCA LEXIS 47, at *19 (N-M. Ct. Crim. App. Feb. 8, 2019).

E. Active-Duty Victim

16 of the 19 cases in this sample involved an active-duty victim. The appellant was a superior in four cases and had a similar rank to the victim in eight cases. When the appellant was a superior, the court acknowledged the power dynamic, though did not condemn the relationship, as seen here:

> In the absence of a duty relationship or an attempt to use superior rank to influence the duties or career of the subordinate, rank differences among enlisted members alone is not a sufficient basis to establish an unprofessional relationship. [155]

This remained, despite cases with evidence of misuse of power: "[a]ppellant soon developed a reputation for engaging in inappropriate behavior with female Airmen under his charge and other female Airmen subordinate in rank.[156]

In other opinions, the court highlighted testimony that the victim had a motive to lie to take advantage of their superior:

> The civilian defense counsel argued that [victim] had a motive to get the appellant in trouble because she was upset that the appellant was not supporting her requests for time off and not supporting her efforts to move to the clinic.[157]

The suggestion of a motive for the victim to fabricate their sexual assault was present in four opinions. The differential coding between motive to lie within this variable, as compared to the timing variable, rests in the court's placement of this argument. Within the Active-Duty Victim variable, motive to lie was linked explicitly to the victim being in the military, as seen here: "[victim] knew her student chain of command was aware of an incident that could get her separated from the Naval Academy unless it was a sexual assault.[158]

Additionally, underage drinking was involved in multiple cases, with the opinions suggesting that victims were fearful of getting in trouble for this activity; therefore, as the rape myth suggests, a claim of sexual assault was the only way to avoid discipline.

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[155] United States v. Allen, No. ACM 39001, 2017 CCA LEXIS 549, at *20 (A.F. Ct. Crim. App. Aug. 11, 2017).

[156] United States v. Lizana, No. ACM 39280, 2018 CCA LEXIS 348, at *3–4 (A.F. Ct. Crim. App. July 13, 2018).

[157] United States v. Dawkins, No. 201800057, 2019 CCA LEXIS 386, at *29 (N-M. Ct. Crim. App. Oct. 4, 2019).

[158] United States v. Gilpin, No. 201900033, 2019 CCA LEXIS 515, at *24 (N-M. Ct. Crim. App. Dec. 30, 2019).

F. Physical Force

Often physical force is seen as a requirement of a "true rape," with an assumption that if force is not used, a potential victim can easily escape the situation or actively chooses not to do so. Even victims may be affected by these stereotypes, as seen in the following victim testimony where she struggles to comprehend her assault: "[s]he [the victim] thought of sexual assault as 'someone getting physically beat' and Appellant 'didn't do any of that . . .,he was still normal.'"[159]

Six of the opinions in this sample discussed the appellant using force during his assault. In three cases, the court expressly acknowledged that the appellant used force against the victim, yet the case was still found factually insufficient:

> He unbuttoned his pants, pulled out his penis, called her "wh[**]e" and "b[**]ch," told her to "suck [his] d[**]k," and forced his penis into her mouth. JH testified that she did not say anything and could not pull away because of his hand in her hair. She also could not stand up because of their respective positions at the picnic table.[160]

This particular opinion continues on with violent actions by the appellant, including tying up the victim, blindfolding her, and binding her wrists with wire, among other atrocities. However, the court made sure to note that it was just "one allegation of rape and described a single instance of sexual intercourse that undeniably involved force . . . . Appellant did not engage in physical violence, meaning he did not hit, bite, or choke [the victim]. . . ."[161] This particular case revolved around a lack of corroboration, despite the court acknowledging a long history of violent behavior from the appellant.[162] Notably, the court was more inclined to believe the victim when she took responsibility for some of her own previous victimizations by the appellant: "[victim]'s allegations of physical abuse were also more believable because they included acknowledgements that [victim] was sometimes the instigator or the initial assailant."[163]

VIII. DISCUSSION

This qualitative analysis of military appellate court decisions reveals concerning patterns in how sexual assault cases are evaluated at the appellate level. The findings suggest that despite statutory reforms and increased

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[159] *Allen*, 2017 CCA LEXIS at *7.

