

Panel Bias During Sexual Assault Courts-Martial

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This article examines criticism from the scholarly community and findings from the military's Judicial Proceedings Panel that training in the U.S. Department of Defense Sexual Assault Prevention and Response program biases panel members during courts-martial. The topic is examined from the perspective of psychological science. Studies on jury bias, stereotypes, decision-making dynamics, and behavioral conditioning are applied to the question of whether sexual assault prevention training can bias panel members. Analysis of the subject suggests that servicemembers are subjected to a range of bias-inducing mechanisms that arise within the military context. This article concludes that expert witnesses in behavioral science should be called during courts-martial to explain how judgements may be influenced by institutional training. Reinforcing the integrity of the military justice system has implications for protecting individual liberties.

J Am Acad Psychiatry Law 48:350–57, 2020. DOI:10.29158/JAAPL.003939-20

The Sexual Assault Prevention and Response (SAPR) program within the US Military has been criticized for its potential to create conditions favorable for the miscarriage of justice.¹⁻³ Scholars argue that the SAPR atmosphere creates a presumption of guilt in the accused and unduly influences the decisions of stakeholders within the military justice system. SAPR's pervasive influence is believed to create biases in servicemembers that may affect the administration of military justice. Such biases have the greatest potential for harm when they influence panel members' decisions about the guilt of the accused. According to this line of thinking, the promulgation of SAPR training within the military influences judgment to such an extent that patterns of fact in sexual assault trials are prejudged as proof of guilt. A predisposition to see sexual assault accusations as proof of guilt usurps the presumption of innocence granted by the United States Constitution and causes a crisis in the administration of justice.

Can highly socialized expectations and reinforced behavior lead to biases in judgment? This article ex-

amines the psychological science associated with bias in jury deliberation and concludes that expectations reinforced by the zealous promotion of SAPR training in the military can contribute to panel member bias. Individual, group, and institutional processes associated with SAPR promotion may lead panel members to conform to an expectation promulgated in the military that overrides the impartial deliberation of facts, resulting in bias against the accused. The recommendation from this analysis is for the military justice system to call experts in behavioral science during courts-martial to discuss the nature of judgments affected by highly socialized and reinforced institutional expectations.

Table 1 compares common legal terms between the civilian and military justice systems for readers unfamiliar with the military justice system.

History of SAPR in the Military

The Department of Defense SAPR policy became official in October 2005.⁴ This policy was established because the Department leadership recognized an ongoing problem of sexual assault in its ranks, but it did not have a coherent policy to systematically address the problem. The policy's aim was to increase victim reporting, hold military leaders accountable for the sexual assaults that occur in their units, and provide increased resources to victims. Sexual assault

Published online May 14, 2020.

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Disclosures of financial or other potential conflicts of interest: None.

Table 1 Comparison of Civilian and Military Justice Systems

Civilian	Military
Judge	Military judge
Jury	Panel
Preliminary hearing	Article 32 hearing
Prosecutor	Trial counsel
Defense attorney	Defense counsel
Prosecutorial discretion	Commander's discretion
Felony trial	General court-martial
Rules of evidence	Military rules of evidence
Defendant	Accused

in the military nonetheless continued as a problem into the second decade of the 2000s and represented a major public image crisis. A documentary released in 2012, for example, entitled *The Invisible War* provided first-person accounts of military sexual assault victims' experiences that were accessible to the general public.⁵

Increased awareness of the sexual assault problem in the military, as well as the related outrage by the public, was soon followed by a number of high-profile military and civilian leaders who vowed strong support for victims and an aggressive processing of sexual assault allegations. A number of mandatory training requirements emerged from the SAPR policy that were enforced with harsh career implications for servicemembers considered non-compliant. These strictly enforced requirements occurred within the context of a high level of politicization, which made it difficult for adjudicators to appropriately handle sexual assault allegations.