[160] United States v. Gonzales, No. ACM 39220, 2019 CCA LEXIS 58, at *10–11 (A.F. Ct. Crim. App. Feb. 14, 2019).

[161] *Id.* at *38.

[162] *Id.* at *40.

[163] *Id.* at *37–38.

awareness of sexual assault issues, military appellate judges continue to employ problematic reasoning that often reflects underlying rape myths and traditional misconceptions about sexual assault. Several key themes emerged from the analysis.

First, the courts' treatment of victim credibility appears heavily influenced by traditional rape myth acceptance, particularly regarding "appropriate" victim behavior. Research has consistently shown how rape myths affect decision-making at every stage of the legal process.[164] In cases involving delayed reporting, courts frequently questioned victim credibility based on behaviors that trauma research has shown to be common among sexual assault survivors, such as maintaining contact with the perpetrator or delayed disclosure. The courts' emphasis on victims' post-assault behavior as a credibility metric demonstrates a disconnect between judicial reasoning and the empirical understanding of trauma responses. Intersectionality theory provides a valuable lens for examining how various identity factors—such as race, class, and gender—interact to shape individuals' experiences of violence and their treatment within the justice system.[165]

Second, the analysis reveals a particularly troubling pattern in cases involving incapacitation. Studies have particularly highlighted the challenges in prosecuting cases where victims were impaired by alcohol.[166] Research shows this ambiguity has made convictions more difficult in cases involving victims who are impaired but not completely unconscious.[167] In 13 of 15 cases mentioning incapacitation, courts acknowledged victims being in significantly impaired states yet found ways to question their inability to consent.

The courts' handling of force and resistance reflects persistent adherence to the "real rape" stereotype. Studies consistently show that cases matching stereotypical notions of "real rape" receive different treatment than those involving acquaintances or lacking physical injury.[168] Research has demonstrated the remarkable persistence of these patterns despite increased awareness and training provided to criminal justice actors.[169] Even in cases where courts explicitly acknowledged the use of force, they often found ways to minimize its significance or require additional evidence of physical resistance.

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[164] *See* Ullman, *supra* note 69, at 45–47.

[165] *See* Crenshaw, *supra* note 117, at 1242–45.

[166] *See* Schenck, *supra* note 22, at 525–26.

[167] *See id.*

[168] *See* Katharine Tellis & Cassia Spohn, *The Sexual Stratification Hypothesis Revisited: Testing Assumptions about Simple versus Aggravated Rape*, 36 J. CRIM. JUSTICE 252, 258 (2008) (finding case outcomes were influenced by whether the victim sustained an injury).

[169] *See* F. Eyssel & G. Bohner, *supra* note 86, at 1580–82.

The findings regarding active-duty victims raise particular concerns about power dynamics within the military justice system. Research has emphasized how various institutional barriers can impede justice in these cases.[170] Studies examining recent changes to the Uniform Code of Military Justice have identified problems with how sexual assault offenses are defined.[171]

Perhaps most significantly, the analysis reveals how military appellate courts employ technical legal reasoning to rationalize overturning convictions. Recent empirical research on judicial decision-making reveals that judges, like everyone else, tend to rely heavily on intuitive cognitive processes when making judgments.[172] Although judges often attempt to reach decisions through deliberate, analytical reasoning, their intuitive responses can influence and sometimes override their deliberative analysis.[173] Research shows that judges are susceptible to anchoring effects from irrelevant numbers, when evaluating probabilities, and hindsight bias in assessing past events.[174]

These findings have important implications for military justice reform. While recent statutory changes have focused on removing commanders from prosecution decisions,[175] the analysis suggests that bias at the appellate level may pose an equally significant barrier to justice. Studies have found that judges' personal characteristics tend to influence their decisions primarily in cases where those characteristics are relevant to the legal questions at hand.[176] Additionally, research indicates that various situational factors—such as time pressure, docket load, and the clarity of legal rules—can influence whether judges engage in more intuitive versus deliberative decision-making.[177]

The study's limitations include its focus on cases overturned for factual insufficiency, which may not represent the full spectrum of military appellate decision-making. Additionally, the qualitative nature of the analysis, while providing rich detail about judicial reasoning, cannot establish the statistical prevalence of identified patterns across all military sexual assault appeals.