Examples of SAPR policy imperatives include mandates that all possible resources be provided to victims of sexual crimes and that complainants should receive the same treatment as identified victims of a crime.⁶ The policy breaks down traditional lines of military communication when it comes to servicemembers who make allegations. Complainants have immediate access to their commanders, some of whom may be general officers. Servicemembers at all levels are evaluated on their fidelity to SAPR promotion in the military. In the Army, for example, supervisors must assess how well their subordinates adhere to SAPR promotion. The assessment specifically looks at how well servicemembers foster a climate consistent with SAPR.⁷ Servicemembers are also assessed for whether any "failures" in adhering to SAPR policy occurred during their rating period.

SAPR's Impact on Military Justice

A key to understanding the negative impact of the SAPR atmosphere on military justice is unlawful command influence (UCI). UCI occurs when someone in the chain of command attempts to coerce or influence the court-martial process.² This impediment to military justice is considered damaging to servicemember rights because it injects a strong extralegal influence into legal process and procedure. A prototype of UCI occurs when a higher-ranking servicemember's expectation for the outcome of a trial is made known. Servicemembers may be inclined to follow through on the higher-ranking person's express or implied message for various reasons, including loyalty, fear of reprisal, or confusion as to whether the message was an order.

High-ranking civilian and military leadership have made public statements that were seen as sufficient to influence the justice process. In a public speech President Barack Obama stated, "If we find out somebody's engaging in [sexual assault], they've got to be held accountable—prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged."⁸ This speech was cited as evidence of UCI in a number of cases, such as *United States v. Johnson* (Navy-Marine Trial Judiciary, Hawaiian Judicial Circuit, 2013), where defense counsel motioned for dismissal of the case due to UCI.⁹⁻¹⁰ The President made other statements regarding sexual assault in the military that were also considered laden with UCI.^{1,11} Secretaries of Defense have also been criticized for making statements about sexual assault in the military that were suggestive of UCI.^{1,2,12}

Uniformed military leaders have made some of the most provocative statements about sexual assault in the military. The highest-ranking general in the United States Marine Corps, General James Amos, toured a number of Marine Corps bases and delivered a speech intended to raise awareness of sexual assault in his organization. Among the many statements considered UCI was this: "I know fact from fiction. The fact of the matter is 80 percent of those [accusations] are legitimate sexual assault . . . and if you do not believe in the statistics . . . I am going to make a believer out of you" (Ref. 1, p 2053). Several other generals, admirals, and mid-level military leaders are known to have made statements about their expectations for dealing with sexual assault in the

military that were seen as sufficient to coerce or influence courts-martial.²

United States v. Sinclair (2013) demonstrated the impact of UCI on legal decision-making.^{2,13} Brigadier General Sinclair was on trial for sexual assault. He entered a plea for a lesser charge when it became apparent the victim's statement had reliability problems. The military prosecutor subsequently lost confidence in the merits of the case and did not want to proceed with trial. The prosecutor, however, reported that a higher-ranking officer from the Pentagon was influencing how the case was processed. The prosecutor withdrew from the case when the charges in question were not dropped. The ongoing perception of extralegal influence, particularly from victim advocates, resulted in the military judge eventually halting the case. (It was later resumed, however.)

The notion that UCI is present in SAPR cases is suggested by the negative career outcomes for servicemembers who do not appear to heed the clarion calls for action. In 2013, Air Force Lieutenant General Craig Franklin exercised his discretion as a courts-martial authority and dismissed a sexual assault conviction of an Air Force officer. That caused great political scrutiny for General Franklin, who was compelled to retire at a lesser rank.²⁻³ Air Force Lieutenant General Susan Helms also experienced career problems after exercising her authority to dismiss a sexual assault conviction in 2013. Congress put a hold on General Helms' promotion to four-star because of the clemency she issued. She retired from the military shortly thereafter.²⁻³

Military officers are acutely aware of the negative career implications of failing to follow the directives of SAPR policy. Scholars have cited an anonymous interview with two high-ranking Army leaders who stated that they experienced pressure to refer cases to trial that lacked merit and that they feared that they would stand out from the crowd by not sending cases for prosecution.²⁻³ In *United States v. Schloff* (Court of Appeals for the Armed Forces, 2015), the Army Court of Criminal Appeals reversed a sexual assault conviction because policy and career concerns were evident during panel deliberations.¹⁴ In the case, the ranking member of the panel made statements about the "political climate" of SAPR in the military. He also explained to the other panel members during deliberations that the Army cannot appear "weak" or "soft" toward sexual assault policy.¹⁵

Servicemembers are aware of the drawbacks of failing to conform, not only to SAPR policy, but also to the expectation intimated in statements considered to be UCI. At the same time, servicemembers are aware of the incentives for acting in accordance with SAPR expectations. This was evident in *United States v. Kauffman* (2013).¹⁶ In this case, the commander received a promotion after sending a case to trial that the military's equivalent of a grand jury did not recommend for trial. The judge in the case subsequently dismissed the charge after it was sent to trial.

The military's own Judicial Proceedings Panel recognized the deleterious impact SAPR promotion in the military has had on the rights of the accused.¹⁷ The Judicial Proceedings Panel is a task force commissioned by the U.S. Congress to follow the sexual assault trend in the military. This task force conducted site visits to military installations and asked both trial counsel and defense counsel for their perspective on the impact SAPR reforms had on the military justice system. Both trial counsel and defense counsel told the taskforce that the reforms interfere with due process. They told the taskforce that convening authorities feel pressured to refer unmeritorious cases for prosecution. They also reported that the reforms criminalized inappropriate and offensive behavior that would not amount to sex crimes in the civilian judicial system. Both trial counsel and defense counsel opined that victims' intent to pursue cases is given higher priority than the actual merits of the case.

The taskforce noted that some of those it interviewed were concerned about the possibility of false convictions. Just as convening authorities have been influenced by SAPR promotion in the military, the military panel (equivalent to the jury in civilian courts) may be influenced. Scholars have articulated this concern. Brady,² for instance, asserted that SAPR trainings promulgate legal misinformation. An example of such legal misinformation is that a person cannot consent to sexual activity if they consumed one alcoholic beverage.² Rustico¹ noted that SAPR training underscores servicemembers' "responsibility" to adhere to policy in addition to other imperatives, with the ultimate message that all servicemembers must take action to end sexual assault in the military.

Socialization to the SAPR message begins immediately upon entry to the service and continues for the duration of one's career; it occurs through man-

datory quarterly and annual training sessions. Commanders often require additional training for their organization if an incident, which may or may not have risen to the level of sexual assault, occurred. Military leaders work to create atmospheres in their organizations that show fidelity to SAPR promotion, which includes ongoing formal and informal message dissemination at military formations, team meetings, and personal discussions. The military's socialization of this policy may create rigid heuristics of institutional expectations, which may bias the deliberation of facts in a legal proceeding.

Data on the military's referrals for prosecution and its conviction rate suggest that the SAPR policy has affected legal decision-making. Brady² reported that 98.2 percent of the cases that appear before commanders for prosecutorial discretion are sent to trial. She asserts that it is implausible that so many cases are well founded and merit prosecution. At the same time, Rustico¹ reported that convictions of sexual assault cases rose 127 percent from 2011 to 2014.

The military's expectation for sexual assault victim-centered outcomes does not occur in a psychological vacuum. The indoctrination of the SAPR message accompanied by its tacitly coercive implications may influence individual and group processes to the detriment of justice. This influence is particularly likely to occur on military panels where service-members indoctrinated to SAPR expectations are asked to judge facts that may be favorable to an accused and therefore militate against all they have been indoctrinated to know on such matters.

A Review of Jury Bias

The biases that influence deliberation are essentially stereotypes, or cognitive heuristics that economize mental effort. It is well established that stereotypes simplify information processing.¹⁸⁻¹⁹ The cognitive economy conferred by stereotypes has an adaptive function because it allows people to navigate complex environments that would otherwise deplete cognitive resources if every detail required attention. Consistent with its economization of resources, stereotypes often occur outside of the perceiver's awareness. Although the application of heuristics can be helpful, the stereotypes that emerge from this cognitive process can have unwanted social consequences. Stereotypes can lead to erroneous and harmful conclusions about a person or a group that reflects the automatic activation of a heuristic rather

than critical thinking. Jury members will have attitudes and beliefs reflective of individual experiences that may be activated in heuristic form when deliberating a case. Rigid attitudes and beliefs about sexual assault allegations may serve as a filter for information processing.