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[170] *See* Bohner et al., *supra* note 72, at 287–89.

[171] *See Blind Spot*, *supra* note 94, at 154–56.

[172] *See* Guthrie et al., *supra* note 121, at 2–3.

[173] *Id.* at 7–8.

[174] *See* Rachlinski & Wistrich, *supra* note 121, at 214–16.

[175] *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. 117-81, § 539D, 135 Stat. 1541, 1708 (2021).

[176] *See* Rachlinski & Wistrich, *supra* note 121, at 206–09.

[177] *See* Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANNU. REV. L. SOC. SCI. 203, 223 (2017).

Further studies have emphasized the importance of continuing to monitor these patterns as prosecutorial authority shifts to military lawyers.[178]

Nevertheless, these findings contribute significantly to our understanding of how military appellate courts approach sexual assault cases. The cumulative body of research on sexual assault case processing reveals a justice system grappling with the inherent challenges of these cases.[179] While progress has been made in recognizing the seriousness of sexual assault and implementing reforms, studies consistently show the persistent influence of extralegal factors and potential biases on decision-making.[180] This underscores the ongoing need for education, training, and systemic reforms to ensure fair and equitable treatment of sexual assault cases within the military justice system.[181]

IX. RECOMMENDATIONS FOR FUTURE RESEARCH

The findings from this study suggest several promising avenues for future research to better understand how appellate courts evaluate victim credibility in sexual assault cases. Future research should expand beyond cases decided on factual insufficiency grounds to examine how military appellate courts assess victim credibility across different types of appeals. While factual sufficiency review provides uniquely direct insight into judicial reasoning about credibility, courts also engage in credibility assessments when reviewing evidentiary rulings, particularly regarding Military Rule of Evidence 412 ("rape shield") determinations.[182] Analyzing these cases could reveal whether the concerning patterns identified in factual sufficiency reviews manifest similarly in other contexts where courts must evaluate victim credibility.

Additionally, researchers should examine post-2019 cases to assess how the revised Article 66 standard has affected appellate review of sexual assault cases.[183] This analysis could help determine whether limiting courts' factual sufficiency authority has meaningfully changed how they approach victim credibility issues or if similar reasoning patterns persist under different legal frameworks. Such research would provide crucial insight into the

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[178] *See Empirically Testing*, *supra* note 3, at 289 ("A system of periodic review and feedback should be established to monitor the implementation of the new prosecutorial discretion policy.").

[179] *See, e.g.*, Frohmann, *supra* note 67, at 213–16 (examining "the centrality of discrediting victims' rape allegations in [prosecutors' decisions to not go forward with a case]").

[180] *See, e.g.*, Matoesian, *supra* note 88, at 683–86 (discussing how social attitudes around sex influence courtroom decisions in cases involving sexual violence).

[181] *See* Creek & Dunn, *supra* note 89, at 313–15.

[182] *See* MIL. R. EVID. 412; *see generally Empirically Testing*, *supra* note 3 (discussing the importance of examining credibility assessments across different contexts).

[183] *See* Military Justice Act of 2016, Pub. L. No. 114-328, § 5330, 130 Stat. 2000, 2932–35 (2016) (revising the standard for factual sufficiency review).

effectiveness of recent statutory reforms in addressing problematic review patterns.