Juries are vulnerable to a range of biases. Specific prejudice occurs when a juror holds attitudes and beliefs that prevent an impartial deliberation of facts.²⁰ Specific knowledge of a defendant's criminal history, for example, may generate a preconception of the defendant that influences the perception of the facts of a case. Interest prejudice is the manifest bias that may be demonstrated by a person who has an interest in the outcome of a case, such as an alleged victim's family member. Conformity prejudice occurs when a juror decides facts based on a perceived community expectation. Generic prejudice is the transfer of preexisting stereotypes onto a defendant.^{21,22} Sexual assault cases evoke biases that differ from other types of criminal cases, such as homicide.²² These biases may result in the reliance on preexisting knowledge to deliberate upon cases.

Biases are not only the result of individual experience; they also emerge from shared experience. An important catalyst of shared stereotype among juries is pretrial publicity. Exposure to publicity related to a case before its trial has been shown to be effective at biasing jurors' decisions and can influence jurors' decisions in the direction of the publicity.²³ A common thread seen among studies of pretrial publicity is that jurors exposed to negative publicity produce more guilty verdicts than jurors not exposed to negative pretrial publicity.²⁴ The culpability of the defendant is often tainted by pretrial publicity when the jury receives negative information about the defendant or the crime. A high rate of pretrial publicity in a community is often grounds for a motion to change venues.²⁴

Decision-Making Dynamics

People form complex decisions using explanatory models.²⁵ Explanatory models provide a causal framework for understanding information. The framework, once construed, is imposed on information and decisions are made. The story model is a popular explanatory framework for studying the decision-making of juries. This model holds that jurors organize trial information into a narrative, or a story. Evidence is incorporated into the story frame-

work to build an explanation of “what happened.” Organizing information in this manner aids juror comprehension of facts and facilitates decision-making.

Stories of an event emerge as jurors actively process evidence and mentally represent a causal chain of events that explains the behavior in question. The information-based stories that jurors use to make decisions are based on the presentation of the evidence, though jurors may fill gaps in understanding by making inferences not guided by evidence of the case. The ease with which a story can be constructed mediates how the evidence and witness credibility is perceived. Stories that are easier to comprehend facilitate the perception that supporting evidence was stronger and supporting witnesses more credible.²⁵

In addition to an information processing framework, juror decisions are influenced by personality styles. Authoritarianism has been described as a rigid personality, a deferential attitude toward authority, and a punitive attitude toward those who violate conventional rules.²⁶ Jurors who score high on measures of authoritarian characteristics tend to deliver more convictions and harsher sentences than jurors who score low on authoritarian characteristics.²⁶ Authoritarian jurors are also more susceptible to the influences of conformity and authority figures.²⁷ Jurors with authoritarian personality characteristics are more likely to change their decisions during deliberation.

Compliance and conformity are important influences on decision-making that affect juror decisions. Compliance is the acquiescence to an implicit or explicit request or expectation.²⁸ Various influences create pressures toward compliance. One important pressure to comply comes from the norms that guide behavior within a particular social unit. People are more likely to act according to norms when the norms are prominent in their lives. In contrast to compliance, conformity is the changing of behavior to match others' responses.²⁸ Conformity is often seen with deliberate attempts to gain social approval, build relationships, or bolster self-esteem.²⁸

Juries may also demonstrate group polarization during decision-making. Group polarization leads to more extreme group decisions than would be expected from the composition of the group.²⁹ Group polarization is evident when dominant leanings within a group are enhanced after group discussions.²⁹ Whereas group polarization is the strengthening of a dominant tendency within the group,

group extremization occurs when a decision moves away from neutrality and toward a specific direction based on the group process.³⁰

Jurors, like others, are susceptible to basic laws of behavior. Reinforcement increases behavior, whereas punishment decreases behavior.³¹ Positive reinforcement, for example, occurs when some stimulus increases behavior. Punishment, and more technically, positive punishment, occurs when an applied stimulus decreases behavior. Simple laws of behavior such as these operate at the social level where certain characteristics are reinforced and punished by a particular social unit. Behavior within institutions is readily shaped by basic laws of behavior because of the token economies that occur. Behavior is also influenced by observational learning and vicarious reinforcement.³² The impact of probable courses of action is conveyed by one's environment. Observing the environment leads to a continuous and reciprocal interaction between the person and environment that determines behavior.³² Observing others' behavior being reinforced or punished, for example, allows people to form new behavior.

Institutionalization of Servicemember Bias

The frequency and intensity of SAPR training may create conditions favorable for bias among panel members. The bias may emerge through a socialization process that creates expectations, which interfere with the impartial reasoning of facts pertaining to sexual assault cases. The socialization begins upon the servicemember's entry to service and is reinforced at career milestones, such as during professional military education.³³ The training is also reinforced throughout the calendar year in both formal and informal ways. Included in the training is the mandate that everyone in a victim's chain of command must take appropriate measures to protect the victim.³³

Actions toward SAPR are heavily reinforced and punished in the military institution. The behavioral contingencies in the military environment shape servicemembers' attitudes and behavior toward SAPR and make certain responses more likely to occur. For example, the appearance of overwhelming support for a complainant will be reinforced by the institution. Because reinforcement maintains and increases behavior, this type of action is likely to continue or increase. Behavior shaped in this manner may be difficult to control when serving on a panel. Instead of unwavering compliance with an institutional im-

perative, panel membership requires impartial deliberation of facts that may, at times, seem at odds with institutional policy.

Although specific SAPR expectations are codified in policy, certain aspects of the SAPR expectation, such as promoting an atmosphere and being supportive, are not well defined. This poses a problem for behavioral contingencies because specific behavior must be reinforced or punished to appropriately shape complex behavior. Aspects of SAPR that are poorly defined may create accidental connections between behavior and reinforcement. Accidental reinforcement leads to what is termed in the behaviorist literature as superstitious behavior.³¹ For example, a servicemember may make random statements in the workplace, such as “all sexual assault allegations must be seen as legitimate.” Though not specifically reinforced by a superior, the servicemember’s act may become accidentally associated with the reinforcement that naturally occurs in the environment. Servicemembers experience varying levels of approval, affection, and submissiveness depending on their rank, and these generalized reinforcers provide opportunity for accidental reinforcement. This may occur, for example, when a subordinate demonstrates approval or submissiveness toward a servicemember of higher rank irrespective of whether the subordinate agrees with, or even likes, the higher-ranking servicemember. These generalized reinforcers occur naturally in servicemembers’ environments and can become accidentally associated with statements such as “all sexual assault allegations must be seen as legitimate.” This may lead to compulsions to make similar generalized statements in the workplace and elsewhere.

Servicemembers may, furthermore, relieve apprehension about negative consequences for failing to support SAPR by acting in ways that are perceived as desirable. An example of this is favoring an alleged victim’s case over an accused even if the merits of the case do not support the conclusion. The negative reinforcement (i.e., the removal of an aversive stimulus that causes reinforcement) occurs when the apprehension is relieved. Because the removal of apprehension is reinforcing, the behavior that relieved the apprehension is likely to occur in the future. This may result in servicemembers assuaging apprehension about institutional sanctions by strongly favoring complainants’ statements. It may be difficult for servicemembers to control this behavioral tendency

when serving on a panel, if the servicemembers are even aware of reinforcement contingencies in the environment.

In addition to the pervasiveness of the SAPR expectation, servicemembers receive rewards and punishments for their actions with regard to SAPR. This is most clearly noticed on servicemembers’ evaluation reports, which have some means of displaying compliance with the SAPR policy. For example, the Army’s company-grade officer evaluation support form has a Character section where officers show how they fully support SAPR. Action that appears to lack fidelity to SAPR policy may be avoided, even if it is consistent with the facts of the matter, to ensure a good evaluation. This creates a victim-centered framework for navigating sexual assault allegations, which may accompany servicemembers to a panel.

Conclusion

This article examined whether the socialization of attitudes and behavior consistent with the military’s SAPR policy causes a bias that can affect panel member decision-making. A review of the psychological science of jury deliberation, cognitive heuristics, decision-making dynamics, as well as SAPR policy and court-martial cases, suggests that SAPR training can have a negative impact on panel member decision-making.