Although civilian appellate courts lack the military's broad factual review authority, they regularly assess victim credibility when reviewing rape shield determinations, evidentiary issues that emanate from a victim's testimony, and similar matters.[184] Future research should compare how military and civilian appellate courts discuss and evaluate victim credibility in these parallel contexts. This analysis could identify whether problematic reasoning patterns are unique to the military system or reflect broader judicial attitudes toward sexual assault victims.[185] Understanding how civilian courts handle issues such as delayed reporting, continued contact with the perpetrator, inconsistent statements, partial memory loss, and counterintuitive victim behavior could provide valuable insights for military justice reform while also illuminating how different institutional frameworks and legal standards affect judicial treatment of sexual assault victims.[186]

Future research should employ mixed methods approaches that combine qualitative analysis of judicial language and reasoning patterns with quantitative assessment of case outcomes and correlations, while also incorporating comparative analysis across jurisdictions and types of review.[187] This comprehensive approach would provide deeper understanding of how courts evaluate victim credibility while facilitating identification of both system-specific and universal challenges in appellate review of sexual assault cases.[188]

X. POLICY REFORM RECOMMENDATIONS

While recent changes to Article 66 have limited military appellate courts' factual sufficiency review authority, these reforms alone are unlikely to resolve the underlying influence of rape myth acceptance (RMA) in judicial decision-making. Although appellate courts can no longer independently weigh evidence and determine guilt beyond a reasonable doubt, they retain

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[184] *See* Spohn & Tellis, *supra* note 70, at 385–86 (discussing parallel credibility assessments in civilian courts).

[185] *See* Frohmann, *supra* note 67, at 214–16 (examining systemic responses to sexual assault across different jurisdictions).

[186] *See* Creek & Dunn, *supra* note 89, at 313–15 (discussing institutional influences on case processing).

[187] The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces provides an example of how this research might look. *See generally* DAC-IPAD Case File Review, *supra* note 2.

[188] *See* ULLMAN, *supra* note 69, at 45–47 (discussing the value of multi-method research in understanding system responses to sexual assault).

significant discretion when reviewing sexual assault cases.[189] Courts must still evaluate whether findings are "clearly . . . against the weight of the evidence," an analysis that inevitably involves credibility assessments where RMA can manifest.[190] Moreover, courts regularly engage with victim credibility when reviewing evidentiary rulings, such as Military Rule of Evidence 412 determinations, where the patterns of RMA-influenced reasoning identified in this study can persist.[191] The fundamental challenge is not the scope of review but rather the underlying attitudes and assumptions that shape how judges approach these cases. Without directly addressing RMA among military appellate judges, problematic reasoning patterns are likely to continue manifesting through whatever legal framework exists.[192]

Rape myth acceptance refers to a set of false beliefs about sexual assault that serve to deny, trivialize, or justify sexual violence against victims, particularly women.[193] Common rape myths include notions that victims provoke assault through their behavior or clothing, that "real rape" involves physical violence and immediate reporting, and that false accusations are common. Research has consistently demonstrated that these myths influence decision-making throughout the criminal justice process, from initial reporting to final appeals.[194] In the military context, RMA takes on additional dimensions shaped by institutional culture and values. The hierarchical structure of military organizations, emphasis on unit cohesion, and historically male-dominated environment create unique conditions that can amplify certain rape myths. Military-specific rape myths may include beliefs that sexual assault accusations damage unit readiness, that warrior ethos is incompatible with victimhood, or that reporting sexual assault demonstrates disloyalty to the military mission. These institutional factors create a particularly challenging environment for addressing sexual assault cases fairly. Military judges, even at the appellate level, operate within this cultural context

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[189] Article 66(d), Uniform Code of Military Justice, 10 U.S.C. § 866(d) (2019); s*ee also* Military Justice Act of 2016, Pub. L. No. 114-328, § 5330, 130 Stat. 2000, 2932–35 (2016) (revising the scope of appellate review for the Court of Criminal Appeals).

[190] Article 66(d), Uniform Code of Military Justice, 10 U.S.C. § 866(d) (2019); *see also Empirically Testing*, *supra* note 3, at 252–53 (discussing how RMA can influence factual review even under more limited standards).

[191] *See* MIL. R. EVID. 412; Schenck, *supra* note 2, at 525 (examining how courts evaluate victim credibility across different contexts).

[192] *See* Guthrie et al., *supra* note 121, at 2–3 (discussing how underlying biases manifest despite formal legal constraints).

[193] *See generally* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE (1975).

[194] *See, e.g.*, Amy Dellinger Page, *True Colors: Police Officers and Rape Myth Acceptance*, 5 FEMINIST CRIMINOLOGY 315, 315–34 (2010); 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 8–13 (Feb. 2012).

and may unconsciously incorporate these belief systems into their judicial reasoning. The technical reforms to Article 66, while important procedural changes, do not address these deeper cultural influences on judicial decision-making.

The persistence of RMA in military appellate review must be understood within the broader historical context of military justice reform efforts. Since the early 2000s, the Department of Defense has implemented numerous initiatives aimed at improving sexual assault prevention and response. These include the establishment of the Sexual Assault Prevention and Response Office (SAPRO) in 2005, the implementation of restricted and unrestricted reporting options, and various amendments to the Uniform Code of Military Justice (UCMJ). Despite these efforts, sexual assault remains a persistent problem within military ranks.[195] This disconnect between reform efforts and outcomes suggests deeper systemic issues that procedural changes alone cannot address. The 2021 amendments to Article 66 represent the latest in this series of reforms, specifically targeting the unique factual sufficiency review powers of military appellate courts. While this change brings military appellate review more in line with civilian practice, it fails to address the underlying issue of how RMA influences judicial decision-making at every level of analysis. Without confronting these deeper biases, reforms risk creating procedural changes without substantive improvements in case outcomes.

The empirical findings from this study suggest that rape myth acceptance (RMA) continues to influence military appellate review of sexual assault cases despite decades of reform efforts. Analysis of appellate decisions reveals several patterns consistent with RMA influence. Appellate opinions frequently emphasize minor inconsistencies in victim testimony while minimizing or contextualizing inconsistencies in defense evidence. This pattern aligns with the rape myth that "real victims" provide perfectly consistent accounts.[196] Many opinions highlight victim behaviors that do not conform to stereotypical expectations, such as delayed reporting, continued contact with the perpetrator, or absence of resistance. These behaviors are often framed as undermining credibility despite extensive research demonstrating their prevalence in genuine sexual assault cases.[197] Decisions often contain language suggesting that cases lacking certain elements—such as physical injury, immediate reporting, or clear evidence of non-consent—are inherently less credible. This reflects the "real rape" myth that authentic sexual assaults follow a specific, narrow pattern. Appellate opinions

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[195] Jennifer Greenburg, THE U.S. MILITARY'S SEXUAL ASSAULT CRISIS AS A COST OF WAR 2–3 (2024) https://watson.brown.edu/costsofwar/files/cow/imce/papers/2023/2024/8.14.24%20Greenburg_Sexual%20Assault%20Crisis_Costs%20of%20War.pdf [https://perma.cc/DG45-7GNW].

[196] *See* Estrich, *supra* note 83, at 121–23.

[197] *See* Fansher& Welsh, *supra* note 73, at 348.

frequently dismiss or minimize explanations related to traumas impact on victim behavior and memory, despite substantial scientific evidence regarding trauma's neurobiological effects. Cases involving alcohol consumption by victims face particularly stringent scrutiny, reflecting myths about victim responsibility and "legitimate" victimhood. These patterns manifest even in cases where courts ultimately uphold convictions, revealing how deeply RMA can influence judicial reasoning regardless of case outcomes. More concerning, when these patterns appear in decisions overturning convictions, they can reinforce RMA throughout the military justice system by legitimizing these perspectives in published opinions.[198]