Servicemembers’ explanatory frameworks, or stories, for understanding evidence may be victim-centric after prolonged exposure to SAPR training. Socialization to SAPR provides vignettes that serve as case-based templates for understanding sexual assault scenarios. An explanatory framework highly influenced by the frequency and intensity of SAPR policy may not have the flexibility needed to judge evidence in an impartial manner. A narrative that is ready-made to provide overwhelming support to victims and to act against accused servicemembers creates a script for a causal chain of events that is biased against defendant servicemembers. Because narratives favorable to victims are easier to construct after prolonged training, the prosecution’s case may be perceived as more credible. This may result in a readiness to adopt a decision favorable to the victim.

Adherence to SAPR policy is reinforced in the military, and poor adherence is punished. This is seen most clearly in performance evaluations that judge a servicemember’s fidelity to SAPR support. Servicemembers socialized to the military institution will

likely maintain the status quo or increase SAPR support due to the behavioral shaping that occurs within the institution. By policy, this support can range from the provision of unchecked resources to a complainant to the creation of an atmosphere supportive of SAPR. The effect of this socialization may interfere with impartial deliberation of evidence in sexual assault trials as histories of reinforcement and punishment follow servicemembers into the courtroom. The behavioral shaping consistent with institutional policy suggests that panel members may be predisposed to a victim-centered frame of thinking that is biased against an accused.

Sexual assault trials in the military are influenced by pretrial publicity manifested as UCI. High-profile leaders have made statements delineating the military's expectation for those accused of sexual assault. Public statements by leaders serve as powerful pretrial publicity applicable to any sexual assault court-martial. A servicemember's culpability at trial may be influenced by the negative publicity. Because jury decisions tend to reflect the direction of the publicity, negative publicity related to sexual assault court-martial may affect panel decisions by fostering guilty verdicts.

The interaction of individual and group processes on panels may bias decisions against accused servicemembers. Mild or moderate biases against servicemembers accused of sexual assault can become extreme biases after deliberation consistent with group polarization processes. Much depends on the composition of the panel. A ranking member of a panel who conflates SAPR policy with legal understanding could influence other panel members' decisions through mechanisms such as compliance, conformity, and the panel members' history of reinforcement and punishment.

Institutional expectations that cultivate compliance with an atmosphere leave responses open to interpretation. In this manner, attentiveness to a unit's atmosphere becomes every servicemember's Rorschach test for how they should demonstrate their fidelity to SAPR policy. A perception of strong compliance is likely desired, but without clear directions, this could result in institutional aberrations such as UCI, impartiality, and injustice.

Servicemembers are exposed to a range of bias-inducing mechanisms that interfere with the impartial judgment of facts. The nature of SAPR promotion in the military may influence judgments that, to the

observer uninitiated in SAPR, appear unsupported. Unsupported judgements by panel members represent a bias that may help explain the 127 percent increase in convictions from 2011 to 2014.¹ These biases may result in cases with weak foundations being referred for prosecution and ultimately gaining convictions.

Recommendations

Experts in behavioral psychology should be called to testify in sexual assault courts-martial. Experts should explain the reinforcement, punishment, and observational learning that occurs in the military institution related to SAPR policy. They should explain mechanisms of token economies, where actions seen as supportive of the policy and leaders' exhortations of it gain reinforcement, whereas deviation gains punishment. Deliberation of facts when on a panel may appear to be an extension of the token economy in which all servicemembers participate.

Experts should explain how cognitive heuristics develop and how they can bias thinking. Experts may also offer certain debiasing techniques to the panel, such as considering the opposite.³⁴⁻³⁵ With this approach, panel members consider alternative explanations for judgments they may easily form. Another debiasing technique is to ask panel members to consider whether others exposed to the same frequency and intensity of training and the same institutional pressures could judge facts in an impartial manner.³⁶ Educating the panel on mechanisms of bias and offering debiasing techniques will help panels understand the impact of conditioned judgments in military sexual assault courts-martial.

Limitations

Limits to the examination of this topic must be considered. No empirical testing of the above explanations occurred within a military context. Thus, the degree to which these explanations apply is not known. It is possible that other mechanisms contribute to the creation of bias. Furthermore, the nature of the pro-SAPR bias has not been empirically examined.

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