Addressing this persistent challenge requires a multi-faceted approach targeting judicial selection, education, oversight, and structural reform.[199] The military justice system should reform its judicial selection process for appellate judges who review sexual assault cases. Selection criteria should require demonstrated expertise in sexual assault law, either through prior experience prosecuting these cases or specialized certification.[200] Additionally, selection boards should prioritize candidates with civilian sexual assault case experience, as this broader perspective could help counter military-specific biases.[201] Current selection processes for military appellate judges typically emphasize general legal experience and military service. While these qualities remain important, they are insufficient for ensuring the specialized knowledge necessary for effectively reviewing sexual assault cases. Sexual assault cases present unique evidentiary, procedural, and psychological considerations that require specific expertise. A reformed selection process might include mandatory minimum experience requirements, where candidates must have handled a minimum number of sexual assault cases as either prosecutor, defense counsel, or trial judge before appointment to appellate courts. The military could implement a specialized training certification program focusing on sexual assault law, trauma-informed approaches, and evidence evaluation that candidates must complete before consideration. Ensuring that judicial selection boards include civilian sexual assault experts, victim advocates, and experienced military sexual assault prosecutors would help evaluate candidates' understanding of these complex cases. Incorporating psychological assessments designed to identify candidates with high levels of RMA or other biases might further enhance

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[198] Rebecca Campbell, *Neurobiology of Sexual Assault: Implications for First Responders in Law Enforcement, Prosecution, and Victim Advocacy*, NATIONAL INSTITUTE OF JUSTICE (Dec. 1, 2012), https://www.ojp.gov/library/publications/neurobiology-sexual-assault-implications-first-responders-law-enforcement [https://perma.cc/VPB2-N6QR].

[199] *See* Guthrie et al., *supra* note 121, at 33–43 (discussing comprehensive approaches to judicial reform).

[200] *See* Rachlinski & Wistrich, *supra* note 121, at 207–09 (examining the relationship between judges' backgrounds and judges' decision-making).

[201] *See* Spohn & Tellis, *supra* note 70, at 385–86 (discussing the value of cross-jurisdictional experience).

the selection process. By selecting judges with deeper understanding of sexual assault dynamics and lower levels of RMA, the military can address this issue at its source rather than attempting to counteract biases after appointment.

Comprehensive judicial education reform represents another crucial intervention point. Military appellate judges should receive mandatory, evidence-based training on trauma responses, victim behavior patterns, and the neurobiology of sexual assault. This training must directly confront common rape myths with empirical evidence demonstrating their invalidity. Regular refresher courses should include case studies showing how RMA influences decision-making, with particular attention to subtle manifestations in judicial reasoning. The training program should incorporate perspectives from sexual assault survivors and experts in trauma and sexual violence to provide judges with a more complete understanding of victim experiences. Effective judicial education must go beyond theoretical understanding to practical application. Training should include analyzing actual cases with identifying information redacted to identify where RMA may have influenced reasoning and discussing alternative approaches. Providing judges with hypothetical cases designed to activate common rape myths and requiring them to identify potential biases in their own reasoning could develop critical self-awareness. Regular updates on the latest empirical research regarding sexual assault victim behavior, memory processes under trauma, and the prevalence and dynamics of false reporting would ensure judges maintain current knowledge. Incorporating insights from psychology, neuroscience, and victim advocacy could provide a comprehensive understanding beyond legal doctrine. Training should foster an environment where judges can candidly discuss these challenges without fear of being labeled biased or unqualified.

Structural reforms could help institutionalize protections against RMA influence. The military should consider creating specialized sexual assault appellate divisions staffed by judges with particular expertise in these cases. Appellate panels reviewing sexual assault cases should include civilian sexual assault experts who can provide external perspective. When overturning sexual assault convictions, courts should be required to provide detailed written explanations specifically addressing how their reasoning avoids RMA influence. Implementation of structured decision-making frameworks could help judges identify when RMA might be affecting their analysis. Specialized courts have proven effective in other complex areas of law, including family courts, drug courts, and veterans courts. A specialized sexual assault appellate division could develop institutional expertise and consistent approaches to these cases. Such specialization would allow judges to develop deeper understanding of the unique dynamics of sexual assault cases and help counter the influence of RMA through accumulated expertise. Developing and requiring the use of standardized analytical tools could guide judges through evidence evaluation in sexual assault cases with specific prompts to identify and counter potential RMA influence. Mandating diverse panel

composition for sexual assault appeals would ensure that panels include members with varied backgrounds and perspectives. Establishing formal mechanisms for appellate panels to consult with trauma experts when evaluating evidence related to victim behavior or testimony could provide critical context. Assigning law clerks with sexual assault case expertise to support appellate judges in these cases would enhance institutional knowledge. These structural changes would create institutional safeguards against RMA influence rather than relying solely on individual judges' awareness and commitment to fairness.

Enhanced oversight and accountability mechanisms are also essential. The military justice system should regularly collect and analyze data on sexual assault case outcomes by judge to identify problematic patterns. An external review board including civilian experts should periodically assess decisions for RMA influence. The military should also establish formal feedback mechanisms allowing victims' advocates to raise concerns about RMA in judicial reasoning. These oversight measures should be coupled with transparent reporting requirements regarding patterns in sexual assault conviction reversals. Effective oversight requires both quantitative and qualitative approaches. Tracking patterns in judicial decisions across different case types, victim characteristics, and circumstances could identify potential biases in decision-making. Employing content analysis methods to examine the language used in judicial opinions for indicators of RMA influence might reveal unconscious patterns. Implementing confidential peer review of sexual assault case opinions before publication could help identify potential RMA influence. Creating secure channels for trial counsel, victims' advocates, and others to report concerns about RMA influence in specific cases without fear of reprisal would enhance accountability. Oversight measures should focus on improvement rather than punishment, creating a culture where identifying and addressing RMA is viewed as strengthening the judicial system rather than undermining it. However, persistent patterns of RMA-influenced reasoning despite intervention should factor into judicial evaluation and retention decisions.

Finally, legislative reform remains a crucial tool for combating RMA influence. Congress should provide clearer statutory definitions that minimize ambiguity that can be exploited by RMA-influenced reasoning. This could include more specific standards for reviewing sexual assault cases and explicit legislative findings regarding RMA's documented impact on case outcomes. Legislation should also require courts to consider trauma evidence and limit what types of victim behavior can be deemed relevant to credibility determinations. Potential legislative reforms include explicitly incorporating scientific findings about trauma responses and victim behavior into statutory provisions to provide clearer guidance for courts. Further strengthening restrictions on using victim behavior unrelated to the specific incident as evidence affecting credibility could prevent common rape myths from influencing outcomes. Requiring specific, detailed explanations when courts

overturn sexual assault convictions, with explicit consideration of how the reasoning avoids RMA influence, would enhance transparency and accountability. Establishing rebuttable presumptions that certain victim behaviors commonly influenced by trauma, such as delayed reporting or fragmented recall, do not undermine credibility could counteract common myths. Legislative approaches must balance providing clear guidance against RMA with maintaining fundamental fairness and due process protections. By focusing on evidence-based standards rather than creating rigid rules, legislation can guide judicial discretion while preserving necessary flexibility.

Implementing these reforms would require significant institutional commitment and resource allocation. However, given the military's stated zero-tolerance policy toward sexual assault and the demonstrated persistence of RMA influence in appellate review, such investments are warranted. Success will require careful attention to both the substance of reforms and the processes for implementing them effectively across the military justice system. Implementation challenges include institutional resistance to reforms perceived as challenging traditional military values or limiting judicial independence. Limited availability of qualified personnel, training resources, and administrative support for implementing comprehensive reforms may constrain implementation efforts. Developing reliable metrics to assess whether reforms are successfully reducing RMA influence in judicial decision-making presents methodological challenges. Ensuring that efforts to counter RMA do not inadvertently undermine fundamental fairness and due process protections for the accused requires careful balancing. Addressing these challenges requires sustained commitment from military leadership, congressional support, and collaboration with external experts in sexual assault law, trauma, and institutional change. Implementation should follow a phased approach with regular assessment and adaptation based on outcomes. The influence of rape myth acceptance in military appellate review of sexual assault cases represents a significant challenge to the fair administration of justice. While procedural reforms like the amendments to Article 66 are important steps, they address symptoms rather than root causes of the problem. Effective reform requires a comprehensive approach targeting judicial selection, education, structural protections, oversight mechanisms, and legislative frameworks.

Implementing these reforms would require significant institutional commitment and resource allocation. However, given the military's stated zero-tolerance policy toward sexual assault and the demonstrated persistence of RMA influence in appellate review, such investments are warranted. Success will require careful attention to both the substance of reforms and the processes for implementing them effectively across the military justice system.

XI. CONCLUSION

This study's examination of military appellate courts' treatment of sexual assault cases reveals deeply concerning patterns in judicial reasoning that extend beyond mere technical legal analysis. Through qualitative analysis of cases overturned for factual insufficiency, we identified persistent manifestations of rape myth acceptance that appear to influence appellate review. The courts' handling of victim credibility, particularly regarding delayed reporting, victim behavior, and incapacitation, demonstrates how traditional misconceptions about sexual assault continue to shape judicial decision-making despite decades of reform efforts.

The findings raise particular concerns about the military justice system's ability to fairly adjudicate sexual assault cases at the appellate level. While recent statutory reforms have focused on removing commanders from prosecution decisions and limiting courts' factual sufficiency review authority, our analysis suggests these changes alone may be insufficient to address the underlying problem of rape myth acceptance among military appellate judges. The patterns identified in this study indicate that problematic reasoning about sexual assault victims and their credibility may simply manifest through different legal frameworks if not directly confronted.

Addressing these challenges will require a multi-faceted approach combining reforms to judicial selection, education, oversight, and statutory frameworks. However, as our analysis of implementation barriers reveals, each proposed reform faces significant practical and constitutional challenges. The complexity of these barriers suggests that meaningful change will require sustained institutional commitment and careful attention to both the substance of reforms and the processes for implementing them effectively.

The stakes for getting this right are immense. The military justice system's handling of sexual assault cases affects not only individual victims and defendants but also broader military effectiveness through its impact on trust, unit cohesion, and willingness to report. While this study focused on appellate review, its findings have implications for understanding how rape myths and gender bias can influence judicial decision-making across all levels of the military justice system. Future research comparing military and civilian appellate approaches to sexual assault cases could provide valuable insights for reform efforts in both systems.

Ultimately, this study demonstrates that achieving meaningful progress in military sexual assault cases requires moving beyond surface-level procedural reforms to address the deeper cultural and attitudinal barriers that continue to influence judicial decision-making. Only through direct confrontation of these underlying issues can the military justice system fulfill its obligation to provide fair and unbiased review of sexual assault cases.

Table 1. Qualitative themes and descriptive statistics by variable (N = 19)

		n
Variable 1: Previous relationship		**4**
Victim Focused	No previous sexual contact	3
	Previous sexual contact	1
Variable 2: Victim verbal resistance		**10**
	Contradiction/credibility	8
Victim Focused	No/not enough resistance	6
	Court acknowledged resistance	5
Offender Focused	Offender stopped actions after victim said "no"	1
Variable 3: Timing of complaint		**15**
	Delayed reporting	12
Victim Focused	Inconsistencies in victim statement	4
	Misperceptions of victim behavior	7
	Motive to lie	4
Variable 4: Incapacitation		**15**
	No alcohol	1
	Credibility	3
Victim Focused	Victim understood/ appreciated the act	7
	Court acknowledged intoxication	13

Court/Law Focused	Evidence issues	3
	Theory issues	4
Variable 5: Active-duty victim		**16**
Victim Focused	Motive to lie	4
Offender Focused	Offender was a superior	4
Victim & Offender Focused	Victim/offender similar ranks	8
	Assault on military property	3
Variable 6: Force used		**6**
Victim Focused	Insufficient resistance	1
Offender Focused	Lack of/not enough force	3
	Court acknowledgment of force	3